In the

Supreme Court of the United States

International Union Of Electrical, Radio And Machine Workers, AFL-CIO Local 790, Petitioner, v. Robbins & Myers, Inc., Respondent.	)	No. 75-1264
and Dortha Allen Guy, Petitioner, v. Robbins & Myers, Inc., Respondent.	)	No. 75-1276

Washington, D. C.
November 9, 1976

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INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, LOCAL 790, Petitioner, v. ROBBINS & MYERS, INC., Respondent.	No. 75-1264
- - - and - - - DORTHA ALLEN GUY, Petitioner, v. ROBBINS & MYERS, INC., Respondent.	No. 75-1276

Washington, D. C.,

Tuesday, November 9, 1976.

The above-entitled matters came on for argument at 10:31 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

BARRY L. GOLDSTEIN, ESQ., 10 Columbus Circle, New York, New York 10019; on behalf of Petitioner Dortha Allen Guy.

WINN NEWMAN, ESQ., 1126 Sixteenth Street, N.W., Washington, D. C. 20036; on behalf of Petitioner Union.

FLETCHER L. HUDSON, ESQ., McKnight & Hudson, Suite 2222 Clark Tower, 5100 Poplar Avenue, Memphis, Tennessee 38137 [pro hac vice]; on behalf of the Respondent.

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C O N T E N T S

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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 75-1264, International Union against Robbins & Myers, and 1276, Guy against Robbins & Myers.

Mr. Goldstein, you may proceed whenever you're ready.

ORAL ARGUMENT OF BARRY L. GOLDSTEIN, ESQ.,

ON BEHALF OF PETITIONER DORTHA ALLEN GUY

MR. GOLDSTEIN: Thank you, Mr. Chief Justice, and may it please the court:

I shall emphasize the important in reversing the Sixth Circuit from the perspective of providing fairness to the victims of employment discrimination and encouraging effective implementation of the public policy of achieving equal employment opportunity.

Mr. Newman will argue from the perspective of encouraging voluntary compliance and incorporating equal employment opportunity into the law of the shop.

This case arises from a straight-forward set of undisputed facts. Mrs. Guy, a black woman, was originally hired by Robbins & Myers on November 1, 1968. From October 19 through October 24, 1971, Mrs. Guy was absent due to illness. That illness was excused by the company.

On October 25, Mrs. Guy did not return to work. She was immediately discharged. Within two days, she caused a review to be undertaken of her discharge by filing a grievance

pursuant to the collective bargaining agreement entered into between the Union and the Company.

Within 22 days, on November 18, 1971, the Personnel Director, after reviewing the decision, denied her grievance.

Within 84 days of that decision, on February 10, 1972, Mrs. Guy filed a charge with the Equal Employment Opportunity Commission. That charge was filed 108 days after the initial company decision to discharge Mrs. Guy. Herein lies the case.

The lower courts held that the ninety-day limitations period began to run from October 25, 1971, the date of the initial company decision to discharge Mrs. Guy. That 90-day provision was amended by the Equal Employment Opportunity Act of 1972 to 180 days.

The petitioners here raise three grounds why Mrs. Guy's charge should be treated as timely filed.

The first one is that the final occurrence of the unlawful act did not occur until November 18, 1971, when the Personnel Director of the Company last acted pursuant to the collective bargaining agreement and the contractual relationship between the company and Mrs. Guy.

Two, the petitioners submit that the filing of a grievance tolls the running of the period of limitations during the resort to the grievance procedure.

And lastly, the petitioners submit that the 180-day

period provided by the 1972 amendment applies to this case.

The first ground, that the practice had not occurred until November 18, when the Personnel Director of the company affirmed the initial decision to discharge Mrs. Guy, does not involve any analysis of legislative history nor any review of this Court's seminal decisions in Johnson v. REA and Alexander v. Gardner-Denver. Rather, the issue is, as the Seventh Circuit stated in Moore v. Sunbeam Corp., when was the last occurrence of the unlawful act.

We submit that that occurrence was when the Personnel Director last acted under the collective bargaining relationship with Mrs. Guy.

On October 25, when the -- excuse me.

QUESTION: Did the Personnel Director have to take an affirmative action at that time, or did he just sit?

MR. GOLDSTEIN: Your Honor, the contract, as set out, I think, on 37a and 38a of the Appendix, requires the Personnel Director to make a decision within ten days of the submission of the third-step grievance to him.

When the company initially made its decision to discharge Mrs. Guy, the situation was analogous to an anticipatory contract breach. The contract between Mrs. Guy and the company was not thereby terminated. She had a right to seek review of the decision to discharge her by filing a grievance and proceeding to a conference with her foreman,

general foreman, and the Personnel Director of the company.

During these three steps of intra-company review, the company had sole power to reverse its initial decision, reinstate Mrs. Guy, and cure the breach of contract.

To treat the denial of her grievance by the company as the final occurrence which triggers the running of the limitation period within which the worker must file a charge with EEOC accords with common sense. When there is the possibility --

QUESTION: Mr. Goldstein, did she have a right of further review within the grievance machinery?

MR. GOLDSTEIN: Yes, Mr. Justice Stevens, she had the right to proceed to arbitration.

QUESTION: Well, would it not be appropriate to postpone the denial, the complete denial of her contractual right to -- her termination contractual rights, until the time in which she could obtain review expired?

MR. GOLDSTEIN: Yes, Mr. Justice Stevens, it could be that the period here would have been tolled until November 28th, since she had ten days to -- or the union had ten days to indicate whether they were going to take their option and proceed to arbitration.

QUESTION: So, is that your position, or is it whenever they -- I don't see how to differentiate, in other words, between the denial after the third stage, and the

initial discharge. Because, under your theory, neither of those was the expiration of the contractual relationship.

MR. GOLDSTEIN: I think, Mr. Justice Stevens, it would be more correct to say November 28th than November 18th, when the union refused to -- or the decision was made not to proceed to arbitration. But it was unnecessary to reach that question here, since --

QUESTION: It wouldn't affect your timing.

MR. GOLDSTEIN: That's correct.

When the agreement for which you bargained provides protection against discrimination in employment, and also provides an accessible means of redress, it is understandable that a worker like Mrs. Guy, who was also a union steward, would turn first to her collective bargaining agreement and the support of her fellow workers before turning to the government.

Accordingly, petitioner Guy's charge was timely files, regardless of whether Congress intended that the limitation period could be affected by equitable consideration such as tolling.

However, an analysis of the legislative history of congressional policies effectuated by Title VII, and this Court's opinion in Alexander v. Gardner-Denver Company, all support tolling the limitations period during resort to the grievance procedure.

The Sixth Circuit's and respondent's reliance on Johnson v. REA is misplaced.

In Johnson, this Court held that federal actions undertaken pursuant to Section 1981 and Title VII were independent, separate, and distinct; and stated that the filing of an EEOC charge does not necessarily toll the limitations period for filing a 1981 action.

The Court, in comparing the remedies available under 1981 and Title VII, examined each and said that each has its advantages and each its disadvantages.

Here, however, there is no such parity of judicial enforcible remedies. The grievance procedure is conciliatory and pragmatic, geared, as this Court has said, to the law of the shop, not the law of the land.

Second, in Johnson, the Court looked to the State tolling law. Here the only question is the application of the federal limitations period.

This Court has repeatedly stated that the question of whether a limitation period, a federal limitation period, is tolled or not is not a semantic question, is not a determination of whether the period is procedural or substantive. Rather, it is a question of examining what is the intent of Congress.

Here Congress made it clear in several ways in the legislative history of the 1972 Equal Employment Opportunity

Act, that the limitations period in 706 and specifically 706(e) were to be interpreted so, quote, "as to give persons the maximum benefit of the law", unquote.

The Congress specifically approved this Court's flexible interpretations of the limitations period for deferral to State fair employment agencies in Love v. Pullman Company and it specifically approved other equitable considerations, such as the notion of continuing violations.

Lastly, the Court, in Johnson, stated that the adoption of the State tolling principles was not inconsistent in that case with federal policies, since the Court pointed out little was at stake.

Here there is much at stake. The accommodation with the effective utilization of the system for industrial self-government, to achieve equal employment opportunity. The grievance machinery is not an alternative judicial remedy, rather, it is a basic component of industrial self-government and a prime mechanism by which fair employment practices must be incorporated into American industry if the goal of equal employment opportunity is to be achieved.

QUESTION: Now, you've been talking so far, Mr. Goldstein, about the congressional purposes. What are we to decide the case on, the congressional purposes or the language of the statute?

The language of the statute is that a charge shall be

filed within 90 days after the alleged unlawful employment practice occurred. Now, that's not ambiguous, is it?

MR. GOLDSTEIN: No, Mr. Chief Justice Burger. The --

QUESTION: Now, recently, when Congress amended that, after this, your case, was under way, there was no change except changing it from 90 days to 180 days, and the language is repeated, "shall be filed", mandatory language, "within 180 days after the alleged unlawful practice, employment practice occurred." That's on page 3 of your Petition for Cert, 2 and 3.

How do we -- how much emphasis should we place upon the purposes when the language is clear, if it is clear?

MR. GOLDSTEIN: Mr. Chief Justice, we would submit that that language speaks to the amount of time someone would have to file a charge once the limitation period begins to run. It doesn't --

QUESTION: Well, it doesn't say that, though, does it? It says 90 days after the practice, the event has occurred; and the event was what? The discharge, was it not?

MR. GOLDSTEIN: Well, under our first theory, we would say that the last occurrence was not until the termination of the review procedure of the initial decision to discharge, which occurred on November 18, when the Personnel Director of the company denied Mrs. Guy's third-step grievance.

QUESTION: But, as Justice Stevens' question

suggested, if you then were to use other remedies, it might be a long, long time before the period would begin to run on your theory. Is that not so?

MR. GOLDSTEIN: Well, the grievance arbitration procedure in American industry is generally geared to a very short period of time, approximately -- as pointed out in the reply brief of the union -- 90 percent of the collective bargaining agreements have provisions such as the one here, where the maximum period of time to -- the decision to go to arbitration could be 35 days.

Also, Mr. Chief Justice, I believe in our reply brief we pointed to the statute of limitations periods in the -- that were discussed in the Burnett case, and also in the Midstate case, which were as mandatory as the statute in this case; but, nevertheless, the Court said that those mandatory time periods did not preclude the application of equitable considerations to a decision as to when those time periods would begin to run.

QUESTION: Was this approach, that your first approach presented to the lower courts?

MR. GOLDSTEIN: Mr. Justice White, the argument which basically depends upon the Moore v. Sunbeam Corp, was stated to the Sixth Circuit. The pertinent language in Moore v. Sunbeam Corp. was cited to the Sixth Circuit. We did not articulate it as a separate argument, as we do here.

QUESTION: You never argued to the courts below that termination did not occur until the grievance procedure was concluded?

MR. GOLDSTEIN: No, Mr. Justice White, we did not. We just cited the pertinent language in Moore v. Sunbeam Corp. to the Sixth Circuit.

While Mr. Newman will discuss the grievance arbitration procedure at some length, I would like to briefly state, contrary to respondent's argument, why the Court's opinion in Alexander requires tolling.

In Alexander, the Court considered the conflict or rather the accommodation of two paramount federal policies: fiar employment practices, and industrial self-government.

The Court, in Alexander, by its ruling, was pointing out that the procedure for the resort to the law of the shop and the law of the land should supplement each other. Repeatedly the Court pointed out that a proper grievance arbitration procedure could effectively assist in implementing Title VII, and even indicated that under certain circumstances evidence gathered in that process could be used by the district court.

In conclusion, this Court has delineated at some length the law enforcing the policy of equal employment. In Griggs and Albemarle Paper Company, unlawful practices were defined.

In Albemarle Paper Company and Franks v. Bowman Transportation Company, the requirements of adequate remedy were discussed.

In this case the Court has the opportunity, by reversing the Sixth Circuit, to encourage the full implementation of these decisions into the law of the shop, where, with the continued spur of court decisions, it would make the goal of equal employment opportunity a reality.

Thank you.

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

Mr. Newman.

ORAL ARGUMENT OF WINN NEWMAN, ESQ.,

ON BEHALF OF PETITIONER UNION

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

Mr. Goldstein has articulated the legal theories supporting our view that the charge was filed timely.

I should like to make one additional comment with respect to the first point, namely, the date on which the violation occurred, and then devote the remainder of my time to the equitable considerations with respect to the tolling issue.

In the industrial world, it's well understood that a first-level foreman's decision is hardly the last word. This generally results, or may result in a request from the union

for a review of that decision which the foreman's action has triggered, and that decision is then, as you know, reviewed and culminates into review through various steps of grievance procedures, including high-ranking company and union officials --

QUESTION: At what time does the pay stop?

MR. NEWMAN: The pay stops, in the case of a discharge, in most cases, immediately. Not in all cases, but in most cases; and it did stop in this case immediately.

However, the decision is not an appeal kind of thing, it's not an appeal to upper steps, it's a review by other management to determine whether the action is consistent with the company policy or the union contract. And that, I submit, is the way in which it is looked at in the industrial world.

Now, --

QUESTION: May I ask you this, Mr. Newman: Am I correct in my understanding that when the grievance was first filed there was no claim at all of racial discrimination?

MR. NEWMAN: The grievance was filed with a charge of unfair action, but that is not untypical of grievances that are filed.

QUESTION: Well, am I -- did I -- you're telling me I misunderstood it?

MR. NEWMAN: No, you understood it -- the language used in the grievance did not allege racial discrimination.

QUESTION: Racial discrimination. Now, --

MR. NEWMAN: However, a grievance that alleges unfair actions does include any kind of unfair action, as held by arbitrators in legion, which includes race discrimination, sex discrimination, or any other kind of disparate treatment.

QUESTION: But there was no identification of racial discrimination.

MR. NEWMAN: There was no identification of it. But --

QUESTION: Should that make a difference, do you think?

In other words, would not -- let's say the grievance was specifically that there had been a violation of some quite different and unrelated provision of the collective bargaining agreement, nothing whatever to do with racial or sexual or age discrimination, and that had been processed; would that make a difference in your argument? Wouldn't that detract from some of your argument, from the point of view of both the tolling and the finality of the grievance procedure --

MR. NEWMAN: Well, Your Honor, I suppose it might --

QUESTION: -- if it had been based on a wholly different inquiry than the one that the -- that has to be undertaken if there's a claim of racial discrimination?

MR. NEWMAN: I suppose it might, if it's a totally different grievance. We submit that in this case, this grievance of unfair action did in fact cover any kind of unfair treatment relating to her discharge.

QUESTION: But in the grievance procedure, was there any focus on racial discrimination at all?

MR. NEWMAN: The grievance procedure itself is not in the record, what took place in that grievance procedure, as you know, is a very informal process. So there's no record of what took place.

But the company, too, both sides have the burden of establishing the facts on the way up through the grievance procedure. And it would be --

QUESTION: Yes. Well, I just wondered if the company really is on notice, if there's no -- if it's not -- if there's no focus, no inquiry into racial discrimination whatsoever during this grievance procedure.

MR. NEWMAN: Well, the --

QUESTION: No notice to the company of any such claim.

MR. NEWMAN: The employer has notice of what the union is alleging in the grievance procedure. There is no -- no formal record that we have. The issue came up in the grievance procedure, but, you know, I could tell you that it's in the record -- obviously I can't do that.

QUESTION: It's not in the record, and we don't know --

MR. NEWMAN: But I can say that if this issue had gone before an arbitrator with a charge of unfair action, an

arbitrator would fully consider any kind of unfair action including race discrimination.

QUESTION: Well, he hardly would, if it were not even suggested to him that that might have been the reason for the discharge, would he?

MR. NEWMAN: He would consider it if it came before him in the form of evidence.

QUESTION: Yes, if it came before him.

MR. NEWMAN: Sure.

QUESTION: Yes.

MR. NEWMAN: That's right.

And in this case, this is the unfair charge, it's a typical way -- there are many contracts indeed that prohibit a grievance from being filed if you allege race or sex discrimination. It's not arbitrable. The General Electric contract, for example, provides that you can griev on that but you cannot arbitrate on that, with the result that our union typically files a grievance and does not allege race or sex discrimination, because as soon as we allege that, it no longer becomes arbitrable.

Nevertheless, the issue goes before the arbitrator in the context of just cause. Because whether you view this as race discrimination or sex discrimination, you come out to the same place, if the treatment is disparate; which is the basic fundamental of arbitration law.

QUESTION: Well, I think perhaps you understand what was behind my question, in any event, that if there is no notice to the employer at all that this is going to turn in, ultimately, to a claim under Section VII, then perhaps some of the force of your argument disappears.

MR. NEWMAN: I submit, Your Honor, that there had been many charges of discrimination filed under Title VII against this employer.

QUESTION: Title VII.

MR. NEWMAN: There had been EEOC determinations against this employer. This has been a heavily black plant. It can be assumed, in such cases, I think, that any time you have discharge of black employees, this is liable to be an issue, and there is some burden on the employer to determine whether that is a factor as well.

QUESTION: When the EEOC issued its right-to-sue letter, concluding that there was no discrimination, racial discrimination, was the employer informed of that circumstance?

MR. NEWMAN: The employer would, in the normal course of things, get a copy of that determination, yes, Your Honor.

QUESTION: So the employer was entitled to draw some inferences at that time as to status of the matter, was he not?

MR. NEWMAN: That was after, of course, the grievance had been dropped, that that determination issued.

QUESTION: Mr. Newman, the petitioner was discharged

on October 25, could she have filed a claim immediately, on October 26, with EEOC?

MR. NEWMAN: Yes, we would argue that she can file that claim, but she is not required to do so at that time, because, although some action has been taken against her and she is no longer on the payroll, the decision is still under review.

Let me suggest in this regard that if the employer treated this as a final decision, and approached the subsequent steps of the grievance procedure with that in mind, and failed to approach the subsequent steps of the grievance procedure with an open mind, he would be in violation of Section 8(a)(5) of the National Labor Relations Act.

I suggest that that requires that, to the extent he is required to come to the table with an open mind, he can't just come and, as you suggested, asked about earlier, Mr. Chief Justice, just sit there; he has to come there with an open mind and give a de novo review of whether the conduct warranted the results that were imposed, whether it be to sustain it, reverse it or compromise it.

And these grievance meetings are hardly perfunctory, mitigating circumstances would be considered. Other courts have held, as has been suggested, that the grievance does not occur until the grievancen procedure is exhausted. In Butler vs. Teamsters, 514 Fed 2d 442, for example, the Eighth Circuit

stated that common sense indicates that there is no approval until all facts have been learned, including those obtained during grievance procedures.

Now, that has been upheld by other courts -- by a recent district court in Ohio.

And I would like just briefly to touch upon tolling, and comment that if you find the occurrence took place at the time of, on October 25th rather than the third step of the grievance procedure, there is substantial equitable grounds to toll in this case.

Aside from the federal policy, or, rather, to be in accord with the federal policy, articulated in Alexander and numerous cases, it's clear that the non-discrimination matters are going to have to be handled through the grievance procedure.

The success rate is far greater in arbitration. It's six times as great as before EEOC in discharge cases, more than six times. The retention rate is more than two times the rate of people restored by the NLRB, and we don't have figures for EEOC.

QUESTION: Mr. Newman, let me interrupt, because I'm troubled by the same points that apparently Justice Stewart had in mind.

For your argument really to be sound, should you not also have the burden of showing that the grievance procedure and the arbitration procedure focused on the charge of discrim-

ination? Isn't that part of what Judge Tuttle had in mind in Culpepper and the other cases that followed Culpepper?

I may be wrong, I don't -- I haven't re-read those cases. But if you don't have that, does your argument really hold water?

MR. NEWMAN: Well, --

QUESTION: And the second part of my question, just so I have it all out is, if that's relevant, who should have the burden of showing whether the arbitration did involve racial discrimination?

MR. NEWMAN: Well, in terms of arbitral law, both parties have the burden of bringing out all the facts and discussing them with an open mind, as I said earlier, and discussing them as a grievance, during the grievance procedure. So that --

QUESTION: But you're saying that the employer should have the burden of showing, under a general charge should always come in with evidence that there was no racial motivation; is that what you're saying?

MR. NEWMAN: Under a general charge you can always come in with evidence that there is racial discrimination.

QUESTION: I understand that, but the question -- if it is relevant to know whether or not the arbitration involved racial discrimination, who should the judge put the burden on to explain whether or not that was part of the arbitration

process?

Here we have a silent record, as I understand.

MR. NEWMAN: Well, we submit that the charge of unfair includes any kind of disparate treatment.

QUESTION: Well, I understand, in terms of that you could bring it out before the arbitrator.

MR. NEWMAN: All right. So that I think we have met that burden when we file -- when a grievance is filed which alleges unfair treatment. It alleges disparate treatment on all grounds, including race discrimination.

QUESTION: Well, that's in every single grievance involving a firing, isn't it? Isn't that always going to be the claim, that it was unfair?

MR. NEWMAN: Well, not always. There may be other factors.

QUESTION: Well, I can't -- it's hard to think of any other. I mean, because that's such a broad generic covering-the-waterfront term, and that's what it is always going to be, isn't it?

MR. NEWMAN: Well, you know, maybe absenteeism or something of that sort. There's lots of other things, that result in discharge.

QUESTION: Well, it's not the employee, the griever is never going to say "I was fired for absenteeism", he's going to say, "I was fired unfairly." Then the employer is

going to respond, "Well, the fact is you were fired for absenteeism."

So, isn't that always going to be generically the charge?

MR. NEWMAN: I think when you have a plant with this kind of racial breakdown and with the large number of EEOC charges that existed, you do have a burden on an employer to look at race discrmination, where he's agreed to do so in his affirmative action plan and conciliation agreements.

Thank you.

QUESTION: Well, what's your answer to Justice Stewart's question?

QUESTION: Or to Justice Stevens.

QUESTION: Or to Justice Stevens' question. I don't think you've answered either one of them.

Isn't it always going to be a claim of disparate treatment?

MR. NEWMAN: It will not always be disparate treatment. There will be other factors, mitigating circumstances, length of service, employee should get another chance, and good work record, and so forth.

But, as distinguished from the act that has taken place. But "unfair" in the industrial -- I cannot say it any differently, that "unfair" would include race discrimination. And clearly, if it had gone to arbitration, that would have been

an issue.

Thank you.

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

I move that Fletcher L. Hudson of the State of Tennessee be permitted to present oral argument pro hac vice in this case on behalf of the respondents. I am satisfied he possesses the necessary qualifications.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Newman. Your motion will be granted, and we'll be glad to hear from Mr. Hudson in this case.

ORAL ARGUMENT OF FLETCHER L. HUDSON, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

First of all, we disagree with the petitioners here as to the issue before this Court. We submit that the issues here are not as complicated and complex as they have made it out in their argument.

There was only one issue decided by the district court in this case. There was only one issue that was briefed on the merits by both parties in the Court of Appeals. And there was only one issue decided by the Court of Appeals. And that issue was simply whether or not the filing of a grievance under a collective bargaining contract operates to suspend or toll the time for filing the charge with the EEOC.

And we contend that this is the only issue that is properly before this Court.

Now, the facts, as have been noted, are basically undisputed and simple.

This employee was discharged on October the 25th and she did not file a charge until 108 days from the date of her discharge.

Now, she filed a grievance, or had a grievance filed on her behalf that alleged a violation of the contract, as she claimed the discharge was unfair.

The union decided not to take this case to arbitration, and nothing happened on this grievance from the date it was denied by the employer -- nothing happened after that point, and nothing happened until the employee filed a charge with EEOC.

Now, it's interesting to note here that the plaintiff, when she filed her case in the district court, alleged two claims. She alleged a claim under 1866 Civil Rights Act, and she alleged a claim under the Civil Rights Act of 1964. In the argument on the motion to dismiss her claim under the 1866 Civil Rights Act, which was granted -- the motion to dismiss was granted -- the plaintiff defended her failure to file her lawsuit within the one-year State statute of limitations on the ground that the time of her filing of the EEOC charge had tolled the time for her filing of this lawsuit under 1866.

In the argument on the dismissal or the motion to dismiss the Title VII claim, she took the position and the sole position that the filing of the grievance tolled the time for filing the charge with EEOC.

The district court rejected these arguments and dismissed both of these claims. The plaintiff appealed the claim under Title VII, and the, as I noted before, Court of Appeals, deciding the issue of tolling and relying on this Court's decision in Alexander and in Johnson, affirmed the dismissal by the district court.

Now, the petitioners and the respondent in this case basically agree on the test that should be applied by this Court in deciding this issue. And the test is: whether or not the failure to apply tolling would be inconsistent with the federal policy underlying the cause of action under consideration. We both agree that this is the basic test that should apply.

Now, what we disagree on here is two things:

No. 1, what is this federal policy?

And No. 2, would it be inconsistent with this federal policy to refuse to apply tolling?

Now, this Court, in Alexander and in Johnson, had several things to say about this federal policy, that we contend should control the answer to the first question.

This Court stated that the underlying policy of

Title VII was to provide Title VII remedies as parallel and overlapping to any other remedies that might be available.

The Court also stated that the policy underlying Title VII was that the EEOC and the courts should have the preferred role in resolving claims of discrimination, and not arbitrators and grievance procedures.

The Court stated that the procedures of Title VII should be given full play and should not be made dependent on what might happen in a grievance or arbitration procedure.

The Court also noted in Alexander that the underlying policy of Title VII was that precise jurisdictional prerequisites must be met before an individual will be able to assert a claim under Title VII. And one of these prerequisites is the timely filing of a charge with EEOC.

Now, we can see nothing inconsistent with these policies, to refuse to apply tolling in this case. And we have heard nothing from the petitioners that suggests that there is anything inconsistent with these policies to require this employee to file her charge within 90 days.

The basic position of the petitioners seem to be that it would be preferable to suspend Title VII remedies and the remedies under Title VII so that the arbitration and grievance procedure will be given a chance to work. They basically take the position that these two remedies are so interrelated and dependent that what happens in one, in the

pursuit of one remedy will necessarily affect what happens in another.

These same arguments were made in this Court in Alexander and in Johnson, and were rejected by this Court.

Their principal argument is that to require an employee to file a grievance or to file an EEOC charge while a grievance is pending would in some way interfere with the national policy that encourages the settlement of labor disputes through grievance and arbitration.

Now, we submit that this has not been shown to be the case, or that we take the position that there would be no substantial interference with the grievance and arbitration procedure to require an employee to file an EEOC charge within 180 days under the new law.

In any event, we take the position that it's not the policy underlying the national labor laws that should be considered here, it's the policies underlying Title VII that should control, whether or not tolling should apply.

The petitioners in their brief took the position that allowing tolling to take place will encourage the settlement of disputes, that will discourage the filing of charges with the EEOC, and will cut down on the work of the EEOC.

This Court, in Alexander, answered this argument by stating that Congress intended for the Commission and the courts to handle claims of discrimination, and not arbitrators.

Contrary to this argument, Congress did not intend to discourage charges with the EEOC, they intended to encourage charges. And we see nothing inconsistent with the policies underlying Title VII to require an employee to file a charge with EEOC.

QUESTION: Mr. Hudson, is not the purpose of the filing with the EEOC to try and seek voluntary adjustment of the matter without resort to the courts? And if that is correct, is it not consistent with that purpose also to exhaust arbitration first?

MR. HUDSON: We do not feel it is consistent with that purpose to exhaust arbitration, because arbitration and grievance procedures are basically between unions and companies. Oftentimes the unions are alleged as the perpetrators of discrimination with the company, and they were in this case. And the purposes underlying Title VII and the filing of the charge is to have the Commission's conciliation procedures to take effect. And the fact that other efforts are taken --

QUESTION: Very simply stated, the purpose is to try and forestall litigation, try to make it unnecessary to go to court, isn't it?

MR. HUDSON: Well, if the purpose is not -- I don't necessarily agree with that. I think the purpose is to bring into play the procedures under Title VII, to try to bring about conciliation, and hope that --

QUESTION: But the EEOC has no power other than to try and get the parties to work it out, isn't that right?

MR. HUDSON: That's correct. That's correct.

But we feel that the procedures under -- I mean, the basic argument that this tolling will allow for the settlement of disputes is not an argument in support of tolling, because the basic purpose of Title VII is to have the EEOC and the courts handle these cases and not unions and employers who are oftentimes together the perpetrators of discrimination.

QUESTION: Mr. Hudson, does the collective bargaining agreement in this case contain any provisions with respect to the time periods, with respect to concluding grievance proceedings, or the filing of grievance proceedings, or the going to arbitration; is there any schedule of limitation period within the bargaining agreement itself?

MR. HUDSON: There is a time limit in which a party has to take a grievance from the final step in the third step --

QUESTION: Yes.

MR. HUDSON: -- to arbitration, yes.

QUESTION: What is that?

MR. HUDSON: I think it's ten days in this case. I don't recall that -- ten or fifteen days.

QUESTION: Is there any time limitation on filing the initial grievance?

MR. HUDSON: There is a time limit on filing the initial grievance of five days. And that --

QUESTION: After the final step, arbitration must be initiated within ten days?

MR. HUDSON: The request for arbitration must be initiated within ten days. Now, many times, under any contract, -- under this contract there is no time limit on how long it would be before the arbitrator rendered a final decision.

QUESTION: Yes.

MR. HUDSON: As a matter of fact, in this particular plant we had one grievance go to arbitration and we never got an answer from the arbitrator; it's still pending. It has been pending for about five years.

So -- this was one of the points I wished to make, that these collective bargaining contracts are all different. There are negotiations or contracts between unions and companies with different time limits for taking grievances to arbitration, taking -- filing of the grievances and what has to be alleged, and the procedures in handling these grievances.

To allow tolling will cause complicated and complex issues that will have to be decided by the EEOC and the courts, and their work in trying to decide these issues, we feel, would detract from their principal objective of trying to eliminate racial discrimination.

As Mr. Goldstein stated, this grievance procedure

involved here is relatively short. In most grievance procedures, you know within a very short period of time whether or not this grievance procedure will bring about a settlement of your particular claim.

We contend that 180 days is ample time for an employee to know whether or not their grievance will bring about an adjustment. They have plenty of time, even if they wanted to wait until after the grievance procedure, to file a claim with the Equal Employment Opportunity Commission.

The Equal Employment Opportunity Commission can develop procedures of deferral, such as the procedures developed by the National Labor Relations Board, which will minimize many of the problems the petitioners contend will take place, if tolling is not permitted to occur.

QUESTION: Mr. Hudson, you just referred to the 180-day provision.

MR. HUDSON: Yes.

QUESTION: I take it you are not receding from your position that the amendment does not apply to this claim as filed?

MR. HUDSON: That's correct, Your Honor.

QUESTION: Is it true, however, that when the amendment was effected, she still could have filed the day after the amendment and been on time, and you would have no defense to that filing?

MR. HUDSON: Our position is that she could not have filed after the amendment became effective, of March the 24th, 1972. It was still within 180 days from the date of her discharge, but we contend that she -- Congress has no power to give her the right to file a charge over a claim that has been extinguished, or has never come into existence.

QUESTION: Despite the language of the amendment that it --

MR. HUDSON: The language of the amendment applies to all charges filed thereafter, and all pending charges. Now, if she had filed a charge therafter, we contend that that would be beyond the power of the Congress, to give her this right to file a charge, if it occurred more than 90 days prior to the effective date of the amendment.

QUESTION: Well, aren't you really saying, then, that the amendment applies to all events that -- all occurrences that took place after the amendment?

MR. HUDSON: Yes, that's our position.

QUESTION: On that interpretation.

QUESTION: So you're driven to the position that her charge, her incident was completely extinguished, and even if she had not filed the charge, and even though it was within 180 days, she could not now file the charge?

MR. HUDSON: That's correct. Even --

QUESTION: So that she could not have filed the

charge between March 24th and April 22nd of that year?

MR. HUDSON: She could not have filed the charge -- that's our first position on that. Because --

QUESTION: And you say Congress was without power to allow her to do so? Without what, constitutional power?

MR. HUDSON: Without constitutional power, because --

QUESTION: Under what provision of the Constitution? Or what inhibition of the Constitution?

MR. HUDSON: We contend that this would be a violation of the Fifth Amendment, due process of law. That this is a situation that as of the date of the amendments, March the 24th, there was no right in existence and no liability in existence as of that date.

Congress cannot legislate rights and liabilities based on conduct that occurred prior to the effective date of the amendment.

QUESTION: Mr. Hudson, couldn't the defendant waive the statute of limitations?

MR. HUDSON: We feel like the defendant could not waive the statute of limitations.

QUESTION: You think it's a non-waivable defense, the statute of limitations? That's a remarkable position.

MR.HUDSON: This --

QUESTION: Under the Fifth Amendment, I guess.

MR. HUDSON: Well, we would contend that the Court

would have no jurisdiction over the subject matter of this claim because no charge was filed. And the filing of a charge is a prerequisite to the very existence of the right and liability.

QUESTION: Well, that's true as a matter of statute, but what authority do you rely on for the proposition that the Fifth Amendment would prevent Congress from accomplishing this result, if it chose to do so?

MR. HUDSON: We rely on this Court's decision in the Danzer case, that was cited in our brief, that has later been distinguished in other situations, where the statute of limitations goes to the remedy only and not to the right.

But we contend that the Danzer decision that we've cited stands for this proposition. And we also contend that even if Congress did have the power to legislate these rights, they did not legislate the rights in this case, because the 1972 amendments do not apply to this situation. They can only apply if this charge was pending, and this charge was not pending --

QUESTION: Well, let's see, Mr. Hudson, I gather, on your submission, the 90 days ran out on January 25?

MR. HUDSON: Approximately, yes.

QUESTION: But there was a complaint filed on February 10th.

MR. HUDSON: That's correct.

QUESTION: And you say that, I gather, that EEOC could not accept on February 10 the complaint which in fact EEOC did accept; but you say it had no authority to accept?

MR. HUDSON: Had no authority to accept.

QUESTION: And therefore the complaint filed on February 10, although still with the Commission on March 24, was not pending for the purposes of the '72 amendments; is that your argument?

MR. HUDSON: That's our position.

And we would also point out --

QUESTION: And we have to accept all of those propositions to agree with you, don't we?

MR. HUDSON: Yes, and you also have to decide that you have this issue before the Court.

QUESTION: Well, that's because, I gather, as I understand it, the Sixth Circuit refused to reach this question --

MR. HUDSON: That's correct.

QUESTION: -- on the ground that although amicus -- I gather EEOC is amicus -- had suggested it, it had not been tendered by the petitioners?

MR. HUDSON: Our position is that it was not before the Court because a party did not raise the issue.

QUESTION: That's what I say.

MR. HUDSON: And the second thing --

QUESTION: But it was tendered by EEOC as amicus,

wasn't it?

MR. HUDSON: But not in the district court.

QUESTION: Yes.

MR. HUDSON: It was not before the district court for decision, it was not briefed on the merits by the parties in the Court of Appeals.

Now, I would also point out that this employee, when she filed her charge on February, stated that the most recent date --

QUESTION: Was January 29.

MR. HUDSON: -- of discrimination was January the 29th. Now --

QUESTION: But you say there's nothing in the record to support that allegation?

MR. HUDSON: There's nothing ever been suggested that any discrimination occurred on that date. If she had not misrepresented this fact --

QUESTION: Then EEOC would not have taken it.

MR. HUDSON: -- they would not have taken it.

QUESTION: Well, that's surmise, isn't it, you don't know whether they would or not?

MR. HUDSON: Well, under their procedures, we have to assume they would not.

QUESTION: I see.

QUESTION: Mr. Hudson, let me get to my question that

has spawned these other ones. Suppose the occurrence took place 30 days before the '72 amendment. Thirty days. How long would she have to file, 60 or 120 days?

MR. HUDSON: We contend that she would have --

QUESTION: Or 180 days?

MR. HUDSON: -- 90 days to file. Sixty more days.

QUESTION: Despite the interposition of the '72 amendment?

MR. HUDSON: Well, this argument, I'm not, frankly solid on this. If the -- I'm not -- I can't really answer your question directly. From a constitutional standpoint, it may be that she could file 180 days later. But I would have to take the position --

QUESTION: I'm thinking of statutory --

MR. HUDSON: -- that, to be consistent, that she could not file after 60 days.

QUESTION: Well, it's certainly your argument that the limitation is a condition of the right itself. You couldn't suggest 180 days would be applicable.

MR. HUDSON: That's correct, Your Honor.

QUESTION: Is it really accurate to say that the Court of Appeals didn't consider this issue? Judge Weick's opinion says that it's a new issue which was not raised by the plaintiff in the district court -- I'm looking at pages 8a and 9a of the Appendix to the Petition for Certiorari.

But then he goes along and in two or three or four short paragraphs, he does discuss the issue and dispose of it, doesn't he? On the merits.

MR. HUDSON: That is correct. In the first part of that decision, he attempts to make it clear that there was only one issue for decision.

QUESTION: Yes.

MR. HUDSON: And he does go ahead and decide the issue without the benefit of the respondent's argument on the merits of that issue.

QUESTION: But the Court of Appeals did deal with the issue and dispose of it on the merits. Do you give it the same reading as I do?

MR. HUDSON: Well, they discussed the issue -- I do not feel that they decided the issue. I do not feel they actually decided the issue. They said, in effect, that "if we were to decide this issue, we would decide such-and-such", and that's the basis of their decision.

QUESTION: Well, he ends up the discussion with: "The subsequent increase of time to file the charge enacted by Congress, could not revive plaintiff's claim which had previously been barred and extinguished." That seems to me a fairly unambiguous conclusion.

MR. HUDSON: They reached that conclusion --

QUESTION: But he doesn't say, "if we did decide the

issue, we would decide it that way".

MR. HUDSON: That may be true, Your Honor. It's really unclear in --

QUESTION: But Judge Edwards' dissent is squarely on the 180-day point, isn't it?

QUESTION: Yes.

MR. HUDSON: And that is a point, I think, that should be noted. Judge Edwards' dissent states that they should not decide the issue, but send it back to the district court and let the district court decide it.

In effect, that's his dissent. They should send the case back to the district court.

I would like to say, concerning the argument that the discharge was not a final act until the termination of the grievance procedure, that, as I stated earlier, this is -- there is also a question here of whether or not this issue is properly before the Court.

We contend that this issue was raised for the first time and briefed to this Court, and under this Court's rules and policies, it should not be considered since it was not considered by the courts below.

But, in any event, we contend that a discharge of an employee is a final and completed act. It was a final and completed act in this particular case, there was nothing left to be done. The only thing left to be done was a question of

whether or not the company would change its mind.

Now, the company still has this question, they can still change their mind, but that does not make the discharge not a final complete act. The denial of the grievance was also a final act and completed. It was a separate act. The employee could have filed an EEOC charge over the denial of the grievance.

The employee filed a charge over the discharge of the employee, and it should be noted also that the plaintiff's complaint in the district court alleged that this discharge occurred on October the 25th, 1971. So we contend that this argument does not lend any assistance to the petitioner's case here.

In conclusion, we contend that the only issue before this Court is whether or not tolling should apply. And based on the policies of this Court, we contend it would not be inconsistent with the policies underlying Title VII of the Civil Rights Act to refuse to apply tolling. And since it would not be inconsistent, we contend that the decision of the court below should be affirmed.

Thank you.

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

Do you have anything further, Mr. Newman?

REBUTTAL ARGUMENT OF WINN NEWMAN, ESQ.,

ON BEHALF OF PETITIONER UNION

MR. NEWMAN: Yes, Mr. Chief Justice.

On the point of the --

QUESTION: Your side doesn't seem to address the 180 days question.

MR. NEWMAN: Well, we think it's an important issue, but in terms of the --

QUESTION: Well, actually, if you were right on the 180-day, we wouldn't have to reach any diversion.

MR. NEWMAN: Yes, in terms of the long-run effect, we think that in the interest of --

QUESTION: Well, apart from -- if you want to win your lawsuit, you might try to help us with the 180-day.

MR. NEWMAN: Yes. Well, we think, as we've said in our briefs, we thought it was fully briefed there, that the 180-day provision applies in this case, and that the grievance clearly is timely on that basis; no question about our thinking on that score.

QUESTION: You would not disagree with the argument made in the amicus brief of the United States, would you?

MR. NEWMAN: No, we fully support it, and did.

I would like to point out, though, that the complaint does allege race discrimination. That the company was silent in its response, it never argued that, on the argument it's

now making, it didn't argue that Guy had slept on her rights, it didn't argue that it was prejudiced by the delay; and we submit that, since the statute of limitations is a defense, that the burden has the obligation to prove all those elements, and, at worse, this case should be remanded on that matter.

Secondly, I want to make clear that we are not in any way suggesting here that the employee should give up the right to go to -- to utilize Title VII.

What we are saying is that for various reasons that we get into in the brief, and won't be able to get into here, the employee may be harmed by the fact that a grievance is pending and it may disrupt the informal atmosphere in terms of settling the case. There will be people looking over their shoulders at lawyers, rather than trying to settle a grievance, with the lawyers taking over rather than the industrial relations people.

We are not suggesting -- Congress clearly did not intend to force people to court, as this Court said in Alexander, it intended to encourage people to stay with the arbitration process.

As far as increasing the statute of limitations is concerned, it seems to us this area is clear, that the cases that have already been referred to, there's Minnesota Mining and Chase Securities. And we submit that -- well, I'm sorry, my time is up.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:27 o'clock, a.m., the case in the above-entitled matter was submitted.]

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