The Ends Justify the Means: Recycling Disparate Treatment Facts In Contemporaneous Hostile Work Environment Claims

CHRISTOPHER BARRETT[†]

INTRODUCTION

Consider the following: an African-American employee (employee A) is hired by a company (company B). Employee A is the only African-American employee at company B (all of employee A's co-workers are Caucasian). After a few years, a supervisory position becomes available. Employee A, who has enjoyed a very successful employment experience with company B, applies for the promotion. Although employee A is, by far, the best qualified applicant for the position, company B gives the position to a Caucasian applicant. Employee A confronts his manager (manager C), the person responsible for the promotion decisions. He asks why he did not receive the promotion. Manager C responds that the *sole* reason employee A did not receive the promotion is that he is African-American.

Over the next hundred days, five supervisory positions, practically identical to the one employee A previously applied for, are made available. Despite being the most qualified applicant, employee A is rejected five additional times. Manager C gives employee A the same justification when confronted after each denial, namely that he was denied promotion solely because he is African-American. Following the sixth denial of promotion, employee A quits his job.

Shortly after quitting, employee A brings a Title VII action. In his lawsuit, employee A alleges six claims of disparate treatment,[1] one for each denial of promotion. He additionally alleges a hostile work environment claim.[2] In support of his hostile work environment claim, employee A points to his six denials of promotion.[3] However, employee A

[†] Christopher Barrett, University of Connecticut School of Law, J.D., expected May 2010. The author would like to all those who took the time to offer their helpful feedback on this Note; special thanks to Jonathan Lewis for his help during the editing process and to Professor Jill Anderson for all her support and guidance.

[1] *See infra* Part II.A.

[2] *See infra* Part II.B.

[3] Some astute observers might immediately question whether this allegation would satisfy the severe or pervasive requirement, discussed *infra* Part II.B. For the sake of argument, please assume that it does.

alleges no additional adverse employment actions beyond the six denials of promotion. Instead, employee A recycles the facts which support his disparate treatment claims, namely the denials of promotion, and aggregates them to form the sole basis for his contemporaneous hostile work environment theory claim.

Courts disagree over the question whether or not employee A should be allowed to reuse the same set of facts used for his disparate treatment claim to make out an additional, contemporaneous hostile work environment claim. This Note will summarize the relevant history surrounding the purpose and function of the hostile work environment theory and then consider how any insights gleaned might play into resolving this issue. The issues dealt with in this Note are critical to understanding employment discrimination law at a fundamental level. Moreover, this Note raises issues of practical significance in employment discrimination litigation. In addition to providing the reader with a better understanding of the proper scope of the hostile work environment theory and its relationship to the disparate treatment theory, this Note also seeks to clarify the meaning and impact of the Supreme Court's decision in *National Railroad Passenger Corporation v. Morgan*.[4]

Part I of this Note will provide the reader with a brief background of the relevant Title VII law and an explanation of the relevant terminology. Part II then considers the history of the hostile work environment theory from its inception to the present. Part III follows by reviewing the recent cases that involve the reuse of disparate treatment facts in making out hostile work environment claims. In Part IV, I argue that such recycling and aggregation of disparate treatment claims as the sole support behind a contemporaneous hostile work environment claim should be allowed because it is the *only* way of providing plaintiffs with the appropriate remedy if they have been subjected to continuing instances of disparate treatment.

I. BACKGROUND INFORMATION

To combat employment discrimination, Congress passed Title VII of the Civil Rights Act of 1964 which protects employees from discrimination on the basis of race, color, religion, sex and national origin.[5] The main provision of Title VII, Section 703(a), provides:

---

[4] 536 U.S. 101, 105 (2002). Discussed *infra* at Part III.C.

[5] 42 U.S.C. §§ 2000e-2000e-17 (2006).

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[6]

While there are a number of different theories under which to bring a claim of employment discrimination, the two most pertinent to this Note are the individual disparate treatment theory and the hostile work environment theory.

A. Individual Disparate Treatment

The Supreme Court has defined individual disparate treatment as follows:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics]. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.[7]

Individual disparate treatment involves tangible employment actions, also referred to as *discrete acts*. The Supreme Court defined discrete acts to include, "termination, failure to promote, denial of transfer, or refusal to hire."[8] It is worth noting that this definition of a discrete act as a tangible employment action differs slightly from the common usage of the phrase

---

[6] 42 U.S.C. § 2000e-2(a) (2006).

[7] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[8] *Nat'l R.R. Passenger Corp.*, 536 U.S. at 114.

"discrete act."[9]

B. Hostile Work Environment[10]

The hostile work environment theory is different from the individual disparate treatment theory in that instead of one tangible employment action, such as getting fired, a hostile work environment is typically composed of a series of acts. The Supreme Court has held:

> Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Such claims are based on the cumulative effect of individual acts.[11]

In contrast to an individual disparate treatment claim where the employer's action at issue is a tangible employment action including, but not limited to, a discharge, formal disciplinary action, or failure to promote, in a hostile work environment claim, the employer action at issue[12] is a series of acts, "different in kind" because they are *generally* more subtle and innocuous than discrete acts,[13] that combine together to form the basis of the claim. By way of examples, a typical individual disparate treatment claim could be based on a Latino not getting hired for a position based solely on the fact that he or she is Latino. A hostile work environment claim could arise from a white supervisor calling an African American employee "Blackie" every time he sees him for six months, in

---

[9] The Merriam-Webster Dictionary defines "discrete" as "constituting a separate entity: individually distinct." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 357 (11th ed. 2005). The usage of the term in the Title VII context is much narrower, referring only to the aforementioned tangible employment actions.

[10] In the sexual harassment context, there are two theories under which claims may be brought: the hostile work environment theory and the *quid pro quo* theory. The *quid pro quo* theory is applicable when an employer conditions an employment benefit, or even employment itself, on the employee acquiescing to sexually-based conduct. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986). The *quid pro quo* theory is unique to the sexual harassment context.

[11] *Nat'l R.R. Passenger Corp.*, 536 U.S. at 115 (citations omitted).

[12] Liability is imputed upon the employer; this is not to say that the employer is always personally creating the hostile work environment. Commonly, the hostile work environment is created by co-workers. Likewise, liability is imputed upon the employer in disparate treatment cases. Rarely is the actual employer personally making the hiring, firing, etc. decisions.

[13] Examples of such acts might include insults, teasing, unwanted physical contact, vandalism, receiving less favorable job assignments, etc.

addition to the white supervisor making racially derogatory jokes in the employee's presence and the white supervisor announcing his views favoring a return to segregation in front of the employee.

In order to be actionable, a hostile work environment claim must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[14] As the Supreme Court explained in *Harris v. Forklift Systems Inc.*, the severe or pervasive standard strikes a "middle path" between making any "merely offensive" conduct actionable and "requiring the conduct to cause a tangible psychological injury."[15] This standard ensures that the victim of discrimination need not wait until actually injured to file suit. It also prevents a single, mildly inappropriate comment from giving rise to a suit.

C. Timely Filing Requirements / Continuing Violation Theory

In order to bring a viable Title VII action, certain filing requirements must be met.[16] In brief, Title VII mandates that the plaintiff file a charge with the Equal Employment Opportunity Commission (EEOC) either 180 or 300 days "after the alleged unlawful employment practice occurred."[17] For the purposes of this Note, whether the 180 – or 300 – day deadline applies is immaterial.

A basic understanding of what has been dubbed the "continuing violation theory" is also helpful. The Supreme Court has determined that, when evaluating a hostile work environment claim, an "employee need only file a charge within . . . 300 days of any act that is part of [a] hostile work environment" because "incidents constituting a hostile work environment are part of one unlawful employment practice, [and thus] the employer may be liable for all acts that are part of this single claim."[18] The Court went on to say that "[i]t does not matter . . . that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court."[19] However, critical to the application of this doctrine is that in order for the time-barred act to be considered as part of the hostile work environment claim, the act must be sufficiently related to

---

[14] *Meritor*, 477 U.S. at 67 (citation omitted).

[15] 510 U.S. 17, 21 (1993).

[16] 42 U.S.C. § 2000e-5(e)(1) (2006).

[17] *Id.*

[18] *Nat'l R.R. Passenger Corp.*, 536 U.S. at 118.

[19] *Id.*at 117.

the whole.[20]

II. HISTORY OF THE HOSTILE WORK ENVIRONMENT THEORY

A. Rogers v. EEOC

The Fifth Circuit was the first to recognize the hostile work environment theory. In *Rogers v. EEOC*,[21] rather than deny the original complainant redress for abuse inflicted by co-workers as well as redress for having to endure "patient segregation" solely because of her Spanish surname, the Fifth Circuit found a new, discriminatory employment practice where none previously existed. [22]

Citing Congress' choice "neither to enumerate specific discriminatory practices, nor to elucidate *in extenso* the parameter of such nefarious activities"[23] and in an effort not to enact a law that was too rigid to adapt to the "constant change" that defines the ever-evolving, modern workplace,[24] the court created the new claim. Specifically, the court noted the shift from a "[t]ime . . . when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting," [25] to the present day, where "employment discrimination is a far more complex and pervasive phenomenon," and more specifically where "the modern employee makes ever-increasing demands in the nature of intangible fringe benefits."[26]

In retrospect, the Fifth Circuit deserves credit for recognizing the need for adaptation of the application of Title VII law. Title VII may have provided redress for "isolated and distinguishable" employment practices, but, prior to the Fifth Circuit's decision in *Rogers*, it was notably deficient in providing redress for another manifestation of the same discriminatory animus, the same manifestation that plagued Mrs. Chavez—the creation of a hostile work environment.

While Title VII addressed obvious disparate treatment, it had not captured less obvious problems until *Rogers*. Instead of an action the law was able to put its finger on, discriminatory employers were legally able to treat members of a workplace inferiorly through a multitude of subtler,

---

[20] *Id.* at 118.

[21] 454 F.2d 234 (5th Cir. 1971).

[22] *Id* at 236.

[23] *Id.*at 238.

[24] *Id.*

[25] *Id.*

[26] *Id.*

seemingly innocuous actions. Instead of firing an employee based on a protected characteristic, the workplace discriminator would express his animus by verbally abusing the employee based on a protected characteristic. Instead of getting one large dose of discrimination, the workplace discriminator simply divided the dose up and administered it in smaller quantities over a longer period of time. This is not to say that this more "subtle" form of discrimination did not exist prior to the enactment of Title VII, most likely alongside workplace discrimination in the form of discrete acts, but only suggests that following the enactment of Title VII, workplace discriminators could have altered their discriminatory practices in this manner without fear of legal recompense. The adaptation of workplace discrimination is akin to having a gallon of water poured on the victim's head slowly instead of dumped all at once. Regardless of the method, at the end of the experience, the victim is soaking wet.

The Fifth Circuit noted the need to protect these so-called "fringe benefits" as well as to point out the manner in which they can be abridged.[27] Citing the adaptability based on experience, time, and expertise of the "broad-gauged innovation legislation" that is Title VII, the court announced its belief that:

> employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase 'terms, conditions, or privileges of employment' in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.[28]

In this manner the court effectively expanded Title VII's coverage so that it could address claims like the ones brought forth by Mrs. Chavez. In so doing, the Fifth Circuit created what is now referred to as the hostile work environment theory of employment discrimination.

B. Meritor Savings Bank v. Vinson

The Supreme Court validated the hostile work environment claim in *Meritor Savings Bank v. Vinson*.[29] In *Meritor*, Mechelle Vinson brought a hostile work environment claim against her former supervisor, Sidney Taylor. Mr. Taylor, the vice president of the bank where Vinson was

---

[27] *Rogers*, 454 F.2d at 238.

[28] *Id.*

[29] 477 U.S. 57 (1986).

employed, was accused of demanding sexual favors from Vinson, fondling her, following her into the women's restroom, exposing himself to her, and forcibly raping her.[30]

The petitioner-defendant bank argued on appeal that the language of Title VII was limited to "'tangible loss' of 'an economic character.'"[31] In rejecting this view, the Court first looked to the actual language of Title VII. Delivering the opinion of the Court, Justice Rehnquist wrote: "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment. Petitioner has pointed to nothing in the Act to suggest that Congress contemplated the limitation [to that of tangible losses of an economic character] urged here."[32]

The Court additionally cited the 1980 EEOC Guidelines which explicitly recognized "sexual harassment" as a form of sex discrimination made unlawful by Title VII.[33] The Guidelines indicated that in addition to prohibiting sexual misconduct that is "directly linked to the grant or denial of an economic *quid pro quo*," conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" is also prohibited.[34]

The Court then went on to discuss how the EEOC based its decision to validate the hostile work environment theory in the Guidelines on a "substantial body of judicial decisions and EEOC precedent," most notably *Rogers*.[35] As the Supreme Court explained in *Harris v. Forklift Systems, Inc.*,[36] the severe or pervasive standard strikes a "middle path" between making any "merely offensive" conduct actionable and "requiring the conduct to cause a tangible psychological injury." This standard ensures that the victim of discrimination need not wait until actual injury to file suit, while also preventing a single, mildly inappropriate comment from giving rise to a suit.

C. National Railroad Passenger Corporation v. Morgan

After unequivocally validating the hostile work environment theory, the Supreme Court, in a later case, went on to more fully define the

---

[30] *Id.* at 60.

[31] *Id.* at 64.

[32] *Id.* (citation omitted).

[33] *Id.* at 65.

[34] *Id.*

[35] *Meritor Sav. Bank*, 477 U.S. at 65.

[36] 510 U.S. at 21.

contours of the relationship between disparate treatment and hostile work environment claims. In *National Railroad Passenger Corporation v. Morgan*, the Supreme Court dealt with the question of whether, and in what specific circumstances, a plaintiff bringing a claim under Title VII may file suit based on events that occurred outside the relevant 180 or 300 day statutorily required filing period.[37] In resolving this issue, the Court discussed the difference between "discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire," and the types of acts that get grouped together into hostile work environment claims.[38] The Court illuminated this contrast in noting "[h]ostile work environment claims are different in kind from discrete acts."[39] Hostile environment claims are different, the Court reasoned, because with a hostile environment claim, "[t]he 'unlawful employment practice,' §2000e-5(e)(1), cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."[40]

In deciding what acts could or could not be considered, albeit in a time-barred context, the Court began by looking to the statutory text, specifically 42 U.S.C. § 2000e-5(e)(1). The Court considered that provision's language: "[a] hostile work environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice,'"[41] as it determined that as long as one of the acts, which when grouped together comprise the hostile work environment claim, occurred within the relevant statutory filing period, then the entire scope of the acts could be considered when determining liability.[42]

In so concluding, the Court again distinguished between discrete discriminatory acts, which may be based only on actions in the relevant time period, and the hostile work environment charge, which requires having one act, of the group of acts, within the relevant time period when determining liability.[43] Additionally, in her part concurrence, part dissent, Justice O'Connor again highlighted the fundamental contrast between discrete act discrimination claims and hostile work environment claims: "a hostile environment claim is, by its nature, a general atmosphere of discrimination not completely reducible to particular discriminatory

---

[37] *Nat'l R.R. Passenger Corp.*, 536 U.S. at 101.

[38] *Id.* at 114.

[39] *Id.* at 103.

[40] *Id.*

[41] *Id.* at 117.

[42] *Id.*

[43] *Nat'l R.R. Passenger Corp.*, 536 U.S. at 122.

acts."[44] Justice O'Connor's "atmospheric" description of the hostile work environment is a helpful one; building on the analogy, one might conceptualize a hostile work environment as a thick mist, made up of small particles of discrimination.

III. RECENT CASES

The recent decisions involving the recycling of disparate treatment facts in a contemporaneous hostile work environment claim can be generally grouped into two different categories: those that do not allow the aggregation and those that do.[45]

A. Aggregation Not Allowed.

1. McCann v. Tillman

In *McCann v. Tillman*, the Eleventh Circuit affirmed the District Court's decision to grant the defendant's motion for summary judgment in a hostile work environment claim.[46] In her initial complaint at the trial court level, Plaintiff Georgia McCann offered four categories of allegations to support her hostile work environment claim: "(1) white employees make racially derogatory comments about blacks; (2) black employees are subjected to harsher discipline than whites; (3) employees complaining of discrimination are retaliated against; and (4) complaints of discrimination are not investigated."[47] While the court recognized that McCann had properly offered evidence of three racially insensitive comments in addition to two incidents where racial epithets were used,[48] the court also noted: "The remainder of [the Plaintiff's] allegations and evidence concern alleged patterns of discrimination practiced against black employees. The plaintiff has cited, and the Court can find, no authority for the proposition that such matters can be considered in evaluating the existence of a racially hostile working environment."[49] The court continued by citing the

---

[44] *Id.* at 124.

[45] At the outset, it bears mention that the facts in the following cases are not ideal for the subject of this Note. Nonetheless, superior cases could not be found. While reading, please keep in mind that the aim of this Note is to consider whether, at a fundamental level, discrete acts that support disparate treatment claims can be aggregated together and reused to make out a contemporaneous hostile work environment claim that is based solely on the disparate treatment facts. Questions considering whether the facts are sufficiently severe or pervasive or timely should be momentarily put to the side.

[46] McCann v. Tillman, 526 F.3d 1370 (11th Cir. 2008).

[47] McCann v. Mobile County Pers. Bd., No. 05-0364-WS-B, 2006 WL 1867486, at *19 (S.D. Ala. July 6, 2006).

[48] *Id.*

[49] *Id.*

Supreme Court's decision in *Morgan*[50] and further holding: "discrete discriminatory acts must be challenged as separate statutory violations and not lumped together under the rubric of hostile work environment."[51]

In affirming the district court's opinion, the Eleventh Circuit agreed with the district court's reasoning for dismissing McCann's hostile work environment claim: "[t]hese [discrete acts] cannot be brought under a hostile work environment claim that centers on 'discriminatory intimidation, ridicule, and insult.'"[52] The language of the court is clear and unambiguous—aggregation of discrete act claims into a hostile work environment claim is not allowed.

Despite the initial appearance of clarity, the question remains: was McCann's hostile work environment claim rejected because discrete acts *fundamentally* cannot be used to make out a hostile work environment claim or is it rather that *time-barred*, discrete acts cannot be used to make out a hostile work environment claim? It is worth noting the language from *Morgan* that the district court cited: "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filing charges."[53] While the court indicated that one of the discrete acts McCann offered in support of her hostile work environment claim was her 1998 termination,[54] it did not specify dates as to the other offered discrete acts and thus gave no indication whether they were time-barred or not. Because the plaintiff's complaint was devoid of any indication of dates of the other discrete acts,[55] the district court and, presumably the Eleventh Circuit, rejected aggregation at the fundamental level, without regard to the timeliness issue.

2. Porter v. California Department of Corrections

In *Porter*, the plaintiff, Lawana Porter, advanced claims of sexual harassment, discrimination, and retaliation under Title VII against her employer, the California Department of Corrections ("CDC").[56] The Ninth Circuit, in a decision that ultimately reversed the district court's grant of the CDC's motion for summary judgment, eloquently stated:

> [W]e refuse to mix recent discrete acts like tinder with the planks of ancient sexual advances and then, regardless

---

[50] *Id.* at *19-20.

[51] *Id.* at *20.

[52] *McCann*, 526 F.3d at 1379.

[53] *McCann*, 2006 WL 1867486, at *20 (quoting *Morgan*, 536 U.S. at 113).

[54] *Id.*

[55] Complaint at 4, *McCann*, 2006 WL 1867486.

[56] Porter v. Cal. Dep't Corr., 419 F.3d 885, 887 (9th Cir. 2005).

> of whatever it was that set the spark in the furnace, call the fire that ignites therefrom a hostile environment. If the flames of an allegedly hostile environment are to rise to the level of an actionable claim, they must do so based on the fuel of timely non-discrete acts.[57]

However, the court did note, citing *Morgan*, that discrete acts were relevant as "background" information.[58] In a footnote, the court, relying on *Morgan*, indicated that "discrete acts still may be considered for purposes of placing non-discrete acts in the proper context."[59] Nevertheless, regarding the central aggregation issue, the *Porter* court explicitly ruled that discrete acts fundamentally do not have a place in hostile work environment claims.

3. Parker v. Del. Dep't of Pub. Safety

In *Parker v. Del. Dep't of Pub. Safety*, a female Delaware state police officer brought an action alleging disparate treatment, hostile work environment, retaliation, and constructive discharge.[60] When considering the plaintiff's hostile work environment claim, the court noted that the plaintiff took "the unusual approach of claiming a hostile work environment based largely on examples of disparate treatment."[61] The court provided insight into the potential pitfalls of allowing discrete act disparate treatment facts to be used in hostile work environment claims:

> [T]he dangers of allowing standard disparate treatment claims to be converted into a contemporaneous hostile work environment claim are apparent. Such an action would significantly blur the distinctions between both the elements that underpin each cause of action and the kinds of harm each cause of action was designed to address.[62]

Ultimately, the court determined that the plaintiff should not be permitted to use the facts which formed the basis of her disparate treatment claim to support her hostile work environment claim.[63]

In all of the aforementioned cases, the courts explicitly held that

---

[57] *Id.* at 893.

[58] *Id.* at n.4.

[59] *Id.*

[60] Parker v. Del. Dep't of Pub. Safety, 11 F. Supp. 2d 467, 472 (D. Del. 1998).

[61] *Id.* at 475.

[62] *Id.*

[63] *Id.* at 476.

discrete acts could not be considered as part of a hostile work environment claim. There exists an additional body of case law where the courts, although not explicitly supportive of aggregation, fail to go quite so far as to explicitly deny the claim based on the aggregation. Rather, courts have used fairly ambiguous language to express concern and apparent disapproval with the plaintiff's aggregation. These cases are dealt with briefly.

In *Lester v. Natsios*, Mary Lester brought an action under Title VII, the ADEA, and the Rehabilitation Act against the United States Agency for International Development.[64] Among her allegations was a claim of being subjected to a hostile working environment.[65] Lester made her hostile work environment claim in response to the defendant's motion for summary judgment.[66] In light of the defendant's attack on her disparate treatment claims, she aggregated three incidents together into a hostile work environment claim.[67]

In dismissing Lester's hostile work environment claim, the court, citing *Morgan* and *Parker*, held:

> Moreover, it is not at all clear that mere reference to alleged disparate acts of discrimination against plaintiff can ever be transformed, without more, into a hostile work environment claim. The courts have been reluctant to do so . . . Discrete acts constituting discrimination or retaliation claims, therefore, are different in kind from a hostile work environment claim that must be based on severe and pervasive discriminatory intimidation or insult.[68]

Nevertheless, the court dismissed Lester's hostile work environment claim saying only that the hostile work environment claim fails because the plaintiff relied "on discrete acts that are neither severe and pervasive nor (as the Court has already concluded) discriminatory."[69] The court did not hold the claim to be insufficient solely because it relied on discrete acts, but seemed to insinuate as much.

Similarly, in *Nurriddin v. Goldin*, the court dismissed the plaintiff, Ahmad Nurridin's hostile work environment claim against NASA citing his reuse of the facts from his disparate treatment claims but not dismissing

---

[64] Lester v. Natsios, 290 F. Supp. 2d 11, 17 (D. D.C. 2003).

[65] *Id.* at 18.

[66] *Id.* at 31.

[67] *Id.*

[68] *Id.* at 32-33 (internal citations omitted).

[69] *Id.* at 33.

his hostile work environment claim conclusively and solely on that ground.[70] Nurridin brought a Title VII action which alleged discrimination based on race, sex and religion, retaliation, and hostile work environment.[71] The court determined that of all Nurridin's disparate treatment claims, the ones which were not time-barred, failed to satisfy the *prima facie* case of disparate treatment.[72] In then considering the hostile work environment claim, the court noticed that the plaintiff had simply aggregated his disparate treatment claims together and offered them as the majority of evidence in support of his hostile work environment claim.[73] In rejecting the plaintiff's effort to "recycle," the court stated: "the bulk of the 'hostile' events on which plaintiff relies are the very employment actions he claims are discriminatory or retaliatory; he cannot so easily bootstrap discriminatory claims into a hostile work environment claim."[74] In addition to dismissing the plaintiff's hostile work environment claim, the court granted summary judgment in the defendant's favor on all claims.

Both the decisions which explicitly reject the aggregation of disparate treatment facts in making out a hostile work claim and those decisions which note distaste for such aggregation,[75] demonstrate that there is a substantial, influential, and persuasive wing of the judiciary that opposes aggregation.

B. Aggregation is Allowed.

In the following cases, the deciding courts allow the aggregation of disparate treatment facts in order to support the plaintiff's hostile work environment claim.

1. Royal v. Potter

In *Royal v. Potter*, Ruth Royal brought a claim of sex discrimination and failure to promote in violation of Title VII, a retaliation claim, and a

---

[70] Nurriddin v. Goldin, 382 F. Supp. 2d 79, 109 (D. D.C. 2005).

[71] *Id.* at 85.

[72] While the facts of this case suggest that bringing the claim under the *quid pro quo* theory of sexual harassment may have been appropriate, the record is devoid of any conditioning of employment benefits based on the performance of sexual acts. This does not foreclose the possibility that this case possibly could have been brought under the *quid pro quo* theory if pleaded differently; *id.* at 92-107.

[73] *Id.* at 108.

[74] *Id.*

[75] *See also* Na'im v. Rice, 577 F. Supp. 2d 361, 377 (D. D.C. 2008) (While ultimately determining that the defendant's motion for summary judgment should be denied, as not enough details regarding the incidents in question had been presented for a court to determine if they were severe or pervasive enough to constitute a hostile work environment, the court, citing *Lester v. Natsios*, *Nurriddin v. Goldin*, and *Parker v. Del. Dep't of Pub. Safety*, bluntly noted: "the plaintiff cannot simply reiterate her discrimination claims in an effort to build up a hostile work environment claim.").

hostile work environment claim stemming from her employment with the United States Postal Service ("USPS").[76] Both parties filed motions for summary judgment as to the hostile work environment claim.[77] The argument at the summary judgment stage focused primarily on the fourth prong[78] of the *prima facie* case for hostile work environment; namely, whether or not there was some basis for imputing liability upon the employer.[79] The court found that in order to be held vicariously liable, a supervisor with immediate authority over the plaintiff must take tangible employment action against the plaintiff.[80]

At USPS, Royal was supervised by Walter Brownlow.[81] Royal alleged that Brownlow forced her to have sex with him, required her to use her leave to accommodate his requests, and forced her to give him money and buy him lunch on a weekly basis.[82] Additionally, Royal alleged two discrete act instances of disparate treatment: first, Royal was removed from a temporary supervisor position, allegedly for poor performance, after she attempted to end her sexual relationship with Brownlow,[83] and second, after inquiring as to the color of Royal's underwear during an interview for a promotion to a supervisor's position, Brownlow later told Royal that she did not get the promotion because he "did not promote people with whom he had sex."[84]

The defendant argued that vicarious liability could not be imputed to USPS because no timely complaints were filed regarding the discriminatory tangible employment actions taken by Brownlow and thus, were time barred from consideration.[85] The court rejected this argument. It held that as the two tangible actions contributed to the hostile work environment and thus occurred within the single unlawful employment

---

[76] Royal v. Potter, 416 F. Supp. 2d 442, 444 (S.D. W. Va. 2006).

[77] *Id.*

[78] The full *prima facie* case used by the court included: "(1) unwelcome conduct; (2) based on her sex; (3) sufficiently severe or pervasive to alter the conditions of employment thereby creating a hostile work environment; and (4) some basis for imputing liability to the employer." *Id.* at 446 (citing Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 266 (4th Cir. 2001)); Note that while *Mativa* was a sexual harassment hostile work environment case, the *Royal* court appropriately used the same *prima facie* framework as "[h]ostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment." (*Nat'l R.R. Passenger Corp.*, 536 U.S. at 116 n.10 (2001)).

[79] *Royal*, 416 F. Supp. 2d at 446.

[80] *Id.*

[81] *Id.* at 445.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 445-46.

[85] *Royal*, 416 F. Supp. 2d at 447.

practice, they would not be time-barred discrete acts.[86]

On its way to ultimately finding that a factual issue existed as to whether or not Royal could prove the existence of a hostile work environment and therefore denying both parties' motions for summary judgment,[87] the court noted:

> From Morgan and cases applying Morgan, a few principles are clear. First, discrete acts, including discriminatory and retaliatory acts, which may have been actionable on their own under Title VII, may still be considered in holding an employer liable for hostile work environment. This is true even for discrete acts that occurred outside of the statutory time period for filing a complaint. Second, when a plaintiff brings a claim for hostile work environment and supports that claim with acts that could be considered discrete acts, the court must review the evidence to make sure that the plaintiff is not attempting to allege a hostile work environment claim based only upon the separate discrete acts.[88]

The *Royal* court thus did not object to the plaintiff bringing contemporaneous disparate treatment and hostile work environment claims which relied, in part, on the same facts. However, the court did note that *Royal* was not a case in which the two discrete acts served as the entire, or even the majority of the hostile work environment claim.[89]

The *Royal* court explicitly rejected the strict division between discrete acts and non-discrete acts employed by the Ninth Circuit in *Porter*.[90] The *Royal* court's criticism centers on the Ninth Circuit failure to appreciate the Supreme Court's decision in *Morgan*:

> By initially examining only non-discrete acts occurring within the statutory time period, the *Porter* court fails to appreciate *Morgan's* explanation of a hostile work environment. As *Morgan* discussed, a hostile work environment claim by its very nature involves repeated conduct and as one unlawful employment practice cannot be said to occur on any particular day. Instead the

---

[86] *Id.*

[87] *Id.* at 445.

[88] *Id.* at 453

[89] *Id.* at 454.

[90] *Id.* at 450-51.

> unlawful practice occurs over a series of days or perhaps years. Because of the nature of the claim, the Supreme Court held that as long as one act that contributes to the claim falls within the statutory period, the entire time period may be considered in determining liability. The Ninth Circuit did not acknowledge this particular holding of *Morgan*.[91]

Even more explicitly, the court went on to say that they did not read *Morgan* as "eliminating discrete acts from consideration in determining hostile work environment claims with non-discrete acts."[92] Accordingly, the *Royal* court would permit the aggregation. It is interesting to further note that in *Royal*, having the discrete acts included in the hostile work environment claim was important for the purpose of imputing vicarious liability, instead of the plaintiff seeking to add the discrete acts to the hostile work environment claim to bolster it in hopes of getting a successful judgment on the claim.

2. Coudert v. Janney Montgomery Scott, LLC

In *Coudert*, the plaintiff brought disparate treatment, retaliation, and hostile work environment charges against her employer under Title VII and the ADEA.[93] The plaintiff alleged seven incidents of discrimination to support her claims.[94] Of the seven, only the final two, the plaintiff being paid a reduced commission and her ultimate discharge, were not time-barred.[95] The court rejected the plaintiff's argument that the additional five incidents should also be considered by the court under the "continuing violation doctrine."[96] Additionally, the court granted the defendant's motion for summary judgment on the disparate treatment and retaliation claims as the reduced commission rate and discharge, standing alone, would not be sufficient for a reasonable jury to conclude that discrimination in the form of disparate treatment or retaliation had occurred.[97]

In considering the plaintiff's hostile work environment claim, while the court agreed that even time-barred incidents could be considered

---

[91] *Royal*, 416 F. Supp. 2d at 450-51 (internal quotations and citations omitted).

[92] *Id.* at 451.

[93] Coudert v. Janney Montgomery Scott, LLC, No. 3:03 CV 324 MRK, 2005 WL 1563325, at *4 (D. Conn. July 1, 2005).

[94] *Id.*

[95] *Id.* at *5.

[96] *Id.* at *6.

[97] *Id.* at *6-7.

alongside timely incidents in a hostile work environment claim, the court determined that they could not be so included in the case at hand, as the time-barred incidents were "distinct" and not sufficiently related to the timely incidents.[98] In his opinion, Judge Kravitz mentioned, "[t]he five alleged incidents of disparate treatment offered in support of her hostile work environment claim . . . ,"[99] thus, it appears as though Judge Kravitz would have allowed discrete act disparate treatment incidents to support a hostile work environment claim. However, it is worth noting that the plaintiff's disparate treatment and retaliation claims had been dismissed earlier in the decision[100] and thus this would not have been a case where the plaintiff was "double-dipping" and using the same set of facts for multiple recoveries.

IV. ARGUMENT

A review of the recent cases that address the aggregation issue can leave one's head spinning. Confusion among the courts is readily apparent from the variety of holdings that have been produced after confronting this issue. The confusion stems from the Court's decision in *Morgan*. In attempting to provide a narrowly tailored holding that would resolve the case without spilling onto issues that were not before it, the Court's use of ambiguous language has left this important issue open for debate.

One notion that most courts should be able to agree with is that *Morgan* does not conclusively address the aggregation issue either way. On the one hand, a reader could reasonably conclude that aggregation is not allowed based on the portion of the *Morgan* holding which reads: "[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct."[101] Reading this to set up a solid division between discrete acts and non-discrete, hostile work environment acts is completely plausible. On the other hand, the Court goes on to say: "[i]t [the 'unlawful employment practice' that is the hostile work environment] occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment *may not* be actionable on its own."[102] The use of "may not" implies that a single act in a hostile work environment claim may be actionable on its own, and thus it is reasonable to conclude that the Court was referring to an independently actionable, disparate treatment act. Still, in some limited cases, courts

---

[98] *Id.* at *7-9.

[99] *Coudert*, 2005 WL 1563325, at *11.

[100] *Id.* at *6.

[101] *Nat'l R.R. Passenger Corp.*, 536 U.S. at 115.

[102] *Id.* (emphasis added).

have held that one extremely severe non-discrete act can be sufficient to make out a hostile work environment claim.[103] In short, the ambiguity makes it impossible to conclusively answer the aggregation question relying solely on *Morgan*.

Without clear guidance from the Supreme Court, and amidst a division among lower courts, the main question shifts from what the law on the aggregation issue *is* to what the law *should be*. This inquiry requires a search for the purpose behind the hostile work environment cause of action. In determining *how* the hostile work environment cause of action should operate, a review of *why* the theory was initially created proves enlightening.

It is worth recalling that the hostile work environment was first recognized by the *Rogers* court in order to fill in a gap in Title VII's protection against discrimination in the workplace. Instead of allowing the plaintiff's injury to go without redress, as it failed under the disparate treatment analysis,[104] the *Rogers* court recognized an entirely new cause of action in response to the ever evolving, "complex and pervasive phenomenon" that is employment discrimination.[105] The hostile work environment theory provided coverage in an otherwise non-actionable claim; it was not created to provide the plaintiff with an additional means of recovery to be brought in conjunction with a disparate treatment action. Whether or not it should be allowed to serve this function is another question. The distinction between *providing* coverage and *enhancing* coverage is a relevant one. In first recognizing the hostile work environment theory, the *Rogers* court was providing, rather than enhancing, coverage. The *Rogers* court justified why it was providing such coverage in a well reasoned opinion—allowing plaintiffs to use the hostile work environment theory to enhance recoveries, absent similar, well reasoned justifications would be inappropriate in that it would be further punishing defendants without just cause.

The Fifth Circuit acknowledged in *Rogers* that an employee has a statutory entitlement to "intangible fringe benefits" that are both "psychological as well as economic" in their nature.[106] After *Rogers* and the cases that followed, no longer would those employment actions that were "different in kind" from discrete acts and actionable under the disparate treatment theory, the more subtle and non-independently actionable employment actions like daily insults, be allowed to leak

---

[103] *See generally* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); Ferris v. Delta Air Lines, Inc., 277 F.3d 128, 136 (2d Cir. 2001).

[104] Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971).

[105] *Id.*

106 Id.

through the Title VII levy of protection.

If the hostile work environment theory was indeed created in *Rogers* to address situations of discrimination in the workplace that would otherwise go without any redress, what justification, if any, exists today to allow plaintiffs to aggregate their disparate treatment claims into contemporaneous hostile work environment claims? The courts in *Royal* and *Coudert* do not affirmatively argue in favor of permitting the reuse of disparate treatment facts in contemporaneous hostile work environment actions, but rather tacitly acquiesce to the plaintiff's tactic.[107]

At the heart of employment discrimination legislation are the concurrent desires to deter discrimination in the workplace and to provide redress to victims of such discrimination. At the most basic level, allowing a plaintiff to aggregate his or her disparate treatment claims and bring an additional claim under another the hostile work environment theory, provides an additional opportunity for the plaintiff to seek redress for employment discrimination. Thus, aggregation is in accord with the purposes of employment discrimination legislation. Accordingly, aggregation, and therefore, promotion of employment discrimination legislation's aims, should be viewed as intrinsically valuable and should only be barred if it can be determined that the negative consequences (if any) of allowing aggregation outweigh the benefit of allowing the aggregation (i.e. promotion of the object of employment discrimination legislation).

In considering the possible dangers of allowing aggregation, an obvious starting point is an examination of the justifications provided by the courts who decided to bar the aggregation. First, the Eleventh Circuit justified its decision by holding that discrete act disparate treatment claims "cannot be brought under a hostile work environment claim that centers on 'discriminatory intimidation, ridicule, and insult.'"[108] Here the Eleventh Circuit focuses on what can best be described as the "different in kind" justification from *Morgan*. This argument is unavailing because while *Morgan* recognizes a distinction between discrete acts and those acts which generally constitute hostile work environments, no where does the Court suggest, much less hold, that because the two categories are distinct, it follows that they are also mutually exclusive. A discrete act, like a denial of promotion that was explicitly fueled by discriminatory animus, can also fall within a claim centering on discriminatory intimidation, ridicule, and insult just as easily as a more classic hostile work environment act.

---

[114] The *Royal* court goes somewhat farther than either the *Pleasants* or *Coudert* courts in at least flatly indicating it did not read *Morgan* as saying that discrete acts could not be considered as part of a hostile work environment claim. *See Royal*, 416 F. Supp. at 453.

115 *McCann*, 526 F.3d at 1379.

Next, the *Porter* court is deficient in its reasoning as it fails to provide adequate support of its decision which barred aggregation. In fact, the *Porter* court's analogy of discrete acts being tinder and hostile work environment facts being planks, works superbly in supporting the view that aggregation should be allowed. The court's analogy aptly demonstrates that although different in shape and size (i.e. different in kind), both tinder and planks are essentially composed of the same substance—wood. Similarly, both discrete acts and hostile work environment acts are composed of the same "substance"—discriminatory animus. The *Porter* court, beyond pointing out the fact that they two categories are different, provides no justification why they cannot both be thrown into the same "fire"—a Title VII lawsuit seeking redress for employment discrimination.

The final court to provide any substantive argument against allowing the aggregation, the *Parker* court, argued that such aggregation "would significantly blur the distinctions between both the elements that underpin each cause of action and the kinds of harm each cause of action was designed to address."[109] This argument is not persuasive. First, it is unclear what is meant by the "elements that underpin each cause of action." The same thing underpins each action—adverse employment actions that are based on illegal discriminatory animus. Similarly, each cause of action was designed to address the same harm—discrimination in the employment context (albeit in different forms—discrete acts/tangible employment actions vs. classic hostile work environment acts). Moreover, assuming *arguendo* that allowing aggregation does somehow blur the distinction between the kinds of harm, what is the justification for needing to promote clarity between the kinds of harm? A discrete act and a classic hostile work environment act are both manifestations of the same evil, so it remains unclear what this "blurring" would consist of and what the danger in it would be. Is the court concerned that if the allowing aggregation course is followed, at some point in the future a plaintiff will not be able to articulate a claim because they can no longer tell which theory to bring? Aggregation allowed or not, a discrete act will remain a discrete act, readily discernable from a classic hostile work environment act. While the *Parker* court's argument may seem plausible at first glance, it falls apart upon closer inspection.

Beyond what the courts have said, what other dangers could befall the area of employment discrimination law if aggregation is allowed? First and foremost, an obvious danger might be dual recoveries. A plaintiff certainly should not be awarded twice for the same injury simply because he or she brought the same evil under the guise of a different legal claim.

---

116 Parker v. Del. Dep't of Pub. Safety, 11 F. Supp. 2d 467, 475 (D. Del. 1998).

Clear and concise jury instructions pertaining to damages could alleviate much of this concern. The issue here becomes: for what injury does allowing the aggregation provide the plaintiff an opportunity to seek redress for which was previously not recognized? Asked in another way, what injury would go uncompensated if the aggregation was not allowed? An answer to this question would yield a persuasive argument in favor of allowing aggregation as it would affirmatively justify, and show the unique benefit in allowing the aggregation.

Returning to the hypothetical offered at this Note's outset, consider the situation of employee A. If the aggregation is not allowed, employee A will be able to recover for six instances of disparate treatment. It would be as if employee A had endured one instance of disparate treatment six times. But would not something be missing if that were the situation? Employee A has not been subjected to the same instance of disparate treatment each time; instead, each successive instance has occurred in the context of the incident or incidents that preceded it. The added injury is the employee A being repeatedly subjected to the disparate treatment. Instead of being the same illegal action simply repeated, each successive denial of promotion is worse than the previous instance because it carries with it the weight of the previous adverse action or actions. In this manner, a hostile work environment has been created, one that would go without redress unless the aggregation is allowed.

Beyond the danger of dual recoveries, no other legitimate concerns exist. Given the lack of a legitimate risk associated with allowing the aggregation, and aggregation's ability to further employment discrimination legislation aims of deterrence of future harm and redress for victims already discriminated against, aggregation should be permitted.

V. CONCLUSION

When Congress passed, and President Lyndon Johnson signed the Civil Rights Act of 1964, which included a component called Title VII, into law, it was done to eradicate the destructive force that is employment discrimination. More than forty years later, the same problem of employment discrimination still infects workplaces across our country. When someone has legitimately been subjected to discrimination at work, both the victim and society, in general, should have that injury redressed; the wrongdoer should be punished. Allowing the reuse and aggregation of discrete acts that comprise a plaintiff's various counts of disparate treatment into a contemporaneous hostile work environment claim allow the plaintiff another opportunity of succeeding in receiving just redress and ensuring that the discriminator's actions go appropriately punished.

More importantly, aggregation of disparate treatment claims into a contemporaneous hostile work environment claim is the best means of

ensuring that a plaintiff like employee A (from the introductory hypothetical) has her injury caused by being subjected to repeated disparate treatment acts redressed. Accordingly, aggregation should be allowed. At the next available opportunity, the Supreme Court of the United States should explicitly so rule.