TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	)	
V.	)	No. 86-1696
COMMERCIAL OFFICE PRODUCTS COMPANY	)	

Pages: 1 through 46

Place: Washington, D.C.

Date: January 13, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, :

Petitioner, :

v. : No. 86-1696

COMMERCIAL OFFICE PRODUCTS COMPANY :

Washington, D.C.

Wednesday, January 13, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:00 p.m.

APPEARANCES:

RICHARD J. LAZARUS, ESQ., Washington, D.C.;

on behalf of the Petitioner.

JAMES L. STONE, ESQ., Denver, Colorado;

on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(2:00 p.m.)

CHIEF JUSTICE REHNQUIST: Mr. Lazarus, you may proceed whenever you are ready.

ORAL ARGUMENT OF RICHARD J. LAZARUS

ON BEHALF OF PETITIONER

MR. LAZARUS: Thank you, Mr. Chief Justice, and may it please the Court:

This case on writ certiorari to the United States Court of Appeals for the Second Tenth Circuit concerns the timeliness of a charge filed with the EEOC pursuant to Title VII of the Civil Rights Act of 1964. Respondent, Commercial Office Products Company, has refused to comply with an administrative subpoena issued by the EEOC pursuant to Title VII on the ground that the underlying discrimination charge was not timely filed with the Commission.

Whether the charge was timely filed depends on the answers to two different questions. First, on what date was the charge first filed with the EEOC; and second, what were the applicable statue limitations under Title VII, with respect to this particular charge?

The answers to these two questions, in turn, depend on the meaning of two related provisions of Title VII, paragraphs C and E of Section 706. The first, Section 706(c) provides that where there are federal and state agencies with

overlapping jurisdictions to remedy a certain employment discrimination practice, a charge alleging such a practice can not be filed with the EEOC until sixty days after state proceedings have commenced, unless such proceedings have earlier terminated.

The second provision, Section 706(e) provides that the normal 180-day federal limitations period does not apply in that circumstance. Instead, the charge must be filed with the EEOC within 300 days of the alleged discriminatory practice, or within thirty days of the termination of state proceedings, whichever is earlier.

The timeliness of the charge in this case depends on the application of these two provisions to the following facts:

The individual complainant in this case submitted a charge to the EEOC in which she alleged that 290 days earlier, the Respondent, Commercial Office Products, had discharged her from appointment on account of her sex. The EEOC subsequently accepted the charge for filing. Upon determining, the Colorado Civil Rights Division declined initially to process the charge, and wanted the EEOC immediately to act on the charge instead.

The state agency notified the EEOC of its intention in three different ways. First, the Colorado Agency had previously entered into a work-sharing agreement with the EEOC in which the state a greed in advance that these procedures would be followed with respect to a charge such as this one,

when it was first received by the EEOC.

Second, the EEOC contacted the state agency on the day that it first received the charge, and on that day received oral confirmation that these procedures should be followed with respect to the charge.

Third, pursuant to the work-sharing agreement, the EEOC sent a copy of the charge to the state agency along with a transmittal form. That was four days after it received the charge. Five days after that, the state agency sent a copy of that transmittal form back to the EEOC, on which it indicated that it declined to initially process the charge.

QUESTION: What did they indicate?

MR. LAZARUS: That they declined to initially process the charge.

QUESTION: Is that all they said?

MR. LAZARUS: That's all it said on that form.

QUESTION: But didn't they simultaneously say they postponed, or might consider it later, or something like that? The big issue in this case is whether that was the termination of the state proceeding. That's the critical issue.

MR. LAZARUS: Well, pursuant to the work-sharing agreement, they reserved the jurisdiction --

QUESTION: They reserved jurisdiction; that was their language? And your basic position is that nevertheless, that was a termination within the meaning of 706(e)?

MR. LAZARUS: Precisely. And that's where we disagree. The District Court agreed with Respondent that under these facts, the charge had not been timely filed. The Court of Appeals agreed. Both of the Courts applied the 300-day limitations period rejecting the Respondent's alternative argument, but they both concluded that the charge had not been filed with the EEOC within that 300 days because the 60-day deferral period of Section 706(e) took it outside the 300 days.

QUESTION: And there had been no termination.

MR. LAZARUS: They both rejected our contention that there had been a termination prior to that.

QUESTION: And you say that there is a termination, even though the case is going to go back to that State Commission?

MR. LAZARUS: We say there is a termination even though the state agency has nominally reserved jurisdiction, if it wants, to act after the EEOC has acted. There is no indication --

QUESTION: And it happens sometimes that that occurs.

MR. LAZARUS: The state agency has informed us, and I believe it's also reflected in their amicus brief filed, that four or five times a year they reactivate a charge. They typically only do that when --

QUESTION: Even though it's been terminated?

MR. LAZARUS: Because the termination does not

require, we believe, a complete surrender, and there is really no reason that it should.

QUESTION: Well, ordinarily, "termination" means "end," doesn't it?

MR. LAZARUS: Well, the word "termination" -- and that's where we disagree with Respondent -- we don't believe that "end" must be a permanent --

QUESTION: "Terminus" is a Latin word that means "end."

MR. LAZARUS: It means the end, but it does not necessarily mean that it be irrevocable, and it be final. It's to cease.

QUESTION: Something can have many ends.

MR. LAZARUS: Well, it depends on what is being terminated.

QUESTION: I know a lot of terminal patients who will be delighted to hear this.

(Laughter)

MR. LAZARUS: Precisely that. But it depends on what type of activity is being terminated. Something like a life -- by the nature of the activity being terminated, can only cease once. Other things, such as proceedings are on-going and they can by their nature cease more than one time.

QUESTION: Well, like a play, it can come on the next night.

MR. LAZARUS: Well, that's right.

QUESTION: But when something ceases temporarily, you ordinarily would say it's "suspended." You wouldn't say that it was "terminated."

MR. LAZARUS: That is right. But the word "termination" includes both a suspension, as in a case such as this one, and a final disposition. And Congress chose a word which included both. That word is consistent with the purposes underlying the deferral requirement. But we believe that there is --

QUESTION: It sounds like it didn't even terminate. It didn't even commence, did it?

MR. LAZARUS: Well, it did commence.

QUESTION: How did it commence? They said they declined to take any action.

MR. LAZARUS: But they declined to initially process the charge.

QUESTION: They didn't even process it.

QUESTION: But it was filed.

MR. LAZARUS: But it was filed with them. And under this Court's decision in Love v. Pullman, there is not question. The same procedure was followed here, in fact, that was followed in Love v. Pullman. There was an oral confirmation; it was the same agency involved. So there is really no doubt that there was a commencement of proceedings

within the meaning of Section 706(c). Initially processing the charges, which is something that they declined to do, is something after the commencement of the state proceedings.

We believe that the judgement of the Court of Appeals, which relied on its ruling that there can not be termination proceedings without a complete and irrevocable surrendering of jurisdiction was incorrect. We also believe that there is equally no merit to Respondent's ultimate contention, and that is that their 300-day limitation period does not apply in the first instance in this case because the charge was not timely filed with the state agency as a matter of state law.

Turning to the First, the decision of the Court of Appeals misconstrues, we believe, the meaning and purpose of the deferral requirement established by Section 706(c). The Court of Appeals when under its reading of termination requires state abdication authority instead of deference to state authority, and would invite needless sixty-day delays instead of promoting expeditious processing of claims.

Indeed, the decision threatens to undermine the operation of the harmonious and efficient and cooperative relationship now existing between federal and state agencies, and precisely the relationship that Congress hoped to foster in enacting Title VII, and which now exists thanks to the work-sharing agreements.

QUESTION: Well, what the Respondents say to that, I think, is that you can read the legislative history to suggest that Congress was worried about the federal government doing too much of these things. They really wanted the states to do most of them. Therefore, they put in the termination provision; the state had to let go.

MR. LAZARUS: Well, we think there is no question that Congress hoped to --

QUESTION: You say this is very harmonious, but under it the federal government's doing an awful lot of the processing rather than the states.

MR. LAZARUS: To the extent that the federal government is doing some of the processing, it is pursuant to the agreement that the states have the upper hand in voluntarily entering into these agreements. The states --

QUESTION: But Congress may have been worried about that, about the states themselves wanting to push as much of the work as possible onto the federal government. There's nothing inconsistent with the Congress wanting to prevent the states, even if they wanted to, from chucking off so much of that work.

MR. LAZARUS: The statute really reflects that Congress chose to encourage the states by a carrot, and not by a stick. By encouraging them, by giving them the opportunity to act first, and not by requiring them to act, and not by

saying that they had to finally dispose of a claim by a certain time, or indeed, that to take advantage of an efficient work-sharing relationship, the states would have to abdicate their authority.

It's really contrary and perverse to the Congressional purpose to assume that Congress was somehow forcing the states to act. We think that instead they were encouraging them by giving them a head start -- a carrot, but not a stick.

The procedural requirements of the two provisions, of paragraphs (c) and (e) of Section 706, are uncommonly complex. They are the product, we admit, of a hard-fought compromise fashioned by Senators Dirksen and Mansfield in order to overcome a filibuster that threatened the passage of the Civil Rights Act of 1964. The competing policy concerns reflected in the statutory language are evident throughout the legislative debates, and they are principally two.

First, on the one hand, there were those such as Senator Dirksen who wanted to insure that state agencies had a meaningful opportunity to address appointment discriminations at the local level. On the other hand, there were those who did not want the force of a federal non-discrimination remedy to depend ultimately on the effectiveness of state law.

The balance was carefully struck by the statutory language they enacted. The language provides a state agency

with that prior opportunity to process a charge first, by giving it in effect --

QUESTION: But Mr. Lazarus, wasn't there another policy consideration that was quite important in this whole scheme of timing? That is that they wanted the claimants to process their claims promptly. The general rule was an 180-rule.

MR. LAZARUS: They wanted them to process promptly, but in this case they extended the limitations period in order to --

QUESTION: -- give them an opportunity to --

MR. LAZARUS: -- give the state agencies their chance.

QUESTION: Yes.

QUESTION: Yes, but here the claim was referred to the state by the EEOC. The Claimant never went there.

MR. LAZARUS: That's right.

QUESTION: It was referred by the EEOC, and after the state's statute of limitations had expired.

MR. LAZARUS: That's right.

But that really goes to the second point. They claim --

QUESTION: It sure does. Are you going to talk about that?

MR. LAZARUS: Yes, I will.

We believe, consistent with this Court's decision in Oscar Mayer, that there only have to be two things for there to be a state deferral agency within the meaning of Section 706(c) to require that that deferral take place.

One --

QUESTION: Do all fifty states have state agencies that qualify?

MR. LAZARUS: I believe there are a handful -- four or five that do not.

QUESTION: That still do not?

MR. LAZARUS: Right, that still do not.

QUESTION: Well, the effect of your position is for all the states that do to convert the 180-day time limit, plus the sixty days, into a 300-day time limit. That's the effect.

MR. LAZARUS: Well, unless the state agency terminates the proceedings prior to the 270 days, in which case it would be the thirty days --

QUESTION: But that's what you're really asking us to do. Wouldn't it have been a lot easier for Congress to just say, "Well, we're going to have a 300-day time limit," if that's what they intended?

MR. LAZARUS: No, Congress has gotten exactly what they wanted. Congress provided for an extended limitations period when there was a state deferral agency. So the only question is whether there is such an agency.

And we believe that the fact that the charge might be untimely under state law --

QUESTION: It depends on how you interpret the language of a state agency -- what do they say -- "with the authority?"

MR. LAZARUS: Right. Whether there's a state law prohibiting the alleged appointment discrimination practice, and whether there is a state agency authorized to remedy such practice.

QUESTION: Authorized to remedy.

QUESTION: In this case there wasn't a state agency that could entertain it when it was referred.

MR. LAZARUS: Well, yes, there was.

QUESTION: You mean that the agency can just waive the time limit if it wants to?

MR. LAZARUS: Well, as the Court of Appeals concluded, and we don't resist that conclusion here, the state limitations period is not self-executing, and it is subject to waiver. It is subject to equitable tolling. The entire purpose of the deferral requirement is to allow the state agency for itself to decide what is the impact for the failure to meet a limitation period -- not to have the federal agency decide. Not to have the federal agency decide the effectiveness of state law, but to allow the state agency itself to apply its own law.

QUESTION: Well, it certainly isn't always black and white, either, is it?

MR. LAZARUS: As it isn't in this case. As the Court of Appeals found that there was jurisdiction, and that therefore there was residual jurisdiction, and no termination.

Senator Dirksen and others --

QUESTION: There is certainly something to be said for your argument that you don't want a federal agency to be deciding these state-law questions.

MR. LAZARUS: That's right. Senator Dirksen and these others objected vehemently to the prior version of the bill, which would have had the federal government investigating and deciding whether or not there was an effective state law, and an effective state agency.

The prior purpose of deferral, and the deferral requirement, Section 706(c) was to avoid that situation. But Respondent invites the federal government to undertake just such an intrusive inquiry to determine whether or not there is still a state agency, because the limitation period is not met. That varies widely among the states upon what is the significance of a charge not being untimely, and whether or not it is in fact untimely.

QUESTION: Do you think Congress really anticipated that the state agency could, just in any case that was referred to it or filed with it, say, "Sorry, we just don't want to do

this. Let the EEOC do it in the first instance."

MR. LAZARUS: Congress did not purport to dictate what states decided to do. What is being done here is not at all an abdication.

QUESTION: I thought that Congress really wanted to really refer the states to process these cases first.

MR. LAZARUS: They wanted two things. They wanted to encourage the states to do so, not to require the states to do so. And in fact, the relationship we have here works quite well. The state handle a lot of the charges first.

There is an overabundance of charges, and the state and federal agencies are trying to work hand-in-hand to deal with these in an expeditious way, and not to have a work-duplication agreement, but a work-sharing agreement. The only purpose of the state in this case, reserving its jurisdiction, really, is to avoid a total abdication of authority and to avoid the untenable result that would be produced if after complete surrender of jurisdiction, the EEOC subsequently determined that it lacked jurisdiction.

Respondents are really ignoring reality when they suggest that the EEOC and the state are somehow conspiring in devious ways to subject them to multiple jurisdiction and to extend the limitations period. What they are trying to do is come up with an efficient and expeditious way to share work. The state agency in Colorado is not routinely processing the

charges after the EEOC has acted.

They are simply nominally holding their jurisdiction afterwards in order to avoid what would be an untenable position.

QUESTION: But if that's such a rare case, why don't they simply terminate the proceeding?

MR. LAZARUS: Because they believe it is important to take care of that rare case. It's the states that insist on this provision of the work-sharing agreement, which really I think illustrates quite well that it's not the federal government dominating the field. It's the states, who are playing a very active role in protecting their jurisdiction.

And it would be a little odd, in my --

QUESTION: And they're protecting their jurisdiction by saying, "Well, you go ahead an investigate it first, and if we are not satisfied with your results, why then we'll take a second look at it.

MR. LAZARUS: You investigate it first when you receive it first. We'll investigate it first --

QUESTION: That's not the scheme Congress created.

MR. LAZARUS: Well, it gives the states the option. It is received, and the state proceedings commence. Then the state can decide, and the EEOC can decide, and not force the states. Congress didn't intend to force the states to act on all these charges finally --

QUESTION: No, but it said, "If you want to act on it, you act first." That's what it said, in essence.

MR. LAZARUS: Well, that's where we disagree.

QUESTION: Thats the issue, I suppose, in the case.

MR. LAZARUS: We said that you were given the opportunity to act first and to process the charge first. You were given a head start. But you don't have --

QUESTION: Not only an opportunity, but it's an opportunity that makes the federal government wait until after they have terminated what they're doing.

MR. LAZARUS: Right, but --

QUESTION: And what you're saying is that they really meant to say, "Well, wait until they say they just as soon would have the federal government go first."

MR. LAZARUS: If the states -- and the states have the authority -- and that's what Congress gave them. Congress gave them that leverage. It's that leverage they've exercised with the work-sharing agreements.

QUESTION: But then you're saying that all of that extra time that was being given in order for the state to do whatever it thought was necessary in order to terminate the proceeding in the way the statute literally reads, you're going to get that time anyway.

MR. LAZARUS: Well, that's not --

QUESTION: Even though the state is doing nothing but

receiving the form and sending it back after checking off a box.

MR. LAZARUS: That's not precisely true. Congress wrote section 706(e) a little more fine-tunely than that. Congress said, "It's 300 days, or thirty days after the termination of state proceedings, whichever is earlier." So as soon as the state terminates it proceedings, the complainant only has thirty days to file with the EEOC. That might be much less than 300 days; that may be less than 180 days.

QUESTION: But you're saying --

MR. LAZARUS: The 300-day limitation period does not apply in every case. It's 300 days or thirty days after the termination of state proceedings.

Our broad view, which we believe is consistent with the purpose of the statute of the meaning of the termination, would trigger much more readily, which Congress accounted for, that earlier period.

QUESTION: It seems to me if Congress meant what you say it meant, it would have said that the state agency relinquishes jurisdiction over the proceedings. If all they meant was, "The state got a first crack, and if they didn't want it --" but instead, they used the word "terminate." I don't think you adequately explained the use of that word.

MR. LAZARUS: Well, simply, if we think the word "terminate" means "to cease," and whether a cessation

necessarily is permanent and irrevocable depends on the nature of the activity being ceased. A life, as justice Scalia pointed out, is something which by its nature, when you terminate it -- which I think is how a lot of people think of the term -- can not be ceased more than once.

But a proceeding is an ongoing process, and it is something which can be ceased. And it is not necessarily --

QUESTION: Well, when you ordinarily think of someone describing a law suit as having been terminated, you think it may just have been temporarily suspended, maybe a little continuance or a recess? I certainly don't think so.

MR. LAZARUS: It could be that the District Court proceedings have been terminated, but there might be more going on in the process. And the statue refers to such proceedings; the proceedings which have already been initiated.

And we think if you look to the purposes underlying, it simply leads to a result which is contrary to exactly what Congress was going after --

QUESTION: We know the result Congress was aiming for is to read the language that Congress used. And it used the word "terminate."

MR. LAZARUS: Right, but we believe that word includes an ambiguity, particularly with respect to what is being terminated.

Contrary to Respondent's claim in the Court of

Appeals, it does not dictate that the stop must be irrevocable. And the words "jurisdiction authority" do not appear anywhere in the relevant portion of the provision. The legislative history shows that there were four purposes to the deferral requirement, one of which would not be furthered by the Court of Appeals construction, and three of which would be completely defeated.

First, Congress plainly wanted to give states the opportunity to begin to process the charge first. That opportunity is provided whether or not a termination is a complete and irrevocable surrender of jurisdiction.

Second, Congress wanted to defer to state agencies to give them a chance to use their authority and give them a meaningful role. Respondent's proposed construction, however, would turn that on its head. It would require the relinquishment of state authority. To achieve efficiency, states would be required to abdicate their authority.

Third, Congress wanted to promote expeditious processing --

QUESTION: I don't follow that. Why couldn't they have just processed the claim?

MR. LAZARUS: But to take advantage of what they believe is an efficient work-sharing arrangement --

QUESTION: Well, yes. But Congress didn't envision this work-sharing agreement. That's a creation of the

agencies.

MR. LAZARUS: But Congress didn't, we think, preclude the states --

QUESTION: But you don't need a work-sharing agreement like this in order to give the state agency an opportunity to process the claim when it's referred to it.

MR. LAZARUS: That's true, but the question is whether Congress intended to preclude them from setting up this kind of arrangement, which is a very sensible and efficient way to have these things work. We believe that the language is not so inflexible to prevent the states from entering into these without also agreeing to completely abdicate their authority.

QUESTION: Again, it all boils down to what meaning one puts on the word "terminated."

MR. LAZARUS: And whether one is willing, as we believe one should be to agree that there is sufficient ambiguity in the provision, particularly with respect to what it applies to -- to look at the purposes in the legislative history underlying the deferral requirement.

Once you look at those purposes, it becomes clear that it is really the only sensible way. Rather than undoing work-sharing agreements which exist throughout the country that are working really quite well -- it's unusual that federal and state coordination works so well. The work-sharing agreements do.

It's precisely what the Dirksen-Mansfield compromise --

QUESTION: But the way in which it works well is that the federal agency is much busier than Congress thought it would be, and the states are much less busy.

MR. LAZARUS: The states have tremendous back logs as well. I think about one-third of the claims are first received by the states. And as the amicus brief filed, they are very much in support. There is really no resulting federal domination in the field.

QUESTION: I'm not asking who has the longest back log. They're just trading back logs aren't they?

MR. LAZARUS: Well, they're sharing work. They're not duplicating work. The result is not just work --

QUESTION: This cooperative arrangement would work just as efficiently if we interpreted "terminate" to mean "terminate" the way it means "terminate" normally. If the state simply had to cut the line and sent back the notice saying, "We are completed with this proceeding," then, if it wanted to reopen the proceeding after the federal government was done, somebody's brief says, "There's nothing that stops a proceeding that has been terminated from being reopened."

Now, if this is only happening four times a year, it's hard to believe that it's going to destroy this cooperative arrangement to simply require them to terminate it,

and then reopen it the four times a year when they have to.

MR. LAZARUS: It's really just a game of words with the state, as a matter of state law: whether they call it a relinquishment of jurisdiction or whether they call it a reopening. In effect, that's all the states have done here. They have been explicit about it rather than trying to hide the ball.

QUESTION: This is just an argument that the statute of limitations should be extended. After all, there wouldn't be any problem if there was a filing before the 240 days.

MR. LAZARUS: The issue that we're really talking about is whether on Section 706(c) the state has to completely abdicate authority in order to terminate. The real result of the state having to do that --

QUESTION: The only reason is that there's a filing, there's a reference to the state after 240 days.

MR. LAZARUS: The implications in this case, given the facts, is that the charge would in fact be rendered untimely and not meet the 300 days. But the implication in the broad class of cases would be that every single instance, whatever the state wanted to call it -- a reopening -- but somehow reserved to itself some jurisdiction. The EEOC would have to sit on a charge for sixty days. The state would be unwilling to act, and the EEOC would be unable to act.

And in certain cases, because of when the charge was

filed, such as a case like this one, that wasteful day would also have the additional perverse result of rendering the charges untimely.

QUESTION: The result couldn't have happened if Plaintiff had filed with the EEOC soon enough.

MR. LAZARUS: That is always true.

QUESTION: Well, exactly. It's always true.

MR. LAZARUS: If they filed it after the second day, there would be no problem.

QUESTION: Of course.

QUESTION: Two-hundred and forty days --

QUESTION: Yes.

MR. LAZARUS: Not under Respondent's view, of course. Respondent's say that it would have to be under eighty days, because if it's untimely under state law, the 300-day limitations period --

QUESTION: Well, under the Court of Appeals rationale.

MR. LAZARUS: That's right.

QUESTION: If they had filed under 240 days, they would have been okay.

MR. LAZARUS: But then we wouldn't be here.

QUESTION: Exactly.

MR. LAZARUS: The question, though --

QUESTION: That's right.

MR. LAZARUS: -- is what if they don't?

QUESTION: The whole point, in other words, is to be sure they have it at a period longer than 240 days.

MR. LAZARUS: And when the Congress provides for 300 days, as we believe they have done --

QUESTION: Subject to the 60-day condition.

MR. LAZARUS: Congress didn't write a statute which said that everything after 240 is untimely. So we're in that gray area, and now we need to decide when the filing --

QUESTION: But they have a limited exception, and that is when the proceeding is earlier terminated by the states. And its exceptions are generally narrowly construed.

MR. LAZARUS: Well, we don't think.

QUESTION: The first general rule is 180 days. The second general rule is 240 days -- but anyway, go ahead. I'm sorry.

MR. LAZARUS: If the Court permits, I would like to reserve my remaining time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lazarus. We will hear now from you, Mr. Stone.

ORAL ARGUMENT OF JAMES L. STONE

ON BEHALF OF RESPONDENT

MR. STONE: Thank you, Mr. Chief Justice, and may it please the Court:

This case involves the timeliness of a charge of

employment discrimination submitted to the Equal Employment Opportunity Commission 290 days after the alleged discriminatory act. Under this Court's decision in Mohasco, in the clear language of Section 706(c) of Title VII, charges filed more than 240 days after the alleged discriminatory act are only timely if the state agency terminates it proceedings prior to the 300th day.

The issue in this case is the meaning of the word "terminated," and it is our position that that word should be given its plain and ordinary meaning, which means "to complete, or to end." The word "terminated" does not mean "suspend." When you give the word "terminated" its plain and ordinary meaning, it is beyond question that the charge here was untimely, and that the judgment of the Tenth Circuit Court of Appeals should be affirmed.

The Tenth Circuit Court of Appeals defined "terminated" by saying it meant the completion or ending of activity. It found it difficult to understand how this definition could in any way be controversial. For those who have doubts as to the meaning of the word "terminated," they may look at a number of accepted sources an authorities to confirm that the word means what the Tenth Circuit said it meant.

We have an example --

QUESTION: Well, you had a dissent on the Tenth

Circuit, didn't you?

MR. STONE: Yes, Your Honor.

QUESTION: Which would be indicative of ambiguity, wouldn't it?

MR. STONE: Justice --

QUESTION: Judge McKay.

MR. STONE: Judge McKay did believe that the statute might have been ambiguous.

We have examined a dozen or more dictionaries, and you can pick up any dictionary you come across. You will find that the word "terminated" is always defined as "to complete or to end." No where will you find that it's defined to mean "suspend."

Another source which reveals the commonly-understood meaning of the word "terminated" is this Court's decision in Mohasco in 1980. On three separate occasions, while the Court was explaining the operation of Section 706(c) in that opinion, the Court used synonyms for the word "terminated." The Court used the word "ended" in place of the word "terminated." The Court used the word "completed" in place of the word "terminated."

And in footnote 16, the Court stated that if a complainant submits a charge of employment discrimination to the EEOC more than 240 days after the alleged discriminatory act, his right to seek relief under Title VII will be preserved

if the state agency happens to complete its proceedings prior to the expiration of the 300th day.

The Petitioner here, itself gave the word "terminated" the same meaning that we are suggesting in its amicus brief in Mohasco. On two different occasions in the amicus brief, the Petitioner also used synonyms for the word "terminated" in explaining the operation of Section 706(c).

QUESTION: Counsel, strictly on words, could you reopen something that had been terminated?

MR. STONE: I don't believe you can, Your Honor.

QUESTION: Well, isn't that why you say "reopen?"

MR. STONE: Yes, Your Honor.

QUESTION: It's because it has been terminated.

MR. STONE: That's correct, Your Honor.

QUESTION: So the two can happen together.

MR. STONE: Yes, Your Honor.

QUESTION: Let me give you an example right here in this Court. We have a case that comes down; a petition for rehearing is filed within the timely period -- denied. Then two years go by, and a decision comes down from the Court that seems to bear on the earlier case. A petition for leave to file a second petition for rehearing is filed.

We consider it, don't we?

MR. STONE: Yes, Your Honor.

QUESTION: Does that mean that the case did not

terminate before?

MR. STONE: I think the case terminated before.

QUESTION: So do I.

QUESTION: Then you ought to reconsider whether you think something that has been terminated can be reopened.

Can something that has been terminated be recommenced?

MR. STONE: No, no Your Honor. Perhaps I didn't understand your question --

QUESTION: You can't recommence something that's been terminated?

MR. STONE: I think when something is terminated, it comes to a completion or an ending.

QUESTION: And you can't start it up again?

MR. STONE: I don't believe you can.

I believe it's a new and separate and distinct event. Our interpretation of the word is consistent with the legislative history. Senator Dirksen used the words "disposed of" in place of "terminate" in explaining the operation of Section 706(c). In that same context, on a number of other occasions, he said that the state of fair employment practice agencies "dispose of" charges in a matter of a week or two.

And in specifically referring to the State of California, he said that they "disposed of" charges in five days. Our interpretation is consistent with Senator Dirksen's

use of the words "dispose of."

QUESTION: Then I guess none of these states ever terminate any of their proceedings. I'm sure that in all of them you could reopen a proceeding for some reason, certainly for fraud. If it is discovered that there has been fraud in a terminated proceeding, I'm sure you can reopen it.

MR. STONE: Well, Your Honor --

QUESTION: So if that's the case, then none of these proceedings is ever terminated in these states.

MR. STONE: In those rare situations, for example, where the termination itself might have been procured by fraud, and the state agency a year or two later realizes that, because these statues are equitable in nature, the agency can go back in and reopen that type of situation.

QUESTION: So you can reopen a terminated proceeding?

MR. STONE: But it's --

QUESTION: Why does it make so much difference to you whether you can reopen a terminated proceeding or not? Why is that important to your case? I don't understand why you're fighting it. It seems obvious to me that you can reopen a terminated proceeding.

MR. STONE: But we view it as being a different proceeding, and Petitioner claims that the state agency was going to act further. We agree with that. They were going to act further. We believe that that is evidence that the state

intended to take further action and didn't terminate its proceedings under Section 706(c).

There even more persuasive legislative history, however, and those are the statements of Senator Case, who was one of the floor leaders for this particular legislation. On June 9, 1964, the day before the historic cloture vote, Senator Case stated that carefully-drafted provisions of the bill require that if there is possible reason to believe that the state agency will deal with the matter, it will have sixty days in which to deal with it before the federal agency will be called in.

Senator Case also said earlier that day, and perhaps even more importantly, that only when the states have no colorable claim to give consideration to such matters can they be considered by the federal government during the first sixty days.

Here the facts demonstrate that the state agency did not dispose of this charge. Here the facts demonstrate that there was possible reason to believe that the state agency would deal with this charge further. Here there is evidence that the state did retain a colorable claim to process this charge further.

QUESTION: How could the state have done it if the charge was outside its time limits?

MR. STONE: Justice White, under our statute, the

statute of limitations will not bar the processing of a charge until the respondent raises it as an affirmative defense.

QUESTION: Well, do you give up on you 180-day argument?

MR. STONE: No, Your Honor.

QUESTION: How do you make it, then?

MR. STONE: Well, it is an alternative argument. We believe that in this situation the charge had to be timely under state law to receive the extended filing period. There had to be an agency with authority to grant or seek relief.

QUESTION: Well, there is an agency.

MR. STONE: But it doesn't have authority to grant or seek relief with respect to this charge.

QUESTION: Why not?

MR. STONE: Because this charge was not timely.

QUESTION: Well, you just told me that unless the defendant raises it, the state can go right ahead and the agency can't. The 180 days is a zero. Isn't that what you just told me?

MR. STONE: Yes.

The three documents demonstrate conclusively that there has been no termination here. The first is the work-sharing agreement, which is found in the appendix end to the petition for certiorari. In the last sentence of paragraph five of the work-sharing agreement, it provides that the

Colorado Civil Rights Agency will review the EEOC's resolution of any charges which it initially processes. This establishes the state's intention to take further action.

The second document is a letter which the state agency wrote to the charging party the day after it received notification that she had filed a charge with the federal government. That's found at appendix I to the petition for certiorari. In that letter, the state agency informed the charging party that it assigned her charge a number, that it would not take any action on her charge until the federal government terminated its proceedings, that it advised her that the state agency had to take final action on her charge within a certain period of time, and that it informed her how to enlarge that period of time.

Finally, it told her to keep the state agency advised of her address and telephone number, and that he cooperation in these matters was essential. This is not the action of an agency which has disposed of a charge.

The third exhibit which is decisive is the Equal Employment Opportunity Commission transmittal form, which is found at Appendix H. The top portion of the form is to be completed by the EEOC, and then it's sent to the state agency, where the state agency may complete the bottom portion of the form.

The form allows the CCARD, which is the state agency

in this case, to express its intentions with respect to how it wants to process the charge. It's given three choices. It chose the second choice, to initially waive processing of the charge. It did not choose the third choice, which was to dismiss or close the charge.

QUESTION: Where is this? I don't see these.

MR. STONE: That is at page 27(a), Appendix H, Your Honor.

QUESTION: Appendix H. I have Appendix H. Where's the dismissal?

MR. STONE: It's the last box on the bottom of the form.

QUESTION: To dismiss, close. Got you.

MR. STONE: Here the Petitioner contends that the concept of initial waiver of processing, which results in a temporary cessation or suspension state proceedings, is the equivalent of termination, and relies on a First Circuit opinion, Isaac v. Harvard University.

We submitted, and the Tenth Circuit agreed, that the First Circuit's definition of the word "terminated" is very strained. And to give the word "terminated" such a strained meaning here is particularly inappropriate. This provision, Section 706(c) which we're talking about, and the deferral requirement, was at the heart of the compromise -- the very compromise which ended the longest filibuster in the history of

the Senate, and eventually led to the passage of the 1964 Civil Rights Act.

Senator Javitz remarked that that compromise was razor-thin, and there was no place to move either way off the edge of the razor. Other senators have remarked that but for the compromise, there would not have been passage of the 1964 Civil Rights Act at that time.

Senator Dirksen, who was the chief architect for this amendment stated that this measure had received meticulous attention. The drafters gave meticulous attention to the meaning of every word, of every comma, and the shading of every phrase.

QUESTION: Well, it doesn't seem to me that the government's position here denies to the State of Colorado anything it wanted in this situation. And I thought that was what the compromise was about. What the government's position here does is make the statute of limitations longer than it would be under your construction.

But were the Members of Congress terribly concerned about just how long the statue limitations would be?

MR. STONE: Well, they were concerned, Your Honor, with the fact that the state agency would be free to act without federal intervention, and that the federal government would be prohibited from acting during this deferral period. The federal government is prohibited from acting. And if

they're prohibited from acting during this period, they can not accept the charge for filing, and they can not being investigating the charge.

QUESTION: Unless, in your view, the state actually dismisses it, or resolves it on the merits.

MR. STONE: Yes, that's correct.

The interpretation which the Petitioner here gives to the word "terminated" in this case effectively does away with that deferral requirement. It completely writes it out of the statute. There is no deferral.

This is true not only in this case, but in countless other cases, where the Equal Employment Opportunity --

QUESTION: Well, that isn't quite right. There is deferral if the states wants to exercise jurisdiction. They leave it up to the state.

MR. STONE: Well, I'm speaking, Your Honor, where the state initially waives processing.

QUESTION: Oh, sure.

MR. STONE: Because in these situations, there is an advance waiver. That occurs today. The discriminatory act may occur six months from now, and the charge may be filed five months after that. So they have waived well in advance of even the act occurring of the charge being filed -- any charge being filed.

And according to the Equal Employment Opportunity

Commission, however --

QUESTION: You mean, here this charge was filed with the EEOC 290 days after the event. Then the EEOC "referred it." Is that right?

MR. STONE: That's what they say.

QUESTION: How did they do it?

MR. STONE: Pardon me?

QUESTION: How did they do it?

MR. STONE: They sent a copy of the charge with the charge transmittal form to the state agency. The charge transmittal form is exhibit --

QUESTION: Prior to that time, the state hadn't waived anything.

MR. STONE: Well, under the work-sharing agreement, the state said it had waived.

QUESTION: Well, it waives as soon as it sends it back.

MR. STONE: I don't believe that's correct, Your Honor. I think --

QUESTION: Well, you mean the state couldn't have kept this proceeding and investigated it itself?

MR. STONE: They could have by notifying the Equal Employment Opportunity Commission that they did not desire to go forward under their previously-agreed-to arrangement.

QUESTION: You mean every single thing that is filed

with the EEOC and referred to the state -- it is assumed that the state is going to waive?

MR. STONE: That's correct. That's the provision contained in the work-sharing agreement. They waived this well in advance of the state having any knowledge of this charge.

QUESTION: So the only cases that the EEOC isn't going to go forward with itself, initially, is when they get a notice back that "We want to handle this case."

MR. STONE: Or if the complainant would happen to walk into the state agency as opposed to the federal agency, just by happenstance.

QUESTION: Why does it have to be happenstance? Couldn't he walk in purposefully?

MR. STONE: Well, yes, I'm sure they could. But under the waiver agreement, Your Honor, charging parties who walk into the Equal Employment Opportunity Commission's offices will have their charge processed by the EEOC, even though the statue requires that the EEOC defer for sixty days.

Let me comment briefly on the second part of our brief. Up until this point, our argument on termination has assumed that the extended 300-day filing period applies to this charge. We do not believe that it applies because the charge was untimely under state law. It must be remembered that the basic filing period under Title VII was 180 days for charges arising in jurisdictions that did not have a state or local

agency which could grant or seek relief from such practice.

Under special circumstances, however, in deferral states, the limitation may be extended by an additional 120 days to reach the magic number of 300. This extended filing period is only available, however, where the charging party initially institutes proceedings in a state or local agency which as authority to grant or seek relief from the particular charge.

Here the state agency didn't have that authority, if the charge was untimely under state law. Under the United Airlines v. Evans case, this Court said, "A discriminatory act, which is not made the basis for a timely charge of discrimination, is the legal equivalent of a discriminatory act which occurred before the passage of the act."

It's an unfortunate event, but it has no legal consequence. Consequently, if an untimely state charge has no legal consequence, the state agency doesn't have any authority to grant or seek relief over that charge.

QUESTION: Yes, but who is going to determine that?

MR. STONE: Who's going to determine if the charge is timely under state law?

QUESTION: Yes.

MR. STONE: The Equal Employment Opportunity Commission can, or the state agency can.

QUESTION: So you want a federal agency to determine

timeliness under state law on every one of these claims?

MR. STONE: In the situation where the extended filing period is to be allowed --

QUESTION: It doesn't sound quite right to me. It seems to me that the agency that ought to determine that is the state agency. Certainly, in a lot of these cases, timeliness is not readily apparent, or, untimeliness is not readily apparent.

MR. STONE: Well, in those situations, there might be a little more work involved. Senator Humphrey, during the debate to --

QUESTION: You're going to bring him in now, too.

MR. STONE: I'm not thinking of your home state, Your Honor, when I mentioned it.

But Senator Humphrey said and recognized that this approach that was devised was not the fast approach. He understood that it was somewhat cumbersome, and he acknowledged that. But it was what was needed to get the filibuster defeated, and there had to be some give and take. He said this might be a slower approach, and a more cumbersome approach.

QUESTION: Is the effect of the sharing agreement here not only to lengthen the federal period, as you suggest, but also to lengthen the period within which the state can act?

MR. STONE: I don't believe so, Your Honor.

QUESTION: What are the limitations upon the state

acting after the federal government has acted? Are there any?

MR. STONE: I guess it would depend on the situation. There are times when, depending on when the charge is filed, how quickly after the discriminatory act, where the state agency would still have time to review the federal charge. You could have a situation where --

QUESTION: Can a state agency routinely wait for the federal government to process the charge, and then conduct its proceeding after that?

MR. STONE: Not routinely, Your Honor. It takes the EEOC some time to process charges. But what happens here is that jurisdiction is exclusive with the states for the first sixty days. The federal government can not act during that sixty-day period. If the charge is timely under state law and under federal law, after the sixty days pass, and assuming the state agency hasn't terminated it, there then is concurrent jurisdiction.

Both agencies can act simultaneously. Jurisdiction is sequential. State first, and then only if there has been no termination, it can be concurrent and both can act at the same pace. To completely answer your question, there are situations depending on how quickly the charge is filed after the allege discriminatory event that may, because of the formula, just not work out.

If the Court has no further questions, we conclude

our argument.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Stone.

Mr. Lazarus, you have three minute remaining.

ORAL ARGUMENT OF RICHARD J. LAZARUS

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. LAZARUS: I just have a few points on rebuttal.

First of all, the effect of the work-sharing agreement in this case is not to lengthen the statute limitations. It is to allow the charge to be filed immediately with the EEOC, and to avoid the sixty-day delay. Whether the work-sharing agreement precludes the application of the 300-day limitations period is an issue which Respondent has not clearly raised in this case, but is raised in another case pending before the Court, on petitioner certiorari Dixon v. Westinghouse.

Second, not every charge submitted to the EEOC first is filed with the EEOC first. Under the work-sharing agreement, those charges originating one-hundred miles outside of Denver are, page 52(a): "Filed, processed first by the state agency." There are other exceptions outlined on page 48(a) for charges that are received first by the EEOC that are nonetheless first processed by the state agency.

The state agencies in this case have really done nothing more than reserve nominal jurisdiction based on the initial filing to reopen the matter later. They are not going

to act, if at all, under the work-sharing agreement, until after the EEOC has acted. Indeed, under Colorado Law, under, I think, Provision 24-34306-11, which is reprinted in the appendix to Respondent's petition, a Colorado agency is without jurisdiction to act 180 days after the charge is filed with the state agency if they haven't before then noticed a hearing.

If the Court concludes that the states must surrender their jurisdiction, but then somehow says that that doesn't prevent them from reopening it later, you'll really only be forcing the states to use different words. In effect, that is what the states have done here. We don't believe that the word "terminate" precludes the states from doing so.

On the second issue, as Respondent concedes, the untimeliness under Colorado Law did not deprive the Colorado agency of jurisdiction to process the charge. Hence, it must be a deferral agency within the meaning of Section 706(c). The Court made this clear in Oscar Mayer and related contexts, at page 763, when it said that the state limitations period did not preclude state proceedings from being commenced under the related provisions of the Age Discrimination Employment Act.

If the Court doesn't have any further questions.

(Continued on next page)

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lazarus.

The case is submitted.

(Whereupon, at 2:52 p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-1696

CASE TITLE: Equal Employment Opportunity Commission v. Commerc
Office Products Company

HEARING DATE: January 13, 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 and that this is a true and accurate transcript of the case.

Date: January 21, 1988

Margaret Daly
Official Reporter

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