In the

Supreme Court of the United States

DELTA AIR LINES, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 79-814
	)	
ROSEMARY AUGUST,	)	
	)	
Respondent.	)	

Washington, D.C.
November 12, 1980

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

DELTA AIR LINES, INC.,

Petitioner,

v. : No. 79-814

ROSEMARY AUGUST,

Respondent.

Washington, D.C.

Wednesday, November 12, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 o'clock a.m.

APPEARANCES:

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MS. SUSAN M. VANCE, ESQ., Glazer & Vance, 179 West Washington Street, Suite 1125, Chicago, Illinois 60602; on behalf of the Respondent,

MRS. ELINOR H. STILLMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; as amici curiae.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Delta Air Lines, Inc. v. August.

Mr. Kovar, I think probably you may now proceed without any interference from the audience, t.v., or otherwise.

MR. KOVAR: Thank you, Mr. Chief Justice.

ORAL ARGUMENT OF E. ALLAN KOVAR, ESQ.,

ON BEHALF OF PETITIONER

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

We are here asking that defendants be given the right, short of complete capitulation to extricate themselves from the burdens of unwarranted and costly litigation. We believe that Rule 68, Federal Rules of Civil Procedure, provide such a right.

In this regard, we note Mr. Justice Stewart's admonition in the Christiansburg case, in which he noted that many defendants are small, mid-size employers, and that the expense of defending even a frivolous claim may become a strong disincentive to the exercise of their legal rights.

We submit that the public policy with respect to Title VII actions does indeed ask that it be easier to bring meritorious suits. But it is no less a public policy in Title VII actions that there should be a diminishment of

unjustified suits. And we contend that this Court should not condone or permit the employer-defendant to be held under economic hostage of protracted litigation. And we submit that Rule 68 provides a realistic access to such freedom.

QUESTION: Now this was a Title VII lawsuit, and I know the parties to some extent and the amici to a greater extent, emphasize that it was a Title VII lawsuit, but do you think or do you not that that makes any difference with respect to the meaning of Rule 68?

MR. KOVAR: I think it does not make any difference, Your Honor. I think that Rule 68 is clear on its face, and that it has no exceptions --

QUESTION: And whatever it means, it means the same thing in any federal lawsuit.

MR. KOVAR: That is our position, yes, Justice Stewart.

QUESTION: What do you think the Rule 1 effect may be, if any; does the concept of Rule 1 pervade all of the rules?

MR. KOVAR: I think indeed it does, Mr. Chief Justice, and as I understand it, Rule 1 says that all the rules shall be construed to secure the just, speedy and inexpensive determination of every action.

QUESTION: Do you think that embraces the idea that good faith offers are -- that an offer must be a bona fide

offer?

MR. KOVAR: I think the idea of good faith offer or a bona fide offer or a genuine offer or a reasonable offer has absolutely no application under Rule 68, any more than it has application as to what is a reasonable ransom request for a kidnapped child or Iranian hostages. I don't believe --

QUESTION: Well rules are rules. Rules don't --

MR. KOVAR: -- the concept is applicable.

QUESTION: -- deal with ransom for kidnapped children but they do deal with offers.

MR. KOVAR: That's correct, Your Honor, and in the case of Rule 1, it says justice is one of the three aspects that we should be looking to, and in the case at hand, in May of 1977, defendant offered this plaintiff the judgment. She did not receive judgment. Plaintiff offered $450, $450 more than the plaintiff received.

The Plaintiff offered costs --

QUESTION: The same result if you had offered a penny?

MR. KOVAR: If the ultimate judgment was nothing, yes, Your Honor. But that would be the determination, if reasonableness is an applicable quality, that would be the determination and the definition of what is reasonable.

As a matter of fact, under Rule 1, it says that it should not only be just but speedy. The offer is --

QUESTION: Would you say a bad faith offer was just?

MR. KOVAR: I don't think there's any such thing as a bad faith offer, Your Honor. If we are offering judgment to a plaintiff, our motivation is no more important than is the motivation of the plaintiff in determining whether an action is vexatious.

QUESTION: Well I thought your point was, Mr. Kovar, that by definition any offer that is higher than what the plaintiff eventually gets, is reasonable.

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

QUESTION: Effectively considered.

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

QUESTION: And it's only then that Rule 68 is even imaginably applicable.

MR. KOVAR: That is our position, Your Honor. That's correct. Rule 1 also says that in terms of speedy being one of the qualities, that a May 12 offer of judgment certainly is speedier than a June 12, 1978 judgment. And Rule 1 says it should be inexpensive. The very time involved in the litigation as distinguished from the offer of judgment which was made in May of '77, would indicate that it would have been far less expensive for the offer of judgment to have prevailed, in the clear reading, as we believe it clear, of Rule 68 to have prevailed. We can take notice that here today, November

12, 1980, a good deal of time and a good deal of money have gone under the bridge in this matter.

Just very briefly, in terms of the background of this case, this was a Title VII case but there were two counts to it. One was the Title VII, the second was the libel and slander. That second count was dismissed on motion of defendant for summary judgment prior to the trial without objection by the counsel for the plaintiff, due to the fact I submit, that in deposition plaintiff admitted she had no evidence whatsoever as to any libel or slander statements by the defendant.

As to the first count, the Title VII count which did go to trial, respondent by its briefs would have this Court believe that there was a close question of liability. For example, at page 13 of the brief, it was stated, "as the District Court observed, Ms. August at least had presented a prima facie case." And at page 21 of the brief, the respondent's counsel notes, "in this case, the District Court noted that Ms. August's evidence unrebutted would have been sufficient to support her claim." And the Court of Appeals supported the lower court opinion.

I think a reading of the District Court's opinion and the Circuit Court's opinion as to the merits would find that that was not the case; that the lower court, the trial court itself, found that by cross-examination of the plaintiff

and plaintiff's witnesses, there was equal evidence, equal number of cases, where blacks were favored or whites were disfavored.

QUESTION: That is true, Mr. Kovar, that she was terminated --

MR. KOVAR: Yes sir.

QUESTION: -- and she was non-white --

MR. KOVAR: That's correct.

QUESTION: -- -- and a majority of the stewardesses for Delta Air Lines were not terminated and were not non-white.

MR. KOVAR: That's correct.

QUESTION: So, to that extent she made a prima facie case.

MR. KOVAR: I don't believe, Your Honor, with all due respect, that that would create a prima facie case; that the mere fact that an adverse employment decision affected a member of a protected minority does not, in my opinion, create a prima facie case. As a matter of fact,the Seventh Circuit -- excuse me, Your Honor?

QUESTION: Did Washington against Davis have any implications about that?

MR. KOVAR: It is my recollection, Your Honor, that that involves a different level of what constitutes a prima facie case in terms of governmental actions as distinguished from private.

QUESTION: That's why I said --

QUESTION: It involves the Constitution, not Title VII.

QUESTION: Does it have anything to do with it?

MR. KOVAR: I don't believe so, Your Honor. I did note, however, that the Seventh Circuit said in its decision on the merits, that the plaintiff offered some proof which suggested discrimination, but the evidence was superficial, incomplete, inadequate or otherwise defective. And I submit, Your Honor, that that is not a finding by the Seventh Circuit that there was even a prima facie case.

Now we've called for these corrections to be noted in order to dispel any implication that the plaintiff was a victim of the vagaries of complex litigation that was simply not involved here.

QUESTION: Mr. Kovar, on this point, I noticed the trial lasted 25 days, was it?

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

QUESTION: And I don't, maybe I just don't remember, but do we have an idea of what the costs you propose to assess against the plaintiffs come to?

MR. KOVAR: No sir, we do not, there was never a bill of costs submitted to the Court because of the denial of our Rule 68 motion, and all references to costs in the briefs, for that reason, are extra records, there is no reference in the record, to-wit --

QUESTION: They would cover things like transcript costs, I suppose, at the very least?

MR. KOVAR: Well, inasmuch as no bill of costs was submitted, I don't know what particular costs the defendant would be submitting to the Court, nor --

QUESTION: Is there any reason you would ask for less than you are statutorily entitled to?

MR. KOVAR: Without conferring with my client, I would not know of any reason offhand, but I certainly couldn't say.

QUESTION: I mean, it's probably several thousand dollars?

MR. KOVAR: Yes, I think there's --

QUESTION: Do you know, for example, whether you are seeking attorneys fees?

MR. KOVAR: I do not know that.

QUESTION: But you would take the position, I take it, that as a matter of statutory law you would be entitled to ask for them as costs under the Title VII case; to that extent, this may be a different Title VII factor may make a difference have.

MR. KOVAR: Well I believe that I've seen the number of 40, I've seen the number of 75 different pieces of litigation which called for the possibility of attorneys fees as being imposed in certain actions. And in any of those, yes,

I would say, and including Title VII, I would say that the possibility of asking for attorneys fees as part of costs is a realistic possibility.

In the case at hand, the District Court denied our Rule 68 motion, saying that there was no good faith attempt to settle because the proposal must be at least arguably reasonable. I submit that there is nothing in Rule 68 which provides that type of condition. And as I indicated earlier, it is our position that if the offer made exceeds the judgment finally received; that, by definition is a reasonable offer of judgment. As a matter of fact, the District Court quoted from the Perkins case, stating that the defendant may offer what is really due and put the burden of costs on the plaintiff. When in this case what was really due was nothing and the trial court found and said that it had no difficulty finding that the plaintiff was entitled to nothing.

QUESTION: In this respect, you don't have to defend the idea of a $1.00 offer, do you? You offered how much, again?

MR. KOVAR: $450.00 --

QUESTION: $450.00.

MR. KOVAR: -- plus costs.

QUESTION: -- plus costs, so that --

MR. KOVAR: That's correct, Your Honor. In terms of reaching the extreme, we don't have that situation here.

But I think from the point of view of the application of the rule that the definition of what is reasonable comes in the end result. The rule says that if the offer exceeds that which is received then the rule applies and the mandatory cross-shifting applies.

QUESTION: Mr. Kovar --

MR. KOVAR: Yes, Mr. Justice?

QUESTION: -- what, in your offer, what did the term costs include? What did you mean by costs?

MR. KOVAR: Well it included --

QUESTION: Did it include attorneys fees up to that point?

MR. KOVAR: No, Your Honor. We included costs other than attorneys fees because we said the $450 would include attorneys fees.

QUESTION: In round figures, would you give us some idea of what the costs would mean, $10, $50, $100?

MR. KOVAR: At that point there were of course some filing fees and there was one, I believe, one deposition.

QUESTION: So that, as I understand that --

MR. KOVAR: Whatever costs the Court might attribute in those, would include the additional costs.

QUESTION: There is an assertion here that counsel spent up to the time of your offer some 39 hours, and that her

hourly rate was $50. I take it you questioned that?

MR. KOVAR: It's not in the record, Your Honor, we did -- we did very much question the inclusion of that in the presentation to this Court.

The fact of the matter is, however, that the value of the attorney services in an action such as this could have been on a contingent basis and one-third of zero, I submit is zero.

QUESTION: Well and also, I take it, if this were not a Title VII action, but simply a personal injury action, and not a contingent fee action, an attorney could have put in 1,000 hours, thinking that he had a real blockbuster of a lawsuit and declined your tender, and gotten a defense verdict from the jury.

MR. KOVAR: That's quite possible, Your Honor; that's quite possible. And it is possible that a Title VII counsel knows full well that recovery may be zero, and zero attorneys fees. And regardless of the number of hours put in the matter, that at that point the attorney certainly has a right to determine, along with his or her client, that $450 will suffice to cover attorneys fees as well as whatever division is going to be made for the party himself or herself.

QUESTION: Mr. Kovar, let me interrupt. I'd like to follow through on one other thing, too. Do you have any comment about Robert Dodge's remarks back in 1938, which as I

read them, had to do with the restriction of Rule 68 to the situation where there is a verdict for the plaintiff and not a verdict for the defendant?

MR. KOVAR: Well my comment, Mr. Justice Blackmun, would be that that certainly is one of the situations in which the rule would apply. That under most state laws, not all, all legal actions -- the prevailing party did get costs. So that the application of the rule would not be required where the plaintiff was victorious. But as indicated in our reply brief, our brief review of the later Title VII cases, indicates that the trial courts in their discretion all too often do not award costs to a prevailing defendant and that the discretion called for under Rule 54(d) is not exercised in favor of the prevailing party in all too many cases. We find --

QUESTION: Well if the discretion is not exercised the prevailing party is awarded costs, isn't he, under Rule 54?

MR. KOVAR: Yes, the rule says of course, the prevailing party should receive costs except --

QUESTION: Except where otherwise ordered.

MR. KOVAR: Yes. And to that extent where the Court exercises its discretion and denies the costs to the prevailing party, and that seems to be happening all too often in our opinion, in Title VII actions; Rule 68 has an even greater application and a greater need for defendants. But of course,

in state actions, both before and since, in equitable actions, whether they were for money alone or for other equitable considerations or equitable relief, there is the exercise of discretion in determining where costs would fall, existed both before and after the rule.

QUESTION: Mr. Kovar, I take it from your answer that you don't buy the Dodge remark?

MR. KOVAR: I do not.

QUESTION: Is it not correct that under your view of Rule 68, if a defendant, defense bar routinely made a $10 settlement offer in every case, that would have the effect of taking away the discretion of the judge under Rule 54 if the defense had ultimately prevailed? And that would really be a sound practice for the defense bar to do that routinely then?

MR. KOVAR: I believe that's correct, Your Honor. If it did happen routinely and if that meant that the Court was relieved of part of the congestion which now faces it, it would be a benefit not only to the public but to the judiciary as well.

QUESTION: If that is a correct reading of the rule, how do you explain the fact that it's taken so long for the defense bar to realize that rule was there, and had that potential benefit?

MR. KOVAR: That I think is very difficult to understand, Your Honor. The -- and it may very well be --

QUESTION: I suppose it's possible that they read the words "finally obtained by the offeree", the judgment finally obtained by the offeree, in accordance with Mr. Justice Blackmun's suggestion a moment ago.

MR. KOVAR: Or it may well be that they relied upon the courts, the federal courts, following Rule 54(d) rather than exercising discretion and denying costs to the prevailing defendant. And only now seeing that that discretion has been exercised more and more, that they find need of some other way of protecting themselves and fortunately have found Rule 68.

We have submitted and we believe that the lower courts erred in at least three respects. We believe that the rule is clearly mandatory, that the word must means must, and does not permit or allow for a revision or a rewriting of that determination; that the drafters of the rules made it quite clear when they wanted to use the word may, when they wanted to permit discussion, they did so, with clarity, with ease, and on many, many occasions.

Only on a few occasions in the drafting of those rules did they use the word must. And it is our view of the cases that in all of those cases where the word must has been used and it has come up for review, must has been construed to mean just that; the mandatory term of must. We say that the courts below attempted to rewrite Rule 68 and we submit that the courts below had no such authority.

And finally, we submit that what the Court did, below, was to equate Rule 68 with Rule 54(d), making the two of them basically the same, permitting for discretion to be exercised in either case. We noted in our briefs to this Court that under Rule 54(d), the Seventh Circuit has indicated that that discretion should be very sparingly exercised and that there should be a clear explication as to why costs were being denied a prevailing defendant and indicated that it was a form of penalty. And we felt that it was relevant because the Seventh Circuit had equated the two rules to look to the standards that that court itself had applied, when discretion was exercised under 54(d) and denying costs.

It is our belief, Your Honor, that the rule is clear on its face. That it does not permit a rewriting or a conditioning, and we note in that respect that this Court had cause to look at, I believe, Rule 23, when it came to class actions and it said in the Eisen case, we're not going to rewrite the rules for certain classes of plaintiffs as distinguished from others; that if there is a notice provision, the notice provision applies and that we don't look to the pocketbook of the plaintiffs to determine whether this rule is going to apply to this class as distinguished from that class. And we note also, in the General Telephone case, that this Court made it quite clear that it was not saying that the rules do not apply to EEOC actions and Title VII actions, that the --

that all it was saying in that case was that an EEOC action was not a class action.

QUESTION: I take it that what you're saying is that if the system wants a good faith component in the rule, the rule should be rewritten?

MR. KOVAR: That's correct, Your Honor. Because to put a good faith requirement or condition into it seems to me, to leave it unclear to both parties as to what has happened; there is no clear reason why a plaintiff should realistically assess his or her claim at that point and know full well that there is still a determination later on as to whether somebody determines that was a good faith offer or not.

I want to reserve a few moments, if I may, Your Honor, for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

MR. KOVAR: Thank you.

MR. CHIEF JUSTICE BURGER: Ms. Vance.

ORAL ARGUMENT OF MS. SUSAN M. VANCE, ESQ.,

ON BEHALF OF RESPONDENT

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

This is a Title VII case, it does make a difference that that is true. To allow Rule 68 to operate in this case would undercut the intent of Congress to promote vigorous enforcement of Title VII.

This is a complex case. Title VII is a complex statute, and litigation under Title VII is routinely complex. This is noted in the amicus brief filed on behalf of the defendant. This Title VII claim is an equitable claim. The key in this case is not money damages, but that Ms. August wanted her job back, she wanted the seniority that she had lost when she was terminated by Delta Air Lines after four years, she wanted the back pay that she was entitled to after she had been terminated, and she wanted to be made whole by being awarded her attorneys fees and costs.

QUESTION: Ms. Vance, am I to understand that, by your emphasis on the fact that this was a Title VII action, that the construction you urge of Rule 68 is applicable only in Title VII cases?

MS. VANCE: The construction -- what I am saying is that the cost provisions in Title VII is what applies in this case, not --

QUESTION: Not Rule 68?

MS. VANCE: That is correct. In this case --

QUESTION: And that Rule 68 is what, simply inapplicable in Title VII actions?

MS. VANCE: That is correct. That is what my argument is.

QUESTION: But your proceeding is an action in the federal courts, is it not?

MS. VANCE: That is correct, Your Honor.

QUESTION: So how do you get around the provision of Rule 1, that these rules shall apply to all suits in the federal courts?

MS. VANCE: These rules shall apply to all suits in federal courts, but I submit that in the application of those rules, it was not the intent that the cost provision of Title VII be disturbed. That the cost provision of Title VII is what applies here.

QUESTION: This wasn't the basis for the judgment below, was it?

MS. VANCE: No, Your Honor, the judgment below --

QUESTION: And you are seeking to support it on another ground, then?

MS. VANCE: Yes I am, Your Honor.

QUESTION: And wouldn't this give you more relief than you got below? Or not?

MS. VANCE: No, I don't believe it would, Your Honor. I don't understand how it would give me more relief than I got below. We didn't get any relief below and we haven't gotten any relief to date.

QUESTION: Yes. What if you win here, on this ground? It means that Rule 68 is never applicable in a Title VII case?

MS. VANCE: In Title VII cases, that's correct.

QUESTION: And that the Court below would have thought it would, it was applicable if there was a fair offer?

MS. VANCE: It said that the offer was not reasonable --

QUESTION: Well that's --

MS. VANCE: And I submit that one --

QUESTION: That's on the assumption that 68 applies?

MS. VANCE: That is correct, Your Honor.

QUESTION: That's a considerably different result, if we sustained your --

MS. VANCE: I understand that. If Rule 68 applies, it is -- it is Ms. August's position that the offer must have been reasonable.

QUESTION: Did you argue below that 68 did not apply to Title VII actions?

MS. VANCE: I don't believe we did, Your Honor.

QUESTION: Well did you argue that way in your brief, here?

MS. VANCE: Yes, we did, Your Honor. The last --

QUESTION: Then your point two is by its terms Rule 68 applies only to plaintiffs who prevail?

MS. VANCE: That's correct, Your Honor. But if you look at the last section of my brief, which begins under the third section --

QUESTION: Right.

MS. VANCE: -- which is their -- the cost provisions of Title VII is the applicable --

QUESTION: I understand that, but I didn't -- as I read your brief, I didn't realize you were completely abandoning the application of Rule 68 to your case.

MS. VANCE: No, Your Honor, I am not abandoning it. I am saying that the Title VII cost provision applies, Rule 68 does not. If this Court decides that Rule 68 does apply in Title VII cases, then the question of reasonableness must be addressed.

QUESTION: Then you defend the Court of Appeals decision?

MS. VANCE: Right, that's correct, Your Honor.

QUESTION: Well I just, may you raise the argument you are now making?

MS. VANCE: I believe so, Your Honor.

QUESTION: That it does not apply, even though you have not raised it until now?

MS. VANCE: I raised it in my brief, Your Honor, yes. I believe it further supports the argument. And at the Appellate Court level, we did raise arguments of public policy and the fact that Title VII cannot be undercut by Rule 68, and I believe that's incorporated in this argument that I am making now.

This case was not a simple case. This case lasted

25 days. At the end of ten days of plaintiff's case, a directed verdict motion by the defendant was not granted by the District Court. The defendant proceeded to spend approximately 8 to 10 days presenting their case and after that, the plaintiff rebutted.

QUESTION: Well what if this had been an anti-trust case, that took you exactly the same amount of time, 25 days, and it consumed exactly the amount of time in attorneys fees? Would you say there that Rule 68 didn't apply?

MS. VANCE: No, I would think that Rule 68 would apply, but I think the question of whether the offer of $450 -- whether that offer was reasonable would have to be raised. And if the plaintiff had not prevailed, I don't think Rule 68 would have applied.

The same standard as addressed by Christiansburg in the award of attorneys fees applies in this case, and that is whether the litigation brought by the plaintiff was frivolous, unreasonable or groundless. This Court, just as recently as Monday, addressed the underlying policy of Title VII in Hughes case, saying that we should not undercut Title VII by allowing an award against the plaintiff that will substantially interfere with their ability to bring this kind of lawsuit. In this case, there were numerous incidences where black flight attendants were dealt with more harshly than white flight attendants. The lower court said that standing on rebuttal the evidence

would have raised the necessary inference of racial bias. If that's not a prima facie case then I don't know what one is.

To allow a mechanical rule, like Rule 68, to operate to impose the payment of costs on a Title VII plaintiff like Ms. August would void all the public policy embodied in Title VII and close the door on all but the airtight cases, a proposition this Court rejected, in Christiansburg in 1978. If this Court determines that Rule 68 applies in Title VII cases, it still doesn't apply in this case. The plaintiff must prevail.

The operative sentence in the rule reads that if a judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the cost incurred after the making of the offer. Ms. August didn't obtain anything. Her complaint was dismissed with prejudice after 25 days of trial.

QUESTION: So you say a take nothing judgment then is not a judgment less favorable?

MS. VANCE: That is correct, Your Honor. She didn't obtain anything. The common sense of that phrase, if you read the entire sentence, and not just the words must, like Delta would have us do, but if you read the entire sentence, the meaning of the sentence is that the plaintiff must prevail. If you look at the advisory committee notes you see a reference to three state statutes: Minnesota, Montana and New York.

That's all it said in the advisory committee notes, and I submit that that means that those statutes and the case law underlying them was incorporated as a reference to tell us what to do with Rule 68.

QUESTION: But would it make any sense, so far as the drafters of Rule 68 are concerned, to say that if the plaintiff prays for $10,000 in damages and gets only $8,000 in damages and has been offered that amount previously, then the defendant gets costs; but if the plaintiff gets nothing, the defendant is not allowed costs?

MS. VANCE: You see what would happen if you allowed the rule to operate that way, is it will totally destroy any of the discretion contained in Rule 54(d) with respect to the defendants that prevail. And I think that the rules were meant to operate, not in a vacuum -- Rule 68 isn't a rule that's totally unrelated to any other rule. Rule 68 is a rule that's designed, even if you look at how the rules are set out, Rule 54(d) is set out in the judgment section, it's the cost provision for plaintiff -- for prevailing parties. Rule 68 is -- and it says, that except where express provision therefor is made by a statute or a rule, prevailing parties as of course will be awarded their costs in the discretion of the court. If you look at Rule 68, it's contained in the provisional remedies section of the rule, it's the exception. It's the exception where the party prevailing shouldn't get

its costs paid.

QUESTION: Well then why do you need Rule 54, if Rule 68 is interpreted the way you say it should be?

MS. VANCE: Because Rule 68 applies to where a party prevails but wins less than the offer. If an instance where the party brought an action and continued in the action and ultimately won something, but took up the time of the Court to determine the relief that they were entitled to, when they could have solved that problem themselves. What it is, Rule 68 operates when there's admitted liability, or when liability is found.

QUESTION: But Rule 54 allows the District Court to disallow costs to the prevailing party in its discretion.

MS. VANCE: For special reasons, that's right. It does allow that. And that is done under special circumstances.

QUESTION: So without 68 at all, the District Court could have disallowed costs here, if -- finding that the prevailing party for any number of reasons, was not entitled to them.

MS. VANCE: That's correct, Your Honor. But in this case, Ms. August didn't prevail, and the costs are being sought by the prevailing party from her. And what Delta wants to do is to be able to make a nominal offer, even an offer as they have said, one penny, and trigger the rule so that they won't have to worry about whether or not they will

get their costs at the end of the litigation. If you use the rules the way they want to use the rules it means that in every case, in the anti-trust case you were talking about, a penny won't be enough if the plaintiff bringing the case doesn't win anything.

QUESTION: Well if there's--suppose this is a class action and there are 100 thousand people in the class, an offer of a penny to each of those 100 thousand people is not an insubstantial amount of money.

MS. VANCE: Then, Your Honor, I submit that the Court, if the Court's going to apply the rule, then the Court has to address the question of whether the offer was reasonable.

In this case, the Court didn't have any trouble deciding, none of the four judges had any difficulty at all deciding that the $450 offer is not worthy of review by the plaintiff. If you look at the general provisions in the state practice, before -- before Rule 68 was enacted, the general rule is that losing parties pay the winning parties' costs. Statutes, like Rule 68, were enacted to prevent abuse of this rule. These statutes are the only explanatory reference in the advisory committee notes and should be incorporated. Then in 1938, the Federal Rules were adopted. The same harmonious scheme that had been working since 1862, since the Civil War, was the statutory scheme that was adopted in the Federal Rules. There was no reason that it should work any differently

than it had before and if you look at the case law that's under those statutes, you'll see that -- there is not one reported case where the defendant, where the prevailing -- where the offer of judgment was used to give costs to a party that prevailed, where the party bringing the lawsuit hadn't won something.

If you look at the disparity between those figures in all of those cases, they're very close. That's because what those people did is, they took up the time of the Court, to figure out how much relief should be awarded and that's what the rule was designed to do, was to cut out the time that the Courts were going to spend when liability was known. In any case, if the purpose of Rule 68 is to be served, the purpose being to encourage settlements and to avoid protracted litigation, offers have to be reasonable. Four judges found that Delta's offer was not reasonable. The burden isn't just on the plaintiff to be realistic when they're litigating, and when you make an offer of judgment as the defendant here -- or as Delta here is suggesting, there is no additional risk to them. In fact, what there is, is the security -- if the rule is going to operate the way they suggest -- in knowing that your costs are ultimately covered. All the rest of the risks of litigation are already going to clearly be incurred by the Defendant.

The Seventh Circuit said in light of the circumstances

of this case, the offer wasn't worth considering. I submit to you that it was a sham.

QUESTION: Ms. Vance, may I ask whether the record shows that fee arrangement with plaintiff's counsel was a contingent fee arrangement?

MS. VANCE: It does not show -- the record does not show. In the Seventh Circuit we routinely file any contingent fee arrangement that we have, we're required to do that by -- with the Court. If you would like to know what that was, I'll be glad to tell you.

QUESTION: You file this prior to trial?

MS. VANCE: You file it at the time you begin the lawsuit, at the time you file your complaint, you are required to file any contingent fee arrangement.

QUESTION: If it's not in the record I suppose that's the answer.

MS. VANCE: That is correct.

QUESTION: It's in the public record.

QUESTION: Where is it filed, in the District Court?

MS. VANCE: Filed in the District Court. It's filed --

QUESTION: Well may we judicially notice if you tell us about it?

MS. VANCE: I don't know, Your Honor. The arrangement

was a contingent fee arrangement. Ms. August paid Ms. Bellows, initial counsel in this case, $1500 before she began this lawsuit. Rule 68, to apply to Ms. August, would encourage the use of this rule that would be contradictory to the purposes as well as the public policy espoused by Congress in Title VII. It would ignore the history of the rule and the success of the state statutory schemes that are the underpinning. And it would violate the harmony of the Federal Rules of Civil Procedure and federal law. And emasculate half of 54(d).

Your Honor, I will now allow Ms. Stillman.

QUESTION: Before you sit down though, since the -- whatever statement you filed is a matter of public record, that we can notice, will you tell us what it is?

MS. VANCE: Yes. The -- as I said, the contingent fee arrangement that Ms. August had with Ms. Bellows who was original counsel in the case, was contingent or in the alternative, an hourly rate of $50 and hour, and the initial retainer was $1500.

QUESTION: Very well.

MR. CHIEF JUSTICE BURGER: Mrs. Stillman.

ORAL ARGUMENT OF MRS. ELINOR H. STILLMAN, ESQ.,

AS AMICI CURIAE

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

The Equal Employment Opportunity Commission and the United States are participating in this case because it is a Title VII case and because we think the purposes of Title VII would be undermined if Rule 68 were permitted to operate as petitioner asserts it should operate.

We have not argued that Rule 68 doesn't apply in Title VII actions, although we would certainly urge the Court as one of the amici has,to -- if it assumed that Rule 68 applied in Title VII actions, to limit its decision and not decide the question of class actions at this time.

QUESTION: Isn't it your argument --

MRS. STILLMAN: It presents a difficult problem --

QUESTION: --though, Mrs. Stillman, that Rule 68 means something different in Title VII actions from what it does in ordinary federal lawsuits, in other federal lawsuits?

MRS. STILLMAN: Your Honor, we made three arguments in our brief, and as to two of those arguments, we think they would apply to any type of civil action.

QUESTION: In the federal court?

MRS. STILLMAN: In the federal court, yes.

The first argument, whether we think the rule does not apply where the offeree does not finally obtain a judgment.

QUESTION: Yes.

MRS. STILLMAN: We think this is plain from its language, and by the way, I would also like to point out that

I think it's plain from the language of the original rule in 1938, which was somewhat changed in 1946, -- this is not in our brief, but is the result of recent enlightenment -- the original rule said "if the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the District Court from the time of the offer, but shall pay them from that time." The clear premise there of the drafters was they were assuming that otherwise he would have recovered his costs and this comes straight out of of the state practice and those three state statutes that were cited by the drafters, that generally the prevailing party recovered costs and this was a rule to prevent that from happening, where the prevailing plaintiff had turned down a reasonable offer. What the rule is designed to do is to prevent someone from prolonging litigation when a reasonable offer was made to them.

The rule will never work if defendants are permitted, as they have candidly announced here, that will be the routine practice of the defense bar, if they come in and make one penny offer served with the complaint -- served with the answer, I suppose -- it can only have two results: one result is, the party will turn down the offer because it's patently unreasonable and who would want to accept such an offer; the other thing is that in the other possible result that is in those cases where the plaintiff is in very precarious financial

situation, typical Title VII cases, those are the ones on whom the rule might exert pressure to accept even an unreasonable offer, for fear of being socked with costs, with defense costs at a later time.

QUESTION: Mrs. Stillman, why do you need Rule 54(d) if your explanation of Rule 68 is correct?

MRS. STILLMAN: Why do you need Rule 54(d)?

QUESTION: Why did the drafters of the Federal Rules of Civil Procedure speak in Rule 54(d) that the prevailing party shall be awarded his costs unless the court otherwise directs, if your interpretation of Rule 68 is correct?

MRS. STILLMAN: I suppose that they wanted greater certainty with respect to offers of judgment and to confine --

QUESTION: Well that isn't the answer to -- the answer is that it wouldn't cover this case. Rule 68 only applies to cases where the plaintiff prevails in part.

MRS. STILLMAN: Correct.

QUESTION: You need Rule 54(d) to apply the case where the defendant wins.

MRS. STILLMAN: Yes, Your Honor. That is the answer.

QUESTION: But wouldn't Rule 54(d) cover the water-front, so to speak, if you are right?

MRS. STILLMAN: Your Honor, I would say this about 54(d). I think what the petitioners are complaining about here

is that they don't like the way Rule 54(d) has been applied recently by District Courts. And so they want to misuse Rule 68, to repair what they think is an incorrect use of Rule 54(d). I think that's really what's going on here. I don't see that Rule 54 -- Rule 68 becomes unnecessary if Rule 54(d) applies, because in the rule -- in Rule 54(d) the prevailing party ordinarily recovers his costs unless the Court directs otherwise. What Rule 68 will do is reverse that presumption, really; when the losing defendant shows that he made a reasonable offer. And that's the effect of Rule 68.

QUESTION: But that's on the assumption that the Plaintiff -- that 68 is limited to the cases where the Plaintiff has won something, but not all.

MRS. STILLMAN: That's right. That's right.

QUESTION: If you're wrong on that assumption, that doesn't explain why 54(d) doesn't cover everything.

MRS. STILLMAN: Well we don't think we're wrong that assumption.

QUESTION: What I had in mind, in my question to you, Mrs. Stillman, was the statement in the summary of your argument that these three independent grounds, that is, your construction of Rule 68 -- have special force in Title VII suits. What does that mean. Does that mean they are well illustrated? Or --

MRS. STILLMAN: Yes, yes, we weren't trying to argue

that they didn't apply. That's a -- just simply a way of saying that it's quite important here that the correct result be reached.

But I think this Court illustrates the real hardships and some of the real difficulties of applying the rule -- and also, the application of Rule 1, which the Chief Justice referred to, that Rule 1 does say that you've got to apply the rules in a way that reaches just results and I think that you would not reach a just result if you applied it in the way that they insist it should be applied, and which is not necessary from the language. But they've tried to suggest that somehow there is a quarrel here about the word must, and that we are somehow saying that must doesn't mean must. Well of course we say it means must; the question is whether the rule applies or not.

QUESTION: Right.

MRS. STILLMAN: And we're not torturing the language in any way, in the construction that we're making of it.

QUESTION: Well you're adding something to the language when you are importing a component of reasonableness.

MRS. STILLMAN: That's true. But it seems to me it is a reasonable common sense addition that --

QUESTION: Doesn't Rule 68 --

MRS. STILLMAN: -- implication. I think what they're doing is --

QUESTION: -- define what's reasonable? If a settlement offer is more than what the plaintiff actually recovers, isn't that, by definition of Rule 68, a reasonable offer?

MRS. STILLMAN: No, Your Honor. We don't think so. Because we think that -- I'm relying here on, I suppose, common sense. But I'm also relying on what the drafters said the purpose of the rule was and the purpose -- I mean, what everyone understood the purpose of the rule to be, which was to encourage judgment -- to encourage settlements. And it wouldn't encourage settlements to allow defendants to make unreasonable offers.

QUESTION: But it would encourage settlements and would self-define reasonableness, if you limit the application to the rule to cases in which the plaintiff recovers something. Then by hypothesis, any offer that was higher would have been reasonable.

MRS. STILLMAN: That's --

QUESTION: You're only getting into arguments about reasonableness if you do not confine the operation of the rule to cases involving judgments obtained by the offeree, which is of course what the rules says.

MRS. STILLMAN: I'm not sure I want to concede that, Your Honor. But I understand what your argument is.

QUESTION: I can't see how an offer -- if the

plaintiff recovers something and was offered something more, by hypothesis, it would seem to me the offer would have been reasonable. In other words, if she had recovered $250 here, then I would say the --

MRS. STILLMAN: But -- but she was also asking for equitable relief. And -- no, I think that you could hypothesize cases in which she might have recovered something less and yet the offer would not have been reasonable. I think --

QUESTION: Of course, you only get into an argument about reasonableness if you want to argue about reasonableness. If it's not --

MRS. STILLMAN: I don't think reasonableness is --

QUESTION: There's no necessity of any argument at all.

MRS. STILLMAN: You wouldn't need to, no, I -- these are independent grounds. We've certainly argued and recognized that these are independent grounds and that if you decide that it doesn't apply in the case in which the plaintiff is not the prevailing party you wouldn't have any reasonableness at all.

QUESTION: That's the end of it.

MRS. STILLMAN: And you wouldn't also have to reach our other argument which I was going to devote my time to, that costs in Title VII actions includes attorneys fees,

because costs takes its meaning from statutory --

QUESTION: Could I ask though, the Court of Appeals didn't decide that Rule 68 was inapplicable?

MRS. STILLMAN: No.

QUESTION: And was it presented there?

MRS. STILLMAN: We were not --

QUESTION: Well do you know whether it was presented?

MRS. STILLMAN: I think that they --

QUESTION: Assuming that it was not, do you suggest that the respondent is nevertheless entitled to raise it here?

MRS. STILLMAN: Well we've been known to do so.

QUESTION: That's hardly what I asked.

MRS. STILLMAN: I'm sorry, Your Honor, I don't mean to be flip. I think that if it was implicit in the argument that they were making to the Court of Appeals, they could raise it here.

QUESTION: Well what if it wasn't?

MRS. STILLMAN: If it wasn't raised in the Court of Appeals, I think the law of this Court in the United States against Lovasco and in National Labor Relations Board against Sears-Roebuck is that they should not raise it here. Although that's usually with the Petitioner and not supporting the judgment on an --

QUESTION: Then why should you?

QUESTION: Well why not, it's an independent --

MRS. STILLMAN: It's an independent ground for supporting the judgment, and it wouldn't change the judgment.

QUESTION: Certainly. There're a million cases say you can do that.

MRS. STILLMAN: That's right.

QUESTION: Well, I was just asking you, does it make any difference whether the argument was raised below or not?

MRS. STILLMAN: Well I don't -- I don't think it makes a difference if we're supporting a judgment and not attempting to change the scope of the judgment.

QUESTION: So you're changing your answer?

MRS. STILLMAN: Yes.

QUESTION: Yes.

MRS. STILLMAN: I would finally emphasize that we do think that a Rule 68 offer, if the Court needs to reach this ground, a Rule 68 offer in the Title VII case does not comply with the requirements of the rule if it does not include an offer of attorneys fees because in a Title VII case, by definition costs includes attorneys fees. And the rules, the Federal Rules do not define attorneys fees. You have to look to statute to find --

QUESTION: But this offer did purportedly include an offer of attorneys fees?

MRS. STILLMAN: That -- but that's not --

QUESTION: Did it not?

MRS. STILLMAN: That's not -- well it didn't offer it as part of costs. And the rule says --

QUESTION: Well it said $450 which shall be deemed to include attorneys fees.

MRS. STILLMAN: We don't think that complies with the rule, because the rule says you have to make an offer and then you have to offer to pay costs then accrued; and you can't limit what accrued costs are.

QUESTION: But you can't be sure that the costs that the parties arranged between themselves as to attorneys fees would be awarded by the Court?

MRS. STILLMAN: You mean if they reached some agreement?

QUESTION: Supposing someone comes in and pays a $25,000 retainer to a lawyer to represent him in a case, and the lawyer says yes, I'll file your complaint, --

MRS. STILLMAN: Oh yes.

QUESTION: -- and there's a tender offer of $20,000 and the defense says well I already paid $25,000 to my lawyer and I -- I'm entitled to recover attorneys fees. That doesn't mean you would be entitled to recover $25,000, does it?

MRS. STILLMAN: No, Your Honor, this would operate just in the way -- in the same way the taxable items of costs under Section 1920 would operate. It may be that certain

events have occurred, but the parties have incurred certain expenses for photocopying, for example, and they might say those are my costs, but what's later taxed is what the Court determines was necessarily obtained. And it's really --

QUESTION: And attorneys fees though, wouldn't be taxed unless the plaintiff prevailed.

MRS. STILLMAN: But if the plaintiff prevails through a settlement under this Court's decision in Maher v. Gagne, and I see no reason that this wouldn't be treated the same. They could expect to recover attorneys fees in a Title VII case; absent special circumstances, but even accrued costs, taxable cost items, can be defeated by subsequent decisions of the Court.

QUESTION: Is that idea not somewhat hypothetical, if there was a settlement wouldn't the settlors say, this is --

MRS. STILLMAN: Well, this is --

QUESTION: -- for all claims, including attorneys fees?

MRS. STILLMAN: Well we're talking about the operation of Rule 68 here, where they've made an offer and if it has been accepted, the Court would enter judgment on it. And we assume that that would entitle attorneys fees -- prevailing plaintiff, at that point the plaintiff would prevail through the settlement, by definition, under this Court's decisions

as we read them. And would be entitled to the attorneys fees.

We ask then that the Court uphold the judgment below on any of the three independent grounds we think each of them would support it. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Kovar, you have nine minutes remaining. If you're going to use all of it or substantially all of it, we'll not ask you to divide it two minutes now and seven minues later. Would you prefer to start at 1:00 o'clock with your response, your rebuttal?

MR. KOVAR: Frankly, Your Honor, I do not believe I will require all of the time --

MR. CHIEF JUSTICE BURGER: Very well. Proceed then, and we will finish now.

ORAL REBUTTAL ARGUMENT OF E. ALLEN KOVAR, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KOVAR: Thank you, Your Honor.

QUESTION: May I ask you a question at the outset? Was the fee arrangement by plaintiff's counsel a matter of public record at the time the offer of your client was made?

MR. KOVAR: We were unaware of it until today, Your Honor.

QUESTION: Was that because you didn't look at the record or because it wasn't there when you made the offer?

MR. KOVAR: It was not my understanding that it was available as a matter of open record, Your Honor.

QUESTION: Is that the general practice at the Chicago bar?

MR. KOVAR: It is, to my knowledge, Your Honor, it is not a matter of public record as to what the fee arrangements are between clients and -- I frankly was unaware of it until counsel announced this morning.

QUESTION: That's not the rule in Virginia.

MR. KOVAR: I'm afraid I'm unacquainted with that, Your Honor.

QUESTION: You're not professing surprise, are you?

MR. KOVAR: I am not professing surprise that there was a contingent arrangement between counsel and plaintiff; I assumed that, but I was unaware of what the arrangement was until this morning.

I think that one of the things that we should point out here is that in attempting to argue that Rule 68 applies only where the plaintiff prevails ignores, I think, two things: one, the language of the rule speaks in terms of obtaining judgment, and judgment under the rules is merely defined as a decree in any order from which an appeal lies. A judgment may be for someone, a judgment may be against someone, but all parties to an action receive that judgment at the end of the case from which judgment they may appeal if they so desire. I see nothing in the rules and in the definition of the term judgment, which would indicate that the judgment must be for

someone or the judgment must be against someone to make a difference in terms of the application of Rule 68.

Going beyond what I think is the plain meaning --

QUESTION: Except insofar as the word obtain may have some coloration.

MR. KOVAR: I think the only other place that the word obtain is used in the rules, to my knowledge, is in Rule 56 having to do with declaratory judgments. It's my understanding that a party may seek declaratory judgment in his favor or merely seek a declaratory judgment so as he or she knows how to act in the future. So that in that respect, obtaining a judgment doesn't necessarily mean for or against --

QUESTION: Generally, obtain is to get something that you've sought.

MR. KOVAR: To obtain a judgment, which may be for you or against you, it is a judgment. We all going into Court seek a judgment. Hopefully it's going to be for us.

QUESTION: Let's hear a response to the claim that your offer did not cover costs.

MR. KOVAR: We submit that the offer specifically did include costs. We said, as I recall, $450 which shall include attorneys fees together with all costs accrued to date. We believe that we followed the wording of the rule specifically. We did, however, say that the one element, the potential element of cost which a Court may include in its

discretion under 706(k), namely, attorneys fees, be a determined portion determined by the plaintiffs themselves, of the $450 offered.

QUESTION: So your $450 of costs, except for attorneys fees, were to be covered in addition to the $450?

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

And if there were a contingency arrangement in effect then, and that was a one-third basis, then the plaintiff would have said to plaintiff's counsel, all right, you are entitled to one-third of that under our fee arrangement.

MR. KOVAR: I think, going beyond the plain meaning of the words, hwoever, I would like to point out, it simply is absured in my opinion to say that a defendant who is totally innocent has no right to the application of Rule 68.

Counsel, on several occasions, counsel for plaintiff has made the point that what we are seeking is security in knowing that our costs are going to be covered. Why indeed not, if we know that we are completely innocent? Why indeed not, if the trial court found as it did, with no trouble whatsoever, that we were indeed innocent? Why shouldn't we have security in knowing in that situation that our costs will be covered? That is what we are seeking; that we believe is justice, and certainly in this case, it would have been speedier, certainly in this case it would have been less expensive.

The Seventh Circuit introduced the element of

discretion. That took away any possibility of certainty in making an offer of judgment, one wouldn't have the faintest idea whether it was going to prevail or not, because it would depend upon subsequent court determination as to reasonableness or good faith or genuineness.

If we know for a certainty that our offer will protect us, if that offer is greater than the judgment ultimately prevailed, an innocent defendant has some protection under the rules which under plaintiff's contentions, would not obtain. We say, Your Honor, that the rule as we construe it, does consistently apply with Rule 54(d) and does completely fulfill the requirements of Rule 1. Thank you, sir.

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

(Whereupon, at 12:03 o'clock p.m. the above-entitled case was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-814

DELTA AIR LINES, INC.

v.

ROSEMARY AUGUST

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: William J. Wilson