OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION, Petitioner v. ANGELO J. SOLIMINO

CASE NO: 89-1895

PLACE: Washington, D.C.

DATE: April 17, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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ASTORIA FEDERAL SAVINGS AND :

LOAN ASSOCIATION, :

Petitioner :

v. : No. 89-1895

ANGELO J. SOLIMINO :

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Washington, D.C.

Wednesday, April 17, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:56 a.m.

APPEARANCES:

PAUL J. SIEGEL, ESQ., Jericho, New York; on behalf of the Petitioner.

LEONARD N. FLAMM, ESQ., New York, New York; on behalf of the Respondent.

AMY L. WAX, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; United States, as amicus curiae supporting Respondent (pro hac vice).

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P R O C E E D I N G S

(10:56 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 89-1895, Astoria Federal Savings and Loan Association v. Solimino.

Mr. Siegel.

ORAL ARGUMENT OF PAUL J. SIEGEL

ON BEHALF OF THE PETITIONER

MR. SIEGEL: Mr. Chief Justice, and may it please the Court:

The issue before the Court this morning is whether an unreviewed state administrative agency finding of no probable cause dismissing an age discrimination claim bars the subsequent claim under the ADEA in Federal court under this Court's decision in University of Tennessee v. Elliott. We submit that this Court should fashion a rule of preclusion under the ADEA because nothing in the legislative history of the ADEA or on the face of the statute would dictate otherwise. The ADEA can be interpreted consistent with preclusion and to effectuate Congress' stated purpose in eliminating age discrimination.

The pertinent facts before the Court are undisputed. Mr. Solimino was employed by Astoria Federal and terminated in March of 1982. A charge of

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discrimination was filed with the EEOC in March, on or about March 18. It was referred to the New York State Division of Human Rights for processing, a factfinding conference was held later that year, and on January 25, 1983, approximately 10 months later, a determination was issued finding no probable cause and dismissing his claim. He took an appeal to the agency's appeal board, and in May of 1984 it sustained the dismissal of the charge.

A lawsuit subsequently followed in the United States District Court for the Eastern District of New York. A motion for summary judgment later was made by Astoria Federal on two bases. One was that the claim was time-barred. The other was that it was barred by the doctrine of administrative preclusion. The motion was granted only on that second basis, and the complaint was dismissed. An appeal followed to the Second Circuit Court of Appeals which reversed, finding under Elliott that there was no basis for a rule of preclusion. We submit that the Court should reverse that decision.

This Court frequently has fashioned common law rules of preclusion in the absence of statutory language directing that such rules not be established. In his brief Respondent does not dispute that the doctrine of common law preclusion is sufficiently established in the Federal common law, and himself refers to it as a

presumption. In Elliott, with respect to Title VII, the Court defined the applicable test by stating the question actually before us is whether a common law rule of preclusion would be consistent with congressional intent. It was found not to be consistent with congressional intent in Title VII for two reasons, both of which are absent from the ADEA.

First was that a substantial weight clause had been added in 1972 to Title VII which explicitly stated how much weight should be given to a finding by a state agency. Before the EEOC was free to give more weight or less weight or no weight, but now a maximum had been set. The second was this Court's decision in Chandler, which again was based substantially upon the 1972 amendments to Title VII. Both of those are absent from the ADEA.

In Elliott this Court went on to state that a claim under 42 U.S.C. Section 1983, the Post-Civil War Act, was barred by an administrative finding, that preclusion was appropriate because there was nothing in the statute or its legislative history to indicate otherwise. The Court cited Allen for the proposition supporting that administrative preclusion.

QUESTION: Mr. Siegel, do you take the position that Congress has to speak expressly to the issue of preclusion in order to overcome any common law presumption

about it?

MR. SIEGEL: It is our position that Congress must in some specific manner, yes, state that preclusion should not apply. It need not use those --

QUESTION: Have our cases ever said that, or have we just found for a variety of reasons that there may not be preclusion or there is?

MR. SIEGEL: You are correct that the rule was done by the Court depending on each specific statute. The closest analogy might be this Court's recent decision in Aramco involving, while it wasn't preclusion, it certainly was another doctrine of, in that case against extraterritoriality. The Court required a rather specific statement --

QUESTION: But you don't think there is any rule that specific in this area, do you?

MR. SIEGEL: There is --

QUESTION: You would have us apply the same kind of presumption we did in Aramco?

MR. SIEGEL: Yes. I would ask the Court to look to find a specific evidence of congressional intent either in the statute or in its legislative history.

QUESTION: Do we owe any deference to the EEOC on this point?

MR. SIEGEL: I believe under the ADEA deference

should not be accorded to the EEOC because of the specific language of the ADEA. From its inception, no factfinding was to be conducted by the Federal Government agency, initially the Department of Labor and later the EEOC, much like the Department of Labor's authority or lack of authority under the Fair Labor Standards Act. Only in Title VII was the EEOC asked to make findings and conduct investigations. Under Title VII the Federal agency was asked to explore the possibility of persuasion, mediation, and conciliation. The EEOC, I believe, has grossly exceeded the authority under the ADEA by engrafting Title VII principles with respect to making findings and the weight of those findings.

Application of the doctrine of administrative preclusion would serve a very significant purpose, or perhaps several of them. First it would achieve --

QUESTION: Excuse me, before you go on --

MR. SIEGEL: I'm sorry.

QUESTION: You -- it's your position that the EEOC has no authority to make findings in this area?

MR. SIEGEL: The statute provides no finding, no basis for the EEOC to make findings.

QUESTION: And yet you say one of the indications that we should, we should find a requirement to exceed to the state ruling here, one of the indications

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is that there was not in this case, as there was in the Title VII case, a specific provision requiring the EEOC in making its findings to give substantial weight to state determinations? Right?

MR. SIEGEL: Yes.

QUESTION: You rely on the absence of that here.

MR. SIEGEL: I believe the absence of it, as the Eighth Circuit said in Stillians, is very significant --

QUESTION: But you now tell us that there is no reason for such a provision to exist here, because on your view the EEOC has no authority to make findings anyway. So why would such a provision possibly be here?

MR. SIEGEL: I may not be following your question, but I believe that the ADEA's lack of any basis for limiting or providing a maximum states no congressional intent to limit the state's agency's effect, just as there was no limit to the effect in the 1983 claim.

QUESTION: Wait. You find it significant that there is not in this statute a provision requiring the EEOC to defer to state findings. You say it's very significant that that is missing, although it was present in Title VII, right?

MR. SIEGEL: Yes.

QUESTION: Now under Title VII the EEOC must

make factual findings.

MR. SIEGEL: That's correct.

QUESTION: But here it's not supposed to make findings, factual findings, according to you.

MR. SIEGEL: That also is correct. It's not in the statute.

QUESTION: If it's not supposed to make factual findings, why would you expect to see the same kind of provision you had in Title VII?

MR. SIEGEL: The Congress --

QUESTION: You would not expect to find it.

MR. SIEGEL: I would certainly not expect to find it, nor is there any other language in the ADEA which would limit application of administrative preclusion. You're correct in that there is no, if there is no findings to be made there is certainly no limit or maximum to those findings. But there is no other indication, as had been in Title VII, that there should be a maximum for the state's administrative finding to be given.

Administrative preclusion would achieve certain very significant goals. One would be to avoid relitigation of claims. It would avoid the parties being twice faced with exhaustive proceedings. In this case the proceeding before the state lasted well over a year. In the discussions with regard to Section 14(a) of the clause

added regarding supersedure of state actions, was added for the specific purpose of avoiding a multiplicity of actions. That was one of the few congressional expressions of its intent with respect to what should happen.

This Court increasingly has required specific proof of congressional intent to overcome various presumptions, whether it was the extraterritoriality presumption in the Aramco case or whether it was the presumption regarding concurrent state and Federal jurisdiction in Yellow Freight. It has required that the party asserting a presumption shouldn't apply to come forward with rather specific evidence of congressional intent. There is none in this instance.

With respect to Section 14(a), for example, of the ADEA, it merely states that nothing in the ADEA should effect the jurisdiction of any agency of any state performing like functions to the EEOC, except that upon commencement of an action under the ADEA, such action shall supersede the state action. That does not indicate that if a proceeding already has been completed by the state and a decision rendered by the state, that that should be reversed and vacated. Merely --

QUESTION: Mr. Siegel, what case is it of ours that you rely on for the proposition that there is a

presumption in favor of preclusion for an unreviewed administrative finding?

MR. SIEGEL: The Utah Mining and Elliott speak about a rule of preclusion that has been applied.

QUESTION: Well, but Elliott doesn't say anything about a presumption in favor. It quotes some of the other cases and says we have frequently fashioned Federal common law rules of preclusion in the absence of a governing statute. That just says we may do it. I don't read that as saying there is a presumption of administrative preclusion.

MR. SIEGEL: I may have overstated it, but the Court in Utah Mining and in Elliott has gone forward in the absence of congressional language to the contrary to apply a rule of preclusion. And that rule should be applied in this case as well because of the lack of congressional language to the contrary.

With respect further to Section 14(a), they speak about the performance of like functions and use performing, again seeming to indicate a present tense, as in the same manner that an action now newly instituted under the ADEA would replace another action. This is consistent with the legislative objective avoiding multiple lawsuits, and is further consistent with Senator Javits' comment that the act included a proviso guarding

against preemption of state proceedings.

With respect to Section 14(b), which also has been cited in opposition to our position, which provides that no suit may be brought under the ADEA before expiration of the 60-day period following referral unless such proceedings have been earlier terminated, it does not define the word terminated. But moreover, it doesn't state how termination might occur. If termination occurred on the state's behalf because the complainant insisted and directed that I intend to file a lawsuit and hence I would like to explore the possibility of conciliation, the possibility of mediation, but no further, that would appear to be consistent with this Court's ruling in Oscar Mayer, which directed that a complainant file a charge with the state agency even though it was already time-barred. It spoke about the purpose of 14(b) being commencement of a proceeding, not exhaustion or even participation, merely commencement.

In the Attorney General of New York's brief in this matter it was stated that it would not, it would appear to be consistent with the purposes of the ADEA for the state agency to terminate upon instruction from the complainant to do so.

Moreover, that termination within the scope of Commercial Office Products could very well be a

termination that was more of a suspension that would allow the ADEA proceeding to commence, to conclude, and then the state might at that point reinstate its proceeding. The termination need not be a final one. And under New York's proceedings it certainly could have resulted from administrative convenience. It could have resulted from the lack of cooperation. It could have resulted from any number of reasons. But the basic purpose, as Oscar Mayer stated, was merely to screen from the courts those type of claims that might be settled to the grievant's satisfaction on a local level. They used settled, they did not use adjudicated.

Finally, it would also be an affirmative defense to be raised by an employer, which might or might not be upheld depending on whether it was timely raised and whether sufficient due process had been afforded to make collateral estoppel a bonafide defense. It has also been asserted that the ADEA was enacted in the first place due to dissatisfaction with the state laws then existing. That's a very great overstatement of the congressional record. If there was dissatisfaction at all, it was in the states that did not yet have state age laws.

New York had one. In fact it was regularly discussed and cited in Kremer approvingly. Senator Javits, who was then the New York Attorney, had been the

New York Attorney General and was a major proponent of the ADEA, referred to the New York law during testimony. So I don't think that there's any dissatisfaction, certainly with the New York law. It's also --

QUESTION: Mr. Siegel, under this statute what weight is to be given to any EEOC proceedings that have occurred on the same, on the same case?

MR. SIEGEL: Since the statute does not even provide for EEOC proceedings, I believe that no preclusive effect should be given to an EEOC proceeding.

QUESTION: Isn't there a provision that says that? I thought there was a provision that said that.

MR. SIEGEL: Well, 7(d)(2) refers to the powers of the agency and speaks about persuasion, conciliation, and mediation. But it doesn't say, to my recollection, that it would not be preclusive as to the EEOC itself.

QUESTION: Well, why would Congress set up a system in which the court, the court would review anything done by the EEOC de novo, but would not review anything done by the states?

MR. SIEGEL: The back --

QUESTION: That would seem very strange.

MR. SIEGEL: I'm sorry. The backdrop against which the statute was enacted was one where other agency proceedings, such as in Utah Mining, had been given

preclusive effect. That was where it started. Why would they have done that? The Department of Labor was selected instead of the EEOC in the first instance to move Federal claims, once asserted, along quickly. It was presumed that older workers might have fewer productive years left, and therefore shorter time periods were utilized to get to court more quickly. At that point Senator Javits noted how far behind the EEOC was after only 3 years. So there did not appear to be any intent at all for at a Federal level there to be factfinding and other slow-moving proceedings.

There also was given the possibility to grievants of removing the cases rather quickly from the state agency, and by filing a claim after only 60 days that would allow you to move ahead. And moreover, the EEOC and the state --

QUESTION: In practice the EEOC has, despite the lack of any authority, been conducting proceedings in these?

MR. SIEGEL: The EEOC has conducted proceedings in the nature of factfinding as they might under Title VII, and they have even engrafted onto it the substantial weight clause after the jurisdiction was given to the EEOC in 1978 in the reorganization.

QUESTION: And what have the courts done with

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those proceedings? Ignored them?

MR. SIEGEL: The EEOC's proceedings have never been held to bar any Federal action, to my knowledge. In fact in the cases that have dealt with this issue, none have even mentioned it.

QUESTION: And you say that's not surprising because they shouldn't have been conducted anyway? And that's the explanation of why --

MR. SIEGEL: Yes, sir, that's our position.

QUESTION: -- why you would treat the Federal ones different from the state ones?

MR. SIEGEL: Yes. And the state agency findings were deemed to be final in their own states. It was only a question then of due process. In New York our proceeding was held to have due process, a human rights proceeding, not this particular one, under the Kirkland case. Again it was looked at as did you have enough to be final in your state. So with respect to the EEOC factfinding, again there is not even a legislative discussion other than to go away from any EEOC model.

It has also been asserted that somehow the ADEA should be interpreted in the same manner as Title VII, the procedural dissimilarities in effect to be ignored. As this Court stated in Lorillard v. Pons when finding that a jury trial was appropriate under the ADEA, they talked

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about while there might be substantive similarities, the procedural schemes were very different. Since they were so different it would be unavailing, in the Court's word, to use Title VII to interpret the ADEA.

Moreover, Senator Javits in the legislative history specifically called for these laws to be enforced independently of each other, and had, Congress had rejected an ADEA format based upon Title VII. Pre-suit filing periods are different, the statutes are so different that utilizing Title VII to interpret the ADEA in this particular instance would be very inappropriate.

There also was asserted that there is a lack of control over which agency might handle your charge, and as a consequence that might be unfair to a claimant. That argument misses the mark. It misses it for a few reasons. While you might as a claimant be required to spend 60 days before a state administrative agency, concurrently the EEOC also could be processing your charge. In that instance the Court found in Oscar Mayer that there might be the benefit of two consecutive, two concurrent rather than consecutive efforts to conciliate and mediate. You might work out a settlement, the courts wouldn't be burdened with further litigation, nor would the state agency, because the effect of the ADEA would have been achieved, which was a nonjudicial settlement.

Moreover, the Attorney General notes, as I have stated before, that very likely the claimant, if asking to now leave the agency, would be granted a termination. New York State's Division of Human Rights from the outset notes conciliation is the preferred manner of reconciliation; if you would like to explore this, please so state. That happens at the very beginning of each case. That could be further emphasized.

It has also been asserted that it would be unfair to laypersons to somehow make this a trap for the unwary. And again that's inappropriate. It's inappropriate because first of all this Court has stated that everyone who makes a claim under a Federal discrimination law is bound to read and understand what they have stated. The Court so stated that in Mohasco, where the complex filing requirements of Title VII, with the initial 60-day exclusive period for the state, and then the 240-day EEOC period and how they might interact were explained and a grievant was charged with that understanding.

But what's more, in Kremer, certainly the appellant who had appealed before the New York State courts and been unsuccessful did not expect that his later claim in Federal court under Title VII would be barred. However, after that the notice of dismissal of the state,

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it's in our Joint Appendix at page 95, specifically states that an adverse finding may very well bar you and in effect it warns please think twice before doing this. A similar warning could be stated on the notice of charge. The state agency could tell the grievant, if adjudication is made it might bar your ADEA lawsuit. If you would like to restrict these proceedings to investigation and conciliation or mediation, please so advise us.

Finally, it has been argued that there might be different results in different states. I think the ADEA already envisioned that. It envisioned it because there were already two different deferral periods, 180 days if you were not in the deferral state, 300 if you were. The Kremer decision envisions different results in different states, because if your state provides for an appeal of a state agency dismissal and you're, depending on the burden of proof that is utilized, you may thereafter be barred. So the mere fact that you might be in New York versus a different state is certainly not determinative.

QUESTION: You say the only purpose you, the only reason you can't go ahead immediately is on the chance that there will be a mediation that's successful? And that's the whole purpose of the weight provision?

MR. SIEGEL: The 60-day period?

QUESTION: Right.

MR. SIEGEL: The 60-day period, as I interpret it, is exactly that. That we might be able to, as Oscar Mayer stated, we might be able to screen from the courts cases through that conciliation process. And after the state has those 60 days, then you as the claimant have the option of filing a suit and thereby superseding any further state actions on your claim. In this instance the 60-day period came and went, and almost a year later an adjudication was made. So it's not as though on the sixtieth day anything happened. It went on for a considerable period of time.

QUESTION: What would happen if you didn't file suit immediately after the 60 days? You continued the state proceedings, and they drag on for 2 years, and then it looks to you as though they are going bad. And just before the final state decision comes out you pop into Federal court and file your Federal suit. What happens then?

MR. SIEGEL: Under 14(b) you would absolutely have the right to do that. Under 14(a) that would supersede the state proceeding, which would then suddenly stop.

QUESTION: It doesn't make a whole lot of sense, does it?

MR. SIEGEL: Well, it does in the fact that you

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have utilized the state proceedings for investigation, you have considered the possibility of conciliation, you have avoided a multiplicity of lawsuits because the state proceeding was cut off at some point before a judgment in that sense, and no probable cause judgment, and you then moved forward. As the Court stated in Stillians, if you instead went on to get a dismissal first, in effect you have elected your remedy, or as they described it you have made your bed and you are then compelled to lie in it.

So the claimant has that option. When the claimant exercises the option to remain before the agency for a considerable period of time, all the way through to an adjudicatory finding against him, then he has already made an election. And Section 621 of the statute, which talks about its purpose, only speaks about the purpose of eliminating age discrimination. It doesn't speak about the purpose of encouraging age discrimination litigation. And so the purpose of the act would be consistent with 14(a).

Otherwise what would be happening is that the agency proceeding would be reduced in effect to a mere dress rehearsal, as the Eighth Circuit noted. You could pretry your case. You could get the employer's case. In this case there was a court stenographer that took down sworn testimony. In effect, the proceeding would become

discovery. If you were unhappy with the first adjudication against you, you could now relitigate it again, perhaps having practiced in the first instance. Nowhere in the statute is there any indication, or in its legislative history, that a claimant was meant to have two full bites of an apple. It appeared that you were meant to have an effort to conciliate and mediate, not to litigate twice and fully.

QUESTION: Well, does the state tribunal pass on the claim under the Federal statute, or just on the similar claim under the state statute?

MR. SIEGEL: The state does not rule upon the ADEA action. It makes a factual finding which we assert should then be adopted by the court under the doctrine of collateral estoppel, but it is not charged with ruling on the state action any more than in Kremer what occurred was an appeal of a Federal dismissal. It was an appeal of a state no probable cause under its own law. We argue that this would be consistent with Kremer.

QUESTION: Can an ADEA action be brought in a state court?

MR. SIEGEL: Yes. It can be brought in any court of competent jurisdiction, just like a Fair Labor Standards Act claim.

QUESTION: Would it be, do you think,

permissible for the state court to give preclusive findings to the state administrative agency?

MR. SIEGEL: We believe that it would be just as appropriate for the state court to do so as it would be for the Federal court, because it would regardless be under the ADEA.

QUESTION: I am sure that would be your position.

MR. SIEGEL: If there are no further questions.

QUESTION: Do you wish to reserve the remainder of your time?

MR. SIEGEL: Yes, I do.

QUESTION: Very well. Mr. Flamm, we'll hear from you.

ORAL ARGUMENT OF LEONARD N. FLAMM

ON BEHALF OF THE RESPONDENT

MR. FLAMM: Mr. Chief Justice, and may it please the Court:

While petitioner's argument relies on what is missing from the ADEA, respondent can point to a bounty of evidence of congressional intent from the text of the ADEA, its legislative history, the principles of common sense and public policy considerations, all of which overcome any so-called presumption in the Federal common law of administrative agency preclusion applying to suits

under the ADEA. I'd like to use my time before you to enumerate some of those salient pieces of evidence.

First, Section 14(b) of ADEA provides that in the event a state agency terminates its proceedings sooner than in the minimum 60-day period allotted, the grievant can still commence his Federal action, and in fact he can do it that much sooner. Terminated cases, that typically fall in the category of being quick open-and-shut type cases, are obviously ones in which the grievant has little or no evidence to support his claims, and they would be summarily rejected and terminated. It would be ironic indeed if Congress intended to permit quick Federal court access for the least worthy cases in which there is no evidence of discrimination, while at the same time barring court access to the more meritorious cases which, because they are meritorious, happen to have warranted more processing time from the state agency, but unfortunately end up with an adverse decision to the grievant.

Petitioner has --

QUESTION: I think his explanation for that is the that the only thing that Congress expects you to be waiting for is mediation. And the state proceedings may be terminated very quickly in the frivolous cases, because the employer is going to say, you know, mediate what? There's nothing here. So that will be terminated quickly.

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MR. FLAMM: The point that the petitioner made in his brief was that the only kind of cases in which there would be a quick termination would be those in which the state agency abandoned the processing for some reason or the grievant just looking around decided that his case is not worth pursuing in this forum and he took some kind of voluntary dismissal, assuming the state procedures allowed that. I am suggesting that that's a very narrow fact pattern, because the statute doesn't say terminated only if there has been an abandonment. The statute says all terminated proceedings lead to that quicker access to Federal court.

There's a second piece of evidence. Section 72 --

QUESTION: May I ask you on that point also; to what extent is it realistic to assume there would be hearings, other than, you know, just a brief negotiation, within the 60-day period? I mean, what you're saying is if they had a hearing and you lost it, within the 60 days you've got an absolute right to go to Federal --

MR. FLAMM: No, there wouldn't be a hearing, Justice Stevens. What there would probably be is something very facial from the submissions that were made by the grievant that caused the examiner to say this is no case. And it wouldn't even go into a more formalized type

of procedure.

QUESTION: But you don't contend there's a likelihood that there would be actual factual determinations made within the 60-day period?

MR. FLAMM: Yes.

QUESTION: Oh.

MR. FLAMM: Yes, I do. Anything -- I don't mean to say anything is possible in the metaphysical sense, but indeed if the examiner charged with responsibility for the case was able to make a quick facial determination based on an affidavit or a filing, whatever, some piece of evidence that showed instantaneously that there is no case, the examiner, at least under New York State's law, could wipe the case right out at that point.

QUESTION: And make findings of fact explaining it. I see what you --

MR. FLAMM: Well, make a finding that this is no case. It's not going to have that full dress quality to it, but it certainly would be a finding of fact that would be what we call in the New York State law finding of no probable cause. That's going to end the proceedings for that grievant.

Section 72 of the ADEA imposes an accelerated EEOC charge filing cut off date in the case of rapid agency termination. Having a second filing requirement

with the EEOC makes no sense if the terminated state agency findings are given preclusive effect. A concurrent EEOC filing would be superfluous if the issue has already been decided by the state agency. Similarly, Section 72 requires the timely filing of an EEOC charge --

QUESTION: Excuse me, what's the purpose of this EEOC filing? I'm unclear of the role of the EEOC in this whole --

MR. FLAMM: It would be, in my opinion, superfluous, because if the state finding is preclusive, walking across the street to the Federal building and filing with the EEOC would serve no purpose, because the only purpose in having the EEOC charge filing is to get the visa, if you will, to go to Federal court. But if the Federal court is already bound by the state agency, you're going around in a circle for nothing. And that's the point. There is no purpose any longer in having that EEOC charge filing.

QUESTION: What do you assert the purpose of the EEOC filing is?

MR. FLAMM: My -- the purpose that I assert is it gives the EEOC concurrent screening responsibility in the 60 days. But the EEOC can't issue the factfindings that you pointed out to earlier. Therefore what --

QUESTION: Do you agree with that? That the

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EEOC has no factfinding responsibilities --

MR. FLAMM: Yes, sir, I do.

QUESTION: -- under this law?

MR. FLAMM: Yes, I do.

QUESTION: They've been doing it, though?

MR. FLAMM: I understand the practice has been in certain cases to give the, if the case warrants it there may be an informal type of proceeding. But they're really just supposed to screen the cases and see if they can resolve some of the more obvious cases for quick resolution, call the parties in and perhaps knock some heads together.

QUESTION: Um hum.

MR. FLAMM: My point is that is a worthwhile trip to the EEOC, but the EEOC at the end of that trip doesn't issue factfindings. That doesn't mean the trip wasn't worth taking, it just means that that, you have it in place to screen out some of the cases that are susceptible to quick resolution.

Third, Section 14(a) of the ADEA provides for instant supersedure of all state agency action upon the commencement of a Federal suit. What is supersedure? It can mean several things. If it means that the state proceedings are instantly nullified, that interpretation of the word supersedure would totally foreclose this

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appeal. However, we'll assume for purposes of going forward that the word supersedure was merely intended by Congress to mean that the state proceedings should be stayed while the Federal court action is pending. The practical result of whatever definition you want to take of supersedure is the same. Once there is a Federal ADEA action that has been brought, it will abruptly halt the state agency proceedings at whatever point they have reached.

The significance of this provision is that the state agency proceedings can be so easily halted while they are still pending. What would be the purpose of giving those proceedings any more credence just because they happen to have been concluded?

QUESTION: Well, yeah, I mean, bad is bad, but worse is worse. It seems to me that it is something of a spectacle to have a plaintiff who has gone all the way through the state proceeding -- he has chosen to stay there. He could have gotten out quickly, the way you have just described, but he chooses not to. And he goes all the way through the state proceeding. People, the state spends money to conduct these proceedings, and he loses. And then he comes over to the Federal court and says well, that's one trial; let me take another bite of the apple, and we start all over again.

MR. FLAMM: Because --

QUESTION: And I lost fair and square, but I want to start with a fresh new slate. He gets, he gets two shots.

MR. FLAMM: My point, Justice Scalia, is that the statute contemplates, I mean, this, your point is valid, but the statute contemplates instant judicial supersedure. And as you pointed out earlier, that doesn't make a lot of sense. But that's the Congress' determination that you can wait until the eleventh hour and fifty-ninth minute, cut it off, and go to court.

QUESTION: That gives them enough. I'm saying, bad is bad, but worse is worse. Congress says, look, we're going to give you every chance to get out, but if you choose not to get out, if you go all the way through to final judgment by the state, at least at that point we're not going to go through the whole circus again. You've had your chance, you've chosen to stay there, and you have lost fair and square.

MR. FLAMM: Okay. The problem is if it's a long, drawn-out state procedure, the point that you're making has greater validity than in the case which is also under the statute in which it happens quick and dirty. And you would feel that a quick and dirty resolution is unfair to the grievant, but you feel that long, drawn-out

procedure is unfair to the employer. That may be, but there is no, there's no line in the ADEA.

Quick and dirty gives you a right to go to court. Long and drawn-out, but the eleventh minute, eleventh hour fifty-ninth minute cut off also allows you to go to court. Now there may be greater equities in your accessibility to court in one case than in the other, I certainly would agree. But that line that you have drawn is not in the statute, sir.

QUESTION: That's a good response.

MR. FLAMM: Thank you, sir. The reason for having instant supersedure in the ADEA is to reaffirm, as I see it, the principles of Federal preemption. That in turn means avoiding potentially inconsistent rulings by having the state proceedings extinguished upon the commencement of a Federal suit. If the commencement of a Federal suit can abruptly halt a pending proceeding, it violates those principles of Federal preemption if the opposite result occurs in the case of a completed state agency proceeding. Why? The whole point of Federal preemption is to avoid or prevent inconsistent results. Federal preemption should not depend upon whether the state agency proceedings have gone one level or a further level.

The only reason that petitioner submits for

carving out an exception to the Federal preemption rules might be to avoid giving, as we have said before, the grievant two bites of the apple. This competing consideration is based on notions of judicial economy and repose. Ironically, it would not accomplish the goal intended, because under most state agency forums the grievant, as I said, can wait until the eleventh hour and fifty-ninth minute. He can use the state agency for dress rehearsal purposes, and as the Stillians Court notes, test his case and practice his presentation. Why? Because instant judicial supersedure allows it. He can cut off his case just at that point. He would get two bites of the apple. And the whole reason for having judicial economy and repose, it wouldn't be served anyway.

Finally, under the ADEA statutory format a grievant is obliged to file his charge with both the state and the Federal agencies as jurisdictional prerequisites -- QUESTION: Excuse me, before you go on. As to the last argument you made, I -- it doesn't seem to me persuasive. He doesn't get two bites in that situation.

MR. FLAMM: He gets almost two bites. He gets to practice the presentation, which is what the Eighth Circuit found so abhorrent.

QUESTION: He doesn't want to practice the

presentation. He wants to be able to roll the dice twice, to roll twice. He wants to get a shot at winning in the state. And if he cuts it off before, even if he goes on for 2 years, if he cuts it off before the final judgment he has not gotten a second raffle ticket. He gets only one, in the Federal courts.

MR. FLAMM: Well, I'm not --

QUESTION: But what your position permits is that he tries to win in the state court. If he wins there, he has it and he goes home with his money. But if he loses there, nothing lost, he can go back and roll again in the Federal courts. That's a very unusual thing. We usually don't let that happen.

MR. FLAMM: Well, I understand your point. What I'm suggesting here is -- I was only responding to the Eighth Circuit's point, that to practice the presentation is somehow abhorrent to the courts. Because I as a lawyer would welcome the opportunity to practice my presentation.

The fourth point I wanted to make was with respect to the obligatory filing requirement with both agencies. When the EEOC filing takes place, that agency, as we have discussed earlier, cannot adjudicate the claims and make factfindings in the traditional sense, as at least as it can do under Title VII. In denying EEOC, factfinding power to the EEOC, Congress obviously

eliminated the possibility that the EEOC's findings would have preclusive effect.

What can be gleaned from the statute that it intended for the state agencies findings, was any greater judicial impact intended for them? Let's look at the landscape of, against which the ADEA is, has been adopted. Some state agencies, some states, as the Court well knows, do not even have discrimination statutes. Some state agencies have discrimination statutes but they don't adjudicate. Some agencies do adjudicate. Some of the state agencies which do adjudicate, like the New York State Division of Human Rights, give an employer, but not the employee, two bites of the apple at the administrative stage in the sense that there is that first nonhearing level in which only the worst cases get screened out against the employee, but the employer, he gets the public hearing if there is a preliminary finding against him.

If state agency preclusion were to apply, some very strange results would occur indeed. The grievant who went to the state agency only as a jurisdictional prerequisite to Federal court action would find he never gets Federal court action. The state agency, presumably having less expertise than the Federal agency, would become the dominant agency. The EEOC's presumed expertise would be lost. And worst of all, since the state agency

filing is mandatory, the aggrieved employee would be better off living and working in a state with no state agency at all, or at least not in a state like New York where the agency has that adjudicatory power.

Could Congress have wanted this jumbled state of affairs to determine Federal court access? Congress did manifest its intent with reasonable clarity. It provided that in the case of a state agency filing there is only 60 days for that processing period. And it also provided that in that 60-day period there would be concurrent, and not sequential, processing by the EEOC, not to mention the doctrine of instant judicial supersedure. This suggests Congress had a twin purpose. Number one, it wanted to give grievants easier, not a more difficult, access to the Federal court than exists under Title VII. And two, it wanted correspondingly reduced reliance on the importance of the state agency's processing.

State agency preclusion would subvert this twin purpose. Agency preclusion would take away all the considerable substantive benefits of ADEA litigation, jury trial, liquidated damages, attorneys' fees, front pay, and I say without hesitation a more sophisticated Federal judiciary. It is doubtful that Congress wanted all these virtues of a Federal action to be so readily lost through the happenstance of state agency preclusion.

If uniformity and consistency under the law is a worthwhile objective, the law in this area would become a veritable patchwork quilt if state agency preclusion were to apply. The separate laws of 50 states could effectively determine which, whether a grievant gets to court. Title VII and ADEA would be treated differently. The principles of Alexander and Gardner-Denver favoring a judicial forum would be undermined. The bright line of Kremer limiting preclusion to only cases where the state, where there has been actual state court review, would be lost. The Oscar Mayer rule that limits the number of restrictions that you could put on access to the Federal court, that would all go out the window.

QUESTION: All this would only happen in that category of cases where the state acts within the 60 days.

MR. FLAMM: Or longer if the grievant, feeling comfortable but not having a good idea, goes --

QUESTION: But after the 60 days it's entirely within his control. If he doesn't want these horrible things to happen, he can get out of the state system.

MR. FLAMM: After 60.

QUESTION: Right.

MR. FLAMM: Yes.

QUESTION: On the sixtieth day he can cut out. But there is that problem which I don't see any way out

of. I think that's right. If the state agency acts quickly --

MR. FLAMM: If the state agency tells him on day 62, we think we can work out something with you, hold your lawyer's Federal court complaint in abeyance, don't rush down to that courthouse. We think we can work something out, stay with us a little bit longer, a little bit longer. We're now up to day 100. Grievant is scratching his head, what do I do? Fish or cut bait? Put in a quandary because he doesn't really have that close consultational relationship with the agency people. He thinks he can get a resolution, he thinks that he might be able to have his matter resolved, so he tarries a little bit too long. That's an unfair case to have the state agency zap him with an adverse finding.

What would knowledgeable lawyers do? They would polarize the EEOC, they would polarize the agency processing. It would become the main litigation background if agency preclusion were to apply, or it would be a minefield to be avoided. The middle ground, the thing we want most of all, judicious use of the state agency to screen cases that are capable of certain quick resolution, the best thing the agency can do, that procedure would be lost. The whole idea of having a limited deferral period for certain state agencies would

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be subverted and the statute turned on its head.

QUESTION: Thank you, Mr. Flamm. Ms. Wax, we'll hear now from you.

ORAL ARGUMENT OF AMY L. WAX

AS AMICUS CURIAE SUPPORTING RESPONDENT

(PRO HAC VICE)

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

I'd first like to address a question that was asked by Justice O'Connor to petitioner, whether there, this Court has ever ruled that there needs to be an express bar to preclusion in the statute in order for it to apply. That, this Court has never so ruled, and the decision of this Court in the University of Tennessee v. Elliott shows that the Court looks and reasons inferentially from many different features of a statute in deciding whether there should be a rule of preclusion or not.

QUESTION: There has to be a background rule, Ms. Wax, doesn't there? I mean, suppose we look at the statute and we say gee, it doesn't seem to me to say anything either way about it. Suppose we look at the statute, it says nothing either way. What's the background rule? I mean, you can call it a presumption if you like, or never mind presumption. We won't call it a

presumption. What's the background rule?

MS. WAX: Your Honor, we don't deny that there's some kind of background rule, whether we call it a presumption or not. All we deny is that a statute needs to say in so many words that there shall be no --

QUESTION: All right.

MS. WAX: -- that a court shall not be bound.

QUESTION: But you acknowledge that if the statute gives no indication either way, but it seems entirely neutral about it, the normal rule would be that we accept the findings of the agency?

MS. WAX: We would generally go along with that. Now, in Elliott the Court reasoned by inference from, largely from a provision that said nothing about the weight that courts give to state agency findings. The substantial weight provision that the Court relied on in part in Elliott addressed itself to the weight that the EEOC would give to state administrative findings, and it reasoned that it made no sense for courts to give preclusive effect if the EEOC did not.

In the Government's view the answer to this case is found in a few specific features of the age act, features that simply cannot be squared with giving preclusive effect to state administrative findings in a subsequent Federal action under the age act. First, as my

colleague has said, there is Section 14(b) of the age act, the so-called deferral provision. This section provides for a delay in the filing of the civil action until a state agency has had at least 60 days to consider the complaint of discrimination, unless the state proceedings are earlier terminated. Now, since employees who are satisfied with the outcome of state proceedings generally don't go to Federal court, 14(b) clearly contemplates a civil action following an unfavorable state agency decision, including a finding of no discrimination.

And to answer a point that has come up in this argument, Congress clearly contemplated that there would be time when the state would be able to make findings of fact and issue a no probable cause determination within that 60-day period. And on page 20 of our brief we cite to a citation in this Court's decision in Oscar Mayer to remarks of Senator Dirksen during the passage of the age act where he said yes, there are many occasions in which 60 days is going to be enough for a dispensation of these claims. But if the state's factfinding is binding on the Federal court, a civil action under such circumstances would be pointless.

The second feature of the age act is Section 7(d) --

QUESTION: Excuse me. Isn't it possible that

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the agency proceeding terminates but doesn't give the claimant all the relief that the claimant desires?

MS. WAX: Right, that could happen.

QUESTION: And he comes into Federal court for more relief?

MS. WAX: Absolutely. And in that case --

QUESTION: So it wouldn't be pointless.

MS. WAX: Well, we're not saying that every case in which there is a termination before 60 days either in favor of the complainant or against the complainant would make a subsequent civil action pointless. We're not saying that. We're saying that there's going to be a significant subset of cases in which it would be pointless, and those are the very cases in which the complainant most needs another look at his, and most deserves another look at his claim, namely where there has been an adverse decision that is on the merits with a no probable cause determination.

It might be that there would be a resolution based on procedural defects. There could be a resolution in favor of the individual and he could want to go to court to get more relief. But in that case, of course, he'd still be required to prove his case again de novo. I mean, the de novo rule favors employees under some circumstances and employers under other circumstances.

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Section 7(d). The age act permits simultaneous or successive consideration of a complaint by a state or Federal agency, but as 7(d) reveals, if an individual decides to file with a state agency first, then he must file his complaint with the EEOC within 30 days of a final state agency action. Therefore the statute clearly contemplates an EEOC investigation and conciliation of a claim on which the state agency has already rendered a decision. Now, if that decision had preclusive effect, that would read the EEOC right out of the act, because the EEOC would have nothing to do. And let me tell you why.

If there was a finding of no discrimination by the state agency and a subsequent filing with the EEOC, and the EEOC made its own findings of fact and approached the employer and said, let's sit down and try to solve a problem that we perceive exists with this employee, there is no reason why the employer would even answer his, the phone calls of the agency. The employer would say, as far as we're concerned, end of case. The state agency has made findings of fact in our favor. Those findings are binding in a subsequent Federal court action where the grievant has to go to get relief under the age act, and we have no reason to talk to you. So that's why Section 7(d) shows, and the role of the EEOC as contemplated by Section 7(d) shows, that state agency finding cannot have

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preclusive effect.

QUESTION: Ms. Wax, what authority does the EEOC have to make findings or to act?

MS. WAX: The age act does not explicitly provide authority for the EEOC to make findings in so many words, and it differs from Title VII in that Title VII, the sections of Title VII that govern the EEOC's role do speak of a probable cause determination or no probable cause determination. However, the EEOC has decided to make findings. In practice the EEOC does investigate and make findings, because it has discovered that it's very difficult to solve a discrimination problem and get a conciliation agreement if you don't know what the problem is.

So fact, the practice under the age act and Title VII has converged since 1978 when the authority to enforce the age act was transferred from the Department of Labor to the EEOC. And it is our position that the EEOC's factfinding under the age act is perfectly legitimate. In fact, it's absolutely necessary to carry out the EEOC's mandate.

QUESTION: But its, its findings are not binding on a subsequent Federal court?

MS. WAX: This Court has never so held, but the lower courts -- under the age act. Under Title VII it has

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been established in Chandler v. Roudebush and many subsequent cases that EEOC factfinding is not binding, that there is de novo review in a subsequent Federal action. The lower courts have uniformly held that that rule applies under the age act. No court has held otherwise.

Which brings me to the third point and the third reason why preclusive effect for state agency findings just does not square with the scheme here. The EEOC's factfinding does not get preclusive effect in a subsequent Federal action. It simply makes no sense, therefore, to give state findings preclusive effect, because the role of the EEOC and the state agency is essentially the same under the age act, and that is to try and resolve problems of discrimination to the satisfaction of the grievant short of a Federal lawsuit, to keep these issues and these conflicts out of court.

QUESTION: Ms. Wax, can I ask you a question? In your view would the, an adverse finding by the state administrative agency be admissible in a Federal judicial action?

MS. WAX: Yes, Your Honor. Our position is that under 803, Federal Rule of Evidence 803(8)(c), which allows the admission into evidence in a Federal civil court, Federal civil action of proceedings and records of

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Government agencies, that it would be admissible and it could be admitted in the record. Now age discrimination actions are tried before a jury, so a jury would be perfectly entitled to evaluate that and evaluate the actual evidence and the answers, and the transcripts as part of the evidence as a whole.

QUESTION: Thank you, Ms. Wax. Mr. Siegel, do you have rebuttal? You have 5 minutes remaining.

REBUTTAL ARGUMENT OF PAUL J. SIEGEL

ON BEHALF OF THE PETITIONER

MR. SIEGEL: I believe that our argument covered the points raised, but there was one question with respect to, as it was termed, the background rule. This Court in Elliott, specifically citing Allen and Migra, said nonetheless they support the view that Congress, in enacting the reconstruction of civil rights statutes, did not intend to create an exception to the general rules of preclusion. So it has been termed a general rule.

With respect to the EEOC's expertise that has been referred to several times, it kind of strains the imagination to think that an agency that received age discrimination coverage in 1978 somehow has greater expertise than the agency that had it since 1958, the New York State Division of Human Rights. And it would not be a nullity to have had the EEOC process this because they

might be able to work out a resolution or they might file their own independent proceeding. So in either event that 7(d) has a life apart from administrative preclusion.

We ask that the Court reverse the Second Circuit's decision, remand this matter back to the Second Circuit with instructions to consider whether sufficient due process was afforded so that collateral estoppel effect be given to the adverse decision of the state division of human rights. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Siegel. The case is submitted.

(Whereupon, at 11:51 a.m., the case in the above-entitled matter was submitted.)

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