

## **United States: U.S. Supreme Court Limits Application of the 'Continuing Violation' Theory**

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On June 10 the U.S. Supreme Court issued an important decision addressing the "continuing violation" theory in the context of a workplace discrimination claim in *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061 (2002). In an article appearing in the December 2001 issue of this newsletter titled "Recent Federal and State Decisions Reject the 'Continuing Violation' Theory," we had discussed three recent decisions applying the continuing violation theory to workplace discrimination claims under federal and New York State law. The Court's decision in *Morgan*, however, has further refined the parameters of the doctrine and set forth rules for its application that depend on the nature of the underlying claim.

The continuing violation doctrine, often asserted by plaintiffs alleging workplace discrimination, is an exception to the statute of limitations for actions brought under Title VII of the Civil Rights Act of 1964, which otherwise bars recovery for conduct occurring more than 180—or, in some states (including New York), 300—days prior to the filing of a discrimination charge with the Equal Employment Opportunity Commission (EEOC). The doctrine permits an employee to recover for discriminatory acts occurring prior to the applicable limitations period where such acts were part of a "continuing violation" that continued into the limitations period. The successful prosecution of a continuing violation case broadens the possibility of liability not only in an individual case, but also in the context of a class action.

In *Morgan*, Abner Morgan, Jr., an African American railroad electrician, filed an EEOC charge Feb. 27, 1995, alleging three violations of Title VII: (1) race discrimination based on specific adverse acts taken against him (in hiring, discipline and discharge), (2) retaliation for raising Title VII complaints and (3) "hostile work environment" racial harassment. After receiving a right-to-sue letter from the EEOC, Mr. Morgan filed a lawsuit Oct. 30, 1996. The district court held that Mr. Morgan could not recover for any acts that occurred prior to May 3, 1994—300 days before Mr. Morgan filed his EEOC charge. On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed, holding that for each of the three categories of claims, Mr. Morgan alleged conduct prior to the limitations period that was sufficiently related to the conduct within the limitations period to invoke the continuing violation doctrine.

After granting certiorari, the Supreme Court affirmed in part and reversed in part. In an opinion by Justice Clarence Thomas, a former chair of the EEOC, the Court announced two sets of rules. First, the Court unanimously held that discrete acts of discrimination—such as termination, failure to promote, denial of transfer and refusal to hire, as well as discrete acts of retaliation—are actionable only if an EEOC charge is timely filed within the applicable 180 or 300 days of when the act occurred. All prior discrete acts are untimely and no longer actionable. The Court did note, however, that such time-barred prior acts still may be used as "background evidence in support of a timely claim."

Second, in a sharply divided 5-4 ruling, the Court majority held that a different rule applies with respect to hostile work environment claims. The majority held that hostile environment claims are "different in kind from discrete acts" because "[t]heir very nature involves repeated conduct." As a result, "[t]he unlawful employment practice . . . cannot be said to occur on any particular day." Thus, the majority concluded that as long as one act contributing to the claim occurs within the limitations period, the entire period of the hostile environment may be considered for the purposes of assessing liability. The Court did suggest, however, that equitable defenses, such as waiver, estoppel and laches, remain available to employers in cases where an employee unduly delays pursuing his or her claim.

For employers, the decision is a mixed bag. In one sense, the Court's ruling is extremely helpful, since it disallows the use of the continuing violation theory to revive stale claims based on discrete acts of discrimination and retaliation. Thus, it should be easier for employers to obtain summary judgment dismissing such claims as time barred when they were not timely raised in an EEOC charge.

On the other hand, the decision creates the potential for expanded employer liability in connection with hostile environment claims. For such claims, employers may be exposed to liability for past events that otherwise might have been avoided, since a single timely allegation in an EEOC charge addressing one of a series of "hostile environment" events is enough to subject the entire period of harassment to the fact-finder's consideration.

One lingering issue after *Morgan* is the extent to which state courts will adopt the Supreme Court's approach when addressing a continuing violation claim under state anti-discrimination laws. Since, as discussed in our December 2001 article, the state courts have historically been guided by the federal continuing violation analysis, the *Morgan* approach is likely to be followed in many jurisdictions.

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