

**THIRD CIRCUIT MAKES IT MORE DIFFICULT FOR EMPLOYEES  
TO PURSUE OLD COMPLAINTS IN FIRST AMENDMENT CASES**

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In O'Connor v. City of Newark, 440 F.3d 125 (3d Cir. March 13, 2006), the Third Circuit addressed a First Amendment lawsuit brought by a police Lieutenant (O'Connor). O'Connor alleged that he was subjected to various forms of retaliation because he had provided information to investigators in a federal corruption probe of the former police director. His allegations included claims that he was improperly denied a promotion, transferred under the command of a hostile superior, assigned excessive work, subjected to unwarranted discipline, and that he was not credited for overtime work.

Constitutional claims are generally subject to a two year statute of limitations in Pennsylvania. The Court determined that most of O'Connor's complaints concerned events that took place more than two years before he filed suit. However, O'Connor claimed that he should be permitted to sue for these complaints because they were part of an ongoing or "continuing violation." The "continuing violation" theory is frequently invoked by employees who bring suit under Title VII, the ADA, and the ADEA on hostile work environment theories. In this case, the Court held that the doctrine can be used where a public employee files suit for Constitutional violations under Section 1983 as well. The Court relied on the Supreme Court's decision in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), a Title VII case setting forth standards for determining whether a continuing violation exists.

Pursuant to Morgan, employment decisions such as "termination, failure to promote, denial of transfer, refusal to hire, wrongful suspension, wrongful discipline, denial of training" and "wrongful accusation" are considered "discrete acts for which the limitations period runs from" the date of the act and cannot simply be lumped into one "continuing violation" for purposes of the statute of limitations. In other words, an employee must bring suit within two years of each discrete act. After restating this general rule, the Court went further and held that:

[T]he *Morgan* rule that individually actionable allegations cannot be aggregated is of particular import in the context of First Amendment retaliation claims. First Amendment retaliation claims are always individually actionable, even when relatively minor. Even "an act of retaliation as trivial as failing to hold a birthday party for a public employee," if "intended to punish her for exercising her free speech rights," may be actionable if under the circumstances it would be sufficient "to deter a person of ordinary firmness" from exercising his or her First Amendment rights . . . a cause of action is supplied by all but truly de minimis violations.

In other words, virtually any complaint involving alleged First Amendment retaliation must be asserted within two years of the act. In broad strokes, the Court ruled that O'Connor's complaints were properly dismissed because "the law required him to sue within two years of the occurrence of these incidents," and the incidents which did occur within two years were not sufficient to support liability.

First Amendment lawsuits are among the most problematic for public employers because the applicable standards reflect a longstanding judicial preference for the protection of First Amendment rights. One complicating factor has often been the aggregation of numerous grievances, which often cover several years of employment. It is not at all unusual for an employee to compile a number of complaints and issues and then attempt to bring each under a broad umbrella of a First Amendment lawsuit. The O'Connor decision provides a rare measure of relief by greatly narrowing the chances that an employee will be able to successfully resurrect stale complaints through a broadly-worded First Amendment lawsuit.