

## Recent Federal and State Decisions Reject The 'Continuing Violation' Theory

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By Jay W. Waks and Gregory R. Fidlon

In three recent decisions, New York courts resisted plaintiffs' attempts to extend the applicable statutes of limitations on their discrimination claims under the so-called "continuing violation" theory.

In *Weeks v. New York State (Division of Parole)*, No. 00-0211, 2001 WL 1345057 (2d Cir. Oct. 31, 2001), plaintiff Frances E. Weeks, an African American female, alleged that her former employer, defendant New York State Division of Parole (DOP), and a DOP supervisor subjected her to disparate treatment based on her race and gender, a hostile work environment and retaliation, in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) and 42 U.S.C. §§ 1981 and 1983. Ms. Weeks also asserted common-law claims for negligent and intentional infliction of emotional distress. The DOP moved, inter alia, to dismiss as untimely Ms. Weeks' Title VII claims arising from events occurring more than 300 days before she filed her EEOC charge. The district court granted the DOP's motion and dismissed these claims as being time barred.

On appeal, Ms. Weeks conceded that many of her claims were based on acts that allegedly occurred more than 300 days before she filed her EEOC complaint, but argued that the district court erred in refusing to apply the continuing violation theory to preserve these claims.

The Second Circuit affirmed the dismissal below. In an opinion by Judge Dennis Jacobs, the court noted: "The 'continuing violation exception' to [the 300 day limitation period] provides that if a plaintiff 'files a timely EEOC charge about a particular discriminatory act committed in furtherance of an ongoing policy of discrimination,' the statute of limitations is extended 'for all claims of discriminatory acts committed under that policy.'" (Citations omitted.) The court then explained that "[t]o invoke the doctrine, a plaintiff must show either (1) 'specific ongoing discriminatory policies or practices,' or (2) 'specific and related instances of discrimination [that] are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice.'" (Citations omitted.)

Although Ms. Weeks failed to allege any "specific ongoing discriminatory policies or practices" in her complaint, she did describe "Course[s] of Action" under 42 U.S.C. §§ 1981 and 1983 (claims not at issue on appeal) as being based on a DOP "custom and policy" of discrimination. The court held that even if it were to consider this "custom and policy: in the context of Ms. Weeks' Title VII claims, "such a conclusory allegation is wholly insufficient" and cannot "stave off dismissal of otherwise untimely claims."

Ms. Weeks also argued that her allegations amounted to a charge of a discriminatory policy, because the discriminatory incidents she alleged continued for an extended period despite her complaints to her employer's affirmative action office. The court, however, held that Ms. Weeks failed to demonstrate continuity, because the alleged discriminatory events were "few and unlinked" and, significantly, Ms. Weeks alleged no discriminatory incident during a period spanning at least two years. The court further held that even if the alleged events were continuous and related, Ms. Weeks could not invoke the "continuing violation" theory because her complaint effectively conceded that the DOP took remedial action on the alleged events and did not "'permit' the violations 'to continue unremedied for so long' that their repetition 'amount[ed] to a discriminatory policy or practice.'" (Citations omitted.)

Although *Kulkarni v. City Univ. of New York*, No. 01 CIV. 3019(DLC), 2001 WL 1415200 (S.D.N.Y. Nov. 13, 2001), was decided after *Weeks*, it did not reference that Second Circuit decision in refusing to revive time-barred claims under the continuing violation theory. In *Kulkarni*, plaintiff Ravi Kulkarni, an Asian American male, claimed that the City University of New York (CUNY) discriminated against him by refusing to promote him to a position of distinguished professor and by refusing to place him in a joint appointment with the CUNY Graduate Center. Mr. Kulkarni applied for and was denied the distinguished professor position in 1988, 1992, 1998 and 2000. CUNY moved to dismiss Mr. Kulkarni's Title VII claims on the ground that they were time barred because he had failed to file his EEOC charge within 300 days of the last alleged discriminatory act. In response, Mr. Kulkarni argued that his "failure-to-promote" claims could be salvaged under the continuing violation theory.

In an opinion by Judge Denise Cote of the U.S. District Court for the Southern District of New York, the court explained that to plead a continuing violation, "the claimant must allege both the existence of an ongoing policy of discrimination and some non-time-barred acts taken in furtherance of the policy" (Quoting *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999)). However, the judge continued, "[a]cts that are 'completed' or 'discrete,' such as termination, discontinuance of a particular assignment, or job transfers...or repeated failures to promote... are not acts of a continuing nature."

Mr. Kulkarni filed his EEOC charge Jan. 5, 2000. Consequently, the court held that absent an extension, any alleged events occurring prior to March 1, 1999, were time barred under Title VII. Judge Cote noted that the only specific events alleged to have occurred after March 1, 1999, were Mr. Kulkarni's applications for promotion during the year 2000. The court refused to consider these discrete events, however, because Mr. Kulkarni applied for these promotions after he filed his EEOC charge, and, thus, these claims were not included in that EEOC charge.

Although the court has jurisdiction to consider Title VII claims based on subsequent conduct that is "reasonably related" to that alleged in the EEOC charge, Judge Cote held that because the promotion denials alleged in Mr. Kulkarni's EEOC charge are all time barred, they could not serve as predicates for allegations in the complaint said to be reasonably related to them. Thus, Mr. Kulkarni was left only with his three alleged pre-March 1, 1999, promotion denials, all of which are time barred. The court refused, therefore, to find a continuing violation because "while [Mr.] Kulkarni has the alleged the CUNY has a discriminatory policy of failing to promote qualified Asian professors, he has not alleged any non-time-barred acts in furtherance of this policy."

Finally, in *Hoffman v. J.P. Morgan Securities Inc.*, 732 N.Y.S.2d 157 (App. Div. 2001), our New York state courts have weighed in on the continuing violation debate. Here, plaintiff Kerry Hoffman, a female former employee of J.P. Morgan Securities Inc., claimed that because of an alleged "informal" policy of gender discrimination, she was denied promotion to a sales trader position, in violation of the New York State Human Rights Law (N.Y. Exec. Law § 290 et seq.) and the New York City Human Rights Law (N.Y.C Admin. Code § 8-101 et seq.). Ms. Hoffman also claimed that she represented a large class of similarly situated women.

Plaintiff allegedly requested promotions on three separate occasions: in 1994, 1995 and, finally, in January 1996. Defendants moved to dismiss the suit on the ground, inter alia, that plaintiff's claims were time-barred. Although there was a three-year limitations period under the state and city anti-discrimination laws, Ms. Hoffman had not filed her complaint until August 1999—approximately three years and seven months after her last alleged promotion application. In an effort to salvage these time-barred claims, Ms. Hoffman attempted to invoke the continuing violation theory, claiming that the *impact* of her alleged promotion denials continued into the limitations period. In September 2000, Justice Ira Gammerman of the New York Supreme Court, New York County, granted defendants' motion to dismiss, holding that each of plaintiff's failure-to-promote claims was time barred and refusing to invoke the continuing violation theory.

On Nov. 1, 2001, the First Department unanimously affirmed Justice Gammerman's decision, rejecting Ms. Hoffman's arguments that in addition to her three stale failure-to-promote claims, conversations she allegedly had with company executives regarding her career amounted to timely applications for promotion. The court held that the "[a]dditional conversations alleged in plaintiff's opposition to the motion, although they occurred within three years of the filing of the complaint, simply do not, given every favorable intendment, indicate that defendant had a continuing policy not to promote women such as might extend the limitations period up to the time of any such policy's cessation." Accordingly, the court, having found no timely acts of discrimination on which to base a continuing violation claim, affirmed the dismissal of Ms. Hoffman's complaint.

These three decisions again demonstrate that continuing violation analysis is very similar under federal and New York State law. Specifically, although plaintiffs may alleged a continuing discriminatory policy, courts will not permit them to invoke the continuing violation theory to revive time-barred claims unless they can identify the policy with specificity and have suffered at least one timely act of discrimination in furtherance of such policy.

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