

ORIGINAL

In the

Supreme Court of the United States

LAVERNE L. LOGAN,

Appellant

v.

ZIMMERMAN BRUSH COMPANY

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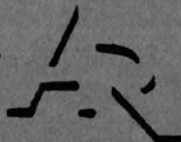
No. 80-5950

Washington, D. C.

October 14, 1981

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IN THE SUPREME COURT OF THE UNITED STATES

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LAVERNE L. LOGAN, :
Appellant : No. 80-5950
v. :
ZIMMERMAN BRUSH COMPANY :

- - - - -x

Washington, D. C.
Wednesday, October 14, 1981

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:05 o'clock p.m.

APPEARANCES:

GARY H. PALM, ESQ., Chicago, Illinois;
on behalf of the Appellant.
JAY A. CANEL, Chicago, Illinois,
on behalf of the Appellees.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
GARY H. PALM, ESQ.,	
on behalf of the Appellant	3
JAY A. CANEL, ESQ.,	
on behalf of the Appellees	25
GARY H. PALM, ESQ.,	
on behalf of the Appellant - Rebuttal	49

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2
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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Logan against Zimmerman Brush Company.

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

ORAL ARGUMENT OF GARY H. PALM, ESQ.,
ON BEHALF OF THE APPELLANT

MR. PALM: Mr. Chief Justice, and may it please the Court, the question presented in this case is whether Mr. Logan's rights to due process and equal protection of the laws were violated by the Illinois Supreme Court's decision that his employment discrimination action should be terminated solely because the Fair Employment Practices Commission failed in its duty to hold a factfinding conference within the 120-day time period.

QUESTION: That is basically a question of state law, isn't it?

MR. PALM: Well, the question of state law is whether or not an entitlement has been created with the reasonable expectation that Mr. Logan would not be deprived of that entitlement, but upon a showing of cause.

QUESTION: But I mean the question of whether or not the thing was jurisdictional is a question of state law.

MR. PALM: Well, my argument is that if it's a procedure, then it must be governed by the procedural requirements of due process, and that this is in accordance

1 with this Court's holdings in Arnett v. Kennedy and Vitec v.
2 Jones.

3 QUESTION: Well, certainly all procedures have to
4 be governed by the Fourteenth Amendment, but insofar as the
5 Illinois FEPC's inability to proceed further without having
6 done its work within 120 days, that is a question of state
7 law.

8 MR. PALM: Well, there are two different things.
9 The question of whether or not they actually failed to do --
10 to hold a factfinding conference within 120 days might well
11 be a matter of state law. The consequence for that is a
12 matter that the Illinois Supreme Court has arrived at as a
13 state law interpretation of the Fair Employment Practices
14 Act, but our contention is that that interpretation is a
15 procedure, because it terminates Mr. Logan's rights without
16 a hearing, without a decision on the merits, without any
17 decision whatsoever, indeed, and without any consideration
18 in the form of notice being provided to Mr. Logan, and is
19 therefore an invalid procedure --

20 QUESTION: Under the Fourteenth Amendment.

21 MR. PALM: -- restricting the substantive
22 entitlement under the -- I'm sorry.

23 QUESTION: Under the Fourteenth Amendment.

24 MR. PALM: Under the Fourteenth Amendment, yes.
25 In other words, it is our position that the entitlement is

1 created by state law, and then after the entitlement is
2 created, it is the state's -- it is the constitution, the
3 Fourteenth Amendment which determines what procedures must
4 be provided.

5 We believe, as I have indicated, that Mr. Logan's
6 rights were violated here because he did not get a decision
7 on the merits of his case and yet he lost, even though he
8 did all that the statute imposed upon him to do. First of
9 all, he filed his charge within five days after he was fired
10 by the Zimmerman Brush Company. That was well within the
11 180-day limitation period provided in the Fair Employment
12 Practices Act.

13 Secondly, his charge set out allegations
14 sufficient to establish an Unfair Employment Practice Act --
15 violation, excuse me, and was referred to the investigator
16 to conduct the investigation.

17 Third, Mr. Logan did appear at the time indicated
18 to him for the factfinding conference, and at that time he
19 was ready to proceed.

20 Fourth, after the Zimmerman Brush Company sought a
21 writ of prohibition from the Illinois Supreme Court, Mr.
22 Logan filed a second charge alleging the identical facts,
23 and this charge, too, was timely. It was filed within the
24 180-day requirements, limitation requirements set forth in
25 the Fair Employment Practices Act.

1 To establish that his rights to due process were
2 violated, we have to establish first that there is a
3 property right, and secondly either that the procedures
4 utilized by the State of Illinois to deprive him of that
5 property right were inadequate under the procedural
6 requirements of due process, or that the procedures which
7 amount to a defense here provided to the company are wholly
8 arbitrary and irrational, and therefore violate substantive
9 due process.

10 Mr. Logan had a property interest in this case.
11 In order to determine that, we must consider whether he had
12 a justifiable expectation that he would receive the benefits
13 conferred by the state unless there was some cause to
14 disentitle him to those benefits.

15 What are the benefits here? The benefit is
16 created by the state law, the Fair Employment Practices Act,
17 that he be free from discrimination in employment. That is,
18 that what would have been otherwise at will here is created
19 for a cause that his employer cannot terminate him or
20 discriminate against him on the basis of his physical
21 handicap, and it provides to him an individual remedy, a
22 remedy that he, if he is discriminated against by his
23 particular employer, can proceed to the Fair Employment
24 Practices Commission and obtain relief. He may obtain back
25 pay here amounting to as high as \$15,000, and he may also

1 obtain other relief to eliminate the continuing effects of
2 the discriminatory --

3 QUESTION: Counsel, did the Illinois court not
4 determine, however, that where the prehearing conference is
5 not granted in a timely fashion, or conducted in a timely
6 fashion, that in fact he had no right? Isn't that the
7 effect, if you will, of the Illinois court state
8 determination, which makes your argument under procedural
9 due process more difficult? It maybe saves your argument on
10 equal protection, but I am not sure that under those
11 circumstances you have a due process, procedural due process
12 argument left.

13 MR. PALM: Well, here he already had obtained
14 access to the procedures of the Commission by filing the
15 timely charge that set forth sufficient allegations, and
16 then under the statutory structure set forth in the Fair
17 Employment Practices Act, it is clear that he had an
18 expectancy at that point that he would not be deprived of
19 his opportunity to recover from the company except upon a
20 showing of cause.

21 QUESTION: What if the Supreme Court of Illinois
22 had held that the entire Illinois FEPC violated the Illinois
23 constitution?

24 MR. PALM: We don't contend that Mr. Logan had a
25 right to force the authorities in Illinois to adopt the Fair

1 Employment Practices Act. Nor do we contend that they
2 cannot repeal that Act. But we say that when there is a
3 termination of an individual's rights, Mr. Logan's rights,
4 and not by repeal that affects the whole general public or a
5 general class of the public, that he is entitled to the
6 procedural requirements of due process, and that the
7 decision, the consequence that the Illinois Supreme Court
8 interpreted the failure to hold the timely factfinding
9 conference is a procedure, because it is a decision that
10 your rights will be terminated without a chance to be heard,
11 and without any consideration whatsoever about whether you
12 have been discriminated against or whether you haven't, and
13 whether you should win or the company should win.

14 QUESTION: Well, Mr. Palm, what is it he was denied
15 a factfinding hearing in respect of? The right to have a
16 statutory hearing within 120 days? Or are you saying, no,
17 it is more than that, it is the right to pursue the basic
18 underlying claim? Which is it?

19 MR. PALM: It is the second one.

20 QUESTION: The second one.

21 MR. PALM: I mean, he also lost the first by
22 definition, but our complaint is that the result of losing
23 the factfinding conference as determined by the Illinois
24 Supreme Court is --

25 QUESTION: That is procedural due process.

1 MR. PALM: That's correct.

2 QUESTION: He loses his job for what he claims was
3 a bad reason.

4 MR. PALM: That's correct, and he loses his chance
5 to recover it.

6 QUESTION: It's like you say, it is the same thing
7 as saying you can't be fired except for cause.

8 MR. PALM: That's correct.

9 QUESTION: And he is saying he couldn't be fired
10 for X cause.

11 MR. PALM: Well, the state of Illinois --

12 QUESTION: Says he can't.

13 MR. PALM: That's right. They say that he can't
14 be fired if it amounts to discrimination because of physical
15 handicap.

16 QUESTION: Yes.

17 MR. PALM: And that right, substantive entitlement
18 with respect to his employment created by the Fair
19 Employment Practices Act is necessarily protected, as is any
20 other property interest, only by the state's coercive power
21 of enforcement, which is through the cause of action, which
22 is given to him to proceed to the Fair Employment Practices
23 Commission, to file a charge if he --

24 QUESTION: I take it your argument would be the
25 same if they didn't provide the hearing at all.

1 MR. PALM: Oh, yes. Having created the for cause
2 entitlement in the first instance.

3 QUESTION: Yes, and this business of negligently
4 missetting the date just nails home your argument.

5 MR. PALM: Yes, it can be --

6 QUESTION: But your basic claim is that once they
7 created the expectation, they had to have a hearing to --

8 MR. PALM: Well, some kind of hearing. We don't --

9 QUESTION: Some kind, yes.

10 MR. PALM: The failure to have any kind of a
11 hearing is for sure in violation, and we say at the very
12 bottom the failure to have any kind of decision with respect
13 to whether he should or should not prevail --

14 QUESTION: I gather, Mr. Palm, this is your
15 argument limited to the due process claim.

16 MR. PALM: That's right.

17 QUESTION: And you also have an equal protection
18 claim.

19 MR. PALM: That's right.

20 QUESTION: And that you didn't get a hearing, but
21 a lot of other people get hearings.

22 MR. PALM: That's right. The equal protection
23 claim proceeds on the analysis that there are categories
24 made between those who have a timely factfinding conference
25 convened by the Commission and those who do not, and that it

1 is --

2 QUESTION: And is there special emphasis in the
3 context of this case that the omission is the Commission's,
4 and no one else? The omission here, as I understand it, was
5 a mistake or something, was it not, on the part of whoever
6 was handling the case for the Commission?

7 MR. PALM: That's correct, the investigator. The
8 statute says that the Commission shall hold a factfinding
9 conference -- this is -- I am not sure I have exactly the
10 words, but this is the context -- shall hold a factfinding
11 conference within 120 days. It says the Commission shall
12 hold. The only obligation put upon Mr. Logan, the
13 Complainant, in that section of the Act is that he shall
14 attend the factfinding conference --

15 QUESTION: I want to be clear about this. I
16 gather your position is on the equal protection that they do
17 for so many within the 120 days, and they didn't here, and
18 therefore denial of equal protection to him.

19 MR. PALM: That's right. That's right. In fact,
20 the Illinois Supreme Court opinion, even though we disagree
21 with it in great part, suggests that everyone should have a
22 factfinding conference within 120 days. The problem is that
23 with respect to due process, they have reached an unfair
24 and, we think, wholly irrational and arbitrary result should
25 that occurrence not take place.

1 QUESTION: Do you claim that the -- on the equal
2 protection issue, do you claim that the deprivation of the
3 hearing was intentional? I thought everybody just thought
4 it might be negligence.

5 MR. PALM: I'm sorry. Do we claim it is
6 intentional, that the negligence --

7 QUESTION: No, that depriving -- the deprivation
8 of the hearing was intentional, or do you agree it was only
9 negligence?

10 MR. PALM: Well, the record doesn't disclose, but
11 everyone has argued the case, and based upon the information
12 we have --

13 QUESTION: Which is, somebody just misread --

14 MR. PALM: Miscalculated the 120 days, either by
15 misreading a calendar or miscalculating the days. We have
16 no evidence to show an intentional, malicious, or any other
17 kind of motivation. There is a problem here, because the
18 action was -- the company initiated this particular action
19 as an original action in the Illinois Supreme Court, which
20 has much more limited evidentiary procedures than normal,
21 but no one has put into the record the reason, but we have
22 no reason to believe it wasn't just simple negligence.

23 QUESTION: Mr. Palm --

24 QUESTION: May I ask, Mr. Palm, would he have a
25 claim, perhaps in the Illinois Court of Claims, against

1 either the Commission or the investigator?

2 MR. PALM: Well, my answer to that is no, it is
3 not at all clear. We don't think that this Court ought to --

4 QUESTION: If he did, I take it he couldn't get
5 reinstatement anyway.

6 MR. PALM: That is right.

7 QUESTION: He could get only damages, couldn't he?

8 MR. PALM: That's correct. He couldn't get
9 reinstatement, and --

10 QUESTION: And he did seek reinstatement, I
11 gather, did he?

12 MR. PALM: That's correct.

13 With respect to the due process entitlement, I
14 would like to emphasize particular provisions of the Fair
15 Employment Practices Act which show that his entitlement hee
16 to obtain relief against his employer, if his employer
17 discriminated against him, is protected except for a showing
18 of cause.

19 There are significant indicators of the cause
20 requirement. The first is, the Section 851 of the Act, the
21 very first section, sets forth this public policy purposes,
22 one, to protect individual employees covered by the Act from
23 employment discrimination because of physical handicap, and
24 two, and this is important as well, to protect all employers
25 from unfounded claims of employment discrimination.

1 Second, another indicator is that the Fair
2 Employment Practice Act sets forth a substantive definition
3 to be used in determining cause. It defines in its terms of
4 the statute and as interpreted by the Courts of Illinois
5 what is an unfair employment practice.

6 And third, this standard of what is an unfair
7 employment practice is also to be measured by an evidentiary
8 test, and two different tests at two different times in the
9 proceeding. First, during the investigative stage, the test
10 is substantial evidence, whether or not there is substantial
11 evidence to establish that an unfair employment practice
12 occurred. This level of evidence, the amount is not
13 particularly significant, but the fact that some level of
14 evidence is used to control the discretion of the Commission
15 in deciding who receives the benefits and who does not,
16 indicates that they are controlled for cause.

17 The other standard is the preponderance of the
18 evidence standard, which is to be applied by the Commission
19 after they have found substantial evidence, the complaint is
20 issued, discovery has been conducted, and there is a full
21 public hearing.

22 Then the Commission is charged by the statute to
23 decide whether there is evidence by a preponderance of the
24 evidence to establish that the unfair employment practice
25 occurred.

1 The fourth indicator here is that there is review
2 and then indeed judicial review of the determination of the
3 Commission. First, the investigator's decision about
4 whether there is or is not substantial evidence is
5 reviewable de novo by the Commission. My client or any
6 complainant, if the investigator rules no substantial
7 evidence to support the charge, can submit new evidence not
8 previously submitted to the investigator, and can submit
9 arguments that were already submitted or new arguments as
10 well.

11 Should the Commission then again decide that there
12 is no substantial evidence, then the review is available to
13 the Circuit Court of Cook County, through the Administrative
14 -- in our case Cook County -- through the Administrative
15 Review Act, and then if again that court should affirm,
16 there is further review to the Illinois Appellate Court as a
17 matter of right, and then, of course, discretionary review
18 by a petition for leave to appeal to the Illinois Supreme
19 Court.

20 All these reviews and judicial reviews indicate
21 that the for cause requirement set forth in the statute,
22 which must be established by some quantum of evidence, is
23 then further controlled by the appellate courts to make sure
24 that there is indeed a for cause determination, and not an
25 at will decision.

1 QUESTION: Mr. Palm --

2 MR. PALM: Yes.

3 QUESTION: -- if we were to agree with you that

4 you should have been given a hearing, what would be the

5 subject of the hearing? What would the inquiry be?

6 MR. PALM: What would the inquiry of the hearing

7 be?

8 QUESTION: Yes.

9 MR. PALM: Well, the inquiry of the hearing and

10 the decision must be as to the merits of the case, whether

11 or not an unfair employment practice occurred. Now, as a

12 part of that, there certainly --

13 QUESTION: So this would be as if you got a

14 timely, within the 120-day hearing.

15 MR. PALM: That's correct.

16 QUESTION: All you are saying is, they can't deny

17 giving you the same thing even if it is later than 120 days.

18 MR. PALM: That's correct.

19 QUESTION: What if the original papers which you

20 have filed or sought to file had never been delivered to the

21 Commission, and the time, the outside time limit passed?

22 Where would the responsibility lie for the failure of

23 delivery? Let's assume that you had used the United

24 States --

25 MR. PALM: First of all, this is not -- there is

1 no statute of limitations problem, sir, as you are aware.
2 We filed on time. And he already has access. He is not
3 seeking access, which we think is a distinction.

4 Conceptually, I have a bit of difficulty with the
5 statute of limitations problem, but I think either way it
6 works out, it doesn't fall within the heart of our case, and
7 our case can be decided without regard to that.

8 First, to answer directly your question, if one
9 looks at the limitations provision as a substantive, or, I
10 am sorry, as a procedural requirement, then it would have to
11 be examined by the procedural requirements of due process.
12 Here, since the burden was on him to make sure that the
13 papers arrived at the Commission on time, that, in my view,
14 would be adequate under due process.

15 QUESTION: He would be out then.

16 MR. PALM: He would be out, but it was his
17 responsibility, and that is the reason that he should bear
18 the blame, because it was his responsibility to get those
19 papers to the Commission on time. Here, he had no
20 responsibility to convene the factfinding conference on
21 time. That was the investigator's responsibility.

22 QUESTION: I take it that the Commission itself
23 actually thought the time limits were just discretionary.

24 MR. PALM: That's correct. The procedural posture
25 of this case is that the investigator and her supervisor at

1 the Commission denied the company's motion to dismiss the
2 charge on the grounds of the failure to convene the
3 factfinding conference on time, and the Commission was
4 prepared to go ahead, at which point the original action was
5 brought in the Illinois Supreme Court, and there, the
6 Attorney General, on behalf of the Commission, argued that
7 the -- as we did, as a matter of state statutory
8 construction, that this -- the consequence doesn't follow,
9 and there is a whole other range of --

10 QUESTION: So it might have been reasonable for
11 the claimant to think that the 180 days wasn't binding
12 either.

13 MR. PALM: No, no, the 180 days says he shall file
14 the charge within --

15 QUESTION: Well, I know, but -- yes, but what is
16 the hearing date?

17 MR. PALM: You mean the factfinding?

18 QUESTION: A hundred and twenty.

19 QUESTION: A hundred and twenty, so he wouldn't --
20 he might think that the hearing was set beyond 125 days
21 wasn't crucial at all.

22 MR. PALM: That's correct, and the notice that was
23 sent him didn't indicate --

24 QUESTION: Any defect in anything.

25 MR. PALM: No. It said, you have to appear at the

1 given day. It didn't say, check your calendar and see if
2 this was in the 120 days.

3 QUESTION: I know, but even if he knew what the
4 statute said, he wouldn't necessarily conclude that it was
5 crucial.

6 MR. PALM: That's right. He wouldn't know from
7 that what the consequences would be of a failure to have it
8 on time.

9 And on the statute itself -- I'm sorry, on the
10 notice itself, it did convey the requirement that he appear
11 at that date or his charge might be dismissed, which he did,
12 and he was prepared to proceed.

13 The other aspect of the problem I have with the
14 statute of limitations, to complete my answer here, is that
15 it also can be seen really as a precondition to -- as access
16 has been seen by this Court in other circumstances, that
17 there is a condition to the second path of the entitlement
18 here, which is the use of the coercive powers of the state,
19 and that is that you initiate your action on time, that you
20 pay the filing fee, that you get it there.

21 And as I say, we don't -- either one of these
22 analyses doesn't affect us, because our charge was filed on
23 time, and the responsibility was directly that of the
24 Commission and not of our client to make sure the conference
25 was held on time.

1 QUESTION: Counsel, if in fact your client has a
2 cause of action against the state, for example, for
3 negligence because of what happened, do you have a problem
4 then under the Parrott case and the ensuing case that
5 followed Parrott in holding that a post-deprivation remedy,
6 in effect, will suffice?

7 MR. PALM: In our opinion, Parrott just doesn't
8 apply to this case. This is a case involving procedures,
9 and not the -- like negligent driving or something of this
10 sort, adjudicatory procedures, which just should not be put
11 in the same category as the negligent handling of a hobby
12 kit or the negligent driving of an automobile.

13 Indeed, in the Bonner opinion, Bonner v. Coughlin,
14 written by then Judge Stevens, the analysis of which was
15 adopted in great part in Parrott, it was made clear,
16 absolutely clear that this analysis was not to apply to
17 procedures, because they are at the very heart of the due
18 process requirement.

19 QUESTION: But what you want, what was sought in
20 this case was reinstatement.

21 MR. PALM: That's right. In any event, it
22 wouldn't be adequate remedy.

23 QUESTION: And you are not going to get that remedy
24 against a state officer.

25 MR. PALM: That's correct. That's correct, but I

1 thought the question was whether we would get to that --

2 QUESTION: Yes, exactly.

3 MR. PALM: I'm sorry.

4 QUESTION: Well, if you win your case here, what
5 relief do you say you are entitled?

6 MR. PALM: Well, this Court should reverse the
7 writ of prohibition that was entered by the Illinois Supreme
8 Court, and we should then go back to the Commission, and the
9 investigation should be concluded, and the Commission should
10 -- the investigator should first decide whether there is
11 substantial evidence that my client was discriminated
12 against by Zimmerman Brush Company --

13 QUESTION: All of this, and you want the 120-day
14 hearing now?

15 MR. PALM: No, we don't -- we have lost that.
16 There is no way we can have that back within --

17 QUESTION: Well, you want a hearing, which would
18 be the one you would have had but for the boner of the
19 Commission.

20 MR. PALM: That's true. I'm sorry.

21 QUESTION: Wouldn't you? That's the kind of
22 hearing you want.

23 MR. PALM: That is exactly right.

24 QUESTION: What you are really arguing for, I take
25 it, is an equitable concept that that should be done that

1 should have been done.

2 MR. PALM: That is correct.

3 QUESTION: And if you win in that hearing, the
4 result is reinstatement.

5 MR. PALM: No, no.

6 QUESTION: What is it?

7 MR. PALM: The result -- this would be the
8 substantial evidence.

9 QUESTION: I know, but what if you win?

10 MR. PALM: Overall --

11 QUESTION: Yes.

12 MR. PALM: -- and we win by a preponderance of the
13 evidence?

14 QUESTION: Yes.

15 MR. PALM: Mr. Logan will get reinstatement to his
16 job.

17 QUESTION: Yes.

18 MR. PALM: And -- as well as the other remedies.

19 QUESTION: All you really want is just to go ahead.

20 MR. PALM: That is all we want. All Mr. Logan has
21 wanted from the beginning, from the day he filed his charge,
22 five days after he believes he was discriminated against, is
23 a chance to prove that. And if he was discriminated
24 against, then he is entitled to the remedies, reinstatement
25 and the other remedies that are provided, and if he is not,

1 then he loses, and then he has the regular appellate -- he
2 does have the appellate remedies provided in Illinois.

3 QUESTION: What is the time lapse here now since
4 the day when you should have had your hearing as you claim,
5 and the employer could have come in and defended? How much
6 time has elapsed?

7 MR. PALM: The time --

8 QUESTION: About 18 months.

9 MR. PALM: Eighteen months?

10 QUESTION: Counsel, is there anything in the
11 Illinois procedure that would provide for mediation at an
12 intermediate stage of the administrative proceeding?

13 MR. PALM: Throughout the investigative stage,
14 emphasis is placed upon settlement, and one of the purposes
15 of the factfinding conference is to discuss settlement and
16 the possibility of reaching an accommodation without
17 adjudication. That is done off the record. Then there is a
18 separate opportunity provided for conciliation before the
19 complaint issues, and if that fails, between the parties,
20 and both parties -- well, and the complainant particularly
21 has some obligations to be reasonable in the settlement
22 demands, then they issue the complaint, and the parties go
23 about discovery and proceed to the hearing.

24 QUESTION: What if this time lag of 18 months, all
25 the fault of the state, not of either of the parties, has

1 impaired the posture of the employer in terms of asserting
2 its position, defending against the claims?

3 MR. PALM: That is a problem inherent with any
4 case that is on appeal and reversal is made and it is sent
5 back to follow the right procedures, and I think it is a
6 part of the cost that one has to bear within the system.

7 QUESTION: And the employer here pursued the writ
8 of prohibition --

9 MR. PALM: That's correct.

10 QUESTION: -- after losing out before the
11 Commission and the investigator.

12 MR. PALM: That's right. There would have been a
13 hearing on the 125th day, and there has never been a claim
14 that the five-day period in any way affected their ability
15 to come forward with evidence or in any way to be adequately
16 prepared for the hearing.

17 QUESTION: Well, in effect, what you are saying is
18 that if the employer's posture has been prejudiced, the
19 employer bears a large responsibility for that himself, by
20 the way he -- in the litigation.

21 MR. PALM: That's right. That's right. He caused
22 the prejudice by initiating the action in the Illinois
23 Supreme Court, since there was none at the end of the 125th
24 day.

25 Thank you.

1 CHIEF JUSTICE BURGER: Mr. Canel?

2 ORAL ARGUMENT OF JAY A. CANEL, ESQ.,

3 ON BEHALF OF THE APPELLEES

4 MR. CANEL: Mr. Chief Justice, and may it please
5 the Court, I have never seen Laverne Logan, but I presume
6 that on the day he walked into Zimmerman Brush Company and
7 asked for a job, they recognized that he was a handicapped
8 person, and knowing of that fact, they nevertheless hired
9 him as a probationary employee. They gave him his first job
10 in the shipping room, and when they felt he was unable to
11 handle that work, they gave him a second job on a machine
12 where he could sit down, but when they didn't feel he could
13 do that either, they discharged him before the end of the
14 probationary period so that he would not be under the union
15 contract.

16 Logan thought Zimmerman had discriminated against
17 him, but if this alleged discrimination had taken place
18 before 1975 in the state of Illinois, Logan would have no
19 rights at all to sue Zimmerman for anything.

20 In 1975, the Illinois Legislature enacted
21 legislation prohibiting employers from discriminating
22 against persons with physical handicaps. That statute did
23 not give Logan an entitlement to sue his private employer
24 under Illinois state law. What it gave him was the right to
25 complain to the State Fair Employment Practices Commission,

1 and to tell that Commission that he thought that his
2 employer had discriminated against him because of his
3 handicap.

4 Once Logan made that complaint to the State Fair
5 Employment Practices Commission, the issue was left up to
6 the Commission, and according to Illinois state statutes,
7 that Commission was required to do several things.

8 First, it was required to hold a conference within
9 120 days, and that conference serves several purposes. One
10 of the major purposes of that conference was that it was for
11 possible conciliation and settlement of Logan's claim.
12 Another reason for the conference was to take some evidence.

13 The statute also provided that there was a 180-day
14 period of time within which the Commission had to make a
15 decision whether or not a claim against any employer could
16 go forward. Only after the Fair Employment Commission did
17 both, and ruled in Logan's favor, did Logan ever have a
18 right to pursue any claim for reinstatement or back pay
19 against his employer.

20 Now, through no fault of Logan's, and I add,
21 through no fault of Zimmerman Brush Company, Logan's case
22 never got past Step One. He never had the mandatory 120-day
23 conference.

24 Previous Illinois Supreme Court cases had ruled
25 twice as a matter of state law that the 180-day period of

1 time within which the Fair Employment Practices Commission
2 was required to decide whether or not there was substantial
3 cause for a discrimination charge to go ahead was mandatory,
4 and in the second of the two cases, a consolidated case,
5 Board of Governors and Royal Crown Corporation versus the
6 Commission, one of those cases found that a handicapped
7 person could not go ahead on his claim because the
8 Commission had not acted within the 180 days.

9 QUESTION: But do I understand, Mr. Canel, that
10 the conference would have been held on the 125th day but for
11 Zimmerman seeking a writ of prohibition in the Supreme Court?

12 MR. CANEL: The conference would have been held.
13 That is correct, Justice Brennan.

14 QUESTION: Well, then, I suppose the prospect --
15 at least there was a prospect, was there not, that the
16 Commission would have completed its work within the 180 days
17 but for the intervention of the prohibition proceeding.

18 MR. CANEL: Yes, Justice Brennan, but the fact is,
19 and I was not a party to those proceedings at that time, but
20 the fact is, Zimmerman was right as a matter of state law,
21 and I think for the Court to say, well, it is Zimmerman's
22 fault, they went ahead and they filed a petition for writ of
23 prohibition, and so it shouldn't make any difference to
24 Zimmerman if they were wrong in getting that writ of
25 prohibition.

1 The fact is, they were right in getting the writ
2 of prohibition. As a matter of state law, they were
3 correct. The state says, yes, the language in the statute
4 for the 120 days and the 180 day provisions is identical,
5 and you were right.

6 QUESTION: But that doesn't answer the Federal
7 constitutional questions that are raised.

8 MR. CANEL: No, sir, it does not. It does not.

9 QUESTION: Has the statute been changed since this
10 all took place?

11 MR. CANEL: The statute has been changed. Now the
12 120-day -- well, the whole law is put into the Human Rights
13 Act, and the 120-day provision is made discretionary. The
14 180-day period is still mandatory.

15 The Zimmerman -- well, as I said, in the Zimmerman
16 case, when the Court finally got to it, it had construed --
17 the Illinois Supreme Court was construing language relating
18 to the 120-day hearing which was exactly the same language
19 that they had construed twice before with reference to the
20 mandatory provision in the 180-day hearing, and it is
21 interesting to note --

22 QUESTION: So it is the thrust of this argument
23 that they should have known that the 120-day period was
24 jurisdictional because of the --

25 MR. CANEL: That is what the Supreme Court said.

1 That is what the Supreme Court of Illinois said.

2 QUESTION: Of course, but the --

3 MR. CANEL: They said, we use the same language in
4 the 120 -- in the 180-day as in the 120-day. We have said
5 twice that that was jurisdictional, and they should know
6 that the 120-day period is also jurisdictional.

7 QUESTION: Of course, your client did know it, but
8 the hearing examiner didn't.

9 MR. CANEL: Yes, that's correct.

10 QUESTION: That is what made a case in your
11 Supreme Court.

12 MR. CANEL: Well --

13 QUESTION: Because the Commission and your client
14 disagreed on that.

15 MR. CANEL: But that whole --

16 QUESTION: Isn't that right?

17 MR. CANEL: That is correct, Justice White. That
18 is correct. But there is also --

19 QUESTION: Well, is your answer to that in part
20 that they can't confer jurisdiction by agreement?

21 MR. CANEL: I am sorry, would you --

22 QUESTION: They couldn't confer jurisdiction where
23 the time had already lapsed. Is that your claim?

24 MR. CANEL: They could have waived jurisdiction.

25 QUESTION: They could have waived.

1 MR. CANEL: Well, I said that, but I may be wrong.
2 I don't know whether or not they could have waived
3 jurisdiction.

4 QUESTION: Well, even if they couldn't, the
5 question is, should you have known it in advance.

6 MR. CANEL: Well, I assume that Zimmerman's
7 lawyers at that time knew it, but that doesn't really --

8 QUESTION: Well, the Commission didn't know.

9 MR. CANEL: Well, but the Illinois Supreme Court
10 said, Justice White, that the Commission should have known.

11 QUESTION: Well, they ruled --

12 MR. CANEL: The Illinois Supreme Court said, we
13 told you twice in identical language that the 180-day
14 provision is mandatory and you should have, by reason of
15 those two cases, known that when we use the same language,
16 when the legislature used the same language in the 120-day
17 provision, that that was also mandatory, and this all gets
18 down to a where do you draw the line argument.

19 The Illinois Supreme Court and the Illinois
20 statute both express substantial concerns for the rights of
21 the employer. The provision which Mr. Palm read to you from
22 the Illinois Act says it is also the public policy of
23 Illinois to protect employers and labor organizations
24 against unfounded charges of discrimination, and there is an
25 economic point here which I think was not properly made in

1 our brief, and which I should make to the Court.

2 I don't think that Logan had much of a case on the
3 facts, because he was --

4 QUESTION: Well, we are not concerned with that
5 now, are we?

6 MR. CANEL: I understand that, but it is
7 important. It is important from this point of view, and it
8 is important in judging the reasonableness of this 120-day
9 rule. The fact is, no matter how bad a case is, the case
10 becomes worth more and more money as to the defendant
11 employer the longer it languishes before some commission,
12 because the longer it languishes before some commission, the
13 more back pay is going to build up, and the more expensive
14 the reinstatement and back pay award will be, and so --

15 QUESTION: Am I correct, sir, that if it had not
16 been for the writ of prohibition, they would have pursued it?

17 MR. CANEL: I presume that that is correct.

18 QUESTION: Well, why are you arguing that he
19 brought all this on? He didn't.

20 MR. CANEL: But it was the --

21 QUESTION: He didn't, did he?

22 MR. CANEL: It was the --

23 QUESTION: You did. Am I right?

24 MR. CANEL: That's right.

25 QUESTION: You are the one that prolonged it.

1 MR. CANEL: And it was our right to do that under
2 the Illinois law, and it was our right to protect
3 ourselves --

4 QUESTION: Well, did that give you the right to
5 argue that the other guy was responsible for it?

6 MR. CANEL: Well, wait a minute. Justice Marhsal,
7 when we say the other guy was responsible for it, Zimmerman
8 was not responsible for the delay. It had a right to a
9 hearing within that time.

10 QUESTION: Well, who filed the court action?

11 MR. CANEL: The writ of prohibition was filed by
12 Zimmerman to enforce a right.

13 QUESTION: Well, that is what I am talking about.

14 MR. CANEL: To enforce a right, the Illinois
15 Supreme Court said it had.

16 QUESTION: And by doing that you delayed the whole
17 thing. If you had not done that, it might have been settled.

18 MR. CANEL: That is possible, but I don't --

19 QUESTION: And certainly we wouldn't be bothering
20 with it.

21 MR. CANEL: Well, it was through no fault of mine
22 that the Court was bothered with it.

23 QUESTION: No fault -- well, who filed it?

24 QUESTION: If an award had been entered against
25 Zimmerman by the Commission, Zimmerman could have appealed

1 through the Illinois court system on the same basis, could
2 he not?

3 MR. CANEL: But he would waive a right.

4 QUESTION: Right, but I mean, the delay might have
5 been just --

6 MR. CANEL: That is correct, Justice Rehnquist.
7 He could have said, and I think probably, based on the first
8 brief I filed in this case, and based on my client's change
9 of lawyers and change of attitude, he probably feels it
10 would have been the better thing for him to do economically
11 instead of becoming a cause celebre before the state and now
12 the U. S. Supreme Court.

13 But at that point in time, he listened to his
14 labor lawyer who was representing him, and the labor lawyer
15 said, you are entitled to have the hearing, and within 120
16 days. That legislation was enacted for your benefit. It is
17 not your fault that that hearing didn't take place in that
18 time, and you might as well take advantage of it, and if
19 anybody is at fault for failing to set the hearing at that
20 time, it is not Zimmerman and it is not Logan. It is the
21 state official who didn't follow the law of the state of
22 Illinois.

23 QUESTION: On the due process issue, supposing the
24 statute said, a similar procedure, but just said one out of
25 every ten complaints shall be dismissed without any hearing.

1 Just arbitrarily, at random, we will dismiss one out of
2 every five or ten. Would that violate any due process right?

3 MR. CANEL: I think so.

4 QUESTION: Why, because it is an arbitrary
5 dismissal?

6 MR. CANEL: It is an arbitrary -- it is an
7 arbitrary --

8 QUESTION: Well, why isn't this arbitrary from the
9 point of view of the litigants?

10 MR. CANEL: Well, if you look to the history of
11 these types of remedial statutes, all you have to do is look
12 at the history of the Federal Government, or the EEOC, which
13 has thousands of these cases sitting around for years at a
14 time, never getting tried, never getting disposed of, and
15 when you look at it in terms of the Illinois law, and my
16 former argument, which is, the more these cases hang around,
17 the more it costs the employer, even in a bad case, if he
18 loses one out of ten bad cases --

19 QUESTION: Well, I suppose they could always file
20 a motion to expedite, go in in 30 days and say, we don't
21 have to have the hearing for 120 but we would like to move
22 it along.

23 MR. CANEL: Well, but that -- but you are not
24 guaranteed that the motion is going to be expedited, that
25 the hearing is going to be expedited. You have no control.

1 Suppose the hearing officer comes back --

2 QUESTION: But your client was conscious of the
3 120-day limit, and knowing that, because they filed the
4 prohibition litigation promptly, knowing that, they could
5 have insisted on the hearing within 120 days. I think we
6 have to presume it would have been granted.

7 MR. CANEL: I don't think that you can presume
8 that it would have been granted. It might have been
9 granted. You don't know what the state administrator is
10 going to do when the state administrator gets a request --

11 QUESTION: But here, doesn't the record show that
12 the error was a miscalculation, and that the administrator
13 understood the 120-day obligation but didn't realize it was
14 jurisdictional?

15 MR. CANEL: The record shows no such thing.

16 QUESTION: Oh, I see.

17 MR. CANEL: The record shows only that the hearing
18 examiner set the initial hearing within 125 days. People
19 have argued that she was negligent when she did that. I
20 don't think that there is any evidence in the record that
21 she did it intentionally. It was done.

22 In any event, I think that there -- that it would
23 be -- certainly when you go back to the Illinois state law,
24 that state law is that at least at the time Logan's case was
25 pending, the 120-day hearing was required by state law. For

1 this Court to say that that requirement is an
2 unconstitutional deprivation of Logan's rights in this case,
3 it would have to come to the conclusion that that mandate
4 from the Illinois Legislature as construed by the Illinois
5 Supreme Court is wholly arbitrary or irrational.

6 And I submit to the Court, based on my economic
7 argument of the cases becoming worth more and more, costing
8 employers more and more the longer that they hang around in
9 administrative tribunals, and the fact that the Illinois
10 Legislature mandated that they hold a settlement conference,
11 that it would be, I think, improper for this Court to say
12 that when you have the legislature and the Supreme Court
13 giving clear directions to move these cases ahead, it would
14 certainly be wrong to say that that is irrational or
15 arbitrary.

16 QUESTION: What about this hypothetical case?
17 Supposing we agree with you now, and we sent it back and
18 affirmed and all the rest of it, and then next week another
19 case similar to this comes up, and on the 119th day a
20 hearing is scheduled, and the parties show up, and the
21 hearing examiner says, well, I am sorry, I decided not to
22 hold a hearing, go home, and he just refused to do it, and
23 everybody knew about it, and no hearing examiner would hear
24 them.

25 Would that still be due process in your view?

1 And if not -- Well, how is that case different
2 from this?

3 MR. CANEL: Well, the law -- you are looking at
4 two things, as to whether or not there is due process. Now,
5 first of all, this ultimate defendant in this lawsuit here,
6 Zimmerman Brush Company, in all those other cases which
7 involved pre-deprivation, post-deprivation hearings, the
8 action is always against the state official, the municipal
9 official, and not the private employer.

10 Even in the example, Justice Stevens, that you
11 put, you are saying that the action of the state official in
12 saying, I don't want to hold a hearing, it is ridiculous, I
13 am too busy, I would rather go see the Chicago Cubs play
14 ball today, so I am not -- I am not going to hold the
15 hearing.

16 That would be an unreasonable action and a
17 deprivation perhaps of Logan's rights, but Zimmerman --

18 QUESTION: It depends on what ball club you
19 support.

20 (General laughter.)

21 MR. CANEL: In Chicago you can't support any.

22 (General laughter.)

23 QUESTION: Counsel, it is difficult for me to see
24 how it is rational to say that some employees with
25 legitimate claims are going to get no hearing at all, such

1 as in this case, while other employees who may have
2 unfounded claims may be heard. I think there is a real
3 equal protection concern here, and as I looked at the
4 statute, there doesn't appear to be any requirement, is
5 there, that after this first conference is held, that the
6 remaining procedures occur within a particular amount of
7 time. Apparently Illinois can take as long as they want to
8 decide the ultimate case.

9 So, I am not sure that this 120 days has anything
10 to do with anything, except to arbitrarily cut someone off.

11 MR. CANEL: Well, I think that the statute is
12 clear that the Commission, at least, must resolve the issue
13 of whether there is substantial evidence to go forward
14 within 180 days. I don't think that this is an equal
15 protection case. I don't think that there are two classes
16 of people who are spelled out or treated under the Illinois
17 Fair Employment Practices Act, or now the Human Rights Act.

18 I think there is one class of persons, and I think
19 the problem with Laverne Logan's case is that he is in the
20 class of persons that ultimately must be protected. If he
21 was deprived of any rights in this case, then he was
22 deprived of those rights by reason of the fact that the
23 state commission erred. If the state commission erred,
24 first of all, that is not an error which was made by
25 Zimmerman.

1 And secondly, under those circumstances, as some
2 of the Court noted in the questions that they asked of Mr.
3 Palm, there is a right which Logan has, and that right, it
4 seems to me, is clear. He has a right under the Illinois
5 Court of Claims Act to make a claim against the person who
6 deprived Zimmerman of whatever rights he had or it had under
7 the law, and I don't think it is proper for this Court to
8 quantify those rights. I think suffice it to say the
9 Illinois Supreme Court said that it had that right.

10 So, the person who -- or the -- well, the person
11 who erred in this case was the Illinois Commission.

12 QUESTION: The state.

13 MR. CANEL: The state erred.

14 QUESTION: If the state -- if there is a denial of
15 due process, does it make any difference where the
16 responsibility for the error lies?

17 MR. CANEL: Well, certainly, because the
18 responsibility for the error, the person responsible, the
19 entity responsible for the error ought to bear the cross of
20 Logan's claim. Now, all -- Logan can't get reinstated if he
21 goes to the Court of Claims, but what Logan can get, and
22 what any successful litigant can get in a multitude of
23 actions and tort contract and whatever, is to get the
24 pecuniary value of what it was that he was deprived of.

25 QUESTION: Then if we make your case a precedent,

1 in Illinois, from now on, any employer facing a similar
2 action can protect himself from back pay and reinstatement
3 by filing a writ of prohibition.

4 MR. CANEL: No, that is absolutely untrue, Justice
5 Marshal. First of all, writs of prohibition are rarely
6 allowed in Illinois by our Supreme Court. It is by far the
7 exception.

8 QUESTION: Well, you have just given me three of
9 them in a row. Two before you and this one, that is three.
10 That is not --

11 MR. CANEL: I don't know that the other two cases
12 came up on an original writ of prohibition.

13 QUESTION: I thought you said that you had two
14 cases that were clearly on point.

15 MR. CANEL: Yes, sir.

16 QUESTION: And that the lawyer on the other side
17 should have known about them.

18 MR. CANEL: No, I --

19 QUESTION: There were two other cases.

20 MR. CANEL: I stay with the three cases on point.
21 All I am saying is, I don't think that the first two came up
22 on a writ of prohibition. They came up by way of appeal.

23 QUESTION: What I am saying is, you really don't
24 want to pay the man his back money. Is that what this case
25 is all about?

1 MR. CANEL: That I don't want to pay the man his
2 back money?

3 QUESTION: Yes.

4 MR. CANEL: No, if you look at the case --

5 QUESTION: Yes, Zimmerman. Is that not what the
6 case is all about?

7 MR. CANEL: If you look at the case that way, you
8 know, that is one way to look at it.

9 QUESTION: Well, how about --

10 MR. CANEL: I can look at the case by saying
11 that --

12 QUESTION: How about the other lawyers?

13 MR. CANEL: -- I want to have what rights, I --

14 QUESTION: How about the other lawyers for
15 Zimmerman before you? Was that what they wanted, too?

16 MR. CANEL: I think that they wanted the same
17 thing I do. They want to say that the employer has certain
18 rights under this Act which are deserving of protection,
19 just as Mr. Logan had rights which are deserving of
20 protection, and if those rights were -- if my rights were
21 violated or his rights were violated, then the person that
22 ought to pay the expenses entailed or the value of his
23 rights is the person who made the error in the first place.

24 Well, let me recap, because I think in answering
25 my -- I want to bring up one last point before I recap, and

1 I think I have touched on this, but in most of the cases
2 that Mr. Logan's attorneys have cited, where persons have
3 been deprived of due process or equal protection, and were
4 deprived by denied hearing, all of those cases involve suits
5 where the person depriving the plaintiff of his rights was
6 some governmental entity.

7 That is not true in this case, as far as Zimmerman
8 is concerned. If the cause of action goes against
9 Zimmerman, it is not a governmental entity. If Logan was
10 deprived of any rights in this case, as I said many times in
11 this argument, the deprivation --

12 QUESTION: Mr. Canel, is your argument that you
13 can never have a violation of the due process clause in a
14 procedure that governs litigation between private parties?
15 What about the Mullane case, where there is a suit by one
16 litigant against others, and the statutory procedure for
17 notice was held to be defective, and that preserved the
18 rights against the --

19 MR. CANEL: Yes, I believe that that is correct.

20 QUESTION: Wouldn't that be true here? Assume you
21 had, say, I don't know what it might be, there are all sorts
22 of things that could be wrong, a corrupt judge, for
23 example. You would say, granted, he was not necessarily
24 corrupted by the defendant, or a totally incompetent, or
25 insane judge. You could still reinstate the case, couldn't

1 you, and say that is a violation of due process?

2 MR. CANEL: Yes, but then the actor in that case
3 would be the corrupt or insane judge.

4 QUESTION: But you would still preserve the remedy
5 against the other litigant in a civil case, wouldn't you, if
6 the judgment were tainted by deprivation of due process?

7 MR. CANEL: Under the facts of the case, the facts
8 of the hypothetical case as you stated, I --

9 QUESTION: Well, similarly here. If the statutory
10 procedure, as applied in this particular case, is
11 unconstitutional, why shouldn't the remedy survive against
12 the private party?

13 MR. CANEL: You have answered -- Justice Stevens,
14 you have answered your question. If it is unconstitutional,
15 it does survive against the party.

16 QUESTION: Well, all I am suggesting is, you have
17 argued it is not unconstitutional unless it was a suit
18 against the judge himself, or the state itself, as I
19 understood you.

20 MR. CANEL: Because the action in this case was by
21 -- the fault in this case was by the state of Illinois --

22 QUESTION: The procedural shortcoming was
23 attributable to the state.

24 MR. CANEL: Under the facts of this case, two
25 parties were deprived of rights, and to look at it --

1 QUESTION: But I don't see how that is any
2 different from my example of one out of ten cases getting
3 thrown out of court arbitrarily, and it seems to me you
4 agreed that would be unconstitutional.

5 MR. CANEL: But you are suggesting --

6 QUESTION: This is sort of like a lottery.

7 MR. CANEL: No, you are --

8 QUESTION: This fellow didn't get a hearing in
9 time, so he is through.

10 MR. CANEL: But, Justice Stevens, you are
11 suggesting a statute which says one out of ten cases must be
12 thrown out, and I would agree that that is unconstitutional,
13 but that is not what happened in this case.

14 QUESTION: Well, this is --

15 MR. CANEL: There is no such requirement in this
16 case. There is a -- There is a requirement that says you
17 shall have a hearing within 120 days, and that hearing is
18 for the protection of everybody. The Illinois Supreme Court
19 said, it is for the protection of the employer as well as
20 the employee.

21 QUESTION: But the state of Illinois has said to
22 this man, even though you have done everything the statute
23 requires you to do procedurally, you can't have a hearing.
24 Now, is that constitutional?

25 MR. CANEL: Well, but he can have a hearing. He

1 can have a hearing before the Illinois Court of Claims, and
2 he can get the monetary --

3 QUESTION: But not against you.

4 MR. CANEL: That's right, but I didn't do anything
5 to deprive the man of his constitutional rights. There is
6 nothing that Zimmerman Brush Company did which deprived
7 Logan of a constitutional right. If it acted inequitably,
8 as Judge Marshal thinks it did by taking it --

9 QUESTION: No, but the question is whether he lost
10 a claim against Zimmerman because he pursued it pursuant to
11 an unconstitutional statute. If the statute is
12 unconstitutional as applied to this case, it cannot bar his
13 claim.

14 MR. CANEL: All right. I would agree with that.
15 But I dispute the fact that the statute is unconstitutional
16 on its facts. To say that it is unconstitutional on its --
17 I'm sorry, on its face. To say that it is unconstitutional
18 on its face, then this Court would have to say --

19 QUESTION: I didn't say on its face. On the facts
20 as applied in this case.

21 MR. CANEL: Well, it is only -- it would only be
22 unconstitutional on its facts as applied in this case if
23 Logan was deprived of any remedy whatsoever, and what this
24 Court has previously said in Parrott v. Taylor is that there
25 is another way to give someone a remedy --

1 QUESTION: Well, where does he get the remedy of
2 getting his job back?

3 MR. CANEL: He doesn't. He can't.

4 QUESTION: Well, he doesn't get that remedy.

5 MR. CANEL: But he can get the monetary --

6 QUESTION: Well, why do you -- Does he get back
7 pay?

8 MR. CANEL: Yes, he gets the --

9 QUESTION: How does he get back pay?

10 MR. CANEL: He gets the economic value of not
11 having a job --

12 QUESTION: How does he get back pay?

13 MR. CANEL: -- and the economic value of back pay
14 from the people who were at fault.

15 QUESTION: That is if the Court of Claims decides
16 to give it to him.

17 MR. CANEL: And that depends on the merits of his
18 case, which I think is not truly before this Court.

19 QUESTION: Mr. Canel, suppose hypothetically that
20 the hearing examiner or whatever person was charged with
21 holding this 120-day proceeding had at the 119th day
22 proceeded without any notice to Zimmerman Brush, and decided
23 that he was to be reinstated, Logan was to be reinstated and
24 back pay allowed.

25 Would you think that was a denial of due process?

1 MR. CANEL: I am sorry, if --
2 QUESTION: On the 119th day the hearing officer,
3 whoever this person was --
4 MR. CANEL: Yes.
5 QUESTION: -- called Logan in, but didn't give any
6 notice to Zimmerman Brush
7 MR. CANEL: Oh, I'm sorry. Absolutely, that --
8 QUESTION: -- and said, all right, after hearing
9 his story, you are reinstated, and you will get \$9,321 back
10 pay. That is denial of due process?
11 MR. CANEL: Denial of due process to Zimmerman.
12 QUESTION: Now, that would be no fault --
13 MR. CANEL: He was entitled to be at the hearing.
14 QUESTION: There would be no fault on the part of
15 Logan if that happened.
16 MR. CANEL: That's right.
17 QUESTION: He would be an innocent beneficiary.
18 MR. CANEL: Yes.
19 QUESTION: But it would be denial of due process.
20 MR. CANEL: Absolutely.
21 QUESTION: Which could be corrected by a judicial
22 proceeding here or elsewhere.
23 MR. CANEL: That is absolutely correct, and if
24 Logan was thereby deprived of any future rights that he
25 might have against Zimmerman, then I would say that the

1 action would have to be against the state official who did
2 the wrong.

3 I want to conclude by saying this. I think that
4 what the Illinois Legislature did in this case was not
5 arbitrary and was not irrational. They had in mind a system
6 which moved these cases along, and when you are fighting
7 these cases in court and in the trenches, on either side, I
8 think it is important that the state have an interest in
9 moving these cases along. It is important to the employee,
10 because if he is right, he ought to get his job back. It is
11 important to the employer because if he is right it is going
12 to minimize any ultimate award which is rendered in the case.

13 The Illinois Supreme Court had previously said on
14 two occasions that the 180-day period was mandated under the
15 statute. When they acted in the Zimmerman case, they said,
16 we are only construing the law, the statute, the same way we
17 did before, and I believe therefore that, first of all,
18 under the Illinois procedure, as enacted by the state of
19 Illinois, the state had no obligation to grant Logan this
20 right in the first place.

21 Having granted him this right, they must grant it
22 to him on a reasonable basis, but I say that as a first step
23 in their statutory proceeding, the procedures that the state
24 of Illinois chose to follow were far from being irrational
25 or arbitrary. Those procedures had a basis in fact. Those

1 procedures should have been followed.

2 And as I have said in this argument, Mr. Logan has
3 a right under Parrott v. Taylor to get at least the economic
4 equivalent of what he was deprived of against the state of
5 Illinois. If he doesn't have it through the Court of
6 Claims, certainly he has it under a 1983 action.

7 Thank you.

8 CHIEF JUSTICE BURGER: Do you have anything
9 further, Mr. Palm? You have two minutes remaining.

10 ORAL ARGUMENT OF GARY H. PALM, ESQ.,

11 ON BEHALF OF THE APPELLANT - REBUTTAL

12 MR. PALM: Just a few brief points. First of all,
13 with respect to the use of the writs of prohibition by the
14 employers, I am not sure with respect to the
15 Springfield-Sangamon case, but clearly with respect to Board
16 of Governors versus the Illinois Fair Employment Practices
17 Commission, that, too, was an original action seeking a writ
18 of prohibition.

19 QUESTION: But you don't question the right of
20 Zimmerman to take those steps, do you?

21 MR. PALM: Well, we did question in the Illinois
22 Supreme Court whether there shouldn't be an exhaustion
23 requirement for them through the Administrative Review Act,
24 and then they could still preserve the error and assert it
25 on appeal eventually.

1 The other comment, Justice O'Connor is correct.
2 There is no requirement that the Commission ultimately
3 decide at any particular time after a finding of substantial
4 evidence, it can take any number of years.

5 And, Chief Justice Burger, we of course do believe
6 that it is a mistake and it is irrational to place the
7 burden, the blame where the responsibility doesn't exist,
8 and here, what highlights the irrationality is that Mr.
9 Logan is worse off than if he had lost on the merits.

10 If he had lost on the merits, then he could have
11 taken an appeal, and at least had the protection of the
12 reviewing courts in Illinois, whether indeed he should have
13 lost or not. As it is, he lost without any decision
14 whatsoever, and no opportunity for review, and that, we
15 contend, violates due process, and he should be given that
16 opportunity.

17 Thank you.

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

20 (Whereupon, at 2:05 o'clock p.m., the case in the
21 above-entitled matter was submitted.

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Laverne L. Logan, Appellant v. Zimmerman Brush Company - 80-5950

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BY Sharon Lynn Connelly

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