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In the

Supreme Court of the United States

LORILLARD, A DIVISION OF LOWE'S THEATRES, INC.,

PETITIONER,

v.

FRANCES P. PONS,

RESPONDENT.

No. 76-1346

Washington, D. C.
December 6, 1977

Pages 1 thru 29

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

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LORILLARD, A DIVISION OF LOWE'S THEATRES, INC., Petitioner,	:	
v.	:	No. 76-1346
FRANCES P. PONS, Respondent.	:	

Washington, D.C.
Tuesday, December 6, 1977

The above-entitled matter came on for argument at 1:16 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

THORNTON H. BROOKS, Esq., P. O. Drawer U, Greensboro, North Carolina 27402; for the Petitioner.

NORMAN B. SMITH, Esq., 704 Southeastern Building, Greensboro, North Carolina 27401; for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 1346, Lorillard Division of Lowe's Theatres against Pons.

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

ORAL ARGUMENT OF THORNTON H. BROOKS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BROOKS: Mr. Chief Justice, members of the Court:

This case is here on certiorari to the Fourth Circuit to review the question of whether a discharged employee who brings an action against her former employer under the Age Discrimination in Employment Act and seeks as recovery reinstatement to her position and monetary damages in the form of back pay is entitled to a jury trial under that act or under the Seventh Amendment.

The facts are briefly stated in the complaint, and that is what we are proceeding on in this case, is that plaintiff was a 48-year-old employee of the defendant company and was terminated from her employment. It is alleged that this was because of her age and was a part of the company's policy to terminate where possible older employees and retain where possible younger employees.

Plaintiff made a timely demand for a jury trial, and defendant moved to strike the jury demand. The District Court

granted the motion to strike the demand, principally basing his ruling on the rationale that the Age Discrimination Act was akin to or parallel with Title VII discrimination on account of race, sex, national origin, and religion. An interlocutory appeal was granted by the Fourth Circuit, and that Court reversed the opinion of the District Court. There were four bases for the opinion of the Circuit Court. Number one, it found in the language of the ADEA those words "legal relief or equitable relief" as making a distinction in the Title VII cases. The Court further found or held or was of the opinion that Curtis v. Loether mandated that kind of ruling, that being a Title VIII case. Third, the Court felt that as a matter of constitutional right they were entitled to recover on that basis. The Sixth Circuit in Morelock v. NCR Corporation held to the contrary, and petition was granted.

I might state that pending the case before the Court of Appeals, plaintiff filed a motion in that Court to have the case remanded after disposition before the Fourth Circuit to permit plaintiff to amend her complaint, to allege that her termination caused her embarrassment, anxiety, and constituted grounds for, in the common law, punitive damages.

The Court of Appeals said that since that matter had been raised for the first time before that Court, it should properly be raised only upon remand. It did not find it necessary to pass on the question of whether asking for

punitive damages in an ADEA complaint made any difference.

Q On this remand, Mr. Brooks, is there anything to prevent the District Judge, within the framework of the Fourth Circuit opinion, anything to prevent the District Judge from reserving to himself all of the purely equitable decisions--injunctive relief, for example--and allowing the jury to deal with the damage issue?

MR. BROOKS: No, sir, I would think he could do that. He could have a bifurcated trial because--

Q What does he have to have first?

MR. BROOKS: I would think on the substantive issue of whether the act had been violated.

Q And that would require a jury trial, if the Court of Appeals is correct, and that would have to come first under Beacon Theatres, would it not?

MR. BROOKS: Right. And so it is our position that first we have to look at the legislative act, the ADEA, to see if it provides for a jury trial. If so, we do not have to reach the constitutional issue. The act itself has no express language that even tangentially deals with the matter of a jury trial. It is utterly silent on the question of jury trial.

In so far as the legislative history is concerned, it does not even rise to the extent of being ambiguous. There is no legislative history with respect to the jury trial aspect

of the case. There is legislative history about the purpose of the act, and we consider the legislative purpose in enacting the act was to fill in the gap of employment discrimination areas that were not covered. It already covered sex, race, religion, national origin; and age was deemed to be a proper subject to prohibit discrimination in that field. As a matter of fact, Title VII has a provision authorizing the Secretary of Labor to make an investigation and report back to Congress on the need for that legislation, and that was done.

Q Mr. Brooks, if the statute had said nothing whatever about jury trial, as it apparently does not, and if there were absolutely nothing in the legislative history indicating that Congress intended a jury trial, if nonetheless it had provided for the mandatory award of damages where found, under Curtis v. Loether, these people would be entitled to a jury trial, would they not?

MR. BROOKS: Certainly in so far--if it provided for punitive damages, as it does in Title VIII.

Q How about compensatory damages?

MR. BROOKS: We say no because we say under the teachings of Title VII cases that is an incident to the equitable relief. The main relief in ADEA cases in Title VII is reinstatement. That is what Miss Pons wants. She wants to get back to her job. And the matter of compensating her for

her lost wages and earnings, she is of course interested in that. But her main request and her main interest in this litigation is to be restored to her position.

Q But she is asserting a claim for damages, is she not?

MR. BROOKS: Yes, in the form of back pay, which is what the typical Title VII case is, sir.

Q Mr. Brooks, does the legislative history show why the Congress elected to enact separate statutes rather than amend Title VII?

MR. BROOKS: Not directly. There was some suggestion that it be amendment to Title VII and just include age along with the other categories. But there was also a suggestion before the committee that the EEOC, which was charged with the administration of the Title VII was so behind in his caseload that it would be better to entrust this to the Secretary of Labor, which presumably had more time and could handle this aspect of it. But that would be the only indication in there as to why it was in the separate act. Some of the commentators have suggested that there is maybe not a legal distinction but a psychological distinction between discrimination on account of age than on account of these other factors.

Q The other factors are immutable and constant, and age changes by the minute.

MR. BROOKS: Right, sir. And it is subject to

everyone's--

Q It gets worse. [Laughter]

MR. BROOKS: It does indeed, sir. And Congress now is contemplating moving it up because they figure it is holding the clock back, I suppose.

So, we contend that there is nothing in the act, even indirectly, that speaks to whether there should be a jury trial. Arguably we say that Congress did not intend to contemplate one; otherwise it could have said so. In Title VII where they speak for a jury trial in contempt cases, they expressly provide that the parties are entitled to a jury trial in that instance. And so we say they could have said so in this case if that had been their intent.

Q Would you say that whenever Congress does not expressly provide for a jury trial, then that means it is a non-jury case?

MR. BROOKS: No, sir, Curtis v. Loether, a Title VII case, did not provide. We consider that that case was correctly decided because of the wording of that statute.

Then we would move to the constitutional issue, and we would stand on the very concise proposition as set forth in the latest case of this Court, Pernell v. Southall Realty, where Justice Marshall said that trial by jury in actions unheard of at common law are permitted but are required by the Seventh Amendment, provided that the action involves rights

and remedies of the sort traditionally enforced in anaction at law rather than in an action at equity or admiralty. And our difference between the parties in this case is whether this is an action that traditionally would be brought in equity or in law.

Q Suppose, Mr. Brooks, that the plaintiff here had been suing your client not under the Age Discrimination Act but for breach of contract and there was a diversity case in the federal courts and her claim for damages was back pay. She had been fired when she should not have been. She would be entitled to a jury trial then?

MR. BROOKS: Right, sir.

Q What is the difference between her claim for back pay in a contract case and her claim for back pay in this case?

MR. BROOKS: Because to come within the Seventh Amendment, you must not only have a right but you must have remedies in the conjunction, not the disjunctive. The remedies in these cases are injunctive, declaring back pay is merely an incident to the main thrust of the action, which is restoring the person to their previous condition. Whereas, in the breach of contract, that is an action for a judgment that would be enforced by a writ of attachment or by--

Q What if she coupled in her breach of contract action with a prayer for injunction for restoration for her job,

assuming that Lumley v. Wagner was not the law in that jurisdiction and the contracts for personal performance were specifically enforceable.

MR. BROOKS: If she had, for example, a specific contract that was a breach--I mean, they were told that you would be employed for a certain length of time and they terminated before that, as distinguished from termination at will, which is the type of situation we are dealing with here--I would say she would be entitled to the jury trial on the contract part and her measure of damages would be different. Her remedy would be different.

Q But would not coupling a claim for equitable relief in the contract case along with the damages claim make that case look a great deal like the case that is being asserted against your client?

MR. BROOKS: No, sir, because Miss Pons's action is based entirely on the ADEA, not at all on any common law, not on lny contract.

Q What if your client had been out of work for a while and then taken another job. It is a job she found very satisfactory. She did not want reinstatement. She had been illegally, she claimed, deprived of her pay for six months, and she sued for her pay.

MR. BROOKS: That causes trouble to the courts.

Q This causes you a little trouble, does it not?

MR. BROOKS: It certainly does, sir.

Q And what would she do then? Would she be entitled to a jury trial?

MR. BROOKS: I really do not think so.

Q It really would not be asking for any reinstatement. So, there would not be any equitable order that this back pay would be incident to, as you say.

MR. BROOKS: But that would be the only type of situation under this, if she is asking for promotion which is a frequent thing, or she is asking to be housed, which is a frequent cause of action, or if she is asking for a difference in pay because she was discriminated there on account of her age--all of those things take injunctive relief or declarative relief to obtain.

Q Of course, if we were to decide against you, we could decide against you on the statute and never reach the constitutional issue, I suppose.

MR. BROOKS: You could, yes, sir. I would--

Q You would suggest that we did not.

MR. BROOKS: You could not find justification in the Curtis v. Loether on the basis of the statute, I hardly see how you could find it here because there is no basis, there is no--there is that language of legal remedies present in this case that is not in the other. They might say that this matter does trouble the trial courts since the handing down of the

decision in this case and the Morelock case. There have been a number of District Court decisions, some following the teaching in the Lorillard case and some following the teaching in Morelock. So, it is not an easy proposition. And only last week this Court denied certiorari in the case of Masonic Home v. Delaware, which was a Title VII case where the request for jury trial was turned down, not that not granting certiorari means anything, but the courts are looking to this Court for guidance on whether in discrimination litigation parties are entitled to a trial. And it is our basic position that when you finally analyze the cases, there is no real difference from the standpoint of remedies and rights in an action brought under Title VII and ADEA.

Q It may be, but Congress would have the power, I suppose, expressly to grant a jury trial under the one statute and not under the other.

MR. BROOKS: Yes, sir, they would. And we say--

Q And one of the arguments here is that that is exactly what they did.

MR. BROOKS: Yes, sir, and one of the arguments is that that is exactly what they did not do.

Q Exactly, I understand that.

MR. BROOKS: And if they can correct our error--

Q And we granted your petition for certiorari.

MR. BROOKS: One further point that I think needs to

be stressed is that as we read the cases and as many of the lower courts read the cases, where the relief is merely incident to the--the remedy is merely incident to the equitable relief, that you do not have to have a trial by jury. And the language in Moody v. Albemarle and the language in Bowman Transportation we think clearly say that back wages, lost wages, do not have to automatically be granted. They are within the discretion of the Court. And, therefore, they are merely an incident to the main relief asked for. And it is not cited in our brief, but I would call the Court's attention to the latest announcement from this Court on the matter of juries, in Atlas Roofing Company which was in March of this year; and as I read footnote No. 10, it says that, going back to Jones and Laughlin, that this is an alternate ground, it is a separate ground, as to whether or not--that that case was based on, that recovery of money damages is an incident to the amount of legal relief, even though damages might have been recovered in an action at law.

I would like to reserve a few minutes for reply.

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

Mr. Smith.

ORAL ARGUMENT OF NORMAN B. SMITH, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I have read the briefs of petitioner and its amicus

with care and listened to oral argument to try to see if there was some way that the meaning of the statute, when it says legal or equitable relief, could be rendered nugatory; and I have failed to find that. I think that the Third, Fourt, and Fifth Circuits are correct and the Sixth Circuit is wrong in the way in which the lower courts have dealt with this jury trial question. The statute clearly says legal or equitable relief can be awarded.

The statute goes on to give certain examples of both types of relief; examples set forth in the statute of equitable relief include compelling employment, reinstatement, and promotion. And to me the example of legal relief that the statute on its face contains is enforcing liability for amounts deemed unpaid minimum wages or unpaid overtime compensation. And in doing this, the Congress has incorporated by reference Section 216, the private remedy provision of the Fair Labor Standards Act. The lower court cases over the last 30 years intepreting the Section 216 are unanimous in holding that a jury trial right does obtain under the statute. We feel that this judicial construction history must have been in the mind of Congress when it passed the law that we have here when it was incorporated by reference.

We feel that not only do we have the items of relief deemed unpaid minimum wages or unpaid overtime compensation--not only do we have these forms of relief as legal relief, but

we feel that other forms of relief provided by the statute or the statute as interpreted by the courts would also be legal for relief. Among these would be included, in my view, the statutory liquidated damages, which is posited on a finding of wilfulness. I further feel that actual damages for pain and suffering and injury to reputation may be recoverable under the statute and, furthermore, that common law punitive damages may be recoverable under the law. The Court of course does not need to reach the question as to precisely what kinds of damages are recoverable because that does not arise in the scope of this case.

Q Mr. Smith, do you agree that the cases hold that a jury trial is not required by Title VII?

MR. SMITH: If Your Honor please, I do not. I think that those cases are wrongly decided, but that is a personal view, and I think that one could rule in my favor under the ADEA and still rule with the lower courts under the Title VII.

Q In expressing that opinion, I take it you rely primarily on the language of the statute?

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

Q Are there any policy considerations that would prompt one to suggest a distinction between the two acts in that respect?

MR. SMITH: To me there is one that is most

significant, and that is related to the question which was asked to Mr. Brooks a few moments ago about the process of aging being something that we all have to encounter. I think we find in our society that we do not have a pervasive prejudice against elderly people, a mindless sort of prejudice that we found against persons of alien extraction or persons of minority races that we dealt with in Title VII.

Q Does that exist with respect to sex?

MR. SMITH: That is a somewhat different type of prejudice because our society is one that is dominated by males. I am inclined to think that this is a type of prejudice which is very pervasive and very malevolent and very often hard to detect. And I suppose the framers of Title VII felt that because such prejudices are so widely shared there might be jury nullification of the law. This is suggested in some of the legislative history as well as in some of the Law Review articles that have been published on the subject.

I am of the view that--the same view that was expressed by this Court in Curtis v. Loether--that such considerations cannot override the Seventh Amendment. But I again emphasize that that is not the case that the Court has before it, and happily we do not seem to be concerned with jury nullification because all the plaintiffs in age cases and all the defendants do not want juries.

Q In age cases?

MR. SMITH: In age cases.

Q Under this statute. How about Title VII cases?

MR. SMITH: I think opinions differ there, Your Honor. Of course 15 years ago or 12 years ago, when the statute was first enacted, I think most of us felt the juries would tend to nullify, particularly in the South. My own views on how the--as primarily a plaintiffs' attorney, I would just as soon have a jury trial in a Title VII case as any other kind of case. In fact, I would prefer to have one.

Q Mr. Smith, suppose Congress changed its mind as to how to administer these two statutes, Title VII and this act, and concluded in view of the mass of litigation that has resulted--120,000 claims now pending in EEOC--that administrative remedies would be more appropriate throughout, perhaps with an appeal ultimately to a court of appeals--do you think that would violate the Constitution of the United States, the Seventh Amendment?

MR. SMITH: Your Honor, reading Atlas Roofing and Jones and Laughlin, I think I would be compelled to say no. I think that we could take very large spheres of newly created rights and put them before administrative tribunals, I think special courts of equity, I think maybe Mr. Justice White characterized them as in one of his opinions.

I am troubled by that. If I saw too much of it going on, if I saw too much in the way of classical legal rights and

remedies becoming institutionalized in the administrative process, I would be disturbed that a very great end run around the Seventh Amendment were being made.

Q So, you are talking about the creation of new rights.

MR. SMITH: Yes, sir, but of course this right--

Q New substantive rights.

MR. SMITH: --has been in existence for ten years. And if we were to suddenly take this right and make it one that is determined soley in an administrative context, it would be to some degree troublesome to me.

Q Of course in the Workmen's Compensation statutes the legislatures took rights that had been available not for ten years but for centuries and abolished them, abolished the common-law rights of action and created instead a system of workmen's compensation having nothing to do with negligence or all the other common-law rules--

MR. SMITH: But was it not true, Your Honor, that the defenses were so nearly absolute to those claims that the claims before the common law courts were, for the most part, not worth pursuing?

Q They wholly abolished them.

MR. SMITH: I know that. But my point is that the assumption of risk in the fellow-servant rule and all those things were so pervasive that it was essentially impossible

for the workmen to have an effective common law claim. But I certainly agree with Your Honor that there are instances where that has been done and it has been upheld by the courts. Happily we do not have such a difficult question.

Q What if you had a statute that Congress enacted where it said up to now there has been no federal remedy for age discrimination, we intend to confer one and do so by this statute, and we want the plaintiffs to be able to recover actual damages, punitive damages, but we do not want them to have a jury trial because it is going to cause too much congestion in the federal judicial system; is it not conceivable that your client under the Seventh Amendment might be required to take the bitter with the sweet and take the remedy that Congress has given, whereas the defendant might have a Seventh Amendment claim?

MR. SMITH: I had not thought about that, Your Honor. My initial reaction would be that what is good for the goose ought to be good for the gander in such instances. But that is a difficult question, and I am really not equipped to respond to it.

Q Generally speaking--whatever the answer to that interesting question might be--there is a rule of law that prevents a legislature from imposing unconstitutional conditions upon the grant of a right.

MR. SMITH: Surely.

Q But that is question begging perhaps to that question.

MR. SMITH: I am very strongly of the opinion that there are limitations on the power of Congress to deny litigants their Seventh Amendment rights. They may have done so under Title VII. Happily that case is not here.

We respectfully contend that because legal relief is set forth on the face of the statute. And less illustrative types of legal relief are also set forth. We do not think that there is any reason for the Court to engage in statutory construction by using extrinsic aids to construction, and hence we see no reason for the Court even to look at Title VII in this case. But were the Court to do so, the differences between these statutes are very dramatic.

Under Title VII, Congress went to considerable length to deliberately exclude jury trials. The statute allows only for equitable relief on its face. The statutory history, including the floor debates and committee reports, are replete with statements that there will be no trial by jury except in the narrow area of criminal contempts that came in pursuant to the Dirksen-Mansfield series of amendments.

Also it is instructive that back pay, under the Title VII, is said may be awarded by the court, not that it must be but that it may be; it is a discretionary matter. Whereas the amounts deemed unpaid minimum wages and unpaid

overtime compensation apparently must be awarded by the way the Age Discrimination Act is phrased.

Q And then is there a statutory addition, a hundred percent addition?

MR. SMITH: That is not automatic, Your Honor. It requires--

Q It is permissible.

MR. SMITH: --a finding of wilfulness. Liquidated damages can be granted if the trier of fact determines that the defendant is wilful.

Q The liquidation is to double the actual damages, right?

MR. SMITH: Yes, sir. And it is very important to note that the Portal to Portal Act provision which allows similar liquidated damages under the FLSA was not carried forward into the Age Act. Under the Portal to Portal Act there is a discretionary provision. The court has discretion to grant or deny liquidated damages, depending on whether or not the court finds the defendant acted in good faith. Here I think Congress is telling us let us let the jury decide whether or not the defendant was wilful because the word "discretion" nowhere appears on the face of the Age Act, and the Portal to Portal Act was not incorporated by reference, as many of the other provisions of the FLSA were. Turning--

Q Did you tell us, Mr. Smith, whether or not the

Fourth Circuit has decided that there is a right to a jury trial in Title VII cases? And if you did not tell us, has it?

MR. SMITH: The Fourth Circuit appears to join with virtually all other courts holding that there is no jury trial right. Indeed, they have even done so in some employment discrimination cases arising under 1983. I do not think those cases any longer can be sustained in light of the Fourth Circuit's decision in Pons. I am saying those public employment cases. I am not saying of course the Title VII cases, which is a different animal.

Turning briefly to the constitutional issue, which I do not think the Court really needs to reach--I think it is a statutory construction problem but nonetheless in case the Court should consider the constitutionality of a jury trial in this case--we would say this appears to be certainly one of those cases in which the Seventh Amendment requires a jury trial to be given.

I think what the petitioner is attempting to do here is to reinstate the now defunct equitable cleanup doctrine and to ask that the damages consisting of lost wages be tried as an adjunct to the claim for equitable relief. This Court clearly said in Beacon Theatres and in Ross v. Bernhard that the right to jury trial will not be lost by a trial of the equitable issues to the Court, and treating the legal issues merely as an incidental to them.

In Wallace there were the three tests identified for the purpose of assisting the court in establishing whether jury trials must be granted or not in a given context. One was whether the claim was legal or equitable. I take it the petitioner really does not raise much of an issue here. I think the petitioner essentially concedes that respondent's claim is a legal claim because it so neatly fits into the common-law analogue of the breach of contract of employment in the action for damages as a result thereof.

And further, taking a suggestion from this Court's decision in Curtis v. Loether, I suppose one could also say that a new statutory tort was also created, consisting of discrimination in employment, and that this is somewhat akin to the common law cause of action for intentional infliction of emotional distress, which is to be tried on the law side and not on the equity side.

I find no pre-merger equitable antecedent to the cause of action here.

The second inquiry required by Ross is whether the remedy is legal or equitable, and we respectfully submit that the remedy here sought is a legal one, at least the remedy for lost wages.

Petitioner argued that reinstatement was the primary relief sought by the respondent. That is not necessarily so. Two years have gone by now, and it is not necessarily true that

by the time this case ultimately comes to trial, the respondent will either wish to or be in a position to try to have her job back. And it is certainly conceptually possible that that claim would be withdrawn before the action comes to trial.

What respondent has particularly asked for here is her damages consisting of lost wages. This is a classic legal remedy. The lost wages under the Age Act are not discretionary, as petitioner argues. They are mandated by the act. The act uses the word "shall" and not "may," and it incorporates all this history of construction under the FLSA, all of which holds that such damages are automatic and calculable with precision.

Furthermore, the claims for punitive or liquidated damages are historically unavailable in equity and available only on the law side. And these remedies as well would indicate that our claim here is one to be tried by a jury.

The third and final element expressed in Ross is whether the action could be managed as a jury case, given their practical limitations. We would respectfully submit that this type case is ideal for resolution by a jury. As Justice Stevens noted in the Curtis case at the Circuit Court level, such cases as these deal primarily with motive and credibility, which are classic issues for jury resolution. Computation of damages is relatively simple, straightforward.

And even in our own district we have the history that two cases have been tried by a jury. And this case came along, and the jury demand was stricken. So, we know that you can try these cases by a jury because in our district we tried two of them. In fact, I was counsel for plaintiff in one of them.

Q You did not pray for punitive or liquidated or double damages, did you?

MR. SMITH: If Your Honor please, we prayed in the initial complaint for statutory liquidated damages. Before the Circuit Court we sought to add other fairest relief for common-law punitive damages, and for actual damages other than back pay, i.e., damages for injury to reputation, mental suffering, and that sort of thing.

Q Is that a customary thing to do in the Court of Appeals?

MR. SMITH: No, Your Honor, but I saw the lower courts going off in all kinds of different directions in these cases, deciding in different ways, depending on the prayers for relief, and I wanted to have the whole thing in front of a court and to get it resolved. And the Circuit Court decided to let it go back to the District Court for a ruling on that motion. And of course we have not been back there because we came up here.

Q What I am trying to get at is, do you concede

that if you had simply prayed for reinstatement, you would not be entitled to a jury trial?

MR. SMITH: If we simply prayed for reinstatement and no monetary relief?

Q Yes.

MR. SMITH: I am inclined to think that that would be tried on the equity side.

Q Then it does vary almost by virtue of your prayer whether or not you are entitled to a jury trial, does it not?

MR. SMITH: But I think under Ross v. Bernhard and the Dairy Queen and those cases that if you ask for any legal relief, that determines how the case is going to be handled.

Q That may be where the line is drawn, but it does depend on the kind of relief that a particular plaintiff seeks.

MR. SMITH: Yes, sir, but what I was seeing, I was seeing--I think there was a decision by the Eastern District in Michigan wherein they said while the prayer for lost wages does not appear to be very serious or very prominent--and I was seeing these kinds of distinctions which I thought were not proper ones.

Q You wanted to make your prayer very prominent.

MR. SMITH: As broad as I could and hopefully broad enough to ensure a trial by jury.

Q Your original complaint--or at least the complaint maybe as amended but still in the District Court--in paragraph three of the prayer it certainly asks for what is called monetary damages and an equal amount of liquidated damages, on page 4 of the Appendix.

MR. SMITH: Yes, sir. If Your Honor please, the word "attorney" is inserted after the word "plaintiff" and before the word "monetary." That is a typographical error, and it is corrected in footnote one on page 6 of my brief. And the record itself will show that that is a typographical error originating in Mr. Brooks's office.

Q I already had it crossed out.

MR. SMITH: Thank you.

Unless there are further questions, that does conclude my presentation. Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Brooks?

REBUTTAL ARGUMENT OF THORNTON H. BROOKS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BROOKS: One or two words on the matter of liquidated damages, to which we were just devoting our attention, Mr. Smith before the District Court--and it was so interpreted before the Court of Appeals--that he made no claim that that issue was triable by jury. That is found in the petitioner for certiorari in the decisions of the courts--before

the District Court in footnote two on page 8-A, and in the Court of Appeals on page 2-A in footnote three, where it states, "This appeal involves only the right to a jury trial on the claim of lost wages."

Mr. Smith has stated that in our argument we have made no mention about the wording in the act of legal relief. I might say that, without exaggeration, that the ADEA is not a whole mouth of clarity. They have the language in there that says you can enforce the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. They make that statement two places in Section 7(b). There is no way possible that you can have unpaid wages or overtime compensation under an ADEA case. This was barred from the language of the FLSA case--the Fair Labor Standards case--where the only issue is, Was the employee paid the minimum wages? If not, they were entitled to a definite amount, bringing their wages up to the minimum wage.

The other part of the overtime compensation under the Fair Labor Standards Act, if you worked over 40 hours and did not pay time and half, the regular rate for those hours, you automatically are entitled to a judgment for that amount. That was a fixed amount not capable of ascertainment within the discretion of any court.

Furthermore, my Brother Smith says that we do not discuss what legal relief means. I would call his attention

and the Court's attention to his opposition for the petition of certiorari. On page 7 in the third paragraph, when he states that, quote, "The term 'legal relief' set out in the Age Discrimination in Employment Act clearly relates to the enumerated remedy of 'enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.' It also may relate to other types of legal claims such as common-law damage claims which are not specifically enumerated in the statute." But we are not dealing with unpaid minimum wages or overtime. We are dealing with a claim for back wages, lost wages.

And in conclusion, I would say if a jury trial is permissible in an ADEA case and is not permissible in the Title VII case, we end up in the anomalous situation that Mrs. Pons, being a female and over age 40, could have coupled both actions, both claims, in her complaint. She would have been entitled to a jury trial. But if she had brought only a Title VII case, she would not have been. We feel that this is all a part of Congress's intent, to put discrimination cases in the same basket or category, and the same kind of result should obtain with respect to whether a party is entitled to a jury trial.

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

[The case was submitted at 2:02 o'clock p.m.]