No. _____

In The

Supreme Court of the United States

WILLIAM McCRAY,

Petitioner,

v.

CITY OF WEST PALM BEACH,

Respondent.

On Petition For Writ Of Certiorari To The Florida Fourth District Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 10 (2002) modify a nearly universally accepted rule of Title VII jurisprudence that dispenses with administrative exhaustion of a retaliation claim that arises after a discrimination claim properly before the trial court?

PARTIES TO THE PROCEEDING

The parties to the proceeding are the same parties that appeared in the caption of the Florida Fourth District Court of Appeal and Florida Supreme Court decisions.

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PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA FOURTH DISTRICT COURT OF APPEAL AND TO THE FLORIDA SUPREME COURT

The petitioner hereby requests issuance of a writ of certiorari to review the judgments of the Florida Fourth District Court of Appeal and the Florida Supreme Court in this case.

OPINIONS BELOW

The opinion of the Florida Fourth District Court of Appeal (App., *infra*, 1-16) is reported at *City of West Palm Beach v. McCray*, 91 So. 3d 165 (Fla. 4th DCA 2012). Rehearing was denied. The Florida Supreme Court denied review without opinion (App. 20-21). The opinion of the trial court is not published (App. 17-19).

JURISDICTION

The judgment of the Supreme Court was rendered April 18, 2013. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

F.S. § 760.10 Unlawful employment practices. –

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

. . .

F.S. § 760.11 Administrative and civil remedies; construction. –

(1) Any person aggrieved by a violation of §§ 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation, naming the employer, employment agency, labor organization, or joint labor-management committee, or, in the case of an alleged violation of § 760.10(5), the person responsible for the violation and describing the violation. Any person aggrieved by a violation of § 509.092 may

file a complaint with the commission within 365 days of the alleged violation naming the person responsible for the violation and describing the violation. The commission, a commissioner, or the Attorney General may in like manner file such a complaint. On the same day the complaint is filed with the commission, the commission shall clearly stamp on the face of the complaint the date the complaint was filed with the commission. In lieu of filing the complaint with the commission, a complaint under this section may be filed with the federal Equal Employment Opportunity Commission or with any unit of government of the state which is a fair-employment-practice agency under 29 C.F.R. §§ 1601.70-1601.80. If the date the complaint is filed is clearly stamped on the face of the complaint, that date is the date of filing. The date the complaint is filed with the commission for purposes of this section is the earliest date of filing with the Equal Employment Opportunity Commission, the fair-employment-practice agency, or the commission. The complaint shall contain a short and plain statement of the facts describing the violation and the relief sought. The commission may require additional information to be in the complaint. The commission, within 5 days of the complaint being filed, shall by registered mail send a copy of the complaint to the person who allegedly committed the violation. The person who allegedly committed the violation may file an answer to the complaint within 25 days of the date the complaint was filed with the commission. Any answer filed shall be mailed to the aggrieved person

by the person filing the answer. Both the complaint and the answer shall be verified.

. . .

STATEMENT OF THE CASE

In this employment discrimination case under the Florida Civil Rights Act (FCRA), § 760.01, Fla. Stat., a jury awarded former police officer William McCray $230,000.00 in back wages because it determined that Mr. McCray, an African American, was discriminated and/or retaliated against by the City of West Palm Beach, his former employer. During the tenure of former Chief of Police Ric L. Bradshaw, now Sheriff of Palm Beach County, he and a group of other African American police officers, protested what they contended was widespread discrimination against African American officers, and blatant favoritism towards white officers. McCray and his group of officers signed and forwarded a petition to the Mayor of the City, held public rallies, press conferences, and filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC) and the Florida Commission on Human Relations (FCHR), to complain against what they contended was Bradshaw's unequal treatment of officers based on race. Shortly after McCray filed his suit against the City, he was fired from his employment; he then amended his claim to add a retaliatory discharge; however, he did

not file a new charge with the EEOC or FCHR on the termination issue.

Prior to trial, the City filed a motion in limine seeking to exclude evidence of his termination based on the fact McCray had not filed a new charge with the EEOC or FCHR on that claim. The Trial Judge, the Hon. Jonathan Gerber,[1] granted said motion. Once the case was set for trial a few years later, multiple efforts were made to have the new Trial Judge, the Hon. Don Hafele, revisit the ruling about excluding the evidence of the termination, because, McCray contended, the ruling was against nearly universally accepted precedent from the federal courts of appeals. Said efforts were denied by Judge Hafele based on the prior ruling of Judge Gerber. However, during the trial, Judge Hafele was persuaded to change the prior order in limine and permitted evidence of the termination, including evidence of lost wages McCray had incurred as a result of his termination. Importantly, during trial, the City ***never*** moved for a directed verdict on the termination claim, and prior to trial, ***never*** moved for summary judgment on said claim. Nor did the City request any jury instruction directing the jury to not consider McCray's claim for damages flowing from his termination. The jury then awarded McCray $230,000 in damages, which is a fair determination of his wage

[1] Judge Gerber has since been elevated to the Fourth District Court of Appeals.

loss flowing from the termination and several earlier suspensions, minus his interim earnings.

Judge Hafele, *sua sponte*, granted the City a new trial on damages, while denying the City's motions for directed verdict and j.n.o.v., addressed to the sufficiency of the evidence, and sustained the liability portion of the verdict.

The City filed a Notice of Appeal to the Fourth District Court of Appeal, seeking review of the denial of its post trial motions for directed verdict and j.n.o.v.; McCray filed a cross appeal, seeking review of the order granting a new trial on damages. The Fourth District Opinion rejected both the City's appeal and McCray's cross appeal, affirming the trial court's disposition in its entirety. The decision of the Fourth District was denied review by the Florida Supreme Court, despite the fact it clearly conflicts with this Court's holding in *Morgan*, and a separate intermediate appellate court decision from Florida, *Maggio v. Dep't of Labor & Empl. Sec.*, 910 So. 2d 876 (Fla. 2d DCA 2005), which correctly construed *Morgan*.

REASONS FOR GRANTING THE PETITION

McCray seeks to invoke the discretionary jurisdiction of this Court to review the Fourth District Court's decision, as well as the Florida Supreme Court's inaction thereon, because it is contrary to the precedent of this Court and conflicts with some, but

not all, federal appellate courts that have decided the precise issue, as discussed *infra*. No reasonable construction of *Morgan* can distort it to mean what was held in this case. *Morgan* simply held that for Title VII cases, discrete discriminatory acts that preceded the limitations period for filing administrative charges with the EEOC were ***not*** actionable; however, for hostile work environment claims, acts of discrimination would continue to be subject to the relation back doctrine. Hence, if a hostile work environment claim occurred within the time limits for filing an administrative charge, related events that occurred ***prior*** to those time limits ***could*** be the basis of a claim because of the unique characteristics of a hostile work environment claim, which often occurs over an extended period of time. The *McCray* court, and at least one federal appellate court, have distorted *Morgan* to require that claims of retaliation arising ***after*** a timely filed discrimination claim that is properly before the court, be administratively exhausted again, or, barred from consideration. This is contrary to the well established rule applied in every Circuit Court of Appeals in the country.

In McCray's case, the Fourth District construed *Morgan* to ***bar*** McCray's ***prospective*** claim of retaliation; however, no reasonable construction of *Morgan* can support this since *Morgan* is a case that looks back in time to determine what is actionable. A review of the facts as set forth by Justice Thomas in the *Morgan* case confirms this:

Respondent Abner Morgan, Jr., sued petitioner National Railroad Passenger Corporation under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq. (1994 ed. and Supp.V), alleging that he had been subjected to discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment throughout his employment. Section 2000e-5(e)(1) (1994 ed.) requires that a Title VII plaintiff file a charge with the Equal Employment Opportunity Commission (EEOC) either 180 or 300 days "after the alleged unlawful employment practice occurred." We consider whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside this statutory time period.

. . .

We hold that the statute precludes recovery for discrete acts of discrimination or retaliation that occur outside [before] the statutory time period. We also hold that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside [before] the statutory time period, is permissible for the purposes of assessing liability, so long as any act contributing to that hostile environment takes place within the statutory time period. . . .

On February 27, 1995, Abner J. Morgan, Jr., a black male, filed a charge of discrimination and retaliation against Amtrak with the

EEOC and cross-filed with the California Department of Fair Employment and Housing. Morgan alleged that during the time period that he worked for Amtrak he was "consistently harassed and disciplined more harshly than other employees on account of his race." . . . The EEOC issued a "Notice of Right to Sue" on July 3, 1996, and Morgan filed this lawsuit on October 2, 1996. ***While some of the allegedly discriminatory acts about which Morgan complained occurred within 300 days of the time that he filed his charge with the EEOC, many took place prior to that time period***. Amtrak filed a motion, arguing, among other things, that it was entitled to summary judgment on all incidents that occurred ***more than 300 days before the filing of Morgan's EEOC charge***. The District Court granted summary judgment in part to Amtrak, holding that the company could not be liable for conduct occurring ***before*** May 3, 1994, because that conduct fell outside [before] of the 300-day filing period. The court employed a test established by the United States Court of Appeals for the Seventh Circuit in *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164 (1996): A "plaintiff may not base [the] suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in

> the light of events that occurred later, within the period of the statute of limitations." Id., at 1167. The District Court held that "because Morgan believed that he was being discriminated against at the time that all of these acts occurred, it would not be unreasonable to expect that Morgan should have filed an EEOC charge on these acts ***before*** the limitations period on these claims ran." App. to Pet. for Cert. 40a. [footnote omitted].

Morgan, *supra*, 536 U.S. at 104-06 (2002) (emphasis added).

The Fourth District has in our case construed *Morgan* to bar ***prospective*** claims, which is wrong since *Morgan* never purports to address the issue of exhaustion for retaliation events that occur ***after*** a charge is filed.

The Fourth District upheld the Trial Judge's grant of a new trial on damages (while upholding the liability verdict for McCray) based on the misapplication of the *Morgan* case. As demonstrated in the foregoing, *Morgan* looks to what claims are actionable from ***past events***. The law is completely different on the need to administratively exhaust claims based on events that occur ***after*** a charge is filed. The decision of the Fourth District is flatly and unequivocally contrary to the decision of every federal appellate circuit court to have considered this issue: 11 of 12 federal Circuits, with a split within the Sixth Circuit, have held that a Plaintiff does ***not have to file a separate charge of retaliation if the retaliation***

arises from a properly filed charge of discrimination. *See*: *Clockedile v. New Hampshire Department of Corrections*, 245 F.3d 1 (1st Cir. 2001) (collecting cases); *Kirkland v. Buffalo Bd. of Educ.*, 622 F.2d 1066, 1068 (2d Cir. 1980); *Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1212 (3d Cir. 1984); *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992); *Gottlieb v. Tulane Univ.*, 809 F.2d 278, 284 (5th Cir. 1987); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989); *Wentz v. Maryland Cas. Co.*, 869 F.2d 1153, 1154 (8th Cir. 1989); *Anderson v. Reno*, 190 F.3d 930, 938 (9th Cir. 1999); *Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 864 F.2d 680, 682 (10th Cir. 1988); *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 168-69 (11th Cir. 1988). The Sixth Circuit position is divided, compare *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 546-47 (6th Cir. 1991), with *Duggins v. Steak'N Shake, Inc.*, 195 F.3d 828, 831-33 (6th Cir. 1999).

Although this case was tried for claims under the FCRA, a State law, the Florida Supreme Court has said such claims must be construed in accordance with federal precedent. The Fourth District has said so as well: "It is well-established that if a Florida statute is patterned after a federal law, the Florida statute will be given the same construction as the federal courts give the federal act. *State v. Jackson*, 650 So. 2d 24 (Fla. 1995)." *Carsillo v. City of Lake Worth*, 995 So. 2d 1118, 1119 (Fla. 4th DCA 2008), *review denied, City of Lake Worth v. Carsillo*, 2009 Fla. LEXIS 1676 (Fla. Sept. 29, 2009). This Court

requires the same for State laws that also regulate employment discrimination, using a limited preemption analysis. *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987). The *McCray* decision here, where the court requires the filing of a ***new*** charge for retaliation, is contrary to the overwhelming federal precedent on this issue, and as in *Guerra*, provides a lesser remedy than federal law.

Federal cases squarely hold that where a person has filed a charge of discrimination, and suffers a subsequent adverse action, ***there is no need to file a new administrative charge. Morgan*** does not change this rule, although some cases have admittedly misconstrued *Morgan* to apply it to ***prospective*** events The Fourth District Opinion is contrary to well established precedent, set forth above, that do ***not*** require a new administrative charge to be filed. Post-*Morgan* cases support the construction urged here by McCray: *Jones v. Calvert Group, Limited*, 551 F.3d 298, 302-05 (4th Cir. 2009) and *Wedow v. City of Kansas City*, 442 F.3d 661, 674-75 (8th Cir. 2006), *but see*, *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847 (8th Cir. 2012) (overruling *Wedow* by a 2-1 split decision without *en banc* consideration).

The broad construction of *Morgan* by the Fourth District Court and by the Eighth Circuit, in a split 2-1 decision in *Richter*, is not supported by any language in *Morgan*, which was only concerned with looking back in time to determine the propriety of whether or not ***past*** acts of discrimination that occur ***prior*** to

the administrative filing period are actionable, and holding that "discrete acts" are not, while those that are part of a hostile work environment may be actionable, under the continuing violations doctrine. This construction also does violence to the well entrenched rule in all of the federal appellate courts that hold that there is no need to administratively exhaust a retaliation charge that arises out of a discrimination claim that was properly exhausted and before the court. The black letter law on this issue is well established: 11 of 12 federal Circuits (with a split in one), including the Eleventh Circuit Court of Appeals, have unequivocally held that a Plaintiff does ***not have to file a separate charge of retaliation if the retaliation arises after a properly filed charge of discrimination***.

This Court should accept this case for review so that *Morgan* can be clarified as ***not*** applying to discrete acts of retaliation that occur ***after*** a properly filed charge of discrimination is already before the trial court. The reasons for this rule are obvious. For example, as in this case, McCray exhausted his remedies on several charges of discrimination, filed his suit, and was fired within one month or so of filing the law suit. To require him to exhaust his claims administratively would only serve to delay his attempt to have his day in court to vindicate important rights. Such a procedure would almost encourage employers to fire their employees so as to derail, or at least delay, the case of a party claiming discrimination. For these reasons, and to clarify *Morgan*,

McCray urges this Court to accept jurisdiction on this case.

CONCLUSION

The petition for writ of certiorari should be granted to resolve the varying interpretations given *Morgan* between the Fourth and Eighth Circuits, and in our State courts.

Respectfully submitted,

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91 So.3d 165

CITY OF WEST PALM BEACH, Appellant,
v.
William McCRAY, Appellee.
No. 4D10-3393.
District Court of Appeal of Florida,
Fourth District.
May 23, 2012. Rehearing Denied July 27, 2012.

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STEVENSON, J.

The City of West Palm Beach appeals a final judgment in the amount of $230,000 after a jury found that discrimination and/or retaliation occurred within the West Palm Beach Police Department (the "Department") against the appellee, William H. McCray. By way of cross-appeal, McCray challenges the trial court's order granting the City's motion for a new trial on damages only. The City contends: (1) that McCray failed to present a prima facie case of disparate treatment, discrimination or retaliation; (2) that improper verdict forms were used; (3) that irrelevant evidence was admitted; and (4) that the jury verdict is excessive and contrary to the weight of the evidence, requiring a new trial on liability as well. McCray argues that the amount awarded by the jury

is supported by evidence in the record. McCray's claim is based on the purported inclusion of his claim for termination at trial. We hold that the evidence was sufficient to support the jury's finding of discrimination and/or retaliation and that the trial court was correct in ordering a new trial on damages because the termination claim was not an issue for the jury. The additional claims raised by the parties are without merit.

McCray, an African American, filed a complaint alleging disparate treatment, discrimination and retaliation against the City. McCray alleged discrimination under the Florida Civil Rights Act based on the Department disciplining him more harshly than white employees and for denying him promotions, assignments and transfer opportunities that were provided to white employees. McCray also alleged retaliation under the Florida Civil Rights Act for the Department failing to promote him, failing to give him desirable assignments and subjecting him to disparate discipline, working conditions and biased internal affairs investigations, which ultimately resulted in his termination. McCray alleged that these acts occurred after he filed two charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Florida Commission on Human Relations ("FCHR").

The City and McCray each filed motions in limine. As a result, the trial judge who was assigned the case at that time excluded from trial the issue of McCray's termination, reasoning that it had not been

included in the charges of discrimination, which was a prerequisite to filing suit. Subsequently, the parties entered into a joint pretrial stipulation. The parties agreed that McCray was terminated from his job on May 9, 2001, after he filed two charges of discrimination with the EEOC and FCHR on April 26, 1999, and July 7, 1999. McCray's issues for the jury were, in relevant part:

- whether the Department discriminated against McCray because of his race;
- whether the Department treated non-African American employees more favorably than McCray for "substantially similar conduct and circumstances"; and
- whether the Department retaliated against McCray for making discrimination complaints.

The City's issues for the jury included whether McCray presented a prima facie case of discrimination or retaliation based on the following disciplinary actions:

> a. One-day suspension (8 hours) on August 25, 1998, for missing court for the third time in twelve months;
>
> b. Suspension for five days (40 hours) on March 8, 1999, for sleeping on duty and failing to maintain control of a prisoner;
>
> c. One-day suspension (8 hours) on May 19, 1999, for improper investigation and

inaccurate/false information in police reports;

d. Four-day suspension (32 hours) o[n] December 13, 1999, for failure to appear for depositions and being late for court resulting in a misdemeanor plea in a felony case; [and]

e. Two-day suspension (16 hours) for failure to properly secure a prisoner while in processing area at headquarters on January 14, 2000.

Prior to the beginning of trial, the new trial judge who had been assigned the case indicated that the issues would be limited by the pretrial stipulation, as well as by the ruling made by the initial trial judge. The trial court reiterated that whether McCray was wrongfully terminated was not an issue for the jury.

At trial, McCray testified that, in 1997, he began generating letters about discrimination within the Department. McCray sent letters up the entire chain of command, from Sergeant to Chief, as well as to several City Hall officials and the Mayor. He spoke personally with his supervisors and, in 2001, spoke with the media after his letter-writing efforts had been ignored. McCray testified that he was accused of lying during disciplinary investigations and punished harshly, whereas other white officers, actually caught lying or admitted to lying, received very light punishments. McCray felt that the five suspensions at issue were specific examples of discrimination. For example, regarding the suspension for not maintaining control of a prisoner on January 14, 2000, McCray

indicated that it occurred because he stepped away from the prisoner for thirty seconds to use the bathroom and left the prisoner in a locked facility. McCray knew that other officers had done the same thing without it being "a problem." McCray also felt that he was discriminated against during the investigation into the incident of him falling asleep while watching a prisoner on March 8, 1999, because two white officers lied under oath about the events. According to McCray, though a video recording showed that the officers had lied, the officers who made the false statements were not punished. McCray further testified about several examples of officers violating Department policy and receiving no, or very lenient, punishments. McCray stated that, during the times that he was suspended, he lost $3,088.80 in wages.

McCray had been reprimanded a total of fifteen times during his career with the Department, beginning in 1993. During the instances of what McCray believed to be discrimination, the Chief of Police ultimately determined whether an officer should be suspended. McCray believed that the Chief knew about "pretty much everything" that happened in the Department.

Another African American officer, Officer Bryant, testified that he experienced discrimination during his employment with the Department, beginning in 1989. Officer Bryant was terminated in 2000, after he joined McCray and four other African American officers in filing the 1999 charges of discrimination. He testified to several instances of perceived discrimination

where he violated a Department rule and received a harsher punishment than white officers who committed the same offense. A third African American officer, Sergeant Key, testified to the use of racial slurs by employees within the Department as well as his attempt to have this conduct investigated.

McCray then offered the testimony of four non-African American officers who he believed had been treated more favorably than he. The first officer, Officer Myers, testified that he was disciplined for missing multiple court dates or depositions. Officer Myers missed traffic court in 2000, and in 2001 was given a letter of reprimand after he missed court a second time. In the same year, he was given an eight-hour suspension because he missed a deposition and it occurred within the same twelve-month period as him missing court. When he missed a deposition on a fourth occasion, in 2003, he received only a written reprimand because it was the first time in a twelve-month time span. Finally, he was also disciplined in 2002 with a written reprimand for not reporting his use of force on an arrestee.

The second officer, Lieutenant Yates, testified that he was recommended for termination in about 1999, 2000 or 2001, due to multiple disciplinary problems. Officer Yates was accused of being "less than truthful" during an internal affairs investigation. He was terminated because of this, but was then reinstated. In 1999, he was accused of improper supervision; falsification of documents; violation of Department rules, regulations, policies and procedures;

and witness intimidation. The allegations were substantiated. It was recommended by internal affairs that he be demoted, but he was given a letter of guidance, a thirty-day suspension without pay and a four-year period of probation instead. He also signed a last chance agreement that provided that if he engaged in similar conduct within four years of the agreement, he would be terminated. The agreement was signed in 2000. In 2002, a citizen complaint was filed against Lieutenant Yates alleging witness tampering. Internal affairs conducted an investigation and made two recommendations-one that he receive a twenty-day suspension and one that he be fired. Though the complaint was filed in 2002, a decision was not made until 2004. The report recommending termination indicated that Lieutenant Yates may have committed two felonies. Lieutenant Yates was ultimately given a twenty-day suspension. During his employment with the Department since 1980, Lieutenant Yates had been disciplined for:

> conduct unbecoming an officer, falsifying a police record by failing to complete an accident investigation, negligent operation of a police vehicle resulting in an accident, disobeying an order from a supervisor, missed overtime assignment, carelessness with use of city equipment, violation of administrative procedure concerning extra duty details, failing to properly supervise a staff services section, making misleading and untruthful statements, conduct unbecoming of a City employee, excessive force during an arrest,

> unprofessional conduct towards a member of the public, falsifying records, professional complaint, improper supervision, leaving an uncivilized voicemail to a fellow officer, lobbying for a candidate that was disqualified by human resources, personal complaint use of force, improper supervision, improper professional misconduct, insubordination, AWOL, violation of department general conduct on duty, [and] improper professional conduct.

The third officer, Officer Shaw, testified that he was disciplined in 2001 for missing one deposition. He received a letter of reprimand. Officer Shaw was also disciplined for missing court in 1999 with a letter of reprimand. On no other occasion had he missed court or deposition. However, he had received a written reprimand for failing to seatbelt a prisoner on one occasion. Further, in 2000, he was "written up" for allowing another officer to complete an improper investigation.

The final officer, Captain Olsen, testified that, in 2000, a prisoner escaped from her vehicle. This was the only time that a prisoner escaped from her custody and she was not disciplined for it. She had not violated any rules regarding securing a prisoner when the prisoner escaped.

The City then presented testimony from Sheriff Bradshaw, who acted as Chief of Police from 1996 to 2004. Sheriff Bradshaw explained that, when someone made a complaint about an officer violating a rule, an investigation was conducted resulting in a

final determination on whether the allegations were substantiated. If he approved that determination, the case was sent back to "supervision" for a recommendation as to discipline. A system of "progressive discipline" was typically used. Sheriff Bradshaw testified that the manner in which McCray had been disciplined on the five relevant occasions was consistent with Department policy. Further, while he would have received copies of the charges of discrimination filed by McCray, and indicated that he eventually became aware of McCray's allegations, he could not recall the specific date on which he gained this knowledge.

The City moved for a directed verdict as to all claims. The trial court found that McCray made out a prima facie case for both discrimination and retaliation. The jury determined that the City had discriminated against McCray because of his race and/or retaliated against him for his complaints of racial discrimination. The jury awarded $230,000 in net lost wages and $0 for emotional pain and mental anguish.

Subsequent to entry of the verdict, the City filed a motion to set aside verdict and enter judgment in accordance with its motion for directed verdict or, in the alternative, motion for new trial. The trial court found that the jury's verdict as to liability should not be disturbed. However, the trial court ordered a new trial on damages, reasoning that the evidence at trial showed that McCray's lost wages for the time that he was suspended was approximately $3,000. The trial court noted that the jury must have been confused

and indicated that, as per the initial trial judge's order, the termination claim was not a proper basis for awarding damages. The instant appeal was then filed where, inter alia, the City has challenged the finding of liability and McCray has challenged the order granting a new trial on damages. The trial court's decision on a motion for a directed verdict is reviewed de novo. *See City of Hollywood v. Hogan*, 986 So.2d 634, 640-41 (Fla. 4th DCA 2008). "Only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party may a trial court enter a directed verdict." *Greenberg v. Schindler Elevator Corp.*, 47 So.3d 901, 903 (Fla. 3d DCA 2010). A trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion. *See Philippon v. Shreffler*, 33 So.3d 704, 709 (Fla. 4th DCA), review denied, 47 So.3d 1290 (Fla.2010).

A prima facie case of employment discrimination may be established by either: direct evidence of discriminatory intent; statistical analysis showing a pattern of discrimination; or circumstantial evidence meeting the test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Washington v. Sch. Bd. of Hillsborough Cnty.*, 731 F.Supp.2d 1309, 1317 (M.D.Fla.2010). McCray used the *McDonnell Douglas* framework in proving his case because only circumstantial evidence was presented. When a plaintiff seeks to prove discrimination through a disparate treatment theory, the *McDonnell Douglas* test requires proof that: (1) the plaintiff belongs to a racial

minority; (2) the plaintiff was subjected to adverse employment action; (3) similarly-situated employees, outside of the plaintiff's racial minority, were treated more favorably than the plaintiff; and (4) the plaintiff was qualified to do the job. *See U.S. E.E.O.C. v. Mallinckrodt, Inc.*, 590 F.Supp.2d 1371, 1376 (M.D.Fla.2008). The City disputes only prong three. When a claim is based on disparate treatment, establishing a prima facie case is sufficient evidence of pretext so that no further evidence is necessary. *See Lobeck v. City of Riviera Beach*, 976 F.Supp. 1460, 1467 n. 3 (S.D.Fla.1997) (stating that "[h]aving established a prima face case of disparate discipline, plaintiff need not demonstrate further evidence of pretext" because disparate discipline is sufficient to establish pretext). Further, "[e]mployees are similarly situated when they are 'involved in or accused of the same or similar conduct.'" *Fla. Dep't of Children & Families v. Shapiro*, 68 So.3d 298, 305 (Fla. 4th DCA 2011) (quoting *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir.1997)). The most important factors are the nature of the offenses and punishments imposed. *See id.* However, "'[t]he quantity and quality of the comparator's misconduct [must] be nearly identical.'" *Id.* (quoting *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir.1999)).

McCray's evidence was sufficient to establish a prima facie case of discrimination/disparate treatment and retaliation. "[T]he elements of a prima facie case are flexible and should be tailored, on a case-by-case basis, to differing factual circumstances."

Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1123 (11th Cir.1993) (citation omitted). McCray presented evidence of disparate treatment through the comparator officers, most notably, through Lieutenant Yates whose disciplinary history was far more severe than McCray's. In addition to this, McCray offered other examples of discrimination that had been suffered by himself and fellow officers in the Department. Because each of the instances testified to by McCray and the other witnesses occurred after McCray made his initial complaints of discrimination to superior officers, the evidence was also sufficient to send the retaliation claim to the jury. *See Shapiro*, 68 So.3d at 305-06 (noting that a plaintiff establishes a prima facie case of retaliation with evidence that: "(1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there is a causal relation between the two events").

Regarding McCray's cross-appeal, McCray argues that the damages award was proper because the termination issue was subsequently admitted, after it had been erroneously excluded by the initial trial judge. However, the record indicates that, while the fact that McCray was terminated was presented to the jury, the termination issue was not before the jury. The trial court clearly instructed the attorneys and the jury that the only issues to be determined were based on the five instances of discipline. Further, the initial ruling on the motion in limine to exclude the termination issue functioned as a dismissal as to the termination count based on McCray's failure

to exhaust his administrative remedies. *See Sunbeam Television Corp. v. Mitzel*, 83 So.3d 865, 873-74 (Fla. 3d DCA 2012) ("[A]n individual claiming discrimination in the workplace must first file an administrative complaint with the FCHR . . . and exhaust the administrative remedies . . . before a civil action asserting discrimination may be brought."). The City's argument that the alleged wrongful termination could not be addressed because McCray had not complied with the statutory prerequisite was raised by a written motion served on McCray and was heard at a separate hearing. *Cf. Rice v. Kelly*, 483 So.2d 559, 560 (Fla. 4th DCA 1986) (cautioning "trial courts not to allow 'motions in limine' to be used as unwritten and unnoticed motions for partial summary judgment or motions to dismiss" but concluding that such error may be harmless). The fact that McCray had not complied with the statutory prerequisites was clear from the record. *See Brewer v. Clerk of Circuit Court, Gadsden Cnty.*, 720 So.2d 602, 604 (Fla. 1st DCA 1998) (affirming dismissal of employment discrimination and retaliation complaint for failing to comply with statutory prerequisites where the issue of appellant's noncompliance was tried by consent and determined by the trial court). As such, any error in the trial court's limiting McCray's damages claim via the motion in limine was harmless.

Finally, the termination issue was properly excluded, pursuant to *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (hereinafter "*National R.R.*").

Section 760.11 of the Florida Civil Rights Act ("FCRA") provides that: "[a]ny person aggrieved by a violation of [the FCRA] may file a complaint with the commission within 365 days of the alleged violation. . . ." § 760.11(1), Fla. Stat. Thus, McCray's time to file a charge based on his termination expired a year after it occurred. Under the federal counterpart of the FCRA, "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *National R.R.*, 536 U.S. at 113, 122 S.Ct. 2061. Rather, "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.* McCray argues that he was not required to file a new charge of discrimination because the termination was not a discrete discriminatory act, but, rather, was part of a continuing pattern of discrimination. We disagree.

The Supreme Court in *National R.R.* reasoned that claims based on discrete discriminatory acts must be filed within the statutory time period because the date on which they occur is easily identified. *See id.* at 114, 122 S.Ct. 2061. On the other hand, ongoing acts of discrimination, such as the hostile work environment claim at issue in *National R.R.*, involve repeated conduct. Thus, the Supreme Court reasoned that "[i]t 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[,] [p]rovided that an act contributing to the claim occurs within the filing period. . . ." *Id.* at 117, 122 S.Ct. 2061. *National R.R.* involved

discriminatory conduct that occurred prior to the statutory time period, whereas the instant case involves a termination which occurred subsequent to a timely charge of discrimination. Admittedly, the proper interpretation of *National R.R.* when applied to acts occurring subsequent to a timely charge of discrimination is unclear. Compare *Martinez v. Potter*, 347 F.3d 1208, 1210-11 (10th Cir.2003) (viewing *National R.R.* as requiring a claimant to timely file a new charge of discrimination for discrete incidents of discrimination and retaliation occurring after the time the original charge is filed) with *Wedow v. City of Kansas City, Mo.*, 442 F.3d 661, 672-73 (8th Cir.2006) (noting that *National R.R.* did not foreclose the possibility that "reasonably related subsequent acts may be considered exhausted," and thus actionable, where the subsequent acts are "'like or reasonably related to the administrative charges that were timely brought'") (citation omitted). However, in accordance with the reasoning of *National R.R.*, McCray's termination is best viewed as an act that reset the time period in which to file a new charge of discrimination. *See also Tademe v. Saint Cloud State Univ.*, 328 F.3d 982, 988 (8th Cir.2003) (noting that *National R.R.* makes clear that termination is generally considered a separate violation). The termination was a separate and different act from the allegations contained in McCray's charges of discrimination and the date on which the termination occurred is easily identified. *See Holder v. Nicholson*, 287 Fed.Appx. 784, 793 (11th Cir.2008) (holding that plaintiff's discrimination claim based on a wrongful termination was

properly excluded as the termination was a "separate act" and plaintiff treated each wrong as a "separate action" from her other claims). Because McCray failed to file a new charge of discrimination including the termination, he was properly prevented from presenting it during the instant proceedings. Further, since the termination was not an issue for the jury, the jury was limited to awarding damages based only on the five suspensions properly at issue. There is no evidence in the record supporting a damages award of $230,000. Thus, the trial court's order of a new trial was appropriate.

Based on the above reasoning, the trial court's order is affirmed in all respects.

Affirmed.

WARNER and CONNER, JJ., concur.

WILLIAM McCRAY, **Plaintiff,**	**IN THE CIRCUIT COURT OF THE 15th JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA**
v.	**CASE NO.: 50-2000-CA-008615XXONAB**
CITY OF WEST PALM BEACH **Defendant.** /	

ORDER IN LIMINE

THIS CAUSE came on to be heard on Tuesday, November 7, 2006, on Plaintiff's and Defendant's Motions in Limine. After hearing arguments of counsel, considering written submission of the parties and being otherwise fully informed in the premises, the Court orders as follows on the Motions listed below:

Plaintiff William McCray, Motion in Limine to Preclude Reference to Arbitration Proceeding and to Arbitrator's Decision; **GRANTED IN PART, DENIED IN PART**, **as ordered in and for reasons stated in the record**.

Defendant, City of West Palm Beach, Motion in Limine to Limit Plaintiff's Witnesses and Exhibits; **DENIED, but Plaintiff is ordered to submit on or before December 1, 2006, the schedule of witnesses he actually intends to call to testify at trial at and in the order he intends to present them. Likewise the Defendant is ordered to submit on or before December 15, 2006, the schedule of witnesses it actually intends to call to**

testify at trial and in the order it intends to present them.

Defendant, City of West Palm Beach, Amended Motion in Limine to Exclude Evidence Unrelated to Alleged Acts of Discrimination and Unlawful Retaliation Occurring Before April 26, 1998; **GRANTED IN PART, DENIED IN PART, as ordered in and for reasons stated in the record**.

Defendant, City of West Palm Beach, Motion in Limine to Exclude Testimony Unrelated to Alleged Acts of Discrimination and Unlawful Retaliation Occurring Before April 29, 1998; **GRANTED IN PART, DENIED IN PART, as ordered in and for reasons stated in the record**.

Defendant, City of West Palm Beach, Motion in Limine to Exclude Evidence of Alleged Acts of Misconduct of Persons Not Similarly Situated to Plaintiff; **GRANTED IN PART, DENIED IN PART, as ordered in and for reasons stated in the record**.

Defendant, City of West Palm. Beach, Motion in Limine to Exclude from Trial the Issue of Plaintiff's Termination of Employment; **GRANTED, as ordered in and for reasons stated in the record**.

Defendant, City of West Palm Beach, Motion in Limine to Exclude Evidence of Alleged Acts of Discrimination and/or Retaliation Not Included in Plaintiff's Charges of Discrimination; **GRANTED IN PART, DENIED IN PART, as ordered in and for reasons stated in the record**.

Defendant, City of West Palm Beach, to Limit Claims of Plaintiff to Those Disclosed in Discovery; **GRANTED**

IN PART, DENIED IN PART, as ordered in and for reasons stated in the record.

Defendant, City of West Palm Beach, to Exclude Evidence of Disparate Treatment Where No Comparators are Identified; **GRANTED IN PART, DENIED IN PART, as ordered in and for reasons stated in the record**.

Defendant, City of West Palm Beach, Motion in Limine Precluding the Presentation of Evidence of Alleged Discrimination and/or Retaliation Where Claims have been Settled; **This Motion is neither granted nor denied at this time as ordered in and for reasons stated in the record**.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this ___ day of November, 2006.

JONATHAN D. GERBER
CIRCUIT COURT JUDGE

Copies to:
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Supreme Court of Florida

THURSDAY, APRIL 18, 2013

CASE NO.: SC12-1897
Lower Tribunal No(s).:
4D10-3393,
502000CA008615XXX
XMB

WILLIAM MCCRAY	vs.	CITY OF WEST PALM BEACH
Petitioner(s)		Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

POLSTON, C.J., and QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

kb
Served:

BARRY M. SILVER
ISIDRO M. GARCIA
CLAUDIA MCKENNA
ZOE PANARITES
JACOB ADDINGTON ROSE
KIMBERLY L. ROTHENBURG
HON. MARILYN BEUTTENMULLER, CLERK
HON. SHARON BOCK, CLERK
HON. DONALD W. HAFELE, JUDGE