



10-1981

## Ford Motor Co. v. Equal Employment Opportunity Commission (EEOC)

Lewis F. Powell Jr.

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Summary.

If Denied, I  
will say I'd

Three women  
~~But~~ ~~(3 women)~~, unsuccessfully  
sought employment in 1971 from  
~~Petr.~~ Petr. EEOC ruled & the  
DC found sex discrimination &  
awarded back pay from '71 to  
1977 (trial on merits) even tho  
in 1973 the women rejected offers  
by Petr. to employ them. DC  
did ~~reduce~~ off-set what women  
had ~~in~~ Preliminary Memo earned in  
other employment.

Grant a  
decision  
of J.  
Hoffman  
suggests  
an  
unjust  
and  
a bad  
precedent

November 6, 1981 Conference CA 4 (2-1) affirmed  
List 1, Sheet 3

No. 81-300

FORD <sup>849</sup>  
MOTOR CO.

v.

EEOC

Hoffman dissented strongly,  
agree with him that

Cert to CA 4  
(Winter  
& Butzner;  
Hoffman,  
dissenting)  
Federal/Civil

Timely

There is an unfair  
judg.

1. SUMMARY: Two issues are presented in this employment  
discrimination case: (1) Whether the lower courts properly  
measured the time within which backpay accrues to a claimant;  
(2) whether the CA assigned a burden of proof to Ford  
inconsistent with Texas Department of Community Affairs v.  
Burdine, \_\_\_\_ U.S. \_\_\_\_ (1981).

2. FACTS: Ford operates a parts warehouse in Charlotte,  
North Carolina. A number of workers at the warehouse are

Grant #1. Allowing backpay to continue to accrue after employer  
offers job ~~is~~ seems unfair and wrong. Employer will



"picker/packers" -- employees who fill orders for automotive parts. Until 1972, when two women were hired as temporary workers, no woman had ever worked as a picker/packer at the warehouse. The first permanent, female picker/packer was hired in 1975. This case involves two different groups of women: one group applied for picker/packer jobs in 1971; the other in 1973. The issues presented here, however, involve only the 1971 applicants. That group consists of Gaddis, Starr, and Smith. After failing to receive a job in 1971, Gaddis filed a sex discrimination charge with the EEOC.

In July 1975, the EEOC brought this Title VII employment discrimination action. The DC found that the three women had applied for, but failed to receive, employment in 1971; petr had hired three men to fill the vacancies. Ford argued that these particular women had not applied before the 1971 openings were filled. The DC rejected this argument, finding that Ford had followed a discriminatory hiring policy and that the three women had applied prior to the time in 1971 when Ford hired the three men. The court concluded that the Commission had established a prima facie case of sex discrimination, and that petr had failed to rebut it. Looking to the employment history of the three men who were hired in 1971, the DC determined that the backpay period should extend from 1971 to the date of trial in 1977. It rejected Ford's claim that backpay for Gaddis and Starr should terminate in 1973, when they rejected job offers from Ford. It found that each had refused the 1973 offer because neither wished to lose the seniority they had accrued with their present

employer, GM, and neither wished to be the only woman employed at petr's warehouse. The court reasoned that the offers should not terminate petr's liability for backpay "inasmuch as neither [woman] would have been confronted by that decision and its implications had both been hired in August 1971." The amount of backpay due from petr was, however, reduced by taking into account the amount that the applicants had earned in other jobs during this period.

3. DECISION BELOW: A divided CA 4 affirmed. The dissent, however, agreed with the majority that Ford was guilty of discrimination; it disagreed only on the scope of the remedy. The court had no trouble finding that EEOC had established a prima facie case of sex discrimination. Ford's rebuttal consisted entirely of arguing that Gaddis and Starr had applied after the vacancies had been filled. The court held that the evidence was to the contrary. With respect to Smith, Ford argued that she had not applied at all during 1971. The CA, however, accepted the DC's finding that she had indeed applied. The majority also accepted the DC's holding that backpay liability should not terminate with the 1973 offer of employment. Had Gaddis and Starr accepted the Ford offers of beginning employment, they would have been forced to abandon their seniority at their GM jobs. Citing two of its own cases, the majority held that victims of discrimination need not accept job offers which include a loss of seniority in order to preserve their backpay rights. UTU v. Norfolk & Western Railway, 532 F.2d 336 (CA 4 1976) ("a refusal to commit seniority suicide is not an



acceptable reason to deny backpay"); Hairston v. McLean Trucking Co., 520 F.2d 226, 232 (CA 4 1975). Ford should not be allowed to cut off the backpay period by making the applicants an incomplete and unacceptable offer. No double recovery is involved because the applicants' GM wages were deducted from their backpay awards. The majority held this position to be consistent with that reached in three other circuits. See Comacho v. Colorado Electronic Technical College, Inc., 590 F.2d 887 (CA 10 1979); Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (CA 3), vacated on other grounds, 414 U.S. 970 (1973); Claiborne v. Illinois Central Railroad, 583 F.2d 143, 153 (CA 5 1978).<sup>1</sup>

Judge Hoffman argued in dissent that the period of backpay liability should have terminated when Gaddis and Starr obtained permanent, substantially equivalent, employment with GM in January 1973. If it did not terminate then, it should have terminated with the Ford offer of employment in July 1973. Only the second point is relevant here. Judge Hoffman argued that the DC and the majority had confused situations involving reinstatement with those involving initial employment. When someone is wrongfully fired, he has a right to insist on protection for the seniority he has already earned. In situations involving initial employment, no seniority rights have accrued. Any requirement that the employer include such rights

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<sup>1</sup>The CA also rejected Ford's arguments that the backpay period should terminate at the point that Gaddis and Starr gained permanent positions with General Motors in 1973 or at the time they entered a nurses' training program.



in an offer would be unfair to present employees, probably would create havoc in employer/employee relations, and might be in violation of an employer/employee contract. Thus, while an employer cannot condition an offer on the employee's surrender of backpay or seniority claims, it need not volunteer backpay or seniority. The employee is left free to litigate these issues in court. If an employee rejects such an unconditional offer, his right to backpay should be cut off. Moreover, in this case, Gaddis and Starr failed to protest the lack of seniority when they rejected Ford's offer. Judge Hoffman argued that their failure to raise the issue precluded them from complaining about it now. He also argued that the evidence with respect to Smith's 1971 application was not clear and that a further hearing should be held to allow Ford to present additional evidence.

4. CONTENTIONS: Under the reasoning of the CA, the only way an employer charged with employment discrimination can stop the accrual of potential backpay liability is to combine an offer of employment with an explicit offer of retroactive seniority and backpay. Although the court did not discuss backpay, its reasoning unambiguously implies that an offer of backpay is necessary. Thus, an employer would be able to stop the accrual of backpay only by giving the claimant all that might be sought in a discrimination suit. In effect, the employer must surrender the right to contest the claimant's allegations of discrimination. This approach is unfair to present employees who will be harmed by retroactive seniority offers and ultimately will make employers less willing voluntarily to resolve

discrimination charges. Decisions of the First, Second, Seventh, Eighth and Ninth Circuits conflict with the position of the CA 4. See National Labor Relations Board v. Harrah's Club, 403 F.2d 865 (CA 9 1968); National Labor Relations Board v. Izzi, 395 F.2d 241, 244-45 (CA 1 1968); National Labor Relations Board v. Midwest Hangar Co., 550 F.2d 1101, 1103-4 (CA 8 1977)1; Waters v. Wisconsin Steel Works, 502 F.2d 1309 (CA 7 1974); Kenston Trucking Co., Inc. v. National Labor Relations Board, 544 F.2d 1165, 1166-7 (CA 2 1976). Finally, petr argues that the CA improperly placed the burden of proof on it: "Ford had the burden of proving a legitimate nondiscriminatory reason for hiring the . . . men instead of Gaddis, Starr and Smith." Under Burdine, supra, Ford had only a burden of production not a burden of proof.

The SG responds that although the single statement quoted from the CA opinion may seem to be inconsistent with Burdine, that statement does not represent the actual holding:

"In this case, Ford neither 'articulated' nor 'established' a legitimate nondiscriminatory reason for hiring the men, since the DC found that the facts did not coincide with Ford's representations. Ford insisted that the other woman had not applied when the men were hired. The district court determined the truth to be that the woman had applied beforehand. In this situation, Ford was left with no defense to the prima facie case of discrimination."

The CA in effect found that the reason articulated by Ford was "pretextual" in that it was unworthy of credence. With respect to petr's first argument, the SG argues that petr misrepresents the holding of the CA. First, it did not hold that the failure to offer backpay was relevant. Second, the CA merely held that



the rejections of petr's offers did not terminate petr's backpay liability because, in the circumstances of this case, it was reasonable for Gaddis and Starr to decline to abandon their GM seniority to accept entrance-level employment with petr. The SG defends the "intolerable choice" theory of the CA: "The women should not be required to risk their job security in order to remain eligible for some possible future backpay relief under Title VII." The cases cited by petr are, with one exception, distinguishable because they did not involve situations in which a victim of discrimination risked losing job security if he accepted a job offer. Thus, the equitable considerations underlying the CA decision were not present in those cases. The one exception is Izzi, supra, in which an employer offered reinstatement to all discharged employees knowing that job openings were limited and that some employees would be laid off immediately if all accepted the offers. The reasoning of the court in that case, however, supports the decision below:

"We can understand that discriminatees who were then employed elsewhere, even if at less pay, might not want to give up their work simply to be laid off by respondent, and we can understand that even those for whom a working position was open might be unable to come forward forthwith. . . . However, any discriminatee who was free should have returned immediately after receipt [of the offer]. We would suggest that all others should return as promptly as possible, or, if they feared there were insufficient vacancies, should at least have inquired."

395 F.2d at 245. The decision below only allows a DC to consider in an equitable manner the discriminatees' reasons for declining a job offer.

5. DISCUSSION: Petr's Burdine argument is insubstantial



for the reasons given by the SG. Furthermore, there is no substance to petr's claim that the CA opinion necessarily implies that an employer must offer backpay; The decision turns on what can be demanded of a claimant with respect to his possible future earnings. I do not believe there is a clear conflict between the holding of the CA 4 with respect to termination of backpay and any other circuit. None of the cases cited by petr directly address the equitable considerations involved in this case.

Harrah's Club, supra, rejected the claimants' argument that the offers of reinstatement were insufficient because they did not give them reasonable time within which to terminate their present employment and then report to work. It did not discuss loss of seniority that would be caused by acceptance of the offer.

Waters, supra, noted that the claimant declined an offer of employment because he had another job and because he feared that return to work might prejudice his pending EEOC suit. Again, however, the court did not discuss whether or not accepting the offer would impose a serious present loss upon the claimant.

Similarly, Izzi, supra, contained only the ambiguous statement quoted above. Given the absence of a conflict, I recommend a DENIAL.

There is a response and a reply.

October 29, 1981

Kahn

Opinion in  
Appendix

ME

Court .....

Voted on....., 19...

81-300

Argued ....., 19...

Assigned ....., 19...

No.

Submitted ....., 19...

Announced ....., 19...

FORD MOTOR CO.

vs.

EEOC

WHR agree  
with Hoffman's dissent  
in CA 4 - as 9 do

Grant

HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
	G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓										
Brennan, J.		✓										
White, J.		✓										
Marshall, J.		✓										
Blackmun, J.					Join 3							
Powell, J.	✓											
Rehnquist, J.	✓											
Stevens, J.	✓											
O'Connor, J.					Out.							



744

April 5, 1982

FORD GINA-POW

MEMORANDUM TO THE FILE

81-300 Ford Motor Co. v. EEOC

In briefest summary this case involves the discriminatory denial of employment by Ford to two women in 1971; an offer by Ford to employ them in 1973, then rejected by the women who at the time were employed by General Motors; Ford's offer of employment in 1973 did not include either retroactive seniority or backpay; the women pursued EEOC remedies, then sued in the D.C. and obtained backpay awards from 1971 to 1978 - the date of the DC's order. C.A. 4, two to one (Hoffman dissenting), affirmed.

The question presented, as stated by the SG for EEOC, is as follows:

"whether an employer who unlawfully refused to hire job applicants ... can terminate its liability for backpay by subsequently offering the applicants positions without seniority at a time when they had obtained, an accumulated seniority in, of the jobs."

*other*



The Ford brief argues that its obligation to pay backpay was tolled - that it is terminated - by its 1973 offer of employment, even though it did not include retroactive seniority or an offer of backpay. The SG's brief focuses only on the failure to offer retroactive seniority, and says that CA 4 did not hold that backpay also should have been offered. See particularly brief p 13, fn. 7.

The SG insists that the failure to offer retroactive seniority, at a time when the claimants would have had to forfeit seniority accrued at General Motors, created "a Hobson's choice" for the claimants. The mere offer of employment therefore did not toll the continuing of backpay rights. SG

SG argues - with citations - that the NLRA rule requires that retroactive seniority be included in an offer of employment, following an earlier discriminatory denial, if there is to be any tolling of the claim to backpay. Even if claimants had accepted the 1973 employment offer, the SG says that their claim to backpay would have remained unsettled and would simply have been resolved in the normal course - including litigation if necessary. The Title VII rule should accord with that under NLRA.

I think the SG's brief postures this case very narrowly. It may permit us to hold that on the facts here, where the claimants had employment with GM plus two years

accrued seniority with GM, the offer by Ford of employment was ineffective because it failed to offer comparable seniority. The SG's brief does not say what the EEOC's position would be if the two women claimants had accrued no *ask* seniority benefits elsewhere during the period 1971 - 1973.

There is a second question in the case whether, under Burdine, CA 4 improperly placed the burden of proof on petitioner. The SG seems to have the better of this argument: that the DC's allocation of proof was not inconsistent with Burdine.

L.F.P.



April 5, 1982

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L.F.P.



meb 04/19/82

To: Mr. Justice Powell

From: Mary

In Re: Very Short Pre-Argument Memo  
in No. 81-300, Ford Motor Co. v. EEOC

My initial reaction is that Judge Hoffman, in dissent in the CA4 decision below, is right. His dissent begins at A-78 of the App. to Cert. There are two question on which cert was granted:

1. Whether back pay continues to accrue after the claimant has had an unconditional job offer that does not include retroactive seniority or back pay. Judge Hoffman would hold that back pay does not accrue after an applicant accepts an equivalent, permanent job, and (the applicant) is no longer available in the job market. With respect to Gaddis and Starr, back-pay liability should end in 1973 when they took permanent jobs with GM.

In any event, there should be no liability after Ford offered them the jobs they wanted. First, the discussions between Ford and the two women at the time the offers were made raised no back-pay or seniority-rights issues, though at trial Gaddis and Starr did mention that they were afraid to lose their GM seniority. But Ford could not unilaterally offer retroactive seniority to a new hire in the absence of a court order without breaching its collective bargaining agreement. The Title VII and NLRB cases cited by Judge Hoffman appear to support his position; those cited by the majority opinion appear to involve situations in which a prior (not a new employee) employee illegally fired is entitled to retroactive seniority in a job offer from his previous employer.

*As not raised*

2. Whether the decisions below erred in placing too much of a rebuttal burden on the employer in light of this Court's decision in Burdine. In Burdine, the Court made it clear (for the second or third time), that the burden that shifts to the deft is one of articulation; provided the employer articulates a plausible, non-discriminatory reason for an employment action, his "burden" is



met; the burden of proof remains on the pltf. Judge Hoffman would remand Smith's case on this basis. See A-127.

The Burdine errors begin at the DC level. See A-168:

"Defendant did not establish a legitimate, nondiscriminatory reason for its failure to hire the three women ...." Under Burdine, there is, of course, no burden on the deft to esdtablish a non-discriminatory reason for an employment action. And I believe Ford articulated a bona fide non-discriminatory reason for not hiring Starr in 1973 when it said it had no way of knowing she had applied for a job as a picker-packer. (Which seems quite likely--no record of her application was ever found, or of a complaint with the EEOC, and her testimony about the kind of job, if any, she applied for is vague, to say the least. See A-125-A-126.)

This problem was not cured at the ca level. See n.5 at A-21-22. The majority indicates that because the DC did not find the deft's reason credible, the deft's burden under Burdine was not met. But, under Burdine, the deft does not have to make the DC believe his reason in order to met his burden of production.

I realize this memo is far too short to do justice to the issues. If you would like more briefing on any issue or issues after arrgument, please let me know.

Many

81-300 FORD MOTOR CO. v. EEOC

Argued 4/20/82



## Wester (Petr - Ford Motor Co)

Offer of employment by Ford was not subject to any conditions. Offer did not subject.

The offer was made 4 yrs before suit was filed & a finding of discrimination was made

~~Petr~~ Ford is not claiming that offer of employment bar suit for back pay or retroactive seniority

→ The rule urged by Petr is the rule consistently applied by NLRB.

If ~~the~~ CA 4's rule ~~is~~ becomes law, there will be no incentive to an ~~employer~~ employer to offer re-employment. ~~It~~ It simply would ~~not~~ choose to litigate.

Strawn (EEOC)

July '73 offer was insufficient in  
that retroactive ~~seniority~~ seniority was not  
provided



81-300 Ford Motor v EEOE 4/22

- I {
1. Agree with J. Hoffman that Back-pay does not accrue after an applicant accepts an equivalent, permanent job. - & then is no longer in job market.
  2. Fall back position - I could give an opinion holding that in any event a cut-off occurred when Ford offered employment.

No request for seniority

Ford not free to offer it.

Back-pay & seniority issues remain

## II Burdine issue.

Burdine places burden of going forward on  $\Delta$ .

Ford carried this when it denied knowledge of any application for employment. No record.

CA4 said jury found there were applications, & this was left the burden on  $\Delta$ .

B. & D. v. Ford Motor Co.

The Chief Justice Reverse

Back pay & seniority were matters to be resolved later.

The offer, in effect, was a "provisional one".  
Then, a simple offer of job - leaving these issues open - a supple.

N.L.R.B. position is consistent with this view. I + hold that bona fide offer of job is sufficient (C.J. read from a NLRB case)

Justice Brennan

Agree on basis of C.A. 4's op.

Not bound by Labor Bd rule. Not correct here.

We should fashion an equitable remedy.  
An employer does have duty to mitigate damages, but the offer here gave Respondents "Hobson Choice" - according to C.A. 4  
(Bill read a long memo of her views)

Ford's offer was unreasonable in conditions of employment were not comparable.

Justice White

Reverse - tentative

Not at rest but tentatively inclined to reverse.

(9 of 9 write, must talk to B.R.W. - as I didn't understand what little he did say.)





Justice Rehnquist

Rev.

Agree with me as to Burdick but  
also agree no need to ~~to reach~~ reach these  
Rev. on merits.

Agree with me on merits also. The  
women, by taking Ford's reemployment  
offer, ~~they~~ <sup>would</sup> not have waived back pay  
or seniority.

Justice Stevens

Rev.

The rule of law ~~is~~ applicable should  
not turn on ~~to~~ the employee's reason  
for rejecting the offer.

If ~~and~~ Ford had made a "provisional  
offer" - as suggested by Chief - this  
clearly would have been adequate.

The simple offer of employment implicitly  
left open both back-pay & seniority.

CA 4's rule would deter re-employment offers

Justice O'Connor

Agree with much of what John said.

The seniority issue is vital. Unreasonable  
to expect an employer to offer this  
at time of ~~a~~ job offer. Also would  
penalize innocent employees

No need to make "provisional" offer.  
Leave to a court for future determination  
both back-pay & seniority. Offer of job  
is sufficient.

John has good ideas  
as to how to write  
this case.



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 2, 1982



Re: No. 81-300 - Ford Motor Co. v. EEOC

Dear Sandra:

In due course, I shall try my hand at a dissent  
in this case.

Sincerely,


A handwritten signature in black ink, appearing to read "Harry", located below the word "Sincerely,".

Justice O'Connor  
cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 2, 1982



Re: No. 81-300 - Ford Motor Co. v. EEOC

Dear Sandra:

I await the dissent.

Sincerely,

*T.M.*  
T.M.

Justice O'Connor

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS



June 2, 1982

Re: 81-300 - Ford Motor Co. v. EEOC

Dear Sandra:

Please join me.

Respectfully,

Justice O'Connor

Copies to the Conference

meh 06/02/82

To: Mr. Justice Powell

From: Mary

In Re: No. 81-300, Ford Motor Co. v. EEOC

I have several substantive problems with this opinion, none of which go to the holding itself--that, absent special circumstances, an employer's unconditional job offer ends the accrual of potential backpay liability.

1. My first problem is n. 6, at 6-7 of the typed draft. Here, Justice O'Connor would hold that the decisions below are not inconsistent with Burdine. Whether the decisions below are inconsistent with Burdine is the only question before the Court with regard to Ms. Smith.<sup>1</sup> With regard to the trial court, Justice O'Connor states that it "entered findings of fact discrediting each of Ford's proffered justifications," and concludes that this

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<sup>1</sup>Only Gaddis and Star were offered jobs in July of 1973, apparently because Ford had no record of Smith's application and no way of knowing it had allegedly discriminated against her. Indeed, only her oral evidence at trial indicated she had ever applied with a job with Ford. Nevertheless, the lower courts both held that she did apply--although Ford had no paper record of her application and did have Gaddis's and Star's applications.



"indicates that the District Court found by a preponderance of the evidence that Ford's justifications were 'unworthy of any credence.'" n. 6 at 7 (quoting Burdine, 450 U.S., at 256). But what the DC actually did was hold that the "[d]efendant did not 'establish' a legitimate, nondiscriminatory reason for its failure to hire the three women in August, 1971." Petn. A-168 (emphasis added). The deft did 'articulate' reasons--see id., at A-155-A160,<sup>2</sup> so the basis of the DC's decision does not seem consistent with Burdine to me. It is true that the DC might have meant that the pltfs proved their case by a preponderance of the evidence, but it sure sounds like a burden of persuasion--entirely inconsistent with Burdine--was placed on the employer: the defendant failed to "establish" legitimate reasons.

And I do not think that this problem, or any troubling language in the CA opinion, is cured by n. 5 (A-21-22 of Petn) as does Justice O'Connor. See last ¶ in n. 6, at 7 of typed draft. That footnote (in the CA opinion) concludes with this ¶:

"In this case, Ford has neither 'articulated' nor 'established' a legitimate nondiscriminatory reason for hiring the men, since the ~~district~~ court found that the facts did not coincide with Ford's representations. Ford insisted that the other women had not applied when the men were hired. The district court determined the truth to be that the women had applied beforehand. In this situation, Ford was left with no defense to the prima facie case of discrimination." A.5, A-21-A-22.

As n. 1, supra, explains, Ford also argued--and the DC found--

<sup>2</sup>Note that <sup>the</sup> ~~men~~ <sup>the</sup> hired over Gladdis and Star had actually applied first, and "stated practice" was to file applications chronologically. Petn A-156. When a vacancy arose, the manager would pull the "earliest filed applications first." Id., at 157.



(though it also found that the procedure was not always followed) that the men applied before the women and that the manager would consider the oldest application first when there was an opening. Given the "neither 'articulated' nor 'established'" language just quoted from the CA decision, together with these facts, I do not see how n.5 of the CA decision cures the Burdine problem. Moreover, the deft, even by the CA's reckoning, had "articulated" a reason (the women had not yet applied when the men were hired), the deft just had not managed to convince the DC of the truth of this statement. But under Burdine, the deft need only articulate a rationale that a trier of fact might believe--he need not convince the trier of fact of the truth of his version to rebut the prima facie case.

2. If Justice O'Connor is affirming on the Burdine question, and that is the only question involving Smith, see 1st sentence of ¶2 of n. 6 at 6 of typed draft, then shouldn't the case be affirmed in part and reversed in part? Yet the final sentence of the opinion simply reverses and remands.

3. There does not seem to have been any way Ford could have known to offer Smith a job when it offered jobs to Starr and Gaddis. It had no record of any application, and <sup>Smith</sup> she had filed no EEOC complaint (which would have given the employer notice). (The action is brought by the EEOC--that is why there is no need for her to have filed a charge.) If the Smith part of the case were reversed on the Burdine point, this problem would not be presented. As the opinion now stands, however, Ford is liable for back pay to



someone it could not possibly have known it was discriminating against. Perhaps an employer should not be liable for backpay in such circumstances.

4. §706(g) of Title VII (attached) provides that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." At 15-18 of the typed draft, Justice O'Connor goes into ~~an unnecessary~~<sup>a</sup> discussion of what this means, and seems to draw her rules--e.g., the claimant need not go into another line of work or take a demotion--from NLRB cases, see, e.g., n.13. I do not see any need to go beyond the point made by citing §706(g), which is done at 14 of the typed draft, prior to all this dicta. Who knows what rules lurk in all those NLRB cases in notes 12-18 and the second half of 19! And why should we presume that Title VII's explicit language should be interpreted in terms of NLRB rules? In short, why not cut everything in section A between the call to n. 11 at 14 of the typed draft and p. 19 (exclusive)?



Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

§ 706(g)

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101-115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 3, 1982

Re: No. 81-300 Ford Motor Co. v. EEOC

Dear Sandra:

Please join me.

Sincerely,

*WHR*

Justice O'Connor

Copies to the Conference

meh 06/03/82

To: Mr. Justice Powell

From: Mary Becker

In Re: No. 81-300, Ford Motor Co. v. EEOC

I have two substantive problems with this opinion, neither of which go to the holding itself--i.e., that absent special circumstances, an employer's unconditional job offer ends the accrual of potential backpay liability.

1. My first problem is n. 6, at 6-7 of the typed draft. Here, Justice O'Connor would hold that the decisions below are not inconsistent with Burdine.<sup>1</sup> Under Burdine, the plaintiff bears the initial burden of establishing a prima facie case. Once this is established, a burden of production shifts to the defendant:

[The defendant must] "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected ... for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. .... It

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<sup>1</sup>Whether the decisions below are inconsistent with Burdine is the only question before the Court with regard to Ms. Smith because she was not given an unconditional job offer in 1973 when such offers were made to Gaddis and Star. Ford had no record of Smith's application and no way of knowing it had allegedly discriminated against her in 1971. See Petn. A-122-123 (Hoffman, J., dissenting in part).



is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Burdine, 450 U.S., at 254-255.

Justice O'Connor finds no error at the trial court level because it "entered findings of fact discrediting each of Ford's proffered justifications," and concludes that this "indicates that the District Court found by a preponderance of the evidence that Ford's justifications were 'unworthy of any credence.'" n. 6 at 7 (quoting Burdine, 450 U.S., at 256).<sup>2</sup> Under Burdine, however, the deft need not convince the court of the credibility of his justification. In the instant case, what the DC actually did was hold that the "[d]efendant did not establish a legitimate, nondiscriminatory reason for its failure to hire the three women in August, 1971." Petn. A-168 (emphasis added). But, under Burdine, the deft only bears the burden of articulating evidence that, if believed, would justify a judgment in his favor; the deft need not establish a legitimate nondiscriminatory reason for his conduct.<sup>3</sup>

Turning to the facts in the cases of Gaddis and Starr, it cannot be seriously disputed that the deft articulated reasons, even according to the factual findings of the DC. The DC found that the men hired over Gladdis and Star had actually applied first, and that the "stated practice" was to file applications chronologically.

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<sup>2</sup>In Burdine, the Court explained that, after the deft articulates a nondiscriminatory reason, the pltf has the opportunity to show "that the proffered explanation is unworthy of credence." 450 U.S., at 256. The burden of proof remains on the pltf. Ibid.

<sup>3</sup>In addition to not finding for the pltf's "on the preponderance of the evidence," the DC never held that Ford's purported reasons were mere pretexts for discrimination.

Petrn A-156. When a vacancy arose, the manager would pull the "earliest filed applications first." Id., at 157. Although the DC found that this practice was not always followed, id., at A-156, the deft apparently followed it in processing Gaddis's and Starr's applications--and the deft thereby articulated a non-discriminatory reason for choosing the men over Gaddis and Starr.

And even with regard to Smith, the deft seems to have articulated a non-discriminatory reason. It is true that the DC found that Smith had applied for a warehouse job at Ford before at least one of the men selected in 1971 as picker-packers. Id., at A-157-158. And the selection procedure, described above, therefore would not explain Ford's failure to hire her. But in his dissent from the CA decision, Judge Hoffman notes that, at trial, Ford did articulate a non-discriminatory reason for not hiring Smith for a warehouse job in 1971--it did not know she had applied for one. Although the trier of fact might not (and was not) persuaded of the truth of this claim, it can hardly be said that it was a mere pretext for discrimination, i.e., that no rational factfinder would have found in favor of Ford on this point. In addition to the absence of any written record of Smith's 1971 application, see id., at A-122-123, Judge Hoffman noted other evidence indicating that Ford's proffered reason was not beyond the credibility of a rational factfinder:

"Smith's own testimony lends support to that explanation [i.e., that Ford did not know of her application] of why she was not given a warehouse job in 1971--she did not make it at all clear to Ford that she was seeking a job in the warehouse. Smith testified before the district judge as follows:



2.

'Q. Did you indicate in, on each occasion that you were applying for work in the Ford warehouse or what did you tell them?'

'A. I didn't indicate what job I applied for, I just, unless it was something in my line of work or whatever.'

Her prior work was in filling orders in a stockroom; although similar to the picker-packer job she claims she was illegally denied, it is not the same job, and therefore she did not unambiguously indicate what job she was seeking. In addition, it is not even clear from her testimony that she is certain she told Ford she wanted work similar to what she was then performing or, if she did, that she described her then job sufficiently for Ford to understand what employment she wanted. .... Given the ambiguity of her own testimony, Ford's explanation is persuasive and carried its burden, admittedly a light one. Certainly she failed completely to show that Ford's reason was a mere pretext for intentional discrimination, a charge she made not attempt to prove." Id., at A125-127.

Judge Hoffman gave an additional reason why a rational factfinder might have found Ford's explanation believable--apparently both Ford and the EEOC were surprised at Smith's testimony that she was the first woman to apply for a warehouse job at Ford in 1971. See Petn A-127.

And I do not think that the Burdine problem at the trial court level, or any troubling language in the CA opinion, is cured by n. 5 (A-21-22 of Petn) of the CA decision. The footnote in the CA opinion concludes with this paragraph:

"In this case, Ford has neither 'articulated' nor 'established' a legitimate nondiscriminatory reason for hiring the men, since the district court found that the facts did not coincide with Ford's representations. Ford insisted that the other women had not applied when the men were hired. The district court determined the truth to be that the women had applied beforehand. In this situation, Ford was left with no defense to the prima facie case of discrimination."

But the debt, even by the CA's reckoning, had "articulated" a reason--the women had not yet applied when the men were hired--the

deft just had not managed to convince the DC of the truth of this statement. Under Burdine, however, the deft need only articulate a nondiscriminatory rationale that a rational trier of fact might believe--he need not convince the trier of fact of the truth of his version to rebut the prima facie case. And, as the above discussion has shown, even with regard to Smith,<sup>4</sup> Ford's evidence was enough to meet his burden under Burdine: an "explanation ... legally sufficient to justify a judgment for the defendant." Burdine, 451 U.S., at 255.

2. Section 706(g) of Title VII provides that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." At 15-18 of the typed draft, Justice O'Connor discusses the precise meaning of mitigation under this provision, drawing her rules--e.g., that the claimant need not go into another line of work or take a demotion--from NLRB cases, see, e.g., n.13. The precise meaning of mitigation under Title VII is not, however, an issue in this case and citation of NLRB cases as determinative could expose the Court to the risk of appearing to approve of these rulings, though the Court might differ with them when specific questions are presented in the context of Title VII,

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<sup>4</sup>In footnote 5, the CA does not address the Burdine problem in the context of Smith; the reason reported as having been given by the employer is that relevant to Gaddis and Starr.



rather than labor law. Justice O'Connor's policy point can be made by citing §706(g) of Title VII, which is done at 14 of the typed draft, and there does not seem to be any need to go beyond this to discuss the meaning of §706(g) in terms of NLRB cases.

meb 06/03/82

To: Mr. Justice Powell

From: Mary

In Re: Note to Justice O'Connor in No.81-300, Ford Motor Co. v. EEOC

1. Burdine Changes. Although cert was granted on the Burdine point, the decision below was issued at almost the same time as Burdine--Burdine issued Mar. 4, 1981, and the decision below was entered Mar. 19, 1981. The decision below does not seem to have been made with the guidance of Burdine--see , e.g., Judge Hoffman's dissent where he relies on Sweeney, Furnco, and McDonnell Douglas, the pre-Burdine cases foreshadowing Burdine's holding rather than on Burdine itself. See Petn. A-123-124.

Under such circumstances, would it be possible for Judge O'Connor to simply remand in light of Burdine on the Burdine issues even though technically the judgment below was entered prior to Burdine?

If that is not a possibility, then perhaps you could suggest that she make the following minor changes to the printed draft: (1) at 4, include both issues in the questions on which cert was granted and delete footnote 6; and (2) add a new section VI as




the next to the last section of the opinion (at 18-19 of the printed draft). This section need only be one or two paragraphs remanding Smith's claim because the judgment in her favor rests on an inaccurate allocation of the burdens of proof and production under Burdene. This point can be made simply, by referring only to (1) the DC's language that the deft had not "established" a nondiscriminatory reason, Petn. A-168; and (2) the CA's failure to cure that defect in its review--as evidenced by the last ¶ in footnote 5, Petn. A-22, in which the CA says that Ford did not meet its burden even though it articulated a nondiscriminatory reason, but one the DC did not believe. A short quote from Burdine would be sufficient to illustrate that these decisions are inconsistent with it.

2. The NLRB Point. This would require only the deletion of the material from 9 of the printed draft (after the call to note 11) through the next to the last ¶ of section A, at 12 of the printed draft. At least half of this material consists of footnotes citing NLRB cases, and none of it is necessary. In addition to the suggested deletion, some new language for the transistion into the last ¶ of section A at 12 of the printed draft might also be necessary.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 3, 1982

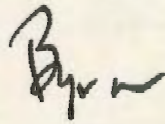


Re: 81-300 - Ford Motor Co. v.  
Equal Employment Opportunity Comm'n

Dear Sandra,

I agree with your excellent opinion in  
this case.

Sincerely yours,



Justice O'Connor

Copies to the Conference

cpm



lfp/ss 06/03/82      Rider A, p. 4 (Ford)

Possible change in n. 6, p. 4 of first printed draft:

We are persuaded, however, that the District Court's findings were consistent with Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). In McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. See also Furnco Construction Co. v. Waters, 438 U.S. 567 (1978), and Board of Trustees v. Sweeney, 439 U.S. 24 (1978). Despite these decisions, some confusion continued to exist. In Burdine we reiterated that after a plaintiff has proved a prima facie case of discrimination, "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" Id., at 253. The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id., at 253. It was then made clear that:

"The defendant need not persuade the Court that it was actually motivated by the proffered reasons . . . it is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. Id., at 254.

*File*

*Sent to  
SOC  
with  
letter  
01/6/4*

As neither the District Court nor the Court of Appeals cited Burdine (apparently because it had only recently been decided), we restate the foregoing principles. We conclude, however, on the basis of the specific findings of fact by the DC, undisturbed by the Court of Appeals, that the plaintiffs in this case carried their burden of persuasion.



lfp/ss 06/03/82

Rider A, p. 4 (Ford)

*of this date.*

Possible change in n. 6, p. 4 of first printed draft:

*She  
has*

We are persuaded, however, that the District Court's findings were consistent with Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). In McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. See also Furnco Construction Co. v. Waters, 438 U.S. 567 (1978), and Board of Trustees v. Sweeney, 439 U.S. 24 (1978). Despite these decisions, some confusion continued to exist. In Burdine we reiterated that after a plaintiff has proved a prima facie case of discrimination, "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" Id., at 253. The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id., at 253. It was then made clear that:

"The defendant need not persuade the Court that it was actually motivated by the proffered reasons . . . it is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. Id., at 254.

*agreed.  
See  
letter  
of 6/4*

As neither the District Court nor the Court of Appeals cited Burdine (apparently because it had only recently been decided), we restate the foregoing principles. We conclude, however, on the basis of the specific findings of fact by the DC, undisturbed by the Court of Appeals, that the plaintiffs in this case carried their burden of persuasion.



lfp/ss 06/03/82

Rider A, p. 4 (Ford)

Possible change in n. 6, p. 4 of first printed draft:

*as  
sent  
to  
Sandra*

We are persuaded, however, that the District Court's findings were consistent with Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). In McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. See also Furnco Construction Co. v. Waters, 438 U.S. 567 (1978), and Board of Trustees v. Sweeney, 439 U.S. 24 (1978). Despite these decisions, some confusion continued to exist. In Burdine we reiterated that after a plaintiff has proved a prima facie case of discrimination, "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" Id., at 253. The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id., at 253. It was then made clear that:

"The defendant need not persuade the Court that it was actually motivated by the proffered reasons . . . it is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. Id., at 254.

As neither the District Court nor the Court of Appeals cited Burdine (apparently because it had only recently been decided), we restate the foregoing principles. We conclude, however, on the basis of the specific findings of fact by the DC, undisturbed by the Court of Appeals, that the plaintiffs in this case carried their burden of persuasion.



June 4, 1982

81-300 Ford v. EEOC

Dear Sandra:

Your opinion for the Court is excellent, and will clarify questions that have plagued this area of Title VII law for some time.

One of the areas of continuing confusion has been the allocation of the burdens and order of presentation of proof. Neither of the courts below cited Burdine, and I am not at all sure that the DC correctly applied prior decisions that were reiterated in Burdine. I agree, however, that on the basis of the DC's undisturbed findings, you are justified in reaching the conclusion stated in n. 6, p. 4.

I write to suggest that it would be helpful if you reiterated McDonnell-Douglas/Burdine rules in your n. 6. As you know, already there is evidence - especially from CA5 - that Burdine is not being followed. Would you be willing to revise n. 6 along the lines of the draft language I enclose?

I expect to join your opinion in any event, but - as the author of the opinions in both McDonnell-Douglas and Burdine - I think it is important to keep our position on the burdens of proof clearly stated and understood.

Sincerely,

Justice O'Connor

LFP/vde

*Sandy [unclear]*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 4, 1982

No. 81-300 Ford Motor Co. v. EEOC

Dear Lewis,

Thank you for your suggestion. I will be happy to include it in footnote 6 in the next printed draft of the opinion. It will be helpful, I think.

Sincerely,

*Sandra*

Justice Powell



June 8, 1982

81-300 Ford Motor Co. v. EEOC

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

lfp/ss

cc: The Conference

CHAMBERS OF  
THE CHIEF JUSTICE

✓

June 8, 1982

Re: No. 81-300 - Ford Motor Co. v. EEOC

Dear Sandra:

I join.

Regards,

WOB

Justice O'Connor

Copies to the Conference



Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: **Justice O'Connor**

Circulated: \_\_\_\_\_

Recirculated: **JUN 9 1982**

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-300

**FORD MOTOR COMPANY, PETITIONER v. EQUAL  
EMPLOYMENT OPPORTUNITY COMMISSION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT**

[June —, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether an employer charged with discrimination in hiring can toll the continuing accrual of backpay liability under § 706(g) of Title VII, 42 U. S. C. § 2000e-5(g), simply by unconditionally offering the claimant the job previously denied him, or whether the employer also must offer seniority retroactive to the date of the alleged discrimination. The question is of considerable practical significance because of the lengthy delays that too often attend Title VII litigation.<sup>1</sup>

I

A

In June and July 1971 Judy Gaddis, Rebecca Starr, and Zettie Smith applied at a Ford Motor Company (Ford) parts warehouse located in Charlotte, North Carolina, for jobs as "picker-packers," "picking" ordered parts from storage, and "packing" them for shipment. At the time, no woman had ever worked in that capacity at the Ford warehouse. All three women were qualified for the positions: Gaddis and Starr recently had been laid off from equivalent jobs at a

<sup>1</sup>The discriminatory refusals to hire involved in this case occurred 11 years ago.

*The  
revision  
of n 6  
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suggested.  
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*9 in joined*

nearby General Motors (GM) warehouse, and Smith had comparable prior experience. Smith applied before any of the openings were filled, and Gaddis and Starr applied while at least two positions remained available.<sup>2</sup> Ford, however, filled the three vacant positions with men, and Gaddis filed a charge with the federal Equal Employment Opportunity Commission (EEOC), claiming that Ford had discriminated against her because of her sex.<sup>3</sup>

In January 1973, General Motors recalled Gaddis and Starr to their former positions at its warehouse. The following July, while they were still working at GM, a single vacancy opened up at Ford. Ford offered the job to Gaddis, without seniority retroactive to her 1971 application. Ford's offer, however, did not require Gaddis to abandon or compromise her Title VII claim against Ford. Gaddis did not accept the job, in part because she did not want to be the only woman working at the warehouse, and in part because she did not want to lose the seniority she had earned at General Motors. Ford then made the same unconditional offer to Starr, who declined for the same reasons. Gaddis and Starr continued to work at the General Motors warehouse, but in 1974 the warehouse was closed and they were laid off. They then unsuccessfully sought new employment until September 1975, when they entered a government training program for the unemployed.

Smith applied again for work at Ford in 1973, but was never hired. She worked elsewhere, though at lower wages than she would have earned at Ford, during much of the time between 1971 and the District Court's decision in 1977.

In contrast to Gaddis', Starr's, and Smith's difficulties, at

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<sup>2</sup>When this case came to trial, Ford claimed that Gaddis and Starr applied after men had already been hired and that Smith had not applied at all. The District Court found to the contrary, however, and the Court of Appeals upheld the findings.

<sup>3</sup>After Gaddis had filed her complaint, she and Starr continued to seek work at the Ford warehouse. In November 1972, Ford hired them and four other workers for six weeks to fill temporary jobs at the warehouse.



least two of the three men hired by Ford in 1971 were still working at the warehouse at the time of the trial in 1977.

B

In July 1975, the EEOC sued Ford in the United States District Court for the Western District of North Carolina, alleging that Ford had violated Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, by refusing to hire women at the Charlotte warehouse. The Commission sought injunctive relief and backpay for the victims.<sup>4</sup>

After trial, the District Court found that Ford had discriminated against the three women on the basis of their sex and awarded them backpay in an amount equal to "the difference between the amount they would have earned had they been hired in August 1971, and the amounts actually earned or reasonably earnable by them" between that date and the date of the court's order. App. to Pet. for Cert. A-170. The District Court rejected Ford's contention that Gaddis and Starr were not entitled to backpay accruing after the dates on which they declined Ford's offer of employment. *Id.*, at A-170 to A-171.

The United States Court of Appeals for the Fourth Circuit affirmed the District Court's finding of unlawful discrimination, as well as the court's award to Gaddis and Starr of backpay that had accrued after July 1973, when the women rejected Ford's unconditional job offer. 645 F. 2d 183 (1981). The court suggested that, had Ford promised retroactive seniority with its job offer, the offer would have cut off Ford's backpay liability. The court concluded, however, that without the promise of retroactive seniority, Ford's 1973 offer was "incomplete and unacceptable." *Id.*, at 193.<sup>5</sup>

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<sup>4</sup> Although the EEOC suit involved additional issues and claimants, we are concerned here with only the part of the suit that involved Gaddis, Starr, and Smith.

<sup>5</sup> Senior District Judge Walter E. Hoffman, sitting by designation, dis-

Ford then petitioned this Court for a writ of certiorari, contending, *inter alia*, that its unconditional job offer to Gaddis and Starr should have cut off the further accrual of backpay liability.<sup>6</sup> We granted the writ. 454 U. S. 1030 (1981).

sented from this portion of the Court of Appeals' decision.

<sup>6</sup> In its petition Ford raised two other issues. First, Ford read the opinion of the Court of Appeals as suggesting that to toll backpay liability an employer must include with his job offer, not just retroactive seniority, but also an offer of already-accrued backpay. The Court of Appeals' opinion did not expressly so hold, however, and before this Court the EEOC concedes that under Title VII such an offer of a lump-sum payment of backpay is not required to toll the continuing accrual of backpay liability. This issue thus is no longer contested by the parties.

The second issue is the only one involving Smith. Ford disputed the District Court's finding that Ford discriminated against the three women, claiming that the court reached its conclusion because it erroneously allocated the burden of proof.

We are persuaded, however, that the District Court's findings were consistent with *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248 (1981).

In *McDonnell-Douglas Corp. v. Green*, 411 U. S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. See also *Furnco Construction Co. v. Waters*, 438 U. S. 567 (1978), and *Board of Trustees v. Sweeney*, 439 U. S. 24 (1978). Despite these decisions, some confusion continued to exist. In *Burdine* we reiterated that after a plaintiff has proved a prima facie case of discrimination, "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" *Id.*, at 253 (citation omitted). The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*, at 253 (citation omitted). It was then made clear that:

"The defendant need not persuade the Court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.*, at 254-255.

As neither the District Court nor the Court of Appeals cited *Burdine* (apparently because it had only recently been decided), we restate the fore-



## II

Section 706(g) of the Civil Rights Act of 1964, 78 Stat. 261, as amended, 42 U. S. C. § 2000e-5(g), governs the award of backpay in Title VII cases. In pertinent part, § 706(g) provides that:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may* be appropriate, which *may* include, but is not limited to, . . . hiring of employees, *with or without* back pay, . . . or any other equitable relief as the

going principles. We conclude, however, on the basis of the specific findings of fact by the District Court, undisturbed by the Court of Appeals, that the plaintiffs in this case carried their burden of persuasion.

As *Burdine* commands, the District Court did not place the burden of persuasion on Ford. Instead, it began its discussion of liability by straightforwardly declaring that the EEOC "ha[d] established that Ford discriminated against Smith, Gaddis and Starr on the basis of their sex." App. to Pet. for Cert. A-167. The court supported this conclusion by pointing, not only to the EEOC's proof of a prima facie case, but also to "its showing that Ford had never hired women into the warehouse until November, 1972, and that [its] procedures for hiring were vague and were based on highly subjective criteria." *Id.*, at A-167 to A-168. The court, moreover, entered findings of fact discrediting each of Ford's proffered justifications for refusing to hire the women. *Id.*, at A-155 to A-161. This progression of factual findings and legal conclusions indicates that the District Court found by a preponderance of the evidence that Ford's justifications were "unworthy of credence," 450 U. S., at 256, and that the company had discriminated on the basis of sex. These findings are fully consistent with *Burdine*. As Ford points out, the Court of Appeals opinion contains some statements that are arguably inconsistent with *Burdine*. The court corrected any misimpression generated by these statements, however, with a discussion directly focusing on the burden-of-proof issue. 645 F. 2d, at 189, n. 5. In light of this discussion, and because it is clear that the trier of fact properly allocated the burden of proof, we find no merit in Ford's burden-of-proof argument.

court deems appropriate. . . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against *shall* operate to reduce the back pay otherwise allowable." (emphasis added).<sup>7</sup>

Under § 706(g), then, "backpay is not an automatic or mandatory remedy[,]. . . it is one which the courts 'may' invoke" in the exercise of their sound "discretion [which] is equitable in nature." *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 415, 416 (1975). Nonetheless, while "the power to award backpay is a discretionary power," *id.*, at 447 (BLACKMUN, J., concurring in the judgment), a "court must exercise this power 'in light of the large objectives of the Act,'" and, in doing so, must be guided by "meaningful standards" enforced by "thorough appellate review." *Id.*, at 416 (opinion of the Court) (citations omitted).

In this case, Ford and the EEOC offer competing standards to govern backpay liability. Ford argues that if an employer unconditionally offers a claimant the job for which he previously applied, the claimant's rejection of that offer should toll the continuing accrual of backpay liability.<sup>8</sup> The

<sup>7</sup>Section 706(g) was "expressly modeled," *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 419 & n. 11 (1975), on the analogous remedial provision of the National Labor Relations Act (NLRA), § 10(c), 49 Stat. 454, as amended, 29 U. S. C. § 160(c). Section 10(c) provides that, if an unfair labor practice has been, or is being, committed, the National Labor Relations Board (NLRB) is empowered to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act.

The principles developed under the NLRA generally guide, but do not bind, courts in tailoring remedies under Title VII. See, e. g., *International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 366-367 (1977); *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 768-770 (1976); *Albemarle Paper Co.*, *supra*, at 419 & n. 11. Therefore, throughout this opinion we refer to cases decided under the NLRA as well as under Title VII.

<sup>8</sup>It should be clear that the contested backpay in this suit stems from



EEOC, on the other hand, defends the lower court's rule, contending that backpay liability should be tolled only by the rejection of an offer that includes seniority retroactive to the date on which the alleged discrimination occurred. Our task is to determine which of these standards better coincides with the "large objectives" of Title VII.

### III

The "primary objective" of Title VII is to bring employment discrimination to an end, *Albemarle Paper, supra*, at 417, by "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group . . . over other employees." *Ibid.* (quoting *Griggs v. Duke Power Co.*, 401 U. S. 424, 429-430 (1971)). See also *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 800 (1973). "[T]he preferred means for achieving" this goal is through "[c]ooperation and voluntary compliance." *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 44 (1974).

To accomplish this objective, the legal rules fashioned to implement Title VII should be designed, consistent with other Title VII policies, to encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into "voluntary compliance" and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace. Delays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them. In a better world, perhaps, law suits brought under Title VII would

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the period following Ford's offer, and during which Gaddis and Starr were unemployed, *i. e.*, after the GM warehouse closed. Our decision today does not affect their right to claim backpay for the period before they rejected Ford's offers.

speed to judgment so quickly that the effects of legal rules on the behavior of the parties during the pendency of litigation would not be as important a consideration. We do not now live in such a world, however, as this case illustrates.

The rule tolling the further accrual of backpay liability if the defendant offers the claimant the job originally sought well serves this objective of ending discrimination through voluntary compliance, for it gives an employer a strong incentive to hire the Title VII claimant. While the claimant may be no more attractive than the other job applicants, a job offer to the claimant will free the employer of the threat of liability for further backpay damages. Since paying backpay damages is like paying an extra worker who never came to work, Ford's proposed rule gives the Title VII claimant a decided edge over other competitors for the job he seeks.

The rule adopted by the court below, on the other hand, fails to provide the same incentive, because it makes hiring the Title VII claimant more costly than hiring one of the other applicants for the same job. To give the claimant retroactive seniority before an adjudication of liability, the employer must be willing to pay the additional costs of the fringe benefits that come with the seniority that newly hired workers usually do not receive. More important, the employer must also be prepared to cope with the deterioration in morale, labor unrest, and reduced productivity that may be engendered by inserting the claimant into the seniority ladder over the heads of the incumbents who have earned their places through their work on the job. In many cases, moreover, disruption of the existing seniority system will violate a collective bargaining agreement, with all that such a violation entails for the employer's labor relations.<sup>9</sup> Under the rule

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<sup>9</sup> See *American Tobacco Co. v. Patterson*, 456 U. S. —, — (1982) ("Seniority provisions are of 'overriding importance' in collective bargaining, . . . and they 'are universally included in these contracts'") (quoting *Humphrey v. Moore*, 375 U. S. 335, 346 (1964), and *Trans World Airlines*,



adopted by the court below, the employer must be willing to accept all these additional costs if he hopes to toll his backpay liability by offering the job to the claimant. As a result, the employer will be less, rather than more, likely to hire the claimant.

In sum, the Court of Appeals' rule provides no incentive to employers to hire Title VII claimants. The rule advocated by Ford, by contrast, powerfully motivates employers to put Title VII claimants to work, thus ending ongoing discrimination as promptly as possible.

#### IV

Title VII's primary goal, of course, is to end discrimination; the victims of job discrimination want jobs, not lawsuits.<sup>10</sup> But when unlawful discrimination does occur, Title VII's secondary, fallback purpose is to compensate the victims for their injuries. To this end, § 706(g) aims "to make the victims of unlawful discrimination whole" by restoring them, "so far as possible . . . to a position where they would have been were it not for the unlawful discrimination." *Albemarle Paper, supra*, at 421 (quoting 118 Cong. Rec. 7168 (1972) (remarks of Sen. Williams)). We now turn to consider whether the rule urged by Ford not only better serves the goal of ending discrimination, but also properly compensates injured Title VII claimants.

#### A

If Gaddis and Starr had rejected an unconditional offer from Ford before they were recalled to their jobs at GM, tolling Ford's backpay liability from the time of Ford's offer

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*Inc. v. Hardison*, 432 U. S. 63, 79 (1977).

<sup>10</sup> See 118 Cong. Rec. 7569 (remarks of Rep. Dent during debate on 1972 amendments to Title VII) ("Most people just want to work. That is all. They want an opportunity to work. We are trying to see that all of us, no matter of what race, sex, or religious or ethnic background, will have an equal opportunity in employment").

plainly would be consistent with providing Gaddis and Starr full compensation for their injuries. An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in § 706(g).<sup>11</sup> This duty, rooted in an ancient principle of law,<sup>12</sup> requires the claimant to use reasonable diligence in finding other suitable employment. Although the un- or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position,<sup>13</sup> he forfeits his

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<sup>11</sup> The provision expressly states that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U. S. C. § 2000e-5(g).

Claimants often take other lesser or dissimilar work during the pendency of their claims, even though doing so is not mandated by the statutory requirement that a claimant minimize damages or forfeit his right to compensation. See, e. g., *Merriweather v. Hercules, Inc.*, 631 F. 2d 1161 (CA5 1980) (voluntary minimization of damages in dissimilar work); *Thornton v. East Texas Motor Freight*, 497 F. 2d 416, 422 (CA6 1974) (voluntary minimization of damages by moonlighting).

<sup>12</sup> See generally, e. g., C. McCormick, *Handbook on the Law of Damages* 127-158 (1935). McCormick summarizes "the general rule" as follows: "Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided." *Id.*, at 127.

In connection with the remedial provisions of the NLRA, we said: "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred." *Phelps Dodge Corp. v. NLRB*, 318 U. S. 177, 197-198 (1941).

<sup>13</sup> See, e. g., *NLRB v. The Madison Courier, Inc.*, 153 U. S. App. D. C. 232, 245-246, 472 F. 2d 1307, 1320-21 (1972) (employee need not "seek employment which is not consonant with his particular skills, background, and experience" or "which involves conditions that are substantially more onerous than his previous position"); *Wonder Markets, Inc.*, 236 N. L. R. B.



right to backpay if he refuses a job substantially equivalent to the one he was denied.<sup>14</sup> Consequently, an employer charged with unlawful discrimination often can toll the accrual of backpay liability by unconditionally offering the claimant the job he sought, and thereby providing him with an opportunity to minimize damages.<sup>15</sup>

An employer's unconditional offer of the job originally sought to an un- or underemployed claimant, moreover, need not be supplemented by an offer of retroactive seniority to be effective, lest a defendant's offer be irrationally disfavored relative to other employers' offers of substantially similar jobs. The claimant, after all, plainly would be required to

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787, 787 (1978) (offer of reinstatement ineffective when discharged employee offered a different job, though former position still existed), enforced *sub nom.* *NLRB v. Eastern Smelting & Refining Corp.*, 598 F. 2d 666, 676 (CA1 1979), supplemental decision, 249 N. L. R. B. 294 (1980); *Good Foods Manufacturing & Processing Corp.*, 195 N. L. R. B. 418, 419 (1972) (offer of reinstatement ineffective because job offered had different conditions of employment and benefits), supplemental decision, 200 N. L. R. B. 623 (1972), enforced, 492 F. 2d 1302 (CA7 1974); *Harvey Carlton*, 143 N. L. R. B. 295, 304 (1963) (offer of reinstatement ineffective because employees would return on probation).

Some lower courts have indicated, however, that after an extended period of time searching for work without success, a claimant must consider taking a lower-paying position. See, *e. g.*, *NLRB v. The Madison Courier, Inc.*, *supra*, at 245-246, 472 F. 2d, at 1320-1321; *NLRB v. Southern Silk Mills, Inc.*, 242 F. 2d 697, 700 (CA6), cert. denied, 355 U. S. 821 (1957). If the claimant decides to go into a dissimilar line of work, or to accept a demotion, his earnings must be deducted from any eventual backpay award. See § 706(g); *Merriweather v. Hercules, Inc.*, 631 F. 2d 1161, 1168 (CA5 1980); *Taylor v. Philips Industries, Inc.*, 593 F. 2d 783, 787 (CA7 1979) (*per curiam*).

<sup>14</sup> *NLRB v. Arduini Mfg. Corp.*, 394 F. 2d 420 (CA1 1968).

<sup>15</sup> The claimant's obligation to minimize damages in order to retain his right to compensation does not require him to settle his claim against the employer, in whole or in part. Thus, an applicant or discharged employee is not required to accept a job offered by the employer on the condition that his claims against the employer be compromised. See, *e. g.*, *NLRB v. St. Marys Sewer Pipe Co.*, 146 F. 2d 995, 996 (CA3 1945).

minimize his damages by accepting another employer's offer even though it failed to grant the benefits of seniority not yet earned.<sup>16</sup> Of course, if the claimant fulfills the requirement that he minimize damages by accepting the defendant's unconditional offer, he remains entitled to full compensation if he wins his case.<sup>17</sup> A court may grant him backpay accrued prior to the effective date of the offer,<sup>18</sup> retroactive seniority,<sup>19</sup> and compensation for any losses suffered as a result of

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<sup>16</sup> For the same reasons, a defendant's job offer is effective to force minimization of damages by an un- or underemployed claimant even without a supplemental offer of backpay, since the claimant would be required to accept another employer's offer of a substantially similar job without a large front-end, lump-sum bonus. See, e. g., *NLRB v. Midwest Hanger Co.*, 550 F. 2d 1101, 1103 (CA8) ("It is clear that had the Company's offer of reinstatement been conditioned solely on its refusal to give back pay, as the Company strenuously argues, then the offer of reinstatement would not have been invalidated"), cert. denied, 434 U. S. 830 (1977); *Reliance Clay Products Co.*, 105 N. L. R. B. 135, 137 (1953) ("The Board has consistently held that a discriminatorily discharged employee may not refuse" an unconditioned offer of reinstatement even though unaccompanied by backpay; refusal of such an offer tolls the employer's liability for back pay).

<sup>17</sup> In tailoring a Title VII remedy a court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 418 (1975) (quoting *Louisiana v. United States*, 380 U. S. 145, 154 (1965)).

<sup>18</sup> See, e. g., *NLRB v. Huntington Hospital, Inc.*, 550 F. 2d 921, 924 (CA4 1977).

<sup>19</sup> See, e. g., *Zipes v. Trans World Airlines, Inc.*, 455 U. S. — (1982); *Teamsters v. United States*, 431 U. S. 324 (1977); *Franks v. Bowman Transportation Co.*, 424 U. S. 747 (1976).

Decisions construing the remedial provision of the NLRA, § 10(c), 29 U. S. C. § 160(c), are in accord. See, e. g., *In re Nevada Consolidated Copper Corp.*, 26 N. L. R. B. 1182, 1235 (1940) (persons unlawfully refused jobs must be offered jobs with "any seniority or other rights and privileges they would have acquired, had the respondent not unlawfully discriminated against them") (quoted in *Franks v. Bowman Transportation Co.*, *supra*, at 770), enforcement denied, 122 F. 2d 587 (CA10 1941), reversed, 316 U. S. 105 (1942).



his lesser seniority before the court's judgment.<sup>20</sup>

In short, the un- or underemployed claimant's statutory obligation to minimize damages requires him to accept an unconditional offer of the job originally sought, even without retroactive seniority. Acceptance of the offer preserves, rather than jeopardizes, the claimant's right to be made whole; in the case of an un- or underemployed claimant, Ford's suggested rule merely embodies the existing requirement of § 706(g) that the claimant minimize damages, without affecting his right to compensation.

### B

Ford's proposed rule also is consistent with the policy of full compensation when the claimant has had the good fortune to find a more attractive job than the defendant's, because the availability of the better job terminates the ongoing ill effects of the defendant's refusal to hire the claimant. For example, if Gaddis and Starr considered their jobs at GM to be so far superior to the jobs originally offered by Ford that, even if Ford had hired them at the outset, they would have left Ford's employ to take the new work, continuing to hold Ford responsible for backpay after Gaddis and Starr lost their GM jobs would be to require, in effect, that Ford insure them against the risks of unemployment in a new and independent undertaking. Such a rule would not merely restore Gaddis and Starr to the "position where they would have been were it not for the unlawful discrimination," *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 421 (1975) (citation omitted); it would catapult them into a better position than they would have enjoyed in the absence of discrimination.

Likewise, even if Gaddis and Starr considered their GM jobs only somewhat better or even substantially equivalent to the positions they would have held at Ford had Ford hired

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<sup>20</sup> Both Ford and the EEOC agree on this point. See Brief for Respondent 19; Reply Brief for Petitioner 9.

them initially,<sup>21</sup> their rejection of Ford's unconditional offer could be taken to mean that they believed that the lingering ill effects of Ford's prior refusal to hire them had been extinguished by later developments. If, for example, they thought that the Ford and GM jobs were identical in every respect, offering identical pay, identical conditions of employment, and identical risks of layoff, Gaddis and Starr would have been utterly indifferent as to which job they had—Ford's or GM's. Assuming that they could work at only one job at a time, the ongoing economic ill effects caused by Ford's prior refusal to hire them would have ceased when they found the identical jobs at GM, and they would have had no reason to accept Ford's offers. As in the case of a claimant who lands a better job, therefore, requiring a defendant to provide what amounts to a form of unemployment insurance to claimants, after they have found identical jobs and refused the defendant's unconditional job offer, would be, absent special circumstances, to grant them something more than compensation for their injuries.

In both of these situations, the claimant has the power to accept the defendant's offer and abandon the superior or substantially equivalent replacement job. As in the case of an un- or underemployed claimant, under the rule advocated by Ford acceptance of the defendant's unconditional offer would preserve fully the ultimately victorious claimant's right to full redress for the effects of discrimination.<sup>22</sup> The claimant who chooses not to follow this path does so, then, not because it provides inadequate compensation, but because the value of

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<sup>21</sup> It is possible that they did so value the GM jobs, since they applied at Ford only after being laid off at GM, and since after being recalled to the GM jobs they rejected Ford's offer. It cannot, however, be fairly inferred solely from their rejection of Ford's offer that they valued the GM jobs more than the value of Ford's job with seniority.

<sup>22</sup> See discussion *supra*, at —.



the replacement job outweighs the value of the defendant's job supplemented by the prospect of full court-ordered compensation. In other words, the victim of discrimination who finds a better or substantially equivalent job no longer suffers ongoing injury stemming from the unlawful discrimination.

## C

Thus, the rule advocated by Ford rests comfortably both on the statutory requirement that a Title VII claimant must minimize damages and on the fact that a claimant is no longer incurring additional injury if he has been able to find other suitable work that, all things considered, is at least as attractive as the defendant's. For this reason, in almost all circumstances the rule is fully consistent with Title VII's object of making injured claimants whole.

The sole question that can be raised regarding whether the rule adequately compensates claimants arises in that narrow category of cases in which the claimant believes his replacement job to be superior to the defendant's job without seniority, but inferior to the defendant's job with the benefits of seniority. In the present case, for example, it is possible that Gaddis and Starr considered their GM jobs more attractive than the jobs offered by Ford, but less satisfactory than the positions they would have held at Ford if Ford had hired them initially. If so, they were confronted with two options. They could have accepted Ford's unconditional offer, preserving their right to full compensation if they prevailed on their Title VII claims, but forfeiting their favorable positions at GM. Alternatively, they could have kept their jobs at GM, retaining the possibility of continued employment there, but, under the operation of the rule advocated here by Ford, losing the right to claim further backpay from Ford after the date of Ford's offer. The court below concluded that under these circumstances Ford's rule would present Gaddis and

Starr with an "intolerable choice," 645 F. 2d 183, 192 (CA4 1981), depriving them of the opportunity to receive full compensation.

We agree that Gaddis and Starr had to choose between two alternatives. We do not agree, however, that their opportunity to choose deprived them of compensation. After all, they had the option of accepting Ford's unconditional offer and retaining the right to seek full compensation at trial, which would comport fully with Title VII's goal of making discrimination victims whole. Under the rule advocated by Ford, if Gaddis and Starr chose the option of remaining at their GM jobs rather than accept Ford's offer, it was because they thought that the GM jobs, plus their claims to backpay accrued prior to Ford's offer, were *more* valuable to them than the jobs they originally sought from Ford, plus the right to seek full compensation from the court.<sup>23</sup> It is hard to see

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<sup>23</sup> Employees value a job for many reasons besides the rate of pay, including, for example, the presence of other workers of the employee's own sex, the availability of recreational facilities at the worksite, staggered work hours, better health benefits, longer vacations, and so forth. What makes one job better than another varies from one employee to another.

Gaddis and Starr presumably rejected Ford's offer because they thought their jobs at GM were worth more to them than full compensation (Ford's offer plus a court award) discounted by the risks of litigation. In essence, the position adopted by the court below and advocated here by the EEOC turns on the fact that we cannot be sure that, had Gaddis and Starr known they were going to win their lawsuit, they still would have rejected Ford's offer. Had they known they were going to win, of course, they would have rejected the Ford job only if they valued the GM jobs more than they valued the combination of Ford's job plus the value of court-ordered compensation *undiscounted* by the risks of litigation. To agree with the EEOC is, in effect, to contend that a claimant is not made whole for purposes of Title VII unless he decided to stay at a replacement job that was worth to him more than the sum of (1) the defendant's job, (2) the right to seek full court-ordered compensation, and, in addition, (3) a sum analogous to insurance against the risk of loss at trial. We discern, however, no reason for concluding that Title VII requires the defendant to insure the claimant against the possibility that the defendant might prevail in the



how Gaddis and Starr could have been deprived of adequate compensation because they chose to venture upon a path that seemed to them more attractive than the Ford job plus the right to seek full compensation in court.

If the choice presented to Gaddis and Starr was difficult, it was only because it required them to assess their likelihood of prevailing at trial. But surely it cannot be contended for this reason alone that they were deprived of their right to adequate compensation. It is a fact of life that litigation is risky and that a plaintiff with a claim to compensation for his losses must consider the possibility that he might lose at trial, either wrongly, because of litigation error, or rightly, because the defendant was innocent. Ford's rule merely requires the Title VII claimant to decide whether he would rather take the job he originally sought, retaining his rights to an award of backpay accrued prior to the effective date of the offer, retroactive seniority, and compensation for any losses suffered as a result of his lesser seniority before the court's judgment, or, instead, whether he would rather commit his future to a more attractive job and accept the limitation of his claim for backpay to the damages that have already accrued. The rule urged by the EEOC and adopted by the court below, by contrast, would have the perverse result of requiring the employer in effect to insure the claimant against the risk that the employer might win at trial.

Therefore, we conclude that, when a claimant rejects the offer of the job he originally sought, as supplemented by a right to full court-ordered compensation, his choice can be taken as establishing that he considers the ongoing injury he has suffered at the hands of the defendant to have been ended by the availability of better opportunities elsewhere. For this reason, we find that, absent special circumstances,<sup>24</sup> the

lawsuit.

<sup>24</sup> If, for example, the claimant has been forced to move a great distance to find a replacement job, his rejection of the employer's offer might reflect

simple rule that the ongoing accrual of backpay liability is tolled when a Title VII claimant rejects the job he originally sought comports with Title VII's policy of making discrimination victims whole.

## V

Although Title VII remedies depend primarily upon the objectives discussed above, the statute also permits us to consider the rights of "innocent third parties." *City of Los Angeles Department of Water & Power v. Manhart*, 435 U. S. 702, 723 (1978). See also *Teamsters v. United States*, 431 U. S. 324, 371-376 (1977). The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap backpay liability only by forcing his incumbent employees to yield seniority to a person who has not proven, and may never prove, unlawful discrimination. As we have acknowledged on numerous occasions, seniority plays a central role in allocating benefits and burdens among employees.<sup>25</sup> In light of the "overriding importance" of these rights, *American Tobacco Co. v. Patterson*, 458 U. S. —, — (1982) (quoting *Humphrey v. Moore*, 375

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the costs of relocation more than a judgment that the replacement job was superior, all things considered, to the defendant's job. In exceptional circumstances, the trial court, in the exercise of its sound discretion, could give weight to such factors when deciding whether backpay damages accrued after the rejection of an employer's offer should be awarded to the claimant.

<sup>25</sup> Seniority may govern, "not only promotion and layoff, but also transfer, demotion, rest days, shift assignments, prerogative in scheduling vacation, order of layoff, possibilities of lateral transfer to avoid layoff, 'bumping' possibilities in the face of layoff, order of recall, training opportunities, working conditions, length of layoff endured without reducing seniority, length of layoff recall rights will withstand, overtime opportunities, parking privileges, and [even] a preferred place in the punch-out line." *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 766-767 (1976) (quoting Stacy, Title VII Seniority Remedies in a Time of Economic Downturn, 28 Vand. L. Rev. 487, 490 (1975)).



U. S. 335, 346 (1964)), we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination.

The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that "the large objectives" of Title VII, *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 416 (1975) (citation omitted), require innocent employees to carry such a heavy burden.<sup>28</sup>

## VI

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<sup>28</sup> In addition to the rights of innocent employees, the rule urged by the EEOC and adopted by the court below burdens innocent employers. An innocent employer—or one who believes himself innocent—has the right to challenge in court claims he considers weak or baseless. The approach endorsed by the lower court undermines this right by requiring the employer, if he wishes to offer some relief to the claimant and toll the mounting backpay bill, to surrender his defense to the charge that the claimant is entitled to retroactive seniority. If the employer offers the claimant retroactive seniority as well as a job, and then prevails at trial, he will have no recourse against the claimant for the costs of the retroactive seniority that the claimant erroneously received. The rule urged by Ford permits the parties to stem the ongoing effects of the alleged discrimination without compelling either claimant or employer to compromise his claims or surrender his defenses. Cf. *Moro Motors Ltd.*, 218 N. L. R. B. 192, 193 (1975) ("were [an employer] required to offer to an employee, allegedly discharged for discriminatory reasons, reinstatement with accrued back pay, the [employer's] right to litigate the issue of whether the discharge was unlawful would for all practical purposes be nullified") (emphasis in original); *National Screen Products Co.*, 147 N. L. R. B. 746, 747-748 (1964).

In conclusion, we find that the rule adopted by the court below disservices Title VII's primary goal of getting the victims of employment discrimination into the jobs they deserve as quickly as possible. The rule, moreover, threatens the interests of other, innocent employees by disrupting the established seniority hierarchy, with the attendant risk that an innocent employee will be unfairly laid off or disadvantaged because a Title VII claimant unfairly has been granted seniority.

On the other hand, the rule that a Title VII claimant's rejection of a defendant's job offer normally ends the defendant's ongoing responsibility for backpay suffers neither of these disadvantages, while nevertheless adequately satisfying Title VII's compensation goals. Most important, it also serves as a potent force on behalf of Title VII's objective of bringing discrimination to an end more quickly than is often possible through litigation. For these reasons we hold that, absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability. We reverse the judgment of the Court of Appeals and remand for proceedings consistent with this opinion.


*So ordered.*



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 15, 1982

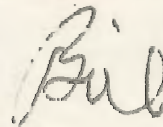


RE: No. 81-300 Ford Motor Co. v. EEOC

Dear Harry:

Please join me in your dissent in the above.

Sincerely,



Justice Blackmun

cc: The Conference

[illegible]