

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL RAILROAD PASSENGER :

4 CORPORATION, :

5 Petitioner :

6 v. : No. 00-1614

7 ABNER MORGAN, JR. :

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9 Washington, D.C.

10 Wednesday, January 9, 2002

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:12 a.m.

14 APPEARANCES:

15 ROY T. ENGLERT, JR., ESQ., Washington, D.C.; on behalf
16 of the Petitioner.

17 AUSTIN C. SCHLICK, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the United States, as amicus curiae,
20 supporting the Petitioner.

21 PAMELA Y. PRICE, ESQ., Oakland, California; on behalf of
22 the Respondent.

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

2 (11:12 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 00-1614, the National Railroad Passenger
5 Corporation v. Abner Morgan.

6 Mr. Englert.

7 ORAL ARGUMENT OF ROY T. ENGLERT, JR.

8 ON BEHALF OF THE PETITIONER

9 MR. ENGLERT: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 25 years ago in United Air Lines v. Evans, this
12 Court observed that an employer was entitled to treat a
13 past act as lawful after respondent failed to file a
14 timely charge of discrimination. In the Court's words --
15 and I quote -- a discriminatory act, which has not made
16 the basis for a timely charge, is the legal equivalent of
17 a discriminatory act which occurred before the statute was
18 passed. The Court further referred to the alleged
19 discriminatory act outside the limitations period as
20 merely an unfortunate event in history which has no
21 present legal consequences.

22 In the present case, Abner Morgan challenges as
23 discriminatory various acts that he did not make the basis
24 for an EEOC charge within 300 days. Our contention is
25 that Amtrak was entitled to treat those past acts as

1 lawful after the passage of 300 days. Those acts are
2 merely unfortunate events in history with no present legal
3 consequences.

4 The Ninth Circuit saw things quite differently.
5 According to the Ninth Circuit, all plaintiffs, completely
6 without regard to their own diligence, may base suit on
7 events they didn't make the basis of a timely charge, as
8 long as those events are sufficiently related to later
9 events that can also be characterized as discrimination.

10 QUESTION: Well, Mr. Englert, there are, I
11 assume even in your view, a few exceptions to this rule.
12 When is it that you would look back?

13 MR. ENGLERT: For certain diligent plaintiffs --

14 QUESTION: Yes.

15 MR. ENGLERT: -- who bring suit within 300 days
16 after their cause of action first accrues, we would look
17 back. That obviously isn't this case.

18 QUESTION: And there's no other circumstance,
19 you think, where you would end up looking back beyond --
20 where the -- the full thrust of -- of what was going on
21 didn't become evident until the statute had passed as some
22 early -- on some earlier events?

23 MR. ENGLERT: We would allow plaintiffs, in
24 exactly the situation you described, Justice O'Connor, to
25 look back, the situation in which it was not fully evident

1 until within the 300-day period what was going on. That
2 is the exception we're willing to concede.

3 QUESTION: I don't understand how's that's an
4 exception. I thought we were talking about the period
5 before the 300 days. Is there any instance in which you
6 would allow a person to get recovery for something that
7 happened to him prior to 300 days before he filed?

8 MR. ENGLERT: Yes, Justice Breyer. If the --

9 QUESTION: What is that?

10 MR. ENGLERT: -- if the events outside the 300-
11 day window were not sufficiently severe or pervasive to
12 rise to the level of being actionable, then we would
13 concede that the cause of action doesn't accrue until
14 they've become sufficiently severe or pervasive.

15 QUESTION: What about the circumstance where
16 they're very much related to what did occur within the 300
17 days, but the person isn't certain? I mean, later on the
18 judge says, yes, it was independently actionable, but I
19 could understand how a person at the time might think it
20 wasn't. What about that one?

21 MR. ENGLERT: Well, there may be close cases,
22 Justice Breyer, and --

23 QUESTION: No, no. But I want to know. This --
24 that is the case. A judge would say a reasonable person
25 would not have realized, though he would have been wrong,

1 that those outside-the-period events rose to the level of
2 giving him a cause of action. How would you decide that
3 case?

4 MR. ENGLERT: We -- we would give away that
5 case.

6 QUESTION: Okay.

7 MR. ENGLERT: If a reasonable person would not
8 have known --

9 QUESTION: Fine.

10 QUESTION: Would not have known his injury. So
11 -- so you're saying the test under the act is not injury,
12 but knowledge of injury.

13 MR. ENGLERT: Well, Justice Scalia, that gets
14 into the debate, of course, this Court has had --

15 QUESTION: I know it does. You're -- you're
16 giving it away. You're saying that under the act,
17 knowledge of injury is --

18 MR. ENGLERT: No. I -- I'm not trying to give
19 that away. I'm trying not to take a position on that. I
20 understood Justice Breyer's question to pertain to the
21 situation in which the judge says a reasonable person
22 would not have known, not this particular plaintiff
23 wouldn't have known, but a reasonable person would not
24 have known.

25 QUESTION: Oh, in practice, that's always an

1 exception to the knowledge of injury rule. With due
2 diligence, he didn't know. I mean, but -- but that --
3 you're willing to accept that.

4 MR. ENGLERT: That's why I'm not trying to give
5 away anything on injury versus injury discovery.

6 QUESTION: With due diligence -- with due
7 diligence -- the person had due diligence but didn't know.
8 So, it's a -- it's a knowledge -- it's a knowledge of
9 injury test.

10 QUESTION: Not a subjective knowledge of injury
11 but knowledge of injury that -- that would have occurred
12 to a reasonable person.

13 MR. ENGLERT: Exactly, Mr. Chief Justice, and --

14 QUESTION: All right. If you're willing to give
15 that one away, what about a person who, though he might
16 have understood -- a reasonable person might have
17 understood that this would have been actionable, he's in
18 the middle of negotiations with his company there --
19 there, and it would have been foolish to go to the EEOC.

20 MR. ENGLERT: That plaintiff loses.

21 QUESTION: I mean, because after all, we're
22 trying to settle this thing right within the company.

23 MR. ENGLERT: That plaintiff loses, Justice
24 Breyer. That's quite clear.

25 QUESTION: He loses.

1 MR. ENGLERT: That's quite clear under cases
2 like Robinson Meyers.

3 QUESTION: And -- and why should he lose where
4 the other one doesn't?

5 MR. ENGLERT: Because this Court has said so.
6 Cases like Robinson Meyers and Johnson v. --

7 QUESTION: Are you talking about EEOC cases?

8 MR. ENGLERT: Those -- those are title VII cases
9 in which -- Robinson Meyers was a case in which the
10 plaintiff exhausted union grievances and then filed the
11 EEOC charge, and the Court said, no, you should have filed
12 your EEOC charge within the statutory period.

13 QUESTION: Mr. Englert, I'm not aware that there
14 is a case -- perhaps I'm wrong about this -- quite like
15 this where there are a succession of similar acts, a
16 number of disciplines, a number of refusal to give
17 training opportunities, and the employee goes to the EEO
18 -- the in-house person, tries to settle it, tries not to
19 make a Federal case out of it. And -- but the rule that
20 you would have us adopt would say if you're in doubt, sue
21 instead of saying, if you're in doubt -- each one of these
22 discrete instances that he was trying to work out, we
23 would have to have -- your rule would mean that this
24 person has to file 10 charges with the EEOC instead of
25 one.

1 MR. ENGLERT: Well, it's not when in doubt, sue,
2 Justice Ginsburg. It is when in doubt, go to the EEOC,
3 and it's an important distinction because the purpose of
4 filing with the EEOC is to start a conciliatory process.

5 QUESTION: But he's always -- he also has the
6 in-house. He's got a conciliatory process going without
7 involving the Federal Government. He's just dealing with
8 his employer. His employer has an EEO counselor. That he
9 did. He didn't come to a Federal agency. So, let's take
10 it that we're talking about the EEOC and not suing in
11 court.

12 The EEOC -- one of its objections is you would
13 be breeding tremendous fragmentation here because on every
14 incident in a pattern, he'd have to file another EEOC
15 charge. That much you are saying.

16 MR. ENGLERT: That much I am saying, and that is
17 very consistent with the purposes of the title VII charge-
18 filing requirement, which is to cause plaintiffs to go
19 promptly to the EEOC, as this Court itself has said in a
20 number of its cases, and to get that process started
21 quickly.

22 Now, there -- there could be rare cases, Justice
23 Ginsburg, in which equitable tolling would apply on the
24 facts that you've suggested. This isn't one of them, and
25 I don't think there are many such cases. But if one is in

1 the middle of some kind of negotiation and is being misled
2 into thinking that it's all going to work out and
3 therefore don't got to the EEOC, that person might have an
4 equitable tolling argument, although as this Court has
5 said, the virtue of equitable tolling is that it is so
6 rarely invoked --

7 QUESTION: Well, I guess any statute of
8 limitations of any sort means you -- you have to sue 10
9 times instead of one time, doesn't it?

10 MR. ENGLERT: Yes.

11 QUESTION: I mean, it's the nature of a statute
12 of limitations that when you're hurt, you have to sue.
13 You can't wait till you're hurt the 10th time and then
14 say, well, you know, let's put it in one big package.
15 I'll wait 10 years until I'm hurt -- hurt more often.

16 MR. ENGLERT: Yes, Justice Scalia, and --

17 QUESTION: Mr. Englert, I don't think that this
18 is in any case. I think you have recognized that in the
19 so-called hostile atmosphere case, the first epithet, even
20 the second, it's -- it's uncertain when how much is enough
21 and when it's insufficient. So, I think you recognize
22 that at least in that category of case, there would have
23 to be a succession of similar incidents.

24 MR. ENGLERT: Yes. That's part of the
25 definition of the very violation of title VII in hostile

1 environment cases.

2 QUESTION: In other words, you're -- you're
3 saying that there is no pervasive hostility, no pervasive
4 hostile environment until the acts are repeated, or is it
5 there is a pervasive hostile environment, but it's just
6 not discovered until the acts are repeated? Which --
7 which of the two is it?

8 MR. ENGLERT: The case I'm willing to concede,
9 looking back beyond 300 days, is the case in which there
10 is no hostile environment until within the 300-day period.
11 The fact that the hostile environment isn't discovered I
12 have not conceded. That -- that case I have not conceded.

13 QUESTION: Wait. Now, you say there is no
14 hostile -- what are you conceding? That that -- that that
15 evidence can be brought in, or that you can get damages
16 for those events?

17 MR. ENGLERT: I'm conceding that you can get
18 back pay or damages for those events as the Seventh
19 Circuit said in Galloway and as the First Circuit said in
20 Sabree.

21 QUESTION: Well, why if -- if you assert that
22 there hasn't been any offense when those events occurred?
23 You say there's not yet a hostile environment. Why should
24 you be able to get any damages for a period during which
25 there as not a hostile environment?

1 MR. ENGLERT: Well, the hypothetical example,
2 Justice Scalia, that I think makes the point is suppose
3 there is an epithet at the office Christmas party one
4 year. Then there's an epithet at the office Christmas
5 party the next year. Then there's an epithet at the
6 office Christmas party the third year, and the person has
7 to seek psychological counseling after each of those.
8 It's not going to rise to the level, in all likelihood, of
9 a hostile environment after one epithet, but with
10 repetition, it can rise to the level of a hostile
11 environment.

12 QUESTION: Well, sure, but it doesn't make the
13 first one a hostile environment.

14 MR. ENGLERT: No, but the statute of
15 limitations, under standard accrual principles, didn't
16 begin to run until it became a hostile environment, and
17 we're suggesting --

18 QUESTION: But if that's the case, you don't
19 have to concede anything because the hostile environment
20 doesn't occur, as you're analyzing it, until -- within the
21 300-day period.

22 I thought what you meant was that you would
23 concede the -- the case -- you would concede the
24 application of continuing violation when the hostile
25 environment was not apparent enough to bring a lawsuit

1 until you get within the 300-day period -- yes, the -- the
2 limitation period.

3 MR. ENGLERT: Yes.

4 QUESTION: Okay. But you're saying that -- I --
5 I thought, in answer to Justice Scalia, you were saying
6 there is no hostile environment prior to the third
7 incident, which is within the period.

8 MR. ENGLERT: No, I --

9 QUESTION: Maybe that isn't what you meant.

10 MR. ENGLERT: I think --

11 QUESTION: That's how I understood him.

12 MR. ENGLERT: Justice Souter -- and I don't know
13 that I want to spend much more of my argument on
14 concessions, but --

15 (Laughter.)

16 MR. ENGLERT: -- I think the -- the point is
17 that the entire series of actions that constitute the
18 hostile environment are all part of the hostile
19 environment, but it may not --

20 QUESTION: Okay. Then the hostile environment
21 goes back beyond the 300-day period. You're saying a
22 hostile environment began with the first epithet, but you
23 didn't have a -- a sufficiently obvious indication of it
24 until you got to epithet three.

25 MR. ENGLERT: In 20/20 hindsight, this is how

1 hostile environment cases work. An epithet that was not a
2 hostile environment on day 1 may actually become part of a
3 hostile environment on day 300.

4 QUESTION: Good. Then change your answer to my
5 earlier question because I asked you whether there was a
6 hostile environment at the first incident -- incident, and
7 you said no, it -- there was not yet until the last
8 incident. You're talking about a different situation
9 where there's been a hostile environment all along, but it
10 doesn't become apparent until the third incident, but
11 there really was one the first time the epithet was used.
12 That's a different situation, and we got to know which one
13 of the two you -- you want us to allow.

14 QUESTION: And that was my -- and that was my
15 question. And I want to know which one you think this
16 case is, and I also want to know can there be both kinds
17 of cases and we have to see which applies -- which
18 description applies in each instance.

19 MR. ENGLERT: Okay. In -- in this case, Mr.
20 Morgan was complaining to members of Congress starting in
21 1991. There is absolutely no doubt that he thought that
22 he was being discriminated against from long before the
23 statute of limitations ran.

24 QUESTION: Is this a hostile environment claim,
25 do you think?

1 MR. ENGLERT: Not primarily, but there is a
2 hostile environment claim in this case as the Ninth
3 Circuit saw it.

4 QUESTION: It is in the case. Is it a pattern
5 and practice case?

6 MR. ENGLERT: No, Your Honor. Pattern or
7 practice is a term in section 707 of the act, which
8 applies exclusively to governmental actions, and the Court
9 has used that phrase in certain class actions as well --
10 in private class actions, but this is not a class action
11 either.

12 QUESTION: But it could be a hostile environment
13 claim included here.

14 MR. ENGLERT: The Ninth Circuit believed there
15 was, yes.

16 But in any event, Mr. Morgan was -- was well
17 aware long before he filed his EEOC charge that he had a
18 -- a claim of discrimination. I --

19 QUESTION: May I ask you about a hypothetical
20 that's perhaps a little simpler to discuss? Supposing the
21 company had a policy that was unwritten or secret or
22 something like that, we will not allow any woman into a
23 certain job category, no woman, no black into a certain
24 job category. It's -- it's found out 3 years after the
25 policy was formally described and so forth. And then a

1 person who repeatedly tried to get into that job category
2 over the entire 3-year period but was refused each time
3 because of the existence of a continuing policy, does that
4 person have any right to recover for anything happening
5 prior to the 300 days?

6 MR. ENGLERT: I think not, Justice Stevens, but
7 that raises two issues that are not in this case. One is
8 fraudulent concealment, and the second is the issue of
9 injury versus injury discovery for statutes of
10 limitation --

11 QUESTION: I'm assuming there's no discovery,
12 but I'm assuming --

13 MR. ENGLERT: No.

14 QUESTION: -- if you can ever describe anything
15 as a continuing violation, I have described a continuing
16 discriminatory policy. And if it's clear as a bell that
17 it's all one policy and it had a several -- manifested
18 itself in several different incidents, is it -- may a
19 plaintiff recover for something that happened prior to the
20 300-day filing? That's my -- sort of the basic question
21 in this case it seems to me.

22 MR. ENGLERT: My short answer is no.

23 QUESTION: Okay.

24 MR. ENGLERT: My longer answer is no unless this
25 Court resolves an issue that is not presented by this case

1 which is injury versus injury discovery in favor of an
2 injury discovery rule.

3 QUESTION: You're saying injury would not be
4 enough.

5 MR. ENGLERT: That issue is not in this case,
6 but that is my -- I'm saying injury would be enough.

7 QUESTION: Well, arguably it would be in this
8 case to the extent the hostile environment claim is a
9 continuing violation. I don't know whether it is, but
10 arguably that's -- the hostile environment claim
11 conceivably could be a continuing policy also.

12 MR. ENGLERT: It could be, but the reason I'm
13 making a concession with regard to hostile environment
14 claims is not injury versus injury discovery. The reason
15 I'm making a concession is because under standard
16 principles of accrual, the plaintiff may not sue until he
17 or she actually has a cause of action. And because a
18 hostile environment claim can only develop over time, it
19 may be that not until the third, fourth, fifth epithet,
20 incident is -- is there anything for the plaintiff to sue
21 on.

22 QUESTION: Well, my assumption is a case --
23 there was a violation all along, but the -- the charge was
24 not filed within 300 days of the commencement of a
25 continuing violation. The question I have in the back of

1 my mind is, could there be recovery for the portion of the
2 continuing violation that was more than 300 days old?

3 MR. ENGLERT: There -- no. There can always be
4 recovery for the portion of the continuing violation
5 within the 300 days.

6 QUESTION: Mr. Englert, you have been deflected
7 from what I think is the strongest point on the other side
8 that said, that's all well and good, but Congress
9 understood you could go back way beyond the 300 days
10 because they put a 2-year cap on back pay.

11 MR. ENGLERT: Yes.

12 QUESTION: So, that shows how, whatever you
13 might say, just looking at the words of the statute,
14 Congress understood that you have to shorten the period
15 and the period they picked was 2 years, much longer than
16 180 days or 300.

17 MR. ENGLERT: And let me try very quickly to say
18 why that argument is not a good argument. Congress did
19 worry that there was no time limit on title VII actions
20 and it put the 2 years in there. But that's because of
21 the continuing effects doctrine, which this Court
22 repudiated in 1977, and that's because this Court hadn't
23 clearly said the title VII statute of limitations is
24 section 706(e) until 1982 in Zipes. Many of the lower
25 courts were actually borrowing State statutes of

1 limitations on the theory that title VII had no statute of
2 limitations of its own. This Court laid that to rest in
3 Zipes, and now all of the Federal courts of appeals,
4 including the Ninth Circuit, agree that 706(e) is a
5 statute of limitations.

6 If I may, I'd like to reserve the balance of my
7 time.

8 QUESTION: Very well, Mr. Englert.

9 Mr. Schlick, we'll hear from you.

10 ORAL ARGUMENT OF AUSTIN C. SCHLICK

11 ON BEHALF OF THE UNITED STATES,

12 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

13 MR. SCHLICK: Mr. Chief Justice, and may it
14 please the Court:

15 This Court's decision in Zipes established and
16 the Court reaffirmed in Lorance that section 706(e)
17 operates as a statute of limitations. The limitations
18 period begins to run with the occurrence of the alleged
19 unlawful employment practice.

20 In this case, respondent could sue on alleged
21 violations that occurred not more than 300 days before he
22 filed his charge with EEOC, but he could not sue on
23 alleged violations that occurred earlier and outside the
24 limitations period.

25 Our construction of section 706(e) gives effect

1 to the balance underlying that provision. On the one
2 hand, it ensures that plaintiffs are able to sue and
3 recover for ongoing violations. At the same time, it
4 ensures that employers will not be liable for violations
5 that -- that occurred long ago.

6 QUESTION: When you say ongoing violations and
7 taking my hypothetical, could they recover for damages
8 prior to the 300 days?

9 MR. SCHLICK: In your hypothetical, Justice
10 Stevens, recovery would only be available if equitable
11 tolling came into play. As -- absent equitable tolling
12 based on -- based on the conceal -- equitable estoppel
13 based on the concealment that you mentioned in your
14 hypothetical, recovery would be limited to 300 days.

15 QUESTION: In my hypothetical it would be
16 limited to 300 days.

17 MR. SCHLICK: Yes, Justice Stevens. The fact
18 that it was continuing would not -- would not affect the
19 application of a 300-day period.

20 QUESTION: In a nutshell, where do you think the
21 Ninth Circuit went wrong, which I take it you believe is
22 the case here?

23 MR. SCHLICK: Yes, Justice O'Connor. There were
24 two categories of claims at issue in this case. The first
25 is what Ninth Circuit referred to as serial violations,

1 that is, independently actionable alleged violations of
2 title VII. And as to -- as to those claims, the Ninth
3 Circuit went wrong in holding that violations that
4 occurred -- that accrued more than 300 days before the --
5 the charge was filed were actionable.

6 The second claim was a hostile work environment
7 claim. Now, the allegation of the complaint and the
8 claims at trial were that the hostile work environment
9 became actionable right from the outset of Mr. Morgan's
10 employment with -- with Amtrak. It was actionable
11 throughout the period. Mr. Morgan, however, didn't bring
12 a charge on that -- on that claim until years later.
13 Accordingly, he could only recover for 300 days of the
14 alleged maintenance of the hostile work environment.

15 Now, our construction --

16 QUESTION: On your theory then, the -- the only
17 thing that the continuing violation concept gives, in
18 effect, is a right to use evidence of something that
19 happened prior to the period. It does not, in effect,
20 give any right to damages for the -- whatever the damage
21 is for the hostility prior to the 300-day period. So, you
22 turned it into an evidentiary rule, it seems to me.

23 MR. SCHLICK: No. Although evidence says that
24 events outside the limitations period are admissible as
25 background evidence, our view of the continuing violation

1 doctrine is that it allows a plaintiff to sue
2 notwithstanding that there may have been notice of -- of
3 similar violations outside the limitations period. And
4 that's the application of the continuing violation
5 doctrine --

6 QUESTION: Oh. So, you're saying if there has
7 been no -- let's -- let's assume a case in which there is
8 no independent notice of the hostile environment within
9 the 300-day period. They would still be able to sue on a
10 continuing violation theory. Whereas, if it were a purely
11 evidentiary rule, they would not be able to sue within
12 that period.

13 MR. SCHLICK: Suit -- suit could be brought
14 within 300 days for the entirety provided that it accrued
15 within the 300 days. And the -- the relevance of the
16 continuing violation rule is that notice outside the
17 limitations period -- in this case going back to the
18 serial claims, in this case notice of related violations
19 outside the limitations period do not prevent Mr. Morgan
20 for suing on violations that occurred within the
21 limitations period.

22 QUESTION: Let's -- let's assume you have a
23 hostile work environment that goes on for 900 days. He
24 doesn't bring an action until the last 300 days or until
25 day 601. What -- what you're saying, I believe -- and

1 correct me if I'm wrong -- is that the mere fact that the
2 hostile work environment really commenced 600 days ago
3 does -- or 900 days ago does not bar you from getting
4 damages for the last 300 days.

5 MR. SCHLICK: That's right, Justice Scalia.
6 When you say commenced, I understand you to mean accrued.
7 It became actionable.

8 QUESTION: It became -- it became a hostile work
9 environment --

10 MR. SCHLICK: Yes.

11 QUESTION: -- 900 days ago.

12 MR. SCHLICK: That's correct, Justice Scalia.

13 QUESTION: But it continued to be a -- a hostile
14 work for all 900 days. You can sue for the last 300
15 days --

16 MR. SCHLICK: That's correct, Justice Scalia.

17 QUESTION: -- even though it's --

18 QUESTION: And you also think he can -- don't
19 you think he can get damages for the whole 900 days if a
20 reasonable person wouldn't have realized that those first
21 600 days were actionable?

22 MR. SCHLICK: That, Justice Breyer, is the
23 question of accrual under Harris. The -- the standard for
24 the claim in that case would be whether the work
25 environment -- the -- was severe and pervasive both

1 objectively and subjectively.

2 QUESTION: All right. Now, if you -- if you --
3 what about just modifying it a little to try to give
4 meaning to the 2 years of back pay that you could get and
5 all the other things and realities of the work place, and
6 say, as long as it was reasonable for him not to go to the
7 EEOC, he can recover for the whole 900 days?

8 And there are a lot of reasons it's reasonable
9 not to go to the EEOC. Maybe because you didn't quite
10 understand what was going on. Maybe you thought it would
11 cure itself. Maybe you thought those were just comments
12 that some guy made. He should be better educated. Maybe
13 you thought the employer will work it out. Maybe you
14 thought your supervisor wasn't the rat he turned out to
15 be. All right, or whatever. You see what I'm saying? As
16 long as a judge would say it was reasonable, what about
17 that?

18 MR. SCHLICK: The -- the reasonableness that
19 would allow -- that would extend the limitations period is
20 -- is reasonableness that would qualify under the
21 equitable tolling or equitable estoppel doctrines. And
22 indeed, the limitations period is sometimes extended even
23 beyond 2 years, thereby giving effect to the 2-year
24 restriction on back pay under the equitable tolling
25 doctrine.

1 QUESTION: Well, there -- there are a lot of
2 reasons for not going to court too, but we've never said
3 those toll the statute of limitations.

4 MR. SCHLICK: That's correct, and if it's a
5 reason which does not --

6 QUESTION: Do you think the Seventh Circuit has
7 adopted the right test in that regard?

8 MR. SCHLICK: The result of the Seventh
9 Circuit's test is generally consistent with our rule, but
10 the -- the Seventh Circuit's test is in our view less
11 definite than our own. They seem to ask whether the
12 plaintiff sued at an appropriate time. Our question is,
13 did the plaintiff bring suit within -- or file a charge,
14 rather, within 300 days or 180 days, if applicable, of the
15 accrual of the violation, of the occurrence of the alleged
16 unlawful employment practice. And that is the rule
17 established in the NLRA, which is the model for title VII.

18 QUESTION: But the agency here -- I mean, that's
19 -- the position that you are taking, on behalf of the
20 United States, differs from the EEOC's position which, I
21 understand it, is the position that the Ninth Circuit
22 followed.

23 MR. SCHLICK: Yes, Justice Ginsburg. The
24 respondent and amici rely on regulations issued by the
25 EEOC under section 717 of the act, which is the Federal

1 employer provision. Those regulations are by their terms
2 inapplicable to claims under 706, and indeed, Congress
3 left it to the EEOC to establish a -- a framework for --
4 for filing charges that the EEOC requires consultation
5 within 45 days with the agency's EEO office. So, it's a
6 different structure, and in that context --

7 QUESTION: Well, what is the EEOC's position on
8 -- on this case?

9 MR. SCHLICK: In section 706 cases, respondent
10 correctly points out that the EEOC has filed briefs and
11 taken a position which is consistent with the Ninth
12 Circuit's test. Our view is that while that would be
13 evaluated under Skidmore, it is not persuasive for the
14 views that we've given in our brief.

15 QUESTION: And your answer to the question about
16 the 2 years is that there are cases. There wouldn't be
17 very many, though, that would fit where would be a 2-year
18 -- possibility of a 2-year back pay.

19 MR. SCHLICK: I can give you two cases from the
20 Southern District of New York last year, *Sye v. The*
21 *Rockefeller University*, 137 F.Supp.2d 276; *Bardniak v.*
22 *Cushman and Wakefield*, 2001 WL 1505501, both last year.
23 In both of those cases, the charge was filed 3 years after
24 the last occurrence that's alleged and applying equitable
25 tolling principles, the courts indicated that the -- that

1 the complaint could go forward because of the equitable
2 tolling.

3 QUESTION: And you agree with those equitable --
4 whatever those equitable tolling reasons were? You think
5 those courts handled the case correctly?

6 MR. SCHLICK: Yes. I think so. In both cases,
7 misinformation was provided by the agency, either the
8 State agency or the EEOC itself. In one case there was a
9 question of mental -- mental incapacity of the plaintiff,
10 and tolling was additionally extended on that basis.

11 QUESTION: I'm not sure I understand why hostile
12 environment cases are unique. Why is that the only kind
13 of continuing violation? I mean, if I'm not giving --
14 given a promotion that I was entitled to because of my
15 race, I continue not to have that promotion month after
16 month after month. Why isn't that as much of a continuing
17 violation as is a hostile work environment?

18 MR. SCHLICK: In our view hostile environment
19 cases are not unique and are not properly exceptions in
20 which -- in which a continuing violation doctrine apply.
21 Rather it's a question of accrual, and hostile environment
22 cases are distinguishable in that they may take a long
23 time to accrue. But that simply means that when they do
24 accrue, the charge should be brought within 300 days. The
25 example of -- of a discharge would be --

1 QUESTION: But I thought you said the opposite.
2 If -- if it accrues now, I can still sue 900 -- 900 days
3 later for the hostile work environment of the last 300
4 days. I thought that's what you said.

5 MR. SCHLICK: If I may answer, Mr. Chief
6 Justice.

7 QUESTION: Yes.

8 MR. SCHLICK: In that case there is an
9 occurrence within the 300 days and it's that occurrence
10 that is the basis for the charge and the complaint within
11 the 300 days.

12 QUESTION: Thank you, Mr. Schlick.

13 Ms. Price, we'll hear from you.

14 ORAL ARGUMENT OF PAMELA Y. PRICE

15 ON BEHALF OF THE RESPONDENT

16 MS. PRICE: Mr. Chief Justice, and may it please
17 the Court:

18 Ongoing violations of the law must be treated
19 differently from discrete acts. A continuing unlawful
20 practice which involves a present violation of the act
21 means that the claim is not stale. Limiting liability to
22 180 days solely would essentially nullify section 706(g).
23 It would allow the defendant in this case Amtrak -- would
24 essentially negate the language of title VII which speaks
25 in terms of practices. It speaks specifically to an

1 unlawful employment practice.

2 QUESTION: Well, I mean, the claim is not stale,
3 of course, as to the continuing acts. The question is can
4 you go back for the acts as -- as to which the statute
5 arguably has run.

6 MS. PRICE: This is true.

7 QUESTION: And -- and so the -- the question is
8 not whether or not you can sue continuing acts. If it's
9 indeed a continuing act, you can sue for the acts that are
10 within the -- the period. The question is can you go
11 back.

12 MS. PRICE: Yes, Your Honor. And it is true
13 that we believe that you can go back. With respect to
14 back pay, Congress has specifically provided under 706(g)
15 that you can go back 2 years for back pay liability.

16 With -- and there is a difference between a
17 liability for damages and liability for essentially
18 liability's sake. Under the statute, under title VII,
19 Congress did not put a limit in as to how far you could go
20 back. It said you must file the charge within 300 days
21 for purposes of initiating the conciliatory involvement of
22 the EEOC. But filing the charge while, you said in Zipes,
23 it's like a statute of limitations, it does not dictate
24 how far you go back in terms of establishing the
25 employer's liability.

1 You said in Havens that where you have a
2 continuing practice of discrimination, that it is
3 appropriate to allow the plaintiff to recover for the
4 entire practice and --

5 QUESTION: But Havens was a different statute,
6 was it not?

7 MS. PRICE: It is a -- it is -- yes, sir. It
8 was a different statute but it has the same language and
9 it has the same purpose. It was a statute intended to
10 outlaw discrimination, and it is supposed to be
11 interpreted with the same understanding, one, that it's a
12 statute that's going to be utilized by lay persons, and
13 two, that it has a broad remedial intent.

14 QUESTION: Well, have we ever set aside this
15 type of statute and said we give all possible breaks to
16 plaintiffs on it? I don't believe we have.

17 MS. PRICE: No. I don't believe you have. And
18 I think what you said in Zipes, Mr. Chief Justice, was
19 that it was necessary to strike a balance to allow for the
20 prompt filing for -- to give notice to allow the EEOC to
21 give notice to the employer and to be sure to effectuate
22 the remedial intent of the statute. So, there was a
23 balance struck.

24 If you date the trigger period for the statute
25 of limitations from the date that the person either knew

1 or reasonably should have known, you disrupt that balance
2 because then you're moving the trigger from the last
3 occurrence of the practice to an uncertain time when the
4 plaintiff either reasonably should have known or
5 unreasonably should have known.

6 QUESTION: Ms. Price, the Ninth Circuit, whose
7 judgment we're reviewing here, as nearly as I can tell
8 seems to take a different view of what can be included for
9 damages as actionable than that taken by other circuits
10 that have looked at the same statute and the same problem.

11 MS. PRICE: It is -- yes, ma'am.

12 QUESTION: Would you agree with that?

13 MS. PRICE: Yes, ma'am. I would agree that it
14 has taken a -- that there is a split in the circuits. I
15 believe --

16 QUESTION: Yes, a very lopsided split really.

17 MS. PRICE: Well, I think the Ninth Circuit's
18 position is actually in the majority view.

19 QUESTION: It's a big circuit. Right?

20 MS. PRICE: Yes.

21 (Laughter.)

22 MS. PRICE: Yes, but none of the circuits
23 disagree about what constitutes a continuing violation.
24 Where the disagreement is is in -- similar in this case.
25 There's a disagreement between us and Amtrak as to when

1 the trigger for the practice -- for the charge-filing
2 requirement occurs. There's a disagreement as -- with --
3 between us and the Government as to what is covered in
4 that 300-day period.

5 QUESTION: Well, if there are separate events
6 that have occurred and if each one standing alone would be
7 actionable and if no charge is filed or suit brought until
8 after the time limit established for some of the
9 violations, what do we do?

10 MS. PRICE: Well, you look, as the circuits have
11 uniformly looked, as to whether or not it is a practice or
12 a continuing violation. You -- it's -- you -- if you look
13 at the case as a series of discrete acts, then yes, we
14 lose. But it's not a case where there's a series of
15 discrete acts, and in fact, the majority of the issues
16 that Mr. Morgan was addressing were not actionable in and
17 of themselves. The initiation of disciplinary action --

18 QUESTION: Do you think the acts that occurred
19 before the applicable statutory period had expired were
20 actionable?

21 MS. PRICE: I -- no, I don't. I think that
22 there were some that, if they had occurred in isolation,
23 could have been actionable. When we presented the case,
24 we did not pursue this case as one for a violation, for
25 example, of the -- his termination and then ultimate

1 suspension in 1991. We did --

2 QUESTION: But if you -- if you say that an
3 event, if it occurred in isolation, would be actionable,
4 you are saying then that it was actionable by itself
5 without combining it with anything else.

6 MS. PRICE: Yes, sir, I am saying that. It is
7 true that if that is -- the difference between a discrete
8 act and a continuing practice of discrimination.

9 QUESTION: Well, what do you mean by a
10 continuing -- let -- let's -- let's take the failure to
11 give a person a promotion because of her sex or his race
12 or whatever. Let's assume that that occurs and then --
13 and then the claim is made 2 years later. During that
14 whole 2 years, the person hasn't gotten the promotion.
15 And is it your position that -- that when it is finally
16 filed 2 years later, you can get back pay or damages for
17 the whole 2 years, even though, you know, you had the
18 claim 2 years ago.

19 MS. PRICE: Well, a promotion, as I understand
20 the law, is a distinct area, and there are some
21 circumstances where the courts have held that a promotion
22 would result in extending the time for one to recover
23 damages. There are other situations where we want to
24 distinguish between a promotion that simply involves the
25 continuing effects.

1 We're not talking about, as -- as the Court is
2 well aware, a promotion in this case or a situation where
3 it's simply Mr. Morgan is suffering the continuing effects
4 of a prior decision. We're talking about a continuing
5 series of acts that continued up until the charge-filing
6 period that were motivated by retaliation and
7 discrimination. We're talking about a hostile environment
8 claim, and the Court should be clear there was a question
9 as to whether or not this case involved a hostile
10 environment. We brought that to the trial court's
11 attention, and on October 22nd, 1998, she issued a
12 specific order ruling --

13 QUESTION: Well, I -- I don't -- I'm not sure
14 what your answer is to my hypothetical, and -- and I asked
15 the hypothetical because frankly I don't see how a hostile
16 environment claim is any different from a failure to
17 promote claim. That failure to promote continues. The --
18 the loss of salary continues right over the 2 years, just
19 as a hostile environment claim continues over 2 years.

20 MS. PRICE: This Court has defined a hostile
21 environment as the -- the actionable part of it is the
22 environment itself. It's not the discrete acts. In the
23 Justice's hypothetical, I believe that you're focusing on
24 the discrete act of a failure to promote that individual,
25 which is -- has a definite beginning, end. It's right

1 there. It happens.

2 In a hostile environment, it's not so simple.
3 Hostile environment -- you can have an act that might not
4 be actionable, but when you -- when you look at it over a
5 period of time, a series of acts, that it's cumulative and
6 the harm is indivisible. In a promotion case, the harm is
7 related solely to the failure to promote. In a hostile
8 environment case, you can't separate the harm that's
9 caused on day 899 from the harm that's caused on day 200.

10 QUESTION: What you're saying, if I understand
11 it correct, is the promotion is a discrete violation with
12 continuing effects, whereas a hostile environment is a
13 continuing violation.

14 MS. PRICE: Yes. Yes, Justice Stevens.

15 QUESTION: Which is two quite different things.

16 MS. PRICE: Yes, sir.

17 QUESTION: Suppose you have a continuing --

18 QUESTION: Is this case --

19 QUESTION: Suppose you have a continuing
20 violation, a hostile environment, made up of many minor
21 acts.

22 MS. PRICE: Yes, sir.

23 QUESTION: And it goes on for many, many years.

24 And the -- the injured individual finally goes to the
25 EEOC after a very long time. In your opinion, can he

1 recover damages then back for the entire 10 years or 15
2 years, or is there some cutoff point behind which you
3 won't get the damages?

4 MS. PRICE: The ability to recover damages in
5 that circumstances depends on a number of factors. First
6 would be the plaintiff's ability to establish that it is
7 in fact a continuing violation that --

8 QUESTION: Well, he does. Let's assume he does.

9 MS. PRICE: Then his ability would be affected
10 by this Court's decisions in both Faragher and Burlington
11 Industries where this Court said that if there's no
12 tangible employment action and the employer can show that
13 it has taken appropriate steps to prevent or remedy
14 discrimination, and the plaintiff --

15 QUESTION: No, they didn't.

16 MS. PRICE: Okay.

17 (Laughter.)

18 MS. PRICE: Well, if they can't show that the
19 victim unreasonably failed to take advantage of whatever
20 remedies or opportunities were -- were not available or
21 should have been available, then yes, the plaintiff
22 would --

23 QUESTION: I just wonder. You see, if at some
24 point we might say, well, he should have gone to the EEOC.
25 It was unreasonable of him not to. I wouldn't say he had

1 to do it immediately, but after many years? And -- and do
2 we want to give him damages all the way back?

3 MS. PRICE: The damages question again is a
4 separate question from liability. The damages are going
5 to be limited by 706(g) which provides a 2-year cap on
6 back pay and by the caps that Congress has enacted for
7 compensatory damages. For instance, if -- if his employer
8 was, you know, within that \$50,000 range, he's only going
9 to get \$50,000.

10 QUESTION: But would you --

11 QUESTION: Why is it that if there's a
12 continuing violation, say, for 900 days and you file on
13 the 900th day, that you can go back for the first 600
14 days? Why?

15 MS. PRICE: Because the statute must have the
16 ability to reach practices. Where you have a longstanding
17 pattern or practice of retaliation or discrimination, this
18 statute in particular is designed to get at that.

19 QUESTION: It does reach it. The only question
20 is, you know, how many damages you get, whether you -- you
21 have to be prompt and bring your action soon enough to put
22 an end to it. I mean, it's not a question of whether you
23 can reach the pattern or practice. You certainly can.

24 MS. PRICE: Well, but if you limit the period
25 for which you can reach it to only 300 days, you're

1 essentially immunizing the employer who has engaged in a
2 longstanding --

3 QUESTION: No, you're not. You're -- you're
4 telling the person who's been harmed, you know, if you're
5 harmed, take action right away --

6 MS. PRICE: Well --

7 QUESTION: -- which is the whole purpose of
8 statutes of limitations.

9 MS. PRICE: You're telling the person not simply
10 to take action, Justice Scalia, but to take action that it
11 may in fact result in greater retaliation or a loss of
12 employment. You're not telling them simply to go to the
13 employer --

14 QUESTION: Well, but that's -- but that's always
15 true.

16 QUESTION: Retaliation is a separate claim.

17 QUESTION: I -- I thought your answer might be
18 that it's difficult to know that there's a pervasive
19 environment until you look at a whole context of acts.
20 I'm not sure that would be a conclusive -- but at least
21 that's a reason. But when you say, well, it's necessary
22 in order to enforce the act, that -- that just begs the
23 question.

24 MS. PRICE: Well, I think that there are cases
25 where it's difficult to know. There are also cases where

1 people --

2 QUESTION: All right. That's one reason.

3 Suppose -- suppose that we play with the
4 hypothetical and we establish that it wasn't difficult to
5 know. Is there any other reason for allowing us -- for
6 requiring the courts to go back?

7 MS. PRICE: It's not that -- well, it's because
8 it's fundamentally a continuing violation of the statute,
9 and the statute itself allows for you to deal with
10 practices.

11 Number two, you have the 706(g) statute which
12 allows the court to -- or allows a -- entitles a victim of
13 discrimination to recover damages for a 2-year period, for
14 back pay.

15 QUESTION: And you say that for compensatory
16 damages you rely on the lid in dollar amount.

17 MS. PRICE: Yes.

18 QUESTION: For back pay time. But I take it
19 your argument would be no different if there were no
20 ceiling on the amount you could get for compensatory or
21 punitive damages.

22 MS. PRICE: That is correct, and the reason why
23 is because Congress looked at this problem. They looked
24 at this problem in 1972. They looked at the problem again
25 in 1991. Congress did not set an anterior limit on

1 liability under title VII, and where Congress has not
2 acted to do that, it is not appropriate for the Court to
3 set that limit.

4 QUESTION: Ms. Price, I don't understand the
5 rationale for treating continuing violations differently
6 in so far as how far you can go back to get damages. I
7 can understand why you should treat them differently for
8 purposes of determining whether you can bring suit at all.
9 That is, if it's a continuing violation, the mere fact
10 that you didn't bring suit within 300 days after the
11 violation started doesn't matter. You can -- you can
12 bring suit at any point during the continuing violation.
13 But it's a separate question whether, once you do bring
14 suit, you can get damages all the way back to the
15 beginning of it or rather damages just back 300 days. I
16 see no -- no reason conceptually why you should have --
17 you should be able to go all the way back.

18 Take a failure to promote, which we discussed
19 before, which you say is a one-shot violation, not a
20 continuing violation. Okay?

21 MS. PRICE: Yes, Your Honor.

22 QUESTION: You -- you can't bring suit for that
23 if you don't sue within 300 days.

24 Suppose it's not a failure to promote. It is
25 simply a failure to pay the salary that this person in --

1 in the job the person has is entitled to, and that's a
2 continuing violation.

3 MS. PRICE: Yes.

4 QUESTION: It continues on and on. And you're
5 saying that even though that's been continuing on and on
6 for 2 years and the -- the employee doesn't take any
7 action, he can go all the way back for the whole 2 years
8 instead of just back for the last 30 days -- last 300
9 days. I -- I don't see conceptually why that ought to be
10 the case.

11 MS. PRICE: 706(g) determines how far one can go
12 for back damages. If the concern is one with respect to
13 liability, the difference -- conceptually there may not be
14 a difference. But in fact in the -- in Bazemore, this
15 Court addressed that particular scenario, and in that
16 particular scenario, the Court said every time the person
17 receives a -- a check that's less, then that constitutes a
18 violation. I mean, it's conceivable under your -- under
19 the Court's hypothetical that the employee could file a
20 charge for each one of those paychecks, and I think that
21 that sort of turns Congress' --

22 QUESTION: You're saying it's not a continuing
23 violation.

24 MS. PRICE: Right. I mean, and that -- that
25 upsets I believe what Congress really intended to do.

1 That would essentially eliminate the caps entirely.

2 And we have that potential problem in this case.
3 If you look at this case as a series of discrete acts, you
4 require Mr. Morgan to file a charge every time he's
5 charged with a rule L violation or every time they
6 threaten to charge him or every time they suggest that he
7 shouldn't have been -- that he was 2 minutes late for
8 work. Those kinds of things in and of themselves should
9 not become the basis for title VII charges.

10 You have to allow for the circumstance where the
11 employee is in fact being subjected to a -- a persistent
12 and a continuing pattern of discrimination that becomes
13 actionable within the 300-day or the 180-day charge-filing
14 period.

15 QUESTION: Well, should we look to what a
16 reasonable person should be expected to recognize as a
17 cause of action?

18 MS. PRICE: No. I think no, Justice O'Connor.

19 QUESTION: There shouldn't be any objective test
20 element in it?

21 MS. PRICE: I think that it's appropriate to
22 look at this continuing violation circumstance in the same
23 way in which the Court has looked at the hostile
24 environment claim. And in the hostile environment claim,
25 the Court has imposed both an objective test and a

1 subjective test to determine whether or not there is a
2 hostile environment. That's in the definition of the
3 cause of action.

4 In this case, the definition of the cause of
5 action is already found within title VII. Title VII
6 defines what practices violate the act.

7 With respect to the timing, title VII doesn't
8 say -- there's nowhere in title VII where it says that you
9 -- the charge-filing is triggered where the person knows
10 or should have known. There is no notice requirement in
11 title VII. Title VII ties the requirement that you file a
12 charge from the last date -- the last occurrence of the
13 unlawful practice. That's what the statute says, and I
14 think that's what the Court has to impose on employers.
15 That is the certainty that employers are entitled to.
16 It's in the language.

17 QUESTION: But it's not certain because if it is
18 a truly continuing violation -- every promotion, every --
19 every training I ask for is going to be denied -- it will
20 never end. It's going on. At some point there's going to
21 be a suit. So, the last act is just the last act that
22 happens before the employee decided to bring the suit.
23 The very nature of the continuing thing, it's going to go
24 on. Hopefully the -- the charge will stop it. But it's
25 -- the last act is the one that the complainant would

1 pick. Right?

2 MS. PRICE: Yes, Your Honor.

3 QUESTION: I think your basic position is these
4 filing periods are like a statute of limitations in some
5 respects but not in other respects.

6 MS. PRICE: This is true, and I believe that's
7 why there is that language in Zipes. It is true that
8 there have been times when it's been referred to as -- as
9 a statute of limitations, but in Zipes where the Court
10 looked at it and when you look at the actual purpose of it
11 in Occidental Life Insurance Company v. EEOC, again the
12 Court looked at the purpose of the charge-filing
13 requirement is not to determine liability. It's to start
14 the administrative process. That's really all it does.

15 There's other statutes of limitations or things
16 that are like a statute of limitations. You have the 90-
17 day period in which one has to bring a lawsuit after you
18 receive the right to sue. That again is another
19 limitations period.

20 QUESTION: Or the 45 days that you have if
21 you're a Government employee to start consulting in your
22 own house.

23 MS. PRICE: Exactly. This is not your
24 traditional statute of limitations that defines the period
25 of time for which liability may be imposed.

1 QUESTION: One of -- one of the peculiarities is
2 the difference between 180-day and 300 which makes very
3 good sense as far as administrative exhaustion is
4 concerned.

5 MS. PRICE: Yes.

6 QUESTION: But as -- why should the person who's
7 in a deferral state get 300 days while the person who's
8 not get only 180 days if we're talking about a statute of
9 limitations as measuring the ripeness or staleness of a
10 claim?

11 MS. PRICE: Yes, that is true. Congress
12 understood that this statute could be utilized with change
13 depending on where one lived, depending on what sector of
14 the employment arena one is found in. So, it's not
15 appropriate to rely upon this particular statute as
16 determining the period of liability. You must look to
17 706(g) and you must look to the caps where Congress
18 specifically tried to address the concerns of employers.

19 Viewing this case solely as a -- as a series of
20 discrete acts ignores the fundamental problem that Mr.
21 Morgan faced at Amtrak. Mr. Morgan thought that the --
22 the practices the he was being subjected to were only
23 being perpetuated by a few managers. What he discovered,
24 when he complained -- and you must acknowledge that he did
25 complain. This is not a situation where the person sat on

1 his rights, as Amtrak would portray him. Mr. Morgan did
2 complain, and then he discovered that Amtrak absolutely
3 refused to address those practices that were going on in
4 the Oakland yard.

5 QUESTION: But if -- he complained in October
6 1991 to the EEOC, didn't he? And if he discovered then
7 what was going on, shouldn't the statute at least have
8 started running then?

9 MS. PRICE: Well, there's no indication that he
10 discovered -- he knew that there were racist practices
11 going on at the yard. He complained to Congresswoman
12 Barbara Boxer and he complained to the EEOC with the
13 anticipation that there would be some action taken. In
14 fact, in 1992 Inspector Wiederholt did come out at the
15 insistence of Congresswoman Boxer and looked at that
16 situation. But that was a process that took over 10
17 months.

18 Subsequently when he did complain again in 1993,
19 Amtrak took 9 months to investigate. To require him to --
20 to go to EEOC within a 6-month or a 10-month window
21 essentially negates his ability --

22 QUESTION: But he did go to EEOC.

23 MS. PRICE: He went to EEOC, yes, when they
24 indicated that they intended to fire him, and that would
25 result in the absolute termination of his relationship

1 with Amtrak.

2 QUESTION: There's some confusion in the -- you
3 are referring not to the EEOC charge that didn't come to
4 till the end of the line, but the EEO charges that he
5 filed in-house.

6 MS. PRICE: Yes.

7 QUESTION: And that's what you're saying he did
8 earlier.

9 MS. PRICE: Yes. Yes, throughout that process.
10 Yes, Mr. Chief Justice, he went to Amtrak's EEO. He filed
11 eight separate charges with them, and they only
12 responded --

13 QUESTION: When -- when was the first time he
14 filed a complaint with the EEOC?

15 MS. PRICE: It was in February of 1995.

16 QUESTION: You know, 300 days is -- it's almost
17 a year. The same thing happens in -- in statutes of -- of
18 limitations, some of which are 2 years, some of which are
19 as short as 1 year. The -- the person who's thinking of
20 bringing a lawsuit is put to the choice of either
21 negotiating with the person and trying to work it out, but
22 at some point, if he knows there's a 1-year statute of
23 limitations, he's just going to have to say, I'm sorry,
24 I'm going to go ahead.

25 And I don't know how this 300-day period is any

1 different from that. It's fine to say you should be able
2 to, you know, waltz around and talk to the employer and
3 talk to, you know, Barbara Boxer or whatever else, but at
4 some point the -- the curtain comes down and you know
5 that's 300 days. That's the standard operation of a
6 statute of limitations.

7 MS. PRICE: In this case, Mr. -- Justice Scalia,
8 the -- as I pointed out, the -- the statute of limitations
9 operates somewhat differently. It's like a statute of
10 limitations.

11 More to the point, however, in this case, as in
12 the cases that are addressed by title VII, you're talking
13 about an employment relationship, an ongoing relationship
14 where the evidence that is -- we've presented in our
15 amicus briefs is that the person wants to maintain their
16 employment, and there is a very real fear that if you go
17 outside the scope of your employment to an outside agency,
18 that's going to tear apart the employment relationship.
19 That -- that is essentially crossing the river, and you
20 can't go back from that. And so, it's very important to
21 allow people an opportunity, and that's the -- the focus
22 of the statute was to allow the EEOC not to come in and
23 file a lawsuit, but to come in and conciliate, to try to
24 resolve the problem without the necessity of a lawsuit.

25 So, you don't want to adopt a strict

1 interpretation or a hard and fast rule that says you've
2 got to file a lawsuit or you've got to start this process
3 within 10 months. That is not -- that doesn't give the
4 employer nor the employee an opportunity to try to resolve
5 matters internally.

6 QUESTION: For some it's 300 days, for some it's
7 180. How many States are so-called deferral States where
8 people would get the benefit of the 300 days rather than
9 the 180?

10 MS. PRICE: I regret, Justice Ginsburg, I'm not
11 -- I don't know how many.

12 QUESTION: Because that would be a very odd
13 statute of limitations to say, depending on your -- the
14 State that you're in, you get 180 days or 300 days.

15 MS. PRICE: This is true. And again, it's
16 interpreted. It has to be interpreted because it applies
17 in other areas of the law, and it does define -- it really
18 defines the point at which you have to try to get an
19 outside agency to come in. It doesn't define the point at
20 which you have to sue, and it doesn't define the point
21 that limits your damages. That is what is critical.
22 Congress has defined the -- the point of damages.
23 Congress has not defined the point of liability.

24 QUESTION: But Mr. Englert said that the
25 limitation, the 2-year limitation -- that's because

1 Congress was reacting to a time when there was no
2 limitation and there were fears that you'd have to go all
3 the way back to 1965. So, they set 2 years. If they had
4 understood properly what was going to be the effect of 180
5 days, which wasn't determined till much later, then they
6 would have realized that there was -- they fixed something
7 that -- where there was nothing broken.

8 MS. PRICE: Congress had an opportunity. The
9 problem with Mr. Englert's view of it is that Congress had
10 another opportunity after this Court's decision in Zipes
11 in 1991, and Congress did not change either 706(g) and it
12 didn't change 706(e).

13 It did address the very concern that employers
14 were raising, that we're going to be subjected to
15 unlimited damages where you -- if you allow compensatory
16 damages, and Congress put in the caps. Congress addressed
17 this problem in a different way by putting in temporal --
18 excuse me -- nontemporal limits, by putting in a monetary
19 limit. Congress could have put in a temporal limit, and
20 it did not.

21 It could have taken out 706(g), and it did not.
22 So, to suggest that that section is -- is a superfluous
23 section that only addresses some long past effect of title
24 VII or a doctrine that is no longer a part of title VII is
25 inaccurate.

1 QUESTION: Well, 706(g) would still apply to a
2 continuing violation, wouldn't it? I mean, if there's a
3 continuing violation, you think it wouldn't apply to that
4 at all. Maybe not. You don't think 706(g) has any
5 application under -- under the petitioner's theory.

6 MS. PRICE: Not under the petitioner's theory,
7 no. I think that they're reading 706(g) out of the
8 statute, which this Court should not do. Ultimately in
9 hostile environment cases, the sexual harassment victim --
10 if you impose this requirement, the sexual harassment
11 victim, in particular, runs the risk of being -- of filing
12 either too early or filing too late.

13 Again, in Love v. Pullman, this Court recognized
14 that this process is one that is initiated and utilized by
15 lay persons unassisted by trained lawyers. You should not
16 impose a requirement upon a lay person to determine, oh,
17 now -- when this continuing violation doctrine is going to
18 start and when my damages are going to start accruing.
19 And therefore, now I must file with the EEOC. They are --
20 the last act which is what Congress contemplated is what
21 has to be the trigger for the statute.

22 QUESTION: But you recognize that you can't turn
23 every discrete act into a continuing violation. I mean,
24 it must be used. You have conceded that the one-time
25 thing -- you're not getting this promotion, you're

1 discharged.

2 How does one tell -- and here -- here there were
3 several similar acts -- whether it's a discrete violation
4 on the one hand or whether it's a continuing violation?

5 MS. PRICE: I think that the courts have not --
6 have been able to determine where there's a discrete act,
7 and there's nothing happens. And this is really where
8 this Court has set the outer limit. The -- it requires a
9 present violation. It is sometimes difficult to determine
10 what's a discrete act and what is a part of a pattern.

11 QUESTION: Thank you, Ms. Price.

12 Mr. Englert, you have 3 minutes remaining.

13 REBUTTAL ARGUMENT OF ROY T. ENGLERT, JR.

14 ON BEHALF OF THE PETITIONER

15 MR. ENGLERT: Thank you, Mr. Chief Justice.

16 Justice O'Connor, in one of her questions for
17 Ms. Price, referred to the very lopsided split in the
18 circuits, and I agree that there's a very lopsided split
19 contrary to the Ninth Circuit's view. Only one of those
20 many circuit cases that I'm aware of -- at least the
21 recent circuit cases -- actually discusses the 706(g)
22 issue that's taken up much of the argument time today, and
23 that is the First Circuit's opinion in Sabree, which
24 actually comes out squarely where we come out in this
25 case, that in general damages are cut off at 300 days.

1 There is an exception, the details of which it's probably
2 better not to spend any more time on. But we agree with
3 the Sabree result.

4 Under no circumstances does our view render
5 section 706(g) superfluous. I do think it's something of
6 an anachronism enacted to deal with problems that went
7 away, but under no circumstances is it superfluous. In
8 cases of equitable tolling, in government suits against
9 municipalities under section 707 where there is no statute
10 of limitations, in the kinds of hostile environment cases
11 we were discussing earlier, the 2-year back pay cap can
12 have effect.

13 Let me mention very briefly, although not much
14 time was spent on it earlier, the Havens case was decided
15 under a different statute. In the Lorange case, the
16 Solicitor General urged the Court to follow Havens. The
17 Court said no. The Court didn't address Havens in its
18 opinion. It said -- but it said -- did say in its opinion
19 the more relevant precedents are the NLRA precedents,
20 which squarely support the position we're taking here
21 today.

22 Because --

23 QUESTION: What's the difference between your
24 position and the Government's?

25 MR. ENGLERT: Very little, if any, Your Honor.

1 I think they might concede less than I was conceding
2 earlier, but other than that, I think there's very little
3 difference.

4 And the Government, quite importantly, in its
5 brief says what the continuing violation doctrine is, and
6 what the continuing violation doctrine is in all other
7 areas of law besides title VII is essentially what some of
8 Justice Scalia's questions were suggesting, which is
9 you're not out of court entirely just because you didn't
10 bring suit within 300 days of the first incident or 4
11 years in the case of the Clayton Act. You do get to bring
12 suit, but you only get damages reaching back to the
13 limitations period.

14 Let me mention very quickly. Amtrak did win
15 this case at trial. So, I don't want the Court to have
16 the impression that it's conceded that there was racial
17 discrimination going on, but I'll leave it at that.

18 And finally, just a detail. 43 States and the
19 District of Columbia more or less are deferral States.
20 That's the figure the Government has given me, and I'm --
21 I'm certain it's more than 40 States are deferral States.

22 QUESTION: Could you explain the logic in
23 statute of limitations terms between giving some people
24 300 and others 180?

25 MR. ENGLERT: The only logic is that that's what

1 Congress said. If it's a single incident case and you
2 file on the 181st day, you're out of court if you're not
3 in a deferral State.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
5 Englert.

6 The case is submitted.

7 (Whereupon, at 12:14 p.m., the case in the
8 above-entitled matter was submitted.)

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