ORIGINAL

In the

Supreme Court of the United States

NEW YORK GASLIGHT CLUB, INC., ET AL.,

PETITIONER,

V.

HUGH CAREY,

RESPONDENT.

No. 79-192

Washington, D. C.
February 19, 1980

Pages 1 thru 35

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NEW YORK GASLIGHT CLUB, INC., ET AL., Petitioners,	:	
v.	:	No. 79-192
CIDNI CAREY, Respondent.	:	

Washington, D. C.,

Tuesday, February 19, 1980.

The above-entitled matter came on for oral argument at 11:18 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ALBERT N. PROUJANSKY, ESQ., Kane, Kressler, Proujansky, Preiss & Nurnberg, 680 Fifth Avenue, New York, New York 10019; on behalf of the Petitioners

JAMES I. MEYERSON, ESQ., 1790 Broadway, New York, New York 10019; on behalf of the Respondent

HARRIET S. SHAPIRO, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; as amicus curiae

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 79-192, New York Gaslight Club v. Carey.

Mr. Proujansky, I think you may proceed now whenever you are ready.

ORAL ARGUMENT OF ALBERT N.PROUJANSKY, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case is here on a writ of certiorari to the Second Circuit Court of Appeals. The issue involved in this case is a novel one and has not had judicial determination before the determination made by the Second Circuit. It involves the issue of whether or not under Title VII of the Civil Rights Act of 1964, which authorizes the award of attorneys fees as a part of costs to a prevailing party, whether that statute extends to state court proceedings.

This case was initiated in early 1975 by the filing of a charge with the Equal Employment Opportunity Commission. In accordance with the statute, the matter was referred to the State of New York which has an anti-discrimination statute and has had one prior to the 1964 Civil Rights Act.

In accordance with the procedures under the

state statute, the hearing was held and the complainant was awarded an affirmative judgment. The employer was directed to offer her an opportunity to accept employment, which was done, and she is currently an employee of the New York Gaslight Club, and back pay to compensate her for the loss of wages that she sustained as a result of the conduct found to be violative of the statute, was awarded to her and paid.

While this matter was proceeding before the state court or before the state civil rights division and subsequently the state courts, the attorney for the complainant importuned EEOC for the issuance of a right to sue letter which the EEOC granted to him in July of 1977, and in September of 1977 he commenced an action in federal court seeking to redress the same grievance which was then before the state board.

At that stage, at the time of the commencement of this action, at the time of the issuance of the right to sue letter, the commissioner of the New York Human Rights Division had awarded relief to the plaintiff, all of the relief to which she was entitled.

QUESTION: Mr. Proujansky, you just referred to the commencement of this action, I believe. As one reads through the '64 federal act and the '76 Attorneys Fee Amendment, you read the terms "action" or "proceedings" and "actions" -- do you think that Congress was extremely careful

and precise in the terms it chose as between "actions" and "proceedings" and "commencement" in those various acts, or do you think that it may have occasionally simply used one as the synonym for another?

MR. PROUJANSKY: I think if Your Honor contrasts the language with respect to attorneys fees as contained in the Fair Labor Standards Act with the language that appears in the Civil Rights Act, we have a difference between day and night. In the Fair Labor Standards Act, the statute says specifically that an action under this act can be maintained in federal or state courts and any judgment shall include an award of attorneys fees in addition to costs.

Now, the statute --

QUESTION: Of course, the Fair Labor Standards Act was passed in '38 and that doesn't necessarily mean that a Congress sitting in '64 or '76 might not have used somewhat more ambiguous language and still meant the same thing.

MR. PROUJANSKY: It is hard to determine exactly what Congress had in mind. There is very little legislative history, as this Court has pointed out with respect to section 706(a). But if we look at the purpose and the procedure of the two statutes contrasting the federal procedure with the state procedure, perhaps some insight will flow therefrom.

Under the EEOC, assuming the State of New York had

no anti-discrimination statute, a complaint would be filed before the EEOC, no hearing would be held, an investigation would be conducted by the EEOC, and then either the commission itself would commence an action in the federal court or it would by a right to sue letter authorize the complainant to commence an action in the courts.

The statute that we are dealing with, 706(k), follows closely after a number of sections dealing solely with procedural as distinguished from substantive matters. There is no constitutional right to attorneys fees, and only this morning Judge Powell announced the decision in which he noted that an American rule is that attorneys fees are not normally paid, it depends upon the existence of a statutory section.

Now, it is most unusual for Congress to pass a law with respect to costs in the State of New York or in any of the individual states. Had Congress intended that attorneys fees as a part of costs, that is the language of the statute, was to be applied in state court proceedings. It seems to me that Congress should have made clear its intent so to do, and absent such an indication, I draw the consequent inference that Congress did not intend this statute to apply to state court proceedings.

All of the preceding sections of (f), (g), (h), (j), (k) relate solely to matters dealing with federal court

proceedings.

QUESTION: Well, I don't read the Second Circuit's opinion as holding that if the respondent here had simply gone before the New York Human Relations Commission and appealed to the New York courts and never filed an EEOC complaint that nonetheless state courts of New York would have been obligated to award her attorneys fees.

MR. PROUJANSKY: As I read --

QUESTION: Just because the filing in the federal court that brings into play the '76 amendment, isn't it?

MR. PROUJANSKY: Mr. Justice Rehnquist, as I read the Circuit Court of Appeals decision, they framed the issue as to whether or not an attorney is entitled to compensation for services rendered in a state court proceeding. As I read their decision, they authorized the commencement of a suit in the federal courts solely for the purpose of collecting attorneys fees, even if the matter has been successfully concluded in the state courts. They have extended 706(k) far beyond what I think Congress intended it to be extended.

There is no need, in my view, for that extension. The human rights law functioned very satisfactorily in New York State prior to the passage of the 1964 Civil Rights Act. Judge Monticello in the Lopino case, which is cited in my brief at a lower stage referred to the fact "the

state division has a staff of competent attorneys to aid potential claimants and thus it is not necessary to retain private counsel to obtain relief from that agency."

A hearing is conducted before the New York State agency, the hearing officer develops a record with or without counsel. As a matter of fact, in this case, with respect to the principal witness, Mr. John Anderson, who testified in this case. The cross-examination by the complainant's counsel took eleven pages of stenographic minutes, the interrogation by the hearing officer took 23 pages of stenographic minutes.

The Human Rights Division in New York functions very well and adequately protects complainants, and I am totally appalled as a citizen of New York State by the position of the Attorney General of the State of New York in the amicus brief which he filed in this case, where he totally denegrates the activities or the ability of the State Human Rights Commission to function adeuqately. I think he should be here standing up for the State of New York. In fact, if there is anything wrong with the manner in which the Human Rights Commission functions, why isn't the Attorney General paying attention to what the Human Rights Commission is doing, instead of saying no, we need the intervention of attorneys because New York has a fiscal problem, and this is going to save it some money. I don't

think these principles should be decided on the basis of the fiscal problems of the State of New York.

Moreover, I would like to point out that under 706(k), 706(k) which to some extent uses the same language as section 54 of the Rules of Civil Procedure, refers to attorneys fees being awarded to a prevailing party. Now, there is no question that Ms. Carey was the prevailing party in the state courts, but Ms. Carey was not the prevailing party in the federal court. The federal court action was dismissed as moot, with the consent of Ms. Carey's counsel. The only thing that was retained was that part of the cause of action which sought to recover attorneys fees.

Now, this whole procedure that has been adopted here was one that was calculated to get to this point where the attorney for Ms. Carey can get attorneys fees. Under the provisions of Title VII, a complaint should be filed in the state -- with a state agency if the state has an agency which provides for redress against discrimination. That was not done. The complaint was initially filed before the EEOC.

After the plaintiff had won at the first stage of the proceedings before the State Human Rights Division, counsel for Ms. Carey began to importune the EEOC to issue a right to sue letter. Ultimately that right to sue letter was granted in July of 1977. In August of 1977, the

employers appealed to the Human Rights Appeal Board and resulted in an affirmance of the earlier decision of the Commissioner of Human Rights.

On September 30th, Ms. Carey commenced an action in federal court. At stage stage, virtually at the same time that the action was commenced in federal court, counsel for the employer filed a petition for review in the appellate division of the Supreme Court of the State of New York. This review resulted on November 3, 1977 in an affirmance. Thereafter, leave to appeal was sought and was denied, and the matter was closed as far as the state courts were concerned. The award made was satisfied, the complainant was hired.

The question has arisen in the Circuit Court of Appeals as to whether or not in making an interpretation of 706(k) we are saddling the federal courts and the federal agencies with a great deal of work by awarding attorneys fees or are we lessening their burden by denying attorneys fees.

If this case is any example, in an effort to obtain attorneys fees, they have involved unnecessarily the EEOC in this case, they have involved the federal courts unnecessarily in this case. The question of attorneys fees is a matter, as Judge Morgan pointed out in the dissent in the Circuit Court of Appeals, "it seems to me to be

fundamental that remuneration of private counsel successful in state agency and state judicial proceedings in vindicating rights under state law should be determined by the law of the state which established the substantive right, created the agency and provided for judicial review."

I have serious question in my mind as to whether or not if this statute be construed to impose costs in state court proceedings, whether it does not run afoul of the Tenth Amendment which reserves to the states the rights to control their courts and procedures.

I wish to point out further that when the 1964 act was enacted, Congress knew what the procedure would be in a federal court and they knew because they were establishing an appropriate procedure, they knew whether costs or attorneys fees should be awarded, whether there was a need for attorneys fees to be awarded.

But in 1964 there were very few state anti-discrimination statutes and Congress did not set out any procedural safeguards as to the method in which anti-discrimination claims should be prosecuted. This was left to the various states to determine. Conceivably, many of the states, as does New York, provide some alternative means in lieu of awarding attorneys fees. If those means -- those means may or may not be adequate, but I suggest that that is a matter that ought to be left to the several states.

I respectfully submit that the judgment should be reversed.

I would like to reserve any additional time for rebuttal.

QUESTION: Counsel, could I just ask one question.

MR. PROUJANSKY: Surely, Your Honor.

QUESTION: In the government's brief they quote the 1976 Attorneys Fee Act as well as the provision of the '64 Act. Is that statute involved in the case at all?

MR. PROUJANSKY: No, it is not, Your Honor. Section 1988 of the U.S. Code does not pertain to Title VII actions. I assume there was no necessity for extending that to Title VII because the language is virtually identical with the Title VII statute.

MR. CHIEF JUSTICE BURGER: Mr. Meyerson.

ORAL ARGUMENT OF JAMES I. MEYERSON, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MEYERSON: Mr. Chief Justice, and may it please the Court: My name is James Meyerson, and I represent the respondent, Ms. Carey, in this matter.

There are several points which I would like to elaborate upon to the Court in order to be in proper focus to the case.

I think at the outset we should recognize that the petitioners were found to violate the New York State

human rights law in that they discriminated against a citizen of the United States because of her race in employment opportunity, and in so finding upon a deferral by the federal agency authorized by Congress to enforce the anti-discrimination law, the State of New York in that proceeding in effect enforced the policy enacted by Congress in 1964 to end discrimination based on race, among other things, in employment.

It is a policy that has uniform application throughout the United States of America, and it is a policy that in 1964 the United States Congress gave its highest priorities to and which this Court has so acknowledged in many of the decisions that have interpreted Title VII since its inception.

Deferral to the State Division of Human Rights was envisioned by the United States Congress as an integral part of the enforcement of the federal policy. It is in effect an extension of the federal proceeding.

QUESTION: Mr. Meyerson, let me put to you the same question I put to your opponent. Supposing this proceeding had never gone into federal court at all and simply had been a proceeding before the New York Human Rights Commission and then an appeal for review through the New York courts. Do you think that the '64 act of Congress authorizing attorneys fees would have required the New York courts to award attorneys fees if New York did not as

a matter of policy or law award them under its own law?

MR. MEYERSON: Well, in response, Mr. Justice Rehnquist, the only way in which the respondent in this case got into federal court was as a consequence of securing a right to sue letter from the EEOC. The situation which you posture, sir, I do not believe could occur because at the time a complaint is filed with the New York State Division of Human Rights, assuming arguendo is filed there before the EEOC, there will be an automatic slide of that complaint sixty days thereafter or perhaps even sooner to the EEOC, representing precisely the issue that is in focus here, the significant interrelationship between that state proceeding and the federal policy under Title VII.

QUESTION: You mean even if the complainant never calls it to the attention of the EEOC and the State Human Rights Division never calls it to the attention of the EEOC, Title VII requires that it go automatically?

MR. MEYERSON: I suggest to you that once a complaint is filed in the New York State Division of Human Rights, that is automatically kicking off the Title VII process because the State Division of Human Rights automatically makes the EEOC aware, as a sister-brother agency, whatever, a deferral agency, that it has an employment discrimination matter pending before it because it is involved by contract and otherwise with the EEOC, it is

obligated and does make known to the EEOC the existence of that complaint, just as in the EEOC"s procedures here where Ms. Carey initially filed with the EEOC, the EEOC made it known to Ms. Carey and the State Division of Human Rights that she was to go to the State Division of Human Rights and --

QUESTION: Well, that is pursuant to act of Congress but I take it that New York's procedure of advising the EEOC is not pursuant to any act of Congress.

MR. MEYERSON: I would defer to the United States government in that regard. There is a contractual relationship to the EEOC --

QUESTION: Well, let's assume there is no provision in Title VII that requires New York to make known to the EEOC if no filing is made with EEOC, would you still say that the Title VII provision for attorneys fees requires New York State courts to award attorneys fees?

MR. MEYERSON: No, the New York State courts have indicated under the human rights law that attorneys fees are not proper and the state legislature has not seen fit to incorporate into its legislation the award of fees to a successful prevailing plaintiff or complainant in the state division, so therefore I don't think the courts in the State of New York would have the option and they have not seen fit to assume the option of providing attorneys fees to

a prevailing complainant in the division.

QUESTION: And Title VII wouldn't require them to do that if it never got into federal court?

MR. MEYERSON: No, I don't think that the case in the Circuit Court below superimposes federal law on the state courts. What the case below suggest is where the state proceeding is inadequate, where Ms. Carey was involuntarily sent there -- she started out in the federal agency -- and if the relief in the state agency is not satisfactory to make her whole, once she has been -- once it has been established that she was discriminated against because of her race, she has the ability, Your Honor, to secure a right to sue letter and seek the more comprehensive and complete relief that was envisioned by the United States Congress as necessary to effect its anti-discrimination policy.

I might point out to you that the sole purpose that Ms. Carey went to the federal court was not to allow her attorneys to get fees, it was to effect a complete relief. This Court has recognized, based on the congressional legislative history of Title VII, that attorneys fees are designed to give effect to the purpose of the act. They act as a deterrent to those who have been found to have discriminated and for those who might seek to follow --

QUESTION: Which act are you referring to now?

MR. MEYERSON: Title VII, in terms of its purpose

in specifically providing for attorneys fees, it is designed, as this Court has so stated on numerous occasions, to make someone whole, it is to give as complete relief as possible and thereby act as a deterrent --

QUESTION: Doesn't Title VII provide that an employer who relies in good faith on a ruling of the EEOC is not subject to liability?

MR. MEYERSON: I'm not sure I understand the import of the question.

QUESTION: It is my impression -- assume for the sake of argument that it does, would you say that Congress intended that to apply to New York proceedings, too?

MR. MEYERSON: Without doubt, Congress -- and I think this Court has so recognized -- drafts legislation with specific words, and this Court has acknowledge that it must give meaning to each word in a piece of legislation unless it is inconsistent with the intent of Congress. Congress set up a multi-step state-federal scheme for enforcing Title VII with both state administrative and judicial processes and federal processes. It clearly envisioned proceedings in addition to federal court actions. There is legislation that Congress has drafted in the same 1964 Civil Rights Act, Title II, which makes no mention of proceedings. That is because Title II is strictly a judicial avenue. Thus, when Congress included proceedings or actions in light

of the multiple administrative-judicial scheme that it set up, it clearly was envisioning that one would be addressing the discrimination in a proceeding, an administrative proceeding as well as a judicial proceeding, and --

QUESTION: And a state administrative proceeding, too?

MR. MEYERSON: Clearly, because Congress mandated that there would be involuntary automatic deferral by the EEOC to a state proceeding where a state forum existed for the purposes of assisting it, the EEOC, in enforcing the federal policy.

QUESTION: Well, what if in this case then the employer had come into the New York Human Rights proceeding and said, look, EEOC under Title VII issued a ruling saying this was not discriminatory, I relied on it, and even though I am in a New York proceeding and I've never filed a federal complaint, the federal law controls and you have no business ordering reinstatement. Do you think Congress intended to reach that far into the state proceeding?

MR. MEYERSON: No, I don't think Congress means to superimpose anything on the state proceeding, and I don't think the Second Circuit does superimpose any federal law on the State of New York. What it suggests is that as an independent but related mechanism for securing complete relief, the prevailing person in this case Ms. Carey, who

was discriminated against because of race, who was not able to get all of the relief envisioned by the Congress under Title VII, having secured the necessary right to sue letter to go into federal court seeking supplementary cumulative comprehensive relief that because of the inadequacy or the limitations of the state proceeding she was not able to secure.

QUESTION: Mr. Meyerson, could I follow up on Mr. Justice Rehnquist's question. As I understand it, you are taking the view that the word "court" in 706(k) describes a federal court and not a state court, because I gather there is judicial review of the state proceeding, is there not?

MR. MEYERSON: In New York, that's correct.

QUESTION: Now, if the word "court" just talks to federal court, it seems to me somewhat inconsistent for you to say the word "proceeding" which is in the same phrase refers to state proceeding.

MR. MEYERS: I might respond to that this way: If you go back a little bit further into the EEOC and to the Title VII legislation and look at 2000(e)(5)(B), (C) and (E), I believe, when it is addressing the deferral, it refers to state proceedings. What I am suggesting, Your Honor, is that there are administrative proceedings clearly envisioned in the legislation. The EEOC is an administrative proceeding and the deferral state proceedings, and the Congress clearly

under --

QUESTION: Under separate proceedings, or is the state proceeding a part of the federal proceeding?

MR. MEYERSON: I suggest to Your Honor that it is clearly part of the federal proceeding. It is an intregal part of the legislation, it is an extension --

QUESTION: Well, is the proceeding before the New York court on review a part of the federal proceeding?

MR. MEYERSON: I would suggest that it is, yes, a part of that proceeding.

QUESTION: Then why is not the New York court a court referred to in this sentence, and why doesn't that court then have the power by virtue of the federal statute to award fees?

MR. MEYERSON: Well, it refers to courts and I don't think --

QUESTION: It says if any action or proceeding under this title, the court in its discretion may allow fees as part of the costs. I understand that probably the New York court could allow costs, but you say it couldn't allow fees as part of those costs even though the proceeding that is referred to is part of the federal proceeding.

MR. MEYERSON: It couldn't allow fees under the human rights law. I do believe that the New York State courts, yes, could on the precedent enunciated in the Second

Circuit and hopefully affirmed here could thereupon of its own accord indicate to prevailing complainants upon a review by a failing employer that fees under Title VII, of which the state proceeding is an integral part, are appropriate. I would like to --

QUESTION: I'm not sure I understand.

MR. MEYERSON: I'm sorry.

QUESTION: You are saying that if we affirm in this case, then the New York courts could allow fees in the state proceeding. Is that what you are saying?

MR. MEYERSON: Under Title VII, yes, even though as --

QUESTION: I understood you to take a contrary view with Mr. Justice Rehnquist.

MR. MEYERSON: I'm sorry, I was under the impression that he was talking about whether they were compelled to do that. I don't think they are compelled to --

QUESTION: Well, the federal court isn't compelled to. It may allow it. It is a grant of authority.

MR. MEYERSON: I think the state court could do that. Certainly it would not change the State of New York's basic position that under the human rights law itself it is not necessary to --

QUESTION: To your knowledge -- this is a '64 statute and the first time we're getting this problem, some

sixteen years later. Has anyone argued in the New York courts to your knowledge that as a matter of federal law a prevailing party in a New York proceeding, a New York subpart of the federal proceeding is entitled to fees awarded by New York courts?

MR. MEYERSON: I don't think it has been argued, and we elected not to argue it, Your Honor, because we firmly believe that Congress meant to allow us to come into a federal court --

QUESTION: Wouldn't it be more efficient to have it done as part of the New York aspect, rather than starting a new lawsuit?

MR. MEYERSON: Well, let me suggest to you, Your Honor -- and I might point out that we were forced to go into the federal court in effect involuntarily because after we sustained our burden before the New York State Division of Human Rights and the appeal board, which entered its decision in August of 1977, immediately thereafter the respondents, on a very questionable appeal as reflected by the absence of any legal or factual discussion by the New York courts on that appeal, was in effect a perfunctory affirmance, immediately thereafter went into the New York State courts. Why? They had nothing to lose -- no attorney fees. It was at that point in time, almost 90 days after we had involuntarily received our right to sue letter, in which I said

we had better go into federal court, file our complaint in case for some reason, which I didn't anticipate, the case was reversed by the state courts.

In other words, it was again the respondent, Ms. Carey, being involuntarily dragged into the state court, as she had been involuntarily dragged, so to speak, into the state proceeding which precipitated the need ultimately for us to go into the federal court to get the relief which we would have automatically been entitled to if we had gone into and permitted to go into the federal court initially.

In other words, if we were not in a deferral state, Your Honor -- and you must remember that Congress envisioned a uniform policy throughout this country -- if we weren't in a deferral state, having filed my EEOC complaint on behalf of Ms. Carey, we would have gone after 90 days or 60 days or 180 days, whatever the appropriate time period, into federal court. Having filed an EEOC complaint in a deferral state, we were compelled pursuant to that statute , in order to enforce the policy of that statute, to go into New York.

QUESTION: I suppose there are some so-called deferral states which have an administrative system without any intervention of state courts.

MR. MEYERSON: There may very well be. In reading the amicus brief, I believe the State of New York and the

State Human Rights Division, I do believe there is only one state where deferral takes place where fees are authorized. I believe that is the State of Alaska. So I would suggest that --

QUESTION: But there may be others where it is exclusi-ely an administrative proceeding.

MR. MEYERSON: That is correct, Your Honor.

Our position in effect is that at the bottom line the respondent has enforced the congressional policy, she prevailed here. She was discriminated against and one of the things that Congress sought to eliminate was discrimination based on race. She did it in a deferral forum under the statute, she did not get all of the complete relief to which she was entitled, which is attorneys fees, among other things, for several reasons, and in effect to deny her the leave to go into federal court would penalize her for having enforced the policy. It would result in the inequitable result that if she had lost in the State Division of Human Rights and proceeded ahead into federal court and won there, she could have gotten more relief than having won in the State Division of Human Rights. Certainly Congress didn't envision that. In point of fact, it authorized and permitted the award of fees in proceedings, including those deferral proceedings.

QUESTION: Mr. Myerson, not that it matters to

this case, but does the State Division of Human Rights, is that the same as the old SCAD?

MR. MEYERSON: The New York State Division of Human Rights used to be known as the New York State Commission on --

QUESTION: Against Discrimination.

MR. MEYERSON: Yes.

QUESTION: It is the same thing?

MR. MEYERSON: Yes. It is interesting to note that --

QUESTION: The old folks remember the old one.

MR. MEYERSON: -- that in 1965 and '68, the New York State law was amended to permit attorneys, private attorneys as a matter of right to appear in those proceedings. That is, after the '64 Title VII enactment, the New York State law was changed to permit private attorneys to appear as a right. Prior to that time, they had to seek leave by intervention. And I would take issue with the license perhaps of counsel for the petitioners in categorizing, as the dissent did and as the District Court did below, the in effect uselessness of the private counsel in the State Division of Human Rights.

It is clear that the private counsel plays a fundamental and pivotal role in the process. In light of the import that the United States has seen to give this

case, I have elected to cede the remaining ten minutes of my argument to the Assistant Solicitor General, and so I would defer unless there are inquiries.

MR. CHIEF JUSTICE BURGER: Mrs. Shapiro.

ORAL ARGUMENT OF HARRIET S. SHAPIRO, ESQ.,

AS AMICUS CURIAE

MRS. SHAPIRO: Mr. Chief Justice, and may it please the Court:

It is clear in this case that Ms. Carey is the prevailing party. The only question is whether the way in which she prevailed somehow deprives her of attorneys fees under section 706(k). We submit that it does not.

There are two rationals for reaching that result. The narrowest reading --

QUESTION: Could I interrupt you, please.

MRS. SHAPIRO: Yes.

QUESTION: You say it is clear she is the prevailing party. Doesn't that kind of beg the question? The question of whether she is the prevailing party in the proceeding referred to in the statute, isn't that right?

MRS.SHAPIRO: Well, she is the --

QUESTION: You can't tell that until youknow what proceeding we are talking about.

MRS. SHAPIRO: Well, that is my point. She is the prevailing party in the federal action under the

narrowest --

QUESTION: If we reverse, she won't be.

MRS. SHAPIRO: Well --

QUESTION: The only issue in the federal action is the right to fees, isn't it?

MRS. SHAPIRO: Well, in the federal action she came into the federal action while she was --

QUESTION: Having prevailed in the New York proceeding.

MRS. SHAPIRO: She had prevailed in the New York proceeding because at the time she filed her federal statute she had gotten an affirmative award from the state administrative agency. The petitioners had then appealed that, she was still before the state appeal board, she then had to go into the state courts, she had won along the way. She hadn't reached the end of the road in the state proceedings. So when she went into the federal court, the Gaslight Club agreed that if the New York Court of Appeals refused to hear the case, they would then pay her her back pay and offer her employment. It was in effect a settlement and so --

QUESTION: In which event she would be the prevailing party in the state proceeding.

MRS. SHAPIRO: And in the federal proceeding.

QUESTION: Well, isn't that the issue?

MRS. SHAPIRO: Well, the --

QUESTION: Maybe you are right, but I don't think you can start out by saying we all agree, she is the prevailing party in the federal proceeding, because then you are saying that the state proceeding is part of the federal proceeding. Maybe you are right, but --

MRS. SHAPIRO: What I am saying is that she is the prevailing party overall. She is either the prevailing party in the federal proceeding --

QUESTION: The only significance of the words "prevailing party" is whether they are the prevailing party within the meaning of this section of the statute.

MRS. SHAPIRO: That's right. But clearly she is the prevailing party. The first point is that she is the prevailing party in the federal proceedings, and under any reading of 706 that means that she is entitled to attorneys fees.

If you don't agree that she is the prevailing party in the federal proceeding, or if you want to approach the statute under the way that we think is preferable, it is enough that she is the prevailing party in the state proceeding. In the state proceedings, they are for the reasons that Mr. Meyerson explained and as are explained in our brief, they are proceedings under Title VII. There is such a close integration that she is -- the fact that she

prevailed in the state proceedings means that she is the prevailing party under Title VII.

QUESTION: How do you answer Mr. Justice Rehnquist's question? Could the New York court under this statute say it has the right to give her fees?

MRS. SHAPIRO: I think it depends. As I understood Mr. Rehnquist's question, he was saying supposing she had simply gone into the state courts, gone into the state administrative agency, gone through the state courts, had never filed a charge under Title VII. In that case, it is hard to see how this would be a Title VII proceeding at all.

QUESTION: Take the question as modified by these facts.

MRS. SHAPIRO: All right. As modified by these facts, she files her EEOC charge, then she goes into the -- well, it is deferred to the state and ultimately she gets into the state court. I think it is arguable that the state court could award her fees on the theory that --

QUESTION: Isn't it more than that? The state proceeding is a part of the federal proceeding.

MRS. SHAPIRO: Well, the state proceeding -- certainly the state proceeding is a part of the federal proceeding and --

MR. CHIEF JUSTICE BURGER: We will resume there

at 1:00 o'clock.

(Whereupon, at 12:00 o'clock noon, the court was in recess, to resume at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION -- 1:00 O'CLOCK P.M.

MR. CHIEF JUSTICE BURGER: You may resume where you left off.

MRS. SHAPIRO: The important thing to remember is that Carey is a Title VII plaintiff because she filed a charge with the EEOC under Title VII and was required by Title VII to go to the state agency for the relief in the first instance. It doesn't follow that the state administrative agency or state courts are enforcing Title VII. They are enforcing the state equal employment law and they are simply within the confines of the state law, so that they are not required by Title VII to award attorneys fees.

From the point of view of the employee, this is part of her route through the state proceedings on her way to the EEOC and ultimately to a court that has jurisdiction to enforce Title VII. That almost always is going to be a federal court. She will get her right to sue letter, then she has 90 days to go into a court with jurisdiction to enforce Title VII rights. Arguably that could be a state court. We don't believe that the jurisdiction to enforce Title VII is exclusively in the federal courts. At any rate, she has to get her right to sue letter and before she is in a court with jurisdiction to enforce Title VII.

QUESTION: Has that ever been decided? Has there ever been a Title VII action brought in a state court?

MRS. SHAPIRO: There are a few cases in state courts holding that there is concurrent jurisdiction. I gather there is also one court saying that there is not, but the majority agree that there is a right to have a state court enforce a Title VII action.

Our fundamental point is that the statute, Title VII, authorizes any court having jurisdiction over a Title VII action to award attorneys fees for proceedings under Title VII. The state proceedings here were under Title VII because the employee was required to resort to them under that statutory scheme, and for that reason she is entitled to attorneys fees for those proceedings.

The only other point that I wanted to make is that it really makes no sense to penalize a victim of employment discrimination simply because she happens to live in a deferral state and therefore has to go to the state agency first.

QUESTION: How many so-called deferral states are there now?

MRS. SHAPIRO: A vast majority of them are deferral states.

QUESTION: A vast majority are now deferrals.

MRS. SHAPIRO: Yes.

QUESTION: Well, how are you penalizing her other than requiring her to resort to state court process?

MRS. SHAPIRO: Because if she was not in a deferral state, then she would go directly to the EEOC, she wouldn't have to go through the state proceedings and --

QUESTION: And there would be no question of her --

MRS. SHAPIRO: -- then she would be entitled to attorneys fees from the beginning.

QUESTION: She wouldn't get them automatically?

MRS. SHAPIRO: That's right, it does but, on the other hand, this Court has emphasized that when the statute says may give it, it means that she is entitled absent specific circumstances indicating that such an award would be unjust. So you are right, it is not a statutory right.

QUESTION: If she had gone first to the state agency before she ever went to EEOC and was turned down and then to EEOC, let's just assume that the time limits could be satisfied.

MRS. SHAPIRO: Then she would not be proceeding under Title VII until she went to EEOC, and that is the point at which the proceedings are under Title VII and the attorneys fees --

QUESTION: In which event -- and then if she went to the EEOC then and eventually got a right to sue letter and sued, she couldn't get attorneys fees for having gone to the state --

MRS. SHAPIRO: That is our position, yes. She

has to get Title VII -- she has to first go to the EEOC in order to start the Title VII procedures.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Proujansky?

ORAL ARGUMENT OF ALBERT N. PROUJANSKY, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. PROUJANSKY: Just a few words if I may, sir.

I think the concept that the federal and state statutes are integrated is erroneous. Senator Dirksen and Senator Humphrey were the cosponsors of the state deferral section. In the course of the debates on this section, Senator Dirksen said this section was enacted to keep primary exclusive jurisdiction in the hands of the state commission for a sufficient period of time to let them work out their own problems at the local level.

The federal statute is intended as a standby only in the event that the state system does not work. Now, in this particular case, instead of going to the state as the statute mandates, the complainant went to the EEOC and they in turn deferred her to the state. The right to sue letter which triggered or necessitated the commencement of the action in the federal court to preserve the plaintiff's rights was solicited by counsel for the plaintiff, and the record contains letters between counsel and EEOC requesting

a right to sue letter.

I disagree with the position of the Solicitor General. There was no need ever for Ms. Carey to have a Title VII complaint. All the relief that she was entitled to she obtained from the state agency. There was no need and, as Judge Werker pointed out below, the right to sue letter issued by the EEOC after the state had awarded affirmative relief and during the time of the appeal was unwise and did not justify the award of attorneys fees in this particular case.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:09 o'clock p.m., the case in the above-entitled matter was submitted.)

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