

Continuing Violation Doctrine and Hostile Environment Cases

By Jeffrey M. Schlossberg

A supervisor subjected an employee to a hostile work environment for 10 years. In the 11th year, another act of alleged harassment occurred and the employee filed a claim of discrimination within the statute of limitations period for the most recent incident. But the employee's claim is based in part on actions that occurred over the entire 11-year period. May the employee maintain a discrimination claim based on all of the incidents, even though most occurred outside the statute of limitations period?

The answer is an unqualified yes, according to the recent U.S. Supreme Court decision in *National Railroad Passenger Corp. v. Morgan*.^{[1]†}

Addressing the issue of the "continuing violation doctrine" for the first time, the Court ruled that a claim alleging hostile work environment harassment "will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period."^{[2]†}

In order to maintain a claim under Title VII of the Civil Rights Act of 1964, a plaintiff must first file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 300 days "after the alleged unlawful employment practice occurred."^{[3]†}

'Morgan'

In *Morgan*, the Supreme Court answered the questions of (a) when the "unlawful employment practice" occurs in a hostile environment case and (b) whether, and under what circumstances, a Title VII plaintiff may file suit based on events that fall outside the statutory time period (i.e., more than 300 days before the charge is filed).

The specific facts in *Morgan* are as follows: On Feb. 27, 1995, Abner J. Morgan, Jr., an African-American, filed a charge of discrimination and retaliation against Amtrak with the EEOC and the corresponding California state agency. Morgan alleged that throughout his employment with Amtrak, he was "consistently harassed and disciplined more harshly than other employees on account of his race."^{[4]†}

Although some of the alleged acts of harassment occurred within 300 days of the time he filed the charge with the EEOC, many took place before then.

Amtrak moved for summary judgment on all incidents that occurred more than 300 days before Morgan

filed his EEOC charge. The district court granted Amtrak summary judgment, ruling that the company could not be liable for conduct occurring more than 300 days prior to Feb. 27, 1995 (when Morgan filed the EEOC charge).

On appeal, the 9th U.S. Circuit Court of Appeals reversed, applying the continuing violation doctrine, which permits courts to consider conduct that would ordinarily be time barred, so long as the untimely incidents are part of an ongoing employment practice.

High Court's Ruling

Before the Supreme Court focused on hostile environment claims, it addressed cases involving discrete acts of alleged discrimination, such as termination, failure to promote, or refusal to hire. The Supreme Court ruled that in cases involving discrete acts of discrimination (even if those acts were related), each incident constitutes a separate actionable unlawful employment practice.

As such, Morgan could only pursue claims of discrete acts that occurred within 300 days of the filing of the EEOC charge. Thus, for example, if Morgan were denied a promotion more than 300 days before filing his EEOC charge, that act could not be considered in determining Amtrak's liability.[5]†

The Supreme Court, however, took an entirely different approach in considering Morgan's claim of hostile work environment harassment.

First, the Court explained that hostile environment claims are "different in kind from discrete acts. Their very nature involves repeated conduct." As the Court explained, the unlawful employment practice "cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."

Reviewing established precedent in the area of hostile work environment harassment, the Court noted that Title VII is violated "'when 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 and create an abusive work environment . . . "[6]†

In considering hostile environment cases, the Court examines all the circumstances, including the frequency of the conduct, its severity, whether the conduct is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. As such, the Court concluded that the "unlawful employment practice" for purposes of measuring the statute of limitations in a hostile work environment claim is "comprised of a series of separate acts that collectively constitute one

'unlawful employment practice.'"

The Court thus reasoned it does not matter that some of the component acts fall outside the statutory time period. A Title VII charge will be timely, the Supreme Court held, so long as one act that makes up part of the claim falls within the filing period. Accordingly, "the entire time period of the hostile environment may be considered by a court for the purposes of determining liability."

As to Morgan's claim, the record established that his managers made racial jokes, performed racially derogatory acts, made negative comments regarding the ability of blacks to be supervisors, and used racial epithets.

The Court noted that many of these acts occurred outside the 300-day filing period but the Court refused to dismiss Morgan's claim because it was possible that all the actions were part of the same actionable hostile environment claim.[7]†

Unfortunately, the Court did not offer any guidance on how to determine whether a series of acts will be part of the same unlawful employment practice, noting only that it will be a lower court's responsibility "to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory period."

Employer Defenses

As a result of the Court's ruling in Morgan , employers will be called upon to defend events that may have occurred years earlier. However, as pointed out by dissenting Justice Sandra Day O'Connor, over time evidence may be lost, memories fade and witnesses disappear. Thus, other than defending the claims on the merits, an employer appears to be left only with equitable defenses to thwart such claims.

For example, the Court notes that an employer may assert a laches defense, which bars a plaintiff from maintaining a suit "if he unreasonably delays in filing a suit and as a result harms the defendant." However, establishing the level of prejudice necessary for a laches defense is extraordinarily difficult, requiring a defendant to show that the plaintiff sat quietly by and neglected to pursue a claim.

Additionally, with its Morgan decision, the Court has now held that a series of events over a period of years may legally constitute one unlawful employment practice. If a series of events over a period of years constitutes one actionable event, it is difficult to envision that a lower court will find that the passing of the same amount of time also constitutes an unreasonable delay sufficient to rise to the level

of laches.

Conclusion

The Supreme Court's Morgan decision is a substantial victory for plaintiffs asserting claims of hostile environment harassment. Employees can maintain logs of events that extend for years and rely upon those remote incidents to establish an employer's liability for hostile environment harassment.

The Morgan ruling is another signal to employers of the need to establish methods to investigate and promptly address situations involving workplace harassment. Of course, as part of the employer's efforts it should memorialize witness statements to protect against the passage of time and fading memories.

Certainly, if an employer allows harassment to go unchecked and/or fails to document the events contemporaneously, the employer will be faced with claims extending back years -- with little ability to defend itself effectively.

Foot Notes:

[1] 536 U.S. ___, No. 00-1614, slip op. (June 10, 2002).

[2] *Id.*, slip op. at 20. The Second Circuit had long held that "a continuing violation may be found where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." *Cornwall v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994). As a result of Morgan, however, a plaintiff will not be able to make out a claim relying upon "specific and related instances of discrimination" that fall outside the limitations period except in the context of a hostile environment claim.

[3] 42 U.S.C. §2000e-5(e)(1). The 300-day limitation period is applicable in states such as New York that have corresponding state agencies like the New York State Division of Human Rights. In states that do not have such agencies, the filing period is 180 days.

[4] Slip op. at 2.

[5] The Court noted, however, that even such time-barred acts could be offered and considered by a jury "as background evidence in support of a timely claim." *Id.* at 10.

[6] *Id.* at 14, quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

[7] The Court did note, however, that it was making no judgment on the merits of Morgan's claim.



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