IN THE SUPREME COURT OF THE UNITED STATES

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FEDERAL EXPRESS :

CORPORATION, :

Petitioner :

v. : No. 06-1322

PAUL HOLOWECKI, ET AL. :

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Washington, D.C.

Tuesday, November 6, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

CONNIE L. LENSING, ESQ., Memphis, Tenn.; on behalf of the Petitioner.

DAVID L. ROSE, ESQ., Washington, D.C.; on behalf of the Respondents.

TOBY J. HEYTENS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 06-1322, Federal Express Corporation v. Holowecki.

Ms. Lensing.

ORAL ARGUMENT OF CONNIE L. LENSING

ON BEHALF OF THE PETITIONER

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

Congress clearly set out a statutory scheme in which timely notice and the opportunity for conciliation are required before an age discrimination private suit may be brought. While our position is that reading -- the reading of ADEA Section 626(d) as a whole shows that "charge" encompasses notice, even if that definition is too broad and you accept only a content definition of "charge," it is clear from the structure of the statute that notice and an opportunity to conciliate before a lawsuit commences is required.

JUSTICE ALITO: Well, EEOC Form 5 is labelled "Charge." And would it be your position that if an employee filled out that form and submitted it to the EEOC, but the EEOC made a mistake and did not notify the employer, that that would not be a charge?

MS. LENSING: We think the better rule is that it would not be a charge until notice is given, because that's the only rule that is faithful to the statute, that notice is required. But equitable tolling is available for such a mistake and that's the exact situation in which equitable tolling should be used, to rectify a true mistake on the EEOC's part at the time, rather than what they have been engaging in of late, which is second-guessing the decision made at the time.

JUSTICE GINSBURG: Well, why don't we do exactly that here? I mean, you say that the proper thing to do, now a charge labelled Form 5 has been filed, is to dismiss this lawsuit; and then we wait 60 days; and the identical lawsuit is reinstated. Why shouldn't the court simply toll the case and say, now we have a proper Form 5. The employer didn't get a chance to engage in settlement. So we hold on to the case and allow the 60 days to elapse, and then the complaint is there. Why isn't that the appropriate solution for this case?

MS. LENSING: Well, Justice Ginsburg, to begin with, the plaintiff never requested that the court do that. But in a broader sense, it's not the proper thing to do because there's a very big difference in conciliation after notification and before a lawsuit has

been filed. There is -- the emphasis is on let's get this conciliated, if possible.

JUSTICE GINSBURG: But you said the same complaint could be filed at the end of the conciliation. What difference does it make that you have a piece of paper there?

What I don't understand is the only effect of your position -- dismiss the whole thing, 60 days, start over -- is you're making the plaintiff file an additional filing fee. The complaint has already been filed. The filing fee has been paid.

Now, everything would work out just the same except the plaintiff has to pay a second filing fee. In the court there are certain inefficiencies if it's first dismissed and then they have to docket it again. So I don't see any -- it doesn't seem to make any sense to me.

MS. LENSING: Well, Congress believed that notice and a chance to conciliate without a lawsuit was the proper way for this to be done, and there is a difference in efforts to conciliate before and after a lawsuit is filed. And if --

CHIEF JUSTICE ROBERTS: Well, I think -- I think you're right about that. I mean, once the lawyer's involved and they're in litigation and all

that, they're not going to take conciliation efforts with the same light as before.

But the question is whether the remedy for that, which is some unfairness to you, is to throw the suit out or try to fix it as much as possible, such as through a stay or dismissing without prejudice or something.

Why should the Plaintiff -- it's not his fault that the EEOC didn't notify you. Why should he suffer the categorical sanction of dismissal simply because it's a little unfairness to you?

MS. LENSING: I think it could be dismissed without prejudice. I think that that's fine, because then you would have an opportunity, as in this case where there is a proper charge, to have that period of conciliation, and the plaintiff would not be out anything other than the filing fee, which the employer is out a little bit, too, because the employer never got a prompt notice at the time of the first situation.

But the biggest reason --

JUSTICE SOUTER: Why -- why should the -- the filing fee penalty, in effect, go to the plaintiff when it wasn't the plaintiff's fault?

MS. LENSING: Well, you know, I would submit that perhaps it is the plaintiff's fault when the

plaintiff does not do everything a plaintiff can to be sure that a charge is filed. This particular form, for instance, stated that it is for -- pre-charge counseling is the purpose, and that it's to determine potential charges.

JUSTICE SOUTER: May I interrupt you to this extent: As I understand it, if -- your position, if the plaintiff had filed on Form 5 and the EEOC had done nothing and the plaintiff then brought suit, you'd be making the same argument.

MS. LENSING: That is true, and equitable tolling is available.

JUSTICE SCALIA: I don't understand that. I mean, that -- that seems to me a very strange argument. You say since -- since the EEOC must give notice when a charge is filed, if it doesn't give notice, no charge has been filed.

That doesn't make sense. I mean, it's just like saying, you know, you have a civil rule, a rule of civil procedure, that says, you know, after a complaint has been filed there shall be an answer within 60 days. And if no answer is filed, no complaint has been filed?

MS. LENSING: Well, Justice -- sorry.

JUSTICE SCALIA: I mean, it just doesn't track.

MS. LENSING: Justice Scalia, I understand your hesitancy to accept our definition of "charge" as including notice, but the other view --

JUSTICE SCALIA: So give me another one that will enable me to rule in your favor?

MS. LENSING: It is -- it is just as true and the results are just the same if you look at the statute as a whole and you uphold the sense of the statute and you understand that the requirement before bringing a suit, whether or not notice is part of the definition of "charge." But there is a requirement under the statute that notice and an effort to conciliate be made before the suit is brought. So understanding the statute as a whole and upholding that purpose, that it's a requirement, an indispensable prerequisite to a lawsuit, is a different way of getting to the same result.

JUSTICE SCALIA: All right. Now, does -- does the person who's filed a proper charge know whether notice has been given or not? Is a copy of the notice always given to the filer.

MS. LENSING: I don't know if it always is. Certainly when it's not given, it is not. But, yes, I think the person easily can contact or find out from the EEOC, what is happening with my, what she believes or

may not believe is a charge. In this particular case, certainly she did within the time limits because she filed a charge later.

JUSTICE GINSBURG: After she had a lawyer. But is it -- is it not the practice at the EEOC when you're dealing with an unrepresented person who files the intake questionnaire and if the SEC reviewer thinks that it fits within the statute, that the Form 5 will be filled out, not by the layperson, but by the EEOC officer herself?

MS. LENSING: Well, I think that the, the practice has been so inconsistent and that's part of the problem. Two field agents in this particular case, one in '01 and one in '02, because she submitted the questionnaire twice, two field agents did decide that it was not a charge and did not treat it as a charge -- no charge number, no notice. They decided it was not a charge. And so no Form 5 --

JUSTICE GINSBURG: But that's not the question. The question I asked is if they decide that the, what the intake -- the information on the intake questionnaire fits within the statute so that the claim can go forward, isn't it the practice not to ask the layperson to fill out the Form 5, but for the EEOC to do it itself?

MS. LENSING: I don't believe so, Your Honor. The website says, for instance, until 2 months ago -- for 2-1/2 years the Web site, which is probably the way the agency gets out information to more people and more employees than any other way, says when the completed signed Form 5 is received back in the field office --

JUSTICE GINSBURG: Well, it has to be signed.

MS. LENSING: Well, this -- right. Received back in the field office -- in this case, for instance, both the questionnaire and the charge were filled out by her, by the, by the employee.

JUSTICE GINSBURG: Well, she filled out hers after she was already in court and had a lawyer. But I thought that this statute, as all the statutes EEOC administers, are designed for claims that are put forth initially largely by unrepresented people. And the notion is that the agency should make it as easy as possible for them to get through the legal process.

MS. LENSING: It -- the form does say, the form that she filled out, the intake questionnaire, does say that someone will talk with you after you fill this out. It does not say that they will fill out the charge. In our experience the charge is very often

filled out by the employee.

JUSTICE SCALIA: It said it wasn't a charge, didn't it? Didn't it say that it's not a charge?

MS. LENSING: Yes, it did. Well, it did not say that this is not a charge, which I think would be a better practice if it did say that in the future. But it said the purpose of this is for precharge counseling --

JUSTICE SCALIA: Precharge counseling.

MS. LENSING: -- and for determination whether we have jurisdiction over potential charges. So we think the plain language of the form --

CHIEF JUSTICE ROBERTS: Do we know -- perhaps this is a question your friend on the other side will be able to answer better than you. But do we know where she got the form, why she filled it out? I couldn't find in the record whether this was given to her by someone at the EEOC or whether she downloaded it from the website or what.

MS. LENSING: We do not know, or I do not know. It is not in the record. You're correct.

The problem is, is that the practice at EEOC has been so inconsistent, both the, what they call a charge, what they recognize as a charge, and their treatment of documents as a charge. Again, the Web site

clearly says a Form 5 that is signed and completed and received back in the field office is a charge. That is when your charge is filed. And yet we have two memos that went out, one after the Edelman case and one after the opening brief in this case, to field agents that say, no, you're supposed to use this manifest intent test.

CHIEF JUSTICE ROBERTS: I agree completely with everything you said. I just don't understand your leap from government incompetence to saying the plaintiff loses.

MS. LENSING: The plaintiff does not lose. And that is the difference in this situation and the Logan case, which the government, I think, and also the Respondent have cited. The plaintiff does not lose, because equitable tolling is available. Now, in our case --

JUSTICE GINSBURG: What happens -- what happens if -- in this case it's not a problem, but I can imagine it would be in many cases -- - if you have a 300-day or a 180-day problem, you withdraw the complaint, and then you're out there and the clock keeps ticking, and you get past the 300 days and you are totally out. That's why it's important not to follow -- to say, well, it's, it doesn't make any difference, if

we dismiss this complaint, she comes back in 60 days. Well, but 60 days may be 360 days.

MS. LENSING: Yes, Your Honor. That's where equitable tolling comes in. That's the purpose of equitable tolling.

If the situation is that you have missed the time to file the charge, either the 180 or the 300 days, equitable tolling saves from you that. In other words, you can now file the charge.

CHIEF JUSTICE ROBERTS: Do you think Ms. Kennedy is entitled to equitable tolling in this case?

MS. LENSING: Ms. Kennedy didn't need equitable tolling, because in this case she caught the situation before the time ran and she filed a charge. The problem in this case is that she chose not to file a lawsuit based on that charge, and she decided to do that for quite some time. She did finally get -- you know, once the charge was filed, the EEOC recognized it as a charge, they gave notice to us, the employer. They began the time --

CHIEF JUSTICE ROBERTS: I guess she, reasonably or otherwise, thought there already was a lawsuit.

MS. LENSING: Well, not after the lawsuit

was dismissed, Your Honor. I mean after the lawsuit was dismissed, she got the right to sue letter and she still did not bring a lawsuit. She had 90 days from the right to sue letter and she still did not bring a lawsuit.

JUSTICE GINSBURG: Wasn't she appealing?

MS. LENSING: Pardon me?

JUSTICE GINSBURG: Wasn't she appealing the dismissal?

MS. LENSING: Yes, Your Honor.

But, you know, the equitable tolling is not needed where you file within the 180 or 300 days. All you have to do is file a --

CHIEF JUSTICE ROBERTS: Did you undertake conciliation efforts after her formal, her filing of the Form 5 charge?

MS. LENSING: We were in a lawsuit, Your Honor, and so that sort of changes everything. We can't, we can't talk to her. We can't -- you know, the discovery process is what you then would use to investigate, rather than an informal investigation. And that never occurred and that's part of the problem here, because we spent a long, long time on the motion to dismiss. It was finally dismissed. Then it was on appeal, and it's still on appeal. So we haven't had that opportunity, although she is a current employee;

that this has been in litigation, and that changes the face of conciliation completely.

JUSTICE ALITO: If the employee files an intake questionnaire but not a Form 5, would you say that there would be equitable tolling, or would you say that the employee wouldn't be entitled to equitable tolling because the employee didn't file the right form?

MS. LENSING: I think that unless she was relying on the EEOC, and there have been cases like that in which the EEOC says, the field agent says, that's all you need to do, this is a charge and notice is going to issue. If that were -- if there were some evidence of that in the record, which of course this record is completely silent. The plaintiff chose to put no information in about whether she believed, didn't believe or what she was relying on. But in a situation where the EEOC misleads her, yes. I would certainly say no in a situation where the form clearly says that it's precharge.

JUSTICE ALITO: I don't see much difference between the substance of these two forms, other than the fact that the Form 5, I think, requires a listing of the number of employees that the employer has. What -- they basically cover the same ground.

MS. LENSING: There is very little

difference, you're exactly right, in the information requested. The difference is that one is an intake questionnaire and not a charge, and the other is a charge. And the EEOC, which we think is a good idea, has had a multistep process, so that lay people that come in and say, you know, I have this charge of discrimination, it happened to me when I was working in France, they can go through those and say that's not, that's not a charge, and they can read through them and not have to process everything as a charge. That's the reason for the intake questionnaire. But it is simply giving the information to the EEOC and not a charge, and must be treated, must be treated differently.

You know, going back, Justice Ginsburg, because I don't think I ever finished the answer to your question some time ago. One of the problems with staying the lawsuit is if that were the answer, then we would be doing away with presuit notice, because anybody could go in on an intake questionnaire a year later because, remember, nothing is happening to --

JUSTICE GINSBURG: Well, I don't understand that, because EEOC is a responsible agency. Congress has told it: You weed out the people complaining about something that happened in Paris, and then you give notice. But the notice obligation -- and I understand

it is EEOC's, not the complainant's. So we would not expect this agency -- yes, it messed up in this case -- routinely not to give notice, routinely not to engage the employer in conciliation efforts.

MS. LENSING: But that is the problem. If you -- they are routinely not giving notice of intake questionnaires, and they are not supposed to. We agree with them. And twice this happened. And only 5 years later after it got to this Court did the EEOC write a memo and say, oh, those field agents were wrong. But we need to take the opinion of the EEOC at the time. And of course this was a very reliable, very justified opinion of the field agents because it clearly said on the form it was precharge.

But if you -- if you just say the lawsuit, that means that anybody that files an intake questionnaire can come in 2 years later because it's not being processed, so no notice to sue letter will ever go out, and so there is no end to the statute.

JUSTICE GINSBURG: What about the new form, the EEOC's new form -- I suppose responsive to this case and others like it -- that says if you don't file any other administrative complaint, we'll count the intake questionnaire as the charge?

MS. LENSING: Well, that's -- that's an

interesting form because that means it you come in the day after the act of discrimination, that form is filled out; it is neither a complaint nor a charge. Who knows what it is until 300 days run. So at the end of 300 days, if the -- if the complainant has not filed another writing, then there -- there can be no prompt notice. Then it is -- has morphed into a charge; then there can be no prompt notice to the employer.

JUSTICE GINSBURG: If the EEOC treats it as a charge, then the EEOC is obliged to give notice.

MS. LENSING: But they won't know if it's a charge until the entire time runs, to know if it's the only timely filed document, because it says it's only a charge if you don't file anything else on time. You have 300 days to do that.

JUSTICE GINSBURG: Where -- where does it say if you don't file it's only --

MS. LENSING: If it's the only timely document filed --

JUSTICE GINSBURG: Yes.

MS. LENSING: -- means that no other document within the time period, which is 300 days.

JUSTICE GINSBURG: That's the new form.

MS. LENSING: In deferral stage. Yes. That's the form, yes, Your Honor, the form in footnote

3, I believe, of the EEOC's brief.

JUSTICE GINSBURG: And where in the form that --

MS. LENSING: I'm sorry. Footnote 2, I think, on page 3.

JUSTICE GINSBURG: The new form does say that, that if no other paper is filed, this can be treated as a charge?

MS. LENSING: This will be a charge, if no other timely allegation of discrimination is -- is filed.

JUSTICE SCALIA: Doesn't that eliminate the whole purpose of the -- of the preliminary document, to weed out those charges that relate to employment in France?

MS. LENSING: It does. It does completely.

JUSTICE SCALIA: It will -- it will be a charge even if it's in France?

MS. LENSING: Right. It should be. Now, I think the practical matter is, Justice Scalia, that if nobody does anything ever -- you don't file suit, you don't try to rely on it -- they don't give notice and they don't --

JUSTICE SCALIA: I think that's right. I think what it boils down to is it'll be a charge if we

decide to give notice, and it won't be a charge if we don't decide to give notice.

MS. LENSING: Exactly.

JUSTICE SCALIA: Which is very nice for the EEOC, but not --

MS. LENSING: Which can only happen at the end of a long period of time, which means that the notice will not be prompt.

CHIEF JUSTICE ROBERTS: Counsel, the Government relied in its brief very heavily on the Chevron case, saying we should defer to the agency's regulations, and on the Auer case, saying we defer to the agency to tell us what its regulations mean. And you didn't cite either of those cases in your reply brief. So I wonder what your answer is to that argument.

MS. LENSING: Well, the -- the regulations are certainly entitled to deference, and taken as a whole, the regulations, just as the statutes, require notice. But what the EEOC's position is, is the regulations that describe what a charge is are not enough, and the entire definition is not embodied in the regulations. You have to go to -- to memos we wrote and to a compliance manual, which is not in the record and is not attached to the brief and is not available to

employees or most lawyers, readily.

JUSTICE BREYER: But if they do that why can't -- and you don't -- if they don't give you the notice, well, then you can complain, they didn't give us the notice.

MS. LENSING: Well --

JUSTICE BREYER: But if you're not hurt by it, what difference does it make?

MS. LENSING: Well, I agree if we get the notice, we cannot complain.

JUSTICE BREYER: And if you don't get it, you can't complain, if you actually knew about it.

MS. LENSING: I -- I --

JUSTICE BREYER: If you didn't know about it, then -- then you have a complaint.

MS. LENSING: Justice Breyer, I agree. If, for instance, a plaintiff gave us the notice and the EEOC didn't -- didn't file it, I agree, because notice is the important thing; but that's not what happened. That is just simply not what happened.

JUSTICE BREYER: Well -- well, then you'd have the complaint if you didn't, et cetera, but so what? In other words, if the EEOC wants to have a very broad definition that turns 90 percent of its -- whatever this thing is called, the statement -- I

forgotten the name, sorry. What's the name of this document? The intake questionnaire.

JUSTICE SCALIA: Intake questionnaire.

MS. LENSING: Intake questionnaire.

JUSTICE BREYER: Yes. If it has a broad definition that says this counts as a charge, so what? Let it do it. Who's hurt?

MS. LENSING: If they treat it as a charge and give notice, I have no problem.

JUSTICE BREYER: And if they don't, you complain about that.

MS. LENSING: Well, where do you -- the problem is that there no place to complain. You didn't get notice; you didn't get a chance to conciliate; the entire --

JUSTICE BREYER: You complain just as you're doing now, in court. You just the same words, but instead of using the words as against the word "charge," you use those same words you've all said in your excellent arguments, except you attack the fact you didn't get the notice, and there you're really hurt. Or if you're not, it doesn't matter.

MS. LENSING: Exactly. If you're not, it doesn't matter.

JUSTICE BREYER: Well, all right. So what's

wrong with that?

MS. LENSING: Well it's -- it's the situation where you are hurt that's the problem. The problem is that we need a better rule that's faithful to the statute, where notice is given. And --

CHIEF JUSTICE ROBERTS: And you're only -- when you say you're hurt, the only prejudice that you rely on is the fact that you didn't have an opportunity to go through prelitigation conciliation.

MS. LENSING: We didn't have prompt notice. We could not investigate --

CHIEF JUSTICE ROBERTS: But -- but my point is, you're not alleging prejudice from the lack of prompt notice. In other words, it's not a situation where you'd say if we had notice we would have done this, and that would have prevented everything.

MS. LENSING: Well, we don't --

CHIEF JUSTICE ROBERTS: Your only prejudice is the lack of conciliation period.

MS. LENSING: Well, I don't think that's the only prejudice, and this is what somewhat speculatory because it did not happen; but generally if you have prompt notice, particularly without a lawsuit, you can investigate; and if you don't have prompt notice, sometimes you have destroyed documents in the regular

course of your business that are helpful to you. That has happened to us. You have employees who are witnesses who are gone; you don't know where they are. You have all sorts of things that --

JUSTICE GINSBURG: Do we know whether that's true in this case?

MS. LENSING: Do I believe that's true in this case?

JUSTICE GINSBURG: Do we know whether -- I mean the difference -- what you are suggesting would be perfectly fine is once the charge was filed, and this is a lawsuit, and then you would investigate or whatever, but you would be under exactly the same disadvantage if the time lapse has meant that employees have left, that you have -- you have removed evidence as old and disposable. It wouldn't -- you would -- on your scenario of what would be the right way to do this lawsuit, you would be -- you would suffer the same disabilities in terms of documents and witnesses.

MS. LENSING: That is true. Had -- had this -- well, the charge, the only timely charge we did get notice of, and so if there had not been a lawsuit we could have investigated, and you're a little bit estopped from the investigation when a lawsuit is pending because you've got rules of discovery and that

sort of thing. And --

JUSTICE SCALIA: Excuse me. I thought you said you were deprived of something else. I mean, the statute provides for a conciliation process in which you can talk to the employee and say, you know, what happened? And you may well be able to satisfy the employee with -- before -- before she lawyers up.

I think it's a big disadvantage to -- to have no contact with the employee until there's a lawyer on the other side, and you can't talk to her confidentially; you can't make a conciliation notice. I think that's a considerable disadvantage, and it's -- it's a situation that the statute did not envision.

MS. LENSING: And I agree, Justice Scalia. I think they did -- the statute did envision it because it does require prompt notice. That's -- that's exactly where I was going next, is it's notice for investigation and the opportunity to conciliate without a lawsuit pending.

And particularly in this suit and in many others now, when you have the piggyback situation, a plaintiff is in a lawsuit and others are attempting to piggyback off of her charge, she may not at that point feel that she can conciliate just for her -- herself; but before suit, that is a very good situation.

JUSTICE SCALIA: Well, as a practical matter, you can't conciliate after suit anyway. You can negotiate with the lawyer --

MS. LENSING: Right.

JUSTICE SCALIA: -- on the other side.

MS. LENSING: That's absolutely right.

Mr. Chief Justice, I didn't finish the question you had asked me about deference in the Auer case. The Auer case is an interpretation of a regulation, and in this case the regulation says nothing about manifest intent, and that is just a wholly new situation that --

JUSTICE SOUTER: How is it -- how is it new? I thought that you argued for that test in the court of appeals.

MS. LENSING: Well, in the court of appeals, as the test had been administered by other courts which required evidence --

JUSTICE SOUTER: Well, didn't -- didn't your brief say that was the appropriate test?

MS. LENSING: Because in that court we were bound by precedent and that was the test, but we said --

JUSTICE SOUTER: Well, you -- I know you're bound by precedent, but if you think it's wrong, you can say it's wrong. And, as I understand, you did not say

it was wrong; you adopted it.

MS. LENSING: Well, we -- the manifest intent test that we talked about was the one the courts have used, which is the situation we were talking about, where equitable tolling should occur. And that is where you have, in the record, reliance on the EEOC that you've done everything you need to do and this is a charge.

That is not the case under the Second Circuit's ruling, where they just say: Just look at the document and if you think that she wanted you to file a charge, that's enough. That's a very different intent test than the other courts accept.

JUSTICE SCALIA: Well, what is your test? When is it a charge?

MS. LENSING: When notice --

JUSTICE SCALIA: And don't tell me when notice is given.

MS. LENSING: Yes, sir. Yes, Your Honor.

JUSTICE SCALIA: My goodness. It's like saying there's no complaint until an answer is filed.

MS. LENSING: Well -- I'm not -- and that's what I'm saying --

JUSTICE SCALIA: It's just not true.

MS. LENSING: But -- but notice is required

for the suit. So, while a charge may be a charge before notice is given, and I understand your reluctance to accept that definition, but --

JUSTICE SCALIA: Yes, only because I'm sane.

(Laughter.)

MS. LENSING: A point well taken.

We still -- we still get to the same place if you -- if you accept the position that notice is required in the statute and suit can't be brought. Maybe there is a minimal charge, but suit cannot be brought on that minimal charge until notice is given, is a more sane way to put it.

JUSTICE GINSBURG: If she had the obligation to give notice, you would have a much stronger argument, but the statute places that burden on the EEOC, not on the lay complainant.

MS. LENSING: The burden is on the EEOC, and that is why there's equitable tolling. But the plaintiff needs to demonstrate in the record she's done everything she can.

JUSTICE SCALIA: But there can't be equitable tolling unless she has really filed a charge. So sooner or later -- you cannot run away from it -- you're going to have to give us a definition of what a charge is.

MS. LENSING: A charge --

JUSTICE SCALIA: You're only going to give her equitable tolling if in fact she's, she's filed a charge. And you don't give me any -- unless you want to fall back on the manifest destiny rule or --

(Laughter.)

MS. LENSING: No. A charge needs to clearly delineate that it's a charge. And I think the EEOC could do that if they knew they had to live by that, and then we're perfectly happy with the EEOC defining "charge" as long as they consistently define it and give us notice.

Your Honor, I'd like to reserve the rest of my time if there are no more questions.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Lensing.

Mr. Rose.

ORAL ARGUMENT OF DAVID L. ROSE

ON BEHALF OF THE RESPONDENTS

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

I'd like to make two points initially. And I'll make them briefly, and I'll try not to re-cover the ground that's been covered by a number of the questions.

The first major point is that the statute

and the -- well, this has been made sort of -- the statute and the regulations state that, after a charge has been filed, the responsibility for sending the notice and docketing the case is upon the commission. It's not on the aggrieved individual. The argument that a petitioner has -- the charging party, excuse me, or aggrieved individual has a duty to provide notice is just absolutely flatly inconsistent with the statute, as Justice Scalia was just stating.

I want to make a second point which ha also been alluded to by, I think, Justice Breyer and others. The Petitioner suffered no harm from the fact Ms. Kennedy filed a Form 283 rather than a Form 5, which is entitled "Charge," because EEOC did not give prompt notice to the defendant Federal Express, the Petitioner here, on May 30th. EEOC did not send the notice of the filing of the charge until sometime after August 20th, 2002. That is, it was more than 60 days. So that even though the charge was filed and -- EEOC did absolutely nothing with it. No notice. And it's in the appendix, if you look at Joint Appendix 294-296.

JUSTICE SCALIA: Is this after the real charge was filed or what everybody concedes --

MR. ROSE: Form 5.

JUSTICE SCALIA: The charge form.

MR. ROSE: The charge Form 5 was file on -- well, she signed it on the 30th. It may have been filed a couple of days later. But whatever it was, that was submitted. I sent it to the EEOC by, I think, FedEx.

JUSTICE SCALIA: But suit was pending at that time.

(Laughter.)

MR. ROSE: Well, I used FedEx --

JUSTICE SCALIA: That's pretty risky.

MR. ROSE: I used FedEx for a record because I can use their tracking. Some of the tracking documents are in the joint appendix. I dealt with -- I dealt with FedEx in the Bost case. I call it Bost. I'm not sure whether it's "BOSST" or "BOEST." He calls himself Tony, so I don't know.

In any event --

JUSTICE SCALIA: Answer my question. Was suit already filed at that point?

MR. ROSE: Yes, sir. Suit had been filed earlier.

JUSTICE SCALIA: Yes.

MR. ROSE: All right, let me address your question, if I may. There is a period for conciliation. We have records from the EEOC which we sent copies of to opposing counsel by e-mail yesterday, and perhaps we

should have done it earlier, that show that something like 240 -- I may have the wrong number -- over 200 cases that were filed -- charges, excuse me, by EEO -- filed by employees of FedEx with the EEOC. Not one had been conciliated from 1997 through 2005. Not one. Zero.

JUSTICE SCALIA: Wait. I'm sorry. 247 during that whole period?

MR. ROSE: Yes.

JUSTICE SCALIA: That's the only number of mistakes they have made; is that what you're saying?

MR. ROSE: No. That's the only mistakes that we know that EEOC made with respect to -- I'm not saying that all of them should have been served or anything like that, but there were --

JUSTICE SCALIA: I'm astounded if that's the only number of mistakes they made, from 19 --

MR. ROSE: No, no. This is only with respect to FedEx.

JUSTICE SCALIA: Oh, with respect to FedEx.

MR. ROSE: And it's age claims.

JUSTICE SCALIA: Oh.

MR. ROSE: That date is -- I had to ask for it, but it is public, and I checked again yesterday with counsel for the EEOC, which I'm also representing here

today.

JUSTICE STEVENS: But are you telling us stuff that's not in the record at all? Why is that relevant to the argument here?

MR. ROSE: Well, it's relevant because this is a complaint that was dismissed before any evidence was taken, and therefore any set of facts that's alleged in the complaint is assumed to be true for purposes of its trial B motion. So there was no discovery. We didn't have a chance to do any discovery. The district court threw us out on a motion to dismiss. Now, it was morphed into a summary judgment motion functionally, but on the very limited topic of what there was.

JUSTICE ALITO: What is the point of these statistics? To show that conciliation wouldn't have done any good? Is that what you --

MR. ROSE: Yes. And, furthermore, I cite to you the fact that since --

JUSTICE KENNEDY: But I thought conciliation was an important policy of the EEOC.

MR. ROSE: EEOC does very little within 2 months, Your Honor, of anything, of receipt of the charge.

JUSTICE KENNEDY: But you want us to write an opinion saying, we're not concerned with

conciliation? We just --

MR. ROSE: No. I think conciliation is important. I think what -- if this is treated as the charge, as I think it should be, under the definition in the regulation, it's -- it's in 16 --29 CFR 1626. It's in 3.6 and 8(b) of that regulation. The original document is a charge because it identified the Respondent, identified the kind of discrimination, and the person signed it. That's all that's needed under the regulation. That regulation is lawful.

JUSTICE ALITO: What if the person fills out an intake form, checks the box that says "I do not consent to have my employer notified"?

MR. ROSE: I think that's a question that's not presented here, and I think that's a question that is best -- best left to EEOC. The -- that form says on it that we don't -- you don't need to let us notify. There's a footnote or something. We don't -- you don't need to let us -- you don't need to agree at this stage --

JUSTICE SCALIA: What's -- what's wrong with this? Why don't I -- I mean, I do believe that the thing either is a charge or isn't a charge before the EEOC decides whether it's going to give notice or not. It either is or isn't.

Now, what about this: It is a charge if it reasonably appears to be a charge, or if you want to say "manifest intent," that's okay, too.

Now, if you signed a document which -- which says that it is a prefiling document and the purpose is to discuss a future charge, it seems to me you know, or ought to know, that this is not a charge.

And we can't run the system for people who are either illiterate or don't even have friends who are literate. We can't run a system that way. So I look at this, and I say this is not a charge.

MR. ROSE: Right.

JUSTICE SCALIA: Now, if the EEOC chooses to give notice, then I guess you could say one that's close to the boundary line becomes a charge retroactively, and there is -- there is no harm done. You can have the counseling, and so forth.

But when you come in with something that doesn't look like a charge, it seems to me if there is no notice given and you get into the situation that is here where the company has been deprived of the conciliation opportunity, deprived of the opportunity to preserve evidence and whatnot, it seems to me the fault should lie on your client, because she filed something that any reasonable person should know is not a charge.

MR. ROSE: Your Honor, I differ on this. I think many reasonable persons don't know what a charge is, particularly if, like Miss Kennedy, she had never filed a charge before. And just let me complete it if I may.

She had never filed a charge before. She had never complained. She had tried to complain internally, but she had never filed a charge before. She didn't know what it was. I --

JUSTICE SCALIA: Whatever it was, this thing says it's a precharge document.

MR. ROSE: Your Honor, it says -- if you look at the two-part form, it's very small writing. It's at the bottom. It doesn't say it's a precharge form. It says the purpose of this questionnaire is to solicit information to enable the Commission to avoid mistakes.

And then it says routine uses, and it says potential charges, complaints or allegations, and to provide counseling --

JUSTICE GINSBURG: This is where -- you're reading from where?

MR. ROSE: It's two -- I'm sorry. It's 265, I believe, (J) 265, it's the two-page printout. And the handwriting is her handwriting on the top. That's a

Xerox of her handwriting.

Justice Scalia, I would further add that I -- she was not my client when she filled this out, as this document makes clear, because she checked the box "not represented."

By the time I asked her if she had filed a charge, and she said, oh, yes, I went and got the document from the EEOC, and I sent it in.

JUSTICE KENNEDY: Is that in the record?

MR. ROSE: No. But -- but it is, Your Honor -- this is in the complaint, the facts that are supposed to be alleged. As we said in the complaint, that the parties had given notice to EEOC of the overall system.

Incidentally, there is another Respondent named Robertson, who did have a live charge and a right to sue letter which was running out, which is why we filed this in May rather than in June or July.

I also -- I think I said that EEOC did not, in fact, give notice to EEOC -- to FedEx until sometime after August 20th, which was much more than 60 days from the filing of the charge. So --

CHIEF JUSTICE ROBERTS: Mr. Rose, I'm having trouble figuring out -- she not only filed this intake questionnaire; she also filed a lengthy affidavit.

MR. ROSE: Yes, sir.

CHIEF JUSTICE ROBERTS: Where did all this stuff come from?

MR. ROSE: She had friends who had filed charges before. She had met with them. Much of this I can --

CHIEF JUSTICE ROBERTS: Did these friends file charges on intake questionnaires?

MR. ROSE: They had all filled out intake questionnaires. Many of them had filed charges thereafter.

CHIEF JUSTICE ROBERTS: On Form 5.

MR. ROSE: Yes. I mean, there's a whole -- she is from the same station -- she was from the same station as Mr. Freeman, who filed a suit way back in 1999 with a group of other people. So this language was around, and the couriers were friends, some of them at least, and they discussed the matter with each other.

CHIEF JUSTICE ROBERTS: Do you know why she signed the intake questionnaire on two different dates?

MR. ROSE: Yes, Your Honor. Because I spoke to her in January, and I believe it was -- this is not on the record, but it's compatible with my allegations in the complaint. This is not on the record, but she -- I -- I never had seen her in person, and I spoke to her, and she said she had been to EEOC, and she filed it.

And then I called her in January and said -- late January, I think -- did EEOC give you a number? I didn't know the difference then between a complaint -- between a Form 5 and a Form 283.

It was not something -- I had been practicing mostly Title VII work, but I had had some age cases before then. And I didn't know the difference in the forms.

And I had a form on my computer that I had people fill out which says "charge," but -- so she -- I said they must have lost it. Why don't you go down and -- she said, well, I'll file it again. I said fine.

CHIEF JUSTICE ROBERTS: You were representing her at that point?

MR. ROSE: By February, I -- I don't think we had the retainer, but I had talked to her, and I -- and she signed the retainer either in late January or early February.

JUSTICE SCALIA: Why do you think -- why do you think they must have lost it? Why did you think they must have lost it: Because she hadn't been given a number?

MR. ROSE: Yes. Because it hadn't been docketed. It's like a clerk. They -- you -- it's similar to what the courts -- the courts do. They get a

new thing, and they docket it. The problem with EEOC is, when they get a new thing that's not a Form 5, they don't docket it. This didn't get docketed.

JUSTICE SCALIA: Even if they treat it as a charge, they don't docket it?

MR. ROSE: I don't know when they docketed the form, the Form 5, that she filed. But the timing suggests they did not docket it until August, sometime after August.

JUSTICE SCALIA: I really think the problem here is the EEOC, rather than anybody else.

MR. ROSE: I think that's exactly right, Your Honor.

JUSTICE SCALIA: It does, indeed, have this form which says -- which says that its purpose -- information provided on this form will be used by Commission employees to determine the existence of the facts relevant to a decision as to whether the Commission has jurisdiction and to provide such precharge filing counseling, blah, blah, blah.

All of that, however, is contained as part of the Privacy Act statement.

MR. ROSE: Exactly.

JUSTICE SCALIA: And if the filer is not interested in keeping any of it confidential, I wouldn't

even read the Privacy Act.

MR. ROSE: Well, she probably didn't, Your Honor.

JUSTICE SCALIA: Well, what kind of an agency is this?

(Laughter.)

JUSTICE BREYER: Suppose they made a mistake here.

MR. ROSE: I'm sorry, Your Honor?

JUSTICE BREYER: What I think Miss Lensing, one of her more basic points is this: There is a statute. And the statute says the EEOC shall send prompt notice in part to the conciliation. And she adds, if we get the notice, we also start getting evidence and preserving it and talking to people. There are a lot of things they would like to do with that notice.

MR. ROSE: Sure.

JUSTICE BREYER: Now, I replied to that, well, okay, they complain about the lack of notice. But her response is, sure, they sometimes don't give notice when they file a charge. That's just a mistake. But if you start calling these documents charges, well, they never give notice, so they will never do it. It will be a big problem, so, therefore, don't call them charges.

Now, I want to know what your answer is to the first part of what I said. My -- I was assuming that if the employer is really hurt, there is a statute and a rule and the statute and the rules say you have to give notice and if they are hurt by that, they can complain about it.

MR. ROSE: Right.

JUSTICE BREYER: But they must make mistakes in their history when they file charges and didn't give notice. So what does the law tell us? If you found it any case ever where the EEOC didn't give the notice, now the complainant files a lawsuit and it's not the complainant's fault, her response is work out some kind of equitable tolling. But there must be law on this, because this couldn't -- this is a big agency and they must have sometimes in the past forgotten to give notice.

MR. ROSE: Oh, it's --

JUSTICE BREYER: What does the law say happens when they don't give notice?

MR. ROSE: I think the law says that it could be a defense but it's an affirmative defense and it's not --

JUSTICE BREYER: Well, it wouldn't be a defense. I mean, it's not this complainant's fault.

It's the --

MR. ROSE: Right.

JUSTICE BREYER: You'd have to work out some kind of equitable tolling or something. I think she's right about that. There is no law to your knowledge or what is there?

MR. ROSE: Well, I'd say the law is, Your Honor, what the regulation says. The regulation was adopted in 1983 after notice published in the 1981 regulation says that any document that has, identifies the employer, essentially respondent, and identifies the nature, general nature of the charge and is signed is a document. By the way?

JUSTICE SCALIA: Where does that appear? Where does that appear?

MR. ROSE: It's in all the, it's in the joint appendix, Your Honor. It's toward the end of the joint appendix.

CHIEF JUSTICE ROBERTS: 351?

MR. ROSE: That sounds right. Yes. It's 351 if you look on the 351, three, it says in the middle there, in the middle of that dense paragraph, it says that most clearly in six which is on 351.

JUSTICE SCALIA: In its very definition of a "charge," it says a charge shall be in writing and shall

name the prospective respondent and shall generally -- shall generally allege the discriminatory acts. That's what it must contain.

MR. ROSE: Yes.

JUSTICE SCALIA: It doesn't say that anything that contains that is a charge.

MR. ROSE: Oh, I think it does.

JUSTICE SCALIA: I could write out something that contains all three of those things. Would that be a charge?

MR. ROSE: Well, let me -- let me refer you to the next page, then, Your Honor, which is --

JUSTICE SCALIA: All right. Let's try something else.

MR. ROSE: -- which is (a) and (b). "Notwithstanding the provisions of (a) of 8 above of this section, a charge is sufficient when the Commission receives from the person making the charge either a written statement or information reduced to writing by the Commission that conforms to the requirements of 1626," which I just read on page 351.

CHIEF JUSTICE ROBERTS: I like my cite better. If you look at 1626.3 on page 351, it says: 'Charge' shall mean a statement filed with the Commission by, or on behalf of, an aggrieved person

which alleges that the main prospective defendant has engaged in, or is about to engage in, actions in violation" --

MR. ROSE: I like that one, too, Your Honor.

(Laughter.)

MR. ROSE: It's the same thing.

JUSTICE ALITO: But if an employee files something like that and says I don't consent to notification of the employer, can that be a charge?

MR. ROSE: I think that it -- it really depends whether the employee has put on top of it -- I think you need -- I think there is a -- we take the position that if it meets the definition of 1626.3, or the other parts of 1626, it is a charge.

JUSTICE SCALIA: Well, then, all intake questionnaires are a charge, because they all contain that. I mean that definition is simply inconsistent with the -- with the agency's assertion that it has something called an intake questionnaire which does not constitute a charge unless -- I don't know -- unless there's manifest whatever it is.

That's inconsistent because all of those intake questionnaires contain all of that information --

MR. ROSE: Well, I think --

JUSTICE SCALIA: -- set forth in 26.3.

MR. ROSE: I think the last question was whether if -- if she checked the other box, it would be; and I think that there is no consistency on what EEOC has done in that situation.

JUSTICE SOUTER: Well, there may be none, but if the -- if the employee indicates by the box checked that the employee does not want the company to know that the employee is making whatever this is, this statement --

MR. ROSE: Right.

JUSTICE SOUTER: -- how can it be regarded as a charge against the employer which sets in effect a litigation process?

MR. ROSE: Well, I think that's why the better reading probably, as Your Honor suggests, is that it's not a charge if that's all the form is, and she checks only --

JUSTICE SOUTER: But you're okay because on that criterion your -- your client said, yes, you can tell them?

MR. ROSE: Absolutely.

JUSTICE SOUTER: Okay.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Rose.

Mr. Heytens.

ORAL ARGUMENT OF TOBY J. HEYTENS

ON BEHALF OF THE UNITED STATES
AS AMICUS CURIAE
SUPPORTING THE RESPONDENTS

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

JUSTICE SCALIA: Mr. Heytens, let me tell you going in that my -- my main concern in this case, however the decision comes out, is to do something that will require the EEOC to get its act in order, because this is nonsense: These regulations that are contradicted by forms; this failure to give notice, but it's okay because it's a charge anyway.

This whole situation can be traceable back to the agency, and I -- whoever ends up bearing the burden of it, it's the agency's fault, and this scheme has to be revised.

MR. HEYTENS: The agency absolutely agrees with that, Your Honor, and the agency has taken a number of concrete steps, some of which we illustrate in our brief, to deal with what in reality is a very serious problem.

I think it is important to point out, therefore, right at the start, that the problems that arose in this case are in some measure -- not exclusively but in some measure -- a reflection of when

it arose.

Ms. Kennedy submitted her form in December of 2001. That was before the Edelman litigation; and, most importantly, it was before the February 21st, 2002, memo that was issued in response to the Edelman litigation.

Now, some members of the Court may recall that one of the problems that surfaced at the time of Edelman was that the agency, or at least some of the field offices of the agency, had a practice of not serving notice until after they received a verified Form 5. And the February 21st memo was to say that needs to stop right now because our statutory obligations require us to serve notice within 10 days of the charge.

So that happened immediately following the Edelman litigation, which was, regrettably, after this case arose.

JUSTICE SCALIA: Excuse me.

MR. HEYTENS: Sure.

JUSTICE SCALIA: That's within 10 days of the charge, but that assumes, it seems to me, what's to be proven. I mean what is the charge?

MR. HEYTENS: That's correct.

JUSTICE SCALIA: If -- if the prefiling, the intake thing, is not a charge, there is no problem.

MR. HEYTENS: That's correct, as well, Justice Scalia, and it's important that --

JUSTICE SCALIA: Can you not make that not a charge by saying in bold letters on the top: This is not a charge. If you want a charge, ask for Form 5?

MR. HEYTENS: Two responses to that, Justice Scalia:

First of all I think it's important to understand that, from our perspective, the test is an objective intent test that looks to the intent of the employee, not the intent of the EEOC in promulgating a form.

And the reason that's important --

JUSTICE SCALIA: Why do the courts have to struggle with this when the agency could put in bold letters at the top: This is a charge or this is not a charge?

Why do Federal district judges have to inquire into manifest intent from now until doomsday?

MR. HEYTENS: The fundamental source of the problem, Justice Scalia, is, as this Court has recognized, the vast majority of people who initiate EEOC proceedings are lay people who aren't familiar with the statute.

And the other dilemma is that a great many

of the initial contacts with the EEOC -- the EEOC, as we set forth in our brief, got 176,000 initial contacts in fiscal year 2006. Of those, 32,000 of them came in by mail -- mail from lay people who have no --

JUSTICE BREYER: And the practical problem: I want to know where do I read what the definition of a "charge" is in the EEOC rules. The three criteria that it has certain information in it can't be the rule. It can't be the rule because we already know that it isn't a charge if the person says I don't want it to become public.

So, where do I read the rule that you just said? That it -- an intake questionnaire that satisfies these three conditions becomes a charge if it reflects the manifest intent of the person who files it that it be a charge.

You said that. That's a pretty modestly clear rule, except it isn't totally. And they qualify -- where do I read that?

MR. HEYTENS: Certainly, Justice Breyer. The definition of "charge" is the one the Chief Justice cited. It is in 1626.3 of the regulations, and that's --

JUSTICE BREYER: We use the word there "manifest intent"?

MR. HEYTENS: The word "manifest intent" is not set forth expressly there.

JUSTICE BREYER: Ah. Well, I read those regs, and those regs had a definition that can't possibly be right as applied to "intake questionnaire," because they make it a charge when the person says I don't want notice. So we know that isn't the thing.

I also know what you just said does sound like a rule. I just want to know where to read it, because I don't think you'd refer to a rule of an agency, though normally we do -- but you don't refer to a rule that doesn't exist; you don't refer to a rule that nowhere can be found; you don't refer to a rule that is internally inconsistent. So, before I defer, I would just like to know where the clear rule that you stated can be found.

MR. HEYTENS: Just as a point of clarification, Justice Breyer, the three requirements that I believe you just referred to are in 1626.6, which is the provision of the regulations labeled "Form of Charges."

We are saying that it's in construction of 1626.3, the definition of "charge." Now, I concede that the --

JUSTICE BREYER: No, I just want to read it

somewhere.

MR. HEYTENS: Sure.

JUSTICE BREYER: So that if I were not here having you in front of me, as many people don't have you in front of them, where I would go to read just what you said.

MR. HEYTENS: Four places, Justice Breyer:

First of all, you could go to the final rule as it was promulgated in 1983. There was an issue that came up when the agency promulgated the final rule that the definition of "charge" versus the definition of "complaint," both of which are defined terms in 1626.3, was ambiguous and unclear.

And in the final rule at Volume 48 of the Federal Register, page 138, the EEOC stated that one of the distinctions between a charge and a complaint is that a complaint is a way for the EEOC to receive information about allegations of discrimination where "the party providing the information does not wish to file a charge."

That was in the final --

JUSTICE GINSBURG: Is a complaint different from an intake questionnaire?

MR. HEYTENS: In our view, yes, Justice Ginsburg. The complaint would include, in a typical

case, an intake questionnaire, but a complaint is broader. A complaint refers under the regulations to any way that the EEOC receives information about discrimination.

The reason that's contained in the Age Act regulations is because, unlike Title VII, the EEOC doesn't need a formal charge in order to initiate its own proceedings.

CHIEF JUSTICE ROBERTS: Why should we defer to an agency regulation when people in the agency hardly ever follow it?

MR. HEYTENS: Mr. Chief Justice, I think it's not fair to say that people in the agency very rarely follow it. We would agree that in certain --

CHIEF JUSTICE ROBERTS: Well, you didn't -- in this case you didn't treat it as a charge, because you didn't give notice.

MR. HEYTENS: It's true that in this case the document was not docketed as a charge, and that's true; we know that. The problem is, because it arose before Edelman and because it arose before the February 21st, 2002, memo, we simply don't know why it wasn't treated as a charge.

JUSTICE BREYER: But you said there were going to be four places. I want to write them down.

MR. HEYTENS: Yes.
JUSTICE BREYER: One is 48 Fed. Reg. 148?
MR. HEYTENS: 48 Federal Register 138, Justice Breyer.
JUSTICE BREYER: 138. Now, the other three.
MR. HEYTENS: Yes, Justice Breyer.
JUSTICE SCALIA: Where is that in CFR?
MR. HEYTENS: It is not codified in the CFR.
JUSTICE SCALIA: Oh, okay.
MR. HEYTENS: The second place it is in section 2.2 (b) of the compliance manual. That language has been contained since at least 1988, if not sooner, and it's quoted on page 16 of our brief. The third place you would look is the February 21st, 2002 memo which is on the EEOC's Web site. And it's also in the appendix to our brief, which directs use of the compliance manual; and it's also the August 13th, 2007 memo, which is also attached to our brief, and what is also contained on the agency's Web site. So this is not something --
CHIEF JUSTICE ROBERTS: Do we give Chevron deference to things like your internal compliance manual and these other memos?
MR. HEYTENS: We certainly do not assert, Mr. Chief Justice, that the compliance manual gets

Chevron deference. In our view, the compliance manual represents the agency's considered judgment about the proper interpretation of its regulations, and is thus entitled to deference under Auer. The Petitioners don't allege that our regulations don't get Chevron deference. The EEOC has clearly been given the authority to issue regulations dealing with this topic.

JUSTICE KENNEDY: Under the --

JUSTICE GINSBURG: Mr. Heytens, is it true that the Form 5 for somebody who's not represented by counsel is usually done by EEOC itself? Is it that true?

MR. HEYTENS: In situations where the Form 5 is filled out in the office, Justice Ginsburg, yes, that's correct. Sometimes people mail in modified Form 5, but official issues where it's done during the office visit, my understanding is that the typical practice it's filled out by the EEOC office.

JUSTICE SCALIA: Mr. Heytens, what's your solution for the situation where the EEOC treats it as a charge, but doesn't give notice, which is what has happened here? How do you think that should play out?

MR. HEYTENS: In situations where the employer does not receive notice, Justice Scalia?

JUSTICE SCALIA: That's right.

MR. HEYTENS: The first thing we think -- at that point, Justice Scalia, I think that task is to try to recreate as well as possible the situation that should have existed, and the Commission agrees notice should have been given. So the first thing, as we say in our brief, the employer should be entitled to a stay of the litigation for up to 60 days to attempt to intent to work out, absent discovery requests, absent motions practices -- the problem -- Justice Scalia, you raised the problem that at that point, the person probably has a lawyer and you can't talk to him, but there's really -- but I think that's conceptually a separate question, for two reasons. First, they might have had a lawyer when they filed the charge, in which case the same problem you discussed would arise; but the flip side is it they could also be pro se after they filed a lawsuit, in which case the ex parte bar wouldn't count either. So I think it's conceptually, although I can see it's probably related in practice, it's at least conceptually different.

The second thing we think, and it's been explored during the oral arguments so far, if the employer could allege or show some concrete prejudice as a result of not having received notice, then the district court should take that into account. But in

this case Federal Express has simply not alleged any concrete prejudice.

JUSTICE BREYER: Well, that's on the notice point. Going back to the other, more important point, your words that I found quite useful are the "manifest intent," that shows a manifest -- are those words going to be in these four sources that I look up?

MR. HEYTENS: The precise words manifest?

JUSTICE BREYER: No. I suspect not.

MR. HEYTENS: Well, then --

JUSTICE BREYER: Therefore -- I'm --

MR. HEYTENS: Well, but I would say, Justice Breyer, the word intend is in fact in the 1983 final rule; it says where the person "does not intend to file" --I apologize, Justice Breyer. As I stand here, the word is "wish," "does not wish to file a charge."

The language in the compliance manual which is repeated in the memorandum is well, is it states that you look at whether the submission constitutes a clear request for the agency to act, which we think, though not exactly the words manifest --

JUSTICE STEVENS: Just to get one thing perfectly clear in my mind, does that mean if the intake questionnaire is checked not consent, that would not be a charge?

MR. HEYTENS: Mr. Chief Justice, may I ask -- in our view that if she had checked the box saying do not disclose for identity, this would not have been a charge. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Heytens.

Miss Lensing, you have a minute left.

REBUTTAL ARGUMENT OF CONNIE L. LENSING,
ON BEHALF OF THE PETITIONER

MS. LENSING: First of all, in this case the affidavit attached to the intake questionnaire began -- and this is at Joint Appendix 266 -- with the statement, "I have been assured of confidentiality by the EEOC." So it is a confidentiality concern.

Congress determined that there must be an opportunity for conciliation before a lawsuit was filed. We never saw the numbers that are not in the record, that were testified to today, but if 247 charges were filed against FedEx, in that period of time we had 25 age discrimination cases. So conciliation before a case does work. And I appreciate those numbers because it -- it just shows that we conciliate, we look into it, but you can't do it once the lawsuit is filed.

The best rule obviously are the clear forms that many of you have mentioned today. One can say it's

not a charge. The other one can say it is a charge, and this could all be a situation where you'd have only rare occurrences where notice was not given.

JUSTICE SCALIA: How do we fix it? You haven't gotten notice, you haven't had a chance to conciliate -- how do we fix it?

MS. LENSING: Well, this particular case, she could -- may I answer?

She could have filed her lawsuit, she had a charge. She chose not to file a subsequent lawsuit 60 days later. This lawsuit was properly dismissed. The opportunity to file another lawsuit was there. She didn't need equitable tolling because she caught it and she filed a charge, indisputable, and we did get notice of the charge in July. I think it was filed the very end of May; we got it in July.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Miss Lensing.

The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)