No. 99-570

In the Supreme Court of the United States

LAWRENCE AVIATION INDUSTRIES, INC., PETITIONER

v.

ALEXIS HERMAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Executive Order No. 11,246, its implementing regulations, or any other applicable law provides a limitations period for the Secretary of Labor's initiation of administrative enforcement proceedings against a government contractor.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unpublished, but the decision is noted at 182 F.3d 900 (Table). The district court's opinion (Pet. App. 6a-37a) is reported at 28 F. Supp. 2d 728. The administrative decisions are unreported. They include the November

[1] The caption of the Petition identifies the respondents as Lawrence Summers, Secretary of Labor, Office of Federal Contract Compliance Programs, and United States Department of Labor. The Secretary of Labor is Alexis M. Herman, Lawrence Summers is the Secretary of the Treasury. This brief's caption corrects the error. See Sup. Ct. R. 35.3 ("any misnomer not affecting substantial rights of the parties" concerning a public office who is a party in an official capacity "will be disregarded").

9, 1995 Final Decision and Order of the Secretary of Labor (Pet. App. 40a-41a); the July 27, 1995 Recommended Decision and Order of the Administrative Law Judge on Remand (J.A. A1344-A1354); the June 15, 1994 Decision and Remand Order of the Secretary of Labor (Pet. App. 42a-55a); and the May 30, 1991 Recommended Decision and Order of the Administrative Law Judge (Pet. App. 56a-82a).

JURISDICTION

The court of appeals entered its judgment on July 7, 1999. The petition for a writ of certiorari was filed on October 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Executive Order No. 11,246, as amended, prohibits federal contractors from engaging in employment discrimination based on race, color, religion, sex, or national origin, and requires contractors to take affirmative steps to ensure nondiscriminatory treatment of their employees and job applicants. Exec. Order No. 11246, § 202(1) (reprinted, as amended, as a note following 42 U.S.C. 2000e). The Secretary of Labor is responsible for the administration and enforcement of the Executive Order, including the issuance of implementing rules, regulations, and orders. *Id.* § 201. Under the applicable regulations, the Office of Federal Contract Compliance Programs (OFCCP) administers and enforces the Executive Order, 41 C.F.R. 60-1.2 (1981); the Office of Administrative Law Judges conducts hearings and issues recommended decisions, 41 C.F.R. 60-30.1 to 60-30.27; and the Secretary of Labor issues final ad-

ministrative orders. 41 C.F.R. 60-30.28 to 60-30.30.[2] Final agency action is subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701-706.

OFCCP obtains information regarding possible violations of the Executive Order by conducting periodic compliance reviews, 41 C.F.R. 60-1.20, and by investigating complaints filed with the agency. 41 C.F.R. 60-1.21 to 60-1.24; see also 41 C.F.R. 60- 1.26(a). "Complaints shall be filed within 180 days of the alleged violation unless the time for filing is extended by the Director for good cause shown." 41 C.F.R. 60-1.21. The regulations prescribe no timetable for compliance reviews, except that any federal contract or subcontract for $1 million or more is subject to a preaward review. 41 C.F.R. 60-1.20(d). If a compliance review reveals a deficiency in the contractor's compliance with the Executive Order, "reasonable efforts shall be made to secure compliance through conciliation and persuasion." 41 C.F.R. 60-1.20(b). Complaints likewise are to be "resolved by informal means whenever possible." 41 C.F.R. 60-1.24(c)(2).

If informal resolution fails, "OFCCP may institute an administrative enforcement proceeding to enjoin the violations, to seek appropriate relief (which may include affected class and back pay relief), and to impose appropriate sanctions," including debarment from future federal contracts. 41 C.F.R. 60-1.26(a)(2). Such a pro-

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[2] Citations are to the 1981 edition of the Code of Federal Regulations. The regulations cited herein, codified at 41 C.F.R. Part 60, remained in effect from 1981, when the underlying discrimination occurred, through 1995, when the Secretary's final decision was issued.

ceeding is initiated when OFCCP, represented by the Solicitor of Labor, files an administrative complaint with the Department's Office of Administrative Law Judges, naming the contractor as the defendant. 41 C.F.R. 60-30.5(a). Neither the rule describing enforcement proceedings generally, 41 C.F.R. 60- 1.26, nor the rule governing the filing of administrative complaints, 41 C.F.R. 60-30.5, contains any time limit.

2. Petitioner Lawrence Aviation Industries is a government subcontractor subject to Executive Order No. 11,246. Pet. 11; Pet. App. 7a-8a. In 1979, a fire destroyed a large part of petitioner's plant, causing it to lay off half of its employees. Pet. App. 12a. In 1981, after rebuilding its plant, petitioner began hiring entry level blue-collar workers to perform machine operation and other factory work. *Id.* at 12a-13a. Petitioner hired 175 of the 849 male applicants for those jobs, but hired none of the 28 women who applied. *Id.* at 13a. Several female applicants testified that petitioner's interviewer told them the jobs were not suitable for women, and petitioner's job descriptions listed among the qualifications that the applicant be a man. *Id.* at 14a-18a. The record also showed that many of petitioner's hiring criteria were unwritten, subjective, and not applied equally to men and women. *Id.* at 19a-23a.

In 1982, OFCCP conducted a compliance review of petitioner. As a result of that review, OFCCP notified petitioner in January 1983 of twelve points of deficiency in its compliance with the Executive Order. Pet. App. 25a-26a, 57a-58a. After meeting six times, the parties resolved eleven of the deficiencies. They were unable, however, to resolve OFCCP's allegation that petitioner intentionally failed to hire women into entry level positions in 1981 because of their gender. Consequently, OFCCP initiated administrative enforcement

proceedings against petitioner on March 31, 1987. *Id.* at 6a.

After pretrial discovery and a twelve-day hearing, Pet. App. 9a, an administrative law judge (ALJ) issued a Recommended Decision and Order on May 30, 1991. *Id.* at 56a-82a. The ALJ concluded that petitioner engaged in a pattern or practice of sex discrimination by failing to hire women for entry level jobs in 1981, *id.* at 74a, and recommended awarding each of the 28 female applicants $2000 in back pay without prejudgment interest. *Id.* at 78a. With respect to timeliness, the ALJ held that "[t]he issue of limitations raised for the first time in the Company's Brief, does not apply to agency complaints following compliance reviews." *Id.* at 57a n.2.

Both parties filed exceptions with the Secretary, Pet. App. 43a, who issued a Decision and Remand Order on June 15, 1994. *Id.* at 42a-55a. The Secretary adopted the ALJ's finding of sex discrimination in hiring, *id.* at 44a, but rejected the recommended relief. The Secretary instead remanded to the ALJ to recalculate back pay, and ordered debarment if petitioner failed to comply with a final back pay order. *Id.* at 49a-55a. In a Recommended Decision and Order on Remand dated July 27, 1995, an ALJ awarded a total of $180,000 in back pay and interest to the 28 female applicants. J.A. A1344-A1351. On November 9, 1995, the Secretary issued a Final Decision and Order summarily adopting the ALJ's back pay calculation. Pet. App. 40a-41a. None of these last three administrative decisions addressed the limitations issue.

On December 28, 1995, petitioner filed a petition in the district court, seeking review of the Secretary's Final Decision and Order pursuant to the APA. Pet. App. 7a. Ruling on cross-motions for summary judg-

ment, the district court affirmed the Secretary's final decision in all respects. *Id.* at 6a-39a. As pertinent here, the district court rejected as "without merit" petitioner's argument that the administrative proceeding was time-barred under 41 C.F.R. 60-1.21 because OFCCP's administrative complaint was filed more than 180 days after petitioner's 1981 hiring decisions. Pet. App. 26a-27a. As the court explained, Section 60-1.21 "refers solely to individual complaints filed with the OFCCP," and has no application to enforcement proceedings commenced by OFCCP. *Id.* at 27a. The court noted that a separate regulation, 41 C.F.R. 60-1.26, sets the procedure for initiating such enforcement actions. That regulation, the court observed, "provides no statute of limitations." Pet. App. 27a.

In an unpublished summary order, the court of appeals affirmed in part, vacated in part, and remanded for further consideration of certain aspects of the back pay award. Pet. App. 1a-5a. "For substantially the reasons stated by the district court in its detailed opinion," the court of appeals affirmed the portion of the district court's judgment rejecting petitioner's claim "that the administrative action was untimely when filed." *Id.* at 2a-3a.

ARGUMENT

The unpublished decision of the court of appeals correctly decided the timeliness question and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly affirmed the district court's determination that the 180-day time limit in 41 C.F.R. 60-1.21 does not apply to the filing of an administrative complaint by OFCCP to initiate formal

enforcement proceedings against a contractor.[3] Section 60-1.21, entitled "Filing complaints," provides that "[c]omplaints shall be filed within 180 days of the alleged violation unless the time for filing is extended by the Director [of OFCCP] for good cause shown." It is followed immediately by regulations specifying where a private party may file a complaint, 41 C.F.R. 60-1.22, the required contents of such a complaint (including the "name, address, and telephone number of the complainant" and signature of "the complainant or his/her authorized representative"), 41 C.F.R. 60-1.23, and the steps to be taken by OFCCP in responding to a complaint. 41 C.F.R. 60-1.24. These regulations plainly apply to informal complaints filed with OFCCP by persons aggrieved by a contractor's non-compliance with Executive Order No. 11,246, not to formal complaints filed by OFCCP with the Office of Administrative Law Judges to initiate an administrative adjudication.

Separate regulations—without time limits—address OFCCP's initiation of formal enforcement proceedings:

> If the investigation of a complaint, or a compliance review, results in a determination that the Order, equal opportunity clause or regulations issued pursuant thereto, have been violated, and the violations

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[3] Petitioner argued to the ALJ and the courts below that 41 C.F.R. 60-1.21 applies directly to OFCCP's filing of an administrative complaint, although it failed to make that argument in its exceptions to the Secretary. Petitioner shifted its argument slightly in the court of appeals, and shifted it again in its petition to this Court. Petitioner now contends that Section 60-1.21's 180-day limitations period for employee complaints to OFCCP should be "borrowed" and applied to administrative enforcement proceedings such as the instant case. See pp. 8-9, *infra*.

> have not been corrected in accordance with the conciliation procedures in this chapter, OFCCP may institute an administrative enforcement proceeding to enjoin the violations, to seek appropriate relief (which may include affected class and back pay relief), and to impose appropriate sanctions, or any of the above.

41 C.F.R. 60-1.26(a)(2). In addition, the rules of practice for administrative proceedings under Executive Order No. 11,246, published at 41 C.F.R. 60-30, authorize the Solicitor of Labor, on behalf of OFCCP, "to institute enforcement proceedings by filing a complaint and serving the complaint upon the contractor which shall be designated as the defendant." 41 C.F.R. 60-30.5(a). Those rules impose no time limit on the initiation of administrative enforcement proceedings under the Executive Order. The court of appeals was therefore correct in upholding the timeliness of OFCCP's enforcement action here.

2. Petitioner now contends (Pet. 8-9, 15-17) that the decision below conflicts with decisions of this Court borrowing limitations periods from analogous state or federal laws when a federal statute contains no limitations period of its own. Petitioner, however, did not rely on this argument below. Before the ALJ and district court, petitioner argued solely for the direct application of 41 C.F.R. 60-1.21. Before the court of appeals, petitioner suggested only as an afterthought that Section 60-1.21 should apply here by analogy. See Pet. C.A. Br. 2, 24-25. Neither the district court nor the court of appeals addressed any type of borrowing argument. See Pet. App. 2a-3a, 26a-27a. This Court generally declines to consider arguments not addressed below. *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).

In any event, the decision below is entirely consistent with this Court's jurisprudence. Particularly analogous is the Court's decision in *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977), that no statute of limitations applies to suits brought by the EEOC to enforce Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The regulatory enforcement scheme for Executive Order No. 11,246 is largely parallel to the statutory enforcement scheme for Title VII. Both schemes authorize the relevant agency to investigate, either in response to an outside complaint or on its own initiative, whether an employer has engaged in unlawful discrimination. Compare 41 C.F.R. 60-1.20 to 60-1.24, with 42 U.S.C. 2000e-5(b). Both require the agency to notify the employer of any finding of discrimination and to attempt to resolve the violation through conciliation. Compare 41 C.F.R. 60-1.20(b), 60-1.24(c)(2), and 60-1.33, with 42 U.S.C. 2000e-5(b). Only upon the failure of such conciliation efforts may the agency commence enforcement proceedings, OFCCP by filing an administrative complaint, 41 C.F.R. 60-1.26(a)(2), and the EEOC by commencing an action in district court. 42 U.S.C. 2000e-5(f)(1). And while both Executive Order No. 11,246 and Title VII specify a 180-day period for the filing of private complaints with the relevant agency (see 41 C.F.R. 60-1.21; 42 U.S.C. 2000e-5(e)(1)), neither prescribes a limitations period for the initiation of agency enforcement actions against employers. See pp. 3-4, *supra*; *Occidental Life*, 432 U.S. at 359-366.

In *Occidental Life*, the Court rejected essentially the same arguments petitioner makes here. First, the Court declined to interpret a 180-day period elsewhere in Title VII, 42 U.S.C. 2000e-5(f)(1) (permitting a private right of action if the EEOC has not acted on a

charge within 180 days), as a limitation on the agency's power to bring its own enforcement action. 432 U.S. at 360-366. Second, the Court declined to superimpose a borrowed state statute of limitations on Title VII's "integrated, multistep enforcement procedure." 432 U.S. at 359. As the Court explained, "[s]tate limitations periods will not be borrowed if their application would be inconsisent with the underlying policies of the federal statute." *Id.* at 367. Here, as in the Title VII context, the adoption of a limitations period could interfere with the duty of the federal agency to "investigat[e] claims of employment discrimination and settl[e] disputes, if possible, in an informal, noncoercive fashion." *Id.* at 367-368.[4]

3. Citing *Volvo GM Heavy Truck Corp.* v. *United States Department of Labor*, 118 F.3d 205 (4th Cir. 1997), petitioner contends (Pet. 7-8, 17-18) that the Court should grant certiorari to resolve the "uncertainty" over what limitations period, if any, applies to enforcement actions under Executive Order No. 11,246. In *Volvo*, OFCCP initiated an administrative enforcement proceeding against Volvo, alleging that Volvo had

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[4] Petitioner (Pet. 16) attempts to distinguish *Occidental Life* on the ground that "unlike Title VII, which imposes strict time limits for the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator * * * EO 11246 as construed below has no such time limits." In fact, both Title VII and the Executive Order regulations provide a 180-day time limit for the filing of private complaints with the agency. And while Executive Order No. 11,246 lacks the provision in Title VII requiring notice to the employer within ten days after a charge is filed (42 U.S.C. 2000e-5(b)), petitioner does not argue that OFCCP fails to provide timely notice to contractors. Petitioner also does not contend that it lacked timely notice of OFCCP's view of its 1981 hiring practices.

violated the Executive Order several years earlier by discriminating against female job applicants. 118 F.3d at 206-207. Volvo sued the Department of Labor in federal district court, alleging, *inter alia*, that OFCCP's enforcement action was barred by a state statute of limitations. *Id.* at 207. The district court dismissed the contractor's suit for failure to exhaust administrative remedies, and the court of appeals affirmed without reaching the merits of the statute of limitations issue. *Id.* at 208-215. Thus, the court of appeals' unpublished decision in this case is in no tension with the Fourth Circuit's holding in *Volvo*.

OFCCP "acknowledged * * * uncertainty" (Pet. 7) in *Volvo* only insofar as it maintained that exhaustion of administrative remedies would not be futile because the Secretary of Labor had not finally decided what limitations period, if any, applies to administrative enforcement proceedings under the Executive Order. 118 F.3d at 213. Whether the Secretary herself will apply a limitations period to her own enforcement actions is distinct from whether a court should impose limitations in the absence of any regulatory or statutory language supporting such an imposition. Uncertainty in the former does not justify judicial action in the latter.[5]

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[5] Moreover, even assuming that some uncertainty remains, the lack of a final decision by the Secretary of Labor on the limitations issue is a reason for this Court to deny review, so that the agency may be given the first opportunity to address those issues based on its specialized expertise. See, *e.g.*, *FEC* v. *Akins*, 524 U.S. 11, 29 (1998); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 93-95 (1943). Certainly, review should not be granted in a case where petitioner did not present any limitations argument, much less the one contained in its petition, to the Secretary in its exceptions to the ALJ's recommended decision. See p. 7 n.3, *supra*.

4. Finally, petitioner argues that if no limitations period applies, the Secretary will have unfettered discretion to bring long-delayed enforcement proceedings, and "investigations that began five, ten or fifty years after the last act of discrimination would be timely." Pet. 17. That concern is exaggerated, and is not presented on the facts of this case. As this Court observed in *Occidental Life*, the "absence of inflexible time limitations on the bringing of lawsuits will not * * * deprive defendants * * * of fundamental fairness or subject them to the surprise and prejudice that can result from the prosecution of stale claims." 432 U.S. at 372. Under Title VII, defendants receive notice and an opportunity for informal resolution before litigation begins, and federal courts may restrict or even deny back pay relief if a defendant is actually prejudiced by agency delay. *Id.* at 373. Similarly under Executive Order No. 11,246, agency action is constrained by judicial review under the APA. See 5 U.S.C. 706(1).

Moreover, petitioner neither asserted nor proved below that OFCCP's alleged delay in filing a formal administrative complaint prejudiced petitioner's defense. Indeed, there was no such prejudice in this case. The disputed hiring occurred in 1981. OFCCP conducted a compliance review in 1982, and notified petitioner of its findings in January 1983. OFCCP and petitioner then engaged in extensive conciliation efforts. After those efforts proved unsuccessful on one out of twelve issues, OFCCP filed a formal complaint in March 1987. Petitioner does not claim that it was unfamiliar with any of the allegations contained in OFCCP's complaint at the time the complaint was filed. Thus, OFCCP's claim was not "stale," and the filing of its complaint did not subject petitioner to "surprise and prejudice." *Occidental Life*, 432 U.S. at 372.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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