2002

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REGIONAL LABOR REVIEW, vol.5, no. 1 (Fall 2002): 36-39.

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This June, the U.S. Supreme Court decided a technical, but important case interpreting Title VII of the Civil Rights Act of 1964.[1] The case–*National Railroad Passenger Corp. (Amtrak) v. Morgan*[2]–was a victory for victims of sexual and other forms of harassment, but a loss for victims of other forms of illegal workplace discrimination. The issue was whether incidents of discrimination that occurred outside the statute of limitations could nevertheless form the basis for a suit pursuant to the "continuing violations" doctrine. The answer from the Court, in a decision authored by Justice Clarence Thomas, was "Yes and no."

This case arose out of the longstanding but troubled employment relationship between Abner Morgan, a black electrician, and Amtrak. According to Morgan, from the time he was hired as an Electrician Helper in 1990 until the time he was fired in 1995, he was subject to a series of discriminatory acts at the hands of his employer. Morgan alleges that he was paid differently, punished unfairly, denied union representation in disciplinary meetings, and harassed because of his race. Amtrak, however, disputes many of these claims on the merits.

Amtrak moved for summary judgment on some of Morgan's claims based solely on the theory that they were time-barred (that is, too early to come within the relevant statute of limitations). The trial court granted the motion and dismissed all claims occurring prior to May 3, 1994, 300 days before Morgan filed a complaint with the Equal Employment Opportunity Commission (EEOC).

The remaining claims went to trial, but a jury found for Amtrak on all counts. That was not the end of the case, however, for the Ninth Circuit Court of Appeals held that the pre-May 3, 1994 claims should not have been dismissed in their entirety because they were "sufficiently related" to those occurring within the limitations period.[3]

The "Continuing Violations Doctrine"

Title VII of the Civil Rights Act of 1964 is the primary federal statute used to challenge race discrimination in employment. It requires that complainants first seek relief from the EEOC, the federal agency charged with the responsibility of administering the nation's employment discrimination laws.[4]

A charge with the EEOC must be filed within the "charge-filing period," which is either 180 or 300 days from the discriminatory act, depending on whether the state where the discrimination is alleged has an agency that shares the work of processing complaints with the EEOC.[5] The EEOC then has the opportunity to review the case, investigate the claims, and decide whether the case has any merit. If it does, the EEOC will sometimes sue on the employee's behalf–or even, if the complaint reveals widespread illegal conduct, on behalf of a class of employees. No matter what the EEOC's decision may be, the complainant at some point earns the right to bring a lawsuit in court.

The argument that acts outside the charge-filing period cannot be sued upon is simple: because the statute of limitations has expired with respect to these incidents, a plaintiff cannot bring suit based on them. The argument that such acts can indeed sometimes be sued upon is based upon the theory that recurring acts of related discrimination may form a single unlawful employment practice for purposes of Title VII. The employer's discrimination should thus be actionable—in its entirety—as long as least one of the isolated acts occurred within the charge-filing period. This argument constitutes the "continuing violations doctrine."

Prior to the Supreme Court's decision in *Morgan*, the legal status of the continuing violations doctrine had plagued courts for a decade and produced a split within the federal courts of appeals. The question that divided the courts was whether Title VII plaintiffs who make it past the

EEOC should be able to recover for discriminatory acts that occurred outside of the relevant limitations period. A leading treatise variously describes the pre-*Morgan* caselaw on this issue as "muddled" and "defy[ing] easy description or convenient characterization,"[6] and describes the Court's own prior cases as "impossible to reconcile."[7] A brief review of relevant cases proves the point.

Past courts agreed that an isolated act of discrimination that occurred outside of the charge-filing period was untimely and could not provide a basis for suit.[8] They also generally agreed that the doctrine of "equitable tolling" applied, which can extend the limitations period for fairness reasons.[9] For example, an employee might be able to file an untimely suit if the employer made affirmative representations that led the employee to miss the charge-filing deadline, or if the employee mistakenly filed the charge with the wrong federal agency.

But suppose there is no basis for equitable tolling, and an employee has been subjected to multiple, related discriminatory acts, some of which fall within the relevant time period, and some of which do not. This is a so-called serial violation, and courts before *Morgan* disagreed on whether suit could be brought upon all the acts or only those that fall within the charge-filing period. This split turned on a disagreement about when an unlawful employment practice "occurs."

When Does An Unlawful Employment Practice "Occur"?

Some circuit courts, as in the *Morgan* case, took the position that an unlawful practice occurred when the last act in a series of "sufficiently-related" acts took place. Take, for example, a case of hostile environment harassment, which, by its very nature, usually takes place over a period of time and includes multiple acts. According to the Ninth Circuit, the harassment plaintiff could sue at any time up until the date of the last act of harassment plus the limitations period. This theory, however, was not limited to cases of serial harassment; it could also be used when an employee was repeatedly discriminated against in some other way–both in the past and, more recently, within the limitations period.

Four federal circuit courts had adopted a more demanding test.[10] Like the Ninth Circuit, they first asked whether the alleged acts involved the same type of discrimination as the later acts that fell within the proper time period. But they also asked whether the earlier acts could fairly be described as "recurring" (if not, the plaintiff could not sue upon them) and whether the earlier acts were sufficiently "permanent" to trigger the employee's awareness of and duty to challenge them (if so, the plaintiff could not sue upon them on the theory that she should have sued upon them earlier).

Other circuit courts had adopted a "notice accrual" approach to the problem.[11] Under this approach, a plaintiff could only sue for acts outside of the limitations period if it would have been unreasonable to expect the plaintiff to file a charge earlier. That might happen if early acts of discrimination were secret (a racist comment in a review the employee was not allowed to read, for example). It might also happen if the plaintiff reasonably thought that, early on in course of harassment, she could not yet sue because a hostile environment had not yet been created. Meanwhile, other federal courts permitted prior acts to be used as background evidence, so that a jury would hear about them, but did not permit them to be used by the jury in calculating damages.[12]

When Abner Morgan went before the Supreme Court, he argued that the Ninth Circuit got it right—that prior acts can be the basis of an award of damages so long as they are sufficiently related to at least one act occurring during the charge-filing period. Amtrak, on the other hand, argued for the more restrictive notice accrual approach described above. And, oddly enough, the United States went even further in supporting the employer's position—arguing, apparently, that there are simply no circumstances under which an employee ought to be able to recover for discriminatory acts occurring outside of the charge-filing period. This extreme position differed from that of the EEOC, thus putting President Bush's Solicitor General in direct conflict with an executive branch agency.

The Supreme Court's Ruling

Faced with so many competing approaches, the Supreme Court struck a compromise. The majority first differentiated between discrete acts of discrimination (like a discriminatory failure-to-promote or firing) and hostile environment harassment, and then adopted a different rule for each.

With respect to the former category, the Court held—unanimously—that each act constitutes an "unlawful employment practice" that occurs at the time the act is taken. The charge-filing period begins with the conclusion of each such act—but only applies to the triggering act itself. The Court thus refused to recognize the continuing violations doctrine for discrete acts, regardless of whether the act or a similar act subsequently recurs.[13] The similarity among discrete acts, the Court held, does not convert them into a single unlawful employment practice, nor does it enable a plaintiff to combine untimely and timely acts for purposes of a lawsuit. The Supreme Court thus reversed the Ninth Circuit on this point. (The Court did acknowledge, however, that untimely acts may be used as background evidence to support a claim based on timely acts,[14] and that equitable doctrines like tolling or estoppel could be invoked to extend or shorten the charge-filing period.[15])

The Court also left open two questions not directly raised by the facts in *Morgan*, and upon which lower federal courts may continue to disagree. First, it did not resolve whether the doctrine might apply to "pattern and practice" cases, in which the claim centers on aggregating various acts to prove systemic discrimination.[16] Second, it did not address whether the charge-filing period should begin for a hidden violation when it occurs, or only when the plaintiff discovers that it has occurred.[17]

For hostile environment harassment, a majority of the Supreme Court took a different approach. In a part of the opinion garnering only five votes, the Court recognized that the nature of a hostile environment claim is that a series of different acts, some very minor, can combine to create an unlawful employment practice for Title VII purposes. The illegal practice occurs when the combined acts become sufficiently severe or pervasive to alter the conditions of employment by creating a hostile, offensive, or abusive working environment. For such a practice, the Court held that a victim may sue for the entire period of the hostile environment, as long as a single act contributing to the claim occurred during the charge filing period.[18] This is true even though a hostile environment may become actionable long before the last act of harassment occurs. As long as the harassment continues, the charge-filing period is pushed back by each subsequent act.[19]

Dissenters criticized the majority opinion as both too lenient and too harsh. Chief Justice Rehnquist and Justices O'Connor and Breyer would have reached the question of hidden violations, at least to clarify that some form of notice rule should be used to determine when discrimination occurs.[20] This further step would have given more rights to victims than the majority did.

But four members of the Court (Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy) would have rejected the continuing violations doctrine in cases of harassment as well as discrete acts of discrimination.[21] These dissenters would treat each act of harassment, whether itself sufficient to create a hostile environment or not, as a form of discrimination that "occurs." At the time suit is brought, only those occurrences within the charge-filing period could form the basis for a hostile environment claim. This approach, the dissenters argued, is justified by the unfairness an employer would face trying to defend itself against, for example, a suit alleging a hostile environment over a ten-year period.[22]

Did Any Justice Get it Right?

In the end, no Justice endorsed a position as broad-ranging as the Ninth Circuit's, while only two endorsed the extremely restrictive approach advocated by the government. The approach taken by the majority is very much a compromise that preserves some important rights for victims of harassment while depriving victims of other forms of discrimination of similar protection.

The approach taken in the majority and dissenting opinions are, however, both vulnerable to criticism. The majority's refusal to recognize the continuing violations doctrine in non-harassment cases (a position shared by the

dissenters as well) is hard to justify. There are already limits in the law that effectively prevent most employers from being faced with a damage award based upon discrimination that took place long ago. Title VII, for example, limits awards of back pay to two years, no matter how long the discrimination has been occurring.

The dissenters' concern about stale harassment claims is a straw man. In sexual harassment law, employer liability is inherently limited by the affirmative defense the Court created four years ago, which protects employers when they have taken adequate measures to prevent and correct harassment and the victim has taken too long to complain.[23] Thus a "good" employer–one that properly adopted an effective harassment policy and complaint system–will be exonerated in a case where the victim waits more than a few months to complain. The only employer protected by the extreme position advocated by the dissenters is the "bad" employer who sits back and does nothing while harassment recurs, and then objects to being held liable for the more dated acts. Such an employer does not deserve statute of limitations protection, for it could have addressed the harassment itself long ago; having allowed a lengthy course of harassment to occur, that employer should not later be heard to complain that the course of harassment alleged is too lengthy.

In the end, not a single justice was willing to acknowledge this basic truth: a pattern is still a pattern, even if it does not constitute a hostile environment. Employers who continue to engage in repeated acts of discrimination should not benefit from a statute of limitations designed to give closure to acts that are long since over and done with. Their pattern is not over, and neither should their exposure to lawsuits be. Nevertheless, the case is at least a partial victory, one that will benefit "hostile environment" plaintiffs, although it should have been a victory for other discrimination plaintiffs as well.

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NOTES

1 *See* 42 U.S.C. §§ 2000e-2000e-17 (1994 & Supp. V 1999).

2 Nat'l R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061 (2002).

3 Morgan v. Nat'l R.R. Passenger Corp., 232 F.3d 1008, 1015 (9th Cir.), *aff'd in part and rev'd in part*, 122 S. Ct. 2061 (2002).

4 *See* 42 U.S.C. §§ 2000e-4-2000e-5 (1994).

5 *See* 42 U.S.C. § 2000e-5 (1994).

6 PHILIP J. PFEIFFER, EMPLOYMENT DISCRIMINATION LAW 770 (3d ed. Supp. 2000).

7 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1351(3d ed. 1996).

8 *See, e.g.*, Chaffin v. Rheem Mfg. Co., 904 F.2d 1269, 1271 (8th Cir. 1990); Berry v. Bd. of Supervisors, 715 F.2d 971, 979 (5th Cir. 1983); Gavigan v. Clarkstown Cent. Sch. Dist., 84 F. Supp. 2d 540, 545 (S.D.N.Y. 2000).

9 *See, e.g.*, Chaffin, 904 F.2d at 1272; Kriegesmann v. Barry-Wehmiller Co., 739 F.2d 357, 358-359 (8th Cir. 1984); Price v. Litton Bus. Systems, Inc., 694 F.2d 963, 965 (4th Cir. 1982).

10 *See* Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 481 (3d Cir. 1997); Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1415 (10th Cir. 1993); Sabree v. United Bd. of Carpenters, 921 F.2d 396, 402 (1st Cir. 1990); *Berry*, 715 F.2d at 781.

11 *See, e.g.*, Galloway v. GM Serv. Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996).

12 *See, e.g.*, Keeler v. Putnam Fiduciary Trust Co., 238 F.3d 5, 12 (1st Cir. 2001); Gipson v. KAS Snacktime Co., 83 F.3d 225, 229 (8th Cir. 1996).

13 *Morgan*, 122 S. Ct. at 2072.

14 *Id.*

15 *Id.*

16 *Id.* at 2073 n.9.

17 *Id.* at 2073 n.7.

18 *Id.* at 2074.

19 *Id.*

20 *Id.* at 2078 (O'Connor, J., dissenting).

21 *Id.* (O'Connor, J., dissenting).

22 *Id.* at 2078-79 (O'Connor, J., dissenting).

23 *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998).