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10-1981

## Zipes v. Trans World Airlines, Inc.

Lewis Powell Jr.

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Probably D

The settlement approved  
by DC, as I understand it,  
grants preferential ~~set~~  
re-employment status to class  
members (women fired for pregnancy)  
whose claims were barred  
by failing to file claims  
w/in 90 days.

This seems unfair to employees  
who may be dismissed to provide

PRELIMINARY MEMORANDUM

places, ~~as with~~  
~~acts~~

February 20, 1981 Conference  
List 3, Sheet 1

No. 78-1545

ZIPES, ET AL. *OK*

v.

TWA, INC., ET AL. *OK*

Cert to CA 7  
(Fairchild, Swygert,  
and Bauer)

Federal/Civil

Timely

No. 78-1549

TWA, INC., ET AL. *OK*

v.

ZIPES, ET AL. *OK*

Same

Federal/Civil

Timely

I would deny. The DC acted  
within its power. PS



No. 80-951

INDEPENDENT FEDERATION  
OF FLIGHT ATTENDANTS  
v.

Same

TWA, INC., ET AL. *OK*

Federal/Civil

Timely

1. SUMMARY: Whether the DC erred in approving a settlement agreement.

2. FACTS AND DECISION BELOW: Resp, Ann B. Zipes, individually and on behalf of a class, initiated this litigation in 1970 challenging the practice of resp TWA of terminating female flight attendants who became mothers. The DC entered a summary judgment in favor of all the class members.

The CA upheld the summary judgment but found that approximately 92% of the plaintiffs' claims were jurisdictionally barred for failure of those plaintiffs to have filed timely charges of discrimination with the EEOC within 90 days after the occurrence of the alleged unlawful employment practice. The DC's order was vacated and the action remanded to the DC for further proceedings. The mandate of the CA, however, was stayed when both the plaintiff's class and TWA filed petitions for certiorari with this Court. On June 4, 1979, this Court granted a motion to defer consideration of the cert petitions pending completion of settlement negotiations in the DC.

The resps arrived at a settlement, for which approval by the DC was required pursuant to Fed. R. Civ. P. 23(e). Under the terms of the settlement, women who were discharged or had children within 90 days of the filing of the EEOC charge or who



were reinstated in a ground position and served in that position within the 90 day period, are to receive a pro-rata share of \$1.5 million. ("Subclass A") Another \$1.5 million is to be divided among the larger class who were discharged earlier -- the class whose claims the CA had found to be jurisdictionally barred. ("Subclass B") All the women affected would be offered reemployment and full company seniority, subject to certain conditions.

Petr, the union representing current TWA personnel, was allowed to intervene to challenge the proposed settlement. The proposed settlement was estimated to create applications for reemployment from 33 members of subclass A and 172 members of subclass B. TWA employs in excess of 6,000 flight attendants. Evidence was presented to indicate that in a single year the airline hires between 400 and 800 new flight attendants.

The DC overruled petr's objection to its jurisdiction to consider the proposed settlement and approved the settlement. Regarding jurisdiction, the DC reasoned that it was not bound by the CA's earlier ruling regarding the jurisdictional bar to the claims of subclass B because of the absence of the issuance of the mandate. The settlement was approved as "fair, reasonable and adequate for the parties and the subclasses."

The CA affirmed. The CA rejected petr's contention that the DC lacked subject matter jurisdiction over the claims of subclass B as a result of the CA's earlier decision. Petr had argued that once the CA had found subject matter jurisdiction to be lacking as to subclass B the DC could not approve a settlement granting



any benefit to the members of subclass B. The CA noted that settlements are entered into because of the very uncertainties of the outcome in litigation as well as the avoidance of wasteful litigation and expense. The issue of the jurisdiction of the DC with regard to subclass B had not been finally determined because a challenge to the CA's earlier decision is still pending before the S. Ct. The compromise reflects the parties perception that the ultimate resolution of this issue could not be predicted with certainty because prior case law leaves the law in this matter open to question and the S. Ct. has not decided whether the time requirements for filing charges with the EEOC defines the court's subject matter jurisdiction (as the CA held) or should be treated as a statute of limitation in which case the doctrines of waiver and estoppel apply. The uncertainty of the outcome of this issue was a major factor leading the parties to reach this settlement and the settlement was not an attempt to confer subject matter jurisdiction by consent.

The CA also rejected petr's contention that the DC should be reversed on the basis of McArthur v. Southern Airways, 569 F.2d 276 (5th Cir. 1978) (en banc). McArthur involved the DC's approval of a settlement between Southern Airways and female flight attendants who alleged similar violations of Title VII. After the settlement approval, this Court decided United Airlines v. Evans which held that a discriminatory act which has not been made the basis for a timely charge has no legal consequences and does not create a continuing violation unless a present violation exists. Because no plaintiff in McArthur had made a timely



filing with the EEOC nor were there continuing violations under the Evans standard, the CA5 reversed the settlement approval on the ground that the DC had lacked jurisdiction over the action and therefore had no authority to approve the settlement. Here, the situation is different. In McArthur, there was found to be no subject matter jurisdiction at the time of approval of the settlement but the DC here clearly had jurisdiction over the claims of 8% of the plaintiff's class. In any event, the CA declined to adopt the McArthur rule. The principles favoring settlement of class action law suits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court. Where the jurisdictional question is not settled with finality, parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement that is otherwise appropriate for DC approval.

3. CONTENTIONS: Petr repeats its argument in this Court. Petr also argues that the CA's determination that McCarthur was distinguishable because the DC here had jurisdiction of the claims of subclass A conflicts with this Court's decision in Snyder v. Harris, 394 U.S. 332 (1969) and Zahn v. International Paper Co., 414 U.S. 291 (1973). Those cases firmly establish that in any class action the court must have jurisdiction of the claim of each plaintiff. Additionally, the jurisdictional issues is clearly controlled by United Airlines v. Evans.

Petr also argues that the settlement was unreasonable and unfair. The burden for a grant of seniority falls squarely upon innocent employees who never discriminated against anyone. Here,



the burden falls disproportionately upon innocent incumbent employees who are asked to move over in favor of individuals who cannot prove violations of Title VII entitling them to any rightful place to which they should be allowed to return. In Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976), this Court said that granting seniority is an appropriate remedy absent unusual adverse impact upon incumbent employees not generally found in Title VII cases. Such adverse impact is present in this case. First, More than 400 flight attendants are presently and have been since at least October 1979, on lay-off. If and when positions reopen, these laid-off flight attendants will pit their seniority against that of returning plaintiffs (with a minimum of 10 years seniority) for such vacancies. Second, many active employees likely will be forced to relocate to another city because of their loss of seniority. Third, the decision below grants seniority at the expense of other classes of employees themselves victims of TWA's past discriminatory practices. Such groups include: (1) black flight attendants; (2) male flight attendants; (3) females denied employment by TWA because of motherhood; and (4) females who were forced to forego motherhood as a condition of continued employment.

The resps have filed separate responses. They argue that where the issue of jurisdiction poses a bonafide question of law, a DC has the power to implement a settlement in which both sides compromise on that question. The CA 5 did not address this issue in McArthur and there is no conflict on this question between the circuits. Because the mandate of the CA was stayed, its opinion



regarding jurisdiction did not present the DC from effectuating the parties compromised settlement. Petr never had standing to prevent TWA from compromising on the legal question of jurisdiction. Petr's limited interest in the seniority question was fully and properly adjudicated. Moreover, the grant of seniority was clearly within the discretion of the DC. Petr failed to show any unusual adverse impact.

4. DISCUSSION: Given that the mandate of the initial CA opinion was stayed, it would seem that a DC should have the authority to approve a settlement between the parties as long as contested issues remained. Arguably, this proposition should not change even though it is very probable that part of the class which was to receive relief would have been dismissed out of the case if the litigation had been allowed to proceed to its normal end. There is, however, a substantial unfairness about granting employees whose claims are jurisdictionally barred seniority at the expense of the present employees. / yes

There is a conflict between the CA's decision and the decision of the CA5 in McArthur but it is not as direct as petr makes it out to be. The resps point out that the plaintiffs in McArthur admitted that they had not complied with the Title VII time requirements. Their brief even conceded that they would not have brought the action if this Court's decision in Evans had been decided before they had filed it. Here, compliance with the Title VII time limit remained in dispute at the time of the settlement and was one of the important issues that gave rise to the compromise. |



It should be noted that both resps have filed stipulations with the Clerk stating that if the present petition for certiorari is denied they will stipulate to the dismissal of the cross petitions in their pending cases in No. 78-1545 and No. 78-1549.

I recommend a denial of this petition as well as a denial in the pending cases. There are two responses.

1/25/81  
JBP

Colson  
(WHR)

Op in petn.



9f 78-1545  
is denied, also  
deny this

PRELIMINARY MEMORANDUM

February 20, 1981 Conference  
List 3, Sheet 1

No. 80-951

INDEPENDENT FEDERATION  
OF FLIGHT ATTENDANTS  
v.

Cert to CA 7  
(Fairchild, Swygert,  
and Bauer)

TWA, INC. ET AL.

Federal/Civil

Timely

Please see the Preliminary Memorandum in No. 78-1545, Zipes,  
Et Al. v. TWA, Inc.

1/25/81  
JBP

Colson  
(Wtr)

Op in petn



No. 78-1549

Relected  
for  
B R W

[illegible]



Argued ..... 19...  
Submitted ..... 19...

Assigned ..... 19...  
Announced ..... 19...

No.78-1545

ZIPES

vs.

TWA, INC.

B.R.W. put him on  
list. Controversy to  
CA's in McCarthy  
Very doubtful whether  
DC had power

12

Referred  
for B R W to  
write. I may  
join him

	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.			✓										
Stewart, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.			✓										
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.													

Out



9f-78-1545  
re Denied, also D this

PRELIMINARY MEMORANDUM

February 20, 1981 Conference  
List 3, Sheet 1

No. 78-1549

TWA, INC. ET AL.

v.

Cert to CA 7  
(Fairchild, Swygert,  
and Bauer)

ZIPES, ET AL.

Federal/Civil

Timely

Please see the Preliminary Memorandum in No. 78-1545, Zipes,  
Et Al. v. TWA, Inc.

1/25/81  
JBP

Colson  
(WHR)

Op in petn







*Announced* . . . . ., 19...

## TWA

Relist  
for  
B. RW

[illegible]



No. 78-1549

Relist  
for  
BRW

[illegible]







*You voted to grant.  
The issue of whether a settlement  
can include those who may be  
jurisdictionally barred is an  
interesting one. And there seems  
to be some conflict about this.  
I would grant.  
PS*

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
☒ Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 3-2-81

Recirculated: \_\_\_\_\_

No. 78-1545, Zipes, et al. v. Trans World Airlines, Inc. &

No. 80-951, Independent Federation of Flight Attendants v. Trans  
World Airlines, Inc., et al.

JUSTICE WHITE, dissenting.

Certiorari should be granted in this case to consider whether the timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to a Title VII suit, and, if so, whether the Court of Appeals erred in affirming the District Court's approval of the settlement of jurisdictionally barred claims.

In 1970 Ann Zipes filed a Title VII class action challenging TWA's policy of terminating female flight flight attendants who became mothers. The District Court granted summary judgment in favor of the plaintiff class, and the Court of Appeals upheld the summary judgment on the merits but concluded that approximately 92% of the plaintiffs' claims were jurisdictionally barred because those plaintiffs had not filed timely charges of discrimination with the EEOC.<sup>1</sup> The Court of Appeals' mandate was

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<sup>1</sup>Plaintiffs argued that TWA had waived the timeliness defense by failing to plead it affirmatively in its answer. Therefore, the court considered whether the time period for filing charges with the EEOC "is in the nature of a statute of limitations, in which case the doctrine of waiver and estoppel

*Add my  
name  
LJP*



stayed pending petition for certiorari here.<sup>2</sup> On June 4, 1979, we granted the parties' motion to defer consideration of the petitions for writ of certiorari pending completion of settlement proceedings. Meanwhile, the parties negotiated a settlement and sought the approval of the District Court, as required by Federal Rule of Civil Procedure 23(e). The settlement provided monetary relief to those plaintiffs whose claims would not be jurisdictionally barred under the Court of Appeals' decision ("Subclass A") and to those plaintiffs whose claims would be jurisdictionally barred ("Subclass B"). All class members were offered reemployment and full company seniority, subject to certain conditions. The International Federation of Flight Attendants ("IFFA") intervened, representing TWA flight attendants who might be affected by the settlement agreement.

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would apply, or is a jurisdictional prerequisite to suit in which case the employer could raise it at any time." In re Consolidated Pretrial Proceedings in the Airline Cases, 582 F.2d 1142 (CA7 1978).

The requirement that a timely charge be filed with the EEOC was contained in 42 U.S.C. §2000e-5(d) (1970), later renumbered 42 U.S.C. §2000e-5(e) (1972).

<sup>2</sup>Plaintiffs filed a petition for writ of certiorari, No. 78-1545, Zipes, et al. v. Trans World Airlines, Inc., and TWA filed a conditional cross-petition, No. 78-1549, Trans World Airlines, Inc. v. Zipes, et al. Plaintiffs argued that the timely filing of a charge is not a jurisdictional prerequisite to a Title VII suit. They noted that the Court had granted certiorari in Shell Oil Co. v. Dartt, 439 U.S. 99 (1977) to resolve the parallel issue under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq., and had affirmed the judgment below by an equally divided court. The Court of Appeals had held that the ADEA's requirement that a timely notice of intent to sue be filed with the Secretary of Labor is subject to tolling and estoppel. Dartt v. Shell Oil Co., 539 F.2d 1256 (CA10 1976).



The District Court approved the settlement and rejected IFFA's contention that it lacked subject matter jurisdiction over the claims of Subclass B, stating that it was not bound by the Court of Appeals' decision, since the court's mandate had been stayed. The Court of Appeals affirmed, reasoning that "the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action" and noting that the disputed issue of whether Subclass B's claims were jurisdictionally barred had not been "settled with finality."<sup>3</sup> The court declined to follow McArthur v. Southern Airways, 569 F.2d 276 (CA5 1978) (en banc), in which the Court of Appeals for the Fifth Circuit reversed the approval of a settlement agreement in a Title VII class action, holding that the District Court lacked jurisdiction since no plaintiff had filed a timely charge of discrimination with the EEOC. IFFA now seeks review of the Court of Appeals decision, arguing that the District Court erred in approving the settlement of jurisdictionally barred claims.<sup>4</sup>

Since the Court of Appeals for the Seventh Circuit has held that the timely filing requirement is jurisdictional, it is difficult to reconcile the Court of Appeals' decision with the rule expressed in Federal Rule of Civil Procedure 12(h)(3):

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<sup>3</sup>Air Line Stewards and Stewardesses Ass'n, Local 550, et al. v. Trans World Airlines, Inc., et al., 630 F.2d 1164, 1169 (CA7 1980).

<sup>4</sup>No. 80-951, Independent Federation of Flight Attendants v. Trans World Airlines, Inc., et al.



"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Furthermore, the Court of Appeals' ruling that a District Court may approve the settlement of a jurisdictional issue conflicts with its own precedent<sup>5</sup> and with the Court of Appeals for the Fifth Circuit's decision in McArthur, supra.

This case would also enable the Court to decide whether subject matter jurisdiction in a Title VII action is dependent upon the timely filing of a charge with the EEOC. The Courts of Appeals have been struggling with this question,<sup>6</sup> and we have referred to the filing requirement both as a "jurisdictional prerequisite"<sup>7</sup> and as serving the purpose of a statute of

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<sup>5</sup>See Patterson v. Stovall, 528 F.2d 108, 112, n. 5 (CA7 1976) ("[T]he District Court would have [had] no authority to approve the settlement had it lacked jurisdiction").

<sup>6</sup>Compare, Hart v. J.T. Baker Chemical Corp., 598 F.2d 829, 831 (CA3 1979) (not a jurisdictional prerequisite) and Laffey v. Northwest Airlines, Inc., \_\_\_ U.S. App. D.C. \_\_\_, 567 F.2d 429, 475 (1976) (same), cert. denied, 434 U.S. 1086 (1978), with In re Consolidated Pretrial Proceedings in the Airlines Cases, 582 F.2d 1142 (CA7 1978) (jurisdictional prerequisite). See Daughtry v. King's Dept. Stores, Inc., 608 F.2d 906 (CA1 1979); Smith v. American President Lines, Ltd., 571 F.2d 102, 108-109 (CA2 1978) (expressly reserving the issue of whether the time limit for filing may be extended by equitable tolling or whether it is "strictly jurisdictional"). See also Chappell v. Emco Mach. Works Co., 601 F.2d 1295 (CA5 1979) (timely filing is a "jurisdictional prerequisite," but is not jurisdictional in the same sense as is the amount in controversy requirement in diversity actions).

<sup>7</sup>See Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); McDonnell Douglas Corp v. Green, 411 U.S. 792, 798 (1973).



limitations.<sup>8</sup>

Accordingly, I dissent from the denial of certiorari in No. 78-1545 and No. 80-951.

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<sup>8</sup>In Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 372 (1977), the Court referred to the filing period as serving the purposes of a statute of limitations. In Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976), the Court referred to the filing period as a "limitations period", 429 U.S. at 238-244, and to the timely filing requirement as a "jurisdictional prerequisite." 429 U.S., at 240.



March 3, 1981

78-1545 Zipes v. Trans World

Dear Byron:

Please add my name to your dissent in the above case.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference



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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

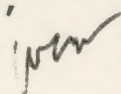
March 3, 1981

Re: Nos. 78-1545 & 80-951 Zipes v. Trans World Airlines

Dear Byron:

Please join me in your dissent from denial of  
certiorari.

Sincerely,



Mr. Justice White

Copies to the Conference



You and WTR have  
joined. PS

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES:

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

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

Recirculated: 3-3-81

1st PRINTED DRAFT

## SUPREME COURT OF THE UNITED STATES

ANNE B. ZIPES ET AL. v. TRANS WORLD AIRLINES,  
INC., and INDEPENDENT FEDERATION OF  
FLIGHT ATTENDANTS v. TRANS WORLD  
AIRLINES, INC., ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 78-1545 and 80-951. Decided March —, 1981

JUSTICE WHITE, dissenting.

Certiorari should be granted in this case to consider whether the timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to a Title VII suit, and, if so, whether the Court of Appeals erred in affirming the District Court's approval of the settlement of jurisdictionally barred claims.

In 1970 Ann Zipes filed a Title VII class action challenging TWA's policy of terminating female flight attendants who became mothers. The District Court granted summary judgment in favor of the plaintiff class, and the Court of Appeals upheld the summary judgment on the merits but concluded that approximately 92% of the plaintiffs' claims were jurisdictionally barred because those plaintiffs had not filed timely charges of discrimination with the EEOC.<sup>1</sup> The Court of Appeals' mandate was stayed pending petition for certiorari

<sup>1</sup> Plaintiffs argued that TWA had waived the timeliness defense by failing to plead it affirmatively in its answer. Therefore, the court considered whether the time period for filing charges with the EEOC "is in the nature of a statute of limitations, in which case the doctrine of waiver and estoppel would apply, or is a jurisdictional prerequisite to suit in which case the employer could raise it at any time." *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142 (CA7 1978).

The requirement that a timely charge be filed with the EEOC was contained in 42 U. S. C. § 2000e-5 (d) (1970), later renumbered 42 U. S. C. § 2000e-5 (e) (1972).

five  
joined



here.<sup>2</sup> On June 4, 1979, we granted the parties' motion to defer consideration of the petitions for writ of certiorari pending completion of settlement proceedings. Meanwhile, the parties negotiated a settlement and sought the approval of the District Court, as required by Federal Rule of Civil Procedure 23 (e). The settlement provided monetary relief to those plaintiffs whose claims would not be jurisdictionally barred under the Court of Appeals' decision ("Subclass A") and to those plaintiffs whose claims would be jurisdictionally barred ("Subclass B"). All class members were offered re-employment and full company seniority, subject to certain conditions. The International Federation of Flight Attendants ("IFFA") intervened, representing TWA flight attendants who might be affected by the settlement agreement. The District Court approved the settlement and rejected IFFA's contention that it lacked subject matter jurisdiction over the claims of Subclass B, stating that it was not bound by the Court of Appeals' decision, since the court's mandate had been stayed. The Court of Appeals affirmed, reasoning that "the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action" and noting that the disputed issue of whether Subclass B's claims were jurisdictionally barred had not been "settled with finality."<sup>3</sup> The court declined to follow

4 <sup>2</sup> Plaintiffs filed a petition for writ of certiorari, No. 78-1545, *Zipes, et al. v. Trans World Airlines, Inc.*, and TWA filed a conditional cross-petition, No. 78-1549, *Trans World Airlines, Inc. v. Zipes, et al.* Plaintiffs argued that the timely filing of a charge is not a jurisdictional prerequisite to a Title VII suit. They note that the Court had granted certiorari in *Shell Oil Co. v. Dartt*, 439 U. S. 99 (1977) to resolve the parallel issue under the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 *et seq.*, and had affirmed the judgment below by an equally divided court. The Court of Appeals had held that the ADEA's requirement that a timely notice of intent to sue be filed with the Secretary of Labor is subject to tolling and estoppel. *Dartt v. Shell Oil Co.*, 539 F. 2d 1256 (CA10 1976).

<sup>3</sup> *Air Line Stewards and Stewardesses Assn., Local 550, et al. v. Trans World Airlines, Inc., et al.*, 630 F. 2d 1164, 1169 (CA7 1980).



*McArthur v. Southern Airways*, 569 F. 2d 276 (CA5 1978) (en banc), in which the Court of Appeals for the Fifth Circuit reversed the approval of a settlement agreement in a Title VII class action, holding that the District Court lacked jurisdiction since no plaintiff had filed a timely charge of discrimination with the EEOC. IFFA now seeks review of the Court of Appeals decision, arguing that the District Court erred in approving the settlement of jurisdictionally barred claims.<sup>4</sup>

Since the Court of Appeals for the Seventh Circuit has held that the timely filing requirement is jurisdictional, it is difficult to reconcile the Court of Appeals' decision with the rule expressed in Federal Rule of Civil Procedure 12 (h) (3): "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Furthermore, the Court of Appeals' ruling that a District Court may approve the settlement of a jurisdiction issue conflicts with its own precedent<sup>5</sup> and with the Court of Appeals for the Fifth Circuit's decision in *McArthur*, *supra*.

This case would also enable the Court to decide whether subject matter jurisdiction in a Title VII action is dependent upon the timely filing of a charge with the EEOC. The Courts of Appeals have been struggling with this question,<sup>6</sup>

<sup>4</sup> No. 80-851, *Independent Federation of Flight Attendants v. Trans World Airlines, Inc., et al.*

<sup>5</sup> See *Patterson v. Stovall*, 528 F. 2d 108, 112, n. 5 (CA7 1976) ("[T]he District Court would have [had] no authority to approve the settlement had it lacked jurisdiction").

<sup>6</sup> Compare, *Hart v. J. T. Baker Chemical Corp.*, 598 F. 2d 829, 831 (CA3 1979) (not a jurisdiction prerequisite) and *Laffey v. Northwest Airlines, Inc.*, — U. S. App. D. C. —, 567 F. 2d 429, 475 (1976) (same), cert. denied, 434 U. S. 1086 (1978), with *In re Consolidated Pretrial Proceedings in the Airlines Cases*, 582 F. 2d 1142 (CA7 1978) (jurisdictional prerequisite). See *Daughtry v. King's Dept. Stores, Inc.*, 608 F. 2d 906 (CA1 1979); *Smith v. American President Lines, Ltd.*, 571 F. 2d 102, 108-109 (CA2 1978) (expressly reserving the issue of whether the time limit for filing may be extended by equitable tolling or whether it is "strictly jurisdictional"). See also *Chappell v. Emco Mach. Works Co.*,



and we have referred to the filing requirement both as a "jurisdictional prerequisite"<sup>7</sup> and as serving the purpose of a statute of limitations.<sup>8</sup>

Accordingly, I dissent from the denial of certiorari in No. 78-1545 and No. 80-951.

---

601 F. 2d 1295 (CA5 1979) (timely filing is a "jurisdictional prerequisite," but is not jurisdictional in the same sense as is the amount in controversy requirement in diversity actions).

<sup>7</sup> See *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 798 (1973).

<sup>8</sup> In *Occidental Life Insurance Co. v. EEOC*, 432 U. S. 355, 372 (1977), the Court referred to the filing period as serving the purposes of a statute of limitations. In *Electrical Workers v. Robbins & Myers, Inc.*, 429 U. S. 229 (1976), the Court referred to the filing period as a "limitations period," 429 U. S., at 238-244, and to the timely filing requirement as a "jurisdictional prerequisite." 429 U. S., at 240.



You joined  
BRW, on 3/1/81.

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
✓ Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 1

From: Mr. Justice White

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

Recirculated: 5 MAR 1981

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

ANNE B. ZIPES ET AL. v. TRANS WORLD AIRLINES,  
INC., and INDEPENDENT FEDERATION OF  
FLIGHT ATTENDANTS v. TRANS WORLD  
AIRLINES, INC., ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 78-1545 and 80-951. Decided March —, 1981

JUSTICE WHITE, with whom JUSTICE POWELL and JUSTICE  
REHNQUIST join, dissenting.

Certiorari should be granted in this case to consider whether the timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to a Title VII suit, and, if so, whether the Court of Appeals erred in affirming the District Court's approval of the settlement of jurisdictionally barred claims.

In 1970 Ann Zipes filed a Title VII class action challenging TWA's policy of terminating female flight attendants who became mothers. The District Court granted summary judgment in favor of the plaintiff class, and the Court of Appeals upheld the summary judgment on the merits but concluded that approximately 92% of the plaintiffs' claims were jurisdictionally barred because those plaintiffs had not filed timely charges of discrimination with the EEOC.<sup>1</sup> The Court of Appeals' mandate was stayed pending petition for certiorari

<sup>1</sup> Plaintiffs argued that TWA had waived the timeliness defense by failing to plead it affirmatively in its answer. Therefore, the court considered whether the time period for filing charges with the EEOC "is in the nature of a statute of limitations in which case the doctrines of waiver and estoppel would apply, or is a jurisdictional prerequisite to suit in which case the employer could raise it at any time." *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142, 1151 (CA7 1978).

The requirement that a timely charge be filed with the EEOC was contained in 42 U. S. C. § 2000e-5 (d) (1970), later renumbered 42 U. S. C. § 2000e-5 (e) (1972).



here.<sup>2</sup> On June 4, 1979, we granted the parties' motion to defer consideration of the petitions for writ of certiorari pending completion of settlement proceedings. Meanwhile, the parties negotiated a settlement and sought the approval of the District Court, as required by Federal Rule of Civil Procedure 23 (e). The settlement provided monetary relief to those plaintiffs whose claims would not be jurisdictionally barred under the Court of Appeals' decision ("Subclass A") and to those plaintiffs whose claims would be jurisdictionally barred ("Subclass B"). All class members were offered re-employment and full company seniority, subject to certain conditions. The International Federation of Flight Attendants ("IFFA") intervened, representing TWA flight attendants who might be affected by the settlement agreement. The District Court approved the settlement and rejected IFFA's contention that it lacked subject matter jurisdiction over the claims of Subclass B, stating that it was not bound by the Court of Appeals' decision, since the court's mandate had been stayed. The Court of Appeals affirmed, reasoning that "the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action" and noting that the disputed issue of whether Subclass B's claims were jurisdictionally barred had not been "settled with finality."<sup>3</sup> The court declined to follow

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<sup>2</sup> Plaintiffs filed a petition for writ of certiorari, No. 78-1545, *Zipes, et al. v. Trans World Airlines, Inc.*, and TWA filed a conditional cross-petition, No. 78-1549, *Trans World Airlines, Inc. v. Zipes, et al.* Plaintiffs argued that the timely filing of a charge is not a jurisdictional prerequisite to a Title VII suit. They noted that the Court had granted certiorari in *Shell Oil Co. v. Dartt*, 434 U. S. 99 (1977) to resolve the parallel issue under the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 *et seq.*, and had affirmed the judgment below by an equally divided court. The Court of Appeals had held that the ADEA's requirement that a timely notice of intent to sue be filed with the Secretary of Labor is subject to tolling and estoppel. *Dartt v. Shell Oil Co.*, 539 F. 2d 1256 (CA10 1976).

<sup>3</sup> *Air Line Stewards and Stewardesses Assn., Local 550, et al. v. Trans World Airlines, Inc., et al.*, 630 F. 2d 1164, 1169 (CA7 1980).



*McArthur v. Southern Airways*, 569 F. 2d 276 (CA5 1978) (en banc), in which the Court of Appeals for the Fifth Circuit reversed the approval of a settlement agreement in a Title VII class action, holding that the District Court lacked jurisdiction since no plaintiff had filed a timely charge of discrimination with the EEOC. IFFA now seeks review of the Court of Appeals' decision, arguing that the District Court erred in approving the settlement of jurisdictionally barred claims.<sup>4</sup>

Since the Court of Appeals for the Seventh Circuit has held that the timely filing requirement is jurisdictional, it is difficult to reconcile the Court of Appeals' decision with the rule expressed in Federal Rule of Civil Procedure 12 (h) (3): "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Furthermore, the Court of Appeals' ruling that a District Court may approve the settlement of a jurisdictional issue conflicts with its own precedent<sup>5</sup> and with the Court of Appeals for the Fifth Circuit's decision in *McArthur*, *supra*.

This case would also enable the Court to decide whether subject matter jurisdiction in a Title VII action is dependent upon the timely filing of a charge with the EEOC. The Courts of Appeals have been struggling with this question,<sup>6</sup>

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<sup>4</sup> No 80-951, *Independent Federation of Flight Attendants v. Trans World Airlines, Inc., et al.*

<sup>5</sup> See *Patterson v. Stovall*, 528 F. 2d 108, 112, n. 5 (CA7 1976) ("[T]he District Court would have [had] no authority to approve the settlement had it lacked jurisdiction").

<sup>6</sup> Compare, *Hart v. J. T. Baker Chemical Corp.*, 598 F. 2d 829, 831 (CA3 1979) (not a jurisdictional prerequisite) and *Laffey v. Northwest Airlines, Inc.*, — U. S. App. D. C. —, —, 567 F. 2d 429, 475 (1967) (same), cert. denied, 434 U. S. 1086 (1978), with *In re Consolidated Pre-trial Proceedings in the Airlines Cases*, 582 F. 2d 1142, 1151 (CA7 1978) (jurisdictional prerequisite). See *Daughtry v. King's Dept. Stores, Inc.*, 808 F. 2d 906, 909 (CA1 1979); *Smith v. American President Lines, Ltd.*, 571 F. 2d 102, 108-109 (CA2 1978) (expressly reserving the issue of whether the time limit for filing may be extended by equitable tolling or whether it is "strictly jurisdictional"). See also *Chappell v. Emco Mach.*



and we have referred to the filing requirement both as a "jurisdictional prerequisite"<sup>7</sup> and as serving the purpose of a statute of limitations.<sup>8</sup>

Accordingly, I dissent from the denial of certiorari in No. 78-1545 and No. 80-951.

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*Works Co.*, 601 F. 2d 1295, 1298 (CA5 1979) (timely filing is a "jurisdictional prerequisite," but is not jurisdictional in the same sense as is the amount in controversy requirement in diversity actions).

<sup>7</sup> See *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 798 (1973).

<sup>8</sup> In *Occidental Life Insurance Co. v. EEOC*, 432 U. S. 355, 372 (1977), the Court referred to the filing period as serving the purposes of a statute of limitations. In *Electrical Workers v. Robbins & Myers, Inc.*, 429 U. S. 229 (1976), the Court referred to the filing period as a "limitations period," 429 U. S., at 238-244, and to the timely filing requirement as a "jurisdictional prerequisite." 429 U. S., at 240.







*Announced* . . . . ., 19...

Grant  
&  
Consolidated  
with 78-1549

[illegible]



No. 78-1549

Grant

[illegible]



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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 30, 1981

*Probably will be  
relisted*

MEMORANDUM TO THE CONFERENCE

78-1545) - Zipes v. TWA  
78-1549) - TWA v. Zipes  
80-951 ) - Ind. Fed. of Flight Attendants v. TWA

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I suggest that Trans World's motion in these cases be relisted for the May 14 Conference. I shall meanwhile circulate a memorandum, and I have suggested to the Legal Officer that he might at least postpone addressing this motion.

*John*







CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 11, 1981

Memorandum to the Conference

Re: Independent Federation of Flight Attendants v. Zipes, et al.

TWA's Motion to Limit the Grant in No. 80-951  
and to Dismiss Nos. 78-1545 and 78-1549 as Moot

I. SUMMARY

We granted certiorari in No. 80-951 on March 9, 1981. The primary issues presented by petitioner are (1) whether the timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to a Title VII suit, and, if so, (2) whether the Court of Appeals erred in affirming the District Court's approval of the settlement of jurisdictionally barred claims. Petitioner is the Independent Federation of Flight Attendants (IFFA), representing TWA flight attendants who would be adversely affected by the grant of competitive seniority to plaintiffs who are re-employed as flight attendants pursuant to the settlement agreement. Respondents are TWA and the plaintiff class.

This extended analysis seems reasonable. The proposed order eliminates unnecessary issues while giving the Court ample flexibility with respect to the ultimate outcome. I would follow  
BRW.  
PS



IFFA challenges two separate orders entered by the DC. In one order the DC approved the settlement agreement; in the other it awarded competitive seniority to reinstated plaintiffs. TWA moves the Court to limit its review to the order awarding competitive seniority.

When we granted certiorari in No. 80-951, we also granted certiorari in two other petitions filed earlier in this litigation, which we had held pending resolution of settlement proceedings. Those petitions seek review of a prior CA decision in this case. In No. 78-1545, plaintiff class contends that the timely filing of EEOC charges is not a jurisdictional prerequisite. In No. 78-1549, TWA contends (a) that the CA erred in affirming summary judgment for plaintiffs on the issue of liability, (b) that TWA should only be required to grant plaintiffs prospective relief, and (c) that the CA erred in defining the subclass of plaintiffs who had filed timely charges with the EEOC.

TWA asks the Court to dismiss No. 78-1545 and No. 78-1549 as moot if the Court limits its review to the order awarding competitive seniority.

The plaintiff class asks the Court to (a) grant TWA's motion; or (b) order the parties to stipulate to the dismissal



of Nos. 78-1545 and 78-1549; or (c) dismiss Nos. 78-1545 and 78-1549 as moot.

## II. BACKGROUND

Plaintiffs are women who lost their jobs as TWA flight attendants because of TWA's policy (prior to 1970) of requiring flight attendants who became mothers to resign or accept ground duty positions.<sup>1</sup> Plaintiffs filed a Title VII class action challenging this policy.

A. DC's 1976 Orders: In October 1976, the DC granted summary judgment on the issue of liability and rejected TWA's contention that certain members of the plaintiff class had not filed timely charges with the EEOC. The DC held that the timely filing requirement is jurisdictional. However, a continuing violation of plaintiffs' rights existed until TWA changed its policy and permitted the rehiring of flight attendants who had become mothers. Thus, all plaintiffs had met the timely filing requirement.

B. CA's 1978 Decision: The CA affirmed the DC's ruling on

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<sup>1</sup>TWA did not impose similar restrictions on male cabin attendants who became fathers. See note 17, infra.



liability and vacated the DC's ruling on the timely filing issue. It held that the timely filing requirement is jurisdictional and that the claims of certain class members (labelled "Subclass B") were jurisdictionally barred. The CA concluded that all members of the plaintiff class who were permanently terminated during the 90 days preceding the filing of EEOC charges and all members who were reinstated in ground duty positions after their maternity leave and continued their employment into the 90-day period preceding the filing of EEOC charges had met the timely filing requirement. (These plaintiffs were labelled "Subclass A.") The CA reasoned that the reinstated employees had been subjected to a continuing violation of Title VII. 582 F.2d at 1149-1150.<sup>2</sup>

C. Cert Petition No. 78-1545: The plaintiff class (on behalf of Subclass B) filed a cert petition, No. 78-1545, seeking review of the CA's decision. The only issue presented in that petition is whether the timely filing requirement is a jurisdictional prerequisite and therefore is not subject to the doctrines of waiver and estoppel.<sup>3</sup>

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<sup>2</sup>See note 17, infra.

<sup>3</sup>The CA had rejected plaintiffs' contentions that TWA waived the timely filing defense by failing to raise it in the



D. Conditional Cross-petition No. 78-1549: TWA filed a conditional cross-petition, No. 78-1549, arguing: (a) summary judgment on the issue of liability was improper; (b) if there was a Title VII violation, the remedies should be prospective only; and (c) the CA erred in defining Subclass A.<sup>4</sup>

E. Motion to Defer Consideration: The parties asked the Court to defer consideration of these cert petitions pending completion of settlement proceedings. Their motion was granted on June 4, 1979.

F. Settlement Agreement: TWA and the plaintiff class negotiated a settlement that provided monetary relief to all class members (Subclass A and Subclass B)<sup>5</sup> and required TWA to re-employ as flight attendants all class members who were ready, willing and qualified to perform the job. The settlement agreement also provided:

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answer to the complaint and that TWA was estopped from relying on this defense because TWA raised the issue so late in the proceedings.

<sup>4</sup>See note 17, infra.

<sup>5</sup>Members of Subclass A were awarded substantially more monetary compensation than members of Subclass B. The settlement agreement adopted the CA's definition of Subclasses A and B.



"All re-employed class members shall have, be credited with and enjoy the amount of seniority and credit for length of service as is provided in Section V hereof."

Section V(A) dealt with company seniority. Section V(B) provided:

"It is agreed that the total amount of seniority and credit for length of service (both accrued and retroactive) for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA."

The settlement agreement also stated:

"Nothing contained in any other agreement or writing and no right or obligation which has arisen or accrued outside of this Settlement Agreement (including prior, current and future labor agreements) shall be deemed to modify, change or diminish the rights and obligations which arise under this Agreement." (emphasis added)

The parties agreed that the settlement would be submitted to the DC for approval and that "[t]he parties shall jointly file in the United States Supreme Court a motion and stipulation asking that the current pending petitions for writs of certiorari be held in abeyance during the settlement procedures, to be dismissed immediately after the Final Order Date." The term



"Final Order Date" was defined as "the date on which the order described in Section X becomes final and no longer subject to court review." The order described in Section X was "an order which approves this Settlement Agreement and dismisses these cases against TWA."

G. DC's 1979 Orders: The parties sought the DC's approval of the settlement, as required by F.R.C.P. 23(e).<sup>6</sup> IFFA intervened, asserting that the DC lacked jurisdiction over the claims of Subclass B and therefore was without authority to approve that part of the settlement agreement that allowed for an award of competitive seniority to members of Subclass B. The DC held that the CA's 1978 decision did not bar it "from exercising its authority over those portions of the proposed settlement agreement pertaining to members of Subclass B." It emphasized that the CA had stayed its mandate with respect to the jurisdictional issue pending final disposition of cert

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<sup>6</sup>F.R.C.P. 23(e) provides:

"A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."



petition No. 78-1545.

1. "Order Approving Settlement and Dismissing Actions":

The DC subsequently entered an order approving the settlement agreement and dismissing the action.<sup>7</sup> The DC retained jurisdiction (a) to determine the total amount of seniority and credit for length of service for re-employed class members as provided in Section V(B) of the Settlement Agreement; (b) to enforce the terms of the settlement agreement and to adjudicate any disputes over the interpretation of the settlement agreement; and (c) to award costs and attorneys' fees.

2. "Order Awarding Seniority": On the same day, the DC entered a separate order, stating that "full restoration of retroactive seniority will not have an unusual adverse impact upon currently employed flight attendants in a manner which is not typical of other Title VII cases," and ordering that each re-employed class member be granted full retroactive competitive seniority. The DC retained jurisdiction regarding subjects (b)

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<sup>7</sup>The DC found that proper notice of the proposed settlement had been given to class members, that no class member had objected to the settlement, and that the settlement agreement was "fair, reasonable, and adequate for the parties and Subclasses A and B."



and (c) above.<sup>8</sup>

H. CA's 1980 Decision: IFFA appealed from both orders, and the CA affirmed the DC's approval of the settlement agreement and its award of retroactive seniority. The CA rejected IFFA's contention that, with respect to the claims of Subclass B, the parties had conferred subject matter jurisdiction on the DC by consent. "We think the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action. Where, as here, the jurisdictional question is not settled with finality, parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement that is otherwise appropriate for district court approval." 630 F.2d, at 1169. The CA ruled that the DC had not abused its discretion in approving the settlement and granting retroactive competitive seniority.

I. Cert Petition No. 80-951: IFFA filed a cert petition, No. 80-951, arguing: (1) The DC lacked subject matter

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<sup>8</sup>With respect to each order the DC made a finding, pursuant to F.R.C.P. 54(b) that "no just reason exists to delay enforcement of or appeal from this Order."



jurisdiction over the claims of Subclass B and therefore could not (a) approve settlement of those claims; (b) order that those employees be awarded competitive seniority; or (c) order that the provisions of the settlement would supersede the collective bargaining agreement between TWA and IFFA. (2) The DC did not make a finding, pursuant to 42 U.S.C. §2000e-5(g), that TWA had violated Title VII as to Subclass B members.<sup>9</sup> Therefore, the DC

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<sup>9</sup>42 U.S.C. §2000e-5(g) provides in part:

"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 or employees ... or any other equitable relief as the court deems appropriate." (emphasis added).

IFFA contends that "as to Subclass B, a violation has neither been admitted nor proven." Cert Petn, at 19. Although IFFA suggests that "plaintiffs who settle" have not established that a Title VII violation occurred, IFFA states that its argument only applies to Subclass B. Ibid., n. 15. IFFA contends that there clearly was no "finding" with respect to Subclass B, since the CA held in 1978 that Subclass B's claims were jurisdictionally barred. "At the time of settlement, the only finding in effect as to the claims of Sub-Class B was that they are barred by the failure to comply with the jurisdictional time limits." Ibid.



was not empowered to grant them full retroactive seniority or to approve a settlement agreement superseding the terms of the collective bargaining agreement. (3) An award of competitive seniority was inappropriate, since it had an unusually adverse impact on incumbent employees.

### III. MOTIONS FILED BY TWA AND THE PLAINTIFF CLASS

A. TWA's Motion: Rather than asking the Court to limit the grant in No. 80-951 to particular questions raised in the cert petition, TWA moves the Court to limit review to the order of the DC entitled "Order Awarding Seniority." As TWA construes the settlement agreement, TWA and the plaintiff class have agreed that as soon as the separate "Order Approving Settlement" is no longer subject to judicial review, they must move this Court to dismiss their cert petitions (Nos. 78-1545 and 78-1549). TWA contends that if the Court limits its review to the "Order Awarding Seniority," it should then treat the petitions in Nos. 78-1545 and 78-1549 as moot and direct their dismissal.<sup>10</sup> If the grant is not so limited, consideration of

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<sup>10</sup>TWA points out that when litigation in the federal courts is settled after a petition for certiorari has been filed, this Court vacates the CA's judgment and directs that the case be dismissed as moot. See, e.g., J. Aron & Co. v.



those petitions should be deferred.<sup>11</sup>

TWA asserts that "review of the seniority order alone will adequately protect the interests of the currently employed flight attendants whom the union solely represents" and that "the issues raised by the union against the settlement order could continue to be considered in review of the seniority order." According to TWA, IFFA cannot object to the Order Approving Settlement, since it merely provided that the DC would decide the issue of competitive seniority pursuant to §706(g) and "all other applicable provisions of law." TWA urges the Court to limit the grant to review of the Order Awarding Seniority so that "[t]he parties to the litigation would be permitted to make a valid settlement regardless of the possible lack of jurisdiction over the claims settled." TWA Motion, p. 9.

B. The Plaintiff Class's Motion: The plaintiff class does

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Mississippi Shipping Co., 361 U.S. 115 (1959).

<sup>11</sup>"The reasons for holding up consideration of the petitions in Nos. 78-1545 and 78-1549 continue to exist until this Court issues an order on the union's appeal from the settlement order in No. 80-951." TWA's Motion, p. 3. I do not read this as a motion to defer and do not treat it as such.



not object to TWA's motion. Plaintiffs move the Court to (a) grant TWA's motion, or (b) order TWA and the plaintiff class to stipulate to the dismissal of Nos. 78-1545 and 78-1549, or (c) dismiss Nos. 78-1545 and 78-1549 as moot. Plaintiffs argue that there is no longer a case or controversy between them and TWA, since they have entered into a settlement. They also contend that IFFA does not have standing to object to the Order Approving Settlement, for IFFA merely objects to that order as "the underpinning to the order which granted competitive seniority." Plaintiffs' Response, p. 3. The settlement agreement merely recognized that competitive seniority would be determined by the DC in an adversarial proceeding in which IFFA could participate. Therefore, the Order Approving Settlement is no longer subject to judicial review and TWA is currently obligated by the settlement agreement to stipulate to the dismissal of the pending cert petitions. Plaintiffs ask the Court to order them and TWA to stipulate to the dismissal of Nos. 78-1545 and 78-1549.

Plaintiffs assert that even if this Court were to hold that the DC lacked jurisdiction over the claims of Subclass B, the settlement agreement would still be binding, "for the simple reason that the pivotal issue of whether the timely filing of an



EEOC charge affects jurisdiction has been settled and compromised." Plaintiffs' Response, p. 4.

C. IFFA's Response: IFFA takes no position on the proper disposition of Nos. 78-1545 and 78-1549 but objects to a limitation of the grant in No. 80-951. IFFA agrees that its interest in the case is the grant of retroactive competitive seniority to the plaintiff class. However, that interest is affected by the Order Approving Settlement as well as by the Order Awarding Seniority. IFFA continues to object to the following provisions in the Order Approving Settlement: (a) the provision that the agreement supersedes prior, current and future labor agreements; (b) the provising stating that the DC will retain jurisdiction to enforce and interpret the settlement agreement; and (c) the provision stating that the DC will decide the issue of competitive seniority [with respect to Subclass B].

IFFA asserts that although TWA and plaintiffs were free to enter into an out-of-court settlement, they could not confer jurisdiction on the DC to approve their agreement to compromise the jurisdictional dispute.

D. The Plaintiff Class's Supplemental Response: Plaintiffs disagree with TWA's position that the Order Approving Settlement will only be final if the Court grants TWA's motion. IFFA may



not obtain review of the Order Approving Settlement, since the provisions in the settlement agreement that IFFA objects to are meaningless. "Each provision recites a matter that by operation of law would exist even in the absence of the provision." IFFA would not be harmed if the Court only reviewed the Order Approving Settlement, for IFFA could raise the same arguments and could obtain the same relief if it only challenged the Order Awarding Seniority.

#### IV. RECOMMENDATION

A. TWA's and the Plaintiffs' Motions: I recommend that these motions be denied.

1. May IFFA Challenge the Order Approving Settlement?

In my view, IFFA has standing to challenge this order. If the DC had not approved that portion of the settlement agreement that provided for the re-employment of Subclass B members, there would have been no award of competitive seniority to those individuals. The settlement agreement expressly authorizes the DC to determine the appropriate amount of competitive seniority to be awarded to re-employed plaintiffs. The plaintiff class admits that the settlement agreement is "the underpinning to the order which granted competitive seniority."



2. If the Court Does Not Limit Its Review to the Order Awarding Seniority, Should It Direct the Dismissal of Nos. 78-1545 & 78-1549? No. The parties are free to stipulate to the dismissal of these petitions pursuant to Rule 53. However, they have not chosen to do so. The parties are not willing to agree to the dismissal of these petitions until the settlement agreement is final.

Plaintiffs move the Court to direct the dismissal of Nos. 78-1545 and 78-1549 on the ground that the Order Approving Settlement is no longer subject to judicial review. Since I believe IFFA is entitled to challenge the Order Approving Settlement, I would deny this motion.

Assuming that the Order Approving Settlement is not yet final, I do not think Nos. 78-1545 and 78-1549 can be dismissed as moot. If the settlement were to fall through, TWA and the plaintiff class could litigate the issues presented in those petitions.<sup>12</sup>

B. Limitation of the Grant in No. 80-951 & Deferral of No.

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<sup>12</sup>As discussed below, if No. 78-1545 does not become moot, the Court will already have ruled in No. 80-951 that the timely filing requirement is a jurisdictional prerequisite.



78-1549: I suggest limiting the grant in No. 80-951 to eliminate question #3.<sup>13</sup> I believe question #2 in many respects merges into question #1.<sup>14</sup> Thus, in No. 80-951 the Court would be left with the two major issues the Court granted certiorari to address.

If the Court were to decide (a) that the timely filing requirement is not jurisdictional or (b) that although the timely filing requirement is jurisdictional, the DC was entitled to approve the settlement of that issue, then the settlement would be approved. Nos. 78-1545 and 78-1549 would be dismissed as moot, and the CA's 1978 decision could then be vacated.

If the Court were to decide (c) that the timely filing requirement is jurisdictional and that the DC lacked

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<sup>13</sup>The issue of whether the order awarding competitive seniority had an unusually adverse impact on incumbent employees relates only to the facts of this case. Furthermore, there is no analysis of this issue in the DC's order or the CA's opinion.

<sup>14</sup>As discussed above, see note 9, IFFA's arguments regarding the need for a "finding" of a Title VII violation ultimately focus on whether or not the claims of Subclass B are jurisdictionally barred. TWA recognizes this, stating that "Point II of the union's petition, attacking the seniority allowance for lack of a finding of a violation of Title VII, means that a violation was not established because there was no jurisdiction." TWA's Motion, at 9.



jurisdiction to approve the settlement of the claims of Subclass B, then either the entire settlement would fall through or the settlement of Subclass B's claims would fall through.<sup>15</sup> On remand, the effect our ruling would have on the enforceability of the settlement agreement would be resolved by the DC in the first instance. However, the Court could still dispose of No. 78-1545 by writing a per curiam stating that the CA correctly held (in its 1978 opinion) that the timely filing requirement is a jurisdictional matter and citing the decision in No. 80-951.<sup>16</sup>

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<sup>15</sup>The settlement agreement does not state what effect a partial reversal of the DC's approval of the settlement agreement would have on the parties' agreement. Plaintiffs state that "if this Court holds that the District Court lacks jurisdiction, TWA will undoubtedly disavow the Settlement Agreement as being unenforceable." Plaintiffs' Response, pp. 4-5.

<sup>16</sup>The issue raised in No. 78-1545 is the same issue that is inherent in question #1 in No. 80-951: Is the timely filing requirement a jurisdictional matter? However, in No. 78-1545 plaintiffs raise that issue in the context of reviewing the CA's 1978 holding that timely filing is a jurisdictional requirement, while in No. 80-951 IFFA raises that issue in the context of reviewing the CA's 1980 holding that a settlement that avoided litigating this issue was proper.

In No. 80-951, IFFA will argue that timely filing is jurisdictional and that the issue may not be settled. Plaintiffs and TWA will argue that the issue may be settled whether or not it is jurisdictional. Plaintiffs probably will also contend that the timely filing issue may be settled because it is not a jurisdictional matter, with TWA taking a contrary



As for No. 78-1549, I question whether any of the issues presented in that petition warrant review, and I would defer it by removing it from the argument calendar. If it does not later become moot, it could be DIG'd.<sup>17</sup>

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position.

<sup>17</sup>The first issue in No. 78-1549 is whether the DC properly granted summary judgment on the issue of liability. TWA's policy clearly precluded any mother from working as a flight attendant. Although TWA states that it did not have any male "flight attendants" during this period, it concedes that it had male cabin attendants called "purser" on international flights. TWA did not terminate male cabin attendants who became fathers.

The second issue is whether it would be unfair to require TWA to award back pay to these plaintiffs. TWA asserts that at the time the "no-motherhood" policy was in effect (from 1965 to 1970) it was not at all clear that such a policy violated Title VII. Therefore, retrospective relief would be inequitable.

The third issue is whether the CA erred in defining Subclass A (those who met the timely filing requirement). There are two parts to this argument. (1) The CA held that "permanent termination" occurred when the flight attendant became a mother. TWA contends that permanent termination occurred on the flight attendant's last day of work. This is simply a matter of construing TWA's policy. The CA described the policy as follows: "[Female flight attendants] who became mothers either by childbirth or by adoption were terminated permanently unless they were willing to accept employment in ground duty positions." (2) The CA held that plaintiffs who were permanently terminated as flight attendants in the 90-day period preceding the filing of EEOC charges were in Subclass A. It also held that the following type of plaintiff was in Subclass A: a flight attendant who became a mother and then returned to a ground duty position (pursuant to TWA's policy) although she wanted to return to a flight attendant position, and who was



Conclusion: I would (1) deny TWA's and plaintiffs' motions; (2) limit the grant in No. 80-951 to Questions #1 and #2; (3) not defer or dismiss No. 78-1545; and (4) defer No. 78-1549 by removing it from the argument calendar.

I suggest that we enter the following order:

"TWA's motion to limit review in No. 80-951, Independent Federation of Flight Attendants v. Trans World Airlines, Inc., et al., to the order of the district court entitled "Order Awarding Seniority" and thereafter to dismiss No. 78-1545, Zipes, et al. v. Trans World Airlines, Inc., and No. 78-1549, Trans World Airlines, Inc. v. Zipes, et al., as moot is denied.

"The motion filed by petitioners in No. 78-1545 (the "plaintiff class"), requesting that the Court (1) grant TWA's motion; or (2) order TWA and the plaintiff class to stipulate to dismissal of the writs in No. 78-1545 and 78-1549; or (3) dismiss No. 78-1545 and No. 78-1549 as moot, is denied.

"No. 78-1549 is removed from the argument

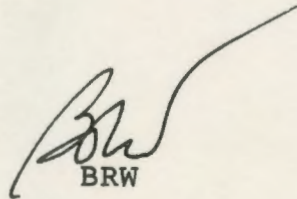
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still working in that ground duty position during the 90-day period preceding the filing of EEOC charges. The CA distinguished United Air Lines v. Evans, 431 U.S. 553 (1977). In Evans the discriminatory policy was not in effect during the 90 days preceding the filing of EEOC charges.

If the Court determines that these three issues do not warrant review, the Court might be inclined to DIG No. 78-1549 at this point. However, I am reluctant to finalize the CA's 1978 decision before the settlement is final.



calendar, and further consideration of that case is deferred. The writ of certiorari in No. 80-951 is limited to Questions 1 and 2 presented in the petition for a writ of certiorari and is otherwise dismissed as improvidently granted."



BRW



May 12, 1981

80-951, 78-1545 and 78-1549 Independent Federation  
of Flight Attendants

Dear Byron:

Your proposed order (p. 20 of your memorandum) is fine with me.

I appreciate your doing this careful study for the benefit of all of us.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference



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

CHAMBERS OF  
JUSTICE POTTER STEWART

May 12, 1981

Re: 80-951, 78-1545 and 78-1549 - Independent  
Federation of Flight Attendants

Dear Byron:

Thanks for your thorough memorandum with  
the conclusions of which I agree. I would  
be glad to subscribe to the order you propose.

Sincerely yours,

P.S.

Justice White

Copies to the Conference



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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 13, 1981

RE: Nos. 78-1545, 1549 and 80-951 Zipes v. TWA; Ind.  
Fed. of Flight Attendants v. TWA

Dear Byron:

I too agree with your recommendation and proposed  
Order in the above. Your memorandum was certainly most  
persuasive as well as very complete.

Sincerely,

*Bill*

Justice White

cc: The Conference



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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

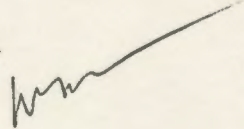
May 13, 1981

Re: No. 78-1545) Zipes v. TWA  
No. 78-1549) TWA v. Zipes  
No. 80-951 ) Ind. Fed. of Flight Attendants v. TWA

Dear Byron:

I concur with your recommendations and thank you for undertaking the task of studying the cases as thoroughly as you did.

Sincerely,



Justice White

cc: The Conference



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

CHAMBERS OF  
THE CHIEF JUSTICE

May 13, 1981

RE: (78-1545) - Zipes v. TWA, Inc.  
(78-1549) - TWA, Inc. v. Zipes  
(80-951) - Ind. Fed. of Flight Attendants  
v. TWA

Dear Byron,

I join.

Regards,

WJB

Justice White

Copies to the Conference



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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 13, 1981

You have  
agreed with  
BRW. PS

ful joined  
BRW

No. 78-1545) - Zipes v. TWA  
No. 78-1549) - TWA v. Zipes  
No. 80-951) - Ind. Fed. of Flight Attendants v. TWA

Dear Byron:

I agree with each and all of your recommendations as set forth in your very complete memorandum of May 11.

Sincerely,

*Harry*

Mr. Justice White

cc: The Conference



<i>Court</i> .....	<i>Voted on</i> ....., 19...	
<i>Argued</i> ....., 19...	<i>Assigned</i> ....., 19...	No. 78-1545
<i>Submitted</i> ....., 19...	<i>Announced</i> ....., 19...	

vs.

TWA

I've joined  
Bryon's order

[illegible]



Reversed - 11/25 monumental work by Mary.

meb 11/24/81 She concludes:

1. The 90 day limit on filing Title VII claims with EEOC is not jurisdictional. But no equitable reasons for non-compliance are shown. Nor has TWA waived period except for purpose of negotiating a settlement.

Thus, CA7 was right in holding claims of 400 Sub-Class B TIs to be barred.

2. The subsequent monetary settlement (\$1.5 to Sub-Class A & B) should be affirmed.

3. The provision for ~~not~~ offering re-employment to both Sub-Class also was w/in auth. of DC & should be approved.

~~4. But the separate~~

4. DC had authority to award competitive seniority to the 30 Sub-Class <sup>A</sup> members as CA7 had found as to them that they had been discriminated against. Bowman v. Frazer standard was properly BENCH MEMORANDUM applied.

To: Mr. Justice Powell

November 24, 1981

From: Mary 5. DC erred in ~~awarding~~ seniority to the 400 Sub-Class B members. CA7 had properly

No. 78-1545, Ann Zipes, et al. v. TWA, Inc. (Case 1)

found their claims time-barred, & therefore had not found any discrimination against them.

No. 80-951, Independent Federation of Flight Attendants

v. TWA, Inc. & Ann Zipes, et al. (Case 2)

Thus, Bowman v. Frazer does not apply, & DC had no Questions Presented auth. to ignore the rights of the existing employees. Indeed Case 1. Did the CA7 err in holding (in 1978) that the new Union represented them, & it ~~disposes~~ disposes claims of certain classmembers were jurisdictionally barred? There was violation of rights guaranteed by a bona fide seniority agreement.

Bottom line: I suppose (if I agree with Mary) we could Reverse outright on this case or Remand for consideration on my Bowman ~~balancing~~ balancing standard.



Case 2. The initial question (in reviewing the CA7's 1980 decision) is whether a DC can approve a settlement in which an award is made to a group whose claims have been held beyond the court's jurisdiction by the CA. The answer to this question might, of course, depend on whether the claims were actually jurisdictionally barred.

The next question is whether competitive-status seniority rights can be awarded--under the standard for awarding such rights articulated in Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976) (once discrimination has been shown, full seniority should be awarded discriminatees in absence of unusual circumstances)--by a court pursuant to a settlement delegating that decision to the court when only the employer and the pltf class have agreed to the settlement.

#### I. PROCEDURAL BACKGROUND

1. Case 1. Resp TWA had a policy of terminating female (but not male) flight attendants when they became parents whether by birth or adoption. On May 30, 1970, a charge was filed with the EEOC challenging this practice. EEOC issued a right-to-sue letter, and a complaint was filed on Aug. 18, 1970, on behalf of a class which included all TWA hostesses who had been fired after becoming mothers at any time after July 2, 1965, the effective date of Title VII. One of the initial class representatives was the union then representing TWA's flight attendants, the Air Line Stewards and Stewardesses Ass'n (ALSSA).<sup>1</sup>

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Footnote(s) 1 will appear on following pages.



In 1971, TWA and the class representatives reached a settlement which provided for the rehiring of each class member with the amount of seniority held at the time of her termination. The settlement was approved by the DC. Several class members appealed, and the CA7 reversed because of a conflict between ALSSA as class representative and ALSSA as union representing currently-working attendants. The settlement was vacated and the case remanded with instructions to replace ALSSA as class representative.

In 1976, the DC awarded summary judgment in favor of the pltf class on liability. Judge McGarr found that the "no-motherhood" policy was discriminatory and that the Title VII time limits did not bar the claims of any class members. An interlocutory appeal was taken.<sup>2</sup>

In the decision on review in Case 1, the CA7 again reversed the DC. The CA7 held <sup>in 1978</sup> that the claims of approximately 92% of the class members were jurisdictionally out of time. These individuals had been terminated more than ninety days prior to May 30, 1970, the filing date of the first EEOC charge, and §706(d) required that charges be filed within ninety days of the discriminatory practice. The CA7 held that the Title VII time requirements were jurisdictional prerequisites and thus there was no subject-matter jurisdiction over the claims of the vast majority of

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<sup>1</sup>Flight attendants are now represented by Independent Federation of Flight Attendants (Union), which is petr in case 2.

<sup>2</sup>During the pendency of the appeal, on April 1, 1977, petr Union became the new collective bargaining representative for TWA flight attendants.



the pltf class.

*We deferred action  
in Case 1 (78-1545) pending  
settlement  
negotiations. (78-1545),*

The pltf class filed for cert on this decision, arguing that the lower courts did have jurisdiction over the claims of all class members and that the deft had waived any statute-of-limitations defense. Thereafter, the parties moved to defer consideration of the cert petns in order to negotiate a new settlement. This request was granted, but the petns were eventually granted with the grant of cert in case 2--which reviews a subsequent CA7 decision approving a settlement the parties reached after this Court deferred consideration of the cert petns on case 1.

2. Case 2. The pltfs and TWA reached a second *"settlement" in 80.951* settlement. It establishes two "sub-classes": sub-class A, consisting of approximately 30 individuals whose claims are based on acts within ninety days of the filing of a charge, and sub-class B, consisting of 400 members whose claims are time-barred. TWA agreed to pay \$1.5 million to each class and to offer a job to each member of each class. The DC was to decide whether the returning employees were to get retroactive competitive seniority.

Upon learning of the new settlement and the likelihood that many women would be returning to the bargaining unit with large amounts of retroactive competitive seniority, the Union intervened and objected. The Union argued that the DC had <sup>①</sup>no subject-matter *Union intervened and argued* jurisdiction to approve the settlement and granted retroactive competitive seniority since the CA7 already had determined that there was no jurisdiction over sub-class B. <sup>\*</sup>The union also argued <sup>②</sup>that the settlement could not override the collective bargaining agreement between TWA and the Union.

*\* Because claims were time barred*



The DC overruled the Union's jurisdictional challenge on the ground that the CA7's decision was not final and not, therefore, binding. A hearing was held to determine the impact the settlement would have on the current bargaining unit members. A few weeks later, on Nov. 8, 1979, the DC entered two separate orders: (1) approving the settlement, under which the DC was to award seniority; and (2) awarding full retroactive seniority to both subclasses. Although the DC's brief order awarding seniority does not cite any cases, it clearly uses the standard articulated in Franks v. Bowman. The DC stated: "the court<sup>15</sup> finding that full restoration of retroactive seniority will not have an unusual adverse impact upon currently employed flight attendants in a manner which is not typical of other Title VII cases." Petn for Cert in No. 80-951 at 18a.

The Union appealed the award of seniority by the DC, but the CA7 affirmed the DC. It held that, despite its earlier ruling regarding the lack of subject-matter jurisdiction, the DC nonetheless had jurisdiction to approve a class-action settlement and to grant seniority pursuant to that settlement over the Union's objections. It relied on (1) principles favoring settlements and (2) the notion that parties should not be forced to litigate the contested issue of subject-matter jurisdiction. The court noted that because the airlines hires 400-800 attendants in a normal year, TWA would likely be able to absorb all returning class members in less than a year.

*Applied  
Franks  
standard*

*CA7's  
reason*



*a 3<sup>rd</sup> case*  
3. Hold in No. 78-1549.

Cert was originally granted in settlement

No. 78-1549 as well as the two cases being argued, but it was removed from the argument list and consideration deferred pending the outcome of the two argued cases. No. 78-1549 is a conditional cross-petn filed by TWA challenging the DC finding of liability prior to the entry of the settlement order and seniority-award order on Nov. 8, 1979. If the settlement order is affirmed--regardless of how this Court disposes of the seniority order--No. 78-1549 can be dismissed as moot since TWA's objections to liability are conditional: if the settlement order stands, TWA has no objections.

*See B.R.W.'s May 11 memo*  
As Justice White pointed out at 19 of his memo of May 11, 1981, (discussing proper disposition of No. 78-1549 and several motions), it is unlikely that any of the issues in No. 78-1549 warrant review even in the event the settlement order were overruled. He suggested that it be DIG'd in the event it does not become moot. The issues involve (1) whether the no-motherhood policy really violated Title VII; (2) whether it was unfair to require TWA to pay back pay to pltfs for the period 1965-1970 when it was not clear that such a policy violated Title VII; and (3) whether the CA erred in defining subclass A (those who met the timely filing requirement). This last objection is based on fact-bound arguments dealing with termination dates, etc.

## II. CASE1: IS FILING A CHARGE A JURISDICTIONAL PREREQUISITE?

### A. Background: Statute and Caselaw

(1) The statute. At the time the pltfs' charge was filed in 1973, §706(d) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-



5(d) (1970)<sup>3</sup> provided:

The 90 day  
limitation in  
Title VII

"A charge ... shall be filed [with the EEOC] within ninety days after the alleged unlawful employment practice occurred ...."

Thus, the statute provides that suit can be brought on the basis of a charge filed with the EEOC during a certain time period. Although it is clear that in the typical case, suit cannot be brought unless a timely charge has been filed, it is not clear whether that requirement is absolute or whether it is subject to equitable considerations that might weigh in favor of extending the time limit (e.g., fraud). Typically, the question is framed as whether the time-limit is a statute of limitations (subject to equitable considerations) or jurisdictional (failure to meet time limit is an absolute bar to judicial consideration of a claim).

Implicit in this issue is the question of who has the burden of pleading and proving either compliance or non-compliance with the requirement. Although a pltf must plead and prove compliance with a jurisdictional prerequisite, failure to meet a statute of limitations is a matter that must be raised as an affirmative defense under rule 8(c) of the Fed. R. of Civ. P. There is an intermediate possibility: the provision can be regarded as a condition precedent to suit; as such, it would be regarded subject to tolling in light of equitable considerations, but would remain a matter for the pltf to plead and prove.

<sup>3</sup>In 1972, §706(d) was amended to allow filing of a charge within 180 days of the alleged discriminatory act. It is now codified at 42 U.S.C. §2000e-5(e). The filing provision will be referred to herein as "706(d)."



(3) Prior decisions of this Court.

(a) Use of the term "jurisdictional prerequisite" in past S. Ct. decisions. The Court has discussed the filing requirement on several occasions and has used a variety of terms in referring to it. In Love v. Pullman, 404 U.S. 522 (1972) (Stewart, J.), the Court held that the filing requirement should not be interpreted in an overly rigid manner (so as to require multiple filings in some situations) and referred to it as a "statutory prerequisite." Id. at 523.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (Powell, J.), the Court noted in presenting the background of the case that "[r]espondent satisfied the "jurisdictional prerequisites" to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commissions's statutory notice of the right to sue." Id. at 798.

In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (Powell, J.), the Court held that an employee's resort to labor arbitration did not bar a Title-VII action. In doing so, the Court noted that the petr had met the "jurisdictional prerequisites" defined "with precision" in Title VII: (1) a timely-filed charge, and (2) a right-to-sue notice. Id. at 47.

In Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) (Rehnquist, J.), the petr argued that the statutory period for filing a claim with the EEOC should toll during the pendency of grievance or arbitration procedures under the collective-bargaining contract. The Court ruled that the statutory



period was not tolled, and noting that this was not a case in which a party had been prevented from asserting its rights. Id. at 237 n.10. In response to petrs' argument that tolling would impose almost no costs and only slight delays, the Court explained that "the principal answer to this contention is that Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable." Id. at 240. The Court noted that adherence to the limitations period "assures the employer of [notification] of an alleged violation." Id. n. 14.

Finally, in United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) (Stevens, J.), the Court held that the employer had not continued to violate Title VII by refusing to credit resp (after re-hiring her in 1972) with pre-1972 seniority. The Court noted that a claim based on her original termination in 1968 was now time-barred, and that "[t]imely filing is a prerequisite to the maintenance of a Title VII action." Id. at 555 n.4 (citing Robbins & Myers and Alexander, discussed above).

(b) Limitations period. In Delaware State College v. Ricks, \_\_\_\_ U.S. \_\_\_\_, 101 S. Ct. 498, 506 (1980) (Powell, J.), the Court referred to the timely-filing requirement as a "limitations period." And in Robbins v. Myer, discussed above, the there were several refernces to "tolling the limitations period." E.g., 429 U.S. 229. Evans also used the statute-of-limitations label as well as the "jurisdictional prerequisite" label. For other examples of cases using limitations labels, see Occidental Life Ins. Co. v.



EEOC, 432 U.S. 355, 371-72 (1977); United Air Lines, Inc. v. McDonald, 432 U.S. 385, 391-92 (1977); Mohasco Corp. v. Silver, 447 U.S. 807, 818-813 (1980).

(c) Supreme Court consideration of similar provision in ADEA. The Age Discrimination in Employment Act (ADEA) has a filing requirement similar to that in Title VII. See 29 U.S.C. §626(d). It is likely the Court will construe the two provisions in the same manner. See Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979) ("We ... hold that under §14(b) of the ADEA, as under §706(c) of Title VII, resort to administrative remedies in deferral States by individual claimants is mandatory, not optional.").

In Dratt v. Shell Oil Co., 539 F. 2d 1256, 1258-60 (CA10 1976), the CA10 viewed these filing requirements as analogous to Title VII and drew upon Title VII precedents in determining whether equitable modification was available to the plaintiff. It concluded that the filing requirement was subject to tolling and estoppel. As the parties note, this Court affirmed by an equally divided Court (4-4). Shell Oil Co. v. Dratt, 434 U.S. 99 (1977) (per curiam). I checked the Conference notes, and the Court would have held that the filing requirements were not jurisdictional, though only four were willing to find actual tolling in that case. There was no equitable tolling ground (such as fraud or infancy); the CA10 allowed tolling simply because the deft received notice that the pltf had a grievance within the statutory period.

Only CJ thought the limitations period jurisdictional. *ADEA* WJB, BRW, TM, and HAB thought that the limitations period was not jurisdictional, and that notice to the deft was enough to toll it.



CA7 stands alone on the 90 day limitation being jurisdictional. 11.  
You, WHR, and JPS considered the period non-jurisdictional, but would only have applied equitable tolling considerations, none of which were supported by the facts in the case.

(3) Decisions in the CAs. In Coke v. General Adjustment Bureau, 640 F. 2d 584 (CA5 1981) (en banc) (Anderson, J) the CA5 overruled an earlier CA5 decision that had regarded the filing requirement of the ADEA as jurisdictional, and the CA5 considered the new rule applicable in Title-VII cases as well as ADEA cases. In this decision, the CA5 held that Title VII and ADEA were subject to equitable tolling and that, in the case before it, summary judgment was inappropriate because there was a material fact in dispute relevant to equitable tolling based on misrepresentation and reasonable reliance.<sup>4</sup>

Before overruling its prior decision, the CA5 undertook a thorough analysis of the entire area, including the current positions of the other CAs. The CA7 currently stands alone in holding that timely compliance with the charge-filing provision is "jurisdictional" in the sense that compliance with it determines the jurisdiction of the DC regardless of circumstances in the case supporting tolling on equitable grounds.

<sup>4</sup>The facts, viewed in the light most favorable to the party against whom the summary-judgment motion had been made, were: (1) the employer misrepresented to a client that the demoted employee would be reinstated in his old position; (2) the employer knew or should reasonably have known that the client would convey the misrepresentation to the employee; and (3) the employee reasonably relied on the misrepresentation in foregoing to file a claim. 640 F. 2d at 595-96.



is subject to  
equitable tolling.

Six CAs (CA3, CA5, CA6, CA9, CA10, & CADC) have held that the charge-filing period is subject to equitable modification. See Hart v. J.T. Baker Chemical Corp, 589 F. 2d 829, 832-833 (CA3 1979); Oaxaca v. Roscoe, 641 F. 2d 386 (CA5 1981); Leake v. City of Cincinnati, 605 F. 2d 255, 259 (CA6 1979); Cooper v. Bell, 628 F. 2d 1208, 1212-1214 (CA9 1980); Sanchez v. TWA, 499 F. 2d 1107, 1108 (CA10 1974); Laffey v. Northwest Airlines, Inc., 567 F. 2d 429, 474 (CADC 1976), cert. denied, 434 U.S. 1086 (1978).

The CA4 has not considered the issue with respect to the charge-filing period, but it has held that the suit-filing limitations period, Title VII §706(f)(1), 42 U.S.C. 20000e-5(f)(1), is subject to equitable modification. Stebbins v. Nationwide Mutual Ins. Co., 469 F. 2d 268, 269 (1972), cert. denied, 410 U.S. 939 (1973). The CA1 and the CA2 have left the question open. Daughtry v. King's Dept. Stores, Inc., 608 F. d 906, 909 (CA1 1979); Smith v. American President Lines, Ltd., 571 F. 2d 102, 109 (CA2 1978). In Satz v. ITT Financial Corp., 619 F. 2d 738, 745 n.11 (1980), the CA8 noted that, "Congress appears to have regarded the time period as a statute of limitations."

(4) Legislative history. The legislative history provides no definitive answer, but, on balance, suggests that the time limit should not be regarded as a jurisdictional bar but rather as something more akin to a statute of limitations. See discussion in SG's brief at 15-18. For example, when the filing period was extended from 90 to 180 days in 1972, both the House and Senate Committee reports referred to the enlarged period as either a



"limitation period" or a "statute of limitations" that is "similar" or "identical" to the limitations period of the National Labor Relations Act (NLRA)<sup>5</sup>--and the CAS have uniformly held that the NLRA provision is a statute of limitations subject to recognized equitable doctrines, rather than a restriction on the NLRB's jurisdiction.<sup>6</sup>

#### B. Discussion

Congress legislates against a background of judicially created equitable exceptions to seemingly preclusive time limitations. See, e.g., American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 558-59 (1974); Burnett v. N.Y. Central R.R., 380 U.S. 424 (1965). Given this background, it is unlikely Congress meant to deprive courts of the power to consider untimely claims in cases in which, for example, employer fraud caused the filing delay. Another reason that the Court might not consider the filing of a claim a true "jurisdictional prerequisite" is the fact that the Court does not require that each member of a class file one. See United Air Lines v. McDonald, 432 U.S. 385, 389 n.6 (1977). This is unlike the approach taken with regard to jurisdictional amounts in class actions brought on the basis of diversity jurisdiction. There, each class member must meet the jurisdictional minimum in order to

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<sup>5</sup>See S. Rep. No. 415, 92d Cong., 1st Sess. 37 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 37 (1971).

<sup>6</sup>See, e.g., Laffey v. Northwest Airlines, Inc., 567 F. 2d 429, 475 n.351 (CA DC 1976).



participate. See Zahn v. International Paper Co., 414 U.S. 291 (1973).

*Many factors equitable tolling in traditional situations.<sup>14</sup>  
though none is present here*

Although a reasonable opinion could be written either way, it seems unnecessarily harsh to hold that no equitable exception can ever be recognized, not even employer fraud. I would therefore suggest that the statute be interpreted as allowing tolling in the traditional equitable situations: (1) legal disability such as infancy or temporary insanity; (2) specific legal prohibitions on the filing of a suit; and (3) fraudulent or other misleading conduct on the part of the deft. None of these factors was, of course, present in this case. Here, the only issue is whether the deft (TWA) waived the statute of limitations. That question is addressed in the next subsection, but there is still a final question that must be considered with regard to the proper treatment of the timely-filing requirement.

*But did TWA waive the 90 day period?*

As mentioned earlier, an implicit issue in the question whether the filing requirement is a "jurisdictional prerequisite" or a "statute of limitations" is whether it is a matter for the pltf to plead and prove of something the deft must raise as an affirmative defense. And, as I mentioned above, there is an intermediate position: the requirement can be regarded as a "condition precedent," subject to equitable considerations, but the pltf's responsibility to plead and prove.<sup>7</sup>

*An intermediate position*

<sup>7</sup>FELA time limits have been treated as condition precedents. In Glus v. Brooklyn Eastern Terminal, 359 U.S. 231, 235 (1959), which disagreed with several earlier FELA cases, the Court permitted non-compliance with the FELA time limit to be excused by estoppel because the deft had induced the pltf's

Footnote continued on next page.



Plaintiff should  
plead equitable ~~claim~~ <sup>15</sup> ~~claim~~ <sup>following</sup>

The current practice seems to be for the plft to plead a timely filing in the complaint. See I Joint Appendix (JA) at 7a, ¶11 (pltfs plead it in complaint in case at bar). As a matter of reasonable allocation of responsibilities, this seems right. It is, after all, the pltf that is responsible for filing the complaint and who should know when (and whether) it was done. Moreover, I think the Court's earlier use of the term "jurisdictional prerequisite" reflected an appreciation of this point. This approach was adopted in EEOC v. Wah Chang Albany Corp., 499 F. 2d 187, 190 (CA9 1974).<sup>8</sup> I looked at the other CA opinions cited in subsection A.3, supra, as holding that the filing-period is subject to equitable modification, but none of them focus on who should plead and prove what.

In conclusion, I would suggest that the filing-period is not a jurisdictional prerequisite, i.e., it is not a limit on the power of the courts to hear claims. Instead, it is akin to a statute of limitations in that it is subject to equitable modification. But, under the statute, the burden of filing a timely complaint is on the employee, and the filing should, therefore, be treated as a condition precedent to suit--something to be plead and proved by the pltf. Such a holding would merely continue what appears to be the current practice of the parties.

delay. But the pltf was required to plead and prove how he was misled by the deft."

<sup>8</sup>There, the court said that the preliminary requirements of §706(f)(1) and (3) were procedural steps that "are most reasonably considered conditions precedent." The court held that performance of the conditions could be plead generally as permitted by rule 9(c).



C. Did Deft TWA Waive Time Limit?

If the statute is not jurisdictional, not only can it be tolled, the deft can waive non-compliance if he so chooses. The pltf class argues that the deft has waived compliance in the case at bar. See Brief of Pltf Class (red) at 34-35. And TWA argues that, on the facts here, there was no waiver. See Brief of TWA (red) at 43-48.

I think it is clear that there was no waiver here other *not waived by TWA except for purpose of settlement* than for purposes of the settlement. TWA did not raise the "statute of limitations" as an affirmative defense in its answer because controlling CA7 precedent held that a timely filing was a "jurisdictional precondition to the commencement of a court action." Choate v. Caterpillar Tractor Co., 402 F. 2d 357, 359 (CA7 1968).

Indeed, the pltf-class had plead a timely filing, and TWA denied that contention. Moreover, the settlement amount was based on the understanding of all parties that a substantial number of pltfs (92%) were probably time-barred. The concession to waive timely filing during settlement negotiations does not operate as a waiver in the event the settlement does not materialize.

If this Court upholds the settlement, waiver is not an issue--even TWA agrees it was waived timely filing for purposes of the settlement. If this Court overrules the settlement for any reason, however, it will then be important whether TWA waived the timely-filing requirement. If it has, then the case should be remanded with directions to proceed on the merits with regard to subclass B as well as subclass A without regard to the delay in filing. On the other hand, if TWA has not waived the timely-filing



17.  
requirement (and the settlement is overturned), the claims of subclass B should be dismissed on remand.

III. CASE 2: CAN DC APPROVE SETTLEMENT TO PLTFs WHOSE CLAIMS ARE TIME-BARRED?

If the filing requirement is not jurisdictional, it follows that the DC had power to approve the settlement at issue in case 2. (Whether this was done under the proper standard is discussed in the next section.)

If you regard the filing requirement as jurisdictional, however, then I think it likely the DC had no power to enter the court order approving the settlement. Jurisdiction cannot be provided by stipulation, consent, waiver, or conduct by the parties. See, e.g., Mitchell v. Maurer, 293 U.S. 237 (1934); American Fire and Casualty Co. v. Finn, 341 U.S. 6 (1951). A challenge to a court's jurisdiction may be raised by anyone at any time, even by parties who stipulated to or argued for the existence of jurisdiction at one point and raised the issue for the first time on appeal. See Mitchell v. Maurer, supra. A court, whether trial or appellate, is obligated to inquire sua sponte into the jurisdiction of the DC and to dismiss any claim once it is determined that the court lacks jurisdiction over it. Id.

Prior to the decision below, there was no doubt that the principle of limited subject matter jurisdiction applied to court actions in connection with approval of settlements, class-action or otherwise. See United States v. Boe, 543 F. 2d 151, 158-59 (CCPA



1976); Patterson v. Stovall, 528 F. 2d 108, 112 (CA7 1976). In Patterson, the CA7 said "[d]espite the withdrawal [of a motion to dismiss for lack of jurisdiction] the District Court would have no authority to approve the settlement had it lacked jurisdiction." 528 F. 2d at 112 n.5.

Indeed, in Case 1 of the two decisions before the Court on cert, the CA7 said, in discussing whether TWA's statements made in negotiating the original settlement (overruled by the CA7 because of the Union's conflict of interest) were a waiver of the timely-filing requirement, the CA7 said: "we need not reach this question as our conclusion that this filing requirement was jurisdictional precludes a finding of waiver." Petn for cert in No. 78-1545 at A16.

The CA7 held that the DC had jurisdiction to approve a settlement even if it lacked jurisdiction over the case because parties should not be forced to litigate jurisdictional questions. As the union points out in its brief in No. 80-951 (blue) at 43, the problem with this argument is that the parties could have reached a settlement and stopped litigating jurisdictional questions without a court order--or with a court-approved settlement that did not affect the rights of anyone other than parties to the settlement. Instead, the pltf-class and TWA used the court to grant competitive-status seniority and supersede the collective bargaining agreement with regard to rights of those not parties to the settlement agreement and without any determination, through litigation, that the members of subclass B had viable and legitimate claims of discrimination.

If the Court considers the filing-requirement a



*The parties did not agree on the seniority issue. They did agree to leave this to DC.* 19.  
jurisdictional prerequisite, then the DC lacked jurisdiction to enter the settlement with regard to the claims of subclass B, and those claims should be dismissed on remand. The only question then remaining is whether the DC properly applied the standard of Franks v. Bowman in deciding to award seniority rights to subclass A. If, however, the Court finds that the filing requirement is not jurisdictional, then the settlement order should be affirmed because the DC had the requisite jurisdiction to enter it. The remaining question then becomes whether, in the seniority-award order, the DC applied the appropriate standard in determining that all members of both subclasses should receive full retroactive seniority rights. These questions are discussed in the next section.

IV. CASE 2: DOES STANDARD OF FRANKS v. BOWMAN APPLY TO AWARD OF COMPETITIVE-STATUS SENIORITY BY COURT PURSUANT TO SETTLEMENT NEGOTIATED BY THE PARTIES BUT NOT INCLUDING AWARD OF SUCH SENIORITY?

In the case at bar, the employer and the pltf-class did not actually reach an agreement on competitive-status seniority rights. Instead, they reached a settlement in which one term provided that the DC would award the appropriate competitive-status seniority. We are not dealing, therefore, with a situation in which the employer and the pltf-class have actually agreed upon a settlement that includes the award of specified amounts of competitive-status seniority. If such a settlement were reached, it could not be enforced absent court approval, because neither the employer nor the pltf-class has the power to modify seniority



True

rights<sup>9</sup> of absent employees. If such a settlement--awarding specific competitive-status seniority--were presented to a court for its approval the court should approve the award of competitive-status seniority only under the standard that should apply in the case at bar. In other words, whatever standard is appropriate for court-ordered seniority in cases such as this one should also be used when the employer and the pltf-class seek court approval of a settlement they have worked out granting competitive-status seniority.

The pltf class, the EEOC, and TWA all argue that the Franks-v.-Bowman standard was the proper one to apply in this case. They argue that there was a finding of liability by the DC, i.e., that TWA's no-parenthood-for women policy violated Title VII. If some claims were barred, it was only by the technical filing requirement. Under such circumstances, a court can modify seniority rights and can award class members full-competitive seniority in order to place the pltf's in the position they would have been in but for the discrimination as long as there was no unusual (in comparison with other Title VII cases) circumstances cautioning

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<sup>9</sup>It is true that under Franks v. Bowman and International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), employees' seniority rights are not vested property rights entitled to the protection of the due process clause. But this does not mean such rights are entitled to no protection in any circumstances. Indeed, courts routinely protect such rights in many circumstances. And, as discussed in text in IV.B.2(a) infra, §703(h) of Title VII affords some special protection to bona fide seniority plans within the context of Title VII itself.



against such awards (the standard of Franks v. Bowman).

A. Standard for Settlement of Claims of Subclass A

1. If filing requirement not jurisdictional. If the DC did have jurisdiction of approve the settlement, then there has been a determination of liability to which no one objects (the only objection to liability is in TWA's cross-petn in No. 78-1549 which raises the objection only in the event the settlement order is overruled). In this situation, the settlement is really only a settlement as to damages. Viewed in this light, the Court properly used the Franks v. Bowman standard.

To put the same point another way, the Union can challenge *Union's position* the lower court's award of retroactive seniority to subclass A only on two grounds: (1) that there was really no violation of Title VII by the no-parenthood policy (and therefore no basis for liability) or (2) that the awards of competitive seniority in this case were unreasonable given the disruption they may cause with regard to the current employees, as discussed in the following section IV.B (i.e., although there was liability, the remedy afforded in the settlement is unreasonable). Cert was, however, not granted on #2 (cert was not granted on question 3 of petn in No. 80-951). And the Union does not argue that the no-parenthood policy was legal--indeed, the predecessor Union filed the original charge of discrimination against that policy.

When there is a finding of liability to which the Union does not object, an award of seniority under the Franks standard is proper. In this situation, the only uncontested issued is the



appropriate remedy--and Franks governs that award.

2. If filing requirement is jurisdictional. If the DC did not have jurisdiction to approve the settlement over subclass B, then the settlement-approval order will be overruled. If the settlement-approval order is overruled, then this question (should Franks v. Bowman standard apply to award of seniority in settlement?) becomes moot--except that, on remand, another settlement might be worked out and the appropriate standard for determining whether to award full competitive-status seniority rights will again be relevant. As discussed below, such rights should be awarded under the usual (Franks) standard in a settlement only when liability has been determined and is uncontested.

(I don't think the Union really objects to the award of seniority benefits to subclass A, though it might be a good idea to clarify this point at oral argument. Only 33 persons from subclass A are expected to return to work.)

#### B. Standard for Settlement of Claims of Subclass B

1. If filing requirement is jurisdictional. If the filing requirement is jurisdiction, this issue disappears because these claims are jurisdictionally barred and should be dismissed on remand.

2. If filing requirement is not jurisdictional. Here, all violations of Title VII are time-barred. Through the DC's award of competitive-status seniority, a bona fide seniority system has been modified because there was once a violation of Title VII. And that modification was adopted without the consent of affected workers and



under the standard of virtually automatic standard of Franks:  
authorizing such grants to remedy past discrimination in the absence  
of circumstances not present in the typical Title-VII case.

This Court's prior cases suggest that the standard of Franks v. Bowman should not apply in settlement situations. In Franks v. Bowman itself, the Court indicated that on the remand, competitive-status seniority would only be awarded to those who were actual victims of discrimination. See 424 U.S. at 762 ("whether an award of seniority relief is appropriate under the remedial provisions of Title VII, specifically, §706(g)").

*Franks  
does  
not  
apply  
in settlements*

And in United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), the Court held that a time-barred discriminatory act cannot be the basis for modification of a valid seniority system. Such systems are protected by §703(h) of Title VII, which provides that:

"Notwithstanding any other provisions of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, ...."

In Evans, the Court held that the fact that a person was in a lower position, seniority-wise, than would have been true had there been no past discrimination did not itself constitute a violation of Title VII. In so doing, the Court noted that "a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer." 431 U.S. at 560.

In the settlement, the DC modified seniority under a bona



fide seniority system on the basis of time-barred claims. This result is clearly contrary to Evans except insofar as the court order of competitive-status seniority changes analysis. There are two questions implicit in this issue: (a) under what standard should a DC award (or approve) the grant of retroactive seniority rights pursuant to a settlement to which the union and current employees have not agreed? and (b) what issues should the union (or current employees) be able to raise in objecting to such a settlement?

(a) What should be the standard when there has been no uncontested finding as to liability? As discussed above at 21-22, when there has been a determination of liability by the DC to which the Union does not object, any settlement between the employer and the pltf(s) is only a settlement as to damages and the Franks v. Borman rule should apply. But when there has been no uncontested finding of liability, and the DC awards (or approves) the grant of retroactive seniority pursuant to the terms of a settlement, it is allowing an adjustment in a bona fide seniority system without any final finding of a viable claim of discrimination. The rights of the pltf(s) to the relief is not clear as it was in Franks. On the other hand, it would be unfortunate to adopt a rule precluding the grant of any retroactive competitive seniority pursuant to a settlement without Union approval of the settlement. Such a rule would make settlements difficult and would give Unions the power to block even reasonable grants of retroactive seniority to any group or individual.

yes



Given the competing policy considerations in the settlement situation--the need to protect the rights of current employees in the absence of any final finding of a viable claim of discrimination and the desire to create an environment in which settlements are possible--I think the best solution would be to hold that the DC has discretion to award appropriate seniority in light of all the relevant equitable factors. For example, in the case at bar, the DC should not have applied the automatic Franks v. Bowman standard, but should have given careful consideration to the fact that any award to subclass B is at the expense of other workers who were working the unpopular flights during the years subclass B slept on its rights. I would suggest that a rule not unlike that you proposed by the Franks dissent is appropriate when the DC is awarding (or approving) competitive-status seniority under a settlement.

In the <sup>my</sup> Franks dissent (joined by Justice Rehnquist) (CJ wrote separately but said he was in general agreement with you), you argued that the language of Title VII did not support the automatic grant of competitive-status seniority and that the DC should have the discretionary power to determine when such relief is appropriate given the competing equities of each case. I agree with the Franks dissent and, at a minimum, the rule it proposes <sup>should</sup> ~~such~~ be adopted as the standard when retroactive competitive-status seniority is awarded in settlement agreements.

→ In summary, it would be inconsistent with Evans and extremely unfair to expand the majority rule in Franks to grant automatic retroactive competitive-status seniority to pltfs in settlements when there has been no final finding of liability. Any



automatic grant in such circumstances would enable employers to settle their liability by a grant of relief costing the employer nothing at the expense of current employees.

yes

If the standard of Franks should not apply in settlement situations, then the DC's award of retroactive competitive-status seniority should be vacated and the case remanded for it to consider the award to subclass B in light of the proper standard. If this happens, it is possible that subclass B will not receive full retroactive seniority.<sup>10</sup>

Re-employment will occur as vacancies (not filled by a non-class member with greater seniority) arise, and there are many other ways in which seniority is relevant to priorities in job selection. See Union's Brief (blue) 6-11. Changes in relative seniority may have major implications in terms of a person's ability to continue to meet responsibilities that may have been assumed in reliance on a person's current status. For example, an attendant might have accumulated enough seniority to bid and get a "cream-puff" run--i.e., a daily flight during weekdays allowing her to work while her children are in school. Such a person may be vulnerable to

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<sup>10</sup> Although cert was not granted on whether the detrimental impact on current employees is so great as to preclude the grant of competitive-status seniority in this case (question 3 in petn No. 80-951), the question framed in text does not address that question but rather whether the Farinks standard should apply at all in determining whether to award such seniority in cases such as this involving settlements. That question is in question 2 of petn No. 80-951. Question 2 states the question as whether the DC should have applied the standard of Franks without regard to the fact that there has been no finding on liability--in other words, in a settlement situation.



"bumping" by class members with retroactive seniority after relying on--and making who knows what arrangements--what seemed to be her fixed and definite seniority under contracts between TWA and Union.

Seniority changes may also force current employees to relocate to new cities as their home bases (or commute). TWA's flight attendants work out of domiciles or base stations located in N.Y., Boston, Chicago, St. Louis, Kansas City, San Francisco, and Los Angeles.

Because the DC used the standard of Franks v. Bowman, there is only limited data on the extent to which the grant of retroactive competitive seniority will affect TWA's current employees. Subclass A has 33 or so members, but 172 members of subclass B are expected to return to work. It is true that TWA has over 6000 attendants and normally hires 400-800 per year, but in the 18 months prior to the settlement, 400 had been laid off. At the present time, 305<sup>11</sup> are on lay off.<sup>12</sup> In II J.A. at 132-138 there are some charts with information relevant to the effect returning pltfs will have, but these charts do not show whether the seniority changes will result in changes in the home cities of any current employees or cause major changes in the schedules of current employees. Instead, they only reveal information such as the fact

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<sup>11</sup>The excess workforce is higher than this figure because contractual provisions require that TWA offer leaves of absence in order to reduce the number of lay-offs.

<sup>12</sup>TWA has been through rough times lately. The 305 were laid off in two groups: 164 on June Oct. 30, 1979 and 141 on June 30, 1980.



that San Francisco is currently the home base for 665 employees and that 30 returning classmembers from subclass B are expected to want to reside there. Id. at 138.

To summarize, as the discussion of subclass A's settlement (see 21-22) indicates, if there is a finding of liability by even the DC (without appellate review) prior to settlement, I see no reason not to allow the use of the Franks standard unless the union contests the employer's liability. When there is no finding of liability or when the Union contests liability, then the standard of the Franks dissent should be used in deciding whether to award seniority.

(b) When retroactive competitive-status seniority is awarded by DC pursuant to settlement, what issues should Union be able to challenge? The remaining question is what issues should the Union should be able to raise in challenging the grant of seniority under such a settlement? There are good reasons why the Union should be able to challenge only the award of competitive-status seniority itself (under the standard of the Franks dissent) rather than every issue settled by the settlement. That issue is, of course, the only one with which the Union is really concerned. If the award is unfair (under the standard of the Franks dissent) the Union can and should challenge the unfairness directly--for example, in the case at bar it can argue against the grant of automatic competitive-status seniority to those who have slept on their rights for up to five years at the expense of innocent employees who worked the graveyard flights during that period.

If the Union were allowed to litigate everything, e.g.,



underlying liability, settlements would be almost impossible. Even when only one pltf sued, the union would be able to block any settlement awarding competitive-status seniority by fighting all the other issues. As a result, it would be difficult to reach effective settlements. In considering competing equities under the standard of the Franks dissent, the DC can of course consider the likelihood that the pltf(s) have live, legitimate claims of discrimination--but there is no reason to allow the union to block the settlement by fighting liability all the way to the S.Ct. provided the DC does take such factors into account in balancing the competing equities. Since the union's legitimate interest can be protected by allowing it to challenge the remedial grant of competitive-status seniority under the discretionary standard of the Franks dissent, there is no need to allow it to disrupt settlements by litigating other issues, such as the employer's liability.

## V. CONCLUSION

### A. Timely Filing Is Jurisdictional

If the failure to file a charge is a jurisdictional defect, then the DC lacked jurisdiction to enter the settlement and both the settlement order and the seniority-award order should be vacated. On remand, the claims of subclass B should be dismissed as time-barred because there can be no waiver of a jurisdictional requirement. The pending cert in No. 78-1549 should be DIG'd (no certworthy issue). Since there has been a finding of liability with regard to subclass A (uncontested by anyone other than TWA and TWA is bound by the earlier finding) the DC will be free to enter a new



settlement as to damages between subclass A and TWA. Because liability will have been determined,<sup>13</sup> retroactive competitive seniority can be awarded to that subclass in such a settlement under the standard of Franks v. Borden.

B. Timely Filing Is Not Jurisdictional *see Franks*

If the filing requirement is not jurisdictional, then the settlement order should be sustained. Cross-petn in No. 78-1549 should be dismissed as moot since it contains TWA's objections to liability in the event the settlement is not upheld.

The question then becomes whether the DC erred in applying the standard of Franks v. Borman to the award of seniority rights under the settlement.

With regard to subclass A, the application of the Franks v. Borman standard was proper because there was a finding of uncontested liability as to subclass A (only TWA would contest liability and then only if the settlement were not upheld).

The DC did err in applying the Franks v. Borman standard to the question of seniority rights of subclass B. With regard to these claims, there had been no finding of liability, let alone a finding uncontested by the union. Indeed, when the DC ordered the grant of competitive-status seniority, all claims of subclass B had been found time-barred. In this situation, the DC should have awarded competitive seniority under the standard of the Franks

<sup>13</sup>The DIG of No. 78-1549 makes the earlier finding of liability final and conclusive as to TWA.



dissent rather than the standard of the Franks majority. The order awarding seniority should be vacated and the case remanded for the DC's consideration of whether retroactive competitive-status seniority is appropriate when all the relevant equities are considered.



78-1545 Ziper v. TWA

11/25

80-951 Union v. TWA and Ziper

(Protracted TWA litigation resulting from its "mother-hood clause". We deferred action on 78-1545 pending settlement discussion).

1978 Decision: CA7 held 92% of class members were juris. out of time under 90 day period for filing claim with EEOC. CA7 had previously held that TWA's policy violated VII.

No  
78-1545

No  
80-951

1980  
I. The Settlement: ~~Two separate~~ Several agreements:

1. Two sub-classes:

Class A - 30 claimants who were ~~not~~ filed timely claims

Class B - 400 whose claims were <sup>untimely</sup>

2. Each Sub Class - \$1.5 damages & offer of reinstatement

3. Parties also agreed that DC should determine competitive seniority rights.

II. D.C. Decision on Seniority: Both sub-classes held entitled to full seniority.

1. Under Bowman v. Franker standard the DC had authority to award seniority status to Sub-Class A, as they were not time barred.

2. DC erred (had no auth.) to apply Bowman standard to Sub-Class B. No findings of liability had ever been made as to them. CA7 had held their claims were time barred.

Even under equitable tolling, T's had shown no equitable excuse. Not did TWA <sup>wait</sup> 90 day period

Union  
attacks  
this →  
in  
80-951



meb 11/27/81

To: Mr. Justice Powell

From: Mary

In Re: Nos. 78-1545 & 80-951, IFFA v. TWA & Zipes, et. al.

In its reply brief (your copy is attached), the Union makes a strong argument that without either (1) a final judicial finding of liability or (2) the union's agreement to a settlement, a court simply lacks the power to affect seniority rights awarded under a collective-bargaining agreement. See IFFA brief (yellow) at 13-18. This argument is not without merit. Relief is given in Title VII suits under §706(g), but §706(g) authorizes courts to award relief to remedy violations that are not time-barred. In settlements, there is no final finding of a violation. Even if the DC had made such a finding at the time of the settlement (which it could not have because the CA7 had held subclass B's claims time-barred), that finding would not have been a final finding, at the end of litigation; settlements are always premature ends to litigation.

The only argument against this point is a policy one--this approach might give unions too much power to block awards of competitive-status seniority in settlements even when reasonable. I don't have any idea whether the rule the union proposes would make it too difficult to reach settlements.



Two cover  
- names

78-1545 ZPIES v. TRANS WORLD

Argued 12/2/81



1 FFA

Jolley (for ~~Petro~~ <sup>78-1541</sup> ~~in 80-951~~) (The present Union)

~~These Petro~~

Objects to DC's order awarding  
competitive seniority to Class B claimants.

1 FFA (Union) has collective  
bargaining agt.

Seniority rights especially important  
to airline flight attendants.

Sub. Class A status is not questioned  
as CA 7 had jurisdiction & their claims were  
not ~~bar~~ time barred. Borman applies

Randolph (Petro) for Liper Class - 80-951

Supports  
affirmance  
of 80-951

A Union has been in this case from  
beginning. It commenced the case. In  
1976 the DC held orig. Union had  
become "defunct".

The present Union did not enter  
~~this~~ this case until 1979. Union  
~~was~~ came in only at time of remedy.  
Does not agree with Jolley.



Randolph (cont.) (for Upper Class)

In orig. suit, TWA conceded  
juris in its answer. Two yrs later,  
the DC found juris. Four yrs later,  
TWA amended its complaint to  
plead ~~from time~~ <sup>time</sup> limitation & therefore was a  
juris. quest. The DC found  
a continuity violation, but CA 7  
reversed & held claims of Sub-Class B  
time-barred & that this was a  
juris. bar.

Argues that claim was not  
jurisdictional.

CA 5 en banc, & every other CA  
except CA 7, has held that time  
limit is not juris.

As I understand Randolph's  
argument, he is saying the  
limitation is not jurisdictional  
- it is merely a statute of limitation -  
and can be & has been waived



Carton (for Rep. TWA) (Weak argument)

TWA is not involved in security dispute.

?  
[ WJB suggests that there is a controlling difference between a jurisdictional bar & a statute of limitations bar

Jolley (Reply - Union)

There has been a "finding" of violation  
- & no one disputes this.

? ? A violation was found as to  
Sub-Class B



The Chief Justice

Chief  
will  
let us  
know

Justice Brennan

Rev. 78-1545

78-1545 In '78 op. CA7 rejected 42% of claimers as  
juris. out of time. This was error. Simply a  
normal st. of line. Thus, ~~by~~ by entering into  
settlement, TWA waived the statute. 1

When WC approved settlement, it ordered  
retroactive seniority. This affected right of  
incumbent employees. Union got into case.

~~In~~

80-951  
Included  
to aff. in.  
across  
Bd

No problem as to Sub-Class A. But even  
if ~~an~~ court had given, there was no finding  
of liability as to B. Thus, Bowman may not  
apply. We did not grant on this Q - may not be  
before

Justice White

Q of retroactivity is here. 80-951 presents it.  
Rev. on 78-1545. - as W & B would.

As to seniority, ~~the~~ <sup>Union</sup> is probably right that  
DL had no authority to grant retroactive  
seniority

80-951 aff in part, & rev. tentatively on  
retroactivity. Byron not entirely at  
rest.

After discussion, BRW is inclined to agree now  
that the DL found liability & CA7 never reversed

Primarily  
BRW wanted  
tentatively to  
aff 80-951 across  
Bd



Agree with BRW

Revene in 78-1545-

Aff action board in 80-951

Revene in 78-1545 - ~~Not~~ given.

Affirm in 80-951 in all respects  
except as to retroactivity. As to it, 9d  
revene decision  
X X X

In further discussion, see SOC<sup>1</sup> view.  
~~that is~~



Justice Rehnquist

Agrees with LFP

Justice Stevens

Out

Justice O'Connor

Agrees with L.F.P. ~~tentatively~~ or  
to retroactively - but not <sup>as to</sup> ~~at~~ vests. \*

Rev. 78-1545

\* The DC found liability & this was  
not reversed by CA 7. If this is  
true - as O'Connor thinks, she will  
aff. across board



CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

December 9, 1981

*This memo is not immediately  
permanent to me. The equities  
favor the present employees.  
They were not strike breakers.*

MEMORANDUM TO THE CONFERENCE

*The 9270<sup>group</sup> permitted  
them claim  
to expense - unless*

RE: No. 78-1545 and 80-951 Zipes v. Trans World Airlines

*TV has waived  
the St/Lem. For me*

Some of us were concerned whether the Franks v. Meier in  
Bowman remedy of retroactive seniority was proper here. *Me Q.*

You may be interested in the attached memorandum of my  
clerk Mary Mikva on that question.

*But what do  
you think?*

W.J.B.Jr.



RE: 78-1545 and 80-951 Zipes v. TWA

TO: Justice Brennan

FROM: Mary Mikva

DATE: December 8, 1981

I have some new thoughts on Zipes (78 1545 and 80-951).

First, to clarify some background. The ALSSA, which was the plaintiffs' union when the suit was filed in 1970 was originally the plaintiff in the suit. A settlement was first reached in 1971. During the settlement hearings TWA waived any statute of limitations defense. That settlement had no retroactive seniority or backpay, and the CA 7 threw it out on the basis that the union had conflicting interests since it represented incumbent employees and plaintiffs. The present plaintiffs were appointed to represent the class and the case was consolidated with the American Airlines case. In 1974 TWA moved to and was granted leave to amend its answer to assert a statute of limitations defense, but the DC noted that the delay in asserting that defense might ultimately constitute a waiver of that defense. In Oct. of 1976 the DC denied the airlines' motion to exclude class members who were terminated more than 90 days before the filing of the charge. The DC accepted the airlines' argument that the timely-filing requirement was jurisdictional, but found that there was a "continuing violation." Three days after that order the DC granted plaintiffs' motion for summary judgment on the basis that the airlines' policy of firing or grounding mothers, but not fathers, violated T. VII. Then the plaintiffs

*but only for purpose of settlement - I assume. Also*

*no retroactive seniority*

*DC found a "continuing violation"*



settled with American Airlines, the settlement was upheld, and cert. was denied. TWA appealed the S.J. and that's what got them into this mess. The 1978 decision by the CA 7 (78-1545) upheld the finding that the "no-mothers" policy violated T. VII but reversed the finding that there was a continuing violation. *CA 7 reversed as to continuing violation*  
Because the CA7 also believed timely filing of a complaint was *But CA 7* jurisdictional, it expressly did not consider the argument that TWA might have waived the defense of statute of limitations by failing to assert it for four years. Accordingly the judgment was reversed as to 92% of the plaintiff class. While petitions for cert were pending, the parties settled.

With this background--I think you can avoid the Franks-Evans problems that concerned Justices White, Marshall and Powell in this case. *??*

There was a finding of liability by the DC and that finding was upheld insofar as the the court found that the "no-mothers" policy violated T. VII. *But not as to the timeliness issue*  
The CA7 reversed as to 92% of the plaintiffs solely on the basis of the defense that the charges *Findings of liability by DC as to "no mothers" policy was aff'd by CA 7* were untimely. (We, in turn have reversed the CA7 on the effect of the untimeliness, reopening the possibility that it would not have been a valid defense even without the 1979 settlement because the Airline waived it by its failure to assert it for four years and/or its explicit waiver in the 1971 settlement.)  
At any rate, that defense, even assuming that it is meritorious, does not affect the fact that the non-plaintiff union members *who are they?* were "unjustly enriched" by the employer's discriminatory practice.  
But for this discriminatory practice the plaintiffs would have



continued to accrue seniority and the other union members would either be unhired or would have less seniority. Since it was this unjust enrichment that underpins the Court's opinion in Franks, see 424 U.S. at 776, there is no basis for reversing the use of the retroactive-seniority remedy the Court approved of there, in this case. This makes this a very unique case where there is no occasion to reach the issue in this case of whether the Franks remedy is appropriate in the usual settlement situation where there has been no finding of liability--e.g. where there are unsettled questions of fact or law which could result in a finding that the practice itself was not discriminatory.

This is, in essence, the reasoning of the CA7 when it upheld the American Airlines settlement. There the court noted that they dealt with a case where settlement followed summary judgment and the plaintiffs had almost earned through full litigation the remedy proposed in Franks. See Airline Stewards & Stewardesses Ass'n v. American Airlines, Inc., 573 F.2d 960, 964-5 n.9 (1978). The only difference between that case and this one is that there the CA7 had not yet passed on the timeliness issue so the question of whether the plaintiffs' claims were timely was unsettled. In essence, however, this issue was also unsettled in this case since petitions for cert. were pending and the CA7 had decided the issue differently than every other circuit.

I don't think Evans is really a problem to this approach. The Court held in Evans that a violation which is not the subject of a timely claim is in effect not really a violation and can not, therefore, be a basis for seeking retroactive seniority when

absurd? The employees said to be unjustly enriched had discrimination. Under Franks's erroneous holding, they may be thrown out. But they are innocent parties never before, especially as to the 70 who slept on rights



the employer voluntarily rehires a discriminatee. Although the dissent, which you joined, has a valid argument, it seems that all the Court really did was to enforce the statute of limitations. The Court said explicitly, in distinguishing Franks, that it dealt only with the issue of whether there was a violation and did not reach any remedy issue. 431 U.S., at 559.



meb 12/12/81

To: Mr. Justice Powell

December 12, 1981

From: Mary

In Re: No. 78-1545, Ann Zipes, et al. v. TWA, Inc. &

No. 80-951, Independent Federation of Flight Attendants

I remain troubled by the Franks-Evans problems presented in this case. The waiver, if any, was by TWA, not the Union or its members, none of whom <sup>will</sup> ~~were~~ guilty of any discriminatory acts. In any event, the waiver issue disappears if the settlement order is affirmed because it included an explicit waiver for purposes of settlement. The question remains, however, whether, in awarding retroactive seniority to the pltf-class in the seniority-award order, the DC erred in awarding that relief under the standard of Franks v. Bowman. I believe that an award of such relief under that standard is inconsistent with United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) and unfair to current employees who worked the unpopular flights to earn their seniority while the pltf-class slept on their rights.

In Evans, the fact that the airline had discriminated against the pltf was not in dispute. Evans had been forced to



resign in 1968 by the company's policy that stewardesses could not be married, though stewards could be. And the CA7 had held that the policy violated Title VII. See Sporgis v. United Air Lines, 444 F. 2d 1194 (1977), cert. denied, 404 U.S. 991 (1971).

Yet, in Evans, the Court held that §703(h)--not just the filing requirement, as suggested in the memo sent by Justice Brennan--precluded any grant of seniority based on Evans' termination. The pltf argued that the refusal to give her the seniority she would have had but for the act of discrimination was a continuing violation of Title VII and that she should, therefore, be able to file a charge now alleging this discrimination and receive the seniority she would have had but for the past discriminatory act.

In considering whether there was a continuing violation, the Court rejected the argument that Franks v. Bowman, 424 U.S. 747 (1976) supported the award of seniority to the pltf. The Court explained that Franks only dealt with the appropriate remedy after there had been findings of discrimination and of a timely charge:

"When that case reached this Court, the issues relating to the timeliness of the charge and the violation of Title VII had already been decided; we dealt only with a question of remedy. In contrast, in the case now before us, we do not reach any remedy issue because respondent did not file a timely charge based on her 1968 separation and she has not alleged facts establishing a violation since she was rehired in 1972." Id., at 559 (footnotes omitted).

Thus, in Evans, the Court indicated that there were two prerequisites to the award of retroactive seniority under the Franks standard: a violation and a timely charge.

After thus explaining that the Court in Franks had been solely concerned with remedy, the Evans Court went on to explain that



§703(h)<sup>1</sup> "highlighted" the "difference between a remedy issue and a violation issue." Id. The Court noted that;

"As we held in [Franks], by its terms that section does not bar the award of retroactive seniority after a violation has been proved. Rather, §703(h) 'delineates which employment practices are illegal and thereby prohibited and which are not.'" 431 U.S., at 553 (quoting 424 U.S., at 758)."

The Court then held that past discriminatory acts could not form the basis for a challenge to a neutral, non-discriminatory seniority system:

"But ... a challenge to a neutral system may not be predicated on the fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer. A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. Such a result would contravene the mandate of §703(h)." 431 U.S., at 560.

Thus, in Evans, the Court held that, in the absence of a finding of a timely charge and a violation of Title VII, "the mandate of §703(h)" barred an award of seniority inconsistent with a neutral, nondiscriminatory, seniority system.

In the case at bar, it is true that there was once a finding of a timely charge, but that finding had been overruled by

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<sup>1</sup>Title VII, §703(h), 42 U.S.C. 703(h):

"Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin ...."



the CA7 prior to the entry of the seniority-award order by the DC. The two prerequisites for relief under Franks were not, therefore, met.

In Evans, the Court stated that a pltf had no right to an order awarding retroactive seniority if the requirements of a timely charge and a violation of Title VII had not been met. But in the case at bar, if we affirm the seniority-award order, we would hold that if the employer--who has no interest in who receives competitive-status seniority--agrees to allow a DC to award such seniority retroactively in a settlement, the DC can award the seniority under the Franks standard without finding that timely charges have been filed. In other words, although a pltf has no right to such relief under such circumstances because of the "mandate of §703(h)," a pltf can be given such relief by a court provided the employer does not object.

If that is true, the "mandate of §703(h)" protects neutral seniority systems only when the employer--not the union or the beneficiaries of the system--considers protection appropriate. Although competitive-status seniority rights are not vested property rights beyond the remedial scope of Title VII, see Franks, 424 U.S., at 778, such rights are determined by a contract between the employer and the union and are not amenable to unilateral change by the employer at the request of third parties. When such rights are adjusted by a Court awarding relief under the Franks standard, the court has found a violation of Title VII and a timely charge and the adjustment is ordered to make the victims whole. The award is justified by the fact that the current employees are merely being



placed in the positions they would have been, relative to the victims, had no discrimination ever taken place.

When there has been no finding of a past violation of the Act, the situation is, of course, otherwise, and the Conference would apparently agree that retroactive competitive-status seniority should not be awarded under the fairly automatic standard of Franks.

When there has been no filing of a timely charge, an award of retroactive competitive-status seniority is necessarily unfair to current, innocent employees. It is argued that current employees have no ground for objecting because they have been <sup>"</sup>unjustly enriched<sup>"</sup> by the employer's discriminatory practice. During the years the pltf-class slept on its rights, however, these employees worked the unpopular flights in order to accrue seniority. That seniority is something they have earned, not a bonus unjustly or arbitrarily given to them rather than another. The pltf-class, on the other hand, has neither (1) worked for the right to retroactive competitive-status seniority nor (2) shown that they are entitled to an award of such seniority because they were discriminated against and have filed timely charges. If such seniority is nevertheless awarded to them under the standard of Franks, it is they who are unjustly enriched at the expense of other employee who worked to earn their seniority. Moreover, employers will be able to settle Title VII actions by bargaining away the rights of others.<sup>2</sup>

<sup>2</sup>It is true that it is the DC, not the employer, that actually entered the order awarding seniority. But if employers and pltfs know that such awards will be available under the standard of Franks provided the employer agrees, the employer will be able to use chips belonging to current employees in settling lawsuits with Title VII

Footnote continued on next page.



I think the DC court erred in applying the Franks standard,<sup>3</sup> in awarding competitive status seniority. In awarding such relief pursuant to a settlement, a DC should carefully consider the equities of the situation. If the settlement includes a waiver of a time-bar, the DC should nevertheless consider whether it is unfair to award retroactive competitive-status seniority to pltfs who slept on their rights while others worked to earn their seniority.

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pltfs.

<sup>3</sup>Although the DC did not cite Franks, it did award relief under the Franks standard: "full restoration of retroactive seniority will not have an unusual adverse impact upon currently employed flight attendants in a manner which is not typical of other Title VII cases."



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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

December 14, 1981

80-951 Independent Federation v. TWA

Dear Bill:

Thank you for circulating a copy of Mary Mikva's interesting memo of December 8. It is a helpful summary of the situation.

At Conference, we were all together - as I recall - in 78-1545, but less harmonious with respect to the claim of the union in 80-951. Although I still am not entirely at rest, my concern as to the validity of the grant of retroactive competitive seniority remains.

I have not yet found any holding that TWA, prior to the settlement that is here at issue, waived the statute of limitations issue. Even if TWA may be said to have waived it as a part of the settlement, it is not at all clear to me that the present contract between TWA and respondent Union can be changed unilaterally by TWA at the request of third parties in a settlement negotiation.

This is quite different from Franks v. Bowman, where the Court had found both a violation of Title VII and timely filing of charges. The Court then awarded relief on the theory that the current employees were merely being placed in the position they would have been, relative to the victims, had no discrimination ever taken place. Two elements had been found to exist: discrimination and timely charges. Here, admittedly subclass B had not filed timely claims. In fact, many of their claims were several years old. Thus, in the absence of a waiver (and I am not satisfied there was a valid waiver as to the union), one of the essential elements of Bowman is absent.

Nor can I agree that the employees who took the places of the subclass B employees are "unjustly enriched". They are not strike breakers. Rather, they are innocent employees who - in many instances - have worked for years on unpopular flights in order to accrue their present



seniority. This is now something they have earned, not a bonus unjustly accrued.

In sum, if I understand this case correctly, an employer attempted to settle a Title VII action in part by bargaining away the rights of others. This seems unfair, and unless there is a compelling reason to the contrary that I have not yet identified, I remain inclined to dissent on this issue. I acknowledge, however, that from the outset this has been a confusing case.

Sincerely,

*Lewis*

Justice Brennan

lfp/ss

cc: The Conference



December 14, 1981

80-951 Independent Federation v. TWA

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Sincerely,

Justice Brennan

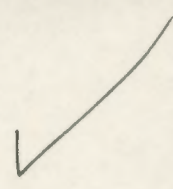
lfp/ss

cc: The Conference



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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST



December 15, 1981

Re: 80-951 Independent Federation v. TWA

Dear Bill:

I am in substantial accord with Lewis' letter to you of December 14th, which finds this case substantially different from Franks v. Bowman.

Sincerely,

Justice Brennan

cc: The Conference



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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

✓

January 4, 1982

Re: 78-1545 and 80-951 - Zipes v. TWA

Dear Byron:

Please add a note stating that I did not participate  
in the consideration or decision of these cases.

Respectfully,

*John*

Justice White

Copies to the Conference



LTP

To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
✓ Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

Circulated: 4 JAN 1982

Recirculated: \_\_\_\_\_

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-1545, ~~78-1549~~ AND 80-951

78-1545 ANNE B. ZIPES, ET AL., PETITIONERS  
v.

TRANS WORLD AIRLINES, INC.

80-951 INDEPENDENT FEDERATION OF FLIGHT  
ATTENDANTS, PETITIONER  
v.

TRANS WORLD AIRLINES, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[January —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

The primary question in this case is whether the statutory time limit for filing charges under Title VII of the Civil Rights Act, 42 U. S. C. § 2000e *et seq.*, is a jurisdictional prerequisite to a suit in the District Court. Secondly, we resolve a dispute as to whether retroactive seniority was a proper remedy in this Title VII case.

I

In 1970, the Air Line Stewards and Stewardesses Association (ALSSA), then the collective bargaining agent of Trans World Airlines (TWA) flight attendants, brought a class action alleging that TWA practiced unlawful sex discrimination in violation of Title VII by its policy of grounding all female flight cabin attendants who became mothers, while their male counterparts who became fathers were permitted to continue

My opinion:

1. Try to obtain clarification from BRW
2. Descent from Part III which would require reversal of 80-951
3. Concur + "clarify" BRW's op.

Reviewed  
L.F.P.  
1/7/82

Probably can  
join I (states  
case) and  
II that holds  
the "timely  
filing"  
requirement of  
Title VII is

not  
"jurisdictional."

But III  
holds ~~that~~  
that Sub class

B is entitled  
to retroactive  
seniority  
without  
making clear  
how the Evans

requirement  
of a timely  
filing was met  
in this case.



flying. After collective bargaining eliminated the challenged practice prospectively, the parties in the case reached a tentative settlement. The settlement, which provided neither backpay nor retroactive seniority, was approved by the District Court. The Court of Appeals for the Seventh Circuit, however, found the union to be an inadequate representative of the class because of the inherent conflict between the interests of current and former employees. It remanded the case with instructions that the District Court name individual members of the class to replace ALSSA as the class representative.<sup>1</sup> *Air Line Stewards and Stewardesses Association v. American Airlines Inc.*, 490 F. 2d 636 (CA7 1973).

Upon remand, petitioners in No. 78-1545 were appointed as class representatives. TWA moved to amend its answer to assert that the claims of plaintiffs and other class members were barred by Title VII's "statute of limitations" because they had failed to file charges with the Equal Employment Opportunity Commission (EEOC) within the statutory time limit. 1 App. 89a.<sup>2</sup> Although the District Court granted the motion to amend, it noted that the "delay in pleading the defense of limitations may ultimately constitute a waiver of the defense." 1 App. 101a.

Subsequently, on October 15, 1976, the District Court denied TWA's motion to exclude class members who had not filed timely charges with the EEOC. In support of its mo-

<sup>1</sup>The class was defined as all female flight cabin attendants who were terminated from employment with TWA on or after July 2, 1965 for reasons of pregnancy. The Court of Appeals assumed the class to include only those who would have resumed flight duty after becoming a mother but for TWA's policy forbidding this. *In re Consolidated Proceedings in the Airline Cases*, 582 F. 2d 1142, 1147 and n. 9 (CA7 1978). The class thus included both former employees and current employees, that is both those who declined and those who accepted ground positions.

<sup>2</sup>When this suit was filed, 42 U. S. C. § 2000e-5(d) (1970 ed.) required charges to be filed within 90 days after the alleged unlawful employment practice occurred. In 1972, this section was amended to extend the time limit to 180 days and was renumbered § 2000e-5(e).



tion, TWA argued that instead of an affirmative defense analogous to a statute of limitations, timely filing with the EEOC was a jurisdictional prerequisite not subject to waiver by any action of the defendants. While the District Court agreed that the filing requirements of Title VII are jurisdictional, it denied the motion on the basis that any violation by the airlines continued against all the class members until the airline changed the challenged policy. 1 App. 131a-32a. On October 18, 1974, the District Court granted the motion of the plaintiff class for summary judgment on the issue of TWA's liability for violating Title VII. 1 App. 134a.

The Court of Appeals affirmed the order of October 18, 1976, granting summary judgment on liability, expressly holding that "TWA's no motherhood policy . . . provides a clear example of the discrimination prohibited by § 2000e-2(a)." *In re Consolidated Proceedings in the Airline Cases*, 582 F. 2d 1142, 1145 (CA7 1978). It declined, however, "to extend the continuing violation theory, as did the district court, so as to include in the plaintiff class those employees who were permanently terminated more than 90 days before the filing of EEOC charges." *Id.*, at 1149. The Court of Appeals went on to hold that timely filing of EEOC charges was a jurisdictional prerequisite. Because TWA could not waive the timely filing requirement, the Court of Appeals found that approximately 92% of the plaintiffs' claims were jurisdictionally barred by the failure of those plaintiffs to have filed charges of discrimination with the EEOC within 90 days the alleged unlawful employment practice. The Court of Appeals, however, stayed its mandate pending the filing of petitions in this Court. Petitions for certiorari were filed by the plaintiff class, No. 78-1545, and by TWA, No. 78-1749. This Court granted a motion to defer consideration of the petitions pending completion of settlement proceedings in the District Court. Pet. App. No. 80-951, at 3a.

In connection with the settlement proceedings, the District

CA7 held  
that timely  
filing is  
"jurisdictional"  
— therefore  
no waiver.



Court designated two subclasses. Subclass A, consisting of some 30 women, comprised those who were terminated on or after March 2, 1970, as well as those who were discharged earlier, but who had accepted reinstatement in ground duty positions. Subclass B, numbering some 400 women, covered all other members of the class and consisted of those whose claims the Court of Appeals had found to be jurisdictionally barred for failure to satisfy the timely filing requirement. 2 J.A. 3.

The proposed settlement divided three million dollars between the two groups. It also provided each class member with full company and union seniority from the date of termination. The agreement specified that "in the event of the timely objection of any interested person, it is agreed that the amount of seniority and credit for length of service for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g),<sup>3</sup> and all other applicable provisions of law, without contest or objection by TWA." App. to Pet. for Cert. in No. 80-951, p. 29a.

The Independent Federation of Flight Attendants (union), which had replaced ALSSA as the collective bargaining agent for the flight attendants, was permitted to intervene and to object to the settlement. On the basis that the Court of Appeals had not issued the mandate in its jurisdictional decision, the District Court rejected the union's challenge to its jurisdiction over Subclass B. App. to Pet. for Cert. in No.

<sup>3</sup>Section 706(g) of Title VII, 42 U. S. C. § 2000e-5(g) (1976 ed) provides: "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 . . ., or any other equitable relief as the court deems appropriate."

*The proposed settlement*

?

*What does this mean?*



80-951, p. 15a. After holding three days of hearing, the District Court approved the settlement and awarded competitive seniority. It explicitly found that full restoration of retroactive seniority would not have an unusual adverse impact upon currently employed flight attendants in any way atypical of Title VII cases. App. to Pet. for Cert. in No. 80-951, p. 18a-19a.

*D.C. approved  
settlement*

The union appealed. It argued that, because of the Court of Appeals' earlier opinion, the District Court lacked jurisdiction to approve the settlement or order retroactive seniority with respect to Subclass B. The Court of Appeals affirmed, reasoning that "the principles favoring settlement of class action law suits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action." *Air Line Stewards and Stewardesses Association, Local 550 v. Trans World Airlines*, 630 F. 2d 1164, 1169 (CA7 1980). It further explained that the question of jurisdiction as to Subclass B had not been finally determined because a challenge to its decision was pending before this Court and that the Courts of Appeals were split on the issue. The Court of Appeals noted that the district court clearly had subject matter jurisdiction over the claims of Subclass A. It concluded, "Where, as here, the jurisdictional question is not settled with finality, parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement that is otherwise appropriate for district court approval." *Id.*, at 1167.

The Court of Appeals also affirmed the award of seniority. According to the court, the settlement served the public policy of remedying past acts of sex discrimination and the consequences of those past act. Moreover, "the right to have its objections heard does not, of course, give the intervenor the right to block any settlement to which it objects." *Ibid.*<sup>4</sup>

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<sup>4</sup>The Court of Appeals relied on language in *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 780 (1976):



The union petitioned for certiorari, No. 80-951. We granted its petition together with the petition in No. 78-1545 and No. 78-1549, — U. S. —, but later removed the TWA case, No. 78-1549,<sup>5</sup> from the argument docket and limited the grant in No. 80-951. — U. S. —.

## II

The single question in No. 78-1545 is whether the timely filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit in federal court or whether the requirement is subject to waiver and estoppel. In reaching its decision that the requirement is jurisdictional, the Court of Appeals for the Seventh Circuit relied on its reading of the statutory language, the absence of any indication to the contrary in the legislative history, and references in several of our cases to the 90-day filing requirement as "jurisdictional."<sup>6</sup> Other Courts of Appeals that have examined the same materials have reached the opposite conclusion.<sup>7</sup>

78-1545

[D]istrict courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases.

<sup>5</sup> In No. 78-1549, TWA contends (a) that the Court of Appeals erred in affirming summary judgment for plaintiffs on the issue of liability, (b) that TWA should be required only to grant prospective relief to plaintiffs, and (c) that the Court of Appeals erred in defining the subclass of plaintiffs who had filed timely charges with the EEOC. In view of our decision in No. 78-1545 and No. 80-951, we now dismiss the petition in No. 78-1549 as improvidently granted.

<sup>6</sup> See *International Union of Electrical Workers v. Robbins & Myers*, 429 U. S. 229 (1976); *United Air Lines, Inc. v. Evans*, 431 U. S. 553, 555, n. 4; *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 798 (1973).

Evans

<sup>7</sup> See *Carlile v. South Routt School District Re 3-J*, 652 F. 2d 981 (CA10 1981); *Coke v. General Adjustment Bureau, Inc.*, 640 F. 2d 584 (CA5 1981); *Leake v. University of Cincinnati*, 605 F. 2d 255 (CA6 1979); *Hart v.*



We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.<sup>8</sup> The structure of Title VII, the congressional policy underlying it, and the reasoning of our cases all lead to this conclusion.

*Agree*

The provision granting district courts jurisdiction under Title VII, 42 U. S. C. § 2000e-5(e) and (f) (1974), does not limit jurisdiction to those cases in which there has been a timely finding with the EEOC.<sup>9</sup> It contains no reference to the timely filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely

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*J.T. Baker Chemical Co.*, 598 F. 2d 829 (CA 3 1979); *Laffey v. Northwest Airlines, Inc.*, 567 F. 2d 429 (CA DC 1976).

<sup>8</sup>One of the questions on which we granted certiorari in No. 80-951 was whether the Court of Appeals erred in affirming the District Court's approval of the settlement of jurisdictionally barred claims. In reaching its decision, the Court of Appeals for the Seventh Circuit explicitly declined to follow *McArthur v. Southern Airway*, 569 F. 2d 276 (CA5 1978) (en banc). In *McArthur*, the Court of Appeals for the Fifth Circuit reversed the approval of a settlement agreement in a Title VII class action, holding that the District Court lacked jurisdiction because no plaintiff had filed a timely charge of discrimination with the EEOC. Because of our holding in No. 78-1545 that timely filing with the EEOC is not a jurisdictional prerequisite, this issue need not be resolved.

<sup>9</sup>42 U. S. C. 2000e-5(f)(3), for example, reads:

"Every United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office."



separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the the district courts.<sup>10</sup> The legislative history of the filing provision is sparse, but Senator Humphrey did characterize the time period for filing a claim as a "period of limitations," 110 Cong. Rec. 12723, and Senator Case described its purpose as preventing the pressing of "stale" claims, 110 Cong. Rec. 7243, the end served by a statute of limitations.

Although subsequent legislative history is not dispositive, see *Cannon v. University of Chicago*, 441 U. S. 677, 686 n. 7 (1979); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U. S. 572, 596 (1980), the legislative history of the 1972 amendments also indicates that Congress intended the filing period to operate as a statute of limitations instead of a jurisdictional requirement. In the Final Conference Committee section-by-section analysis of H. R. 1745, The Equal Opportunity Act of 1972, 118 Cong. Rec. 7166, 7167, the Committee not only termed the filing period a "time limitation," but explained:

"This subsection as amended provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection."<sup>11</sup>

<sup>10</sup>Section 2000e-5(e) (1976) reads simply: "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ."

<sup>11</sup>The Senate Labor Committee's Section by Section analysis of the 1972 Amendments explained that "[t]his subsection would permit . . . a limitation period similar to that contained in the Labor-Management Relations Act, as amended." Rep. No. 415, 92d Cong., 2d Sess. 65-66 (1971). We have recognized that the Labor Act was "the model for Title VII's remedial provisions," *International Brotherhood of Teamsters v. United States*, 431



This result is entirely consistent with prior case law. Although our cases contain scattered reference to the timely filing requirement as jurisdictional, the legal character of the requirement was not at issue in those case, and as often or more often in the same or other cases, we have referred to the provision as a limitations statute.<sup>12</sup> More weighty infer-

U. S. 324, 366 (1977). Because the time requirement for filing an unfair labor practice charge under the NLRA operates as a statute of limitations subject to recognized equitable doctrines and not a restriction of the jurisdiction of the National Labor Relations Board, see *NLRB v. Local 26;4, Laborer's Int'l Union*, 529 F. 2d 778, 781-785 (CA8 1976); *Shumate v. NLRB*, 452 F. 2d 717, 270 (CA4 1971); *NLRB v. A. E. Nettleton Co.*, 241 F. 2d 130, 133 (CA2 1957); *NLRB v. Itasco Cotton Mfg. Co.*, 179 F. 2d 504, 506-507 (CA5 1950), the time limitations under Title VII should be treated likewise.

Moreover, when Congress in 1978 revised the filing requirement of the Age Discrimination in Employment Act of 1967, 29 U. S. C. §§ 621 et seq., which was modeled after Title VII, see *Oscar Mayer & Co. v. Evans*, 441 U. S. 750 (1979), the House Conference report explicitly stated that "the 'charge' requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act." House Conference Report No. 950, 95th Cong., 2d Sess., at 12, reprinted in 1978 U. S. Code Cong & Admin. News 504, 534 (footnote omitted).

<sup>12</sup> As the Court of Appeals for the Fifth Circuit points out in its opinion in *Coke, supra*, at 588-589, references to the filing requirement as a statute of limitations have come to dominate in our opinions:

"The trend of the Supreme Court cases is also significant. In the early cases, the Court in dicta referred to such time provisions using the label 'jurisdictional prerequisite.' *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 . . . (1973); *Alexander v. Gardner-Denver Co.*, 415 U. S. 36 . . . (1974). In the 1976 *Robbins & Myers* decision the jurisdictional label was used once, but there were numerous references to "tolling the limitations period," 429 U. S. at 239, . . . and other labels obviously referring to a statute of limitations, as opposed to subject matter jurisdiction. See also *United Air Lines v. Evans*, 431 U. S. 553, . . . (1977), in which both labels are used. From and after late 1977, all nine justices have concurred in opinions containing dicta using the limitations label to the exclusion of the jurisdictional label. *Occidental Life Insurance Company v. EEOC*, 432

*Evans*



ences are to be drawn from other cases, however. *Franks v. Bowman Transportation Co., Inc.*, 424 U. S. 747 (1976), was a Title VII suit against an employer and a union. The District Court denied relief for unnamed class members on the ground that those individuals had not filed administrative charges under the provisions of Title VII and that relief for them was thus not appropriate. The Court of Appeals did not disturb this ruling, but we reversed, saying,

"The District Court stated two reasons for its denial of seniority relief for the unnamed class members. The first was that those individuals had not filed administrative charges under the provision of Title VII with the Equal Employment Opportunity Commission and therefore class relief of this sort was not appropriate. We rejected this justification for denial of class-based relief in the context of backpay awards in *Albemarle Paper*, [422 U. S. 405 (1975)] and . . . reject it here. This justification for denying class-based relief in Title VII suits has been unanimously rejected by the courts of appeals, and Congress ratified that construction by the 1972 amendments." 424 U. S., at 771.

If the timely filing requirement limits the jurisdiction of the district court to those claimants who have filed timely charges with the EEOC, the district courts in *Franks* and *Abemarle* would have been without jurisdiction to adjudicate the claims of those who had not filed as well as without jurisdiction to award them seniority. We did not so hold. Furthermore, we noted that Congress had approved the Court of Appeals cases that awarded relief to class members who had not exhausted administrative remedies before the EEOC. It is evident that in doing so, Congress necessarily adopted the view that the provision for filing charges with the EEOC

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U. S. 355, 371-372, . . . (1977); *United Air Lines, Inc. v. McDonald*, 432 U. S. 385, 391-391 . . . (1980); *Delaware State College v. Ricks*, — U. S. —, . . . (1980).



should not be construed to erect a jurisdictional prerequisite to suit in the District Court.

In *Love v. Pullman Co.*, 404 U. S. 522 (1972), we announced a guiding principle for construing the provisions of Title VII. Declining to read literally another filing provision of Title VII, we explained that a technical reading would be “particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.” 404 U. S., at 527. That principle must be applied here as well.

The reasoning of other cases assumes that the filing requirement is not jurisdictional. In *International Union of Electrical Workers v. Robbins & Myers*, 429 U. S. 229 (1976), we rejected the argument that the timely filing requirement should be tolled because the plaintiff had been pursuing a grievance procedure set up in the collective bargaining agreement. We did not reach this decision on the basis that the 180 day period was jurisdictional. Instead, we considered the merits of a series of arguments that grievance procedures should toll the requirement. Such reasoning would have been gratuitous if the filing requirement were a jurisdictional prerequisite.<sup>13</sup>

Similarly, we did not *sua sponte* dismiss the action in *Mohasco Corp. v. Silver*, 447 U. S. 807 (1980) on the basis that the district court lacked jurisdiction because of plaintiff’s failure to comply with a related Title VII time provision. Instead, we merely observed in a footnote that “[p]etitioner did

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<sup>13</sup> In *Robbins & Myers*, we also held that the expanded 180 “limitations period,” enacted by the 1972 amendments, was retroactive. This holding presupposes that the requirement is not jurisdictional. Moreover, in reaching this conclusion, we quoted from *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 315–316 (1945): “[C]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.” Several circuit courts have read *Robbins & Myers* as implicitly approving equitable tolling. *Coke, supra*; *Hart, supra*; *Smith v. American President Lines, Ltd.*, 571 F. 2d 102, 108–109 (CA2 1978).



not assert respondent's failure to file the action within 90 days as a defense." 447 U. S., at 811, n. 9.

By holding compliance with the filing period not to be a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

We therefore reverse the Court of Appeals in No. 78-1545.

### III

In No. 80-951, the Union challenges on several grounds the District Court's authority to award, over the Union's objection, retroactive seniority to the members of Subclass B. We have already rejected the Union's first contention, namely, the District Court had no jurisdiction to award relief to those who had not complied with Title VII's filing requirement. The Union also contends that in any event there has been no finding of discrimination with respect to Class B members and that the predicate for relief under § 706(g) is therefore missing. This contention is also without merit.

The District Court unquestionably found an unlawful discrimination against the plaintiff class, as a whole, and the class at that time had not been subdivided into Subclasses A and B. Summary judgment ran in favor of the entire class, including both those members who had filed timely charges and those who had not. The Court of Appeals affirmed the summary judgment order as well as the finding of a discriminatory employment practice. The court went on, however, to hold that the District Court had no jurisdiction over claims by those who had not met the filing requirement and that those individuals should have been excluded from the class prior to the grant of summary judgment. But as we have now held, that ruling is erroneous. The District Court did have jurisdiction over non-filing class members. Thus, there was no jurisdictional barrier to its finding of discrimination

*DC found  
discrimination  
vs class as  
a whole -  
before it  
was sub-  
divided,  
& CA7 affirmed*



with respect to the entire class. With the reversal of the Court of Appeals judgment in No. 78-1545 and our dismissal of No. 78-1549, which had challenged the affirmance of the summary judgment order, the order that found class-wide discrimination remains intact and is final. The award of retroactive seniority to members of Subclass B as well as Subclass A is not infirm for want of a finding of a discriminatory employment practice.

*Finding of  
class-wide  
discrimination  
remains  
intact*

Equally meritless is the union's contention that retroactive seniority contrary to the collective bargaining agreement should not be awarded over the objection of a union that has not itself been found guilty of discrimination. In *Franks v. Bowman*, 424 U. S. 747, 764 (1976) we read the legislative history of Title VII as giving

“emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole in so far as possible the victims of . . . discrimination . . . .”

While recognizing that back pay was the only remedy specifically mentioned in the provision, we reasoned that without a seniority remedy adequate relief might be denied. We concluded that the class-based seniority relief for identifiable victims of illegal discrimination is a form of relief generally appropriate under § 706(g).

In *Franks*, the District Court had found both that the employer had engaged in discrimination and that the discriminatory practices were perpetuated in the collective bargaining agreements with the unions. 424 U. S., at 751. *International Brotherhood of Teamsters v. United States*, 431 U. S. 324 (1977), however, makes it clear that once there has been a finding of discrimination by the employer, an award of retroactive seniority is appropriate even if there is no finding that the union has also illegally discriminated. In *Teamsters*, the parties agreed to a decree which provided that the



District Court would decide "whether any discriminatees should be awarded additional equitable relief such as retroactive seniority." 431 U. S., at 330, n. 4. Although we held that the union had not violated Title VII by agreeing to and maintaining the seniority system, we nonetheless directed the union to remain in the litigation as a defendant so that full relief could be awarded the victims of the employers post-act discrimination. 431 U.S., at 356, n. 43.<sup>14</sup> Here, as in *Teamsters*, the settlement left to the District Court the final decision as to retroactive seniority.

In resolving the seniority issue, the District Court gave the union all the process that was due it under Title VII in our cases. The union was allowed to intervene. The District Court heard its objections, made appropriate findings, and determined that retroactive seniority should be awarded. The Court of Appeals agreed with that determination, and we have eliminated from our consideration here the question whether on the facts of this case the Court of Appeals and the District Court were in error in this respect.

Accordingly, the judgment in 78-1545 is reversed and the judgment in 80-951 is affirmed.

*So ordered.*

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<sup>14</sup> In noting that the union in *Teamsters* properly remained a defendant in the litigation, we cited to Fed. Rule Civ. Proc. 19(a). The union in this case was not joined under Rule 19 when individuals replaced the union as class representatives, but intervened later. Cf. *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F. 2d 1086, 1095 (CA5 1974) (joinder under Rule 19(a) provides union with full opportunity to participate in the litigation and the formulation of proposed relief, although as practical matter union not play role in litigation until court finds violation of Title VII).



meb 01/04/82

*Revised - Discuss with  
Mary the application  
of Evans*

To: Mr. Justice Powell

From: Mary

In Re: Nos. 78-1549 & 80-951, Zipes v. TWA

The opinion is written fairly narrowly. As an alternative to dissenting on the implications of United Air Lines v. Evans, it might be possible either to concur specially, narrowing the opinion just a little further, or to suggest a slightly narrower approach to section III to Justice White.

As expected, the opinion is not entirely consistent with United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977). Section II is not actually inconsistent, since it holds only that there was no lack of jurisdiction, not that an award of competitive status seniority was appropriate as a matter of substantive Title VII law. The language, especially at p.10, requires careful reading to perceive this distinction, and Evans is never explicitly distinguished. A footnote explaining the distinction might be helpful.

The third section is more troubling. The good thing is that the holding is limited to instances in which there has been a final finding of discrimination. There is, as we discussed earlier, a tension between this holding (award of seniority appropriate because



I don't understand how  
the Evans requirement of "timely  
filing" is met

there has been discrimination) and Evans. In Evans, the Court explained that Franks v. Bowman, 424 U.S. 747 (1976), only dealt with the appropriate remedy after there had been findings of discrimination and of a timely charge:

"When that case reached this Court, the issues relating to the timeliness of the charge and the violation of Title VII had already been decided; we dealt only with a question of remedy. In contrast, in the the case now before us, we do not reach any remedy issue because respondent did not file a timely charge based on her 1968 separation and she has not alleged facts establishing a violation since she was rehired in 1972." Id., at 559 (footnotes ommitted).

Two pre-requisites

Thus, in Evans, the Court indicated that there were two prerequisites to the award of retroactive seniority under the Franks standard: a violation and a timely charge.

It would be possible to affirm the courts below on the narrow ground that there has been, in this case <sup>1</sup> a final finding of a timely charge <sup>2</sup> as well as a final finding of discrimination.

At the top of 13, the opinion explains that, given the disposition of the various appeals, the DC order finding discrimination "remains intact and is final." This "final and intact" finding is an October 18, 1976, summary-judgment order which holds that the no-motherhood policy did violate Title VII. It is final and "intact" (without any remand) with regard to the grant of summary judgment in favor of subclass B because the CA7 stayed its mandate of its decision affirming the grant of summary judgment on the merits, but holding that the claims of subclass B were jurisdictionally out of time.

By that standard of "final and intact" (order not actually modified by formal mandate from CA), there is also a "final and



intact" order that subclass B did file timely claims (using a "continuing-violation"-by-failure-to-re-hire theory). That order is reprinted in petn no. 78-1545, at A21. It was entered on Oct. 15, 1976, three days before entry of summary judgment, and the two orders were appealed to the CA7 together. See CA7 decision in petn no. 78-1545, at A2 & A8. Because the CA7 stayed the mandate in its decision reviewing these orders, see petn in no. 80-951 at 2a, the Oct. 15, 1976, order finding that timely charges had been filed also remains "final and intact."

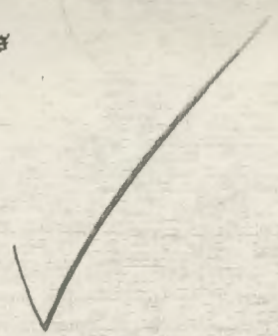
It is, therefore possible to affirm the decisions below, yet remain consistent with Evans. Under this approach, the DC's seniority-award order would be affirmed because it is based on "final and intact" findings of discrimination and of timely charges. On the other hand, this approach may be entirely too technical, and it might be better to dissent, noting that you would remand. Such a dissent could note that there is a "final and intact" finding of timeliness and could even suggest that it is not clear what the majority would have done had that not been true.



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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

January 5, 1982



RE: Nos. 78-1545 and 80-951 Zipes & Independent  
Federation of Flight Attendants v. Trans World  
Airlines, Inc., et al.

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Dear Byron:

I agree.

Sincerely,

A handwritten signature, appearing to be "Bill", is written below the word "Sincerely,".

Justice White

cc: The Conference



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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

January 6, 1982

No. 78-1545 Zipes v. Trans World Airlines  
No. 80-951 Independent Fed. of Flight Attendants  
v. Trans World Airlines, Inc.

Dear Byron,

Please join me in your opinion in the referenced cases.

Sincerely,

*Sandra*

Justice White

Copies to the Conference



meb 01/13/82

<sup>3</sup>  
1/

I am not entirely content with this formalistic resolution of the "timely filing" issue. But, after 12 years of litigation, neither the parties nor the lower courts have even focused on whether the failure to file timely charges should affect the balance of ~~the~~ equities in awarding competitive-status seniority. Perhaps the equities of all of the parties--as well as the form<sup>al</sup> record set forth above--justify the Court's judgment approving the settlement.

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2-22



To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: **JAN 15 1982**

1st DRAFT

Recirculated: \_\_\_\_\_

## SUPREME COURT OF THE UNITED STATES

Nos. 78-1545 AND 80-951

78-1545 ANNE B. ZIPES, ET AL., PETITIONERS  
v.  
TRANS WORLD AIRLINES, INC.

80-951 INDEPENDENT FEDERATION OF FLIGHT  
ATTENDANTS, PETITIONER  
v.  
TRANS WORLD AIRLINES, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[January —, 1982]

JUSTICE POWELL concurring in No. 78-1545 and concurring in the judgment in No. 80-951.

The above cases arise out of the same protracted controversy, and the Court disposes of them in a single opinion. The only question in No. 78-1545 is whether the timely filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit. I agree that timely filing is not jurisdictional and is subject to waiver and estoppel. Accordingly, I join parts I and II of the Court's opinion.

I join only the judgment in No. 80-951. My concern with the Court's opinion is that it does not make clear that a timely charge, as well as a violation of Title VII, is a prerequisite to disturbing rights under a *bona fide* seniority system protected by § 703(h), 42 U. S. C. § 2000 e-2(h).<sup>1</sup> This was

<sup>1</sup> In *Franks v. Bowman*, 424 U. S. 747 (1976), timely charges of discrimi-



made clear in *United Airlines, Inc. v. Evans*, 431 U. S. 553, 559 (1977), a case not discussed in the Court's opinion.<sup>2</sup> I nevertheless concur in the remand of No. 80-951, in which a settlement agreement was approved awarding retroactive competitive-status seniority under the standard of *Franks v. Bowman*, 424 U. S. 747 (1976). This case has been in litigation since 1970, and in view of its complexity it is difficult to be certain as to "what happened and when." I believe, however, that one can conclude that the requirements of *Evans* were met.

As the noted in the Court's opinion, *ante* at —, the District Court's order finding class-wide discrimination is now final and intact. The District Court also entered an order finding that timely charges had been filed for all class members, and that order is similarly final and intact. The timely-charge order was entered on October 15, 1976, three days before the entry of the order finding class-wide discrimination. These orders were consolidated on appeal to the Court of Appeals for the Seventh Circuit. Although the October 18th order, finding discrimination, was affirmed, the Court of Appeals vacated the other order, holding that the members of Subclass B had failed to meet the jurisdictional requirements

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nation had been filed. Relief was awarded on the theory that current employees were merely being placed in the position they would have enjoyed, relative to the victims, had no discrimination ever taken place. In contrast, when the victims of discrimination have slept on their rights, it will often be unfair to award them full retroactive seniority at the expense of employees who may have accrued their present seniority in good faith. When timely charges have not been filed, a District Court should consider these equities in determining whether to award competitive-status seniority, and the presence of a settlement between the employer and the plaintiffs should not affect the balancing of these equities. Under any other rule, employers will be able to settle Title VII actions, in part, by bargaining away the rights of current employees.

<sup>2</sup>The Court cites *United Air Lines v. Evans* twice, see notes 6 and 12 *ante* at — and —; both references are to terms used by the *Evans* Court in describing the timely-filing requirement.



of Title VII because they had not filed timely claims. No district court order was ever actually vacated because, on the motion of the parties, the Court of Appeals stayed its mandate, and the parties then reached a settlement. Today, the Court reverses that portion of the Court of Appeals' judgment that would have vacated the October 15th order. As a result, both the October 15th and October 18th orders, finding timely charges and class-wide discrimination, are now final and intact. I therefore concur in the judgment of the Court affirming the award of retroactive competitive-status seniority under the standard of *Franks v. Bowman*.<sup>3</sup>

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<sup>3</sup> I am not entirely content with this formalistic resolution of the "timely filing" issue. But, after almost 12 years of litigation, neither the parties nor the lower courts have even focused on whether the failure to file timely charges should affect the balance of the equities in awarding competitive-status seniority. Perhaps the equities of all of the parties—as well as the formal record set forth above—justify the Court's judgment approving the settlement.



L.F.R

Mary:

9 of my note 3 - added at  
end - seems OK, lets go  
to Press

No. 78-1545, ZIPS v. TWA &

No. 80-951, INDEPENDENT FEDERATION OF FLIGHT ATTENDENTS

v. TWA

Justice Powell concurring in No. 78-1545 and  
concurring in the judgment in No. 80-951.

The above cases arise out of the same protracted  
controversy, and the Court disposes of them in a single  
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prerequisite <sup>to</sup> ~~in~~ bringing a Title VII suit. I agree that  
✓ ~~it~~ <sup>timely filing</sup> is not jurisdictional and is subject to waiver and  
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Court's opinion.

I join only the judgment in No. 80-951. My concern  
with the Court's opinion is that it does not make clear  
that a timely charge, as well as a violation of Title VII,  
is a prerequisite to disturbing rights under a bona fide



seniority system protected by Section 703(h), 42 U.S.C. §2000 e-2(h).<sup>1</sup> This was made clear in United Airlines, Inc. v. Evans, 431 U.S. 553, 559 (1977), a case not discussed in the Court's opinion.<sup>2</sup> I nevertheless concur in the remand of No. 80-951, in which a settlement agreement was approved awarding retroactive competitive-status seniority under the standard of Franks v. Bowman, 424 U.S. 747 (1976). This case has been in litigation since 1970, and in view of its complexity it is difficult to be certain as to "what happened and when". I believe, however, that one can conclude that the requirements of Evans were met.

*main - a good note*

<sup>1</sup>In Franks v. Bowman, 424 U.S. 747 (1976), timely charges of discrimination had been filed. Relief was awarded on the theory that current employees were merely being placed in the position they would have enjoyed, relative to the victims, had no discrimination ever taken place. In contrast, when the victims of discrimination have slept on their rights, it will often be unfair to award them full retroactive seniority at the expense of ~~innocent~~ employees who *in good faith* may have accrued their present seniority, by ~~performing undesirable jobs~~. When timely charges have not been filed, a District Court should consider these equities in determining whether to award competitive-status seniority, and the presence of a settlement between the employer and the plaintiffs should not affect the balancing of these equities. Under any other rule, employers will be able to settle Title VII actions, in part, by bargaining away the rights of current employees.

<sup>2</sup>The Court cites United Air Lines v. Evans twice, see notes 6 and 12 ante at \_\_\_ and \_\_\_; both references are to terms used by the Evans Court in describing the timely-filing requirement.



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discrimination, are now final and intact. I therefore concur in the judgment of the Court affirming the award of retroactive competitive-status seniority under the standard of Franks v. Bowman. <sup>3]</sup>

3. I am not entirely content with this formalistic resolution of the "timely filing" issue. It is ~~perhaps not~~ certainly arguable that the issue was never thoughtfully addressed in view of the preoccupation of the courts below with the jurisdictional question we decide today in No 78-1545. After 12 years of litigation, however, perhaps the equities of all <sup>of the</sup> parties - as well as the formal record set forth above - justify the Courts' judgment approving the settlement.



Not -- there are  
ready to circulate  
2 small corrections  
on 2, 4, 5

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: JAN 15 1982

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 78-1545 AND 80-951

78-1545 ANNE B. ZIPES, ET AL., PETITIONERS  
v.  
TRANS WORLD AIRLINES, INC.

80-951 INDEPENDENT FEDERATION OF FLIGHT  
ATTENDANTS, PETITIONER  
v.  
TRANS WORLD AIRLINES, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[January —, 1982]

JUSTICE POWELL concurring in No. 78-1545 and concurring in the judgment in No. 80-951.

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<sup>1</sup> In *Franks v. Bowman*, 424 U. S. 747 (1976), timely charges of discrimi-

~~Should we circulate after my co-clerks have read this?~~

Mary



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nation had been filed. Relief was awarded on the theory that current employees were merely being placed in the position they would have enjoyed, relative to the victims, had no discrimination ever taken place. In contrast, when the victims of discrimination have slept on their rights, it will often be unfair to award them full retroactive seniority at the expense of employees who may have accrued their present seniority in good faith. When timely charges have not been filed, a District Court should consider these equities in determining whether to award competitive-status seniority, and the presence of a settlement between the employer and the plaintiffs should not affect the balancing of these equities. Under any other rule, employers will be able to settle Title VII actions, in part, by bargaining away the rights of current employees.

<sup>2</sup>The Court cites *United Air Lines v. Evans* twice, see notes 6 and 12 *ante* at — and —; both references are to terms used by the *Evans* Court in describing the timely-filing requirement.



of Title VII because they had not filed timely claims. No district court order was ever actually vacated because, on the motion of the parties, the Court of Appeals stayed its mandate, and the parties then reached a settlement. Today, the Court reverses that portion of the Court of Appeals' judgment that would have vacated the October 15th order. As a result, both the October 15th and October 18th orders, finding timely charges and class-wide discrimination, are now final and ~~intact~~. I therefore concur in the judgment of the Court affirming the award of retroactive competitive-status seniority under the standard ~~set forth in~~ *Zip v. Bowman*.<sup>3</sup>

LA  
Rather than prolong this  
disruptive litigation, it may  
~~appear to~~ <sup>well</sup> be in the  
best interest of all of  
the parties to approve  
the settlement — as  
the Court's judgment  
does to-day.

<sup>3</sup> I am not entirely content with this formalistic resolution of the "timely filing" issue. But, after almost 12 years of litigation, neither the parties nor the lower courts have ~~even focused on~~ whether the failure to file timely charges should affect the balance of the equities in awarding competitive-status seniority. [Perhaps the equities of all of the parties—as well as the formal record set forth above—justify the Court's judgment approving the settlement.]

*addressed specifically*

A ?



*Mary - add W.H.R.'s name*

Supreme Court of the United States

Washington, D. C. 20543

*& recirculate*

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 18, 1982

Re: Nos. 78-1545 & 80-951 Zipes v. Trans World Airlines

Dear Lewis:

Please join me in your separate concurrence in this case.

Sincerely,

*WHP*

Justice Powell

Copies to the Conference



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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

✓  
January 22, 1982

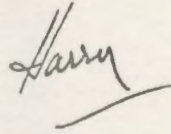
Re: No. 78-1545) - Zipes v. Trans World Airlines, Inc.  
No. 80-951) - Independent Federation of Flight Attendants  
Trans World Airlines, Inc.

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Dear Bryon:

Please join me in your opinion for these cases and in digging  
No. 78-1549.

Sincerely,



Justice White

cc: The Conference



*Mam - addy*

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

CHAMBERS OF  
THE CHIEF JUSTICE

January 28, 1982

Re: No. 78-1545 - Zipes v. Trans World Airlines, Inc.  
80-951 - Independent Federation of Flight  
Attendants v. Trans World Airlines, Inc.

Dear Lewis:

Please show me joining your opinion concurring  
in No. 78-1545 and in the judgment in No. 80-951.

Regards,

*WRB*

Justice Powell

Copies to the Conference



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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

✓  
January 29, 1982

Re: No. 78-1545 - Zipes v. Trans World Airlines  
No. 80-951 - Independent Federation of Flight  
Attendants v. Trans World Airlines

Dear Byron:

Please join me.

Sincerely,

T.M.  
T.M.

Justice White

cc: The Conference



To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

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

Recirculated: FEB 1 1982

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 78-1545 AND 80-951

78-1545 ANNE B. ZIPES, ET AL., PETITIONERS  
v.  
TRANS WORLD AIRLINES, INC.

80-951 INDEPENDENT FEDERATION OF FLIGHT  
ATTENDANTS, PETITIONER  
v.  
TRANS WORLD AIRLINES, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[January —, 1982]

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in No. 78-1545 and concurring in the judgment in No. 80-951.

The above cases arise out of the same protracted controversy, and the Court disposes of them in a single opinion. The only question in No. 78-1545 is whether the timely filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit. I agree that timely filing is not jurisdictional and is subject to waiver and estoppel. Accordingly, I join parts I and II of the Court's opinion.

I join only the judgment in No. 80-951. My concern with the Court's opinion is that it does not make clear that a timely charge, as well as a violation of Title VII, is a prerequisite to disturbing rights under a *bona fide* seniority system protected by § 703(h), 42 U. S. C. § 2000e-2(h).<sup>1</sup> This was made

<sup>1</sup> In *Franks v. Bowman*, 424 U. S. 747 (1976), timely charges of discrimi-



clear in *United Airlines, Inc. v. Evans*, 431 U. S. 553, 559 (1977), a case not discussed in the Court's opinion.<sup>2</sup> I nevertheless concur in the remand of No. 80-951, in which a settlement agreement was approved awarding retroactive competitive-status seniority under the standard of *Franks v. Bowman*, 424 U. S. 747 (1976). This case has been in litigation since 1970, and in view of its complexity it is difficult to be certain as to "what happened and when." I believe, however, that one can conclude that the requirements of *Evans* were met.

As noted in the Court's opinion, *ante*, at —, the District Court's order finding class-wide discrimination is now final. The District Court also entered an order finding that timely charges had been filed for all class members, and that order is similarly final. The timely-charge order was entered on October 15, 1976, three days before the entry of the order finding class-wide discrimination. These orders were consolidated on appeal to the Court of Appeals for the Seventh Circuit. Although the October 18th order, finding discrimination, was affirmed, the Court of Appeals vacated the other order, holding that the members of Subclass B had failed to meet the jurisdictional requirements of Title VII because

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nation had been filed. Relief was awarded on the theory that current employees were merely being placed in the position they would have enjoyed, relative to the victims, had no discrimination ever taken place. In contrast, when the victims of discrimination have slept on their rights, it will often be unfair to award them full retroactive seniority at the expense of employees who may have accrued their present seniority in good faith. When timely charges have not been filed, a District Court should consider these equities in determining whether to award competitive-status seniority, and the presence of a settlement between the employer and the plaintiffs should not affect the balancing of these equities. Under any other rule, employers will be able to settle Title VII actions, in part, by bargaining away the rights of current employees.

<sup>2</sup>The Court cites *United Air Lines v. Evans* twice, see notes 6 and 12 *ante*, at — and —; both references are to terms used by the *Evans* Court in describing the timely-filing requirement.



they had not filed timely claims. No district court order was ever actually vacated because, on the motion of the parties, the Court of Appeals stayed its mandate, and the parties then reached a settlement. Today, the Court reverses that portion of the Court of Appeals' judgment that would have vacated the October 15th order. As a result, both the October 15th and October 18th orders, finding timely charges and class-wide discrimination, are now final. I therefore concur in the judgment of the Court affirming the award of retroactive competitive-status seniority under the standard of *Franks v. Bowman*.<sup>3</sup>

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<sup>3</sup> I am not entirely content with this formalistic resolution of the "timely filing" issue. But, after almost 12 years of litigation, neither the parties nor the courts have addressed specifically whether the failure to file timely charges should affect the balance of the equities in awarding competitive-status seniority. Rather than prolong this disruptive litigation, it may well be in the best interest of all of the parties to approve the settlement—as the Court's judgment does today.



To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
✓ Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT,  
SEE PAGES:

From: Justice White

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

Recirculated: 17 FEB 1982

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 78-1545 and 80-951

78-1545 ANNE B. ZIPES, ET AL., PETITIONERS  
v.  
TRANS WORLD AIRLINES, INC.

80-951 INDEPENDENT FEDERATION OF FLIGHT  
ATTENDANTS, PETITIONER  
v.  
TRANS WORLD AIRLINES, INC., ET AL.

*9'ne  
written  
separately*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[February —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

The primary question in these cases is whether the statutory time limit for filing charges under Title VII of the Civil Rights Act of 1964, 78 Stat. 235, as amended, 42 U. S. C. § 2000e *et seq.*, (1970 ed.) is a jurisdictional prerequisite to a suit in the District Court. Secondarily, we resolve a dispute as to whether retroactive seniority was a proper remedy in this Title VII case.

### I

In 1970, the Air Line Stewards and Stewardesses Association (ALSSA), then the collective bargaining agent of Trans World Airlines (TWA) flight attendants, brought a class action alleging that TWA practiced unlawful sex discrimination in violation of Title VII by its policy of grounding all female flight cabin attendants who became mothers, while their male



counterparts who became fathers were permitted to continue flying. After collective bargaining eliminated the challenged practice prospectively, the parties in the case reached a tentative settlement. The settlement, which provided neither backpay nor retroactive seniority, was approved by the District Court. The Court of Appeals for the Seventh Circuit, however, found the union to be an inadequate representative of the class because of the inherent conflict between the interests of current and former employees. It remanded the case with instructions that the District Court name individual members of the class to replace ALSSA as the class representative.<sup>1</sup> *Air Line Stewards and Stewardesses Association v. American Airlines Inc.*, 490 F. 2d 636 (CA7 1973).

Upon remand, petitioners in No. 78-1545 were appointed as class representatives. TWA moved to amend its answer to assert that the claims of plaintiffs and other class members were barred by Title VII's "statute of limitations" because they had failed to file charges with the Equal Employment Opportunity Commission (EEOC) within the statutory time limit. 1 App. 89a.<sup>2</sup> Although the District Court granted the motion to amend, it noted that the "delay in pleading the defense of limitations may well ultimately constitute a waiver of the defense." 1 App. 101a.

Subsequently, on October 15, 1976, the District Court denied TWA's motion to exclude class members who had not

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<sup>1</sup>The class was defined as all female flight cabin attendants who were terminated from employment with TWA on or after July 2, 1965 for reasons of pregnancy. The Court of Appeals assumed the class to include only those who would have resumed flight duty after becoming mothers but for TWA's policy. *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142, 1147, & n. 9 (CA7 1978). The class thus included both former employees & current employees, that is, both those who declined and those who accepted ground positions.

<sup>2</sup>When suit was filed, 42 U. S. C. § 2000e-5(d) (1970 ed.) required charges to be filed within 90 days of the alleged unlawful employment practice. In 1972, this provision was amended to extend the time limit to 180 days and is now codified as § 2000e-5(e).



filed timely charges with the EEOC. In support of its motion, TWA argued that instead of an affirmative defense analogous to a statute of limitations, timely filing with the EEOC is a jurisdictional prerequisite not subject to waiver by any action of the defendants. While the District Court agreed that the filing requirements of Title VII are jurisdictional, it denied the motion on the basis that any violation by the airlines continued against all the class members until the airline changed the challenged policy. 1 App. 131a-32a. On October 18, 1974, the District Court granted the motion of the plaintiff class for summary judgment on the issue of TWA's liability for violating Title VII. 1 App. 133a-134a.

The Court of Appeals affirmed the order of October 18, 1976, granting summary judgment on liability, expressly holding that "TWA's no motherhood policy . . . provides a clear example of the discrimination prohibited by § 2000e-2(a)." *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142, 1145 (CA7 1978). It declined, however, "to extend the continuing violation theory, as did the district court, so as to include in the plaintiff class those employees who were permanently terminated more than 90 days before the filing of EEOC charges." *Id.*, at 1149.

The Court of Appeals went on to hold that timely filing of EEOC charges was a jurisdictional prerequisite. Because TWA could not waive the timely filing requirement, the Court of Appeals found that approximately 92% of the plaintiffs' claims were jurisdictionally barred by the failure of those plaintiffs to have filed charges of discrimination with the EEOC within 90 days of the alleged unlawful employment practice. The Court of Appeals, however, stayed its mandate pending the filing of petitions in this Court. Petitions for certiorari were filed by the plaintiff class, No. 78-1545, and by TWA, No. 78-1549. This Court granted a motion to defer consideration of the petitions pending completion of settlement proceedings in the District Court.

In connection with the settlement proceedings, the District



Court designated two subclasses. Subclass A, consisting of some 30 women, comprised those who were terminated on or after March 2, 1970, as well as those who were discharged earlier, but who had accepted reinstatement in ground duty positions. Subclass B, numbering some 400 women, covered all other members of the class and consisted of those whose claims the Court of Appeals had found to be jurisdictionally barred for failure to satisfy the timely filing requirement. 2 App. 3.

The proposed settlement divided three million dollars between the two groups. It also provided each class member with full company and union seniority from the date of termination. The agreement specified that "in the event of the timely objection of any interested person, it is agreed that the amount of seniority and credit for length of service for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g),<sup>3</sup> and all other applicable provisions of law, without contest or objection by TWA." App. to Pet. for Cert. in No. 80-951, p. 29a.

The Independent Federation of Flight Attendants (union), which had replaced ALSSA as the collective bargaining agent for the flight attendants, was permitted to intervene and to object to the settlement. On the basis that the Court of Appeals had not issued the mandate in its jurisdictional decision, the District Court rejected the union's challenge to its jurisdiction over Subclass B. App. to Pet. for Cert. in No.

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<sup>3</sup> Section 706(g) of Title VII, 78 Stat. 253, as amended, 42 U. S. C. § 2000e-5(g) (1976 ed) provides:

"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 . . . , or any other equitable relief as the court deems appropriate. . . ."



80-951, pp. 14a-15a. After holding three days of hearing, the District Court approved the settlement and awarded competitive seniority. It explicitly found that full restoration of retroactive seniority would not have an unusual adverse impact upon currently employed flight attendants in any way atypical of Title VII cases. App. to Pet. for Cert. in No. 80-951, pp. 18a-19a.

The union appealed. It argued that, because of the Court of Appeals' earlier opinion, the District Court lacked jurisdiction to approve the settlement or order retroactive seniority with respect to Subclass B. The Court of Appeals affirmed, reasoning that "the principles favoring settlement of class action law suits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action." *Air Line Stewards and Stewardesses Assn. v. Trans World Airlines*, 630 F. 2d 1164, 1169 (CA7 1980). It further explained that the question of jurisdiction as to Subclass B had not been finally determined because a challenge to its decision was pending before this Court and that the Courts of Appeals were split on the issue. The Court of Appeals noted that the district court clearly had subject matter jurisdiction over the claims of Subclass A. It concluded, "Where, as here, the jurisdictional question is not settled with finality, parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement that is otherwise appropriate for district court approval." *Ibid.*

The Court of Appeals also affirmed the award of seniority. According to the court, the settlement served the public policy of remedying past acts of sex discrimination and the consequences of those past act. Moreover, "[t]he right to have its objections heard does not, of course, give the intervenor the right to block any settlement to which it objects." *Ibid.*<sup>4</sup>

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<sup>4</sup>The Court of Appeals relied on language in *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 779, n. 41 (1976):

"[D]istrict courts should take as their starting point the presumption in



The union petitioned for certiorari, No. 80-951. We granted its petition together with the petition in No. 78-1545 and No. 78-1549, — U. S. —, but later removed the TWA case, No. 78-1549,<sup>5</sup> from the argument docket and limited the grant in No. 80-951. — U. S. —.

## II

The single question in No. 78-1545 is whether the timely filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit in federal court or whether the requirement is subject to waiver and estoppel. In reaching its decision that the requirement is jurisdictional, the Court of Appeals for the Seventh Circuit relied on its reading of the statutory language, the absence of any indication to the contrary in the legislative history, and references in several of our cases to the 90-day filing requirement as “jurisdictional.”<sup>6</sup> Other Courts of Appeals that have examined the same materials have reached the opposite conclusion.<sup>7</sup>

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favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases.”

<sup>5</sup> In No. 78-1549, TWA contends (a) that the Court of Appeals erred in affirming summary judgment for plaintiffs on the issue of liability, (b) that TWA should be required to grant only prospective relief to plaintiffs, and (c) that the Court of Appeals erred in defining the subclass of plaintiffs who had filed timely charges with the EEOC. In view of our decision in No. 78-1545 and No. 80-951, we now dismiss the petition in No. 78-1549 as improvidently granted.

<sup>6</sup> See *Electrical Workers v. Robbins & Myers*, 429 U. S. 229, 240 (1976); *United Air Lines, Inc. v. Evans*, 431 U. S. 553, 555, n. 4 (1977); *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 798 (1973).

<sup>7</sup> See *Carlile v. South Routt School District Re 3-J*, 652 F. 2d 981 (CA10 1981); *Coke v. General Adjustment Bureau, Inc.*, 640 F. 2d 584 (CA5 1981); *Leake v. University of Cincinnati*, 605 F. 2d 255 (CA6 1979); *Hart v. J.T. Baker Chemical Co.*, 598 F. 2d 829 (CA3 1979); *Laffey v. Northwest Airlines, Inc.*, 567 F. 2d 429 (CA9 1976).



We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.<sup>8</sup> The structure of Title VII, the congressional policy underlying it, and the reasoning of our cases all lead to this conclusion.

The provision granting district courts jurisdiction under Title VII, 42 U. S. C. § 2000e-5(e) and (f) (1974), does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC.<sup>9</sup> It contains no reference to the timely filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the the dis-

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<sup>8</sup> One of the questions on which we granted certiorari in No. 80-951 was whether the Court of Appeals erred in affirming the District Court's approval of the settlement of jurisdictionally barred claims. In reaching its decision, the Court of Appeals for the Seventh Circuit explicitly declined to follow *McArthur v. Southern Airway*, 569 F. 2d 276 (CA5 1978) (en banc). *Airlines Stewards and Stewardesses Assn. v. TWA*, 630 F. 2d, at 1168-1169. In *McArthur*, the Court of Appeals for the Fifth Circuit reversed the approval of a settlement agreement in a Title VII class action, holding that the District Court lacked jurisdiction because no plaintiff had filed a timely charge of discrimination with the EEOC. Because of our holding in No. 78-1545 that timely filing with the EEOC is not a jurisdictional prerequisite, this issue need not be resolved.

<sup>9</sup> 42 U. S. C. § 2000e-5(f)(3), for example, reads:

"Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. . . ."



strict courts.<sup>10</sup> The legislative history of the filing provision is sparse, but Senator Humphrey did characterize the time period for filing a claim as a “period of limitations,” 110 Cong. Rec. 12723, and Senator Case described its purpose as preventing the pressing of “stale” claims, 110 Cong. Rec. 7243, the end served by a statute of limitations.

Although subsequent legislative history is not dispositive, see *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U. S. 572, 596 (1980); *Cannon v. University of Chicago*, 441 U. S. 677, 686 n. 7 (1979), the legislative history of the 1972 amendments also indicates that Congress intended the filing period to operate as a statute of limitations instead of a jurisdictional requirement. In the Final Conference Committee section-by-section analysis of H. R. 1745, The Equal Opportunity Act of 1972, 118 Cong. Rec. 7166, 7167, the Committee not only termed the filing period a “time limitation,” but explained:

“This subsection as amended provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection.”<sup>11</sup>

<sup>10</sup> Section 2000e-5(e) (1976), the amended version of the filing provision, reads simply: “A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . .”

<sup>11</sup> The Senate Labor Committee’s Section by Section analysis of the Amendments explained that “[t]his subsection would permit . . . a limitation period similar to that contained in the Labor-Management Relations Act, as amended.” S. Rep. No. 415, 92d Cong., 1st Sess. 36-37 (1971). We have recognized that the National Labor Relations Act was “the model for Title VII’s remedial provisions,” *Teamsters v. United States*, 431 U. S. 324, 366 (1977). Because the time requirement for filing an unfair labor practice charge under the National Labor Relations Act operates as a stat-



This result is entirely consistent with prior case law. Although our cases contain scattered references to the timely filing requirement as jurisdictional, the legal character of the requirement was not at issue in those case, and as or more often in the same or other cases, we have referred to the provision as a limitations statute.<sup>12</sup>

ute of limitations subject to recognized equitable doctrines and not a restriction of the jurisdiction of the National Labor Relations Board, see *NLRB v. Local 264, Laborers' Int'l Union*, 529 F. 2d 778, 781-785 (CA8 1976); *Shumate v. NLRB*, 452 F. 2d 717, 720 (CA4 1971); *NLRB v. A. E. Nettleton Co.*, 241 F. 2d 130, 133 (CA2 1957); *NLRB v. Itasca Cotton Mfg. Co.*, 179 F. 2d 504, 506-507 (CA5 1950), the time limitations under Title VII should be treated likewise.

Moreover, when Congress in 1978 revised the filing requirement of the Age Discrimination in Employment Act of 1967, Stat. 607, 29 U. S. C. §§ 621 *et seq.*, which was modeled after Title VII, see *Oscar Mayer & Co. v. Evans*, 441 U. S. 750 (1979), the House Conference report explicitly stated that "the 'charge' requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act." House Conference Report No. 950, 95th Cong., 2d Sess., at 12, reprinted in 1978 U. S. Code Cong & Admin. News 504, 534 (footnote omitted).

<sup>12</sup> As the Court of Appeals for the Fifth Circuit points out in its opinion in *Coke*, 640 F. 2d, at 588-589, references to the filing requirement as a statute of limitations have come to dominate in our opinions:

"The trend of the Supreme Court cases is also significant. In the early cases, the Court in dicta referred to such time provisions using the label jurisdictional prerequisite. *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 . . . (1973); *Alexander v. Gardner-Denver Co.*, 415 U. S. 36 . . . (1974). In the 1976 *Robbins & Myers* decision the jurisdictional label was used once, but there were numerous references to 'tolling the limitations period,' 429 U. S. at 239, . . . and other labels obviously referring to a statute of limitations, as opposed to subject matter jurisdiction. See also *United Air Lines v. Evans*, 431 U. S. 553, . . . (1977), in which both labels are used. From and after late 1977, all nine justices have concurred in opinions containing dicta using the limitations label to the exclusion of the jurisdictional label. *Occidental Life Insurance Company v. EEOC*, 432 U. S. 355, 371-372, . . . (1977); *United Air Lines, Inc. v. McDonald*, 432 U. S.



More weighty inferences are to be drawn from other cases, however. *Franks v. Bowman Transportation Co., Inc.*, 424 U. S. 747 (1976), was a Title VII suit against an employer and a union. The District Court denied relief for unnamed class members on the ground that those individuals had not filed administrative charges under the provisions of Title VII and that relief for them was thus not appropriate. The Court of Appeals did not disturb this ruling, but we reversed, saying,

“The District Court stated two reasons for its denial of seniority relief for the unnamed class members. The first was that those individuals had not filed administrative charges under the provision of Title VII with the Equal Employment Opportunity Commission and therefore class relief of this sort was not appropriate. We rejected this justification for denial of class-based relief in the context of backpay awards in *Albemarle Paper*, [422 U. S. 405 (1975)] and . . . reject it here. This justification for denying class-based relief in Title VII suits has been unanimously rejected by the courts of appeals, and Congress ratified that construction by the 1972 amendments. . . .” 424 U. S., at 771 [footnote omitted].

If the timely filing requirement were to limit the jurisdiction of the district court to those claimants who have filed timely charges with the EEOC, the district courts in *Franks* and *Albemarle* would have been without jurisdiction to adjudicate the claims of those who had not filed as well as without jurisdiction to award them seniority. We did not so hold. Furthermore, we noted that Congress had approved the Court of Appeals cases that awarded relief to class members who had not exhausted administrative remedies before

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385, 391-391 . . . (1980); *Mohasco Corp. v. Silver*, 447 U. S. 807, 818-823. . . . (1980), *Delaware State College v. Ricks*, — U. S. —, . . . (1980).”



the EEOC. It is evident that in doing so, Congress necessarily adopted the view that the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the District Court.

In *Love v. Pullman Co.*, 404 U. S. 522 (1972), we announced a guiding principle for construing the provisions of Title VII. Declining to read literally another filing provision of Title VII, we explained that a technical reading would be “particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.” 404 U. S., at 527. That principle must be applied here as well.

The reasoning of other cases assumes that the filing requirement is not jurisdictional. In *Electrical Workers v. Robbins & Myers*, 429 U. S. 229 (1976), we rejected the argument that the timely filing requirement should be tolled because the plaintiff had been pursuing a grievance procedure set up in the collective bargaining agreement. We did not reach this decision on the basis that the 180 day period was jurisdictional. Instead, we considered the merits of a series of arguments that grievance procedures should toll the requirement. Such reasoning would have been gratuitous if the filing requirement were a jurisdictional prerequisite.<sup>13</sup>

Similarly, we did not *sua sponte* dismiss the action in

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<sup>13</sup> In *Robbins & Myers*, we also held that the expanded 180 “limitations period,” enacted by the 1972 amendments, was retroactive. 429 U. S. at 244. This holding presupposes that the requirement is not jurisdictional. Moreover, in reaching this conclusion, we quoted from *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 315–316 (1945): “[C]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment.” Several circuit courts have read *Robbins & Myers* as implicitly approving equitable tolling. *Coke v. General Board of Adjustment*, 640 F. 2d 584, 588 (CA5 1981); *Hart v. J. T. Baker Chemical Co.*, 598 F. 2d 829, 833 (CA3 1979); *Smith v. American President Lines, Ltd.*, 571 F. 2d 102, 108–109 (CA2 1978).



*Mohasco Corp. v. Silver*, 447 U. S. 807 (1980) on the basis that the district court lacked jurisdiction because of plaintiff's failure to comply with a related Title VII time provision. Instead, we merely observed in a footnote that "[p]etitioner did not assert respondent's failure to file the action within 90 days as a defense." 447 U. S., at 811, n. 9.

By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

We therefore reverse the Court of Appeals in No. 78-1545.

### III

In No. 80-951, the union challenges on several grounds the District Court's authority to award, over the union's objection, retroactive seniority to the members of Subclass B. We have already rejected the union's first contention, namely, the District Court had no jurisdiction to award relief to those who had not complied with Title VII's filing requirement. The union also contends that in any event there has been no finding of discrimination with respect to Class B members and that the predicate for relief under § 706(g) is therefore missing. This contention is also without merit.

The District Court unquestionably found an unlawful discrimination against the plaintiff class, and the class at that time had not been subdivided into Subclasses A and B. Summary judgment ran in favor of the entire class, including both those members who had filed timely charges and those who had not. The Court of Appeals affirmed the summary judgment order as well as the finding of a discriminatory employment practice. The court went on, however, to hold that the District Court had no jurisdiction over claims by those who had not met the filing requirement and that those individuals should have been excluded from the class prior to



the grant of summary judgment. But as we have now held, that ruling is erroneous. The District Court did have jurisdiction over non-filing class members. Thus, there was no jurisdictional barrier to its finding of discrimination with respect to the entire class. With the reversal of the Court of Appeals judgment in No. 78-1545 and our dismissal of No. 78-1549, which had challenged the affirmance of the summary judgment order, the order that found class-wide discrimination remains intact and is final. The award of retroactive seniority to members of Subclass B as well as Subclass A is not infirm for want of a finding of a discriminatory employment practice.

Equally meritless is the union's contention that retroactive seniority contrary to the collective bargaining agreement should not be awarded over the objection of a union that has not itself been found guilty of discrimination. In *Franks v. Bowman*, 424 U. S. 747, 764 (1976) we read the legislative history of Title VII as giving

"emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole in so far as possible the victims of . . . discrimination . . . ."

While recognizing that back pay was the only remedy specifically mentioned in the provision, we reasoned that adequate relief might be denied without a seniority remedy. We concluded that the class-based seniority relief for identifiable victims of illegal discrimination is a form of relief generally appropriate under § 706(g).

In *Franks*, the District Court had found both that the employer had engaged in discrimination and that the discriminatory practices were perpetuated in the collective bargaining agreements with the unions. 424 U. S., at 751. *Teamsters v. United States*, 431 U. S. 324 (1977), however, makes it clear that once there has been a finding of discrimination by



the employer, an award of retroactive seniority is appropriate even if there is no finding that the union has also illegally discriminated. In *Teamsters*, the parties agreed to a decree which provided that the District Court would decide "whether any discriminatees should be awarded additional equitable relief such as retroactive seniority." 431 U. S., at 331, n. 4. Although we held that the union had not violated Title VII by agreeing to and maintaining the seniority system, we nonetheless directed the union to remain in the litigation as a defendant so that full relief could be awarded the victims of the employers post-act discrimination. 431 U. S., at 356, n. 43.<sup>14</sup> Here, as in *Teamsters*, the settlement left to the District Court the final decision as to retroactive seniority.

In resolving the seniority issue, the District Court gave the union all the process that was due it under Title VII in our cases. The union was allowed to intervene. The District Court heard its objections, made appropriate findings, and determined that retroactive seniority should be awarded. The Court of Appeals agreed with that determination, and we have eliminated from our consideration here the question whether on the facts of this case the Court of Appeals and the District Court were in error in this respect.

Accordingly, the judgment in 78-1545 is reversed and the judgment in 80-951 is affirmed.

*So ordered.*

JUSTICE STEVENS did not participate in consideration or decision of these cases.

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<sup>14</sup> In noting that the union in *Teamsters* properly remained a defendant in the litigation, we cited to Fed. Rule Civ. Proc. 19(a). The union in this case was not joined under Rule 19 when individuals replaced the union as class representatives, but intervened later. Cf. *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F. 2d 1086, 1095 (CA6 1974) (joinder under Rule 19(a) provides union with full opportunity to participate in the litigation and the formulation of proposed relief, although as practical matter union not play role in litigation until court finds violation of Title VII).



To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

Changes 2,3

From: Justice Powell

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

Recirculated: JAN 18 1982

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 78-1545 AND 80-951

78-1545 ANNE B. ZIPES, ET AL., PETITIONERS  
v.  
TRANS WORLD AIRLINES, INC.

80-951 INDEPENDENT FEDERATION OF FLIGHT  
ATTENDANTS, PETITIONER  
v.  
TRANS WORLD AIRLINES, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[January —, 1982]

JUSTICE POWELL concurring in No. 78-1545 and concurring in the judgment in No. 80-951.

The above cases arise out of the same protracted controversy, and the Court disposes of them in a single opinion. The only question in No. 78-1545 is whether the timely filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit. I agree that timely filing is not jurisdictional and is subject to waiver and estoppel. Accordingly, I join parts I and II of the Court's opinion.

I join only the judgment in No. 80-951. My concern with the Court's opinion is that it does not make clear that a timely charge, as well as a violation of Title VII, is a prerequisite to disturbing rights under a *bona fide* seniority system protected by § 703(h), 42 U. S. C. § 2000e-2(h).<sup>1</sup> This was made

<sup>1</sup> In *Franks v. Bowman*, 424 U. S. 747 (1976), timely charges of discrimi-



clear in *United Airlines, Inc. v. Evans*, 431 U. S. 553, 559 (1977), a case not discussed in the Court's opinion.<sup>2</sup> I nevertheless concur in the remand of No. 80-951, in which a settlement agreement was approved awarding retroactive competitive-status seniority under the standard of *Franks v. Bowman*, 424 U. S. 747 (1976). This case has been in litigation since 1970, and in view of its complexity it is difficult to be certain as to "what happened and when." I believe, however, that one can conclude that the requirements of *Evans* were met.

As noted in the Court's opinion, *ante*, at —, the District Court's order finding class-wide discrimination is now final. The District Court also entered an order finding that timely charges had been filed for all class members, and that order is similarly final. The timely-charge order was entered on October 15, 1976, three days before the entry of the order finding class-wide discrimination. These orders were consolidated on appeal to the Court of Appeals for the Seventh Circuit. Although the October 18th order, finding discrimination, was affirmed, the Court of Appeals vacated the other order, holding that the members of Subclass B had failed to meet the jurisdictional requirements of Title VII because

nation had been filed. Relief was awarded on the theory that current employees were merely being placed in the position they would have enjoyed, relative to the victims, had no discrimination ever taken place. In contrast, when the victims of discrimination have slept on their rights, it will often be unfair to award them full retroactive seniority at the expense of employees who may have accrued their present seniority in good faith. When timely charges have not been filed, a District Court should consider these equities in determining whether to award competitive-status seniority, and the presence of a settlement between the employer and the plaintiffs should not affect the balancing of these equities. Under any other rule, employers will be able to settle Title VII actions, in part, by bargaining away the rights of current employees.

<sup>2</sup>The Court cites *United Air Lines v. Evans* twice, see notes 6 and 12 *ante*, at — and —; both references are to terms used by the *Evans* Court in describing the timely-filing requirement.



they had not filed timely claims. No district court order was ever actually vacated because, on the motion of the parties, the Court of Appeals stayed its mandate, and the parties then reached a settlement. Today, the Court reverses that portion of the Court of Appeals' judgment that would have vacated the October 15th order. As a result, both the October 15th and October 18th orders, finding timely charges and class-wide discrimination, are now final. I therefore concur in the judgment of the Court affirming the award of retroactive competitive-status seniority under the standard of *Franks v. Bowman*.<sup>3</sup>

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<sup>3</sup> I am not entirely content with this formalistic resolution of the "timely filing" issue. But, after almost 12 years of litigation, neither the parties nor the courts have addressed specifically whether the failure to file timely charges should affect the balance of the equities in awarding competitive-status seniority. Rather than prolong this disruptive litigation, it may well be in the best interest of all of the parties to approve the settlement—as the Court's judgment does today.



*Announced* . . . . ., 19...

TWA

Grant

[illegible]



pg 1

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

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

Recirculated: JAN 19 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-1545 AND 80-951

78-1545 ANNE B. ZIPES, ET AL., PETITIONERS  
v.  
TRANS WORLD AIRLINES, INC.

80-951 INDEPENDENT FEDERATION OF FLIGHT  
ATTENDANTS, PETITIONER  
v.  
TRANS WORLD AIRLINES, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[January —, 1982]

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins,  
concurring in No. 78-1545 and concurring in the judgment in  
No. 80-951.

The above cases arise out of the same protracted contro-  
versy, and the Court disposes of them in a single opinion.  
The only question in No. 78-1545 is whether the timely filing  
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<sup>1</sup> In *Franks v. Bowman*, 424 U. S. 747 (1976), timely charges of discrimi-



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they had not filed timely claims. No district court order was ever actually vacated because, on the motion of the parties, the Court of Appeals stayed its mandate, and the parties then reached a settlement. Today, the Court reverses that portion of the Court of Appeals' judgment that would have vacated the October 15th order. As a result, both the October 15th and October 18th orders, finding timely charges and class-wide discrimination, are now final. I therefore concur in the judgment of the Court affirming the award of retroactive competitive-status seniority under the standard of *Franks v. Bowman*.<sup>3</sup>

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<sup>3</sup> I am not entirely content with this formalistic resolution of the "timely filing" issue. But, after almost 12 years of litigation, neither the parties nor the courts have addressed specifically whether the failure to file timely charges should affect the balance of the equities in awarding competitive-status seniority. Rather than prolong this disruptive litigation, it may well be in the best interest of all of the parties to approve the settlement—as the Court's judgment does today.



GRANT  
Schwartz

OK

February 19, 1982 Conference  
List 5, Sheet 6

No. 78-1545

ZIPES

v.

TRANS WORLD AIRLINES

No. 80-951

IND. FED. OF FLIGHT ATTENDANTS

v.

TRANS WORLD AIRLINES

Motion of Respondent for  
Leave to File Supplemental  
Brief after Argument

(Same)

SUMMARY: Arguments were heard on these consolidated cases on December 2, 1981. On January 25 the Court granted petr's motion for leave to file a supplemental brief (Stevens, J., not participating). In that brief, the Court was urged to consider a recent CA 5 decision, United States v. Miami, No. 77-1856 which, according to petr, impacts on the issue of entering a consent decree over objection

Grant?

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of a union whose contract rights are adversely affected. Resp now also moves for leave to file a supplemental brief in which it addresses the Miami case and the recent settlement of United States v. AT&T.

DISCUSSION: The motion is in compliance with Rule 35.5 and should be granted.

There is no response.

2/2/82

Schlueter

Miami Op. in Petr's  
Supp. Brief

PJC



February 22, 1982

CHAMBERS OF  
JUSTICE BYRON R. WHITE

MEMORANDUM TO THE CONFERENCE

Cases Held for No. 78-1545 and No. 80-951 -  
Zipes v. Trans World Airlines

No. 81-373: Bridgeport Firefighters v. Association Against  
Discrimination

No. 81-374: City of Bridgeport v. Association Against  
Discrimination

Both these cases involve a Title VII suit for discrimination against minority applicants for firefighter jobs through the use of a written examination. CA2 upheld the District Court's remedial order against an attack, inter alia, that the city could not be held liable for discriminatory hiring based on the 1971 exam because the last such hirings occurred on May 2, 1973, and resps filed their first EEOC charges later than the 300 days permitted under §706(e), the timely filing provision applicable to complaints instituted before a state agency. The court explained that the 1971 exam and any hirings based on that exam were not isolated acts of discrimination, but part of a continuous policy of discrimination. The district court not only found a "clear-cut pattern of long-continued and egregious racial discrimination," but also made express findings as to several discriminatory acts that occurred within 300 days of the filing. The CA concluded that all of the claims were timely.

These cases were held for the possibility that we would hold Title VII's timely filing requirements to be jurisdictional or that we would address the continuing violation theory in No. 78-1545. Because we have held that timely filing is not a jurisdictional prerequisite to a Title VII suit and have dismissed the writ of certiorari in No. 78-1545 as improvidently granted, I recommend denying the petitions in these cases.

*BH*



LFP/vde

January 12, 1982

78-1545 ZIPS v. TWA

80-951 INDEPENDENT FEDERATION OF FLIGHT ATTENDENTS v.

TWA

Justice Powell concurring in 78-1545 and concurring  
in the judgment in 80-951.

The above cases arise out of the same protracted  
controversy, and the Court disposes of them in a single  
opinion. The only question in 78-1545 is whether the  
timely filing of an EEOC charge is a jurisdictional  
prerequisite in bringing a Title VII suit. I agree that  
it is not jurisdictional and <sup>is</sup> subject to waiver an<sup>d</sup>



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re-read II. Does it<sup>2</sup>  
address only the  
the Q in 78-1545?

estoppel. Accordingly, I join parts I and II of the  
Court's opinion.

I join only the judgment in 80-951. My concern with  
the Court's opinion is that it does not make clear that a  
timely charge, as well as a violation of Title VII, is a  
prerequisite to disturbing rights under a bona fide  
seniority system protected by Section 703(h), 42 U.S.C.  
Section 2000 e-2(h). This was made clear in United  
Airlines, Inc. v. Evans, 431 U.S. 553, 559 (1977), a case

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92 this  
correct →

not cited in the Court's opinion. I nevertheless concur  
in the remand of 80-951, <sup>in which</sup> ~~that approves~~ <sup>agreement</sup> a settlement <sup>order</sup>  
<sup>was approved</sup> awarding retroactive competitive - status seniority under  
the standard of Franks v. Bowman, 428<sup>4</sup> U.S. 747 (1976).

This case has been in litigation since 19<sup>70</sup><sub>6</sub> (2), and in



view of its complexity it is difficult to be certain as to "what happened and when". I believe, however, that one can conclude that the requirements of Evans were met.

In its order of October 15, 1976, the District Court found that timely charges had been filed for all class members. That order was appealed to the Court of Appeals for the Seventh Circuit with the appeal of the October 18, 1976, order which found that the defendant had discriminated against the entire plaintiff class. Although the October 18th order was affirmed, the Court of Appeals vacated the October 15th order, holding that the members of Subclass B had failed to meet the jurisdictional requirements of Title VII because they had not filed timely claims. But the mandate of the Court of

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be sure  
what we  
are talking  
about.



Appeals never issued. Today, the Court reverses this aspect of the Court of Appeals' judgment. The October 15, 1976, and October 18, 1976, orders of the District Court, finding timely charges and discrimination, are now final and intact. I therefore concur in the judgment of the Court affirming the award of retroactive competitive-status seniority under the standard of Franks v. Bowman.



January 22, 1982 Conference  
List 3, Sheet 3

No. 80-951

IND. FED. OF FLIGHT  
ATTENDANTS

v.

TRANS WORLD AIRLINES

See Memorandum No. 78-1545.

1/19/82

Caldwell

Motion of Petitioner in  
No. 80-951 for Leave to  
File a Supplemental Brief  
after Argument







MS  
January 22, 1982 Conference  
List 3, Sheet 3

No. 78-1545

ZIPES

v.

TRANS WORLD AIRLINES

No. 80-951

IND. FED. OF FLIGHT  
ATTENDANTS

v.

TRANS WORLD AIRLINES

GRANT  
Caldwell  
G  
Motion of Petitioner in  
No. 80-951 for Leave to  
File a Supplemental Brief  
after Argument

(Same)

SUMMARY: On December 2, the Court heard oral argument in these consolidated cases. Petr now moves for leave to file a supplemental brief after oral argument to apprise the Court of a Dec. 3, 1981 en banc decision by the CA 5, United States v. City of Miami, No. 77-1856. Petr appends a copy of that decision and advises that it addresses one of the issues of this case: whether a consent decree may be entered over the objection of a union whose contract rights are adversely affected thereby.

DISCUSSION: The motion is in compliance with Rule 35.5 and should be granted.

There is no response.

1/19/82

Caldwell

PJC

~~East on Miami~~

Murray



*Court* .....  
*Argued* ....., 19...  
*Submitted* ....., 19...

*Voted on*....., 19...  
*Assigned* ..... , 19...  
*Announced* ..... , 19...

No. 78-1545

## ZIPES

vs.

TWA

Motion of petitioner in 80-951 for leave to file a supplemental brief after argument.

[illegible]



502

THE C. J.	W. J. B.		B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
John T & P 1/29/82	Asper 1/5/81	John B & W 1/6/82	1st draft <del>1/4/82</del> 1/4/82	John B & W 1/29/82	John B & W 1/22/82	1st draft con in 78-15451 con in	John T & P 1/18/82	out 1/4/82
			2nd draft 2/17/82			Judge in 80-951 1/15/82		
			3rd draft 2/23/82			2nd draft 1/18/82		
						3rd draft 1/15/82		
						4th draft 2/11/82		

78-1545 Zpies v. Trans World