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In the

Supreme Court of the United States

UNITED AIR LINES, INC.,

PETITIONER,

V.

CAROLYN J. EVANS,

RESPONDENT.

No. 76-333

Washington, D. C.
March 29, 1977

Pages 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED AIR LINES, INC., Petitioner,	:	
v.	:	No. 76-333
CAROLYN J. EVANS, Respondent.	:	

Washington, D. C.

Tuesday, March 29, 1977

The above-entitled matter came on for argument at 11:15 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

STUART BERNSTEIN, Esq., P.O. Box 66100, Chicago, Illinois 60666, for the petitioner.

ALAN M. LEVIN, Esq., Dorfman, De Koven, Cohen & Laner, One IBM Plaza, Suite 3301, Chicago, Illinois 60611, for the respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 76-333, United Air Lines against Carolyn Evans.

Mr. Bernstein, you may proceed.

ORAL ARGUMENT OF STUART BERNSTEIN

ON BEHALF OF PETITIONER

MR. BERNSTEIN: Mr. Chief Justice, and may it please the Court: This case arises under Title VII of the Civil Rights Act of 1964. Its primary concern is the regard, if any, to be paid to a prior time-barred discriminatory act in the application of a current, neutral,nondiscriminatory seniority system.

United Air Lines, like other domestic air carriers in the United States, up until November of 1968, maintained a policy which required that its stewardesses, now called flight attendants, be and remain unmarried. In November of 1968 it entered into an agreement with the Airline Pilots Association, the collective bargaining agent for the flight attendants, abrogating this rule, offering reinstatement to those who had been terminated and who had protested through company or Federal or State agencies the fact of the discharge. Reinstatement was offered without back pay.

That policy was ultimately held in the case of Sprogis v. United Air Lines in the Seventh Circuit to be a discrimination on the basis of sex in violation of Title VII.

In February of 1968 Mrs. Evans, the respondent here resigned upon marriage. She claims that it was involuntary, that she was forced to resign, and since this arises on a motion to dismiss, that is admitted for the purposes of this proceeding. At the time of her discharge, Title VII provided that a charge claiming a violation of the Act had to be filed with the Equal Employment Opportunities Commission within 90 days of the event. It is conceded that Mrs. Evans did not file such a charge within that time limit, and in fact did nothing with respect to that for a period of 4 years.

In February of 1972 she applied to United Air Lines for reemployment as a stewardess, and in fact was hired as a new employee at that time. She was sent to training school, along with other new employees, finished her training a month later, and in March 1972 was assigned to the line to assume the duties of a flight attendant. At that time, as this Court may know, it had already been decided that the limitation of that position to members of the female sex only was a violation and the job had been opened up to males as well as females.

She worked as a stewardess, as a flight attendant, from March 1972 upon completion of training until February of 1973, at which time she filed a charge with the Equal Employment Opportunities Commission in which she alleged that it was a violation of the Act for United to have refused to

credit her with seniority for her earlier employment, which ended in 1968, when it assigned her her seniority on rehire in 1972.

QUESTION: Mr. Bernstein, has United ever given credit in other situations for prior service?

MR. BERNSTEIN: The only time it has done so, your Honor, is when charges have been filed within the time limits. That is, there have been a number of instances where stewardesses have complained within the appropriate time limits about their termination, have been reinstated with full seniority. That is a different situation.

QUESTION: Those are the only other times.

MR. BERNSTEIN: Pardon, sir?

QUESTION: I say those are the only other times.

MR. BERNSTEIN: That's correct. There is nothing in this record to the contrary.

QUESTION: And the collective bargaining agreement specifies nothing.

MR. BERNSTEIN: That's correct. There is a period after termination in which seniority is lost. Discharge under these circumstances, it's lost immediately.

She received in due course the permission, the right-to-sue letter from the EEOC, and suit was filed in September of 1974. United answered, and I will allude to this later. In its answer it admitted that the termination had been

by resignation, but denied the allegation that it had been involuntary. It also added as an affirmative defense the time limit issue, and then raised that by motion to dismiss. The district court held that there was no continuing violation, that the act of the termination, assuming it to be discriminatory, was completed long ago, the 90-day limit had run on that, and that it was not continuing consistent with decisions of this Court and other courts, and I don't think there is any issue here as whether or not a discharge is a completed act and not continuing, and held that what she was really trying to do in this case was to reassert a claim which had been time-barred, namely, the 1968 termination of employment.

The matter was appealed to the Court of Appeals. In the interim the case of Collins v. United Air Lines had been decided in the Ninth Circuit where the Ninth Circuit held that a similarly situated former United stewardess who applied for reinstatement after four years of unemployment did not state a claim against the company because there was no continuing violation. It held there was no obligation to rehire.

When the Seventh Circuit first was faced with the Evans case on appeal, it determined, consistent with the district court, that there was no cause of action, no continuing violation, action was based on a time-barred act, and saw no difference between the situation before it,

because United had voluntarily rehired Mrs. Evans, and the situation in the Ninth Circuit where United had refused to reinstate Mrs. Collins, so the result should be the same in any event, and affirmed the dismissal by the district court. It noted in a footnote that if the rule should be otherwise, employers such as United Air Lines would have a temptation not to rehire employees who otherwise would be rehirable because you get into this morass immediately upon doing so, and that the situation should not be the same.

Petition for rehearing was filed, and pending the determination on the ruling on a petition, this Court issued its decision in Franks v. Bowman Transportation Company. The Court of Appeals thereupon granted the petition, and on rehearing reversed itself without reference at all to Collins, to the problem of the time-barred first event, and said that under Franks v. Bowman the relief requested could be granted.

Obviously Franks v. Bowman has some significance to our position here, and I would like to discuss that briefly.

Franks did not involve, as this case did, the question of a time-barred claim. In Franks the issue was whether, the court having found that there was a discriminatory act within the time limits, by the way, that a permissible form of relief under Section 706(g) of the Civil Rights Act was to accord retroactive seniority. And in that instance it would have been seniority from the date that the black

applicants who had been discriminatorily refused employment as over-the-road drivers with Bowman Transport, when they were hired could get seniority credit back to the time of first application. In that case the charge had been filed in February of 1970. The record in this case, the opinions themselves -- we examined your opinion and the opinion in the Court of Appeals -- were clear that there were 200 -- it was a class action, incidentally -- there were 206 applicants concerned in that case, all of whom had applied for employment after January 1 of 1970. There simply could not have been a time limit question in that case. None was ever raised in this Court.

What the Court held was that the fact that section 703(h) of the Civil Right Act said that a bona fide seniority system itself could not be the basis of a finding of a violation did not preclude the granting as an element of remedy under 706(g), the remedial section of the Act, retroactive seniority. That would not stand in the way. So Franks v. Bowman presupposed the proof of a discriminatory act within the time limit and concerned itself only with the application of remedy.

The fact is that there was a time limit problem in Franks, but that had been disposed of in the Court of Appeals and never reached this Court.

The courts in Evans II the Supreme Court interpreted

that to mean that the fact that a remedy was available of retroactive seniority under 706(g) made United's refusal or failure to accord seniority for the prior employment an offense under 703(h).

Now, United had never raised 703(h) as a defense. Its defense simply was you cannot prove a claim within the time limits provided by the Civil Rights Act. We never get to the question of remedy. You don't talk about remedy until you have proved a violation, and none had been proved. Well, the court made up the argument for us. It said United's argument appears to rest sub silentio on 703(h), and the Supreme Court disposed of that in Franks.

I submit to you, your Honors, that the holding of the Court of Appeals on Franks, and Evans II a complete misreading of Franks, nothing to do with the case whatsoever. In fact, the NAACP, which has filed an amicus brief here in support of respondent concedes that, that Franks was not a case involving timeliness, it really does not reach the issue. We therefore submit that the Court of Appeals was simply in error. We have a simple situation here where an act occurred, action was not taken within the prescribed time, that act is gone. It is as though it was a pre-Act violation. A post-Act violation on which the statute has run is no different posture than a pre-Act violation. This is our basic position.

Now, there is one other line of cases that have been

cited by counsel for respondent to support their position. And these are the so-called departmental seniority cases typified by United Papermakers in the Fifth Circuit, Quarles in the District Court of Virginia, which are the leading cases in this direction. It may well be that those cases will stand some review after your Honors have finished consideration of the T.I.M.E case and the East Texas Motor Freight case which are now pending before you, or some challenges made to the departmental seniority cases.

But in any event the departmental seniority cases have no application here, because the theory there is that a facially neutral seniority system is in fact discriminatory because it requires that seniority be exercised on the basis of seniority credits which employees were prohibited from gaining because of prior unlawful practices. So that although it appears that the black employees in Papermakers, for example, could bid into lines of progression formerly held by white employees and whites could equally bid on the black positions, yet no white would ever bid into a black position because they were the lower rated positions, lower paying positions. And since you have to bid on the basis of departmental seniority, in order to move up into a higher paying job, you have to sacrifice your existing seniority.

That's an entirely different question. The point there is that the courts have found that that kind of seniority

system is at that time a discriminatory act. The system is discriminatory.

Now, as I say, there is some question as to whether or not that position is viable. But however this court may resolve the issues before it in the over-the-road cases that you have under consideration doesn't reach the point here.

Now, one way to bring this to a focus, to show that inevitably -- inevitably -- respondent cannot prevail unless reliance is placed on the time-barred 1968 Act, is to look at the way this matter arose, simply the state of the pleadings. As I said, there was an allegation in the pleadings that the termination was involuntary and was forced by United Air Lines. We have admitted only that there was a resignation. It would not be an illegal act, would not be a violation of the Act at any time, had an employee voluntarily resigned upon being married. We no longer have the rule, and many stewardesses and flight attendants still do resign upon getting married. The percentage is not the same, but it is certainly not rare. They are numbered in the hundreds. There are still circumstances in which marriage -- the woman withdraws herself from the job market upon becoming married. So the mere fact of resignation wouldn't be sufficient.

If this were to be sent back to the district court for trial, since it stands on our answer denying it, it would

be encumbent upon the respondent to prove the fact that the resignation had been involuntarily, in other words, that there in fact had been a violation of the Act. But that would require proof of a 1968 time-barred claim in order to sustain the position here.

Now, this brings us around to the Machinists v. National Labor Relations Board, a decision arising under the National Labor Relations Act, and as this Court said in the Franks case itself that analogies to that statute are extremely helpful in applying Title VII of the Civil Rights Act.

QUESTION: Before you go on with that --

MR. BERNSTEIN: Yes, sir.

QUESTION: It's not clear. You say there was no burden on the respondent here to demonstrate that the 1968 termination was involuntary by showing, for example, that upon her marriage her supervisor came and said, "Of course, you know you have got to resign." That would be the way you would show the unvoluntariness, would it not?

MR. BERNSTEIN: Yes, sir.

QUESTION: Where is the burden to show that?

MR. BERNSTEIN: The situation is that since we have raised this on a motion to dismiss, we have admitted all matters well pleaded, and she has pleaded that it was involuntary enforced, so we have admitted it for this purpose.

Our position is it's irrelevant whether it was a discriminatory act or not in 1968. Our point is whatever it was, that is time-barred, you can't enter into that. If this matter should be tried, since we have denied it in our answer, and the motion to dismiss is not sufficient for her to win if we lose on that, she has to go back and prove her case. Then she would be put on her proof as to the nature of her act, whether it was voluntary or involuntary.

QUESTION: Then the burden is clearly on her.

MR. BERNSTEIN: That's correct,sir. But the point is not the burden as much as that must be proved at that point and she must rely then on a 1968 time-barred act in order to assert the point that in an application of a seniority system in 1972 she should have been given credit for that service which ended in 1968.

If I may, I would like to allude to the Machinsts v. National Labor Relations Board case. That was a 1960 case, and it arose under 10(b) of the National Labor Relations Act, which is the analog of Section 703(d) of Title VII of the Civil Rights Act in that it provides that charges be filed with the National Labor Relations Board within six months of the alleged unlawful labor practice, and under Title VII it's the unlawful employment practice, again, now, a six-months period. There the issue was what effect will be given to a pre-10(b), pre-six months incident to cast light on an event

occurring within the 10(b) period. In that case, an illegal union security clause had been entered into in a collective bargaining agreement. It was illegal because at that time the union did not represent a majority of the employees. And in order to enter into a union security clause, the union must be the majority representative. A contract was entered into, and of course since there was a union security clause, employees had to join the union, so that very soon the union had a majority by operation of the clause.

More than six months after the execution of the contract but within the period of its enforcement, a charge was brought against the employer and union alleging that this was an unlawful labor practice under the National Labor Relations Act. The matter came before this Court, and it was held that since the contract on its face was a completely lawful, legal agreement, and its illegality, if any, could only be established by proof of what had happened at the execution of the contract more than six months earlier, that such evidence was not admissible to prove a violation within the limitations period. And the National Labor Relations Board decision holding that in fact such evidence could be adduced was reversed.

Now, we submit, your Honors, we have the same situation here. There is simply no way that respondent can make out its assertion here that United failed to credit her

with seniority earned up to 1968 in its present application of its neutral, nondiscriminatory, time-in-the-position seniority system which the company now has, unless that is proved, because this respondent in 1972 was in no different position than a new employee who had never worked for the company or an employee who had quit clearly on a voluntary basis four years ago, or an employee who had been fired for cause, for theft, and then rehired four years later. In none of those instances would it be suggested that any of these employees were entitled to any prior seniority, and the only distinction we could make among those groups and the respondent here is that in fact she worked for United up to 1968 and was terminated under this no marriage policy, a claim which is time-barred.

QUESTION: Is the analogy you see in the Machinists case the limitation that case placed on the notion of a continuing violation when you have a statute of limitations?

MR. BERNSTEIN: Well, sir, I think it goes to both points. The Court did discuss the concept of a continuing violation in that case. And it said that if in fact you were to follow the theory of the Labor Board in that instance, the violation would never end. As here, respondent could have waited 20 or 30 years and come in and said, "Well, back in 1972 you didn't give me the seniority I was entitled to and therefore there is a continuing violation." It went to that

point as well as to the point when did the initial event occur which started the statute to run. And they held that was the execution of the contract. Since that ran there was no present defense.

QUESTION: If your opponents are right about the seniority violation, then their argument is that the violation is a continuing one and it's occurring every day.

MR. BERNSTEIN: The point, however, your Honor, about the seniority violation is that unless you rely on a time-barred claim, the 1968 claim, there is nothing offensive about the present seniority system. In fact, the system is not attacked, it's the failure -- put in terms of practice it said that we follow a practice of not giving her credit for her prior employment. And the point is that her prior employment ended four years earlier, long beyond the determination of the statutory period.

Your Honor, I am responding to your question. I hope you will question me if I am not.

QUESTION: I am not sure how clear my question was. You say you derive two principles from the Machinists case, both of which you think helped you.

MR. BERNSTEIN: Right. The concept of the continuing violation, I think, was laid to rest both in IOE v. Robbins & Myers earlier this term and in Johnson v. Railway Express where time limit questions were raised, one under 1981

and one under Title VII, and the Court made clear that the act of discharge is the complete fact and the time limits begin to run from that date. There is no continuing concept in that. And I submit that the courts of appeal are uniform in that, the Eighth Circuit, the Fourth Circuit, even the Seventh Circuit agrees with that.

In Evans I, which was a two-to-one decision, even in dissent, Judge Cummings said, "We agree that there was no obligation to rehire." There is no continuing violation. Unless respondent can show that somehow he can sustain his position without reliance on a time-barred event, there seems to me to be a rather clear case. I apologize for saying that. Clear cases don't get up here, but it seems to me that it's crystal clear if the time limits mean anything in Title VII, then it must foreclose the claim here.

I would like to reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Mr. Levin.

ORAL ARGUMENT OF ALAN M. LEVIN ON BEHALF OF THE RESPONDENT

MR. LEVIN: Mr. Chief Justice, and may it please the Court: My name is Alan M. Levin. I am with the Chicago law firm of Dorfman, De Koven, Cohen & Laner, and I represent the respondent Carolyn Evans.

I would like to note in passing before proceeding to argument that in the first place we have not yet had a

trial in this case. There has been no proof taken on whether or not United applies a continuous time-in-service rule across the board. I personally have met an individual flight attendant with United who was not discriminated against by the "no marriage" rule who did quit, who was rehired and was given past service credit.

Now, I am not accusing Mr. Bernstein of lying or anything like that. I am only suggesting --

QUESTION: Is she testifying here today?

MR. LEVIN: No.

QUESTION: Well, if it's not in the record, let's not hear about it.

MR. LEVIN: Excuse me, your Honor.

By way of argument, Mrs. Evans' case can be summarized in a nutshell as consisting of two points: First, that her charge was timely because it was filed during the pendency of the employment practice which she is challenging, namely, United's practice with respect to her seniority whereby they deny her credit for any time before 1972.

Secondly, that United's practice with respect to her seniority is illegal, because it gives present vitality to United's past open, admitted, across-the-board, pattern and practiced discrimination of which Carolyn Evans is an identifiable victim.

The real issue in this case is not one of timeliness.

At every stage of this case we have conceded and we concede again that if Carolyn Evans were solely and simply attacking the 1968 termination, her only effective avenue of relief would be by way of success in the McDonnell litigation as a class member in McDonnell. She is not seeking the back pay or other monetary relief for the period 1968 to 1972. That's the penalty she suffered for not filing her charge within 90 days of the '68 termination.

QUESTION: Do you concede if there were a back pay claim, it would be barred?

MR. LEVIN: For 1968 to 1972, yes, Mr. Justice White.

QUESTION: How about reinstatement?

MR. LEVIN: You are referring to the Collins case, I assume, Mr. Justice White.

QUESTION: I am not referring to anything. I am just asking you a question.

MR. LEVIN: Reinstatement of employment or of seniority, your Honor?

QUESTION: Assume that she had not been hired and that she asked for reinstatement.

MR. LEVIN: That's a different case. I believe that --

QUESTION: Is it any different than back pay claims?

MR. LEVIN: It could be different potentially if it could be shown that United's refusal to rehire would have been

based or was in fact based upon prior discrimination, in other words, that United said, "Because we discriminated against you in the past, we are not going to rehire you."

QUESTION: They just say, "We are full now, we haven't got any places for people."

MR. LEVIN: I think that would be a different case then, and I think that --

QUESTION: It's like the back pay claims, then.

MR. LEVIN: Yes, sir.

QUESTION: You mentioned the refusal to rehire. As I understand it the "no marriage" rule was terminated in November of 1968. Is there anything in the record that indicates why your client was not employed after that period and before 1972? Was it a refusal to rehire situation?

MR. LEVIN: As a matter of fact, for four years until she was rehired, she made several efforts to be rehired and was turned down. She was not represented by counsel.

QUESTION: Are those alleged in the complaint?

MR. LEVIN: Yes, they are, your Honor.

QUESTION: I just missed them.

QUESTION: Mr. Levin, what if your client's claim here, instead of being under the employment section of the Civil Rights Act, was under the open housing section and she asserted that she had been discriminatorily denied housing in 1968 and then she came back in 1978 and asserted she had been

discriminatorily denied the same house she wanted to buy in '68, she again tried to buy in '78. Do you think she could resuscitate any part of her '68 claim by making a claim of discrimination with respect to the same house 10 years later?

MR. LEVIN: Mr. Justice Rehnquist, I believe the way you have posited the facts, it would be different from our case and I don't believe the claim could be resuscitated unless a continuing pattern could be shown. On the facts as you have stated them, I don't see a continuing pattern.

We are dealing here with seniority, which is a special kind of an animal, a special kind of an employment animal. It is based upon the past. It necessarily looks to the past, operates in the present; it looks to the future as well and operates in the future. We are talking about an on-the-job policy. We are not necessarily stating that an employer has an obligation to rehire a past discriminatee, but we are saying that an employer once he hires somebody, has to treat that person with fairness and not give present vitality to past discrimination.

I think the best analogy I could give would be under the wage and hour law. If an employer says to a prospective applicant, "I am not going to hire you because I can only afford to pay you $1.90 an hour," and the employee says, "Well, that's 40 cents below the minimum wage," and runs down to his nearest regional office of the U.S. Department of Labor

and files a claim. He is going to be told his employer has no obligation to hire him. But once the employer hires him, suppose the employee agrees to work for $1.90, the employer says fine, he hires him. The next day the employee can go down to the U.S. Department of Labor and file a claim, and the employer will be told that there is no such waiver in that case, that once you hired the man, you had the obligation to pay him the minimum wage.

We have an analogous claim here. Once United rehired Carolyn Evans, it couldn't treat her like a stranger because she was in fact no stranger.

QUESTION: If your rule were adopted by the Court, it would certainly put some pressure on United not to ever rehire anybody who might have had a claim against them in the past, wouldn't it?

MR. LEVIN: Mr. Justice Rehnquist, I suspect that it is the very rare employer indeed who rehires an employee who has previously been discharged for discriminatory reasons unless he is ordered by a court to do so.

Carolyn Evans was not hired out of the goodness of United's heart. United got an experienced, mature employee who was better than the average crop of employee coming around. Presumably that is the reason she was rehired.

Secondly, it is possible to posit a case,unlike the Collins case, where the employee can demonstrate that

the refusal to rehire was in fact based upon the fact that the employee was a past discriminatee. That is not the Collins case. That would be closer to our case.

Even today as Carolyn Evans flies for United Air Lines, she suffers a current loss of benefits, a loss of wages, a loss in vacation. She suffers a loss in the area of flight assignment selection, rights to retention in case of layoff, because of United's current practice with respect to her seniority.

QUESTION: Is there any time limit to her bringing a suit such as this on your theory? Could she wait for 20 or 30 years and then --

MR. LEVIN: Mr. Justice Blackmun, if she were to file today, it would be our contention that she would still be timely. But Section 706(g) of the Act places a 2-year limitation on back pay recovery. So in terms of financial recovery, whenever she were to file the claim, she would be limited to 2 years of back pay.

Furthermore, if, unlike this case where United has not once claimed that it has been prejudiced by the time delay, United argues about claims in the future, not about this case. But if in the future an employee could demonstrate actual prejudice in defense on the merits, then conceivably the court could apply the doctrine of laches.

QUESTION: But you don't get to a doctrine of laches

where you have congressionally specified statute of limitations, do you? That's Congress saying the claim shall not be filed after such a date.

MR. LEVIN: Mr. Justice Rehnquist, I believe in this case that Congress has not barred this case with the time limitation of 706(e).

QUESTION: But should there be a doctrine of laches at all if it is not time-barred by the congressional action?

MR. LEVIN: I believe this would be similar to the veterans reemployment cases where, while there was a one-year statutory protection period, the courts have traditionally applied the doctrine of laches to bar claims which are deemed to be stale for evidentiary reasons. And that essentially is the argument which is being made by the company in this case.

Carolyn Evans also suffers from present sexual disparity on the job. She is perpetually subordinated to where she would have been had she been a married male flight attendant and had she --

QUESTION: To the extent of 18 months.

MR. LEVIN: To the extant of 18 months. Also to the extent of four years, 1968 to 1972. I realize that on equitable grounds the claim for the 18 months actually worked is more compelling than the four years that were not worked.

On the other hand, it is no less true that the present denial of seniority does in fact give vitality to the

past discrimination today through the denial of the four years as well.

QUESTION: Mr. Levin, I can't let that last comment go without observing that if she had been a married male attendant, she wouldn't have had this job in '68, would she? They excluded all males from the position at that time.

MR. LEVIN: I am not aware of that, your Honor.

QUESTION: Read the Sprogis case.

MR. LEVIN: OK.

Carolyn Evans complains of a current act of a current sexual disparity and of a current loss. Her charge was timely when judged by the standards in the legislative history when Congress considered amendments to Title VII in 1972. Specifically Congress stated that it was accepting the judicially created doctrine that certain violations are deemed to be continuing in nature, that a charge is timely when filed during the pendency thereof or at any time up to 180 days after the last occurrence of the practice. In addition, you have to couple thatwith section 706(g) of the Act which limits back pay relief to 2 years, which would have significance only in a continuing violation case.

And to refer again to the veterans reemployment cases, this Court in 1949, in the Oakley case and the Haynes case, at 338 U.S. 278, two 1949 decisions, recognized on the escalator theory of seniority that a veteran could raise a

claim for a denial of seniority credit from his original date of hire even after the one-year statutory protection period had run. There is no time limit issue in this case. Her charge was timely. United has never disputed the fact that the challenged seniority practice is a current one. It has never disputed that the seniority practice itself is a continuing one. It has never really disputed the proposition that if the seniority practice is illegal, then the charge was timely. United has never alleged prejudice against them on their ability to defend on the merits.

In saying that the only violation that occurred in this case occurred in 1968, United is really saying that the statute of limitations should be held to have run before the violation was even committed. The violation challenged in this case didn't even begin to occur until after Carolyn Evans was rehired in 1972.

QUESTION: I thought you said at the outset that it began when she was involuntarily terminated in 1968.

MR. LEVIN: Mr. Chief Justice, I am referring to the specific current practice which she is challenging, the practice with respect to her seniority.

Now, it is our contention that that practice is illegal because it gives present vitality to,perpetuates the effects of the past discrimination against her in 1968.

United Air Lines is openly relying on that past act

of discrimination, an open, admitted policy across-the-board pattern or practice adjudicated to be legal in the Sprogis case as creating a break in service to deprive Carolyn Evans of benefits and seniority today. And then they tell us that we are time-barred.

We submit that it is a basic, established, accepted principle of Title VII law, has been for at least the last 9 years, from this Court for 6 years, that United cannot be permitted to perpetuate the effect of past discrimination through its current practice.

The principle we rely on is as follows: that where a present employment practice,characteristically a seniority practice, which is so characteristically tied to the past operates in the present, looks to the future, where such a practice, to use United's words, is inexorably tied to and tainted by past discrimination, as they say was true in the Papermakers case, and where that present practice extends and perpetuates the past discrimination into the present resulting in loss and disadvantage to the identifiable victim of that past discrimination in the present, then we say that that present practice is illegal. EEOC said this several years ago. Eight courts of appeals have agreed with the principle in the seniority area. Congress recognized the principle when it cited the Papermakers case with approval in considering amendments to Title VII in 1972. This Court recognized the

principle that present facially fair employment practices that perpetuate the effects of past discrimination are illegal in the Griggs case in 1971.

We submit that that principle fits the Evans case like a glove. She is the identifiable victim of past open adjudicated discrimination. She suffers today due to a current superficially neutral but no less damaging policy which gives present vitality to that past discrimination. Every time Carolyn Evans bids on a flight assignment, every time she takes a vacation, every time she gets her paycheck, every time she has to stand in an airport waiting to see if she is going to fly on standby duty --

QUESTION: Mr. Levin, could I interrupt, because I want to the thrust of your theory. Supposing instead of your particular client you had a person who had been married prior to '68 and applied for a job with United, say in '67, was turned down because she was married, and then she is employed at this time so that she didn't work for the year '67 to '68 because of the no-marriage rule. Would she have the same claim Your client does to seniority for that period of denial of employment on account of her marriage?

MR.LEVIN: She could under that theory. It isn't necessary for the Court to hold that to be the case, Mr. Justice Stevens.

QUESTION: Why not?

MR. LEVIN: She could -- Well, in this case, our contention includes the fact that Carolyn Evans actually worked for United Air Lines from 1966 to 1968 and that she in service as a past employee.

QUESTION: But the wrong that she complains of is the fact that she was treated unlawfully. You are not really seeking seniority for the period subsequent to the illegal act; you are seeking seniority for the time when they treated her perfectly lawfully. In other words, she was employed up until 1968.

MR. LEVIN: Yes, she was, your Honor.

QUESTION: But she is not getting credit for that seniority because of an illegal act in '68.

MR. LEVIN: That is true, your Honor.

QUESTION: Now, why wouldn't another comparably situated qualified stewardess who was denied employment on the same date as a new employee, why wouldn't she be entitled to make the same argument?

MR. LEVIN: The second half of my answer is going to be that I believe that she should be entitled to relief. I was going to suggest a possible distinction. I believe she should get relief, and this is in fact the Acha case which was decided by the Second Circuit, the New York City police woman case.

QUESTION: In fact, should your client not -- if you

are correct, should your client not merely get relief for the four years, but for the four years plus whatever additional time she would have worked but for the unlawful discharge?

MR. LEVIN: Exactly, Mr. Justice Stevens. And we are going for both constructive and actual seniority.

QUESTION: Your whole complaint is that she was illegally fired.

MR. LEVIN: That she has been illegally fired.

QUESTION: Yes.

MR. LEVIN: And that through its present action, United gives present effect to that past discrimination.

QUESTION: It all goes back to that. And yet you can't get any action for that firing in any court, any place in the world.

MR. LEVIN: Solely for that which she lost because of the '68 discrimination. That is true. On the other hand, nobody twisted United Air Lines' arm and told them to ignore Carolyn Evans' seniority for 1966 to 1968.

QUESTION: But United could have evaded it very simply by not rehiring her.

MR. LEVIN: That is true.

QUESTION: Mr. Levin, are you going to discuss the Machinsts case?

MR. LEVIN: Yes, I am, and I will do so now, Mr. Justice Brennan.

The Machinists case is clearly distinguishable from this one on three grounds -- statutory policy, the statutory language, and the legislative history. First, let's take a look at the Machinists case. It was decided under the National Labor Relations Act in 1960, around the time of the Steelworkers trilogy decided by this Court. At that time, as Mr. Justice Harlan expressly stated in his opinion -- I refer to 362 U.S. 428 -- the National Labor Relations Act was being viewed in the context of that case as primarily a regulatory statute. The chief concern in that opinion was institutional stability in labor relations. By contrast, in the Evans case Title VII applies. In 1964 and 1972 Congress reiterated the fact, as this Court recognized in Griggs and in Albemarle, that the purpose of Title VII was remedial, a make whole purpose. Congress recognized that it would be upsetting the applecart. Institutional stability was not the primary concern.

Secondly, the statutory language. Under the National --

QUESTION: Albemarle relied on Phelps Dodge for allowing restitution to people who had been discriminated against. And Phelps Dodge arose under the National Labor Relations Act, didn't it?

MR. LEVIN: I think what we are discussing here, though, is an NLRA case which arose at a time, in 1960, with a particular interpretation on Section 10(b) of the Act. I

will agree that there are appropriate analogies with the National Labor Relations Act as this Court made clear in the Franks case, but that the analogy doesn't apply here.

The second distinction that I would make is on the statutory language. Whereas the NLRA prohibits complaints issuing based upon acts occurring prior to the 6-month period, Title VII of the Civil Rights Act does not use those terms. Title VII speaks in terms of challenging a practice occurring within 180 days, the challenged practice.

But more importantly, the legislative history is really the key difference. As Mr. Justice Harlan stated in the Machinists case, 362 U.S. 426, Congress' policy was to let sleeping collective bargaining contracts lie. Congress specifically, Mr. Justice Harlan said, specifically adverted to the problem of contracts with minority unions, had previously taken pains to protect minority unions against belated attack, and had enacted 10(b) with that purpose in mind. In Title VII, by contrast, Congress has accepted the continuing violation theory, wrote in a two-year back pay limitation rule, has implicitly indicated with those two actions that there are cases where an employer's past actions can be brought in to assess responsibility, to assess liability. Congress was explicitly concerned with seniority when it considered amendments to Title VII in 1972. And Congress specifically approved the Papermakers case.

We believe it is clear from the legislative history, the cases that Congress accepted at the time it acted prior to the 1972 amendments, that Congress intended to prohibit the practices which in present operation perpetuate the effects of past discrimination.

QUESTION: Why wouldn't on that basis, then, back pay claims be entertainable?

MR. LEVIN: Back pay claims under what circumstances, Your Honor?

QUESTION: Well, back pay claims for periods beyond the 6 months.

MR. LEVIN: Well, Congress had said that back pay claims would be recognizable beyond the 6-month period.

QUESTION: I know, but you apparently agree it took a special provision to do that. Your claim here is that without any provision like that, you can make the seniority claim.

MR. LEVIN: We aren't seeking back pay, and there is no prohibition in 706(g) --

QUESTION: I know, but on your theory you wouldn't need any special provision to get back pay.

MR. LEVIN: That is true, your Honor.

QUESTION: Well, you conceded that without it, you wouldn't have it.

MR. LEVIN: No. Excuse me, your Honor. Without

706(g), it is our contention that the principle would still be valid, but that 706(g) is evidence of Congress' intention when it was considering the 1972 amendments to Title VII.

QUESTION: You say, I suppose, that 706(g), in the absence of that you might be able to get back pay for 8 or 10 years, that Congress has cut off a right that would otherwise exist.

MR. LEVIN: It does cut both ways, Mr. Justice Rehnquist.

QUESTION: Earlier in this argument, if I understood you correctly, you conceded that you would not have a back pay claim here on your theory.

MR. LEVIN: Earlier than 1972, Mr. Justice White. We do seek back pay for the seniority differential since 1972.

QUESTION: I understand that.

MR. CHIEF JUSTICE BURGER: We will resume there at 1 o'clock.

[Whereupon, at 12 noon, the argument was recessed until 1 p.m. the same day.]

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Levin, you may continue.

ORAL ARGUMENT OF ALAN M. LEVIN ON BEHALF OF RESPONDENT (RESUMED)

MR. LEVIN: Thank you, Mr. Chief Justice.

I would like to return to the point that was being discussed just before the luncheon recess that was raised by Mr. Justice White and Mr. Justice Rehnquist. In reference to Section 706(g) of the Act, in order to avoid any question that I might have misstated Congress' purpose, it is true that the legislative history demonstrates that the 2-year limitation was essentially intended to limit back pay relief so that there wouldn't be an unlimited period.

Our position is that the fact that there still is a 2-year limitation period, as opposed to a 6-month filing period, is evidence for the acceptance of the theory of a continuing violation and the impact of past acts.

QUESTION: So what about reinstatement?

MR. LEVIN: Are we talking about reinstatement of employment, Mr. Justice White?

QUESTION: I am talking about reinstatement of a person who was discriminatorily discharged and asked for reinstatement after 6 months.

MR. LEVIN: Our position would be that if it could

be demonstrated that the employer's decision not to rehire the person --

QUESTION: That was your answer the last time. Is your answer to the next question the same, too? Let's assume that he just says, "I am full, I haven't got any places."

MR. LEVIN: Then presumably the employer's reason is a nondiscriminatory reason and we would hold that that case is distinguishable, on that basis.

I would also like to return to a point which was made by Mr. Bernstein regarding the Papermakers case. Mr. Bernstein indicated that under Papermakers there was a present discriminatory seniority policy. I believe that an alternative interpretation of that case is more suitable and correct, that is, that the Court in Papermakers found that the seniority practices in issue were in fact facially neutral and arrived at the discriminatory nature thereof only by reference to past discrimination which was incorporated. And, in fact, in that case plaintiffs did have to prove the existence of past discrimination. The past discrimination there was in hiring.

I would suggest also that there are strong policy reasons for accepting the principle advanced by Mrs. Evans here. If this Court reverses the Evans decision, we feel that it may be well nigh impossible in the future to attack the non-overt, non-obvious, subtle but pervasive practices

in employment which do in fact extend discrimination into the present, be it in a departmental seniority system, seniority practices, an employment seniority system, promotional system, possibly in the testing area as well. Because the only really effective way to get at subtle but pervasive discrimination is by looking at the roots of the practice, the historical background of the practice, how did it originate, what effect does it have. If we can't look at that, then I submit that the really pervasive form of discrimination in our society today may be untouchable, because the days of the overt and the obvious seem to be passing. Seldom, if ever, or less often than before, do we see explicit signs of discrimination. No Jews need apply. No blacks need apply. No Catholics need apply. Today the prevalent form of discrimination is subtle, and we believe that the way to get at it is with the principle we have here.

An upholding of the Evans decision, far from opening a Pandora's Box, will keep open a necessary avenue of relief under Title VII.

QUESTION: As one of the Justices suggested, however, to affirm will mean that all the incentive on the part of an employer to reemploy a person in the posture of your client, not only is the incentive removed, there is a disincentive to hire them, isn't there?

MR. LEVIN: Well, Mr. Chief Justice, I believe that

that problem, if it exists, is in fact de minimis, because I think that it --

QUESTION: It isn't de minimis for the particular person involved. It runs on whether the concern is addressed to the particular individual or to the generality of womenkind in this situation.

MR. LEVIN: What I am suggesting, Mr. Chief Justice, is that it is rare for an employer to rehire a past discriminatee. I am also suggesting that if it can be demonstrated that the employer's action is in fact based upon past discrimination, that he doesn't rehire because the person is a past discriminatee, that that would be closer to our case, different from the Collins case.

If the Court has no further questions, I thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Bernstein?

MR. BERNSTEIN: Yes.

REBUTTAL ARGUMENT OF STUART BERNSTEIN ON BEHALF OF THE PETITIONER

MR. BERNSTEIN: Mr. Chief Justice Burger, the point that you just made concerning the disincentive to hire was made by the court of appeals in Evans I. It seemed to concern them very much, although it completely ignored it in Evans II. The same point has disturbed the district court in California last year in a case in which it attempted to

reconcile Collins and Evans and expressed some concern about the dichotomy now between these cases, that it was perfectly all right not to rehire, but once you did, you ran into these hosts of problems that have been raised here. That was Kennan v. Pan Am cited in the briefs.

I wish to respond very briefly to some of the points made. We agree there can be a continuing violation. No question about that. And we agree that if there is a continuing violation, that the statute now provides as a result of the 1972 amendments that there can be a 2-year period of back pay. But that 2-year period is a limitation of liability, not a statute of limitations point. Up to that point, the limitations for back pay was drawn from the various State laws, as it is now under Section 1981 of the earlier Civil Rights Act, in order to make uniform a back pay period when the 1972 amendments were passed. Griggs is a good example of a continuing violation where an employer at the time of litigation required the passage of a Wunderlich test and the maintenance of a high school diploma in order to progress into higher paying jobs. That was going on, and the employer attempted to justify that and this Court said that it had a disparate effect now and therefore was now discriminatory, even though facially neutral, because the requirement for the test and a diploma were required of blacks as well as whites is neutral. The fact is that the whites could more readily meet the requirement than

the blacks, and it was therefore held to be now a discrimination and a continuing discrimination. That is not the case here.

There is no contention here, there never has been, that the United seniority system, which is based on date of hire, is discriminatory in any way with respect to race, sex, or in any other manner. In fact, I think that has been completely conceded all along. United's seniority system is not being challenged.

The thesis stated in respondent's brief on page 14 is this: "By relying on the 1968 termination as creating a break in service, and giving effect to that break in service in its current seniority practice with respect to Mrs. Evans, United is actively enabling that prior discrimination to reach effectively into the present." It says we are trying it as a break in service. Yes, we are. We concede that's exactly what it was. It was a break in service, and it would be a break in service for any employee, no matter how that break occurred. But the fact that we do not give credit for that break in service in 1972 does not create a present discriminatory act as counsel insists. It is inevitable. There is no way you can get to this point without relying on a time-barred claim.

United was as sensitive to the civil rights movement as is counsel, and I don't think it's encumbent upon us to defend ourselves here. We concede for the purposes of this case that the "no-marriage" rule was a violation up until 1968

when we abandoned it. And we concede that if Miss Evans had filed the charge within 90 days of her termination, she would have been back working long ago with full seniority and full back pay.

QUESTION: But if you go to trial --

MR. BERNSTEIN: Yes, sir.

QUESTION: -- in this case and suppose the respondent could show that another employee in the same position was discharged for theft and two years later it was found out that the employee was not guilty of theft and was rehired and ordered now to be given full seniority rights, that would put a damper on yours, wouldn't it?

MR. BERNSTEIN: Well, sir, I think I would have to ask you to qualify the question a bit. If you assume the employee was discharged for theft and had filed a timely grievance --

QUESTION: No, hadn't filed anything.

MR. BERNSTEIN: Then, sir, the employer would have had no obligation. If in fact they did, that would be a different case, and a different complaint would have to be filed, and if counsel can bring up such examples, he -- but that's not this case.

QUESTION: Wouldn't that show that United was using a different standard?

MR. BERNSTEIN: Yes, sir. Yes, it would. But I

submit to you that is not this case. I responded to Mr. Justice --

QUESTION: Because they can't go to trial.

MR. BERNSTEIN: No, I am sorry. In this case they can't go to trial. Let's suppose this, your Honor. Let's suppose we had a system in which, for all employees who voluntarily quit we would permit them to return 4 years later and give them full seniority credit for past service, but we would not do the same thing for employees who had been terminated because of a "no-marriage" rule. I think you could make out a different case. But that is not this case. If you would say in our present practice, our present seniority system is discriminatory because it grants seniority on a different basis to employees whose only differentiation was prior discrimination, I would concede. That is the kind of case that is typified by United Papermakers. That is not the case here. If such a case exists, I suggest counsel bring a new cause of action against us. But that is not what is being tried here. It's not the issue at all.

Counsel says that Machinists can be distinguished because of the historical context in which it arose, the congeniality toward collective bargaining agreements and the desire to stabilize labor relations. The fact is that in that case this Court cited with approval an NLRB case, Bowen by name, the citation of which is 113 NLRB 731. I have 1975

in my notes, but I am sure it must have been 1955. It was cited with approval by the Court in Machinists. That was a seniority case. There an employee who had been on layoff, on return from layoff was given less seniority than he was entitled to under the collective bargaining agreement by some kind of conspiracy between the union and the company because he had occupied a supervisory job in the meantime. So he was in a lower seniority slot. Well, 6 months after he came back there was a layoff, and because of his low seniority, relatively low seniority because of what happened to him when he came on board, he was laid off earlier than he would have otherwise been. And at that time he filed an unfair labor practice charge. And the Board held it was time-barred because the event that caused that situation occurred when they failed to give him the seniority to which he was entitled. And there the same point was made that otherwise this could go on for 10, 20, 30 years, indefinitely. And you simply read Section 10(b) out of the National Labor Relations Act just as you would read out section 706(e) out of the Civil Rights Act of 1964.

Your Honor, our thesis is a very simple one. There is no way that the case can be made out here without reliance on a time-barred event. If the statute of limitations are to mean anything, then, the court of appeals should be reversed and the district court's opinion reasserted.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:14 p.m., the arguments in the above-entitled matter were concluded.]