Your Monthly Legal Update – March 2007
By: Attorney Dawn Marie Harris

COURT OF APPEALS DECISION, BOWEN v. L.I.R.C.

This month I am focusing on a recent Court of Appeals decision, *Bowen v. L.I.R.C.* from February 7, 2007, Docket: 2006AP000987. The employer in this action was Stroh Die Casting and the case involves a hostile work environment claim based upon sexual orientation and the interpretation of how the 300 day statute of limitation applies to hostile work environment claims.

In this case, the Labor and Industry Review Commission and Stroh Die Casting appealed the circuit court's order remanding Christopher Bowen's sexual-harassment complaint to the Commission for a new hearing. The issue underlying this appeal was the circuit court's determination that Bowen was prevented from introducing significant material evidence relating to his sexual-harassment contentions. *See* Wis. Stat. §§ 227.57(4) ("The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure."); 111.395 ("Findings and orders of the commission under this subchapter are subject to review under ch. 227."). The Court of Appeals accepted review of the Commission's decision, not the circuit courts'. *See* ***Virginia Sur. Co. v. Labor & Indus. Review Comm'n***, 2002 WI App 277, ¶11, 258 Wis. 2d 665, 675, 654 N.W.2d 306, 311. The Court of Appeals affirmed, and clarified the standards applicable to the new hearing.

Bowen started this case on April 28, 2003, when he filed a *pro se* complaint with the Wisconsin Department of Workforce Development, Equal Rights Division, contending that Stroh violated the Wisconsin Fair Employment Act, Wis. Stat. §§ 111.31–111.395, and checked the following boxes that summarized his complaint: "Sexual Orientation," "Homosexual," and "Termination/Discharge." (Some bolding omitted.) He also checked the following on the form:

> I believe that I was <u>retaliated</u> against based on:
>
> Activities protected under the Wisconsin Fair Employment Act (WFEA)

Under the form's request for the "dates of alleged discrimination," which carried the caveat that an answer was "[r]equired to show complaint is timely," and that the Wisconsin Fair Employment Act "requires that complaints be filed within 300 days of alleged violation," Bowen gave the date of "the <u>first</u> alleged act of discrimination (or retaliation)," which Bowen alleged to be "harassment," as happening on "03/23/02." Bowen gave the date of "the <u>most recent</u> action" as happening on "03/25/2003," and asserted that the "action" was "termination."

In a typed attachment to the form complaint, Bowen asserted that:

> • On January 26, 2002, there was an "[i]ncident witnessed by company personnel which started 5 months of daily sexual harassment." The attachment related that "during the 5 months of daily harassment from Jan. through May 02, a bumper sticker was placed on my tool box 'Honk If Your [*sic*] Gay,'" and alleges that Bowen's "supervisor" gave the sticker to Stroh's human resource manager, James Kaufman.
>
> • On February 11, 2002, he "[n]otified the Company of harassment."
>
> • On May 22, 2002, he had a meeting with three Stroh employees, including Kaufman "regarding continuing harassment," that another employee was "charged with harassing me," and that Bowen was "[s]ent home with pay to 'cool down'. [*sic*] Told by Mr. Kaufman this is nondisciplinary."
>
> • On May 23, 2002, he was told by Kaufman "to get anger management," and that Bowen did so. Bowen also asserted that he was "[f]orced to sign disciplinary suspension in order to be able to return to work."
>
> • In January of 2003, a Stroh employee with whom Bowen worked, Rick Hafemeister, pointed to doughnuts "and told me 'The pink one is for you.'" Bowen noted in that entry that the "pink doughnut" incident was seen by three persons, and that Bowen "[d]id not report this to my supervisor Ron Howski right away because of my willingness to try and get along with" persons he called "the harassers."
>
> • Those whom he described as his "harassers" complained about him, and he was "terminated on 03/25/03 ... after [he] made numerous complaints to the company about sexual harassment and unfairness."

Bowen filed this complaint on April 28, 2003. Three-hundred days preceding April 28, 2003, is July 2, 2002. While 300 days is normally the cut off for allegations of discrimination, the court looked at the form and the fact that Bowen included in his litany of assertions against Stroh matters antedating July 2, 2002. Accordingly, Stroh's contention that it did not have notice that Bowen was complaining about those earlier was found to lack merit.

Bowen subsequently filed an amended complaint with the Equal Rights Division on July 24, 2003, asserting that Stroh, as phrased by the form, "discriminated or took action against me because" as noted by the box checked "of my sexual orientation," which Bowen noted in handwriting was "homosexual." Bowen gave the date of the first violation as "approx." February 12, 2002, and the date of the last violation as March 19, 2003. In a handwritten attachment, Bowen alleged the following incidents: (1) a newspaper article about Liberace was "put on top of locker," further alleging that his supervisor, Howski, did not report the incident to the "company," and (2) someone wrote "'queer'" on his locker, but that Howski also did not report that to the company.

Bowen filed yet another amended complaint with the Equal Rights Division on August 28, 2003. This amended complaint repeated Bowen's contention that he was the victim of adverse employment consequences because he was a "homosexual," and gave the date of the first alleged violation as "02/11/02" and the date of the last violation as "03/25/03." The attachment to this third amended complaint asserted that he was fired because of "his unceasing complaints to supervisor Ron Howski of sexual harassment." Bowen also claimed that he was treated differently in connection with his termination by Stroh than was another similarly situated employee. The attachment also complained that when he spoke to Michael E. Stroh, Stroh's president, about his being harassed and threatened to sue over it, Stroh wrote in a letter dated May 9, 2002: "After listening to the repeated threats about lawsuits and his harassment, I told Chris that if he didn't like working at Stroh he should move on." This letter was received by the examiner as an exhibit at the hearing.

The matter went on to hearing and a Department hearing examiner found that none of Bowen's complaints had merit. The matter was appealed to the circuit court who determined, that under the applicable law the examiner improperly restricted Bowen's ability to fully present his case by limiting Bowen's evidence to incidents within the 300-day period starting on July 2, 2002, and that the earlier incidents were material to whether Stroh was liable for the alleged hostile work environment. The Court of Appeals ultimately concurred with the circuit court and agreed that those incidents also bore on whether Stroh fired Bowen because of his sexual orientation and his complaints that he was being harassed because of that orientation.

The Court of Appeals found Wisconsin to have a broad policy prohibiting "unfair discrimination in employment against properly qualified individuals." Wis. Stat. § 111.31(1). Included in the class of those protected against "unfair discrimination" are persons who are deprived of non-discriminatory employment opportunities "by reason of their ... sexual orientation." ***Ibid.*** It is thus illegal in Wisconsin for an employer to either sexually harass or permit sexual harassment of an employee, "or permit sexual harassment to have the ... effect of substantially interfering with an employee's work performance or of creating an intimidating, hostile or offensive work environment." Wis. Stat. § 111.36(1)(b).

This written opinion states that substantial interference with an employee's work performance or creation of an intimidating, hostile or offensive work environment is established when the conduct is such that a reasonable person under the same circumstances as the employee would consider the conduct sufficiently severe or pervasive to interfere substantially with the person's work performance or to create an intimidating, hostile or offensive work environment. ***Ibid.***

Pursuant to Wis. Stat. § 111.39(4)(b), the Department investigated Bowen's complaints and determined:

> There is probable cause to believe Stroh Die Casting Co., Inc. may have violated the Wisconsin Fair Employment Law, sec. 111.31--111.395, Stats., by:
>
> A. discriminating against [Bowen] in terms or conditions of employment because of sexual orientation;

B. engaging in or permitting sexual harassment;

C. terminating the employment of [Bowen] because of his sexual orientation; and

D. discharging [Bowen] because he opposed a discriminatory practice under that Act.

This probable cause decision rightfully was the ticket to allow the employee to pursue a hearing on the merits before a Department examiner. The problem occurred when the examiner did not permit Bowen to introduce any evidence antedating July 2, 2002, except to show that Stroh knew of Bowen's contentions that he was harassed because of his sexual orientation.

The Court of Appeals opined that the hearing examiner, in determining that the pre-July 2, 2002, evidence was not admissible, other than for possible "notice," was wrongly based upon the examiner's determination that Bowen failed to show that the pre-July 2 incidents were connected with the post-July 2 "pink doughnut" incident, so as to prove a "continuing" violation.

This decision goes on to review arguments made relevant to ***Morgan***, 536 U.S. at 114. ***Morgan*** decided two interrelated issues relating to the time within which complaints of employment discrimination had to be filed under federal law. *See* footnote 4. Where only discrete acts of employment discrimination are alleged, evidence antedating the limitations period is not admissible to prove liability:

> Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice." Morgan can only file a charge to cover discrete acts that "occurred" within the appropriate time period. While Morgan alleged that he suffered from numerous discriminatory and retaliatory acts from the date that he was hired through March 3, 1995, the date that he was fired, only incidents that took place within the timely filing period are actionable. Because Morgan first filed his charge with an appropriate state agency, only those acts that occurred 300 days before February 27, 1995, the day that Morgan filed his charge, are actionable.

Morgan, 536 U.S. at 114 (footnote omitted). The Court however found that the issue is different with respect to a "hostile environment" claim:

> 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.

Id., 536 U.S. at 115 (citations omitted); *see also* ***id.***, 536 U.S. at 117 ("A hostile work environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.' 42 U.S.C. § 2000e-5(e)(1). The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, 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 for the purposes of determining liability.").

It should be noted that ***Morgan*** specifically rejected the continuing-course-of-conduct rational applied by the Ninth Circuit in ***Morgan***, and, apparently, by the Commission here, which permitted the introduction of acts outside the limitation period if either of two albeit related showings were made:

> First, a plaintiff may show "a series of related acts one or more of which are within the limitations period." Such a "serial violation is established if the evidence indicates that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period." The alleged incidents, however, "cannot be isolated, sporadic, or discrete." Second, a plaintiff may establish a continuing violation if he shows "a systematic policy or practice of discrimination that operated, in part, within the limitations period—a systemic violation."

Id., 536 U.S. at 107 (quoting ***Morgan v. National R.R. Passenger Corp.***, 232 F.3d 1008, 1015–1016 (9th Cir. 2000)) (specific citations omitted).

The Court of Appeals determined that any fair reading of Bowen's complaints (other than the one that alleged termination as his specific discrimination-injury) is that he is alleging a hostile work environment based on his sexual orientation. *See* Wis. Stat. § 111.36(1)(b). Thus, just because only one of the alleged incidents creating that environment happened during the three-hundred days from July 2, 2002, through April 28, 2003, does not make his hostile-work-environment claim untimely. The Court of Appeals went on to use an example given by ***Morgan***:

> The following scenarios illustrate our point: (1) Acts on days 1-400 create a hostile work environment. The employee files the charge on day 401. Can the employee recover for that part of the hostile work environment that occurred in the first 100 days? (2) Acts contribute to a hostile environment on days 1-100 and on day 401, but there are no acts between days 101-400. Can the act occurring on day 401 pull the other acts in for the purposes of liability? In truth, all other things being equal, there is little difference between the two scenarios as a hostile environment constitutes one "unlawful employment practice" and it does not matter whether nothing occurred within the intervening 301 days so long as each act is part of the whole. Nor, if sufficient activity occurred by day 100 to make out a claim, does it matter that the employee knows on that day that an actionable claim happened; on day 401 all incidents are still part of the same claim. On the other hand, if an act on day 401 had no relation to the acts between days 1-100, or

> for some other reason, such as certain intervening action by the employer, was no longer part of the same hostile environment claim, then the employee cannot recover for the previous acts, at least not by reference to the day 401 act.

Id., 536 U.S at 118. Thus, the Court of Appeals found that the Commission's assertion that the break in the alleged unlawful sexual-orientation harassment of Bowen makes the pre-July 2, 2002, events not admissible is contrary to ***Morgan***, which neither the Commission nor Stroh contends in a developed argument does not apply here. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (we do not consider undeveloped contentions). Indeed, as Bowen points out, the Commission *has* recognized ***Morgan***'s applicability in these types of cases. *See, e.g.*, ***Kanter v. Ariens Co.***, ERD Case No. 200205229 (LIRC Sept. 23, 2005), *available at* http://www.dwd.state.wi.us/lirc/erdecsns/838.htm. The failure of the Commission to apply ***Morgan*** to Bowen's complaints is thus entitled to little weight. *See* ***City of Marshfield v. Wisconsin Employment Relations Comm'n***, 2002 WI App 68, ¶9, 252 Wis. 2d 656, 664, 643 N.W.2d 122, 126–127.

The Court of Appeals next went on to apply ***Abbyland,*** a sex- and marital-status discrimination case under the Wisconsin Fair Employment Act. ***Abbyland***, 206 Wis. 2d at 312, 557 N.W.2d at 420. This precedent upheld the Commission's determination that acts antedating the start of the limitations period were admissible to "intent or state of mind" of the party allegedly violating the equal-employment law, as long as they were not "unduly remote" from the incidents alleged to be within the limitations period. ***Id.***, 206 Wis. 2d at 315–316, 557 N.W.2d at 421–422.

The Court of Appeals then turned to the evidence excluded by the hearing examiner to determine whether it: (1) supports Bowen's hostile-work-environment claim, and thus can support a finding that Stroh is liable on that claim under ***Morgan***, and (2) is relevant to "intent or state of mind," under ***Abbyland*** and thus material to Bowen's wrongful-termination claim. They then considered whether exclusion of that evidence could be considered harmless, as both the Commission and Stroh argue.

The most forceful evidence in connection with Bowen's hostile-work-environment claim was an offer of proof of what Kathryn Corroo would testify to if permitted to be called as a witness at the hearing:

> I work at Stroh Die Casting on First shift with Chris Bowen. ... I witnessed the sexual harassment against Chris Bowen especially during February 2002 through May 2002 by [co-employees] Tom Meier, Rick Hafemeister, David Lepke, Jesse Manhardt and Rose McGee. At times, the sexual harassment was too much for Chris, that he would elect to take a half day of vacation just to escape it. I heard Tom Meier say that Chris was not in a very good mood and that maybe it was because he (Chris) didn't get a piece [*sic*] of ass over the weekend at Pridefest, the day after the weekend of Pridefest. I heard Rick Hafemeister make comments to Chris and myself about how all niggers [*sic*] and queers, etc. [*sic*] should be put in a big hole and shot. And get rid of them all. I heard Rick [H]afemeister call Chris and Greg Meyer "Butt Buddies" when Greg Meyer stopped to talk to Chris about company business. I observed Chris submit to this type of attack for the sake of

> getting along with these individuals for the sake of his job. I also observed Chris complain to Ron Howski, our foreman, about this treatment at least [*sic*] twice a week.

(Footnote added.) In addition to Corroo's attesting to what certainly had all the earmarks of a hostile work environment according to the Court of Appeals, *see* Wis. Stat. § 111.36(1)(b) (A "hostile or offensive work environment is established when the conduct is such that a reasonable person under the same circumstances as the employee would consider the conduct sufficiently severe or pervasive to interfere substantially with the person's work performance or to create an intimidating, hostile or offensive work environment."), her offer of proof was significant because it also directly contradicted a key finding by the hearing examiner that although Bowen "periodically made complaints to Howski about work disputes between Bowen and various co-workers involving work issues" from January of 2002 through May of 2002, "Bowen did not complain to Howski about any incident that could be considered sexual harassment because of Bowen's sex or Bowen's sexual orientation." The hearing examiner's finding was consistent with Howski's testimony, but contrary to Bowen's testimony that he did, in fact, tell Howski that he was being sexually harassed at work, and Corroo's offer of proof supported Bowen's version.

The hearing examiner also was found to have improperly excluded an offer of proof from another of Bowen's co-workers at Stroh, Jerald Davidson, who indicated he would testify that when Bowen and another worker, Rose McGee, disputed who would operate an apparently desirable machine, McGee responded to Bowen's comment that, as recounted in Davidson's offer of proof, Bowen's "best friend was an attorney," that she "didn't care if Chris had 'Boy Toy Lawyers.'"

Thus, the Court of Appeals found that by not considering pre-July 2, 2002, evidence as it related to Bowen's claim of unlawful sexual harassment as encompassed by his complaints, the hearing examiner and the Commission ignored evidence that was material to Bowen's claim that he was subjected to a hostile work environment. Further, the excluded evidence was also relevant to Bowen's contention that he was fired by Stroh because of his sexual orientation and his complaints about being harassed because of his orientation.

It should be noted that Stroh presented evidence at the hearing that Bowen was fired because he had two disorderly-conduct company citations within one year, the most recent of which concerned a situation where Bowen was, according to his testimony, participating in what he said he thought was good-natured fun when one of his co-workers, Meier, angrily approached him for having put a tissue in a parts box at Meier's work space. According to Bowen, Meier threatened to "take it outside" and told him that he should not be hiding behind "skirts." Bowen also testified that he perceived the "skirts" remark as a reference to his sexual orientation. According to Bowen, he thought he might not have heard clearly what Meier said, and touched him on his arm to get his attention as Meier was starting to walk away. At that point, Meier allegedly spun around and shouted several times that Bowen was to never touch him. Meier then told Kaufman that Bowen had forcibly spun him around and Kaufman believed Meier, after getting statements from Lepke and Hafemeister. However, Corroo's offer of proof, evidence that was improperly excluded, asserted that Meier, Lepke, and Hafemeister sexually harassed Bowen.

The Court of Appeals then ordered the case remanded for a new hearing to provide the employee a fair opportunity to present all credible evidence to rebut the assertions made by the employer. This decision is recommended for publication.

Lesson of the Story: Just because acts start as juvenile pranks does not mean that they cannot escalate into employer liability. Further, no employer can hide behind a literal interpretation of any 300 day statute of limitation period for cases involving hostile work environment. Finally, don't document retaliation intent.