

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CARL PLEASANTS,

Plaintiff,

v.

JOE ALLBAUGH

Director,

Federal Emergency Management Agency,

Defendant.

Civil Action No. 00-3094 (JMF)

MEMORANDUM OPINION

This case has been referred to me by Judge Kessler for all purposes including trial pursuant to LCvR 73.1(a). I herein resolve defendant's Motion for Reconsideration of February 1, 2002, and May 24, 2002 Orders based on the recent analysis of the continuing violation theory issued by the United States Supreme Court in National R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061 (2002). For the reasons set forth below, defendant's motion for reconsideration will be granted in part and denied in part.

BACKGROUND

Plaintiff is an African-American male who was employed by the Federal Emergency Management Agency ("FEMA") as a GS-13 program specialist. Plaintiff commenced this Title VII action alleging racial discrimination. The acts that underlie plaintiff's claims are FEMA's pre-retirement failure to upgrade his position (the "upgrade claim") and his post-retirement non-selection (the "non-

selection claim") to a newly expanded GS-13/14 position.¹

In denying the defendant's motion to dismiss, I concluded that the upgrade claim was substantially related to the non-selection claim and thus justified the use of the continuing violation theory to save the upgrade claim from being time-barred. Pleasants v. Allbaugh, 185 F. Supp. 2d 69, 74 (D.D.C. 2002). I also granted plaintiff's motion to compel, over defendant's objection, and allowed discovery related to the pre-retirement upgrade claim. Pleasants v. Allbaugh, 208 F.R.D. 7, 10 (D.D.C. 2002). Shortly thereafter, on June 10, 2002, the Supreme Court held that the Title VII statute of limitations "precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period." Nat'l R.R. Passenger Corp., 122 S. Ct. at 2068. As a result of this recent decision,² defendant filed a motion for reconsideration of my Memorandum Opinions dated February 1, 2002, and May 24, 2002.

DISCUSSION

Reconsideration of Defendant's Motion to Dismiss

The defendant has moved me to reconsider "whether plaintiff may premise a claim for relief upon . . . refusals to upgrade his position to a GS-14, even though the last of such refusals occurred in December 1998, and plaintiff never contacted an EEOC counselor about it." Pleasants, 185 F. Supp. 2d at 73. By invoking the "continuing violation" theory, plaintiff argued that his claims, which fell outside

¹ The facts are discussed at length in my Memorandum Opinion & Order of February 1, 2002, denying defendant's motion to dismiss with regard to plaintiff's failure to upgrade claim. See Pleasants v. Allbaugh, 185 F. Supp. 2d 69 (D.D.C. 2002).

² I anticipated the decision would have a significant impact on this case. See Pleasants v. Allbaugh, 208 F.R.D. 7, 8 (D.D.C. 2002).

the time-filing requirements, were saved by his timely filed claims. However, analysis of the continuing violation theory is now controlled by the Supreme Court's decision in Nat'l R.R. Passenger Corp., 122 S. Ct. 2061 (2002). The Court expressly held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Id. at 2072. Each isolated act of discrimination rewinds the clock for filing charges alleging that discriminatory act. Id. Therefore, the charge must be filed within the statutorily allowed time period after the discrete act occurs. Id. This is not to say that employees are then barred from filing charges regarding related discrete acts, but those acts must be independently discriminatory and charges of those acts must also be timely filed. Id.

Plaintiff alleges that FEMA, specifically Reginald Trujillo ("Trujillo"), engaged in racial discrimination by failing to promote him to a GS-14 level position. In January 1999, plaintiff accepted FEMA's offer of an early-out retirement, claiming that a significant factor in his decision was Trujillo's repeated refusals to upgrade his position. This "failure to promote" is a discrete act of discrimination which is not actionable unless charges have been timely filed. Id. at 2073 ("[D]iscrete acts such as . . . failure to promote . . . constitutes a separate actionable 'unlawful employment practice.'"). The Court also rejected the application of its "continuing violation" theory to what the lower courts had called "serial violations," where one acts falls within the charge filing period and prior acts are sufficiently related to the timely filed charge. Id.

Therefore, I now conclude that the failure to promote claim constitutes a discrete act and is only actionable if it was filed within the 45 day time period allowed by EEOC regulations. Filing an EEOC complaint on October 28, 1999, for a discrete act of discrimination which conceivably took place

during January 1999, falls very short of the filing time requirement. Plaintiff's failure to contact an EEOC counselor within 45 days of his non-promotion pre-retirement claim renders the upgrade claim untimely and requires its dismissal.

In an attempt to save the upgrade claim, plaintiff avers that the "upgrade situation is more akin to the hostile work environment claim discussed by the Supreme Court." Opposition to Defendant's Motion for Reconsideration of February 1, 2002, and May 24, 2002 Orders, at 2. In Nat'l R.R. Passenger, the Supreme Court addressed hostile work environment claims and distinguished those claims from disparate treatment claims. See Nat'l R.R. Passenger Corp., 122 S. Ct. at 2073-74.

In order for a jury to find that a plaintiff was subjected to a hostile working environment, a plaintiff must establish that the discriminatory intimidation, ridicule, and insult he suffered was so pervasive that it altered the terms and conditions of his employment. Id. at 2074 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). See also Stewart v. Evans, 275 F.3d 1126, 1133-34 (D.C. Cir. 2002). When determining whether such a hostile environment exists, courts must look at the frequency of such discriminatory conduct, its severity, whether it was physically threatening or humiliating, and whether it reasonably interfered with the employee's work performance. Harris, 510 U.S. at 22.

The Supreme Court has made clear that a claim of disparate treatment is based on a single act of discrimination, regardless of its connection to other discriminatory acts. Nat'l R.R. Passenger Corp., 122 S. Ct. at 2070. However, hostile work environment claims are based upon repeated conduct which occurs over a series of days or perhaps even years. Id. at 2073.

From that interpretation it logically follows that a plaintiff may not list all the discrete acts of

discrimination which he suffered and then use them to assert two very different claims. The discrete acts are independently actionable as disparate treatment claims as long as the charges are timely filed. When viewed as a whole, these acts are also actionable if together they create a working environment described in Harris and other similar cases. There is absolutely no indication of a hostile working environment in this case.³ Indeed, I cannot find a reference to it anywhere in the case. Plaintiff's claim of being subjected to a hostile working environment because of what are obviously two discrete acts of alleged discrimination is specious.

Reconsideration of Plaintiff's Motion to Compel

Defendant further requests that I reconsider my ruling of May 24, 2002, in which I granted discovery on the upgrade claim in order for the plaintiff to "examine how the Division in which he worked treated people who were similarly situated." Pleasants, 208 F.R.D. at 10. As a result of Nat'l R.R. Passenger, defendant insists that, since the upgrade claim is barred by the statute of limitations, any discovery whatsoever regarding that claim should now be denied. I disagree. Regardless of whether the discrete acts are time-barred, the Supreme Court noted that they "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue. The emphasis, however, 'should not be placed on mere continuity' but on 'whether any present violation exist[ed].'" Nat'l R.R. Passenger Corp., 122 S. Ct. at 2072 (citing United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977)(emphasis in original)).

As I stated previously,

³ I must remind plaintiff that claims may not be raised for the first time in an opposition motion. The proper avenue is to seek leave of the court to amend the complaint. See FED. R. CIV. P. 15(a).

[T]he comparison of the plaintiff to his colleagues and whether they suffered from being forced to do more than their position descriptions required has a temporal dimension that has to extend back to a period before he became Acting Chief of the Operations Services Branch in October, 1995, so that he can flesh out (if he can) that there was a pattern of treating people of his race differently. The exploration of this allegation requires the analysis of events that pre-date the rejection of his demand that his position warranted a promotion to GS-14.

Pleasants, 208 F.R.D. at 10.

The same person, Trujillo, was the decision-maker at the time plaintiff was not promoted to a GS-14 level, and when plaintiff was denied the newly expanded position in October 1999. The continuum of events affecting African-Americans that extended over the period of time plaintiff worked at FEMA under Trujillo may produce whatever evidence of Trujillo's discriminatory animus there is that plaintiff claims motivated him to retire in the first place. Therefore, plaintiff is still entitled to the discovery ordered in this court's order of May 24, 2002, to support his non-selection claim from October 1999, even though plaintiff's pre-retirement upgrade claim is now time-barred.

An Order accompanies this Memorandum Opinion.

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARL PLEASANTS,

Plaintiff,

v.

JOE ALLBAUGH

Director,
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Defendant.

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ORDER

In accordance with the accompanying Memorandum Opinion, it is, therefore, hereby,

ORDERED that Defendant's Motion for Reconsideration of February 1, 2002, and May 24, 2002 Orders [#40] is **GRANTED IN PART AND DENIED IN PART**. It is further, hereby,

ORDERED that the parties' Consent Motion For Enlargement of Time For Discovery and Continuance of Trial Date [#32] is **DENIED AS MOOT**. Finally, it is, hereby,

ORDERED that the parties' Consent Motion For Enlargement of Time For Discovery and Continuance of Trial Date [#36] is **DENIED AS MOOT**.

SO ORDERED.

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated: