

Leading the News

Discrimination Supreme Court Considers Arguments On Applying Continuing Violation Theory

During oral argument before the U.S. Supreme Court Jan. 9, discussion of the continuing violation theory as applied to claims under Title VII of the 1964 Civil Rights Act quickly turned to questions about whether Section 706(e) was a statute of limitations for liability purposes and why continuing violations should be considered conceptually different from other Title VII claims (*National R.R. Passenger Corp. v. Morgan*, U.S., No. 00-1614, oral argument 1/9/02).

In reviewing what Justice Sandra Day O'Connor called "a lopsided circuit split" created by the U.S. Court of Appeals for the Ninth Circuit's 2000 decision finding that Amtrak electrician Abner Morgan was covered under the continuing violation theory in his race bias suit, the justices questioned attorneys representing both sides--as well as the U.S. Justice Department--about the nuances of when a continuing violation or hostile environment claim begins to toll and whether the 300-day limitation for filing a claim with the Equal Employment Opportunity Commission was a statute of limitations for the purpose of liability.

The case arose after Morgan, who was hired in 1990 as an electrician helper at Amtrak's Oakland Maintenance Yard, quickly began having what he considered racially tinged experiences at the yard and was terminated after only six months for refusing to meet with two managers.

Fearing that the meeting would be disciplinary in nature, Morgan had refused to meet unless he was accompanied by a union representative, as allowed under a collective bargaining agreement with Amtrak. Morgan filed a grievance and was reinstated after a 10-day suspension--the most severe discipline imposed on an Amtrak employee between 1989 and 1992, Amtrak's inspector general claimed during trial.

Morgan continued to have complaints about his managers and took each of his complaints to Amtrak's EEO office for resolution. Until his eventual termination in 1995, Morgan continued to have conflicts at Amtrak, once resulting in a meeting with his congresswoman and in the intervention of Amtrak's inspector general. The conflicts included numerous disciplinary actions for absenteeism and tardiness, most of which were dismissed after grievances were filed. Morgan also alleged bias in managers' failure to assign him to training programs and in his managers' orders to perform work outside of his job description.

Charge Filed Four Years After First Incident

Morgan filed his EEOC charge in February 1995, and sued for race discrimination, racial harassment, and retaliation under Title VII of the 1964 Civil Rights Act. The trial court ruled that claims based on conduct prior to May 1994 were untimely because it would not have been unreasonable to expect Morgan to file an EEOC charge before then.

The Ninth Circuit rejected the trial court's use of the "reasonable knowledge approach of *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 70 FEP 341 (7th Cir. 1996), ruling that "this court has never adopted a strict notice requirement as the litmus test for

application of the continuing violation doctrine." To show a continuing violation, a plaintiff must demonstrate either a serial violation--a series of related acts one or more of which are within the limitations period--or a systemic violation--a systemic policy or practice of discrimination that operated in part within the limitations period, the court said.

The court found a factual issue as to whether Morgan could show a continuing violation on his discrimination claim. The allegations "reveal a consistent pattern of similar employment actions ... over the entire five-year period of employment, perpetrated by the same core group of managers. Such incidents are not discrete or isolated," the court said.

'If You Are in Doubt, Sue.'

In the case characterized by Amtrak attorney Roy T. Englert Jr. as "merely unfortunate history without legal significance," the justices questioned Englert on when a continuing violation occurs and when the employee should file a claim.

Englert--of Robbins, Russell, Englert, Orseck & Untereiner in Washington, D.C.--argued that Morgan had extensive notice that he was allegedly being discriminated against, and thus should not have waited four years before filing an EEOC charge.

Justice Antonin Scalia asked whether Morgan, or any plaintiff, should be held to a "knowledge of the injury" test in determining when a statute of limitations tolls or whether it was based on the actual injury.

Saying it depends on the situation, and to some extent whether the employee was arguing that there was a hostile work environment, Englert responded that the determination should be based on the actual injury.

"Doesn't this create an 'if you are in doubt, sue,' situation?" Justice Ruth Bader Ginsburg asked, adding that it forces employees to file 10 charges instead of just one when applied to continuing violations.

"No," Englert responded. "It is not about suing, but [about] going to the EEOC, and [it is] consistent with the charge filing requirements that employees go promptly to the EEOC."

Justices: Is Conciliation Undermined?

A number of the justices questioned Englert whether strict adherence to the 300-day period undermines the intention of internal mediation and conciliation. The justices noted that Morgan appeared to be attempting to resolve his problems within Amtrak's internal EEO process and only went to the EEOC after those attempts failed.

But Englert continued to insist that Morgan had plenty of opportunities to head to the EEOC with his claims prior to 1995 and that his efforts only demonstrated that he was on notice of potential discrimination, to the point that he contacted his congressional representative, then-Rep. (now-Sen.) Barbara Boxer (D-Calif.).

Responding to concerns that plaintiffs could potentially be prevented from obtaining full relief if the continuing violation theory was too strictly interpreted, Englert added that equitable estoppel and equitable tolling still could salvage claims that missed the 300-day charge filing requirement.

Representing the Justice Department, Austin Schlick attempted to clarify confusion over when is a claim based on a serial violation and on a hostile work environment claim. He explained that serial violations trigger the 300-day rule with each event while a hostile environment claim is actionable anytime during the period the employees believes bias is taking place, as long as some event occurs during the 300-day period.

Under questioning by Ginsburg, Schlick also explained that the position taken by the Justice Department in its brief and in oral arguments was in conflict with EEOC, which has taken a position on the continuing violation analysis consistent with the Ninth Circuit. It was the position of DOJ, Schlick said, that Morgan should be limited to recovery only for violations occurring during the charge-filing period.

Conflict Between 706(e), 706(g)

When Morgan's attorney, Pamela Price, took her turn before the court, she quickly moved the discussion to the apparent conflict between Section 706(e) and 706(g) of Title VII. Section 706(g) allows back pay liability to accrue for up to two years from the date a charge is filed.

"Amtrak is attempting to nullify 706(g) and negate the language of Title VII by limiting the application of the continuing violations theory," said Price of Price & Associates in Oakland, Calif.

She argued that when Congress enacted Section 706(g) in 1972, they were clear that claimants should be able to collect back pay for up two years prior to the filing of a charge. This two-year period would not have been necessary, Price continued, if Congress intended to limit recovery to 706(e)'s 300-day period.

"Congress had the opportunity in 1991 to amend 706(g) when it imposed the statutory caps on damages, but it chose not to," Price said.

'Not a Statute of Limitations.'

Despite skeptical questions from the court, Price continually reinforced her belief that 706(e)'s 300-day limitations were a charge-filing requirement consistent with EEOC's mission of conciliation and not a statute of limitations for liability purposes, therefore the 300-day rule should not be rigidly applied in continuing violations.

Ginsburg appeared to join Price in questioning the view of 706(e) as a statute of limitations, noting that in nondeferral states, the charge-filing period is 180 days as opposed to 300 days.

"Why would Congress create a statute of limitations with different time periods for residents of different states?" Ginsburg asked.

"They wouldn't have," Price responded. "That's not what was intended by the rule." She added that 706(e) was designed with laypeople, not lawyers, in mind when the EEOC filing rules were

created, and therefore it was unreasonable to expect nonlawyers to know when to wait and when to file.

Under questioning from Justice Anthony M. Kennedy, Scalia, and O'Connor about the necessity for the continuing violation analysis when Morgan was free to go to EEOC at anytime, Price responded that employees often are reluctant to go to EEOC out of fear of reprisals and that they often allow incidents to continue in hopes the employer will respond.

Price argued that in an ongoing employment relationship, an employee wants to avoid conflict as much as possible when there are problems in the workplace. Filing an EEOC charge is like "crossing the river," she said, and the employee may never be able to rehabilitate the relationship with the employer after that. It is for that reason, Price said, that employees do not immediately file a charge every time there is a potential problem and why the continuing violation theory is necessary.

By Michael R. Triplett