No. 04-3496

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Plaintiff – Appellant,

vs.

AMERITECH SERVICES, INC.

Defendant – Appellee.

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On Appeal from the United States District Court
for the Northern District of Ohio
No. 1:97 CV 2106
The Honorable Paul R. Matia

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# FINAL BRIEF OF DEFENDANT-APPELLEE AMERITECH SERVICES, INC.

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the neutral application of a seniority system by appellee Ameritech Services, Inc. ("Ameritech") violated Title VII simply because it perpetuated the effects of its predecessors' policy, abandoned upon enactment of the Pregnancy Discrimination Act in 1979, not to provide full seniority credit for pregnancy leaves.

2. Whether Title VII discrimination charges filed many years after that policy was abandoned were untimely.

3. Whether the Equal Pay Act's affirmative defense for seniority systems and statute of limitations bar the Equal Pay Act claim of appellant Equal Employment Opportunity Commission ("EEOC").

## STATEMENT OF FACTS

The relevant facts were stipulated and are undisputed. R.74, Agreed Joint Stipulations of Fact ("Stip."), Apx. pg. 54; R.93, Mem. Op. and Order 3, Apx. pg. 30; EEOC Br. 4.

**Pregnancy Leave Policy**. Before the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) ("PDA"), became effective on April 29, 1979, Ameritech's predecessors treated pregnancy leave as personal leave rather than as disability leave for purposes of seniority accrual. R.74, Stip. ¶¶ 34, 46, Apx. pgs. 61, 64. Consistent with the personal leave policies then in effect, employees who took pregnancy leave typically did not receive service credit for the entire leave period but only for up to 30 days. *Id.* ¶¶ 34, 57-58, 72, Apx. pgs. 61, 67-68, 71. Due to changes in collective bargaining agreements, employees who took pregnancy leave from August 1977 until April 29, 1979 received up to six weeks of service credit and disability benefits for the period following delivery and up to 30 days of service credit for the period preceding delivery. *Id.* ¶ 73.

The PDA amended Title VII by defining "because of sex" and "on the basis of sex" to include pregnancy. 42 U.S.C. § 2000e(k). On its effective date, April 29, 1979, Ameritech's predecessors adopted a new pregnancy leave policy that complied with the new statute. From that point on, employees have received full service credit for pregnancy-related leaves. R.74, Stip. ¶¶ 38, 74, Apx. pgs. 62, 72.

**Seniority System**. To determine an employee's entitlement to pension and other employment benefits, Ameritech and its predecessors long have used a seniority system based on "term of employment." R.74, Stip. ¶ 66, Apx. pg. 69. Since the 1960s, that seniority system has been entitled Net Credited Service ("NCS") and incorporated in the applicable collective bargaining agreements. *Id.* ¶ 67, Apx. pg. 70. An employee's NCS date is her original hire date adjusted to reflect any leaves or other absences for which service credit was not earned. *Ibid.* This NCS date is used to determine retirement eligibility, pension benefits, bids on open positions, vacations, promotions, and transfers, and for other job-related purposes. *Id.* ¶¶ 65, 69. Both before and after enactment of the PDA, employees taking pregnancy leave were provided written notice of their NCS when returning to work and periodically throughout their careers at the company. *Id.* ¶¶ 61-65, 70-71, Apx. pgs. 68-70.

**Early Retirement Plan**. In March 1994, Ameritech amended its retirement and pension plan through the Ameritech Pension Plan Enhancement Program ("APPEP"). APPEP provided that the retirement benefits of eligible employees who terminated employment between February 22, 1994 and September 30, 1995 would be calculated as if they had three additional years of service and three additional years of age. As a result, some employees became eligible for an

immediate service pension and other benefits for which they otherwise would not have qualified. R.74, Stip. ¶¶ 39, 41, Apx. pgs. 62-63.

When it established APPEP, Ameritech did not alter employees' NCS service credit and did not retroactively grant credit for pregnancy-related leaves occurring prior to enactment of the PDA. R.74, Stip. ¶ 40, Apx. pg. 63. As a result, approximately 7,000 Ameritech employees who had taken such leave prior to April 1979 were not eligible for all the newly offered benefits. *Id.* ¶ 10, Apx. pg. 57; R.1, Complt. ¶ 16, Apx. pgs. 19-20. Beginning in 1994, individual employees filed discrimination charges with EEOC, alleging that Ameritech unlawfully discriminated by refusing to grant them benefits to which they would have been eligible had it provided full service credit for pre-1979 pregnancy leaves. EEOC subsequently issued right-to-sue letters based on those charges. R.74, Stip. ¶ 43, Apx. pg. 64.

**Prior Proceedings**. In December 1995, Ameritech employee Bernadette Bernabei filed suit against Ameritech in the Northern District of Ohio, alleging that Ameritech's failure to grant retroactive credit for pre-PDA pregnancy leaves violated, *inter alia*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Equal Pay Act, 29 U.S.C. § 206(d). In March 1997, Ameritech filed suit in the Northern District of Illinois against a proposed defendant class, seeking a declaration that it had not violated, *inter alia*, Title VII or the Equal Pay Act.

Ameritech named 36 present and former employees as class representatives, and an additional 906 employees intervened. R.74, Stip. ¶¶ 10-15, 17, Apx. pgs. 57-58. Bernabei's suit was transferred to the Northern District of Illinois and consolidated with Ameritech's suit. The district court granted the parties' joint request for class certification and, on cross-motions for summary judgment, entered judgment for Ameritech. *Ameritech Benefit Plan Comm.* v. *Foster Hall*, 1998 WL 419483 (N.D. Ill. July 21, 1998).

The Seventh Circuit affirmed on the merits. *Ameritech Benefit Plan Comm.* v. *Communications Workers of Am.*, 220 F.3d 814 (7th Cir. 2000), cert. denied, 531 U.S. 1127 (2001). The Seventh Circuit limited its resolution to the named and intervening plaintiffs but noted that its decision would "have a powerful stare decisis effect" on the claims of all other members of the class certified by the district court. *Id.* at 821.

**The District Court Proceeding**. In August 1997, EEOC filed this suit against Ameritech, alleging violations of Title VII and the Equal Pay Act. EEOC sought relief on behalf of a class of "all present and former female employees of [Ameritech] who took any maternity-related leave of absence which commenced on or after July 2, 1965 and before April 29, 1979 and who are now or were within the scope of the offer made by the March 25, 1994 Pension Plan Enhancement Program of [Ameritech]." R.1, Cmplt. ¶ 16, Apx. pgs. 19-20.

On cross-motions for summary judgment, the district court ruled in favor of Ameritech. Although the court found that the Seventh Circuit's decision in *Ameritech Benefit Plan* was not preclusive, it agreed with the Seventh Circuit that *Ameritech Benefit Plan* had a "powerful *stare decisis* effect" on this litigation. R.93, Mem. Op. and Order 12, Apx. pg. 39. On the merits, the district court ruled that EEOC's Title VII claim is time-barred because the claimants' EEOC charges were not filed within 300 days of any discriminatory conduct, as required by Title VII.

The district court explained that this case involves "a neutral application of a benefit package to all employees with the same amount of time." R.93, Mem. Op. and Order 12, Apx. pg. 39, quoting *Ameritech Benefit Plan*, 220 F.3d at 823. The court determined that Ameritech's application of NCS was not "a new discriminatory act" and that differentials in early retirement eligibility and benefits represented only "the present effect of its pre-1979 maternity leave policy." R.93, Mem. Op. and Order 13-14, Apx. pgs. 40-41. Ameritech and its predecessors had not "merely continued its pre-PDA maternity leave structure" but rather "amended its policies to fully comply with the PDA amendments." *Id.* at 16, Apx. pg. 43. Hence, the court concluded, "Ameritech's present NCS structure does not violate Title VII." *Ibid.*

The district court rejected EEOC's argument that Ameritech's APPEP program is facially discriminatory. The court explained that "the NCS system is presently in full compliance with Title VII" and that Ameritech "was entitled to rely on NCS in deciding who was eligible for the newly offered benefits." R.93, Mem. Op. and Order 17, Apx. pg. 44. The court also rejected EEOC's argument that Ameritech engaged in intentional discrimination and that therefore, pursuant to 42 U.S.C. § 2000e-5(e)(2), the employees' cause of action accrued only in 1994 when they were denied the newly offered benefits. The court explained that, prior to enactment of the PDA, the companies had no reason to consider their pregnancy-related leave policies discriminatory, and that subsequently they had no reason to believe they were obliged to issue seniority credit to employees affected by those pre-PDA policies. *Id*. at 19-20, Apx. pgs. 46-47.

Because any discrimination took place no later than 1979, the district court held that "the NCS system had not been timely challenged." R.93, Mem. Op. and Order 17, Apx. pg. 44. The court explained that "[t]he proper time for this claim was, at the latest, 300 days after Ameritech's predecessors amended the maternity leave policies to comply with the PDA amendments and subsequently refused to credit those who took maternity leave prior to 1979." *Ibid*. The court relied on this Court's precedents, which preclude employees from sitting on their rights and imposing "an open-ended period of liability for the employer." *Ibid*.

Finally, the district court rejected EEOC's Equal Pay Act claim. The court explained that "the statute provides Ameritech a complete defense" where any unequal pay was due to "a seniority system." R.93, Mem. Op. and Order 22, Apx. pg. 49, quoting 29 U.S.C. § 206(d)(1). The court found this defense applicable because "Ameritech has established that the NCS is a *bona fide* seniority system." *Ibid*. Furthermore, the court found EEOC's Equal Pay Act claim "untimely." *Ibid*. The court explained that Equal Pay Act claims must be filed within two years of accrual, whereas "these claims were not presented until many years after the initial decision not to adjust the employees' time in service for pre-1979 pregnancy leaves." *Id*. at 22-23, Apx. pgs. 49-50, quoting *Ameritech Benefit Plan*, 220 F.3d at 824.

## SUMMARY OF THE ARGUMENT

This Court should affirm the district court and follow the Seventh Circuit's decision in *Ameritech Benefit Plan*, which affirmed summary judgment to Ameritech based on the same allegations with respect to the same company.

I.

Ameritech's application of its NCS seniority system to determine early retirement eligibility and benefits was not unlawfully discriminatory. Section 703(h) of Title VII bars discrimination claims based on differential terms and benefits resulting from application of a seniority system. The Supreme Court and

this Court repeatedly have recognized that, pursuant to Section 703(h), neutral application of a bona fide seniority system does not give rise to a Title VII claim even if it tends to perpetuate the effects of prior discrimination. Ameritech's NCS is a bona fide seniority system because it neutrally reflects length of employment.

EEOC cannot rely on an exception to the safe harbor of Section 703(h) for intentional discrimination. EEOC points to no evidence of intentional discrimination, and there is none in the record. To the contrary, the pre-PDA pregnancy leave policies of Ameritech's predecessors were lawful at the time, those policies were immediately changed to comply with the PDA upon enactment, and the PDA is not a retroactive statute. By seeking to impose liability on Ameritech for not adjusting pre-PDA service credit to comport with the PDA, EEOC impermissibly seeks retroactive application of a prospective-only statute.

II.

EEOC's Title VII claim is untimely because the underlying discrimination charges were not filed within the statutory time limit. Governing precedents of the Supreme Court and this Court hold that the effects of past discrimination perpetuated by a facially neutral seniority system do not re-trigger the charge-filing period. Any impact on early retirement eligibility and benefits from Ameritech's application of NCS was just such an effect of the pre-PDA policies of its predecessors. Hence, the charges at issue were filed at least 15 years too late.

EEOC's reliance on Section 2000e-5(e)(2) of Title VII is misplaced. It applies only to intentional discrimination for which there is no evidence here.

III.

EEOC's Equal Pay Act claim is barred by that statute's affirmative defense for seniority systems. In addition, EEOC challenges pregnancy leave policies discarded in 1979, yet it did not file its claim until 1994. Accordingly, EEOC's Equal Pay Act claim is barred by the applicable two-year statute of limitations.

## ARGUMENT

As demonstrated below, the district court properly granted summary judgment to Ameritech. The parties stipulated to the material facts, leaving no genuine issue for trial. Based on those facts, EEOC's Title VII claim fails as a matter of law because Ameritech has engaged in no discriminatory conduct; EEOC's Equal Pay Act claim fails as a matter of law because any differentials in retirement eligibility and benefits result from a bona fide seniority system; and both the Title VII and Equal Pay Act claims are time-barred.

Furthermore, the Seventh Circuit's *Ameritech Benefit Plan* decision has a "powerful *stare decisis* effect" on this case. 220 F.3d at 821. *Ameritech Benefit Plan* addressed the same undisputed material facts, the same legal issues, the same pregnancy leave policies, and the same seniority system that are at issue in this case. EEOC (Br. 25) urges this Court to "repudiate" *Ameritech Benefit Plan*. But

there is no reason for this Court to depart from the Seventh Circuit's rulings that the plaintiffs' Title VII and Equal Pay Act claims were untimely and that Ameritech's NCS system is a bona fide seniority system that did not result from an intention to discriminate. EEOC, which participated in *Ameritech Benefit Plan* as an amicus, may be unhappy with the Seventh Circuit's decision, but that does not justify repeatedly relitigating the same issues.

Moreover, a ruling in EEOC's favor would impose inconsistent seniority treatment and retirement benefits within *one company*'s workforce. Because EEOC is barred from obtaining any relief on behalf of the 943 named class representatives and intervenors in *Ameritech Benefit Plan*, those women would not benefit from a reversal of the district court's decision in this case. See *EEOC* v. *United States Steel Corp.*, 921 F.2d 489, 496-97 (3d Cir. 1990) (individuals who fully litigated their own claims "are precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims"); *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1290-91 (7th Cir. 1993) (same). This Court should avoid a ruling that would confer more seniority credit and benefits on some Ameritech employees and retirees than on identically situated Ameritech employees and retirees covered by *Ameritech Benefit Plan*.

## I. AMERITECH'S APPLICATION OF ITS SENIORITY SYSTEM IS NOT UNLAWFULLY DISCRIMINATORY.

EEOC contends that Ameritech violated Title VII when it implemented its APPEP program in 1994. According to EEOC (Br. 16-17, 19-20), Ameritech engaged in facial discrimination because its use of NCS to determine early retirement eligibility and benefits treated "pre-PDA pregnancy-related leave differently from other medical leave taken during the same period." EEOC is wrong for several reasons.

### A. Section 703(h) Bars EEOC's Title VII Claim.

Seniority systems are subject to "an exception" to "general principles" governing disparate impact in other contexts. *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982). Section 703(h) of Title VII permits employers "to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority * * * system, * * * provided that such differences are not the result of an intention to discriminate." 42 U.S.C. § 2000e-2(h); see *Taylor* v. *Mueller Co.*, 660 F.2d 1116, 1120 (6th Cir. 1981).

Section 703(h) accords "special treatment" for seniority systems because both employers and employees rely on seniority to ensure a fair workplace. *Trans World Airlines* v. *Hardison*, 432 U.S. 63, 81 (1977); accord *NAACP* v. *Detroit Police Officers Ass'n*, 900 F.2d 903, 907 (6th Cir. 1990). EEOC (Br. 17-18) attempts to weaken the force of Section 703(h) by improperly labeling this safe

harbor for seniority systems an "affirmative defense." But the Supreme Court has expressly rejected that contention, holding that "proof of discriminatory intent [is] a necessary element of Title VII actions challenging seniority systems." *Lorance* v. *AT&T*, 490 U.S. 900, 908 (1989). The Supreme Court has relied on Section 703(h) to reject the position advocated here by EEOC in three governing cases.

In *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324 (1977), the employer had prohibited minority employees from transferring to (and thus earning seniority credit in) desirable jobs prior to the effective date of Title VII. The employer declined to give those employees additional seniority to make up for the pre-Act discrimination and continued to make job-related decisions based on accumulated seniority. The government argued, as EEOC does here, that each new promotional decision, job assignment, or benefit program was a separate act of discrimination. The Supreme Court rejected that position and found no violation. The Court explained, based on its text and legislative history, that "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII" even if it "tends to perpetuate the effects of pre-Act discrimination." 431 U.S. at 352-53. Thus, the Court concluded, "the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful." *Id.* at 356. The same is true here.

Similarly, in *United Air Lines* v. *Evans*, 431 U.S. 553 (1977), issued the same day as *Teamsters*, the Court deemed United's seniority system "neutral in its operation" even though it perpetuated the effects of a no-marriage rule that United had discarded. 431 U.S. at 558. United's ban on marriage by female flight attendants had forced Evans to resign in 1968. United discontinued that policy after a court ruled that a similar policy violated Title VII, and it rehired Evans in 1972. United gave her no seniority credit for the period of her prior employment, consistent with its policy for former employees who had long breaks in service. 431 U.S. at 554-55. Like EEOC here, Evans contended that United was "committing a second violation of Title VII by refusing to credit her with seniority" that she would have earned if not for the discarded marriage policy. *Id.* at 554.

In words which apply to the letter in this case, the Court held:

> [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. 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).

*Id.* at 560. Applying *Evans* to this case, Section 703(h) bars EEOC from basing its Title VII claim on the 1994 effects of the long-discarded pre-PDA policies of Ameritech's predecessors. See also *Taylor*, 660 F.2d at 1122-23 (use of a "bona

fide seniority" system does not violate Title VII even if it perpetuates effects of past discrimination).

EEOC attempts (Br. 14, 19) to distinguish *Evans* by contending that United's seniority system "was bona fide and free of discrimination" and that Evans was not challenging "a new discriminatory act" but only "incidental use of seniority at a later date." But there is no principled difference between Evans' claim that United's application of its seniority policy violated Title VII and EEOC's claim that Ameritech's application of its seniority policy violated Title VII. Just as some employees would have an earlier NCS date if Ameritech had treated pregnancy leaves the same as other disability leaves prior to 1979, so Evans would have had greater seniority if United had not barred flight attendants from marrying before such a policy was deemed unlawful. EEOC is plainly wrong when it asserts (*ibid.*) that Evans "did not allege that the seniority rule at issue — no credit for prior service — was discriminatory." That is precisely what she alleged. See *Evans*, 431 U.S. at 557 (Evans contended "that United's seniority system illegally discriminates against her"). As the district court and the Seventh Circuit properly recognized, the result here follows ineluctably from *Evans*.

EEOC further argues (Br. 15) that *Evans* "does not apply" because Ameritech's NCS system "itself contains a discriminatory provision." EEOC identifies no such provision. To be sure, it calls non-provision of full seniority

credit for pre-PDA pregnancy leave an "ancillary rule" of Ameritech's seniority system (Br. 16). But as the Supreme Court has explained, Congress intended Section 703(h) to protect "ancillary rules" that define "which passages of time will 'count' towards the accrual of seniority and which will not." *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598, 607 (1980). Section 703(h) therefore protects not only NCS but any ancillary rules that credit pre-1979 service for purposes of seniority accrual in a manner consistent with the lawful leave policies of Ameritech's predecessors.

Finally, in *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68-71 (1982), the Supreme Court confirmed that the § 703(h) safe harbor applies to the adoption as well as to the operation of seniority systems. The Court reiterated that Section 703(h) "on its face immunizes *all* bona fide seniority systems." *Id*. at 75-76.[1]

[1] The Supreme Court more recently has reiterated the primacy of seniority systems in the age discrimination and disability contexts. In *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 896 (1996), the Court unanimously rejected the Ninth Circuit's view that amendments to ADEA and ERISA, which prohibited age-based benefit accrual rules, required that employees be credited for service years during which they were lawfully excluded from benefit plans. And in *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 404 (2002), the Court rejected a challenge to a seniority system based on the Americans with Disabilities Act, explaining that "the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment."

### B. Ameritech's NCS Is A Bona Fide Seniority System.

Ameritech's NCS system is a bona fide seniority system. It "applies equally to all" (*Teamsters*, 431 U.S. at 355), is "facially neutral" (*Taylor*, 660 F.2d at 1122), was not adopted "with a discriminatory motivation" (*NAACP*, 900 F.2d at 909-10), and is not "administered in an irregular or arbitrary way" (*ibid.*). NCS was adopted in 1914 (a half-century before Title VII was enacted), is incorporated in Ameritech's collective bargaining agreements with its unions (R.74, Stip. ¶¶ 66-68, Apx. pgs. 69-70), and "grant[s] preferences on the basis of length of employment" — "the hallmark of a true seniority system." *United States* v. *City of Cincinnati*, 771 F.2d 161, 167 (6th Cir. 1985); see also *California Brewers*, 444 U.S. at 606 (seniority systems dispense "preferential treatment" based on "some measure of time served in employment").

NCS produces a term of employment number through a purely mechanical calculation which in turn determines APPEP eligibility and benefits. R.74, Stip. ¶¶ 67-69, Apx. pg. 70. Any differential impact is simply the effect of pre-PDA policies that were lawful when they were applied. As EEOC admits, "[p]ost-PDA leave is treated in a *facially neutral* manner." Br. 17 (emphasis added). Thus, Ameritech's application of NCS to determine APPEP eligibility and benefits was not discriminatory at all, much less "facially discriminatory."

The Seventh Circuit so ruled in *Ameritech Benefit Plan*. Judge Diane Wood's opinion explains that NCS provides for "a neutral application of a benefit package to all employees with the same amount of time." 220 F.3d at 823. Because NCS relies "on relative lengths of employment," the court found that "it fits easily into the seniority system line of cases," which hold that mere perpetuation of past discrimination does not preclude a neutrally applied seniority system from being bona fide. *Ibid*. EEOC's "mantra-like repetition" of the phrase "facially discriminatory" is no answer to the Seventh Circuit's thoughtful analysis. See *Oscar W. Larson Co.* v. *United Capitol Ins. Co.*, 64 F.3d 1010, 1013 (6th Cir. 1995).

### C. Ameritech Has Not Intentionally Discriminated.

EEOC asserts (Br. 18) that Section 703(h) does not bar its claim because Ameritech has intentionally discriminated. It offers no further explanation other than to repeat yet again (*ibid*.) that "Ameritech's seniority system is facially discriminatory." The exception to the "bona fide seniority" system defense on which EEOC relies, where differential impacts are "the result of an intention to discriminate" (42 U.S.C. § 2000e-2(h)), has no application here.

EEOC offers not a whit of proof that Ameritech intended through its NCS system — adopted decades before the passage of Title VII — to violate that statute. See *Lorance*, 490 U.S. at 905 ("absent a discriminatory purpose, the

operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences"); *Hardison*, 432 U.S. at 82 (same); *Black Law Enforcement Officers Ass'n* v. *City of Akron*, 824 F.2d 475, 481 (6th Cir. 1987) (upholding seniority system based on § 703(h) because plaintiffs failed to show that it reflected "a discriminatory intent"). EEOC offers no proof of intentional discrimination because there is none.

As the Seventh Circuit held in *Ameritech Benefit Plan*, Ameritech employees "cannot show the kind of intentional discrimination that would trigger the exception to the statutory protection afforded to seniority systems." 220 F.3d at 823. Before the PDA was enacted in 1979, Ameritech's predecessors cannot have intended to discriminate unlawfully because their pregnancy leave policies were perfectly legal. Title VII did not then require employers to extend the same benefits to employees absent due to pregnancy as to employees on disability leave. *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 136-38 (1976); *In re Southwestern Bell Tel. Co. Maternity Benefits Litig.*, 602 F.2d 845, 848-49 (8th Cir. 1979) (pre-1979 "policy of granting female employees on maternity leave up to the former maximum of thirty days or the present maximum of forty-two days seniority for the period of their absence" did not violate Title VII). Indeed, if Title VII already

had required such equal treatment, there would have been no need to enact the PDA.[2]

After the PDA, Ameritech cannot have intended its neutral application of NCS to discriminate unlawfully. It is uncontested that Ameritech's predecessors immediately adjusted their pregnancy-related leave policies to comply with the PDA. R.74, Stip. ¶¶ 38, 74, Apx. pgs. 62, 72. And the PDA was not a retroactive statute but rather "was intended to be prospective only in application." *Fields* v. *Bolger*, 723 F.2d 1216, 1218 n.4 (6th Cir. 1984); accord *Ameritech Benefit Plan*, 220 F.3d at 823; *Whitehead* v. *Oklahoma Gas & Elec. Co.*, 187 F.3d 1184, 1193 (10th Cir. 1999); *Schwabenbauer* v. *Board of Educ.*, 667 F.2d 305, 210 n.7 (2d Cir. 1981); *Condit* v. *United Air Lines*, 631 F.2d 1136, 1139-40 (4th Cir. 1980). Furthermore, even if Ameritech's belief that it was complying with Title VII was incorrect, an *intentional* violation cannot result from mere "negligence" or from a "good-faith but incorrect assumption" that the challenged act complied with the applicable statute. *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 135 (1988).

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[2] EEOC asserts (Br. 7, 19) without record citation that Ameritech "openly admits" and "does not dispute" that its predecessors' pre-PDA treatment of pregnancy leaves was "facially discriminatory." In fact, Ameritech consistently has maintained that its predecessors' pre-PDA policies were lawful. See, *e.g.*, R.60, Memorandum in Support of Ameritech's Motion for Summary Judgment 15-24.

According to EEOC (Br. 20), Ameritech "should have known" that failure to adjust the employees' NCS was discriminatory. EEOC does not explain why the company should have known that a prospective-only statute created an obligation to reach back and alter service credits provided under a policy that was lawful at the time. In any event, unsupported assertions about what Ameritech should have known cannot cure EEOC's failure to prove the discriminatory intent required by Section 703(h) to permit a Title VII challenge to application of a seniority system.

At bottom, EEOC simply *presumes* intentional discrimination from an "ongoing disparity" (Br. 17) in NCS dates between women who took pre-PDA pregnancy leave and other employees. But this Court has held that intentional discrimination for purposes of § 703(h) may not be presumed from such a "disparate impact" resulting from neutral application of a seniority system. *NAACP*, 900 F.2d at 908. Otherwise, "the employer would be found liable not for present racial discrimination but for complying with a seniority system." *Id.* at 910. EEOC's position that NCS must be intentionally discriminatory because its neutral application results in differential effects also conflicts with the U.S. government's statements to Congress in 1964 that Title VII was not intended to override neutrally applied seniority systems:

> Title VII would have no effect on seniority rights existing at the time it takes effect. * * * This would be true even in the case where owing to discrimination prior to the effective date of the

> title, white workers had more seniority than Negroes. * * * Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

110 Cong. Rec. 7207 (1964) (Statement of Department of Justice).

In sum, a "seniority system" is "valid so long as an intent to discriminate did not enter into its adoption and it has been maintained free from any illegal purpose." *Black Law Enforcement Officers*, 824 F.2d at 481. Ameritech's NCS system satisfies that standard, precluding EEOC's Title VII claim.

### D. EEOC Claim Seeks Retroactive Application Of The PDA.

EEOC effectively seeks retroactive application of the PDA. If Ameritech's predecessors had provided full service credit to employees taking pregnancy leave prior to 1979, EEOC could not have filed this suit. Its position hinges entirely on the fact that employees who took pregnancy leave prior to 1979 did not receive full service credit *back then*. It seeks to apply the PDA to that pre-PDA conduct and thereby make that conduct a Title VII violation. But as the Supreme Court has stressed, "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994). Indeed, the Court in *Landgraf* cited the PDA as an example of a prospective-only statute. *Id.* at 257 n.10.

EEOC says (Br. 20-21) that it does not seek retroactive relief because the service credit adjustments it demands would affect only "future decisions" and

impose no "new liability." But it is undisputed that the adjustments sought by EEOC would undo *past* decisions regarding treatment of pregnancy leave and impose an enormous "new liability" on Ameritech in the form of earlier and increased benefits for thousands of employees and retirees. EEOC observes (*id*. at 21) that Ameritech adopted APPEP "long after the PDA came into effect." But EEOC's only objection to that 1994 program, the benefits of which depend entirely on an employee's NCS, is that it reflects the effects of the *pre*-PDA policies. Forcing Ameritech to reach back and revise those then-lawful policies, as EEOC demands, would overthrow "settled expectations," the very evil against which the *Landgraf* presumption against retroactive application of a statute protects. *Landgraf*, 511 U.S. at 265.

EEOC relies (Br. 16, 25) on a pre-*Landgraf* case, *Pallas* v. *Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991). In that divided opinion, the majority treated the PDA as a retroactive statute by requiring the employer to make post-PDA adjustments to service credits determined prior to enactment of the PDA. The panel majority's treatment of the PDA as a retroactive statute was inconsistent with the view of every other court of appeals (see *supra* p. 20) and cannot be sustained in light of the Supreme Court's subsequent retroactivity analysis in *Landgraf*. Furthermore, *Pallas* cannot be reconciled with the Supreme Court's subsequent decision in *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 896 (1996), which held that, because

Congress' extension of the ADEA to retirement plans in the Omnibus Budget Reconciliation Act of 1986 ("OBRA") was not retroactive, there could be no liability for denial of benefits based on pre-OBRA seniority calculations. That ruling refutes EEOC's reliance on *Pallas*, which imposed liability for denial of benefits based on pre-PDA seniority accrual. The *Pallas* majority also departed from the Supreme Court's rulings in *Evans* and *American Tobacco*. As the dissent in *Pallas* properly observed, the defendant was merely "applying a bona fide seniority system" that was "not discriminatory on its face." 940 F.2d at 1328.

Significantly, EEOC fails to mention that the Ninth Circuit currently is considering whether to overrule *Pallas*. In a case involving the same issue, the district court ruled in favor of plaintiffs, holding that it was bound by *Pallas*, but then certified its decision for interlocutory appeal. *Hulteen* v. *AT&T Corp.*, No. C-01-1122 MJJ (N.D. Cal. Orders of Aug. 7, 2003 and Sept. 24, 2003). The Ninth Circuit subsequently granted AT&T's petition for interlocutory appeal. *Hulteen* v. *AT&T Corp.*, No. 03-80107 (9th Cir. Order entered Feb. 27, 2004). That appeal is pending.

Beyond *Pallas*, EEOC has no support for its contention that neutral application of a seniority system is facially discriminatory if it does not reflect service credit withheld at a time when it was lawful to do so. The cases it cites (Br. 12-14) that address facial discrimination are not Title VII seniority cases, do

not involve retroactive application of a statute, and are in no way analogous to the facts at issue here. See *DiBiase* v. *SmithKline Beecham Corp.*, 48 F.3d 719, 727 (3d Cir. 1995) (rejecting claim of facial discrimination based on ADEA); *International Union, UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187, 197-98 (1991) (all women were barred from certain job classifications); *Larkin* v. *Michigan Dep't of Social Servs.*, 89 F.3d 285, 290 (6th Cir. 1996) (addressing whether statute singling out group homes for disabled violated the Fair Housing Act); *EEOC* v. *Kentucky State Police Dep't*, 80 F.3d 1086, 1094 (6th Cir. 1996) (addressing whether mandatory retirement policy violated ADEA); *Mullins* v. *Crowell*, 228 F.3d 1305, 1310 (11th Cir. 2000) (addressing whether employer's disability classifications violated the Rehabilitation Act); *Anderson* v. *Zubieta*, 180 F.3d 329, 336 (D.C. Cir. 1999) (addressing exclusion from salary and benefit programs based on national origin). And in the one additional case cited by EEOC that did involve a Title VII challenge to a seniority system, the Supreme Court rejected the claim and upheld summary judgment for the employer. *Lorance*, 490 U.S. at 911-12.

Even if the relief EEOC seeks were otherwise available, it would be inappropriate as a policy matter. EEOC seeks a retroactive grant of seniority that would provide more than 7,000 current and former employees with additional benefits from the Ameritech Pension Plan. The Supreme Court consistently has recognized that authorizing such retroactive liability is inappropriate in Title VII

pension plan cases because it may "impose financial costs that would threaten the security of both the funds and their beneficiaries." *Florida* v. *Long*, 487 U.S. 223, 236 (1988); see also *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans* v. *Norris*, 463 U.S. 1073, 1105-07 (1983); *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 721 (1978). EEOC offers no valid basis for imposing such costs by creating an exception to the established legal principles set forth above.

## II. EEOC'S TITLE VII CLAIM IS UNTIMELY.

EEOC's Title VII claim is untimely because the claimants did not file their underlying charges within the statutory time frame. Pursuant to 42 U.S.C. § 2000e-5(e)(1), a Title VII plaintiff "must timely file a charge with the EEOC" within 180 days of the alleged discriminatory act or within 300 days if a charge is initially pursued with an equivalent state or local agency. *Cox* v. *City of Memphis*, 230 F.3d 199, 202 (6th Cir. 2000). The Supreme Court has stressed the importance of "strict adherence" to this "mandatory" filing deadline. *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 108-09 (2002). A claimant alleging discriminatory conduct must file a charge by the statutory deadline "or lose the ability to recover." *Id*. at 110.

### A. EEOC's Claim That The Claimants Timely Filed Their Discrimination Charges Conflicts With Governing Precedent.

In this case, the charge-filing period began at the latest on April 29, 1979, when Ameritech's predecessors modified their pregnancy leave policies to comply with the PDA and did not adjust NCS to credit pre-PDA pregnancy leaves. This Court so held in analogous circumstances in *EEOC* v. *Chrysler Corp.*, 683 F.2d 146 (6th Cir. 1982). In *Chrysler*, EEOC's Title VII claim was held untimely because the charge was not filed within 300 days after the date Chrysler abandoned its allegedly discriminatory pregnancy leave policy. At that time, the Court explained, "all of the facts and law necessary to a timely complaint were known." *Id.* at 149. Here, too, the employees knew that their NCS was not adjusted to reflect pre-PDA pregnancy leaves. Indeed, they received written NCS reports upon their return to work and throughout their careers at the company. R.74, Stip. ¶¶ 59-64, Apx. pgs. 68-69. And they received copies of collective bargaining agreements stating that NCS would be used to determine eligibility for numerous job-related benefits. *Id.* ¶ 65. Yet, none of the affected employees filed a charge with EEOC until 1994 (*id.* ¶ 43, Apx. pg. 64) — many years after the statutory deadline.

EEOC acknowledges (Br. 11) that if the alleged discrimination took place in 1979 or before, the discrimination charges in this case "are plainly outside the statutes of limitations." To avoid the statute of limitations, it therefore argues (Br.

17) that NCS is "facially discriminatory" and results in a Title VII violation "every time that it is applied," triggering a new limitations period. But as explained *supra* in Part I, NCS is not facially discriminatory; it is a standardized procedure for tracking terms of employment. See *Ameritech Benefit Plan*, 220 F.3d at 817-18, 823-24; R.74, Stip ¶¶ 66-67, Apx. pgs. 69-70. The service credit differentials about which EEOC complains are the inevitable result of neutral application of NCS and the pre-PDA pregnancy leave policies of Ameritech's predecessors.

In *Evans*, the Supreme Court rejected an argument — identical to EEOC's here — that a Title VII claim, which challenged the effects of past discrimination perpetuated by a facially neutral seniority system, was timely. As explained *supra* p. 14, United gave Evans no seniority credit for the period of her prior employment when it rehired her in 1972. 431 U.S. at 554-55. With any challenge to her 1968 resignation time-barred, Evans claimed that United continued to violate Title VII because the seniority system treated her less favorably than males hired after her resignation and prior to her reemployment. *Id.* at 557. The Court ruled that her Title VII claim was untimely because United's seniority system operated neutrally, and "the critical question is whether any present violation exists." *Id.* at 558. The Court explained that, although "the seniority system gives present effect to a past act of discrimination," United was "entitled to treat that past act as lawful" after Evans failed to file a discrimination charge within the applicable time limit. *Ibid.*

That past act was "merely an unfortunate event in history which has no present legal consequences." *Ibid.* EEOC now seeks what the Supreme Court barred in *Evans* — a Title VII claim challenging past conduct that has "no present legal consequences." The charges underlying EEOC's lawsuit were filed a decade-and-a-half too late.

The Supreme Court reaffirmed the *Evans* principle in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980). In *Ricks*, after a public college denied tenure to a Liberian professor, the college and professor entered into a "terminal" contract allowing him to teach for one year before his employment ended. Although the professor filed a charge with EEOC more than 180 days after the tenure decision, he claimed that his actual termination upon expiration of the contract was itself a discriminatory act that extended the filing period. The Court rejected that argument, holding that the loss of his teaching position was simply "a delayed, but inevitable, consequence of the denial of tenure." *Id.* at 257-58. "[T]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Id.* at 258 (emphasis in original); accord *Chardon* v. *Fernandez*, 454 U.S. 6, 8 (1981) (per curiam). In this case, if there was a discriminatory act, it occurred in 1979 or before. As in *Ricks*, there cannot be a timely Title VII claim based on the 1994 *consequences* of any such prior discrimination.

This Court's precedents are in accord, rejecting the notion that neutral policies that perpetuate the effects of past discrimination give rise to timely Title VII claims. In *Cox*, this Court rejected EEOC's theory that each subsequent promotion based on a previously established and allegedly discriminatory seniority list constituted a "separate discriminatory act" that re-started the charge period. 230 F.3d at 202. The Court recognized that, based on *Evans* and other precedents, "the limitations period begins to run in response to discriminatory acts themselves, rather than in response to the continuing effects of past discriminatory acts." *Ibid*. Accordingly, promotions based on the "facially neutral" seniority list were "merely the effect of previous discrimination," making the EEOC charges at issue untimely. *Id*. at 203-04. The Court supported that conclusion by noting that an affected employee should have known when the roster was established "that alleged discrimination [would be] likely to play a pivotal role in her future advancement." *Id*. at 204.

Here, too, any impact on retirement benefits from application of the facially neutral NCS was "merely the effect" of the pre-PDA leave policy, and an employee should have known in 1979 that not adjusting her NCS to reflect past pregnancy leaves was "likely to play a pivotal role in her future advancement." As in *Cox*, EEOC's claim is untimely because the class members did not file their charges within the statutory deadline. See also *Dixon* v. *Anderson*, 928 F.2d 212,

216 (6th Cir. 1991) (claim for pension benefits was untimely where plaintiffs "suffer[ed] only the continuing *effects* of past discrimination and are not the victims of a continuing *violation*") (emphasis in original); *EEOC* v. *Penton Indus. Publ'g Co.*, 851 F.2d 835, 837 (6th Cir. 1988) (granting summary judgment to employer because "the statutes of limitations for actions predicated upon employment discrimination are triggered at the time when the alleged discriminatory act occurred, and not at the time when the last discriminatory effects have been manifested"); *EEOC* v. *McCall Printing Corp.*, 633 F.2d 1232, 1237 (6th Cir. 1980) ("residual effects" of alleged discrimination that were "still felt through seniority status established" prior to the limitations period did not constitute "a continuing act of discrimination"); *Conlin* v. *Blanchard*, 890 F.2d 811, 815 (6th Cir. 1989) (courts determine timeliness of claim that "employment decisions" were discriminatory based on "what event should have alerted the average lay person to protect his rights").[3]

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[3] There are many similar cases from other circuits. One example is *Carter* v. *West Publ'g Co.*, 225 F.3d 1258 (11th Cir. 2000), which found untimely Title VII claims of female employees who received lower dividend checks than male counterparts because previously the employer had denied women an equal opportunity to purchase company stock. The Eleventh Circuit reasoned that the employer now operated its dividend program "in a neutral manner" and that the men's larger dividend checks were but "the inevitable consequence of [the] allegedly discriminatory practice of offering only men the opportunity to purchase stock." *Id.* at 1265. See also *Bronze Shields, Inc.* v. *New Jersey Dep't of Civil Serv.*, 667 F.2d 1074, 1083 (3d Cir. 1981) (any discrimination occurred when

(cont'd)

The Seventh Circuit applied these principles to the same claims and allegations at issue here in *Ameritech Benefit Plan* and affirmed the district court's grant of summary judgment to Ameritech. The court explained that the suit involved "computation of time in service — seniority by another name — followed by a neutral application of a benefit package to all employees with the same amount of time." 220 F.3d at 823. The court applied the *Evans-Ricks* principle that a "continuing impact" of earlier discrimination "within the context of an otherwise neutral system" is "not enough to show a present violation." *Id.* at 822-23. Applying that principle to the claims against Ameritech, the court explained:

> [T]he women knew the minute they took their pregnancy or maternity leaves that they were not getting full credit for their time off. No later than the time when Ameritech amended its plan in response to the PDA, they knew that their NCS had not been amended. It is no secret to any employee that seniority rolls like Ameritech's NCS make a difference for a host of employee benefits, some present, and some future. Ameritech informed each employee periodically of his or her accrued NCS.

*Id.* at 823. The Seventh Circuit therefore concluded that any complaint should have been filed "long ago" and that the plaintiffs "had sued too late." *Ibid.*

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(… cont'd)

hiring roster was promulgated, not when the inevitable consequences, denied applications, occurred); *Dobbs* v. *City of Atlanta*, 606 F.2d 557, 559 (5th Cir. 1979) (receiving lower pension due to past discriminatory placement on seniority list was not a present violation).

EEOC rejects that conclusion, contending (Br. 22-23) that the claimants had no reason to file charges in 1979 because they "may have believed" that losing "a few weeks or months" of seniority credit "would make little difference." But any such belief cannot have been reasonable. The impact of reduced service credit on future terms and benefits of employment was not a "remote possibility," as EEOC asserts (Br. 24), but rather a virtual certainty. As provided in the applicable collective bargaining agreements, NCS is a critical factor in countless employment determinations throughout an employee's career, including competitive job bidding, shift preferences, layoff determinations, vacation scheduling, and benefit programs. R.74, Stip. ¶ 65, Apx. pg. 69. EEOC's suggestion that employees do not know the importance of their seniority dates is untenable. Moreover, EEOC itself filed suit against the pregnancy leave policy of an Ameritech predecessor as early as 1981. See *EEOC* v. *Indiana Bell Tel. Co.*, 641 F. Supp. 115, 115-16 (S.D. Ind. 1986) (granting summary judgment to defendant based on laches). EEOC offers no reason why, if it knew enough to file suit at that time, the claimants in this case had to wait until 1994 to file their discrimination charges.

EEOC's contention (Br. 23) that the alleged discrimination "occurred" in 1994 not only conflicts with *Evans* and its progeny but also with the Supreme Court's more recent decision in *Morgan*. In effect, EEOC claims that the charges filed in 1994 were timely because Ameritech's neutral application of NCS in 1994

was *related* to its predecessors' allegedly discriminatory policies in 1979 and earlier. In *Morgan*, the Supreme Court rebuffed a similar attempt to circumvent the Title VII charge-filing deadline, rejecting the notion that a Title VII claim may be based on nondiscriminatory conduct within the limitations period so long as it is "related" to discriminatory conduct prior to the limitations period. 536 U.S. at 110. The Court instead held that, except for hostile environment claims, only "independently discriminatory" acts within the filing period are actionable. *Id*. at 113. As this Court has recognized, *Morgan* "overturns" prior cases that permitted a "continuing violation" exception to statutory time limits based on "alleged acts of discrimination occurring prior to the limitations period [being] sufficiently related to those occurring within the limitations period." *Sharpe* v. *Cureton*, 319 F.3d 259, 268 (6th Cir.), cert. denied, 124 S. Ct. 228 (2003); see also *Maki* v. *Allete, Inc.*, 2003 WL 21980481, at *5-6 (D. Minn. Aug. 18, 2003) ("Consistent with *Morgan*," employer's "neutral application" of pension plan was not "independently discriminatory," making plaintiffs' claims untimely). EEOC's attempt to bring a Title VII claim in the 1990s based on the consequences of a pregnancy leave policy that ended in the 1970s cannot be reconciled with these precedents.

### B. The Supreme Court's *Bazemore* Decision Does Not Apply To The Lingering Effects Of Past Discrimination.

EEOC (Br. 13) improperly relies on *Bazemore* v. *Friday*, 478 U.S. 385 (1986), which was not a seniority system case and which has no application to the

issues here. *Bazemore* involved a public employer that, before Title VII became applicable to public employers in 1972, segregated its employees and paid black workers less than white workers. In 1972, the employer ended its segregation policy but continued to pay black employees less than white employees for doing the same work. *Id*. at 394-97. The Supreme Court held that the employees' Title VII claim was timely because the employer "continued to engage" in discrimination after 1972. *Id*. at 395.

Thus, *Bazemore* involved *current* discriminatory conduct, *i.e.*, a decision to pay black workers less than white workers for work done in the current or immediately preceding pay period. In *Evans* and this case, by contrast, the allegedly discriminatory treatment had *ceased* prior to the limitations period, leaving only lingering effects of a discarded policy. *Bazemore* therefore has been limited to claims of discriminatory pay and not applied to claims of discriminatory application of a seniority system. *E.g.*, *Reese* v. *Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1013 (7th Cir. 2003) ("narrow" *Bazemore* rule applies only to "strict paycheck cases," not to allegedly "discriminatory plans or systems"); *Goodwin* v. *General Motors Corp*., 275 F.3d 1005, 1010 (10th Cir. 2002) (relying on *Bazemore* in discriminatory pay case because "a claim of discriminatory pay is fundamentally unlike other claims of ongoing discriminatory treatment").

That distinction makes sense. As noted, a paycheck is for work completed in the current or immediately preceding pay period. Thus, paying women or racial minorities unequally for equal work is *current* discrimination. See *Florida*, 487 U.S. at 239 ("each week's paycheck is compensation for work presently performed"). Seniority credit, by contrast, accumulates over the course of an employee's entire career at the company. Thus, applying *Bazemore* in the context of seniority credit and pension benefits "would render employers liable for all *past* conduct." *Ibid.* (emphasis added). The Supreme Court's rulings in *Bazemore* and *Evans* give effect to the important distinction between current discrimination and the effects of past discrimination. Here, any discrimination affecting an employee's seniority credit occurred fifteen years or more *before* any EEOC charges were filed, rendering *Bazemore* inapplicable.

EEOC also again relies on the Ninth Circuit's divided opinion in *Pallas* to support the timeliness of its claim. But *Pallas* exemplifies the Ninth Circuit's unduly expansive "continuing violation" jurisprudence, which the Supreme Court forcefully rejected in *Morgan*, 536 U.S. at 113. Instead of following the applicable *Evans-Ricks* line of cases, the *Pallas* majority improperly relied on *Bazemore* (see 940 F.2d at 1327) which, as discussed *supra*, does not apply to the lingering effects of prior discrimination caused by neutral application of a seniority system.

### C. Section 2000e-5(e)(2) Does Not Apply To EEOC's Claim.

EEOC further argues (Br. 24-25), based on 42 U.S.C. § 2000e-5(e)(2), that employees may wait until they have been injured by application of a seniority system to file a charge. But Section 2000e-5(e)(2), which states that discrimination with respect to a seniority system occurs when a person "is injured by the application of the seniority system," applies by its terms only "to a seniority system that has been adopted for an *intentionally* discriminatory purpose in violation of this subchapter" (emphasis added). It has no application here because, as explained *supra* pp. 18-20, EEOC offers no evidence of any intentional discrimination nor any reason why lawfully complying with existing Title VII requirements both before and after enactment of the PDA would be intentional discrimination "in violation of this subchapter."

Furthermore, Congress had a very limited purpose when it added Section 2000e-5(e)(2) to Title VII in the Civil Rights Act of 1991. The Supreme Court had held in *Lorance* that a discrimination claim based on a facially neutral seniority system accrues when the system is adopted. Congress was concerned that "[t]aken to its logical conclusion, the *Lorance* rule would bar all challenges to present-day applications of discriminatory practices in existence when Title VII became law—since, under the *Lorance* rule, the deadline for a timely charge would have expired before Title VII became effective." H.R. Rep. No. 102-40 (II), at 23 (1991),

reprinted in 1991 U.S.C.C.A.N. 694, 716. Congress therefore enacted § 2000e-5(e)(2) to ensure that an employee could file a Title VII claim based on an intentionally discriminatory seniority system upon the "*first* application after adoption by the employer." *Id.* (emphasis added). The legislative history emphasizes the narrowness of any change to existing law, stating that "[c]hallenges to the bona fides of a seniority system continue to be governed by the principles set forth in the Supreme Court's decision in *Teamsters* v. *United States*, 431 U.S. 324 (1977)." *Id.* at 24 n.40, 1991 U.S.C.C.A.N. at 718 n.40.

* * * * *

EEOC's position not only is inconsistent with established precedents but also represents bad policy. This Court in *Cox*, 230 F.3d at 205, noted the "important policy considerations" that underlie the distinction between discriminatory acts and continuing effects when determining the timeliness of an EEOC charge for Title VII purposes. In particular, "courts must take care not to 'expose employers to a virtually open-ended period of liability.'" *Ibid.* That is precisely what EEOC's theory would do. It would allow an employee to sit back and wait to bring a Title VII suit based on the lingering effects of an otherwise neutral seniority system until damages are maximized. And there would be no end to such suits. Each demotion, layoff, or other adverse employment action incurred as a result of neutral application of an employer's seniority system would bring a

new raft of suits. In fact, the logic of EEOC's position would allow Ms. Evans to sue United Airlines *today* (if United were not in bankruptcy). But as the Supreme Court ruled, her suit was time-barred when she brought it three decades ago. The judgment below should be affirmed to prevent the "open-ended period of liability" sought by EEOC.

## III. EEOC'S EQUAL PAY ACT CLAIM IS BARRED BY THE ACT'S AFFIRMATIVE DEFENSE FOR SENIORITY SYSTEMS AND STATUTE OF LIMITATIONS.

The district court properly granted summary judgment on EEOC's Equal Pay Act claim, for two reasons. First, any disparity in pay results from Ameritech's bona fide seniority system – an affirmative defense under the EPA. Second, EEOC's claim is untimely.

### A. The Equal Pay Act's Affirmative Defense for A Bona Fide Seniority System Bars EEOC's Claim.

EEOC offers no argument in support of its Equal Pay Act claim other than simply referencing its Title VII arguments (Br. 18). Indeed, it has not shown that the Equal Pay Act applies at all. The Equal Pay Act precludes an employer from "paying wages" at a lesser rate than paid to the opposite sex for substantially "equal work." 29 U.S.C. § 206(d)(1). It is far from clear that this provision would compel an employer to grant additional service credits to enhance retirement benefits.

But even if the Equal Pay Act were applicable, Ameritech has a dispositive affirmative defense. It determined early retirement eligibility and benefits "pursuant to * * * a seniority system." 29 U.S.C. § 206(d)(1). Because Ameritech has established that affirmative defense (see *supra* pp. 16-17), it "is absolved of liability as a matter of law." *Timmer* v. *Michigan Dep't of Commerce*, 104 F.3d 833, 843 (6th Cir. 1997). The Seventh Circuit so ruled in *Ameritech Benefit Plan*, holding that the "disadvantage" challenged by the plaintiffs resulted from a "*bona fide* seniority system," which "dooms their claim." 220 F.3d at 824. EEOC offers no reason to hold otherwise here.

**B. EEOC's Equal Pay Act Claim Is Time-Barred.**

In addition, EEOC's Equal Pay Act claim was not timely filed. Equal Pay Act claims must be filed within two years after such claims accrued (or three years in the case of willful violations). 29 U.S.C. § 255(a). EEOC's claim accrued at the latest when Ameritech's predecessors did not credit pre-PDA pregnancy-related leave upon adoption of the PDA in 1979. Because EEOC's EPA claim was not filed until 18 years later in 1997, it is barred by the statute of limitations. See *Anderson* v. *City of Bristol*, 6 F.3d 1168, 1176 (6th Cir. 1993) (holding Equal Pay Act claim untimely where allegedly reduced overtime pay was but an effect of a wage-rate reduction that occurred five years before claim was filed); *EEOC* v. *Penton Indus. Publ'g Co.*, 851 F.2d 835, 837-39 (6th Cir. 1988) (holding Equal

Pay Act claim untimely and rejecting continuing violation theory). As the Seventh Circuit ruled in *Ameritech Benefit Plan*, 220 F.3d at 824, these claims "were not presented until many years after the initial decision not to adjust the employees' time in service for pre-1979 pregnancy leaves." Thus, as the district court properly ruled, EEOC's Equal Pay Act claim is time-barred.

## CONCLUSION

The judgment of the district court should be affirmed.

Dated: September 17, 2004

Respectfully submitted,

________________________________

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of Defendant-Appellee Ameritech Services, Inc. complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) because it contains 9,453 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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One of Appellee's attorneys

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, hereby certifies that on September 17, 2004 he caused one copy of the foregoing Final Brief of Defendant-Appellee Ameritech Services, Inc. to be served by first-class mail upon the following:

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