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IN THE SUPREME COURT OF THE UNITED STATES

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FORD MOTOR COMPANY, :
Petitioner, :
v. : No. 81-300
EQUAL EMPLOYMENT OPPORTUNITY :
COMMISSION :
- - - - -x

Washington, D. C.
Tuesday, April 20, 1982

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:57 o'clock p.m.

APPEARANCES

JOHN R. WESTER, ESQ., Charlottesville, North Carolina;
on behalf of the Petitioner.
DAVID A. STRAUSS, ESQ., Office of the Solicitor General,
Department of Justice, Washington, D. C.; on behalf of
the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments
next in Ford Motor Company against EEOC.

Mr. Webster, I think you may proceed when you
are ready.

ORAL ARGUMENT OF JOHN R. WESTER, ESQ.,
ON BEHALF OF THE PETITIONER

MR. WESTER: Mr. Chief Justice, and may it
please the Court, this case is here on certiorari to the
Fourth Circuit and presents two issues of employment
discrimination law. The first issue is whether an
employer's potential back pay liability to a
discrimination claimant continues to accrue after the
claimant has rejected the employer's unconditional job
offer of employment.

The second issue is whether Ford was
improperly required to prove its explanation for its
employment decisions in this case. The resolution of
the back pay issue may well affect the handling of
almost any employment discrimination case in which an
employer finds itself able to offer employment to a
discrimination claimant before the determination of the
merits of the claim.

The facts essential to the resolution of this
issue may be stated briefly. On July 21, 1971, Judy

1 Judy Gaddis and Rebecca Starr applied to work at the
2 Ford Motor Company's parts warehouse in Charlotte, North
3 Carolina. Both had recently been laid off from General
4 Motors warehouse, where each had worked for some ten
5 months. Neither was hired. Ms. Gaddis then wrote the
6 Equal Employment Opportunity Commission and charged that
7 Ford had not hired Ms. Starr or her because they were
8 women.

9 Neither Ms. Gaddis nor Ms. Starr resumed
10 regular employment again until January of 1973, although
11 Ford did employ both women in its parts warehouse for
12 some six weeks in late 1972. In July of 1973, seven
13 months after the women had returned to work at General
14 Motors, Ford had a vacancy for a permanent warehouse
15 job, the same job for which Ms. Gaddis and Ms. Starr had
16 initially applied. That vacancy was the first Ford had
17 had for a permanent position since Ms. Gaddis had
18 charged Ford with employment discrimination. Ford
19 offered the position first to Ms. Gaddis, and she
20 declined it. Ford then offered the position to Ms.
21 Starr. She declined it.

22 QUESTION: Did that coincide with the filing
23 of charges?

24 MR. WESTER: No, sir, it occurred some two
25 years after, nearly so, following the filing of --

1 QUESTION: How long after?

2 MR. WESTER: The offers to these claimants
3 occurred some two years following the charges that were
4 filed, nearly two years.

5 Neither of Ford's offers included seniority or
6 back pay, nor did either offer require Ms. Gaddis or Ms.
7 Starr to abandon any aspect of their discrimination
8 claims against Ford. Two years later, in July of 1975,
9 the Commission brought this suit. The district court
10 concluded that Ford had discriminated against Gaddis and
11 Starr when it did not hire them in 1971, and also
12 concluded that Ford's offers in 1973 had no effect on
13 the amount of back pay.

14 QUESTION: Well, are you saying --

15 MR. WESTER: Ford's back pay.

16 QUESTION: Are you saying that when the offer
17 of reinstatement was made, it was rejected out of hand?

18 MR. WESTER: I am saying that it was rejected
19 in both cases. Yes, sir.

20 QUESTION: With no conditions --

21 MR. WESTER: That's correct.

22 QUESTION: -- except that the employees said
23 they wouldn't come back unless. Is that it?

24 MR. WESTER: No. No, Your Honor. Let me say
25 that there were no conditions attached to the offer by

1 Ford. With respect to the claimants' response, the
2 evidence is that both testified to Ford's administrative
3 clerk who delivered the offers by wire and by telephone,
4 that neither wanted to be the only woman in the
5 warehouse. There was just one position, and neither
6 wanted to be the only woman. That is what she said.
7 And neither woman mentioned, I might add, any claim for
8 retroactive seniority or back pay at the time the offers
9 were made. There was no evidence that that was
10 mentioned.

11 QUESTION: Well, I got the implication that
12 you were -- at least an intimation that the employees
13 were attaching conditions.

14 MR. WESTER: No, sir, they did not.

15 QUESTION: Mr. Wester, is it clear what the
16 salary, the wage rate that was offered was? Was it what
17 would have been paid when they were originally denied
18 employment, or was it the current wage rate?

19 MR. WESTER: They were offered 1973 jobs, Your
20 Honor, the same jobs they -- 1973 jobs in the
21 warehouse. There has been no question about that in the
22 evidence.

23 QUESTION: And was the wage rate the same as
24 it had been in 1971?

25 MR. WESTER: I am unaware of that. There has

1 been no issue of that, as far as I know.

2 QUESTION: And the government gives us a
3 hypothetical in their brief -- pardon me --

4 MR. WESTER: Yes.

5 QUESTION: -- but we don't know whether it
6 fits this case or not.

7 MR. WESTER: I think not. The current rate is
8 what all the evidence indicates. They received 1973
9 offers at the 1973 wage. They had worked there, as you
10 will recall from the statement of facts, just previous
11 to that, and from all the record shows, they were
12 offered 1973 rates when they were offered these jobs.

13 QUESTION: They weren't offered the seniority
14 they would have had if they had been hired in the first
15 place?

16 MR. WESTER: That's correct. They were not.
17 Neither was. And there was no discussion of it at the
18 time.

19 QUESTION: And if they had been there that
20 long, would they have not only seniority, but would they
21 have had higher wages?

22 MR. WESTER: They would have had the wages
23 determined by the bargaining agreement with the United
24 Auto Workers. It would not --

25 QUESTION: But if they had been hired, if they

1 had been hired when they were turned down, when they
2 weren't hired, when they were allegedly turned down,
3 would they have been making higher rates in 1973 than
4 new employees would make?

5 MR. WESTER: I am unaware of that, and it
6 would require me to speculate outside the record to
7 answer, sir.

8 QUESTION: Mr. Wester, is it your position
9 that the claims for both women should be tolled, even
10 though only one job was available?

11 MR. WESTER: Yes, Your Honor, because both
12 women were offered jobs. The offers occurred first to
13 Ms. Gaddis, who declined it. Then it was offered to Ms.
14 Starr, and she declined it. That is our position.

15 The district court held Ford's liability to
16 Gaddis and Starr with allowances for interim earnings
17 extended to the end of 1977, the date the Court entered
18 its findings in the case. Over a dissent, the Fourth
19 Circuit affirmed its conclusion rejecting Ford's
20 contention that its unconditional offers of employment
21 cut off the accrual of back pay.

22 Ford submits that the Fourth Circuit's holding
23 should be reversed, first because it is unfair to
24 employers, to incumbent employees, and to claimants,
25 second, because it is unworkable for the Title VII

1 process, and third, because there is a rule available
2 that is better in all respects, and that is the rule
3 followed by the National Labor Relations Board and the
4 circuit courts reviewing the Board's decisions.

5 The Fourth Circuit's holding means that an
6 employer charged with employment discrimination can be
7 assured that a job offer will stop the accrual of back
8 pay liability only by offering not only the job
9 initially sought, but also retroactive seniority, and as
10 the court of appeals' reasoning indicates, back pay as
11 well. Thus, to shut off the back pay meter, the
12 employer must offer the claimant essentially all relief
13 that the claimant could be awarded should he or she
14 ultimately prevail at a trial.

15 The practical effect of this holding is to
16 require that employers give up any meaningful right to
17 contest and defend against the claimant's allegations.
18 The Fourth Circuit's rule is also unfair to incumbent
19 employees, because job offers that comply with the
20 Fourth Circuit's rule will undermine their seniority
21 rights, although these employees are third parties
22 totally removed from the discrimination controversy.

23 QUESTION: Well, it might not have been
24 undermined had there been no discrimination.

25 MR. WESTER: Well, yes, Your Honor, but when

1 the offer was made, there is no finding of any
2 discrimination. The offer is made --

3 QUESTION: The offer is made later.

4 MR. WESTER: The offer is made following the
5 alleged discriminatory act. At the moment the offer is
6 made, the matter of discrimination is a matter of
7 allegation alone.

8 QUESTION: But isn't that the way we have to
9 accept this case, as though there was discrimination?

10 MR. WESTER: To the contrary. It is
11 fundamental to our position that the Court understand
12 the posture in which these offers were made, that is,
13 before any finding of discrimination. There is no
14 question that this Court has stated that both back pay
15 and retroactive seniority would have to be provided, if
16 there was to be a valid offer or a reinstatement offer
17 following, or instatement offer for this case, following
18 a finding of discrimination. To the contrary, in this
19 case, this offer occurred before a suit was even
20 brought, and some four years before a finding of
21 discrimination.

22 QUESTION: Would you take the same legal
23 position if there had been a finding but you were
24 appealing it?

25 MR. WESTER: I would, Your Honor.

1 QUESTION: You would still say that
2 notwithstanding the finding, as long as you make an
3 offer, that would cut off back pay from the date of the
4 offer?

5 MR. WESTER: Yes, because there still is no
6 adjudication of discrimination.

7 QUESTION: Yes.

8 MR. WESTER: Yes, Your Honor. Yes, Justice
9 Stevens.

10 The Fourth Circuit's rule is unfair to
11 incumbent employees because it requires an employer to
12 award seniority to a claimant who has never worked for
13 that employer, although such an award will necessarily
14 dislodge from their positions on the seniority ladder
15 all employees who have been hired subsequent to the date
16 the applicants applied for work -- the claimants applied
17 for work. If the employer is a party to a collective
18 bargaining agreement, the award of seniority will breach
19 any standard seniority provision of that agreement.

20 Apart from the obligations under any such
21 agreement, however, an employer in Ford's view should
22 not be encouraged to protect itself from continuing back
23 pay liability by sacrificing the interest of present
24 employees who have earned and who rely upon their
25 seniority standing.

1 This Court's decisions have carefully
2 delineated the basis upon which seniority rights of
3 incumbent employees may be altered. In each such
4 decision, this Court -- the predicate set by this Court
5 for permitting those seniority rights to be affected was
6 either a finding of discrimination or the adoption
7 through collective bargaining of a comprehensive,
8 narrowly drawn, and temporary affirmative action plan
9 designed so as not to affect unnecessarily the seniority
10 interest of employees in the plant.

11 The Fourth Circuit's rule, we submit, has no
12 such foundation. Instead, it encourages an employer to
13 make self-interested ad hoc decisions whether in any
14 given case the employer wishes to cut off its back pay
15 liability instead of -- cut off its back pay liability
16 at the expense of the seniority interest of incumbent
17 employees.

18 QUESTION: Well, just how would that affect
19 the seniority of incumbent employees, Mr. Wester, if you
20 simply hired people? Don't you have to hire them with
21 kind of advanced seniority?

22 MR. WESTER: To the contrary. What was
23 necessary here for Ford to do, and the rule that it
24 advocates this Court should adopt in this case, is
25 precisely what it did, make an offer, make an

1 unconditional offer that there are no strings attached
2 to the prosecution of the claim, but without any rights
3 of seniority that may be indeed the due of the claimants
4 once they have established a claim.

5 QUESTION: Mr. Wester --

6 MR. WESTER: Yes.

7 QUESTION: -- I am still confused. Are you
8 saying that this record does not show a finding of
9 discrimination on account of sex here?

10 MR. WESTER: It certainly does show such a
11 finding, Your Honor, and the key to that -- and the key
12 to that is that it occurred, the finding, at a trial
13 some four years following the date these unconditional
14 offers were made, and the key to our position --

15 QUESTION: How do you avoid that? I mean, you
16 are hung with that finding, aren't you?

17 MR. WESTER: Well, Your Honor, the second
18 issue in the case is whether or not the finding was
19 proper, whether the correct burden of proof was applied,
20 but putting that aside, we are by no means hung with the
21 finding for the purposes of analyzing the first issue,
22 the back pay issue, and the reason for that is that the
23 employer ought be entitled to a cutoff of further back
24 pay liability. Let me emphasize that if Ford is indeed
25 and should be held liable for sex discrimination, Ford

1 is liable, but through the point of the offer for back
2 pay and seniority, and there can be no question of
3 that. Our point is that past that point, past that
4 point, there is no subsequently accruing back pay
5 liability because it is shut off by the unconditional
6 offer that Ford makes.

7 QUESTION: But you didn't offer seniority.

8 MR. WESTER: Quite right. We did not, nor
9 should we have, for if we had, it would have required
10 the surrender difficulty that I have just described, and
11 would have also impacted certainly on the seniority
12 interest of other incumbents.

13 QUESTION: Which means that the complainants
14 are not made whole.

15 MR. WESTER: Precisely. They are not made
16 whole at the time the offer is made, but they give up no
17 item whatever, in no respect whatever, their ultimate
18 right to be made whole.

19 QUESTION: You mean, they could continue
20 litigating it.

21 MR. WESTER: Absolutely, and that is the crux
22 of our position, and because they can continue
23 litigating, Ford's back pay liability should have ended.

24 QUESTION: What you are saying is, in effect,
25 that eventually these claims will be resolved by a

1 court, and the court will decide what things in addition
2 to employment, back pay, and that sort of thing, if
3 anything, the successful plaintiff should get, but that
4 the employer before that sort of a determination is made
5 or before a finding of discrimination is made, the
6 employer should have some way of limiting the back pay
7 liability when he does not know what the outcome of the
8 lawsuit will be.

9 MR. WESTER: That is our entire argument. In
10 fact, it would seem to us, in light of this Court's
11 holding in Franks, that an award of retroactive
12 seniority is not always appropriate even after a finding
13 of liability, that it would be anomalous to require an
14 employer just to cut off subsequently accruing back
15 liability to throw in an award of retroactive seniority
16 that may turn out never to have been appropriate at all.

17 The rule followed that we advocate and that I
18 have -- the rule we advocate in this case is a rule that
19 has been developed by the National Labor Relations
20 Board, and followed by all of the circuits who have
21 reviewed the Board's findings on this issue. The
22 National Labor Relations Board has consistently held
23 that an unconditional offer of reinstatement or of
24 employment tolls any subsequent accrual of back pay
25 liability.

1 The remedial provision of Title VII, as this
2 Court has noted on several occasions, is derived from
3 the National Labor Relations Act so that the Board's
4 decisions provide again in this case, as they did --

5 QUESTION: Counsel, I have trouble with your
6 unconditional offer which denies seniority status.

7 Unconditional, and denied. Is there any tension there?

8 MR. WESTER: I think not, Your Honor. The key
9 is that Ford was obliged to make an offer of the job
10 initially sought, about which there has been no dispute,
11 and --

12 QUESTION: Well, suppose you had offered her a
13 job at half the salary. Would that be good?

14 MR. WESTER: No, sir, that would not be good,
15 because Ford was obliged --

16 QUESTION: Suppose you offered them a job with
17 half of their seniority. Would that be good?

18 MR. WESTER: That would be -- No, sir, that
19 would not be good. The key is --

20 QUESTION: Well, you offered it with no
21 seniority.

22 MR. WESTER: That is exactly right, Your Honor.

23 QUESTION: Which is worse.

24 MR. WESTER: No, sir, half seniority would
25 have been bad just like full seniority is bad. What we

1 had to offer was none.

2 QUESTION: You mean to give somebody full
3 seniority hurts them?

4 MR. WESTER: It would have hurt -- it would
5 have required Ford -- by no means would it have hurt
6 them, but it would have required Ford to surrender its
7 right to defend against seniority benefits that the
8 claimant would enjoy.

9 QUESTION: And it would also require them to
10 pay some money, too.

11 MR. WESTER: And would also -- absolutely.
12 And would also require the impact on the third parties
13 in the plant, the other employees.

14 QUESTION: That to my mind is not an
15 unconditional offer.

16 MR. WESTER: Well, Your Honor, I was --

17 QUESTION: To the contrary, it is a
18 conditioned offer.

19 MR. WESTER: All right, sir. I --

20 QUESTION: We will give you a job provided you
21 waive your seniority.

22 MR. WESTER: No, sir. That is exactly -- it
23 is important that I note that is not what Ford offered.
24 Ford did not make any such offer in this case. To the
25 contrary, its offer did not require in any respect, and

1 the record is undisputed, the waiver of any seniority,
2 the waiver of any back pay. It required nothing of the
3 sort.

4 QUESTION: Are you saying they could still
5 litigate that either in the courts or by arbitration
6 proceedings if there were arbitration proceedings
7 available?

8 MR. WESTER: Precisely. That is exactly what
9 we are saying. The offer was unconditional. It has
10 never been challenged in either court as other than
11 unconditional. The district court's findings and the
12 Fourth Circuit's findings do not fault Ford's offer in
13 that respect.

14 QUESTION: Could they also litigate the health
15 benefits and all those other things?

16 MR. WESTER: Yes, sir, most certainly, because
17 again Ford's offer required --

18 QUESTION: So what you say is, we will give
19 you a piece of it and you can litigate for the rest of
20 it.

21 MR. WESTER: Well, sir, it depends on how
22 you --

23 QUESTION: Is that what it is?

24 MR. WESTER: It depends on how you define a
25 piece of it. The piece of it Ford would give them was

1 the job they initially sought and unconditionally so,
2 with no strings whatever attached to their continuing
3 right to litigate fully their claims and to receive full
4 make whole relief.

5 QUESTION: Well, how in the world could you
6 stop them from litigating? Do you control the courts?

7 MR. WESTER: No, sir. There has been no
8 intimation that we -- that we tried to stop them from
9 litigation. To the contrary --

10 QUESTION: I mean, I love this very generous
11 offer that Ford says, you are free to go to court.

12 QUESTION: They were already in court.

13 MR. WESTER: They were already in court.
14 That's quite right.

15 QUESTION: Yes, so you haven't given up
16 anything.

17 MR. WESTER: Well, precisely, nor should we be
18 required to. That is our point, Your Honor.

19 QUESTION: Nor did they give up anything.

20 MR. WESTER: Nor did they give up anything,
21 and that is the rest of our point.

22 QUESTION: Did they give up their claim for
23 back pay?

24 MR. WESTER: No, sir, not in any way.

25 QUESTION: Wasn't it involved?

1 MR. WESTER: It was not involved at that
2 stage, Your Honor, because there is a pending claim for
3 back pay by reason of their charge, as well as for
4 seniority and all other benefits --

5 QUESTION: Well, what were you settling?

6 MR. WESTER: -- and all other benefits that
7 attend --

8 QUESTION: What did you settle?

9 MR. WESTER: Sir?

10 QUESTION: What did you offer for settlement?
11 The job.

12 MR. WESTER: We offered not for settlement --

13 QUESTION: The bare bones job.

14 MR. WESTER: No, sir, it wasn't a settlement
15 offer. It was offer -- you are quite right, the bare
16 bones job, but unconditionally so, with no attendant
17 conditions of any sort. That is what we offered.

18 QUESTION: Well, Mr. Wester, is it fair to
19 state that -- you describe the offer as being one that
20 said, you can have the job plus whatever back pay and
21 seniority is determined to be available in litigation.

22 MR. WESTER: That's correct.

23 QUESTION: And you didn't have to offer -- the
24 government says the correct offer would have been the
25 job plus seniority plus whatever back pay may be found

1 to be due in litigation. You both contemplated further
2 litigation of one or the other issue. You just say
3 there are two issues. They say there is one that had to
4 be litigated.

5 MR. WESTER: That's correct, Your Honor.

6 QUESTION: That's the only difference. Nobody
7 thinks it settled the lawsuit.

8 MR. WESTER: No, sir.

9 QUESTION: Yes.

10 MR. WESTER: No, sir. No one does.

11 QUESTION: How is it an unconditional
12 settlement?

13 MR. WESTER: Because it is not --

14 QUESTION: It didn't --

15 MR. WESTER: It is not a settlement, Your
16 Honor. It is an unconditional offer.

17 QUESTION: That's right. It is not even a
18 settlement.

19 MR. WESTER: And it was not purported to be,
20 nor do we argue that it is.

21 QUESTION: All right.

22 MR. WESTER: It is simply an unconditional
23 offer.

24 QUESTION: Was any request made by either one
25 of these ladies for seniority rights or back pay?

1 MR. WESTER: None, Your Honor.
2 QUESTION: None whatever.
3 MR. WESTER: None whatever.
4 QUESTION: While I am asking you a question,
5 was there a collective bargaining agreement in effect at
6 the time?
7 MR. WESTER: Yes, Your Honor, there was.
8 QUESTION: And what about seniority rights
9 being given in light of the provisions of it?
10 MR. WESTER: Yes, Your Honor. The seniority
11 provisions were explained by Ford's warehouse manager at
12 the trial, who testified that seniority was earned by
13 working there. You earned it after 90 days, and if you
14 did work 90 days or more, then your seniority started
15 from the first day you started work. We would contend
16 that this sort of offer would have, of course, since
17 these claimants had never worked there, given them in
18 these circumstances two-year seniority, and they would
19 have move down all those on the seniority ladder hired
20 subsequent to their applications.
21 QUESTION: It would displace people who had
22 been working there.
23 MR. WESTER: Yes, sir.
24 QUESTION: Their seniority.
25 MR. WESTER: Without any question. Displace

1 all of those who were hired subsequent to these
2 applications. We submit that the decisions from the
3 Board and the circuit courts reflect a striking of a
4 careful balance between the rights of alleged victims of
5 discrimination, the interests of employers in retaining
6 their right to defend against such charges, and the
7 rights of incumbent employees to maintain their
8 seniority standing.

9 Ford submits that that rule provides the
10 employer an incentive to offer the claimant the job,
11 provides the claimant an incentive to accept it,
12 requires neither employer nor claimant to waive any
13 defense or claims, and avoids any unnecessary
14 interference with the rights of incumbent employees. We
15 would commend that rule to this Court.

16 There is another issue presented in this
17 case. This concerns the standard the Fourth Circuit
18 applied in assessing Ford's explanation of its failure
19 to hire Gaddis, Starr, Judy Gaddis, Rebecca Starr, the
20 claimants whom I have been discussing, and a third
21 claimant, Zettie Smith. Ford contends that the Fourth
22 Circuit imposed a burden of proof on Ford that this
23 Court expressly rejected in Texas Department of
24 Community Affairs versus Burdine.

25 QUESTION: How do you square your statement

1 just made with Footnote 5 in the Fourth Circuit's
2 opinion?

3 MR. WESTER: I square it, Your Honor, because
4 that footnote, if anything, confirms what the Fourth
5 Circuit said in its introductory remarks concerning the
6 burden of proof Ford bore. What the district court --
7 what the court of appeals -- I beg your pardon -- stated
8 in Footnote 5 was that Ford had failed to convince the
9 Fourth Circuit of the truth of its explanation. The
10 district court found the facts to be otherwise, I
11 believe was the language employed.

12 QUESTION: Well, it speaks of articulation. I
13 guess I don't read it the way you do.

14 MR. WESTER: Well, I think it does speak of
15 articulation and establish, and speaks of some of the
16 words that have been approved by this Court. My point
17 is the analysis employed makes it clear to us when the
18 entire portion of the Fourth Circuit's opinion is read
19 in that regard to indicate Ford had to prove its
20 rebuttal case.

21 QUESTION: Well, the use of the one phrase in
22 the Fourth Circuit opinion lends some force to your
23 argument. On the other hand, this Court hasn't been
24 consistent either in pre-Burdine cases, and Burdine came
25 down just a very short time before the Fourth Circuit's

1 case here.

2 MR. WESTER: I understand that, but I think
3 this Court in Burdine actually just more fully stated,
4 perhaps, the standards of proof and what was required to
5 meet those standards, and it seems to me that as I read
6 Footnote 5, what actually it does show is that Ford did
7 not satisfy at the rebuttal stage the district court of
8 the truth of its explanation, and that was a matter left
9 for the pretext stage. Ford was therefore convicted, so
10 to speak, on the force of the prima facie case, and was
11 denied the effect of a rebuttal it should have had.

12 QUESTION: But, Mr. Wester, on this same
13 point, didn't the court in the footnote say that Ford
14 neither articulated nor established? I mean, how can
15 you read it any other way?

16 MR. WESTER: There is no question the Fourth
17 Circuit said that. Because Ford did articulate, Your
18 Honor, through the evidence it introduced into trial,
19 because Ford did articulate, the use of those words
20 confirmed that the burden imposed on Ford was one of
21 proof, and no less than that.

22 To explain why it did not hire these
23 claimants, Gaddis and Starr, Ford introduced evidence
24 that for legitimate and non-discriminatory reasons Ford
25 had not actually reached their applications in the

1 course of the review conducted by the warehouse
2 manager. He did not after he identified two male
3 applicants proceed to later filed applications, and thus
4 had no occasion to make any comparison of the males'
5 applications with these later filed claimants'
6 applications. Even assuming Gaddis and Starr's
7 applications had been on file at the time the decisions
8 were made, Ford's evidence that the applications were
9 not reached in the ordinary course is an adequate
10 articulation, in our view, of the legitimate reason for
11 not hiring.

12 QUESTION: Mr. Wester, wasn't that claim
13 really an afterthought, and what is there in the record
14 to show that Ford raised this hire in order of
15 application defense in a timely fashion?

16 MR. WESTER: It --

17 QUESTION: It looks very much, frankly, like
18 an afterthought.

19 MR. WESTER: Yes, ma'am.

20 QUESTION: And there apparently was no request
21 that the findings of fact be amended to clarify it.
22 Nothing. I mean, all of a sudden it is here.

23 MR. WESTER: I think it is not all of a sudden
24 at all, Your Honor, and for this reason. This evidence
25 came out at the very beginning of the testimony by the

1 warehouse manager who made the decision. It came at the
2 very start of that. It came as soon as he explained
3 that he was the person who made the decisions, and
4 explained the hiring procedure, and explained the
5 qualifications of the males that were selected, and
6 explained that he never made any comparison. In fact,
7 he repeated it three times in the course of, I think,
8 two pages, which are set out in the opening brief.

9 In Ford's earliest brief on appeal, in Ford's
10 earliest brief on appeal, we noted specifically that
11 even though there was some ambiguity about whether the
12 offers were actually communicated before these claimants
13 were hired -- before these claimants applied, there was
14 no question, the record was unambiguous that Ford
15 actually made the decisions without the benefit of or
16 comparison with the females' applications.

17 Now, Ford has raised, I submit to you,
18 contrary to the Commission's suggestion about that, this
19 issue in a timely manner, that it certainly did clearly
20 articulate its reason. It came from exactly whom the
21 court, the district court would expect it to come, the
22 person who made the decisions, and it did it in a direct
23 manner.

24 QUESTION: Was this presented in the court of
25 appeals?

1 MR. WESTER: It was, Your Honor, in the
2 passage that I just referred to --

3 QUESTION: What did the court of appeals say
4 about it?

5 MR. WESTER: The court of appeals did not
6 address that issue, Your Honor.

7 QUESTION: And yet you would -- your
8 submission was that it was dispositive. I mean, you are
9 suggesting it is.

10 MR. WESTER: It is -- it certainly would be.

11 QUESTION: Well, isn't that strange, for the
12 court of appeals not to address it at all, if it even
13 recognized the --

14 MR. WESTER: Well, I can't explain that, and
15 wouldn't know how to characterize it. I should --

16 QUESTION: Well, I suppose we can look in your
17 briefs to see what you said about it.

18 MR. WESTER: You can. We have set that out at
19 Page 16 of the opening brief and reproduced it at Page
20 18 of our reply brief.

21 QUESTION: All right.

22 MR. WESTER: I should like to reserve the rest
23 of my time for rebuttal.

24 CHIEF JUSTICE BURGER: Mr. Strauss.

25 ORAL ARGUMENT OF DAVID A. STRAUSS, ESQ.,

1 ON BEHALF OF THE RESPONDENT

2 MR. STRAUSS: Mr. Chief Justice, and may it
3 please the Court, I will first address the back pay
4 issue. We are willing to assume arguendo that the NLRA
5 principle governs this case, although we don't think
6 that conclusion is obvious, but there is no support,
7 either in the law developed under the Labor Act or in
8 the logic of the Labor Act principle for holding that
9 the July, 1973, offer to Gaddis and Starr cut off their
10 back pay awards at that date.

11 The best way to understand what that principle
12 is and why those offers did not cut off the back pay
13 awards is to understand the rationale of the Labor Act
14 principle, and that straightforward rationale is that if
15 an employer can ensure that after a certain date an
16 employee will suffer no further effects from an alleged
17 discriminatory act, then the employer should not
18 continue to accrue liability after that date.

19 In other words, if the July, 1973, offer had
20 placed Gaddis and Starr in such a position that after
21 that date they would not continue to suffer the effects
22 of the Petitioner's discriminatory refusal to hire them,
23 then under the Labor Act principle Petitioner would not
24 continue to accrue back pay liability, but the July,
25 1973, offer to Gaddis and Starr was not sufficient to

1 prevent further injury to them because that offer left
2 them at a continuing seniority disadvantage. They were
3 at a two-year seniority disadvantage that was entirely
4 the result of Petitioner's refusal to hire them in 1971.

5 QUESTION: How did this injure them, pending
6 resolution finally of the issue?

7 MR. STRAUSS: Well, it would have injured them
8 in a number of ways. It would have reduced the health
9 and life insurance benefits. It would have exposed them
10 to a greater risk of layoff, and less job security.

11 QUESTION: But until there was a layoff, that
12 wouldn't arise. That would be purely speculative,
13 wouldn't it?

14 MR. STRAUSS: Well, they would have been at
15 that disadvantage. They would have had that much less
16 security, as well as a variety of other disadvantages in
17 the warehouse. I don't know the details, but
18 customarily bidding on overtime and bidding on more
19 attractive jobs are all functions of seniority.

20 QUESTION: Mr. Strauss, under a collective
21 bargaining agreement such as here, can an employer
22 without the benefit of a court order offer somebody
23 retroactive seniority to the detriment of other
24 employees there? Is that even possible to do?

25 MR. STRAUSS: Well, the details of this

1 collective bargaining agreement just haven't been
2 litigated on that point.

3 QUESTION: Yes. Well, isn't that very
4 hazardous for the employer?

5 MR. STRAUSS: Well, it may well be.

6 QUESTION: I mean, it really puts him on a
7 spot.

8 MR. STRAUSS: It may well be that the employer
9 has given up his right to make the sort of offer that
10 would be necessary to cut off the back pay award in the
11 course of collective bargaining, but that is no
12 different from many litigants who find that their
13 chances to improve their litigating position by making a
14 settlement offer or in some other way to improve their
15 position are blocked by a contract they have entered for
16 mutual advantage.

17 QUESTION: And even if they haven't given it
18 up in an agreement, which might be the typical case, but
19 even if they haven't, then what does that do to the
20 innocent other employees who are affected by inserting
21 someone laterally?

22 MR. STRAUSS: Well, there are really two
23 points to be made about that. The first, Justice
24 O'Connor, is that those employees are only being placed
25 in the position they would have been in had the employer

1 never discriminated, but the second, and perhaps more
2 fundamental, is that the court of appeals holding
3 doesn't do anything to the rights of those employees.
4 Whatever rights they have for breach of the collective
5 bargaining agreement or whatever remain intact, and
6 unaffected by this decision.

7 QUESTION: Well, but rights similar to that
8 will be affected in the future if the Fourth Circuit's
9 opinion stands, because then the employers will be given
10 an incentive to place someone in a higher seniority
11 position than opening, so to speak.

12 MR. STRAUSS: Well, if their collective
13 bargaining agreement permits it, they will presumably do
14 that, but if the collective bargaining agreement permits
15 it, then there is no sense in which the incumbent
16 employees have rights, because they have only the rights
17 given to them by the collective agreement.

18 QUESTION: Will you spell out for me exactly
19 what offer Ford should have made to these people, in
20 your estimation?

21 MR. STRAUSS: It should have said, to
22 summarize, that they will be put in the position in 1973
23 they would have been in had they been hired in 1971. If
24 those jobs were now -- if they would have received a
25 routine pay increase or routine promotion, they would be

1 hired at that position, and since they would have
2 received two years' seniority, they would be entitled to
3 those two years' seniority with the company, health and
4 life insurance benefits, and layoff protection.

5 QUESTION: If that had been what happened,
6 what would happen to the lawsuit?

7 MR. STRAUSS: Then there would be no -- the
8 back pay award would be cut off at that date, so that
9 when Gaddis -- when the Commission proved the
10 discrimination --

11 QUESTION: The lawsuit would have gone on.

12 MR. STRAUSS: The lawsuit would have gone on.

13 QUESTION: And then suppose the lawsuit was
14 lost. Then what happens? Do these ladies stay in with
15 the seniority and all the other -- all the rest of it?

16 MR. STRAUSS: They would be subject to the
17 same terms as the other employees. If they were
18 incompetent, they could be fired, and so on.

19 QUESTION: No, but if not, they would retain
20 the seniority you say should have been offered.

21 MR. STRAUSS: That's right.

22 QUESTION: Even though ultimately they lost
23 the lawsuit?

24 MR. STRAUSS: That's right.

25 QUESTION: And if the collective bargaining

1 agreement in effect prohibited that, then if the
2 employer made that kind of an offer, they committed an
3 unfair labor practice? Is that it?

4 MR. STRAUSS: Well, I don't know that they
5 would have committed an unfair labor practice. They
6 might have violated the collective bargaining.

7 QUESTION: And open the company up to a
8 strike, and so forth.

9 MR. STRAUSS: Well, that's right, but the
10 issue is whether Gaddis and Starr's back pay award is
11 going to be cut off. Now, it would be anomalous to say
12 that the amount of their back pay award depends on the
13 terms of the collective bargaining agreement that Ford
14 entered for its advantage with the collective bargaining
15 representative of the employees. There may well be
16 collective bargaining agreements that would permit this
17 sort of remedial slotting in, and if there were, there
18 could be no claim. That argument that Gaddis and
19 Starr's back pay award should be cut off simply could
20 not be made.

21 QUESTION: Why shouldn't the appropriate
22 remedy, the cutoff of back pay award, depend to a
23 certain extent on the nature of the collective
24 bargaining agreement? I mean, you speak as if there
25 were only one conclusion that could be drawn in this

1 case as to the appropriate type of offer that would cut
2 off a back pay award, but actually this is the first
3 time I think the Court has considered it, and I suppose
4 there are two sides to every lawsuit.

5 MR. STRAUSS: Oh, I suppose there are two
6 sides also. It may be that there are certain
7 circumstances in which the offer would not have to
8 include the two years' seniority. There is just no
9 suggestion that those circumstances existed here. For
10 example, if -- we suggested in our brief that if in 1973
11 the jobs Gaddis and Starr were denied in 1971 included
12 -- would have included after two years additional
13 responsibilities for which they had not been trained,
14 then some arrangement could have been worked out so they
15 would receive the training before taking on those
16 responsibilities, but there is no suggestion of that
17 here. There is no --

18 QUESTION: What if the offer had been to give
19 them provisional security -- seniority, dependent upon
20 adjustment after the matter was litigated?

21 MR. STRAUSS: Well, I think they have to be
22 given -- they have to be put in the position they would
23 have been had they been hired in 1971.

24 QUESTION: Well, that is exactly my
25 hypothesis, that they would be put provisionally in that

1 position dependent on whether they could establish their
2 right to it.

3 MR. STRAUSS: My understanding of the Labor
4 Board principle is that that would be a conditional
5 offer. If --

6 QUESTION: Well, do you suggest that they
7 could not continue to litigate these issues?

8 MR. STRAUSS: Oh, of course they could
9 continue --

10 QUESTION: That is what I am suggesting.

11 MR. STRAUSS: They can continue -- well, they
12 can continue to litigate the issues, no matter what.
13 The question is whether they can cut off the back pay
14 award, and in order to cut off the back pay award, they
15 have to ensure that that employee will not be injured
16 after the date at which they proposed to cut it off.

17 QUESTION: Well, is there a back pay award
18 unless they win the lawsuit?

19 QUESTION: No.

20 MR. STRAUSS: There isn't. That's right.
21 There is no back pay award, of course.

22 QUESTION: You still tell me that if they lose
23 the lawsuit, they still are slotted in with the
24 increased seniority, and with all the other benefits
25 that go with it, the training that you just now

1 suggested, even though they lost the lawsuit?

2 MR. STRAUSS: They aren't required to be
3 slotted in. The employer chose to give them that job
4 offer.

5 QUESTION: You have said that they can't --
6 could not have made a proper offer at this stage of the
7 litigation without also offering them the seniority that
8 would be theirs had they been employed back in 1971.
9 Would you say that?

10 MR. STRAUSS: That's right, proper meaning
11 cutting off back pay.

12 QUESTION: Now they are given that. You say
13 that is what they must be given, and they are given
14 that, the two ladies are.

15 MR. STRAUSS: Um-hm.

16 QUESTION: They go out in the lawsuit and they
17 lose the lawsuit.

18 MR. STRAUSS: Um-hm. That's right.

19 QUESTION: But they still retain the seniority.

20 MR. STRAUSS: They are in the same position as
21 any other employees. Now, if they lose the lawsuit, for
22 example, because the court found that they were not
23 qualified for those jobs, and they remain unqualified
24 for the jobs, they can be fired, if --

25 QUESTION: But if they are qualified, they

1 can't be fired just because they lost the lawsuit.

2 MR. STRAUSS: That's right. Not -- if the --
3 well --

4 QUESTION: If the employer did not want them,
5 he should have taken his chances and not offered them a
6 job at all.

7 MR. STRAUSS: Well, that's right. That's
8 right. I suppose if it is an at will contract, they
9 could be fired at will, but if the --

10 QUESTION: Your position puts the -- puts Ford
11 in the same place they would be if they had never made
12 them any offer, if Ford had never made any offer.

13 MR. STRAUSS: As far as cutting off the back
14 pay award is concerned.

15 QUESTION: Cutting -- everything. Everything.

16 MR. STRAUSS: Well, that's right, because the
17 offer was neither sufficient to cut off the back pay
18 award nor did it give them an opportunity to mitigate
19 damages which they did not take.

20 QUESTION: Incidentally, Mr. Strauss, is there
21 any significance in the fact that at the time the offer
22 was made they were both employed at GM?

23 MR. STRAUSS: Well, that is significant to the
24 mitigation of damages question. There is an argument
25 that had they not been employed at GM, and had they

1 refused to take Ford's offer, that would have been an
2 unreasonable failure to mitigation damages, and --

3 QUESTION: That would be so if they were
4 unemployed at the time?

5 MR. STRAUSS: That's right. That's right.
6 But there is -- Petitioner doesn't even seriously
7 contend that it was unreasonable for them to keep their
8 GM jobs instead of coming with two years' seniority that
9 they had gone out and earned at GM after having been
10 discriminated against by Ford. It was unreasonable for
11 them not to give that up.

12 QUESTION: Why shouldn't their taking of the
13 job at GM have cut off the running of back pay?

14 MR. STRAUSS: Well, the taking of the job at
15 GM reduced the running of the back pay award.

16 QUESTION: Well, why didn't it cut it off
17 totally, as taking other employment?

18 MR. STRAUSS: Well, the short answer is that
19 they would not be made whole if it cut them off
20 entirely. The GM job, I don't know if it paid more or
21 paid less, but it turned out to be a less good job, and
22 they were forced to --

23 QUESTION: Well, when you say it turned out to
24 be, what you mean is, they left it after a year or so,
25 don't you? Or they were laid off?

1 MR. STRAUSS: No, the plant closed.

2 QUESTION: Well, but supposing they had stayed
3 with GM for five years and the plant closed. Would the
4 employer's liability for back pay be cut off or not?

5 MR. STRAUSS: Well, it wouldn't be cut off,
6 but it would probably be zero, or it would be very low,
7 because all the wages they earned at GM would be
8 deducted from the back pay award.

9 QUESTION: Well, supposing the employer's
10 plant closes after -- GM's plant closes after five
11 years, and they are unemployed for three years, so the
12 sixth, seventh, and eighth year after the offer was
13 made, is Ford liable for that?

14 MR. STRAUSS: Well, if the matter hasn't been
15 settled by then, hasn't been litigated out by then, yes,
16 it would, because they are in the GM job, don't forget,
17 because Ford discriminated against them.

18 QUESTION: Well, but there comes a point at
19 which you can't do it on a house that Jack built basis,
20 you know, where you don't have reverberations after ten
21 or fifteen years. I think the Commission's approach
22 here seems to be quite different from the common law
23 approach that people are to be encouraged to settle,
24 encouraged to mitigate damages, and that sort of thing,
25 pending the -- encouraged to settle, pending

1 litigation. You seem to take the position that you want
2 a pound of flesh.

3 MR. STRAUSS: No, I think this -- in the first
4 place, this case has really nothing to do with
5 settlements. There is no settlement offer in this
6 case. The Petitioner tries to present this as a
7 settlement offer. It wasn't. It was, as he emphasizes,
8 an unconditional offer. Settlements remain where they
9 were before, and the incentives to settle remain where
10 they were before.

11 QUESTION: But this was an effort to mitigate
12 damages on the part of Ford, or to cause the employees
13 to mitigate damages.

14 MR. STRAUSS: Well, it was an effort to
15 reduce --

16 QUESTION: To reduce the amount of liability
17 on the part of Ford --

18 MR. STRAUSS: That's right.

19 QUESTION: -- and to encourage the employees
20 to mitigate damages.

21 MR. STRAUSS: That's right. It was an effort
22 to reduce the amount they would be liable for, but it
23 comes to us in the posture that Ford has been found to
24 have discriminated, and the question now is, is the back
25 pay award going to be reduced below the amount that

1 would be needed to make them whole.

2 QUESTION: Was Ford required to offer, in your
3 view, the seniority that these people had at GM, which
4 was 17 months --

5 MR. STRAUSS: No.

6 QUESTION: -- or the seniority they would have
7 had at Ford?

8 MR. STRAUSS: The seniority they would have
9 had at Ford. That's the Labor Board principle. The
10 seniority and the wages and so on that they would have
11 had at Ford.

12 QUESTION: Mr. Strauss, I would like to get
13 back to the question the Chief Justice asked you. I am
14 not sure I got your answer. The one where he asked,
15 what if this offer had been made provisionally,
16 seniority provisionally, if they won their lawsuit.
17 This is not sufficient, in your estimation.

18 MR. STRAUSS: That, if it were made in those
19 terms, it would not be sufficient. They -- If they were
20 hired, they would be under the same rules as every other
21 employee, and if they were unqualified for the jobs and
22 could be fired for that reason, there would be nothing
23 to prevent Ford from hiring, but Ford does not eradicate
24 their injury, does not prevent a further accumulation of
25 their injury.

1 QUESTION: Why didn't it eradicate the injury
2 if the seniority is offered provisionally, that is,
3 provisionally on their winning the lawsuit?

4 MR. STRAUSS: Well, at that point, they are
5 still placed in a position that is less secure than they
6 would have been had they not been discriminated against.

7 QUESTION: Oh, of course it is less secure,
8 but maybe they didn't deserve any more security.

9 MR. STRAUSS: Well, that's right, and that, I
10 think, is what the mitigation --

11 QUESTION: They keep their job. They just
12 don't keep the seniority.

13 MR. STRAUSS: Well, I think that is what the
14 mitigation principle is designed to deal with. I think
15 then the question becomes, was it reasonable for them to
16 keep the jobs they had gone out and found after they
17 were discriminated against, as opposed to taking Ford's
18 job, and the two courts below found that it was
19 reasonable and --

20 QUESTION: Legally, your position can't depend
21 on the fact they were working at General Motors, can it?

22 MR. STRAUSS: Well, not on the --

23 QUESTION: I mean, legally, you wouldn't take
24 -- it seems to me you would make the same argument if
25 they are just unemployed and they said, well, we don't

1 think we'd better take this job unless we get seniority.

2 MR. STRAUSS: There are two different
3 principles at stake. One is the Labor Act principle,
4 and the other is the mitigation of damages principle.
5 The Labor Act principle does not depend on their working
6 at GM. The mitigation principle does. Either can
7 justify reducing a back pay award.

8 QUESTION: Well, but they are not arguing for
9 mitigation. They are just arguing under the Labor Act
10 principle that the unconditional offer terminated the
11 right to back pay.

12 MR. STRAUSS: Well, to the extent --

13 QUESTION: And would it not have done so had
14 they not been employed at GM?

15 MR. STRAUSS: Well, that's right. That's
16 right, and to the extent their argument is limited to
17 the Labor Act principle, it is irrelevant, but in answer
18 to the suggestions that Justice Blackmun was making that
19 it is somehow unfair to the employer to say, you can't
20 give them a provisional offer of seniority, I think that
21 would not be unfair because the employee remains under a
22 duty to act reasonably, and if that was a reasonable
23 opportunity to mitigate damages, then the employee
24 should have taken it, even though it was provisional
25 seniority.

1 QUESTION: That just guarantees them the right
2 to partially win his lawsuit.

3 MR. STRAUSS: Guarantees whom, Justice White?

4 QUESTION: The employee.

5 MR. STRAUSS: It doesn't -- the employer can
6 stand pat. The employer doesn't have to give up
7 anything.

8 QUESTION: Well, he does. He does. He may
9 offer him a job, but why does he have to guarantee him
10 the seniority?

11 MR. STRAUSS: Well --

12 QUESTION: Why do you put the risk of losing
13 on the employer?

14 MR. STRAUSS: The employer doesn't have to --
15 well, the risk of losing is on the employer the way the
16 risk of losing every lawsuit is on a party to the
17 lawsuit.

18 QUESTION: Well, the risk of losing -- If the
19 employee lost his lawsuit, he wouldn't get any back pay.

20 MR. STRAUSS: That's right.

21 QUESTION: Or any seniority.

22 MR. STRAUSS: That's right, and if the
23 employer lost his lawsuit, he would be liable for
24 everything.

25 QUESTION: Then I don't understand why you

1 think it is some injury to him, the employee, the woman,
2 if they accepted provisional status of their seniority.
3 That is, they would get just what they were asking for
4 subject to the proposition that if they lost their
5 lawsuit they would give it up. They are going to give
6 it up anyway.

7 MR. STRAUSS: Well, at the time that offer was
8 made to them, they had jobs that didn't have this
9 condition on it that they had to win their lawsuit in
10 order to retain their seniority.

11 QUESTION: Well, but the seniority is one of
12 the issues in the lawsuit, isn't it?

13 MR. STRAUSS: Well, that's right, but --

14 QUESTION: Certainly, and if they lose on that
15 issue, are you going to say that they have some kind of
16 constitutional right to it?

17 MR. STRAUSS: Oh, no, of course not.

18 QUESTION: You seem to be arguing that
19 repeatedly.

20 MR. STRAUSS: Of course not. Well, as I said,
21 the employer could simply stand pat and offer them
22 nothing, and take his chances on the lawsuit. He chose
23 not to do so. He made them an offer. Now, at the time
24 he made --

25 QUESTION: Suppose they were unemployed and he

1 made them this conditional offer. I offer you a job,
2 and I offer you conditionally on your winning the
3 lawsuit seniority equal to what you would have had, and
4 the employee takes the job, takes the job, and continues
5 to litigate. He wants back pay.

6 MR. STRAUSS: Um-hm.

7 QUESTION: He loses the lawsuit, and so he
8 gets no back pay, and the employer suggests that he
9 should then not have his seniority.

10 MR. STRAUSS: That would be fine. The
11 employee accepted the offer and could be fired. There
12 is certainly -- I mean, perhaps I misstated myself.
13 There is certainly no suggestion that the employer is
14 prohibited from making such an offer.

15 QUESTION: All right. Now, the employee says,
16 no, sorry, I will not take the job because you didn't
17 make me an unconditional offer of seniority.

18 MR. STRAUSS: Um-hm. And the employee is --

19 QUESTION: And then the employee goes on and
20 loses the lawsuit. What does he get?

21 MR. STRAUSS: Was the employee unemployed at
22 the time this offer was made?

23 QUESTION: Completely unemployed.

24 MR. STRAUSS: Then it would quite possibly be
25 a failure to mitigate damages. That would depend on --

1 QUESTION: In what respect? Just the job?

2 MR. STRAUSS: According to the common law
3 principle that if you have an opportunity to mitigate
4 damages, you should take it, and --

5 QUESTION: Well, if he loses the lawsuit, he
6 isn't going to get anything, is he?

7 MR. STRAUSS: Well, if he loses the lawsuit,
8 he is not going to get anything. That's right. If he
9 wins the lawsuit, his award might be reduced for the
10 failure to mitigate damages if he were unemployed at the
11 time he rejected the offer.

12 QUESTION: It would seem to me that the logic
13 of your position would require an offer of back pay
14 because the employee could often come in and say, I have
15 had to borrow money, and so forth, to pay hospital bills
16 and the like. Unless I get back pay, I am not in the
17 position I would have been had there been no
18 discrimination.

19 MR. STRAUSS: Well, I think that would be the
20 only possible argument that could be made for back pay.
21 The court of appeals did not require back pay. There is
22 a --

23 QUESTION: No, I am talking about -- The
24 statement of the Labor Board principle as you phrase it,
25 it seems to me, would really always justify the employee

1 in saying, I am not made whole unless you give me back
2 pay.

3 MR. STRAUSS: I think the reason it does not,
4 Justice Stevens, is that there has been an historic
5 difference recognized by this Court in a case called
6 Gullet Gin, between the collateral and the direct
7 effects.

8 QUESTION: Seniority is not collateral?

9 MR. STRAUSS: No, seniority, I think, is a
10 direct effect.

11 QUESTION: What about -- what is back pay?

12 MR. STRAUSS: Well, back pay is awarded for
13 the direct effects, and not for the --

14 QUESTION: Well, they are both correct then.
15 Seniority and back pay then should be treated alike. Is
16 that what that seems to suggest?

17 MR. STRAUSS: No, the back -- the offer does
18 not have to include back pay accrued up to that point,
19 because that doesn't have anything to do with injuries
20 occurring after that point. The question is, what kind
21 of offer cuts off the further accrual of the back pay
22 award.

23 QUESTION: It does if he can't pay off the
24 loan that he had to -- you know, he can't make the
25 payments for the washing machine and the car and --

1 MR. STRAUSS: That's right. Those are
2 collateral -- those, I think, are historically regarded
3 as collateral consequences. If the lawsuit were
4 litigated straight through to completion without any
5 offers and the employee's back pay was then being
6 computed, it would be computed on the basis of lost
7 wages and so on, and there wouldn't be extra damages for
8 his inability to pay off his loan.

9 QUESTION: If there is a dispute as to the
10 date of the application for the job, which there often
11 is, say they tried one or -- I take it the employer to
12 be safe would have to give the maximum amount of
13 seniority, wouldn't he?

14 MR. STRAUSS: Well, that would be litigated
15 out at the end, to be absolutely certain.

16 QUESTION: In order to cut off the running of
17 back pay.

18 MR. STRAUSS: That's right. In order to be
19 absolutely safe, although he would be -- it could be
20 litigated out at the end when the application was made.

21 QUESTION: If the collective bargaining
22 agreement prevented Ford from offering seniority rights
23 retroactively, what incentive would there have been for
24 Ford to make any re-employment offer?

25 MR. STRAUSS: Well, there is always an

1 incentive to settle.

2 QUESTION: What would it be? Because back pay
3 would continue to run? This case has been in litigation
4 for nine years.

5 MR. STRAUSS: Well, they could always settle.
6 There is always an incentive to settle.

7 QUESTION: Well, if you have to offer
8 somethingn that you have no contractual right to offer,
9 you are not in a very strong position to settle, are you?

10 MR. STRAUSS: Well, if the collective
11 bargaining agreement would have precluded a settlement
12 offer including seniority, they could -- would have had
13 to have offered the employee something else to get it
14 settled.

15 QUESTION: Like what?

16 MR. STRAUSS: Well, whatever the employees --

17 QUESTION: Like more money.

18 MR. STRAUSS: -- would take, like more money.

19 They could still settle. It's important to see that the
20 employer can still settle the case on whatever terms --

21 QUESTION: So the government is really taking
22 a position that discourages settlement, it seems to me.
23 Is that the position of the government?

24 MR. STRAUSS: Not at all, Justice Powell. I
25 think this case has nothing to do with settlements. The

1 employer here claims --

2 QUESTION: Well, let's say offering
3 re-employment. If you are advising the employer, the
4 employer had a contractual right that prohibited it
5 offering retroactive seniority, I would say, just sit
6 tight and litigate. Why offer, because back pay
7 continues to run, under your theory?

8 MR. STRAUSS: Well, he can -- back pay would
9 continue to run. He may have precluded himself from
10 making an offer --

11 QUESTION: But it is running in any event
12 under your theory. Why offer anything?

13 MR. STRAUSS: Well, he can settle. He can
14 still settle. He can still offer whatever will get the
15 employees to give up their suit, and that is unaffected
16 by this --

17 QUESTION: Which is everything they ask for.

18 MR. STRAUSS: Which is whatever -- they will
19 assess their chances of winning the case.

20 QUESTION: What you are suggesting is that
21 they have got to give everything that is being demanded
22 or else they can't mitigate the damages.

23 MR. STRAUSS: Absolutely not. That is
24 absolutely not --

25 QUESTION: Well, if you add up two, three,

1 four, and five, it adds up to exactly that.

2 MR. STRAUSS: If they want to cut --

3 QUESTION: You are saying that this was a
4 complete futility to make this offer of reinstatement on
5 the job subject to having the unresolved matters decided
6 in a routine way.

7 MR. STRAUSS: Well, it turned out not to do
8 the employer any good because it was not reasonable for
9 the employees to take it, and in Justice White's
10 hypothetical, they have been unemployed, and might have
11 been --

12 QUESTION: It has not yet been decided whether
13 it was reasonable for the --

14 MR. STRAUSS: Both courts below believed it
15 was reasonable for them not to give up their GM jobs to
16 take the Ford job back. Had they not reached that
17 decision, it might have been far from complete
18 futility. The question is whether that offer cut off
19 the back pay award. That is, whether Gaddis and Starr
20 are no not to be made whole by not receiving any back
21 pay after 1973 because they turned down those offers.

22 QUESTION: It has been suggested three or four
23 times in questions from the bench that what the position
24 of EEOC is, or amounts to, is that employers are wasting
25 their time to make offers of reinstatement in the

1 position while the other issues are being resolved.

2 MR. STRAUSS: Not at all. There are at least
3 two reasons -- three reasons why they are not. They can
4 try to settle the case, and that is completely
5 unaffected by the decision below. They can make an
6 offer that will get the employee assessing his chances
7 of winning and losing to give up, and Justice Brennan,
8 that may be something very much less than what the
9 employee is asking for if he thinks his chances of
10 winning are not great. He may settle for something very
11 little.

12 Second, he can put them in the position they
13 would have been in had he not discriminated, and if he
14 says at this point, if he says to the employee, at this
15 point we are drawing the curtain, and we will continue
16 to litigate about any injuries you have suffered up
17 until now, but from now on I am putting you in the
18 position you say you would have been in if I had not
19 discriminated against you.

20 If the employer says that, then he has cut off
21 the back pay award under the Labor Act principle.

22 Or, third, he can give the employee an
23 opportunity to mitigate damages, and then the question
24 becomes, does the employee act reasonably in not
25 accepting that offer.

1 QUESTION: Suppose there had been no seniority
2 system. All the facts are the same, except no seniority
3 system at all, and he made the offer, and then the
4 person was employed at General Motors at what he thought
5 was a better job, so he just stayed with General Motors,
6 and then his job at General Motors ran out and he sued
7 for back pay at Ford. He wouldn't get back pay for any
8 time after the offer, would he?

9 MR. STRAUSS: That would depend on whether his
10 decision to stay at GM was reasonable. That is the old
11 common law principle of having a reasonable --

12 QUESTION: Well, say it was reasonable to stay
13 at General Motors. His back pay at Ford certainly
14 wouldn't run beyond the offer.

15 MR. STRAUSS: Oh, if the offer gave him -- put
16 him in the position of --

17 QUESTION: Well, there was no seniority
18 system. They just offered him a job.

19 MR. STRAUSS: Then it would cut off the
20 offer. Of course, the job would have to be at 1973
21 wages, not 1971 wages.

22 QUESTION: Oh, yes. Yes.

23 MR. STRAUSS: I think it is important to keep
24 in mind that we are talking about cutting off a back pay
25 award, reducing back pay below the amount that would be

1 needed to make victims of employment discrimination
2 whole, and there has to be some reason for chopping off
3 the award, not just reducing it by the amount of
4 subsequent earnings or subsequent amounts that could
5 have been earned, but chopping off the award at the date
6 of the offer.

7 Now, there is some logic to doing that. If
8 the offer takes the form of saying, from now on, you
9 will suffer no further the effects of the
10 discrimination, then it makes sense to say, you will
11 not --

12 QUESTION: Well, you have to allege
13 discrimination, don't you, because at this time it has
14 not been determined whether there was or was not
15 discrimination.

16 MR. STRAUSS: That's right, but of course the
17 employer is not liable at all for any back pay if he is
18 not found to have discriminated.

19 QUESTION: But before the determination both
20 parties are kind of looking at their whole card, really.

21 MR. STRAUSS: Well, that's right. That's
22 right, but in that they are in the same position.

23 QUESTION: Why shouldn't the Commission take
24 the position as far as possible consistent with the
25 statute, encourage mitigation of damages, encourage

1 employees to cut liability, and encourage settlement?

2 MR. STRAUSS: We absolutely do all three of
3 those things, and if this had been an unreasonable
4 decision by the employees, if they had been unemployed
5 and had turned down a good job offer, that would be an
6 unreasonable failure to mitigate damages.

7 QUESTION: What is your final answer on the
8 Chief Justice's question about a provisional offer?

9 MR. STRAUSS: I think the offer has to be to
10 place -- and I think this is the Board rule. The offer
11 has to be to place them in the same position as other
12 employees. They can't be under a cloud --

13 QUESTION: So the answer is that that kind of
14 offer would not suffice.

15 MR. STRAUSS: That sort of offer would not
16 suffice, although, although they would be in no better
17 position than other employees, and if they proved to be
18 incompetent or unqualified, and that were a ground for
19 dismissal, they could be dismissed subsequently.

20 QUESTION: Mr. Strauss -- oh, excuse me. Did
21 you finish your answer? I don't think you can phrase
22 your test in terms of whether it is reasonable from the
23 point of view of the employee, because in the example
24 Justice White gave you, if there were no seniority
25 system at Ford, and they were employed at General

1 Motors, and very reasonably decided, well, I don't think
2 I will take the Ford offer, you agree that would
3 nevertheless cut off their back pay?

4 MR. STRAUSS: Yes, if Ford --

5 QUESTION: So it does not turn just on the
6 reasonableness of the employee's decision.

7 MR. STRAUSS: That is back to the two
8 principles. The Labor Act principle is distinct from
9 the mitigation principle. The Labor Act principle says,
10 if you are put in a position such that you will not
11 continue to suffer the effects of the alleged
12 discrimination, that cuts it off no matter how
13 reasonable it was to take that job. Then there is a
14 separate way the employer can reduce his back pay, and
15 that is by showing that the employee had a reasonable
16 chance to take a job, whether or not that job was
17 identical to the one he would have had had he not been
18 discriminated against and he failed to do that. Either
19 of those avenues can be used by the employer to reduce
20 back pay.

21 QUESTION: Well, we don't need to be bound by
22 the Labor Board principle, I don't think.

23 MR. STRAUSS: No, that's right. In fact,
24 the --

25 QUESTION: And anyway, isn't that just some

1 discrete application of a mitigation rule?

2 MR. STRAUSS: Well, it certainly serves the
3 same policies as the mitigation rule, Justice White.
4 The reason I am distinguishing it so sharply is that I
5 think analytically they rest on different foundations,
6 and it is important to see the rationale of the Board
7 rule.

8 QUESTION: Why should the Labor Board rule be
9 important in this context at all?

10 MR. STRAUSS: Well, I think it is not obvious
11 that it should. We are, as I said, accepting arguendo
12 that it should because the remedial provision of Title
13 VII --

14 QUESTION: Well, what if it weren't? Then how
15 would we come out in this case?

16 MR. STRAUSS: Well, I certainly don't think --

17 QUESTION: Just on a straight mitigation.

18 MR. STRAUSS: I certainly don't think there is
19 any logical sense in cutting off the back pay award at a
20 date if the employee continues to suffer injury after
21 that date on account of the employer's discrimination.

22 QUESTION: You certainly would come out
23 differently on your provisional offer.

24 MR. STRAUSS: Well, he continues to suffer the
25 injury of being under the provisional cloud which he

1 would not have been under.

2 QUESTION: Well, I know, but he wouldn't
3 continue to suffer if he won the lawsuit, but if he lost
4 it, why should he continue to have his seniority that he
5 didn't deserve in the first place?

6 MR. STRAUSS: Well, we are cutting off back
7 pay, and we are saying, no back pay --

8 QUESTION: Well, I know, but that is just the
9 Labor Board rule. Your only answer to the Chief
10 Justice's question was the Labor Board rule.

11 MR. STRAUSS: Well, I agree, the provisional --

12 QUESTION: On a mitigation theory, I can't
13 imagine --

14 MR. STRAUSS: A provisional offer would -- may
15 well suffice to mitigate damages in certain
16 circumstances.

17 QUESTION: All right.

18 MR. STRAUSS: That is right.

19 QUESTION: If you admit that, why, this is a
20 provisional offer case, isn't it, because in effect they
21 said, you get the job, and provided you win, you get
22 everything else, too.

23 MR. STRAUSS: I do think there is a possible
24 mitigation argument in this case. The problem is that
25 both lower courts found it was reasonable for them to

1 decline the Ford offer, and it is a reasonableness test.

2 CHIEF JUSTICE BURGER: Mr. Wester, do you have
3 anything further?

4 ORAL ARGUMENT OF JOHN R. WESTER, ESQ.,

5 ON BEHALF OF THE PETITIONER - REBUTTAL

6 MR. WESTER: I would suggest that the
7 reasonableness analysis employed in the mitigation cases
8 to which Mr. Strauss has referred does not apply to this
9 case, and the reason it does not apply is because the
10 reasonableness analysis in those cases has always come
11 from the context where the courts or the Board were
12 evaluating whether a job other than the one that was the
13 subject of the claim was being offered, and in this
14 case, of course, it was the job that was the subject of
15 the claim that was being offered.

16 All of the mitigation damages concerned
17 interim or alternative employment other than, distinct
18 from the job initially sought.

19 Except for that clarification, I shall be
20 pleased to address any questions anyone might have of
21 me. Otherwise, I shall waive the remainder of our
22 allotted time.

23 CHIEF JUSTICE BURGER: Thank you, gentlemen.
24 The case is submitted.

25 (Whereupon, at 2:56 o'clock p.m., the case in

1 the above-entitled matter was submitted.)
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CERTIFICATION

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FORD MOTOR COMPANY v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
#81-300

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Deene Hammond

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