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Timeliness of NJLAD and CEPA Claims: A Not Too Indiscrete View of the Current State of the Law

Todd M. Kelly

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I. Introduction

Imagine that you are an attorney in New Jersey and a client walks into your office with the following issue: the client has been employed by the same employer for the past five years during which time he has been subjected to a hostile work environment. Specifically, he has been exposed to derogatory language; received reprimands for minor infractions while fellow employees commit major infractions that go unpunished; and is assigned menial tasks and assignments while other less-qualified employees are given better career opportunities. Under the current state of the law in New Jersey, these types of acts, if tied to a protected class, can make up a hostile work environment and are actionable under New Jersey's Law Against Discrimination ("NJLAD"). If the acts are tied to the employee's whistleblowing activity, then they are also actionable under New Jersey's Conscientious Employee Protection Act ("CEPA"). And, under the courts' interpretation of these statutes, even acts occurring outside of the statute of limitations are actionable under the continuing violation doctrine for a hostile work environment claim.

But what would happen if the client's employer failed to promote him, or denied him a transfer? If either of those events occurred outside of the statute of limitations, your client would be barred from bringing a claim because the courts treat those actions as discrete acts, as opposed to a hostile work environment, and refuse to include them under the continuing violation doctrine. "The overarching goal" of NJLAD, which reflects the clear public policy of the State, "is nothing less than the eradication 'of the cancer of discrimination'" in the workplace.[1] Similarly, the

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[1] Fuchilla v. Layman, 537 A.2d 652, 660 (N.J. 1988) (quoting Jackson v. Concord, Co., 253 A.2d 793, 799 (N.J. 1969)).

purpose of CEPA is to "protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct."[2] Thus, CEPA must be considered remedial in nature and "should be construed liberally to effectuate its important social goal."[3] To stay true to the purpose and goals of theses statutes, New Jersey's Legislature should amend the statutes to allow for the aggregation of "discrete acts" for statute of limitation purposes.

The important difference between the two types of acts is how the courts treat them for purposes of the applicable statute of limitations. Courts have ruled that discrete acts cannot be aggregated under the continuing violation doctrine, while repeated acts of harassment or retaliation can be brought into a claim even if many of the acts occurred outside of the statute of limitations period.[4]

The difference in the way the courts handle these situations is the focus of this Comment. Part II will review the background of NJLAD and New Jersey's CEPA. Part III will discuss the Supreme Court's Decision in *National Railroad Passenger Corporation v. Morgan*,[5] which was the impetus for New Jersey's adoption of the discrete acts, as opposed to hostile work environment, application to the statute of limitations under NJLAD and CEPA. Part IV will discuss the New Jersey cases that adopted the *Morgan* framework and the outcomes of each. Specifically, the cases of *Shepherd v. Hunterdon Developmental Center*,[6] *Roa v. Roa*,[7] and *Green v. Jersey City Board of Education*[8] will be discussed through the analytical framework applied by the courts. Part V

[2] Abbamont v. Piscataway Tp. Bd. Of Educ., 650 A.2d 958, 971 (N.J. 1994) (citing Judiciary, Law and Public Safety Committee, *Statement on Assembly Bills No. 2872, 2118, 2228* (1990)).
[3] *Id.*
[4] *See* Nat'l Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002).
[5] *Id.*
[6] Shepherd v. Hunterdon Developmental Ctr., 803 A.2d 611 (N.J. 2002).
[7] Roa v. Roa, 985 A.2d 1225 (N.J. 2010).
[8] Green v. Jersey City Bd. of Ed., 828 A.2d 883 (N.J. 2003).

will explore hypothetical situations which cause confusion among lower courts in determining what constitutes a discrete act for purposes of applying the continuing violation doctrine. *Miller v. Beneficial Management Corporation*,[9] which overturned a lower court's summary judgment finding that a failure to promote claim was a discrete act as a matter of law instead of allowing a jury to decide the issue, will supplement the discussion of the hypothetical situations. Part VI will recommend statutory amendments to both NJLAD and CEPA which would eliminate the courts' differentiation of certain types of acts for purposes of applying the statute of limitations. Specifically, it will call on the New Jersey Legislature to allow for the aggregation of all acts of discrimination or retaliation that are substantially related to the underlying statutory-defined protected status, in the case of NJLAD, or in the case of a CEPA claim, in relation to the whistleblowing activity. Finally, Part VII will briefly conclude.

II. Background of NJLAD and CEPA

This section begins in subpart A. with a brief history of NJLAD along with a discussion of the act's legislative history and purpose. Subpart B. then discusses the history and purpose of New Jersey's CEPA.

A. The History and Purpose of NJLAD

NJLAD was enacted in 1945, nearly twenty years prior to the federal Civil Rights Act of 1964.[10] Its purpose is to eradicate discrimination on defined bases, whether intentional or unintentional.[11] The New Jersey Legislature has amended NJLAD throughout its history as required by the ever-changing landscape to ensure that its overarching goal of "eradicat[ing] . . .

[9] Miller v. Beneficial Mgmt. Corp., 977 F.2d 834 (3d Cir. 1992).
[10] N.J. STAT. ANN. § 10:5-1.
[11] George v. Board of Educ. of the Tp. of Millburn, 34 F. Supp. 3d 442 (D.N.J. 2014).

the cancer of discrimination" is met.[12] NJLAD is considered remedial legislation[13] and should be read with an approach sympathetic to its objectives.[14] NJLAD was "enacted to protect not only the civil rights of individual aggrieved employees but also to protect the public's strong interest in a discrimination-free workplace."[15] In order to achieve this goal, NJLAD expressly prohibits an employer from discriminating against an employee based on specified enumerated statutory characteristics, such as: race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality.[16]

Since its inception, New Jersey courts have construed NJLAD's text liberally to achieve its aims.[17] NJLAD is thus a cornerstone of our fundamental social and political philosophy that demands protection from casual or unintended erosion. Indeed, NJLAD's entire legislative history has demonstrated a continual enlargement of the Division on Civil Rights' power and jurisdiction to enable it more readily to discharge its responsibilities in the quest for a just society.[18] The judicial construction of NJLAD has been concomitantly liberal and to the same end.[19]

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[12] Gardenhire v. New Jersey Mfrs. Ins. Co., 754 A.2d 1244, 1248 (N.J. Super. Ct. 2000) (quoting Dale v. Boy Scouts of Am., 734 A.2d 1196 (N.J. 1999)).

[13] BLACK'S LAW DICTIONARY 1624 (10th ed. 2014) ("1. Any statute other than a private bill; a law providing a means to enforce rights or redress injuries. 2. A statute enacted to correct one or more defects, mistakes, or omissions.").

[14] Nat'l Org. for Women v. Little League Baseball, Inc., 318 A.2d 33 (N.J. Super. Ct. App. Div. 1974).

[15] Hoag v. Brown, 935 A.2d 1218, 1226 (N.J. Super. Ct. App. Div. 2007) (quoting Lehman v. Toys 'R' Us, 626 A.2d 445, 452 (N.J. 1992)).

[16] N.J. STAT. ANN. § 10:5-3 ("The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality, are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State; provided, however, that nothing in this expression of policy prevents the making of legitimate distinctions between citizens and aliens when required by federal law or otherwise necessary to promote the national interest.").

[17] Zive v. Stanley Roberts, Inc., 867 A.2d 1133, 1138 (N.J. 2005) (citing Franek v. Tomahawk Lake Resort, 754 A.2d 1237, 1243 (N.J. Super. Ct. App. Div. 2000)).

[18] *See* N.J. STAT. ANN. § 10:5-6.

[19] Hinfey v. Matawan Regional Bd. of Ed., 371 A.2d 78, 81 (N.J. Super. Ct. App. Div. 1977).

NJLAD does not contain its own statute of limitations for bringing a civil suit.[20] Courts therefore differed as to whether the statute of limitations for NJLAD claims was two years or six years.[21] But in 1993, in *Montells v. Haynes*, the New Jersey Supreme Court established that the statute of limitations for civil actions under NJLAD is two years, in keeping with the New Jersey statute of limitations for personal injury, N.J.S.A. 2A:14-2.[22]

B. The History and Purpose of CEPA

In 1986, New Jersey enacted CEPA to provide extensive protection against retaliatory action directed at employees engaged in a broad range of whistleblowing activities.[23] Consistent with the breadth of the statute, the New Jersey Supreme Court liberally construed CEPA's provisions to further its remedial purpose of protecting employees who refuse to engage in illegal activity, or "blow the whistle" on employer illegality or corruption. In a series of opinions interpreting CEPA, the court broadened the scope of the statute in terms of public policy, the employer conduct prohibited by the law, and the justifications employees need to blow the whistle

[20] *See* N.J. STAT. ANN. § 10:5-3 *et seq*.

[21] *See, e.g.*, Lautenslager v. Supermarkets General Corp., 600 A.2d 525 (N.J. Super. Ct. 1991) (six-year statute of limitations); White v. Johnson & Johnson Products, Inc., 712 F. Supp. 3d (D.N.J. 1989) (two-year statute of limitations).

[22] Montells v. Haynes, 627 A.2d 654 (N.J. 1993).

[23] N.J. STAT. ANN. § 34:19-3 (2019) (The relevant substantive section (section 3) is as follows: "3. An employer shall not take any retaliatory action against an employee because the employee does any of the following: a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer or another employer, with whom there is a business relationship, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care; (2) is fraudulent or criminal; or (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.").

on their employers.[24] The purpose of CEPA is to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct, and thus, CEPA must be considered remedial in nature and should be construed liberally to effectuate its important social goal.[25]

The statute of limitations for a CEPA claim is one year.[26] Unlike Title VII,[27] the limitations period begins to run upon the occurrence of the retaliatory action and not when the plaintiff learns that a retaliatory action will take place; for example, the CEPA statute of limitations begins to run as of the employee's last day of work, rather than when he learned of his discharge.[28] When there is continued retaliatory conduct, the statute of limitations runs from the final act of retaliation.[29] The Third Circuit, however, has held that the "continuing violation" toll on CEPA's statute of limitation does not apply where the plaintiff's claims are individually actionable, discrete events under the test set forth by the United States Supreme Court in *AMTRAK v. Morgan*.[30]

III. The United States Supreme Court's Decision in *Morgan*

This section will discuss the United States Supreme Court's seminal case which distinguishes between discriminatory hostile work environment claims and separate, discrete acts

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[24] Michael J. Garrison, *Limiting The Protection For Employees From Compelled Noncompete Agreements Under State Whistleblower Laws: A Critical Analysis Of* Maw v. Advanced Clinical Communications, 20 THE LABOR LAW 257, 274 (2005). *See, e.g.*, Mehlman v. Mobil Oil Corp., 153 N.J. 163 (1998) (employee is not required to have specific knowledge of the precise source of public policy at the time he or she objects to it); Estate of Roach v. TRW, Inc., 164 N.J. 598 (2000) (court rejected a limited reading of CEPA that would have required a whistleblower to demonstrate that the reported illegality "implicates the public interest").

[25] Abbamont v. Piscataway Tp. Bd. Of Educ., 650 A.2d 958, 971 (N.J. 1994).

[26] *See* N.J. STAT. ANN. § 34:19-5; *see also* Beck v. Tribert, 711 A.2d 951, 956–957 (N.J. Super. Ct. App. Div. 1998), *cert. denied*, 719 A.2d 1022 (1998).

[27] *See* Alderiso v. Medical Ctr. of Ocean County, Inc., 770 A.2d 275, 280–81 (N.J. 2001).

[28] *See id.*; *see also* Keelan v. Bell Commc'ns Research, 674 A.2d 603, 607–608 (N.J. Super. Ct. App. Div. 1996) (finding that the employer's notice to the plaintiff that he would be terminated was not a sufficient retaliatory action to trigger the statute of limitations).

[29] *See* Green v. Jersey City Bd. of Educ., 828 A.2d 883 (N.J. 2003); *see also* Marrero v. Wimalawansa, 2013 N.J. Super. Unpub. LEXIS 1693 at *6–7 (N.J. Super. Ct. App. Div. Jul. 9, 2013), *cert. denied*, 82 A.3d 939 (N.J. 2013) (holding that the "continuing violation" doctrine does not preserve otherwise time-barred CEPA claims from the earlier of two separate periods of employment); O'Connor v. City of Newark, 440 F.3d 125, 130–31 (3d Cir. 2006).

[30] *See* Nat'l R.R. Passenger Corp. (AMTRAK) v. Morgan, 536 U.S. 101, 114 (2002).

of discrimination or retaliation to determine if a complaint is timely filed. Subpart A. presents the facts and procedural history of *Morgan*; the majority opinion is discussed in subpart B.

A. Facts and Procedural History

Abner Morgan, Jr. sued his employer, National Railroad Passenger Corporation ("Amtrak"), under Title VII of the Civil Rights Act of 1964.[31] Amtrak hired Morgan, a black male, in August 1990.[32] He alleged he was the victim of discrete and retaliatory acts of discrimination and was exposed to a racially hostile work environment throughout his employment.[33] Amtrak's alleged racially motivated discrimination against Morgan began when he was hired as an electrician's helper, rather than as an electrician.[34] Although previously trained and experienced in electrical work, Morgan was the only person ever hired as a "helper" at his location of employment.[35] Other alleged acts included reprimands and termination for refusing to follow orders, Amtrak refusing to allow him to participate in an apprenticeship program, written and verbal reprimands for days taken off from work, and the use of "racial epithets" against him by his managers.[36]

On February 27, 1995, Morgan filed a discrimination and retaliation charge against Amtrak with the EEOC and also with the California Department of Fair Employment and Housing.[37] In his Complaint, Morgan alleged that during the nearly five years he worked for Amtrak, he suffered harsh discipline and harassment because of his race from his supervisors.[38] While many of Morgan's alleged discriminatory events took place within 300 days of the time he filed an EEOC

[31] *Morgan*, 536 U.S. at 104.
[32] *Id.* at 105 n.1.
[33] *Id.* at 105.
[34] *Id.* at 105 n.1.
[35] Morgan v. AMTRAK, 232 F.3d 1008, 1011 (9th Cir. 2000).
[36] *Id.* at 1013.
[37] *Morgan*, 536 U.S. at 106.
[38] *Id.*

claim, many alleged acts also took place before the 300-day filing period.[39] Morgan was terminated by Amtrak on March 3, 1995.[40] The EEOC issued a "Notice of Right to Sue" on July 3, 1996, and Morgan filed his lawsuit on October 2, 1996.[41]

Morgan originally brought suit against Amtrak in the United States District Court for the Northern District of California alleging that he experienced discrimination, retaliation, and suffered exposure to a hostile work environment because of his race.[42] In response, Amtrak filed a motion for summary judgment relating to all incidents occurring more than 300 days before Morgan filed his EEOC charge.[43]

The District Court granted Amtrak partial summary judgment and ruled Amtrak was not liable for conduct that occurred before May 3, 1994, because that conduct fell outside the 300-day filing period.[44] Thus, Amtrak was held responsible only for alleged discriminatory conduct occurring 300 days, or approximately ten months, before Morgan filed his administrative charge on February 27, 1995, but not for any events that took place before May 3, 1994.[45] The remaining timely-filed claims proceeded to trial, resulting in a jury verdict in favor of Amtrak.[46] Morgan appealed the District Court's summary judgment ruling and the jury verdict judgment to the Ninth Circuit Court of Appeals,[47] which considered each of Morgan's three types of Title VII claims separately.[48] The Ninth Circuit concluded that the pre-limitations conduct in all three claims was sufficiently related to the post-limitations acts to apply the continuing violation doctrine.[49] It held

[39] *Id.* at 102.
[40] *Id.* at 115 n.8.
[41] *Id.* at 106.
[42] *Morgan*, 232 F.3d at 1010.
[43] *Morgan*, 536 U.S. at 106.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 107 n.2.
[47] *Id.* at 106.
[48] *Id.* at 107.
[49] *Morgan*, 536 U.S. at 108.

that the District Court should have allowed certain events occurring in the pre-limitations period to be put before the jury for liability purposes.[50] The Court of Appeals reversed the District Court's ruling and remanded the case for a new trial.[51] Because of a split in circuit decisions,[52] the Supreme Court granted certiorari on the issues in this case.[53]

B. Majority Opinion

The *Morgan* Court first reversed the Ninth Circuit Court of Appeals' holding that charges for discrete discriminatory acts must be filed within the appropriate 180- or 300-day filing period as required by the EEOC.[54] Specifically, the Ninth Circuit applied the continuing violations doctrine to what it termed "serial violations," holding that so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to that act may also be considered for the purposes of liability.[55] The Court went on to define discrete acts as including "termination, failure to promote, denial of transfer, or refusal to hire" as easily identifiable.[56] As such, these types of acts constitute separate "actionable 'unlawful employment practice[s].'"[57]

The Court then affirmed the Ninth Circuit's ruling on Morgan's hostile work environment claims.[58] In so doing, the Court found that "hostile environment claims are different in kind from discrete acts" because "[t]heir very nature involves repeated conduct."[59] Therefore, unlike discrete

[50] *Id.*
[51] *Id.*
[52] *Id.* at 106 (District Court employed the test established by the Seventh Circuit in *Galloway v. General Motors*); *see also id.* at 107 n. 3 (where the Fifth Circuit employs a multi-factor test).
[53] *Id.*
[54] *Id.* at 113.
[55] *Morgan*, 536 U.S. at 114.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 121.
[59] *Id.* at 115.

acts, hostile environment claims do not "occur on any particular day," but rather occur over a period of time with no one act necessarily being considered actionable on its own.[60]

To reconcile treating the two types of acts differently, the majority opinion, authored by Justice Thomas, interpreted "unlawful employment practice" in the statute "to apply to a discrete act or single 'occurrence,' even when it has a connection to other acts."[61] To determine whether an actionable hostile work environment claims exists, the Court will look to "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[62] The Court then held that a hostile work environment claim was composed of a series of separate acts that collectively constitute one "unlawful employment practice."[63]

The majority opinion thereby treats two similarly situated employees, who have suffered discrimination or retaliation, differently for purposes of when they are required to file claims. One who suffers a loss of promotion due to discrimination or retaliation is forced to file within the statutory time period (even if they suffer other acts of retaliation or discrimination that the court does not deem "discrete"), while one who suffers minor, but repeated, discriminatory acts has the option to wait and is not barred from claiming each act as one "unlawful employment practice," even if some of the acts occurred outside of the statutory time period. This issue will be discussed further throughout the remainder of this Comment.

IV. The New Jersey Supreme Court's Adoption of the *Morgan* Framework

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[60] *Id.*

[61] *Morgan*, 536 U.S. at 111; *see, e.g.*, Elec. Workers v. Robbins & Myers, 429 U.S. 229, 234 (1976) (wherein an employee asserted that his complaint was timely filed because the date "the alleged unlawful employment practice occurred" was the date after the conclusion of a grievance arbitration procedure, rather than the earlier date of his discharge. The discharge, he contended, was "tentative" and "nonfinal" until the grievance and arbitration procedure ended. Not so, the Court concluded, because the discriminatory act *occurred* on the date of discharge—the date that the parties understood the termination to be final.).

[62] *Morgan*, 536 U.S. at 116 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)).

[63] *Id.* at 117.

This section explores three cases decided by the New Jersey Supreme Court that adopt the *Morgan* framework when analyzing workplace discrimination and retaliation causes of action. Subpart A. is a brief discussion of the case wherein the New Jersey Supreme Court officially adopted the *Morgan* framework. Subpart B. reviews the purpose of a statute of limitations and the judicially created equitable exception, the continuing violation doctrine. Subparts C. and D. discuss two New Jersey Supreme Court cases to show how the courts analyze claims of workplace discrimination and retaliation for purposes of the statute of limitations.

A. *Shepherd v. Hunterdon Developmental Center*

In *Shepherd*, two plaintiffs alleged illegal retaliation in that they had been subjected to a continuous pattern of ill-treatment after they supported a co-worker's discrimination lawsuit, and they asserted, among other things, hostile work environment claims.[64] Defendants sought dismissal, arguing that plaintiffs' claims were time-barred because they had known that they had been discriminated against when they sent a detailed letter about their claims to their superintendent two years and 26 days before they filed their complaint.[65] Despite noting that federal precedent is only a guide for NJLAD claims, Justice Peter Verniero, writing for the majority, explained there was a benefit in having New Jersey law "mirror the approach taken in *Morgan* to avoid further confusion in an already complicated area of law."[66] As a result, New Jersey's Supreme Court expressly adopted *Morgan*'s distinction between discrete act and continuing course of conduct discrimination for NJLAD claims.[67] Applying that analytical framework, Justice Verniero found that, because the plaintiffs had identified one timely act and

[64] Shepherd v. Hunterdon Developmental Ctr., 803 A.2d 611 (N.J. 2002).
[65] *Id.*
[66] *Id.*
[67] *Id.*

had asserted a continuing course of conduct which included that timely act, their claims were timely.[68]

B. Statutes of Limitations and the Continuing Violation Doctrine

One hundred years ago, Oliver Wendell Holmes, Jr. asked, "What is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?"[69] The law of limitation of actions is the set of legislatively and judicially created legal rules—including the classification of claims, the duration of limitation periods, the applicable principles of accrual and tolling, and the like—that determine whether a claim is time-barred.[70] In 1944, the Supreme Court, in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, stated,

> Statutes of limitation . . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and the right to be free of stale claims in time comes to prevail over the right to prosecute them.[71]

New Jersey recognizes an important continuing violations exception to the NJLAD statute of limitations.[72] "When an individual is subject to a continual, cumulative pattern of tortuous conduct, the statute of limitations does not begin to run until the wrongful action ceases."[73] For example, discrimination in wages may be a continuing violation.[74] A plaintiff's hostile work environment claim can proceed under a continuing violations theory if at least one of the acts in a series falls within the statute of limitations.[75] The continuing violation theory is a judicially created

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[68] *Id.*
[69] Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).
[70] Tyler T. Ochoa and Andrew Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L. J. 453 (1997).
[71] Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348 (1944).
[72] *See* Shepherd v. Hunterdon Developmental Ctr., 803 A.2d 611, 620–24 (N.J. 2002).
[73] Wilson v. Wal-Mart Stores, 729 A.2d 1006, 1010 (N.J. 1999).
[74] *See* Decker v. Elizabeth Bd. of Ed., 380 A.2d 285, 287 (N.J. Super. Ct. App. Div. 1977), *cert. denied*, 384 A.2d 842 (N.J. 1978).
[75] *See* Caggiano v. Fontoura, 804 A.2d 1193, 1207 (N.J. Super. Ct. App. Div. 2002).

equitable exception to the statute of limitations in employment discrimination and harassment cases. It is used when a plaintiff argues that unlawful acts that began outside the statute of limitations period actually "continued" within the statutory period and that the timely acts should resurrect the time-barred acts.[76]

The Appellate Division has adopted a three-factor analysis articulated by the Third Circuit to be used to determine whether a plaintiff's claim can survive a statute of limitations bar under the continuing violations theory.[77] Courts are directed to consider the subject matter of the violation/discrimination, the frequency, and the degree of permanence.[78] "If, however, a plaintiff knew, or with exercise of reasonable diligence should have known, that each was discriminatory, the plaintiff 'may not sit back and accumulate all the discriminatory acts and sue on all within the statutory period applicable to the last one.'"[79] In the instances of continuing violations, if a timely complaint is filed as to current violations, prior (otherwise time-barred) acts may be litigated.[80] Damages are not restricted to only those violations that occurred within the timely filing period.[81]

Discrete acts of discrimination or retaliation are those acts that occur on the day they happened. A discrete act is one that allows a plaintiff to be aware of the act when it occurs and is completed upon one's awareness of it taking place.[82] Discrete acts of discrimination, such as a failure to hire, a failure to promote, a demotion, or a discharge, are considered to provide a plaintiff

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[76] *See Shepherd*, 803 A.2d at 611.
[77] *See* Rush v. Scott Specialty Gases, Inc., 113 F.3d 474, 481 (3d Cir. 1997); Bolinger v. Bell Atl., 749 A.2d 857, 861 (N.J. Super. Ct. App. Div. 2000); Hall v. St. Joseph's Hosp., 777 A.2d 1002, 1010–11 (N.J. Super. Ct. App. Div. 2001), *cert. denied*, 754 A.2d 1211 (N.J. 2000).
[78] *Hall*, 777 A.2d at 1011 (internal citations omitted); *Bolinger*, 749 A.2d at 862.
[79] *Id.* (quoting Moskowitz v. Tr. of Purdue Univ., 5 F.3d 279, 282 (7th Cir.1993)) (holding that an age-discrimination claim based on the denial of suitable laboratory space was actionable at the time it occurred and would not be considered part of later discriminatory conduct).
[80] *Id.* at 1010.
[81] Terry v. Mercer Cty. Freeholders Board, 414 A.2d 30, 32 (N.J. Super. Ct. App. Div. 1980), *aff'd as modified*, 430 A.2d 194 (N.J. 1981) (180-day filing requirement is not a restriction on damages; relief may be granted from date of earliest discrimination).
[82] *See* Nat'l Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 110 (2002).

sufficient notice of an NJLAD violation, and therefore, a separate limitations period begins to run from each such discriminatory act.[83] Hostile work environment claims, on the other hand, consist of repeated harassing acts over a period of time that collectively constitute a single unlawful employment practice under NJLAD.[84]

C. Differentiating Discrete Acts of Retaliation from a Series of Acts of Retaliation for Purposes of Applying the Continuing Violation Doctrine

In *Roa v. Roa*, the New Jersey Supreme Court addressed the type of retaliatory conduct that is considered discrete, and therefore not entitled to application of the continuing violation doctrine. In 2003, plaintiffs Fernando and Liliana Roa worked for Gonzales and Tapanes Foods, Inc. ("G&T") where Marino Roa, Fernando's brother, supervised the plaintiffs.[85] Marino was romantically involved with two female subordinates, one of whom left a gift for Marino on Valentine's Day.[86] Marino asked Fernando to lie and claim the gift was for him.[87] Fernando did so initially, but eventually told Marino's wife the truth.[88] In response, plaintiffs allege that Marino began to harass and threaten them, culminating with their termination.[89]

G&T terminated Liliana's employment on August 24, 2003.[90] On September 15, 2003, she received notice that she was ineligible for unemployment compensation benefits because the company had stated that her termination was due to misconduct.[91] Liliana successfully appealed

[83] *See* Roa v. Roa, 985 A.2d 1225 (N.J. 2010); Shepherd v. Hunterdon Develop. Ctr., 803 A.2d 611, 623 (N.J. 2002); Stoney v. McAleer, 11 A.3d 376 (N.J. Super. Ct. App. Div. 2010).
[84] *See Shepherd*, 803 A.2d at 623.
[85] Roa v. Roa, 985 A.2d 1225, 1229 (N.J. 2010).
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Roa*, 985 A.2d at 1229.

that decision.[92] On October 3, 2003, G&T terminated Fernando's employment.[93] While Fernando was still employed by the company, Liliana underwent surgery that resulted in medical expenses of approximately $6,000.[94] Plaintiffs thought the expenses were covered by Fernando's health insurance, but on November 11, 2003, Fernando's health insurer notified him that it would not pay for the surgery because he was not covered at the time the medical services were rendered.[95] Although the premature termination of Fernando's health benefits eventually was corrected, the insurer did not pay the claim until February 2004.[96]

Nonetheless, Liliana's delay in receiving her unemployment compensation benefits and medical benefits allegedly caused plaintiffs to suffer financial problems and stress.[97] On November 5, 2005, plaintiffs sued G&T and Marino, alleging, among other things, that the company engaged in unlawful retaliation in violation of the NJLAD.[98] The trial court granted defendants' motion to dismiss the complaint on the basis of the NJLAD's two-year statute of limitations.[99] Plaintiffs appealed to the Appellate Division, which agreed that Liliana's claim was time-barred.[100] It pointed out that her discharge occurred in August 2003, and the latest alleged retaliatory act occurred when she received notice of the Appellate Tribunal's decision regarding her unemployment compensation benefits in October 2003, more than two years prior to the filing of the lawsuit.[101] The Appellate Division, however, reversed the trial court's dismissal of Fernando's retaliation claim, finding that his claim for post-discharge retaliation regarding the

[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Roa*, 985 A.2d at 1230.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*

cancellation of his health insurance was timely filed in November 2005, if Fernando did not become aware of the cancellation until November 2003.[102] The claim was actionable even if the conduct was not related to his "current or prospective employment."[103] Critically, the Appellate Division found that the insurance cancellation could constitute the last in a series of retaliatory acts under the continuing violations theory, thereby making Fernando's October 2003 claim actionable as well.[104] Defendants appealed to the New Jersey Supreme Court.[105]

The two issues before the court were: (1) whether the post-discharge retaliatory act (cancellation of insurance) constituted the last act in a continuing violation, thereby reviving the untimely discharge claim; and (2) whether the post-discharge retaliation must relate to present or future employment in order to be actionable.[106] On the first issue, the court held that the limitations clock begins to run from the date of the discrete retaliatory act—in this case, Fernando's discharge—and that post-discharge retaliatory conduct does not encompass or revive the untimely discharge retaliation claim.[107] In so holding, the court explained that the continuing violation theory was developed to protect an employee from being time-barred from bringing claims arising from a series of acts, where no single event alerted the employee to the existence of a claim, but which together show a pattern of discrimination.[108] The primary example would be acts which by themselves would not support a lawsuit but, taken as a whole, could constitute a hostile work environment.[109] The court held here, however, that the continuing violations theory does not permit the aggregation of discrete discriminatory acts, like a termination or refusal to promote, any

[102] *Id.*
[103] *Roa*, 985 A.2d at 1230.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 1228.
[107] *Id.*
[108] *Id.* at 1233.
[109] *Roa*, 985 A.2d at 1232.

one of which is significant enough to put the employee on notice of a possible claim.[110] As a result, a lawsuit based on a discrete act of discrimination or retaliation must be brought within two years of the event, notwithstanding later actions that might rise to the level of a continuing violation.[111]

With respect to the second issue, the court held that a discrete post-discharge act of retaliation is independently actionable even if it does not relate to present or future employment.[112] Therefore, the court found that Fernando could still pursue his cancellation of benefits retaliation claim under the NJLAD.[113] In so finding, the court recognized "the discovery rule," which postpones the accrual of a cause of action as long as the party did not know and reasonably could not have been expected to know of the claim.[114] In other words, the court recognized that Fernando should be given the opportunity to prove that he was unaware of the cancellation of his insurance until November 2003, which would make his post-discharge retaliation claim timely filed.

In deciding these issues, the court did not foreclose an employee's use of untimely claims as evidence to support the discrimination claim.[115] Indeed, the court expressly stated that although plaintiffs' discharge claims were time-barred, they could be used at trial as evidence to demonstrate conduct such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute" in accordance with the New Jersey Rules of Evidence.[116]

D. Application of the Continuing Violation Doctrine to a CEPA Claim

[110] *Id.* at 1233.
[111] *Id.*
[112] *Id.* at 1228.
[113] *Id.* at 1230.
[114] *Id.* at 1235.
[115] *Roa*, 985 A.2d at 1237.
[116] *Id.*

In *Green v. Jersey City Board of Education*, the New Jersey Supreme Court applied the continuing violation doctrine to a Plaintiff's claim of retaliation under CEPA. Plaintiff Doris Green was a science teacher in the Jersey City Public School system for the thirty-year period from 1967 to 1997.[117] In 1994, she sought and obtained an assignment to Public School 22 because of the teacher programs offered there.[118] At Public School 22, Green participated in training seminars and other non-classroom activities, including workshops in mediating student disputes and increasing student interest in scholarships.[119] She also attended a summer teachers' program at the Stevens Institute of Technology ("Stevens Institute"), for which she received no compensation, but which resulted in a $1,000 grant of computers and materials to her classroom.[120]

According to plaintiff, she was asked in May of 1995 by her supervisor and principal, Cassandra Wiggins, to expect receipt of a check for more than $500 on behalf of another employee.[121] Wiggins explained to Green that the other teacher had supervised an after-school program for which he did not have adequate credentials.[122] Wiggins had submitted Green's name and credentials to the District and was asking Green to give the money to Wiggins when she received the check so that Wiggins could, in turn, ensure that the other teacher was compensated.[123] Green refused to participate in this scheme because she believed it to be fraudulent or illegal.[124] After informing Wiggins that she did not wish to receive the money on her colleague's behalf, Green left Wiggins's office presuming that the matter was closed.[125]

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[117] Green v. Jersey City Bd. of Educ., 828 A.2d 883, 885 (N.J. 2003).
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Green*, 828 A.2d at 885.
[124] *Id.*
[125] *Id.*

Two months later, however, Green received a check for $543.63 that she deposited in her bank account, believing it to be payment for her participation in a mediation program.[126] It was not until Wiggins telephoned Green at home asking whether Green had received the check and demanding payment that Green realized the check she had deposited was not money she had earned.[127] After the telephone call from Wiggins, Green brought the matter to the attention of the Vice Principal of Public School 22, and then to Lorraine Casey Church, the payroll supervisor for the Jersey City Board of Education.[128] Green told Church that she wanted to return the money. Church advised Green to have Wiggins call her and to send a check to the Board enclosing a letter that explained the situation.[129] Green followed Church's instructions and mailed a check to the Board for $543.63 with a letter explaining that she had not participated in the program for which she had been compensated.[130] Green also requested that her name be removed from any list naming her as a participant in that program.[131] Subsequently, Church returned the check to Green with a note informing her that Wiggins had authorized Green's receipt of a portion of the money and that the difference would be taken out of Green's next paycheck.[132] Green kept the remainder of the money, again believing that it was for the mediation program.[133] By the time of trial, however, Green had become convinced that she was not entitled to any portion of the money.[134]

When the school year started the following September, Wiggins informed Green that she was very angry with her for reporting the incident to Church and that Green would no longer be

[126] *Id.*
[127] *Id.*
[128] *Id.* at 885–86.
[129] *Green*, 828 A.2d at 886.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*

able to participate in the Stevens Institute program or the student mediation program.[135] Green was told that she was on Wiggins's "shit list" and that any requests Green made for additional programs or training would be denied.[136] A host of other retaliatory acts followed: Green was given substandard evaluations even though her previous evaluations had been consistently satisfactory; she was moved to a dilapidated classroom with inadequate furniture; she had trouble getting necessary supplies; she was denied a key to the science lab; and her requests for photocopying services were repeatedly rejected.[137] In addition, Green's class was treated unfairly, i.e., her students were no longer allowed to participate in opening exercises or in an honor roll ceremony, or permitted to go on field trips.[138] These incidents continued throughout two school years, from September 1995 through the spring of 1997.[139]

In May 1997, Green left her teaching position and went on medical leave as a result of persistent severe headaches and other physical symptoms she had been suffering since November 1996.[140] Her psychiatrist has diagnosed her with a major depressive disorder, finding a causal relationship between her work situation and her illness.[141] She has never returned to teaching.[142]

On May 14, 1997, Green filed suit against the Jersey City Board of Education and several individual defendants, including Cassandra Wiggins, alleging that defendants had engaged in "continuous and increased forms of harassment" dating back to July 23, 1995.[143] She contended that defendants' behavior caused her loss of employment due to stress-related illness and that their

[135] *Green*, 828 A.2d at 886.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Green*, 828 A.2d at 886.
[142] *Id.*
[143] *Id.*

harassing conduct amounted to a violation of her rights under CEPA.[144] On the CEPA claim, the jury returned a verdict against the Jersey City School Board, awarding plaintiff $265,000 in compensatory damages and $300,000 in punitive damages.[145] Defendant appealed and the Appellate Division affirmed.[146] Defendant petitioned for certification, in particular as to whether Green's claim was barred by CEPA's one-year statute of limitations, and it was granted.[147]

CEPA defines actionable retaliation as "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment."[148] The statute further states that "[u]pon a violation of any of the provisions of this act, an aggrieved employee or former employee may, within one year, institute a civil action in a court of competent jurisdiction."[149] The Jersey City Board of Education argued that, because Green's complaint was filed on May 14, 1997, and the retaliatory conduct that she alleged began in September 1995, her lawsuit was barred by the one-year statute of limitations.[150]

The New Jersey Supreme Court held that "[t]he policy concerns underpinning the determination in *Shepherd* in respect of LAD claims require the application of the *Morgan*/*Shepherd* framework in CEPA actions."[151] "Retaliation," as defined by CEPA, need not be a single discrete action.[152] Indeed, "adverse employment action taken against an employee in the terms and conditions of employment" can include, as it did in this case, many separate but relatively minor instances of behavior directed against an employee that may not be actionable

[144] *Id.*
[145] *Id.*
[146] *Id.* at 887.
[147] *Green*, 828 A.2d at 887.
[148] N.J. STAT. ANN. § 34:19-2e.
[149] *Id.* § 34:19-5.
[150] *Green*, 828 A.2d at 890.
[151] *Id.* at 891.
[152] N.J. STAT. ANN. § 34:19-2e.

individually but that combine to make up a pattern of retaliatory conduct.[153] Relying on the majority opinion from *Abbamont v. Piscataway Township Board of Education*,[154] the court held that because the acts of retaliation against plaintiff continued until she resigned her teaching position in May 1997, and because plaintiff filed her lawsuit on May 14, 1997, CEPA's one-year statute of limitations did not bar her claim.[155] Thus, both NJLAD and CEPA recognize adverse employment actions that consist of relatively minor acts of harassing or hostile behavior that together make up a pattern of retaliatory conduct that is actionable.

The foregoing cases reaffirm the New Jersey courts' use of the *Morgan* framework when determining the timeliness of claims filed under NJLAD and CEPA. Typically, a prima facie case of unlawful discrimination in the workplace under the NJLAD is established when a plaintiff demonstrates by a preponderance of the evidence that he or she (1) belongs to a protected class; (2) was performing a job at a level that met the employer's legitimate expectations; (3) suffered an adverse employment action; and (4) others not within the protected class did not suffer similar adverse employment actions.[156] To establish a *prima facie* case of retaliation under CEPA, an employee must establish (1) his reasonable belief that his employer's conduct violated a law, rule, or regulation, (2) whistleblowing activity, (3) adverse employment action, and (4) causal connection between her whistleblowing activity and adverse employment action.[157] The problem

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[153] *Id.*

[154] *Green*, 828 A.2d at 891–92 (quoting Abbamont v. Piscataway Tp. Bd. of Ed., 650 A.2d 958, 971 (N.J. 1994)) ("The whistleblower statute, like LAD, is a civil rights statute. Its purpose is to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct. Consistent with that purpose, CEPA must be considered 'remedial' legislation and therefore should be construed liberally to effectuate its important social goal. In New Jersey, we are deeply committed to the principle that an employer's right to discharge an employee carries a correlative duty to protect his freedom to decline to perform an act that would constitute a violation of a clear mandate of public policy.").

[155] *Id.* at 892.

[156] *See* Maclean v. Stuart Weitzman Shoes, 863 F. Supp. 2d 387, 391 (D.N.J. 2012) (citing Zive v. Stanley Roberts, Inc., 867 A.2d 1133, 1139 (N.J. 2005).

[157] *See* Caver v. The City of Trenton, 420 F.3d 243, 254 (3d Cir. 2005); Dzwonar v. McDevitt, 828 A.2d 893 (N.J. 2003).

arises in these claims under the adverse employment action part of the rule. Specifically, when the occurrence of the adverse employment action triggers the statute of limitations. The different treatment afforded to complainants as to the timeliness of their claims will be discussed to further show the unfairness of the current state of the laws.

V. Hypothetical and *Miller v. Beneficial Management Corporation*

This section begins in subpart A. with a summary of a Third Circuit case to help illuminate how similarly situated claimants can be treated differently, for statute of limitations purposes, based on the same type of workplace discrimination. Subpart B. continues with a hypothetical situation that is resolved through the courts' current interpretation of how claims of workplace discrimination and/or retaliation are to be treated for statute of limitations purposes. These differences generate unfair results and therefore undermine the legislative purpose of both the NJLAD and CEPA, which leads to the final section's discussion about ways to eliminate these differences.

A. *Miller v. Beneficial Management Corporation*

Plaintiff Miller was employed as an attorney for defendant company and in 1984 joined the Government Relations Department, where she replaced two attorneys who were terminated.[158] One of those attorneys, Charles Walsh, was Vice President in Government Relations and the other was assistant to the Vice President.[159] When Miller joined the department in July 1984, she took on the responsibilities of both previous attorneys, although without the accompanying title, at a salary of $40,000 compared to Walsh's salary of $55,000 and a year-end bonus of $28,500.[160] In June of 1985, Miller was promoted to Assistant Vice President (while still doing the work of the

[158] Miller v. Beneficial Mgmt. Corp., 977 F.2d 834, 837 (3d Cir. 1992).
[159] *Id.* at 836.
[160] *Id.*

previous Vice President and Assistant Vice President) and her salary was increased to $47,300, far below the salary of the male attorney who previously did the work she was now doing.[161] Over the next two years, Miller continuously asked her supervisor (Ward) to recommend her for a promotion to Vice President.[162] Although she was not promoted to that title, her salary in January 1987 was increased to $50,200 with a bonus of $8,000,[163] (which was still significantly lower than the bonus of the previous male Vice President she replaced).[164] In May of 1988, Ward informed Miller that she would never get the title of Vice President.[165] Again, in September 1988, "Ward told Miller that she would never become a Vice President."[166]

On September 30, 1988, Miller called the previous Vice President, Walsh, who advised her about his compensation before he was terminated, as well as the Assistant Vice President's compensation, both of which were higher than what Miller was being paid.[167] On October 20, 1988, Miller was transferred to a different department, a transfer which became permanent on December 14, 1988.[168] Miller's request for a promotion was officially denied by the Executive Committee on December 22, 1988.[169] Miller alleged she became aware at this time that she would not be promoted.[170] Miller's employment with defendant ended on January 6, 1989.[171]

On February 27, 1989, Miller filed a charge of employment discrimination with the EEOC.[172] On July 20, 1989, Miller filed a complaint in the U.S. District Court of New Jersey

[161] *Id.* at 837.
[162] *Id.* at 837–38.
[163] *Id.* at 838.
[164] *Miller*, 977 F.2d at 836.
[165] *Id.*
[166] *Id.* at 839.
[167] *Id.* at 840.
[168] *Id.*
[169] *Id.*
[170] *Miller*, 977 F.2d at 840.
[171] *Id.* at 841.
[172] *Id.*

alleging discrimination under the Equal Pay Act, the Age Discrimination in Employment Act, NJLAD, and CEPA.[173] Defendants moved for dismissal and/or summary judgment (the CEPA claim was dismissed for lack of pendent jurisdiction) on all claims.[174] The District Court granted defendants' motion for summary judgment and dismissed Miller's complaint with prejudice after holding "that all of Miller's federal claims were barred by the applicable statutes of limitations, and also that defendants were entitled to summary judgment on the merits."[175]

Miller appealed to the Third Circuit Court of Appeals.[176] The main issue was determining when the causes of action accrued in order to ascertain whether they were timely filed.[177] The District Court found that the statute of limitations on all of Miller's claims began to run when she first joined the Government Relations section in July 1984, claiming that "Miller had actual knowledge of any alleged discrimination at the time she accepted and assumed the position."[178] Miller claimed she had no knowledge of the pay disparity until her conversation with Walsh on September 30, 1988.[179] Since Miller had to be aware of the alleged discriminatory act in order for the statute of limitations to be triggered, the court found that summary judgment was inappropriate as to the timeliness of her equal pay claims because a reasonable jury could find that Miller did not know and should not have known of the pay disparity until her conversation with Walsh.[180] As to her failure to promote claims, merely being told she would not be promoted to Vice President was not enough to trigger the statute's time limitations, as a reasonable juror could agree with Miller that until she was transferred to another section, she could have been promoted at any time

[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Miller*, 977 F.2d at 842.
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.* at 842–43.

to Vice President.[181]

The court then analyzed the failure to promote claim based on the continuing violations doctrine by comparing the methods used in two earlier Third Circuit cases, *Jewett v. International Telephone & Telegraph Corp.*[182] and *EEOC v. Hay Associates.*[183] The Third Circuit believed that *Hay* represented the proper method of analyzing whether a repeated failure to promote, where promotion is not based on specific vacancies, constitutes a continuing violation.[184] Under this formulation, the court found that Miller sufficiently alleged a continuing violation, and her claim for failure to promote was timely.[185]

The *Miller* case illustrates the problem with construing an act of discrimination or retaliation as a discrete act as opposed to part of a continuing course of conduct, thus creating a hostile work environment. Although *Miller* was decided before *Morgan* and *Shepherd*, the problem continues because the court's classification of the allegation can lead one plaintiff's claim to be barred by the statute of limitations while another's is timely. This is especially prevalent in the case of a failure to promote claim where the employer leaves the vacancy unfilled as opposed to promoting someone other than the complainant to the position. Under the courts' current

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[181] *Id.* at 843.

[182] *Miller*, 977 F.2d at 844 (quoting Jewett v. Int'l Tel. & Tel. Corp., 653 F.2d 89, 91–2 (3d Cir. 1981)) ("Suits may be brought by victims of one or more discriminatory acts occurring before the limitations period, so long as the plaintiff establishes that the offending practice is an ongoing one . . . . To prevail on a continuing violation theory, however, the plaintiff must show more than the occurrence of isolated or sporadic acts of intentional discrimination. The preponderance of the evidence must establish that some form of intentional discrimination against the class of which plaintiff was a member was the company's 'standard operating procedure.'").

[183] *Id.* (quoting EEOC v. Hay Assoc., 545 F. Supp. 1062, 1082–83 (E.D. Pa. 1982)) (emphasis added) ("Hay contends that we cannot find a continuing violation under *Jewett* because Bay has not shown that discrimination against women was Hay's 'standard operating procedure.' We do not read Jewett so narrowly. The *Jewett* court faced a situation in which promotion was based on specific vacancies, all of which had been filled more than 180 days before Martha Jewett filed her charge of discrimination. *The case before us, by contrast, involves a fundamentally different personnel structure, in which promotion was not based on specific vacancies. Bay could have been promoted at any time, including the time within 180 days of the filing of the charge. Because of this difference, Bay could prove continuing discrimination without producing systemwide evidence*. Bay has produced ample evidence that the 'offending practice, i.e., intentional discrimination against her, was 'an ongoing one.'").

[184] *Id.*

[185] *Id.*

interpretation, the employee would be on notice of the failure to promote at the time the position is not filled (yet the position/title is never officially eliminated), which starts the clock for statute of limitation purposes.

B. Hypothetical

Take, for example, an employee who refuses an employer's request to participate in conduct the employee knows is in violation of a law, rule or regulation. After the employee's refusal to participate, things begin to change at work. The employee is subjected to subtle acts of harassment, such as: being left out of meetings; receiving less important work tasks; and getting reprimanded for minor infractions while other employees receive no such reprimands for equal or worse behavior. Then, the employee fails to receive a promotion that he was the most qualified and next in line for. The employee can decide to ride it out and hope that over time things will get better, look for another employment opportunity, or file a claim under New Jersey's whistleblower statute, CEPA.[186]

This is the point where things become murky under the law as written and applied by the courts. The acts of harassment, which began after the employee refused to act in violation of the law or rules or regulations at his employer's request, would likely be considered a continuing course of retaliatory conduct which, for statute of limitations purposes, would not accrue until the last such act.[187] Thus, if the acts of retaliation began three years prior to the date of filing, the claim would still be within CEPA's one-year statute of limitations so long as the last act occurred within the past year. Each separate act would be aggregated and considered as one act of retaliation.

[186] *See supra* Part II.B. p. 5.
[187] *See supra* Part IV.D. p. 22.

On the other hand, the failure to promote claim could be considered either an ongoing course of retaliatory conduct, as in *Miller*, or it could be treated as a single discrete act, the date of which would be the accrual date.[188] This was the situation addressed by the *Miller* court,[189] and continues under the current state of the law. If the aggrieved employee was passed over for promotion and a less deserving employee was promoted, then the adverse employment action is clear and occurred on that date. The statute of limitations would be triggered as of that date, leaving the aggrieved employee with either one year (under CEPA) or two years (under NJLAD) to decide whether to file a claim. An employer, however, can be more subtle in their retaliation or discrimination against an employee who was in line for a promotion to a vacant position by just leaving the vacancy unfilled. This second situation leaves the aggrieved employee in the same situation as the first (he still was not promoted because of an unlawful act of retaliation or discrimination), but when is the statute of limitations triggered? The current state of the law tends to point to the date that the aggrieved employee could have been promoted to the vacancy. This lack of clarity puts the aggrieved employee in a precarious position: he can decide to file a claim and run the risk of the court finding he was not the victim of an adverse employment action, or he can wait to see if he or anyone else is promoted to the vacancy, thereby running the risk of

[188] *Miller*, 977 F.2d at 844 (quoting EEOC v. Hay Assoc., 545 F. Supp. 1062, 1082–83 (E.D. Pa. 1982)) (emphasis added) ("Hay contends that we cannot find a continuing violation under *Jewett* because Bay has not shown that discrimination against women was Hay's 'standard operating procedure.' We do not read Jewett so narrowly. The *Jewett* court faced a situation in which promotion was based on specific vacancies, all of which had been filled more than 180 days before Martha Jewett filed her charge of discrimination. *The case before us, by contrast, involves a fundamentally different personnel structure, in which promotion was not based on specific vacancies. Bay could have been promoted at any time, including the time within 180 days of the filing of the charge. Because of this difference, Bay could prove continuing discrimination without producing systemwide evidence*. Bay has produced ample evidence that the 'offending practice, i.e., intentional discrimination against her, was 'an ongoing one.'").

[189] *See supra* Part V.A. p. 26.

becoming time-barred. These incongruent results are based on legal nuances that no aggrieved party could be expected to understand, and which the courts have had difficulty determining.[190]

It is time for the New Jersey Legislature to step in and alleviate this discrepancy by amending both NJLAD and CEPA so that all similarly situated aggrieved parties are treated the same in workplace discrimination and retaliation claims.

VI. Proposed Amendments

This section will discuss proposals for legislative amendments to both NJLAD and CEPA to end the confusion faced by the courts in differentiating between discrete acts of discrimination or retaliation and acts that make up a hostile work environment.

When alleged discriminatory or retaliatory acts are related to an employee's protected status or whistle blowing activity, discrete acts occurring outside of the statute of limitations should be aggregated and not treated as time-barred. Forcing an employee to file a cause of action when she may not be ready to take legal action because of the stigma that is attached, or the fear of potential future acts of retaliation, is not the way to protect employees and "eradicate the 'cancer of discrimination' in the workplace."[191] Not only are potential plaintiffs expected to discern what a discrete act is, and which acts are included under the continuing violation doctrine, but employers and courts are also without a clear answer. Therefore, amendments to both NJLAD and CEPA are necessary to end the confusion caused by the application of *Morgan's* framework.

Thus, in order to further the purpose of the two statutes by eliminating discrimination in the workplace and encouraging employees to blow the whistle on unscrupulous employers without fear of retaliation, the New Jersey Legislature should amend both to specifically allow for all acts

[190] *See, e.g.*, *Miller*, 977 F.2d 834 (3d Cir. 1992); *Roa*, 985 A.2d 1225 (N.J. 2010) (where lower courts were overturned for failing to analyze the claims properly).
[191] *See* Fuchilla v. Layman, 537 A.2d 652, 660 (N.J. 1988) (quoting Jackson v. Concord, Co., 253 A.2d 793, 799 (N.J. 1969)).

of discrimination and retaliation (whether discrete or not) to be included as part of one "unlawful employment practice" so long as the acts are substantially related as set forth in the test presented by the Ninth Circuit Court of Appeals in *Morgan*.[192] The following language should be added to N.J.S.A. 10:5-12(a) (NJLAD): "for purposes of determining whether the 'continuing violation' doctrine applies to any appropriate claim, all acts of discrimination or retaliation that are substantially related to the protected status defined by the act shall be aggregated and deemed to have occurred within the statute of limitations." Likewise, the following language should be added to N.J.S.A. 34:19-5 (CEPA): "the 'continuing violation' doctrine shall apply to any appropriate claim, whereby all unlawful acts of retaliation prohibited under this act that are substantially related to the protected whistleblowing activity shall be aggregated and deemed to have occurred within the statute of limitations." The added benefit of implementing these amendments will be to further promote the adjudication of claims based upon their substantive merits as opposed to procedural bars.

VII. Conclusion

The current state of the interpretation of New Jersey's LAD and CEPA statutes has led to confusion by the courts, employers, and employees, therefore generating inconsistent results. It is time for the New Jersey Legislature to eliminate the current distinction between discrete acts and those that make up a continuing course of conduct so that as long as the act of discrimination or retaliation is linked to protected status or whistle blowing activity, all acts should be aggregated to form the basis of a claim for statute of limitation purposes. As discussed throughout, the timeliness of claims turned on this distinction rather than the substantive merits of the claim. NJLAD and CEPA are meant to protect New Jersey employees from adverse employment actions based on acts

[192] *See supra* Part III.B. p. 9.

of discrimination or retaliation. The only way to reach the statutes' overarching goals of eradicating the "cancer of discrimination"[193] in the workplace and to "protect and encourage employees to report illegal or unethical workplace activities and discourage public and private sector employers from engaging in such conduct"[194] is to allow for the aggregation of discrete acts of discrimination or retaliation when determining the accrual date for statute of limitations purposes.

[193] *See* Fuchilla v. Layman, 537 A.2d 652, 660 (N.J. 1988) (quoting Jackson v. Concord, Co., 253 A.2d 793, 799 (N.J. 1969)).
[194] *See* Abbamont v. Piscataway Tp. Bd. Of Educ., 650 A.2d 958, 971 (N.J. 1994) (citing Judiciary, Law and Public Safety Committee, *Statement on Assembly Bills No. 2872, 2118, 2228* (1990)).