

DISTRICT OF COLUMBIA  
COURT OF APPEALS

GAYE LIVELY, )  
 )  
 Plaintiff/Appellant )  
 )  
 v. ) No. 97-CV-128  
 )  
 FLEXIBLE PACKAGING )  
 ASSOCIATION, ET AL., )  
 )  
 Defendants/Appellees )  
 \_\_\_\_\_ )

**SUPPLEMENTAL BRIEF OF AMICI**

1. The United States Supreme Court rejected the analysis urged by appellee, namely, that Ms. Lively's prior knowledge of discriminatory treatment outside the limitations period foreclosed her ability to pursue her claims in this case. To the extent that this Court chooses to apply the Supreme Court's reasoning in *Morgan v. National Railroad Passenger Corp.*, \_\_\_ U.S. \_\_\_, 122 S.Ct. 2061 (2002), to hostile environment cases arising under the D.C. Human Rights Act, it will be unnecessary for courts to grapple with the often nebulous issue of deciding on precisely what date an employee first knew or should have known that she was the victim of discrimination.

*Amici* submit that *Morgan's* analysis of timeliness should be adopted for hostile environment cases under the DCHRA. *Morgan's* analysis is sensible because a legally cognizable hostile environment generally is not actionable until there have been a series of incidents, and even a lawyer specializing in this area would be hard-pressed to advise a client as to the precise moment in time when the number and severity of the incidents have met the legal threshold. Under the rule urged by the employer in this case and rejected by the Supreme Court, it has been far too easy for an employer to argue in almost all cases that the employee went to court either too early or too late.

The employee might be too early if there have been only a few incidents, and too late if there have been enough incidents that she "should have suspected" discrimination earlier. Since the incidents themselves can be spaced months or more apart, this now-discredited approach has proved unjust and unworkable in practice. Accordingly, this Court should adopt the Supreme Court's approach in *Morgan* to hostile environment claims.

2. Although not directly presented in this appeal, *Amici* part company with appellant in her description of *Morgan's* approach to individual discriminatory acts. With regard to what *Morgan* described as "discrete acts," the Supreme Court apparently held that a continuing violation theory would not permit recovery for acts outside of the limitations period, even though such incidents could be introduced as background information to show context, motive, absence of mistake, etc. *Morgan*, 122 S.Ct. at 2071-2072; *see also Carter-Obayuwana v. Howard Univ.*, 764 A.2d 779, 794 (D.C. 2001) ("A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario" (internal quotes and citations omitted)).

Significantly, *Morgan* refrained from addressing the class of continuing violation cases that, in effect, applied the "discovery rule" to discrimination claims where an employee is unable to recognize discrimination until he has been subjected to a series of unlawful acts. 122 S.Ct. at 2073 n.7 (reserving the issue). The discovery rule is illustrated in two often-cited cases, *Sabree v. United Brotherhood of Carpenters & Joiners*, 921 F.2d 396, 402 (1st Cir. 1990) (theory provides relief for an individual who "is unable to appreciate he is being discriminated against until he has lived through a series of acts and is thereby able to perceive the overall discriminatory pattern."); and *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989) (similar).

Consider the example of a woman who is repeatedly passed over for promotion. There may be nothing suspicious about being passed over once or twice in favor of some male co-workers, but the issue changes when the woman is passed over 15 or 20 times in favor of male co-workers. Those types of acts are not easily perceived as discriminatory until the cumulative effect over time becomes apparent. *Randon v. AT&T Technologies*, 883 F.2d 388, 396 (5th Cir. 1989) ("[P]romotion systems, unlike hiring systems, 'produce[]effects that may not manifest themselves as individual discrimination except in cumulation over a period of time."); *Glass v. Petro-Tex Chemical Corp.*, 757 F.2d 1554, 1561 (5<sup>th</sup> Cir. 1985) (similar); *Chung v. Pomona Valley Community Hosp.*, 667 F.2d 788, 790 (9th Cir. 1982) (a number of discrete acts over a period of time suggest a pattern of discrimination).

In a future case that fairly presents this issue, *amici* would urge the Court to adopt the reasoning of *Sabree*, *Randon* and the other cases cited in this section. Notwithstanding that, the facts in this appeal do not present an occasion for discussing the discovery rule any more than *Morgan*

did. Accordingly, *amici* submit that this Court should likewise refrain from using this appeal to resolve that issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on July 17, 2002 via United

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