04-0090

To be Argued By:
LAUREN M. NASH

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-0090

GEORGE E. KINCADE,
Plaintiff-Appellant,

-vs-

JOHN W. SNOW, SECRETARY OF THE TREASURY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF FOR THE DEFENDANT-APPELLEE

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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

LAUREN M. NASH
Assistant United States Attorney
JEFFREY A. MEYER
Assistant United States Attorney (of counsel)

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STATEMENT OF JURISDICTION

The district court (Peter C. Dorsey, J.) had subject matter jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on November 19, 2003. On December 22, 2003, Kincade timely filed a notice of appeal pursuant to Fed.R.App.P. 4(a)(1)(B). This Court has appellate jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. Did the district court err in granting summary judgment on the basis of its conclusions that Kincade failed to establish a genuine issue of fact necessary to show a *prima facie* case of discrimination and retaliation or that the government's race-neutral reasons were a pretext?

II. Did the district court err in dismissing Kincade's hostile work environment claim and concluding that otherwise time-barred claims could not be considered under a continuing violation theory?

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BRIEF FOR THE DEFENDANT-APPELLEE

PRELIMINARY STATEMENT

The plaintiff-appellant, George Kincade, appeals from a grant of summary judgment against him with respect to his claims of racial discrimination arising from his employment as a revenue officer for the Internal Revenue Service in Connecticut. Based on a detailed evidentiary record, the district court evaluated each of Kincade's many allegations of discriminatory or retaliatory actions. It concluded that Kincade either failed to establish a *prima facie* case of discrimination or retaliation, or that Kincade failed to adduce sufficient, non-conclusory evidence to

show that the government's proffered race-neutral reasons were no more than a pretext for discrimination. The district court further concluded that some of Kincade's allegations were time-barred and could not be salvaged under either a continuing violation theory or hostile work environment theory. Because the district court correctly concluded that no genuine issues remained for trial, this Court should affirm the grant of summary judgment.

STATEMENT OF THE CASE

This is a civil appeal from a final judgment granting summary judgment by the United States District Court for the District of Connecticut (Peter C. Dorsey, J.). The district court dismissed an employment discrimination against the defendant-appellee John W. Snow, Secretary of the Treasury.[1]

On September 18, 2000, Kincade filed a federal court complaint alleging racial discrimination in connection with his prior employment with the Department of Treasury's Internal Revenue Service ("IRS"). Joint Appendix ("JA") at 1-3. On April 11, 2001, Kincade filed an amended complaint. JA 17-24.

The amended complaint contained four counts. Count One alleged racial discrimination, in violation of Title VII

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[1] The Civil Rights Act requires that a discrimination complaint name as defendant "the head of the department, agency, or unit, as appropriate." 42 U.S.C. § 2000e-16(c). Because John Snow is sued in his official capacity and for ease of reference, this brief refers to the defendant-appellant simply as "the government."

of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (hereinafter "Title VII"). Count Two alleged discriminatory retaliation, in violation of Title VII. Count Three alleged retaliatory conduct, in violation of the Civil Service Reform Act, 5 U.S.C. § 2302(b)(9). And Count Four alleged infliction of emotional and physical distress, in violation of state law. JA 17-23.

On August 8, 2002, the government moved for summary judgment pursuant to Fed. R. Civ. P. 56, seeking judgment as to all four counts of the amended complaint. JA 33-229.

On March 31, 2003, the district court granted the government's motion as to the cause of action under the Civil Service Reform Act alleged in Count Three of the amended complaint. JA 406. Several days later, on April 3, 2003, Kincade withdrew Count Four of the amended complaint. JA 409. Kincade does not challenge the dismissal of Counts Three or Four in this appeal.

On September 29, 2003, the district court issued a second "Ruling on Motion for Summary Judgment" as to Counts One and Two. It dismissed Kincade's claims except insofar as he alleged that he was discriminated against with respect to his caseload and work driving requirements. JA 421-46.

Both parties moved for reconsideration. JA 451-66; JA 474-78. On November 10, 2003, the court issued a "Ruling on Cross-Motions to Reconsider." In this ruling, the court granted the government's motion to reconsider and entered summary judgment in the government's favor as to the one remaining claim concerning caseload and

driving requirements. The court also denied relief for Kincade's motion for reconsideration. JA 483-90.

Final judgment for the government entered on November 19, 2003. JA 9, 491. On December 22, 2003, Kincade filed a timely notice of appeal. JA 9, 492.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. General Background

Kincade began working for the IRS in June 1988. He worked as an accounting technician for the IRS in Cincinnati, Ohio, until 1994. In June 1994, Kincade joined a group of IRS agents in Norwalk, Connecticut. He was thereafter promoted to the position of GS-9 revenue officer. His duties included conducting field visits to individual taxpayers and businesses to ensure tax compliance and to secure and collect delinquent tax returns and payments. JA 422.

Beginning in March 1997, Kincade's immediate supervisor was Christopher Quill. The next level supervisor was Joseph Wynne. JA 199-200, 438.

The IRS officially terminated Kincade's employment in March 2001. However, he took sick leave and effectively stopped reporting to work on May 27, 1999. JA 424, 464, 485. Kincade's various allegations of discrimination and retaliation relate to events between 1996 and 1999.

B. Allegations of Wrongful Conduct

In this case Kincade has alleged numerous actions taken against him that he claims were done on the basis of his race or in retaliation for his filing of discrimination complaints with the Office of Equal Employment Opportunity ("EEO"). Some of these allegations are set forth in his amended complaint, and some appeared for the first time in Kincade's deposition or in his pleadings but were nonetheless considered by the district court in its rulings granting summary judgment. The following section of this brief reviews each of these allegations in turn, the government's response before the district court to each of the allegations, Kincade's rebuttal to the government's response, and the district court's resolution of each claim.

1. Failure to Promote, 1996

Kincade alleged that the IRS discriminated against him on the basis of his race when the agency failed to promote him in 1996. He claimed that he and several of his co-workers in the IRS Norwalk Office applied for a promotion from a grade 9 to a grade 11 Revenue Officer. He further alleged that the co-workers, who are Caucasian, were promoted, while he, the only African American applicant from the Norwalk Office, was not promoted. JA 18-19, 243-44.

In response to this claim, the government adduced evidence which established that this claim was untimely. It was undisputed that Kincade had received a Notice of Right to File a Discrimination Complaint on May 5, 1997 but did not file his first EEO complaint until May 21,

1997. Given that Kincade was required to file his EEO complaint within 15 days of receipt of the EEO counselor's notice of final interview and right to file a formal complaint, pursuant to 29 C.F.R. § 1614.106(a), (b)), he missed the 15-day period by one day. Based on this untimeliness, the government argued for the dismissal of the claims. JA 41-42, 75, 184-85, 236.

As to the merits of the claim, the government established that Kincade and 15 of his co-workers from the Norwalk IRS office submitted applications for the promotion to grade 11. On October 10, 1996, a "Roster of Eligibles for Promotion" was issued which included Kincade and others. The roster indicated that "[t]he Highly Qualified candidates with the top ten (10) scores will be designated as Best Qualified", and that "[t]he cut-off score for Highly Qualified will be 32." This cut-off score was established prior to the ranking of the candidates. The score was a strictly numerical compilation that involved multiplying the average critical element rating from the employee's appraisal by a factor of ten. JA 200-02. Kincade did not make the list of Highly Qualified candidates because he had a promotion score of 31. Kincade was simply not at the same level of performance as those selected. JA 201-02, 212-15.

In rebuttal, Kincade did not specifically address the timeliness issue as to this claim, but raised the continuing violation theory with respect to late-filed EEO complaints in general. JA 395. Regarding the merits of his failure to promote claim, Kincade alleged that white co-workers were promoted over him even though he was qualified.

JA 391. His sole support for this allegation was his own deposition. Id.

The district court's summary judgment ruling found that Kincade's claim of failure to promote as alleged in his May 21, 1997 EEO complaint was a time-barred discrete act that could not be considered as part of a continuing violation theory. Based on this untimeliness, the court did not reach the merits of the claim. JA 429-31.

2. IRS Falsely Accusing Kincade of Causing Other Employees Not to Receive Their Telephone Calls, 1996

In opposition to summary judgment, Kincade claimed that, in July 1996, he was falsely accused by his manager of causing other employees to not receive their telephone calls. JA 241. The government did not address this statement in its moving papers on the grounds that it had no prior notice pleading that this or any of the other fifty statements in Kincade's opposition were being raised as independent acts of discrimination or retaliation. JA 456-57. Kincade restated this claim in his opposition papers. He offered his deposition testimony as support for this claim. JA 390.

The district court determined that Kincade had failed to show that this allegation rose to the level of a cognizable "adverse employment action." No formal disciplinary action was taken against him, and he did not lose any privilege or benefit or suffer any repercussion as a result of this event The court therefore concluded that

Kincade had failed to meet his *prima facie* burden as to this claim. JA 433-34.

3. Kincade's Performance Appraisals, 1997

Kincade alleged that he was discriminated against because he was not given fair evaluations in April and October of 1997 by his manager, Christopher Quill. He claimed that these evaluations impaired his eligibility for promotion. JA 20, 245.

In response, the government produced evidence which established that this claim was untimely. Pursuant to 29 C.F.R. § 1614.105(a)(1), Kincade was required to contact an EEO counselor within 45 days from the occurrence of the matter alleged to be discriminatory. Thus, he should have made contact with an EEO counselor within 45 days after the evaluations in April and October of 1997. However, he did not contact an EEO counselor until January 30, 1998, well past the 45-day window. The government sought the dismissal of this untimely claim. JA 42-43, 80, 188, 190-92.

The government also addressed the merits of the claim by offering evidence that Kincade's evaluations were fair and based on his level of performance at the time. Quill evaluated Kincade and all revenue officers against a uniform set of standards. When Quill evaluated Kincade's performance in 1997, he found that his performance on a critical element was not done in a consistent manner. JA 128-29.

In rebuttal, Kincade did not specifically address the timeliness issue as to this claim, but raised the continuing violation theory with respect to late-filed EEO complaints in general. JA 395. As to the merits of this claim, Kincade alleged that white co-workers were promoted over him even though he was qualified. JA 391. He offered his deposition statement as evidentiary support. Id.

The district court concluded that Kincade's claim as to his negative evaluations was time-barred and was not preserved under the continuing violation theory. The court found that an evaluation is a single, completed action that constitutes a discrete act and is not amenable to a claim of continuing violation. Based on this untimeliness, the court did not reach the merits of Kincade's claim. JA 429-31.

4. Failure to Assign Higher Graded Cases, 1998

Kincade alleged discrimination based on the fact that Quill assigned him higher grade duties without his knowledge, and then took those duties away. JA 190, 245. In response, the government argued that Kincade had not shown any adverse employment action with regard to this claim. JA 45-46. As to the merits, the government adduced evidence to show that in 1997 Quill occasionally assigned Kincade higher graded duties, but not in excess of 25% of his case load such as would warrant a temporary promotion. In 1998, Quill removed higher graded cases from his inventory. However, this removal was done because Kincade had shown performance deficiencies with respect to those cases. JA 129.

In rebuttal, Kincade reiterated his claim and alleged that white co-workers were temporarily promoted over him even though he was qualified. JA 392. He relied on statements he made in his deposition. Id.

The district court determined that Kincade met his *prima facie* burden with respect to this allegation but that the government established a legitimate, nondiscriminatory reason justifying its treatment of Kincade. The court then held that Kincade had failed to rebut the government's proffered reasons. The court found that Kincade had not provided any information that would allow a conclusion that the white employees were similarly situated in all material aspects, and that Kincade relied only upon his own conclusory statements. JA 436.

5. Failure to Allow "Flexiplace" Work

Kincade claimed that the IRS discriminated and/or retaliated against him when in October of 1997 Quill denied his request to participate in the "flexiplace" program, a program in which a revenue officer can perform some of his duties at home. JA 191, 244. In response, the government produced evidence to establish that this claim was untimely. Pursuant to 29 C.F.R. § 1614.105(a)(1), Kincade was required to have contacted an EEO counselor within 45 days from the occurrence of the matter alleged to be discriminatory. His request was denied in October of 1997, but he did not contact an EEO counselor until January 30, 1998. JA 42-43, 80, 188, 190-92.

In addition, the government argued that Kincade had not shown any adverse employment action with regard to this claim. JA 45-46. In defense of the merits of this claim, the government asserted that Quill denied Kincade's request because Kincade had some difficulties with the new computer system the IRS was using, and Quill was not comfortable that Kincade was fully prepared to work at home at the time he made the request. JA 129, 142-48.

In rebuttal, Kincade claimed that white employees were allowed to participate in the program while he was not. His source for this claim was his statements in his deposition. JA 391.

The district court held that Kincade made a *prima facie* showing with respect to this allegation and that the government in turn had established a legitimate, nondiscriminatory reason for the denial with support from two memoranda. The court then found that Kincade had failed to rebut the government's explanation with his conclusory assertion of discrimination. JA 437.

6. Use of a Credit Hour, 1997

Kincade complained that he was the victim of race discrimination and/or retaliation when he was required to use a credit hour for coming in late one day in November of 1997. JA 191, 244. In response, the government produced evidence to establish that this claim was untimely. Pursuant to 29 C.F.R. § 1614.105(a)(1), Kincade was required to contact an EEO counselor within 45 days from the occurrence of the matter alleged to be

discriminatory. He should have made contact with an EEO counselor within 45 days after the November 1997 incident, but he did not contact an EEO counselor until January 30, 1998. The government sought the dismissal of this untimely claim. JA 42-43, 80, 188, 190-92.

The government further argued that Kincade had not shown an adverse employment action with regard to this claim. JA 45-46. Addressing the merits, the government established that a credit hour is time earned prior to the normal tour of duty or after the normal tour of duty that can be taken instead of annual leave. The IRS asserted that requiring Kincade to use a credit hour was standard practice when an employee is late for work. JA 129.

In rebuttal, Kincade claimed that a white employee who was late on the same day was not required to use a credit hour. His source for this claim was his own deposition testimony. JA 391.

The district court found that Kincade met his *prima facie* burden, but that the government proffered a legitimate, nondiscriminatory reason for its action. The court determined that Kincade's rebuttal was deficient because he provided no information about the other employee, such as whether the employee was similarly situated, or whether the employee was even required to be in at the same time as Kincade. JA 437-38.

7. Failure to Promote Kincade, 1998

Kincade alleged that the IRS' failure to promote him to a GS-11 Revenue Officer on January 28, 1998 was

motivated by discrimination and/or retaliation. JA 191. The government established that Kincade's non-selection was based entirely on the same neutral ranking procedure that governed the 1996 promotion procedure. Once again, the cut-off score for this position was set at 32. JA 228. Kincade was not selected for promotion because he did not make the Best Qualified List. He received a score of 30 and was not eligible for the promotion. JA 204, 227.

In rebuttal, Kincade claimed that white employees with identical evaluations were promoted while he was not. He alleged that the majority of revenue officers hired by the IRS under Joseph Wynne were white. He relied upon his deposition as evidence for these claims. JA 245, 392.

The district court determined that Kincade made a *prima facie* showing but that the government had produced evidence of a nondiscriminatory reason for the failure to promote Kincade. The court then found that Kincade had not offered sufficient evidence to rebut the government's legitimate reasons in that he offered no support for his claim of disparate treatment other than his own statements. JA 438-39.

8. Failure to Allow Access to Employee Performance Folder, 1998

Kincade claimed that Quill would not allow him to review his Employee Performance Folder (EPF) because of race discrimination and retaliation. JA 191. In response, the government argued that Kincade had not shown any adverse employment action with regard to this claim. JA 45-46. As to the merits, the government

showed that on March 3, 1998, Kincade came into Quill's office and asked to see his "review file". After further questioning, Kincade indicated that he needed his mid-year evaluation and was under the impression that he had a second annual appraisal. Quill retrieved Kincade's EPF, opened it in front of him and showed him that there was not a second annual appraisal. He also gave him the mid-year evaluation so that he could make a copy. At no time did Kincade ever ask Quill to review his EPF, and Quill never denied him or any other employees in his group the opportunity to review an EPF. JA 130. Kincade did not attempt to rebut the government's race-neutral explanation in his opposition papers. The district court determined that there was no issue remaining as to this claim since Kincade agreed that Quill never denied him or anyone the opportunity to review his EPF. JA 436, n.4.

9. Re-validation of Performance Appraisal, 1998

Kincade claimed that Quill performed a re-validation of his performance appraisal in April of 1998 because of race discrimination and retaliation. JA 247. In response, the government asserted that re-validations by the immediate manager are very common when there is no change in an employee's level of performance from the prior rating period. The government contended that when Quill re-validated Kincade's appraisal in April of 1998, he concluded that there was no positive substantive change in the level of his work. Based on this review, Quill decided to re-validate his appraisal, or to adopt his prior appraisal. JA 130, 149.

In rebuttal, Kincade claimed that the evaluations of white employees were not re-validated. Again, he alleged that the majority of revenue officers hired by the IRS under Joseph Wynne were white. His evidence for this claim was his deposition. JA 245, 393.

The district court found that Kincade met his *prima facie* burden but that the government established a legitimate, nondiscriminatory reason as to the claim. The court held that Kincade failed to rebut this reason, based on the court's pretext analysis with respect to Kincade's 1998 promotion claim. JA 439-40.

10. Kincade's Having Been Initially Denied the Right to Earn and Use a Credit Hour on the Same Day, 1998

Kincade alleged that he was discriminated and/or retaliated against when he was initially denied his request to earn and use a credit hour in the same day. JA 77, 237. In response, the government argued that Kincade had not shown any adverse employment action with regard to this claim. JA 45-46. Addressing the merits, the government produced evidence to show that while Quill was group manager at Norwalk, a white female was transferred to his group from New Haven and continued her practice of earning a credit hour in the morning and using that credit hour in the afternoon. It was Quill's understanding that by doing this she was circumvented the tour of duty she had selected and therefore it was prohibited. However, he allowed her to continue doing so since it was a past practice. In May 1998, Kincade requested the same privilege but Quill initially denied the request because he

believed it was prohibited. Quill made some inquiries about this issue and found out the practice was not prohibited and therefore reversed his initial denial. Thereafter, Kincade was allowed to earn and use credit hours the same day. JA 130-31.

In rebuttal, Kincade claimed that a white employee was allowed to take advantage of this practice while he was not. He relied on his deposition testimony as evidence for this claim. JA 393.

The district court held that Kincade made a *prima facie* showing but that the government's proffered reason was legitimate and nondiscriminatory. The court then found that Kincade had not carried his burden to show pretext because he had not demonstrated any reason to disbelieve the government's reason, nor had he offered any evidence to support his conclusory allegation. JA 440-41.

11. Loss of Tax Return

Kincade claimed that he was discriminated against when Quill spoke to him harshly about a lost tax return. JA 78, 237. In response, the government argued that Kincade had not shown any adverse employment action with regard to this claim. JA 45-46. As to the merits, the government adduced evidence to show that in September of 1998, Quill had received a Teller's Error Advice on a return that was not received with the group daily. Quill spoke to Kincade about this and, probably in a stern manner, asked him "How do you explain this missing return?" This problem was rectified and a memorandum was written by Kincade, which was attached to the Teller's Error Advice along with supporting documentation. JA

131-32. Kincade did not rebut this evidence in his opposition papers.

The district court found that Kincade had failed to show that this allegation rose to the level of an adverse employment action. No formal disciplinary action was taken against him, and he did not lose any privilege or benefit or suffer any repercussion as a result of this event. The court concluded that Kincade had failed to meet his prima facie burden as to this claim. JA 433-34.

12. <u>Multiple Reviews in Single Day, 1998</u>

Kincade claims that the IRS discriminated and/or retaliated against him when Quill gave him four case reviews in one day. JA 79, 237. In response, the government established that Quill's supervisory responsibilities required him to review, at a minimum, one case per month per employee, and to record his comments. These comments could be positive, negative or both. It was within his discretion to review additional cases per month, especially if he found negative trends in performance. Quill noticed a downward trend in Kincade's performance beginning sometime near the end of his previous appraisal and began looking at his work more closely. He reviewed more of Kincade's cases than the other revenue officers in the group because of his performance deficiencies, and he did in fact conduct four case reviews on July 27, 1998. In addition, Quill expected that Kincade's performance should have been improving given that at the time he was the only GS-9 in the group, with the least complex cases, and overall

inventories were lower because of a new computer system. JA 132-33, 155-58.

In rebuttal, Kincade did not address the government's evidence specifically, but alleged in general that white employees were not reviewed in the same fashion as he was. His evidence for this claim was his deposition. JA 391.

The district court held that Kincade met his *prima facie* burden but that the government established a legitimate, nondiscriminatory reason for the multiple same-day reviews. The court found that Kincade's attempted rebuttal was insufficient in light of his failure to offer any specifics concerning the white employees who were allegedly treated differently, or whether such employees had the same performance deficiencies as Kincade. JA 441-42.

13. Quill Asking Co-worker to Leave Kincade's Desk, 1998

Kincade claimed that Quill singled him out because of his race and prior EEO activity when he asked a co-worker to leave Kincade's desk. JA 241. In response, the government argued that Kincade had not shown any adverse employment action with regard to this claim. JA 45-46. The government defended the merits of the claim by adducing evidence to establish that on July 28, 1998 there was a mandatory training session during which Quill observed Kincade at his desk speaking with another employee from a different division. Quill went to

Kincade's desk and asked the other individual to leave so that the other employees would not be disturbed. JA 133.

In rebuttal, Kincade claimed that the incident in question could not have disturbed anyone since they were speaking quietly about a work question. He claimed that it was the white employees who were talking loudly. His evidence for this claim is his diary and his deposition. JA 241.

The district court found that Kincade had failed to meet his *prima facie* burden because he had not established a cognizably adverse employment action. Kincade did not show that this incident resulted in any formal disciplinary action or other negative repercussions. JA 433-34.

14. Reprimand for Lost Security Badge, 1998

Kincade claimed that it was retaliation when Quill recommended that he be reprimanded for losing his IRS security badge. JA 21, 247. In response, the government established that in 1998, during the IRS's annual check of credentials, it was discovered that Kincade did not have his security badge. Quill recommended that Kincade be reprimanded for losing his badge. Thereafter, he was issued a letter of reprimand. Kincade challenged this reprimand, and as a result, the letter was rescinded. Kincade did in fact lose the security badge that he had been using. He claimed that he never received a badge since coming to Connecticut, in spite of the fact that the IRS records showed that he was issued a badge in 1994. JA 133-34, 159.

In rebuttal, Kincade claimed that 75 white employees lost their badges and were not reprimanded. His evidence for this claim was his deposition. JA 393.

The district court determined that Kincade met his *prima facie* burden but that the government established a legitimate, nondiscriminatory reason for the discipline. However, the court found that Kincade had failed to rebut the government's proffer in that he offered no information to support his claim regarding the white employees or whether they were similarly situated to Kincade. JA 442-43.

15. Reprimand for Allowing a Statute of Limitations to Expire

Kincade alleged that Quill retaliated against him when he reprimanded Kincade for allowing a statute of limitations to expire on one of his cases. JA 80, 238. In response, the government submitted evidence to show that Kincade had in fact allowed the statute of limitations to expire. Based on this deficiency, Quill recommended that a letter of reprimand be issued, and this recommendation was accepted and a letter was issued. Kincade challenged this reprimand, and a result the letter was rescinded. JA 134, 160-62. In rebuttal, Kincade stated that he allowed the statute of limitations to expire but claims that both he and Quill thought the statute had not expired. JA 123-24.

The district court found that Kincade made a *prima facie* showing and that the government's proffer was sufficient. The court then found that Kincade had not rebutted the government's reason for the discipline

because he did not show that Quill was responsible for monitoring the statutes of limitations on Kincade's own cases. JA 443.

16. Opportunity Letter, December 1998

Kincade alleged that it was retaliation when Quill issued him a performance-improvement letter in December of 1998 giving him an opportunity to improve his work performance. JA 21, 248. In response, the government established that the letter was issued to provide him with a deadline to improve his unsatisfactory performance. In this letter Quill set forth sixteen examples of Kincade's failure to meet performance standards as to the Critical Elements of Case Decisions and Time and Work Load Management. JA 135, 165-72. In rebuttal, Kincade claimed that the performance improvement letter was just a means of harassment and that only black employees received these letters. JA 394.

The district court determined that Kincade met his *prima facie* burden but that the government had met its burden by showing a legitimate, nondiscriminatory reason for the issuance of the letter. The court found that Kincade had failed to establish pretext because he offered no foundation for his statements about harassment of other black employees, other than his deposition statements. JA 443-44(a) (not numbered in joint appendix).

17. Notice of Proposed Adverse Action, July 1999

Kincade alleged that when he received a letter on July 23, 1999, proposing that he be disciplined, the letter was

sent because of a desire to retaliate against him for prior protected activity. JA 21, 248. The government countered this claim by establishing that the letter was based on Kincade's conduct. On July 23, 1999 a Notice of Proposed Adverse Action was issued to Kincade. Quill recommended the issuance of this letter based on several issues, including Kincade's failure to timely pay his own federal and state income taxes for 1996 and his presenting false statements for travel vouchers from June to October of 1998 and false statements concerning his educational background. JA 135, 173-77.

In rebuttal, Kincade admitted that he failed to pay his taxes and that he provided some misinformation about his background, but denied falsifying travel vouchers. JA 81, 239. He claimed that white employees would not be subjected to a review of their educational qualifications. JA 247.

The district court found that Kincade made a *prima facie* case but that the government established a legitimate, nondiscriminatory reason to justify its action. The court then found that Kincade had failed to rebut the government's reason because he offered no evidence to show that white employees would not have been subject to the same discipline. JA 444(a)-44(b).

18. Notice of Proposed Adverse Action, Sept. 1999

Kincade alleged that it was retaliation when he received another Notice of Proposed Adverse Action on September 2, 1999. JA 21, 248. In response, the government adduced evidence that Quill recommended the

issuance of this letter. As a result of this notice, Kincade was suspended for 30 days. In issuing this suspension, the Acting District Director, William Caine, noted that Kincade had been reprimanded on April 9, 1999, for allowing a statute of limitations to expire, that he had been suspended for seven days on November 18, 1996, for failure to timely pay federal income taxes, and that he had been suspended for one day on June 20, 1994, for failure to timely pay his federal income taxes. JA 135-36, 178-82. In rebuttal, Kincade did not dispute his failure to pay taxes or that the charges were correct, but claimed that disciplinary action would not have been taken against him if he were white. His evidence for this claim was his deposition. JA 394.

The district court held that Kincade met his *prima facie* burden but that the government had set forth a sufficient reason. The court deemed insufficient Kincade's conclusory and unsupported claim that similarly situated white employees were treated differently. JA 444(b)-445.

19. Not Placing Name on the Office Board When Out of Office, 1998

In opposition to summary judgment, Kincade claimed for the first time that in July of 1996, he was falsely accused by his manager of not placing his name on the office board to indicate that he was out of the office. JA 241. The government did not address this statement in its moving papers on the grounds that it had no notice pleading that this or any of the other fifty statements in Kincade's opposition were being raised as independent

acts of discrimination or retaliation. JA 456-57. Kincade did not address this claim in his opposition papers.

The district court found that Kincade had failed to show that this allegation rose to the level of an adverse employment action, since he did not show that he had been disciplined or otherwise suffered the loss of any privilege or benefit as a result of this incident. Therefore, the court concluded that Kincade had failed to meet his *prima facie* burden as to this claim. JA 433-34.

20. IRS Barring Kincade from Field Work, 1999

In opposition to summary judgment, Kincade claimed for the first time that on March 29, 1999, Quill told him that he would not be allowed to go into the field. No reason was given for this order. JA 240. The government did not address this statement in its moving papers on the grounds that it had no notice pleading that this or any of the other fifty statements in Kincade's opposition were being raised as independent acts of discrimination or retaliation. JA 456-57. Kincade did not address this claim in his opposition papers.

The district court initially found that this claim was so unclear as to preclude discussion on the merits. JA 425, n.2. On reconsideration the court held that despite clarification of the claim, the claim must still fail, and cited Kincade's failure to establish a *prima facie* case as to the claim. JA 484-85 & n. 2.

21. Caseload and Driving Responsibilities

In opposition to summary judgment, Kincade claimed for the first time on the basis of his deposition testimony that he and the only other black revenue agent were required to do more driving than the white employees, and that he was required to carry between 100 and 110 cases, whereas the white workers were required to carry between 54 and 74 cases. JA 247-48. The government did not address this statement in its moving papers on the grounds that it had no notice pleading that this or any of the other fifty statements in Kincade's opposition were being raised as independent acts of discrimination or retaliation. JA 456-57.

The district court initially ruled that a genuine fact issue remained as to this claim because of the government's failure to address the issue. JA 444(b)-445. But in its motion for reconsideration from the district court's initial denial of summary judgment as to this issue, the government contended that the claim was not raised in the complaint, that it had not been administratively exhausted, and that Kincade had not met his *prima facie* case in that no cognizably adverse employment action was shown. JA 456-63. In rebuttal, Kincade restated his claim, relying again on his deposition testimony. JA 394.

On reconsideration, the district court held that Kincade had failed to establish a prima facie case with respect to his claims that he had been given excessive driving and caseload responsibilities. The court found that Kincade failed to clarify whether these were claims of discrimination or retaliation, but in either case, he failed to

satisfy his *prima facie* burden. He made no showing of any adverse employment action, nor established any inference of racial animus. Accordingly, it held that summary judgment was appropriate as to these claims. JA 486-89.

SUMMARY OF ARGUMENT

I. The district court did not err when it granted summary judgment against Kincade on his claims under Title VII of the Civil Rights Act that he was subject to adverse employment actions as a result of racial discrimination. Based on a careful review of the record, the district court correctly concluded that Kincade failed even to establish a *prima facie* case as to several of his claims. As to the remaining claims, the district court correctly concluded that Kincade failed to set forth specific facts to establish that the government's race-neutral justifications were pretextual.

II. The district court did not err when it granted summary judgment as to Kincade's hostile work environment claim. In the absence of any overtly racially derogatory conduct by supervisors or employees at the IRS, it correctly concluded that Kincade had failed to raise a genuine issue of fact concerning the objective component of a hostile work environment claim. In view that there was no basis for a hostile work environment claim, the district court correctly concluded that otherwise time-barred acts of alleged discrimination could not furnish grounds for Title VII relief under a continuing violation theory. Accordingly, the district court properly granted summary judgment.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR WHEN IT CONCLUDED THAT NO GENUINE ISSUE OF FACT REMAINED TO ESTABLISH A *PRIMA FACIE* CASE AS TO SOME OF KINCADE'S ALLEGATIONS AND TO REBUT THE GOVERNMENT'S RACE-NEUTRAL REASONS AS TO THE REMAINING ALLEGATIONS.

A. GOVERNING LAW AND STANDARD OF REVIEW

1. Standard Governing Summary Judgment

This Court reviews *de novo* a district court's grant of summary judgment. See Williams v. R.H. Donnelley, Corp., ___ F.3d ___, 2004 WL 1067939, at *2 (2d Cir. 2004); Dallas Aerospace, Inc. v. CIS Air Corps., 352 F.3d 775, 780 (2d Cir. 2003).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-50 (1986) (discussing summary judgment standard).

When ruling on a motion for summary judgment, the district court must construe the facts in a light most favorable to the non-movant, and must resolve all ambiguities and draw all reasonable inferences against the

moving party. See R.H. Donnelley, Corp., 2004 WL 1067939, at *2 (quoting Dallas Aerospace, 352 F.3d at 780). "It is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases." Feingold v. New York, 366 F.3d 138, 149 (2d Cir. 2004) (quoting Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 466 (2d Cir. 2001)). Nevertheless, this Court has cautioned that "we affirm a grant of summary judgment in favor of an employer sparingly because 'careful scrutiny of the factual allegations may reveal circumstantial evidence to support the required inference of discrimination.'" Feingold, 366 F.3d at 149 (quoting Mandell v. County of Suffolk, 316 F.3d 368, 377 (2d Cir. 2003) (internal quotations omitted)).

Where a defendant contests the bare allegations of a complaint, the plaintiff bears the burden to set forth specific facts sufficient to establish the need for a trial. "If the movant demonstrates an absence of a genuine issue of material fact, a limited burden of production shifts to the nonmovant, who must 'demonstrate more than some metaphysical doubt as to the material facts,' and come forward with 'specific facts showing that there is a genuine issue for trial.'" Powell v. Nat'l Board of Med. Examiners, 364 F.3d 79, 84 (2d Cir. 2004) (quoting Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993)).

"[T]he existence of a mere scintilla of evidence in support of nonmovant's position is insufficient to defeat the motion; there must be evidence on which a jury could reasonably find for the nonmovant." Powell, 364 F.3d at

84. Accordingly, "'[c]onclusory allegations, conjecture, and speculation ... are insufficient to create a genuine issue of fact.'" Shannon v. NYC Transit Auth., 332 F.3d 95, 99 (2d Cir. 2003) (quoting Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998)).

This Court may affirm summary judgment in a Title VII case on any ground with support in the record, even if it was not the ground relied on by the district court. Palmer v. Occidental Chemical Corp., 356 F.3d 235, 236 (2d Cir. 2004) (citing Headley v. Tilghman, 53 F.3d 472, 476 (2d Cir.1995)(internal citation omitted)). See also Abdu-Brisson, 239 F.3d at 466("[I]t is axiomatic that an appellate court may affirm the judgment of the district court on any ground fairly supported by the record.") (citing Shumway v. United Parcel Service, Inc., 118 F.3d 60, 63 (2d Cir.1997) (citations omitted)).

2. Standard Governing Title VII Claims

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, prohibits discrimination against all federal employees "based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). Such claims of discrimination are subject to the familiar burden-shifting test set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981), and St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-08 (1993).

First, a plaintiff bears the initial burden of proving by a preponderance of the evidence a *prima facie* case of

discrimination. The plaintiff must show (1) that he was a member of a protected group; (2) that he was otherwise qualified for his position or promotion; (3) that he suffered an "adverse employment action"; and (4) that the employment action gave rise to an inference of discrimination based on his protected status. R.H. Donnelley, Corp., 2004 WL 1067939, at *3; Feingold v. New York, 366 F.3d 138, 152 (2d Cir. 2004)

With respect to the third prong of this standard (whether the plaintiff suffered an adverse employment action), a plaintiff must demonstrate a "tangible employment action" that "constitutes a significant change in employment status," such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998). "'[A] bruised ego is not enough.'" Id. (quoting Flaherty v. Gas Research Institute, 31 F.3d 451, 456 (7th Cir. 1994)); see also Sanders v. New York City Human Resources Admin., 361 F.3d 749, 755 (2d Cir. 2004) (noting that "[w]e define an adverse employment action as a 'materially adverse change' in the terms and conditions of employment").

If the plaintiff can establish a *prima facie* case of discrimination, this "'creates a presumption that the employer unlawfully discriminated,' and thus places the burden of production on the employer to proffer a nondiscriminatory reason for its action." Holtz v. Rockefeller & Co., 258 F.3d 62, 77 (2d Cir. 2001) (quoting James v. New York Racing Ass'n, 233 F.3d 149, 154 (2d Cir. 2000)). The employer's explanation "must,

if taken as true, '*permit* the conclusion that there was a nondiscriminatory reason for the adverse action.'" Back v. Hastings On Hudson Union Free School Dist., 365 F.3d 107, 123 (2d Cir. 2004) (emphasis in original) (quoting St. Mary's Honor Ctr., 509 U.S. at 509).

Once the employer sets forth a legitimate, race-neutral reason, the burden of persuasion then shifts back to the plaintiff. "If the defendant has stated a neutral reason for the adverse action, 'to defeat summary judgment ... the plaintiff's admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based in whole or in part on discrimination.'" Feingold, 366 F.3d at 152 (quoting Stern v. Trustees of Columbia Univ., 131 F.3d 305, 312 (2d Cir. 1997)); see also Back, 365 F.3d at 123 (same).

Title VII not only prohibits racial discrimination against employees but also proscribes retaliating against an employee for having alleged discriminatory conduct. See Sanders, 361 F.3d at 755 (citing 42 U.S.C. § 2000e-2(a), 2000e-3(a)). "Title VII is violated when 'a retaliatory motive plays a part in adverse employment actions toward an employee, whether or not it was the sole cause.'" Terry v. Ashcroft, 336 F.3d 128, 140-41 (2d Cir. 2003) (quoting Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1039 (2d Cir. 1993)). In order to make out a *prima facie* case of retaliation, an employee must show " '[1] participation in a protected activity known to the defendant; [2] an employment action disadvantaging the plaintiff; and [3] a causal connection between the protected activity and the adverse employment action.'"

Feingold, 366 F.3d at 156 (quoting Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998)); Terry, 336 F.3d at 140 (same). A claim of retaliation under Title VII is otherwise evaluated under the same McDonnell Douglas burden-shifting rules as set forth above for a substantive discrimination claim. See Sanders, 361 F.3d at 755; Terry, 336 F.3d at 141.

B. DISCUSSION

The district court properly granted summary judgment for the government with respect to each of Kincade's many claims of discrimination and retaliation. To begin with, it correctly concluded that at least four of Kincade's claims did not even rise to the level of an "adverse employment action" sufficient for purposes of a *prima facie* case: "[1] being accused of causing employees not to receive their phone calls in July of 1996, [2] being told to stop talking during a training session in July of 1998, [3] being yelled at for a lost tax return in September of 1998, and [4] being accused of not placing his name on the out of office board in September 1998." JA 433-34 (bracket numbers added). As the district court noted, "[i]n all four instances, no formal disciplinary action was taken," and "[h]e was not issued any reprimand and did not lose any privilege or benefit, even temporarily, as a result." JA 434.

The same considerations support the district court's determination upon the government's motion for reconsideration that Kincade's vague complaints in his deposition about an increased caseload and driving responsibilities did not amount to adverse employment

actions. JA 488-89; JA 332-33 (driving); 352 (caseload). Such differences in treatment (which were not even identified in Kincade's complaint) were justified by the difference between the responsibilities of GS-9 and GS-11 agents, and the harm to Kincade falls well outside the realm of the type of material changes in the conditions or terms of employment that may furnish the basis for a Title VII action. See Feingold, 366 F.3d at 152; Sanders, 361 F.3d at 755.

As for Kincade's remaining discrimination and retaliation claims, the district court correctly concluded that Kincade failed to carry his burden to show more than a conclusory or speculative basis for his supposition that the government's race-neutral reasons were pretextual. His burden was to "adduce enough evidence of discrimination so that a rational fact finder can conclude that the adverse job action was more probably than not caused by discrimination." Back, 365 F.3d at 123.

A review of Kincade's deposition testimony reveals that he voiced little more than his personal suspicions about the motives of his supervisors. He claimed that others who were similarly situated were treated differently than he was; yet despite having an opportunity to conduct discovery, he failed to offer any substantiating evidence whatsoever. See Shumway, 118 F.3d at 64 (affirming grant of summary judgment for failure to establish *prima facie* case where plaintiff's "allegations, generously construed, are little more than conclusory statements of no probative value").

Kincade's brief in this appeal does no better at shoring up his claims. It does not identify any particularized evidence to rebut the government's many race-neutral reasons. Instead, in *ipse dixit* fashion, it asserts: "Mr. Kincade offered the best proof of pretext that he could. He is black." Kincade Br. at 22. The district court correctly concluded that such speculation – and the mere fact that he is black -- did not entitle him to a trial.

Kincade devotes several pages of his brief to a bullet-point list of various instances of alleged discrimination that he identified during his deposition. See Kincade Br. at 23-29. But for none of these allegations did Kincade offer any more evidence than his own vague descriptions. Indeed, Kincade's brief concedes that "some of these instances are little more than conclusory statements," but then he adds that "some of these instances are not." Kincade Br. at 29 (internal quotations omitted). He otherwise fails to identify which allegations, if any, have the least bit of merit. In the absence of appropriate argumentation in Kincade's brief, the burden should not fall on this Court or the government "'to scour the record, research any legal theory that comes to mind, and serve generally as an advocate for appellant.'" Amnesty America v. Town of West Hartford, 361 F.3d 113, 132 (2d Cir. 2004) (quoting Sioson v. Knights of Columbus, 303 F.3d 458, 460 (2d Cir. 2002) (*per curiam*)).

Kincade further complains that the district court misapplied this Court's "similarly situated" analysis in Shumway, *supra*, insofar as he suggests that "[i]t is unclear whether this Court ever intended the Shumway [similarly situated] standard to be applicable outside the

context of evaluating a *prima facie* case." Kincade Br. at 20. He cites no authority for this suggestion and ignores contrary authority. For example, in Graham v. Long Island Rail Road, 230 F.3d 34, 43 (2d Cir. 2000), this Court stated that "[a] showing that similarly situated employees belonging to a different racial group received more favorable treatment can also serve as evidence that the employer's proffered legitimate, non-discriminatory reason for the adverse job action was a pretext for racial discrimination." Id. at 43. See also Hargett v. Nat'l Westminster Bank, USA, 78 F.3d 836, 839 (2d Cir. 1996) (same).

To be sure, a Title VII plaintiff is not required to prove his case by establishing that similarly situated employees were treated differently. See Back, 365 F.3d at 121; Abdu-Brisson, 239 F.3d at 467-68. But here Kincade chose to attempt to prove his case by alleging that he was treated differently from Caucasian IRS agents in his group. In this context, the district court properly noted that his claim of such disparate treatment was not substantiated and could not otherwise survive the government's showing of legitimate, non-discriminatory reasons for the actions taken by Kincade's supervisors against him.

In short, the district court did not err when it concluded that Kincade has failed to establish a genuine fact issue to support a *prima facie* case as to several of his allegations or to rebut the government's race-neutral reasons as to his remaining allegations. Kincade failed to substantiate his claims in any proper manner, and these claims were therefore properly dismissed on summary judgment.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT KINCADE FAILED TO ESTABLISH A HOSTILE WORKING ENVIRONMENT CLAIM AND FAILED TO ESTABLISH A CONTINUING VIOLATION THEORY SUFFICIENT TO ALLOW ALLEGATIONS THAT WERE OTHERWISE TIME-BARRED

A. GOVERNING LAW AND STANDARD OF REVIEW

Where a plaintiff is unable to show (as discussed above) that he that "he has suffered an adverse job action under circumstances giving rise to an inference of discrimination," he may still establish a Title VII claim "by demonstrating that harassment on [the basis of racial discrimination] amounted to a hostile work environment." Feingold, 366 F.3d at 149. However, in order to establish a hostile work environment for purposes of Title VII, a plaintiff must show *both* "objective and subjective elements: the misconduct shown must be 'severe or pervasive enough to create an objectively hostile or abusive work environment,' and the victim must also subjectively perceive that environment to be abusive." Id. at 150 (citing Alfano v. Costello, 294 F.3d 365, 374 (2d Cir. 2002)); Mormol v. Costco Wholesale Corp., 364 F.3d 54, 58 (2d Cir. 2004) (same).

"In order to survive summary judgment on a claim of hostile work environment harassment, a plaintiff must produce evidence that 'the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment.'" Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir. 2000) (quoting Harris v. Forklift

Sys., Inc., 510 U.S. 17, 21 (1993)). "Isolated instances of harassment ordinarily do not rise to this level." Id. "Rather, the plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were 'sufficiently continuous and concerted' to have altered the conditions of her working environment." Id. (quoting Perry v. Ethan Allen, Inc., 115 F.3d 143, 149 (2d Cir. 1997)); see also Feingold, 366 F.3d at 150 (noting that "incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive") (internal quotations omitted).

A "hostile work environment" claim requires a nexus to discriminatory behavior and may not be premised simply on conduct by his supervisors that a plaintiff may find burdensome or unpleasant:

> Everyone can be characterized by sex, race, ethnicity, or (real or perceived) disability; and many bosses are harsh, unjust, and rude. It is therefore important in hostile work environment cases to exclude from consideration personnel decisions that lack a linkage or correlation to the claimed ground of discrimination. Otherwise, the federal courts will become a court of personnel appeals

Alfano, 294 F.3d at 377.

"In Title VII cases, the statute of limitations begins to run when 'the alleged unlawful employment practice occur[s].'" Mix v. Delaware and Hudson Ry. Co., 345 F.3d 82, 89 (2d Cir. 2003) (quoting National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109 (2002)

(citing 42 U.S.C. § 2000e-5(e)(1)), cert. denied, 124 S. Ct. 1423 (2004). Prior to filing a federal court complaint, a plaintiff must timely exhaust administrative remedies by means of the prescribed EEO complaint process. See Belgrave v. Pena, 254 F.3d 384, 386 (2d Cir. 2001) (*per curiam*) (describing administrative timeline requirements).

Ordinarily, for purposes of a Title VII claim, "'[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act.'" Elmenayer v. ABF Freight System, Inc., 318 F.3d 130, 134 (2d Cir. 2003) (quoting Morgan, 536 U.S. at 111). "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Morgan, 536 U.S. at 113. However, because of the continuing nature of a hostile working environment claim, "a plaintiff may assert a hostile work environment claim under Title VII if one predicate act occurs within the filing period, which is consistent with Title VII's requirement that the statute of limitations begins to run once the act has 'occurred.'" Mix, 345 F.3d at 89 (citing Morgan, 536 U.S. at 114-17).

As noted above, this Court conducts *de novo* review of the district court's grant of summary judgment, including as to a claim of a hostile working environment. See Feingold, 366 F.3d at 148; Mormol, 364 F.3d at 57.

B. Discussion

The district court correctly concluded that Kincade failed to establish a triable issue of fact to show the existence of a hostile working environment. Focusing on the objective aspect of a hostile work environment claim, the court observed that Kincade "alleges no explicit racial slurs," and that "[v]iewing the record as a whole, it is just not possible to find that the work environment was objectively abusive." JA 428. The work environment at the IRS was not shown to be "permeated with discriminatory intimidation, ridicule and insult ... sufficiently severe or pervasive to alter the conditions" of Kincade's employment. Harris, 510 U.S. at 21 (internal quotations omitted). Indeed, Kincade's brief in this appeal "concedes the lack of a 'smoking gun'" and that Kincade "was not the target of racial slurs or epithets." Kincade Br. at 30. No genuine fact issue remained to suggest from an objective viewpoint that Kincade was subject to a discriminatorily abusive environment.

It is telling that Kincade made the claim of a hostile work environment for the first time only in response to the government's motion for summary judgment, and in apparent response to the government's argument that many of his claims were not timely exhausted. Although not addressing the issue of timeliness, Kincade argues on appeal that his claims should be considered under a continuing violation theory as part of an overall policy of discrimination, or because there was a hostile work environment throughout his federal employment. See Kincade Br. at 30-31.

Having failed to establish a hostile working environment claim, the district court correctly concluded that the continuing violation doctrine does not otherwise operate in this case to preserve Kincade's untimely Title VII claims. JA 429-31. In Morgan, *supra*, the Supreme Court concluded that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Morgan, 536 U.S. at 113.

Morgan clearly abrogates the Court's prior "continuing violation" rule. That rule held that "a timely charge with respect to any incident of discrimination in furtherance of a policy of discrimination renders claims against other discriminatory actions taken pursuant to that policy timely, even if they would be untimely if standing alone." Connecticut Light and Power Co. v. Secretary of U.S. Dept. of Labor, 85 F.3d 89, 96 (2d Cir. 1996). The Morgan decision "clarified the limits of the continuing violations doctrine," so that now "each discriminatory act starts a new clock for filing charges," subject to "an exception for claims based on a hostile work environment." Pegram v. Honeywell, Inc., 361 F.3d 272, 279 (5th Cir. 2004); see also Hildebrandt v. Illinois Dept. of Natural Resources, 347 F.3d 1014, 1026-28 (7th Cir. 2003) (same).[2]

In any event, even assuming the continuing violation theory to be valid outside the context of a proper hostile working environment claim, Kincade failed to adequately

[2] This Court has yet to address the issue in the form of a published opinion.

raise the theory as he was required to do during the EEO administrative process. See Fitzgerald v. Henderson, 251 F.3d 345, 360 (2d Cir. 2001) (noting that "a plaintiff may not rely on a continuing violation theory unless she has asserted that theory in the administrative proceedings"), cert. denied, 536 U.S. 922 (2002); but see JA 429 (district court ruling that Kincade preserved theory simply by saying in his October 1998 EEO complaint that "there is plenty more they are doing to me and they feel like no one can stop them").

Kincade misplaces his reliance upon Elmenayer, *supra*. He cites that case for the proposition that "this Court could treat discrete acts as a 'single completed action.'" Kincade Br. at 31 (quoting Elmenayer, 318 F.3d at 135). To the contrary, the Court in Elmenayer used the phrase "single completed action" to describe a discrete act which does *not* give rise to a continuing violation. The Court reasoned that "[t]he rejection of a proposed accommodation is a single completed action when taken, quite unlike the 'series of separate acts' that constitute a hostile work environment and 'collectively constitute' an unlawful employment practice." Elmenayer, 318 F.3d at 135 (quoting Morgan, 536 U.S. at 117).

In short, the district court correctly concluded that Kincade failed to raise a genuine issue of fact concerning a hostile working environment. Because of the absence of a hostile work environment, the district court further and correctly concluded that otherwise time-barred acts could not furnish grounds for Title VII relief under a continuing violation theory. Accordingly, the district court properly granted summary judgment.

CONCLUSION

For the foregoing reasons, the judgment of the district court for the defendant-appellee should be affirmed.

Dated: June 3, 2004

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

LAUREN M. NASH
ASSISTANT U.S. ATTORNEY

JEFFREY A. MEYER
ASSISTANT U.S. ATTORNEY (on the brief)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 10,361 words, exclusive of the Table of Contents and the Table of Authorities.

LAUREN M. NASH
ASSISTANT U.S. ATTORNEY