In the

Supreme Court of the United States

SHELL OIL COMPANY,

Petitioner,

vs

ANNE M. DARTT,

Respondent.

No. 76-678

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Washington, D. C.
November 7, 1977

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Monday, November 7, 1977

The above entitled matter came on for argument at 1:01 o'clock p.m.

BEFORE:

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

APPEARANCES:

MS. MARY T. MATTHIES, 124 East Fourth Street, Tulsa, Oklahoma 74103; for the Petitioner.

JEFFERSON G. GREER, Esq., 206 Beacon Building, Tulsa, Oklahoma, 74103; for the Respondent.

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PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 76-678, Shell Oil Company against Dartt.

Counsel, you may proceed whenever you are ready.

ORAL ARGUMENT OF MS. MARY T. MATTHIES

ON BEHALF OF THE PETITIONER

MS. MATTHIES: Thank you. Mr. Chief Justice, may it please the Court:

This case involves the interpretation and application of Section 626(d) of the Age Discrimination in Employment Act. Section 626(d) provides that prior to the institution of a civil action by a private individual under the act, the individual must give 180-days' notice to the Secretary of Labor of their intent to sue, and then must afford the Secretary of Labor 60 days in which to conciliate or mediate the dispute.

The issues presented here are basically twofold. The first issue--and we submit that the case could in fact be decided on a narrower ground--is whether the Court of Appeals improperly intruded upon the equitable discretion of the District Court in overturning the decision by the District Court that the relative equities in this case did not warrant a tolling of the 180-day time period set forth in Section 626(d).

The broader grounds is whether Section 626(d) is a

substantial jurisdictional prerequisite to suit or it is more analogous to a statute of limitations and, if it is more analogous to a statute of limitations and thereby subject to similar tolling principles, whether the actions by Mrs. Dartt brought this case within one of the recognized tolling principles.

Q And which do you say it is?

MS. MATTHIES: Obviously, Your Honor, our first contention is that it is a substantive jurisdictional prerequisite suite. We believe that both the clear language of the statute as well as the legislative history indicate a congressional intent to circumscribe private right of action and to have the 180-day period not modified except perhaps in very egregious circumstances certainly not present in the record here. We believe that the legislative history, for instance, indicates that the 180-day period was not initially contained in the House-passed bill. The Senate included the 180-day requirement, and then the House receded to the Senate's request for the 180-day requirement. The 180-day requirement was lobbied extensively for by management in order to circumscribe the private right of action of individuals and in order to give, we believe, the Department of Labor close to exclusive jurisdiction of age discrimination cases.

We believe the congressional and legislative history

shows employers did not want any private right of action to be maintained because they could see the possibility of frivolous lawsuits being brought, and frivolous lawsuits are of course expensive. And it is clear that employers clearly preferred that there be a limited right for private action only in the first 180-day period, only if notice of intent to sue was given in the 180-day period.

We believe also the clear statutory language--which is of course the best evidence of what Congress intended--sets forth that such notice shall be filed within 180 days.

Mrs. Dartt contends, I believe alternatively, that either her oral complaint to the Department of Labor within the 180-day period satisfied or it tolled the time for her to meet the notice-of-intent-to-sue requirement. We think clearly her oral complaint, which she stipulated included no evidence of suing or of intent to sue--we believe her oral complaint clearly did not satisfy the 180-day notice requirement, and the Court of Appeals so found. The Court of Appeals found, however, that the 180-day period was analogous to a statute of limitations and therefore could be tolled on certain equitable grounds.

We believe that even assuming that the Court of Appeals was correct in its holding that the 180-day time period is analogous to a statute of limitations, it certainly was incorrect in finding that, based upon substantial

precedent by this Court, that the situation here warranted a tolling of that time period. The recognized equitable grounds for tolling a 180-day requirement or statute of limitations requirement are that the defendant has acted in some way to mislead or prevent the plaintiff from acting, that the plaintiff was acting under some kind of recognized legal disability or that the plaintiff was prevented by operation of law from acting to preserve her rights. We believe the fact situation here establishes--and the record so shows--that all Mrs. Dartt did, she called an attorney preliminarily because she felt she had been discharged because of her age. The attorney did not tell her of the notice requirement. The attorney told her to go to the Department of labor. She went to the Department of Labor. The Department of Labor treated her complaint as being a complaint which could activate the administrative, investigative mechanisms. The Department of Labor did not consider her oral complaint to be a notice of intent to sue. In fact, the files show that no notice of intent to sue had been filed. And then proceeded to process the complaint.

We do not believe that these circumstances indicate--Mrs. Dartt--I am stepping back just a moment. Mrs. Dartt also stated that when she went to the Department of Labor, she said, "My thought was the Department of Labor would handle it. Then why bother with an attorney? Why bother with the expense

of an attorney?" She was asked in the District Court whether she made any inquiry as to what was necessary to preserve her rights, if she had inquired at any time from the Department of Labor as to what she needed to do, and her answer was no, that she did, that she went to them and she thought they would take care of everything. And, therefore, she had properly relied upon them to advise her as to her 180-day-notice-of-intent-to-sue requirement, which the Department of Labor did not do but which the Court of Appeals found they had no statutory obligation to do.

Q Ms. Matthies, I take it there is no question of or intimation of bad faith on the part of Shell here, is there?

MS. MATTHIES: I believe there is absolutely nothing in the record that would show any bad faith or evil machinations or anything of that nature, Your Honor.

Q The other side of that coin is, How was Shell prejudiced by the result below?

MS. MATTHIES: Shell was prejudiced by the result below, Your Honor, because it was never given early on a notice that Mrs. Dartt intended to maintain a civil action against it.

Q But you certainly knew of her discomfiture and concern, did you not?

MS. MATTHIES: I beg your pardon?

Q I say you certainly knew of her discomfiture

and concern.

MS. MATTHIES: We knew that she had filed and registered an oral complaint with the Department of Labor. The Department of Labor had told Shell that she had not filed any notice of intent to sue. So, we knew that the Department of Labor had a complaint before it, that they were in the process of investigating her complaint. It was and is Shell's position that her complaint had absolutely no merit whatsoever. And we fully believed that the Department of Labor, upon a complete investigation, would so find and we would be without any suit whatsoever. Because we were in the posture where we had no notice of intent to sue, we were not given the opportunity, within the time which Congress established, to take a close look at the possibility that she was going to sue us and therefore look at settlement in light of nuisance lawsuit value, which may have still have been to her benefit, in light of possibly increased litigation expenses. I think that anybody who has been in practice knows that when they are dealing with a client, the client tends, when a claim is initiated--say, for instance, a contract claim. Someone writes and says, "You owe me such and such and so and so." They are not as inclined to settle that case as they are when they get a clearcut notice through the attorney calling me, the attorney for the opposing side calling the attorney for the client, or through some other means where they get clearcut notice that

they are going to be sued if they do not settle.

Q Then it is your position that this period of time is a rigid limitation period?

MS. MATTHIES: We believe that there is nothing inherently unfair to Mrs. Dartt, and we believe--

Q Can you concede there ever might be circumstances where equitable principles or otherwise might lead to an opposing result?

MS. MATTHIES: I can see, Your Honor, that in certain rather egregious situations--for instance, I think if Mrs. Dartt had been able to show that Shell had immediately upon discharging her hurried her off and locked her up in a Mexican jail for six months and thereby she had been unable to fulfill her notice-of-intent-to-sue requirement, and we did this knowing full well that we were prohibiting her from doing that, that fundamental principles of justice would certainly I think hold that no one can profit from any wrong and therefore that timeliness could be modificed in that situation, although I am not really sure in that kind of situation it would even be a tolling so much as it would be an adjustment of the equity.

Q Do you not really have three alternatives here rather than two, the first being the type of limitation that applies when you are filing a notice of appeal from the District Court to the Court of Appeals, that there just

virtually are no exceptions for it, and the second being the statute of limitations type of thing, that, as my Brother Blackmun suggests, there may well be tolling situations that are fairly well established by law, and the third being a sort of principle of laches, which would be a good deal looser and where, if the defendant could not show any prejudice, you might well permit them to proceed without any great showing of equitable tolling principles on their side?

MS. MATTHIES: Yes, Your Honor, there would certainly be those three possibilities. I believe that plaintiff in fact argued in the District Court, although it did not continue to press that in the Court of Appeals, to my recollection, that the 180-day requirement was in fact what I believed they termed as directory rather than mandatory. And that would fall into I suppose what you would call the third classification of cases.

I do not really think that this time limitation, the 180-day time limitation, would fall into the third category of cases. I think that the close analogy perhaps is the 180-day requirement here to the 180-day requirement under Title VII indicates that it is in fact a jurisdictional prerequisite to suit. The wording of the statute itself indicates that the filing of a notice of intent to sue within the 180-day period is in fact a jurisdictional prerequisite to suit.

I note in the Senate report on the new possible amendments to the Age Discrimination in Employment Act that the Senate, when they deleted the 180-day requirement from the notice-of-intent-to-sue provision, stated that they were deleting the requirement of the notice of intent to sue, which I think kind of tends to indicate that the Senate thought that the 180-day requirement was a substantial requirement. And the legislative history itself indicates that the Senate considered it to be a substantial requirement when the House deleted the 180-day requirement from the Senate-passed bill, and the Senate put it right back in, saying, "We want there to be a 180-day limitation."

So, if we were to take the position here that we were going to allow any kind of tolling--for instance, of the 180-day requirement--I think what we would get into, Your Honor, is adopting an approach that the House and the Senate ended up specifically rejecting because the House bill had provided for the allowance of a filing of a notice of intent to sue any time within the statute of limitations period, the two-year statute of limitations period. And the Senate said, "No. We want a notice of intent to sue filed within 180 days." And I think that that indicates very clearly that the Congress considered it to be a substantial requirement.

So, kind of turning back to the decision by the Court of Appeals, although the Court of Appeals did not

specifically say so, the Court of Appeals I believe followed what could be characterized as an extension of the tolling principles enunciated by this Court in Burnett v. New York Central Railroad Company. And the rationale behind the tolling allowed by the Tenth Circuit was that in this particular situation they felt that the de facto purposes--the filing or the registering of the oral complaint--and a subsequent isolated settlement inquiry by the Department of Labor fulfilled the notice and conciliation functions of Section 626(d) and therefore there was no particular reason in this situation to not toll the 180-day time limitation.

We do not believe that Burnett is controlling here. We believe that the rationale of Burnett applies to a very, very limited situation. In the first place, Burnett dealt with an ordinary statute of limitations. The Burnett facts were significantly different from the facts in this particular case. In Burnett the defendant received all of the things contemplated by the statute. An otherwise valid complaint was issued. There was no defect in process or in services process. The only defect was in venue.

The fact that there was a defect only in venue was deemed important because Congress had, number one, expressed a desire for uniform time limitations by enacting the statute of limitations provisions in fila. And to not allow tolling would have caused a substantial non-uniformity in time

limitations because many states as well as the federal government had savings or transfer provisions. And had the plaintiff resided in any other part of the country than where he did in Burnett, there was a good possibility that his cause of action would have been saved. And this Court, looking at the fact that there was only a defect in venue and the fact that the Congress had indicated the desire for uniform time limitations in fila, and also noting that the Congress had indicated a desire for saving improperly venued actions by allowing transfer, having enacted a statute to that precise effect, this Court decided that there should be a tolling in Burnett.

It is also significant in Burnett that the plaintiff would have lost all means of relief.

It is also significant in Burnett that the defendant could have waived, according to this Court, the defect in venue. If in fact the Section 626(d) requirement is jurisdictional, as we contend, then it is clear--and I think the decisions of this Court have so held--that a party cannot waive a jurisdictional defect. It cannot be waived even with the consent of the parties. Whereas the defect in venue in Burnett could.

There was also--and I think this is probably one of the most important differences--there was a fixed time period in Burnett to which the tolling would apply, so that you had

clearcut periods from the time of the institution of the action to the time when the action was dismissed where you could say yes, the tolling in fact occurred.

Here I do not believe--and I think this would be an interesting question to ask opposing counsel--I do not believe that there is any triggering period when you can say that the statute was tolled here and it starts in here if you allow a tolling for oral complaints. You have an oral complaint filed with the Department of Labor. Then when does the statute start to run? Does it run when they get actual knowledge of the notice requirement? Can this tolling extend indefinitely and thereby toll the 255 two-year statute of limitations? What is the triggering effect of that?

We also believe that the express ruling by this Court in the Unexcelled Chemical Corporation case with respect to the construction of portal-to-portal time limitations indicates quite clearly that no tolling is permissible of the Section 255 two-year statute of limitations during the period of time that the secretary is engaging in administrative investigative and conciliation functions under the act. We have here the portal-to-portal time limitations, assuming assuming that we have what can be characterized here as a statute of limitations.

Mrs. Dartt has shown no circumstances here or no situation here different from what this Court was presented in

Unexcelled Chemical Corp. And in the Unexcelled Chemical Corporation case this Court expressly held that if Congress thought that prejudice would occur by the fact that there was no tolling of a limitation period during the time when administrative actions in the Department of Labor were being undertaken, then Congress could go about remedying that particular situation.

Q This act also has a two-year limitation, does it not?

MS. MATTHIES: Yes, Your Honor, a two-year or three-year, if wilful, but yes.

Q What is the sense of having that if you have this 180-day one as jurisdictional?

MS. MATTHIES: The 180-day period--

Q If that is jurisdictional, why do you need the two-year statute of limitations?

MS. MATTHIES: Once the plaintiff has filed a notice of intent to sue, then the plaintiff is not required to bring suit immediately. They must bring suit some time within the two-year limitations provision. So, the 180-day period is not a limitation provision.

Q Could I not assume from that that you could not be injured unless it was two years? At least Congress did not think you would be.

MS. MATTHIES: I am not sure I understand the

question.

Q I understand that Congress said if you do not file the suit within two years, you cannot file it. And the reason for that is because if you do not file within two years, you would be injured. The employer would be injured. My query is, How can you be injured before the two years--specifically at 181 days?

MS. MATTHIES: We believe that we can be injured, Your Honor, because the employee in a Department of Labor lawsuit under the Age Discrimination in Employment Act are two entirely different situations. An individual can bring a private right of action. There does not have to be, under Title VII standards, any finding of reasonable cause by the agency. The employee can simply file a suit--a good suit, bad suit, frivolous suit, lots of merit to it, no merit to it at all, if they act quickly to preserve that right and act within 180 days to give their notice of intent to sue.

On the other hand, the Department of Labor is required to investigate and to weed out frivolous suits and then to bring suit itself also within that two-year limitation period. And the fact that there is a two-year limitation period in addition to the 180-day requirement I think indicates that the 180-day requirement is there for a reason. And we submit that the reason that the 180-day requirement is there is precisely to have the effect which is had here, which is to

weed out the complaints of individuals who do not act within a timely manner to assert their right to file a suit by filing a notice of intent to sue.

We think that the arguments that that is too short a time limitation are frankly addressed to the wrong branch of the government when they are addressed to this Court. In fact, we really think that the fact that they may be short begs the question of the fact that lawsuits may be dismissed as a result of failure to comply with the 180-day requirement. It begs the question because the necessary and expected result of the short limitation is--

Q You said it may be dismissed? I thought your argument was it had to be dismissed.

MS. MATTHIES: Had to be dismissed.

Q You said may. You had not changed that.

MS. MATTHIES: Your Honor, I have not changed it. No, I do submit that it is a mandatory requirement. And I think we ought to analogize that requirement in fact to Title VII standards. Under Title VII, if the charging party does not file a charge with the ESE within 180 days, their right to sue is lost entirely. And this Court has held that that particular period, which is over and above the two-year limitation on back pay under Title VII, is in fact a jurisdictional pre-requisite. And the effects on a Title VII plaintiff of applying the 180-day charging requirement as a jurisdictional

prerequisite are much more severe than they are here because here Mrs. Dartt still had a remedy expressly approved by Congress. She had instituted a complaint with the Department of Labor. The Department of Labor could in fact act on her complaint and could in fact sue on her behalf if it were so inclined.

So, the strict application of the title limitation in this particular situation is much less harsh in operation than it is to strictly apply it in the case of Title VII plaintiff.

Q Is the notice function, in your view, a large one here--that is, the notice to the employer so that they can identify the facts and assemble the information promptly before it is lost? Is that a large factor in the 180-day--

MS. MATTHIES: I do not really think it is. I do not really think it is. I think that clearly in 180 days you do not lose sight of the fact you have witnesses die and things of this nature.

Q But after 180 days you might. Does not that prospect--

MS. MATTHIES: There is that point, that obviously the statute of limitations are arbitrary, and they are established to cut off rights justifiably or not. But I think that the real purpose of the 180-day requirement is in fact to let the employer know that it is going to be sued because

we all know that if you are going to be sued, you are more inclined to go about settling the case in a speedy fashion. It also acts as a trigger to the Department of Labor to let the Department of Labor know chich cases it has in its office it needs to devote concerted conciliation activities to hear.

For instance, in this case, when Mrs. Dartt registered her oral complaint, the Department of Labor just kind of put the case in its normal processing and took a look at it and never asked Shell--even made its preliminary cursory inquiry as to whether Shell was interested in settling until some 80 or better days after the complaint had been registered with it. So, the Department of Labor is, I would say, as equally prejudiced as both the plaintiff and the employer are when the notice of intent to sue is not given because--

Q How is the Department of Labor prejudiced? What did they lose?

MS. MATTHIES: The Department of Labor--

Q What did they lose?

MS. MATTHIES: The Department of Labor wants the ability to know when it got--

Q This employee has lost her job. What did they lose compared to that?

MS. MATTHIES: Comparable to that, I am not sure.

Q I am.

Q I was saying I do believe that the Department

of Labor in its administration of the Age Discrimination in Employment Act certainly needs to know when it is supposed to exert exhaustive conciliation efforts and when it is not supposed to exert exhaustive conciliation efforts. Normally the Department of Labor will not exert exhaustive conciliation efforts until after they have decided there is merit to the charge.

However, there is an exception to that, and they will exert exhaustive conciliation efforts when they get a notice of intent to sue. They did not exert exhaustive conciliation efforts here because they did not know they had to because they did not think they had a notice of intent to sue. And I think that is important.

I would like to reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: You are going into your rebuttal time now. Very well.

Mr. Greer.

ORAL ARGUMENT OF JEFFERSON G. GREER, ESQ.

ON BEHALF OF THE RESPONDENT

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

When Congress passed the Age Discrimination Act in 1967, they had at that time the benefit of observing the machinery of Title VII for some three years. That was passed in 1964. They found that there had been a great deal of delay

in Title VII procedures in that a person would file a charge which was required to be in writing and under oath, incidentally, and then the EEOC would begin investigating that charge. It would be months and months and sometimes years before they ever got their notice or right-to-sue letter.

When Congress was considering that and rather than amending the 1964 act, which they could have done very easily to cover age discrimination, they chose instead to fit it into the machinery of the Fair Labor Standards Act and put it under the jurisdiction of the Labor Department.

The 60-day limitation--that is, the 60-day notice of intent to sue--was of course put in there to trigger conciliation. The Congress was very heavy on conciliation because there are a great many of these cases filed. The Labor Department certainly cannot bring lawsuits on all of them. And it was the intent of Congress, as shown by the record of the hearings, that they certainly wanted conciliation. But, further than that, the 60-day notice gives a claimant a right to give that 60-day notice and then get on with his lawsuit. He does not have to sit there and wait for months to wait and get this right-to-sue letter from the EEOC.

The 180-day limitation I think was placed in there for the same reason, to speed up the procedure, simply to speed up the procedure. Congress I think showed that they wanted conciliation procedures to begin and to begin speedily.

So, the 180 days limitation was placed in there for that purpose. There is nothing in the legislative history that incidates that the Congress intended the 180-day limitation to be jurisdictional. In fact, the latest pronouncement by Senator Williams, who is the floor manager for the Senate-passed bill, which is now in the House Conference Committee--put it very clearly that it has never been our intent that the 180-day notice period be considered a jurisdictional prerequisite.

Q What would you say if neither a claim nor intent-to-sue notice was filed within 180 days?

MR. GREER: I think that the 60-day notice, Your Honor, is a prerequisite.

Q That is not what I asked you. What if neither is filed within 180 days, neither a claim nor a notice of intent to sue?

MR. GREER: Well--

Q What if nothing happens for 180 days?

MR. GREER: For 180 days. I think that is too long.

Q Then it is a jurisdictional provision, is it not?

MR. GREER: I beg your pardon?

Q It is a jurisdictional provision then, is it not?

MR. GREER: I think you would have to consider that

if you are going to apply equity. You look at all the--

Q There are some circumstances where the 180 days is jurisdictional.

MR. GREER: There has been a great deal of confusion as to what the Court has called jurisdictional and--

Q Whether you call it jurisdictional or not, he is not going to get very far if he does not do something within the 180 days.

MR. GREER: I would agree with that, yes, sir.

Q And you claim that just filing a claim is enough to toll the 180 days?

MR. GREER: To toll the 180 days? Filing a complaint with the Labor Department as opposed to a notice to sue?

Q Yes.

MR. GREER: Yes.

Q Then you would have the full two years given you to bring an action in District Court once you file a complaint with the Labor Department?

MR. GREER: Depending as in this case, where the complaint serves exactly the same purpose as a notice of intent to sue.

Q When would it not?

MR. GREER: I beg your pardon?

Q When would it not?

MR. GREER: I do not know that I can answer that.

Q Congress nevertheless left in this act two different things, the filing of claims and the filing of letters of intent to sue, did they not?

MR. GREER: Yes.

Q So, Congress did not treat them as the same thing.

MR. GREER: No. In practical effect they have the same effect. A complaint to the Labor Department serves under 626(b) serves exactly the same purposes of a notice of intent to sue. It triggers the Secretary's responsibility to investigate, and indeed that is what happened in this case. The claimant filed her complaint--

Q If you file a claim within 180 days, you should just forget about the notice of intent to sue?

MR. GREER: No. I think that Congress certainly intended that you file a notice of intent to sue but--

Q Why? Why? Why?

MR. GREER: --it serves the same purpose--here the complaint serves the same purpose as the notice of intent to sue. However, in this case, the notice of intent to sue was filed, belatedly of course, some 36 days late.

Q But you would be making the same arguments if you did it one day before the two years expired?

MR. GREER: I do not think we could apply equity there if they waited that long. That is--

Q Is it up to the District Court to balance every single individual case as to how many days they waited beyond the 180-day period?

MR. GREER: Your Honor, that--equity looks at each case individually. We have been doing that for hundreds of years. When you toll a statute of limitations, there has to be equity.

Q So, then your answer is yes.

MR. GREER: You would look at each case, yes, that is right. Yes.

Q I respectfully suggest that you are getting in trouble, using the phrase "statute of limitations" and arguing laches; they are two different animals.

MR. GREER: Yes.

Q You keep talking about statute of limitations in an equitable proceeding.

MR. GREER: Yes, Your Honor.

Q Are you not talking about laches?

MR. GREER: Yes. The legislative history, if we look at the language of the statutes, the provision for the 60-day limitation is in rather absolute terms. It says: "No civil action may be commenced until the individual is given notice." And in the 180-day timing provision, it says notice shall be filed.

Section 255 states: "Every action shall be forever

barred"--quite different language than that establishing the 60-day notice. However, even that provision has been held not to always bar the actions, as held in the Humphries case from the Tenth Circuit.

In considering this matter in committee, prior to the passage of the act, the industry spokesman there spoke of the statute of limitations. And Senator Javits in considering it referred to this as a statute of limitations. We suggest that the usual policy of repose, which is a justification for a statute of limitations, when it is outweighed by justice, should not be applied, as this Court held in the Burnett case. We nothing in the legislative history to indicate that Congress intended forfeiture of the claimant's right to file a notice within a 180-day period.

Q Mr. Greer, even if you regard this as a statute of limitations and not jurisdictional in the strictest sense, there is nothing in this case, is there, which would support a fraudulent concealment type of tolling, where the defendant is responsible in some way for the delay, fraudulent concealment or any other kind of conduct?

MR. GREER: Your Honor, nothing that we would call fraud. Mr. Speer testified that he--he contacted Speer the very day that claimant made her complaint. That was on August 9th, following her discharge on July 31st. Nothing happened during the negotiations, and he did carry on negotiations with

them, until November 27th. And they told him at that time they thought she had been lawfully discharged and no further negotiations. He said they reached an impasse. They did agree to furnish statistical material to them at that time. But as of March 5, 1974, he still had received nothing that he requested from Shell Oil. So, yes, they did drag their feet on furnishing the material which he had requested.

So, I think we can easily assume that had he gotten the material timely, he could notified the plaintiff before March 5th that she had this right to sue, which he had never told her before. As he stated on the hearing there himself, he blew it. He said he just did not give her--did not tell her about the notice of the right to sue.

Q The two people who failed to advise her of the notice requirement, her lawyer and the Department of Labor.

MR. GREER: Yes. Her bridge club member, lady lawyer there that she consulted, told her to go to the Labor Department. And the Labor Department--yes, they did not inform her.

Q Should the rule be that whenever an employee consults either a government representative or a lawyer and fails to be properly advised, that then you toll the statute? Is that the rule?

MR. GREER: I think that is certainly one of the things that you can look at.

Q Is there precedent for that kind of tolling?

MR. GREER: Thinking of Love v. Pullman where the claimant filed a Title VII action. The claimant was supposed to file the action in the state agency but instead filed with the federal agency. There never was any claim of any nature filed with the state agency. The federal agency--all they advised the state agency was that they were holding that claim in abeyance, after which the state agency said, "We are not going to do anything. So, proceed."

So, the most you could say was that they had oral notice from another government agency and that the claimant never made any notice at all. And the Court there said this served the purposes of the act, and they held that that was all right. They said two technicalities were particularly inappropriate where a layman initiates the process.

Q Is not your principal argument then that she complied in substance with the 180-day requirement rather than that the requirement is tolled? There are two quite different arguments.

MR. GREER: I think you can justify it either way. I mean, I think there are circumstances here that would justify tolling the 180 days, but I think that the complaint to the Labor Department served exactly the same purpose as a notice of intent to sue.

Shell has never been hurt here because they never

intended to negotiate anyway. After the notice of intent to sue was served, out of an abundance of caution Mr. Speer again started negotiations and attempted to carry them on as he had before. He was rebuffed by Shell. They never wanted to settle. We cannot see how their position was any different at that point than it was when he originally attempted to negotiate, based on the complaint.

Q I suppose you heard that whenever you do not get the benefit of a statute of limitations defense that you think you are entitled to, they have got to defend the lawsuit instead of moving to dismiss on the 180-day ground.

MR. GREER: Yes, Your Honor, and it is interesting to note that when Shell Oil Company had notice of this complaint, they were on notice that this Labor Department could bring an action at any time and did not have to wait for any notice of intent to sue. They could be sued at any time. So, can they seriously content that we do not know we are going to be sued when the Labor Department is investigating a complaint against them?

They had notice that they could be sued, either by the Labor Department or by the claimant.

Q But they are not being sued by the Labor Department. They apparently were satisfied that they would not get sued by the Labor Department.

MR. GREER: The Labor Department could file it any

time within two years.

Q They could, if they thought there was merit to the charge.

MR. GREER: Yes. They had not at that point determined it, and they never told Shell that we are not going to sue you. There was never any such statement to Shell. So, they could not rely on that.

It is interesting to note that the Labor Department, charged with the administration of this act, had since its passage in 1967 taken the position that this was non-jurisdictional. Mr. Speer has testified to that on the hearing in District Court. And, as this Court has previously said in the Griggs v. Duke Power Company case, the administration, interpretation, of an act is entitled to great deference.

We suggest that this was not a case where the plaintiff slept on her rights. She did everything that a person could reasonably be expected to do, as the Tenth Circuit found. She sought out counsel. She filed her complaint nine days after they had told her that she did not have any potential because of her age. And she made repeated calls to the Labor Department, asking them what was going on. "What is going on on my lawsuit?"--to get some sort of assurance from Mr. Speer. And she did what the Labor Department poster said. And, incidentally, it does not have one word on it about any notice of intent to sue. It says that

if you think that you have suffered discrimination, go to the local wage and hour office of the Labor Department, which is exactly what she did.

We think that every purpose of the act was served. The defendant had notice by virtue of Mr. Speer investigating the complaint. The Labor Department began investigation and conciliation, just as is intended in a notice of intent to sue. And Shell has suffered, so far as we can see, no damage by a 36-day delay.

Q Your position, I take it, then is that as long as you file a complaint, you need never file a notice of intent to sue.

MR. GREER: Your Honor, our contention is that if the complaint serves the same purpose as a notice of intent to sue--which it did in this case--

Q It would seem to me it always would, would it not?

MR. GREER: I can conceive of situations--there is no time limit within which the Labor Department must negotiate either under a notice of intent to sue or the complaint. It says he shall do so promptly, whatever that means. But the Labor Department is the one that interprets it.

Q So, your feeling would be if you file a complaint with the Labor Department within 60 days, then without any more ado you can file your lawsuit?

MR. GREER: If the purpose of the act is served.

Q Suppose the Labor Department gets the complaint but they are just too busy and do not try to conciliate at all.

MR. GREER: I do not think you can say that the defendant had proper notice then. He must have proper notice. Of course, these two cases that the defendant has relied on so heavily--this Robbins v. Electrical Workers and Johnson v. Railway Express--the Court pointed out there the procedure followed in pursuing two separate remedies did not guarantee notice to the defendant. In Electrical Workers case they were proceeding under the National Labor Relations Act grievance procedure, a separate, independent, distinct action.

Q The purpose of it, I thought you said, was to give the Labor Department time to conciliate, not to give the defendant notice.

MR. GREER: It serves to trigger the investigating responsibilities of the Labor Department. It does not set any time limit that it has to do it.

Q Suppose the Department does not investigate after the claim is filed. Is the claimant entitled to sue after 60 days or is he not?

MR. GREER: If the defendant has notice, I do not think we could say that. They have to have notice. But our contention is--

Q When the lawsuit is filed they will have plenty of notice.

MR. GREER: Yes, but I think that is why they put the 180 days in there so that the conciliation would begin within 180 days. It is merely to speed up the process that was bogging down Title VII, the 60-day notice as well as the 180-day notice.

Q Then you are saying that there must be something filed besides the complaint with the Labor Department.

MR. GREER: No, I am saying that there must be notice to the defendant, certainly. I do not think that if you just file a complaint and the Labor Department never got around to it--I mean, the defendant certainly has got to have notice that something is going on.

Q So, he must do something else besides file a claim?

MR. GREER: Yes. In this case the--

Q And then if he files it after that, he files a notice of intent to sue. He files that in the Labor Department, does he not?

MR. GREER: Yes.

Q So then what if the Labor Department does not do anything then either?

MR. GREER: He can go ahead and bring his lawsuit.

Q Even if the defendant does not know a thing?

MR. GREER: That is true. That is true. That is why they put the 60-day notice in, I believe, is so the claimant can get on with his lawsuit rather than waiting for the right-to-sue letter which is bogged down under Title VII. They experience all kinds of delays in wating for the right-to-sue letter.

If I may proceed with the discussion of the Electrical Workers case, there you had two separate and distinct remedies, and the claimant had attempted to proceed under the grievance procedure, whereas the Court said that that would not afford the notice to the defendant as the proceedings under Title VII. Likewise in Johnson v. Railway Express, you had two separate and distinct statutory remedies, one under Title VII and one under Section 1981. But in this case the plaintiff is proceeding under one statute. There is one remedy, one cause of action. It is whether the Labor Department brings the action or whether the plaintiff brings the action. And since the defendant had notice, the purposes of the act were served in all respects, we believe. We think that, as the Tenth Circuit held, there was de facto fulfillment and that plaintiff should prevail.

MR. CHIEF JUSTICE BURGER: Do you have anything further, counsel?

REBUTTAL ARGUMENT BY MS. MARY T. MATTHIES

ON BEHALF OF THE PETITIONER

MS. MATTHIES: There were several questions which

were presented to Mr. Greer that I believe warrant some further discussion. I believe Mr. Justice Stevens asked if there was any evidence of fraudulent concealment in this particular case, and Mr. Greer responded that I guess the fraudulent concealment was the dragging of the feet by Shell with respect to furnishing information. In the first place, I do not think that the mere dragging of one's feet would amount to fraudulent concealment under any cases that I know dealing with fraudulent concealment.

In the second place, there is simply not any evidence in the record that Shell was dragging its feet. There were no statements made by Mr. Speer, the wage and hour investigator, stating that he thought the delay was unreasonable. As a matter of fact, I believe the statements to that effect by the Court of Appeals were no more than sheer speculation as to the reasons for the delay.

Shell, on the other hand, presented evidence showing that the reason for the delay was the large amount of data which the Department of Labor wanted. Of course, if the Department of Labor had thought that the delay was unreasonable, the Department of Labor could have subpoenaed the data, which it did not do. As a matter of fact, there is no indication in the record that the Department of Labor even contacted Shell betwixt the time that it requested the data and Shell called the Department some 2-1/2 months later to say,

"We are working on it. We are almost through, and we just wanted to let you know where we are." I am not sure that there is any evidence in the record that would establish fraudulent concealment.

Mr. Justice Stevens also, I believe, asked whether there is any precedent for tolling where the government fails to advise a plaintiff of its rights. And I believe Mr. Greer responded that he thought that Love v. Pullman applied to this particular situation. I question Love v. Pullman's applicability. In the first place, in Love v. Pullman there was at issue whether or not the actions of the government fulfilled the purposes of Title VII, and it appeared that there was wrongful advice in fact given with respect to what needed to be done as opposed to here, which was simply an omission which Mrs. Dartt, we believe, could surely have corrected herself had she made just a minimal inquiry as "Do I have to wait with you guys handling this thing any longer or is there something else I can do? Do I have any other rights? What should I do? Where do I go? How do I proceed?" Mrs. Dartt did not do that.

I believe that Mr. Greer also stated that Mrs. Dartt followed everything that the ADA poster required her to do. In other words, she went to the Department of Labor, and that is what the ADA poster states. I do not know how the ADA poster's difference, had it in fact included some kind of

provision with respect to that, would have helped Mrs. Dartt because she testified before the lower court that she in fact did not see the poster, and she never thought it was in fact up. And so we do not believe that there is any evidence based truly on the alleged inadequacy of the poster for a tolling here.

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

[Whereupon, the case was submitted at 1:53 o'clock p.m.]

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