ORIGINAL

In the

Supreme Court of the United States

OSCAR MAYER & CO., ET AL.,

PETITIONERS,

V.

JOSEPH W. EVANS,

RESPONDENT.

No. 78-275

Washington, D. C.
February 28, 1979

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OSCAR MAYER & CO., ET AL.,

Petitioners,

v. No. 78-275

JOSEPH W. EVANS,

Respondent.

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Washington, D. C.
Wednesday, February 28, 1979

The above-entitled matter came on for argument at 11:45 o'clock, a.m.

BEFORE:

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

APPEARANCES:

JAMES W. GLADDEN, JR., ESQ., 231 South La Salle Street, Chicago, Illinois 60604, on behalf of the Petitioners.

ALLAN A. RYAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, as amicus curiae, supporting Respondent.

MARK W. BENNETT, ESQ., Allen, Babich and Bennett, 102 East Grand Avenue, Suite G-101, Des Moines, Iowa 50309, on behalf of 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 78-275, Oscar Mayer & Company against Evans.

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

ORAL ARGUMENT OF JAMES W. GLADDEN, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

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

The issue presented in this case is whether, under Section 14(b) of the Age Discrimination in Employment Act, when a state which has a law which prohibits age discrimination in employment and has established an agency empowered to grant relief from such practices, must a claim of age discrimination first be filed with that state agency before the claimant may initiate an action in federal court.

The facts of this case may be stated very briefly. Respondent Joseph Evans retired in January 1976 from his position as hog buyer for Oscar Mayer in Iowa. In March 1976, Mr. Evans filed a notice of intent to sue with the United States Department of Labor, claiming that he had been forced to retire in violation of the Age Discrimination Act.

At the time of Mr. Evans' alleged forced retirement, the Iowa Civil Rights Act prohibited age discrimination in employment and established the Iowa Civil Rights Commission to investigate and attempt to conciliate all charges of age

discrimination. In addition, the Iowa Civil Rights Commission was empowered, if it was unable to settle a charge through conciliation, to hold hearings and if it found that a discriminatory practice had been engaged in, to order cease and desist and award back pay.

Mr. Evans ignored the available avenue of state relief. He did not file a claim at any time with the Iowa Civil Rights Commission. Rather, one year after he had filed his notice of intent to sue with the United States Department of Labor, he instituted an action in the Federal District Court in Iowa. The Defendants in that action and Petitioners here are the company Oscar Mayer and four of its management employees who were involved in the decision with respect to his retirement.

Oscar Mayer and the other Defendants in the trial court below moved to dismiss the action for the reason that Mr. Evans had failed to file a claim with the Iowa Civil Rights Commission as Oscar Mayer contended was required by Section 14(b) of the Age Discrimination Act.

Section 14(b) requires -- and it is found at page 2 of our brief -- and I quote: "In the case of an alleged unlawful practice occurring in a state which has a law prohibiting discrmination in employment because of age, in establishing or authorizing a state authority to grant or seek relief from such discriminatory practice, no suit may be

brought under Section 626 of this Title before the expiration of 60 days after proceedings have been commenced under the state law, unless such proceedings have been earlier terminated.

In the trial court in response to the motion to dismiss, Respondent conceded that Iowa has an age discrmination law and that it has established an agency, and is, therefore, within the terms of Section 14(b). Respondent also conceded that he had at no time filed a charge with the Iowa Civil Rights Commission. The trial judge, however, denied the motion to dismiss, holding that filing of a charge with the state agency was not required by Section 14(b) as a prerequisite to instituting action in the Federal District Court.

Rather, he concluded that Section 14(b) gave an age claimant the option of determining whether or not to avail himself of an available state remedy. The trial judge certified his order and an appeal was taken to the Eighth Circuit under Section 1292(b).

In its first decision, the Eighth Circuit reversed the trial court and held that Section 14(b) did require prior resort to the state agency. On rehearing, the Eight Circuit changed its position and by a divided panel concluded that, while the issue was not free from doubt, the preferable view was that Section 14(b) gave an age claimant an option that he was not required to file with a state agency.

QUESTION: This was not by rehearing of the findings,

but because one of the judges changed his mind?

MR. GLADDEN: One of the judges changed his mind after the petition for rehearing had been filed. It was not an en banc hearing.

It is Petitioners' position that Section 14(b) establishes a prerequisite which must be complied with prior to instituting action in Federal District Court.

It is our position that the language of the statute is clear and, further, that requiring resort to an available state remedy is completely consistent with the purposes of the age discrimination act.

As I just read the language to you, it specifically says "where a state has a law and an agency to enforce that law, no suit may be brought under Section 626 of this title before the expiration of 60 days after proceedings have been commenced under the state law."

QUESTION: Mr. Gladden, it doesn't say that proceedings must be commenced under the state law though, does it?

MR. GLADDEN: It does not say they must be commenced, but it says no suit may be brought. And I think if you will look at Section 7(b) which deals with filing an action in Federal Court, it says, "No suit may be commenced until notice is given to the Department of Labor." That particular provision, using the same language, "no suit may be commenced,"

has been uniformly accepted by the courts as requiring the filing of a notice of intent to sue.

Equally as important, this language in Section 14(b) is titled precisely after language which appears in 706(c) of Title VII, which is also quoted at page 2 of our brief and reads almost identically. It says, and I quote: "In the case of an alleged unlawful employment practice occurring in a state which has a law prohibiting the unlawful employment practice alleged and establishing or authorizing state authority to grant or seek relief from such practice, no charge may be filed by the person grieved before the expiration of 60 days after proceedings have been commenced under the state law."

Now, that particular provision has been uniformly held to require a person to file a charge with a state agency before he may initiate proceedings under Title VII.

Indeed, this Court in the decision in Love v. Pullman Co. agreed with that position of the lower court. And it is our position that, just like in Title VII, requiring prior resort to a state agency clearly serves the purposes of the age discrimination --

QUESTION: You are arguing that the similar language had been construed and that we should follow that construction, but I was suggesting to you that the language itself is not entirely unambiguous. Because, unlike Section 7(b) which says that "until the individual has given the Secretary notice,"

there is nothing here that requires that the proceedings be commenced before the state agency.

You can read it either way, is all I am saying.

MR. GLADDEN: I think you could technically read it either way, but I think that when you look at the fact that the language was taken from Title VII and consists of an interpretation of Title VII, I think the far better reading, and I think the reading which gives more meaning to the language of the section, is one which reads it as a requirement.

It is our position that making it a requirement is very consistent with the purposes underlying the Age Discrimination Act, because the Act encourages conciliation of disputes rather than litigation of such disputes, and that by requiring resort to state agencies you maximize the possibility of a non-judicial resolution of such disputes.

I think it is important to recognize that in 1976 and in 1977 over 5,000 charges of age discrimination were filed each year with the United States Department of Labor, and as of the end of fiscal 1977 there was a backlog of over 2,000 cases before the Department of Labor with respect to notices of intent to sue.

In 1977, 86 cases were filed by the Department of Labor, but there were 433 individual actions filed. Since the Department of Labor has enforcement responsibilities under 82 different laws, it is easy to see why the backlog is growing.

This led to statements of concern with respect to the handling of age discrimination claims during the consideration of the 1978 Amendments.

It is our feeling that, given this problem, state authorities clearly have a necessary, effective and viable means of assisting in handling this growing number of age discrimination complaints.

There are at least 30 states which have both a law and have established authority to deal with age discrimination complaints and, therefore, would be qualified for coverage under Section 14(b).

Given the number of states which have acted in this area, we think they have a clear role to play.

If the position of Respondent is accepted, and an age claimant is given the option of whether or not to file with the state agency, he is in a position to ignore the state agency, file a notice of intent to sue with an over-extended Department of Labor and then proceed immediately into Federal Court.

The Solicitor General in his amicus brief concedes that the state agency could help where there may have been a mistake which led to the charge or where there may be simple facts.

However, the Solicitor contends that since a claimant could refuse to cooperate with the state agency and

then go off to Federal Court, that you should not require a claimant to file a charge with a state agency.

It is our position that it is improper to determine whether or not a person should be required to file a charge with a state agency on the basis of whether or not he is willing to cooperate with that agency.

QUESTION: Is there anything in congressional history that supports you that you have to go to the state first?

MR. GLADDEN: I think, Mr. Justice Marshall, that if you look at -- the history which led to Title VII was very clear. They wanted --

QUESTION: I am talking about this.

MR. GLADDEN: When they adopted this provision, as you recall -- This statute, when it was first proposed at a National Labor Relations Board type procedure, then through various discussions it was amended and became a hybrid of some of Title VII and some of --

QUESTION: I assume your answer is going to be no.

MR. GLADDEN: No.

Then, toward the end of the consideration, a representative of organized labor and a representative of one of the state agencies raised the question with Congress with respect to the possibility that the Age Discrimination Act, as then drafted, would preempt states and preclude them from age discrimination enforcement. And these two people suggested

to Congress that they follow the Title VII procedure.

Subsequent to that testimony, Section 14(b) was added to the Act. That's all the legislative history --

QUESTION: But no Member of Congress said a word about it?

MR. GLADDEN: There is no recorded discussion on that provision either way.

With respect to the question -- I think this question of cooperation or lack thereof could also be made with respect to Title VII, yet no court has ever said that, even though a person could defeat a state agency's acting under Title VII by failing to cooperate, he should be excused from going to a state agency.

Now, the Solicitor and Respondent both rely on this Court's opinion in Lorillard v. Pons, decided last term, where this Court held that there was a right to a jury trial for age discrimination claimants. And they particularly point to the language in that case where this Court stated that Title VII was not a reliable guide to interpreting the Age Discrimination Act.

However, the Court did recognize in that opinion that the Age Discrimination Act was a hybrid, taking some provisions from Title VII and taking some provisions from the Fair Labor Standards Act, and that therefore they pointed out -- it's at page 582 of the opinion -- this selectivity that

Congress exhibited in incorporating provisions and in modifying certain Fair Labor Standards Act practices, strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the Fair Labor Standards Act.

Now, it is our feeling that Section 14(b) is clearly one of those exceptions. The language is taken directly from Title VII. There was no counterpart of that in the Fair Labor Standards Act.

So, we feel then --

QUESTION: Can I interrupt here with a question before the noon hour, so you can reflect on it over lunch?

You've cited this Love v. Pullman as holding that under Title VII it is a jurisdictional requisite that you go to the state agency first.

I don't see that the case really held that. Is there anything in the opinion that even says that?

MR. GLADDEN: I think the question there was whether or not you had to file with the state agency, as I understand it. Basically, this has been conceded by the Solicitor and Respondent. That has been attributed as being the holding of Love v. Pullman by lower courts and, as I say, has been conceded in the briefs.

What they there held was that the deferral procedure whereby, as I recall the opinion, you could defer a case --

if the charge was initially filed with the EEOC, then it could be deferred to the state and then come back to the agency after 60 days, that satisfied the requirement of going to the state.

QUESTION: It was a question of timeliness, I think. Wasn't it a question of whether it was filed in time?

MR. GLADDEN: I think it was also a question of whether you had to file with the state, as well.

As I say, the Respondent and Solicitor both accept that proposition and the courts have uniformly accepted -- lower courts have uniformly cited the Love v. Pullman case for the proposition that this Court agreed that prior resort to a state agency was required.

With respect to the Lorillard opinion, I might go on, this Court did also state in there that where Congress adopts a new law, incorporating sections of a prior law, that normally Congress will be presumed to have knowledge of the interpretation given to the incorporated law.

There are two differences between the Age Discrimination Act and Title VII to which Solicitor and the Respondent point, one being that you may file a concurrent charge with both the Department of Labor and a state agency under the Age Discrimination Act.

We do not feel that the fact that you can file a concurrent charge means that the state agency should be ignored. This was obviously Congress' effort to speed up the

administrative process.

We still feel that a state can play a meaningful role in disposing even of a charge which is filed concurrently with the charge filed with a federal agency.

Likewise, I think that the fact that if a federal lawsuit is filed under the Age Discrimination Act it supercedes the filing of a charge before a state agency. I do not think that that means a state agency should be ignored.

This provision merely avoids duplication once a lawsuit has been instituted. But the fact that a state agency cannot conclude a proceeding, does not mean it should not commence the proceeding, because, if it is making meaningful progress, there is no requirement that the lawsuit be immediately filed. The requirement is that the state be given a minimum of 60 days. A petitioner does not have to file until at least two years. And if he alleges a willful violation, three years.

So that, if a state is making meaningful progress, he does not have to go to court.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Counsel.

(Whereupon, at 12:00 o'clock noon, the Court recessed to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: Counsel, you may proceed.

ORAL ARGUMENT OF JAMES W. GLADDEN, JR., ESQ.,
ON BEHALF OF THE PETITIONERS (Resumed)

MR. GLADDEN: Thank you, Mr. Chief Justice, and may it please the Court:

Mr. Justice Stevens, prior to lunch, you asked me a question with respect to Love v. Pullman.

We reviewed that decision over lunch, and I think it important to point out that the Court of Appeals there held that the charge of discrimination had not been properly filed with the EEOC in accordance with the requirements of the Act; and this Court then specified that there were two such requirements, one being 706(b), which under the Amendments in 1972 became 706(c), and the other one being 706(d) which was dealing with the time within which to be filed with EEOC.

This Court then reviewed the procedure that was followed there and indicated that in the facts there had been a referral to the state agency and the state agency had declined to act. And then this Court held that the procedure complies with both the purpose -- excuse me, complies with the purpose both of 706(b), to give state agencies a prior opportunity to consider discrimination complaints, and of 706(d),

to insure expedition in the filing and handling of those complaints. This case has been assumed and presumed by all to have held that you had to take a prior resort to a state agency before you could file a charge under Title 7.

QUESTION: The Love case simply held that there had been compliance.

MR. GLADDEN: The Love case simply held that there had been in the procedure that was followed there --

I think it is important to point out that recognizing the close relationship and the similarities between the Age Discrimination Act and Title VII, in February 1978, President Carter proposed a reorganization of civil rights enforcement. And this was submitted to Congress. Congress did not act, and therefore this reorganization will go into effect. Pursuant to this reorganization, the enforcement of the Age Discrimination Act is transferred to the EEOC as of July 1, 1979. This transfer was being undertaken to avoid confusion and the overlap in enforcement.

The EEOC has, throughout its history, worked closely with state agencies in enforcing discrimination complaints and, indeed, in the 1972 Amendments to Title VII if the EEOC is acting on a commissioner's charge as opposed to an individual charge, it still must refer that commissioner's charge to a state agency before it may undertake its investigation.

Iowa,and most other states, with age discrimination

statutes, have the same agency to enforce age discrimination, race and sex discrimination. And it is our feeling it simply makes no sense to treat two identically worded statutory provisions to be enforced by the same agency in two different manners. This simply will not reduce the confusion to which the President was referring when he proposed his reorganization.

QUESTION: But there is some difference between the procedures, isn't there?

MR. GLADDEN: There is some difference, absolutely correct. The procedures are more streamlined, there is no --

QUESTION: And you don't have to go to the state before you go to the federal, do you?

MR. GLADDEN: No, you may go --

QUESTION: Isn't that quite a substantial difference? It certainly shows a good deal less deference to the state.

MR. GLADDEN: It shows less deference, but it doesn't mean that you shouldn't go to the state at all, because what it does is it sets up two parallel administrative lines to be pursued. If one starts taking meaningful action with respect to that, then it may resolve an attempt to to conciliate the matter to avoid the necessity of litigation. I don't think the fact that you can file concurrently means that you can ignore one, which is what the Respondent's position here is.

Respondent's position is the age claimant should

determine whether he wants to go to a state agency or not. I don't think there is anything in the statutory pattern which suggests that the option should be given to him to determine --

QUESTION: Must be filed with the federal people before he goes to court.

MR. GLADDEN: Yes.

QUESTION: Once he files with the federal people, how long does he have to wait?

MR. GLADDEN: He must wait a minimum of 60 days.

QUESTION: But even under your theory the claimant can forget about the state proceedings at the expiration of 60 days, can he not?

MR. GLADDEN: He can, after a minimum of 60 days, but he doesn't have to go to court at the end of 60 days. He can wait for two years. So if the state has undertaken a meaningful investigation as attempting to resolve the matter, there is no requirement that at the end of 60 days he goes to court. It simply gives him that option after 60 days.

QUESTION: That's all he is claiming here, I take it.

MR. GLADDEN: No. What he is claiming here is he doesn't have to go to the state at all, that he never filed a claim and he never has to file a claim with the state, and that any age claimant does not have to file a claim with the state, he may ignore the state proceedings completely.

QUESTION: He can't ignore the federals but he can ignore the state?

MR. GLADDEN: That's his contention.

QUESTION: And your contention is that, of course, he has to file with the federal, too, but he has to file with the state, too.

MR. GLADDEN: Correct, because in terms of the numbers of complaints and the obvious purpose of the Act is to have conciliation in these matters to avoid litigation.

QUESTION: So, if he files with the federal people and waits 60 days, he still is going to have to file with the state and wait 60?

MR. GLADDEN: But he could make that filing contemporaneously. And it is our feeling that this encourages -- What it does is that it establishes a state agency which has an ongoing relationship dealing with plants with respect to race and sex charges and other age charges. It enables those local people that have been dealing with plants to get into this picture and attempt to resolve these matters, so we don't get into federal litigation over an age discrimination complaint if at all possible.

QUESTION: Is there any explanation in the legislative history as to why there was no requirement of resorting to state procedures before resorting to the federal procedures.

MR. GLADDEN: No. There is no legislative history

in those terms with respect to the 1967 Act.

As I say, the legislative history with respect to Title VII was very specific that they wanted prior resort to the state agency. And the '67 Age Act, we feel, adopted that language and, therefore, adopted basically the position which was being expressed by the Senate with respect to Title VII.

I think it is important at this point to turn to the fact that, although there was no change in Section 14(b) in the 1978 Amendments to the Age Discrimination Act, the Solicitor and Respondent both point to the Senate report which was adopted by the Conference Committee which concluded that Section 14(b) had not been intended to require prior resort to the state, and that it had merely been intended to give the claimant an option.

It is our feeling that observations ten years after the passage of an Act clearly are not part of its legislative history. In addition, in 1978, as the Solicitor admits in his brief, Congress amended the Act to alter judicial decisions which in Congress' view had been unfaithful to the Act, and they made specific amendments, both substantive amendments and procedural amendments.

First of all, they made a substantive amendment with respect to retirement plans, overruling this Court's opinion in the McMahon case. Secondly, with respect to the notice of intent to sue requirement of the Secretary of Labor,

since there had been a good deal of litigation with respect to what is a notice of intent to sue and what is not a notice of intent to sue, they made a change making it simply that you had to file a charge with the Department of Labor. They also made a change with respect to how the statute of limitations was to be treated, saying that the statute could be tolled during the period of time when the Secretary was undertaking conciliation.

At the time the '78 Amendments were being considered, the only two Courts of Appeals which had addressed this question of Section 14(b) had both held that prior resort to a state agency was mandatory. Yet, Congress made no change at all in Section 14(b). And the fact that they did not make the change while they made other procedural changes, seems to me, indicates that no weight should be given to the Senate Report which was part of the legislative history.

Respondent and the Solicitor both ask this Court that even if this Court adopts the position that Section 14(b) establishes a prerequisite to the filing of an action under the Age Discrimination Act, that this Court should also adopt a doctrine of equitable modification, whereby on a case by case basis an individual age claimant should be able to show why it should be excused from this requirement.

I think it is important to understand what this position entails. They are not asking for the tolling of the

Statute of Limitations to excuse a late filing. What they are asking is to be excused completely from the filing on a case by case basis. In effect, they are asking this Court to say that courts can rewrite the statute and drop the requirement out altogether, if the person can present sufficient factual circumstances to justify that.

This will obviously create confusion as to under which circumstances there would be a private right of action and under which circumstances a private right of action is preserved or not preserved.

And I think it is important to recognize that any age claimant would then attempt to posit to the court a set of circumstances which would justify his being excused if he has not filed, which creates another issue, and we feel simply encourages litigation.

Even in situations where courts have allowed tolling of the Statute of Limitations, they have made every effort to develop a very much objective standard of tolling so as to avoid issues being raised as to whether or not this person should be excused from the requirement.

We feel that, in short, Congress did not change Section 14(b) at the time of its consideration of the 1978 Amendments, even though numerous plaintiffs had their cases dismissed on this ground.

Because of the identity of the language between

Title VII and the Age Disdrimination Act, and the obvious benefits from state participation in handling the ever-increasing numbers of charges in this area, we feel that this clearly indicates that the Court should reverse the Eighth Circuit and remand this case to the District Court with instructions to dismiss.

Thank you.

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

Mr. Ryan.

ORAL ARGUMENT OF ALLAN A. RYAN, JR., ESQ.,

AS AMICUS CURIAE SUPPORTING RESPONDENT

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

This is a hard case. It is hard because the statutory language is so ambiguous that it can support either alternative before the Court, and because the Petitioner has advanced appealing arguments in his brief, the reversal of the result reached below will alleviate congestion in the Federal Courts. But these arguments are more seductive than they are persuasive.

First, let us keep matters in perspective. There is no question that a person with a complaint of age discrimination may vindicate his right in Federal Court. He is required to give the Secretary of Labor 60 days notice of his intent to do so, which is now a charge as a result of the '78 Amendment. And during that 60 days the Act requires the Secretary to

attempt to bring about conciliation through informal methods of persuasion.

The question here, before this Court, is whether the Act also erects an additional procedural obstacle that the plaintiff must clear before he can go to Federal Court.

QUESTION: Is it fair to say from your opening remark that if the Eighth Circuit had gone the other way you would not have brought the case here?

MR. RYAN: I think by the time the Eighth Circuit decided this case there was a pretty pronounced conflict among the circuits and I think that, by itself, would have justified certiorari.

The question here is whether in addition to giving the Secretary 60 days to settle the case, the complainant must also, in effect, give the state 60 days to do the same thing, if the discrimination took place in a state that has an agency set up to handle age discrimination claims.

Now, we are not talking here in this case about exhaustion of state remedies. Petitioner concedes that the most the statute can require is that the claimant file his charge with the state agency and then wait 60 days. After that 60 days, the claimant has an unfettered right to go into Federal court, regardless of what the state may or may not have done to his complaint in the meantime. That requirement, if this Court holds that it is a requirement, is, we think, a

procedural monkeywrench in the administration of this Act that will serve neither the states nor the plaintiffs nor the Federal Courts.

QUESTION: If the Court finds that the language of the statute provides just that, however, the fact that it may be a procedural monkeywrench is none of our business, is it?

MR. RYAN: If this Court finds that that is what Congress intended, then we agree, Mr. Justice Stewart. But I think this Court has the opportunity to construe an admittedly ambiguous statute --

QUESTION: Who admits it is ambiguous? You claim it is ambiguous and so does the Respondent, but the Petitioner says that it is very clear. So, it is not at all conceded that this is an ambiguous statute.

MR. RYAN: I am sorry. I don't mean to imply that it was.

QUESTION: You are relying on a presumption that Congress does not create procedural monkeywrenches?

MR. RYAN: I would like to rely on that presumption, Mr. Justice Rehnquist. Experience shows that that is not always a safe presumption to rely on.

QUESTION: Is it true that the complaining party would only have to file a piece of paper with the state?

MR. RYAN: In this case?

QUESTION: In any case.

MR. RYAN: I am sorry, I don't understand.

QUESTION: In order to do what Petitioner says, would it be satisfactory if the complainant merely files a piece of paper with the Wisconsin agency, or Iowa, or whatever it is, saying "I've been done in"?

MR. RYAN: That is a question that the Federal Court will have to answer when the case ends up there. In fact, that is a question that has been much litigated, where plaintiffs have gone to state agencies. They go into the Federal Court and the employer says, "Now wait a minute. You've been to a state agency, but did you file in time, did you file sufficiently, did you file on the proper form, did you comply with all of the state procedural requirements that the state act sets up?"

And then the District Court has to decide that entire round of questions. That's why we say it is really not so to hold that the complainants' going to a state agency will alleviate any burden of the Federal Courts. It will do no such thing, in our opinion. It will simply place a new round of questions before the Federal Court in that time when the plaintiff finally ends up there.

QUESTION: Your friend has suggested that -- and I suppose we can judicially notice the fact that most claims of this kind are subject to settlement by conciliation negotiation.

Now, starting from that premise, if that's true -- and we are trying to look at a statute that's not very clear -- wouldn't it make sense that Congress would prefer to disperse this as, I think, he suggested, among the states, rather than having it all concentrated in the Federal Courts?

MR. RYAN: Well, I think they would much prefer to have cases like this settled rather than litigated. I think there is no question about it and it --

QUESTION: It is the desirable -- for a dozen reasons.

MR. RYAN: Without any doubt at all. I am sure that given that choice every Member of Congress would have said, "We favor conciliation and settlement." What they did in response to that concern, in our view, is they gave it to the Secretary of Labor. They said, "Thou shalt not file a suit in Federal Court until you have gone to the Secretary of Labor and given him at least 60 days." And then it said to the Sectetary of Labor, "You are obligated to make every attempt within the 60 days to settle this claim."

QUESTION: One way that the Secretary of Labor might employ to settle it would be cooperation and coordination with the state agencies, is it not?

MR. RYAN: That is, in his discretion, one path that he might choose.

QUESTION: In other words, if the state has an agency

which has established a record in the mind of the Secretary of Labor as being effective, prompt -- reasonably so -- and the Secretary of Labor would perhaps hold his hand and say proceed.

MR. RYAN: That is a choice that the Act leaves open in the sense that it doesn't preclude it, but there are two points, I think, Mr. Chief Justice, in that regard. One, not every state has an agency of this sort. In fact, Petitioner says thirty, and I see no reason to dispute that. So that leaves twenty states without an agency of any kind.

QUESTION: If there is no agency, there is no problem, is there?

MR. RYAN: Well, there is a problem in the sense that if a plaintiff goes directly into Federal Court the employer is free to raise the question and say, "Is this a state which requires resort to state procedures?" And this puts another question in front of the Federal Court that it must answer.

QUESTION: If there is no agency that should be a question readily answered.

MR. RYAN: It is not readily answered as easily as it sounds, because there are cases in which Federal Courts have opened the state statute books and said, "There are some statutes in here that prohibit discrimination in one way or another." Does this fall within the type of statute that

Congress had in mind?

QUESTION: But the question is not does the state law require resort to the state procedures? The question, as I understand it, is if the state has a law prohibiting discrimination in employment because of age, and establishing or authorizing a state authority to grant or blah, blah.

It doesn't depend at all on whether the state does or does not require.

MR. RYAN: That is correct, Mr. Justice, it does not depend on that, but when the plaintiff goes into Federal Court not having gone to any state agency at all the employer is certainly entitled to raise as one of the questions that the Federal Court must decide: "We are in a deferral state and this man has not deferred."

So, what we are saying is to hold an employee must go to the state agency, as a general rule of law, is not going to alleviate any burden on the Federal Courts. In fact, the predictable effect is going to be to further embroil the Federal Courts in these matters.

That's just one aspect of this case, but it is important.

QUESTION: I suppose once it were decided in any district, that state does have a law or that state doesn't have a law, that would be the end of it for future cases, wouldn't it?

MR. RYAN: Assuming that the law doesn't change in that state.

QUESTION: Yes. There wouldn't be repeated litigation about it.

MR. RYAN: I would think not.

QUESTION: Would you help me with the problem I was concerned with before lunch?

Doyou agree that Section 706(c) of Title VII, which I guess has identical language in it, does require a prior filing with the state, in the Title VII case?

MR. RYAN: I would answer that, Mr. Justice Stevens, by saying that is the way it has always been understood.

QUESTION: And the Government doesn't question that understanding?

MR. RYAN: Certainly not in this case, and I don't think that we do in --

QUESTION: So, what really we are being asked to do is to say that the identical language in two similar statutes has different meaning?

MR. RYAN: Well, that -- My answer was that that is the way it has always been understood.

Love v. Pullman did not pass on that question. In fact, I think, a proper reading of Love would indicate that the plaintiff is required to go to the EEOC before he goes to Federal court, something that's perfectly --

QUESTION: I didn't think Love really squarely decided, but it seems to me this is something everybody is assuming for purposes of the decision. And so really what it boils down to is you are asking us to construe precisely the same language in similar statutes in different ways.

MR. RYAN: Yes. I cann't shy from that. It is true.

QUESTION: Without pertinent legislative history?

MR. RYAN: Well, the difference is that in Title VII there is unmistakable legislative history that shows that prior resort to the states was required.

Senator Humphrey and Senator Dirksen, on both sides of the aisle, said, "This is what we intend," and perhaps as a result of that --

QUESTION: Well, according to Petitioner, when you buy that you also buy that legislative history.

MR. RYAN: In Title VII.

QUESTION: He says you buy that over here, too.

MR. RYAN: I disagree with the Petitioner on that score.

QUESTION: Why not? You are taking the whole thing, aren't you? You say it is the same section.

MR. RYAN: It's not the same section. It is, we admit, as we have to, that the language is similar. It is similar. It is not identical. And, as you pointed out before

lunch, sir, we are construing a separate statute here. We are not construing Title VII in this action. We are construing the ADEA, and there is no legislative history in the ADEA which speaks specifically --

QUESTION: What my brother Stevens says is that we say that these two sections are not identical but are so similar that we can't discern difference between the two. However, we do find that one means something different from the other.

Now, I can write that much, if I was writing the opinion, but when I got to citing some, I'd be in a lot of trouble.

MR. RYAN: I would be happy to give you something to cite.

The structure of the ADEA is different from the structure of Title VII in terms of utilizing state remedies and utilizing Federal remedies. There are a number of distinctions that we point out in our brief, where Congress clearly intended something different for ADEA. And part of the reason, as Senator Javits and others mentioned in a debate, is that they were most unimpressed with the conduct of many state agencies. They felt that the state agencies -- and this is only two years after Title VII -- three years -- after Title VII had passed -- that many of the state agencies simply were not equipped to deal with these discrimination complaints.

Now, as a result of that, they made unmistakable changes in ADEA. For example, they did not require a right to sue letter from the Federal agency. The plaintiff can go into Federal Court 60 days after he notifies the Secretary, without any further ado.

They did not require, for example, that any state remedy be resorted to first. They showed, as my opponent mentioned in his argument, the ADEA does show less deference to the states than Title VII. There is no question about it.

So, that is my answer to that question, that while Congress may have used similar language, this Court is certainly free to look at the acts themselves and see that the structure is different.

QUESTION: The Act we have here was not intended to give any deference to the states?

MR. RYAN: I would not say it was intended to give no deference. It was intended to give a -- well, I am sorry. If, by deference, you mean a mandatory referral to the state procedures, then I agree. It was not intended to do that. It was intended to give the states some opportunity if the plaintiff chose to go there.

QUESTION: But they would have that without this section, wouldn't they?

MR. RYAN: That the plaintiffs would have been free to go?

QUESTION: Yes.

MR. RYAN: They would have, but then they would have gotten into some of the problems which this Court mentioned in Love v. Pullman, which, of course, was yet to be decided in 1967. For example, could he go to a state agency and then go into a Federal Court, if the state agency found no probable cause? Or if the state agency, for that matter, found no discrimination whatever, would he have a res judicata problem?

There were any number of questions that could readily be imagined if this statute did not address the proper relationship between state and federal agencies. So, by passing Section 14(b), what they were saying is: "You can go to the states if you want to. We don't want to shut off the states altogether, but it is our position" -- Congress is speaking -- "that after 60 days you are free to vindicate whatever rights you have under this Act."

So, I think, in that sense, it was not clear, and certainly not in 1967.

I think that what we are talking about here, this Act -- the ADEA has an unusual number of procedural difficulties. And any look at the recorded decisions, I think, will bear that out. We are asking this Court to simplify this Act, not to complicate it. It can construe this ambiguity, as we say, reasonably, either way.

QUESTION: We simplify it no matter what we do, if

we decide the case.

MR. RYAN: I respectfully disagree, sir.

I think that while if you reverse the judgment below you will have answered a question, you will not have simplified the administration of the Act because every act henceforth will have to answer the number of questions that I raise. Namely, was the compliance with the state procedures, in this case, sufficient? It is just going to --

QUESTION: As conditions change in the various states, it is a simple matter for Congress to modify this problem, if they think a problem flows --

MR. RYAN: It is simple for Congree to modify it in either way. Certainly if Congress does not like what this Court says it can change it. It did that in McMahon and it can do that in this case if it wants to.

But our position is that, given that choice to complicate the Act or to simplify it, that this Court should simplify it. And if Congress wants to change it, that's up to Congress. But until that time comes, the purpose of this Act, to give individuals a right in Federal Court to vindicate claims of age discrimination, should be supported by this Court and not submitted to a continuing round of procedural questions.

QUESTION: Was enforcement of ADEA transfered last summer to EEOC?

MR. RYAN: It becomes effective this coming summer,

July 1, 1979.

QUESTION: So the EEOC will administer the section at issue here today, as well as Title VII?

MR. RYAN: Yes, sir, that's my understanding.

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

Mr. Bennett.

ORAL ARGUMENT OF MARK W. BENNETT, ESQ.

ON BEHALF OF THE RESPONDENT

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

The narrow issue before the Court today, involving the proper statutory construction of Section 14(b) of the Age Discrimination in Employment Act, has been considered by five Courts of Appeals, four within the last year.

The court below, the Holliday opinion, which is en banc unanimous from the Third Circuit, reversing their previous in Goger, and the Gabriele decision of the Sixth Circuit, held that it is an optional prerequisite. The contrary views --

QUESTION: Is that the case where the Court of Appeals relied on the legislative history, largely?

MR. BENNETT: Yes, Your Honor.

QUESTION: The legislative history eleven years after the event, is that the one?

MR. BENNETT: Ten years after, Your Honor.

QUESTION: Perhaps, different Members of Congress

who were not even Members of Congress when the Act was passed.

MR. BENNETT: As the Secretary pointed out in the brief, Mr.Chief Justice, six of the Members were.

QUESTION: I said "could be," not "were." They could be an entirely new team.

MR. BENNETT: Yes. Some of them were, in fact, and some were holdovers.

But the collective wisdom of the Holliday, Gabriele and the court below established three major principles. One is that Section 14 of the ADEA is not the mere image of Title VII. There are some differences which I will get to, and I think those differences are important and affect the interpretation to be given Section 14(b).

Secondly, the legislative history of the ADEA is not instructive. It is, perhaps, silent on the proper interpretation to be given Section 14(b).

And, finally, that absent congressionally expressed intent to the contrary, Section 14(b) should be construed to assist the intended beneficiary of the Act.

Turning to the first proposition, that Section 14(b) is not the mere image of Section 706(c) of Title VII. Throughout the litigation in this case, Petitioners would have us believe that the mere incantation of the analogy to Section 706 (c) resolves the matter.

I think it takes additional analysis. The language

is not identical.

Under Section 706(c) of Title VII, the appropriate terminology is "no charge may be filed," with EEOC. That gives a state a mandatory 60 days deferral opportunity to deal with the alleged discrimination.

All federal action is precluded and the filing of suit is likewise precluded.

On the other hand, under Section 14(b) of the Age Discrimination in Employment Act, no suit may be brought. However, as Mr. Justice Rehnquist previously recognized, this allows for a multitude of opportunities.

For example, there can be simultaneous jurisdiction, where the state deferral agency and the Department of Labor go at it simultaneously, or the state can go first or the Federal Government can go first, or the Federal Government can go first or the state can go first. They haven't clarified it in the statute.

Now, the effect of the difference in the language is this. Under Title VII, the states have exclusive jurisdiction for 60 days. Under the ADEA, there is no exclusive jurisdiction. There is either simultaneous or consecutive, in any order that the claimant may go. He may go to the state first, or he may go to the federal first.

QUESTION: You do agree that under Title VII, even if the complaining party does not file anything with the state, he

still must wait 60 days before he can file a charge with the EEOC? Do you agree with that?

In other words, the 60-day waiting period is not contingent on an actual filing with the state, under Title VII?

MR. BENNETT: I am not sure that situation would arise because of this Court's decision in Love, which said -- or at least it seemed to intimate -- that you had to go to the state agency first.

In other words, I guess the answer to your question is EEOC will not accept jurisdiction until the state has its 60 days. It is a mandatory exclusive jurisdiction.

QUESTION: Then, if that's a fair reading of that language as mandatory, why -- except for the difference between "no charge" and "no suit" -- doesn't grammatically the same language lead to the same result in the other statute?

Do we have an English grammar problem here?

Once you've agreed that it reads that way in one statute, why doesn't it read the same way in the other statute?

MR. BENNETT: Because, in Title VII, I think they specifically said that the state must be given the 60-day period. It's not the language of 706, but the language of another section in Title VII.

Just like in the ADEA, it is not the language of Section 14(b), but the language of another section. In other words, the jurisdictional prerequisites in the ADEA are set

forth in Section 7(d), the notice with the Department of Labor.

QUESTION: What is the section in Title VII that requires prior resort to the state agency?

MR. BENNETT: I don't know the answer to that.

QUESTION: But you say it is not this section?

I was under the impression, from all the argument, that this is the source of the requirement they go to the state first. But then you are saying the same language doesn't impose a similar requirement --

MR. BENNETT: Section 706(c) has been interpreted to me and I am erroneous.

QUESTION: This section only applies to states like Iowa.

MR. BENNETT: That's also true of Section 706(c). The sections only come into play if the state has a civil rights agency.

QUESTION: But I mean the whole section, not just this bottom. It starts off: "In cases like Iowa this will apply." That's what it says.

Doesn't that lead some credence to the fact that they do expect you to use the state machinery? Aren't they really making a separate rule for states that have state machinery, from states that don't have state machinery? Isn't that what 14(b) is?

MR. BENNETT: I think 14(b) says you have the option

of going to the state.

QUESTION: Well, let me read. It says: "In the case of an alleged unlawful discrimination occurring in a state which has a law."

Well, what is the provision in a state that does not have a law?

MR. BENNETT: In a state that does not have a law, Mr. Justice Marshall, there is no state exhaustion requirement.

QUESTION: Right. So, I mean, the whole point is, that this could be once you get in a state that does have such a law you have to go to the state machinery first.

MR. BENNETT: That could be, but it's obviously not the interpretation that we are urging.

QUESTION: Do I have to buy "obviously"?

MR. BENNETT: No, Your Honor.

QUESTION: Mr. Bennett, did you argue the case below?

MR. BENNETT: Yes, sir.

QUESTION: Did you have an oral argument on the rehearing petition when it was granted?

MR. BENNETT: No, Your Honor.

QUESTION: Done purely on briefs?

MR. BENNETT: It was done on the petition for rehearing filed by myself and the Solicitor General.

QUESTION: What do you think prompted Judge Smith to change his mind? The appearance of the Secretary of Labor?

MR. BENNETT: Mr. Justice Blackmun, I believe it was the subsequent -- There was a subsequent holding by Gabriele of the Sixth Circuit, in between the time when we orally argued the case and the time when we filed the petition for rehearing. So, the obvious assumption would be that it was the impact of the Gabriele decision on the Eighth Circuit.

QUESTION: That had no impact on Judge Bright, though, did it?

MR. BENNETT: Judge Bright to date has not been persuaded, no.

QUESTION: The Sixth Circuit was Judge Smith's old circuit. He was a district judge in Ann Arbor, Michigan, wasn't he? Isn't this Talbot Smith?

MR. BENNETT: Yes. Talbot Smith sitting by designation from Michigan.

QUESTION: Yes, Sixth Circuit.

MR. BENNETT: In any event, Title VII --

QUESTION: The Sixth Circuit judges were divided?

MR. BENNETT: Yes. One-one.

In any event, Title VII strongly emphasized the administrative process. The ADEA gives less deference to the administrative process than does Title VII. As an example of that, under Title VII, the state agency would have 60 days and then EEOC would have 120 days. And at the time the ADEA was passed the EEOC either had to make a finding of probable

cause or else mediate the action. But under the ADEA for any reason whatsoever, after the filing of the 60 days, the complainant can cut off the state administrative agency.

Under Oscar Mayer's view of Section 14(b), they still get a different result than under Title VII, because under Title VII -- excuse me. They would still get a different result because under Title VII you have to go to the state first. But there is no requirement, if you hold that Section 14(b) is mandatory, that we would have to go to the states first.

In other words, you may go second, or it may proceed simultaneously. And if you proceed simultaneously, there is no exclusive jurisdiction in the state agencies.

It is hard to believe that Congress would have intended every claimant to make a prior resort to the state, even after going to the Secretary of Labor, where the case was unable to be conciliated, and then go back to the state for another attempt, when the first attempt was futile, before they could file suit.

I don't think that's what this section entitles. This section is really an anti-preemption section. They wanted to make sure, and show the states, that Section 14(b) did not preempt the states' right to have laws that interpret this matter in the same way as the ADEA.

In fact, I think, the construction we are urging would be an incentive for state civil rights agencies to have

stricter enforcement to encourage claimants to return to the states.

QUESTION: There have been anti-preemption provisions, though, in civil rights acts that simply say "nothing in this Act shall preempt state provisions that go further," without saying -- being as expressive about going into the state procedure as this one does.

MR. BENNETT: That certainly would have been a clearer way to do it, but I think this section -- We would have known the answer had they done that.

QUESTION: Yes. We wouldn't all be here today. We might, but you wouldn't.

MR. BENNETT: It is interesting to note under the legislative history that there is a total lack of legislative history under the ADEA; where under Title VII the legislative history is clear, by the remarks of Senator Humphrey, that it was intended to go to the states. In fact, I've cited in a footnote in my brief that at least two courts and Senator Javits felt that the courts would be the way to resolve actions under the ADEA, rather than the administrative bureaucracy; hence, the streamlining of the process.

I would like to comment briefly on the legislative history cited by the Petitioners in this matter. They cited the testimony of Ed Conway of the New York Human Rights Commission had supported their position. But the last phrase

on page 23 of their brief is that he wanted to avoid to the greatest extent possible the coming into being of unnecessary, duplicitous effort.

I would suggest that the construction they urge that would require simultaneous or consecutive filings with both a state and federal agency would contribute to duplicitous resources at the federal and at the state levels.

QUESTION: Couldn't they solve it, as I have read that some states have solved it? When the papers are filed with the state agency, they notify the federal and vice versa, and they work out a coordination that if one is going ahead the other one stays its hand? Isn't that administratively a relatively easy problem to solve?

MR. BENNETT: That would work in the case of concurrent filings, where the filings took place at the same time, but if an individual chose to file with the Department of Labor first, then the Department of Labor is under a mandate to use those 60 days. And then maybe on the 61st day, if that individual is within the statute of limitations on the state, and would then file with the state, it would be too late for that kind of cooperation that you suggest.

QUESTION: Why would it be too late? The Secretary of Labor or no other agency in the Government works so swiftly that it would have gone very far, that it couldn't work coordination on the 61st day.

MR. BENNETT: But in any event, the claimant could file suit in Federal Court on the 61st day, because that's all the time the statute gives.

QUESTION: Under the statutory scheme, that can't be avoided by coordination, I agree.

QUESTION: Well, he need not go to the federal administrative agency at all.

MR. BENNETT: Under this statute?

QUESTION: Under this statute.

MR. BENNETT: That is incorrect, Your Honor.

QUESTION: Can't he file suit?

MR. BENNETT: No, there is a 60-day waiting period with the Department of Labor, as well as a 60-day waiting period with any state civil rights commission.

QUESTION: But he doesn't have to get a right to sue letter, or anything?

MR. BENNETT: There is no right to sue letter. He controls the time at which he wishes to file suit, rather than the opposite in Title VII he has to have a right to sue letter. But you still have a 60-day waiting period with the Department of Labor.

Before I touch on the final argument, just briefly, I would like to address the question of noncompliance with Section 14(b) and should it be subject to equitable considerations.

The lower court decisions on this issue that held that 14(b) was mandatory also allowed the principle of equitable modification.

I suggest that this case, if the Court goes against us on the 14(b) argument, is the kind of case where the district court judges should be allowed to exercise their discretion, because we relied on the statements of the Department of Labor that we did not have to comply with Section 14(b).

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Gladden?

REBUTTAL ORAL ARGUMENT OF JAMES W. GLADDEN, JR., ESQ.,
ON BEHALF OF THE PETITIONERS

MR. GLADDEN: May it please the Court, I would add just briefly that the major changes administratively that were made were in response to the EEOC's handling of charges under Title VII. What they did away with was the notice of right to sue, the fact that the agency had to make a finding of reasonable cause. Those are the things that were changed. They also gave this enforcement to the Department of Labor instead of EEOC. Those were the things that were changed.

With respect to going to a state or not going to a state, the language of 14(b) is identical. I might also point out that with respect to filing a charge with the Department

of Labor, Section 7(b) provides that if you are in a state which is covered by 14(b) you have 300 days to file your notice of intent to sue, now charged with the Department of Labor.

If you are not in a state covered by 14(b), you only have 180 days. Clearly, that's giving deference to the state, encouraging the party to go to the state because it extends his period of time within which he can come to the Federal Government if the state doesn't start moving along in a meaningful way. That 180-300 day pattern is exactly the same pattern that is followed under Title VII.

So, with respect to the states and the effect of filing a charge or a notice with the state, the pattern is identical, in the Age Discrimination Act, to Title VII. The changes that were made had to do with what the EEOC had been required to do under Title VII, as opposed to what the Department of Labor was required to do, and that was an effort to speed up the administrative process, primarily at the federal level.

Thank you, very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:44 o'clock, p.m., the case was submitted.)