ORIGINAL

SUPREME COURT OF THE UNITED STATES

In the Matter of:

ANN McLAUGHLIN, SECRETARY OF LABOR,

Petitioner

vs.

RICHLAND SHOE COMPANY

No. 86-1520

Pages: 1 through 39

Place: Washington DC

Date: February 24, 1988

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I N D E X

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RICHLAND SHOE COMPANY

No. 86-1520

Washington, D. C.

Wednesday, February 24, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:11 o'clock a.m.

APPEARANCES:

DONALD B. AYER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the petitioner.

LEON EHRLICH, ESQ., Reading, Pennsylvania; on behalf of the respondent.

P R O C E E D I N G S

(10:11 A.M.)

CHIEF JUSTICE REHNQUIST: We will hear argument first today in Number 86-1520, Ann McLaughlin, Secretary of Labor, versus the Richland Shoe Company.

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

ORAL ARGUMENT OF DONALD B. AYER, ESQ.

ON BEHALF OF THE PETITIONER

MR. AYER: Thank you, Your Honor. Mr. Chief Justice and may it please the Court, this case presents the question of the meaning of the term "wilfull violation" as it appears in the Fair Labor Standards Act statute of limitations provision, 29 USC Section 255(a).

That section provides that an action may be brought "within two years after the cause of action has accrued except that a cause of action arising out of a wilfull violation may be commenced within three years."

This action was brought in 1984 by the Secretary of Labor to enjoin further overtime pay violations and to compel payment of overtime accrued during the prior two and a half years. It was brought under Section 217 of the Act authorizing equitable relief, so there is in this case no question of the availability of liquidated damages. We are simply talking here about compensatory relief and injunctive relief.

In that action the Secretary moved for summary judgment based primarily on the records of the employer, and that motion was granted by the District Court. The court first rejected the defense of the employer that his behavior his conduct was justified under the so-called Below plan exception of the Fair Labor Standards Act, Section 207(f), and went on to address the question of the statute of limitations provision.

The court rejected the contention that the three-year statute of limitations was inapplicable here on the ground that the conduct was not wilfull, and in doing so it applied what was at that time the uniform view of the Courts of Appeals, the so-called appreciable possibility test first adopted by the Fifth Circuit in the Jiffy June Farms case.

The court said that that test requires only an awareness of the possible application of the Fair Labor Standards Act and found on those facts that the vice president and general manager had made clear that he was indeed aware of the Fair Labor Standards Act, and that that Act does govern over time systems of compensation.

The Third Circuit Court of Appeals affirmed with regard to the issue of a violation and, however, reversed with regard to the statute of limitations question. It found that the appreciable possibility test was inappropriate, stating primarily the reason that it has the tendency to

collapse the two tiers that are plainly contemplated on the face of the statutory provision, the two tiers of liability, two years versus three years, because in virtually every case, although I think not in every case, an employer is going to be found to be aware of an appreciable possibility that the Fair Labor Standards Act will cover.

Instead of the at that point established appreciable possibility test, the court applied the test enunciated by this Court in the Thurston case, where it dealt not with this statute, but rather dealt in the context of the Age Discrimination Employment Act's section dealing with liquidated damages, and that test is generally articulated as requiring a knowledge of the violation or reckless disregard for the matter of whether or not the conduct is in fact in violation of the law.

QUESTION: Mr. Ayer, do you think that the government's proof could have met that reckless disregard standard in this case?

MR. AYER: I think that there -- the answer to that question turns upon the precise application given, the precise interpretation given to the reckless disregard test, and our concern with the reckless disregard test is essentially -- it is not with the part that talks about disregard. It's the part that talks about reckless. And we feel that the term "reckless disregard" as it is used generally throughout the law carries with it a connotation

of outrageous conduct, a connotation of highly unreasonable conduct, and that if you read that connotation into the Thurston test, I think it is arguable at least -- I think it is unclear. I think you would have to remand to get the determination whether we meet that test or not.

QUESTION: Well, in your position is the evidence sufficient to meet that standard?

MR. AYER: I think our -- the answer to that, I think, is yes, in two aspects. Number One, with regard to overtime that everyone agreed had to be paid quite apart from the Belo plan issue, payments were not made anywhere close to the statutory one and a half times rate.

And secondly, there are four requirements for this Belo plan requirement. It was our position below and it continues to be that none of the four were met, and we believe that in those two respects the plan is indeed outrageous and is indeed --

QUESTION: Now, under the Federal Fair Labor Standards Act, liquidated damages can be sought for a violation, can't they?

MR. AYER: Yes, they can. They can be sought under Section 216.

QUESTION: And could they have been sought here?

MR. AYER: They could have been sought had the action been brought under 216 rather than 217.

QUESTION: And what standard should be applied for a violation if liquidated damages are sought under this Act?

MR. AYER: Well, we think that in the context of the Fair Labor Standards Act, there is strong authority that liquidated damages are themselves not punitive, as this Court found in Thurston in the Age Discrimination Act, but rather are compensatory. The Court's reasoning in the Thurston case finding that the liquidated damages were punitive looked to the legislative history, where Congress had substituted in essence for the criminal provision, criminal enforcement provision of the FLSA a liquidated damages penalty and had specifically not applied the liquidated damages provisions of the FLSA.

In the FLSA, the authority of this Court, the Overnight Transport case and other cases have explicitly said that liquidated damages are compensatory, and I think that is not an implausible conclusion when you consider the various things they can be compensating for: number one, delay, interest that accrues on something that is unpaid for a period of years; number two, the emotional strain, the humiliation, as has been said by some courts that results in the context of a denial of pay to which you are legally entitled; and number three, consequential damages of whatever sort that may result when you are paid as your salary less

than you are entitled to and perhaps at a rate that makes it difficult to live in the way that you are accustomed to or would like to.

QUESTION: Well, I wonder if there aren't some advantages to having a more uniform test of what is meant by wilfull, whether it appears in this statute or another one.

MR. AYER: Well, I think there are indeed some advantages, but I think the approach that needs to be taken is not one that simply says there are some advantages, therefore the language must mean the same thing, but is rather an approach much like the one this Court took in Thurston of looking at the particular statute, looking at the particular context in which the words appear, and deciding whether or not -- what the precise meaning should be.

In this situation we think that the proper standard is one that is really a refinement of what the Court said in Thurston, a refinement in the sense that it indeed does pay attention and adopt the notion of disregard, but the question is, disregard of what? We think really what the Court ought to do in the context of the statute of limitations provision is start with the question of whether the employer was aware of an appreciable possibility that his conduct might not -- might be governed by the statute, that is, start with the old Jiffy June appreciable possibility test, but go on beyond that test and ask the question, what does the employer do in light

of that knowledge, in light of that uncertainty, and does he act in a way that is reasonable in light of that. We think what the employer should be required to do is, when he has that uncertainty, seek and get reliable assurances that his conduct is in fact in compliance with the law, and if he doesn't do that and he rather proceeds to act aware that he may be violating someone's rights to minimum wage or to overtime compensation, then he should be made to bear the risk of that --

QUESTION: Well, with that word "reliable advice" in there, how can he ever win if it turns out the Court decides the advice was not reliable, was just wrong?

MR. AYER: Well, reliable in the sense that when he got it it was reasonable to rely on it. That is what we mean by reliable.

QUESTION: Even though it is wrong.

MR. AYER: Well, he can't -- no, if he goes to a lawyer and the lawyer gives an opinion which on its face appears to be a reasonably reliable statement of what the law is and gives him basis on which he can fairly conclude that he is --

QUESTION: And yet you say you can't always rely on a lawyer's advice.

MR. AYER: I think you can't always rely on it. For example, in a situation where the lawyer --

QUESTION: I mean, the client is supposed to second guess the lawyer?

MR. AYER: Well, if the lawyer, for example, assumes hypothetical facts that are incorrect, and he sends you a letter that says, assuming Situation X, then the law, I believe, is as follows. In that situation, for example --

QUESTION: Well, he hasn't got any advice at all about his case, then.

MR. AYER: Well, that's right. He has tried. He has gone to a lawyer. But he hasn't gotten advice.

QUESTION: He has got a poor opinion.

QUESTION: He might have asked a lawyer about a tort case, and you say he can't rely on that advice in this case. I go with that. That is very reasonable.

MR. AYER: Okay, well, I think there is a question as to how far -- as to how reliable it has to be, but I think considering this you have got to bear in mind what is at stake. We are not talking here about punishing somebody. We are only talking about the third year of liability.

QUESTION: No, but you are saying that the word "wilfull" in the statute means unreasonable, right?

MR. AYER: I am saying -- No.

QUESTION: Sort of a negligence standard. Right.

MR. AYER: No, we are not. We are saying that the word "wilfull" means wilfully going forward knowing of a

significant risk that you are not complying with the statute, and that is a reasonable approach.

QUESTION: You can always phrase the wilfull, wilfully going forward and doing a negligent act. I mean, you can always end up with kind of a negligence standard even though you start out with the word "wilfull," because some part of your act is always volitional. You will to do something.

MR. AYER: Well, the "wilfull" here I think focuses on proceeding aware of the risk, and the reason --

QUESTION: That is just an ordinary negligence standard, being aware of the risk, isn't it? A reasonable man knows that there is a risk.

MR. AYER: Well, I think it is a reasonable approach to take here, because you have to look at the consequence. The consequence is not the assessment of some punitive measure. It is certainly not the assessment of a criminal sanction. It is rather the compulsion to pay what you are legally required to pay at the time that you didn't pay it, that is, during the third year.

QUESTION: Yes, but Congress obviously wanted to distinguish in some way between the duty to pay for two years and the duty to add on a third year. It wanted a heightened level there.

MR. AYER: I think it did, and I think it is useful

to look at the context in which it put those words into the statute in 1966 and to compare it to the context in which the Congress acted in 1967 in the Age Act, as this Court found in the Age Act, it was a substitution for the criminal provision of the FLSA of a liquidated damages provision which was to be punitive.

In the context of this Act, which was amended in 1966, we were dealing with two competing policies. The purpose of the FSLA amendments in 1966 was essentially to expand coverage. They expanded coverage to seven million additional employees and to 700,000 additional employers, and they increased the minimum wage, and did a number of other things.

There were concerns raised at that time about the effect that that would have, these new and suddenly arising obligations, on particularly small businesses, and some restaurant people came in and testified, and what was done following the expression of those concerns, those concerns of unanticipated new liabilities on small entities relatively poorly suited to deal with those new and unanticipated liabilities, was to put this provision into the statute, modify it from a two-year statute of limitations to a two-year provision with a three-year provision for wilfull violations, and that is why, that precise legislative history is why I think our view makes sense.

When an employer goes forward aware of a substantial or a significant risk, that what he is doing is in violation of the law, you can't say that that risk is unanticipated. It is fair to treat his conduct as wilfull in the sense that he is going forward wilfully aware of the risk that is being incurred.

QUESTION: Mr. Ayer, it is not at all unusual that Congress, although it has a particular problem in mind, adopts language that entirely solves that problem but also solves some other problems as well or extends to some situations other than that problem.

What you are urging upon us is a very strange interpretation of the word "wilfull" based upon the principle that we should scrutinize legislative history and be sure that the only thing the statute covers is what you find in the legislative history as the primary, and as far as we know the exclusive concern of the Congress. That is a very strange principle of statutory construction.

MR. AYER: Well, we don't think that this is at all a strange concept of the word "wilfull" in the context of this Court's interpretation of the word "wilfull."

QUESTION: It took you a long time to come up with it. Below you were just going with Jiffy June in its original version, weren't you?

MR. AYER: The government's position has been up

until the filing of this petition that the Jiffy June so-called appreciable possibility test is the law.

QUESTION: Has anybody ever thought of this meaning of wilfull before?

MR. AYER: Well, yes, I think so. I think --

QUESTION: Where does it exist, and what is --

MR. AYER: Well, I think the D.C. Circuit decision in the Laffey case in 1976 enunciated something very close to it, talking about where an employer cognizant of an appreciable possibility that he may be subject to the statutory requirements fails to take steps reasonably calculated to resolve the doubt.

QUESTION: Isn't your position here essentially that of the D.C. Circuit?

MR. AYER: It is very close. We think it is essentially identical to the D.C. Circuit. And I would like to go back to the question of --

QUESTION: Well, of course, the Jiffy June standard is even an odder interpretation of the word "wilfull."

MR. AYER: Well, we agree with that. Our position is that the Jiffy June standard has significant problems, and I cannot account for or justify the course of development under which the Fifth Circuit initiated it and other courts followed it.

QUESTION: And the Secretary.

MR. AYER: Well, it has two problems.

QUESTION: I suppose the Secretary was responsible for urging it on the Fifth Circuit.

MR. AYER: That's correct, Your Honor. The problems that we have with it, just so we are clear as to why we are departing with it, are, Number One, it tends to collapse the two parts of the statute, the two parts of the statute of limitations, and Number Two, maybe even more seriously, it creates a disincentive for employers to go out and get good advice because they figure, well, I am going to be wilfully liable no matter what I do, so why don't I just go ahead and not worry about it?

What we want to put in place, what we want to adopt is the Laffey standard, which puts an incentive on the employer to get good advice. It tries to make the statute work. It tries to get the employer to get good advice, to comply with the statute, and when he takes those reasonable steps and he gets reliable assurances, he is not liable for that --

QUESTION: Well, he is. He is liable -- he takes the risk that his lawyer is wrong for two years.

MR. AYER: That is true in any event.

QUESTION: Well, all right.

MR. AYER: That is true in any event.

QUESTION: He is not off the hook just because he gets advice. He is just off the hook if he gets good advice

for the third year, for the third year of liability.

MR. AYER: That's right, but that is an incentive to -- that is some incentive, depending on how much money is at stake, to get him to comply with the law, and that is good.

QUESTION: And so long as he is not neligent in accepting the advice, in which case if he is negligent he is wilfull.

MR. AYER: Well, I would -- we think that the concept of negligence is really a concept that is inappropriately applied here. We think that it is possible that an employer acts non-negligently in getting advice that says, on balance we think your conduct is probably legal, but there are these risks and this possiblity that you may not be acting legally.

It is conceivable, at least, that that is not negligent conduct on the part of the employer to go ahead in the face of that advice. We would say that nonetheless under this wilfull violation standard the employer should be treated as wilfully violating because he went forward knowing that there was a significant risk that he was going to be violating the law, and we are not talking -- again, I want to emphasize we are not talking about throwing the man in jail. We are not talking about assessing a punitive sanction. We are talking about whether the Secretary or individual employees can go into court to collect what they were legally entitled to at the time it wasn't paid.

QUESTION: Isn't that essentially a question for Congress? I mean, this would have been a very good argument to make to Congress when it was drafting this section, saying we are not talking about -- don't put the word "wilfull" in. But to say, now that Congress has put the word "wilfull" in, that this really isn't all that bad so we should disregard the word "wilfull" --

MR. AYER: We are not at all advocating disregarding the word "wilfull," nor are we advocating disregarding much of what is in the Thurston test. We are talking about a test that says when an employer goes forward with conduct in disregard of his knowledge that it may violate the law, then he is liable for the --

QUESTION: You are not going to punish him?

MR. AYER: No, we are not going to punish him. We are going to make him pay what he was legally obligated to pay before. All we are going to do --

QUESTION: Plus maybe double damages or whatever it is.

MR. AYER: Plus maybe double damages, but double damages in the context of this Act are not punitive, they are compensatory, and this Court's number of cases, the Overnight Transport case, other cases have said specifically that, that they are not punitive.

QUESTION: Mr. Ayer, under your test of a

significant risk of a violation when you take action, I suppose everybody who files an income tax return is at significant risk that he has made an error.

MR. AYER: I think that is right, and so to follow --

QUESTION: And so is every error a wilfull failure to pay?

MR. AYER: Well, but there you are mixing two different statutory schemes. In the context of the tax situation it is obviously true that when a taxpayer doesn't pay the tax, and he has some thought that he may be making a mistake or he may be doing something wrong, he has to pay the tax. All we are saying is --

QUESTION: Yes, but if he does -- if he files an incorrect return wilfully, he has a more serious consequence.

MR. AYER: This Court has addressed that in a number of cases as to what wilfull means in the context of the tax laws, criminal sections, the ones I am thinking of, and that is a different context than the notion that the word "wilfull" has to mean the same thing throughout federal law is one that is contradicted in almost every single case this Court has written dealing with that word.

QUESTION: Isn't it true that even under the wage and hour laws there are some rather complicated regulatory provisions where a person can take a significant risk even,

you know, unless he gets a pretty skilled lawyer on the proposition? There have been all sorts of significant risks of violation in the federal --

MR. AYER: Well, that's true. Under the wage and hour laws there is a specific provision of Section 259 where you can go to the Labor Department and you can get advice, and if you get a definitive ruling, you not only are not wilfull but you are not liable for the unpaid overtime or minimum wage at all.

QUESTION: This man paid a weekly wage based on 48 hours of work, didn't he, and then he paid time and a half, he averaged that out and paid time and a half on the --

MR. AYER: He was supposed to. In fact, Footnote A of our brief indicates clearly that he did not pay anything close to time and a half for the overtime over 48 hours.

QUESTION: But if the average wages for the 48 hours had been the proper regular wage, then it was time and a half over that, wasn't it?

MR. AYER: That he should have paid. He in fact did not pay. If you read that Footnote A it talks about several -- they were only talking about seven mechanics here.

QUESTION: Right.

MR. AYER: And as to a number of them we discuss there the fact that the employer was paying an hourly rate as you calculate it that was not only not time and a half, it

was not even the minimum wage of $3.35. So that there is no question, I think, but that with regard to the overtime that everyone agrees had to be paid, quite apart from this Belo plan, if we approve the Belo plan, they still had to pay overtime above the 48-hour regular week, and as to several of these employees, they were not paying anything that resembled not only overtime, it didn't even resemble their base regular wage. It was way below it.

So that in that sense I think the answer to Justice O'Connor's question is that this is indeed something that would meet, should meet on a full assessment of the facts by the District Court the conclusion that they were in disregard of the law.

QUESTION: If we agree with you on this standard that you propose, what do we do, send it all the way back to the District Court?

MR. AYER: I think you remand to the District Court. The Court of Appeals, of course, had remanded to the District Court for application of its standard, of the Thurston standard, and the reason that we brought this case to you now is that we have this sharp split in the circuits. We have four circuits that have adopted the Thurston test under 255(a) under the statute of limitations. We have five since Thurston that have applied the Jiffy June test, and so you have the sharpest of splits in the circuits, plus you have

three other circuits that apply different standards.

QUESTION: And all those cases are wrong?

MR. AYER: Well, we think that the first nine, that the four that have applied Thurston and the five that have applied Jiffy June are poles, and we are in the middle.

QUESTION: But nevertheless all wrong?

MR. AYER: They are incorrect. We think they are not the most appropriate reading of this statute.

QUESTION: Are there a lot of cases out there that will have to be done over, that are not final?

MR. AYER: There are, I think, a fairly large number of enforcement actions at various stages along the way, and I think a change in the law would allow them to be corrected at various stages. We are only talking about an assessment -- we are not talking about the basic assessment of liability. We are talking about a judgment as to whether the violation itself is wilfull or not as to the third year.

Now, one thing I would like to say in answer to that is that the reason we are here is also because this really matters. There are, for a variety of reasons, an enormous number of cases brought under this statute. It takes a significant time in order to, Number One, get a report of a possible violation, Number Two, to investigate the violation, Number Three, if you find a violation that you want to enforce, to try to settle the violation. If you can't settle the

violation, you then refer it to the U.S. Attorney's office or to a lawyer to prosecute. All of that takes time, so that these cases are being brought at a time when not infrequently in fact quite commonly there is liability that is more than two years old, and so we are talking about impairing the enforcement scheme of this Act.

QUESTION: How long had the Secretary been applying the Jiffy standard?

MR. AYER: Well, it was, I think, in 1973 is when Jiffy June was decided.

QUESTION: That was the case.

MR. AYER: That was the case.

QUESTION: Yes, but he must have been --

MR. AYER: I don't know the answer to that.

QUESTION: Of course, it was a construction by the agency charged with enforcing this statute. It was a construction of the statute.

MR. AYER: I don't know precisely what the Secretary was urging between 1966, when this was enacted, and 1973, when Jiffy June was decided. I do know, I think, that when Jiffy June was decided, and up until Thurston, it was the uniform position of all the Courts of Appeals that decided it that the appreciable possibility test was the law, and what we are asking the Court to do is to apply a rule that is more liberal for employers than that test, which was the uniform

interpretation for a period of, what, 12 years.

QUESTION: So I suppose you have to say, though, there just isn't any -- if you are going to differ with the Sectetary's or reject the Secretary's original position, you are really having to say there is just no room for the Jiffy June standard under the words of this Act.

MR. AYER: Well, that's correct. I would say it a different way. I would say that both it and the reckless disregard Thurston test need refinement to be appropriate in this context. We are borrowing the Jiffy June test as the first step of our test. We think you first ask, does the employer have an appreciable knowledge of an appreciable possibility?

QUESTION: Mr. Ayer, I understand that wilfull leaves some problems, and that the cases you cite on Page 16 of your brief, but those problems always relate to what has to be willed. Is it just the act that has to be conscious and wilfull, or need the defendant in the case have to will the violation of the law?

That is an understandable ambiguity. I don't see how your interpretation of the word has anything to do with that kind of an ambiguity. How is yours based on what it is that must be willed? I mean, the fact that a word is ambiguous in some respects doesn't mean that it is just an empty bottle and you can give it any meaning you want.

MR. AYER: Well, we certainly don't mean to suggest that.

QUESTION: What is it that must be willed --

MR. AYER: What must be willed --

QUESTION: -- and therefore must be wilfull, in a sense?

MR. AYER: What must be willed is conduct in the face of a known risk. That is what must be willed. And we think that that is a reasonable reading of the statute, given its history, because the concern at the time it was enacted was for unanticipated economic burdens on small business. They are not unanticipated. They are known. The risks are known at the time the action is taken. And that is why --

QUESTION: I don't see how you get there. The conduct must be willed or the violation of the law must be willed, and then you are just adding from nowhere an additional requirement, in face of a known risk. I don't see how you get that out of the word "wilfull." That is all I am saying.

MR. AYER: Well, we get it out of the word "wilfull," and the only thing I would like to add before I sit down and try to reserve the rest of my time is, our reading of the word "wilfull" is well within the mainstream of words -- of readings of that word as this Court has used it. Indeed, in the Illinois Central case, which this Court cited approvingly in Thurston, you are dealing there with a concept of

disregard. There it was an instance of failing to unload a cattle car within 36 hours because some employee forgot to unload the car, and that conduct was found wilfull, and this Court said in Thurston, that's a reasonable reading of the word "wilfull."

QUESTION: Mr. Ayer, I take it no Court of Appeals has applied the Laffey standard since the Thurston case came down.

MR. AYER: Well, it is hard to say, I think, precisely whether that is right or not. We think that the Nolting case in the Eighth Circuit, which we have cited, and the Donovan case in the Sixth Circuit, they are not identical to the Laffey case, but they are certainly somewhere between Thurston and Jiffy June, appreciable possibility, and we think they give some support to the position that we are advocating.

If the Court has no further questions, I would like to reserve the remainder of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ayer.

We will hear now from you, Mr. Ehrlich.

ORAL ARGUMENT OF LEON EHRLICH, ESQ.

ON BEHALF OF THE RESPONDENT

MR. EHRLICH: Mr. Chief Justice, and may it please the Court, I believe that the petitioner has stated something that is not entirely correct when he stated that the Jiffy

June case was uniform. I refer the Court respectfully to the footnote, Footnote 9 at Page 16 of the amicus brief, in which that same issue was addressed, and amicus states in its brief at Page 38 the government erroneously called the Jiffy June standard a majority rule. In fact, only the First, Fourth, and Tenth Circuits have adopted the rule. Four other circuits, however, have clearly rejected the Jiffy June standard.

I believe that the crux --

QUESTION: Those cases that rejected it were after Thurston?

MR. EHRLICH: After Jiffy June? Or after the Thurston?

QUESTION: When were the Court of Appeals opinions that rejected the Jiffy standard?

MR. EHRLICH: The Peters Shreveport case, 1987. The Brock case, of course. Walton versus Consumers Union, 1986.

QUESTION: Okay. Okay.

MR. EHRLICH: I believe that the petitioner's case rests upon the allegation that the conduct would be wilfull if done in the face of a known risk. I think that is a fairly close summary of what was stated. However, one thread through the petitioner's brief and reply brief is the reference, and reference was made here, to the employer's uncertainties. At

Page 30 of the brief, they state "Employers should bear the burden of a third year of liability when they engage in pay practices without resolving legal uncertainties." And in the reply brief at Page 7,"Only where an employer faces uncertainty about compliance with the FLSA need reasonable inquiry or other steps be taken to avoid a wilfullness finding."

If any part of this case can be stated with absolute certainty, it is that the respondent never experienced uncertainty about its pay practices. The respondent believed that it was dealing fairly, generously, and in compliance with the law in its salary arrangement with the mechanics, so if for no other reason we respectfully submit to this Court that no wilfullness on the part of the respondent can be found, and the respondent should be relieved of any further obligation.

I think it would be a travesty were this case to be sent back to the District Court in the light of the testimony that has been adduced. It was the respondent that submitted to the petitioner all the information that was requested. The petitioner limited its inquiry based on the Jiffy June doctrine.

Once they found out from the general manager that he was aware of the existence of the Act, they said, fine, we have got you, and now have us go back, I think it would be a travesty considering the total amount of money involved.

QUESTION: Mr. Ehrlich --

MR. EHRLICH: Approximately $4,000.

QUESTION: Mr. Ehrlich, I thought the Court of Appeals decision below has remanded it to the District Court to apply its standard. Is that not correct?

MR. EHRLICH: That is a correct statement, Your Honor.

QUESTION: And you think that shouldn't be done?

MR. EHRLICH: I think that that should not be done.

QUESTION: So you are not here supporting the judgment of the court below?

MR. EHRLICH: I am here supporting the judgment of the court below insofar as it rejects the contention of liability. I am contending --

QUESTION: Well, did you cross --

MR. EHRLICH: -- that it should not go back.

QUESTION: Did you cross petition to this Court?

MR. EHRLICH: May it please the Court, considering the amount of money involved in this case, we felt that it just didn't justify additional costs, and we felt that if we came --

QUESTION: Well, if you didn't cross petition I don't know how you can argue what you are arguing, if I may say so. You either have to argue in support of the judgment below or --

MR. EHRLICH: I believe that I can rightly argue

it for the same reason that the petitioner is arguing a theory not advanced in either the District Court nor in the Circuit Court of Appeals. I believe that this case should not have been granted certiorari because the issue here is one that is really seeking an advisory opinion. The petitioner is interested in resolving what it concedes to be a conflict, and so they drag us into this Court, but the case that was presented in both courts below had nothing to do with the issue being argued here. And we feel that if we are here, we might as well let the Court know our entire feelings.

Petitioner asserts at Page 44 of its brief that it is hard to imagine how the plan could have been the product of good faith reliance on sound assurances of the plan's legality. We suggest that it is not hard and that no imagination is required to establish good faith on the part of the respondent.

The records of the respondent show that the total compensation received by these mechanics, the initial compensation was almost double the minimum wage, and though not required to do so, the respondent paid these mechanics for vacation, though not required to pay it. They paid for holidays. They paid insurance. And they paid a bonus.

When all those figures are added up, they are greatly in excess of what a technical Belo contract would have required. As a matter of fact, in the appendix, there is a

reference in the deposition that one mechanic while receiving disability pay for which the employer had paid was also paid his full salary for 14 weeks. Now, if that is the kind of conduct that shows wilfullness, then there is a total distortion of that term.

QUESTION: Would you say that if a corporation paid three mechanics excess of what they were expected to pay and paid all the rest of them less, then that wouldn't be wilfull?

MR. EHRLICH: It would be wilfull --

QUESTION: Well, what good is it to show that one or two got the just amount?

MR. EHRLICH: Beg pardon?

QUESTION: What good does it do in this case to show that one or two were paid what they were entitled to receive?

MR. EHRLICH: May it please Your Honor, we are dealing with all the mechanics. All the people that are involved in this case, seven, are all mechanics. We are not dealing with anyone else. They were all treated the same way.

QUESTION: Were they all given this extra money you were just talking about?

MR. EHRLICH: Oh, all of them were. All of them were given bonuses, holiday pay, vacation pay.

QUESTION: All of them?

MR. EHRLICH: All of them. And as to intention, the depositions make it clear that the respondent was using the Department of Labor coefficient table, albeit incorrectly, it turns out, but they were using that coefficient table showing that they were intending to comply with the law.

QUESTION: Mr. Ehrlich, we don't ordinarily decide evidentiary questions here. The Third Circuit, which ruled in your favor on the standard, sent the case back to the District Court for further hearings, and as Justice O'Connor pointed out, you didn't cross petition for certiorari. So the best result you are going to get here is an affirmance of the Court of Appeals, which means the case goes back. All we are interested here is the proper standard which the District Court should apply when the case does go back.

MR. EHRLICH: Can I not argue, then, that this case still resolves a request for an advisory opinion and then as a matter of law determined that under these facts there is nothing to go back?

QUESTION: Well, I can only speak for myself. I think there is very little to be said for that argument.

MR. EHRLICH: Okay. We propose, however, that the Third Circuit Court of Appeals deicsion is an appropriate one as to the application of the law. But I think if it goes back and is remanded it should go back and we respectfully

submit and suggest that it go back with instructions as to what should be looked for. First, we think that the term "wilfull" should be taken in its ordinary sense, as the Circuit Court held, meaning a deliberate, intentional act. With some variations, the petitioner has advanced a test for determining wilfullness set out in its brief at Page 13 as follows:

"We think an employer's unlawful pay practices should be found wilfull for purposes of the FLSA's limitation provision when the employer is aware of the potential application of the FLSA but pursued the pay practices without reliable assurances of their legality, and then in the same vein in the reply brief that a wilfull violation would exist where an employer is aware of the FLSA applicability and fails to take steps to determine the statute's demands, or having taken such steps do not secure a reasonable basis for eliminating uncertainties about their compliance.

As I believe was evident from some of the questions, the petitioner offers amnesty only to those who sought reliable or reasonable advice on their legal obligation, and there is no definition of what the petitioner conceives to be reliable or reasonable. It could very likely be only that which or who agree with petitioner's views.

Would the petitioner, for example, find that the respondent, relying on my advice, would not have acted

properly because my advice might not have been considered reliable since I had disagreed with the Jiffy June decision? Isn't that what an employee would be faced with? Or, is the reliability of advice to be determined by a Martindale Hubbell listing? It just boggles the mind that this is what the government conceives to be an appropriate substitute for the Jiffy June standard.

And what comfort or security can the respondent and others derive as to what would be the definition considering again that the Jiffy June argument was espoused in both the District Court and the Circuit Court of Appeals? Meeting those tests, the three criteria, we admit the respondent knew that the Act applied. As to the second, we submit, as I stated before, that they used the coefficient table, albeit improperly, and we further say that the final criteria called for by petitioner of reliability and reasonableness is unrealistic and onerous.

It would mean that every employer before doing anything would have to seek a legal opinion on any action he took. We have got to remember that my client is a small business. They don't have house counsel. They can't afford to have everything run through attorneys. But more unsettling is the fact that after that legal opinion would have been secured there is no assurance that the government would still say, you have done a reasonable thing, what you are doing is

not wilfull. They would sit in judgment on the advice given the client. That is an horrendous suggestion.

If we are talking about reasonableness and since the petitioner now espouses that theory, let us look at what the conduct of the petitioner has been. How reasonable has its conduct been?

First, and it was mentioned in the argument, wilfullness requirement of the FLSA statute of limitations provision the petitioner states is designed to protect certain employers from unanticipated liability rather than to punish. Nothing in the record indicates that my client anticipated this liability, and nothing in the record shows any recklessness. So if we use that test, my client is home free. They never anticipated this liability. Is it reasonable to believe that my client established some contingent fund to take care of this? If they did that would be an act evidencing wilfullness.

I believe mention was made of uniformity of construction. And the Second Circuit Court in the case of Rousseau versus Trafari pointed out, "We believe that wilfull should have but a single meaning within the ADA, and that therefore the Thurston definition applies. Construing identical language in a single statute in pari materia is both traditional and logical. Moreover,a single meaning avoids potential jury confusion resulting from different

instructions."

And concerning the same word, the petitioner argued in support of that theory in the Thurston case, and yet in the brief here it would appear that the petitioner denies any need for uniformity. I on that subject point out to one other fact, that in its petition for certiorari there was an admission that the federal government itself has taken different positions on the proper interpretation of wilfull violation as used in the FLSA statute of limitations. That certainly doen't give anyone assurance. The reference to that is in its petition at Page 11.

The allegation then is made that the history of the Act suggests that the standard of wilfullness was to allow employees and the Department of Labor needed additional time to challenge unlawful pay practices, and the Circuit Court discussing the issue of punitiveness rejects the petitioner's position and states that more time is needed, that more time is needed by saying it is neither more difficult to detect nor more severe than it would be were the violations not wilfull.

And today again the petitioner acknowledges, as it did in its brief, that the In re Picture standard threatens to collapse the two-tiered scheme envisaged by Congress into a one-tiered scheme. When did they first became aware of that obvious fact, and why did they subject us to this litigation?

I think the most bizarre of the petitioner's case rests in its proposal in its brief at Page 45, when the petitioner states, "Respondent should be afforded an opportunity to present new evidence, including evidence of any efforts it undertook to secure reliable assurances that its pay practices complied with the FLSA. If respondent acknowledges in this Court that there is no such evidence, this Court should order affirmance of the District Court judgment. Otherwise, the case should be returned to the District Court for further proceedings on the third year of back pay liability."

Is that considered a reasonable approach? If this were an appropriate choice, and we dispute it, why wasn't it advanced previously? Why wasn't that alternative given to the respondent? We submit that the alternatives offered the respondent are not properly stated. If I may paraphrase, I would say it would be more reasonable for me since the petitioner does have the burden of proving wilfullness to state to the petitioner, if petitioner acknowledges in this Court that it has no further evidence of wilfullness than it has to date, despite what was said in answer to a question, this Court should order affirmance of the Circuit Court judgment and further hold that as a matter of law based on the evidence already in the picture respondent has no liability for the third year.

And then what was said here, the observation that the petitioner's standard be viewed at most as a variation on Thurston's standard, and that Thurston need not be read as substantially different from the petitioner's prose standard, I would suggest smacks more of salesmanship than accurate observation.

The standard now proposed, asserts the petitioner, was always a possible resolution as this case progressed. If that were really the case, I would submit respectfully that it was the most carefully hidden secret in Washington. And then, in the reply brief, the petitioner attempts to allay the fear of the respondent that there is no signficant danger that wilfullness disputes will center on whether an attorney's advice if relied upon is reasonable.

The requirement, continues the petitioner, means only that a court must examine the advice as one factor in determining the issue. Won't the petitioner examine that advice initially, at the outset, before it becomes a court case? And what does one factor mean, 25 percent, 50 percent, 75 percent? We have no assurance on what a person in the position of the respondent can expect?

We submit that this Court in Thurston has already determined the meaning of wilfull , that it is a knowing or a reckless disregard, and contrariwise the petitioner can point to no decision of this Court to support the definition

now urged, nor can it point to any evidence in the record that would show a reckless disregard. The petitioner seeks to distinguish the standard in this case and Thurston on the ground that Thurston dealt with liquidated damages rather than the statute of limitations. We submit that the reasoning in Thurston is equally applicable here.

The end result of what is urged if a third year of liability is found to exist is added money paid out for a violation of a statute. That is punitive. The fact that it is called something else doesn't mean any less as far as the employer, the respondent is concerned. It means paying out money for having done something conceived subsequently to be wrong.

We submit that on the record as it stands now, there is absolutely nothing to suggest that the respondent did anything improper, anything wilfull, anything other than a reasonable and responsible business would do. We ask that this Court reject the contention of the petitioner.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ehrlich.

Mr. Ayer, you have two minutes remaining.

ORAL ARGUMENT OF DONALD B. AYER, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. AYER: Thank you, Your Honor.

I would just like to make one point about the

extent to which the statute of limitations provision in fact governs the recoverability of liquidated damages in answer to Justice O'Connor's earlier question. I have already said that it is our view and I think it is the Court's historical view that liquidated damages under the FLSA are compensatory, not punitive.

The other point I want to make is that only in a very partial and somewhat peculiar sense does the statute of limitations control the recoverability of liquidated damages, and I say that because of the Section 260 provision that essentially governs whether or not an employer is going to be able to avoid the payment of liquidated damages. That provision says that the employer can come in and show a reasonable basis for -- a good faith reasonable basis for believing his action was legal, and then within the Court's discretion the court may decide to award no liquidated damages if it does't want to, so that it is only in the sense of avoiding considering that Section 260 that the statute of limitations controls the availability of liquidated damages.

If there are no further questions, I have nothing further.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ayer.

The case is submitted.

(Whereupon, at 11:04 o'clock a.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-1520

CASE TITLE: McLaughlin v. Richland Shoe Company

HEARING DATE: Wednesday, February 24, 1988

LOCATION: Washington, D.C.

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.

Date: 2/29/88

Margaret Daly

Official Reporter

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