

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 -- of parents, or leaves for any other
18 particular purpose.

19 JUSTICE GINSBURG: But at the time -- at the
20 time of the original reduction of credits, 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 from, on the books of AT&T,
2 they were docked X number of days? Nothing has happened
3 as a 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 Worker 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's 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. And -- and we are not talking about simply
24 benefits seniority here. We are talking about
25 competitive seniority.

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

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

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

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

1 didn't have notice -- they clearly did have notice --
2 and, two, didn't have an incentive to act, they clearly
3 did have an incentive to act.

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

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

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

23 MR. PHILLIPS: I mean, Justice Ginsburg,
24 there's -- there's no question that the impact in Evans
25 is -- is stronger than the impact here. I will readily

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

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

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

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

8 And then the third factor that it seems to
9 me the Court has been concerned about -- and it's one we
10 have been discussing -- which is the -- the -- you know,
11 the adequacy of the notice, where the employee is put on
12 notice at the time that actions were being taken.

13 Now, we can quarrel about how serious the --
14 the actions were, how detrimental they might have been.
15 But it seems to me there is no question that the -- that
16 the injury here is real and that the average employee
17 being told that you are being deprived of seniority on
18 -- on a race-based or sex-based or any other condition
19 that is protected would act immediately.

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

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

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

13 JUSTICE GINSBURG: But that was when Gilbert
14 was prevailing. Certainly, we would not regard it that
15 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 Lorance about facially discriminatory plans.

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

1 credited with a full day of work for a day's -- a day's
2 effort, and a woman is credited with half a day's work
3 for a day's effort. And -- and the Court said, quite
4 rightly, that's a facially discriminatory plan.

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

11 JUSTICE BREYER: Btu you -- what about --
12 I'm trying to work with this distinction where I agree
13 with you that it's hard to see exactly what it is. But
14 if I look at Bazemore, I think there we have a large
15 number of employees. And if you look at a complicated
16 thing, a salary structure, earlier, you see that that
17 salary structure systemically paid black people less
18 than white people. And at the time, for whatever
19 reasons, there wasn't a statute -- we assume that that
20 was lawful at 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 the key matter, look very
15 much 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 it 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 unanimately 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 -- and why isn't the payment of the
15 retirement benefit exactly on par with the payment of
16 the salary in Bazemore?

17 MR. PHILLIPS: I -- I mean, I think the
18 answer to that, Justice Souter, is that's not -- that's
19 certainly not an implausible way of trying to look at
20 this problem, but if you look at the language of this
21 Court two terms ago in Ledbetter, and I'll quote it for
22 you: "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 -- do you see
5 Ledbetter in effect as -- 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 -- from Evans
10 and -- and Ledbetter because, remember, we are talking
11 about a situation where what we did at the time, in our
12 judgment, was perfectly legal.

13 JUSTICE SOUTER: And -- 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: At that time, even --

20 MR. PHILLIPS: And then --

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

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

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

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

24 MR. PHILLIPS: Justice Souter, there's no
25 question that you can read Bazemore that way. I just

1 think that the way this Court has read Bazemore and
2 Lorance and Ledbetter suggests that, in the context of
3 the case we have here, the right answer is this is more
4 like present effects of past allegedly discriminatory
5 acts and, therefore, not actionable at this time.

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

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

12 JUSTICE STEVENS: At the time it was
13 adopted, it was lawful.

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

17 I would like to reserve the balance of my
18 time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Ms. Blatt.

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

25 MS. BLATT: Thank you, Mr. Chief Justice,

1 and may it please the Court:

2 The Ninth Circuit's decision in this case
3 impermissibly imposes retroactive liability on
4 Petitioner, and Respondents' claims are in any event
5 time-barred.

6 JUSTICE GINSBURG: Miss Blatt, that was not
7 the position of the only representative of the United
8 States in the Ninth Circuit, as far as I know, the EEOC,
9 the brief in the Ninth Circuit. We don't hear from the
10 EEOC in this Court, but I think it was not just that
11 brief but in the EEOC manual, they are taking a position
12 that is 180 degrees opposite yours. Am I right in --

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

1 the time was lawful under this Court's decision.

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

11 MS. BLATT: Unconstitutional?

12 JUSTICE SOUTER: Yes.

13 MS. BLATT: I think -- I mean, the way I
14 understand your case is that Congress can speak in clear
15 language to impose retroactive --

16 JUSTICE SOUTER: To make it retroactive.
17 Yes.

18 MS. BLATT: Retrospective liability. It's
19 just there's nothing in the PDA that indicates that
20 retroactive liability was imposed. And --

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

24 MS. BLATT: Right, and your hypothetical
25 statute would seem inconsistent with --

1 JUSTICE SOUTER: If Congress would have had
2 in mind, then there would be a question whether Congress
3 could do it, and you agree that it could. So the
4 question is simply: Did it or didn't it in this case?

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

11 JUSTICE KENNEDY: Was this statute effective
12 180 days after its -- after signature?

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

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

1 for the pregnancy leave before the passage of the -- of
2 the PDA. And I --

3 JUSTICE SOUTER: Do you -- do you think
4 Ledbetter modified or overruled Bazemore?

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

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

25 And, third, the retroactive scrambling of a

1 seniority system upsets the vested rights of other
2 employees.

3 And I just don't think you have any of that
4 in Bazemore. The employer said --

5 JUSTICE SOUTER: Well, why does it upset --

6 MS. BLATT: -- you me to pay out money
7 prospectively.

8 JUSTICE SOUTER: So far as pension benefits
9 are concerned, it doesn't upset any employee's
10 expectations. The ones who don't have a pregnancy
11 background are going to get the same pension that they
12 -- they bargained for.

13 MS. BLATT: Well, I think of a pension plan
14 as a zero-sum game. There's a more limited amount. But
15 more specifically, there --

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

1 would be a good reason to go one way. But I don't think
2 we have that in the case. And --

3 MS. BLATT: Well, I --

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

6 MS. BLATT: Well, we don't know what we have
7 in the case, because it was -- it was -- liability was
8 imposed on summary judgment. The class allegations are
9 15,000.

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

19 JUSTICE GINSBURG: But this is not a
20 situation like Evans, somebody who was out of the
21 workforce for 4 years and then is going to come back and
22 bump some people who -- who filled in while she was not
23 working, and get that credit. This is quite different.
24 This is just a question of weeks.

25 MS. BLATT: No, I think some -- some of

1 these people had very significant disabilities, over 6,
2 7 months. But in terms of the fairness here, I mean,
3 the -- the female flight attendant was discharged on a
4 facially discriminatory policy of forcing married female
5 flight attendants to resign. Here, the two Supreme
6 Court cases have said that the decision -- as
7 inexplicable as it was, the decision not to treat
8 pregnancy as a disability was not on its face a
9 discriminatory policy.

10 Now, the PDA immediately overruled that, but
11 applied it prospectively, and now we are here 30 to 40
12 years later basically litigating the complaint that was
13 brought in the Eighth Circuit as well as the complaint
14 that was brought in the Second Circuit by the Respondent
15 here. They brought this case twice in the Second -- and
16 these are all cited on the Petitioner's brief and the
17 reply brief on page 17.

18 In the Second Circuit case, it was granted,
19 vacated, and remanded in light of Gilbert. And then in
20 the Eighth Circuit case, they actually lost on the
21 merits under Satty.

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

25 JUSTICE STEVENS: Do I correctly understand

1 that -- that you would agree that if this plan were
2 adopted today it would be unlawful, but because it was
3 -- that at the time it was adopted, and the statute uses
4 the word "adopted," it was lawful?

5 MS. BLATT: Let me be very clear on this.
6 The seniority system in this case is facially neutral;
7 it just accords seniority to men and women on an equal
8 basis depending on whether they took disability leave or
9 personal leave. The leave policy that forced women to
10 take pregnancy leave as personal leave would be illegal
11 if it were adopted today, because the PDA says you can't
12 treat -- women affected by pregnancy have to be treated
13 for the same purposes.

14 So the seniority system is always just the
15 same. It says, based on total years of service, you get
16 pension benefits, men and women the same. In the
17 accrual policy, men and women were treated identically.
18 Just like in Evans, men and women were denied seniority
19 or service credit if they were terminated for -- for
20 charge, and there was a separate unlawful policy that
21 basically defined -- cause -- excuse me -- if you were
22 terminated for cause -- and a separate policy that
23 defined "cause" to say, well, if you were a female
24 flight attendant and you married, then you were forced
25 to resign. So obviously that policy was always

1 unlawful. It would be unlawful today. And similarly,
2 if AT&T hadn't had changed its leave policy, someone
3 could sue immediately. I mean, these women -- the
4 immediate --

5 CHIEF JUSTICE ROBERTS: Before you -- do I
6 understand your answer to Justice Stevens's question to
7 be yes, it would be legal to adopt this seniority policy
8 today?

9 MS. BLATT: Yes -- the seniority system is
10 their seniority system, and it's completely neutral and
11 completely lawful. AT&T's pre-PDA leave policy. That
12 if you were a woman and you take pregnancy --

13 CHIEF JUSTICE ROBERTS: I understand, but
14 we're --

15 MS. BLATT: -- that's unlawful today. That
16 would be facial discrimination on the basis of
17 pregnancy, and it would be unlawful.

18 CHIEF JUSTICE ROBERTS: But even adopting
19 the policy today -- which I thought was
20 Justice Stevens's question, and maybe it's not -- that
21 would be acceptable? In other words, it's not simply
22 the fact that this -- the leave policy -- the seniority
23 policy was adopted during the time prior to Gilbert?

24 MS. BLATT: I -- AT&T could not adopt their
25 leave policy today, and --

1 CHIEF JUSTICE ROBERTS: They couldn't adopt
2 the leave policy. Could they adopt today a leave -- a
3 seniority policy today based on -- today, based on the
4 pre-Gilbert situation?

5 MS. BLATT: Oh. Then I think you would have
6 a -- well, you would have an unlawful policy that
7 someone could sue on immediately, and it would be facial
8 discrimination, and we wouldn't be up here making a
9 retroactivity argument because no court would be
10 ordering them to undo decisions that were made before
11 the passage of the Act. They today would be making
12 decisions and there were nothing -- there would be no
13 retroactive imposition of liability.

14 Thank you.

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

17 Mr. Russell.

18 ORAL ARGUMENT OF KEVIN RUSSELL
19 ON BEHALF OF THE RESPONDENTS

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

22 The distinction between Evans and this case
23 turns on the difference between discrimination outside
24 of the seniority system which affects an employee's
25 ability to provide service to the employer, and

1 discrimination within the seniority system itself that
2 gives unequal credit for equal service.

3 Congress drew that line, adopting one that
4 this Court had referred to in Lorange, when it passed
5 section 706(e)(2) of Title VII, which provided that a
6 facially discriminatory seniority system can be
7 challenged, not only when --

8 JUSTICE STEVENS: May I ask a question? If
9 there is a facially discriminatory system, are you
10 saying this is a disparate impact case or a disparate
11 treatment case?

12 MR. RUSSELL: This is a disparate treatment
13 case.

14 JUSTICE STEVENS: When did the -- when did
15 the intentional discrimination take place?

16 MR. RUSSELL: It took place when AT&T
17 applied an accrual rule to my clients' disability leave,
18 and said --

19 JUSTICE STEVENS: You do not -- you do not
20 contend that the plan was unlawful at the time it was
21 adopted?

22 MR. RUSSELL: We think that it was, but it
23 doesn't matter. Ultimately under 706(e)(2), what
24 matters is that the plan discriminated on its face. And
25 the insight beyond that -- and that doesn't turn on

1 whether it is unlawful or not. A plan that
2 discriminates against short people discriminates on its
3 face, intentionally discriminates on the basis of height
4 every time it's applied; and when it does, whether it's
5 lawful or not, is applied in accordance with the law
6 that existed at the time of the application.

7 JUSTICE STEVENS: Well, let me ask you this
8 question: At the time the plan was adopted,
9 discrimination on the basis of pregnancy was not
10 discrimination on the basis of sex, according to the
11 majority in Gilbert.

12 MR. RUSSELL: That's correct.

13 JUSTICE STEVENS: Which I happen to disagree
14 with.

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

17 MR. RUSSELL: Well, we think it was unlawful
18 for two reasons, and one is that it was unlawful under
19 Satty. Now, I acknowledge --

20 JUSTICE STEVENS: Under what?

21 MR. RUSSELL: Under Satty, under the Court's
22 decision in Satty that said discrimination with respect
23 to seniority had an unlawful discriminatory impact on
24 the basis of sex.

25 JUSTICE GINSBURG: That was -- that was

1 coming back to work and having all of your seniority
2 stripped. Is that --

3 MR. RUSSELL: That is correct, but we don't
4 think that there's a distinction because what the Court
5 said was that the injury is cognizable because it
6 affects employment opportunities.

7 JUSTICE SCALIA: Yes, but I thought the
8 question was whether it was unlawful at the time, before
9 the later statute.

10 MR. RUSSELL: Yes, and we think --

11 JUSTICE SCALIA: And -- and you say that,
12 even though discriminating against pregnancy leave was
13 itself lawful, a retirement plan that did not give you
14 credit for the time of that pregnancy leave was
15 unlawful?

16 MR. RUSSELL: No. Let me be clear. We
17 think that at the time our clients took their leave, it
18 was unlawful under Title VII and under Satty to
19 discriminate on the basis of pregnancy with respect to
20 seniority, whether it's the right to retain accrued
21 seniority or the right to accumulate it in the first
22 place.

23 JUSTICE SCALIA: And you say Gilbert had
24 nothing to do with it?

25 MR. RUSSELL: Gilbert said that it wasn't

1 intentional discrimination on the basis of sex. Satty
2 said it had an unlawful disparate impact on the basis of
3 sex. But ultimately none of this matters, because under
4 section 706(e)(2), the question is whether the system as
5 a whole, which includes the accrual, discriminates on
6 its face, whether it's intentionally discriminatory; and
7 the insight behind that rule was, as I said before with
8 the example of a height discrimination, a rule that
9 discriminates on the basis of height intentionally
10 discriminates on the basis of height every time it's
11 applied.

12 CHIEF JUSTICE ROBERTS: Could you -- could I
13 pause? I'd just trying to understand your earlier
14 answer. It just took me a little while before you got
15 off on the other point.

16 You're saying it was lawful at the time to
17 deliberately discriminate on the basis of pregnancy --
18 Gilbert -- but that that was somehow unlawful if in fact
19 your deliberate discrimination had a disparate impact?

20 MR. RUSSELL: Had a disparate impact on the
21 basis of sex, yes. That's what Satty held -- that's
22 what Satty held clearly with respect to accrued
23 seniority.

24 CHIEF JUSTICE ROBERTS: Well, maybe I'm
25 missing it. Isn't it a bit unusual to say it's

1 perfectly all right to discriminate intentionally, but
2 if it has a disparate impact, that's not all right?

3 MR. RUSSELL: That's every disparate impact
4 case. It's not that it's all right. It's just that
5 it's not --

6 CHIEF JUSTICE ROBERTS: No, I -- I don't
7 think it's every disparate impact case. In a disparate
8 impact case, it's because you can't show, typically,
9 deliberate discrimination, so you look at what the
10 impact was. But I guess I've never heard of a case
11 where it's okay to do something intentionally, but it's
12 illegal -- to discriminate intentionally, but it's
13 illegal if that has a disparate impact.

14 MR. RUSSELL: Let me just be clear about the
15 terms. Gilbert said it was not unlawful intentional sex
16 discrimination, but Satty said that it constitutes --
17 that pregnancy discrimination with respect to seniority
18 credits constitutes -- has an unlawful disparate impact
19 on the basis of sex. In that sense --

20 CHIEF JUSTICE ROBERTS: Well, but Gilbert
21 said it wasn't discrimination on the basis of sex,
22 because it said that discrimination on the basis of
23 pregnancy was not discrimination on the basis of sex;
24 and yet you are saying if there is a disparate impact on
25 the basis of pregnancy, then it is discrimination on the

1 base of sex.

2 MR. RUSSELL: Let me try one more time. And
3 maybe -- it's just to say that sometimes, intentional
4 discrimination on the basis of pregnancy can have a
5 disparate impact on the basis of sex. That's what Satty
6 said -- Satty said. But --

7 CHIEF JUSTICE ROBERTS: Is your -- is there
8 any other -- can you cite a case to me where we have
9 held there is discriminatory treatment, but that's
10 lawful, but the discriminatory impact of that is
11 unlawful?

12 MR. RUSSELL: Well, I think a height
13 requirement would be intentional discrimination on the
14 basis of height that could have an unlawful disparate
15 impact on the basis of sex. I think it's a parallel
16 construction.

17 But, ultimately, I -- I don't want to waste
18 too much time on this, because I don't think it matters
19 because the insight behind section 706(e)(2) is that
20 every act that implements a facially discriminatory
21 system constitutes a fresh act of that intentional
22 discrimination. And so there's no question --

23 JUSTICE STEVENS: But does the statute use
24 the term -- does the statute use the term "facially
25 discriminatory system"?

1 MR. RUSSELL: No. It uses the term
2 "intentionally discriminatory system."

3 JUSTICE STEVENS: Right.

4 MR. RUSSELL: And there's no dispute that a
5 facially discriminatory system discriminates
6 intentionally. And so --

7 JUSTICE STEVENS: It is also clear that --
8 is it also clear that a statute -- that -- that a plan
9 that does not intentionally discriminate may,
10 nevertheless, discriminate facially? I think the two
11 things --

12 MR. RUSSELL: Well, again, it's -- it's the
13 predicates that change. It's a -- it can be a plan that
14 doesn't intentionally discriminate on the basis of sex
15 at the time, in the past. But when it -- but it's clear
16 that it intentionally discriminates on the basis of
17 pregnancy.

18 And so then the question -- so then under
19 706(e)(2), under this Court's insight in Lorraine, the
20 current application of that system constitutes a present
21 act --

22 JUSTICE STEVENS: Yes, but that was the
23 current application of a system that was plainly
24 discriminatory, intentionally discriminatory. Lorraine
25 was. They intentionally discriminated against women.

1 MR. RUSSELL: Yes. The -- the intent behind
2 the system is imbued in every application of the system.
3 So a system that is intentionally discriminatory on the
4 basis of pregnancy discriminates intentionally on the
5 basis of pregnancy every time it's applied. And the
6 question --

7 JUSTICE SCALIA: Go on, finish. I --

8 MR. RUSSELL: And, under Section 706(e)(2),
9 the question is simply whether that discrimination is
10 unlawful at the time of application --

11 JUSTICE SCALIA: I don't understand why you
12 say that the retirement plan is facially discriminatory
13 now. You contend that right now it's facially
14 discriminatory.

15 MR. RUSSELL: Yes, it's --

16 JUSTICE SCALIA: It seems to me what the
17 retirement plan says is that there is deducted from your
18 seniority, for purposes of calculating what you get
19 under the plan, all periods in which you -- you were
20 lawfully not deemed to be -- to be working for the
21 company. Now, that doesn't seem to be facially
22 discriminatory at all.

23 MR. RUSSELL: I think it's -- the system is
24 facially discriminatory -- there are several parts. One
25 is: What set of rules constitutes a relevant seniority

1 system? And we think that the rule that says pregnancy
2 leave doesn't get full credit is as an accrual rule,
3 it's part of the seniority system. And that rule
4 discriminated on its face on the basis of pregnancy.

5 JUSTICE SCALIA: No, but it didn't. Not --
6 not during the period for which it is used in -- in the
7 retirement system.

8 MR. RUSSELL: There's no --

9 JUSTICE SCALIA: After the new legislation
10 was passed, yes, pregnancy leave counts for seniority.
11 But -- but during the period before that occurred, it
12 was not counted towards seniority, and it -- and it was
13 lawfully not counted towards seniority.

14 So what you have is a retirement plan that
15 says all lawful periods of work -- all periods of work
16 are -- that lawfully must be credited will be credited
17 to the -- to the employees. I don't see how that is
18 facially discriminatory.

19 MR. RUSSELL: It facially discriminates on
20 the basis of pregnancy and then does so whether the
21 pregnancy discrimination was unlawful at the time or
22 not. And under 706(e)(2), that -- that facially
23 discriminatory intent to discriminate on the basis of
24 pregnancy is carried forward today in every application.
25 And the whole point of the rule was simply to say that

1 we don't want to force employees to have to run into
2 court every time there's some discrimination --

3 JUSTICE SCALIA: Is -- is there a difference
4 between "facially discriminatory" and "discriminatory
5 impact"? I mean I can see how you could say it has a
6 discriminatory impact, but to say that on its face, when
7 all it says is that you are credited with all of the
8 periods in which you were lawfully working for the
9 company and you are not credited for periods in which
10 the company lawfully deemed you not to be working for
11 the company, I don't see how that is facially
12 discriminatory in -- in any sense.

13 MR. RUSSELL: Well, that scenario, I think,
14 is indistinguishable from what happened in Bazemore.
15 Recall, in Bazemore, that the basic rule is you get paid
16 now today what we paid you before Title VII, plus a
17 nondiscriminatory raise. And this Court said that that
18 is simply perpetuation of the pre-Act intentional race
19 discrimination, which wasn't unlawful at the time. But
20 if you apply that system today, that constitutes a
21 present act of racial discrimination subject to the
22 present requirements of Title VII.

23 JUSTICE SCALIA: Did it say it was facially
24 discriminatory? I'm -- I'm just talking about your --
25 your assertion that it's facially discriminatory. Did

1 Basemore more say it was facially discriminatory?

2 MR. RUSSELL: No, Bazemore did not use that
3 term. But this Court, in Ledbetter, assumed that the
4 rationale of Bazemore was the rationale this Court gave
5 in Lorance, which was that it involved a --
6 intentionally a systematic system of discrimination
7 that, even though it was lawful when it was instituted
8 -- was first instituted, its carrying over into the
9 present era subjects it to the requirements of Title VII
10 now.

11 And I don't think it's -- it's fairly
12 distinguishable because what the employer in Bazemore
13 did is -- is simply what AT&T has done here. At the
14 time Title VII took effect, the employer in Bazemore
15 stopped giving discriminatory base salaries and stopped
16 giving discriminatory pay raises, but it just added to
17 that base salary in a nondiscriminatory manner, in the
18 same way that AT&T stopped discriminating in the amounts
19 that it added to accrued seniority.

20 JUSTICE STEVENS: No, but in Bazemore each
21 paycheck was discriminatory.

22 MR. RUSSELL: It was discriminatory in the
23 sense that it paid unequal wages for equal work. And
24 here our pension checks give unequal compensation for
25 equal amounts of service to the company.

1 JUSTICE STEVENS: But the reason for that is
2 because they adopted a plan a long time ago that was
3 lawful.

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

6 JUSTICE STEVENS: They're not applying a
7 plan in Bazemore. They're paying a current salary.
8 They're paying black people less than whites just
9 because they are black.

10 MR. RUSSELL: They were applying a pay
11 structure that was adopted --

12 JUSTICE STEVENS: Yes, they were still
13 paying -- each paycheck was a discriminatory paycheck.
14 It didn't depend on history; whereas, a pension plan --
15 they always look at the formation of the plan. At least
16 under subsection (h), I think you do.

17 MR. RUSSELL: The paychecks were in -- in
18 Bazemore were intentionally discriminatory only insofar
19 as you look back to the pre-Title VII --

20 JUSTICE STEVENS: And that's what I disagree
21 with. It seems to me if you look at the present in
22 Bazemore, you find they are getting different salaries
23 because of the difference in -- one is of one race, and
24 the other is of another race.

25 MR. RUSSELL: And the same is true here.

1 Our clients are giving --

2 JUSTICE SOUTER: The -- the point that is
3 not true that -- that Justice Stevens is bringing out is
4 that, in this case, you had a plan which was established
5 at a time when the plan was -- was lawful. And, in
6 effect, you are saying there is -- there is no value to
7 be given to any reliance interest on the part of the
8 company that established the plan when it funded
9 according -- prior to the passage of the Act, when --
10 when it -- it calculated it's funding on the basis of
11 what was, in fact, lawful conduct. And you are saying
12 that is irrelevant. You didn't have that factor in
13 Bazemore.

14 MR. RUSSELL: It's not irrelevant. It's
15 simply something that this Court has traditionally taken
16 into account at the remedial stage. The Court has --

17 JUSTICE SOUTER: Well, how would it do that?

18 MR. RUSSELL: Well, the -- in Florida v.
19 Long -- there's a long line of cases where this Court --

20 JUSTICE SOUTER: Well, you're -- you're not
21 asking the Court to do that, are you? You -- you're
22 saying, look, pay -- pay pension benefits to these
23 people exactly as they would have been calculated if, in
24 fact, their pregnancy had been treated as whatever the
25 regular sick leave was, so that they would get full

1 credit for the time they were out. You're -- you're not
2 asking for any remedial order that gives them anything
3 less than 100 percent of what they want.

4 MR. RUSSELL: We're not asking for that
5 because we don't think that there are substantial
6 reliance interests that are -- with respect to the --
7 the liquidity of the -- the pension plan that are
8 affected here. My point is simply that --

9 JUSTICE SOUTER: How -- how do we -- you
10 think that? How do we know that?

11 MR. RUSSELL: Well --

12 JUSTICE SOUTER: How do we know -- maybe --
13 maybe I can put the same question in a different way.
14 Let's assume -- and this isn't a bizarre assumption here
15 -- that we've got two lines of cases, and we could rely
16 on either of those lines of cases, go one way if -- if
17 we rely on line a, and go another way if we rely on line
18 b.

19 What are the good reasons, apart from simply
20 statements of the cases themselves, to go with the one
21 line or the other line? One reason would be reliance
22 interests in setting up a pension plan to distinguish
23 this from Bazemore. How are we in a position to make
24 that judgment?

25 MR. RUSSELL: I don't think you are, which

1 is why I do think that it's perfectly appropriate for
2 this Court to do what it did in cases like *Manhart*,
3 which is to say there's one definition of
4 "discrimination" under Title VII, and it's not going to
5 vary depending on whether we're talking about the
6 pension plan or something else.

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

11 MR. RUSSELL: There's only that --

12 JUSTICE KENNEDY: And shouldn't that
13 possibility be weighed in the decision of this Court? I
14 think that's the line of questioning here.

15 MR. RUSSELL: And my suggestion is, number
16 one, that there's no realistic possibility of that here.
17 But, number two, that that's a --

18 JUSTICE KENNEDY: And there's no realistic
19 possibility that some pensions are based on a fixed fund
20 which has been established already?

21 MR. RUSSELL: I don't think so. If you are
22 talking about a defined benefit plan, which is what we
23 have here, any increases in liability simply mean that
24 the employer has to --

25 JUSTICE KENNEDY: But I take it that this

1 decision you want us to write applies across the board
2 to all plaintiffs.

3 MR. RUSSELL: I think that it does, but I
4 think that it could quite possibly apply differently,
5 for example, through a 401(k) plan where the
6 discrimination would have occurred at a time when people
7 are making running contributions. But ultimately, I
8 mean, I think that this Court has taken into account
9 those kinds of things at the remedial phase, where you
10 have an opportunity to look at the facts about how this
11 would affect the pension in this case or pensions
12 generally.

13 There's simply no evidence here to suggest
14 that there are those kinds of problems, because very few
15 employers as far as we can tell continue this kind of
16 discrimination. Most have eliminated it decades ago.
17 And we're talking about a small subset of employees and
18 relatively small amounts of money with respect to each
19 of them. So I think --

20 JUSTICE GINSBURG: Mr. Russell, what do you
21 say to Mr. Phillips' argument that you brought -- you
22 brought essentially this case way back when, that the
23 union said that this retirement plan is in violation of
24 Title VII?

25 MR. RUSSELL: Well, first of all, I mean, my

1 individual-named clients didn't bring those claims back
2 then; and they lost, the union that brought this claim.
3 And then there were -- if I recollect correctly, they
4 were challenging at that moment the denial of their
5 disability leave payments. They weren't coming in and
6 saying simply, you know, the only harm we're facing now
7 is the prospect in the future of a lower pension.

8 And that's the kind of hypothetical future
9 harm that we don't think Congress would have intended to
10 be the basis of a lawsuit, not -- one of the -- when the
11 entire purpose of enacting 706(e)(2) was that Congress
12 was concerned not to require employees to run to court
13 every time there is some discrimination that affects the
14 amount of their seniority, because that causes a
15 disruption to the employment atmosphere, it creates work
16 for the EEOC and the courts, and in many, many cases the
17 marginal difference in the amount of the seniority
18 credit we are talking about here will make no big
19 difference at all to anything.

20 JUSTICE KENNEDY: Well, when you say there's
21 relatively little amounts of money, can you tell us what
22 amount -- what the maximum amount would be involved?
23 Are you --

24 MR. RUSSELL: I think -- and we haven't had
25 discovery on this. I think there is a fairly linear

1 relationship between the amount of leave and the
2 percentage of the pension check, and so we're talking in
3 between --

4 JUSTICE KENNEDY: Would it be less than
5 \$100,000?

6 MR. RUSSELL: Per person?

7 JUSTICE KENNEDY: Would it be -- for the
8 whole suit?

9 MR. RUSSELL: No. It would be more than
10 that. It would be about half of a percent to maybe two
11 and a half percent per person.

12 JUSTICE KENNEDY: Would that be a million --
13 a million dollars?

14 MR. RUSSELL: It could be millions of
15 dollars. And the plan that --

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

18 MR. RUSSELL: It's a small amount of money
19 to a plan that has tens of billions of dollars in it.
20 AT&T's last report to the SEC said they had a
21 \$17 billion surplus in that fund. There's no question
22 that this is going to bankrupt this particular fund.

23 JUSTICE SCALIA: What -- what do you do
24 about section 703(h) of Title VII, which -- which we
25 have held says that -- that makes it lawful for a bona

1 fide seniority system to perpetuate the effects of
2 pre-Act discrimination?

3 MR. RUSSELL: The distinction between 703(h)
4 and this case is that, in this case, we challenge a
5 system, a seniority system that is itself facially
6 discriminatory, and 703(h) says that doesn't apply --

7 JUSTICE SCALIA: That hinges -- that hinges
8 on your "facially discriminatory."

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

14 JUSTICE SCALIA: Well, yes, that's -- that's
15 rather implausible, but 70(h) covers sex discrimination
16 and even race discrimination, but it doesn't cover
17 pregnancy discrimination. I mean, I --

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

19 JUSTICE SCALIA: You need pretty clear
20 language to persuade me of that.

21 MR. RUSSELL: I think that in the end, I
22 mean, it's worthwhile to focus on the consequences of
23 accepting AT&T's view. On the better view, it depends
24 mightily on whether an employer keeps a running tab on
25 seniority, in which case they can avoid the application

1 of the PDA because it made the calculation beforehand,
2 and an employer who, at the end of an employee's career,
3 simply tabulates the term of employment, which I think
4 under their view subjects that employer to the current
5 requirements of the PDA. And we respectfully suggest
6 that Congress wouldn't intend Title VII to turn on such
7 trivial distinctions.

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

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

21 MR. RUSSELL: Well, I don't think --

22 JUSTICE SCALIA: -- for any kind of
23 discrimination that preceded Title VII? When was Title
24 VII enacted?

25 MR. RUSSELL: 1964.

1 JUSTICE SCALIA: There may be still some of
2 those people around.

3 MR. RUSSELL: There are. There are, but
4 it's very unlikely that there are very many of them
5 subject to this kind of --

6 JUSTICE SCALIA: I mean, you're scaring me.
7 (Laughter.)

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

14 JUSTICE BREYER: I take it you are not
15 saying anything that is in effect and is still there,
16 you do retro, you win. I take it -- maybe I am not
17 right, but I take it that what -- what the point is here
18 is that you -- you took a complicated superstructure of
19 rules that was creating boxes and those boxes were
20 created on the basis of discrimination. Then you move
21 it, whole cloth, into the post-new world. And it's the
22 administration of that complicated system of rules that
23 was created out of the discrimination, but it's
24 administration today that makes it like Bazemore.

25 MR. RUSSELL: Yes, that's -- that's right.

1 That the present implementation of the system subjects
2 it to the present-day requirements of Title VII.

3 JUSTICE BREYER: It does that, but what I
4 can't figure out is does that have a lot of implication
5 for other areas or not? And the other thing I'm not
6 sure of is how it squares with Ledbetter.

7 MR. RUSSELL: Well, the difference between
8 Ledbetter and this case is Ledbetter involved
9 discrimination entirely outside of the seniority system,
10 and as a result, it didn't -- 706(e)(2) didn't apply;
11 this Court's decision in Lorange didn't apply. And
12 Congress enacted this 706(e)(2) to provide a very
13 special rule to displace the rule of evidence. It was
14 -- it was unambiguously intended to displace the rule of
15 evidence with respect to intentionally discriminatory
16 seniority systems.

17 MR. RUSSELL: Evans isn't a problem because
18 the rule they were administering in Evans is whoever is
19 hired is in fact hired at low seniority. Now, it's hard
20 to say that that's a complicated system of rules that
21 had a pre-existence, even though this individual was
22 where she was because of that earlier system.

23 MR. RUSSELL: Again, I think the distinction
24 between Evans and this case is discrimination that
25 occurred entirely outside of a -- the seniority system

1 and discrimination within the seniority system that
2 gives unequal credit for equal service. And Congress
3 said of that kind of discrimination -- we're not going
4 to make you challenge immediately. We're going to let
5 you wait until the reduced seniority has a concrete
6 effect on your compensation or other terms and
7 conditions of employment, and then you can raise it
8 then.

9 And the underlying thought of the provision
10 is that if you are subject to intentional discrimination
11 with respect to seniority accrual, we are going to
12 impute that intent to the subsequent applications of
13 that seniority system when it's applied to injure you.
14 And if --

15 JUSTICE STEVENS: I still want to go back to
16 assure that I've given you a fair opportunity to answer
17 this. You are relying on Nashville v. Satty, which was
18 a discriminatory impact case, and now you are arguing
19 that the key is the -- is the intent. Which is it?

20 MR. RUSSELL: We make alternative arguments.

21 JUSTICE STEVENS: Oh, okay.

22 MR. RUSSELL: We argue that to the extent it
23 matters whether this was lawful at the time our clients
24 took their leave, it was not unlawful, and we point to
25 Satty. But we say ultimately that doesn't matter

1 because under section 706(e)(2), so long as they
2 implement, so long as they rely on the diminished
3 seniority in the present, that constitutes a present act
4 of pregnancy discrimination, intentional pregnancy
5 discrimination, which is unlawful under the PDA.

6 JUSTICE STEVENS: Well, as soon as you get
7 back to the intentional, you get away from Satty.

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

9 JUSTICE STEVENS: Oh, okay.

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

15 JUSTICE STEVENS: But it was not unlawful at
16 the time it was done.

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

19 If I could turn briefly to the retroactivity
20 argument: It's important to be clear what the Ninth
21 Circuit held and what it didn't hold. It did not hold
22 that AT&T was liable for anything it did prior to the
23 effective date of the PDA. It didn't, for example, hold
24 that it was liable simply because it moved the NCS dates
25 or because it relied on them in any way before the

1 effective date of the PDA. All it said was that AT&T is
2 precluded from relying on that discriminatory measure of
3 service in the future.

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

15 And that's all that the Ninth Circuit
16 interpreted the PDA to do here, is to prohibit AT&T from
17 engaging in the post-Act reliance on those pre-Act
18 discriminatory measures, that AT&T had every opportunity
19 to conform its -- to conform its conduct to the -- to
20 the requirements of the PDA, and a statute that simply
21 tells an employer how it has to treat past events for
22 future employment decision purposes is simply not a
23 statute that has a retroactive effect.

24 Finally, I'd like to -- if I have time, I'd
25 like to address this suggestion from the Solicitor

1 General's Office that this doesn't involve seniority
2 discrimination at all because what we are talking about
3 here is discrimination that occurred with respect to the
4 personnel policy about the classification of leave, as
5 opposed to discrimination within the seniority system
6 itself.

7 And this Court was clear in California
8 Brewers that an accrual rule that says how time counts
9 for seniority purposes is part of the seniority system.
10 And under AT&T's system, it's true you have to apply a
11 two-part rule. You have to know whether -- if you are
12 asked, does this pregnancy leave count, you have to ask,
13 well, is it personal leave? But that doesn't tell you
14 anything until you apply the second part of the rule
15 that says pregnancy leave counts as -- as personal
16 leave.

17 And because you need to know the answers to
18 -- to both of those questions, both parts of the rules
19 are properly considered to be part of the accrual rule
20 and part of the seniority system.

21 Finally, if I -- if I could return once
22 again to this alternative argument that we have, that
23 even setting aside Bazemore and section 706(e)(2), this
24 is not -- our clients weren't required to challenge this
25 discrimination before because it wasn't an completed,

1 unlawful employment practice at the time.

2 And, again, the point is that discrimination
3 with respect to a small amount of time going towards
4 seniority doesn't affect even the worker's actual
5 seniority, that is, her place in the seniority
6 hierarchy. A worker who is 2 years' junior to the
7 person who is next in line above her and 2 years' senior
8 to the person next in line below her -- 6 weeks of
9 service credit aren't going to make any difference with
10 respect to her place on the seniority hierarchy. It's
11 not going to make any difference with respect to her
12 ability to bid for jobs. And it's not necessarily even
13 going to make any difference with respect to her
14 pension, because at the time that these leaves are taken
15 typically, the person is years away, perhaps decades
16 away, from even vesting in their pension benefit.

17 And Congress reasonably would have thought,
18 I think, that that kind of harm is too speculative to
19 warrant immediate -- to warrant the requirement that the
20 employees have to immediately challenge that kind of
21 discrimination at the time it occurs. That's why
22 Congress enacted section 706(e)(2), to give employees an
23 opportunity to wait until the discrimination has a
24 concrete effect on their employment status, on their
25 compensation or terms of employment. And AT&T's view of

1 the statute --

2 JUSTICE GINSBURG: Are you -- are you making
3 a claim that they had the choice or that the claim
4 wasn't ripe until they felt the impacts of it?

5 MR. RUSSELL: I think they don't have a
6 choice. They can't bring the claim until it has a
7 concrete impact.

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

13 Remember, we're talking here about facial
14 discrimination, and the concerns about stale evidence
15 are not particularly strong here because -- and, as a
16 result, we are able to stipulate to the underlying
17 facts. Everybody knows what the system was and what it
18 did. And there's no reasonable dispute about whether
19 the reduction in our clients' leaves was as a result of
20 pregnancy versus something else. And in any event, this
21 is simply a consequence Congress must have intended when
22 it said that discriminatory seniority systems are open
23 to challenge whenever they apply to injure a worker,
24 even if that means that so long -- if an employer
25 implements a plan for 30 years, Congress understood that

1 that meant that they were subject to suit for 30 years.

2 CHIEF JUSTICE ROBERTS: Thank you, Mr.

3 Russell.

4 Mr. Phillips, 3 minutes.

5 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

6 ON BEHALF OF THE PETITIONER

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

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

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

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

23 Justice Souter, I do agree with you. I
24 think the reason that Bazemore is not the -- I wouldn't
25 say "line" -- more the point of authority to be as the

1 departure in this particular case is because of the
2 implications for the seniority system.

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

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

24 And, Justice Breyer, I think that is the
25 answer to your question because we are not taking this

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you, Mr.
2 Phillips.

3 The case is submitted.

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

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