7-2-2002

A Recent Supreme Court Decision Gives a Boost to Sexual Harassment Victims, But Not to Other Victims of Discrimination

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A RECENT SUPREME COURT DECISION GIVES A BOOST TO SEXUAL HARASSMENT VICTIMS, BUT NOT TO OTHER VICTIMS OF DISCRIMINATION

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Tuesday, Jul. 02, 2002

The Supreme Court's recent decision in *National Railroad Passenger Corp. (Amtrak) v. Morgan* resolved an important question relating to the interpretation of Title VII, the central federal anti-discrimination statute.

The case involved the statute's brief limitations period - which requires that suits be brought within either 180 or 300 days of when the alleged harassment occurred, depending on whether the state in which the suit is brought has a work-sharing agreement with the EEOC. The question the Court resolved was this: If a pattern of discrimination includes incidents too early to fall within the relevant period, can those incidents still form part of the basis for a discrimination suit?

As I described in a prior column, some federal appellate courts had said "Yes." In justifying their answer, they had invoked the "continuing violations" doctrine. Under this doctrine, an entire pattern of conduct can form the basis of a suit as long as at least one related act falls within the relevant period.

These courts reasoned that it is the pattern that needs to fall within the period, not every act of discrimination within it. All that is legally required, they said, is that the untimely acts were sufficiently related to at least one act that took place during the limitations period. They concluded that the relatedness of different acts made it reasonable to treat them as a single, "unlawful employment practice," as defined by Title VII, and to take untimely acts into account as long as some related acts were timely.

Other appellate courts, however, had refused to invoke as broad a version of the doctrine - taking narrower, and extremely varied, approaches.

In *Morgan*, the Supreme Court answered the question in an opinion authored by Justice Clarence Thomas - himself a former head of the Equal Employment Opportunity Commission who, of course, famously got into trouble based on Anita Hill's harassment claims. The Court's answer to the question about the continuing vitality of the continuing violations doctrine was "Yes and no."

The result 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 Supreme Court Majority's Compromise in *Morgan*: Two Rules

In the majority opinion, Justice Thomas put forth a view that represented a compromise between the positions advocated by the different sides. First, he differentiated between, on the one hand, discrete acts of discrimination (like a discriminatory failure-to-promote or firing), and on the other hand, hostile environment harassment (under which a climate of acts of harassment amounts over time to a hostile work environment for the victim).

Justice Thomas, on the majority's behalf, adopted a different rule for each type of situation. His approach is very much a compromise. It preserves some important rights for victims of harassment, while depriving victims of other forms of discrimination of similar protection.

What the Majority Opinion in *Morgan* Said About Discrete Acts of Discrimination

Take the fired secretary. With respect to discrete acts of discrimination such as the secretary's firing, the Court held that the 180 day/300 day period would begin when she was fired. Each such act, the Court reasoned, constitutes an "unlawful employment practice" that occurs at the time the act occurs. When the act concludes, the time period begins.

So far, this may sound reasonable. But the Court also held that the "continuing violations" doctrine cannot apply to a series of discrete acts, even when they are very similar. So suppose the secretary is not promoted because she refuses to sleep with her new boss - but, fearing the loss of her job, she doesn't sue. Then two years later, her boss propositions her again. This time, when she refuses, he fires her.

Under the Court's logic, the secretary can now sue for the firing, but not the earlier failure to promote. Even if discrete acts like the failure to promote and the firing are similar, the Court reasoned, that does not mean they are a single "unlawful employment practice." Thus, each act's timeliness must be evaluated as if that act stood alone, even if they seem to form a pattern.

The Court did acknowledge, however, that untimely acts may be used as background evidence to support a claim based on timely acts. So our hypothetical secretary, while she could not sue for and receive damages based on the nonpromotion, could at least take evidence to a jury about it.

The Court also recognized that plaintiffs could still invoke equitable doctrines like tolling (which stops a time period due to fairness concerns) or estoppel (which stops a defendant who caused a plaintiff not to file from complaining that she filed late). So, for instance, if our hypothetical secretary could prove her boss's intimidation was the reason she failed to timely sue about the nonpromotion, she might still be able to sue about it later, on a theory of estoppel or tolling.

All nine Justices agreed with this position, though three would have gone further to clarify other important Title VII questions, as I describe below.

The *Morgan* Majority, and Dissent, on Hostile Environment Harassment

Accordingly, the Court held that in the case of a hostile environment claim, 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. When that happens, the Court reasoned, it makes sense to consider - and let the plaintiff sue upon - the whole course of acts, timely or not. All that is required is that at least one act is timely.

One might think this makes sense because a plaintiff could not sue upon the early acts before the harassment became pervasive - so it is unfair to fault her for not suing earlier with respect to these acts, since she could not legally have done so. This logic also suggests that a plaintiff should be barred from her suit based upon untimely acts that did occur after the harassment became pervasive.

But the Court went beyond this logic, to allow untimely acts to be sued upon even if the plaintiff could have sued upon them within the 180 day/300 day period. As long as the hostile environment continues, the Court held, each new act means the plaintiff can go back in time to sue on all prior acts that comprised part of the hostile environment - regardless of whether she could also have sued on those acts long ago.

The Dissenters' Fairness Concerns, and Why They Are Misplaced

Four dissenting Justices (Rehnquist and O'Connor, Scalia, and Kennedy) would have rejected the continuing violations doctrine altogether--in cases of harassment as well as discrete acts of discrimination. They argued that each act of harassment in either context is an act of discrimination that "occurs" when it happens --and thus that it must be sued upon within the number of days fixed by statute.

If this rule were adopted, a hostile environment plaintiff could only go back 180 or 300 days to look for acts to sue upon. That is only fair, the dissenters argued, since going back further means the claim is harder for the employer to defend.

The majority's rule, the four dissenters pointed out, means an employer may have to defend itself against a harassment suit that has been building for ten years - even though the memories of witnesses who might have supported the employer may have faded and employee-witnesses may have left the company and moved to another state or firm.

An employer that has not intimidated the suing employee into keeping quiet, and has not had a supervisor who

did so- in which cases tolling/estoppel doctrines would apply - should not have to contend with this unfairness by facing a belatedly-filed claim, the dissenters noted.

This concern, however reasonable it might sound, is no longer realistic. Employer liability is limited in sexual harassment law--time-wise--by the affirmative defense the Court created four years ago in *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth*.

Moreover, courts interpreting the affirmative defense have adopted extremely stringent standards for victim complaints. Some have held that a delay a short as a month or even a week in filing an internal complaint can be sufficient to excuse the employer from liability. Far from worrying about whether an employee waits 180 or 300 days, these courts sometimes will not give the employee 7, or 30, days to wait.

There is thus no chance for the hypothetical employee who waits ten years before filing a complaint to win any resulting lawsuit. The dissenter's argument about unfairness to employers is thus itself unfair. Any employer with minimal knowledge of the law will adopt complaint procedures that will ensure it always has early knowledge of claims, and can always timely prepare itself to defend against them if it believes they are meritless (or, hopefully, to address them if it finds they have merit).

Questions the *Morgan* Majority Left Open

The Court also left open two questions on which lower federal courts may continue to disagree - questions that the facts of *Morgan* did not directly raise, and thus the Court chose not to decide.

First, it did not resolve whether the doctrine might apply to a so-called "pattern and practice" case, in which the claim centers on aggregating various acts to prove systemic discrimination.

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. An example of a hidden violation might be a firing that appeared neutral, but that comments in the plaintiff's employment file later showed to be discriminatory.

For instance, a worker believes he was fired because he missed a quota, but later learns he was misinformed about the quota; that he had actually met it; and that the reason for his firing was different, and discriminatory. Does the period start when he is fired, or when he learns about the real reason for it?

The Supreme Court still has not weighed in on this issue. Three Justices (Rehnquist, O'Connor and Breyer) would have reached this question, at least to acknowledge that some form of notice rule should apply to measure when discrimination occurs.

These Justices acknowledge the basic unfairness of an employee's being asked to sue for discrimination before he is sure it exists. This further step would have given more rights to victims, and would have avoided putting them in the unfair "Gotcha!" situation of being victimized both by discrimination and its cover-up.

Did Any Justice Get It Right?

In the end, the approaches taken in the majority and dissenting opinions are both vulnerable to criticism. The Court's 9-0 refusal to recognize the continuing violations doctrine in cases where employees face a series of discrete discriminatory acts - rather than a hostile environment - is probably an error.

The secretary who is not promoted because she won't sleep with her boss, then two years later is fired because she turns him down again, should be able to sue based on both acts. Both the nonpromotion and firing have serious financial consequences, and the secretary should be compensated for both, if they form a pattern, even if she waits until she is fired to sue.

Not a single Justice was willing to acknowledge this basic truth: A pattern is still a pattern, even if it does not constitute a hostile environment. Employers who continue to engage in repeated acts of discrimination should not benefit from a statute of limitations designed to give closure to acts that are long since over and done with. Their pattern is not over, and neither should their exposure to lawsuits be.

Nevertheless, the case is at least a partial victory, one that will benefit "hostile environment" plaintiffs. It should have been a victory for other discrimination plaintiffs as well.

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