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Title VII of the Civil Rights Act of 1964- Seniority Provisions of Union Collective Bargaining Agreement Held Controlling Over EEOC Affirmative Action Hiring Program. Jersey Central Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975).

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CASE NOTES

Civil Rights—Title VII of the Civil Rights Act of 1964—Seniority Provisions of Union Collective Bargaining Agreement Held Controlling Over EEOC Affirmative Action Hiring Program. *Jersey Central Power & Light Co. v. Local 327, IBEW*, 508 F.2d 687 (3d Cir. 1975).

Plaintiff, Jersey Central Power & Light Company (Jersey Central), a large public utility, was economically forced to announce a series of plant wide layoffs.[1] The collective bargaining agreement in force between Jersey Central and various unions required that layoffs be conducted in reverse order of seniority, *i.e.*, the last person hired is the first person to be fired.[2] A conciliation agreement[3] among Jersey Central, the unions and the Federal Equal Employment Opportunity Commission (EEOC) called for the company to begin an affirmative action program designed to increase employ-

1. Jersey Central Power & Light Co. v. Local 327, IBEW, 508 F.2d 687, 696 (3d Cir. 1975).

2. The collective bargaining between Jersey Central and the Unions provides in pertinent part: "1.1(d) The Company [Jersey Central] and the Union[s] agree that the application of the various provisions of this agreement shall in no way serve to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment or otherwise affect his status as an employee because of such individual's race, color, creed, ancestry, religion, national origin, sex, age, place of birth, marital status or liability for service in the Armed Forces of the United States . . . . 3.2(a) All layoffs, or demotions occasioned because of falling off or curtailment of work, shall be discussed with the Union two weeks in advance of the layoff and shall be made in order of seniority. No senior employee shall be laid off as long as any work which he can reasonably be expected to do is being performed by an employee junior in point of service. 3.3 Employees who have been laid off shall be reinstated to employment as need for their services arises, in the reverse order of their layoff. 3.4 Seniority is defined as length of continuous service with the Company." *See* Brief for Appellants/Union at 2-3, Jersey Central Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975). The parties to the collective bargaining agreement were Jersey Central and seven locals of the International Brotherhood of Electrical Workers; Locals 327, 749, 1289, 1298, 1303, 1309, and 1314.

3. *See* notes 18-19 *infra* and accompanying text.

ment opportunities for women and minority workers. Plaintiff sought a declaratory judgment in federal district court[4] as to its rights and obligations under the collective bargaining agreement, the conciliation agreement, Title VII of the Civil Rights Act of 1964 (Title VII)[5] and Executive Order 11246.[6]

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4. *See* notes 28-30 *infra* and accompanying text.

5. Equal Employment Opportunities Act, 42 U.S.C. §§ 2000e to e-(17), *as amended*, (Supp. 1972) [hereinafter cited as "Title VII"]. Title VII was enacted in 1964 and went into effect on July 2, 1965. The act was intended to eliminate discriminatory employment in federal agencies, private businesses doing business with the federal government and all other private concerns which met the statutory requirements for compliance. The relevant provisions of Title VII are: Section 2000e-2(a): "It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." Section 2000e-2(c) (Labor Organization Practices) places the same burden of non-discrimination applicable to employers upon "labor organizations:" "It shall be an unlawful employment practice for a labor organization — (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section." Section 2000e-2(h) specifically allows the establishment of "bona fide seniority or merit" systems: "(h) Notwithstanding any other provision of this subchapter, 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 . . . ." Section 2000e-2(j) specifically pro-

Plaintiff named various locals of the International Brotherhood of Electrical Workers (the Union),[7] the EEOC,[8] the Office of Federal

hibits the granting of "preferential treatment" to any group because of imbalances existing between percentages of minorities employed in a given place of employment and the minority population of the surrounding community: "(j) Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin . . . in comparison with the total number of [*sic*] percentage of such persons . . . in any community, State, section, or other area or in the available work force in any community, State, section, or other area."

6. Exec. Order No. 11246, *as amended*, 3 C.F.R. § 169 (1974). 42 U.S.C. § 2000e (1970) provides that all federal agencies and contractors doing business with the federal government must comply with the provisions of Title VII.

7. 508 F.2d at 691.

8. Title VII establishes the EEOC and grants this agency enforcement powers to ensure compliance with the act. 42 U.S.C. § 2000e-(4) establishes the EEOC. 42 U.S.C. § 2000e-(5), *as amended*, (Supp. III, 1973), defines its enforcement powers: "(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title. (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, [or] labor organization . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) . . . within ten days,[to the parties concerned] and shall make an investigation thereof. . . . If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge . . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion . . . . (f) (1) If . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . . (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in

Contract Compliance (OFCC),[9] the General Services Administration (GSA),[10] and the New Jersey Division of Civil Rights[11] as defendants. Jersey Central took no position as to which of the two agreements must govern the proposed layoffs.[12] The district court held that the layoffs could not alter the pre-layoff minority proportion of the work force by more than fifteen percent.[13] On appeal, the Third Circuit reversed and held that layoffs were to be effectuated in accordance with the provisions of the collective bargaining agreement.[14]

Plaintiff employed 3,859 workers of whom 2,877 were represented by the Union.[15] The EEOC had filed charges against plaintiff and the Unions alleging that both parties "unlawfully discriminated against women and 'minority group persons,' in violation of Title

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an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief the court deems appropriate." For an excellent treatment of the powers of the EEOC, see Berg, *Title VII: A Three-Years' View*, 44 NOTRE DAME LAW. 311 (1969). For a detailed examination of EEOC enforcement procedures, see 29 C.F.R. §§ 1601.1-.33 (1974); Note, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

9. 508 F.2d at 691. The OFCC has been charged by the Secretary of Labor with enforcing the provisions of Title VII involving federal contractors. *See* 41 C.F.R. chs. 60-1 to 60-60. Jersey Central had been designated a federal contractor. Brief for Appellant OFCC and GSA at 8.

10. The GSA and OFCC have concurrent enforcement powers under Executive Order 11246. Brief for Appellant OFCC and GSA at 8.

11. 508 F.2d at 691.

12. *Id.*

13. *See* Jersey Central Power & Light Co. v. Local 327, IBEW, 8 F.E.P. 690, 694 (D.N.J. 1974).

14. 508 F.2d at 710.

15. *Id.* at 694.

VII of the Civil Rights Act of 1964."[16] The EEOC found "reasonable cause" to believe that the Union and plaintiff had been guilty of discriminatory employment practices under Title VII.[17] After negotiations among plaintiff, the Union, and the EEOC, a conciliation agreement to be effective from December 1973 to December 1977 was executed by the parties.[18] Jersey Central and the Union agreed

16. *Id. See* note 8 *supra* for a discussion of the EEOC's enforcement powers under Title VII.

17. The EEOC found that there was "reasonable cause" to believe that Jersey Central had discriminated against "minority group persons and females with respect to hiring and job assignments." 508 F.2d at 694. The Union was charged with having discriminated against women "by virtue of the maternity leave provisions in the collective bargaining agreement." *Id.* at 694 n.16. The EEOC decision is docketed at Case No. YNK-063 (Jan. 19, 1973).

18. The pertinent portions of the conciliation agreement are as follows: "Section I-General Provisions 1. It is understood that this Agreement does not constitute an admission by the Respondents [Jersey Central] of any violation of Title VII of the Civil Rights Act of 1964, as amended . . . . 3. The Commission [EEOC] agrees not to sue the Respondents over matters contained in this Agreement subject to Respondent's compliance with the promises and representations contained herein. . . . [4.] This does not preclude individual Charging Parties, or the Commission itself, from filing charges or suit over new matters or practices which may arise with respect to practices of the Respondents. 5. Respondents agree that all hiring and promotion practices, *and any and all other conditions of employment* (emphasis added) shall be maintained and conducted in a manner which does not discriminate on the basis of race, color, creed, ancestry, religion, sex, national origin, age, place of birth, marital status or liability for services in the armed forces of the United States in violation of . . . [the] Civil Rights Act of 1964, as amended. . . ." Section III of the conciliation agreement . . . obligates Jersey Central to make reasonable efforts to: "recruit minorities and females into those craft areas where such jobs are to be filled by new hires, where they have heretofore been under utilized or not employed." Concerning the establishment of seniority for such newly hired minority employees, the agreement provides that they may be given credit for experience gained with other employers and may be initially assigned to jobs above the entry level. Section III, Paragraph 10 states that: "The wages, benefits, other conditions of employment and seniority date of such employee shall be determined in accordance with the provisions of the Collective Bargaining Agreement." Section V of the conciliation agreement provides for a five year affirmative action pro-

not to discriminate in hiring practices and Jersey Central agreed to make reasonable efforts to recruit "minorities and females." In addition, newly hired minorities were to be given credit "for experience gained in the craft with other employers . . . ."[19]

In July, 1974 plaintiff announced its layoffs. It estimated that the total number of employees to be affected would reach approximately 400 by December.[20] The Union insisted that Jersey Central conduct the layoffs in accordance with the collective bargaining agreement.[21] The EEOC advised the company that basing layoffs on seniority would destroy any gains made by minorities under the conciliation agreement and would violate Title VII and Executive Order 11246.[22]

Plaintiff, confronted with apparent contradictory obligations under the two agreements, asked the district court to determine its rights and obligations.[23]

In August, 1974, plaintiff commenced its layoffs in reverse order of seniority as required by the provisions of the collective bar-

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gram designed to increase the percentage of minority group employees in all levels of the employee structure, including job categories not covered by the collective bargaining agreement. 508 F.2d at 694-95.

19. *See* note 18 *supra*.

20. 508 F.2d at 696.

21. *Id.*

22. *Id.* The EEOC opposed the intended layoffs on the basis of seniority in both the district court and on appeal. The gravamen of the EEOC's argument was that the disproportionate effect the layoffs would have on minorities if conducted according to seniority (20 percent of the minority employees were scheduled for layoffs as opposed to approximately 4 percent of the remainder of the workforce) was indicative of a practice that was "fair in form, but discriminatory in practice." *See* Brief of Appellant EEOC at 32-33.

23. 508 F.2d at 691. At the same time Jersey Central was instituting its declaratory judgment action, it submitted the question of whether the seniority provisions in the collective bargaining agreement were valid to arbitration, as provided for in the collective bargaining agreement. *Id.* at 697. On August 21, 1974, the arbitrator held that the proposed layoffs would not be violative of the non-discrimination provisions of the collective bargaining agreement but made no ruling as to the validity of the layoff procedures in the context of a challenge based on alleged violation of the conciliation agreement. *Id.*

gaining agreement. On the same date, contending that "it faced multiple suits for back pay,[24] irreparable injury to itself and to the public, and severe financial inroads on its resources,"[24] plaintiff moved for a show cause order requiring "the defendants to show cause why summary judgement should not be granted 'declaring the respective rights of the parties and whether plaintiff [the Company] violated its collective bargaining agreement with [the Union] defendants . . . and the Conciliation Agreement entered into on December 3, 1973 by the layoff . . . of [designated] employees . . . .' "[25]

As of August 30, 1974, plaintiff had laid off or designated for termination 176 employees. Of this number, 54, or 30.7 percent, were male or female minority group persons.[26] As a result, the minority group representation in the "bargaining units" decreased from 7.9 percent to 6.4 percent.[27] On September 5, 1974, the district court granted plaintiff partial summary judgment,[28] holding that the layoffs could not alter the pre-layoff proportion of minority employees by more than fifteen percent.[29] Furthermore, the district court found that the dispute did not involve a controversy under

24. *Id.* at 692. Back pay awards are part of the EEOC enforcement procedures available to deal with violations of Title VII. *See* note 8 *supra.*

25. *Id.*

26. *Id.* at 697. *See also* Brief of Appellant EEOC at 14, stating that "total minority group employment fell 20 percent from 258 to 204, while total white employment fell slightly less than 6 percent from 3844 to 3660 . . . ."

27. 508 F.2d at 697. Total female employment including both minority and non-minority workers actually increased slightly during the initial lay-off period from 14.6% of the total work force to 15.2%. *Id.*

28. Jersey Central Power & Light Co. v. Local No. 327, IBEW, 8 E.P.D. ¶ 9759 (D.N.J. 1974).

29. In arriving at the fifteen percent figure the court reasoned: "the parties should realize that the achievement of exact percentages is probably impossible under any system. In the first place, employees come in complete units. . . . You've either got one or two, so there are going to be distortions for that reason alone, and other unavoidable conditions will undoubtably result in some variation from theoretically ideal proportions on that basis, and the Court would be inclined to suggest that a deviation either way not greater than 15 percent of the theoretical ideal would have to be regarded as acceptable. . . ." *Id.* Though the court recognized the problems involved in effectuating layoffs without regard to a seniority system, it failed to adequately deal with the problem, preferring to allow

Title VII, but rather the interpretation of two conflicting contracts — the conciliation agreement and the collective bargaining agreement.[30]

The court of appeals agreed that the dispute was grounded in contract law and not Title VII.[31] However, unlike the district court, it found that the conciliation agreement and the collective bargaining agreement were not in conflict, and that the seniority provisions of the collective bargaining agreement did not "frustrate" the provisions of the conciliation agreement.[32] The court also held that the

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the parties to present suggested solutions. *Id.* Before any of these suggestions could be presented or implemented the court's order was stayed by the Third Circuit. For a discussion of alternate means of effectuating layoffs, see notes 97-98 *infra* and accompanying text.

30. 8 E.P.D. ¶ 9759. The court stated: "I don't see basically that Title Seven is involved at all. . . . There is no need to look at the statute. You have got a contract. You have got two contracts, and the objective of one is in conflict with the objective of the other, and the conflict has got to be resolved. That is what declaratory judgment relief is about." *Id.* In determining which of the two agreements was to prevail in the conducting of the proposed layoffs, the court held: "An affirmative action program with a target some five years later is the kind of thing whose purpose would be utterly frustrated if in a situation of the kind now faced here, the layoffs were to be effectuated solely in accordance with the seniority clause. This does not mean that a seniority clause in and of itself is discriminatory. On the contrary, everything that the Court has been able to find indicates that such clauses are inherently valid. The difficulty is in its application in the context of the affirmative action program which has been developed through the EEOC contract, that it would have a frustrating effect, and even though it might not be discriminatory the fact of frustration calls for construction of a seniority clause in the collective bargaining agreement which would make it possible to carry forward the objectives of both agreements to the fullest extent possible. This requires an accommodation of their provisions." *Id.*

31. 508 F.2d at 700.

32. The court found that the conciliation agreement: "[h]as, as its objective, the percentage increase of females and minority group persons among employees. This objective was to be attained by the Company *hiring* a greater percentage of minority group and female workers—not by resort to a system of 'artificial' seniority." *Id.* at 701. The court apparently found it significant that the conciliation agreement made no attempt to modify the provisions of the collective bargaining agreement

seniority provisions of the collective bargaining agreement were not against "public policy."[33] In addition, the court examined the overall effect of the layoffs to ascertain whether the "seniority system, although facially neutral, nevertheless violates Title VII in that it operates to carry forward the effect of prior acts of discrimination."[34] The court of appeals found that in the collective bargaining agreement there was a "bona fide seniority system" permitted under Title VII,[35] and:

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concerning layoffs. In fact, the conciliation agreement affirmatively adopted the seniority provisions of the collective bargaining agreement: "The wages, benefits, *other conditions of employment and seniority date of such employee* [minorities hired under the conciliation agreement] shall be determined in accordance with provisions of the Collective Bargaining Agreement." *Id.* at 702.

33. Though the court initially stated that *Jersey Central* was grounded in contract law, it used the concept of a public policy argument to begin its analysis of Title VII. The court looked to the standard of "public policy" enunciated in Muschany v. United States, 324 U.S. 49 (1945). In *Muschany*, the Supreme Court stated that since determination of whether a contract was void as against public policy was a "vague" standard, there "must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to . . . [public] policy." *Id.* at 66. Using this interpretation as a guideline, the *Jersey Central* court interpreted the two agreements at issue in light of the "Constitution, treaties, federal statutes and applicable legal precedents." 508 F.2d at 704. The court ruled that: "In the case *sub judice* we are not without legislative guidance in ascertaining the public policy applicable to the particular situation here presented. Title VII of the Civil Rights Act of 1964 provides Congress' formulation of public policy." *Id.*

34. 508 F.2d at 706.

35. Title VII specifically provides for the establishment and maintenance of bona fide seniority systems. *See* 42 U.S.C. § 2000e-2(h), at note 5 *supra*. The legislative history of Title VII indicates the concern in Congress about the retention of seniority systems under Title VII. The Interpretive Memorandum of Senators Clark and Case, floor managers for the Title VII bill in the Senate provides in part: "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer

> [I]n light of the legislative history . . . . on balance a facially neutral company-wide seniority system, *without more*, is a bona fide seniority system and will be sustained even though it may operate to the disadvantage of females and minority groups as a result of past employment practices. If a remedy is to be provided alleviating the effects of past discrimination perpetuated by layoffs in reverse order of seniority, we believe such remedy must be prescribed by the legislature and not by judicial decree.[36]

Negroes for future vacancies, or, once Negroes are hired, to give them special *seniority rights at the expense of the white workers hired earlier* . . . ." 110 CONG. REC. 7213 (April 8, 1964), *cited in* 508 F.2d at 707. Senator Clark further commented upon the status of employee seniority under Title VII in response to a series of written interrogatories posed by Senator Dirksen. "Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires that they be first fired and the remaining employees are white? Answer. Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race. Question. If an employer is directed to abolish his employment list because of discrimination what happens to seniority? Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists." 110 CONG. REC. 7217 (Apr. 8, 1964), *cited in* 508 F.2d at 707-08. Senator Clark also had entered into the record an advisory memorandum by the Department of Justice which also dealt with the issue of seniority rights under Title VII which opined: "Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. 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. . . . It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is low man on the totem pole he is not being discriminated against because of his race. *Of course, if the seniority rule itself was discriminatory, it would be unlawful under Title VII* . . . . But in the ordinary case, assuming that seniority were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII . . . ." 110 CONG. REC. 7207 (Apr. 8, 1964), *cited in* 508 F.2d at 708.

36. 508 F.2d at 710. Though the court seems to be making a forceful argument for plant wide seniority systems despite the disproportionate

Seniority systems calling for layoffs to be conducted in reverse order of seniority, "last hired, first fired," have been the subject of a great deal of recent interest in the press and in the courts.[37]

In *Watkins v. United Steel Workers of America, Local No. 2369*,[38]

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effect such systems might have on newly hired minority workers, it carefully limits its ruling. The court was apparently concerned with determining such an important Title VII issue where the facts before the court were framed in the context of a declaratory judgment action. The court indicates that if the issues were framed in a more traditional Title VII complaint, *e.g.* a laid off minority worker suing for reinstatement and back pay, a different result might have been reached: "Here, with the meager record before us and considering the manner in which the issues are framed, we need not, and indeed could not, decide whether any different result would obtain in an action brought by an aggrieved party . . . . What we decide here can obviously affect and bind only the parties present in this litigation. Of the parties before us, none has offered evidence to prove that the seniority provisions are not *bona fide*." *Id.*

37. See *Job Discrimination, 10 Years Later*, N.Y. Times, Nov. 10, 1974, § 3, at 1, discussing the conflicts arising between union collective bargaining agreements and various federal and state affirmative action programs. When asked his solution to this problem, Mr. John H. Powell, Jr., Chairman of the Federal Equal Employment Opportunity Commission, stated: "The question of what is the equitable remedy turns on the facts of every case. There might be cases where the expectations of the white majority might have to be modified." *Id.* at 5, col. 3. *Issue and Debate: Recession Layoffs and the Civil Rights of Minorities*, N.Y. Times, Jan. 29, 1975, at 17. This article also treats the subject of seniority system-affirmative action program conflicts and includes synopses of the most recently decided cases on the subject. In discussing the importance of the concept of seniority to union job security, Mr. William E. Pollard, Director of the Civil Rights Office of the American Federation of Labor and Congress of Industrial Organizations opined: "Seniority is one of the most highly prized possessions of any employee . . . . Although unions can develop their own local options . . . . we feel a commitment to protect the workers and the principle of seniority." *Who Gets the Pink Slip?* TIME, Feb. 3, 1975 at 50; *Recession's Special Victims Newly Hired Blacks, Women*, N.Y. Times, March 9, 1975, § 4 at 1.

38. 369 F. Supp. 1221 (E.D. La.), *appeal docketed*, No. 74-2604 (5th Cir. June 17, 1974). The court noted that "this is the first time that a federal court has been asked to determine that layoffs and recalls based on plant seniority are racially discriminatory because of past hiring discrimination against blacks." *Id.* at 1225. "The Company's [Continental

the District Court for the Eastern District of Louisiana held that a plant wide seniority system had the effect of "perpetuating past discrimination" and therefore violated Title VII.[39] *Watkins* involved a class action by black employees of the Continental Can Company in Harvey, Louisiana. With the exception of token hiring during World War II, no blacks had been hired by the company until 1965. Upon implementation of Title VII, blacks were hired in increasing numbers and by 1971 there were fifty blacks employed out of a total work force of 400.[40] In 1971, due to adverse economic conditions, Continental began a series of plant wide layoffs in accordance with a plant wide seniority system mandated by the collective bargaining agreement.[41] After the layoffs, only 152 hourly employees, including the two blacks hired during World War II, remained.[42] Since the first 138 names on the company's recall list were white, it was conceded that no blacks could expect to be hired for several years.[43]

Plaintiffs contended that they had been precluded from obtaining employment with Continental until Title VII came into effect, and thus were unable to accrue the requisite seniority to protect their jobs.[44] Plaintiffs maintained that by basing the layoffs on seniority, the defendants were perpetuating the effect of past discriminatory hiring practices which Title VII had been enacted to rectify.[45]

The *Watkins* court found that Continental and the union had been guilty of discriminatory labor practices proscribed by Title VII.[46] It concluded that no system of job classification or seniority could stand where minorities were unable to protect their jobs or seek advancement due to past discrimination practices which denied them the opportunity to obtain requisite seniority or job experi-

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Can] history of racial discrimination in hiring makes it impossible now for blacks (other than the original 2 [hired during World War II]) to have sufficient seniority to withstand layoffs. In this situation, the selection of employees for layoff on the basis of seniority unlawfully perpetuates the effects of past discrimination." *Id.* at 1226.

39. *Id.* at 1224.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 1223.

ence to protect their jobs.[47]

The court deferred its decision as to the remedy to allow the parties to work out a suitable plan which "should involve the minimum alteration of existing industrial practices that is consistent with redressing the discrimination present . . . ."[48]

The *Watkins* court relied upon *Quarles v. Phillip Morris, Inc.*[49] In *Quarles*, seniority systems which were based upon the length of an employee's service in a particular job classification or department were ruled invalid under Title VII.[50] The *Watkins* court concluded:

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47. *Id.* at 1226.

48. *Id.* at 1232. The court stated that "[p]lant seniority and recall rights should not be eliminated, but should be modified only to the extent necessary to effect this end." *Id.* The court opined that the "best" remedy would involve an "apportionment of layoffs among whites and blacks on the basis of the proportion of each group to the total work force. Then the employees to be laid off could be selected within each racial group on the basis of plant seniority." *Id.* Other remedies which the court suggested included compensatory lump sum payments to laid off workers and reducing the total workweek for the entire work force. *Id.* For further discussion of remedies to be utilized in effectuating work force reductions, see notes 82-98 *infra* and accompanying text. The parties were unable to resolve the dispute satisfactorily and the case was appealed to the Fifth Circuit. *See* note 38 *supra*.

49. 279 F. Supp. 505 (E.D. Va. 1968).

50. Quarles and others brought a class action in federal district court claiming that the provisions of the collective bargaining agreement between the Phillip Morris Co. and Local 203 of the Tobacco Workers Int'l. Union were violative of Title VII. The Phillip Morris cigarette and tobacco manufacturing operations in Richmond, Virginia were divided into four main departments. Prior to the implementation of Title VII, the employee population of the former two departments was almost exclusively black, while composition of the remaining two departments was overwhelmingly white. *Id.* at 507-08. Prior to 1966, the collective bargaining agreement in force between the union and Phillip Morris contained no provisions for interdepartmental transfers. On March 6, 1966, under pressure from the EEOC, the union and the company amended their agreement to allow limited interdepartmental transfers. In addition, due to increased hiring of minorities, the minority population of the two formerly exclusively white departments increased to 14 percent and 12.9 percent. Quarles had been employed in the prefabrication department as a laborer for a period of nine years. His salary was $2.22 per hour. He desired to transfer into the warehouse department where he hoped to obtain a job as a truckdriver at a

salary of $2.58 per hour. The gravamen of Quarles' complaint was that even if he were allowed to transfer departments, he still would be unable to obtain the truck driver's job since under the provisions of the collective bargaining agreement, he would have to give up all his prior earned seniority and become the most junior employee in his new department. *Id.* at 514. The court examined the legislative history of Title VII and opined that although Title VII did indeed preserve previously existing seniority rights, only "bona fide" systems were to be preserved: "[Title VII] declares that it shall not be an unlawful employment practice for an employer to apply different standards pursuant to a *bona fide* seniority system '. . . provided that such differences are not the result of an intention to discriminate because of race.' The differences between the terms and conditions of employment for white [*sic*] and Negroes about which plaintiffs complain are the result of an intention to discriminate in hiring policies on the basis of race before January 1, 1966. The differences that originated before the act are maintained now. The act does not condone present differences that are the result of intention to discriminate before the effective date of the act, although such a provision could have been included in the act had Congress so intended. The court holds that the present differences in departmental seniority of Negroes and white [*sic*] that result from the company's intentional, racially discriminatory hiring policy before January 1, 1966 are not validated by [Title VII]." *Id.* at 517-18. Significantly, the court specifically cites the lack of a legislative mandate to construe the provisions of Title VII as broadly as it did in invalidating the departmental seniority system. The court in *Jersey Central* refused to invalidate the seniority system in force because it claimed it needed a more specific legislative mandate. *See also* Bing v. Roadway Express Co., 485 F.2d 441 (5th Cir. 1973); Cox v. Allied Chem. Corp., 382 F. Supp. 309 (M.D. La. 1974). For other cases invalidating departmental seniority systems, see United States v. Local 189, United Papermakers Union, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), citing *Quarles*, and holding that the departmental seniority system violated Title VII and should be replaced with a seniority system based on mill wide seniority. *See also* United States v. Jacksonville Term. Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972) in which the court held that: "continued use of the craft and class seniority systems to restrict the transfer and promotion opportunities of incumbent black employees at the Terminal is neither bona fide [as required by Title VII] nor a business necessity: such systems necessarily exclude blacks from jobs for which they might otherwise qualify." *Id.* at 453. United States v. N.L. Ind. Inc., 479 F.2d 354 (8th Cir. 1973), holding that a dual seniority system providing for plant wide seniority for company provided insurance and annuity benefits coupled with departmental seniority for job classification and promotional benefits was proscribed under Title VII.

> In these cases, where the affected class was composed of long standing—but previously segregated—black employees, the defendants were ordered to adopt a seniority standard based on total length of service. Plant seniority was held to be a racially neutral standard in those cases, not because it is *per se* valid, but because blacks had not been excluded from the plant (as distinct from certain departments or jobs) and thus had been able to earn plant seniority.[51]

The *Watkins* court also relied on court decisions invalidating union referral systems based on seniority.[52] In most construction trades, employee hiring for individual jobs is accomplished by referrals from union "shape-up" halls.[53] Prior to Title VII, many construction unions engaged in discriminatory admission practices.[54] After Title VII forced these unions to alter their admission policies, the unions still prevented newly hired workers from obtaining any actual employment by basing their referrals on seniority within the union.[55] Since most of the minority union members were also the most junior, they were effectively precluded from job assignments.[56] The *Watkins* court indicated that in these cases, courts uniformly held such referral systems violative of Title VII.[57]

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51. 369 F. Supp. at 1226 (citation omitted).

52. *See* United States v. Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969), holding that job referrals, apprenticeship training, and promotional examinations administered by defendant union violated Title VII; Dobbins v. Local No. 212, EWU, 292 F. Supp. 413 (S.D. Ohio 1968), invalidating separate referral standards for newly admitted black union members and more senior white members; EEOC v. Local No. 180, Plumbers and Pipe United Ass'n., 311 F. Supp. 468 (S.D. Ohio 1970), *vacated on other grounds*, 438 F.2d 408 (6th Cir. 1971).

53. For a discussion of hiring practices and referral systems in the construction trades as well as a history of past discriminatory practices utilized by these unions, see Hain, *Black Workers Versus White Unions: Alternate Strategies in the Construction Industry*, 16 WAYNE L. REV. 37 (1969); Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84 (1970); Note, *Title VII of the Civil Rights Act of 1964 and Minority Group Entry into the Building Trade Unions*, 37 U. CHI. L. REV. 328 (1969).

54. *See generally* sources cited in note 53 *supra*.

55. *Id.*

56. *Id.*

57. 369 F. Supp. at 1226. *See also* Dobbins v. Local No. 212, EWU, 292 F. Supp. 413 (S.D. Ohio 1968), where the court held: "A policy of giving

Other cases have disagreed with the conclusions reached in *Watkins*.[58] In *Waters v. Wisconsin Steel Works of International Harvester Company*,[59] the Seventh Circuit concluded that the seniority system in question was plant wide, "facially neutral," and acceptable under Title VII.[60] Nevertheless the court concluded that employers must exercise "discretion" in devising employment systems, including those based on plant wide seniority.[61] Unlike the *Watkins* court, the *Waters* court offered no guidance as to how such a "discrete" seniority system was to be implemented.[62]

In *Franks v. Bowman Transportation Co.*,[63] the Fifth Circuit had little difficulty granting relief for such proscribed employment practices as discriminatory departmental seniority systems or failing to hire or promote employees on the basis of race.[64] The court held, however, that Title VII did not afford unlimited relief, and refused to create "fictional" or "constructive" seniority based upon the date some applicants were refused employment on the basis of race.[65]

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priority in work referrals to persons who have experience under the Local's Collective Bargaining Agreement is discriminatory when competent [Negroes] have previously been denied the opportunity to work under the referral agreement by reason of their race." *Id.* at 445.

58. Although *Watkins* was cited by *Jersey Central*, the court stated that "we do not agree with its analysis." 508 F.2d at 707 n.56.

59. 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3476 (U.S. Feb. 24, 1975).

60. "We are of the view that Wisconsin Steel's employment seniority system embodying the 'last hired, first fired' principle of seniority is not of itself racially discriminatory nor does it have the effect of perpetuating prior racial discrimination in violation of the strictures of Title VII." 502 F.2d at 1318.

61. "We are not, however, insensitive to the plaintiffs' argument, and think employers should be discrete in devising an employment seniority system. We recognize that it is a fine line we draw between plaintiffs' claim of discrimination and defendants' countercharge of reverse discrimination." *Id.* at 1320. *Compare* 508 F.2d at 710.

62. 502 F.2d at 1320.

63. 495 F.2d 398 (5th Cir.), *cert. denied sub nom.* Bowman Trans. Co. v. Franks, 43 U.S.L.W. 3330 (U.S. Dec. 9, 1974).

64. 495 F.2d at 416-17. The court followed the same line of reasoning as had been followed in *Quarles* and its progeny. The court held that black employees would be able to apply their plant wide seniority to establish the requisite seniority needed to transfer into the jobs they desired.

65. *Id.* at 417-18.

> In seeking application-date seniority . . . appellants ask us to take a giant step beyond permitting job competition on the basis of company seniority. They ask us to create constructive seniority for applicants who have never worked for the company. Granting that the black . . . applicants who were rejected on racial grounds suffered a wrong, we do not believe that Title VII permits the extension of constructive seniority to them as a remedy. . . . 'It is one thing for legislation to require the creation of *fictional* seniority for newly hired Negroes, and quite another thing for it to require that time *actually worked* in Negro jobs [within the company] be given equal status with time worked in white jobs. . . . [C]reating fictional employment time for newly-hired Negroes would constitute preferential rather than remedial treatment.'[66]

The Courts in *Jersey Central, Waters,* and *Franks* concluded that the creation of fictional seniority would constitute "preferential treatment" for minorities rather than promoting equal employment opportunities.[67] Nevertheless, the principle of extending such "preferential treatment" has been firmly established by other judicial precedent.[68] In addition, "preferential treatment" toward minorities

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66. *Id.*

67. 508 F.2d at 32-33.

68. *See* Contractors Ass'n. v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir.) *cert. denied*, 404 U.S. 854 (1971). This case involved a challenge to the "Philadelphia Plan" as being violative of Title VII and the United States Constitution. On June 27, 1969, pursuant to his authority under Executive Order 12246 (*see* note 6 *supra*), the Secretary of Labor issued a regulation entitled the "Revised Philadelphia Plan." The Plan required each prospective bidder and contractor to "federally assisted" construction projects where the total estimated cost would exceed $500,000 to submit with his bid an "affirmative action program" which set specific goals for "minority manpower utilization." The standards which this program had to meet were promulgated by the Secretary of Labor on September 23, 1969. 311 F. Supp. at 1004-05. The "ranges" within which these goals were expected to reach were as follows: "[I]n the first year employment 'ranges' [should] vary between four (4) and nine (9) percent; in the second year between nine (9) and fifteen (15) percent; in the third year between fourteen (14) and (20) twenty percent; and in the fourth and last year between nineteen (19) and twenty-six (26) percent . . . ." *Id.* at 1005. The plaintiffs alleged that the Plan was violative of Title VII in that it required hiring to be, "on the basis of and with regard to race, color and national origin." *Id.* at 1009. In holding that the Plan did not conflict with Title VII, the district court held: "The Court is of the opinion that the Plan is not in conflict with the provisions

in labor contracts and hiring practices has been legislatively sanctioned by Title VII[69] and upheld by the Supreme Court.[70]

In *Jersey Central*, the court relied on the legislative approval of bona fide seniority systems.[71] The court failed to deal adequately

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of the Civil Rights Act . . . . If there is any one lesson that loomed above the others it is that the Civil Rights Act and the Executive Orders both have a common purpose to assure to all an equal chance for employment. . . . The Plan does not require the contractors to hire a definite percentage of a minority group. To the contrary, it merely requires that he makes every good faith effort to meet his commitment to attain certain goals. If a contractor is unable to meet the goal but has exhibited good faith, then the imposition of sanctions, in our opinion, would be improper . . . . *Id.* at 1008-10. *See also* Associated Gen. Cont. of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974), upholding a similar affirmative action hiring plan. The courts have gone far beyond the "merely" making a "good faith effort" to achieve the percentage goals standard expressed in the Philadelphia Plan case. Recent decisions have required an exact percentage of minorities to be hired until certain numeric quotas have been satisfied. *See* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972), mandating that the City of Minneapolis hire two minority persons for every one non-minority person until the municipal fire department contained 20 qualified minority persons; Bridgeport Guardians, Inc. v. Members of the Bridgeport Civ. Ser. Comm'n., 482 F.2d 1333 (2d Cir. 1973), affirming the imposition of affirmative action quotas in which half of all future patrolmen hired by the Bridgeport, Connecticut police department were to be blacks and Puerto Ricans until the total number of such minorities on the force numbered fifty. *See* Comment, *The Infirmities of Affirmative Action: The New York City Plan*, 2 FORDHAM URBAN L.J. 305 (1974).

69. 42 U.S.C. § 2000e-2(i) states: "Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation."

70. Morton v. Mancari, 417 U.S. 535 (1974). In upholding this statute's constitutionality in the face of a challenge by a class of non-Indian employees of the Bureau of Indian Affairs the Supreme Court said: "[Section 2000e-2(i)] explicitly exempted from its coverage the preferential employment of Indians by Indian tribes or by industries located on or near Indian reservations . . . . This exemption reveals a clear congressional recognition, within the framework of Title VII, of the unique legal status of tribal and reservation-based activities." *Id.* at 545-46. Though *Morton*

with the Supreme Court's decision in *Griggs v. Duke Power Company*,[72] in which the Court ruled that a legislatively sanctioned employment practice may still be found to be violative of Title VII.[73]

Griggs involved a challenge to the defendant company's departmental transfer policies.[74] Prior to Title VII, the defendant maintained a segregated work force.[75] After 1965, employees were allowed to transfer into the more desirable departments only upon presentation of a high school diploma or the passing of company administered aptitude tests.[76] Whites already in the more desirable departments did not have to meet these qualifications to retain their jobs.[77] The defendant relied upon the provisions of Title VII[78] which specifically allowed the administration of aptitude tests to aid employers in employee selection.[79]

The Court rejected these contentions and ruled the testing requirements invalid since the defendant failed to show any "de-

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deals with a small class—American Indians, it represents the principle that "preferential treatment" for minorities is not per se unconstitutional.

71. 508 F.2d at 709-10.
72. 401 U.S. 424 (1971).
73. *Id.* at 429-31.
74. *Id.* at 427.
75. *Id.* at 426-27.
76. *Id.* at 427.
77. *Id.*
78. *Id.* at 433 n.9. The defendant relied upon 42 U.S.C. § 2000e-2(h) which provides in part: "nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."
79. The interpretive memorandum offered by Senators Clark and Case concerning employer administered testing stated: "There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and may hire, assign, and promote on the basis of test performance." 110 CONG. REC. 7213 (Apr. 8, 1964), *cited in* 401 U.S. at 435 n.11.

monstrable connection" between the tests and the requirements of the applicable job classifications.[80]

> Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices. . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[81]

In *Jersey Central*, the court of appeals had to determine the extent to which non-minority rights were to be sacrificed to minority expectations. Applying the holding of *Griggs*, in order to invalidate the seniority provisions of the collective bargaining agreement it would be necessary to show that there is no "demonstrable connection" between the seniority system and any "business necessity" of the employer.

It has been suggested that a four tier test be employed for determining whether an employment practice meets the *Griggs* standard of "business necessity."[82] First a court must determine whether the employment practice in question is facially neutral.[83] The plant-wide seniority system present in *Jersey Central* appears to meet this test and such systems have received repeated judicial approval.[84] Next, the court must consider whether the practice has a disparate impact on minority employees.[85] Although the conciliation agreement in *Jersey Central* contained a specific disclaimer of past discriminatory practices,[86] the record of the court clearly indicates the disproportionate effect of seniority based layoffs on minority workers.[87]

Third, a court must determine whether an employment practice

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80. 401 U.S. at 431; *see generally* 1 FORDHAM URBAN L. J. 252 (1972).
81. 401 U.S. at 430-31.
82. Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974) (hereinafter cited as *Business Necessity).*
83. *Id.* at 107.
84. 508 F.2d at 706-09.
85. *Business Necessity* 107.
86. 508 F.2d at 694.
87. *Id.* at 697.

serves a valid business purpose.[88]

Several arguments have been advanced in support of the beneficial effects of seniority systems for workers.[89] Seniority systems tend to eliminate subjective decisions by employers and supervisors with respect to promotions and layoffs.[90] They provide union officials and employers with an objective standard to aid in settling disputes.[91] Most importantly, seniority systems provide workers with job security.[92] Employers also benefit from seniority systems by securing lower turnover rates and providing objective criteria upon which to base retention and promotional decisions.[93]

Finally, a court must consider the availability of alternate practices which would achieve the same business purposes with a less disparate impact on minority workers.[94] In both *Watkins*[95] and the district court opinion in *Jersey Central*,[96] the courts refused to mandate any remedy which would include the laying off of incumbent non-minority workers. Nevertheless, in order to decrease the impact

88. *Business Necessity* 107-13.

89. *See* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962) [hereinafter cited as Aaron]; Cooper and Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969) [hereinafter cited as Cooper & Sobel]; *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971) [hereinafter cited as *New Developments*].

90. Cooper & Sobel 1604.

91. *Id.* at 1604; *New Developments* 1157.

92. Aaron 1535; Cooper & Sobel 1605; *New Developments* 1157.

93. Cooper & Sobel 1606-7; *New Developments* 1157.

94. *Business Necessity* 113-15.

95. 369 F. Supp. at 1232.

96. 8 E.P.D. ¶ 9759. *See also* Cooper & Sobel 1606 n. 21. "This does not necessarily mean that white employees should be removed from their jobs. Although by retaining jobs acquired on a discriminatory basis, white employees in one sense benefit from prior discrimination, it is unclear whether there is in such a case any employment decision as to which a fair employment law is operative. The legal placement of a white in a job, even on a discriminatory basis, may be viewed as a closed transaction as to which the emphasis in the legislative history [of Title VII] on non-retroactivity would be applicable. In view of the practical consequences of a contrary interpretation, this view has substantial merit." *Id.*

of layoffs on minority workers while preserving non-minority jobs, a new method of affectuating work force reductions is needed.

One promising proposal for dealing with this problem is a system of "work allocation."[97] Under such a system, the impact of work force reductions would be spread through a greater portion of the work force by such measures as reductions in the length of work days, the imposition of four or even three day weeks, and rotational layoffs in which groups of workers would be temporarily laid off and then recalled.[98]

Work allocation programs have the further advantage of preserving basically intact the "business purposes" of seniority systems in that workers still retain the benefits of job security while employers can implement such programs so that their impact falls least heavily on "senior" employees.[99]

After the decision in *Jersey Central*, it is difficult to determine how far courts will go in applying Title VII to remedy the effects of discriminatory labor practices. As has been illustrated, courts have had little difficulty invalidating departmental seniority systems[100] and discriminatory union referral systems.[101] In addition, courts have designated quotas of blacks and other minorities to be hired in preference to equally qualified non-minorities.[102]

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97. *See* Cooper & Sobel 1635-36. Work allocation systems are also supported by Mr. Gustav Heninburg of the Greater Newark Urban Coalition. In a recent interview, Mr. Heninburg stated "[work allocation] can mean almost anything, depending on what kind of industry it is. It may mean 4 ½-day work weeks, or 4-day work weeks. It may mean giving up vacation days. It may mean a whole range of things which are designed to keep everybody working. Everybody may work a little bit less, but everybody continues to work." N.Y. Daily News, Mar. 10, 1975, at 19, col. 2.

98. *Id.*

99. *See* notes 88-93 *supra* and accompanying text. The greatest benefit of work allocation programs is keeping workers on the job. Workers who have accrued seniority could have their work periods curtailed the least, while the more "junior" employees would work comparatively less. The objective benefits of seniority systems would still be available to employers and unions in making these selections, but junior workers would have the advantage of retaining their jobs.

100. *See* note 50 *supra* and accompanying text.

101. *See* notes 52-57 *supra* and accompanying text.

102. *See* note 68 *supra* and accompanying text.

Courts have refused to rule that incumbent non-minority workers must give up their jobs to allow minorities to remain employed.[103] Until definitive guidelines are established by either judicial or legislative action,[104] work allocation systems appear to be the most equitable alternative to seniority based layoffs.

Ira E. Goldberg

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103. *See* notes 95-96 *supra*.

104. The Supreme Court has finally decided to rule on this issue in Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3515 (U.S. March 25, 1975) (No. 74-728).