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

2 (11:03 a.m.)

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

6 Ms. Lensing.

7 ORAL ARGUMENT OF CONNIE L. LENSING

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20                But the biggest reason --

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

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

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

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

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

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

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

23 MS. LENSING: Well, Justice -- sorry.

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

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

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

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

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

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



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

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

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

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

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

8 JUSTICE GINSBURG: Well, it has to be  
9 signed.

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

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

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

1 filled out by the employee.

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

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

9 JUSTICE SCALIA: Precharge counseling.

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

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

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

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

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

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

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

18 JUSTICE GINSBURG: What happens -- what  
19 happens if -- in this case it's not a problem, but I can  
20 imagine it would be in many cases -- - if you have a  
21 300-day or a 180-day problem, you withdraw the  
22 complaint, and then you're out there and the clock keeps  
23 ticking, and you get past the 300 days and you are  
24 totally out. That's why it's important not to follow --  
25 to say, well, it's, it doesn't make any difference, if

1 we dismiss this complaint, she comes back in 60 days.

2 Well, but 60 days may be 360 days.

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

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

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

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

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

25 MS. LENSING: Well, not after the lawsuit

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

5 JUSTICE GINSBURG: Wasn't she appealing?

6 MS. LENSING: Pardon me?

7 JUSTICE GINSBURG: Wasn't she appealing the  
8 dismissal?

9 MS. LENSING: Yes, Your Honor.

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

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

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

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

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

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

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

25                MS. LENSING:   There is very little

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

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

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



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

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

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

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

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

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

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

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

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

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

20 JUSTICE GINSBURG: Yes.

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

23 JUSTICE GINSBURG: That's the new form.

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

1 3, I believe, of the EEOC's brief.

2 JUSTICE GINSBURG: And where in the form  
3 that --

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

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

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

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

16 MS. LENSING: It does. It does completely.

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

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

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

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

3 MS. LENSING: Exactly.

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

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

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

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

1 employees or most lawyers, readily.

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

6 MS. LENSING: Well --

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

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

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

13 MS. LENSING: I -- I --

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

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

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

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

3 JUSTICE SCALIA: Intake questionnaire.

4 MS. LENSING: Intake questionnaire.

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

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

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

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

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

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

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

1 wrong with that?

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

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

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

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

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

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

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

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

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

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

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

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



1 sort of thing. And --

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

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

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

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

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

4 MS. LENSING: Right.

5 JUSTICE SCALIA: -- on the other side.

6 MS. LENSING: That's absolutely right.

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

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

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

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

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

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

1 it was wrong; you adopted it.

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

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

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

16 MS. LENSING: When notice --

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

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

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

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

24 JUSTICE SCALIA: It's just not true.

25 MS. LENSING: But -- but notice is required

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

4 JUSTICE SCALIA: Yes, only because I'm sane.  
5 (Laughter.)

6 MS. LENSING: A point well taken.

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

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

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

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

1 MS. LENSING: A charge --

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

6 (Laughter.)

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

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

15 CHIEF JUSTICE ROBERTS: Thank you, Ms.  
16 Lensing.

17 Mr. Rose.

18 ORAL ARGUMENT OF DAVID L. ROSE  
19 ON BEHALF OF THE RESPONDENTS

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

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

25 The first major point is that the statute

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

10 I want to make a second point which ha also  
11 been alluded to by, I think, Justice Breyer and others.  
12 The Petitioner suffered no harm from the fact Ms.  
13 Kennedy filed a Form 283 rather than a Form 5, which is  
14 entitled "Charge," because EEOC did not give prompt  
15 notice to the defendant Federal Express, the Petitioner  
16 here, on May 30th. EEOC did not send the notice of the  
17 filing of the charge until sometime after August 20th,  
18 2002. That is, it was more than 60 days. So that even  
19 though the charge was filed and -- EEOC did absolutely  
20 nothing with it. No notice. And it's in the appendix,  
21 if you look at Joint Appendix 294-296.

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

24 MR. ROSE: Form 5.

25 JUSTICE SCALIA: The charge form.

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

5 JUSTICE SCALIA: But suit was pending at  
6 that time.

7 (Laughter.)

8 MR. ROSE: Well, I used FedEx --

9 JUSTICE SCALIA: That's pretty risky.

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

16 In any event --

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

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

21 JUSTICE SCALIA: Yes.

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

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

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

9 MR. ROSE: Yes.

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

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

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

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

20 JUSTICE SCALIA: Oh, with respect to FedEx.

21 MR. ROSE: And it's age claims.

22 JUSTICE SCALIA: Oh.

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



1 today.

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

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

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

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

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

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

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

1 conciliation? We just --

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

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

14 MR. ROSE: I think that's a question that's  
15 not presented here, and I think that's a question that  
16 is best -- best left to EEOC. The -- that form says on  
17 it that we don't -- you don't need to let us notify.  
18 There's a footnote or something. We don't -- you don't  
19 need to let us -- you don't need to agree at this stage  
20 --

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

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

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

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

12                  MR. ROSE: Right.

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

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

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

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

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

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

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

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

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

1 Xerox of her handwriting.

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

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

9 JUSTICE KENNEDY: Is that in the record?

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

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

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

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

25 MR. ROSE: Yes, sir.

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

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

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

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

11 CHIEF JUSTICE ROBERTS: On Form 5.

12 MR. ROSE: Yes. I mean, there's a whole --  
13 she is from the same station -- she was from the same  
14 station as Mr. Freeman, who filed a suit way back in  
15 1999 with a group of other people. So this language was  
16 around, and the couriers were friends, some of them at  
17 least, and they discussed the matter with each other.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 MR. ROSE: Exactly.

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



1 even read the Privacy Act.

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

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

6 (Laughter.)

7 JUSTICE BREYER: Suppose they made a mistake  
8 here.

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

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

18 MR. ROSE: Sure.

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

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

7                   MR. ROSE: Right.

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

18                  MR. ROSE: Oh, it's --

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

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

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

1 It's the --

2 MR. ROSE: Right.

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

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

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

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

19 CHIEF JUSTICE ROBERTS: 351?

20 MR. ROSE: That sounds right. Yes. It's  
21 351 if you look on the 351, three, it says in the middle  
22 there, in the middle of that dense paragraph, it says  
23 that most clearly in six which is on 351.

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

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

4 MR. ROSE: Yes.

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

7 MR. ROSE: Oh, I think it does.

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

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

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

15 MR. ROSE: -- which is (a) and (b).  
16 "Notwithstanding the provisions of (a) of 8 above of  
17 this section, a charge is sufficient when the Commission  
18 receives from the person making the charge either a  
19 written statement or information reduced to writing by  
20 the Commission that conforms to the requirements of  
21 1626," which I just read on page 351.

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

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

4                   MR. ROSE:  I like that one, too, Your Honor.  
5                   (Laughter.)

6                   MR. ROSE:  It's the same thing.

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

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

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

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

24                  MR. ROSE:  Well, I think --

25                  JUSTICE SCALIA:  -- set forth in 26.3.

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

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

10                  MR. ROSE: Right.

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

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

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

21                  MR. ROSE: Absolutely.

22                  JUSTICE SOUTER: Okay.

23                  CHIEF JUSTICE ROBERTS: Thank you, Mr. Rose.

24                  Mr. Heytens.

25                  ORAL ARGUMENT OF TOBY J. HEYTENS

1                   ON BEHALF OF THE UNITED STATES  
2                   AS AMICUS CURIAE  
3                   SUPPORTING THE RESPONDENTS

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

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

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

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

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

1 it arose.

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

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

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

18 JUSTICE SCALIA: Excuse me.

19 MR. HEYTENS: Sure.

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

23 MR. HEYTENS: That's correct.

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



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

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

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

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

13 And the reason that's important --

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

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

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

25 And the other dilemma is that a great many

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

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

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

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

20 MR. HEYTENS: Certainly, Justice Breyer.  
21 The definition of "charge" is the one the Chief Justice  
22 cited. It is in 1626.3 of the regulations, and that's  
23 --

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

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

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

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

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

22                   We are saying that it's in construction of  
23 1626.3, the definition of "charge." Now, I concede that  
24 the --

25                   JUSTICE BREYER: No, I just want to read it

1 somewhere.

2 MR. HEYTENS: Sure.

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

7 MR. HEYTENS: Four places, Justice Breyer:

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

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

21 That was in the final --

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

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

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

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

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

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

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

18 MR. HEYTENS: It's true that in this case  
19 the document was not docketed as a charge, and that's  
20 true; we know that. The problem is, because it arose  
21 before Edelman and because it arose before the February  
22 21st, 2002, memo, we simply don't know why it wasn't  
23 treated as a charge.

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

1 MR. HEYTENS: Yes.

2 JUSTICE BREYER: One is 48 Fed. Reg. 148?

3 MR. HEYTENS: 48 Federal Register 138,  
4 Justice Breyer.

5 JUSTICE BREYER: 138. Now, the other three.

6 MR. HEYTENS: Yes, Justice Breyer.

7 JUSTICE SCALIA: Where is that in CFR?

8 MR. HEYTENS: It is not codified in the CFR.

9 JUSTICE SCALIA: Oh, okay.

10 MR. HEYTENS: The second place it is in  
11 section 2.2 (b) of the compliance manual. That language  
12 has been contained since at least 1988, if not sooner,  
13 and it's quoted on page 16 of our brief. The third  
14 place you would look is the February 21st, 2002 memo  
15 which is on the EEOC's Web site. And it's also in the  
16 appendix to our brief, which directs use of the  
17 compliance manual; and it's also the August 13th, 2007  
18 memo, which is also attached to our brief, and what is  
19 also contained on the agency's Web site. So this is not  
20 something --

21 CHIEF JUSTICE ROBERTS: Do we give Chevron  
22 deference to things like your internal compliance manual  
23 and these other memos?

24 MR. HEYTENS: We certainly do not assert,  
25 Mr. Chief Justice, that the compliance manual gets

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

8 JUSTICE KENNEDY: Under the --

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

13 MR. HEYTENS: In situations where the Form 5  
14 is filled out in the office, Justice Ginsburg, yes,  
15 that's correct. Sometimes people mail in modified Form  
16 5, but official issues where it's done during the office  
17 visit, my understanding is that the typical practice  
18 it's filled out by the EEOC office.

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

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

25 JUSTICE SCALIA: That's right.

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

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



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

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

8 MR. HEYTENS: The precise words manifest?

9 JUSTICE BREYER: No. I suspect not.

10 MR. HEYTENS: Well, then --

11 JUSTICE BREYER: Therefore -- I'm --

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

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

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

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

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 Mr. Heytens.

7 Miss Lensing, you have a minute left.

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

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

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

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

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

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

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

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

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 Miss Lensing.

20 The case is submitted.

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

23

24

25

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