ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1578

TITLE ROBERT R. SHAW, ETC., ET AL., Appellants
v.
DELTA AIR LINES, INC., ET AL.

PLACE **Washington, D. C.**

DATE January 10, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT R. SHAW, ETC., ET AL.,

Appellants

v. No. 81-1578

DELTA AIR LINES, INC., ET AL.

Washington, D.C.

Monday, January 10, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:52 a.m.

APPEARANCES:

DEBORAH BACHRACH, ESQ., Assistant Attorney General of New York, New York, N. Y.; on behalf of the Appellant.

GORDON DEAN BOOTH, JR., ESQ., Atlanta, Georgia; on behalf of the Appellees.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Ms. Bachrach, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF DEBORAH BACHRACH, ESQ.

ON BEHALF OF THE APPELLANT

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

This case presents two distinct issues. First, whether ERISA, the Employee Retirement Income Security Act of 1974, preempts the New York State Human Rights Law to the extent that law prohibits discrimination in employee benefit plans.

The second issue is whether ERISA preempts the New York State Disability Benefits Law.

The Court of Appeals for the Second Circuit found both laws preempted, a result never intended by Congress and at odds with the language of ERISA.

Turning first to the Human Rights Law, the dispositive language is in Section 514(d) of ERISA. Section 514(a) --

QUESTION: Where is that set forth in the brief?

MS. BACHRACH: Pages four and five of the blue brief.

QUESTION: Thank you.

MS. BACHRACH: ERISA, Section 514(a), provides that ERISA supersedes state laws which relate to employee benefit plans. Section 514(d) directs that that language shall not be construed so as to alter, amend, modify, invalidate, impair, or

supersede any law of the United States.

To preempt the New York State Human Rights Law would impair Title VII.

A review of the legislative history and the statutes makes clear the inter-relationship between the state fair employment laws and the federal fair employment law and shows that to preempt the New York Human Rights Law would, indeed, impair that statutory scheme.

Title VII was enacted in 1964. At that time, more than half the states had fair employment legislation. Congress examined the statutes in the states and designed the federal scheme to supplement the state statutes.

In fact, the role of the state proceedings in the Title VII scheme was so integral that Senator Humphrey was lead to describe Title VII as a states' rights or states' responsibility bill.

The importance of a multi-remedy approach to irradicating employment discrimination was reiterated in 1972 when Title VII was amended to correct certain deficiences in the statute and to strengthen the national policy against employment discrimination.

Again, the importance of a multi-remedy approach on the state level, on the local level, and on the federal level to irradicate employment discrimination was reiterated.

QUESTION: Now, the Solicitor General, as I understand

it, has suggested that what all of this means is that ERISA would invalidate New York's substantive law, but not its procedural law, if you will. Would you address yourself to that at some point in your discussion?

MS. BACHRACH: As I understand the Solicitor's suggestion, he is saying that this Court need only reach the situation where New York law provides more protection than state law, but need not reach that situation where the protections are identical.

However, ERISA permits no such distinction. It does not support the Solicitor General's approach. ERISA seeks to impairing any federal law and it would impair Title VII equally if the New York Human Rights Law were preempted to the extent it went beyond Title VII or to the extent it provided identical protections and in procedural protection.

QUESTION: It requires sort of a strained interpretation, doesn't it, to say that New York law is a federal law?

MS. BACHRACH: We don't suggest the New York law is a federal law. What we suggest is that when Congress developed the Title VII scheme, the foundation was the state laws. Congress was aware, and has always been aware, that state laws were not identical to the federal law.

And, in fact, it discussed New York law in 1964 and noted that New York's protections were greater than those being offered by Title VII and Congress intended the states' law to

survive, to be utilized as part of the Title VII process; to give states the opportunity to apply their laws first, and, indeed --

QUESTION: You can say that, and you are perfectly correct so far as Title VII is concerned. Title VII did intend state laws to survive and to be used. But, I think it is a different question to say that that made the state laws that were allowed to survive the federal law.

MS. BACHRACH: First of all, New York does not, by any means, suggest that it is a federal law, but rather to preempt New York's law would impair the federal scheme.

QUESTION: Simply because it was allowed to survive after Title VII?

MS. BACHRACH: No. That is obviously the first step of our analysis, but it was intended to go beyond. When Congress designed Title VII, it intended the states to go beyond Title VII. Title VII provided only the minimum protection. So, if this Court preempts the New York law to the extent it goes beyond Title VII, small employers in this country will face no prohibitions against employment discrimination, because Title VII only covers employers with more than 15 employees.

QUESTION: But, really Title VII left the decision as to employers below of 15 or less up to the individual states, didn't it?

MS. BACHRACH: Yes.

QUESTION: It was really neutral as to what kind of policy the state enforced with respect to employers of less than 15.

MS. BACHRACH: I think it would be more accurate to say that it encouraged the states to take the first step to irradicate employment discrimination. It was a problem on the state level, but had not risen to being a problem yet on the national level.

QUESTION: Well, why do you say that it encouraged -- That it is not accurate to say it is simply left up to the states, but rather the states were, in your words, "encouraged to take the first step?" Would you have some of the legislative history?

MS. BACHRACH: I think that if we look at the legislative history in 1978, when Congress was considering the Pregnancy Discrimination Amendment --

QUESTION: Was this after ERISA was passed?

MS. BACHRACH: Yes, it was obviously -- The history was three and four years later.

CHIEF JUSTICE BURGER: We will resume at 1:00.

(Whereupon, at 12:00 noon, the case in the above-entitled matter was recessed, to reconvene at 1:00 p.m., this same day.)

AFTERNOON SESSION

(1:00 p.m.)

JUSTICE BRENNAN: You may proceed, Ms. Bachrach, when you are ready.

MS. BACHRACH: May it please the Court, at the lunch break, I was discussing the 1978 Pregnancy Amendment to Title VII. At that time, both the Senate report and the House report make clear that Congress assumed that state laws prohibiting discrimination on the basis of pregnancy were in effect and would remain so after the Pregnancy Amendment.

The House report and the Senate report examined the experiences of employers in states prohibiting discrimination on the basis of pregnancy and more than 23 states have laws prohibiting such discrimination. And, based on that, on the experience at the state level, both the Senate and the House reports concluded that the economic impact of these pregnancy amendments would not be unduly burdensome, because employers in more than 23 states were already under state law obligation to provide equal benefits for pregnancy and related medical conditions.

Now, this is particularly significant since the major impact of the Pregnancy Amendment was in the context of employee benefit plans, medical plans, health plans, disability plans.

The co-sponsor of the Pregnancy Amendment were Senators Williams and Javits, who were two of the principal architects of

ERISA and it is never doubted for a moment in 1978 that state laws prohibiting discrimination on the basis of pregnancy were in effect and would remain so in the future.

In fact, Senator Williams described these amendments as reinforcing state laws prohibiting employment discrimination.

ERISA, the legislative history to ERISA, in 1974 also underscores that Congress intended state laws prohibiting discrimination in employee benefit plans, all state laws to remain in effect.

ERISA does not include a non-discrimination provision, although in the debates it was stated on more than one occasion that discrimination in benefit plans was to be considered one of the most serious forms of discrimination.

Members of the House and Senate were dissuaded from offering a non-discrimination amendment to ERISA only upon being reassured by ERISA's sponsors that Title VII non-discrimination provisions would be fully applicable.

QUESTION: And, they remain fully applicable, do they not, Title VII non-discrimination provisions?

MS. BACHRACH: If this Court reverses the Second Circuit, they would remain --

QUESTION: Title VII non-discrimination provisions are contained in the substance of Title VII, aren't they? And, since it is a federal law, it would not be preempted by ERISA.

MS. BACHRACH: We would suggest otherwise. We would

suggest that Title VII non-discrimination provisions start with Title VII and go beyond Title VII and go into the states, because the states --

QUESTION: What do you mean, "go into the states?"

MS. BACHRACH: That the federal scheme in Title VII was built on the laws in effect in 1964 in the states. And, when Congress developed the scheme, Congress intended the state laws to remain in effect and it was aware at that time, in 1964 --

QUESTION: There is no question that Congress intended in 1964 that those laws remain in effect if they were in effect in the states. It left that entirely up to the states. But, the question is what did Congress mean when they enacted ERISA in 1974? It saved only federal laws, not state laws that were otherwise exempted from preemption by some other statute.

MS. BACHRACH: I would state it slightly differently and I would say that what Congress did in 1974 was to make sure that nothing would -- That the preemption provisions of ERISA would not be construed as to even alter in any way the protections of any federal law.

QUESTION: Well, do you mean that what Congress did in enacting ERISA was, in effect, to say Title VII saves state laws in this respect and ERISA continues that scheme. Is that what you are saying?

MS. BACHRACH: Yes, and more. Not only ~~that~~ does Title VII

saves state laws, but it utilizes those state laws and it encourages the states to go further.

The Solicitor General seems to suggest that this Court could come up with a workable preemption formula which would save state laws that are identical to Title VII and only preempt state laws which provide greater protection than Title VII.

We would suggest that there is no workable formula because identity of statutory language does not mean that the state law and the federal law give the same protection and this case amply demonstrates that, because in 1976, New York State's Human Rights Law forbid discrimination on the basis of pregnancy. Excuse me. In 1976, New York State's Human Rights Law prohibited sex discrimination. In 1976, Title VII prohibited sex discrimination, but in December 1976, this Court and the New York Court of Appeals reached contrary conclusions as to whether or not that prohibition against sex discrimination included discrimination on the basis of pregnancy.

So, if we try to fashion some formula which says which state laws fall on which side of the line, we are confronted with quite a problem, or, better yet, the EEOC would be confronted with a problem, because every time the complaint of discrimination in a fringe benefit plan was filed with EEOC, before it could decide whether to defer to the state agency, as it is required to do by Title VII, it would first have to

determine what state law said on the subject of this type of discrimination. It would then have to decide what federal law said on this type of discrimination and only if state law and federal law were identical could it then defer to the state agency.

QUESTION: I don't think I understood the Solictor General's suggestion in quite the same way. It appeared to me that what was being suggested was that New York can regulate the employer but not the plan and that New York could require employers to set up certain, for example, disability benefits, plans, that do govern solely the benefits within the State of New York for that employer and could seek enforcement in that fashion.

MS. BACHRACH: I believe that was the Solicitor's argument only as to the Disability Benefits Law.

QUESTION: Right.

MS. BACHRACH: And, as to the Human Rights Law, the Solicitor General took the position that New York State's Human Rights law was preempted to the extent it provided protection beyond Title VII and it urged this Court not to reach the situation where the two statutes appear to be congruent.

However, we would suggest it is impossible to make any dividing line between what appears to be the same language in theory and in practice how state courts and the federal courts have interpreted that language which may not always be

the same.

If New York State's Human Rights Law is preempted, the EEOC would be unable to defer any complaints of employment discrimination in benefit plans to state agencies. That would mean that the caseload of EEOC would rise dramatically. It would also mean that the caseload of the federal courts would rise dramatically since the EEOC has no authority to order the employer to provide any relief. So that all victims of discrimination in employee benefit plans must now go through a court system, a federal court system. And, the administrative agency process that would ease the burden on victims of discrimination would be eliminated by preemption.

This is contrary to the decisions of this Court which have taken pain to preserve state authority in the area of employment discrimination.

Just last term in the Kremer case this Court looked at the relationship between state laws and federal laws in this area and it noted the importance of state proceedings to federal law in the area of employment discrimination and as a result of that this Court held that state judgments, state court judgments, in the area of employment discrimination were entitled to full ~~phase~~ faith and credit in the federal courts. Any other decision would have violated basic tenants of federalism and would have served to decrease the incentive for states to develop effective and meaningful employment discrimination

systems.

I cannot think of anything that would serve to reduce the incentive on states to develop effective and meaningful employment discriminations than to say that states may not prohibit discrimination in any employee fringe benefits, child care, health benefits, pension benefits, training programs, apprenticeship programs.

The state system would be effectively torn down by not allowing us to prohibit those forms of discrimination which have proved to be problematic on the state level, but have not yet risen to the level of a national problem.

QUESTION: You argue as though we were writing on a clean slate. Isn't the question just a statutory interpretation as to what Congress intended?

MS. BACHRACH: Yes.

QUESTION: Shouldn't we talk about that? You talk as though we had a choice. Maybe we do.

MS. BACHRACH: We think the Congress that enacted ERISA intended that in the area of employment discrimination that the principles enunciated in Title VII control and --

QUESTION: Is that argument all predicated on 514(d)?

MS. BACHRACH: It is predicated on 514(d) and on the specific legislative history where --

QUESTION: And you say 514(d) is to be read how?

MS. BACHRACH: That the preemption provision may not

be construed so as to any way alter --

QUESTION: Alter what?

MS. BACHRACH: A federal law.

QUESTION: What federal law?

MS. BACHRACH: Title VII. And we say that to preempt the Human Rights Law would alter, indeed, in many cases, impair the Title VII scheme that Congress envisioned in 1964 when it enacted Title VII, repeated in '72 when it amended Title VII and repeated again in '78.

QUESTION: There just wouldn't be a state welfare law with respect to benefit plans. It wouldn't otherwise affect state law, but Title VII says you only need to defer to state law when a state has a law. A state doesn't need to have a law, does it, and some states don't.

MS. BACHRACH: No, some states don't. Most states --

QUESTION: So Title VII operates on its own. They don't defer to anything.

MS. BACHRACH: Title VII was formulated on the assumption that the states would take pain to irradicate employment discrimination at the local level.

QUESTION: That simply isn't correct. I think Title VII was put together because Congress felt many states weren't doing much about employment discrimination and that a national law was necessary because there was such unevenness in the states. Do you disagree with that?

MS. BACHRACH: No. But, I think it goes beyond that, that Congress hoped and, indeed, set up a system to encourage states to enter the field and that is why it required the 60-day deferral, the deferral to state agencies to irradicate this form of discrimination; to apply state law in its entirety, state rules of evidence, state rules of damages, would all apply, not simply for states to apply federal law, but for states to apply state law and to get a handle on the types of pernicious employment discrimination that Congress recognized in '64 and that the states recognized in the years to come.

As I see that my time is running short, I would like to briefly address the problem of ERISA preemption of the New York State Disability Benefits Law, because if the Second Circuit's decision is affirmed, New York will be unable to apply its Disability Benefits Law to any employer unless that employer happens to maintain disability benefits in a separate administrative unit. This decision will wreak havoc --

QUESTION: Well, can't New York require the employers to do exactly that? Can New York enact a law and say to employers you must maintain a separate unit?

MS. BACHRACH: New York could do that, however, that was not what Congress intended. When Congress enacted ERISA and its predecessor statute, the Welfare Pension Plan and Disclosure Act, Congress was aware of New York's law and was aware --

QUESTION: Yes, but how do you read out of the federal ERISA statute the word solely? Such plan as maintained solely for the purpose of complying with applicable Workers' Comp laws or Unemployment Comp laws?

MS. BACHRACH: We would say that that language has to be read to mean any plan, fund, or program. The definition of plan includes all three. So, any program required to be maintained by state law.

The term "solely" means only that to the extent the employer provides benefits beyond what is required by state law. In that respect, the employer would be governed by ERISA.

Now, I am aware that that is not the most --

QUESTION: That is not a normal reading of the language, is it?

MS. BACHRACH: It certainly is not a literal reading of the language. But, I would suggest that it is really the only interpretation that gives effect to what Congress intended which was to preserve --

QUESTION: But, don't we have to look at the language Congress employs initially and in that paragraph it is very difficult to resolve it in the way you are suggesting.

MS. BACHRACH: Yes. I understand that the starting point must be the language, but this Court has never hesitated to look beyond the language when to focus solely on the language would lead to absurd results. And, I think that is demonstrated

by the literal reading suggested by the airlines here which is to focus on the purpose for which the employer is providing disability benefits.

The airlines suggest that that purpose can be gleaned from the type of benefits provided and if employers provide benefits beyond what is required by state law, then the employer is not maintaining a plan solely for the purpose of complying with state law.

If we follow that out, an employer who maintains less benefits than is required by state law or no disability benefits at all, is also not maintaining a plan solely for the purpose of complying with state law, because, indeed, that employer is not complying with state law.

So, what you have is preemption determined by the employer's good will, economic judgment, and --

QUESTION: At least on the Disability Benefits Law, New York has the means to solve the problem if you follow the Solicitor General's theory, right?

MS. BACHRACH: The Solicitor General's theory is really not very different than New York State's.

QUESTION: I was going to ask, as far as the DBL is concerned, do you agree with the Solicitor General?

MS. BACHRACH: Yes. And, it is, for all practical purposes, essentially what we have argued all along; that New York's Disability Benefits Law, like the Workers' Compensation

law of 48 states, must remain in effect. That is what Congress intended. And that we can continue to apply our law as written and to require the mandatory benefits to protect workers in the state.

I would like to save my remaining time for rebuttal.

JUSTICE BRENNAN: You may.

Mr. Booth?

ORAL ARGUMENT OF GORDON DEAN BOOTH, JR., ESQ.

ON BEHALF OF THE APPELLEE

MR. BOOTH: May it please the Court: In this case we have a situation which one would hope would be more usual where the statutory language is thoroughly consistent with the legislative history which is thoroughly consistent with the policies sought to be effectuated.

It is clear that Congress was keenly aware of the fact that all federal taxpayers have a stake in employee benefit plans through federal economic encouragement plans, either through delayed and preferential taxation or through tax policies allowing certain benefits to employees to be totally free of tax to the employee although deductible to the employer.

It is also clear that Congress adopted a policy that lead to the statute, ERISA, designed to encourage the voluntary establishment, growth, and expansion of private employee benefit plans.

It is clear that Congress believed that one way to foster and encourage the growth and development of employee benefit plans was to give the plan designers and participants the maximum possible flexibility consistent with other federal laws in selecting and allocating the resources available for employee benefits.

It is clear that Congress believed the plan should be allowed to be administered uniformly throughout all of the United States.

It is clear that Congress believed that the plan should be allowed to be uniform and equitable among their participants throughout all of the United States.

It is clear that Congress believed that without pre-emption of state laws, interstate plans could not maintain uniformity and equity among participants throughout the United States.

It is clear that Congress thought that state laws affecting employee benefit plans might result in slowing down the growth or even the possible elimination of some employment benefit plans.

It is clear that Congress believed that the federal government's interest in employee benefit plans was comprehensive and pervasive and it is clear that Congress believed that this pervasive federal interest required, with certain narrow exceptions, the displacement of state action in the field of

private employee benefit plans.

It is clear the Congress intentionally, and after full debate on a specific point, passed a preemption provision intended, as one senator said, "to apply in its broadest sense to all actions of state or local governments."

All of this resulted in Section 514(a) of ERISA which states: "These provisions shall supercede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.

There is no ambiguity of any kind. There is no patent ambiguity. There is no latent ambiguity. The language, the history, and the policy are all congruent.

QUESTION: Are you now referring to 514(d)?

MR. BOOTH: I may be, Your Honor.

QUESTION: I beg your pardon?

MR. BOOTH: It is the preemption provision.

QUESTION: Well, it is your case.

MR. BOOTH: Well, Your Honor, I will have to check. It is 514(a).

QUESTION: It is 514(a)?

MR. BOOTH: Yes, I think so.

QUESTION: How about the word "impair" in there? Isn't there some ambiguity in that word?

MR. BOOTH: I am sorry, Your Honor, the impairment provision as in alter, amend, or impair is relating to federal

law which is not the preemption provision.

QUESTION: You are not presently discussing that?

MR. BOOTH: That is right, Your Honor. Thank you.

We have been told that the policy of preemption will result in coverage for some participants being different than otherwise would be the case and this is true. The benefits provided by the appellees' employee benefit plans were different than they would have been if the State of New York had participated in the design of the plans.

The provisions of the plans were, however, permitted under federal law.

The views of the State of New York with regard to the allocation of plan resources is different from the decision these employees and these employers made with regard to the allocation of those finite resources among the members of the participant groups.

It is also likely that there will always be differences of opinion between the states as to what is fair and what constitutes discrimination and, therefore, how plan resources should be allocated.

It is not always clear --

QUESTION: Let me ask you a question at this point, Mr. Booth. I take it your argument then goes to any difference in the plan. It obviously isn't just related to pregnancy disability. It would include, I take it, a difference in the

method of computing years of services, for example.

MR. BOOTH: Exactly, Your Honor.

QUESTION: So that if New York had, under its Human Rights Law, computed seniority in a manner different than this Court approved in American Tobacco, for example, and someone came in and made a claim under the plan and said you must count pre-Act seniority or something like that. What should the EEOC do with such a complaint? Should they refer it to the New York agency or say, well, we are not interested in what the New York agency says?

MR. BOOTH: Well, Your Honor, the EEOC now would not technically defer to a state agency.

QUESTION: But, doesn't part of the processing include the preliminary screening by the state agency which first addresses the issue?

MR. BOOTH: If there is coverage under both statutes, the EEOC defers. If there is not coverage, the EEOC does not defer.

QUESTION: Suppose there is different coverage?

MR. BOOTH: If there is different coverage -- Do you mean if the laws are different, Your Honor, I am sorry.

QUESTION: No. Title VII coverage is one thing and the state coverage on pregnancy is something different. What happens then?

MR. BOOTH: Well, Your Honor, they wouldn't defer. The

EEOC is not allowed --

QUESTION: Is it your argument that there would be complete preemption?

MR. BOOTH: Yes, Your Honor.

QUESTION: And that is because (a) says supersede any and all state laws?

MR. BOOTH: Yes, Your Honor.

QUESTION: That would relate to any employee benefit plan?

MR. BOOTH: Yes, Your Honor.

QUESTION: To the extent there is a difference between the federal provision and the state provision, the state law is out, is that it?

MR. BOOTH: That is correct, Your Honor.

QUESTION: Why should it make any difference whether they are different?

MR. BOOTH: Well --

QUESTION: They are just preempted.

MR. BOOTH: They are preempted in the area of employee benefit plans.

QUESTION: That is what Congress says.

QUESTION: Well, if that is true, does that not alter the federal procedure that would otherwise be implied in processing such a claim?

MR. BOOTH: Your Honor, the present procedure involves

enforcement. The deferral for enforcement --

QUESTION: There has to be a state law in effect before you defer.

MR. BOOTH: The EEOC can only defer if the state law --

QUESTION: If there isn't one, you don't defer at all.

MR. BOOTH: The EEOC may not defer if the state law doesn't adequately cover the claim.

QUESTION: Or if there isn't one.

MR. BOOTH: Or if there isn't one.

QUESTION: And, if it is preempted, there isn't one in this respect.

MR. BOOTH: That is right, Your Honor.

QUESTION: Isn't that begging the question, because the statute, at the time it was enacted, there was a state law. Right before ERISA became effective, there was a state statute in effect in New York. The federal statute says, "enactment of ERISA shall not alter federal statutues." Prior to the date of enactment, there was a state law which involved a deferral procedure. Subsequent to the date of the statute, if I understand your argument, there was no longer a deferral procedure. Was there or was there not an alteration of the federal law?

MR. BOOTH: Your Honor, there was a deferral procedure in Title VII before and after ERISA was passed.

QUESTION: The same one.

MR. BOOTH: The same one. Before ERISA was passed, there may have been a state law which was preempted by ERISA which no longer existed. The federal law has not changed at all. What was illegal in the federal law before ERISA was illegal after ERISA. There is no procedure whereby a claim for violation of state FEP law now gets to be a federal cause of action.

QUESTION: What happens with a state claim that has two counts in it, one saying we are not getting the entire employment benefit under the pension plan and we are entitled to it? Secondly, we want back pay because you miscalculated my seniority. What does the EEOC do with such a claim? It defers in part and treats -- There is a law for part of the claim but not for the other part. I guess that --

MR. BOOTH: I don't know what they do, but I would assume they do the same thing they do now if the employee complains about discrimination on the basis of marital status or sexual orientation or disability or any of the other bases for state discrimination that do not apply in the federal area. It is possible that an employee today would have a great deal of different views as to why he was discriminated against which is a point I was about to make.

It is not always clear what is fair and unfair. This Court and the Court of Appeals of the State of New York reached a contrary view nine days apart in 1976 on the issue of pregnancy. There are many questions now in sharp debate on the issue of

what constitutes discrimination, the question of male/female retirement benefits, questions relating to order of layoff upon a work force diminution, questions relating to male/female death benefits, questions relating to the use of actuarial tables generally since they, by and large, do not purport to take into account subgroup characteristics. There are many plan choices which may impact on different groups in a different way, orthodontic coverage, denture coverage, abortion coverage, coverage providing for compensation for eye glasses.

Some states have statutes which prohibit different treatment based on marital status, sexual orientation, parenthood, disability and other factors.

These possible limitations on plan choice lead to other questions including the interplay of marital status with sexual orientation. Is it discrimintory to limit benefits to a traditionally defined family group? Should the concept of widowhood, of spouse, be expanded? Have they already been expanded in some states?

No doubt society will continue to refine its ideas in these areas. It may be that our national society would express those views in federal law or rulings just as some states have already done.

In the meantime, however, Appellees submit that Congress has concluded that more people will be better served by encouraging the establishment, growth, and proliferation

of employee benefit plans and within the limits of federal discrimination law to allow the parties involved to allocate the resources available in ways that seem to them to best serve their needs and to be equitable, fair, and uniform throughout all of the United States.

The parties here made a choice on allocation of benefits permitted by federal law. The State of New York says that the choice cannot be made. The New York law clearly relates to ERISA plans and is, therefore, preempted by 514(a) of ERISA.

We have been told that the broad preemption provision of ERISA does not apply to state FEP laws. ERISA does, indeed, provide specific exemptions of its sweeping preemption provisions. It provides specific exemptions for state security laws, state insurance laws, state banking laws, and relevant state criminal laws. It does not provide a specific exemption for state federal employment practice laws.

ERISA also provides in 514(e) that it does not alter, amend, modify, or impair any federal law. It is here, we are told, that Congress intended to exempt state fair employment practice laws from exemption.

Are the state federal employment practice laws exempted from preemption by the fact that no federal laws are changed? The argument is that it is not since Title VII provides that all state laws not in conflict with it are not affected by it, all state laws. And, since it is a federal law not altered by ERISA,

its provision disclaiming any effect on state law not in conflict with it is not altered. And, it is also argued that the state FEP laws have become federal laws because of their involvement in the enforcement scheme of Title VII.

Federal laws in the securities, insurance, and banking areas all also contain similar provisions disclaiming any intent to preempt state laws in those areas, but Congress nevertheless specifically excepted state laws in these areas from the pre-empted provisions of ERISA.

The Title VII language is not specific. It states that Title VII does not relieve any person from any liability, duty, penalty or punishment.

The ADEA contains a similar provision, yet its legislative history makes it abundantly clear that its sponsors believed that all state FEP laws relating to age discrimination were preempted by ERISA.

Since the language in the enforcement scheme is indistinguishable for Title VII, this would seem to be conclusive evidence of the import and effect of the language in ERISA.

Appellants argue in their reply brief that the ADEA is different because that federal law contains a provision that age considerations are allowed under federal law in connection with the structure of employee benefit plans and, therefore, the federal law would not be altered by the preemption

of state laws pertaining to age consideration in employee benefit plans.

With all respect, it seems to Appellees that the argument misses the point. The policies of employee benefit plans under consideration today were also fully allowed under federal law. There was no conflict whatsoever with Title VII. In both the case of Title VII and ADEA, the policy in question would be fully legal under federal law and the preemption provision of ERISA would apply to any state law related to an employee benefit plan including the age aspects as well as any other aspect of any such state/federal employment practice law relating to any employee benefit plan.

If the State of New York decided, Justice Stevens, that a policy of fixing benefits for retirement at an employee's normal retirement age, a policy allowed under federal law, violated the age provision of the Human Rights Law and proceeded to enforce such a decision, the defense would be the preemption provision of ERISA, the provision preempting all state laws relating to employee benefit plans.

It is also clear that the integrated scheme of Title VII relates only to enforcement. An employee complaining about the policy of the Appellees in this case would not have had the EEOC defer to the State of New York because the employee benefit plans of the Appellees were consistent with federal law. The person might have been referred to the State of New York since

there was no federal violation.

Cooperation exists where federal and state requirements are congruent. The EEOC is not allowed to defer if state law does not adequately cover the complaint and it does not defer, although it may refer, where a federal law does not cover the action complained of.

The scheme involves cooperation in the enforcement of a federal law. Similarly, the requirement that the EEOC accord substantial weight to the findings of state agencies relates only to factual determination and not to conclusions of law concerning the substantive provisions of Title VII.

None of the cases relied on by the Appellants involves questions of substantive law. Mr. Kremer lost his case in this Court because he could not, under a state law, found by this Court to be at least as broad as the federal law, convince the state agency of the facts necessary to support his claim.

If New York amended or modified its law, would that modify, alter, amend, or impair Title VII? If the substantive bonding and integration existed such as suggested by the Appellants, such an action would necessarily modify Title VII. But, Title VII would be unchanged. Whatever action violated federal law would be the same both before New York amended its law as well after New York amended its law.

No act by an employer is or becomes the basis for a federal cause of action because of the state FEP law.

QUESTION: Mr. Booth, let me ask you another question if I may. Supposing a state law defines the child for purposes of inheritance as either including or not including an illegitimate child, something of that character. They have their own state definition. But, there is no federal definition on the question of what a child is. Does that mean that, under you view, since a plan -- It would be permissible, as a matter of federal law, to exclude all illegitimate children from benefits, say, that a state law to the contrary would be preempted?

MR. BOOTH: Your Honor, if I may, illegitimate children occupy an unusual constitutional status. Let me assume --

QUESTION: Well, these are state laws that relate to the obligation to pay benefits to a person defined in a plan.

MR. BOOTH: State law required a payment to a live-in lover which is the San Francisco statute, which was vetoed by the Mayor, as a spouse. It would be preempted by state law.

It may be that what you are asking me is if the law is unclear.

QUESTION: Assume it is perfectly clear, that as a matter of state law an illegitimate child or an adopted child must be treated like a natural, legitimate child. But, as a matter of negotiation between a union and employer, they decided we will only provide for legitimate, natural children.

MR. BOOTH: Your Honor, if that choice were clearly allowed under federal law, they would be preempted.

QUESTION: Well, there is nothing in the federal law to prevent it that I know of any way.

MR. BOOTH: I am -- I don't know --

QUESTION: When it is negotiated between private parties, there is no federal law that applies to that.

Your position, as I understand it, is that anything permitted by federal law may not be prohibited by state law?

MR. BOOTH: Insofar as an employee benefit plan is concerned.

QUESTION: Right. And, I am talking now about who is a child for purposes of receiving a death benefit under a union/employer negotiated plan which says only natural-born, legitimate children shall be treated as children under this plan.

MR. BOOTH: And if that doesn't violate any provision of federal law, it would be preempted. It would be preempted in any event. It would legal if it didn't violate federal law.

Title VII leaves virtually all state laws intact, but the fact that it leaves all state laws intact does not transmute those state laws in federal law. If it does, where is the boundary? Title VII leaves all state laws providing a penalty or imposing a duty in tax. What about other state laws relating to employee benefit plans? Do any filing or reporting requirements apply? Surely a penalty is provided for failure to file a report. Do the state fiduciary dues apply, state limitations on investments?

Title VII's procedural and enforcement scheme is for the joint enforcement of federal law and it is comprehensive and demonstrates considerable confidence in the state. The enforcement scheme does not somehow serve as a talisman to convert the state's substantive rules into federal laws so as to preserve them from ERISA preemption.

Here, the choice made on the allocation of benefits was permitted under federal law and was not permitted under state law. There was no partnership in connection with these plans. There would have been no deferral. There was no integration, there was no reliance, there was no overlap.

The Appellees, therefore, submit that it must be concluded from a legislative history, the plain language of the statute, and the policies sought to be effected, that Congress intended to preempt all state laws relating to employee benefit plans; that it was fully aware of the broad nature of the language it selected; that it knew that some statutes might be preempted which had not been specifically considered; and that it nevertheless made a considered judgment to preempt all law relating to employee benefit plans.

It had some concern that attention might be needed to deal with specific problems in the future because of this blanket approach and it therefore created a commission specifically charged to study the effects of preemption among other things.

It cannot be denied that Congress was fully aware of

the comprehensive nature of this provision and nevertheless decided that the public and the nation would be better served by having only federal standards apply in this relatively narrow area in order to encourage the growth of plans as well as the expansion of plan benefits without whatever inhibiting or chilling effects which would or might result from state involvement through the application of any law relating to an employee benefit plan.

Insofar as the Disability Benefit Law is concerned, the state cannot claim that the employee benefit plans of the Appellees are free from ERISA coverage. The exception in the statute for Disability Benefit Laws is clearly related to plans not subject to the coverage of ERISA. This is a coverage definition and the exception is to ERISA coverage.

It has been suggested that while the Appellees plans may not be exempt from ERISA coverage, nevertheless, certain paragraphs or portions of the employee benefit plans are exempt from coverage and, therefore, because they are exempt from the coverage of ERISA, are subject to state regulation within the exception.

ERISA, however, indicates that the term "plan" refers to an integral unit or program, not to isolated and subsidiary provisions of a plan.

It has also been suggested that a ruling following the plain language of the statute would require a determination

as to whether or not a plan is maintained solely to comply and that this would impose an impossible intent test on the statute which would in turn allow wide-spread avoidance of state law.

Even if it could be assumed that employers would seek to be regulated by ERISA instead of the state, there is no reason to conclude that a purpose or intent test is so difficult to apply. Many federal statutes now have such tests, securities laws, criminal laws, anti-trust laws to name but a few.

The determination of purpose is not only required by the statute, there is no reason to anticipate any undue burden in this application.

The Appellees submit that the question for determination by this Court is does ERISA preempt state statutes that regulate the nature of the benefits an employer must provide in his ERISA regulated employee benefit plan.

The Appelles submit that this Court should find that a state statute that eliminates or adds to an ERISA covered employee benefit plan features that are committed or not required by federal law is preempted by Section 514 of ERISA.

Thank you.

JUDGE BRENNAN: Do you have anything further, Ms. Bachrach?

MS. BACHRACH: Briefly, Your Honor.

ORAL ARGUMENT ON DEBORAH BACHRACH

ON BEHALF OF THE APPELLANT -- REBUTTAL

MS. BACHRACH: The Appellees argue that the Human Rights Law is preempted in its entirety to the extent it seeks to prohibit discrimination in employee benefit plans and that that would not impair Title VII because Title VII envisioned a joint enforcement scheme between the state and the federal government only to enforce federal law, but that simply is not correct.

The deferral provisions of Title VII were for the state agencies, the state fair employment agencies, to apply state laws in their entirety so that if a complaint of race discrimination in a medical plan was first filed with EEOC, the EEOC would defer immediately to the state agency to allow the state to apply its law in its entirety without any preliminary determination of whether, in fact, the state law might provide greater protection under the rubic of race discrimination than would federal law.

Title VII envisioned state enforcement of state law in the area of employment discrimination.

Thank you.

JUSTICE BRENNAN: We will next hear argument in 81-523, Container Corporation of America versus Franchise Tax Board.

The case is submitted.

(Whereupon, at 1:45 p.m., the case in the above-entitled matter was submitted.)

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:

ROBERT R. SHAW, ETC., ET AL., Appellants vs. DELTA AIR LINES, ET AL., # 81-1578

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

BY _____

(REPORTER)