In the

Supreme Court of the United States

RICHMOND UNIFIED SCHOOL DISTRICT, ET AL.,

Petitioners,

v.

SONJA LYNN BERG, individually and on behalf of all other female employees of the Richmond Unified School District,

Respondent.

No. 75-1069

Washington, D. C.
October 5, 1977

Pages 1 thru 50

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The above-entitled matter came on for argument at 10:05 p.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 P. STEVENS, Associate Justice

APPEARANCES:

ARTHUR W. WALENTA, JR., Esq., Assistant County Counsel, Courthouse P.O. Box 69, Martinez, California 94553, for the Petitioners.

MISS MARY C. DUNLAP, Equal Rights Advocates, Inc., 433 Turk Street, San Francisco, California 94102, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 75-1069, Richmond Unified School District against Sonja Lynn Berg.

Mr. Walenta, you may proceed whenever you are ready.

ORAL ARGUMENT OF ARTHUR W. WALENTA, JR.

ON BEHALF OF PETITIONERS

MR. WALENTA: Mr. Chief Justice, and may it please the Court: This is a civil rights action brought by Mrs. Berg, a teacher employed by the Richmond Unified School District. It was brought to prevent the District from placing her on maternity leave and to compel the District to allow her sick leave credit while absent due to maternity.

Mrs. Berg was granted a summary judgment in the district court, and that judgment was affirmed by the Ninth Circuit Court of Appeals. Because this case was decided as a summary judgment and because there is disagreement between the parties as to the import of the evidence that was before the district court, I would like to review briefly what the evidence was.

The evidence consisted of the pleadings in the case, Mrs. Berg's complaint, an amendment to it, a supplement to it, the answer filed by the School District, limited affidavits and exhibits presented by Mrs. Berg, and somewhat

more extensive affidavits and exhibits provided by the School District. And that is all the evidence there was.

That evidence shows that before December 1972, the School District maintained a compulsory maternity leave regulation requiring teachers to terminate their service at the end of the seventh month of pregnancy and to take maternity leave. And the evidence shows that the District had an informal policy disallowing sick leave usage for maternity purposes.

In November of 1972 Mrs. Berg filed a charge with the EEOC challenging these policies. This charge was unsworn, this charge contained the notation that she had had no correspondence with the School District.

On December 13 of 1972, the School District Governing Board modified its maternity leave policy to permit individual consideration of requests of teachers to work later than the seventh month. The next day Mrs. Berg applied for maternity leave in an application that conformed to the policy as it had been modified the preceding day. On December 20 Mrs. Berg submitted a second application for maternity leave, and in that application she asked permission to continue work until term, until her child was born. Seven days later the School District replied in a letter to Mrs. Berg stating that if she was going to work until that date, the District wanted a physical examination by its doctor to

assure it of her physical condition.

There was intervening correspondence from Mrs. Berg's attorney, and she filed suit in Federal district court on February 5th. On February 16th, taking into account the medical advice that the District had obtained in the intervening period, the District superintendent promulgated a more elaborated policy for maternity leave, and Mrs. Berg was notified that this revised policy would be applied in her case.

In chronological order, on the 21st of February Mrs. Berg received the notice of her right to sue under title VII, and on the 22nd she received a preliminary injunction from the Federal district judge.

In March, on the 14th, she had her child and she worked up until that time, and in June she supplemented her complaint in the Federal district court action to allege her receipt of statutory notice of her right to sue under Title VII.

From the outset, the School District has challenged the jurisdiction of the district court in this case. It is our contention in the first place that her EEOC charge was premature and that it was not a proper charge sufficient to found a Federal district court action under title VII. At the time that she filed this charge, the District had taken no action respecting her. The policy that she complained of

in the charge was modified before the District took any action concerning her, and it was not until the 27th of December when a letter was written by the District to Mrs. Berg that there was the first occasion, or occurrence, as I would call it, between the District and the aggrieved person that I think she could complain about. And that was the point at which the District indicated that it wanted a medical examination by its physician.

When we look to the specific language of the statute, I think we find that Congress intended under that statute that an unlawful practice has occurred before we can file a charge. The time periods that are involved in the statute occur "after the alleged unlawful employment practice occurred." The charge is to be filed by a person claiming to be aggrieved, and that person has to allege in the charge "that an employer has engaged in an unlawful employment practice."

QUESTION: Mr. Walenta, you are prejudiced how?

MR. WALENTA: We are prejudiced, for one thing, by becoming implicated in a legal proceeding based upon a charge that was hypothetical and speculative when filed and, in fact, in a situation in which the facts changed between the time the charge was filed and the time any action was taken concerning Mrs. Berg.

Secondly, I think as a matter of law and as a matter of policy, it is Congress that mandated that this

EEOC charge be a condition that a person is required to file before they can file suit in the district court. They must file suit a certain number of days after a charge.

QUESTION: The latter doesn't bear on prejudice, of course, does it?

MR. WALENTA: Excuse me, Mr. Justice.

QUESTION: I say the latter doesn't bear on your prejudice in any way.

MR. WALENTA: No; that is correct. That is a different issue.

In any event, we find no occurrence between the District and Mrs. Berg until six weeks after this charge was filed. We believe that Congress clearly mandated that a charge be filed and that indeed the statutory procedure for charges for EEOC investigation and for the various time periods that are implicated in the statute cannot be followed unless one requires that there be a charge that is definite as to occurrence and which shows an actual subject of actual grievance on the part of a complaining party before they can file a Federal court suit.

A further major jurisdictional issue in this case has to do with Mrs. Berg's filing suit before she received the statutory notice of her right to sue from the Attorney General. This Court has characterized that notice as a jurisdictional prerequisite in more than one case. The

Ninth Circuit Court of Appeals ruled that by virtue of her obtaining the notice after she filed suit and by virtue of her supplementing her complaint, she had cured a jurisdictional defect that existed when the suit was filed, and in reaching this conclusion the Ninth Circuit relied upon the Fourth Circuit's position in Henderson v. Eastern Freight Ways. We have in our brief elaborated our quarrel with the Henderson decision. Henderson holds that a late notice under title VII has the effect of validating a complaint that was untimely filed.

One wants to sympathize, perhaps, with the decision in the Henderson case, but we believe that it is wrong in principle, and we believe that there is a very serious issue indeed about ascertaining when a Federal court has jurisdiction, and we believe that the proposition that jurisdictional facts can occur to perfect jurisdiction that did not exist when the suit was filed would leave the courts with a rather intolerable situation.

This Court in 1824, in Mollan v. Torrance established a rule that Federal court jurisdiction depends upon the facts at the time the action is filed. This specific rule was confirmed by an opinion written by Justice Brandeis, and we believe that it is correct, it is simple, it is intelligible, and we believe that it ought to be followed. I have mentioned that in the absence of following that rule

you raise a situation in which plaintiffs are entitled to file Federal district court suits and establish jurisdiction after the fact.

In district court cases following Henderson and title VII, district court jurisdiction has been found to be established one year and more after the suit was filed. The idea of this being a general rule in Federal courts is one that I find very difficult to live with.

Finally, we contend that the Henderson decision has the practical effect of avoiding all of the requirements that Congress mandated with respect to the operation of title VII and the preliminary operation of an administrative procedure required to resolve complaints before matters get into the Federal courts.

I would like to bring the Court's attention to a decision that has been handed down by the Third Circuit since our reply brief was filed. That is Glus v. G. C. Murphy Company. That is a Title VII case.

QUESTION: Gluce, G-l-u-c-e?

MR. WALENTA: G-l-u-s. I have filed, or lodged, I should say, copies of that opinion with the clerk of the court for the Justices.

QUESTION: Do you have a citation?

MR. WALENTA: It's not yet in print. You have copies with the clerk and in your law library.

QUESTION: Third Circuit.

MR. WALENTA: Third Circuit.

That case was one in which an employer wanted to file a cross-complaint in a Title VII case against a union that had not been named in the original EEOC charge. And the Third Circuit ruled that Title VII jurisdiction could not be obtained by procedural devices under the Federal Rules. And following Rule 82, the Glus case stands for the position that the Federal Rules cannot be used to expand subject matter jurisdiction.

The importance for this case is that Mrs. Berg's supplement was filed under Rule 15(e).

The other ground upon which the Ninth Circuit found jurisdiction in this case arises from the theory that Title VII jurisdiction can be perfected before the receipt of a notice of right to sue in order to permit preliminary injunctive relief. And in that the Ninth Circuit followed the theory of Drew v. Liberty Mutual Insurance Company, a Fifth Circuit decision.

If I understand the Drew case correctly, it holds -- or it reasons, I should say -- that before the 1972 amendments to Title VII which permitted a preliminary suit by the Attorney General, there existed by implication a private cause of action to obtain preliminary relief without awaiting Commission action. This class of action existed because it

was necessary to enforce the rights granted by the statute.

The court in Drew does not cite any authority holding that to be the case. They simply apparently expound it, and as far as I can tell, the proposition in Drew is that there is jurisdiction under 1343 to prosecute a Title VII action before you have obtained Title VII jurisdiction. That case has been criticized by several district court opinions. We have argued at length in our brief that its theory is untenable. We believe in particular that the theory in Drew was contrary to this Court's decision in National Railroad Passenger Corporation v. Passengers Association, and the rule of that case is that express statutory provisions for Federal court jurisdiction are controlling absent clear evidence to the contrary legislative intent. We have found, and Mrs. Berg has not found, to my knowledge, any evidence that Congress intended a broader private cause of action in Title VII cases than is specifically set forth in the statute.

We believe that the holdings of the Ninth Circuit in this case, of the Fifth Circuit in Drew, and of the Fourth Circuit in Henderson conflict with the language of this Court in Occidental Life v. E.E.O.C., and Alexander v. Gardner-Denver, and in the McDonnell Douglas case that the statutory preconditions to private suit under Title VII are jurisdictional prerequisites.

So far as the merits --

QUESTION: This complaint was also based on 1983, was it not?

MR. WALENTA: Yes, it was a 1983 claim as well.

QUESTION: And it was on that basis, was it, that the district court granted preliminary injunctive relief?

MR. WALENTA: Yes. That is the statute pursuant to which the district court purported to act. The district court had jurisdiction under 1983.

QUESTION: By virtue of 1343.

MR. WALENTA: Well, as against Superintendent Snodgrass. It did not have jurisdiction against the District and the Governing Board, although at the time that it entered the preliminary injunction, this Court had not decided the case which ruled that a public agency was immune from general 1983 jurisdiction for injunctive purposes.

QUESTION: How does that affect the arguments you have just made?

MR. WALENTA: Well, of course, the problem is that the Ninth Circuit expressed the theory that there was Title VII jurisdiction notwithstanding that the district court didn't purport to act under Title VII at the outset. And you have to reach that aspect of the Ninth Circuit decision.

QUESTION: What is that case that you are talking about that we have decided that school boards -- you say public agencies?

MR. WALENTA: City of Kenosha v. Bruno.

QUESTION: Right.

QUESTION: That was just a city?

MR. WALENTA: City of Kenosha v. Bruno is a case in which this Court ruled that there was not jurisdiction under 1983 to grant equitable relief against a public agency because the agency --

QUESTION: Did it say public agency or city?

MR. WALENTA: Well, the case involved a city --

QUESTION: What about a school board?

MR. WALENTA: I would say the lower courts have universally accepted that case as being applicable to school boards.

QUESTION: I wondered if you knew the answer to the case that is being argued next week.

(Laughter.)

MR. WALENTA: Well --

QUESTION: You say all the 1983 desegregation suits were no jurisdiction?

MR. WALENTA: So far as I can tell, since you handed down City of Kenosha v. Bruno we do not suffer the wear and tear that we did prior to your decision in that respect, and if I mention that case to a district -- in fact, in this case, as soon as that case was mentioned to Judge Zirpoli, he allowed that he was incorrect, and at one point

this case was dismissed as to the school board and then reinstituted after Mrs. Berg supplemented her complaint.

QUESTION: Did Kenosha say public agency?

MR. WALENTA: Well, Kenosha deals with the question of who is a person and who is not. And really more seriously -- it's a fascinating case -- statutory immunity was abolished by the California Supreme Court in 1960, but before that time direct suits against governmental agencies were practically unknown, and they were practically unknown when the Fourteenth Amendment was adopted. And I think that this Court was correct when it interpreted the early Civil Rights Act as not providing for any implied cause of action against public agencies as against individuals. That was absolutely consistent with the general legal thinking and understanding of the era when the statute was adopted.

QUESTION: That was done in Monroe v. Pape with respect to municipalities and with respect to actions for money damages.

MR. WALENTA: That is correct. City of Kenosha v. Bruno --

QUESTION: Had to do with injunctive relief.

MR. WALENTA: -- was required because the appellate courts and district courts could not believe that Monroe v. Pape extended to injunctive relief.

QUESTION: Right.

MR. WALENTA: As to the merits, we contend that a school district policy requiring medical information concerning a pregnant teacher and reserving the right to determine the beginning data of maternity leave does not violate Title VII unless that policy is a pretext for discrimination or results in gender-based discriminatory effects.

QUESTION: Mr. Walenta, what does the new statute have to do with this case, the one that is on page 52 and 53, the 1976 statute?

MR. WALENTA: Yes.

QUESTION: Is that in here?

MR. WALENTA: The change in that statute does not directly affect the merits of this case as to Mrs. Berg.

QUESTION: It says, "The length of the leave of absence, including the date on which the leave shall commence and the date on which the employee shall resume duties shall be determined by the employee and the employee's physician," period.

MR. WALENTA: Yes, your Honor. I should like to --

QUESTION: Doesn't that have any effect on this case at all?

MR. WALENTA: Strictly speaking, I think not, and I say that for this reason: We are faced, of course, with our obligations to Mrs. Berg which have got to adjudicated; we are faced with our obligations to the class, since this

was certified as a class action; and we also have at risk $5,000 in attorneys' fees that have been awarded. So the case remains tangible.

I would like to point out to the Court that in connection with the statutory change there is a factual situation that is not precedented so far as your decisions are concerned. The California Legislature did not change this statute with a view toward voluntarily changing the law in the State.

QUESTION: I am not talking about why it was changed; I am talking about what it says.

MR. WALENTA: Well, the statute was changed to write into California law the EEOC regulation that this Court criticized in Gilbert v. General Electric, I agree. But that statute was adopted -- and I read section 6 of Chapter 915 of the California Statutes of 1976, I believe -- 1975.

QUESTION: This is 1976.

MR. WALENTA: Yes. Had that statute been adopted simply to change California law and to allow benefits to teachers that they wouldn't have had otherwise, the State would have been required to reimburse the School District for the costs incurred as a matter of State law. The legislature ruled that out and they said --

QUESTION: If this statute had been in effect when this case was decided, would you be here?

MR. WALENTA: Well, if this statute had been in effect in December of 1972, we would not be here.

QUESTION: Does it have any effect on your case? Or whether we should decide --

MR. WALENTA: I realize that was your point, and that's why I want to indicate to the Court what the California Legislature thought they were doing when they adopted this statute. The statute says, "There are no --

QUESTION: Your basis for this -- are you going to give us some legislative history or something?

MR. WALENTA: Yes, your Honor.

QUESTION: Is it in here, in the record or brief anyplace?

MR. WALENTA: It is a matter of public record and it is section 6 of Chapter 915 --

QUESTION: Where will I find it?

MR. WALENTA: California Statutes, 1975.

QUESTION: Is it in any of these things here, in any of these briefs or records or anything?

MR. WALENTA: This is in the Court's Law Library, I expect.

QUESTION: You want me to go out and get it.

MR. WALENTA: No, I am going to read it to you.

The legislature said, "There are no State mandated local costs in this Act that require reimbursement because

this Act merely affirms for the State that which has been declared existing law or regulation through action by the Federal Government." In other words, the California Legislature was under a misapprehension of how this Court was going to decide the General Electric case. And it is interesting --

QUESTION: Even if they were, it still went ahead and adopted the law as State policy.

MR. WALENTA: That's true, but we will at least have a claim to ask the legislature for our money back if this Court can rule in our favor in this case.

QUESTION: You mean to repeal the statute?

MR. WALENTA: Not to repeal it, but to appropriate money under the collateral law that requires them to reimburse our costs when they impose those costs as opposed to the courts imposing those costs.

QUESTION: Is there any issue about a forced leave of absence?

MR. WALENTA: Excuse me?

QUESTION: What issue do you think is open here after this change in the law?

MR. WALENTA: All issues remain open as to Mrs. Berg.

QUESTION: Except she did not in fact leave because of the injunction. She did not in fact leave until

very shortly before the birth of her child.

MR. WALENTA: That is correct. The point is if she was entitled to the relief that she received, notwithstanding that her actual leave is moot, she is entitled to award of her attorney's fees, and we have to pay them. So that $5,000 is at issue regardless.

QUESTION: Is that enough to keep this case alive?

MR. WALENTA: Oh, I think it is.

QUESTION: I thought the general rule was more than $10,000.

MR. WALENTA: That is a limitation on Federal courts' jurisdiction under certain other statutes.

QUESTION: Aren't there cases, at least from other jurisdictions, holding that the mere claim for attorneys' fees if it is left standing all by itself is not sufficient to keep a case from being moot?

MR. WALENTA: That is no subject that I have researched. I cannot respond to it.

QUESTION: What about the pay claim?

MR. WALENTA: The pay claim exists and continues to exist both as to Mrs. Berg and as to the class --

QUESTION: For the past.

MR. WALENTA: Between the period 1973 and 1975.

QUESTION: For the past.

MR. WALENTA: Yes.

QUESTION: That issue is here, but that claim doesn't involve the forced leave issue.

MR. WALENTA: That's true; that involves the right to use sick leave.

QUESTION: Which is in that respect like the case we just heard, I mean the prior case.

MR. WALENTA: Yes, that is true.

I think I will reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Walenta.

QUESTION: Mr. Walenta, could I ask you, do you concede the presence of any paid paternity leave?

MR. WALENTA: No, we do not. That issue was not litigated functionally until the respondent's brief was filed before this Court, and there are no facts on the subject that I know of in the record.

QUESTION: So you don't concede the presence of even one day's payment to a father for paternity leave?

MR. WALENTA: There is no showing of it.

QUESTION: Well, do you concede it?

MR. WALENTA: No, I do not.

And I must frankly say the District's policies were in some disarray and I do not know what was being done with respect to that aspect of their regulation.

MR. CHIEF JUSTICE BURGER: Miss Dunlap.

ORAL ARGUMENT OF MISS MARCY C. DUNLAP

ON BEHALF OF THE RESPONDENT

MISS DUNLAP: Mr. Chief Justice, and may it please the Court: In November of 1972 Sonja Lynn Berg, who was approximately five months pregnant, was the sole support of her family. She was, if you will, the breadwinner. Her husband was a full-time student of the ministry, and she was the sole source of income for him, herself, and her soon-to-be-born first child.

QUESTION: Would it make any difference if that were not so?

MISS DUNLAP: Well, it makes a difference here, Mr. Chief Justice, because of the nature of the injury.

QUESTION: On the legal issues?

MISS DUNLAP: It makes a difference with respect to the nature of the injury that would have been incurred by Mrs. Berg had she been compelled to leave at a time when she was fully able to work for the Richmond School District and teach her kindergartners.

The nature of her injury was such that the district court, as Mr. Justice Stewart has pointed out, issued a preliminary injunction solely on the basis of its jurisdiction over her 1983 claim of an invasion of her constitutional rights by virtue of the forced leave policy.

Mrs. Berg, in November of 1972, was indeed a person

claiming to be aggrieved under Title VII for purposes of filing her charge for the following reasons:

It was her doctor's very best prediction -- and in the area of pregnancy we deal with predictions -- that she would be able to teach until the onset of delivery, that is to say, until the time the doctor believed she would be confined for purposes of giving birth. For that reason her doctor recommended in a letter to the School District that her state of health was such that she be permitted to continue to teach.

Unlike my opposing counsel's statement of the record -- and I believe page 113 of the Appendix will illustrate this -- the policy of the District was not to permit teachers as of November of 1972 to teach through their seventh month, but only through their sixth. That bears little importance to the question of whether the leave was a compulsory one, but in terms of an individual whose income and whose family livelihood depends upon that person's being able to continue working and where that person's doctor's advice is that that person is capable of doing so, one month or one week or even one day's loss of employment is actionable and a matter of concern under Title VII.

The statement of opposing counsel was that leave would begin at the end of the seventh month, and I share

counsel's confusion about the various policies of the District with respect to leave dates, for in the course of this litigation the original policy on which Mrs. Berg filed her charge, which appears at page 109 of the Appendix, was a policy that would have required her not to work during a period of three months when she was perfectly capable of doing so. Reality has demonstrated that fact to us.

QUESTION: What are we supposed to do in this confused state of the record if you want a summary judgment on disputed affidavits in the district court?

MISS DUNLAP: I believe, Mr. Justice Rehnquist, that the record is not confused on the points as to which this Court has the ability to make determinations of law. I merely wish to point out to the Court that the Richmond Unified School District changed its so-called compulsory leave policy twice in the course of this litigation but retained the compulsion in that policy. And as the district court observed, the compulsory nature of the policy with its assumption of the inability of the individual to work and its coercive element that that individual's doctor's judgment was to be distrusted and with the effect on the individual with a deprivation of income was, regardless of when the compulsion applied, a discrimination.

QUESTION: Is that agreed on by everybody, by your opponent, too?

MISS DUNLAP: I am sure that my opponent disagrees with me with respect to the characterization of the policy as compulsory. It has been the position of the Richmond School District that this is an individual policy.

Let me address --

QUESTION: Then how did the district court on your motion for summary judgment decide a question like that?

MR. DUNLAP: Mr. Justice Rehnquist, in this case there is a local rule which requires the party making a motion for summary judgment to recite undisputed facts, and at, I believe it's pages 101 and 102 of our Appendix, those facts which we believed to be undisputed and to be necessary to the district court's determination of the illegality of this policy are set forth.

I wish to call this Court's attention to the fact that the submissions of the petitioners in this case, which I believe appear at pages 105 through 107, do not dispute the following facts which are critical to the understanding of the discriminatory nature of this policy:

First, that disabilities arising from pregnancy are the only disabilities excluded from the payment of accumulated sick leave pay.

That, second, no other class of persons who can be predicted to be disabled are subjected to a classificatory doubt of their doctors' advice, an assumption -- and I would

say a presumption would come to the fore, I believe -- that those individuals in their ninth month are incompetent, incapable of teaching, awkward, incapable indeed, in the words of Dr. Thebaut, of even controlling their urinary functions, that, in short, these pregnant women in their ninth month, all of them, mind you, can be excluded from employment by the District.

Now, in short, the basic facts in this case with respect to the discriminatory purpose and effect of the Richmond School District's policies taken as a whole are not in dispute before this Court, nor, I believe, in terms of this Court's determination in General Electric Company v. Gilbert. I believe the implications of this designedly discriminatory policy are a matter of legitimate dispute. Let me explain.

First of all, we submit that Mrs. Berg, in light of her doctor's advice, her breadwinner status, her ability to continue teaching, and her understanding of the Richmond School District's policies as demonstrated in her charge are illustrative of rational conduct on the part of an employee capable of working who is subject to a mandatory leave policy. She faced a policy which, at the time she filed her charge, presumed her incapable in her seventh, eighth, and ninth month, and by the time we got to the stage of the preliminary injunction, the Richmond School District

would have done the following things to her with respect to the district court's determination on the injunction if it were not enjoined:

First, despite her own doctor's advice, she would be compelled to see a District physician.

Second, the District physician, whose opinion has been presented to this Court at page 56, had his mind made up with respect to all of these cases, all teachers in their ninth month.

QUESTION: Miss Dunlap, what about this other statute, the 1976 statute?

MISS DUNLAP: We believe that the 1976 statute would, were it not for the adversariness between these parties by the definition of this Court in the opinion in Kremens v. Bartley, would moot the case. However, our understanding of the requirements with respect to sufficient adversariness is this: The parties here have a genuine dispute about the legality of the combined policy of mandatory leave denial of accumulated sick leave pay. Those policies must be read together because they were built together and they were applied together. That genuine controversy, involving as it does the payment of accumulated sick leave to Mrs. Berg and her class, makes the case a live one for this Court.

QUESTION: Where is the injunction itself?

MISS DUNLAP: I believe that the district court -- the final injunction? The final judgment is printed in the petition for certiorari at Appendix C, and that judgment embodies the final provisions --

QUESTION: What page is that?

MISS DUNLAP: I am sorry. Appendix C, page 46.

If I may turn to what I believe to be the most important and controlling question in both this case and the Satty case --

QUESTION: Miss Dunlap, before you do that, let me just get one thing straight. Is there no dispute over back pay, any monetary dispute?

MISS DUNLAP: There is a monetary dispute between the Richmond School District and all the members of the class. It consists in the position of the class members, and under the district court's injunction, this would be upheld, that they are entitled to accumulated sick leave pay for every day of actual disability due to pregnancy.

QUESTION: Including the named plaintiff.

MISS DUNLAP: That is correct. She is included among those who are in need of that relief and who were afforded it below.

Mr. Justice Stevens, I wish to turn to your question asked this morning because I believe it has not yet been answered. How are these policies discriminatory against

women on account of sex?

In the case of the Richmond Unified School District, the question is fairly easy to answer on the basis of a record made, indeed, before the Gilbert case was decided. First of all, the Richmond Unified School District with respect to pregnant teachers and no other group presumes them incapable of working in their ninth month, untrustworthy in terms of their doctors' advice if their doctor says they may work in their ninth month, and in short, that policy with respect to forced leave questions the judgment of these teachers, these women teachers. I think the National Education Association's amicus brief which characterizes that particular presumption as insulting puts the matter mildly. We have something more here than an insult to a group of people. We have --

QUESTION: Let me test that with you for a moment.

MISS DUNLAP: Yes.

QUESTION: You argued that very forcefully in your brief. Do you think that there is room for a difference of opinion between doctors as to the precise time when a pregnant person should discontinue teaching a class?

MISS DUNLAP: I am sure there is a difference of opinion with respect to that like any other health condition. Doctors do tend to vary in their prescriptions for vacations.

QUESTION: Then why would it be irrational for the

School Board to say it would like to have its own doctor form a judgment on that question?

MISS DUNLAP: It is discriminatory because no other class of persons who can contemplate disability or who are disabled and have recurring conditions are subjected to that untrusting interventionist requirement on the part of the School District.

Additionally here we have a factor that suggests the Richmond School District's policy is nothing more or less than the subterfuge that this Court defined as an actionable form of conduct in Gilbert, namely, this School District maintained that for purposes of leave these teachers are presumptively disabled, and I call the Court's attention to the affidavit of the physician at pages 54 through 56 of the record in support of that, and simultaneously maintained that these same teachers who are disabled, who are awkward, who are unable to walk around, who are unable to teach their students are going to be deprived of their accumulated sick leave pay.

I wish to turn to the very critical distinction between the denial of accumulated sick leave pay in this case and the denial of disability insurance in the General Electric case.

QUESTION: The '76 statute says that you can't do that any more.

MISS DUNLAP: Well, they can't do it any more, Mr. Justice Marshall, but in the interim there are a group of women as to whom they have done it, as to whom they have denied that compensation.

QUESTION: Did you get damages in this case?

MISS DUNLAP: The court enjoined them from denying these individuals of their accumulated sick leave pay, but --

QUESTION: Am I correct that the only relief was an injunction?

MISS DUNLAP: You are quite correct that the only relief in form is an injunction, but --

QUESTION: But that led to a monetary --

MISS DUNLAP: Yes, which has been unpaid, yes, Mr. Justice Stewart. Thank you.

QUESTION: Where in the order does it say anything about money? It says an injunction and counsel fees; that's all.

MISS DUNLAP: There is money, Mr. Justice Marshall, tied up --

QUESTION: Where is it in the order?

MISS DUNLAP: All right. The court enjoined them from depriving the plaintiff of her accumulated sick leave pay. She nonetheless has not received that pay. Neither has any class member, and there is a group of people from 1973 to 1975 who by virtue of this District's denial of

accumulated sick leave pay haven't received their money. I can assure you that they haven't received their money although I can't point out to you where in the judgment the injunction treats that because I don't have it in front of me. That is the reason why.

Let me turn, if I may --

QUESTION: The whole injunction is what you pointed out to me in the Appendix, isn't it?

MISS DUNLAP: It's the judgment at page 46 of Appendix C to the petition.

QUESTION: That's the whole thing.

MISS DUNLAP: That's the whole thing, that's right. It is.

With respect to the critical distinctions between the deprivation of accumulated sick leave pay in this case and the denial of disability insurance in the Gilbert case I wish to call this Court's attention to another statute. Perhaps we have had too many statutes already, but this one turns out to be quite important, namely, California Education Code, Section 13456, which is reprinted in the appendix to the petitioners' opening brief in this Court. The relevant section of that statute,which we believe is controlling on the question of whether these petitioners could deprive these women of their accumulated sick pay, reads as follows: "Nothing in this section shall be construed so as to deprive

any employee of sick leave rights under other sections of this code for absences due to illness or injury resulting from pregnancy." In short, the state of the State statute at the time that Mrs. Berg would have been entitled to her accumulated sick leave pay entitled her to that sick leave pay.

The Richmond Unified School District at no point in this litigation has presented any reason of any substance, constitutional or statutory, for its deprivation of accumulated sick leave pay for pregnancy.

QUESTION: What you mean to say is that the court means a word that you stop withholding payment.

MISS DUNLAP: Yes.

QUESTION: Which means pay.

MISS DUNLAP: Yes. In the second sentence -- That hasn't been pled because we viewed it as a money judgment in terms of the payment by the District of this money and therefore stayed in effect by the appeals.

QUESTION: It was stayed.

MISS DUNLAP: It was stayed. That's correct.

Now, basically what we have here is a situation where this District asserts that for purposes of statutorily accumulated pay -- you earn 10 days a year of this for every year that you teach full time -- that they could nonetheless deprive persons ill or injured, disabled, in short, due to

pregnancy of that part of their accumulated sick leave pay that they would otherwise be capable of drawing for any other disability.

Let us scrutinize this condition and this practice under the test of General Electric Company v. Gilbert. First of all, we have evidence in this record -- and if this Court finds it insufficient to make the point, I think we are entitled to a remand under Gilbert, we believe that it is sufficient as a matter of law, it shows purposeful discrimination -- that for purposes of comparing leave, this employer said, "You are disabled in your ninth month."

Now, we need to look at that compulsory leave provision in terms of the history of school districts' treatments of teachers generally and in terms of this School District's treatment of these teachers. The National Education Association in an amicus brief to this Court in LaFleur case detailed some 200 years of discrimination against women in the teaching profession. First, women as a whole were excluded, then married women, and then, finally, as in the LaFleur case, women who were pregnant at various stages of their pregnancy.

Now, how about the conditions of pregnancy with respect to this employer? This employer had a mandatory maternity leave law that contained in it, that entailed, a presumption of disability at a certain point and simultaneously

deprived every woman actually disabled by pregnancy of her accumulated sick leave pay. We submit that the statute, which is the only excuse, if you will, offered by the District for that deprivation of accumulated sick leave pay, required the School District to pay accumulated sick leave pay under all conditions, pregnancy or otherwise.

QUESTION: That is the California statute?

MISS DUNLAP: The statute.

QUESTION: The California statute? You are not talking about Title VII.

MISS DUNLAP: Title VII required it --

QUESTION: Which are you talking about?

MISS DUNLAP: Oh, I am sorry. I was speaking of the statute, the California statute, when I said what I said. That is not only not a justification for deprivation of accumulated sick pay here, but --

QUESTION: Just the opposite.

MISS DUNLAP: Right, that the District was in violation of that statute.

QUESTION: Does that mean that you would have had a suit as a matter of State law? You could have brought this action in the State court?

MISS DUNLAP: It is a possibility, I believe. It would certainly not have resulted --

QUESTION: If it is not more than a possibility,

should we get involved in the issue?

MISS DUNLAP: Well, it is our view that the questions before this Court are the Title VII rights of the parties. It may well have been that an action could have been brought under State law challenging --

QUESTION: Did either of the lower courts construe the California statute that you are now directing our attention to?

MISS DUNLAP: No, but a district court in a similar case has construed this very statute, namely, the Oakland Federation of Teachers v. Oakland School District case, which is cited in our brief in which the District Court for the Northern District of California found that where that district had argued that the statute afforded them this option --

QUESTION: So this argument, if I get it correctly, is that another distinction of the General Electric case is that here you are entitled as a matter of State law to be paid and in defiance of State law you were not paid; therefore, that shows that -- what does it show? What evolves from that?

MISS DUNLAP: Basically what it shows is that this employer had no basis, none of the sort demonstrated in GE and none of any sort that this is found to be a defense under Title VII for denying accumulated sick leave pay.

Additionally, unlike the State of California in

Geduldig v. Aiello, and unlike General Electric Company as found by this Court, this School District had no option but to afford 10 days of accumulated sick leave pay per year.

QUESTION: Miss Dunlap, the question I asked earlier today and you were going to answer is, How have you made out a prima facie case? Everybody seems to say that they haven't made out an affirmative defense. You seem to be saying the same thing. How have you made out your prime facie case?

MISS DUNLAP: I hope not to be saying that. We have made our prime facie showing in two ways: Viewing first this Court's language about purposeful discrimination, we submit that the tandem operation of a presumption of disability among these pregnant teachers with a presumption of nondisability with respect to the accumulated sick leave pay shows a purpose to discriminate against these pregnant women.

QUESTION: But they say it's the kind of disability that makes it inappropriate for you to teach, but it's not the kind of disability for which we are going to allow sick leave. Why is that discrimination on account of sex if you accept the basic reasoning of General Electric?

MISS DUNLAP: It's a discrimination on account of sex because it's a whipsaw, I submit to this Court, that were General Electric's mandatory leave policy before the Court when it decided that case, it would have decided, as the dissenting brethren pointed out, two policies in tandem

operation which for one purpose drove women out of employment at a time when they were able and for another purpose deprived them of insurance benefits at a time that they were disabled, that in short this employer is saying for purposes of whatever discretion we may have over your leave, we presume you are 'disabled, and the group is composed solely of women who, along with their doctors, are being mistrusted and suspected and questioned and presumed incompetent for purposes of their going on working and teaching, at the same time that the School District is saying when it comes to accumulated sick pay this is the one condition for which we will not pay you. I submit that that tandem operation of these two policies makes a different case than this Court decided in the General Electric situation.

May I briefly review a couple of other aspects --

QUESTION: You haven't dealt at all, Miss Dunlap, and whether or not you do is of course up to you, with the jurisdictional issues raised by your brother.

MISS DUNLAP: I will try to do that in a very --

QUESTION: Perhaps they are covered in your brief.

MISS DUNLAP: I will try to do that in a very brief time. I wish only to point out to this Court that the Richmond Unified School District has argued that the whole question here is a matter of contract, at page 11 of their reply brief, and that State regulations and laws form a part

of that contract. And I would finally submit to the Court on this issue of accumulated sick leave pay that by an unwritten policy that has never been justified in this litigation, the Richmond School District deprived these women of compensation which their own policy, namely, that appearing at pages 74 and 75 of the Appendix, would have suggested these women were entitled to. In short, we have here the elements of a subterfuge for discrimination that were absent in the General Electric case. If this Court remains in doubt about my characterization and believes that there are issues of fact as to that subterfuge, then because we are here in a summary judgment posture, a remand would be appropriate.

Briefly as to jurisdiction, first, the petitioners allege that Mrs. Berg's charge is unsworn. The record simply forecloses that argument because at page 109 she signs and dates below the language, "I swear or affirm that I have read the above charge and that it is true," and so forth. Basically what we have here is a charge that isn't notarized, and I submit to this Court that notarization is not a jurisdictional prerequisite to the bringing of suit.

The second issue raised by these petitioners is whether she rushed to court too quickly. I submit, first, that the Ninth Circuit's dictum with respect to the lower court's discretion to maintain the status quo under Title VII is really of no special concern to this Court because the

district court's jurisdiction to grant a preliminary injunction under 1983 is unquestioned and the final judgment in this case imposed upon these petitioners under Title VII rests upon a timely filed charge by an aggrieved individual on the basis of which the Department of Justice issued a right to sue, and the judgment was entered long after 180 days from the filing of the charge.

QUESTION: You would concede that it is the structure of the Act that a person can't bring a Title VII action until he or she gets a right-to-sue letter from the motion, isn't that correct?

MISS DUNLAP: It certainly appears to be. That's correct.

QUESTION: It appears to be, and this Court has so understood it when it publicly said so in at least two opinions, hasn't it?

MISS DUNLAP: That is correct. However, this Court's decision in Occidental Life Insurance Company v. E.E.O.C. indicates that the Court's concern is with private individuals who completely avoid or circumvent the stages of administrative proceeding that Congress has prescribed in Title VII, and here we would suggest that Mrs. Berg did everything within her capabilities and within the confines of a pregnancy that lasted nine months --

QUESTION: .. before she got the right-

to-sue letter?

MISS DUNLAP: She filed a 1983 action and a Title VII complaint.

QUESTION: A Title VII complaint before she had been notified by the Commission of her right to sue, isn't that correct?

MISS DUNLAP: Before the letter had arrived in the mail, that's correct. The court was informed of the issuance of the letter on the day it issued the preliminary injunction. Moreover, in this case, Mrs. Berg faced -- I am sorry, the district court faced the following choice: Once that letter was issued some 14 days after the suit was filed, it could either require dismissal and refiling that same day or permit supplementation of the complaint. And we believe that the district court followed this Court's holding in Love v. Pullman Train Company by saying, "I won't require you to go to them and pull that complaint out of the drawer, stamp it dismissed, and then put in the letter and stamp it refiled. I will permit supplementation."

QUESTION: Miss Dunlap, I assume you don't want us to say as a matter of precedent that anyone who happens to disregard a statute may file providing they file the notice letter 14 days later. You don't want us to say that, do you?

MISS DUNLAP: No, Mr. Justice Marshall, but I think that is really not an appropriate characterization of what

occurred here. I think that rather what occurred here --

QUESTION: Why did you have to file it right that day?

MISS DUNLAP: She had to file suit right that day -- well, let's see. Yes, she could have filed suit two weeks later, and if she had filed suit two weeks later, she might still have been able to give the other side ample notice and get to court in time to get the injunction which was the only means by which this woman kept her job. Yes, she could have. We could have cut it a little finer. But basically it is the petitioners' position here that she filed her charge too soon.

QUESTION: Their position is that she disregarded a statute.

MISS DUNLAP: I don't believe there was disregard of the statute. I believe the reading of the statute would provide that the Department of Justice's letter is valid if issued within 180 days or after dismissal of the charge. It does say whichever is later. The Department of Justice in this case recites --

QUESTION: Could it be issued any time up until the day of final judgment?

MISS DUNLAP: It seems to me that a notice of right of action if issued on the day of final judgment, that would be a very unusual case, it seems to me, because how

would the district court have determined it had jurisdiction at any earlier stage?

QUESTION: The filing of a right-to-sue letter is a jurisdictional prerequisite for filing a complaint under Title VII, that is correct.

MISS DUNLAP: That is correct.

QUESTION: You may think that is wrong, but that is what this Court has said, isn't it?

MISS DUNLAP: I don't resist that. I simply would suggest that the district court had no opportunity to dismiss this action before the time that the right-to-sue letter was issued. How could it have dismissed the action? It was filed on the 5th, a preliminary injunction was granted on the 22nd, a right-to-sue letter was issued on the 21st, the day before, the court was notified of that fact, and the district court as of the time the right-to-sue letter was issued had that choice, should it require dismissal and refiling or should it permit supplementation? I submit, therefore, that in this case, which is somewhat unusual in its facts, the district court at the time that it determined to allow supplementation had before it both of the jurisdictional prerequisites -- the filing of the timely charge, the issuance of a proper and valid notice of right of action from the Department of Justice.

QUESTION: By your line of reasoning, I suppose you

would concede if the court issued a temporary restraining order and required bond on the 5th and the right-to-sue letter hadn't arrived until the 21st, perhaps damages could be recovered on that bond, but the district court really took no action on the complaint until after all the jurisdictional prerequisites were present.

MISS DUNLAP: That's correct, Mr. Justice Rehnquist. I think we are in a difficult posture here arguing what might have been the case if the district court had not had 1983 jurisdiction to do precisely what it did, and as this Court itself pointed out, although it cut in a different direction, the equal protection concerns here and the Title VII concerns here are not so far apart.

QUESTION: I can't see why you would be satisfied in saying that in this case, special as the facts are, it is possible to do it this way rather than to be asking us to make a blanket approval of it.

MISS DUNLAP: Oh, I don't request a blanket approval I simply --

QUESTION: That's what I asked you.

MISS DUNLAP: Oh, I am sorry. I meant to be much clearer with you about that. I don't think any blanket approval is necessary in this case because I don't think the issues that you suggest are necessarily to be determined in this case. I think they need not be reached by this Court.

QUESTION: Let me give you another suppose to the case. You have a judgment and an award of attorneys' fees. Let's just suppose that in every respect this case is moot on the merits and that everybody agrees that it is just moot, that the State law has given you every piece of relief on the merits that you could want. What should we do with respect to -- normally, if a case is moot, we vacate, in the Federal courts, we vacate the judgment and order its dismissal.

MISS DUNLAP: We are truly moot. I don't mean to fight your facts. We are truly moot.

QUESTION: I know, but let's just assume it is truly moot.

MISS DUNLAP: And no issues of relief and everyone has been paid.

QUESTION: No, except for attorneys' fees. You have been awarded attorneys' fees, but it now happens that every other part of the judgment is moot, the case is just moot.

MISS DUNLAP: You make it a harder question if the only issue is attorneys' fees.

QUESTION: That's what I want to ask you. Do you know any cases that bear on this question?

MISS DUNLAP: Where the only thing remaining is attorneys' fees? I believe there is a Federal appellate

level decision holding that even where there only issue is attorneys' fees, the action is not moot. I would have to do some research.

QUESTION: Is not moot?

MISS DUNLAP: The action is not moot, that's correct.

QUESTION: And what do you do with the rest of the judgment?

MISS DUNLAP: Well, the rest of the judgment would --

QUESTION: You mean the attorneys' fees issue saves all the other issues from being moot.

MISS DUNLAP: It may sound surprising, but I believe I read an opinion to that effect. I think that is not this case without fighting your facts, because we have here --

QUESTION: I know what your position is, but we may or may not agree with you.

MISS DUNLAP: That is perfectly possible, and in that event, we would --

QUESTION: Highly unlikely, I suppose you are saying.

MISS DUNLAP: Highly unlikely, but perfectly possible. In the event there is a need for briefing on the question of mootness, we stand ready to do anything this Court wishes in that regard.

MR. CHIEF JUSTICE BURGER: In any event your time has expired.

MISS DUNLAP: Thank you very much.

QUESTION: I have one further question.

If attorneys' fees are saved from -- I take it the rest of the case has got to be saved, too, because the Court has got to examine into the question of whether it was properly decided that the prevailing party received the attorneys' fees.

MISS DUNLAP: I think that is quite correct.

QUESTION: Do you think, then, the possibility of a petitioner having his costs paid saves a case from being moot? You know it doesn't.

MISS DUNLAP: I believe it does not.

QUESTION: You know it doesn't, and yet I believe a case that moots out when it has been filed here, we strip it down and the petitioner is left with his costs.

MISS DUNLAP: I assure you very quickly attorneys' fees are a form of relief specifically prescribed under Title VII that would require certain legal determinations, as Mr. Justice Rehnquist pointed out.

QUESTION: There was money involved here. There was any health or temporary disability insurance.

MISS DUNLAP: Well, they are still in here. I assure you, you and I agree on that.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Walenta.

REBUTTAL ARGUMENT OF ARTHUR W. WALENTA, JR.

ON BEHALF OF THE PETITIONERS

MR. WALENTA: May it please the Court, I will reply very briefly only to a couple of points.

The District does not concede the validity of a 1983 cause of action against Superintendent Snodgrass individually. There is nothing alleged in the pleading, in our view, that shows any nexus or connection between any conduct on the part of that man and Mrs. Berg's claims. It is very troublesome representing public agencies to have some officer picked out and stand with a suit when he is two or three points removed from what actually happened. We do not concede that.

QUESTION: Do you concede there still is remaining an issue as to whether or not this lady should receive some money?

MR. WALENTA: There is no question on the sick leave.

QUESTION: Then the case can't possibly be moot, can it?

MR. WALENTA: That's true. I think I am at issue with --

QUESTION: You agree with your sister on the other side this case is not moot.

MR. WALENTA: I basically do.

QUESTION: What about the issue of enforced leave?

MR. WALENTA: That, of course, is the point at which I really --

QUESTION: Let's assume we agreed with you on the sick leave pay.

MR. WALENTA: I have to rely upon the attorney fee award, on her legal right to get attorneys' fees based on the decision below.

QUESTION: In order to save the other issue.

MR. WALENTA: That is correct, your Honor.

QUESTION: But didn't the order itself say that you were enjoined from not paying the sick leave money?

MR. WALENTA: Yes, but, of course, there are two issues.

QUESTION: And what does that mean? You are enjoined from not paying; it means you pay.

MR. WALENTA: Oh, yes, the sick leave issue is not moot. The issue of the right of the District to require medical examination and the right of the District to have the last say on the question of leave for maternity is one that has been manifestly affected by change in California law.

I would hope, though, that the Court would take into account the fact this was a change that was made because the legislature thought that the Federal law required the

contrary. That is something quite unique in terms of the history of this Court and its examination of legislation and its effect on questions of mootness, because by virtue of that legislation, we didn't get reimbursed for the additional costs that we have to incur.

QUESTION: What would happen -- you paid the costs in the lower court, I gather.

MR. WALENTA: When I say costs, I am talking about the costs of the whole sick leave program.

QUESTION: I know, but you lost below.

MR. WALENTA: Yes.

QUESTION: So whatever costs there, you paid them.

MR. WALENTA: Oh, yes.

QUESTION: Assume we did what we usually do when a case is moot and vacated the judgments below. What happens to costs? You are just left where you were, aren't you?

MR. WALENTA: If the judgment is vacated, I think that Mrs. Dunlap's award of attorneys' fees is vacated as well.

QUESTION: I know, but how about your costs?

MR. WALENTA: Well, the costs we incurred are lost.

QUESTION: Yes. So you lost, but if we vacated the judgments, those judgments aren't authoritative any more with respect to your losing, but nevertheless, you are stuck

with your costs, I take it.

MR. WALENTA: Not necessarily, excuse me.

QUESTION: Mr. Walenta, aren't the costs that you are discussing the costs of paying these people for service. You got services in exchange for that money.

MR. WALENTA: We are all now kind of confused as to what the question is. If the judgment is vacated, we don't lose our costs. We will go into the district court and collect them, because the plaintiff didn't prevail. It seems to me we will have been the prevailing party, as far as the costs of the suit are concerned.

Now, Mrs. Berg's entitlement to sick leave is something that remains at issue. If she wins in this lawsuit, she will be entitled to recover that money, we will pay it to her.

QUESTION: And the members of the class.

MR. WALENTA: That's right, and those members of the class in that intervening period.

Mr. Justice, thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

[Whereupon, at 2:09 p.m., the arguments in the above-entitled matter were concluded.]