In the

Supreme Court of the United States

Willie Johnson, Jr.,

Petitioner,

v.

Railway Express Agency, Inc., et al.,

Respondents.

No. 73-1543 C2

Washington, D. C.
December 11., 1974

Pages 1 thru 45

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIE JOHNSON, JR., Petitioner, v. RAILWAY EXPRESS AGENCY, INC., et al., Respondents.	No. 73-1543

Washington, D. C.,

Wednesday, December 11, 1974.

The above-entitled matter came on for argument at 11:46 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MRS. DEBORAH M. GREENBERG, 10 Columbus Circle, Suite 2030, New York, New York 10019; on behalf of the Petitioner.

ARTHUR M. WISEHART, ESQ., 219 East 42nd Street, New York, New York 10017; on behalf of Respondent REA Express, Inc.

JAMES L. HIGHSAW, JR., ESQ., Highsaw & Mahoney, Suite 506, 1015 Eighteenth Street, N.W., Washington, D. C. 20036; on behalf of Respondents, Union Locals.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-1543, Johnson against Railway Express Agency.

Mrs. Greenberg, you may proceed whenever you're ready.

ORAL ARGUMENT OF MRS. DEBORAH M. GREENBERG,

ON BEHALF OF THE PETITIONER

MRS. GREENBERG: Mr. Chief Justice, and may it please the Court:

This case comes here on writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The writ was directed to the question of whether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission tolls the running of the statute of limitations applicable to an action based on the same facts brought under Section 1981.

Petitioner, Willie Johnson, Jr., a black man, was hired by REA Express in 1964. In 1967 he filed with the EEOC a charge of racial discrimination against REA and two Locals of the Brotherhood of Railway Clerks.

He charged REA with discriminatory job assignments, and the Locals with being racially segregated.

Three weeks later, REA fired petitioner. Petitioner then amended his EEOC charge to include discriminatory discharge.

Respondents were given notice of the charges in September 1967.

An EEOC investigation substantiated petitioner's charge and in March 1970 the EEOC issued a determination finding reasonable cause to believe that respondents had violated Title VII.

After efforts at conciliation failed, on January 4, 1971, petitioner received from the EEOC his notice of right to sue, on January 15, 1971.

When he was unable to obtain private counsel, the District Court appointed counsel to represent him, and permitted him to file his right to sue letter as a complaint on a pauper's oath.

On March 18, 1971, the court-appointed attorney filed a supplemental complaint, alleging violation of both Title VII and section 1981.

Respondents filed motions to dismiss or for summary judgment, with supporting affidavits and memoranda of law.

Petitioner's court-appointed attorney filed no papers in opposition. The court dismissed all claims under section 1981 as barred by the Tennessee one-year statute of limitations on actions for compensatory or punitive damages brought under federal civil rights statutes.

On a record which contained undisputed evidence of

the maintenance of segregated Locals and higher membership dues for blacks, the court granted summary judgment to the unions, on the grounds that plaintiffs had, quote, "no grounds for relief under Title VII", close quote.

And granted partial summary judgment to REA on the issue of the lack of supervisory training.

The issues that remained in the case were claims under Title VII against REA for discriminatory job assignment, referral to segregated Locals, discriminatory application of seniority rules, discriminatory discharge and discriminatory disciplinary action.

The case was set for trial and REA took discovery and filed a pretrial memorandum, as required by the local rules of court.

Petitioner's court-appointed attorney did nothing.

TEA then offered petitioner a settlement of $150, and when petitioner refused this offer, his court-appointed counsel filed a motion to withdraw.

The court clerk advised petitioner, by letter, that the motion, of which petitioner had received no notice, had been granted and that if petitioner did not obtain another lawyer within thirty days his case would be dismissed.

Petitioner went to the local Legal Aid Society, to the Bar Association Referral Service and to two private attorneys, to whom he was referred by the EEOC.

All to no avail.

Finally, he went to a Memphis law firm and explained his plight to William Caldwell.

I should explain at this point that when petitioner first received his right to sue letter he went to the same firm and they were unable to take his case because of the great number of Title VII cases to which the court had appointed them.

Caldwell wrote to the Chief Judge of the District Court, stating that he was attempting to obtain support for the suit, and requesting an additional thirty days to obtain counsel.

But just the day before, on February 16, 1972, an order had been entered dismissing petitioner's case without prejudice.

On May 5th, Caldwell again wrote the Chief Judge, indicating that the NAACP Legal Defense and Educational Fund had agreed to pay the costs of litigation, entering an appearance, and requesting that the order of dismissal be vacated.

The Chief Judge wrote back suggesting that it would be appropriate for Caldwell to file a new action.

On May 31, Caldwell filed a new complaint, under both Title VII and Section 1981, reiterating petitioner's original allegations.

The District Court dismissed the complaint on several grounds.

First, with respect to petitioner's Title VII claims, he held that the interlocutory order of June 14, 1971, in the first action, granting summary judgment to respondent Locals and partial summary judgment to REA, was a final judgment constituting res judicata.

Second, that petitioner's claims under Section 1981 were barred by Tennessee's one-year statute of limitations and also barred because of petitioner's failure to exhaust remedies under the Railway Labor Act.

Third, he held that petitioner's Title VII action against REA was barred by his failure to refile within thirty days after the dismissal without prejudice.

The Court of Appeals affirmed, disposing of the case on timeliness grounds. It held that the Title VII action was barred because the second action was filed more than thirty days after the dismissal of the first action, and held that the statute of limitations on petitioner's 1981 action was not tolled by the filing of his EEOC charge.

Rehearing was denied.

QUESTION: Are you going to tell us a little bit about what administrative remedies were available, if any, under the Railway Act? Or do you --

MRS. GREENBERG: No, Your Honor, that --

QUESTION: -- take the position that isn't a real, genuine, meaningful remedy?

MRS. GREENBERG: We would take the position that there are independent remedies under Section 1981 and Title VII, we, in our Petition for Certiorari, asked the Court to review the holding that petitioner should have exhausted his remedies under the Railway Labor Act, and the Court did not agree to review that question.

Petitioner, and the United States as amicus curiae, urged the Court to adopt the rule of the Fifth and D.C. Circuits; namely, that the filing of an EEOC charge operates to toll the running of the statute of limitations on an action based on the same facts brought under Section 1981.

If such a rule is applied to the case at bar, petitioner's Section 1981 action was timely filed under Tennessee's one-year statute of limitations.

He filed his charge with the EEOC on May 31, 1967, while still employed by REA. The discriminatory acts alleged therein were continuing in nature, so that none of the one-year period had run prior to said filing.

He received his notice of right to sue on January 15, 1971.

The supplemental complaint in the first action -- and that was the first pleading to state a cause of action

under Section 1981 -- was filed 62 days later, on March 18, 1971.

So, to that point, only 62 days had run, if the tolling rule is adopted.

The statute stopped running when the action was filed, and did not start running again until February 16, 1972, when the action was dismissed without prejudice.

The second action was filed 105 days after the dismissal of the first action, on May 31, 1972. Thus, a total of 167 days of the Tennessee one-year statute had run.

The purposes underlying the statute of limitations, notice to the defendants, and the barring of stale claims by a plaintiff who has slept on his rights, were served by the filing of petitioner's EEOC charge.

In Burnett vs. New York Central, this Court suggested that the basic inquiry is whether congressional purpose would be effectuated by tolling the statute of limitations in the circumstances of this case.

As this Court recognized in Alexander v. Gardner-Denver, it is clear from the legislative history of Title VII that Congress intended that an individual be able to pursue his rights to be free from racial discrimination in employment under both Title VII and Section 1981.

It is equally clear that Congress preferred the process of fact-finding and conciliation provided in Title VII,

and hoped that litigation would be resorted to only if this process was not effective.

Both policies can be accommodated by adopting the tolling rule urged by petitioner. Bringing suit under Section 1981 is, of course, simpler than bringing suit under Title VII, as there are no administrative remedies that must be exhausted.

Indeed, one of the grounds urged by the sponsors of the Equal Employment Opportunity Act of 1972 for rejecting an amendment that would have made Title VII the exclusive remedy, was that procedural requirements of Title VII may sometimes prevent an aggrieved individual from obtaining redress, and, in such event, he should be able to fall back on Section 1981.

On the other hand, from the point of view of the individual with limited resources, unable to obtain counsel, Title VII is the better remedy. The EEOC can investigate and conciliate claims and can even bring suit on behalf of complainant.

As long as a person has reason to hope that he can get the relief he seeks by resort to the EEOC, he should not have to go to the expense of filing suit.

As Judge Tuttle, writing for the Fifth Circuit Court of Appeals, sitting en banc in Kessler vs. EEOC, said, competent lawyers are not eager to enter the fray in behalf

of a person who is seeking redress under Title VII. This is true even though provision is made for payment of attorney's fees, in the event of success.

Therefore, he held, the reasources of the EEOC, such as their investigatory files, should be made available to the private litigant, to make it less difficult for him to bring his case to court.

QUESTION: Mrs. Greenberg, --

MRS. GREENBERG: Yes?

QUESTION: -- are you in any way restricting your application of your theory, that is, should the tolling effect, for instance, be limited to the charges raised in the EEOC complaint, or should it be wide open?

MRS. GREENBERG: I think tolling effect should be limited to the same extent that they would be limited in a Title VII case. That is, under the standard of Sanchez vs. Standard Brands, to the facts that would be likely to grow out of an investigation of the EEOC charge.

QUESTION: Would it have been possible for Mr. Johnson to have filed his 1981 action before the period of limitation expired, and then just kind of sit on it? He'd have to have approval of the court, I suppose.

MRS. GREENBERG: Yes, that would have been possible, but we see no reason for burdening the court calendars with cases which are going to be sat on.

QUESTION: What if it takes, as it does with some of the agencies, Mrs. Greenberg -- I won't mention any particular agency; but some of them take four or five years or more. Does that give you any problems?

MRS. GREENBERG: This is a problem. It is a problem that has been raised in respondents' principal argument, is that almost four years passed between the filing of the EEOC charge and the receipt of petitioner's notice of right to sue.

And the point that respondents make is that allowing petitioner to file an action after such a long period would work an injustice on the respondents.

But Congress must have intended that aggrieved employees could take advantage of all of the investigative and conciliatory processes of the EEOC, otherwise they could have required --

MR. CHIEF JUSTICE BURGER: We'll resume there right after lunch.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Mrs. Greenberg, you have about 15, 16 minutes left.

MRS. GREENBERG: Thank you.

Before recess, I was responding to a question of the Chief Justice as to the problem of delay.

Congress must have intended that aggrieved employees could take advantage of all the investigative and conciliatory processes of the EEOC, even though that might mean not filing a civil action under Title VII for several years. The legislative history is replete with material about the backlog in the EEOC. Congress could have required the EEOC to issue right to sue letters within a specified time after the filing of a charge.

It put in all kinds of short limitations on times for doing certain things, but did not put in a limitation on how long a matter could be before the EEOC.

QUESTION: Now, are you arguing that the commencement of the first action itself tolled the statutes?

MRS. GREENBERG: Yes. I think that the commencement of an action --

QUESTION: Is that question here? That's the problem that's been giving me some trouble.

MRS. GREENBERG: That question is not here. We

would argue that, just as a matter of common sense, that a statute of limitations on the commencement of an action would have to stop running with the commencement of the action.

QUESTION: Well, if you were arguing to sustain the judgment of the court, you could use any argument you wanted, probably, or almost any argument. I'm having a little trouble with that one.

MRS. GREENBERG: Well, we could further argue that even if the commencement of the first action did not toll the running of the statute on the time for filing that action, that the second action was brought within a year after dismissal of the first action, as allowed by the Tennessee saving statute, which provides for bringing -- in the case of any action, dismissed without a determination on the merits, it can be filed within a year.

Affirmance of the decision below would not only do violence to congressional policy with respect to preserving a petitioner's right of action under 1981 and its policy, at the same time, of encouraging resort to the conciliatory processes of the EEOC, but would also -- could also have adverse effects on the federal judicial system.

The aggrieved employee would have to file his EEOC charge, file suit under 1981, if he could obtain counsel, and very likely see his action come to judgment on his 1981 action before the EEOC had had a chance to investigate his

charge.

If he did not file suit, he would run the risk of foregoing his rights under Section 1981 and running afoul of the procedural requirements of Title VII, as did petitioner.

One can only speculate about the number of such precautionary suits that might be filed. However, the EEOC informs us that in fiscal 1974 it received over 50,000 new charges.

Of the charges investigated, on which decisions were issued, 44 percent were found to be without probable cause.

As this Court observed in Alexander vs. Gardner-Denver, with respect to the conciliatory or therapeutic processes of arbitration, the processes of the EEOC may satisfy an employee's perceived need to resort to the judicial forum.

This Court's recent holding in American Pipe vs. Utah, that the avoidance of precautionary litigation is a sound reason for tolling a statute of limitations, is equally applicable to the instant case.

Respondents contend in their briefs that the principles of Burnett and American Pipe do not apply to this case because they involved the tolling of federal not State statutes of limitations.

This contention was squarely rejected in Holmberg

vs. Armbrecht, where Mr. Justice Frankfurter stated:' It would be too incongrous to confine a federal right within the bare terms of a State statute of limitations unrelieved by the settled federal equitable doctrine as to fraud, when even a federal statute in the same terms would be given the mitigating construction required by that doctrine.

I would like to reserve my remaining time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Wisehart.

ORAL ARGUMENT OF ARTHUR M. WISEHART, ESQ.,

ON BEHALF OF RESPONDENT REA EXPRESS, INC.

MR. WISEHART: Mr. Chief Justice, and may it please the Court:

My opponent is in error in stating that the Commission had concluded that conciliation had failed in this case.

In actual fact, as page 75a of the record shows, the right to sue letter was issued in response to a request from the petitioner in this case. The case involved ten employees. So far as I am informed, the Commission has never concluded conciliation efforts, and it did not advise the petitioner that its efforts had failed.

Which brings into play Section 29 C.F.R., section 1601.25b of the Commission's regulations. That provision states that when a right to sue letter has been issued at the

request of a complainant, then the Commission's proceedings shall suspend. That is the word of the regulation.

Now, the consequence of that, I submit, is that the Commission's proceedings are still in a state of suspense, and if this Court is to hold that Commission proceedings toll the running of a statute of limitations under the 1866 Act, that state of suspense could go on for an indefinite period, something that we entirely not contemplated by Congress when it passed the 1964 Act, and specified that judicial action in these cases must begin promptly.

I simply do not see how it can be asserted that giving effect to a tolling principle in this case would be consistent with the will of Congress when the most recent pronouncement of Congress on the subject has underscored the need for fast resolution of these disputes.

The question regarding the Railway Labor Act remedies is --

QUESTION: I suppose it would be a simple matter to say that the statute would have to be satisfied within the time that the Title VII suit would have to be filed?

MR. WISEHART: Well, that is one alternative that may be open to this Court, but it is not open on the facts of this case.

QUESTION: Why?

MR. WISEHART: Because under the law of the case as

it stands, the time for a Title VII suit here has expired. In all of the cases relied upon by petitioner --

QUESTION: Well, we didn't grant on that issue.

MR. WISEHART: That is correct. All of the cases that are relied upon by petitioner are distinguishable on that basis. There has been no case holding that the time for suing under the 1866 Act --

QUESTION: So that you're saying, even if your opponents are right on the initial tolling, they are really cut out by the fact that the Title VII suit can't be filed now?

MR. WISEHART: That is correct, Your Honor. And I believe this Court has two courses open to it. It can either affirm the decision below on that narrow issue, and say, We're simply not going to hold that tolling applies when it would extend beyond the period provided by Congress in the 1964 Act --

QUESTION: So you say our limitation of grant, you think, was -- almost decided this case?

MR. WISEHART: Yes, I do, Your Honor.

But the Court could decide it on that narrow ground, that we're not going to hold here that it can extend beyond the period allowed in the 1964 Act, and reserve for another day the question posed by Guerra v. Manchester Terminal in the Fifth Circuit, which I understand they are going to

petition for certiorari on it.

They can either decide -- the Court can either decide on the narrow grounds, or it can decide on the broader grounds, which we have briefed in this case, and that is, that under the 1866 Act, which does have in it Section 1988, Congress has said specifically that you must refer to State law.

Now, there's no dispute in this case that for the purpose of referring to State law you do refer to the State statute of limitations.

The only question in this case is if, under Section 1988, you must refer to State law for limitations periods, whether you must also refer to State law for the purpose of tolling.

And we submit, Your Honor, that it does not make sense to refer to State law for one limited purpose when tolling and statute of limitations are all part and parcel of the same statutory framework.

So that the cases that do not deal with the effect of Section 1988 sidestep the issue; and the case that does deal with that case, the best-reason case, I submit, is the case in the Third Circuit, Ammlung v. City of Chester, which was decided under Section 1983, another section of the 1866 Act.

And in the Ammlung case, the Third Circuit focused specifically on the effect of 1988 and it said: If you're

going to refer to the State law for the purpose of the statute of limitations, you must also refer to the State law for the purpose of the tolling provision.

That is the holding in Ammlung. The Ammlung holding also speaks of the disarray that is found in the Fifth Circuit cases on this subject. The Fifth Circuit cases go both ways. You could cite two cases in the Fifth Circuit in our favor, and you could cite two cases from the Fifth Circuit in favor of petitioner. And those are not dispositive.

As far as the District of Columbia Circuit case is concerned, that is dictum, because the Court found that the alleged discrimination in that case was of a continuing nature.

Now, I would like to speak about a case that the petitioner relies on principally, and that's the Moviecolor case in the Second Circuit.

The Moviecolor case was an antitrust case, and in extensive dictum, not necessary for the disposition of the case, Judge Friendly has analyzed what is this doctrine of federal tolling.

The decision of Judge Friendly makes it clear that going all the way back to the case of Bailey v. Glover, decided by this Court in 1874, 21 Wallace, the concept of federal tolling applies (1) where there is a federal statute of limitations -- and, remember, we're talking here about an

admitted application of a State statute, not a federal statute of limitations -- or, alternatively,where there is fraud or concealment involved. Indeed, that portion of the Moviecolor case that is quoted on page 3 of the Reply Brief for Petitioner makes it quite clear that Judge Friendly's decision there is premised upon the concept of concealment.

And concealment is not in issue in this case.

More importantly than what the quotation set forth on page 3 shows, we submit, is the language that's contained in what was deleted from that quotation.

On page 3 of the Reply Brief, it appears that the quotation provided by the petitioner is the beginning of a paragraph. But in fact the sentence that begins that paragraph reads as follows:

In the last analysis decision of that issue -- namely, tolling --requires an attempt to divine a purpose of Congress on a subject where no purpose has been manifested, if indeed it was had.

Now, we submit that that language is dispositive of this case. Because Congress has manifested a purpose. It has enacted Section 1988 of the 1866 Act, in which, for purposes of these cases reference is made to State law. That's entirely apart from the concept of borrowings from State statutes as a matter of comity. This is a congressional directive.

When Congress passed the 1964 Act, it did not focus upon this question, as this Court's decision in Jones v. Mayer Company shows, the Congress did not seem to be aware of the 1866 Act when it enacted the 1964 Act, and this Court's opinion in the Jones case does say that therefore it cannot be expected that the 1964 Act had any effect upon pre-existing rights.

That's the holding of this Court.

Subsequently, Congress did focus on the existence of the 1866 Act, partly as a result of this Court's decision in Jones v. Mayer in 1966 and in the legislative history of the amendments to the 1972 Act, it's made clear that Congress did not intend to affect existing rights under prior legislation. That is what the legislative history shows.

So that we have a situation in which, as Moviecolor points out, the purpose is to inquire into what Congress intended. And here you have three evidences of congressional intent. First you have what they said in 1988 of the 1866 Act, which is, you refer to State law.

Secondly, we have the 1964 Act and the subsequent decision of this Court in Jones, in which it is held that Congress did not intend to affect rights under pre-existing legislation.

The third evidence of congressional intent is what

Congress itself provided in the Act of 1964. And that is, that lawsuits must be brought at an earlier time than is possible, or is contended for, by the petitioners in this case.

The effect of the tolling which they seek in this case would be to extend the time for lawsuits beyond that which Congress itself provided in its most recent enactment on this question.

And in view of those three indications of congressional intent, and in view of the fact that the analysis of Judge Friendly in Moviecolor shows that application of tolling to the facts of this case which do not involve fraud or concealment would be pushing the doctrine farther than it has ever been pushed before.

QUESTION: Do you know of anything that would have prevented the Congress from providing that if an action could be brought within six months, one year, some fixed period after some described cutoff point in the EEOC proceedings?

MR. WISEHART: That is, in effect, what they did as far as the EEO cases are concerned, under Title VII. They must sue now within a specified time after the EEOC proceeding ends under Title VII.

But Congress was silent as to --

QUESTION: As to this?

MR. WISEHART: -- as to the effect on the 1866 Act.

Now, you had asked in an earlier question, Mr. Chief

Justice, about whether or not the first case here had the effect of tolling the action of -- under the earlier Act. And my opponent is correct, that question has never really been focused on here.

However, the law of this case, we submit, is that the first action could not have had the effect of tolling because the Court did instruct that further litigation be commenced within a specified time.

And as the Court of Appeals mentioned, --

QUESTION: But you don't even get to that question.

MR. WISEHART: No, you don't.

QUESTION: If you're correct, the first suit was untimely.

MR. WISEHART: That's correct. Yes, Your Honor.

QUESTION: Yes, but if you're wrong on that, if you're wrong on that and the first suit was filed in time, wouldn't you say that while that suit was pending, the statute was tolled?

MR. WISEHART: Except for the fact that it became the law of the case, that further proceedings --

QUESTION: Well, let's just assume that that first case was still pending and had never been decided,yet the statute is tolled while it's pending, I suppose; isn't it?

MR. WISEHART: Your Honor, I respectfully submit that the Court --

QUESTION: Well, it doesn't expire and the suit become barred while it's pending.

MR. WISEHART: That may be, Your Honor. Except I wish to draw the Court's attention to the fact that the Court in the first suit did specify a period of time in which further action should be brought.

QUESTION: I understand; I understand.

MR. WISEHART: And there was no appeal from that --

QUESTION: Well, that's another point.

MR. WISEHART: -- as the Court of Appeals pointed out at 107a of the record, and that that was a final decision. So that would seem to be --

QUESTION: I understand.

MR. WISEHART: -- res judicata on the issue.

QUESTION: Well, that's another point.

MR. WISEHART: Yes, it is.

QUESTION: Yes. While it was pending the statute was tolled.

MR. WISEHART: I think that one could infer that.

QUESTION: If it was timely in the first place?

MR. WISEHART: Yes.

Now, there was a question also on the Railway Labor Act procedures. The decision below was that prior resort was required under the Railway Labor Act procedures, and that would be dispositive of this case, even if the Court

should rule in petitioner's favor, because there was a question raised, but certiorari was not granted.

Furthermore, the record indicates that this is precisely the kind of case in which the common law of the shop should be applied, and could have been applied with respect to the petitioner, because it involved the application of a system of demerits, a number of particular charges. And he could have been represented in that system without cost to himself, unless he pursued that system of industrial justice that is provided in that way, I don't know how he could establish that he had been damaged.

The reference was made to the fact that his prior counsel had recommended settlement, which the petitioner did not agree with.

I think that if one reads the deposition of petitioner in this case, one can see why his prior counsel recommended settlement, because petitioner admitted in his deposition that because of the massive layoffs of REA, employees with 25 years' seniority were those who could retain jobs; and he only had seven years' seniority in 1971. He admitted that he would have been laid off under normal application of the company's reduction in force system two years before his deposition was taken.

So one can well understand why his first counsel recommended settlement.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Highsaw.

ORAL ARGUMENT OF JAMES L. HIGHSAW, JR., ESQ.,

ON BEHALF OF RESPONDENTS, UNION LOCALS

MR. HIGHSAW: Mr. Chief Justice, and may it please the Court:

The two union Local Lodges of the Brotherhood of Railway and Airline Clerks, which I represent, find themselves in an unusual posture in this case.

At the time the second complaint was filed, in May 1972, which is the complaint before this Court, these two lodges had not been in the case for a few days short of a year. They had been eliminated from the case the year before by an order of the District Court, which has not been appealed, dismissing the 1981 action on the basis of the Tennessee State statute of limitations, and finding that on the undisputed facts, there was no claim, valid claim by the plaintiff against the two union Lodges, and granting summary judgment with respect to the Title VII claim.

Consequently, when the second complaint was filed, these two union Lodges immediately moved for a dismissal of summary judgment on the basis of res judicata.

The District Court, with another judge sitting, granted that motion. We got to the Court of Appeals -- that was appealed by the petitioner, that issue. The Court of

Appeals focused on the jurisdictional problem in its original opinion, and its opinion on rehearing, the petition on rehearing, after referring to the jurisdictional problem, it specifically stated that the two Local Unions had a complete defense against all claims of the petitioner based on res judicata.

The petitioner sought cert in this Court on that issue, and this Court denied cert.

Now the petitioner in their brief, original brief, and in their reply brief filed a few days ago, says this Court should remand the res judicata issue to the Court of Appeals.

And the amicus brief states that these two Local Unions are asking this Court to affirm the judgment below on this alternative ground.

Neither one of these are correct in our opinion. Our position is that the case -- when this Court denied certiorari on the issue, that ended it. It is a final and binding judgment now as to these two respondents. It's the law of the case, and we're out of the case.

Now, I would like to address myself briefly to the tolling issue. I'm not going back over the ground that Mr. Wisehart went into. But I would like to say this: the petitioner's case boils down simply to this:

They say that in terms of congressional intent and

public policy, they must have the tolling principle applied here, because of the public policy expressed by Congress in the conciliation process under Title VII.

And petitioner's counsel, as I understood it, made reference to a plaintiff who had money, needed to -- and who could go ahead with 1981, still needed to file a petition; and one who didn't have money needed to wait for conciliation, with the EEOC.

Well, of course, the one that has the money and wants to go ahead under 1981 can, because all he has to do is wait 180 days and get a right to sue letter. This petitioner got a right to sue letter. He got it about four years later. Which is the other side of the coin. Which is, as the amicus brief says, you have to have tolling here to let conciliation work, because they say that the EEOC, because of its caseload, the lack of money, and its budget and lack of staff, simply cannot get around to conciliation.

Well, it means, and it meant in this case, that you, as a practical matter, never have any conciliation at all. That's the real other side of the coin.

So when you finally get around to litigating one of these matters, they have reached the point of being in violation of the principles on which statutes of limitations are based, of litigating stale claims, which is unfair to the

defendants.

Now, in their briefs, the petitioners say, No, that's not so here, because, they say, the defendants will have notice from the EEOC that there is a discrimination problem. So it can't get stale on them.

Well, the notice that you have after the 1972 amendments is one little sheet of paper, with a few boxes on it. About all it tells you is that there is some discrimination.

Prior to that time you did get a notice with a copy of the complaint, but even that didn't give you too much notice, because the Sanchez case and other cases that's been cited by petitioner's counsel were so broad in permitting Title VII complaints that had charges different than those before the Commission, that you didn't really get any notice then, either.

QUESTION: Well, I take it that the 1981 action is separate and apart from the Title VII suit that might eventuate?

MR. HIGHSAW: Yes, that's an alternative basis for jurisdiction. Yes, Your Honor.

QUESTION: I take it that the 1981 action will either be completely distinct or overlap the Title VII suit.

MR. HIGHSAW: Well, I've never seen a case that it wasn't just the same facts.

QUESTION: Well, that's what I'm -- what difference does it make whether the 1981 action survives at all?

MR. HIGHSAW: Well, --

QUESTION: If the Title VII suit may be brought within time?

MR. HIGHSAW: Well, it requires -- it requires the defendants, among other things, to be litigating these stale issues in a situation --

QUESTION: Well, I understand, but let's assume --

MR. HIGHSAW: Yes, yes, in this --

QUESTION: -- let's assume that suit is timely brought and there's two counts, one's a Title VII suit and one's a 1981 suit; will the 1981 suit either reach substantive matters or provide remedies that the Title VII suit will not?

MR. HIGHSAW: It can reach other matters, but usually it does not. But it was -- does provide other remedies, which can make a substantial --

QUESTION: What's that? I want to know.

MR. HIGHSAW: -- substantial difference to a defendant.

QUESTION: Well, that's what I want to know. Why do you feel threatened by a 1981 suit more than a -- separately from a Title VII suit?

MR. HIGHSAW: Well, punitive damages is one area, one very major area, --

QUESTION: Punitive damages?

MR. HIGHSAW: Yeah -- that you feel threatened in.

There is a statute of limitations now in Title VII that goes back two years from the time the Title VII complaint is filed. You can -- you could go back further than that, in the 1981, if you could go forward with the 1981.

QUESTION: In some States.

MR. HIGHSAW: In some States, yes.

It might be three or four years in some States. So you would have much bigger damages, and this becomes a matter of great concern, particularly to the Unions, where you have these big class actions, which is what you have now -- you have hundreds of people you're talking about.

QUESTION: Well, the filing of the EEOC complaint at least puts you on notice that there may be, eventually, a Title VII suit.

MR. HIGHSAW: Yes. But there's another --

QUESTION: And it also, as you said, would very frequently involve facts that could give 1981 relief.

MR. HIGHSAW: There's another aspect of it, Your Honor. And that is you're lucky if you get a notice from EEOC.

The cases which we cite in our brief, the EEOC violates the statute, they just don't serve a notice. And the cases hold that this is not fatal.

I cited a case I'm in now. I couldn't get the District Court to send it back to the EEOC for conciliation. We would have loved to conciliate it. We never heard of the discrimination, alleged discrimination matter until we got served with the complaint in a federal court.

So that there's no -- there's no guarantee on the basis of the application of the law that you're even going to get a notice from the EEOC. And, as I say, the notice you get doesn't show you anything. It's just a single sheet of paper with a box on it. And you would have to be -- you would have to be a real wizard if you figured out exactly what was involved in it, or what the nature of the claim was.

QUESTION: You represent a union with quite a large membership, I take it?

MR. HIGHSAW: Well, the union that these two Local Lodges are in is, that's right, it's a railroad union that has about 200,000 members. These two Local Lodges at that time probably had maybe 75 members.

QUESTION: I don't know that it's relevant here, but I wonder if you, if you know, any idea how many notices a year, how many complaints a year are filed with EEOC affecting the people who were your members, or are your members?

MR. HIGHSAW: Well, --

QUESTION: Is it a very large number, a very small

number?

MR. HIGHSAW: It's a very large number. There's -- at one time there were pending before EEOC, and there has never been any conciliation or anything done about them, approximately 200 complaints.

And there's a constant flow of these complaints.

Because of the nature of the individuals that this union represents, it has a large number of black employees and it has a large number of women employees it represents, and it gets substantial number of complaints in both areas.

QUESTION: And I suppose this is something fairly common to any new mechanism of this kind?

MR. HIGHSAW: I think that's right.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Highsaw.

Mrs. Greenberg, you have some time left.

REBUTTAL ARGUMENT OF MRS. DEBORAH M. GREENBERG,

ON BEHALF OF THE PETITIONER

MRS. GREENBERG: In response to REA's contention that under the regulations petitioner's charge might still be pending before the EEOC and therefore this -- there would be tolling forever, we are only contending that the statute of limitations should be tolled until a notice of right to sue is issued.

Mr. Justice White suggested the possibility of limiting the time for charging, for bringing suit under

1981 to the time allowed to bring suit under Title VII.

This possibility was suggested in a footnote in the government's brief, citing McAllister vs. Magnolia Petroleum.

McAllister is not precedent for limiting the time for bringing a 1981 action to the time for bringing Title VII actions. We are not asking the Court to fashion a time limitation for the bringing of 1981 actions as was done in McAllister, but merely to determine the circumstances under which the statute, the State statute of limitations should be tolled.

QUESTION: And you think it should be tolled during the time the complaint is pending, and up until the time the right to sue letter is issued?

MRS. GREENBERG: Yes.

QUESTION: And then the State statute starts running again?

MRS. GREENBERG: Yes. It --

QUESTION: And the time begins when -- not with the complaint, begins with the filing of a charge with the Commission, doesn't it?

MRS. GREENBERG: Yes. I'm sorry, I thought that's --

QUESTION: That's when the tolling begins.

MRS. GREENBERG: Yes, that's when the tolling begins.

QUESTION: The tolling period begins, under your submission, from the time the -- a charge is filed with the Commission --

MRS. GREENBERG: Yes.

QUESTION: -- until the issuance of a right to sue notice by the Commission?

MRS. GREENBERG: Yes.

QUESTION: Correct?

MRS. GREENBERG: Yes.

QUESTION: That's your submission.

QUESTION: And then it starts running again, and it ends whenever the State law would say it ends.

QUESTION: Right.

MRS. GREENBERG: Yes.

In McAllister --

QUESTION: What would that have been here?

MRS. GREENBERG: When would it have ended?

Sorry, I haven't -- I haven't computed that. I did observe that, I think, 167 days had passed under that method of computation; 167 out of the one year.

QUESTION: One-year statute, right?

MRS. GREENBERG: Yes.

QUESTION: As construed by this Court, --

MRS. GREENBERG: Yes.

QUESTION: -- the Tennessee statute of one year.

MRS. GREENBERG: Yes.

Incidentally, just going back to McAllister again, in that case the only way the Court could -- the only means that the Court could fashion to enable plaintiff to preserve his rights under the unseaworthiness claims was by stretching or extending the time for filing to the time allowed by the Jones Act. There was no event, as in this case, which might have triggered the tolling of the State statute of limitations.

QUESTION: Mrs. Greenberg, may I ask -- you said 167 of the one-year period had elapsed, --

MRS. GREENBERG: Yes.

QUESTION: -- when the right to sue letter issued; right?

MRS. GREENBERG: No. The -- our contention is that no time had elapsed before the right to sue letter was issued, because the charge which was filed, based on continuing violations, was filed while plaintiff was still employed by REA. So that --

QUESTION: So that you mean at the time of the right to sue letter issued there was still a year --

MRS. GREENBERG: Yes.

QUESTION: -- before the 1981 suit could be brought?

QUESTION: Right.

MRS. GREENBERG: Yes.

QUESTION: And was it in fact brought within that year?

MRS. GREENBERG: The -- yes, the first action was brought less than thirty days -- the first Title VII action was --

QUESTION: When was the 1981 action brought?

MRS. GREENBERG: The 1981 -- the first pleading, which included 1981, was the supplemental charge filed by the court-appointed attorney in the first action 62 days after the receipt of the notice of right to sue.

QUESTION: So it was within the year?

MRS. GREENBERG: Yes.

QUESTION: All right.

QUESTION: And that was dismissed?

MRS. GREENBERG: That was dismissed without prejudice.

QUESTION: But was that the one that said you have to do something within -- you have to refile within a certain time?

MRS. GREENBERG: There's a -- respondents are in error when they say that the District Court, in dismissing the first action, provided a time within which a new action had to be filed. There was no such provision.

I think there is some confusion, and there was some confusion in the Court of Appeals.

QUESTION: Well, the Court of -- did the Court of Appeals think so, too?

MRS. GREENBERG: Well, it's not -- it's hard to tell, but what -- what the decision, what the ruling was, that is, Judge Brown's ruling in the first action was: if you don't get another lawyer within thirty days your action will be dismissed without prejudice.

QUESTION: Yes?

MRS. GREENBERG: It did not say when you could then file a new action.

QUESTION: So then what -- why was it, the second Title VII suit, ever dismissed?

MRS. GREENBERG: The second Title VII action was dismissed because the new complaint was not filed within thirty days after the -- after the dismissal without prejudice, on the grounds that Title VII provided a --

QUESTION: I see.

MRS. GREENBERG: -- thirty-day statute of limitations for the filing of a Title VII action.

QUESTION: So it wasn't because they hadn't -- that they had failed to comply with the court order?

MRS. GREENBERG: No.

QUESTION: So the rationale for dismissing the Title VII suit, second Title VII suit was wholly inapplicable to the 1981 action, --

MRS. GREENBERG: Yes.

QUESTION: -- and then the time for filing it hadn't run, and you think it should be sustained?

MRS. GREENBERG: No!

QUESTION: Oh, you think it should -- you think the [sic] Title I action should be sustained?

MRS. GREENBERG: I'm sorry, but --

QUESTION: As timely. As timely.

MRS. GREENBERG: I think that the Title VII action should --

QUESTION: No, no, the 1981 action?

MRS. GREENBERG: The 1981 action was timely, yes.

QUESTION: Yes, unh-hunh.

QUESTION: That's why you're here.

MRS. GREENBERG: Yes.

As to the Railway Labor Act point which was first raised by the Chief Justice: We discussed the Railway Labor Act point at page 18 of our Petition for Certiorari. At that place we cite a number of cases holding that in order to bring a 1981 action one does not have to exhaust procedural --

QUESTION: I'm sorry, Mrs. Greenberg, I want to know -- if I've got the chronology now: A right to sue issued, an initial suit was brought within thirty days, which also included the 1981 count. Right?

MRS. GREENBERG: No. Because --

QUESTION: Well, it was added; it was added.

MRS. GREENBERG: It was added. The problem was that the first --

QUESTION: Right.

MRS. GREENBERG: He couldn't get a lawyer the first time, so the judge allowed him to --

QUESTION: Now, what was dismissed were both actions when finally -- the first dismissal, was it?

MRS. GREENBERG: The final dismissal, because he couldn't get a lawyer, --

QUESTION: Not the final, this was an initial dismissal, wasn't it?

MRS. GREENBERG: There was an initial interlocutory order dismissing the 1981 actions as not timely filed, because of the one-year statute, not dealing with the tolling issue at all.

And granting summary judgment to the union on their Title VII action. And it's not clear whether that was on procedural grounds. The motion for summary judgment was based on procedural issues.

And graning partial summary judgment on plaintiff's Title VII claims against REA.

QUESTION; But when you got around to filing your second action --

MRS. GREENBERG: Yes.

QUESTION: There was a second action filed, I take it?

MRS. GREENBERG: Yes.

QUESTION: -- you included both 1981 and Title VII actions?

MRS. GREENBERG: Yes.

QUESTION: And that one was dismissed, that one was totally dismissed, --

MRS. GREENBERG: Yes.

QUESTION: -- and the Title VII was on account of how it didn't comply with the statute of limitations in Title VII.

MRS. GREENBERG: Yes.

QUESTION: And the 1981, for the same reason as before, --

MRS. GREENBERG: Yes.

QUESTION: -- which you claim was wrong, just flatly erroneous?

MRS. GREENBERG: Yes.

QUESTION: All right.

MRS. GREENBERG: Your Honor, to just briefly get back to the Railway Labor Act issue, and point out that all the cases hold that, in every Circuit that has considered it, that one does not have to exhaust the EEOC procedural

remedies before filing a suit under 1981. I don't see any reason why one should have to exhaust remedies under the Railway Labor Act.

It has been held by the Eighth Circuit, in Norman vs. Missouri-Pacific, that in order to file a Title VII suit one does not have to exhaust under the Railway Labor Act.

That is the only decision we have found specifically dealing with that, other than, of course, Glover.

I want to address myself further to the REA's argument that one has to apply the -- if one looks at the State statute of limitations, one has to look at all of the State laws.

This was rejected -- was rejected by Mr. Justice Frankfurter in the portion of Holmberg v. Armbrecht that I quoted before. It is discussed at some length in our Reply Brief. And it is of course discussed by Justice Friendly -- Judge Friendly, who said in Moviecolor: for some purposes you look at the State law, for some purposes you look at federal law. If the concerns are federal concerns, you look at federal law.

QUESTION: Mrs. Greenberg, are the unions still here in light of our limitation and denial of cert to Question 2(c) in your petition?

MRS. GREENBERG: Yes.

QUESTION: They still are?

MRS. GREENBERG: The Circuit Court, in its footnote, in its opinion denying rehearing, which is in the Appendix at 115, said that the summary judgment against the unions was res judicata.

Now, that summary judgment, which is at page -- the order granting summary judgment, which is at page 92a -- no, I'm sorry -- yes, page 92a of the Appendix, paragraph 3 goes only to the union's -- to the claims against the union under Title VII.

As we --

QUESTION: Was there a subsequent judgment entered pursuant to paragraph 3 of that order granting the motion for summary judgment?

MRS. GREENBERG: No. The only other order in the case was the order dismissing without prejudice.

QUESTION: As to the union as well as to the other defendants?

MRS. GREENBERG: As to everyone. The complaint was dismissed without prejudice.

QUESTION: That's kind of inconsistent with the granting of a motion for a summary judgment, isn't it?

MRS. GREENBERG: Oh, the granting for motion for summary judgment was an interlocutory order, and there never was a final appealable order.

QUESTION: Yes, but I take it if you could get

that from an affirmative judgment, you could appeal from that tomorrow.

MRS. GREENBERG: If you could get -- I'm sorry?

QUESTION: If you could get the District Court to -- the granting of summary judgment in the form of a judgment, you could appeal from that tomorrow, because --

MRS. GREENBERG: Yes.

QUESTION: -- there's never been an appealable judgment up to this date.

MRS. GREENBERG: Yes. That is our position, and the question was never certified.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Greenberg.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:48 o'clock, p.m., the case in the above-entitled matter was submitted.]

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