

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:

THEODORE J. LOEFFLER,

Petitioner,

v.

PRESTON R. TISCH, POSTMASTER
GENERAL OF THE UNITED STATES

No. 86-1431

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

PAGES: 1 through 36

PLACE: Washington, D.C.

DATE: January 11, 1988

Heritage Reporting Corporation

Official Reporters
1220 L Street, N.W.
Washington, D.C. 20005
(202) 628-4888

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

-----x

THEODORE J. LOEFFLER, :

Petitioner, :

V. : No. 86-1431

PRESTON R. TISCH, POSTMASTER GENERAL :

OF THE UNITED STATES :

-----x

Washington, D.C.
Monday, January 11, 1988

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

LISA S. VAN AMBURG, ESQ., St. Louis, Missouri;
on behalf of the Petitioner.

CHARLES A. ROTHFELD, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.;

on behalf of the Respondent.

C O N T E N T S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORAL ARGUMENT OF

PAGE

LISA S. VAN AMBURG, ESQ.	
on behalf of Petitioner	3
CHARLES A. ROTHFELD, ESQ.	
on behalf of Respondent	17
LISA S. VAN AMBURG, ESQ.	
on behalf of Petitioner - Rebuttal	32

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

2 11:02 a.m.

3 CHIEF JUSTICE REHNQUIST: Ms. Van Amburg, you may
4 proceed whenever you're ready.

5 ORAL ARGUMENT OF LISA S. VAN AMBURG, ESQ.

6 ON BEHALF OF PETITIONER

7 MS. VAN AMBURG: Thank you, Mr. Chief Justice, and
8 may it please the Court:

9 For over 75 years since this Court's decision in
10 National Home v. Parrish, it's been the general rule that an
11 agency authorized by Congress to sue and be sued is liable for
12 prejudgment interest in the same way and under the same
13 circumstances as a private enterprise would be. The Government
14 today seeks an exception to this general rule to deny interest
15 to employees of sue and be-sued agencies who have been the
16 victims of employment discrimination.

17 We believe that the issue in this case, that is,
18 whether or not an employee may recover prejudgment interest in
19 a Title VII case against the Postal Service is flatly resolved
20 by the application of a longstanding principle governing
21 resolution of claims against sue and be-sued agencies. And
22 that principle is one first articulated by this Court in a 1940
23 case, FHA v. Burr known as the "liberal construction rule."

24 And that rule is that a sue and be-sued clause in the
25 charter of a Federal agency effects a broad waiver of immunity
and subjects that agency to suit and the natural incidence of

1 suit which a private enterprise would be liable for in the same
2 circumstances. That rule was more recently reaffirmed by this
3 Court in a suit against the Postal Service, the Franchise Tax
4 Board case in 1984 interpreting the scope of the waiver of
5 immunity in the charter of the Postal Service.

6 The no-interest rule, which is another longstanding
7 rule which is to the effect that interest cannot be recovered
8 against the Government absent an express statutory waiver, is
9 not applicable to the Postal Service. This Court, in another
10 Title VII case the last term, Library of Congress v. Shaw,
11 noted that the no-interest rule doesn't apply to agencies which
12 have assumed the status of a private commercial enterprise.

13 And typically Congress has waived the immunity of the
14 agency by inserting into its charter, a sue and be-sued clause.
15 We believe that the Postal Service is one such agency noted by
16 this Court in footnote 5 of the Shaw opinion. The no-interest
17 rule doesn't apply to it because it does not have the status of
18 a sovereign for these purposes.

19 The Government's position is that there is not one
20 agency which fits within the footnote 5 exception of the Shaw
21 decision to the no-interest rule. We don't believe that
22 footnote 5 is superfluous; we think it's a reflection of this
23 Court's understanding of the 75-year-old rule that interest is
24 recoverable against a sue and be-sued agency.

25 Is the Postal Service a footnote 5 agency? Clearly,
the Franchise Tax Board case answers that question squarely.

1 It is such an agency. Congress intended the Postal Service,
2 when it chartered it in the 1970 Postal Reorganization Act, to
3 operate as much like a private business as possible. In
4 Franchise Tax Board, this Court stated that because of the
5 Charter of the Postal Reorganization Act, because of the
6 legislative history, we must assume that the Postal Service's
7 liability is the same as a private business. And we must also
8 assume that Congress did not intend to preserve sovereign
9 immunity for the Postal Service.

10 QUESTION: Well, if this weren't a Title VII case,
11 don't you think that the Government would agree with you, with
12 everything you've said so far?

13 MS. VAN AMBURG: I don't know if they'd admit it,
14 that interest is recoverable against a sue and be-sued agency,
15 but I would think they'd have to.

16 QUESTION: What about the Postal Service, would they
17 agree with you in the Postal Service if this were an ordinary
18 lawsuit, rather than a Title VII case?

19 MS. VAN AMBURG: I would hope they would because
20 there's so many consistent court decisions to the effect that
21 interest is recoverable against a sue and be-sued agency.
22 Those decisions have followed in the breach of contract
23 actions, other back pay actions.

24 Their position is based upon an inference, Justice
25 White, that under section 717, Congress intended to impose
equal liability upon all Federal Agencies regardless of whether

1 it's a sue and be-sued agency.

2 QUESTION: I think their argument follows from Title
3 VII in Shaw.

4 MS. VAN AMBURG: That's right. But they don't
5 acknowledge that the Postal Service is a footnote 5 agency
6 where the no-interest rule doesn't apply. Because all Section
7 717 does is lays out a statutory scheme for processing charges
8 for Federal employees. But once that employee gets to the
9 Federal courtroom, the remedies are the same. The only thing
10 that prevents an employee of the Federal Government from
11 getting interest is the no-interest rule. And that rule simply
12 doesn't apply to the Postal Service.

13 QUESTION: Well, Ms. Van Amburg, I suppose at bottom,
14 we're dealing with waiver of sovereign immunity and the extent
15 to which it's been waived. And I suppose you can take the
16 position that when Congress enacted Section 717 in Title VII,
17 that it was adopting a more limited waiver of sovereign
18 immunity, and that that more limited waiver should be read as
19 limiting the more general waiver enacted in the sue and be-sued
20 clause for the Postal Service.

21 MS. VAN AMBURG: That's correct. That's what the
22 Postal Service's position is. However, Congress is experienced
23 in legislating against the backdrop of liberal construction
24 rule, and Congress knows how to express in a statute what it
25 wants to do if it wants to delimit the general waiver of a sue
and be sued agency. It did that in the Federal Tort Claims Act

1 back in 1945. Section 2679 of the Federal Tort Claims Act
2 explicitly states that the authority of any Federal agency to
3 sue and be sued in its own name shall not be construed to
4 authorize suits against such agency on claims cognizable under
5 the Federal Tort Claims Act. And the remedies provided by the
6 Federal Tort Claims Act shall be the exclusive remedies.

7 So here Congress in the Federal Tort Claims Act
8 acknowledges that a sue and be sued clause in the charter of a
9 Federal agency can be a separate source of authority for
10 proceeding under suit or for certain remedies. And Congress
11 did not do that in Title VII. Not that it wouldn't have known
12 how to, but it simply is silent in Title VII about how to treat
13 sue and be sued agencies.

14 So I think that we have to defer to Congress'
15 experience in legislating against this long-standing liberal
16 construction rule which tells us that it's up to Congress to
17 draw the line on these delimitations of a general waiver
18 effected by a sue and be sued clause.

19 It shouldn't be the Court's inferring any
20 delimitations absent plain evidence of Congress' intent to
21 delimit the general waiver, or absent a grave interference with
22 a Governmental function, which I don't think we have in this
23 case. There's certainly no policy reason for drawing the line
24 on interest here.

25 This Court's recognized in General Motors v. Devex
that interest can be a catalyst to avoiding prolonged

1 litigation. The Postal Service is one of the most frequently
2 sued employers under Title VII. Making them liable for
3 prejudgment interest might further earlier settlement of
4 meritorious claims.

5 I might note that this case was appealed on the
6 merits to the United States Court of Appeals on issues of
7 credibility findings of the trial judge. If Federal Express
8 takes interest into consideration as to whether to settle a
9 claim, why shouldn't the Postal Service. I think that Congress
10 intended the Postal Service to bring its management
11 decisionmaking as nearly as possible up to the level of private
12 enterprise.

13 And so there really is no policy reason to draw the
14 line by inference here. And Justice O'Connor's point about
15 Section 717 is correct; that's the Government's argument. The
16 Government wants the Court to infer a delimitation on the
17 general waiver from the language of Section 717, but all that
18 that language does is tell us how to process the charges for
19 the employee. Once that employee gets into the Federal
20 courtroom, that employee's entitled to the same remedies as a
21 private employee would be.

22 QUESTION: As the Government points out, you sued the
23 Postmaster General by name, rather than the Post Office, and
24 had 717 not spoken to what happens in the courtroom, that was
25 incorrect.

MS. VAN AMBURG: Well, that is a procedural

1 distinction, and --

2 QUESTION: Well, you acknowledge 717 has some bearing
3 in the courtroom, then?

4 MS. VAN AMBURG: It does.

5 QUESTION: Or maybe you made a mistake.

6 MS. VAN AMBURG: More by what it doesn't say than
7 what it does say. I think its silence on the issue of whether
8 interest is recoverable is not particularly instructive,
9 because as this Court noted in the Shaw case, interest is an
10 element of damages that's historically been viewed as separate
11 from damages on a separate claim. But its silence on the
12 exclusiveness of the damages or the remedy for sue and be sued
13 agencies is more instructive, given what Congress had done in
14 the Federal Tort Claims Act.

15 So if we are to conclude that the no-interest rule
16 applies to the Postal Service, we would be doing so undermining
17 this liberal construction rule which has been in place for 48
18 years now. The fact that it's in different names is, I think,
19 an irrelevant procedural distinction.

20 QUESTION: May I ask you a different question.

21 The sue and be sued clause for this entity was
22 enacted in 1970, is that right?

23 MS. VAN AMBURG: Yes, that's correct.

24 QUESTION: And the Title VII amendment was 1972.

25 MS. VAN AMBURG: 1972.

QUESTION: Now, in 1971 say this lawsuit had been

1 brought, could your client have recovered from the Postal
2 Service, and I guess the answer is, no.

3 MS. VAN AMBURG: In 1971, if we had brought an action
4 under Title VII?

5 QUESTION: Yes.

6 MS. VAN AMBURG: I would have to say the answer is,
7 no, because we didn't have a right to proceed under Title VII
8 at that time.

9 QUESTION: And is the reason that you had no right,
10 did that have anything to do with sovereign immunity?

11 MS. VAN AMBURG: No.

12 QUESTION: Your position is the only relevant
13 sovereign immunity was waived in 1970?

14 MS. VAN AMBURG: That's correct.

15 QUESTION: And what happened in '72 was you got a
16 cause of action you didn't previously have.

17 MS. VAN AMBURG: That's right. It added a cause of
18 action against the Federal Agencies that did not previously
19 exist. But the Postal Service comes into the 1972 law as a
20 private enterprise, with the status of a private enterprise for
21 the purposes of interest and damages.

22 QUESTION: Why couldn't they have been sued as a
23 private enterprise under Title VII in 1971?

24 MS. VAN AMBURG: Well, because of what we know of the
legislative history of the Postal Reorganization Act, Congress
expressly listed those Federal labor laws applicable to the

1 Postal Service in its charter and left out Title VII. And there
2 was some debate about it. The debate was not over sovereign
3 immunity; it was a debate whether to leave the employees of the
4 Postal Service under the Executive Order or to put them under
5 Title VII. Which shows, I think, that Congress is viewing
6 Title VII as a different kind of agency, the fact that they
7 even talked about putting them under Title VII.

8 But the issue was where would the employees be better
9 off, under the Executive Order or under Title VII, and that was
10 the debate. But they later changed their mind about where
11 they'd be better off.

12 The issue of sue and be sued in the official name
13 versus the name of the Postmaster's the exact kind of issue
14 that was raised in FHA v. Burr, and dismissed by the Court.
15 Courts have been reluctant to draw procedural distinctions that
16 would sabotage this rule construing sue and be sued clauses
17 broadly.

18 I think that this Court rejected a similar procedural
19 distinction in the Franchise Tax Board case when you said we're
20 really not going to say that a suit in an administrative
21 proceeding is not covered under the sue and be sued clause
22 versus a suit in the courtroom. That's the kind of procedural
23 distinction the courts have rejected.

24 QUESTION: Why do you say that in 1972, Congress
25 created a cause of action, rather than eliminate the cause of
action?

1 MS. VAN AMBURG: I didn't mean to say that if I did.

2 QUESTION: Well, I thought you did.

3 MS. VAN AMBURG: The right of proceeding into the
4 courtroom.

5 QUESTION: Well, Justice Stevens made you do it.
6 That's the question he asked and you agreed with that.

7 MS. VAN AMBURG: I don't think so. I think that
8 there was a cause of action for employment discrimination back
9 then.

10 QUESTION: Against the Post Office?

11 MS. VAN AMBURG: It's certainly debatable, however,
12 under Title VII whether an employee could have gotten back pay.
13 An employee could have complained through the Executive Order
14 administrative process back then.

15 QUESTION: Was there a cause of action for damages by
16 an employee who was discriminated against by the Postal Service
17 in 1971?

18 MS. VAN AMBURG: Possibly under 1981, possibly under
19 42 U.S.C. 1981 there might have been.

20 QUESTION: Against the Federal Government?

21 MS. VAN AMBURG: Against the Postal Service.

22 QUESTION: Well, I mean the Postal Service as stated,
23 I mean, how would you sue the Postal Service under 1981?

24 MS. VAN AMBURG: Well, in the same way you would sue
25 a private enterprise if you assume that the Postal Service
occupies the status of a private commercial enterprise, which

1 has not really been decided by this Court.

2 But in that two years, I don't think we know the
3 answer to that question.

4 QUESTION: What's your position on whether they were
5 suable in 1971? I'm really not quite clear.

6 MS. VAN AMBURG: Well, there were some cases that
7 went into the Court of Claims under the Executive Order for
8 back pay, and I would say that they were suable back then, at
9 least in the Court of Claims. Although this Court has, in
10 Brown v. GSA settled that in terms of forums, that Title VII
11 would be the exclusive remedy.

12 So, yes, I think they were suable back in 1971.

13 QUESTION: In other words, you say the Executive
14 Order created a duty not to discriminate and a violation of
15 that duty, since the sovereign immunity had been waived, gave
16 rise to a cause of action in 1971.

17 MS. VAN AMBURG: That's right.

18 QUESTION: All that Title VII did was change the
19 procedure a little bit and make it a statutory duty instead of
20 an administrative duty?

21 MS. VAN AMBURG: That's correct, that's our position.
22 And really all Title VII is is an exclusive
23 administrative scheme for getting into the Federal courtroom,
24 but once the employee's there, the damages are the same against
25 a sue and be sued agency.

If there are no further questions, I'll reserve some

1 time for rebuttal.

2 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Van Amburg.
3 Mr. Rothfeld, we'll hear now from you.

4 ORAL ARGUMENT OF CHARLES A. ROTHFELD, ESQ.

5 ON BEHALF OF RESPONDENT

6 MR. ROTHFELD: Thank you, Mr. Chief Justice, and may
7 it please the Court:

8 Both sides in this case agree that the so-called no
9 interest rule or the aptly named no-interest rule prevents the
10 award of interest to virtually all Federal employees who obtain
11 Title VII judgments against the United States. The only
12 question in this case is whether Congress created a special
13 exception to this limitation on Title VII for the benefit of
14 the Federal workers who are employed by the Postal Service, a
15 benefit that gives those workers, in contrast to all other
16 Federal employees, a right to interest on a Title VII awards.

17 QUESTION: Well, if this weren't a Title VII suit,
18 say it was a contract action against the Postal Service.

19 MR. ROTHFELD: We don't disagree with the petitioners
20 as a general matter a sue and be sued clause in that sort of
21 proceeding, a contract-type proceeding is a waiver of sovereign
22 immunity which may entitle it to --

23 QUESTION: So your submission is that the Title VII
24 717 really took away that waiver to some extent?

25 MR. ROTHFELD: Well, I wouldn't say that it took away
the waiver. We think that Section 717 is a separate waiver and

1 it is the dispositive waiver in this case. Also I think the
2 way in which Congress created the Postal Service and the way in
3 which it regulated the relationship between the Postal Service
4 and its employees provide an independent reason.

5 QUESTION: So you should look at this 717 just as a
6 waive with respect to Title VII suits?

7 MR. ROTHFELD: We think that's right. We think this
8 is a case about Title VII, it was brought under Title VII, it
9 is a Title VII case. Now, obviously before anyone obtains any
10 kind of judgment against the United States, there must be two
11 things; there must be a waiver of sovereign immunity and there
12 must be a cause of action. To resolve this case, the Court
13 must do two things; it must find a waiver of sovereign immunity
14 and decide if the waiver which is controlling here is broad
15 enough to allow for awards of interest.

16 QUESTION: I really am puzzled because if the sue and
17 be sued clause enacted in 1970 was a general waiver of
18 sovereign immunity for any claims for which there was a cause
19 of action and a remedy, why wasn't, to the extent that
20 sovereign immunity would otherwise bar the recovery of
21 interest, why hadn't that been waived? There just simply,
22 there was no cause of action, but you don't really contend that
23 in '72, they cut back on the waiver?

24 MR. ROTHFELD: No, not at all.

25 QUESTION: You're saying that all they did in '72 was
create a cause of action which hadn't been created.

1 MR. ROTHFELD: Well, I don't think that's a proper
2 characterization.

3 QUESTION: At least that's one -- isn't that an
4 argument, at least?

5 MR. ROTHFELD: That is the argument that petitioner
6 makes.

7 QUESTION: Well, she waives a little on it, but I
8 guess that's her argument.

9 MR. ROTHFELD: Well, I think that was the final
10 landing place for the petitioner.

11 And I think that there are two responses to that.
12 One involves the nature of the waiver which is controlling
13 here. The other involves the nature of the Postal Service and
14 its relationship to its employees.

15 Answering your question now, in particular, we think
16 that that analysis that it was the sue and be sued clause which
17 was the waiver here and that Title VII simply created a cause
18 of action is not the proper way to view this case. And the
19 relationship between the two statutes makes that quite clear.

20 Congress passed Title VII in 1964 and at the time, it
21 preserved the sovereign immunity of the United States by
22 excepting from the definition of employer, the Federal
23 Government including the old Post Office Department.
24 Therefore, no part of the Federal Government could be sued
25 under Title VII after its enactment in 1964.

Six years later in 1970 --

1 QUESTION: Well, you could regard that as reserving
2 sovereign immunity, or you could regard that as not creating a
3 cause of action. And I don't know how to --

4 MR. ROTHFELD: Well, I think it was both, Justice
5 Scalia. Congress typically waives the sovereign immunity of
6 the United States as we think it did in this case by enacting a
7 cause of action. The cause of action waives the sovereign
8 immunity to the extent that the cause of action has been
9 created, and therefore they are two sides of the same coin.

10 The Court, in Shaw, for example, characterized the
11 1972 provision of Title VII as a waiver of sovereign immunity.
12 It was those provisions which created the cause of action. In
13 the usual case, there's no point in distinguishing between the
14 waiver and the cause of action.

15 QUESTION: Yes, but there, there had been no
16 preceding waiver of sovereign immunity for the Library of
17 Congress. Isn't there a difference when the sovereign
18 immunity's already been waived, you don't need a second waiver.
19 But you did need the first waiver there.

20 MR. ROTHFELD: Well, I think there are two answers to
21 that, Justice Stevens. First, let me just spell out a little
22 bit how the system worked from 1964 to 1972. In 1970, when
23 Congress created the Postal Service it preserved, we think, the
24 sovereign immunity as to employment discrimination claims.
25 Congress specifically considered extending to the Postal
Service the existing private sector provisions of Title VII.

1 It decided not to do that.

2 So in 1970, it was quite clear that a Postal employee
3 could not sue the Federal Government under Title VII.

4 QUESTION: But can't you describe that in either of
5 two ways: one, as you do now, they were preserving a portion of
6 sovereign immunity; or simply say, they just didn't create the
7 cause of action?

8 MR. ROTHFELD: Well, I think they were doing both.

9 QUESTION: Supposing you had a statute passed today
10 that created a cause of action against the Postal Service for
11 late delivery of mail? Say there's an implied promise that the
12 mail be delivered within a week, and if it's over 30 days late,
13 well, you get a dollar a day or something.

14 Could you get interest on that?

15 MR. ROTHFELD: I think you might if you're suing
16 under the sue or be sued clause. But again, we think it's --

17 QUESTION: Brand new cause of action, you just waived
18 sovereign immunity as to late delivery of mail.

19 MR. ROTHFELD: That's quite right, Justice Stevens,
20 but the crucial point is not when the cause of action was
21 created. We certainly agree that causes of action created
22 after the enactment of the sue and be sued clause may be
23 brought under that clause. But there are two reasons why the
24 clause here is not the waiver of sovereign immunity.

25 First, Congress in 1972 when it enacted the Federal
sector provisions of Title VII which grant a remedy for

1 employment discrimination to all Federal employees, Congress
2 viewed that as you say, as creating a cause of action. It also
3 clearly said at the time, and the Court has since recognized
4 that that was a blanket waiver of sovereign immunity.

5 It is that blanket waiver of immunity that allows all
6 Title VII actions against the Government, including this one,
7 to proceed. Now, the fact that Title VII was extended to an
8 agency like the Postal Service that already had a sue and be
9 sued clause in its charter, I think, is a matter of
10 happenstance. It doesn't affect the identity of the waiver of
11 the statute that's waiving immunity. Congress viewed that
12 blanket waiver as the waiver which made these suits possible.

13 And I think there is clear textual evidence of that,
14 and that is the second reason for saying that it is Title VII
15 and not the sue and be sued clause that is the waiver here.
16 Those two provisions actually authorize suits against different
17 named defendants, as Justice Scalia noted. Section 717(c) of
18 Title VII waives the Government's immunity in suits brought
19 against the head of the defendant's agency. That is why this
20 case is captioned, Loeffler v. Tisch, Postmaster General.

21 In contrast, the sue and be sued clause makes the
22 Postal Service amenable to suit in its official name. And
23 that is why a typical suit that is brought pursuant to the
24 clause in which the clause is the waiver is captioned something
25 like, Freed v. U.S. Postal Service. Now, this obviously is a
technical distinction but it has real significance. The courts

1 will uniformly dismiss Title VII actions that are brought
2 against the agency rather than against the agency head. That
3 means that this case can proceed only because it is Title VII
4 that makes the Postmaster General amenable to process.

5 And if it is Title VII that makes the defendant
6 amenable to suit, it must be Title VII itself that provides the
7 relevant waiver of immunity here.

8 Now, in turn, the Court has made it quite clear
9 repeatedly that it is the statute waiving immunity that sets
10 out the conditions under which the Government has agreed to be
11 sued. And Shaw held clearly that one of the conditions under
12 the Title VII waiver is that it does not authorize awards of
13 interest to employees suing any part of the Federal Government.

14 QUESTION: Mr. Rothfeld, who pays the judgment if
15 your client loses?

16 MR. ROTHFELD: Well, the short answer is that the
17 judgment comes out of the U.S. Treasury.

18 QUESTION: It does come out of the Treasury, not out
19 of the Postal Service?

20 MR. ROTHFELD: Well, the judgment comes in particular
21 out of something called the "Postal Service Fund" which is a
22 fund created in the Postal Reorganization Act in which Postal
23 revenues are placed and Postal expenditures are made. That
24 fund, in turn, is specifically labeled by the Postal
25 Reorganization Act as part of the United States Treasury.

QUESTION: If it were a non-discrimination suit that

1 arose in 1971 for something that you could sue the Post Office
2 for then, maybe rent, would it come out of the same source?

3 MR. ROTHFELD: Yes, it would

4 QUESTION: It would. So it's money basically
5 allocated to this particular entity, and obviously the
6 Postmaster General doesn't pay it individually?

7 MR. ROTHFELD: No, that's correct.

8 QUESTION: And neither does the United States
9 generally?

10 MR. ROTHFELD: Well, again, it comes out of the
11 United States Treasury.

12 QUESTION: Yes, in the same sense that a rent payment
13 might, or a suit for rent might?

14 MR. ROTHFELD: Well, that's true. That's true. But
15 I mean, I should emphasize that the Postal budget is part of
16 the budget of the United States. The Postal Service in
17 allocating expenditures from the Postal fund, which as I said
18 is part of the Federal Treasury, will send its budget to the
19 President. The President, through the Office of Management and
20 Budget, will send it on to Congress. Congress approves that
21 budget as part of the United States' budget.

22 The money comes out of the Federal Treasury, out of
23 the Postal Service comes out of the Federal Treasury and
24 therefore adds to the Federal budget deficit, one reason why
25 Congress is now tinkering with the Postal budget. In fact, in
 Section 409 of the Postal Reorganization Act which deals with

1 suits against the Postal Service, Congress specifically
2 categorized judgments paid from the Postal fund as judgments
3 against the United States which are paid out of the Postal
4 fund. So I think the money that's at stake here must be
5 characterized as Federal money, money coming out of the United
6 States Treasury.

7 Certainly, without a waiver of sovereign immunity, an
8 express waiver somewhere, petitioner could not sue and get its
9 hands on that cash. And that we think is the first dispositive
10 reason for ruling for the Postal Service here. The waiver of
11 sovereign immunity in this case is Title VII. That waiver does
12 not allow for awards of interest. Therefore, the express
13 waiver of sovereign immunity, the only waiver that allows the
14 suit to proceed, is not broad enough to allow them to obtain
15 awards of interest under this Court's holding in Shaw.

16 And there is also, as I suggested, a second
17 independent reason for ruling for the Postal Service in this
18 case, which is not at all technical or sophisticated. It's a
19 simple matter of Congressional intent. Even if it is true that
20 the sue and be sued clause is the source of the waiver here --
21 and we don't think that it is -- but even if that were true,
22 all that would mean is that the clause allows petitioner to
23 bring the Postal Service into court. It would remain Title VII
24 that provides the cause of action. It would remain Title VII
25 that defines the scope of the relief here.

And there's nothing controversial about this point.

1 If Congress had said expressly in Title VII that Federal
2 employees could not obtain interest under that statute, it is
3 quite clear that nothing in the sue and be sued clause could
4 change that outcome. But that is essentially this case. The
5 Court has already held in Shaw that Title VII does not
6 authorize awards of interest to Federal employees. Therefore -
7 - it did that of course not by expressly withholding interest,
8 but by omitting any mention of interest from the statute --
9 that means that petitioner is not entitled to interest, simply
10 because his cause of action does not provide interest as part
11 of the relief.

12 Now, Ms. Van Amburg's response to that point this
13 morning has been to suggest that the Federal sector provisions
14 of Title VII have a split personality. That those same
15 provisions should be interpreted to withhold interest from
16 other Federal employees, while granting interest to employees
17 of the Postal Service. And her rationale for that assertion is
18 the suggestion that Congress viewed the Postal Service as being
19 just like a private commercial corporation and that it
20 therefore must have wanted Postal employees to be treated just
21 like private sector workers under Title VII.

22 Now, we think there are several fundamental problems
23 with that approach. First, it oversimplifies the nature of
24 what is a very complicated Federal Agency. It is certainly
25 true that, as petitioner effectively lays out in its brief,
that there are many ways in which the Postal Service is like a

1 private corporation. But it is equally true, as we point out
2 in our brief and in an enormously long footnote on pages 19 and
3 20, it is equally true that there are a great many ways in
4 which the Postal Service is nothing like a private corporation.

5
6 Among many other things, the Postal Service exercises
7 power of eminent domain, and enters into international
8 agreements, and investigates criminal violations. Obviously
9 it's represented by the Solicitor General when it appears in
10 this Court. And in a variety of other ways, the Postal Service
11 is just like all other Federal agencies.

12 Now, the second more fundamental problem with
13 petitioner's suggestion that the Postal Service is very much
14 like a private corporation is that we think it is beside the
15 point here. We think that petitioner's list of Postal Service
16 characteristics and our competing list are essentially
17 irrelevant. It would not be a sensible approach for the Court
18 to add up the number of statutes cited by each brief and decide
19 on the basis of who has the longer list that for all time and
20 all purposes, the Postal Service is more like a private
21 corporation or is more like a Government agency.

22 The question here is a much narrower one. It
23 concerns how Congress wanted Postal employees to resolve their
24 complaints of employment discrimination. On that we think the
25 answer is quite clear; Postal employees are Federal employees.
They are in the Postal Service which is expressly made by

1 statute, a part of the Civil Service. In particular, and of
2 dispositive importance here, Congress has always treated Postal
3 Service employees identically to all other Federal employees
4 for purposes of equal employment opportunity.

5 In 1970, Congress specifically considered protecting
6 Postal Service employees by the private sector provisions of
7 Title VII. It decided not to. It decided to extend the
8 existing Federal sector antidiscrimination provisions. In 1972
9 of course Congress placed the Postal Service in the Federal
10 sector and not in the private sector provisions of Title VII.

11 QUESTION: The employees, did they get the two
12 percent raise?

13 MR. ROTHFELD: Well, for purposes of equal employment
14 opportunity they are treated identically to Federal employees.
15 As I suggested, --

16 QUESTION: They are or they are not?

17 MR. ROTHFELD: Well, they clearly are Federal
18 employees. They were --

19 QUESTION: But do they get the two, the raise?

20 MR. ROTHFELD: Well, the Labor Relations section of
21 the Postal Service is modeled to a certain extent on the
22 private sector, and therefore their pay is not awarded under
23 the same standards as that used for other Federal employees.

24 But as I say, Congress was quite clear that they were
25 Federal employees. They were characterized repeatedly as
Federal employees in the Congressional debates and particularly

1 for purposes of equal employment opportunity, as well as for
2 many other public rights and obligations of Federal employees.

3 QUESTION: May I ask, following up on Justice
4 Marshall's thought, do you suppose it would be permissible as a
5 matter of Federal law for their collective bargaining agent to
6 negotiate an agreement which authorized the award of
7 prejudgment interest in all litigation against their employer?

8 MR. ROTHFELD: As far as I'm aware --

9 QUESTION: Or would they say they couldn't do it
10 because sovereign immunity would preclude it?

11 MR. ROTHFELD: Well, to the extent that that was
12 being done to redress employment discrimination claims which
13 are cognizable now under Title VII, I think that would be
14 appropriate because --

15 QUESTION: Well, the question wasn't whether it was
16 inappropriate, the question was would there be as a matter of
17 Federal law, would it be prohibited. I think that's your
18 position.

19 MR. ROTHFELD: I think it would be prohibited if it
20 was something which is cognizable under Title VII, because the
21 Postal Service clearly cannot by its own action waive sovereign
22 immunity when Congress has declined to do so, and Congress has
23 declined to do so.

24 As I suggested, Congress has treated Postal employees
25 identically to other Federal employees for purposes of equal
employment opportunity. And Postal employees must bring their

1 claims of employment discrimination under the Federal sector
2 provisions of Title VII.

3 QUESTION: For most other terms and conditions of
4 employment, they're treated differently from Federal employees?

5 MR. ROTHFELD: Well, --

6 QUESTION: They do have collective bargaining rights
7 that are different.

8 MR. ROTHFELD: Well, there are a long list of ways in
9 the Postal Reorganization Act and in Title V which we set out
10 in our brief, in which they are treated identically to other
11 Federal employees. The Civil Service Reform Act of 1978, which
12 was the basic charter of rights of Federal employees, applies
13 to most to Postal employees who are veterans preferences, and
14 applies to other Federal Postal Employees except to the extent
15 that it's displaced by a collective bargaining agreement.

16 There are also as I say a wide variety of independent
17 provisions of personnel laws that apply to Postal employees.
18 And in particular, in the Title VII contracts, the differences
19 between Postal Service employees and Federal employees on the
20 one hand, and private sector employees on the other, will
21 remain whether or not the Postal Service is viewed as being
22 like a private corporation, and whether or not the rights of
23 Postal employees are otherwise viewed as being similar to the
24 rights of private as opposed to public sector employees. And
25 there's no answer to this, we think, to suggest as petitioner
does, that Congress' inclusion of the sue and be sued clause in

1 the Postal Charter can somehow change that and signal a
2 Congressional intention that Postal employees should be treated
3 identically to private sector workers under Title VII.

4 QUESTION: What do you suppose the Court had in mind
5 in its footnote 5? Are there some agencies that would fall
6 under that?

7 MR. ROTHFELD: Well, I think that the Court had two
8 things in mind, Justice O'Connor. First, it clearly had in
9 mind the long line of cases cited by the petitioner in which a
10 cause of action is brought pursuant to a sue and be sued clause
11 in a setting in which the relationship between the agency being
12 sued, and the person bringing the suit is the same as one in
13 the private sector. That was the case, for example, in the
14 Franchise Tax Board case where the Postal Service's
15 relationship to the Franchise Tax Board was the same as that of
16 any other employer.

17 I think the best example of what the Court had in
18 mind is the illustration provided in Footnote 5, a case called
19 Standard Oil Company v. United States, in which the Federal
20 government had essentially gone into the insurance business,
21 into the rural risk insurance business in competition with
22 private insurers using contracts identical to those used by
23 private insurers. And the Court said in that case, the
24 relationship between an insured party and the Government was
25 identical to the relationship between an insured party and a
private insurer, and therefore the terms of the lawsuit should

1 be the same.

2 Now, that is clearly not true in the case of a Title
3 VII suit which as been brought against the Postal Service. It
4 must be brought pursuant to the Federal sector provisions of
5 Title VII, which differ in a variety of significant ways from
6 the private sector provisions of Title VII. Federal employees,
7 including Postal workers, for example, must use the
8 administrative mechanism set out in the Federal sector
9 provision.

10 Federal employees including Postal workers, unlike
11 private sector workers, must use Title VII exclusively as their
12 remedy for employment discrimination. Those differences will
13 remain however the nature of the Postal Service is
14 characterized.

15 And as I suggested, the existence of the sue and be
16 sued clause can't change that. It can't magically move the
17 Postal Service from one provision of Title VII, the Federal
18 sector provision, to another provision, the private sector
19 provision. That means that Postal employees must bring their
20 employment discrimination claims pursuant to the Federal sector
21 provision, using Federal sector administrative remedies against
22 the Federal defendant like other Federal employees, but unlike
23 workers in the private sector. They must use Title VII
24 exclusively as their remedy for employment discrimination.

25 Now, we think the clearest indication of how Congress
wanted to treat Postal employees under Title VII is how it

1 actually did treat them. It treated them identically to all
2 other Federal workers. Those Federal workers cannot get
3 interest under Title VII. Now, by giving petitioner the
4 special benefit of interest, it will introduce an incoherence
5 into the statutory scheme which is now nicely symmetrical
6 dividing private sector and Federal sector workers.

7 It would also give employees in the Postal Service a
8 special benefit and distinction which is not awarded to any
9 other Federal sector employee, any other employee of the
10 Executive Branch. Now, the Court of Appeals properly declined
11 to give this special and unique benefit to Postal Service
12 employees, and we think that this Court should affirm that
13 decision.

14 If there are no further questions?

15 QUESTION: I have a question. Maybe it's too far off
16 in left field, but there are a lot of sue and be sued agencies
17 and a lot of them are not mentioned in Section 717. I guess
18 Federal Housing Agency, aren't there? Am I not right, there
19 are quite a few of these agencies?

20 MR. ROTHFELD: That's correct.

21 QUESTION: What requires them, if anything, to obey
22 non-discrimination laws, most of those? I'm just wondering if
23 whatever we decide in this case would apply to a lot of other
24 agencies, or is it really pretty unique to the Postal Service?

25 MR. ROTHFELD: Well, I think that this case would
apply essentially to any component of the Federal Government

1 which is sued pursuant to Section 717(c). We think that that
2 is (a) the dispositive waiver of sovereign immunity, and (b)
3 clearly embodies the Congressional intention that all employees
4 of the Federal Government should be treated in one way for
5 purposes of employment discrimination.

6 QUESTION: But does this statutory provision apply to
7 all these other sue and be sued agencies in much the same way?

8 MR. ROTHFELD: Well, I'm actually not sure of the
9 answer to that question.

10 QUESTION: I don't think -- it doesn't seem to on the
11 face of the statute. I was just puzzled by it as I was just
12 looking at it.

13 MR. ROTHFELD: Well, that would be a difficult
14 question of interpretation for the Court, because the way in
15 which the private sector provision of Title VII is written, it
16 specifically excludes, as I said from the definition of
17 employer, --

18 QUESTION: All Federal agencies.

19 MR. ROTHFELD: -- all, not only the United States,
20 itself, but all Federally-owned corporations and
21 instrumentalities, and therefore, it is quite clear that an
22 employee of the Federal Government cannot bring a Title VII
23 action pursuant to the private sector provision.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rothfeld.

25 Ms. Van Amburg, you have fourteen minutes remaining.

ORAL ARGUMENT OF LISA S. VAN AMBURG, ESQ.

1 ON BEHALF OF PETITIONER - REBUTTAL

2 MS. VAN AMBURG: Thank you.

3 Mr. Rothfeld suggests that this Court must make a
4 decision between the two waivers, the waiver in the Postal
5 Service Charter, or Title VII, which one applies. I don't
6 agree that the two are mutually exclusive. I think that the
7 Court can take into consideration and give effect to each
8 waiver. The waiver that occurs in the Postal Reorganization
9 Act is a waiver of the status of the agency as the sovereign.
10 The waiver that occurs in Title VII concerns a substantive
11 right to proceed.

12 Both can be taken into consideration. Title VII
13 doesn't tell us anything, however, regarding interplay of these
14 two waivers. Congress has expressed interplay in the Federal
15 Tort Claims Act, but has not done so in Title VII. So then we
16 are left to infer a wavy line as to what the Postal Service is
17 immune to and what it isn't by Mr. Rothfeld's argument.

18 Under the longstanding liberal construction rule, no
19 inferences to that broad waiver of the Postal Reorganization
20 Act should be lightly drawn. And it's clearly a rule that's
21 very functional for the courts in the sense that if you assume
22 that Congress is experienced in legislating against this
23 liberal construction rule, they you really don't have to draw
24 wavy lines. Maybe they're liable for punitive damages, maybe
25 they're liable for costs, for interest. That's up to Congress
to draw the line. Congress knows how to do it, it's done it

1 before. It's expressed it before.

2 And Congress understands that a sue and be sued
3 clause can be a separate source of authority for proceeding
4 even as to certain damages, elements of damages which interest
5 theoretically is an element of damages. So the Government's
6 position is based upon a mere inference, not upon any express
7 statutory language.

8 And the fact that interest is not articulated in
9 Title VII isn't particularly instructive. It doesn't mean that
10 Congress did not want sue and be sued employees to get
11 interest. It's a function of the fact that interest has
12 historically been viewed as an element of damages separate and
13 apart from the substantive claim.

14 So a as a natural incident of Title VII suits,
15 interest should be recoverable against the Postal Service
16 because it occupies the status of a private commercial
17 enterprise for these purposes. I don't think that the Court
18 needs to make a broad decision that would affect over 124 sue
19 and be sued agencies because of the unique character of the
20 Postal Service. It's clearly one of those agencies the Court
21 had in mind in footnote 5 of the Shaw opinion. Congress when
22 it created it, removed the cloak of sovereign immunity and
23 launched it into the world of private commercial enterprise.

24 There are a lot of sue and be sued agencies. The
25 first interest case was against the National Home for Disabled
Volunteer Soldiers which I don't think was a commercial

1 enterprise. But this Court need not define the holding so
2 broadly because of the unique character of the Postal Service.

3 I would like to just for one moment note something I
4 found in the legislative history of the Postal Reorganization
5 Act, which I think is an indication of Congress' understanding
6 that there would be new causes of action created in the future
7 which would affect the Postal Service in the same way as a
8 private enterprise would be affected. In discussing the
9 applicability of the National Labor Relations Act to the Postal
10 Service, which is correct, the National Labor Relations Act
11 applies to the Postal Service except for the right to strike.

12 Congress discussed the applicability of right to work
13 laws of the various States and recognized that these laws
14 applied to the Postal Service in the same way as they would a
15 private enterprise. And then it said, in the legislative
16 history, if the National Labor Relations Act should be further
17 amended at some future time, --

18 QUESTION: What are you quoting, you said it said,
19 Congress said in what? What are we talking about? It is a
20 floor statement or?

21 MS. VAN AMBURG: Committee Report, the Conference
22 Committee Report in the United States Congressional and
23 Administrative News, Vol. 2, page 3664. If the National Labor
24 Relations Act should be further amended at some future time
25 either to extend or to restrict right to work provisions, that
amendment presumably would apply to the Postal Service in the

1 same way that it applies to other Federal entities.

2 I think Congress understood that there would be
3 changes in the future and the Postal Service would be affected
4 by these changes in the same way as a private business would
5 be. And that's the key there, that the Postal Service came
6 into Title VII effectively as a private business.

7 Thank you.

8 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Van Amburg.

9 The case is submitted.

10 (Whereupon, at 11:40 a.m., the case in the above-
11 entitled matter was submitted.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-1431

CASE TITLE: *Loeffler v. Postmaster General*

HEARING DATE: 1-11-88

LOCATION: *WASHINGTON, DC.*

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the *United States Supreme Court* and that this is a true and accurate transcript of the case.

Date: 1-11-88

Margaret Daly

Official Reporter

HERITAGE REPORTING CORPORATION
1220 L Street, N.W.
Washington, D.C. 20005

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'88 JAN 19 P4:18