STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF PUBLIC HEARINGS

Commission on Human Rights and Opportunities, ex rel. Salvatore Feroleto, Complainant	:	CHRO No. 0510140
v.	:	
State of Connecticut, Department of Mental Retardation, Respondent	:	August 27, 2007

RULING ON RESPONDENT'S MOTION TO DISMISS

The complainant filed this complaint with the commission on human rights and opportunities (commission) on October 8, 2004, alleging unequal pay, denied promotions, denied accommodations, lack of training, harassment and termination. After a commission investigator found reasonable cause that a discriminatory act had occurred, the complaint was certified to public hearing. The complainant subsequently amended the complaint on or about May 10, 2007 and again on or about May 16, 2007. The second amended complaint incorporates both the original and the first amended complaints.

On July 13, 2007, the respondent filed a motion to dismiss the complaint as amended. The commission filed a timely objection to the motion on August 2, 2007.

The respondent proffers three specific arguments in support of its motion:

1. The commission lacks jurisdiction over claims filed under the Connecticut Fair Employment Practices Act (CFEPA) for alleged acts that occurred more than 180 days prior to the filing of the complaint.

2. The commission lacks jurisdiction over claims filed under federal laws for alleged acts that occurred more than 300 days prior to the filing of the complaint.

3. The commission lacks jurisdiction over discrete acts that have not first been through the merit assessment review and investigation—in particular the respondent's termination of the complainant's employment after this complaint was certified to hearing.

For the reasons discussed below, I deny the motion to dismiss.

A. Both of the respondent's claims of untimeliness must be addressed in the context of the state statutory requirements, as the issue before me is not when claims were filed with the Equal Employment Opportunity Commission (EEOC), but when they were filed with the commission. The pertinent filing period is set forth in General Statutes § 46a-82 (e), which requires a complainant to file a discrimination complaint with the commission within 180 days after the alleged discriminatory act. The statute makes no distinctions between claims predicated upon state law and those predicated upon federal law.

Furthermore, with regard to federal claims, General Statutes § 46a-58 (a) states, "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, blindness or physical disability." (Emphasis added.) Thus, § 46a-58 (a) expressly converts a violation of federal antidiscrimination laws into a violation of Connecticut anti-discrimination laws; *Trimachi v. Connecticut Workers Compensation Committee* (sic), 27 Conn. L. Rptr. 469 (Conn. Super, June 14, 2000); *Commission on Human Rights & Opportunities ex rel. Kennedy v. Eastern Connecticut State University,* CHRO No. 0140203, p. 12 (December 27, 2004); and, logically, the federal claim becomes subject to the CFEPA filing requirements. Therefore, I need not address any argument

predicated upon the federal 300-day filing limitation; it suffices to address whether the complainant met the state filing requirement.

The filing requirement is not jurisdictional, but is comparable to a statute of limitations, with which one must comply absent factors such as waiver, consent or equitable tolling. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (discussing the EEOC filing deadlines); *Williams v. Commission on Human Rights & Opportunities*, 257 Conn. 258, 284 (2001)(discussing the CFEPA filing deadlines); *Tosado v. State of Connecticut, Judicial Branch,* 2007 WL 969392, *2 (Conn. Super.); *Magda v. Diageo North America*, CHRO No. 0420213 (Ruling on Motion to Dismiss, March 16, 2006). The issues before me, then, are whether the allegations are timely, and if not, whether they remain actionable under the recognized exceptions to the filing requirement.

In *National Railroad v. Morgan*, supra, 536 U.S. 101, the United States Supreme Court considered whether incidents occurring outside the statutory filing period were actionable under Title VII of the Civil Rights Act of 1964. To resolve this issue, the court needed to clarify the meaning of "unlawful employment practice" and to determine precisely when each such practice occurred. This, in turn, required differentiating between an employer's discrete acts and its repeated conduct.

The Ninth Circuit Court of Appeals, in its underlying decision, determined, inter alia, that discrete discriminatory incidents occurring prior to the limitations period may be actionable as part of a continuing violation if proven to be "sufficiently related" to acts occurring within the limitations period. *Morgan v. National Railroad Passenger Corp.*, 232 F.3d 1008, 1015-16 (9th Cir. 2000). Reversing on this issue, the Supreme Court held that each discrete act of discrimination constitutes a separate, actionable incident, and that an employee's claims must be limited to discrete acts that fall within the appropriate time period. The court further emphasized that discrete discriminatory acts are not actionable if untimely, even if they are related to timely acts and regardless of their ongoing

effect on the employee. “Each discrete act starts a new clock” for filing a complaint based on that act. *National Railroad v. Morgan*, supra, 114. [1]

In the present case, because of the exceedingly general nature of the allegations, I cannot ascertain when most of the discriminatory acts, discrete or otherwise, occurred. Denial of the motion to dismiss will afford the complainant an opportunity to present evidence, subject to the aforesaid rule, on each of his vaguely worded claims of unequal pay, denied promotions, denied accommodations (for his disability), lack of training and termination.[2] At the appropriate instance, I will rule on the timeliness of the various claims.

Both federal and Connecticut employment discrimination decisions have recognized that filing deadlines may be equitably tolled when an employer has engaged in certain continuing acts of discrimination. *National Railroad v. Morgan*, supra, 536 U.S. 122; *Miner v. Town of Cheshire*, 126 F.Sup.2d 184, 189 (D.Conn. 2000); *Williams v. Commission,* supra, 257 Conn. 275-76; *State v. Commission on Human Rights & Opportunities,* 211 Conn. 464, 473 (1989);

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[1] While Connecticut courts—and this tribunal—look to cognate federal law for guidance in interpreting state antidiscrimination law, nevertheless, “under certain circumstances, federal law defines the beginning and not the end of [the] approach to the subject.” (Citations omitted; internal quotation marks omitted.) *State v. Commission on Human Rights & Opportunities,* 211 Conn. 464, 470 (1989). In other words, state tribunals may interpret the state statutes more liberally than federal courts interpret their federal counterparts. Nevertheless, several Connecticut Superior Court decisions have followed the *Morgan* constraints rather than embracing the broader scope espoused in, for example, the Ninth Circuit decision; I am aware of no Connecticut cases to the contrary. See, e.g., *Tosado v. State,* supra, 2007 WL 969392, *3 (noting that nothing in the record of that case suggested interpreting state antidiscrimination law more broadly than federal courts have interpreted analogous federal law); *Majewski v. Bridgeport Board of Education*, 2005 WL 469135,*6 n.3, *7 (Conn. Super.) (citing the pre-*Morgan* case of *Brittell v. Department of Correction*, 247 Conn. 148, 164 (1998), for the proposition that the Connecticut Supreme Court relies on federal jurisprudence in defining the ‘contours’ of the continuing violation doctrine). Absent any legal or factual justification provided in the record before me, I see no need to diverge from their approach.

[2] The complainant’s termination on June 10, 2004 is an example of a discrete act that appears to fall within the 180-day time frame. The complainant was, however, subsequently reinstated.

*Tosado v. State, supra, 2*007 WL 969392, *3. In *Morgan*, the Supreme Court focused upon one particular type of continuing violation—a claim of hostile work environment. Unlike discrete acts, a hostile work environment comprises a series of separate actions that collectively constitute a single unlawful employment practice. Thus, a complaint of hostile work environment will not be time barred as long as all the actions constituting the claim "are part of the same unlawful employment practice and at least one act falls within the time period." (Emphasis added.) *National Railroad v. Morgan*, supra, 536 U.S. 122; *Patterson v. County of Oneida*, 375 F.3d 206, 220 (2nd Cir. 2004); see also *Tosado v. State,* supra, *4; *Slowik v. Morgan Stanley & Co*., 2006 WL 2556561, *3 (Conn. Super.); *Majewski v. Bridgeport Board of Education*, 2005 WL 469135, *8 (Conn. Super.).

According to the complaint, the respondent "continuously" harassed the complainant. Reading the complaint in a light favorable to the non-movant, as I must do in evaluating a motion to dismiss; *New England Savings Bank v. Bedford Realty Corp*., 246 Conn. 594, 608 (1998); I find it premature to dismiss this particular allegation at this juncture. The complainant should be afforded the opportunity to prove an ongoing hostile work environment, notwithstanding any individual acts that might, but for this exception, be barred as untimely.

Although the Supreme Court decisively found untimely discrete acts to be barred, and painstakingly explained why and under what circumstances hostile work environment claims could survive a challenge of untimeliness, it also noted that it had "no occasion . . . to consider the timely filing question with respect to 'pattern or practice' claims brought by private litigants." *National Railroad v. Morgan*, supra, 536 U.S. 115 n.9. Thus, situations may exist where related incidents are collectively actionable, provided sufficient evidence shows not only that at least one of the incidents is timely, but also that the incidents resulted from an underlying practice or policy of discrimination. Both state and federal decisions have analyzed such situations numerous times and they remain valid precedent.

Connecticut courts and this tribunal have held that the continuing violation theory "extends the statute of limitations where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue for so long as to amount to a discriminatory policy or practice." (Emphasis added.) *City of Hartford v. Commission on Human Rights & Opportunities*, 2004 WL 424197, * 7-8 (Conn. Super.) (quoting *Cruz v. Coach Stores*, 202 F.3d 560, 569 n.4 (2nd Cir. 2000)); see *Hebrew Home and Hospital, Inc., v. Brewer*, 92 Conn. App. 762, 772 n.10 (2005); *Slowik v. Morgan Stanley, supra,* 2006 WL 2556561, *5; *Walker v. Connecticut Commission on Human Rights & Opportunities*, 1999 WL 643369, *3 n.3 (Conn. Super.); *Commission on Human Rights & Opportunities ex rel. Ward v. Black Point Beach Club Assn*., 2002 WL 33957399 (CT Civ. Rts.) (CHRO Final Decision, August 30, 2002).[3] The "policy or practice" type of continuing violation, if appropriately supported by facts, remains unaffected by *Morgan*, and may still toll the § 46a-82 (e) statute of limitations. Accordingly, I will not dismiss those portions of the complaint alleging other continuing violations until I have a more comprehensive factual record before me.

The as-yet undeveloped record, comprising only the complaint and its amendments, the respondent's answers, and various motions and responses (and my rulings), affords me little opportunity for analysis. The allegations in the complaint are all general in nature, merely asserting that the complainant was denied promotions and given less training than others, and alleging that he was the victim of continuous harassment, unequal pay, and denial of accommodations for his disability. The complainant has provided no specific dates and described no specific incidents prior to his termination. The respondent, likewise, has also failed to identify any particular dates or incidents,

[3] Analogous federal decision include, but are not limited to, *Washington v. County of Rockland*, 373 F.3d 310 (2nd Cir. 2004); *Cruz v. Coach Stores*, supra, 202 F.3d 560; *Boxill v. Brooklyn College*, 115 Fed. Appx. 516 (2nd Cir. 2004); *Alungbe v. Board of Trustees of the Connecticut State University System*, 283 F.Sup.2d 674 (D.Conn. 2003).

and neither party has provided any supplemental documents beyond a memorandum of law supporting or opposing the motion to dismiss.

Given the scant record before me, I cannot determine if any discrete acts—other than the complainant's termination—occurred within the 180-day filing period. Nor can I determine whether the claims of continuing violations are actionable. Under *Morgan*, the factual underpinnings for the claim of hostile work environment may exist and the complainant should not be denied the opportunity to prove his case. Whether the complainant can identify any other discriminatory acts sufficient to demonstrate a continuous "policy or practice," however specious that may seem at first blush, likewise will depend on a more fully established factual record.

In light of the foregoing, I hereby deny the motion to dismiss (as to timeliness), without prejudice to any evidence adduced or arguments raised at the public hearing once the pertinent dates and other specific details of the complaint become apparent. See *Torres v. State of Connecticut, Department of Public Safety*, 2006 WL 3859249, *5 (Conn. Super.) (at trial, the court "can make the appropriate ruling which might or might not thereby limit the ambit of the claim and the remedy sought depending on the appropriateness of applying some continuing violation analysis").

B. The respondent also contends that by allowing the two amended complaints, I improperly included the complainant's allegation of retaliatory termination on April 26, 2007—an act occurring long after this complaint was filed and certified to hearing. Such act, claims the respondent, should not be part of this adjudication because it was not considered at the commission's merit assessment or investigative stages, is not reasonably related to the allegations considered at those stages, and was not the subject of a finding of reasonable cause and subsequent certification to hearing.

I can easily dispose of this argument because, as the commission incisively notes in its objection, the respondent is simply incorrect in its assertion that the alleged retaliation in April 2007 has been included in this adjudicatory process. Nowhere in the first or second amendments, much less in the original complaint, does the complainant even raise this issue. On the contrary, the termination is the basis of a new complaint filed on June 10, 2007. That complaint is subject to review and investigation (or fact-finding or mandatory mediation) in one of the commission's regional offices. Should an investigator make a finding of reasonable cause, that matter would be certified to hearing—in all likelihood at a future date long after this case is adjudicated.

The motion to dismiss the claim of retaliatory termination occurring in 2007 is accordingly denied.

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David S. Knishkowy
Human Rights Referee

c: N. Brouillet
L. Feroleto
S. Feroleto
C. Sharp