

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 AT&T CORPORATION, :

4 Petitioner :

5 v. : No. 07-543

6 NOREEN HULTEEN, ET AL. :

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8 Washington, D.C.

9 Wednesday, December 10, 2008

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:06 a.m.

14 APPEARANCES:

15 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of
16 the Petitioner.

17 LISA S. BLATT, ESQ., Assistant Attorney General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the United States, as amicus curiae, supporting the
20 Petitioner.

21 KEVIN RUSSELL, ESQ., Bethesda, MD.; on behalf of the
22 Respondents.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 07-543, AT&T Corporation v. Hulteen.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS
ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

When Judge Wood on the Seventh Circuit addressed precisely the same issue that's before this Court, I think she correctly observed that the distinction between an ongoing violation that arises with each new use of a seniority system and the present effect of a past discrimination is a distinction that is subtle at best.

But it is the line that this Court has asked the lower courts to draw, and I think the majority of those courts have actually drawn that line appropriately, although you could actually probably argue that it's more a scatter plot than it is a line. And I think it's a scatter plot that essentially looks to three primary factors in evaluating whether or not this is a case that is more like Evans and Lorange and

1 Ledbetter, or a case that is more like Bazemore.

2 And those three factors are the stale nature
3 of the claims, whether or not there is a seniority at
4 stake, and whether or not the employees have fair and
5 adequate notice at the time of the action of the
6 employer.

7 Let's look at the staleness of the claim.
8 In this particular case, we are talking about maternity
9 leaves that were taken by -- taken by the Respondents
10 between 1968 and 1976. The information that's available
11 to AT&T today is simply whether or not these particular
12 individuals were paid for periods of time. There is
13 nothing more than that.

14 We have no way of knowing whether or not
15 these were maternity leaves or not maternity leaves,
16 whether these were leaves to go to school, leaves to
17 take care of parents, or leaves for any other particular
18 purpose.

19 JUSTICE GINSBURG: But at the time -- at the
20 time of the original reduction of credit, was there any
21 right claimed that any of these women had? I mean,
22 nothing had happened to them except there was a
23 bookkeeping entry. They wouldn't be hurt until they
24 sought retirement or sought some other benefit that
25 increased seniority would give them. But could they

1 have come into court just when on the books of AT&T they
2 were docked X number of days? Nothing has happened as a
3 consequence of that.

4 MR. PHILLIPS: Justice Ginsburg, they not
5 only could have, but they did. If you look at the
6 Eighth Circuit's decision -- and, indeed, Respondents in
7 this case did -- in the Communications Workers case out
8 of the Eighth Circuit, which is 602 F.2d 304, they
9 specifically alleged that one of the Bell operating
10 companies, one of the subsidiaries, had, in fact,
11 refused to grant these -- these exact service credits,
12 sued on that basis pre-PDA, and alleged that they were
13 entitled to relief.

14 The Eighth Circuit in that case looked at
15 this Court's decision in Gilbert and looked at this
16 court's decision in Satty and said specifically this
17 case is more like Gilbert than it is like Satty, but
18 never remotely questioned that that was an actionable
19 claim at that point in time. And, candidly, it seems to
20 me clear that that's an actionable claim. Because there
21 -- there is very little that is quite as critical in
22 this process -- in the employment relationship as
23 seniority.

24 And -- and we are not talking about simply
25 benefits seniority here. We are talking about

1 competitive seniority. So whether you have a -- a
2 better claim to a cushier job or -- or to better working
3 conditions, all of those are determined on the basis of
4 -- of seniority, which is being decided on an
5 individualized basis.

6 JUSTICE GINSBURG: They haven't applied in
7 any of those situations yet. At -- at the -- at the
8 point when the person returns from leave and is docked a
9 certain number of days, it hasn't been applied to any of
10 the situations you mentioned. I grant you the case
11 would be totally ripe if there was a better job to bid
12 for, if it was an early retirement opportunity. But
13 here there was nothing, nothing to be done.

14 MR. PHILLIPS: Well, Justice Ginsburg, I --
15 I question the premise that there was nothing to be
16 done. I think the average person told that they have
17 less seniority today than they had yesterday, and if
18 they were told that on the basis of -- of gender-based
19 discrimination or race-based discrimination, would say:
20 I am entitled to go to court today.

21 Not only do I think that that is the way
22 most people would react to it, but the reality is if you
23 look at the way the litigation arose in the Eighth
24 Circuit case that I alluded to earlier, these very --
25 the same union here made exactly that claim prior to the

1 passage of the PDA. So the notion that the employees,
2 one, didn't have notice, they clearly did have notice;
3 and, two, didn't have an incentive to act, they clearly
4 did have an incentive to act.

5 And I think this is not much different from
6 what the Court said in Ricks, which is that obviously
7 you have more of an incentive when you feel the true
8 pain of a -- of a discriminatory act, assuming the act
9 was in -- was, in fact, discriminatory, but the
10 obligation to respond more -- to respond sooner remains
11 on the plaintiff.

12 And, again to go back to the point I was
13 trying to make initially, these are all claims that
14 arose -- these are all actions taken between 1968 and
15 1976, and one of the --

16 JUSTICE GINSBURG: But then you have to, I
17 think, recognize that there's a big difference between
18 evidence when -- who is told: Goodbye; you got married;
19 you have to resign, a definite act that had immediate
20 consequences; and this where there -- there is a
21 potential for future consequences, but no immediate
22 consequence of the kind that existed in your model case,
23 Evans.

24 MR. PHILLIPS: I mean, Justice Ginsburg,
25 there is -- there is no question that the impact in

1 Evans is -- is stronger than the impact here. I will
2 readily concede that. But what I won't concede is that
3 the importance of seniority is so far down the pecking
4 order or so de minimus in its impact that it would be
5 reasonable to assume that the average employee told
6 that, I'm am taking away your seniority on the basis --
7 on the basis of your race would then sit back and say:
8 I'm not going to do anything; I'm going to wait until
9 the impact of that is felt.

10 To the contrary, you would expect, given the
11 -- the centrality of seniority as a term of employment,
12 that any employee under those circumstances would
13 respond, you know, almost immediately under those
14 circumstances.

15 The -- the second factor in this case that
16 -- that it seems to me this Court has relied upon
17 significantly in the prior decisions that have come out
18 on the side of not allowing this kind of litigation to
19 go forward is we are talking about a seniority system
20 here. And the -- as I said a minute ago, it's not just
21 the rights of the individual and what benefits she might
22 be entitled to. The seniority system obviously affects
23 the rights of all members of the -- of the seniority
24 plan and all of the pension plan and the entire system
25 that the seniority operates on. And so there are

1 third-party interests that are involved here.

2 And, again, both Congress and this Court's decisions
3 have consistently recognized that when that situation
4 arises, the resolution of the question ought to be to
5 say, no, these are present effects of past
6 discriminatory acts; we should be loath to try to
7 interfere with those -- with that seniority scheme under
8 these circumstances.

9 And then the third factor that it seems to
10 me the Court has been concerned about -- and it's one we
11 have been discussing -- which is the -- the -- you know,
12 the adequacy of the notice. Were the employees put on
13 notice at the time that actions were being taken? Now,
14 we can quarrel about how serious the -- the actions
15 were, how detrimental they might have been. But it
16 seems to me there is no question that the -- that the
17 injury here is real, and that the average employee being
18 told that you are being deprived of seniority on -- on a
19 race-based or sex-based or any other condition that is
20 protected would act immediately.

21 Now, it seems to me that the only argument
22 that the -- that the Respondents offer on the other side
23 -- and it's almost a mantra-like exposition by them and
24 it was certainly the basis for the Ninth Circuit and I
25 think it's where the mistake arises -- is this claim,

1 this is a -- this is a facially discriminatory policy.
2 And their argument is if it's facially discriminatory,
3 then you can apply it now and all the reasons why this
4 Court has not applied these -- these kinds of claims in
5 the past in Evans and Lorange and Ledbetter is -- is --
6 are off the hook in this circumstance.

7 But the truth is this is not a facially
8 discriminatory policy. In the first place, this exact
9 same policy was looked at in "SAH-tee" or "SAT-ee." I
10 don't know exactly how to pronounce it. And the Court
11 said these kinds of arrangements where you don't give
12 service credit to people who take pregnancy leave is not
13 facially discriminatory.

14 JUSTICE GINSBURG: That's was when Gilbert
15 was prevailing. We would not regard it that way today.

16 MR. PHILLIPS: Well, I don't know whether it
17 would be regarded as facially discriminatory today. I
18 think it would be regarded as illegal today. Whether it
19 would be facially discriminatory I think is a -- is a
20 trickier question, because again it seems to me that --
21 that the other side relies heavily on the statement in
22 Lorange about a facially discriminatory plan.

23 But what the Court described as a facially
24 discriminatory plan in that day was that it was -- in
25 that case, was a situation where every day a male worker

1 is credited with a full day of work for a day's -- a
2 day's effort, and a woman is credited with half a day's
3 work for a day's effort.

4 And -- and the Court said, quite rightly,
5 that's a facially discriminatory plan. Well, we don't
6 have anything like that in this case. This plan was
7 changed in the wake of the passage of the PDA to bring
8 it completely in compliance. So the plan, as it
9 operates today, is -- is not only not facially
10 discriminatory, it is in no way discriminatory.

11 JUSTICE BREYER: Do you -- what about -- I'm
12 trying to work with this distinction where I agree with
13 you that it's hard to see exactly what it is. But if I
14 look at Bazemore, I think there we have a large number
15 of employees. And if you look at a complicated thing, a
16 salary structure, earlier, you see that that salary
17 structure systemically paid black people less than white
18 people. And at the time, for whatever reasons -- there
19 wasn't a statute -- we assumed that that was lawful at
20 the time.

21 MR. PHILLIPS: Right.

22 JUSTICE BREYER: Then later it turns out
23 that they are keeping that salary structure, although
24 not for racially motivated reasons. They are keeping it
25 simply because that's what it was. And the Court says

1 you've taken that complex structure, and you are
2 administering it now, and the administration of it now
3 is what is unlawful.

4 Then, look at your case. We had a
5 complicated structure involving seniority, really. And
6 part of that old seniority system was this rule which
7 was legal at the time. It is no longer legal.

8 Now, we move that structure over until now,
9 and we see we are administering the same complex
10 structure today in the same kind of way that was at
11 issue at Bazemore. It's a complicated set of rules that
12 you have to apply today in order to see who is entitled
13 to what, just as they did that in Bazemore. So I began
14 to think: Doesn't that on a key matter look very much
15 like Bazemore? What is your response?

16 MR. PHILLIPS: Justice Breyer, I -- I -- in
17 looking at this case, I have long thought of it as kind
18 of an M.C. Escher picture, where you look at it from one
19 direction and it looks one way, and then you turn and
20 you look at it the other way and it looks completely
21 different to you.

22 But I think the right answer to -- to your
23 analysis is that the way to look at Bazemore is that
24 every day after the statute was enacted every employee
25 who showed up to work who was black was paid less than

1 every employee who showed up to work who was white. And
2 that, it seems to me, as the Court said in Bazemore
3 unanimously and without a whole lot of fanfare, is just
4 something simply illegal under Title VII under those
5 circumstances.

6 JUSTICE SOUTER: Yes, but why can't you make
7 exactly the same kind of analysis here? People here are
8 not showing up for work. They are staying home and
9 getting retirement benefits. And every day a person who
10 was out for 90 days because of a physical illness other
11 than pregnancy is getting a retirement benefit with an
12 extra dollar. And everybody who was out -- who was out
13 for 90 days for maternity is only getting an extra 33
14 cents. And why isn't the payment of the retirement
15 benefit exactly on par with the payment of the salary in
16 Bazemore?

17 MR. PHILLIPS: I mean, I think the answer to
18 that, Justice Souter, is that's not -- that's certainly
19 not an implausible way of trying to look at this
20 problem, but if you look at the language of this Court
21 two terms ago in Ledbetter, and I'll quote it for you:
22 "The fact that pre-charging period discrimination
23 adversely affects the calculation of a neutral factor
24 like seniority" -- which is what we are talking about
25 here -- "that is used in determining future pay" --

1 which is the benefits from this program -- "does not
2 mean that each new paycheck constitutes a new violation
3 and restarts the EEOC charging period."

4 JUSTICE SOUTER: Well, do you see Ledbetter
5 in effect as overruling Bazemore?

6 MR. PHILLIPS: No, I think Ledbetter deals
7 with Bazemore in the context of a -- of a true seniority
8 system and an arrangement in which what you are looking
9 at -- because our case is a fortiori from Evans and
10 Ledbetter because, remember, we are talking about a
11 situation where what we did at the time, in our
12 judgment, was perfectly legal.

13 JUSTICE SOUTER: And at the time, in
14 Bazemore, that the private employers discriminated for
15 racial purposes, that was not unconstitutional or
16 illegal, either.

17 MR. PHILLIPS: Right, I understand that, but
18 --

19 JUSTICE GINSBURG: And then --

20 MR. PHILLIPS: But --

21 JUSTICE GINSBURG: Even more so, you said
22 several times that it was perfectly legal, but isn't it
23 true that the law in all of the circuits was the other
24 way, and it wasn't until this Court decided the Gilbert
25 case that the law changed? But if you were -- if you

1 were an employer and you were advising a client in, say,
2 1975, look to see where the circuits were, the circuits
3 said, yes, discrimination on the basis of pregnancy is
4 surely discrimination on the basis of sex. It wasn't
5 until this Court decided first the Aiello case and then
6 Gilbert that -- that that law changed.

7 MR. PHILLIPS: And I understand that,
8 Justice Ginsburg, and obviously we don't quarrel with
9 that. But the problem obviously is the Court did decide
10 Gilbert; the Court didn't say the law changed. It was
11 the way the Court interpreted the statute at the time,
12 and under the interpretation of Gilbert and Satty what
13 we did was perfectly legal, and when the statute changed
14 what we did was to bring ourselves into assiduous
15 compliance with that position, Justice Souter, which is
16 what I think distinguishes --

17 JUSTICE SOUTER: No, but I mean that -- with
18 respect, I think that sort of begs the question because
19 if Bazemore is the right template for analyzing this
20 case, then you're not in compliance when your payment of
21 pension benefits reflects the pregnancy differential.

22 MR. PHILLIPS: Justice Souter, there's no
23 question that you can read Bazemore that way. I just
24 think that the way this Court has read Bazemore and
25 Lorance and Ledbetter suggests that, in the context of

1 the case we have here, the right answer is this is more
2 like present effects of past allegedly discriminatory
3 acts and, therefore, not actionable at this time.

4 JUSTICE STEVENS: Let me just be sure I
5 understand one thing: Are you contending that the plan
6 is not unlawful or that the claim is untimely?

7 MR. PHILLIPS: We are -- both, actually. We
8 say it's not -- we say it's untimely, but we also say
9 that if --

10 JUSTICE STEVENS: At the time it was
11 adopted, it was lawful.

12 MR. PHILLIPS: Right, exactly. And that
13 otherwise it would have to be retroactive application of
14 the PDA.

15 I would like to reserve the balance of my
16 time.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Ms. Blatt.

19 ORAL ARGUMENT OF LISA S. BLATT
20 ON BEHALF OF THE UNITED STATES,
21 AS AMICUS CURIAE,
22 SUPPORTING THE PETITIONER

23 MS. BLATT: Thank you, Mr. Chief Justice,
24 and may it please the Court:

25 The Ninth Circuit's decision in this case

1 impermissibly imposes retroactive liability on
2 Petitioner, and Respondents' claims are in any event
3 time-barred.

4 JUSTICE GINSBURG: Miss Blatt, that was not
5 the position of the only representative of the United
6 States in the Ninth Circuit, as far as I know, the EEOC,
7 the brief in the Ninth Circuit. We don't hear from the
8 EEOC in this Court, but I think it was not just that
9 brief but in the EEOC manual they are taking a position
10 that is 150 degrees opposite yours. Am I right --

11 MS. BLATT: You are absolutely correct. You
12 are absolutely correct. And Ledbetter, this Court's
13 decision in Ledbetter, which was issued after both the
14 compliance manual and after the EEOC filed their brief,
15 explained that the EEOC is entitled to no special
16 deference on the interpretation of this Court's cases.
17 And the EEOC's interpretation is based on a conclusion
18 whether this case is governed by Evans or Bazemore, and
19 the EEOC hasn't purported to even discuss the
20 retroactivity or the retroactive imposition of liability
21 because the pregnancy leaves in this case were taken
22 before the PDA and, as the EEOC acknowledged in that
23 compliance manual, that denial of service credit at the
24 time was lawful under this Court's decision.

25 JUSTICE SOUTER: Would you -- would you --

1 would you agree that if -- well, let me be less
2 rhetorical about it. What if Congress passed a statute
3 providing that, starting one year from the effective
4 date of the statute, no pension plan will differentiate
5 in computing pension benefits on leaves taken between --
6 as between leaves taken for conventional sickness and
7 leaves taken for pregnancy. Would that statute be
8 unconstitutional?

9 MS. BLATT: Unconstitutional?

10 JUSTICE SOUTER: Yes.

11 MS. BLATT: I think -- I mean, the way I
12 understand your case is that Congress could speak in
13 clear language to impose retrospective liability.

14 JUSTICE SOUTER: To make it retroactive.
15 Yes.

16 MS. BLATT: Retrospective liability. There
17 is nothing in the PDA that indicates that retroactive
18 liability was imposed. And --

19 JUSTICE SOUTER: So your -- your argument
20 simply is a purely statutory construction argument:
21 That isn't what Congress had in mind.

22 MS. BLATT: Right, and your hypothetical
23 statute would seem inconsistent with --

24 JUSTICE SOUTER: If Congress would have had
25 in mind, there would be a question whether Congress

1 could do it, and you agree that it could. So the
2 question is simply: Did it or didn't it in this case?

3 MS. BLATT: That's right, and I think the
4 seniority system provision, 703(h), would just be
5 completely counter to that hypothetical provision
6 because Congress has taken special care to make sure
7 seniority systems can continue to exist, even though
8 they incorporate pre-Act discrimination.

9 JUSTICE KENNEDY: Was this statute effective
10 180 days after signature?

11 MS. BLATT: With respect to fringe benefit
12 programs, I think it was effective on the date it
13 passed. And there's no question -- everyone concedes
14 that AT&T immediately came into compliance on the
15 effective date of the Act.

16 And our key point on retroactivity is the
17 way to look at this is what the statute prohibited and
18 that is discrimination on the basis of pregnancy. And
19 the pregnancy discrimination occurred in this case based
20 on the discriminatory leave policies, and those were all
21 taken in the '60s and '70s before the PDA was passed.
22 And what the Ninth Circuit's decision does is it orders
23 Petitioner to restore service credit taken for the
24 pregnancy leave before the passage of the PDA. And I --

25 JUSTICE SOUTER: Do you think Ledbetter

1 modified or overruled Bazemore?

2 MS. BLATT: No. It just put it in context,
3 and I don't think that Bazemore deals with the
4 retroactivity point, and let me explain why: The
5 employer in Bazemore who continued to pay African
6 Americans less than whites was ordered prospectively to
7 start paying equal wages for equal work, but
8 specifically not ordered to make up for past wage
9 differentials. And I think it's for three reasons.
10 What this does is much more prejudicial and upsets
11 expectations in three ways, and this is some of the
12 things that Mr. Phillips talked about. And at the time
13 the pregnancy leaves were taken, the Petitioner was
14 entitled and probably required to make planning and
15 funding decisions for its pension liabilities.

16 Second, the Petitioner should not, 30 to 40
17 years after the fact, have to defend claims about
18 whether these women were disabled and actually unable to
19 work due to pregnancy, when medical records and
20 personnel records are probably missing and memories long
21 since faded.

22 And, third, the retroactive scrambling of
23 the seniority system upsets the vested rights of other
24 employees.

25 I just don't think you have any of that in

1 Bazemore, where it said you've got to pay out money
2 prospectively.

3 JUSTICE SOUTER: Well, why does it upset --
4 so far as pension benefits is concerned, it doesn't
5 upset any employee's expectations. The ones who don't
6 have a pregnancy background are going to get the same
7 pensions that they bargained for.

8 MS. BLATT: Well, I think of a pension plan
9 as a zero-sum game. There is a more limited amount.
10 But more specifically --

11 JUSTICE SOUTER: Well, but that -- I mean,
12 that's an issue that you touched on on your second
13 point. I don't know if it is a zero-sum game. And if I
14 were faced with a problem, and I may be, in which I
15 really have two choices, I have got two analogies in our
16 cases, I can take either one, and there were evidence in
17 here that the -- that this was going to be so traumatic
18 to the pension system that it would be manifestly unfair
19 and perhaps endanger benefits for others to force these
20 benefits to be paid, that would be a good reason to go
21 one way. But I don't think we have that in the case.

22 MS. BLATT: Well --

23 JUSTICE SOUTER: And if we don't have it in
24 the case, then this isn't a zero-sum game.

25 MS. BLATT: Well, we don't know what we have

1 in the case, because it was -- it was -- liability was
2 imposed on summary judgment. The class allegations are
3 15,000.

4 But my point on vested seniority rights is
5 that the class includes current employees. The
6 Respondent Porter is a current employee. The order in
7 this case is to restore seniority credit, I assume for
8 current employees, which will give them greater
9 seniority rights vis-a-vis other employees who have
10 planned their own issues about job bidding and
11 retirement and seniority based on 30 to 40 years of
12 expectations. So I --

13 JUSTICE GINSBURG: This is not a situation
14 like Evans, somebody who was out of the workforce for
15 four years and then is going to come back and bump some
16 people who -- who filled in while she was not working,
17 and get that credit. This is quite different. It's
18 just a question of weeks.

19 MS. BLATT: No, I think some -- some of
20 these people had very significant disabilities over six,
21 seven months. But in terms of the fairness here, I
22 mean, the -- the female flight attendant was discharged
23 on a facially discriminatory policy of forcing married
24 female flight attendants to resign. Here, the two
25 Supreme Court cases had said that the decision, as

1 inexplicable as it was, the decision not to treat
2 pregnancy as a disability was not on its face a
3 discriminatory policy. Now the PDA immediately
4 overruled that, but applied it prospectively, and now we
5 are here 30 to 40 years later basically litigating the
6 complaint that was brought in the Eighth Circuit as well
7 as the complaint that was brought in the Second Circuit
8 by the Respondent here. They brought this case twice in
9 the Second -- these are all cited on the Petitioner's
10 brief and the reply brief on page 17.

11 In the Second Circuit case it was granted,
12 vacated and remanded in light of Gilbert; and then in
13 the Eighth Circuit case they actually lost on the merits
14 under Satty.

15 Now, the only thing that has changed is the
16 passage of 30 years and the PDA, which doesn't apply
17 retroactively. So I just think that --

18 JUSTICE STEVENS: Do I correctly understand
19 that -- that you would agree that if this plan were
20 adopted today it would be unlawful, but because it was
21 -- at the time it was adopted, and the statute uses the
22 word "adopted," it was lawful?

23 MS. BLATT: Let me be very clear on this.
24 The seniority system in this case is facially neutral;
25 it just affords seniority to men and women on an equal

1 basis depending on whether they took disability leave or
2 personal leave. The leave policy that forced women to
3 take pregnancy leave as personal leave would be illegal
4 if it were adopted today, because the PDA says you can't
5 treat -- women affected by pregnancy have to be treated
6 for the same purposes.

7 So the seniority system is always just the
8 same. It says based on total years of service you get
9 pension benefits, men and women the same. In the
10 accrual policy, men and women were treated identically.
11 Just like in Evans, men and women were denied seniority
12 or service credit if they were terminated for -- for
13 charge, and there was a separate unlawful policy that
14 basically defined cause -- excuse me -- if you were
15 terminated for cause -- and a separate policy that
16 defined cause to say, well, if you were a female flight
17 attendant and you married, then you were forced to
18 resign. So obviously that policy was always unlawful;
19 it would be unlawful today; and similarly, if AT&T
20 hadn't had changed its leave policy, someone could sue
21 immediately. I mean, these women -- the immediate --

22 CHIEF JUSTICE ROBERTS: Before you -- do I
23 understand your answer to Justice Stevens's question to
24 be yes, it would be legal to adopt this seniority policy
25 today?

1 MS. BLATT: Yes, yes. The seniority system
2 is their seniority system, and it's completely neutral
3 and completely lawful. AT&T's pre-PDA leave policy that
4 if you were a woman and you take pregnancy --

5 CHIEF JUSTICE ROBERTS: I understand, but
6 we're --

7 MS. BLATT: -- that is unlawful today. That
8 would be facial discrimination on the basis of
9 pregnancy, and it would be unlawful.

10 CHIEF JUSTICE ROBERTS: But even adopting
11 the policy today -- which I thought was
12 Justice Stevens's question, and maybe it's not -- that
13 would be acceptable? In other words, it's not simply
14 the fact that this, that the leave policy -- seniority
15 policy was adopted during the time prior to Gilbert.

16 MS. BLATT: I -- AT&T could not adopt their
17 leave policy today.

18 CHIEF JUSTICE ROBERTS: They couldn't adopt
19 the leave policy. Could they adopt today a leave -- a
20 seniority policy today based on -- based on the
21 pre-Gilbert situation?

22 MS. BLATT: Oh. Then I think you would have
23 a -- you would have an unlawful policy that someone
24 could sue on immediately, and it would be facial
25 discrimination, and we wouldn't be up here making a

1 retroactivity argument because no court would be
2 ordering them to undo decisions that were made before
3 the passage of the act. They today would be making
4 decisions and there would be nothing -- there would be
5 no retroactive imposition of liability.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, Ms.
8 Blatt.

9 Mr. Russell.

10 ORAL ARGUMENT OF KEVIN RUSSELL

11 ON BEHALF OF THE RESPONDENTS

12 MR. RUSSELL: Mr. Chief Justice, and may it
13 please the Court:

14 The distinction between Evans and this case
15 turns on the difference between discrimination outside
16 of the seniority system which affects an employee's
17 ability to provide service to the employer, and
18 discrimination within the seniority system itself that
19 gives unequal credit for equal service.

20 Congress drew that line, adopting one that
21 this Court had referred to in Lorange, when it passed
22 section 706(e)(2) of Title VII, which provided that a
23 facially discriminatory seniority system can be
24 challenged, not only when --

25 JUSTICE STEVENS: May I ask a question? If

1 there is a facially discriminatory system, are you
2 saying this is a disparate impact case or a disparate
3 treatment case?

4 MR. RUSSELL: This is a disparate treatment
5 case.

6 JUSTICE STEVENS: When did the -- when did
7 the intentional discrimination take place?

8 MR. RUSSELL: It took place when AT&T
9 applied an accrual rule to my client's disability leave,
10 and said --

11 JUSTICE STEVENS: You do not -- you do not
12 contend that the plan was unlawful at the time it was
13 adopted?

14 MR. RUSSELL: We think that it was, but it
15 doesn't matter. Ultimately under 706(e)(2) what matters
16 is that the plan discriminated, discriminated on its
17 face. And the insight beyond that -- and that doesn't
18 turn on whether it is unlawful or not -- a plan that
19 discriminates against short people, discriminates on its
20 face, intentionally discriminates on the basis of height
21 every time it is applied; and when it does, whether it's
22 lawful or not is applied in accordance with the law that
23 existed at the time of the application.

24 JUSTICE STEVENS: Let me ask you this
25 question. At the time the plan was adopted,

1 discrimination on the basis of pregnancy was not
2 discrimination on the basis of sex, according to the
3 majority in Gilbert.

4 MR. RUSSELL: That's correct.

5 JUSTICE STEVENS: Which I happen to disagree
6 with.

7 So as a matter of law, it seems to me at the
8 time the plan was adopted it was a lawful plan.

9 MR. RUSSELL: Well, we think it was unlawful
10 for two reasons. One is that it was unlawful under
11 Satty. Now, I acknowledge --

12 JUSTICE STEVENS: Under what?

13 MR. RUSSELL: Under Satty, under the Court's
14 decision in Satty that discrimination with respect to
15 seniority had unlawful discriminatory impact on the
16 basis of sex.

17 JUSTICE GINSBURG: That was -- that was
18 coming back to work and having all of your seniority
19 stripped. Is that --

20 MR. RUSSELL: That is correct, but we don't
21 think that there is a distinction because what the Court
22 said was that the injury is cognizable because it
23 affects employment opportunities.

24 JUSTICE SCALIA: Yes, but I thought the
25 question was whether it was unlawful at the time before

1 the later statute.

2 MR. RUSSELL: Yes.

3 JUSTICE SCALIA: And -- and you say that,
4 even though discriminating against pregnancy leave was
5 itself lawful, a retirement plan that did not give you
6 credit for the time of that pregnancy leave was
7 unlawful?

8 MR. RUSSELL: No, let me be clear. We think
9 that at the time our clients took their leave, it was
10 unlawful under Title VII and under Satty to discriminate
11 on the basis of pregnancy with respect to seniority,
12 whether the right to retain accrued seniority or the
13 right to accumulate it in the first place.

14 JUSTICE SCALIA: And you say Gilbert had
15 nothing to do with it?

16 MR. RUSSELL: Gilbert said that it wasn't
17 intentional discrimination on the basis of sex. Satty
18 said it had an unlawful disparate impact on the basis of
19 sex. But ultimately none of this matters because under
20 section -- section 706(e)(2), the question is whether
21 the system as a whole, which includes the accruable,
22 discriminates on its face, whether it's intentionally
23 discriminatory; and the insight behind that rule was, as
24 I said before with the example of a height
25 discrimination, a rule that discriminates on the basis

1 of height intentionally discriminates on the basis much
2 height every time it is applied.

3 CHIEF JUSTICE ROBERTS: Could you pause?
4 I'll just trying to understand your earlier answer; it
5 just took me a little while before you got off on the
6 other point.

7 You are saying it was lawful at the time to
8 deliberately discriminate on the basis of pregnancy,
9 Gilbert, but that that was somehow unlawful if in fact
10 your deliberate discrimination had a disparate impact?

11 MR. RUSSELL: Had a disparate impact on the
12 basis of sex, yes. That's what Satty held -- that's
13 what Satty held clearly with respect to accrued
14 seniority.

15 CHIEF JUSTICE ROBERTS: Well, maybe I am
16 missing it. Isn't it a bit unusual to say it's
17 perfectly all right to discriminate intentionally but if
18 it has a disparate impact, that is not all right?

19 MR. RUSSELL: That's every disparate impact
20 case. It's not that it's all right.

21 CHIEF JUSTICE ROBERTS: I don't think it's
22 every disparate impact case. In a disparate impact case
23 it's because you can't show, typically, deliberate
24 discrimination, so you look at what the impact was. But
25 I guess I've never heard of a case where it's okay to do

1 something intentionally but it's illegal -- to
2 discriminate intentionally, but it's illegal if that has
3 a disparate impact.

4 MR. RUSSELL: Let me just be clear about the
5 terms. Gilbert says it was not unlawful intentional sex
6 discrimination, but Satty said that it constitutes --
7 that pregnancy discrimination with respect to seniority
8 credit constitutes -- has an unlawful disparate impact
9 on the basis of sex.

10 CHIEF JUSTICE ROBERTS: Well, but Gilbert
11 said it wasn't discrimination on the basis of sex,
12 because it said that discrimination on the basis of
13 pregnancy was not discrimination on the basis of sex;
14 and yet you are saying if there is a disparate impact on
15 the basis of pregnancy then it is discrimination on the
16 base of sex.

17 MR. RUSSELL: Let me try one more time. And
18 maybe -- it's just to say that sometimes, intentional
19 discrimination on the basis of pregnancy can have a
20 disparate discrimination on the basis of sex. That's
21 what Satty says -- Satty said.

22 CHIEF JUSTICE ROBERTS: Mr. Russell, is
23 there any other -- can you cite a case to me where we
24 have held there is discriminatory treatment that is
25 lawful but the discriminatory impact of that is

1 unlawful?

2 MR. RUSSELL: I think a height requirement
3 would be -- intentional discrimination on the basis of
4 height that could have an unlawful disparate impact on
5 the basis of sex. I think it's a parallel construction.
6 But, ultimately, I -- I don't want to waste too much
7 time on this, because I don't think it matters because
8 the insight behind Section 706e2 is that every act that
9 implements a facially discriminatory system constitutes
10 a fresh act of that intentional discrimination. And so
11 there is no question --

12 JUSTICE STEVENS: Does the statute use the
13 term -- does the statute use the term "facially
14 discriminatory system"?

15 MR. RUSSELL: No. It uses the term
16 "intentionally discriminatory system."

17 JUSTICE STEVENS: Right.

18 MR. RUSSELL: So I mean there is no dispute
19 that a facially discriminatory system discriminates
20 intentionally.

21 JUSTICE STEVENS: And so it is also clear --
22 is it also clear that a statute -- that -- that a plan
23 that does not intentionally discriminate may,
24 nevertheless, discriminate facially? I think the two
25 things --

1 MR. RUSSELL: Well, again, it is -- it is
2 the predicates that changed. It can be a plan that
3 doesn't intentionally discriminate on the basis of sex
4 at the time, in the past. But when it -- but it's clear
5 that it intentionally discriminates on the basis of
6 pregnancy.

7 And so then the question -- so -- so then
8 under 706e2, under this Court's insight in Lorange, the
9 current application of that system constitutes, you
10 know, a present act --

11 JUSTICE STEVENS: The current application of
12 a system that was plainly discriminatory, intentionally
13 discriminatory -- in Lorange they intentionally
14 discriminated against women.

15 MR. RUSSELL: Yes. The -- the intent behind
16 the system is imbued in every application of the system.
17 So a system that is intentionally discriminatory on the
18 basis of pregnancy discriminates intentionally on the
19 basis of pregnancy every time it is applied.

20 JUSTICE SCALIA: Go on, finish.

21 MR. RUSSELL: Under Section 706e2, the
22 question is simply whether that discrimination is
23 unlawful at the time of application.

24 JUSTICE SCALIA: I don't understand why you
25 say that the retirement plan is facially discriminatory

1 now. You contend that right now it's facially
2 discriminatory.

3 MR. RUSSELL: Yes.

4 JUSTICE SCALIA: It seems to me what the
5 retirement plan says is that there is deducted from your
6 seniority for purposes of calculating what you get under
7 the plan all periods in which you -- you were lawfully
8 not deemed to be -- to be working for the company. Now,
9 that doesn't seem to be facially discriminatory at all.

10 MR. RUSSELL: I think the system is facially
11 discriminatory in several parts. One is: What set of
12 rules constitutes a relevant seniority system? And we
13 think that the rule that does pregnancy leave doesn't
14 get full credit. As an accrual rule, it's part of the
15 seniority system. And that rule discriminated on its
16 face on the basis of --

17 JUSTICE SCALIA: But it didn't. Not -- not
18 during the period for which it is used in -- in the
19 retirement system.

20 MR. RUSSELL: There is no --

21 JUSTICE SCALIA: After the new legislation
22 was passed, yes, pregnancy leave counts for seniority.
23 But -- but during the period before that occurred, it
24 was not counted towards seniority, and -- and it was
25 lawfully not counted towards seniority.

1 So what you have is a retirement plan that
2 says all lawful periods of work -- all -- all periods of
3 work that are -- that lawfully must be credited will --
4 will be credited to the -- to the employees. I don't
5 see how that is facially discriminatory.

6 MR. RUSSELL: It facially discriminates on
7 the basis of pregnancy and then does so whether the
8 pregnancy discrimination was unlawful at the time or
9 not. And under 706e2 that -- that facially
10 discriminatory and -- to discriminate on the basis of
11 pregnancy is carried forward today in every application.
12 And the whole point of the rule was simply to say that
13 we don't want to force employees to have to run into
14 court every time there is some discrimination.

15 JUSTICE SCALIA: Is -- is there a difference
16 between "facially discriminatory" and "discriminatory
17 impact"? I mean I can see how you could say it has a
18 discriminatory impact. But to say that on its face,
19 when all it says is that you are credited with all of
20 the periods in which you were lawfully working for the
21 company and you are not credited for periods in which
22 the company lawfully deemed you not to be working for
23 the company, I don't see how that is facially
24 discriminatory in -- in -- in any sense.

25 MR. RUSSELL: Well, that scenario, I think,

1 is indistinguishable from what happened in Bazemore.
2 Recall in Bazemore, that the basic rule is you get paid
3 now today what we paid you before Title VII, plus a
4 nondiscriminatory rate. And this Court said that that
5 is simply perpetuation of the pre-act intentional race
6 discrimination which wasn't unlawful at the time. But
7 if you apply that system today, that constitutes a
8 present act of racial discrimination subject to the
9 present requirements of Title VII.

10 JUSTICE SCALIA: Did it say it was facially
11 discriminatory? I'm -- I'm just talking about your --
12 your assertion that it is facially discriminatory. Did
13 Bazemore more say it was facially discriminatory?

14 MR. RUSSELL: No, Bazemore did not use that
15 term. But this Court in Ledbetter assumed that the
16 rationale of Bazemore was the rationale this Court gave
17 in Lorance, which was that it involved a -- an
18 intentionally systematic system of discrimination. That
19 even though it was lawful when it was instituted, was
20 first instituted, it is carrying over into the present
21 era, subjected to the requirements of Title VII now.

22 And I don't think it's -- it's fairly
23 distinguishable because of what the employer in Bazemore
24 did is -- is simply what AT&T has done here. At the
25 time Title VII took effect, the employer in Bazemore

1 stopped giving discriminatory base salaries and stopped
2 giving discriminatory pay raises, but it just added to
3 that base salary in a nondiscriminatory manner, in the
4 same way that AT&T stopped discriminating in the amounts
5 that it added to accrued seniority.

6 JUSTICE STEVENS: But in Bazemore each
7 paycheck was discriminatory.

8 MR. RUSSELL: It was discriminatory in the
9 sense that it paid unequal wages for unequal work. And
10 here our pension checks give unequal compensation for
11 equal amounts of service to the company.

12 JUSTICE STEVENS: But the reason for that is
13 because they adopted a plan a long time ago that was
14 lawful.

15 MR. RUSSELL: Well, the same thing was true
16 in Bazemore. They had adopted --

17 JUSTICE STEVENS: They are not applying a
18 plan in Bazemore. They are paying a current salary.
19 They are paying black people less than whites just
20 because they are black.

21 MR. RUSSELL: They were applying a pay
22 structure that was adopted --

23 JUSTICE STEVENS: They are paying -- each
24 paycheck was a discriminatory paycheck. It didn't
25 depend on history; whereas, the pension plan -- they

1 always look at the formation of the plan. At least
2 under Subsection (h), I think you do.

3 MR. RUSSELL: The paychecks were in -- in
4 Bazemore were intentionally discriminatory only insofar
5 as you look back to the pre-Title VII --

6 JUSTICE STEVENS: And that's what I disagree
7 with. It seems to me presently in Bazemore you find
8 they are getting different salaries because of the
9 difference in -- one is of one race, and the other is of
10 another race.

11 MR. RUSSELL: And the same is true here.
12 Our clients are --

13 JUSTICE SOUTER: The -- the point that is
14 not true that -- that Justice Stevens is bringing out is
15 that in this case you had a plan which was established
16 at a time when the plan was -- was lawful. And, in
17 effect, you are saying there is -- there is no value to
18 be given to any reliance interest on the part of the
19 company that established the plan when it funded
20 according -- prior to the passage of the act when --
21 when it -- it calculated it's funding on the basis of
22 what was, in fact, lawful conduct. And you are saying
23 that is irrelevant. You didn't have that factor in
24 Bazemore.

25 MR. RUSSELL: It's not irrelevant. It's

1 simply something that this Court has traditionally taken
2 into account at the remedial stage. The Court has --

3 JUSTICE SOUTER: How would it do that?

4 MR. RUSSELL: Well, in -- in Waterlong v.
5 Porter v. -- there is a long line of cases where --

6 JUSTICE SOUTER: Well, you are -- you are
7 not asking the Court to do that, are you? You -- you
8 are saying: Look, pay -- pay pension benefits to these
9 people exactly as they would have been calculated if, in
10 fact, their pregnancy had been treated as whatever the
11 regular sick leave was, so that they would get full
12 credit for the time they were out. You are -- you are
13 not asking for any remedial order that gives them
14 anything less than 100 percent of what they want.

15 MR. RUSSELL: We are not asking for that
16 because we don't think that there are substantial
17 reliance interests that are -- with respect to the --
18 the liquidity of the -- the pension plan that are
19 affected here. My point was --

20 JUSTICE SOUTER: How -- how do we -- you
21 think that? How do we know that?

22 MR. RUSSELL: How do you --

23 JUSTICE SOUTER: How do we know -- maybe --
24 maybe I can put the same question in a different way.
25 Let's assume -- and this isn't a bizarre assumption here

1 -- that we have got two lines of cases, and we could
2 rely on either of those lines of cases. Go one way if
3 -- if we rely on line a, and go another way if we rely
4 on line b.

5 What are the good reasons, apart from simply
6 statements of the cases themselves, to go with the one
7 line or the other line? One reason would be reliance
8 interests in setting up the patient plan to distinguish
9 this from Bazemore. How are we in a position to make
10 that judgment?

11 MR. RUSSELL: I don't think you are, which
12 is why I do think that it is perfectly appropriate for
13 this Court to do what it did in cases like Manhart,
14 which is that there is one definition of
15 "discrimination" under Title VII. And it's not going to
16 vary depending on whether we are talking about a pension
17 plan or something else.

18 JUSTICE KENNEDY: But -- but doesn't the
19 risk -- or the potential of a fixed-fund pension plan
20 where employees who are not parties to this action
21 receive less? Isn't there at least that possibility?

22 MR. RUSSELL: There is only that
23 possibility --

24 JUSTICE KENNEDY: Shouldn't that possibility
25 be weighed in the decision of this Court? I think

1 that's the line of questioning here.

2 MR. RUSSELL: And my suggestion is, No. 1,
3 that there is no realistic possibility of that here.

4 JUSTICE STEVENS: There is no realistic
5 possibility that some pensions are based on a fixed fund
6 that has been established already.

7 MR. RUSSELL: I don't think so. If you are
8 talking about a defined benefit plan, which is what we
9 have here, any increases in liability simply mean that
10 the employer --

11 JUSTICE STEVENS: But I take it that this
12 decision you want us to write applies across the board
13 to all plaintiffs?

14 MR. RUSSELL: I think that it does, but I
15 think that it could quite possibly apply differently,
16 for example, to a 401(k) plan where the discrimination
17 would have occurred at a time when people were making
18 running contributions. But ultimately, I think that
19 this Court has taken into account those kinds of things
20 at the remedial phase, where you have an opportunity to
21 look at the facts about how this would affect the
22 pension in this case or pensions generally.

23 There is simply no evidence here to suggest
24 that there are those kinds of problems, because very few
25 employers as far as we can tell continue this kind of

1 discrimination; they would have eliminated it decades
2 ago; and we are talking about a small subset of
3 employees and relatively small amounts of money with
4 respect to each of them.

5 JUSTICE GINSBURG: Mr. Russell, what do you
6 say to Mr. Phillips' argument that you brought -- you
7 brought essentially this case way back when, the union
8 said this is the time the plan is in violation of Title
9 VII?

10 MR. RUSSELL: Well, first of all, I mean, my
11 individual named complaints didn't bring those claims
12 back then; and they lost, the union that brought this
13 claim; and then there were -- if I recollect correctly,
14 they were challenging at that moment the denial of their
15 disability payment; they weren't coming in and saying
16 simply, the only harm we were facing now is the prospect
17 in the future of a lower pension.

18 And that's the kind of hypothetical future
19 harm that we don't think Congress would have intended to
20 be the basis of a lawsuit, not -- one of the -- when the
21 entire purpose of enacting 706(e)(2) was that Congress
22 was concerned not to require employees to run to court
23 every time there is some discrimination that affects the
24 amount of their seniority, because that causes a
25 disruption to the employment atmosphere, it creates work

1 for the EEOC and the courts, and in many, many cases the
2 marginal difference in the amount of the seniority
3 credit we are talking about here will make no big
4 difference at all.

5 JUSTICE KENNEDY: Well, when you say there
6 is relatively little amounts of money, can you tell us
7 what amount -- what's the maximum amount would be
8 involved? Are you --

9 MR. RUSSELL: We haven't had discovery on
10 this. I think there is a fairly linear relationship
11 between the amount of leave and the percentage of the
12 pension check, and so we're talking in between --

13 JUSTICE KENNEDY: Would it be less than
14 \$100,000?

15 MR. RUSSELL: Per person?

16 JUSTICE KENNEDY: For the whole suit.

17 MR. RUSSELL: No. It would be more than
18 that it would be half of a percent to maybe two and a
19 half percent.

20 JUSTICE KENNEDY: Could that be millions? A
21 million dollars?

22 MR. RUSSELL: It could be millions of
23 dollars. And the plan that --

24 JUSTICE KENNEDY: But that -- that's a small
25 amount of money, a million -- millions of dollars?

1 MR. RUSSELL: It's a small amount of money
2 to a plan that has tens of billions of dollars. And
3 AT&T's last report to the SEC is that they had a
4 \$17 billion surplus in that fund. There is no question
5 that this is going to bankrupt this particular fund.

6 JUSTICE SCALIA: What do you do about
7 section 703(h) of Title VII, which -- which we have held
8 says -- that -- that makes it lawful for a bona fide
9 seniority system to perpetuate the effects of pre-Act
10 discrimination?

11 MR. RUSSELL: The distinction between 703(h)
12 and this case is that in this case, we challenge that
13 system, a seniority system that is itself facially
14 discriminatory, and 703(h) says that doesn't apply here.

15 JUSTICE SCALIA: That hinges -- that hinges
16 on your facially discriminatory.

17 MR. RUSSELL: It does. And in addition, we
18 also have the argument that the Ninth Circuit accepted,
19 but -- that the PDA on its own terms says, that 703(h)
20 doesn't apply to permit discrimination that the PDA
21 itself would forbid.

22 JUSTICE SCALIA: Well, that's -- that's
23 rather implausible, but 70(h) covers sex discrimination
24 and even race discrimination, but it doesn't cover
25 pregnancy discrimination. I mean, I --

1 MR. RUSSELL: You may think that, but --

2 JUSTICE SCALIA: You need pretty clear
3 language to persuade me of that.

4 MR. RUSSELL: I think that in the end, I
5 mean, it's worthwhile to focus on the consequences of
6 accepting AT&T's view. On the better view, it depends
7 mightily on whether the -- on seniority, in which case
8 they can avoid the application of the PDA because it
9 made the calculation beforehand. And an employer can at
10 the end of an employee's career simply tabulates the
11 term of employment, which I think under their view
12 subjects that employer to the current requirements of
13 the PDA. And we respectfully suggest that Congress
14 wouldn't intend Title VII to turn on such trivial
15 distinctions.

16 Moreover, under their view, an employer
17 who -- an employer would be able to pay black workers
18 today smaller pensions than white workers who provided
19 exactly the same amount of service, if those black
20 workers started working for it before Title VII was
21 enacted, at a time when the employer had no pension
22 system for blacks and didn't give them any seniority
23 credit. That employer could say the same thing AT&T
24 says here, which is that the present disparity in
25 pension benefits is simply the present effect of

1 discrimination that was lawful when it occurred.

2 JUSTICE SCALIA: You mean there are a lot
3 more suits coming behind this one --

4 MR. RUSSELL: I don't think so.

5 JUSTICE SCALIA: -- for any kind of
6 discrimination that preceded title VII. When was Title
7 VII enacted?

8 MR. RUSSELL: 1964.

9 JUSTICE SCALIA: There may be still some of
10 those people around.

11 MR. RUSSELL: There are; it's very unlikely
12 that there are very many of them subject to this kind --

13 JUSTICE SCALIA: You're scaring me.

14 (Laughter.)

15 MR. RUSSELL: Well, let me reassure you,
16 because I think most employers, unlike AT&T, have --
17 don't make those kinds of distinctions with respect to
18 their employees who were hired before and after the
19 effective dates of the relevant provisions of Title VII.
20 And I think it's --

21 JUSTICE BREYER: I take it you are not
22 saying anything that is in effect, and is still there,
23 you do -- you win. I take it -- maybe I am not right,
24 but I take it that what the point is here is that you --
25 you took a complicated superstructure of rules that was

1 creating boxes and those boxes were created on the basis
2 of discrimination. Then you move it, whole cloth, into
3 the post-new world. And it's the administration of that
4 complicated system of rules that was created out of the
5 discrimination, but it's administration today that makes
6 it like Bazemore.

7 MR. RUSSELL: Yes, that's -- that's right.
8 That's the present implementation of the system subjects
9 it to the present-day requirements of Title VII.

10 JUSTICE BREYER: It does that, but what I
11 can't figure out is does that have the implication for
12 other areas or not? And the other thing I'm not sure of
13 is how it squares with Ledbetter.

14 MR. RUSSELL: Well, the difference between
15 Ledbetter and this case is that Ledbetter involved
16 discrimination that was entirely outside the seniority
17 system, and as a result, it didn't -- 706(e)(2) didn't
18 apply; this Court's decision in Lorance didn't apply.
19 Congress enacted this 706(e)(2) to provide a very
20 special rule to displace the rule of evidence. It was
21 unambiguously intended to displace the rule of evidence
22 with respect to intentionally discriminatory seniority
23 systems.

24 MR. RUSSELL: Evans isn't a problem because
25 the rule they were administering in Evans is whoever is

1 hired is in fact hired at low seniority. Now it's hard
2 to say that that's a complicated system of rules that
3 had a preexistence, even though this individual was
4 where she was because of that earlier system.

5 MR. RUSSELL: Again, I think the distinction
6 between Evans and this case is discrimination that
7 occurred entirely outside of a -- the seniority system
8 and discrimination within the seniority system that
9 gives unequal credit for equal service; and Congress
10 said of that kind of discrimination, we are not going to
11 make you challenge immediately. We are going to let you
12 wait until the reduced seniority has a concrete affect
13 on your compensation or other conditions of employment
14 and then you can raise it then.

15 And the underlying thought of the provision
16 is that if you are subject to intentional discrimination
17 with respect to seniority accrual, we are going to
18 impute that intent to the subsequent applications of
19 that seniority system when it's applied to injure you.
20 And if --

21 JUSTICE STEVENS: I still want to go back to
22 assure that I've given you a fair opportunity to answer
23 this. You are relying on Nashville and Satty which is a
24 disparate impact case, and now you are arguing that the
25 key is the intent.

1 MR. RUSSELL: We make alternative arguments.

2 JUSTICE STEVENS: Okay.

3 MR. RUSSELL: We argue that to the extent it
4 matters that this was lawful at the time our clients
5 took their leave, it was not unlawful, and we point to
6 Satty. But we say ultimately that doesn't matter
7 because under section 706(e)(2), so long as they
8 implement, so long as they rely on the diminished
9 seniority in the present, that constitutes a present act
10 of pregnancy discrimination, intentional pregnancy
11 discrimination, which is unlawful under the PDA.

12 JUSTICE STEVENS: As soon as you get back to
13 the to intentional you get away from Satty.

14 MR. RUSSELL: Yes, I agree with that.

15 JUSTICE KENNEDY: Oh, okay.

16 MR. RUSSELL: But I don't think there can be
17 any dispute that when my clients had their seniority
18 reduced, it was an act of facial pregnancy
19 discrimination; and under 702 -- 706(e)(2), that intent
20 to discriminate on the basis of pregnancy is --

21 JUSTICE STEVENS: It was not unlawful at the
22 time it was done.

23 MR. RUSSELL: I do think it was unlawful,
24 but it doesn't matter with respect to 706(e)(2).

25 If I could turn briefly to the retroactivity

1 argument: It's important to be clear what the Ninth
2 Circuit held and what it didn't hold. It did not hold
3 that AT&T was liable for anything it did prior to the
4 effective date of the PDA. It didn't, for example, hold
5 that it was liable simply because it moved NCS dates or
6 because it relied on them in any way before the
7 effective date of the PDA. All it said was that AT&T is
8 precluded from relying on that discriminatory measure of
9 service in the future.

10 And in that sense, this case is quite like
11 this Court's decision in *Griggs v. Duke Power Company*,
12 where the Court said Title VII prohibits employers from
13 relying on the results of discriminatory employment
14 tests. Now, nobody thought that that meant that Title
15 VII subjected to liability employers who administered or
16 relied on those tests before the effective date of Title
17 VII, but everybody understood that they couldn't rely on
18 those results after the effective date of Title VII, and
19 nobody thought that that gave the statute a retroactive
20 effect.

21 And that's all the Ninth Circuit interpreted
22 the PDA to do here, is to prohibit AT&T from engaging in
23 the post-Act reliance on those pre-Act discriminatory
24 measures, that AT&T had every opportunity to conform its
25 -- to conform its conduct to the requirements of the

1 PDA, and a statute that simply tells an employer how it
2 has to treat past events for future employment decision
3 purposes is simply not a statute that has a retroactive
4 effect.

5 Finally, I'd like to -- if I have time, I'd
6 like to address this suggestion from the Solicitor
7 General's Office that this doesn't involve seniority
8 discrimination at all because what we are talking about
9 here is discrimination that occurred with respect to the
10 personnel policy about the classification of leave, as
11 opposed to discrimination within the seniority system
12 itself. And this Court was clear in California Brewers
13 that an accrual rule that says how time counts for
14 seniority purposes is part of the seniority system. And
15 under AT&T's system, it's true you have to apply a
16 two-part rule. You have to know whether -- if you are
17 asked, does this pregnancy leave count, you have to ask,
18 well, is it personal leave? But that doesn't tell you
19 anything until you apply the second part of the rule
20 that says pregnancy leave counts as personal leave.

21 And because you need to know the answers to
22 both of those questions, both parts of the rule are
23 properly considered to be part of the accrual rule and
24 part of the seniority system.

25 Finally, if I -- if I could return once

1 again to this alternative argument that we have, that
2 even setting aside Bazemore and section 706(e)(2), this
3 is not -- our clients weren't required to challenge this
4 discrimination before because it wasn't an completed,
5 unlawful employment practice at the time.

6 And, again, the point is that discrimination
7 with respect to a small amount of time going towards
8 seniority doesn't affect even the worker's actual
9 seniority, that is, her place in the seniority
10 hierarchy. A worker who is two years' junior to the
11 person who is next in line above her and two years'
12 senior to the person next in line below her -- six weeks
13 of service credit aren't going to make any difference
14 with respect to her place on the seniority hierarchy,
15 it's not going to make any difference with respect to
16 her ability to bid for jobs, and it's not necessarily
17 even going to make any difference with respect to her
18 pension, because at the time that these leaves are taken
19 typically, the person is years away, perhaps decades
20 away, from even vesting in their benefits pension.

21 And Congress reasonably would have thought,
22 I think, that that kind of harm is too speculative to
23 warrant immediate -- to warrant the requirement that the
24 employees have to immediately challenge that kind of
25 discrimination at the time it occurs. That's why

1 Congress enacted section 706(e)(2), to give employees an
2 opportunity to wait until the discrimination has a
3 concrete effect on their employment status, on their
4 compensation, or terms of employment. And AT&T's --

5 JUSTICE GINSBURG: Are you making a claim
6 that they had a choice or that the claim wasn't ripe
7 until they felt the impacts of it?

8 MR. RUSSELL: I think they don't have a
9 choice. They can't bring the claim until it has a
10 concrete impact.

11 Now, if 706(e)(2) applies, they can
12 challenge the system as of -- when it's adopted or when
13 it's applied to them, but otherwise they have to wait
14 until it injures them within the meaning of section
15 706(e)(2). And that's a perfectly sensible rule.

16 Remember, we're talking here about facial
17 discrimination, and the concerns about stale evidence
18 are not particularly strong here because -- and, as a
19 result, we are able to stipulate to the underlying
20 facts. Everybody knows what the system was and what it
21 did. And there is no reasonable dispute about whether
22 the reduction in our clients' leaves was as a result of
23 pregnancy versus something else. And in any event, this
24 is simply a consequence Congress must have intended when
25 it said that discriminatory seniority systems are open

1 to challenge whenever they apply to injure a worker,
2 even if that means that so long -- if an employer
3 implements a plan for 30 years, Congress understood that
4 that meant that they were subject to suit for 30 years.

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

7 Mr. Phillips, three minutes.

8 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

9 ON BEHALF OF THE PETITIONER

10 MR. PHILLIPS: Thank you, Mr. Chief Justice.

11 I'd just like to make a couple of points:

12 Justice Ginsburg, you asked a question about the earlier
13 litigation, and let me quote from the first page of
14 Judge Bright's opinion where it says the appellants in
15 the class action allege that Southwestern Bell
16 discriminates against women by, quote, "refusing to
17 extend full seniority credit to female employees on
18 maternity leave." That is precisely the claim that's
19 being litigated in this particular case.

20 And contrary to my brother's position just a
21 few minutes ago, that these don't have any impact and
22 why would anybody act on the basis of them, it seems to
23 me that that lawsuit belies that fact. They recognize
24 the impact on seniority, and they acted immediately as a
25 consequence of that.

1 Justice Souter, I do agree with you. I
2 think the reason that Bazemore is not the -- I wouldn't
3 say "line" -- more the point of authority to be as the
4 departure in this particular case, is because of the
5 implications for the seniority system.

6 Justice Kennedy, the problem here is we
7 don't know exactly what the impact's going to be. What
8 we do know is that all plans are funded on a set of
9 actuarial assumptions, and candidly if they say we are
10 overfunded a couple months ago, given to what has
11 happened to my pension plans over the next couple of
12 months, I would worry a little bit about what the
13 situation is.

14 But the most fundamental point is you don't
15 know. And in that context, what we do understand is
16 that Congress routinely says protect the seniority
17 systems, protect the pension plans. You know, my
18 colleague says, well, but this is all form over
19 substance because what if they come back at the end and
20 decided to do all these calculations? That
21 fundamentally misunderstands the nature of the pension
22 process. You have to fund these in advance. You make
23 actuarial assumptions. No one is in a position where
24 they're going to allow the determination of seniority to
25 be made at the tail end without making assumptions about

1 what they are going to be like going in.

2 And, Justice Breyer, I think that is the
3 answer to your question because we are not taking this
4 complex system wholesale and just dumping it post-PDA.
5 What we did is we retained the specific rules with
6 respect to the accrual and the seniority, and we
7 eliminated the underlying distinctions between pregnancy
8 and other kinds of disabilities. And that's how we
9 apply it, and that is fundamentally different from
10 Bazemore because we are not discriminating every day in
11 a way that harms them. We made a seniority decision,
12 like a pay decision, pre-Act; now we are acting -- it's
13 not a pay decision post-Act. And to my mind in that
14 sense it is just like Evans and that line of cases.

15 Finally, you asked the question, Justice
16 Souter, could Congress have done exactly what the
17 Respondents have? And the answer to that is yes.
18 Congress could say today, "We're not going to allow
19 this. It would upset a lot of pension plans. It would
20 upset a lot of expectations."

21 Congress could have done it. Congress
22 didn't do it, or at least if it were going to upset all
23 of those reliance interests, Congress would have done so
24 in language that was much more explicit than what it has
25 done in the PDA and 706(e)(2).

1 If there are no further questions, Your
2 Honor, I urge you to reverse the judgment below.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.
4 Phillips, the case is submitted.

5 (Whereupon, at 12:07 p.m., the case in the
6 above-entitled matter was submitted.)

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