ORIGINAL

In the

Supreme Court of the United States

OFFICIAL TRANSCRIPT OF PROCEEDINGS •

DELAWARE STATE COLLEGE ET AL.,	)	
	)	
PETITIONERS,	)	
	)	
V.	)	No. 79-939
	)	
COLUMBUS B. RICKS,	)	
	)	
RESPONDENT.	)	
	)	

Washington, D.C.
October 7, 1980

Pages 1 thru 46.

NORTH AMERICAN REPORTING
GENERAL REPORTING, TECHNICAL, MEDICAL
LEGAL, DEPOSITIONS, GENERAL TRANSCRIBING

Washington, D.C. (202) 347-0693

IN THE SUPREME COURT OF THE UNITED STATES

DELAWARE STATE COLLEGE ET AL.,

Petitioners,

v. : No. 79-939

COLUMBUS B. RICKS,

Respondent.

Washington, D. C.,

Tuesday, November 7, 1980

The above-entitled matter came on for oral argument at 10:57 o'clock a.m.

BEFORE:

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

APPEARANCES:

NICHOLAS H. RODRIGUEZ, ESQ., P. O. Box 427, Dover, Delaware 19901; on behalf of the Petitioners

MISS JUDITH E. HARRIS, ESQ., Harris and Kahn, 1521 Three Girard Plaza, Philadelphia, Pennsylvania 19102; on behalf of the Respondent

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll near arguments next in Delaware State College v. Ricks.

Mr. Rodriguez, I think you may proceed when you are ready.

ORAL ARGUMENT OF NICHOLAS H. RODRIGUEZ

ON BEHALF OF THE PETITIONERS

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

This is an employment discrimination case. It was filed in the Federal District Court in Delaware by Mr. Ricks alleging unlawful discrimination based on his national origin.

There really is a narrow question before the Court, when does the statute of limitations period run on the two statutes in issue? And those two statutes are Title VII of the Civil Rights Act of 1964 and 42 United States Code 1981.

QUESTION: Mr. Rodriguez, perhaps at the outset you could clarify something that's confused me. Both the parties to this case seem to have agreed, when I read their briefs, that the applicable limitation period is 180 days. And then the Government comes in and it says that the period is 300 days.

MR. RODRIGUEZ: Yes. Mr. Justice Brennan (sic), it went through the District Court and the 3rd Circuit on the 180-day --

QUESTION: On the hypothesis said it was 180 days, didn't it?

MR. RODRIGUEZ: Yes.

QUESTION: Now the Government comes in here and says, well, it's 300 days.

MR. RODRIGUEZ: Their contention is that there was a state filing on April 11 of 1975 by Mr. Ricks with the state agency, the state Department of Labor. And that triggered the 300-day extension for EEOC filing. Now, there are myriad decisions of the lower courts concerning this of which I am sure you are aware. They go from one extreme of saying that if you file anywhere you're entitled 300 days; that's one part of it. The other end is that you must have a state filing which is timely, which this was not. Delaware was 120 days.

QUESTION: So it wasn't a timely state filing?

MR. RODRIGUEZ: It was not a timely state filing.

QUESTION: So it depends upon whether there was a state filing. By "it depends upon" I mean the question of whether or not it's 180 days or 300 days. It depends upon whether or not there was a state filing. Is that it?

MR. RODRIGUEZ: Yes, Mr. Justice Stewart. I think that is, I think that was the reasoning of the District Court and of the 3rd Circuit.

QUESTION: Well, don't we generally have a rule that amicus curiae can't inject a new issue into the case that has not been argued by the parties in the lower courts?

MR. RODRIGUEZ: I think that is the ruling of this

Court, Mr. Justice Rehnquist.

QUESTION: Is that a rule of this Court?

MR. RODRIGUEZ: That was not raised in the District Court or in the 3rd Circuit.

QUESTION: What about plain error?

MR. RODRIGUEZ: That could be very true and that's the reason I'm glad it was brought up here, Mr. Justice White, because if it was plain error, then, very obviously, you must rule on it. But as I said, there seems to be no decision in the lower courts concerning this, and in our particular case I really don't think it makes that much of a difference. And I'd be glad to cover that later but --

QUESTION: Could it be plain error?

QUESTION: The Government amicus does think it makes a difference. So that injects another issue.

MR. RODRIGUEZ: Mr. Justice Stewart, the District Court decided that the date that triggered the statute of limitations was June 26, 1974, the date of the terminal letter to Mr. Ricks. Now that, if you take back 300 days from April 28, 1975, the date of the filing, that would be back to July 2 of 1974. So the District Court action of June 26, 1974, when they said, that's when the statute, the last discriminatory act, that would be on that date. Also the date of denial of tenure of March 13, 1974, that would also be beyond that date. So that's the reason I say to the Court that in those circumstances

I really don't think it makes that much difference.

QUESTION: And you also have the 1981 claim here, which isn't governed at all by that, is it?

MR. RODRIGUEZ: Yes. That was filed on September 9, 1977. So three years back under the --

QUESTION: In the District Court. And that's a three-year statute of limitations.

MR. RODRIGUEZ: Yes. It's three years under Delaware, Delaware laws.

QUESTION: Right.

MR. RODRIGUEZ: The District Court chose the June 26, 1974 date, and that was the date that Mr. Ricks was notified that he would receive a terminal contract, and dismissed both actions under Title VII and also 1981 as being time-barred. The 3rd Circuit took the date of the end of the terminal contract, which was June 30, 1975.

QUESTION: Is Mr. Ricks a United States citizen or not?

MR. RODRIGUEZ: Is not. The 3rd Circuit picked this date and they laid down a law that is applicable in that circuit to Title VII cases, to 1981 cases, which we feel is highly undesirable and is not only contrary to law, prior decisions of this Court. And their decision was that when the employee knows or a reasonable person should know in his circumstances that his employer is going to terminate him and -- and it's very important because it's a two-part decision -- and he leaves the

service of his employer, then the statute starts to run. And that's the law in thd 3rd Circuit, and that's the reason for our appeal.

Now, we feel it's contrary to the plain reading, the plain language of Title VII. Title VII sets out unlawful employment acts and it sets those out as being compensation, terms of employment, conditions and privileges, and it places a time limitation and it says you must file within 180 days from the alleged unlawful act.

What the 3rd Circuit is doing is substituting for that and it's saying, you can wait until you're terminated or until you have a final decision to file. And it doesn't --

QUESTION: I was -- both the briefs of the parties and the amicus briefs kind of talk about this as an all-or-nothing situation, but it really depends, doesn't it, upon what the complaint is, what the complaint is? And if the complaint is for wrongful discharge, based upon a person's national origin, then the question is, when did the discharge occur? If on the other hand the claim is for a wrongful denial of tenure based upon a person's national origin, the question is, when did the denial of tenure take place? You can't generalize it. You have to look at the complaint and see what the alleged discrimination was, don't you?

MR. RODRIGUEZ: Mr. Justice Stewart, I don't believe that's a holding. I believe it can be read that way. I hope it

will be read that way.

QUESTION: How do you read this complaint? Is it a claim of wrongful discharge? Ultimately, is that one of the claims? Wrongful discharge based upon the plaintiff's national origin?

MR. RODRIGUEZ: Dr. Ricks alleged two, really two basic reasons: denial of tenure and termination.

QUESTION: Well, then, insofar as he alleged that he was terminated by reason of his national origin, then the question is, when was he terminated, isn't it?

MR. RODRIGUEZ: Yes, that's correct.

QUESTION: And if he alleges that he was denied tenure on account of his national origin, then the question is, when was he denied tenure?

MR. RODRIGUEZ: Those two or --

QUESTION: And if he claims that he was denied a promotion, when was he denied the promotion? Or denied a job, when was he denied the job? You can't generalize about these things, you have to look and see what the complaint is, don't you?

MR. RODRIGUEZ: Let me discuss the facts of our particular case. Under the tenure policy in effect at the time that Dr. Ricks was there a denial of tenure for the second time, which is exactly what took place, automatically results in a terminal contract. So it automatically results in his termination. Now, he has a right to accept a one-year terminal

contract.

QUESTION: Which he did.

MR. RODRIGUEZ: Which he did. And at the end of that period of time --

QUESTION: That was the end of the line.

MR. RODRIGUEZ: -- he was out of work, and -- but he did not have to accept that, that was up to him.

QUESTION: I understand that.

MR. RODRIGUEZ: But what my argument is, that the termination of his services is not the alleged unlawful act, the denial of tenure is.

QUESTION: But isn't that the question? Isn't that the dispositive question? What is the alleged discriminatory act?

MR. RODRIGUEZ: Yes; very -- sure.

QUESTION: Whether it was a denial of hiring or a denial of transfer, a denial of promotion, in this case a denial of tenure, and/or maybe of firing. And the question is to determine which, or maybe it's both.

MR. RODRIGUEZ: But the decision here, among other things, flies straight in the face of the decision in the Evans case, because in that case you had a stewardess who was denied -- their policy at that time was, an airline stewardess could not be married. If she married she had to resign. That was in 1968. That was the unlawful act. It was later to be held by

this Court to be unlawful. She came back to work in 1972 and she said, I'm now being denied seniority because I was terminated in 1968 unlawfully. And this Court held that that was a past act, beyond the statutory period, the 1968 termination or resignation has no present effect, and you must show a present violation. Now, our argument here is exactly the same, that Dr. Ricks was denied tenure March 13, 1974. That is barred by all statutes of limitations, 1981, Title VII. He --

QUESTION: Doesn't he also allege that it was continuing up till the time he was let go?

MR. RODRIGUEZ: Yes, he does, Mr. Justice Marshall, but --

QUESTION: It was continuing. Isn't that different from the Evans case?

MR. RODRIGUEZ: Well, Evans -- Evans, she left -- very true --

QUESTION: She couldn't have been persecuted when she wasn't there.

MR. RODRIGUEZ: The point I would like to make, Mr. Justice Marshall, that as far as continuing is concerned, Dr. Ricks does not say that our tenure policy, to which he was subjected, is unconstitutional or discriminatory toward him. And the same thing in the Evans case. The stewardess did not contend that the seniority policy was discriminatory toward her. And Mr. Justice Stewart, you -- the Court held in the

majority in that case that he had to have a present violation, and there was no present violation. And our contention here is that there is no present violation. There's a termination: a denial of tenure automatically results in a terminal contract. So the day that he last worked has no significance under Title VII.

QUESTION: Well, it does have significance if the basic claim is that he was fired by reason of his national origin. Then the question is, was he fired and when? That's the first question.

MR. RODRIGUEZ: Yes.

QUESTION: The first two questions.

MR. RODRIGUEZ: Under the faculty policy which he was subject to, when he was denied tenure on March 13, 1974, by the Board of Trustees, that was a final act.

QUESTION: Well, if his claim of alleged discrimination is that he was denied tenure, then the question becomes, when was he denied tenure?

MR. RODRIGUEZ: Yes, he was denied tenure --

QUESTION: And the statute of limitations begins to run from then.

MR. RODRIGUEZ: Very true, Justice Stewart.

QUESTION: If his claim is that he was wrongfully discharged, then the question is, was he discharged, when, and if you'd answer those two questions, then the statute of

limitations begins to run from the time he was discharged.

MR. RODRIGUEZ: Our argument there --

QUESTION: So one must look to the complaint in every case, isn't that true?

MR. RODRIGUEZ: I don't think so under the 3rd Circuit opinion because it's an overall opinion. As I read their opinion in this case, Mr. Justice Stewart, you have to have, number one, that he knows his employer's going to finally terminate him. That's the first test. And, number two -- and one could come before two or two could come after one -- he has to leave his employment. And I think that's the rule that is laid down in this case.

QUESTION: Well, there can be violations of Title VII by somebody who never leaves the employment. I mean, the violation might be a failure to promote.

MR. RODRIGUEZ: That's our very point.

QUESTION: And there could be violations of Title VII by somebody who never becomes an employee. The violation might be a failure to hire. So, you can't have a general rule, can you?

MR. RODRIGUEZ: Well, I think the 3rd Circuit has put out a general rule and that's our argument and I think that's wrong.

QUESTION: And that's what some of these amicus briefs seem to have come in for.

MR. RODRIGUEZ: And I think EEOC does say that. It says that he could have sued in 1973, or March 21 when he was denied tenure for the first time; and he could have sued when he was denied tenure for the second time.

QUESTION: Mr. Rodriguez, following up on Justice Stewart's suggestion, it depends a little bit on the way the complaint is written. If we put to one side equitable relief, an injunction requiring tenure, say, and just look at the damage action, I suppose normally a cause of action doesn't accrue until all the elements of the damage claimed are present. And he didn't suffer any monetary damage until he stopped working for the college, did he?

MR. RODRIGUEZ: No, that's very true, Mr. Justice Stevens, but he took --

QUESTION: So wouldn't his damage claim have been premature if he'd brought suit before, while they still had him on the payroll?

MR. RODRIGUEZ: I don't think so because his rights were terminated once the Board of Trustees denied tenure to him. And he knew that under the faculty policy, under the AAUP policy.

QUESTION: But then he could have sued for an injunction, I suppose, a grant of retenure, but he couldn't have recovered any money, could he?

MR. RODRIGUEZ: Well, I think he could have gone in at that time and sued for a damage claim because --

QUESTION: Say he sued and 30 days later the case came on for trial, he wouldn't go to judgment, would he? He's still working.

MR. RODRIGUEZ: No, his contract -- see, he was unemployed as of June 30, 1974, had he not decided to take the terminal contract. See, that had to be offered to him under the AAUP regulations. It was his decision to take that terminal contract or not, and --

QUESTION: Well, yes. And so, if he brought suit on January 1, 1975, say, he was still on the payroll.

QUESTION: But he knew that that terminal contract was only for one year.

MR. RODRIGUEZ: Yes, he knew that that was -- June 30, 1975, he was done work.

QUESTION: If he had -- knew it too, that would have been admitted or conceded or stipulated in any action for damages.

QUESTION: He would have been suing for anticipatory breach, in effect, future damages.

MR. RODRIGUEZ: Mr. Justice Stewart, the problem that you brought up is a problem we're concerned with. Denial of promotion is an unlawful act. Now that could, under the opinion of the 3rd Circuit, that could occur five years -- say in 1975, and under their reasoning, the employee could wait until he's terminated and then he could bring that as an unlawful act.

And that's the thing that disturbs us.

QUESTION: Well, do you suppose the Court of Appeals possibly meant that?

MR. RODRIGUEZ: That's the reading. They quoted it from Bonham, another 3rd Circuit opinion, and they quoted that very explicitly, and it seems to me --

QUESTION: If the alleged discriminatory act is a failure to promote, based upon somebody's race, sex, or national origin, then that's the act, and it becomes important to determine, first, did that act occur? Secondly, when did it occur? And then the statute of limitations runs and then if you find that it is within the statute, then you consider the merits of the claim. But it has -- that alleged act has nothing to do with termination.

MR. RODRIGUEZ: No, I certainly agree, but I don't think that's the holding of the 3rd Circuit. I read, or I'd be happy to read their holding again, and they quoted from Bonham, which was an age and discrimination act. But this Court has said that the time limitation should be construed similarly.

QUESTION: And how about a failure to hire? You couldn't possibly say that the statute of limitations begins to run when the person was fired if he was never hired.

MR. RODRIGUEZ: Well, that would not activate the Ricks decision, because there was no employment. They're just saying, in employment termination cases where the employee

actually leaves the employer. But that is the date when the statute starts to run.

QUESTION: Well, that is the date when the statute starts to run if the alleged discrimination occurred at the time of the firing, if he allegedly was fired because he or she, the plaintiff --

MR. RODRIGUEZ: Yes, there can be no doubt about it.

QUESTION: -- of a certain sex or a certain race or a certain ethnic origin. But if that's not the gravamen of the complaint, then that that's not where the statute begins to run.

MR. RODRIGUEZ: Another example, Mr. Justice, I'd like to bring out is the denial of seniority. That is a discriminatory denial of seniority while one is employed is also a discriminatory act and it could be sued upon when that occurs. Now, if that employee does not sue under the 3rd Circuit rules, does not bring an EEOC action and then, say, three or four years later they have a RIFing policy because of decrease in work force and because he was denied that promotion he doesn't make it and his seniority, those people having his seniority are terminated, then according to the 3rd Circuit, he can bring that. And it leads to stale claims and everything that this Court has said should not occur under the statute of limitations and under Title VII.

QUESTION: Mr. Rodriguez, procedurally this case was dismissed by and not tried by the District Court, was it not?

MR. RODRIGUEZ: Under Rule 12(b)(6), ...

QUESTION: Yes. And then on an appeal with 3rd Circuit that court reversed?

MR. RODRIGUEZ: That is correct.

QUESTION: Do you think that the complaint stated a claim both for denial of a contract to teach and tenure?

MR. RODRIGUEZ: The complaint originally listed six counts. And all counts were adjudged to be time-barred. Some -- I think two by agreement of counsel, and the rest by the court. And it covered the entire spectrum from denial of First Amendment rights to state rights under pendent jurisdiction, violation of terms of contract, things of that nature. Everything was dismissed except these two actions. Now, in oral argument before Judge Stapleton, the district judge, Miss Harris indicated, I believe -- and I think she may contest that -- but Judge Stapleton assumed that there were two violations, denial of tenure and termination. And that is what he based his opinion on. And I think the reason --

QUESTION: You mean there would have been, in his mind, there would have been a violation even if tenure was legally denied?

MR. RODRIGUEZ: No, I think not, Mr. Justice White, because he thought that tenure was legally denied; then that automatically led to termination.

QUESTION: So there's not two separate violations?

MR. RODRIGUEZ: No. I don't believe so. He considered two separate violations.

QUESTION: Well, did he say there were two?

MR. RODRIGUEZ: He said that Dr. Ricks said there were two. That's what he surmised from the complaint. And I think that's the reason that he picked the June 26, 1974, date, because as of that time Dr. Ricks had been denied tenure, which occurred by the Board of Trustees on March 13, 1974, and the significance of the June 26, 1974, date is a letter from the Board President indicating that he would be offered a terminal contract.

QUESTION: But when were his appeal rights exhausted on the tenure decision?

MR. RODRIGUEZ: On the tenure decision? Would have --

QUESTION: September?

MR. RODRIGUEZ: He filed suit September 9, 1977, so it would have been September 9, 1974. The June date would have been prior to that. If you take 180 days, it would have been October 7, 1974. That's taking 180 days under the Title VII case. If you take 300 days, it would have been July 2, 1974. So the June 26 date of 1974 is valid either under the 300 days or the 180 days.

QUESTION: Was there a timely filing with the state agency here?

MR. RODRIGUEZ: It depends, Justice Rehnquist, on what

you call timely filing. It was 120 days, a maximum. So that it was not a timely filing for the June 26, 1974, act that Judge Stapleton considered significant. There was a final -- Dr. Ricks grieved, filed grievance proceedings in May of 1974, and one of the things that he grieved was denial of tenure. The Grievance Committee reached a final decision on September 12, 1974. And our argument there is that this Court has held by your opinion in Electrical Workers that a grievance procedure does not toll the statute under Title VII. And the reasoning there was that the Congress did not provide for such a tolling and there are really two separate actions, the grievance procedure is contractual, Title VII is an Act of Congress. And that's our argument there for saying that the September 12, 1974, date is merely a decision on the grievance procedure.

We feel that the decision is directly contrary to the purpose and intent of the statute of limitations, that if you permit someone to sue when they know they're going to be terminated, finally or when they do leave employment, that that violates the whole purpose and intent of the statute of limitations.

It's very pertinent in this case because the statute is to prevent stale claims, to allow you to have witnesses. Two of the key witnesses in this case are now unavailable, if it goes back and is required to be tried. One is deceased and one has removed from the jurisdiction.

The whole intent of Congress in Title VII is to expedite these claims. There are time limitations throughout. If no agreement is reached by EEOC in the conciliation agreement then the employee may file suit and the district court is asked in the statute to assign a judge to the case and to expedite the case with all due speed.

We think it's also very contrary to practical considerations. It leaves the employer in a state of not knowing what's going to happen. He can have a termination four or five years from the date that it occurred, which could be promotion, denial of promotion, and then under the 3rd Circuit ruling suit could be brought at that time. That also leaves the employee in doubt. Does he file a Title VII as written, which says, 180 days from the date of the discriminatory act, or does he file under the 3rd Circuit ruling, that he can bring suit after he leaves the services of his employer?

QUESTION: Isn't it possible that even though the 3rd Circuit was wrong in laying down a general rule, the plaintiff might prevail on this particular case?

MR. RODRIGUEZ: No, I don't think so, Justice Rehnquist. It depends on when you take the date of the last discriminatory act. If you take it as far as we're concerned and we agree that it should be at the very latest, June 26, 1974, when Ricks was notified of his terminal contract, then that's the last discriminatory act.

I think our argument would even take it back in time to March 13, 1974, when that decision to deny tenure became final.

QUESTION: Well, if the claim can be read as one that the plaintiff was unlawfully terminated from his employment by reason of his national origin, then he might prevail, because the statute of limitations would then begin to run at the time he was terminated from his employment, and if he can show that the reason he was terminated was because of his national origin, then he might prevail under Title VII, quite apart from 1981.

MR. RODRIGUEZ: Well, Mr. Justice Stewart, our argument there is that he was terminated once tenure was denied because he --

QUESTION: No, I thought your argument was that the only discriminatory act fairly alleged is a failure to give him tenure?

MR. RODRIGUEZ: Yes, that's very true, but under the policy, once he was denied tenure for the second time, he was automatically offered a terminal contract. That was the act, denial of tenure was the act.

QUESTION: Yes, but as I say, his claim is -- and if he can prevail on it -- that he was terminated by reason of his national origin, then he might win, although Judge Higginbotham of the 3rd Circuit says that his claim was that he was denied tenure. Now, if the claim can be shown to be one of unlawful

termination by reason of national origin, then the statute of limitations begins to run at the time of termination, doesn't it?

MR. RODRIGUEZ: We disagree with that, very respectfully.

QUESTION: Well, you disagree with that characterization of the claim --

MR. RODRIGUEZ: Yes.

QUESTION: -- but if the claim can be fairly so characterized, then he, as my brother Rehnquist suggested in his question, he might prevail for a reason other than the broad reasoning of Judge Higginbotham for the 3rd Circuit.

MR. RODRIGUEZ: Yes, sir. But under the faculty regulations, Mr. Justice, he knew that the second time he was denied tenure, that he would no longer be employed by the college, and our argument is that that, if there was an alleged discriminatory act, it occurred then, because that sealed --

QUESTION: Well, that would be the merits of the case.

MR. RODRIGUEZ: Yes. That sealed his fate, at that point.

QUESTION: Yes, but if his claim is that he was wrongfully terminated by reason of his national origin, then the merits would be whether or not that was correct.

QUESTION: Doesn't that beg the question? Because if the only discriminatory act is denying tenure which automatically

results in discharge a year and a half later, can one claim that's a termination for a discriminatory act and not time-barred?

MR. RODRIGUEZ: I think it does.

QUESTION: I think that that would just beg the question, when you phrase it that way.

MR. RODRIGUEZ: I think it does, Mr. Justice Stevens.

QUESTION: If a tenure decision doesn't automatically result in termination, didn't the one year contract even more clearly indicate that he was terminated at the end of that year?

MR. RODRIGUEZ: The denial of tenure, Mr. Justice White, does result in termination. There's no question about it. That's clearly in the policy that was just as much a part of Dr. Ricks' contract as if it had been written in there.

QUESTION: But what about the one year contract that was then given him?

MR. RODRIGUEZ: That was entirely discretionary. The AAUP --

QUESTION: I know that was discretionary but would it be -- if that was the discriminatory act, would it be untimely, would the filing be untimely?

MR. RODRIGUEZ: The denial of tenure, Mr. Justice White?

QUESTION: No, the issuance of the one year contract.

MR. RODRIGUEZ: No. That was provided by AAUP

regulations.

QUESTION: It wasn't discretionary on the part of the college?

MR. RODRIGUEZ: No, it was not.

QUESTION: The college had to offer it?

MR. RODRIGUEZ: They had to offer that.

QUESTION: But what if that were determined to be the discriminatory act? Would that have been timely or not?

MR. RODRIGUEZ: No. That was a voluntary act by Dr. Ricks. He could accept the terminal contract for one year or he could reject it. He chose to accept it.

QUESTION: He chose to accept it but it was also, it certainly was unequivocally indicated then that he was terminated at the end of that year?

MR. RODRIGUEZ: No question about it. He knew as of March 13, 1974, when the Board of Trustees made the decision to deny tenure.

QUESTION: Even if he didn't know when tenure was terminated?

MR. RODRIGUEZ: He grieved tenure but I say, under the ruling of Electrical Employees, the grievance procedure does not toll the statute under Title VII. That's very clearly the holding of this Court.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Miss Harris.

ORAL ARGUMENT OF MISS JUDITH E. HARRIS

ON BEHALF OF THE RESPONDENT

MISS HARRIS: Mr. Chief Justice, may it please the Court:

I'd like to begin by answering a question posed by Justice Stewart concerning what it is that Dr. Ricks is claiming in his complaint. He is claiming that, and I think a fair reading of his complaint indicates that he is claiming that his discharge is discriminatory for reasons of national origin.

QUESTION: It's a little hard to -- maybe it is a fair reading, is it? I find the complaint a little hard to read.

MISS HARRIS: I'm sorry, I didn't hear you.

QUESTION: I find the complaint a little hard to read either your way or any other way, frankly, so maybe it was a very fair reading.

MISS HARRIS: Well, the complaint was framed with a multiplicity of issues, and sometimes that creates problems that one couldn't foresee until hindsight.

At any rate, he is claiming that his discharge was discriminatory and he's claiming it both ways. He's claiming that the ultimate discharge of him on June 30, 1975, was discriminatory. He's also claiming that his discharge was caused by the tenure denial and that the discharge was discriminatory and that that process, that discriminatory process of the denial

of tenure caused a discriminatory discharge. So he's going at it from both ways, and I want to make that clear.

QUESTION: Does he claim that the discharge was discriminatory for any other reason than that the tenure denial was discriminatory?

MISS HARRIS: That remains to be proved. I would say a fair reading of the complaint says, yes; that he is alleging the discharge as a separate violation, separate discriminatory act. One of the problems obviously with this case is it's been ruled on on the pleadings alone. I think he is entitled to put forth his proof as to whether the discharge itself was discriminatory, whether he was discharged in a manner in which those who were not of his national origin were not discharged.

QUESTION: Even though they too had been denied tenure?

MISS HARRIS: Even though they too had been denied tenure. That's correct; yes.

QUESTION: Did the Court of Appeals read the complaint as you have outlined it?

MISS HARRIS: The Court of Appeals focused on the process of, focused on his discharge and said it occurred on the last day that he worked, and said that what he was complaining about overall was the process which resulted in that, and said that that was a continuing, ongoing process. It's not clear which acts they picked out as being part of that process but

they looked at the period from June 26, 1974, to June 30, 1975, when he ceased working, as being a period in which that process was ongoing and resulted in the termination of his employment on 6-30-75.

QUESTION: Well, a lot of this is, or most of it is irrelevant, if you are correct on this 300-day submission.

MISS HARRIS: That's correct.

QUESTION: And you as well as an amicus support that and so as a respondent you are urging this in support of the decision below?

MISS HARRIS: That's correct. I believe that he filed his charge within 180 days. I believe that --

QUESTION: I understand that.

MISS HARRIS: All right. But I believe that if this Court finds that he didn't, I believe that he was timely because of the 300-day rule. The respondent filed a supplemental brief after the Mohasco case came down. In that case, the Court will recall that no filing could occur with EEOC until there had been, where there was a state agency that had a local law prohibiting discrimination; that no filing could occur with EEOC until the state had been given the opportunity to look at that charge, and that the time limits were either 60 days after the state had received the filing or 30 days after the termination of the proceeding, assuming that that 60-day period was not exceeded.

QUESTION: Do you think that Mohasco included an untimely filing with the state commission too?

MISS HARRIS: I believe it did. I believe Footnote 19 in Mohasco, I believe it's Footnote 19, speaks to that issue when it talks about whether or not charge has to be filed within 180 days. It makes specific reference to Olson v. Rembrandt Publishing Company, I believe. But it doesn't say -- it says clearly that it doesn't have to be filed within 180 days, and it suggests in that footnote that the charge doesn't have to be filed timely with the state.

I would also like to point out, Justice Rehnquist, that there's some question as to whether Dr. Ricks's charge was untimely with the state. What the state did with that charge was to waive jurisdiction over to the EEOC, and I'd submit that the waiver of jurisdiction, inherent in that waiver is the power to review the charge. The state assumed that it had jurisdiction, it didn't dismiss the charge as an untimely charge. Clearly that was not the case. What it did was, it simply waived over to the EEOC.

So that if you pick up on the Mohasco theory, it seems to me that you can count that 300 days from the point at which, the earliest point at which Dr. Ricks could have filed his charge with the EEOC. That date would have been April 28, 1975. You count back 300 days, there are a number of acts that occurred, that in and of themselves might, would be timely.

You go back to July 2, 1974. Clearly the notice of nonrenewal on 6-26-74 would not be included, but, as in the supplemental brief, I indicated the contract that was referred to in that notice was signed by the College President on behalf of the College on August 16, 1974, and it was executed by Dr. Ricks on September 3, 1974. Those two dates are within the 300-day period, if you assume the Mohasco reading.

In addition, the College issued to Dr. Ricks a notice that tenure had in fact been denied. After the review of the educational policy decision, the Board had decided to deny him tenure and that notice was issued on September 12, 1974. Again, for purposes of Title VII, if you assume the Mohasco treatment of the case and the 300 days applies, that September 12, 1974, date is within the 300-day period. I might also add that it's within the three-year period for purposes of Section 1981. We both agree, and both the District Court and the Court of Appeals held that it was a three-year Delaware statute of limitations that applied to the 1981 claim, that the Court complaint was filed on September 9, 1977, and if you go back three years to September 9, 1974, clearly the college issued its letter on September 12, '74, and that period is within the three-year period.

QUESTION: Then you have something in your brief about his being punched in the nose.

MISS HARRIS: There are some allegations of events

that occurred after the --

QUESTION: But those events really don't have anything to do with Title VII, do they? They would -- they're assault and battery if true.

MISS HARRIS: Those specific events, yes, except insofar as the person who allegedly engaged in that conduct subsequently evaluated him in that last year of the contract.

QUESTION: Well, that might be evidentiary but it's not itself a substantive cause of action under Title VII.

MISS HARRIS: That's correct. No, no, it's not alleged as a cause of action under Title VII. It is an evidentiary matter.

QUESTION: Miss Harris, before you go on, could we come back to the complaint for a minute or two? I had thought the charge was related solely to the denial of tenure. Then, if I understand that you are saying that actually the denial was based on an unlawful discharge. Is that correct?

MISS HARRIS: The charge of discrimination filed by Dr. Ricks before the EEOC and which is a part of this record alleges a discriminatory discharge from his employment.

QUESTION: I appreciate that the complaint is long and perhaps not as clear as it might be. Could you identify the paragraphs in the complaint that do not relate to tenure and specifically aver a discharge?

MISS HARRIS: Paragraph 48, Justice Powell, I believe,

is the paragraph that does that -- paragraph 48.

QUESTION: It says he was discharged.

MISS HARRIS: The count two of the complaint says that all the allegations numbered 1 through -- however many of them are -- I think 48 is the last one, are alleged to be discriminatory and in violation of Section 1981. And that would include the discriminatory discharge.

QUESTION: Apart from that, there's no specific averment of discriminatory discharge?

MISS HARRIS: That said that -- some allegations separate and apart from the tenure?

QUESTION: Yes. There are 15 or 16 paragraphs that talk about tenure, so I was under the impression until this morning that your contention was based on the denial of tenure, but I'll take another look at it.

MISS HARRIS: I think a fair reading of the complaint is that most of the allegations do go to tenure; yes, that's correct. There are no allegations separate and apart from those other than that one paragraph 48 that talks about discriminatory discharge.

QUESTION: Would respondent have remained on the faculty without tenure?

MISS HARRIS: That's a question that would remain to be proved, and it is a question at this point. I think that the College has taken the position that because he was awarded a

terminal contract, he would automatically leave. I think the complaint alleges, and if allowed to be put to the proof, Dr. Ricks would attempt to show that he had been previously denied tenure and although under the College regulations that previous denial of tenure required the issuance of a terminal contract and certain treatment prescribed in the College's regulations, that did not in fact occur. That being the prior case, I think it remains a question as to whether he would have automatically ceased to be employed with the College simply because he was awarded what's called the terminal contract. In addition a --

QUESTION: It was a one year contract?

MISS HARRIS: Yes, it was.

QUESTION: And there was no offer of a second one year contract?

MISS HARRIS: That is correct. His employment did come to an end on June 30, '75. He had a series of one year contracts.

QUESTION: I thought there was a single one year contract, at the end?

MISS HARRIS: No. Throughout his -- there was, from June 30 --

QUESTION: Well, of course at the end there was.

MISS HARRIS: That's correct. But there were a series of one year contracts under which he was employed.

QUESTION: But I thought after the second denial of tenure there was a single one year contract?

MISS HARRIS: That's correct. That is absolutely correct.

QUESTION: Well, that really is the difference between tenure and a series of one year contracts, isn't it? I mean, teachers generally who do not have tenure are operating under a year-to-year contract and then when they get tenure they no longer have to depend on a one year contract.

MISS HARRIS: Yes, Justice Rehnquist, that's my understanding of the practice.

QUESTION: I suppose a nontenured teacher, though, could have a five-year contract?

MISS HARRIS: I suppose so. I don't know that that's been the experience at Delaware State College, but --

QUESTION: As an instructor or an assistant professor, or whatever.

MISS HARRIS: That's probably true.

QUESTION: What is the evidence in this case, or what supports the suggestion or the assertion that the final contract that he was given was a terminal one year contract?

MISS HARRIS: That's been the way --

QUESTION: Is that what the contract said?

MISS HARRIS: No, it did not say that. The contract looked exactly like the previous one year contracts he'd been

given.

QUESTION: What is the basis for saying it was a terminal contract?

MISS HARRIS: Because under the regulations of the College -- Mr. Rodriguez is correct -- upon that denial of tenure he was to be afforded a terminal contract, and that was deemed to be the terminal contract.

QUESTION: So that would mean that he would not be working for the university after the end of that terminal contract?

MISS HARRIS: Well, I think that --

QUESTION: I mean, otherwise it isn't terminal?

MISS HARRIS: That's correct. I don't think, though, that the issuance of the contract necessarily meant that he would not be working there after June 30, 1975, and I say that --

QUESTION: What does terminal mean?

MISS HARRIS: That's what it ordinarily means but I would say, Justice White, that the --

QUESTION: Doesn't it suggest that although in other circumstances you might have had another one year contract issued to you after this one, you won't be issued another one after this one?

MISS HARRIS: Well, what the notice, the June 26 notice that preceded the issuance of the terminal contract said was that, we're issuing you this contract to comply with the

AAUP regulations. However, if the Board of Trustees decides to grant you tenure, this action will be superseded. So I think that by the very issuance of that letter the question was created as to whether he would remain on the faculty.

QUESTION: Well, not if they -- the only condition on the letter was if the Board of Trustees granted him tenure.

MISS HARRIS: That's correct. And by September 12, '74, that had happened.

QUESTION: Is this in your view just a traditional method of giving the faculty member a year's time to find new employment, and a year's notice, in effect, that at the end of the year there would be no more employment at this institution? Is that what it amounts to?

MISS HARRIS: The issuance of a terminal contract, Mr. Chief Justice? -- Yes, it is. I think it's a very common practice in academic institutions.

QUESTION: Is it fundamentally any different from ordinary workers in industry that might get 15-day or 30-day notice that their employment is terminated, but they have the employment during that 15 or 30-day period? Is it essentially the same in operation?

MISS HARRIS: It may be, depending on why the notice was given.

QUESTION: Well, if it's either a layoff or for cause, whatever, is that not the function of it, to give the person a

turnaround time?

MISS HARRIS: To find other employment? Yes, that's correct.

QUESTION: Now, in your view, the statute of limitations is not tolled until the end of the notice period rather than the beginning of the notice period. Isn't that the essence of it?

MISS HARRIS: Yes. The end of -- the point at which he ceases to work. In this case it was the end of the notice period.

QUESTION: Not the point of termination of the contractual relationship?

MISS HARRIS: That's correct. That is my position.

QUESTION: Getting back to Justice Powell's question, it seems to be clear, at least in the first sentence of Judge Higginbotham's opinion for the Court of Appeals for the 3rd Circuit that that court considered your complaint to allege a discriminatory denial of tenure. And "denial of tenure," that ends the sentence, first sentence of the opinion, doesn't it?

MISS HARRIS: That's correct.

QUESTION: Then he goes on, the opinion goes on at some length to talk about the whole history and then ending up with the termination, and then holding, as we know it held, as to when the statute of limitations began.

MISS HARRIS: That's correct.

QUESTION: But the question is still whether it was 180 days or 300-day statute.

MISS HARRIS: That question does remain.

QUESTION: And the Court of Appeals assumed it was 180 days?

MISS HARRIS: That's right.

QUESTION: Both parties assumed it was 180 days. Now there seems to be a possibility that it was a 300-day statute. Should we remand it to the Court of Appeals to decide that question? Because the answer to the question seems to depend upon whether or not there was a filing in the state, with the state commission.

MISS HARRIS: Yes, I think you would be required to do that, and that this Court should not decide that.

QUESTION: Only if we think your 180-day argument is --

MISS HARRIS: -- is incorrect. That's correct. Yes, Justice Brennan.

QUESTION: That's right. If you win, even under the 180 days, a fortiori you'd win under the 300?

MISS HARRIS: That's correct.

I did want to comment, I think in response to Justice Blackmun's question as to whether Dr. Ricks was a United States citizen. He is a United States citizen. I believe that was a question that you earlier posed to Mr. Rodriguez. I just wanted to clarify that.

The question of when a discharge occurs has been addressed by this Court on several occasions before and I believe that in the context of Title VII as well as in the Age Discrimination in Employment Act this Court has held and courts below have held that discharge occurs on the last day of work. I think that that's what happened in I.U.E. vs. Robbins & Myers, where the question was whether a grievance procedure tolled the Title VII time limitation. In that case this Court held that the time for filing the charge ran from the last day that the employee worked and not from the later point when the grievance was concluded, a point at which he was off the payroll.

QUESTION: Do you think this situation is analogous to a grievance procedure?

MISS HARRIS: No, I'm simply saying that -- no, I don't. I don't at all. I think that this situation is simply a question of focusing on when the discharge occurred, from the perspective of the respondent. And I believe that that discharge and what's commonly understood in Title VII law to be the point of discharge is the point at which an employee ceases to work. And I think that if the Court decides this case differently and decides that the June 26, '74, date is the date at which discharge occurred or the violation occurred, that it will be carving out an exception either for academic institutions or perhaps for institutions that choose to give employees notice of the fact that their employment is coming to an end.

I think a better rule is the rule of the employee's remaining on the job and the point at which the work terminates, that that's a point from which violation of termination or discharge can properly be alleged. I think there's no prejudice suffered by an employer in this situation because employers naturally maintain records of employees that they have on the rolls. They can defend. The claim really isn't stale. If you're talking about the termination of employment, they can defend, they have the records available, and they know that they only have to defend up to either 180 days or, if this Court so decides, 300 days of the date of discharge, so that the claim really isn't stale.

Attention's been called to the fact that two of the witnesses are unavailable. One of them is deceased -- one died during the course of the appeal, not during the course of the proceeding in the trial court.

QUESTION: But, Miss Harris, supposing that it was agreed that your sole claim was denial of tenure and not denial of a contract to work, and that the university policy was to give the faculty member who had been finally denied tenure a five-year contract of employment and tell him that that was the terminal contract. Then you really would run into problems of disappearance of witnesses and that sort of thing if you took the date of -- the last date of employment rather than the date on which the discriminatory denial of tenure became final, wouldn't you?

MISS HARRIS: That problem might be created but what colleges could do in response to that is simply maintain the records. The witnesses might disappear and they might die but it seems to me that the records of the tenure process and the denial of it and the reasons for it could be maintained in the college archives or in the college records, and used in support of the college's position that denial of tenure was appropriate.

QUESTION: Might there not be considerable evidence that wouldn't be a matter of record, something in people's memories?

MISS HARRIS: That could be. Yes, I would have to say that that's possible but it might be possible for colleges to simply hold their proceedings as they did here in the Educational Policy Committee. There were transcripts of a hearing made, and witnesses came in and they got to do it in the form of testimony, and to submit evidence.

QUESTION: Your positions apparently equate the existence of a contract with the execution of it. That is, you're placing the statute to running date from the last day of work as distinguished from the notice of termination of the contract. That wipes out the significance of the notice, does it not?

MISS HARRIS: I believe it does. I believe that the violation, the ultimate termination of Dr. Ricks, was a discriminatory act.

QUESTION: But haven't the rights -- whatever the

right is, hasn't it been violated as soon as the notice is given that the contract is terminated, even though the work may continue for six months, 12 months, or as Justice Rehnquist suggested, a number of years?

MISS HARRIS: It could very well be that the right was violated then, but it doesn't necessarily follow that it was. It could very well be that the giving of notice was a discriminatory act and that notice was not given under similar circumstances to those people who were not of Dr. Ricks's national origin. It may very well be that notice was given to everyone in those circumstances. On the other hand --

QUESTION: Isn't that a little difficult to square with the general idea of staleness in the prosecution of claims? Take the five-year illustration that was suggested hypothetically by Justice Rehnquist. It's a pretty stale claim if the statute doesn't begin to run until the end of the five years of actual work, is it not?

MISS HARRIS: I don't believe so, if the allegation is that the discharge, the ultimate act of terminating the employee on the day he or she last worked is the discriminatory conduct. It might very well be that the giving of notice is, or some event that occurred in any of those five years, but that, it seems to me, goes to what issues or what claims the Court's going to give relief on, versus whether or not the Court -- the party is properly in court to assert some of that claim.

QUESTION: Supposing that you were claiming that the denial of tenure was discriminatory but that everything that happened after the denial of tenure was not discriminatory, that your client was treated just the way everybody else who was denied tenure was, although the denying of tenure had been discriminatory. Would you still say that the statute ran from the time he last occupied a desk in the university?

MISS HARRIS: Oh, that's a harder problem. That looks more like the effects of discrimination than it does an active discriminatory act.

QUESTION: Well, Mr. Rodriguez says that's precisely this case.

MISS HARRIS: I don't agree that that is this case.

QUESTION: Miss Harris, I want to be sure about one thing. The charge was filed after 180 days but still while he was in the employment of the college.

MISS HARRIS: That's correct, Justice Blackmun.

QUESTION: So under your theory, then, the charge was filed even before the statute of limitations period began?

MISS HARRIS: Yes. That's correct. He filed his charge in anticipation of his employment ending on June 30, 1975.

QUESTION: So he was aware of the alleged discrimination, all right. Isn't that a little bit unusual, though, for the person to be able to file the charge even before a

limitations period begins?

MISS HARRIS: I don't think so. I think it happened in Noble vs. Rochester, a 2nd Circuit case, and I think it happened in Egelston vs. State University at Geneseo. That's precisely what happened. Two charging parties filed their charges with EEOC in anticipation of the discriminatory act taking place. They knew they'd been -- in one instance removed from a position and asked to train someone else, and the court found in that case that the time really started to run from the point at which that person assumed the job.

QUESTION: Well, are you defending the rationale of the Court of Appeals or not?

MISS HARRIS: The rationale of the 3rd Circuit? Yes, I am.

QUESTION: Well, this Court of Appeals said the discriminatory act was a continuing one.

MISS HARRIS: No, it said the process of termination was a continuing process.

QUESTION: All right, but it was a process. And when did it begin? When did the process begin?

MISS HARRIS: It said it began on June 26, '74.

QUESTION: So the charge was filed after that?

MISS HARRIS: That's correct.

QUESTION: Miss Harris, for purposes of statute of limitations analysis, is there any difference in your view between

the discriminatory act denying tenure and a discriminatory act denying seniority, or refusing to grant some special, better seniority? If there's not, it seems to me that under the 3rd Circuit rationale you might have a case arguably in which there was a clear proof of discriminatory denial of seniority, say, in 1974, resulting in an early discharge in 1990, with nothing happening in between. And under that rationale, it seems to me that the 1990 claim would be timely. Do I misread the opinion?

MISS HARRIS: No, I don't believe a 1990 claim would be timely if there's no difference between the discriminatory denial of seniority and tenure. I think they would be treated the same but I don't think the 1990 claim would be timely.

QUESTION: Well, under the logic of the Court of Appeals' opinion, my brother Stevens suggests that it would be.

MISS HARRIS: Yes, I understand that, but I believe that the 1990 claim, to the extent that it alleged a discriminatory denial of seniority resulting in a layoff or an earlier termination than would otherwise have occurred, would be like United Air Lines vs. Evans, and I don't think that's what's alleged here.

QUESTION: Well, it wouldn't really be the same as United Air Lines, because there there's been the -- I'm assuming continuous employment. You did not have continuous employment in the Evans case. The woman left and then came back, whereas here the test of the Court of Appeals, as I understand

it is, the discharge is the event that triggers the running of the statute and that he had no separation of employment before 1990, which is quite different from Evans. I think they distinguish Evans on the ground that you have continuous employment.

MISS HARRIS: That's correct; they did.

QUESTION: And I'm assuming, in my seniority case, continuous employment. And so I don't think you can answer it by saying, well, Evans would apply there. I don't -- if Evans applies there, in other words, I think it may well apply here. That's what I --

MISS HARRIS: That's correct. I was assuming -- I misunderstood your hypothetical. I was assuming that the employment had terminated. I jumped the gun; I'm sorry.

I think that the Court of Appeals opinion, in thinking about it, in both instances would say that the 1990 charge was a timely charge.

QUESTION: Yes, I think they would.

MISS HARRIS: I think they would.

QUESTION: I do, too. Let me pose a variation of that, an alleged unlawful discriminatory denial of seniority. That is, the statute would begin to run at the time the seniority is denied, or on the first occasion when the denial of that seniority has some impact on the employee, by way of either not getting promoted or not getting an assignment or an increase in

salary.

MISS HARRIS: I believe that the statute starts to run, assuming the employee stays at work, at the point at which it has an adverse impact on the employee, the point at which either he is precluded from advancing because of seniority because someone else was put into the position, or precluded from getting a higher salary because that job grade, for example, might have been upgraded and people who were higher level than he or she would get a raise that that person would not get. I think it's the point at which the adverse --

QUESTION: You really must take that position to support your other positions, must you not?

MISS HARRIS: Yes, I believe I must, and I do.

QUESTION: But in a small plant, a small industrial operation, that might be a long, long time before there was any impact, would it not, could be?

MISS HARRIS: That's right. It could be. Could very well be, in a very static employment situation.

I believe I've concluded my remarks, unless there are further questions, I will sit down.

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

(Whereupon, at 11:59 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

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

No. 79-939

Delaware State College, et al

v

Columbus B. Ricks

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

BY: William J. Wilson