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# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

# THE SUPREME COURT
# OF THE
# UNITED STATES

**CAPTION:** PATRICIA A. LORANCE, ET AL., Petitioners V. AT&T TECHNOLOGIES, INC., ET AL.

**CASE NO:** 87-1428

**PLACE:** WASHINGTON, D.C.

**DATE:** March 20, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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PATRICIA A. LORANCE, ET AL., :

Petitioners :

v. : No. 87-1428

AT&T TECHNOLOGIES, INC., ET AL. :

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Washington, D.C.

Monday, March 20, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

BARRY L. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of the Petitioners.

CHARLES A. SHANOR, ESQ., General Counsel, EEOC, Washington, D.C.; as amici curiae, supporting the Petitioners.

DAVID W. CARPENTER, ESQ., Chicago, Illinois; on behalf of the Respondents.

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P R O C E E D I N G S

10:02 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning on No. 87-1428, Patricia Lorance v. AT&T Technologies.

Mr. Goldstein, you may proceed whenever you're ready.

ORAL ARGUMENT OF BARRY L. GOLDSTEIN

ON BEHALF OF PETITIONERS

MR. GOLDSTEIN: Mr. Chief Justice Rehnquist, and may it please the Court:

The question presented by this case is may a female worker file a timely charge from the operation of a selection practice designed to discriminate against female workers when that operation causes her job demotion, as the company and the union intended. This record dramatically presents this issue because AT&T and Local 1942 conspired to change the seniority system to advantage male workers over female workers.

In 1982 the Petitioners were demoted to lower-paying jobs by the operation of this discriminatory seniority system, while males with less seniority remained in the higher-paying jobs.

Within 300 days, within the time requirement required by Title VII, the Petitioners filed charges

that their Title VII rights had been violated by the operation of this discriminatory seniority system. Nevertheless, the lower court granted summary judgment against Petitioners since the Petitioners did not file within 300 days of first becoming subject to the discriminatory system in 1979 and 1980, although the system at that time did not operate to cause them to lose their jobs.

Both Petitioners and Respondents argue that the lower court erred. I shall describe three reasons, based upon the projected operation of the three rules, the rules proposed by Petitioners and Respondents and the rule adopted by the Seventh Circuit as to why the Petitioners' rule is the only one consistent with the objective of Title VII to end discriminatory employment practices and the only rule consistent with the efficient judicial administration of the Fair Employment law.

First, let me turn to the opportunity to challenge discriminatory practices. Petitioners' rule is straightforward. It would permit a member of a class of intended victims of a plan to discriminate to sue, as here, when they are harmed by the implementation of that discriminatory plan.

Petitioners' rule follows from this Court's

unanimous decision in Bazemore that the pay practice at issue in Bazemore was illegal even though, "It is a mere continuation of the pre-1965 discriminatory pay structure." Similarly, the implementation of the discriminatorily designed seniority system is an unlawful employment practice.

QUESTION: Excuse me, but in Bazemore the violation was not the establishment of the pay structure. I mean, that was not what the plaintiff had to prove in order to make the case. All the plaintiff had to prove was a difference in pay, not that it was established discriminatorily. Isn't that correct?

MR. GOLDSTEIN: Justice Scalia, I don't think it's quite correct. I think in Bazemore the plaintiff had to prove, and did prove, that there was a difference in pay and that difference in pay was the result of a discriminatorily designed pay structure established prior to 1965.

It was the two parts, it was the continuation -- as the Court said, the mere continuation of the discriminatory pay structure into the time period, as well as the fact that it had been established with a discriminatory intent.

QUESTION: But it was on its face discriminatory, wasn't it? I mean, did --

MR. GOLDSTEIN: No, sir.

QUESTION: It was not?

MR. GOLDSTEIN: In fact, the lower court had approved the -- well, had said that the pay structure was not discriminatory because, as the lower court said and the Supreme Court credited, the system had been operated in good faith from 1965 through the 1970s when it was challenged. It was not on its face discriminatory.

QUESTION: I thought the lower court had said it was not discriminatory only because it was a continuation of a prior system and that was okay, even though if you just looked at it objectively at any single moment, it was discriminatory.

MR. GOLDSTEIN: The lower court said both. That it was merely a continuation of the prior -- prior discriminatory practice and that it was neutral on its face, as is the seniority system at issue here.

QUESTION: So, you don't claim that in '79 when it was set up that it was discriminatory on its face?

MR. GOLDSTEIN: No.

QUESTION: No.

MR. GOLDSTEIN: It was not.

QUESTION: When -- but it '82 it did become

discriminatory on its face, I take it. No?

MR. GOLDSTEIN: No, Justice White. In 1979 it was set up with an intent to discriminate. However, AT&T and Local 1942 were clever enough not to put their invidious purpose in the written contract itself. Their discriminatory purpose was just stated on the --

QUESTION: So your position is, yes, it was intentionally discriminatory in '79?

MR. GOLDSTEIN: Yes, sir, it was.

QUESTION: And how about '82? Didn't they amend it in '82?

MR. GOLDSTEIN: No, sir, they didn't amend it in 1982.

QUESTION: When did they do it?

MR. GOLDSTEIN: On the record, the seniority system stayed in effect --

QUESTION: Yes?

MR. GOLDSTEIN: -- as drawn in 1979 through the period pertinent here, and that discriminatory intent established in the system in '79 continued through 1982.

QUESTION: And -- and it's just that -- it's just that your clients got hurt by it in '82?

MR. GOLDSTEIN: That's correct. They got hurt, as the union and the company intended. The senior

female workers were demoted while junior male workers stayed in the higher-paying jobs.

QUESTION: May I ask --

QUESTION: But why was it not apparent in 1979 that it would have a discriminatory effect?

MR. GOLDSTEIN: Well, in 1979 it was clear that it was the intent of the union to put in a discriminatory system. It was blatantly stated at the union meeting. What was not clear was whether or not the system would ever operate in certain ways to harm the petitioners. For example, under the system if you stayed a tester, the higher-paying male job, for five years, you bridged your seniority, you recaptured your plan seniority.

When Petitioner Lorance was demoted, she was a few months away from recapturing her plan seniority. If the layoff had occurred a year later, she would never have been harmed in this way by the system.

QUESTION: But in 1979 wasn't it clear that the plan could have that effect?

MR. GOLDSTEIN: Yes, Justice Kennedy. In 1979 it was clear that the plan in many hypothetical ways may have discriminated against the women testers in different ways. Whether it would in fact operate to discriminate against a particular female tester in a

particular way was unclear and ambiguous.

QUESTION: Mr. Goldstein, could a female tester have filed a suit in your view in, let's say, 1980 before any demotion had occurred?

MR. GOLDSTEIN: I believe that she could.

QUESTION: Would that have been possible to do?

MR. GOLDSTEIN: I believe she could have. I think it's a somewhat harder question than the one here when there was a clear job harm. But I -- and, of course, the claim would be different before she was specifically harmed in 1979 than in 1982.

But I believe when the system was put in with an intent to discriminate, which classified women differently than men, with an intent to discriminate, and affected their status as employees, then, yes, they could bring charges upon them.

QUESTION: If such a suit were filed, would the proof be essentially the same as the proof in the suit that was actually filed now?

MR. GOLDSTEIN: There would be a lot of proof that would overlap. There would some proof, of course, that would not be available in 1980 before the system was implemented. For example, there would be no proof which would specifically state how the system operated and what its specific effect was.

There would be, I can imagine, some dispute as to how the system would operate and what its effect would be.

The advantage of permitting workers to file a suit after they have been specifically harmed is we know then at that time how the system will operate and --

QUESTION: Well, the problem is how to fit the 300-day limit in. Under your theory, it would just go on indefinitely, I assume. A suit could have been filed then or you could wait until there was some concrete injury.

MR. GOLDSTEIN: Well, it can go on so long as the union and the company continue to implement their intentionally discriminatory plan. And whenever they implement it, they engage in unlawful employment practice and someone who is harmed by it, who is the intended victim of that discrimination, should be able to sue.

It is no different than how this Court treats Constitutional claims, whether it's a challenge to an unconstitutional statute, such as in Hunter v. Underwood or Personnel Administrator v. Feny, when the Court went back to what was the intent of Congress after the Civil War with respect to providing jobs for veterans.

If there is an unconstitutional act which

continues to harm those -- that class of persons intended to be harmed, then a person harmed can sue.

Similarly, in Title VII, if there is an unlawful employment scheme designed to discriminate, when that scheme is implemented against an individual --

QUESTION: May I ask you a question on that? Of course, we don't have a statute of limitations on the Constitutional claims. But, in an event, supposing you had a case like this in which you did not know in 1979 that there was a discriminatory intent, and you had a plan that worked perfectly equitably for 20 years.

On the 20th year, somebody dug up some old files and found out that the union president and the company president really had a very invidious intent because they -- the documents said, we don't want any women to get any benefits; in an way we can design this, we want to hurt the women. But they were stupid; they didn't achieve their objective.

Would that -- could they recover under such a plan?

MR. GOLDSTEIN: Yes, they could. Title VII, of course, should not reward subterfuge and hiding the discrimination. However --

QUESTION: But, I mean, the mere fact that there was an intent to discriminate, even though they

didn't actually discriminate against anyone --

MR. GOLDSTEIN: Oh, I'm sorry.

QUESTION: -- it would make the whole plan --

MR. GOLDSTEIN: I misunderstood.

QUESTION: I'm just saying the plan worked out absolutely equitably, but somewhere down the line a female had the plan operate against her, as it had against males for the last 20 years. And she says, well, I know this plan was aimed at women; ergo, I want to recover. Could she?

MR. GOLDSTEIN: Well --

QUESTION: I want to set aside the whole plan now.

MR. GOLDSTEIN: This is a defensive mistake of fact. They tried --

QUESTION: Right.

MR. GOLDSTEIN: They tried to put in a plan that discriminated, and they weren't able to because --

QUESTION: Such as in this case. If five years had gone by, maybe they wouldn't have succeeded in their invidious intent.

MR. GOLDSTEIN: Well, under the petitioner's rule, there has to be a discriminatory harm.

QUESTION: Well, the woman got demoted in this case. That's enough, isn't it?

MR. GOLDSTEIN: If it was pursuant to a plan to intentionally discriminate against women, it would be enough. Yes, sir. The Respondent --

QUESTION: Well, doesn't the result have to be discriminatory too? Supposing -- following up Justice Steven's hypothesis -- that there is intent to discriminate but the plan -- don't look at the clock.

MR. GOLDSTEIN: I'm sorry, sir.

QUESTION: You're here to answer questions as well as to talk.

So that no harm actually occurs and the plan on its face works perfectly fairly. Is still a cause of action there?

MR. GOLDSTEIN: Justice Rehnquist, I think there are two different causes of actions which have to be separated.

The first is -- as pled in this case, is that there is a discriminatory scheme that's established to affect women. And if there was one layoff, one woman was laid off who was senior to junior males, then even though you couldn't show through the statistical study that women as a class were being adversely affected, that -- that person would be entitled to relief under a discriminatory treatment theory. The plan old argument that there was a discriminatory plan that was

established to harm women; it harmed a specific woman.

There is a second type of case in which I agree with your question in which there is a practice set up, such as a seniority system. It operates to have a discriminatory effect, which is established statistically.

At the point the plaintiffs show there is this practice, it has a discriminatory consequence. And at that point in time the question becomes whether or not that discriminatory practice is protected by 703(h), that is, that the practice is a bona fide seniority system.

So, I think there -- there's two separate approaches here. One is, is it an intentionally discriminatory scheme? If it is and the plaintiffs show that, and it harms an individual woman, then that's an unlawful employment practice. They could --

QUESTION: Even though the way the thing works is not discriminatory at all? It was intended to discriminate but incompetent people drew it up and simply failed.

MR. GOLDSTEIN: Well, if there is no discriminatory harm against a woman, she wouldn't have a claim. When I answered the question I assumed that as a result of the operation of the system, as in this case,

a woman with more seniority was demoted, lost pay, while a male with less seniority remains in the job.

QUESTION: Mr. Goldstein, this dual violation that there is one when the agreement is executed and another one when the person is fired, this argument was explicitly made and rejected in Machinists.

We said -- this is a quote from what we said in Machinists -- "It may be conceded that the continued enforcement as well as the execution of this collective bargaining agreement constitutes an unfair labor practice and that these are two logically separate violations independent in the sense that they can be described in discrete terms. Nevertheless, the vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed but unlawfully administered."

I mean, this is the same argument that you're making to us, and we explicitly rejected it in Machinists.

MR. GOLDSTEIN: Justice Scalia, two points, if I may. The first is the Machinists, of course, interprets the statute of limitations in an Act other than Title VII. And the Court, in footnote 15 in

Machinists expressly stated that it was basing its interpretation of the labor law on the basis of the particular legislative history and purpose of the labor law. It was not writing large for all statute of limitations.

The legislative history for Title VII is quite different than for the labor law.

QUESTION: We've said that the two are the same, haven't we? Haven't we said that the statute of limitations for Title VII was drawn upon -- was modeled upon the one for the National Labor Relations Act?

MR. GOLDSTEIN: As far as I know, you have not. I believe the Supreme Court has said that the remedial section of Title VII, 706(g), is modeled on the remedial section of the labor law. But that the statute of limitations was not draw on the labor law.

In fact, the legislative history is just to the contrary. In 1972 when Title VII -- when the limitations period was extended from 90 to 180 days, 180 days being the same period under the labor law. When Congress did it in the Conference Committee Report just before the bill was voted on in both the House and the Senate, the Conference Committee said that it was the intent to have an unlawful employment practice be counted from the last occurrence rather than the first

occurrence of a discriminatory practice, and to provide the maximum benefit of law to the victims of discrimination.

That is the difference with the labor law, which was focused specifically on the collective bargaining process and not on providing individual rights to the victims of discrimination. In fact, Title VII -- one of the reasons for Title VII was that the labor laws unfortunately had not worked to prevent discrimination in the workplace.

The Respondents' position would immunize seniority systems from challenge 300 days after they had been implemented. Some female workers would never have an opportunity to challenge the practice which they are harmed by simply if they were hired or moved from another department into the department with the discriminatory practice more than 300 days after the practice went into effect.

The female workers seek to file a timely suit when a practice designed to discriminate against women limits their work opportunities. This is a straightforward application of Title VII. It will end discriminatory employment practices.

Petitioner Lorance should be permitted to proceed below to establish that the company and union

conspired to discriminate against her and other women because of their gender.

I'd like to reserve the remainder of my time for rebuttal, please.

QUESTION: Very well, Mr. Goldstein.

Mr. Shanor.

ORAL ARGUMENT OF CHARLES A. SHANOR

AS AMICI CURIAE SUPPORTING PETITIONERS

MR. SHANOR: Mr. Chief Justice Rehnquist, may it please the Court:

The United States and the Equal Employment Opportunity Commission, which I serve as General Counsel, support Petitioners' contention that the alleged unlawful employment practices here occurred when Respondents demoted Petitioners, not when the test or concept was adopted or when Petitioners first became testers, as the Seventh Circuit held.

Only this rule fulfills Congress' intent that Section 706(e) be interpreted to give charging parties the maximum benefit of the law by looking at the last --

QUESTION: Mr. Shanor --

MR. SHANOR: -- rather than the first occurrence.

QUESTION: -- when is the first time that a female tester could have brought a suit here, in your

view?

MR. SHANOR: Your Honor, notwithstanding language in this Court's American Tobacco Company opinion that the -- quote -- "the adoption of a seniority system which has not been applied would not give rise to a cause of action, a discriminatory effect would arise only when the employer applies the system," we believe that a separate violation could have been alleged but need not have been alleged at that time.

QUESTION: So, there could have been a suit filed right after the adoption of the plan?

MR. SHANOR: There could have been, Your Honor, but for a variety of reasons we think it would be unwise to adopt the rule that only at that time could a suit be filed because people would not know whether or not they had been injured by that particular system.

Perhaps no harm would come to an individual personally from the adoption of such a system, such as in this case where the individuals hoped to bridge to their plant-wide seniority.

QUESTION: Well, it might alter the remedy. But I guess some remedy could be obtained at that time then, in your view?

MR. SHANOR: That's correct, Your Honor.

QUESTION: What about the other people in the

unit who take the job thinking that tney have a certain seniority? These are the people who are not affected discriminatorily, could not possibly be. And then six years down the line after they've worked there thinking they had this seniority, somebody brings a suit and they suddenly find out that they don't have it, they should have gone to work somewhere else.

Is that the kind of a system we ought to --

MR. SHANOR: Justice Scalia, this Court has never been hesitant to redress discrimination in order to put individuals back into the place that they should have been in but for that discrimination. That's the rule of Franks against Bowman. It's been the rule ever since.

QUESTION: But we're talking about people who could have sued at the outset. Chose -- as you say, chose not to. Then, six years down the line when they do find out that actually, yes, this seniority that they lost is going to affect them, then they bring suit and they upset the expectations of everyone else in the unit. Why is that a fair system?

MR. SHANOR: Your Honor, it's fair because the seniority rights of the Petitioners were altered by the Respondents allegedly for discriminatory purposes.

QUESTION: And they had a cause of action, as

you say. Right at the outset -- as soon as that was done, they could have sued.

MR. SHANOR: Correct, Your Honor, they could have sued. Although I say could have sued, some of them were not even members of the tester universe at that time. As to those individuals, they couldn't have sued.

As to the other individuals, perhaps as soon as soon as they came on the job, they could have sued within 300 days of when they got the job. But at that point they were neophytes to the jobs, perhaps had inadequate information concerning the discrimination. And, moreover, they hadn't been individually harmed.

So, they would have been challenging in a relatively hypothetical way before the EEOC and the courts rather than in a concrete way where they had been individually harmed.

QUESTION: I don't understand this statement that goes through all the briefs that there is no individual harm if you're being subjected to a seniority system that you don't think gives you the protection that you're entitled to. I mean, they don't have the job security right away that they think they should have.

MR. SHANOR: Yes, there's --

QUESTION: That's why a lot of women voted against this thing, I think.

QUESTION: They lost seniority.

MR. SHANOR: Your Honor, we --

QUESTION: That was -- isn't that right? So, that's pretty concrete harm, isn't it?

MR. SHANOR: There is harm to loss of seniority. But whether that loss -- this is -- this is competitive seniority, not benefit seniority. And whether competitive seniority loss will later harm you, depends upon whether you are at some future point in --

QUESTION: Well, that's true --

MR. SHANOR: -- competition with someone --

QUESTION: -- but you, nevertheless, have right then and there lost seniority.

MR. SHANOR: I would have to agree with that, Your Honor.

QUESTION: And that is a harm.

MR. SHANOR: There is no question but that it is a harm. There are also additional harms which occurred down the road. You can't tell whether or not or to what extent a reduction of your competitive seniority --

QUESTION: Well, that's like saying you don't care if my life insurance policy is going to be cancelled because I might live forever. If you're harmed right at the time. I mean --

MR. SHANOR: Well, Your Honor, the argument is not that they weren't harmed, but simply that this statute designed where there is a continuing violation of a seniority system in effect over many years, designed to intentionally harm Petitioners can be challenged at the point of that harm, not merely at the time when the system was put into place.

QUESTION: Suppose that a woman was demoted and did nothing and the 300 days passed? Then she's laid off. Can she sue at the layoff time?

MR. SHANOR: No, Your Honor. We believe that would be the Evans case. The particular demotion, the particular layoff is a discrete point in time. As that becomes 300 -- an event 300 days in the past, one cannot challenge that particular event.

What distinguishes this case is the fact that there is an ongoing employment system whose effects were intended to go on for many years by the Respondents. And it is that system which Congress called a continuing violation, which is the heart of why this is different from Evans, from Ricks, and from Chardon.

QUESTION: What about language in Machinists Local and Delaware State College?

MR. SHANOR: In Machinists Local, Your Honor, we would have to concede that there is language which,

If strictly followed in this case, would cause Petitioners to lose the case. It should not be.

QUESTION: And Delaware State College?

MR. SHANOR: In Delaware State College against Ricks, Your Honor, there was absolutely no allegation that the tenure system involved in that case operated intentionally to discriminate. Merely that there was an aberrational application of that system to the petitioner, which harmed the petitioner. And in that case there was --

QUESTION: But there was a claim that it discriminatorily harmed him, wasn't it?

MR. SHANOR: Yes, there was a claim that there was a discriminatory harm of the particular tenure denial.

QUESTION: So you say that statute limitations questions should be treated differently if the plan was intentionally discriminatory, as opposed to discriminatory in fact?

MR. SHANOR: Yes, Your Honor. It's the continuing violation of the existence of a seniority system over time that distinguishes this case from Ricks.

QUESTION: It seems to me the issue in Ricks was the same as the issue here. Was he harmed when he was denied tenure, which is really just an academic name

for seniority, or was he harmed when he was dismissed because he didn't have tenure? He couldn't have been dismissed if he had had tenure.

We said, no, the harm occurs when he's denied tenure even though the dismissal occurs later. Well, I don't see how that's any different from this.

MR. SHANOR: Your Honor, this case would be -- would be the Ricks case if on the day of the adoption of this seniority system this woman had been bumped out of her job and she waited more than 300 days to challenge being bumped out of that job.

QUESTION: He wasn't bumped out of his job. He kept his job. He just -- he just didn't have tenure. And the next year he was -- he was dismissed.

MR. SHANOR: But the specific and predictable, indeed inevitable event of that single event, tenure denial, was simply a specific effect a year later that he lost his job.

In this case, there was no such predictable effect to a long-term system which may or may not have had some future adverse effect to any individual petitioner.

QUESTION: Well, was it clear in Ricks that he had to be dismissed a year later? Couldn't they have kept him on two years, three years if they wanted to?

MR. SHANOR: The system in effect, the tenure system, said no, after a terminal year you're out.

QUESTION: Uh-huh.

QUESTION: May I ask you a question, Mr. Shanor. Do you think in this case the -- as the fair reading of the complaint, the seniority system would have been unlawful even if they couldn't prove any invidious intent at the time of its adoption?

MR. SHANOR: Your Honor, that's a very difficult question. Paragraphs 6, 18, 19, and 20 all specify not merely that there's a problem with the adoption, but with the continuing discriminatory effects of the system.

This is not a wholly-benign system, as this Court referred to what was going on --

QUESTION: Let me put it another way. Supposing that the proof of invidious intent failed, just for a hypothet -- prove that -- really was just trying to be fair to everybody and work out a way to give women an opportunity to become testers. And that, nevertheless, they adopted this system. And the system has caused some disparate treatment between the two sexes. Would it be a lawful or unlawful system, as alleged?

MR. SHANOR: We would concede that would be

lawful under Section 703(h). This is, however, a situation, Your Honor, in which the fact of discriminatory intent at the time of adoption has separate evidentiary value for whether or not there's been a 703(h) bona fide seniority system --

QUESTION: I understand.

MR. SHANOR: -- or a non-sheltered system. And if it's not a sheltered bona fide seniority system, Your Honor, we believe that the system then would be actionable separately under Title VII because it has -- if it has a discriminatory impact.

QUESTION: Thank you, Mr. Shanor.

Mr. Carpenter.

ORAL ARGUMENT OF DAVID W. CARPENTER

ON BEHALF OF RESPONDENTS

MR. CARPENTER: Mr. Chief Justice, and may it please the Court:

The one point of agreement in this case, I think, is that under Delaware State College v. Ricks, the determination of the timeliness of a Title VII claim requires a court to identify precisely the unfair employment practice of which the plaintiffs complain, and the 300-day limitation period is keyed to the date of that event and not to consequences, future consequences, of the event that are not themselves

discriminatory.

EEOC and Petitioners are simply refusing to face up to the consequences of this rule and the statutory policy against litigating stale claims. Here the entire basis for Petitioners' complaint is their charge that we acted for discriminatory reasons when we took away certain plant-wide seniority rights in the 1979 collective bargaining agreement and adopted the tester system.

If their allegations were true, the taking away of those rights could have been challenged in 1979, and the system would have been enjoined then and there.

By contrast, what Plaintiffs have alleged within the limitations period in 1982 are simply nondiscriminatory consequences of the 1979 changeover to the tester system. This system on its face is perfectly valid and it's the kind of system that employers and unions can adopt for perfectly legitimate reasons any time. And Plaintiffs have not alleged that the system was discriminatorily administered or maintained during the limitations period.

The 1982 gown -- downgrades, it's conceded, were required by the terms of this collective bargaining agreement. There was an undisputed lack of work, and Petitioners were the low persons on the seniority totem

pole. Down -- the downgrades were for that reason, not their sex. And under Section 703(h) that is not unlawful discrimination, and it's not unlawful discrimination even if it's correct that the system had a disparate -- the downgrades had a disparate impact on women.

This is just like Ricks. The claim there was time-barred because the discharge was the nondiscriminatory consequence of the denial of tenure. And the denial of tenure couldn't be challenged.

Similarly, when the downgrades were because of low seniority, there -- here they're most nondiscriminatory consequences of the '79 changeover. And to litigate our motive -- our motive -- in 1979 and threaten to dismantle a system that's operated and has been administered nondiscriminatorily for years would epitomize the kind of litigation that the statute of limitations is designed to prevent.

Now, Petitioners' proposed way around Ricks is their argument that if the initial adoption of the system was discriminatorily motivated, then each subsequent application of it is a continuing violation. And that theory was rejected by the Court's 1960 decision in Machinists.

As Justice Scalia alluded to, the critical

thing there is that if it had been established that the union lacked majority support at the time the system was adopted, then each subsequent act of enforcing it would have been a continuing violation. But the Court said that challenges to the enforcement are suable unfair labor practices only during the six months statute of limitations.

They said it would destroy the stability of bargaining relationships and lead to the litigation -- and produce litigation of stale claims if neutral systems, neutral on their face, can be a challenge on the basis of events outside the limitations period.

QUESTION: Mr. Carpenter, what about -- what about a female employee of AT&T who was not in the tester unit at the time it was originally set up but later came into it and came into it without seniority because of the system that was adopted originally. She wouldn't have known to sue originally. How do you -- how do you solve that problem?

MR. CARPENTER: Well, as a matter of fact, Your Honor, some of the most vehement opponents to the adoption of this tester system in 1979 were women who weren't testers. Their contention was that the change in the seniority system diluted everybody's rights in the plant, including them.

QUESTION: And you think they could have sued?

MR. CARPENTER: Yes, I think they could have sued.

QUESTION: In 1979?

MR. CARPENTER: Anybody who was an employee. Now, what --

QUESTION: Well, what about -- what about someone who wasn't an employee? They come from --

MR. CARPENTER: Yes.

QUESTION: -- another town and apply for a job, come in later.

MR. CARPENTER: Uh-huh.

QUESTION: When can they sue?

MR. CARPENTER: That's -- That's what seems the source of our disagreement with the Seventh Circuit -- the Seventh Circuit's dictum at least. As to an employee like that, she would come on the job and then she would be subject to the operation of a seniority system that is lawful because it is being nondiscriminatorily maintained and applied and is entitled to 703(h) protection. She wouldn't have anything to complain about because she wouldn't be the victim of anything that's unlawful.

QUESTION: Until she gets demoted.

MR. CARPENTER: But then she would not be the

victim of anything unlawful because even if the demotion could be shown to have a disparate impact, that would not be sufficient to show a violation -- unlawful discrimination under 703(h) and all this Court's decisions construing it.

QUESTION: Well, if she were subsequently demoted, could she sue on the basis of the discriminatory intent that's alleged when the plan was adopted?

MR. CARPENTER: We say -- we say not, Your Honor, because -- because the discrimination -- that would entail the litigation of events, you know, 10, 20, 30 years later. And the point is there has to be a current violation. And she, during the limitations period, is simply being subjected to the lawful operation of a seniority system. So we say --

QUESTION: So, even if she was demoted within the limitations period, she couldn't sue.

MR. CARPENTER: She -- well, let me just make this very clear.

QUESTION: This new employee.

MR. CARPENTER: She couldn't --

QUESTION: This new employee.

MR. CARPENTER: She couldn't sue solely on the ground that the initial adoption of the system years

earlier was discriminatorily motivated.

QUESTION: She would have to prove something else.

MR. CARPENTER: She'd have to show something discriminatory within the 180 days.

QUESTION: For instance, if she's a new employee, it's pretty hard to see how she'd have any seniority under either system.

MR. CARPENTER: Yeah. I think it's a very hypothetical question because probably she has no basis for showing any injury. But even if -- even if she did, we would say that her claim would be time-barred if she were basing the claim solely on these remote --

QUESTION: I'm not sure you answered Justice White's question. I think the question was whether she could sue even within the 180-day period.

QUESTION: Yes.

MR. CARPENTER: After the demotion?

QUESTION: No, no, no. Nothing's happened. She's just joined the plan. It's still within the 180-day period and she says --

MR. CARPENTER: After the initial adoption?

QUESTION: That's right.

MR. CARPENTER: Oh, yeah, she could sue then. Sure.

QUESTION: Why? See, I don't understand why.

MR. CARPENTER: Well, the --

QUESTION: You mean after 180 days after she becomes a member of the tester unit, two years after the adoption of the plan?

MR. CARPENTER: No, she could not sue then.

QUESTION: No, but I'm talking about 180 days after -- within 180 days after adoption of the new system.

MR. CARPENTER: She could --

QUESTION: Five days after the new --

MR. CARPENTER: She could sue then.

QUESTION: -- system is adopted, she joins the plan --

MR. CARPENTER: She could sue then.

QUESTION: -- but not as a tester. She could sue.

MR. CARPENTER: She could sue then.

QUESTION: Why? She hadn't lost anything. She came into a system knowing that this plant had this system. The system is not discriminatory on its face. I mean, the women who have been there already, I understand how they've been deprived of something. They've been deprived of seniority that they have been accumulating.

But she comes brand new into what you say is a nondiscriminatory system. What -- why -- why would she have a cause of action?

MR. CARPENTER: Well, perhaps I'm being too generous.

QUESTION: Well, I'm not concerned about your being generous. I'm concerned about your being illogical.

(Laughter.)

MR. CARPENTER: Well, no. I think -- I think we would have a powerful argument that she suffered no injury for the reasons you stated. But she would be able to argue, I suppose, that but for a discriminatory motive there would have been a more favorable -- a seniority system more favorable to her. And even though she wasn't an employee at the time of adoption, that she could -- still had something to complain about.

But this is a very hypothetical question, I think, for the reasons Justice Stevens identified.

On the Machinists case, the --

QUESTION: May I ask you one other question?

MR. CARPENTER: Yes, sir.

QUESTION: Because this troubles me. We talk about the cases, though, that the whole issue is the discriminatory intent at the time of adoption. But

there are portions of the complaint that can be read as saying that the effect of the system was discriminatory also.

And if the effect was discriminatory, then why couldn't the employee sue whenever it operated against that employee?

MR. CARPENTER: Well, because under 703(h) and this Court's decisions construing it, a showing of disparate impact is insufficient to invalidate a seniority system. That's the holding of Teamsters, Swint, and a whole line of cases of this Court under 703(h).

QUESTION: It has to be an illegal system in itself?

MR. CARPENTER: Yes. Yes. The differences in treatment have to be the result of an intention to discriminate. A mere showing of disparate impact is not sufficient to show a violation.

QUESTION: Is it conceded by all parties that the plan operates neutrally now?

MR. CARPENTER: There is no allegation --

QUESTION: Or is that in dispute?

MR. CARPENTER: There is no allegation that it didn't, and it was conceded below that these -- that the demotions were required by the terms of the plan, the

terms of the collective bargaining agreement.

The distinction of Machinists that Petitioners and EEOC make in their briefs is that the challenge there was to the method of execution of the collective bargaining agreement and that there was some error in the execution. The challenge wasn't that the clause was unlawful.

But that is just incorrect because if the employer -- if the union lacked a majority, it's unlawful discrimination and a violation of Section 8(a)(3) of the NLRA for an employer to force an employee to join a union.

So, in both Machinists and this case, the claim is that a facially neutral provision of the collective bargaining agreement is unlawfully discriminate -- discriminatory in violation of a statute. And this isn't just the language in the Machinists case; it's the holding. So, the only possible answer to Machinists is Petitioners' suggestion that Title VII statute of limitations should be interpreted different -- should be interpreted differently than the NLRA's.

But this Court explicitly stated in Zipes v. TWA that the time limitations under Title VII should be treated likewise as under the NLRA. And it refers to

the legislative history of the '72 amendments.

And the fact is that these are both labor statutes. They're both -- have the purpose of barring litigation of stale claims and promoting the stability of bargaining relationships. So, there's no basis, in our view, to have a different rule, even if there weren't that language in Zipes.

Now, here we are simply urging the rule that the lower courts uniformly apply under the NLRA and suits under Section 301 of the Labor Management Relations Act. The rule there is that when there is a neutral change in the seniority system, the employee has to challenge it then and there. If the employee waits until he's downgraded or laid off in the future outside the limitations --

QUESTION: When you say a neutral change in a seniority system, what do you mean?

MR. CARPENTER: Such that after the change is made the system is neutral on its -- on its face. Like our tester system is here. Not discriminatory on its face. But the rule there is that if they wait and --

QUESTION: But if the law is that disparate impact isn't enough to invalidate a seniority system, why does it make any difference how -- what the fact -- factual effect of it is so long as it's not

intentionally discriminatory?

MR. CARPENTER: It -- it doesn't make any difference what the factual effect of it is. But if it were discriminatory on its face, if it classified employees on the basis of race or sex or some other statutorily-prohibited criterion, then you wouldn't have these staleness problems because you'd be looking at the criteria that were in fact applied during the limitations period.

QUESTION: Yes, but always -- what you're saying is that that shows on its face that there is an intentional discrimination.

MR. CARPENTER: Yes, and that's the point. That's exactly the point. That's exactly the point.

And, you know, apart from the NLRA cases, you know, we think Evans and Ricks simply follow the same methodology as Machinists. If you have neutral and otherwise lawful conduct within the limitations period, it can't be challenged solely on the basis of events outside the limitations period.

Contrary to the EEOC's argument, we don't think the decision in Ricks rested in any way on the fact that the discharge was the inevitable consequence of denial of tenure.

The point there was that if you litigated the

denial of tenure outside the limitations period, you'd have staleness problems. We submit the result would have been the same if Ricks had been allowed to continue to work as a non-tenured faculty member and there had been some change in the economy and all non-tenured faculty members had been fired five years later. At that point, it would be inconsistent with the purpose of the limitations period to allow Ricks to come in and challenge the denial of tenure five years later.

The Bazemore case, which is the principal case on which our opponents rely, doesn't have anything to do with this case because that's a situation where blacks were paid less than whites for the same work during the limitations period. What that case establishes is that when there is a current violation, it's actionable, even if past violations weren't also challenged.

Here there is no current violation alleged. And, moreover, in view of this Court's decision in Florida v. Long of last June, I think it's a reading of -- an overly-broad reading of Bazemore that would somehow sweep in this case -- it's clearly foreclosed because Long indicates that even some current violations of Title VII can't be enjoined when they would retroactively upset reasonable reliance interests.

And that's the case here. When a facially

valid seniority system is adopted and not challenged within 300 days, and then nondiscriminatorily administered, employers and employees alike reasonably change their position in all sorts of fundamental ways in reliance on the system.

To allow a challenge to that system to be brought years, decades, later would upset those reliance interests.

Really, the ultimate question here is whether this is a case challenging a seniority system on the grounds that it's not entitled to protection under 703(h). And the ultimate question here is whether there is any basis in the statute for exempting 703(h) challenges from the statute of limitations of Title VII. And it couldn't be clearer that Congress intended no such thing.

Section 706(e)'s limitation period applies to all claims. There is no exception there for challenges to seniority systems. And to exempt challenges to seniority systems from the limitations period would be absolutely irreconcilable with the purposes of 703(h) -- 703(h) was part of the Mansfield-Dirksen compromise. It was the quid pro quo for the inclusion of Title VII in the '64 Civil Rights Act.

The whole reason for 703(h) is that Congress

recognized that seniority is of critical importance in collective bargaining, and it's of critical importance to workers. The whole purpose was to assure that Title VII wouldn't destroy the reliance interests that are built up around the routine and nondiscriminatory administration of neutral seniority systems.

A rule that permits these systems to be challenged and dismantled after they've operated for years or decades, as their rule would, is absolutely irreconcilable with that purpose. And for that reason, we submit that the lower court's decision to dismiss this case was absolutely correct and that it should be affirmed.

If there's no further questions, I'll submit.

QUESTION: Thank you, Mr. Carpenter.

Mr. Goldstein, you have two minutes remaining.

REBUTTAL ARGUMENT OF BARRY L. GOLDSTEIN

ON BEHALF OF PETITIONERS

MR. GOLDSTEIN: Thank you. Justice White is correct. The seniority system itself must illegal. And that was the distinction made in Machinists. Even if Machinists applied, which we don't accept, the court there said that evidence during the time-barred period could be used to illuminate the practice that occurred during the period within the time limitations period.

In Machinists the system itself, the clause itself, was not challenged as discriminatory, as opposed to this one. The system itself is being challenged.

That is precisely what the Court -- how the Court approached seniority issues in Teamsters and Patterson, and, in fact in Bazemore distinguished Evans by saying that the plaintiff had made no allegation that the seniority system itself was intentionally designed to discriminate. Implying, of course, as in Bazemore, that if the allegation of intentional discrimination in the design had been made, then the charge would have been timely in Evans. That, of course, is the allegation that we have made.

In conclusion, I would -- I think Judge Cudahy in his dissent summed up the case. It's a simple case, as he said. The plaintiffs filed complaints at the time they were injured by demotion in the way the Defendants allegedly intended them to be injured. Viewed in that direct and uncluttered fashion, their complaints are timely.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Goldstein.

The case is submitted.

(Whereupon, at 10:48 o'clock a.m., the case in

the above-entitled matter was submitted.)

CERTIFICATION

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NO. 87-1428 - PATRICIA A. LORANCE, ET AL., Petitioners V. AT&T TECHNOLOGIES, INC., ET AL.

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BY alan friedman

(REPORTER)