No. 08-1048

In the Supreme Court of the United States

LYNDA MARQUARDT, PETITIONER

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a federal agency that has issued a final decision denying on the merits an employment discrimination complaint without addressing the timeliness of the administrative complaint may raise a timeliness defense after petitioner brings suit in federal district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the *Federal Reporter*, but is reprinted in 294 Fed. Appx. 112. The opinion of the district court (Pet. App. A5-A20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2008. A petition for rehearing was denied on November 18, 2008 (Pet. App. A3-A4). The petition for a writ of certiorari was filed on February 13, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* as amended, prohibits discrimination in federal employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e-16(a). The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, similarly prohibits discrimination in federal employment on the basis of age. 29 U.S.C. 633a(a). Federal employees who believe that they have been discriminated against must consult an Equal Employment Opportunity (EEO) counselor "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. 1614.105(a)(1). If the matter is not resolved within 30 days, subject to a 60-day extension upon the employee's agreement, the EEO counselor shall provide notice of the right to file a formal discrimination complaint with the employing agency within 15 days of receipt of that notice. 29 C.F.R. 1614.105(d) and (e), 1614.106(a) and (b).[1]

"Prior to a request for a hearing in a case, the agency shall dismiss an entire complaint" that, *inter alia*, (i) "fails to comply with the applicable time limits contained in §§1614.105, 1614.106 * * * unless the agency extends the time limits in accordance with § 1614.604(c)";

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[1] Under both the ADEA and Title VII, a claimant may invoke the EEO administrative process and then sue in federal court if dissatisfied with the results. 29 U.S.C. 633a(b) and (c); 42 U.S.C. 2000e-16(b) and (c). Alternatively, under the ADEA, the claimant may bring suit directly in federal court so long as, within 180 days of the alleged discriminatory act, he provides the Equal Employment Opportunity Commission (EEOC) with notice of his intent to sue at least 30 days before commencing suit. 29 U.S.C. 633a(c) and (d). Petitioner did not invoke the alternative procedure in this case.

or (ii) "is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint." 29 C.F.R. 1614.107(a)(2) and (3). The regulations further provide that "[t]he time limits in this part are subject to waiver, estoppel and equitable tolling." 29 C.F.R. 1614.604(c).

2. Petitioner is a 62-year-old female who has been employed by the Dallas regional office of the Department of Health and Human Services (the agency) since 1991. Pet. App. A7. Petitioner applied for one of three newly created Regional Coordinator positions for the Dallas office announced in August 2003. *Id*. at A8. After the application and interview process had been completed, the Dallas Division Director informed candidates for that position that no selection would be made at that time. *Ibid*. An April 20, 2004 email to all employees announced the names of the new Regional Coordinators for all regions hiring except Dallas, where the position would be filled later in the year. *Ibid*.

On November 19, 2004, the agency readvertised the Regional Coordinator positions for the Dallas office. Pet. App. A8. Petitioner applied again. *Ibid*. The agency hired the top three scorers based on its interview-panel rating process—two males and one female—to fill the three Regional Coordinator positions. *Ibid*.; Gov't C.A. Br. 10-11. On January 25, 2005, the Dallas Division Director informed petitioner that she had not been selected, and that if she disagreed with the decision, she could pursue EEO or union channels. Pet. App. A8.

In April 2005, petitioner initiated contact with an EEO counselor by filing an informal complaint alleging age and gender discrimination. Pet. App. A8-A9. Peti-

tioner subsequently filed a formal EEO complaint with the agency on May 31, 2005.[2] Petitioner did not request a hearing before an administrative judge.

On May 30, 2006, the agency's EEO office issued a final decision on the merits, concluding that petitioner "was not discriminated against based on gender or age." Pet. App. A21. The agency's decision stated that "[t]he entire record has been reviewed and considered." *Ibid.* The agency did not address timeliness.[3]

3. On May 18, 2006, twelve days before the agency had issued its final decision, petitioner brought suit against respondent in federal court for discriminatory failure to promote her, in violation of Title VII and the ADEA. Pet. 4.

The district court granted summary judgment for respondent and dismissed petitioner's discrimination claims as untimely. Pet. App. A5-A20. The court noted that federal employees "must initiate contact with a[n] [EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action," 29 C.F.R. 1614.105(a)(1), and that the failure to initiate contact within the required period will bar subsequent review of the claim in federal court absent

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[2] The district court noted that the record before it did not contain a copy of petitioner's formal EEO complaint. But, as the court also noted, the cover letter to the final agency decision contains the notation "DOF: 5-31-05." Pet. App. A9.

[3] Petitioner filed a second EEO complaint, alleging that the agency retaliated against her by failing to select her for a subsequent Regional Coordinator opening in October 2006. Pet. App. A9-A10. The district court rejected petitioner's retaliation claim on the merits (*id.* at A14-A20), and the court of appeals affirmed that decision (*id.* at A1-A2). Petitioner's retaliation claim is not at issue here.

waiver, estoppel, or equitable tolling. Pet. App. A10-A11. The court found that it was "undisputed" that petitioner received notice via email on April 20, 2004, that the first position was not going to be filled and learned on January 25, 2005, that she had not been selected for the second position. *Id.* at A11. The court found that petitioner nevertheless did not contact an EEO counselor any earlier than April 1, 2005—"well past the 45-day deadline." *Ibid.*

The court rejected petitioner's argument that the agency had waived a timeliness objection. Pet. App. A11-A12. The court reasoned that, under controlling circuit precedent, the agency must make a specific finding that the EEO submission is timely in order to waive a timeliness objection. *Ibid.* (citing, *e.g.*, *Rowe* v. *Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992)). The court concluded that because the agency did not find petitioner's complaint timely, the agency did not waive an objection based on the 45-day requirement in her case. *Id.* at A12.

The district court also rejected petitioner's argument for tolling under either 29 C.F.R. 1614.105(a)(2) or general equitable tolling principles. Pet. App. A12-A13. Although petitioner argued that the agency did not inform her of the 45-day filing deadline and that the agency had a practice of applying that deadline "loosely," the court found that petitioner "does not dispute" that details of the EEO process—including the 45-day limitation period—were posted on an accessible agency intranet site and contained in the Dallas office's employee manual. *Id.* at A11-A13. Under those circumstances, and the lack of an affirmative inquiry on petitioner's part, the court concluded that tolling was unwarranted. *Id.* at A13.

4. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. A1-A2. It noted that petitioner "appears to acknowledge that her argument for timeliness is foreclosed by *Rowe* v. *Sullivan*, 967 F.2d 186 (5th Cir. 1992), on which the district court properly relied." *Id.* at A2.

ARGUMENT

Petitioner argues that an agency waives a timeliness defense to a federal court action when it decides an EEO complaint without addressing timeliness. Although the courts of appeals have disagreed on that issue, the result reached by the courts below is correct. In any event, this case does not present an appropriate vehicle to resolve that disagreement. Once petitioner filed her federal court action (12 days *before* the agency issued its decision), EEOC regulations required the agency to dismiss her pending EEO complaint. 29 C.F.R. 1614.107(a)(3). Because the agency appears to have lacked authority to issue its final decision, that decision cannot form the basis of a timeliness waiver even under petitioner's preferred standard. Further review is therefore unwarranted.

1. There is no question in this case that petitioner did not timely seek EEO counseling. The agency nevertheless investigated petitioner's complaint and ultimately issued a decision rejecting her discrimination claim without addressing timeliness. The courts of appeals are in agreement that an agency does not waive its timeliness defense to a federal court action merely by accepting and investigating petitioner's claim of discrimination. See, *e.g.*, *Horton* v. *Potter*, 369 F.3d 906, 911 (6th Cir. 2004) (collecting cases). As petitioner points out (Pet. 6-8), however, the courts of appeals disagree

about when agency *adjudication* of the EEO complaint triggers waiver of the timeliness defense.

In the Fifth Circuit, the agency "must make a specific finding that the claimant's submission was timely" in order to waive a timeliness objection. *Rowe* v. *Sullivan*, 967 F.2d 186, 191 (1992); see Pet. App. A2. By contrast, the Seventh Circuit's rule (applied or endorsed by several other courts of appeals) is 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." *Ester* v. *Principi*, 250 F.3d 1068, 1071-1072 (2001); see, *e.g.*, *Horton*, 369 F.3d at 911 ("waiver occurs when the agency decides the complaint on the merits without addressing the untimeliness defense"); *Bruce* v. *United States Dep't of Justice*, 314 F.3d 71, 74-75 (2d Cir. 2002) (citing *Ester* with approval as "good law" albeit inapplicable in that case); *Bowden* v. *United States*, 106 F.3d 433, 438-439 (D.C. Cir. 1997) ("if [agencies] not only accept and investigate a complaint, but also decide it on the merits—all without mentioning timeliness— their failure to raise the issue in the administrative process may lead to waiver of the defense when the complainant files suit"); *cf. Hall* v. *Department of the Treasury*, 264 F.3d 1050, 1061 (Fed. Cir. 2001) (applying *Ester* in Merit Systems Protection Board case). The Ninth Circuit, meanwhile, has stated that "[t]he mere receipt and investigation of a complaint does not waive objection to a complainant's failure to comply with the original filing time limit *when the later investigation does not result in an administrative finding of discrimination*." *Boyd* v. *USPS*, 752 F.2d 410, 414 (1985) (emphasis added). That view could be characterized as a compromise approach, because the last clause implies that an administrative finding of discrimination

could waive the timeliness defense (see *Ester*, 250 F.3d at 1071).

In the government's view, the compromise approach attributed to *Boyd*—that an agency waives a subsequent timeliness defense by not addressing timeliness in its final decision if, but only if, it makes a specific finding of discrimination—best reconciles the different interests at stake. Like the Fifth Circuit's rule, the compromise approach conserves limited administrative and judicial resources and protects the public fisc against untimely claims. For example, an agency might determine in a particular case that denying an EEO complaint on the merits is more efficient or worthwhile than addressing a factbound timeliness issue. Cf. *Pearson* v. *Callahan*, 129 S. Ct. 808, 818 (2009) (requiring adjudication of all issues "sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case"). An agency should not be penalized for investigating and denying a discrimination claim on the merits, rather than dismissing it as untimely at the outset. See *Rowe*, 967 F.2d at 191 ("agencies may inadvertently overlook timeliness problems and should not thereafter be bound") (quoting *Henderson* v. *United States Veterans Admin.*, 790 F.2d 436, 441 (5th Cir. 1986)). Foreclosing the agency in those circumstances from thereafter asserting a timeliness defense to a civil action could discourage it from investigating certain discrimination claims and instead cause it to dismiss more cases as untimely—thereby undermining the goal of ferreting out illegal discrimination in the federal workplace.

At the same time, where the agency has made a finding of discrimination, that would rarely be the more efficient or easier route. The agency's finding of discrimi-

nation can thus be taken as an implicit waiver of any untimeliness argument. The compromise approach also mitigates the Seventh Circuit's concerns about the administrative process and prejudice to the plaintiff. See *Ester*, 250 F.3d at 1072-1073. Waiver after a finding of discrimination would eliminate unfair surprise to a plaintiff who had relied on the agency's determination that her claim was meritorious. A plaintiff whose claim was denied on the merits, however, has no such reliance interest.

Given that the agency's final decision here found no discrimination, the courts below reached the correct result in concluding that the agency had not waived the timeliness defense. Accordingly, this Court's review is unnecessary.

2. Irrespective of which legal rule is correct, this case does not present an appropriate vehicle for resolving the conflict. Petitioner filed her district court action on May 18, 2006. As of that date, the agency had not taken any final action on petitioner's administrative complaint. Under EEOC regulations, given that petitioner had not requested a hearing and that 180 days had passed since the filing of her EEO complaint, the agency was required to dismiss the complaint. See 29 C.F.R. 1614.107(a)(3) ("Prior to a request for a hearing in a case, the agency *shall* dismiss an entire complaint * * * [t]hat is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint.") (emphasis added); cf. 29 C.F.R. 1614.409 (filing a civil action

"shall terminate Commission processing of the appeal").[4] The regulation's plain text is mandatory and serves sensible purposes. See *Menoken* v. *James*, EEOC Request No. 05A30918, 2005 WL 38762, at *3 (Jan. 3, 2005). Dismissal in those circumstances avoids "wasting resources, and creating the potential for inconsistent or conflicting decisions," and gives "due deference to the authority of the federal district court." *Smith* v. *Potter*, EEOC Request No. 05A30021, 2002 WL 31888936, at *1 (Dec. 18, 2002); see *Stromgren* v. *Derwinski*, EEOC Request No. 05891079, 1990 WL 711560 (May 7, 1990).

Consequently, the agency lacked authority to issue its decision on May 30, 2006—12 days *after* petitioner had filed in district court. That agency decision, at least for present purposes, appears to be without legal effect. It therefore cannot trigger a waiver of a timeliness defense in federal court under any of the potentially applicable standards—including the one advocated by petitioner—all of which premise waiver on a valid agency adjudication. As noted above, there is no disagreement that any investigation and processing short of a final agency decision cannot constitute a waiver of a timeliness defense. See pp. 6-7, *supra*. Accordingly, regardless of which standard applies, the agency in this case did not, by operation of its decision, waive the right to raise the untimeliness defense. This case is thus a de-

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[4] As the EEOC has recognized, Section 1614.409 contains a typographical error, referencing civil actions under Sections "1614.408 or 1614.409" instead of Sections 1614.40*7* and 1614.40*8*. The regulation thus applies to civil actions predicated on Title VII or the ADEA. See *Menoken* v. *James*, EEOC Request No. 05A30918, 2005 WL 38762, at *3 (Jan. 3, 2005). Once the EEOC is divested of authority over the matter, the agency EEO office is similarly divested of authority to further process the complaint.

cidedly poor vehicle to resolve the circuit conflict on the waiver standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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