A P rti Leg ictory Ag inst Continuing Discri/ in tion. The Ne Supre/ e Court Ru ing in A/ tr k v Morg n

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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. Atl. 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 "contin-

EEOC should be able to recover for discriminatory acts that occurred outside of the relevant limitations period. A leading treatise variously describes the pre-

The Supre e Courts 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 *Morg* 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]

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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