

**SUPREME COURT ELIMINATES THE CONTINUING VIOLATION
THEORY IN EMPLOYMENT DISCRIMINATION CASES, FOR ALL
BUT HOSTILE ENVIRONMENT CLAIMS**

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On June 10, 2002, the United States Supreme Court issued a split decision in *National Railroad Passenger Corp. v. Morgan*, No. 00-1614, which resolved the issue of whether a plaintiff may seek recovery for discriminatory acts that occurred outside of the statutory time period under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* ("Title VII"). In a major decision, the Court strictly adhered to the statute of limitations provision of Title VII. The Court held that Title VII, which requires plaintiffs to file charges with the Equal Employment Opportunity Commission ("EEOC") either 180 or 300 days after the unlawful employment practice occurred, precludes recovery for acts of discrimination that occur outside this time period. Thus, the Court eliminated the application of what has become known as the continuing violation doctrine in such cases. However, in a hostile work environment claim, a party may seek to impose liability for the entire period of time, including for behavior that occurred outside of the usual Title VII limitations period, if at least one of the acts constituting the hostile environment took place within the time period.

**THE CONTINUING
VIOLATION DOCTRINE**

By way of background, over the last 25 years, the courts have grappled with Title VII cases in which the plaintiff brings a claim that seeks recovery not just for events that occur within the relatively short Title VII statute of limitations (*e.g.*, 180 days, unless the claim is brought in a state in which there is a state or local fair employment practices agency, in which case the Title VII limitations period is 300 days) but also for earlier-occurring events as to which the limitations period has already expired. With no firm principle of law to determine whether such pre-limitations period claims are valid, the lower federal courts reached irreconcilable results in a myriad of cases. Some courts found that the older events were part of a pattern of ongoing discrimination that was also manifested by the employer through acts within the limitations period, while in other seemingly similar cases the prior events were found to be insufficiently related to the current and timely claims to permit the employee to impose liability against the employer for the otherwise untimely acts. *Compare Mamos v. School Comm. of Wakefield*, 553 F. Supp. 989, 993 (D. Mass. 1983) (employee may litigate refusals to reinstate that

occurred more than 300 days prior to filing charge with EEOC where there were also refusals to hire within the limitations period), with *Pao v. Holy Redeemer Hospital*, 47 F. Supp. 484, 493 n.4 (E.D. Pa. 1982) (refusals to hire that predated limitations period may not be basis for liability).

The doctrine that has permitted pre-limitations period conduct to be litigated has been known as the *continuing violation* doctrine, and it has been invoked in several contexts: (1) where the employer has committed a number of acts, each of which may violate Title VII, but where some occurred outside the limitations period and at least one occurred within the period; (2) where the employer maintains a discriminatory policy or practice, *e.g.*, by failing to promote women or assign minority-group employees to certain jobs; or (3) where the employee has recently suffered residual effects of a discriminatory act by the employer outside of the limitations period (such as in *United Air Lines v. Evans*, 431 U.S. 553 (1977), in which an employee who resigned because of a discriminatory policy and whose seniority date, on rehire, did not credit her for prior service did not prove continuing discrimination when the employee had not filed a timely charge with respect to the conduct giving rise to the resignation). See 2 B. Lindemann & P. Grossman, *EMPLOYMENT DISCRIMINATION LAW* 1351-60 (3d ed. 1996).

Prior to *Morgan*, litigation involving the application of the statute of limitations in category (1) cases typically focused on the degree to which the acts that are challenged on a timely basis are related to acts that occurred outside of the charge-filing period. It is in this category that the case law has been in the greatest state of disarray. In many category (2) cases, the courts focused on whether an employer's policy or practice was sufficiently formal to tie the acts that occurred outside of the limitations period to those that occurred more recently. With respect to category (3) cases, the Supreme Court has largely foreclosed liability for pre-limitations period acts where there was no unlawful act of the employer within the limitations period.

Some courts have attempted to instill theoretical discipline in this area, by examining such factors as whether the acts complained of involve the same type of discrimination, such as race-based denials of salary increases, whether the acts are recurring and whether the earlier acts were sufficient in seriousness to put the employee on notice that he/she had been discriminated against and therefore should have filed a charge approximately at the time of occurrence. See *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983). But these suggestions have not been followed with rigor.

Finally, courts have recognized that apart from those cases involving relatively discrete acts of disparate treatment, cases involving claims of a hostile work environment (whether on the basis of race, sex, religion or otherwise) present a different issue with regard to the applicability of the continuing violation doctrine. Because hostile work environment claims involve the cumulative effects of what may be day-to-day workplace conduct, and require a finding that the acts have been severe and pervasive in the workplace, courts have applied the continuing violation doctrine to hostile environment cases on finding a congruence between the current acts and those that occurred in the pre-limitations period. See *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 483 (3d Cir. 1997).

The Supreme Court's recent decision in *Morgan* held that the continuing violation theory is inapplicable to category (1) and (2) cases, as described above, and that the theory remains viable only with respect to cases alleging a hostile work environment.

THE FACTS OF MORGAN

In the *Morgan* case, the employee, Abner J. Morgan, Jr., an African-American male, filed a charge of discrimination and retaliation with the EEOC claiming that during his employment with the National Railroad Passenger Corp. ("Amtrak"), he was "consistently harassed and disciplined more harshly than other employees on account of his race." While some of the acts occurred within the 300-day time period before the date he filed his EEOC claim, many of the acts took place prior to that time period. Amtrak argued that it was entitled to summary judgment on all incidents that occurred before the 300-day time period pursuant to Title VII.

**THE DECISIONS OF THE DISTRICT
COURT AND COURT OF APPEALS**

The District Court granted summary judgment in part to Amtrak, holding that the company could not be liable for conduct that fell outside of the 300-day filing period. The court relied on a Seventh Circuit test where a plaintiff can rely on conduct outside of the time period only if it would have been unreasonable to expect the plaintiff to sue before the time period ended, such as when actionable harassment is only recognized in light of later occurring events.¹ The District Court held that because Morgan believed he was being discriminated against at the time the actions occurred, it would not be unreasonable to expect him to file an EEOC charge before the end of the time period.

The Ninth Circuit Court of Appeals reversed, relying on the "continuing violation" doctrine, which "allows courts to consider conduct that would ordinarily be time barred as long as the untimely incidents represent an ongoing unlawful employment practice." As stated above, this doctrine allows recovery if a plaintiff can show a series of acts where at least one of the acts is within the statutory time period and the acts outside the time period are sufficiently related to those occurring within the time period. In addition, recovery is permissible if the plaintiff can establish a systemic policy or practice of discrimination that at least partially operated within the time period.

¹ *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164 (7th Cir. 1996).

THE SUPREME COURT DECISION

The Supreme Court, noting the “various approaches” taken by the courts of appeals, granted *certiorari* to resolve the conflict between the circuits. The Court framed the issue as whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside the statutory time period. The Court, in partially reversing the Ninth Circuit, held that Title VII precludes recovery for discrete acts of discrimination that occur outside the statutory time period. However, consideration of the entire scope of a hostile work environment claim, including behavior that occurred outside of the time period, is permissible so long as at least one act took place within the time period.

As the starting point of its analysis, the Court emphasized the importance of “strict adherence to the procedural requirements specified by the legislature,” including short deadlines. *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980). Under Title VII, if a state has an entity with the authority to grant relief for discrimination, an employee who initially files a grievance with that entity must file a charge with the EEOC within 300 days of the unlawful practice. If the state does not have such an entity, the employee must file the charge with the EEOC within 180 days. A claim is time barred if it is not filed within these specified time periods.

The Court focused on the sentence: “A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred.” 42 U.S.C. § 2000e-5(e)(1). The Court framed the critical question as “What constitutes an ‘unlawful employment practice’ and when has that practice ‘occurred’?” The Court concluded that the answer differs depending on whether the “unlawful employment practice” was a discrete discriminatory act or a hostile work environment.

DISCRETE DISCRIMINATORY ACTS

A discrete act is said to have “occurred” on the day that it “happened”. Therefore, a party must file a charge within either 180 or 300 days of the date of the “unlawful employment practice”. If the party fails to do so, it loses the ability to recover. Generally, discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify and each incident constitutes a separate actionable “unemployment practice”. Morgan argued, however, that Title VII does not require the filing of a charge within 180 or 300 days of each *discrete act*, but only that a charge be filed within the specified number of days after an “unlawful employment practice”. Morgan argued that the term “practice” connotes an ongoing violation.

The Court, however, concluded that there is no indication that the term “practice” converts related discrete acts into a single unlawful practice for the purposes of timely filing. In previous decisions, the Court has repeatedly interpreted the term “practice” to apply to a

discrete act even when it is connected to other acts.² In addition, the Court has held that discrete acts that fall within the statutory period do not make acts that fall outside the time period timely.³

Discrete discriminatory acts are not actionable if time barred, even when they are related to acts that occurred within the time period. Each discrete discriminatory act starts a new clock for filing charges. However, the existence of past acts and the employee's prior knowledge of their occurrence does not bar the employee from filing charges about related discrete acts so long as they are independently discriminatory and timely filed. Moreover, the statute does not bar an employee from using prior acts as background evidence to support a separate and timely claim.

HOSTILE WORK ENVIRONMENT CLAIMS

Hostile environment claims differ from claims of discrete discrimination because their very nature involves repeated conduct. The "unlawful employment practice" occurs over a series of days, or even years, and is not actionable on its own. Such claims are comprised of a series of separate acts that collectively constitute one "unlawful employment practice". As with discrete discrimination, the timely filing provision requires the plaintiff to file a charge within a certain number of days after the occurrence of the unlawful practice. However, here it is irrelevant that some of the component acts fall outside the statutory time period. As long as one of the acts contributing to the claim occurs within the filing period, the entire time period of the hostile work environment may be considered by the court for the purposes of determining liability.

EMPLOYER DEFENSES

Several defenses are available to employers against employees who bring hostile work environment claims based on actions that occurred over long periods of time. The filing period is subject to waiver, estoppel and equitable tolling. Furthermore, an employer may also raise a laches defense which would bar a plaintiff from maintaining a suit if he or she unreasonably delayed the filing. This defense requires a lack of diligence by the employee, as well as prejudice to the employer.

It must be noted that the plaintiff may not base a suit on individual acts that occurred outside the time period unless it would have been unreasonable to expect the plaintiff to sue before the statute of limitations expired. However, the statute does not separate individual acts

² See, e.g., *Bazemore v. Friday*, 478 U.S. 385 (1986); *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

³ See, e.g., *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

that are part of the hostile work environment claim from the whole for the purposes of timely filing and liability.

CONCLUSION

The Court's decision in *Amtrak* reflects the Court's determination to follow closely the specific language of Title VII. The effect of this decision is to encourage employees to file discrimination claims without delay as well as to ensure prompt processing of such claims, and/or to cause plaintiffs to assert hostile environment claims where older acts for which the employee seeks recovery lie outside the limitations period. This decision is favorable to employers and will likely increase dismissals of Title VII claims for discriminatory employment practices that occurred outside the statutory time period. However, although the Court stated that discrete acts falling outside the time period are not actionable, the facts must be examined in each case to determine whether the employee's claim constitutes a hostile work environment claim where related unlawful practices are actionable. Moreover, notwithstanding the decision in *Amtrak*, employers must be cognizant of other statutory rights that may provide a remedy for claims that would otherwise be barred by Title VII's filing deadline, *e.g.*, state discrimination laws with longer limitations periods.

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