

Supreme Court, U.S.
FILED

081048 FEB 13 2009

NOFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

LYNDA MARQUARDT,

Petitioner,

v.

MICHAEL O. LEAVITT, SECRETARY,
UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

On Petition for Writ of Certiorari To The United
States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DELILA LEDWITH

Counsel of Record

LAW OFFICE OF DELILA LEDWITH

213A W. HUDGINS, SUITE 200

GRAPEVINE, TEXAS 76051

817-424-4210

QUESTION PRESENTED

Whether a federal agency may raise a timeliness defense in an employment discrimination complaint filed in federal court, where it knowingly accepted the underlying untimely administrative complaint, investigated it, and issued a final decision on the merits without ever raising the issue of timeliness.

PARTIES TO THE PROCEEDING

All parties are named in the caption to the case.

NOTE: Michael O. Leavitt is no longer Secretary of the Department of Health and Human Services. As of this writing, a new Secretary has not yet been confirmed.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	v
DECISIONS BELOW.....	1
STATEMENT OF JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	4
STATEMENT OF MATERIAL FACTS.....	4
REASONS FOR GRANTING THE WRIT.....	6
1. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE RULINGS OF OTHER COURTS OF APPEAL AND DISTRICT COURTS.....	6
2. THE DECISION BELOW IS INCONSISTENT WITH ESTABLISHED PRINCIPLES OF ADMINISTRATIVE LAW AND JUDICIAL ECONOMY.....	8
3. THE DECISION BELOW PROMOTES INEFFICIENCY AND IRRESPONSIBILITY IN FEDERAL AGENCY OPERATIONS, AND FRUSTRATES THE PURPOSES OF FEDERAL ANTI-DISCRIMINATION LAWS.....	9
CONCLUSION.....	11

APPENDIX

<i>Marquardt v. Leavitt</i> , Case No. 08-10190 (5th Cir., Sept. 25, 2008).....	A-1
<i>Marquardt v. Leavitt</i> , Case No. 08-10190 (5th Cir., Nov. 18, 2008)(order denying reh'g and reh'g en banc).....	A-3
<i>Marquardt v. Leavitt</i> , 2008 U .S. Dist. LEXIS 8624 (N.D. Tex. Feb. 6, 2008).....	A-5
<i>Lynda Marquardt</i> , HRSA-005-05, U.S. Dep't of Health and Human Services EEO Final Decision [excerpt].....	A-21
Lynda Marquardt's typewritten attachment to EEO Counselor's Report.....	A-23
E-mail, by Division Director, Shirley Henley, May 10, 2005.....	A-24

TABLE OF AUTHORITIES

<i>Bowden v. United States</i> , 106 F.3d 433, 438-439 (D.C.Cir. 1997).....	8
<i>Boyd v. United States Postal Service</i> , 6522 F.2d 410, 414 (9th Cir. 1985).....	7
<i>Bruce v. United States Department of Justice</i> , 314 F.3d 71, 74-75 (2d Cir. 2002),,,,,,,.....	10
<i>Ester v. Principi</i> , 250 F.3d 1068, 1071-72 (7th Cir. 2001).....	6, 7, 8, 9, 10
<i>Hall v. Dep't of the Treasury</i> , 264 F.3d 1050, 1061 (Fed. Cir. 2001).....	10
<i>Horton v. Potter</i> , 369 F.3d 906, 911 (6th Cir. 2004).....	10
<i>Marquardt v. Leavitt</i> , 2008 U .S. Dist. LEXIS 8624 (N.D. Tex. Feb. 6, 2008).....	1, 7

<i>Marquardt v. Leavitt</i> , 2008 U.S. App. LEXIS 20420 (5th Cir. Tex., Sept. 25, 2008).....	1
<i>MacDougall v. Potter</i> , 431 F. Supp.2d 124, 129 (D.C. Mass., 2006).....	10
<i>Moncus v. Johanns</i> , 2006 U.S. Dist. LEXIS 4648; 87 Empl. Prac. Dec. (CCH) P42, 306 (M.D. Ala. 2006).....	11
<i>Rowe v. Sullivan</i> , 967 F.2d 186 (5th Cir. 1992).....	2, 4, 6, 7
<i>Slivicki v. Principi</i> , 2006 U.S. Dist. LEXIS 73437 (D.N.D, 2006)....	10
<i>United States v. L.A. Tucker Truck Lines, Inc.</i> , 344 U.S. 33, 37, 97 L.Ed. 54, 73 S.Ct. 67 (1952).....	8

DECISIONS BELOW

The opinion of the court of appeals (Pet. App., A-1) is reported at *Marquardt v. Leavitt*, 2008 U.S. App. LEXIS 20420 (5th Cir. Tex., Sept. 25, 2008). The Court's order denying rehearing and rehearing en banc (Pet. App., A-3) is unpublished. The opinion of the district court (Pet. App., A-5) is reported at *Marquardt v. Leavitt*, 2008 U.S. Dist. LEXIS 8624 (N.D. Tex. Feb. 6, 2008). The opinion of the Director, Office of Diversity Management and Equal Employment Opportunity in the Office of the Secretary, United States Department of Health and Human Services is unreported. *Lynda Marquardt, HRS-005-05*. (Pet. App., A-21)(excerpt)

JURISDICTION

The court of appeals entered judgment on September 25, 2008. (Pet. App., A-1). An order denying rehearing and rehearing en banc was entered on November 18, 2008. (Pet. App., A-3.) This Court has jurisdiction under 28 U.S.C. § 1254. This Petition is filed within 90 days of the order denying rehearing and rehearing en banc.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 42 U.S.C. 2000e-16 (a)

§2000e-16. Employment by Federal Government

(a)Discriminatory practices prohibited; employees or applicants for employment subject to

coverage. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code) in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission [Postal Regulatory Commission], in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office [Government Accountability Office], and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

2. 29 U.S.C. § 633a

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected. All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as

defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission [Postal Regulatory Commission], in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office [Government Accountability Office], and the Library of Congress shall be made free from any discrimination based on age.

3. 29 C.F.R. 1614.107(a)(2)

§ 1614.107 Dismissal of Complaints

(a) Prior to a request for a hearing in a case, the agency shall dismiss an entire complaint:... .

(2) That fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance with § 1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor.

4. 29 C.F.R. 1614.604 (c)

1614.604 (c) Filing and computation of time

(c) The time limits in this part are subject to waiver, estoppel and equitable tolling.

STATEMENT OF THE CASE

The decision below represents a preexisting split among the federal circuits on an important and recurring question affecting the substantive and statutory rights of federal employees who complain about discrimination.

The question to be resolved is whether a federal agency waives a timeliness defense in federal court when it knowingly accepts a discrimination complaint after the 45-day filing deadline, investigates it, and issues a final decision on the merits without ever raising the issue of timeliness.

In the decision below, the Fifth Circuit relied on its rule announced in *Rowe v. Sullivan*, 967.F.2d 186, 191 (5th Cir. 1992), which holds that a federal agency does not waive a timeliness defense in federal court unless it has made a specific finding of timelines.

Statement Of Material Facts

On May 18, 2006, Lynda Marquardt, a long-term employee of the U.S. Department of Health and Human Services, Health Resources Service Administration ("HRSA" or "the agency"), sued the agency for its failure to promote her because of unlawful gender and age discrimination in federal employment pursuant to Title VII, 42 U.S.C. §§ 2000e-16(a)(2007), and the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 633a (2008).

Prior to filing suit and after Marquardt was twice passed over for a promotion, she filed a discrimination complaint with the agency based on age and gender. However, because the Dallas Regional Office where she worked had no Equal Employment Opportunity ("EEO") contact person on site or any conspicuous information posted outlining the EEO process, she filed her initial informal complaint after the deadline for doing so had elapsed. At the time of filing, she informed the EEO counselor in writing that she would have filed an EEO action sooner if she had been aware of the deadline for doing so. (Pet. App., A-23) The stated policy of the agency's EEO office was to enforce the 45-day deadline only "loosely." (Pet. App., A-24) Marquardt met all other deadlines in a timely fashion.

The agency accepted her complaint, did a lengthy investigation, and issued a Final Agency Decision on the merits without ever raising the issue of timeliness. That decision stated explicitly that "the entire record has been reviewed and considered." (Pet. App., A-21.)

On May 18, 2006, Marquardt timely exercised her right to file a discrimination complaint in federal court.

On September 27, 2007, after a lengthy discovery period, which included numerous depositions and several contentious pretrial motions, the agency filed a motion for summary judgment arguing, *inter alia*, that Marquardt's case

should be dismissed because her initial informal complaint was untimely.

The district court granted the motion, relying on Fifth Circuit precedent holding that a federal agency does not waive a timeliness defense unless it makes a specific finding of timeliness. *Rowe*, at 967 F.2d 186, 191. The trial court's order was final and disposed of all the issues.

Marquardt timely filed a notice of appeal pursuant to 28 U.S.C. § 1291 with the Fifth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

The question presented is one of exceptional significance because the Fifth Circuit rule is in direct conflict with a number of authoritative decisions of other courts of appeal and involves important issues of public policy, statutory interpretation, and fundamental fairness.

1. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE RULINGS OF OTHER COURTS OF APPEAL AND DISTRICT COURTS.

Fifth Circuit jurisprudence on the question of administrative waiver of a timeliness defense is at odds with the majority of courts that have addressed the issue. A leading and widely followed case from the Seventh Circuit involved facts nearly identical to Petitioner's: *Ester v. Principi*, 250 F.3d 1068 (7th Cir. 2001). In *Ester*, the plaintiff claimed that the Department of Veterans Affairs had denied him a promotion in violation of Title VII. The district court dismissed the case on summary judgment because the plaintiff had failed to file a

formal complaint of discrimination within the required 15 days. *Ester*, 250 F.3d at 1068. As in Marquardt's situation, the agency had accepted the complaint, investigated it, and issued a final decision on the merits, without ever raising the issue of timeliness. *Id.*, at 1070-71. In *Ester*, as in the *Marquardt* case, the agency first raised its timeliness defense in its answer to the plaintiff's subsequent lawsuit. *Marquardt v. Leavitt*, 2008 U.S. Dist. LEXIS 8624 (N.D. Tex., Feb. 6, 2008).

The Seventh Circuit reversed the decision of the district court. *Id.*, at 1071-72. In deciding *Ester*, the panel observed that it had not yet addressed the question of when an agency's failure to assert an available exhaustion defense in administrative proceedings should constitute a waiver of such a defense in a subsequent lawsuit. *Id.*, at 1071. The panel also noted that courts of appeal, which had looked at the issue, had not produced uniform results. *Id.* To inform itself on how other courts had approached the question, the panel looked at decisions from three other circuits. First, the panel considered the Fifth Circuit's rule in *Rowe v. Sullivan*, requiring an explicit finding of timeliness before an agency is deemed to have waived a timeliness defense. *Id.*, at 1071 (citing *Rowe*, 967 F.2d at 191). Second, the panel looked at a Ninth Circuit decision, which held that an agency waives a timeliness defense if it makes a finding of discrimination. *Id.*, at 1071-72 (citing *Boyd v. United States Postal Service*, 752 F.2d 410, 414 (9th Cir. 1985)). Finally, in declining to follow either the Fifth or Ninth Circuits, the Seventh Circuit cited

and followed a 1997 decision from the District of Columbia Circuit, which held that when an agency decides the merits of a complaint, without addressing the question of timeliness, it has waived a timeliness defense in a subsequent lawsuit. *Id.*, at 1071-72 (citing *Bowden v. United States*, 106 F.3d 433, 438-39 (D.C. Cir. 1997)).

The *Ester* court explained the sound policy reasons for its decision: (1) consistency in the established principles of administrative law; (2) judicial economy; (3) agency autonomy and efficiency; and (4) fairness to plaintiffs. *Ester*, 250 F.3d at 1072.

2. THE DECISION BELOW IS INCONSISTENT WITH ESTABLISHED PRINCIPLES OF ADMINISTRATIVE LAW AND JUDICIAL ECONOMY

It is well established that “orderly procedures and good administration” require that procedural objections be raised during the administrative process, where there is opportunity for correction, before those issues are reviewable by the courts. *Ester*, 250 F.3d at 1072 (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 97 L.Ed. 54, 73 S.Ct. 67 (1952)). Consistency in the established principles of administrative law is thus preserved by requiring timeliness objections to be raised during the administrative process. *Ester*, 250 F.3d at 1072.

The principle of judicial economy also is served by requiring known procedural objections to be raised during the administrative process. *Id.* If a potential plaintiff is informed of an agency’s

timeliness objections to her discrimination complaint, she is likely to consider more carefully whether or not to seek expensive, time-consuming judicial review or to resolve the dispute at the administrative stage. Also, clarity at the administrative stage allows courts to focus more frequently on the merits of discrimination claims, and limit review to substantive and policy considerations.

3. THE DECISION BELOW PROMOTES INEFFICIENCY AND IRRESPONSIBILITY IN FEDERAL AGENCY OPERATIONS, AND FRUSTRATES THE PURPOSES OF FEDERAL ANTI-DISCRIMINATION LAWS.

As the *Ester* court observed, inefficiency and irresponsibility in federal agency operations should not be encouraged by allowing agencies to overlook and fail to develop procedural objections that can be corrected during the administrative phase. *Id.* Moreover, if an agency can preserve a timeliness defense simply by refraining to make a specific finding of timeliness, even though it is well aware that such a defense is available, it opens the door to practices that operate to penalize those who complain about discrimination. The purposes of federal anti-discrimination laws are frustrated when plaintiffs are unfairly prejudiced by having to defend a claim of untimeliness that was never previously raised. *Ester*, 250 F.3d at 1072; 42 U.S.C. § 2000e-16(a)(2007)(all personnel actions affecting federal government employees shall be free from discrimination).

The *Ester* court explicitly declined to extend an “immortal status” to the timeliness defense and held that the defense is waived if the agency reaches the merits of a discrimination complaint without addressing its untimely filing. *Ester*, 250 F.3d at 1073.

The majority of federal courts of appeal that have addressed the question herein presented are either in substantial accord with, or have explicitly followed, *Ester*: *Horton v. Potter*, 369 F.3d 906, 911 (6th Cir. 2004)(waiver occurs when the agency decides a complaint on the merits without raising the untimeliness defense); *Bruce v. United States Department of Justice*, 314 F.3d 71, 74-75 (2d Cir. 2002)(the result reached in *Ester*, that an agency waives an untimeliness defense if it issues a decision on the merits without raising the defense is “sound” and “good law”); *Hall v. Dep’t of the Treasury*, 264 F.3d 1050, 1061 (Fed. Cir. 2001) (waiver occurs when the agency decides a complaint on the merits without addressing the untimeliness defense.)

In addition, district courts in the First, Eighth, and Eleventh Circuits are either in substantial agreement with the Seventh Circuit’s *Ester* decision or have cited it with approval. The District Court for the District of Massachusetts followed *Ester* in deciding that a federal agency waived the defense of untimely exhaustion of administrative remedies when it did not raise the issue before, or at the time, it issued its final decision on the merits. *MacDougall v. Potter*, 431 F. Supp.2d 124, 129 (D.C. Mass., 2006). See also, *Slivicki v. Principi*,

2006 U.S. Dist. LEXIS 73437 (D.N.D, 2006)(the defendant agency waived a timeliness defense when it never raised the issue before its summary judgment motion); *Moncus v. Johanns*, 2006 U.S. Dist. LEXIS 4648, *22-24; 87 Empl. Prac. Dec. (CCH) P42, 306 (M.D. Ala. 2006)(when the defendant agency recognized the timeliness issue at the outset of administrative processing but failed to dismiss the untimely complaint, it waived its objection to the plaintiff's untimely contact).

The Fifth Circuit stands alone among the circuits in bestowing a virtually perpetual status on the timeliness defense, just so long as the defendant agency refrains from, or withholds, making a specific finding of timeliness.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,



DELILA LEDWITH

LAW OFFICE OF DELILA LEDWITH

213A W. Hudgins, Suite 200

Grapevine, Texas 76051

817-424-4210

Counsel for Petitioner

February 10, 2009

APPENDIX

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**No. 08-10190
Summary Calendar**

**LYNDA MARQUARDT,
Plaintiff-Appellant,**

v.

**MICHAEL O. LEAVITT,
Secretary, Department of Health and Human
Services,**

Defendant-Appellee

**Appeal from the United States District Court
for the Northern District of Texas**

No. 3:06-CV-893

**Before SMITH, STEWART, and SOUTHWICK,
Circuit Judges.**

PER CURIAM:¹

¹ Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.