By Charlotte G. Rowan

The Continuing Violations Doctrine after *National Railroad Passenger v Morgan*

On June 10, 2002, the United States Supreme Court handed both plaintiffs' counsel and defense counsel a victory with respect to the Continuing Violations Doctrine. The Continuing Violations Doctrine is a judicially created doctrine that allows courts to toll limitation periods for alleged discriminatory conduct that is deemed continuing in nature. In *National Railroad Passenger Corporation Morgan*[1] the Supreme Court addressed the application of this doctrine to suits brought under Title VII of the Civil Rights Act of 1964. This article explores the *Morgan* decision and its impact on the future of the Continuing Violations Doctrine in employment suits.

National Railroad Passenger Corporation v Morgan

In *Morgan,* Abner Morgan sued his employer, National Railroad Passenger Corporation, better known as "Amtrak," for race discrimination, retaliation, and hostile work environment under Title VII.[2] He alleged a series of discriminatory incidents from the beginning of his employment in August of 1990 until his termination on March 3, 1995.[3] On February 27, 1995, Morgan filed a charge with the Equal Employment Opportunity Commission (EEOC) and the California Department of Fair Employment and Housing. The EEOC issued a "Notice of Right to Sue," and on October 2, 1996 Morgan filed suit in the United States District Court for the Northern District of California.

Amtrak filed a motion for summary judgment arguing, in part, that it was entitled to a judgment on all incidents that occurred after the applicable 300-day statute of limitations period. The district court granted the motion, and held that Amtrak was not liable for incidents occurring prior to the applicable limitations period. The remaining allegations proceeded to trial and resulted in a verdict for Amtrak. Morgan appealed.[4]

The issue on appeal was whether, under the Continuing Violations Doctrine, Amtrak was liable for the incidents occurring prior to the applicable 300-day limitations period. The Ninth Circuit reversed the district court, holding that the incidents occurring prior to the limitations period were "sufficiently related" to the incidents that occurred within the limitations period to trigger the operation of the Continuing Violations Doctrine.[5] Amtrak appealed the Ninth Circuit's holding, and the United States Supreme Court granted certiorari.

Notably, the Supreme Court had before it the conflicting analyses of the Fifth, Seventh, and Ninth Circuits on the issue of what factual situation triggers the Doctrine's use. In its Supreme Court brief, Amtrak argued that the Court should adopt the analysis of the Seventh Circuit's *Galloway v General Motors Service Parts Operations,*[6] or the Fifth Circuit's *Berry v Board of Supervisors.*[7]

In *Galloway v General Motors Service Parts Operations,* Judge Posner wrote that a plaintiff can avail himself or herself of the Continuing Violations Doctrine when it would be "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 light of events that occurred later, within the period of the statute of limitations."[8] Judge Posner called this the "concept of cumulation."[9]

The Fifth Circuit's *Berry v Board of Supervisors* is very similar to *Galloway.* In *Berry,* however, the Court used a multifactor test to determine if a plaintiff can avail himself or herself of the Continuing Violations Doctrine. Under this test the plaintiff must prove that: 1) the alleged acts "involve the same type of discrimination": 2) the alleged acts are "recurring"; and 3) the alleged acts "have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights."[10]

Morgan argued, predictably, for the Supreme Court's adoption of the Ninth Circuit's analysis. He argued that the *Galloway* or *Berry* approaches improperly emphasized "the desire to encourage prompt filing of claims and conflicts with harassment victims' entitlement to the maximum benefit under the law." Notably, Morgan stated that there was a "natural affinity between hostile environment claims and continuing violations."[11]

The Supreme Court voted 5–4 to affirm the Ninth Circuit's approach to the Continuing Violations Doctrine as to hostile environment claims only.[12] With regard to claims of discrimination or retaliation, however, the Supreme Court unanimously reversed the

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Ninth Circuit, holding that Title VII "precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period."[13]

The majority opinion, written by Justice Thomas, for the first time emphasized the clear distinction between applying the Continuing Violations Doctrine to "hostile environment claims" and applying it to "discrete claims of discrimination or retaliation." Thomas wrote that discrete acts of discrimination or retaliation, such as discriminatory discipline or retaliatory termination, should be treated entirely differently than claims of hostile environment. Indeed, Justice Thomas stated:

> *Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice." Morgan can only file a charge to discrete acts that "occurred" within the appropriate time period.*[14]

With regard to hostile environment claims, however, the Court stated that "[p]rovided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." Thus, in deciding whether a plaintiff can use the Continuing Violations Doctrine to introduce evidence of incidents occurring outside the charge filing period, courts will have to determine whether these incidents are acts "contributing to" the incidents that occur within the charge filing period.[15]

Justice O'Connor concurred with the majority's opinion regarding discrete acts of discrimination or retaliation, but disagreed with the majority's opinion regarding hostile environment claims.[16] She wrote: "Unlike the Court, I would hold that section 2000e-5 (e)(1) serves as a limitations period for *all* actions brought under Title VII, including those alleging discrimination by being subjected to a hostile working environment."[17] Justice O'Connor reasoned that "[a]llowing suits based on . . . remote actions raises all of the problems that statutes of limitations and other similar time limitations are designed to address."[18]

Victory for Defense Counsel

The obvious victory for defense counsel is the fact that, after *Morgan,* when an employee alleges discrimination or retaliation under Title VII, these allegations are clearly limited to conduct that occurred within the limitations period. As Justice Thomas wrote, a plaintiff cannot argue that independent actions, such as a failure to promote, a denial of transfer and a termination, together constitute a serial violation that warrants a tolling of the limitation period. These are separate, discrete acts. Each act, if based on discrimination or retaliation, triggers the clock on the plaintiff's charge filing period. A plaintiff cannot use a discrete act that occurred within the charge filing period to resuscitate a discrete act that occurred outside the charge filing period.

Victory for Plaintiffs' Counsel

The significance of the victory the Supreme Court handed plaintiffs' counsel is best illustrated by example. Suppose an employer subjects an employee to a hostile environment over a period of ten years. This employee does not file a charge with the EEOC until year ten, but bases this charge on all the actions that occurred during the previous ten years. Under *Morgan,* if the acts beyond the charge filing period are sufficiently related to the acts within the charge filing period, the employee can maintain a hostile environment harassment claim based on all the incidents, even the most remote.

Conclusion

Admittedly, some leeway must be given any analysis of the statute of limitations with regard to claims of hostile environment. However, in *Morgan,* the Court seems to have ignored Congressional intent to place a charge filing limitation period on all Title VII claims. Under Justice Thomas's decision, a hostile environment plaintiff has no incentive to act diligently to file his or her claim. Indeed, the opposite is true. As long as the incidents of alleged harassment are "sufficiently related," a plaintiff can wait to file a claim. This is contrary to the whole idea of a limitations period. On the other hand, however, Justice O'Connor's view that each act restarts the limitation period running again is not completely consistent with the concept of hostile environment claims, which are cumulative in nature. Thus, both Justice Thomas and Justice O'Connor got it wrong.

An approach, similar to Judge Posner's approach in *Galloway,* based upon when a plaintiff actually has notice that he or she is being harassed would have been more consistent not only with the concept of statutes of limitations, but with the concept of hostile environment claims. Judge Posner of the Seventh Circuit has repeatedly advocated for this type of approach, and most eloquently summarizes it: "If the victim of sexual harassment sues as soon as the harassment becomes sufficiently palpable that a reasonable person would realize when she had a substantial claim under Title VII, then she sues in time and can allege as unlawful conduct the entire course of conduct that in its cumulative effect has made her working conditions unbearable."[19] In handing out a victory to both sides of the debate, the Supreme Court missed a valuable opportunity to decide a fair approach to the application of the Continuing Violations Doctrine to hostile environment claims. ✦

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FOOTNOTES

1. See *Morgan v National Railroad Passenger Corp,* 232 F3d 1008 (CA 9, 2000), cert granted.
2. See id. at 1010.
3. See id. at 1011–1013.
4. See id. at 1014.
5. See id. at 1017.
6. 78 F3d 1164 (CA 7, 1996).
7. 715 F2d 971 (CA 5, 1983).
8. See Galloway, supra, at 1167.
9. See id. at 1166.
10. See Berry, supra, at 981.
11. Resp. Br. at 10.
12. See *National Railroad Passenger Corporation v Morgan,* No. 00-1614, slip op at 20, 536 US ___ (Thomas, J., Majority Opinion, June 10, 2002).
13. See id. at 2.
14. See id. at 11.
15. See id. at 14.
16. See id. at 1.
17. See Morgan, No. 00-1614, slip op at 2, 536 US ___ (O'Connor, J., concurring in part and dissenting in part, June 10, 2002) (emphasis added).
18. See id. at 3.
19. See *Galloway v General Motors Service Parts Operations,* 78 F3d 1164, 1166 (CA 7, 1996).