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Employment Discrimination--Seniority Systems under Title VII

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COMMENTS

Employment Discrimination—Seniority Systems Under Title VII

Seniority systems[1] have an important role in most personnel systems, often governing not only the order of layoff and recall, but also promotions, wages, and relative entitlements to ancillary benefits. During the congressional debate on Title VII,[2] opponents were concerned that the proposed statute might have an adverse effect on established seniority systems and on the concept of seniority as an allocator of benefits in the workplace.[3] In response to these concerns, Senators Mansfield and Dirksen introduced a compromise section clarifying Title VII's effect on seniority systems.[4] This section, section 703(h) of Title VII, provides:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona-fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .[5]

Section 703(h) provides a defense for an employer or a union accused of operating an unlawful seniority system. It protects only those seniority systems that are bona fide and are not the result of an intention to discriminate. Its terms reflect the balance Congress struck between affording immediate equal employment opportunity for all and maximizing the freedom of employers and employees to set the terms and conditions of their employment relationship through collective bargaining.[6]

Since the enactment of Title VII, courts have struggled to resolve the ten-

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1. A seniority system has been defined as a system that "alone, or in tandem with non-'seniority' criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." California Brewers Ass'n v. Bryant, 444 U.S. 598, 606 (1980). *See also* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights,* 75 HARV. L. REV. 1532, 1534 (1962); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598, 1602 (1969).

2. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66, (codified as amended at 42 U.S.C. § 2000e (1976 & Supp. V 1981)). Title VII prohibits an employer from discriminating on the basis of race, color, religion, sex, or national origin in all employment decisions.

3. *See, e.g.,* H.R. REP. No. 914, 88th Cong., 1st Sess. 64-66 (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2432-34; 110 CONG. REC. 486-89 (1964) (statement of Sen. Hill); *id.* at 11,471 (statement of Sen. Javits).

4. 110 CONG. REC. 11,926, 11,931 (1964). The Mansfield-Dirksen compromise was introduced on May 26, 1964.

5. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(h), 78 Stat. 241, 257 (codified at 42 U.S.C. § 2000e-2(h) (1976)).

6. American Tobacco Co. v. Patterson, 456 U.S. 63, 76-77 (1982).

sion between these conflicting policies. Initially, the policy of affording immediate and complete relief from discrimination predominated. The Supreme Court's recent decisions, however, have given increasing weight to the strong national policy favoring minimal supervision over the collective bargaining process. This shift in policy focus has engendered a need for new definitions of "bona fide" and "intent to discriminate." While the Supreme Court has clearly rejected the analysis of the early cases, it has provided neither a new definition of these terms nor a new method of analyzing seniority system cases. This comment will analyze the development of seniority system law, and will propose an analytical and procedural model for future application.[7]

I. THE HISTORY OF SECTION 703(h)

A. Systems that Perpetuate Past Discrimination Are Illegal

Section 703(h) provides that the application of "different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona-fide seniority . . . system" will not constitute an unlawful employment practice.[8] This section gives seniority systems a general immunity from Title VII scrutiny. As originally interpreted, section 703(h) did not, however, immunize a facially neutral seniority system that perpetuated past discrimination.[9] A prima facie violation of Title VII was established when the plaintiff showed that the seniority system had a disparate impact on minority employees.[10] Thus, under this interpretation, a plaintiff whose claim of discriminatory job assignment might otherwise be barred by the statute of limitations,[11] or be defeated because the discriminatory act occurred prior to the effective date of Title VII,[12] could still obtain relief on the ground that he was

7. Other commentators have explored the meaning of bona fide and the proper allocation of burdens of proof in seniority system cases. *See* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981); Hillman, Teamsters, California Brewers, *and Beyond: Seniority Systems and Allocation of the Burden of Proving Bona Fides,* 54 ST. JOHN'S L. REV. 706 (1980); Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases,* 32, STAN. L. REV. 1129 (1980); Schnapper, *Two Categories of Discriminatory Intent,* 17 HARV. C.R.-C.L. L. REV. 31 (1982); Smalls, *The Burden of Proof in Title VII Cases,* 25 How. L.J. 247 (1982).

8. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §703(h), 78 Stat. 241, 257 (codified at 42 U.S.C. § 2000e-2(h) (1976)).

9. International Bhd. of Teamsters v. United States, 431 U.S. 324, 346 n.28 (1977) (reviewing prior case law). *See* Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). *See also* Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967) (advancing the theory that perpetuating past discrimination through a seniority system violates Title VII).

10. Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

11. Title VII requires that a charge be filed with the EEOC within 180 days of the alleged unlawful employment practice. When the aggrieved party initially complains to a state or local agency empowered to seek relief the period is extended to the earlier of 300 days after the alleged unlawful employment practice or 30 days after notice of termination of the state or local agency's proceedings. 42 U.S.C. § 2000e-5(e) (1976).

12. Title VII's prohibition against employment discrimination became applicable to employers with 100 or more employees on July 2, 1965. The prohibition extended to those with 75 or more employees on July 2, 1966; to those with 50 or more employees on July 2, 1967; and to employers with 25 or more employees on July 2, 1968. Title VII applied to all labor organizations procuring employees for a covered employer effective July 2, 1965. All other labor organizations

presently disadvantaged by the seniority system that perpetuated the effects of the past discrimination.

Quarles v. Phillip Morris, Inc.[13] is the seminal decision in the development of this early interpretation of section 703(h). Prior to 1965, defendant company discriminated against blacks, assigning them to lower paying segregated departments. Each department had its own seniority list and its own lines of progression.[14] The company allowed employees in the black departments to transfer to entry level jobs in the white departments upon their supervisor's approval, but with a forfeiture of all seniority earned in their former departments.[15]

Plaintiffs were black employees hired before 1966 and assigned to the segregated black departments. They argued that the seniority system violated several provisions of Title VII by perpetuating past discrimination.[16] The district court rejected defendant's argument that section 703(h) immunized the seniority system, finding that neither the legislative history nor the text of section 703(h) contained a clear exemption for a departmental seniority system.[17] Rather, the court found that the present diminution of minority opportunity, resulting from the combination of past discrimination and the operation of an otherwise neutral seniority system, was repugnant to the remedial purposes of Title VII.[18]

The *Quarles* court considered the specific language of section 703(h) and noted that the section immunized only a "bona-fide" seniority system when the resulting differences in employment conditions were not the product of an intention to discriminate.[19] The court did not treat "bona-fide" and "intent to discriminate" as wholly separate requirements. Instead, the court found that defendant's past discrimination compelled a finding that the system was not bona fide, because this past discrimination showed that the system resulted from an intention to discriminate.[20] Under *Quarles*, then, the system's bona fides were to be determined with reference to the employer's acts and inten-

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were covered according to the number of members following the same timetable as employers. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), (e), 78 Stat. 241, 253-54. In 1972 Congress amended Title VII to extend its coverage to all employers of 15 or more employees, and to all labor organizations with 15 or more members, effective March 24, 1973. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(2), (4), 86 Stat. 103 (codified at 42 U.S.C. § 2000e (e) (1976)).

13. 279 F. Supp. 505 (E.D. Va. 1968).

14. *Id.* at 508, 511. The defendant's cigarette manufacturing facilities were organized into four departments: (1) green leaf stemmery; (2) prefabrication; (3) fabrication; and (4) warehousing. Blacks were historically assigned to stemmery and prefabrication departments, while whites were assigned to fabrication and warehousing. *Id.* at 508.

15. *Id.* at 512-513. After 1961 the company allowed a very limited number of employees to transfer from the black to the white departments without forfeiting their seniority. *Id.*

16. Plaintiffs alleged violations of 42 U.S.C. § 2000e-2(a), (c), (d) (1976). *Quarles,* 279 F. Supp. at 514.

17. *Quarles,* 279 F. Supp. at 516, 518. The legislative history of Title VII is summarized and discussed in Vaas, *Title VII, Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966).

18. *Quarles,* 279 F. Supp. at 516-18.

19. *Id.* at 517.

20. *Id.*

tions at some time past; if either showed discrimination, the system could not be bona fide.

While the *Quarles* court considered evidence touching on intent in determining the system's bona fides, it also advanced an independent analysis of the intent to discriminate proviso. The court reasoned that when a system's present disparate impact is, in part, the result of defendant's past discrimination, then that present disparate impact results from an intention to discriminate.[21] The court focused on the precise language of section 703(h); its analysis was careful and accurate. It recognized that, by its terms, the proviso of section 703(h) does not require that the *system* result from an intention to discriminate, but only that the differences in terms and conditions of employment result from such intent. The court held that when the differences in employment terms and conditions result from both the operation of the seniority system and the defendant's past discrimination, then the proviso excludes the seniority system from the protection of section 703(h). The operation of such a seniority system would be an unlawful employment practice under *Quarles*.

The perpetuation of past discrimination theory of Title VII liability developed in *Quarles* and the general disparate impact theory of liability set out in *Griggs v. Duke Power Co.*[22] reflect a similar view of the scope and purpose of Title VII. Both the *Quarles* and *Griggs* theories of liability are directed at facially neutral, institutionalized practices that work to disadvantage protected minority groups. The *Quarles* theory of liability gives greatest weight to the policy of promoting actual equal employment opportunity, and to the goal of implementing equal employment opportunity as soon as possible. Without the *Quarles* theory of liability, the last vestiges of pre-Title VII job discrimination would not be totally eliminated until all members of minority groups in the work force as of 1965 retire, which could well be fifty years hence.

By weighing policy considerations so heavily in favor of promoting immediate, actual equal opportunity, the *Quarles* court gave too little attention to countervailing considerations. The court felt that the seniority system was designed to serve the employer's interest in a stable and efficient work force.[23] Because the seniority system was excluded from the protection of section 703(h) by defendant's past discrimination, defendant would have to show that the system met the test of "business necessity" in order to escape Title VII liability.[24] This is in keeping with the general analytical model for Title VII disparate impact cases: business necessity is a defense to plaintiff's prima facie

21. *Id.* at 518.

22. 401 U.S. 424, 430-31 (1971). In *Griggs* plaintiffs challenged their employer's diploma and testing requirements as unrelated to job performance. The Court held that although the requirements were facially neutral and no discriminatory intent had been shown, the practice was discriminatory in effect and therefore unlawful. *Id.*

23. *Quarles,* 279 F. Supp. at 513.

24. *See Griggs,* 401 U.S. at 431-32; Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). A defendant could prevail with the "business necessity" defense only by showing that the employment practice was "irresistably demanded" by the employer's need for efficiency and employee safety. *See* United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971).

case of disparate impact.[25] The defendant in a seniority systems case may be unable to show business necessity, however, because seniority systems generally do not serve the employer's business interests.

Seniority systems and section 703(h) involve social policy judgments unlike those arising in most cases concerning employment practices with a disparate impact. Most practices with a disparate impact serve only the employer's interests. Certainly, in cases concerning job testing, requirements of physical size or ability, and minimum educational requirements, it is only the employer who stands to benefit from the practice in question. In seniority system cases, however, the seniority system is often designed to serve the interests of incumbent employees, and may even operate to the employer's detriment, limiting flexibility in personnel assignment and compensation decisions.[26] Section 703(h) was inserted into Title VII in part to protect the seniority expectations of incumbent employees.[27] More importantly, section 703(h) was intended to afford some measure of protection to the institution of seniority in general and, in a broader sense, the right of employees to bargain freely with their employer to determine the terms and conditions of their employment.[28] The *Quarles* court's failure to identify and analyze these countervailing considerations resulted in an over-restrictive interpretation of section 703(h).

The *Quarles* rule that seniority systems which perpetuate past discrimination violate Title VII was adopted by the Fifth Circuit in *Local 189, United Papermakers and Paperworkers v. United States.*[29] In *Papermakers* defendants had maintained segregated lines of progression until 1966. Vacancies in all lines were posted, and were awarded to the employee bidding for the job who had the greatest seniority in the job immediately below. In 1966 the company merged the black and white lines of progression according to wages, which, with a few exceptions, meant that the black lines were tacked on below the white lines.[30] Thus, in order to be eligible for the jobs in the formerly white line, a black employee already in the black line would have to advance to the top of that line by achieving greater seniority than all other black employees in that job. A contemporaneously hired white would already be rising through the formerly white line of progression.[31] The court agreed that the system was facially neutral, but noted that the consequence of the system was that "every time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the

25. *See Griggs,* 401 U.S. 424 (1971).

26. *See* Cooper & Sobol, *supra* note 1, at 1604.

27. *See, e.g.,* United States v. Bethlehem Steel Corp, 446 F.2d 652 (2d Cir. 1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). *See also* 110 CONG. REC. 7213 (1964) (memorandum concerning the effect of Title VII on seniority introduced by floor captains Sens. Clark and Case), *id.* at 7207 (Justice Department memorandum on the same subject).

28. American Tobacco Co. v. Patterson, 456 U.S. 63, 76-77 (1982); California Brewers Ass'n v. Bryant, 444 U.S. 598, 608 (1980). *See also* 110 CONG. REC. 7207, 7213 (1964).

29. 416 F.2d 980 (5th Cir. 1969).

30. *Id.* at 984.

31. *Id.*

Negro suffers anew for his employer's previous bias."[32] The court held that the seniority system was unlawful under Title VII, and affirmed the district court's ruling that mill seniority, rather than job seniority, would be the determining factor when a job was bid for by a black employee hired prior to January 1966.[33]

The *Papermakers* court followed the *Quarles'* court's interpretation of the language and legislative history of Title VII, focusing on the broad remedial purposes of Title VII.[34] The court found that section 703(h) did not protect the seniority system in question because the system was not bona fide, and because the differences in employee opportunity resulted from an intention to discriminate.[35] As in *Quarles*, the *Papermakers* court held that "a departmental seniority system which has its genesis in racial discrimination is not a bona-fide seniority system."[36] The defendant's past discrimination in hiring and job assignments was imputed to the seniority system, thereby compelling a finding that the system was not bona fide. Thus, *Papermakers* continued to consider the employer's intent and the system's origins in determining its bona fides. As in *Quarles*, the *Papermakers* court analyzed the intent to discriminate proviso of section 703(h) independently, and its analysis tracked that in *Quarles*. When differences in employment conditions resulted from the combination of past discrimination and the operation of a seniority system, said the court, those differences were unlawful, because the proviso of section 703(h) excluded the seniority system from the section's protection.[37]

The reasoning in *Papermakers* differed from that in *Quarles* in two respects. First, the *Papermakers* court recognized that the seniority expectations of fellow employees were a countervailing interest to equal employment policies.[38] The court felt, however, that the remedy of plant-wide seniority would adequately preserve the legitimate component of incumbent employees' seniority expectations.[39] Second, and more importantly, the *Papermakers* court reasoned that Congress' intent in enacting section 703(h) was to proscribe the granting of fictional seniority, or a seniority preference, to a person discriminatorily refused employment.[40] In other words, section 703(h) was intended to limit the courts' remedial powers. Under this interpretation, the court could not grant fictional or constructive seniority dating from the original refusal to hire to a person who was hired after having been discriminatorily refused employment on first application.[41]

The view that a seniority system which perpetuated past discrimination

32. *Id.* at 988.
33. *Id.* at 990, 997.
34. *Id.* at 987-88.
35. *Id.* at 988, 995-96.
36. *Id.* at 995 (quoting *Quarles,* 279 F. Supp. at 517).
37. *Papermakers,* 416 F.2d at 996.
38. *Id.* at 988.
39. *Id.* at 995, 998.
40. *Id.* at 995.
41. *Id.*

violated Title VII was adopted by most of the circuit courts[42] and enjoyed widespread support from the commentators.[43] By the early 1970's, courts were likely to find a violation of Title VII when a seniority system had a history of discriminatory job assignments and rules burdening transfer between seniority units. Discriminatees who had been hired but assigned to a less desirable department could attack the departmental system that perpetuated the discriminatory job assignment. Those who had been discriminatorily *refused* employment, either before or after the effective date of Title VII could not, however, if later hired, obtain relief from a seniority system that perpetuated the effects of the refusal to hire. This was a necessary consequence of the then-prevailing view that section 703(h) limited the courts' remedial powers. Thus, the availability of relief did not hinge on when the discriminatory act occurred, but rather on whether the act was a discriminatory assignment or a refusal to hire.

B. Section 703(h) Redefined

Throughout the early Title VII cases, section 703(h) was interpreted as nothing more than a bar against a grant of fictional or constructive seniority to discriminatees previously denied a job.[44] The courts uniformly based remedies on seniority accruing from the actual date of hire, or "plant seniority." The Supreme Court vitiated this interpretation of section 703(h), however, in *Franks v. Bowman Transportation Co.*[45]

The issue before the Court in *Franks* was whether section 703(h) proscribed remedial seniority for those discriminatorily refused employment after the effective date of Title VII.[46] The Court held that when plaintiffs showed a pattern or practice of discriminatory hiring, all members of the class of minorities who had been discriminatorily rejected for employment after the effective date of the Act were presumptively entitled to constructive seniority dating from the refusal to hire.[47] The Court felt that a grant of seniority was a necessary concomitant of the make-whole remedy authorized by Congress in section 706(g).[48]

As interpreted by the *Franks* Court, section 703(h) was not in any way a limitation on the courts' remedial powers; the Court found, instead, that it was "apparent that the thrust of the section is directed toward defining what is and

42. *E.g.*, Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); United States v. Navajo Freight Lines, Inc., 525 F.2d 1318 (9th Cir. 1975); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

43. *See, e.g.*, Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268 (1969); Cooper & Sobol, *supra* note 1; Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 UCLA L. REV. 177 (1975).

44. *See supra* text accompanying notes 38-41.

45. 424 U.S. 747 (1976).

46. *Id.* at 750.

47. *Id.* at 779.

48. *Id.* at 766. *See* 42 U.S.C. § 2000e-s(g) (1976).

what is not an illegal discriminatory practice."[49] The Court rejected any distinction between post-Act refusals to hire and discriminatory assignments, commenting that such a distinction would be "not only without substance but in defiance of that against which the prohibition of discrimination is directed."[50] Henceforth all post-Act discriminatees could obtain relief. Those not hired could receive constructive seniority as a remedy for the illegal refusal to hire; those hired but discriminatorily assigned could either secure direct seniority relief in a suit based on the act of discrimination or attack the seniority system as illegally perpetuating the discriminatory act.

For persons who had suffered pre-Act discrimination, the availability of relief continued to hinge on the nature of the discrimination. Those who had been denied employment were foreclosed from any relief, while those who had been hired and discriminatorily assigned could attack the seniority system. Thus, the distinction found repugnant by the Court in *Franks* persisted in cases involving pre-Act discrimination.

This distinction between pre-Act denial of employment and pre-Act refusal to hire resulted in an inconsistent application of section 703(h). When a pre-Act discriminatory assignment was involved, the courts invalidated seniority systems both because they had their "genesis in racial discrimination," and because the present disparate impact of the systems resulted from previous intentional discrimination.[51] Both elements were no less present when a seniority system perpetuated the effects of a refusal to hire. It would seem to follow that a seniority system which perpeptuated the effects of a pre-Act refusal to hire would be illegal also. Under the *Quarles* analysis, however, it would not be. Interpreted as a limitation on remedy, the section barred all seniority relief for those not hired, regardless of when the refusal to hire occurred.[52] Thus, even though a seniority systems' perpetuation of a refusal to hire might be a theoretical violation, section 703(h) foreclosed all relief. After the Court in *Franks* held that section 703(h) was definitional and not a limitation on remedy, the distinction between pre-Act refusals to hire and pre-Act discriminatory assignments was left unsupported by any rationale.

Two means were available to resolve the inconsistency in the then-prevailing view of section 703(h) as it was applied to seniority systems that perpetuated pre-Act discrimination. The courts could apply the bona fide and intent to discriminate tests of *Quarles* and *Papermakers* to systems that disadvantaged those refused employment before the Act, and find the systems illegal. To do this, however, would contravene Congress' unmistakable intent[53] and

49. *Id.* at 761.

50. *Id.* at 769 (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 178 (1941)).

51. *See supra* text accompanying notes 18-21, 34-37.

52. This interpretation relied in part on the legislative history of § 703(h), which indicated that Congress intended to prohibit *any* remedy of constructive seniority for persons discriminatorily refused employment prior to Title VII. The legislative history's failure to consider explicitly a seniority system that perpetuated the effects of a pre-Act assignment, *see* 110 CONG. REC. 7213 (1964), led the courts to conclude that § 703(h) did not immunize such a system. *See, e.g., Franks,* 424 U.S. at 761-62; *see also* Vaas, *supra* note 17.

53. *See supra* note 52.

render section 703(h) a nullity. Alternatively, the courts could interpret 703(h) as affording some measure of immunity to all seniority systems, regardless of the nature of the discrimination thereby perpetuated. This interpretation, however, would require developing new concepts of bona fide and intent to discriminate, because the prevailing interpretation of those provisions rendered any departmental seniority system perpetuating past discrimination illegal. The Supreme Court adopted the second alternative when it next considered the meaning of section 703(h) as applied to seniority systems, in *International Brotherhood of Teamsters v. United States*[54] and *Evans v. United Air Lines, Inc.*[55]

In *Teamsters* the United States brought suit against T.I.M.E.-D.C., Inc., a trucking company, and the Teamsters union, which represented the bulk of the company's employees. The government charged that defendants had engaged in a pattern or practice of discrimination against members of various minority groups by refusing to hire them for the more desirable line driver jobs.[56] The government further charged that the seniority system agreed on by defendants violated Title VII by perpetuating past discrimination.[57]

The Supreme Court agreed with the lower courts' findings that defendants had engaged in a pattern or practice of discrimination.[58] It then considered whether a seniority system that perpetuated past discrimination was immunized by section 703(h). The Court noted that under *Franks* post-Title VII discriminatees could obtain full make-whole relief, including retroactive seniority as a remedy for a discriminatory refusal to hire.[59] Members of minority groups discriminatorily hired as city drivers *before* the effective date of Title VII, however, could obtain relief only if the seniority system itself was found to be unlawful.[60]

The *Teamsters* Court recognized the broad remedial purposes of the Act,[61] and referred to its own prior holdings that facially neutral practices which freeze the status quo of prior discrimination are unlawful under Title VII, regardless of intent to discriminate.[62] Therefore, under ordinary disparate impact analysis, the seniority system would be illegal. The Court then considered the exception provided by section 703(h) for a bona fide seniority system, and held that the section immunized the seniority system in question.[63]

In reaching its result, the Court concluded that Congress intended that

54. 431 U.S. 324 (1977).

55. 431 U.S. 553 (1977).

56. *Teamsters,* 431 U.S. at 328-34. Line drivers were those who drove intercity, between terminals; city drivers were those who worked in the terminals' local area. Line driver jobs paid better and generally were considered to be more desirable. *Id.*

57. *Id.* at 328.

58. *Id.* at 337.

59. *Id.* at 347.

60. *Id.* at 348, 356.

61. *Id.* at 348.

62. *Id.* at 349. The rule is that developed in *Griggs*, 401 U.S. 424 (1971).

63. *Teamsters,* 431 U.S. at 356.

section 703(h) proscribe seniority relief to employees discriminatorily refused employment prior to the Act.[64] The Court reiterated its observation in *Franks* that distinctions between employees not hired and those hired but given a lesser job were irrational, and not in harmony with the purposes of the Act.[65] Furthermore, the court noted, the legislative history supported a conclusion that section 703(h) did in fact protect seniority systems that perpetuated past discrimination.[66] Finally, the court noted that interpretation of the bona fide and intent to discriminate provisos of section 703(h) to exclude all seniority systems that perpetuated pre-Act discrimination would be to read the section out of the statute.[67] To do so would subject all seniority systems to ordinary disparate impact analysis.

Evans, decided on the same day as *Teamsters*, presented the issue whether a seniority system was illegal because it perpetuated the effects of a post-Act violation of Title VII. Plaintiff in *Evans*, a female flight attendant for defendant airline, had been discriminatorily discharged in 1968. She was rehired in 1972 after the airline had ended the discriminatory policy in question.[68] Upon rehire, however, she was credited with seniority only from the date of rehire, pursuant to a provision in United's collective bargaining agreement.[69] The Court held that section 703(h) immunized the seniority system from attack,[70] reasoning that "a discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed."[71] *Evans* thus extended the *Teamsters* rationale to a seniority system that perpetuated post-Act discrimination.

The results of *Evans* and *Teamsters* reflected the Court's redefinition of the interests protected by section 703(h). *Quarles* had identified the employer's need for a stable and reliable workforce as the interest competing with equal employment opportunity in seniority system cases.[72] The *Teamsters* Court, however, analyzed the issue in terms of the tension between equal employment opportunity and the seniority expectations of fellow employees.[73] The Court's analysis is supported by the legislative history of Title VII, which indicates that congressional debate focused in part on the effect of Title VII on the seniority expectations of incumbent employees.[74] An interpretive memorandum placed in the record by bipartisan floor captains Senators Clark and

64. *Id.* at 354 & n.40.
65. *Id.* at 354-55.
66. *Id.* at 352-53.
67. *Id.* at 353 & n.18.
68. *Evans,* 431 U.S. at 554-55.
69. *Id.* at 555-56.
70. *Id.* at 560.
71. *Id.* at 558. The Court emphasized this characterization of an act not complained of within the statute of limitations, describing such an act as "a past event which has no present legal significance." *Id.* at 560. In reality, however, the act was not wholly insignificant; "It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." *Id.* at 558.
72. *See supra* text accompanying notes 23-28.
73. *Teamsters,* 431 U.S. at 350-56.
74. *E.g.*, 110 CONG. REC. 1518 (1964) (statement of Rep. Cellar); *id.* at 6549 (statement of

Case stated that Title VII would "have no effect on established seniority rights."[75] When an employer had discriminated prior to the effective date of Title VII, the employer would be obligated only "to fill future vacancies on a non-discriminatory basis."[76] He would not be required to grant former victims of discrimination "special seniority rights at the expense of white workers hired earlier."[77] Thus, Congress' "unmistakable purpose" was to protect employees' seniority expectations. While the memorandum referred only to those not hired, the absence of any rational basis on which to distinguish between those not hired and those discriminatorily assigned compelled the conclusion that it applied equally to both.[78]

Teamsters abolished distinctions in the availability of relief based on the nature of discrimination. Persons victimized by discrimination after the effective date of Title VII could obtain full relief under *Franks*, as limited by *Evans.* Those who had suffered discrimination prior to the Act were foreclosed from all relief unless they could show that the seniority system was not bona fide, or that the differences in present status resulted from an intention to discriminate. *Teamsters* rejected the government's argument, based on the *Quarles* line of cases, that a system which perpetuated past discrimination was excluded from the protection of section 703(h) by its "bona-fide" and "intent to discriminate" provisions. Thus, *Teamsters* resolved the inconsistency in the prior law that arosed from the combination of the *Quarles* distinction between refusal to hire and discriminatory assignment and the *Franks* holding that section 703(h) defined what was and was not an illegal employment practice.[79]

Implicit in *Teamsters'* rejection of the theory that all seniority systems perpetuating past discrimination are illegal is a rejection of the *Quarles* and *Papermakers* definitions of "bona-fide," and "resulting from an intention to discriminate." Two circumstances are always present when a seniority system "perpetuates past discrimination." First, the defendant must have discriminated at some time in the past. Second, there must be a seniority system that, in the case of past discriminatory assignments, must be organized into seniority units with rules burdening transfer. If a seniority system that perpetuates past discrimination is protected by section 703(h), then a history of discrimination cannot render it not bona fide. Because the perpetuation must result in part from the past discrimination, the *Quarles* view that the system reflects an intention to discriminate because of its genesis in and perpetuation of past discrimination likewise must be incorrect. Otherwise, the very facts that lead to the perpetuation would remove the system from the protection of 703(h).

Sen. Humphrey); *id.* at 7207 (Justice Department memorandum); *id.* at 7217 (answers to questions propounded by Sen. Dirksen).

75. 110 CONG. REC. 7210 (1964).

76. *Id.*

77. *Id.*

78. *See Franks,* 424 U.S. 747. The *Teamsters* Court also felt that apart from the inconsistency that would result from a contrary holding, *see supra* text accompanying notes 64-66, there was no reason to suppose that Congress preferred "any one [type of seniority] system." *Teamsters,* 431 U.S. at 355 n.41.

79. *See supra* notes 51-55 and accompanying text.

Teamsters recognized that the *Quarles* interpretation of the "intention to discriminate" proviso was untenable:

> [W]e reject the contention that the proviso in § 703(h), which bars differences in treatment resulting from "an intention to discriminate," applies to any application of a seniority system that may perpetuate past discrimination. . . . "Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the Title."[80]

To hold that the differences do not result from an intention to discriminate, however, the court must turn a blind eye to the causal role of the initial act of discrimination in the differences that arise. In *Evans* the Court appeared to do just that, by finding that an act of discrimination before the effective date of the Act, or an act not made the subject of a timely complaint, is a legal nullity.[81]

C. *Bona Fide: What Are the Criteria?*

While *Teamsters* rejected the past defintions of "bona-fide" and "resulting from an intention to discriminate," it only briefly discussed the meaning of bona fide, and then only as applied to the seniority system in question:

> The seniority system in this litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it "locks" employees into non-line-driver jobs, it does so for all. The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white. The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with industry practice, and consistent with National Labor Relations Board precedents. It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose.[82]

Although the Court's discussion was confined to the facts of the case, it illustrates the factors the court thought important to the system's bona fides: (1) the system was facially neutral; (2) a majority of employees burdened by the no-transfer rule were not members of a minority group; (3) the departmental

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80. *Teamsters,* 431 U.S. at 353 n.38 (quoting in part 110 CONG. REC. 7207 (1971)).

81. 431 U.S. at 558. The *Evans* Court cautioned that the defendant's past discrimination might be relevant for some purposes: "It may constitiute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences." *Id.*

82. *Teamsters,* 431 U.S. at 355-6. Although this passage was adopted by the courts of appeals as the test of a system's bona fides, *see infra* notes 87-92 and accompanying text, the government had conceded that the system "did not have its genesis in racial discrimination" and "was negotiated and . . . maintained free from any illegal purpose." If this is understood as a concession that the system did not result from an intention to discriminate, then the court only considered the system's neutrality, its rationality, and perhaps its impact in determining that it was bona fide. Intent to discriminate was not at issue in *Teamsters*; therefore the government's concession should be read as conceding the intent issue.

divisions were rational; and (4) the system did not have its genesis in discrimination nor was it maintained for a discriminatory purpose.

The first factor, that the system be facially neutral, is an obvious requirement. No seniority system that, by its very terms, discriminates against members of minority groups can be bona fide.[83] The third factor is also at the core of the system's bona fides: the system must be rational; it must in some way advance the employer's or employees' legitimate interests. Industry practice and NLRB precedent are strong objective indicators of the system's rationality. The absence of a legitimate business or employee purpose indicates the possibility of an illegal motive.

The second and fourth factors are more problematic. The second factor (the proportion of minority to nonminority employees disadvantaged by the system) essentially measures disparate impact. The plaintiff already will have shown disparate impact in establishing a prima facie case. Thus, if this factor is read as a precondition to the system's bona fides, the defense afforded by section 703(h) vanishes. This reading of the second factor in *Teamsters* would essentially return to the *Quarles* standard, which *Teamsters* had rejected. A better reading is that the extent of disparate impact should be considered, but is not dispositive of the issue.[84] Read this way, this factor is more relevant to an inquiry into the defendant's intent.[85] Thus, as in the *Quarles* line of cases, the *Teamsters'* Court continued to blur the issues of the system's bona fides and the defendant's intent.

The inclusion of the fourth factor, whether the system had its genesis in racial discrimination and whether it has been negotiated and maintained free from an illegal purpose, highlights the Court's merger of the bona fide and intention to discriminate provisions. Both the system's genesis and the circumstances surrounding its negotiation and application are probative of the defendant's motive. The phrase "genesis in racial discrimination" echoes the

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83. A seniority system that, by its terms, applied different rules to members of minority groups would violate Title VII's broad prohibition against discrimination.

> It shall be an unlawful employment practice for an employer . . . 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.

42 U.S.C. § 2000e-2(a)(2) (1976). While § 703(h) is an exception to Title VII's prohibitions, it does not shelter those seniority systems that result from an intention to discriminate. A seniority system that classified employees by race or other prohibited criterion would necessarily show an intention to discriminate and thus would be illegal.

84. It appears that the courts of appeals have not read each factor in *Teamsters* as an independent requirement for the system to be bona fide. The four factors are to be considered in light of the "totality of circumstances." James v. Stockham Valves & Fittings Co., 559 F.2d 310, 352 (5th Cir. 1977). *See infra* note 88.

85. The Supreme Court has held on numerous occasions that statistics showing the presence or absence of disparate impact may be relevant in assessing discriminatory intent. *E.g.*, Pullman-Standard v. Swint, 456 U.S. 273, 289 (1982); Furnco Constr. Co. v. Waters, 438 U.S. 567, 580 (1978); Hazlewood School Dist. v. United States, 433 U.S. 299, 307 (1977); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976).

Quarles court's holding that such a system could not be bona fide.[86] *Teamsters* defined a system that "had its genesis in racial discrimination" as one in which an "intent to discriminate entered into its very adoption."[87] The Court's subsequent discussion of the systems "genesis" in the context of the criteria for bona fide indicates that bona fide includes the issue of discriminatory intent. The court noted the government's concession that the system did not have its genesis in racial discrimination, regarding the concession as a consequence of the government's stipulation that the system did not "result from an intention to discriminate."[88]

Although *Teamsters'* construction of section 703(h) received only grudging acceptance from some appellate courts,[89] the courts endeavored to apply *Teamsters,* and began to fashion new criteria for determining a system's bona fides. The seminal post-*Teamsters* decision on the criteria for bona fide was *James v. Stockham Valves & Fittings Co.*[90] In *James* the Fifth Circuit declared that a seniority system was to be judged in light of the "totality of circumstances." The *James* court abstracted a four part test from the Supreme Court's dictum on bona-fide. In determining a system's bona fides, the trial court should focus on:

> (1) Whether the seniority system operates to discourage all employees equally from transferring between seniority units;
> (2) Whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
> (3) Whether the seniority system had its genesis in racial discrimination; and
> (4) Whether the system was negotiated and has been maintained free from any illegal purpose.[91]

The Fifth Circuit's test is a trifle disingenuous. The first prong of the *James* test relies on *Teamsters'* observation that the seniority in that case burdened

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86. "The court holds [that] a departmental seniority system that has its genesis in racial discrimination is not a *bona fide* seniority system." *Quarles,* 279 F. Supp. at 517 (emphasis in original).

87. The Court stated that:

> Insofar as the result in *Quarles* and in the cases that followed it depended upon findings that the seniority systems were themselves "racially discriminatory" or "had their genesis in racial discrimination,". . . the decisions can be viewed as resting upon the proposition that a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona-fide if an intent to discriminate entered into its very adoption.

Teamsters, 431 U.S. at 346 n.28.

88. *Id.* at 356.

89. *See, e.g.,* Equal Employment Opportunity Comm'n v. United Air Lines, Inc., 560 F.2d 224 (7th Cir. 1977):

> *International Brotherhood of Teamsters v. United States* is an extraordinary case from the standpoint of *stare decisis* . . . . When the Supreme Court hands down an opinion contrary to the universal holdings of a plethora of cases of the Courts of Appeals and the unbroken voices of the commentators, its decision still discloses the controlling law.

Id. at 235-36.

90. 559 F.2d 310 (5th Cir. 1977).

91. *Id.* at 352.

many nonminorities as well as minorities. In *James* and subsequent decisions many appellate courts interpreted this factor as a requirement that the system not have a substantial disparate impact on minorities.[92] Since the *James* test also considers whether the system had its "genesis in racial discrimination," most seniority systems that perpetuate past discrimination will fail at least two prongs of the *James* test: such a system will have its "genesis in racial discrimination" because of the defendant's history of discrimination,[93] and will discourage minority employees disproportionately, because its rules perpetuate the past discrimination. Under *Quarles*, a system was illegal if it perpetuated past discrimination, while under this application of *James*, it was the particular facts that had led to the perpetuation of discrimination which served to vitiate the system. Therefore, this application of *James* only refocused the issues on the facts leading to the perpetuation, rather than on the perpetuation itself.[94] Though this application effectively continued the rejected *Quarles* approach, it appeared to be the analysis used by at least one appellate court from 1977 through 1981.[95] This approach may be criticized because it gave too little recognition to the effect that section 703(h) was intended to have, as interpreted by *Teamsters*.

D. "Intent to Discriminate": Defined With Increasing Deference Toward Collective Bargaining

In the *Quarles* line of cases, intent to discriminate could be found from the defendant's foreknowledge of the disparate impact resulting from the adoption or continued application of a seniority system that perpetuated past discrimination.[96] Furthermore, the discriminatory intent could be found in

92. *See* Terrell v. U.S. Pipe & Foundry Co., 644 F.2d 1112 (5th Cir. 1981), *vacated sub nom.* International Molders & Allied Workers Union, Local 342 v. Terrell, 102 S. Ct. 2229 (1982) and International Ass'n of Machinists & Aerospace Workers v. Terrell, 102 S. Ct. 2028 (1982); United States v. Georgia Power Co., 634 F.2d 929 (5th Cir. 1981), *vacated*, 102 S. Ct. 2026 (1982); United States v. Lee-Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978). *Cf.* Fisher v. Proctor & Gamble Mfg. Co., 613 F.2d 527 (5th Cir. 1980), *cert. denied*, 449 U.S. 1115 (1981) (system that did not lock in victims of past discrimination held bona fide).

93. While a number of courts adopted this approach, *see supra* note 92, there is authority to the contrary. "The fact that the seniority system was adopted at a time when [the defendant] practiced racial discrimination in its employment practices does not establish that the system had its genesis in racial discrimination." Taylor v. Mueller Co., 660 F.2d 1116, 1122-23 (6th Cir. 1981).

94. In a few cases, the result might be different under this application of *James*. Assuming facts like those in *Teamsters* (discriminatory assignments, departmental seniority with no transfer allowed, a significant number of nonminorities in low-paying departments), the system could be bona fide under the first two prongs of the *James* test. Under the flexible "totality of circumstances" approach, however, violation of the last two prongs might still allow a finding that the system was not bona fide.

95. The Fifth Circuit appeared to find departmental seniority systems that locked employees into pre-Act discriminatory patterns particularly noxious. *See supra* note 92. Other circuit courts seemed to consider this factor less important. *Cf.* Alexander v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 565 F.2d 1364, 1378 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978) (focusing on the defendant's intent to discriminate in adopting bumping privilege with disparate impact on black workers).

96. *See, e.g., Papermakers,* 416 F.2d at 997.

the defendant's pre-Act discrimination. The courts considered not only whether the system itself reflected an intention to discriminate but also whether the differences in present status resulted in any way from prior discriminatory intent.[97]

In two recent decisions, the Supreme Court briefly discussed the meaning of the "intent to discriminate" proviso of section 703(h). Although both cases involved seniority systems, neither directly implicated the definitions of either bona fide or intent to discriminate. In both cases the Court indicated that intent to discriminate, as used in section 703(h), refers to the defendant's intent in adopting the seniority system, and is to be equated with actual motive.

In *American Tobacco Co. v. Patterson*[98] the Court rejected the view expressed in *Quarles* that intent to discriminate could be found from a showing of foreseeable disparate impact alone. The Court stated that "the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved."[99] The Court did not reach the question whether the facts presented in *American Tobacco* evidenced an actual intent to discriminate. The issue presented in the case was the threshold question whether section 703(h) applied to seniority systems adopted after the effective date of Title VII.[100]

The Court held that the limited immunity granted seniority systems by section 703(h) applies regardless of whether the system was adopted before or after the effective date of Title VII. In so holding, the Court determined that Congress' intent in drafting section 703(h) was to protect the collective bargaining process, not merely the seniority expectations of those in the workforce as of the effective date of Title VII.[101] The Court noted that seniority provisions were of "overriding importance in collective bargaining,"[102] and that the collective bargaining process "lies at the core of our national labor policy."[103] Section 703(h) was said to represent the balance struck by Congress between equal employment policy and the "policy favoring minimal supervision by courts . . . over the substantive terms of collective bargaining agreements."[104]

In *Pullman-Standard v. Swint*[105] the Court held that the question of discriminatory intent is a pure question of fact, to be resolved by the trier of fact, and that under rule 52[106] an appellate court is bound by a district court's determination of discriminatory intent unless it is clearly erroneous.[107] In *Pull-*

97. *See, e.g., Quarles,* 279 F. Supp. at 517. *See also supra* text accompanying note 19.
98. 456 U.S. 63 (1982).
99. *Id.* at 65.
100. *Id.*
101. *Id.* at 74-75.
102. *Id.* at 76 (quoting Humphrey v. Moore, 375 U.S. 335, 346 (1946)).
103. *American Tobacco,* 456 U.S. at 76 (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 79 (1977)).
104. *American Tobacco,* 456 U.S. at 76.
105. 456 U.S. 273 (1982).
106. FED. R. CIV. P. 52.
107. *Pullman-Standard,* 456 U.S. at 290.

man-Standard the district court evaluated defendant's seniority system under the *James* standard, and found it to be bona fide and not the result of an intent to discriminate.[108] The Fifth Circuit reversed,[109] disagreeing with the trial court's evaluation of the facts, and held that discriminatory intent is an issue of "ultimate fact."[110] When ultimate facts are concerned, said the court, the reviewing court is not bound by Rule 52.

In *Pullman-Standard* Justice White implicitly approved the *James* test, but cautioned that the passage in *Teamsters* on which *James* relied was "not meant to be an exhaustive list of all the factors that a district court might or should consider in making a finding of discriminatory intent."[111] The Court's discussion of intent in the context of *James* indicates that it viewed bona fide and intent to discriminate as the same issue. As in *American Tobacco*, the Court in *Pullman-Standard* defined intent as "actual motive";[112] the relevant inquiry was whether a seniority system was adopted "because of its racially discriminatory impact."[113] The Court specifically rejected a presumption of discriminatory intent based on defendant's foreknowledge of the probable disparate impact of a seniority system, because such an approach would render section 703(h) a nullity.[114] In accord with earlier Title VII decisions, however, the Court identified the disparate impact of a system as one element that the trial court might consider in assessing discriminatory intent.[115]

In both *Swint* and *American Tobacco* the Court restricted the intent to

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108. 17 Fair Empl. Prac. Cas. (BNA) 730 (N.D. Ala. 1978), *rev'd*, 624 F.2d 525 (5th Cir. 1980), *rev'd*, 456 U.S. 273 (1982).

109. 624 F.2d 525 (5th Cir. 1980).

110. *Id.* at 533 n.6. The Fifth Circuit explained the application of the ultimate facts doctrine to questions of discriminatory intent in East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975):

> Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U.S.C.A. § 2000e-2(a). As such, a finding of discrimination or non discrimination is a finding of ultimate fact . . . . In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous.

East, 518 F.2d at 339 (citations omitted).

The ultimate facts doctrine originated in Baumgartner v. United States, 322 U.S. 665 (1944), in which the determination that the clear and convincing evidence standard of proof had been satisfied was held to be a finding of ultimate fact. The Fifth Circuit then applied *Baumgartner* in Galena Oaks Corp. v. Scofield, 218 F.2d 217 (5th Cir. 1954). In *Galena Oaks* the court held that the question whether a gain was capital gain or ordinary income was an issue of ultimate fact. The Fifth Circuit then applied the ultimate facts doctrine to questions of discriminatory intent in Causey v. Ford Motor Co., 516 F.2d 416 (5th Cir. 1975).

The Supreme Court limited the ultimate facts doctrine to those findings which "clearly impl[y] the application of standards of law." *Pullman-Standard,* 456 U.S. at 286-87 n.16 (quoting *Baumgartner,* 322 U.S. at 671).

111. *Pullman-Standard,* 456 U.S. at 279 n.8.

112. *Id.* at 290.

113. *Id.* at 277. This is similar to the "but-for" test of discriminatory intent in Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). Under this test, it is enough that discriminatory intent was one factor motivating the defendant, which "but-for" such intent the challenged practice would not have been implemented.

114. *Pullman-Standard,* 456 U.S. at 289. The view that discriminatory intent may be inferred from knowledge of resulting disparate impact was expressed in *Papermakers*, 416 F.2d at 996-97.

115. *Pullman-Standard,* 456 U.S. at 289. *See supra* note 85.

discriminate proviso of section 703(h) to the defendant's intent in adopting and maintaining the seniority system. Read literally, however, the proviso refers to the situation in which the *differences in treatment* (which may result in part from a seniority system) are caused by an intention to discriminate. Thus, the proviso would seem to exclude from the protection of section 703(h) the situation in which past discrimination and a seniority system combine to produce a present disparate impact. This was the view of *Quarles* and *Papermakers*.[116] *Teamsters* and *Evans*, however, rejected this reading of section 703(h); therefore, *American Tobacco* and *Swint* are consistent with *Teamsters* and *Evans* in limiting the intent issue to the defendant's intent in adopting the seniority system.

E. The Scope of Section 703(h)

The scope of the seniority system exception afforded by section 703(h) has received far less attention than the section's meaning. Seniority systems, however, usually incorporate rules regarding entry, transfer, leave, layoff and numerous other employment situations. Often, the particular ancillary rules, rather than the seniority criterion, burden members of minority groups. Restrictive transfer rules in a departmental seniority system are the most common example. In the early cases the courts assumed that the restrictive transfer provisions in question fell within the scope of section 703(h).[117] Had these rules not been regarded as within section 703(h), they would have been illegal under ordinary disparate impact analysis, thereby finessing the issues of the meanings of the "bona-fide" and "intention to discriminate" provisions.[118]

The Supreme Court considered the scope of section 703(h) as applied to seniority systems in *California Brewers Association v. Bryant*.[119] In *California Brewers* defendant breweries maintained separate seniority rosters for temporary and permanent employees. In order to become a permanent employee, a temporary employee was required to work 45 weeks in the year.[120] Plaintiffs alleged that defendant had previously discriminated against blacks, and that the 45 week threshold for permanent employee status operated to deny them a reasonable opportunity of achieving permanent status.[121] In reversing the district court's dismissal of the complaint, the court of appeals held that the 45

116. *See supra* text accompanying notes 20-21.

117. *E.g.*, Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Phillip Morris Inc., 279 F. Supp. 505 (E.D. Va. 1968).

118. Exactly such an approach has been used by at least one circuit court. In Parson v. Kaiser Aluminum & Chemical Corp., 583 F.2d 132 (5th Cir. 1978) (per curiam), the Fifth Circuit held that a requirement that a transferee enter a new department at the lowest level and remain there at least 10 days before bidding on a higher job was not a seniority rule and was therefore outside the protection of § 703(h). *Parson*'s holding is questionable in light of California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) (45 week threshold for permanent employee status is seniority rule).

119. 444 U.S. 598 (1980).

120. *Id.* at 602-03.

121. *Id.* at 602.

week entry requirement was not a part of a bona fide seniority system within the meaning of section 703(h).[122] The Supreme Court reversed, holding that the term "seniority system," as used in section 703(h), encompasses the rule in question.[123]

The Court indicated that the definition of "seniority system" begins with "commonly accepted notions about 'seniority' . . . . A 'seniority system' is a scheme that, alone or in tandem with non-'seniority' criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employent increase."[124] The Court observed that most seniority systems incorporate rules concerning entry into the system, accrual of seniority credit, and forfeiture of seniority benefits; these rules also identify employment decisions governed by the system. Such rules, said the Court, do not fall outside the scope of section 703(h) merely because they operate on the basis of factors other than the passage of time.[125]

In *California Brewers* the Court regarded section 703(h) as an exception to Title VII that reflects a strong national policy of noninterference in the collective bargaining process. The Court's recognition of this policy as an important interest protected by section 703(h) was a departure from earlier cases, in which only the interests of the employer and fellow employees were considered.[126] Because section 703(h) was intended to protect the collective bargaining process, Justice Stewart concluded that employers and employees must be allowed significant freedom to tailor seniority systems to their particular needs.

The Court cautioned that section 703(h) does not automatically immunize any personnel rule simply because the rule is labelled a component of a seniority system. Rules that "depart fundamentally from commonly accepted notions" of seniority systems are not within the scope of section 703(h).[127] Educational prerequisites for entry into or promotion within a system, subjective evaluations, and aptitude and physical tests, were not to be regarded as components of a seniority system.[128] The Court seemed to suggest that particular employment practices already subject to ordinary disparate impact scrutiny are outside the ambit of section 703(h).[129]

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122. *Id.* at 604.

123. *Id.* at 610.

124. *Id.* at 605-06.

125. *Id.* at 608.

126. The Court's decisions in *American Tobacco*, 456 U.S. 63, and *Pullman-Standard*, 456 U.S. 273, reflect a similar concern with noninterference in the collective bargaining process. In *Teamsters*, 431 U.S. 324, and in *Franks*, 424 U.S. 747, the Court was primarily concerned with the seniority expectations of incumbent employees. *See supra* notes 74-77 and accompanying text.

127. *California Brewers,* 444 U.S. at 608-09.

128. *Id.* at 609-10.

129. In Alexander v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 565 F.2d 1364, 1377-79 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978), the court held that a bumping preference given to employees with prior experience on a job was a part of a seniority system within the meaning of § 703(h). Although the seniority system operated on a plantwide basis, the bumping privilege tended to favor white workers who in the past had been assigned to the more desirable jobs.

California Brewers suggests that promotional systems that use subjective judgement in con-

In *Younger v. Glamorgen Pipe and Foundry Co.* [130] the Fourth Circuit held that a rule that requires an employee to forfeit all previously earned seniority on transfer to a new department is within section 703(h). The seniority rule at issue was the type of rule that often perpetuates past discrimination. The issue of scope thus seems an ineffective way to avoid section 703(h). The law in this area, however, is still developing, and there have been few decisions delineating the precise extent of the section.[131]

II. AN ANALYTICAL MODEL FOR SENIORITY SYSTEM CASES

The present state of the law is undesirable for both plaintiffs and defendants. The definition of bona fide, and the meaning of intent to discriminate remain unclear. While the *James* test is an important step toward a definition of bona fide, its contours are vague and it continues to blur the issues of bona fide and intent to discriminate. With *Pullman-Standard* restricting appellate review of trial courts' findings on the issue of intent, there is some risk of inconsistent decisions. Under the *James* test, the facts are thrown into a "totality of circumstances" hotchpot; the trial judge then examines them and speaks "yea" or "nay" on the issue of discriminatory intent. This approach does not allow independent consideration of the facts in light of the two important policies embodied in section 703(h): equal employment opportunity and nonintervention in collective bargaining.

These policies are reflected in the language of section 703(h). Properly read, "bona-fide seniority system" embodies the strong national policy of affording considerable latitude to the collective bargaining process,[132] while "intent to discriminate" marks the point at which equal employment opportunity concerns control. Many of the inconsistencies that have arisen in section 703(h) law result from the failure to adequately and independently consider these two countervailing considerations. The facts relevant for determining whether the system is supported by our national labor policy are often irrelevant for determining whether the system was adopted because of its discrimi-

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junction with seniority may not be within the scope of § 703(h). "The 45-week rule does not depart significantly from commonly accepted concepts of 'seniority.' The rule is not an educational standard, an aptitude or physical test, or a standard that gives effect to subjectivity." *California Brewers,* 444 U.S. at 609-10. *See* Taylor v. Teletype Corp., 648 F.2d 1129 (8th Cir.), *cert. denied,* 454 U.S. 969 (1981); Fisher v. Proctor & Gamble Mfg. Co., 613 F.2d 527 (5th Cir. 1980), *cert. denied,* 449 U.S. 1115 (1981).

130. 621 F.2d 96 (4th Cir. 1980) (per curiam), *aff'g*, 20 Fair Empl. Prac. Cas. (BNA) 776 (W.D. Va. 1979).

131. *See* cases cited in Hillman, *supra* note 7, at 727 nn.128 & 132.

132. In *California Brewers* the Court stated:

> Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. *See Ford Motor Co. v. Huffman,* 345 U.S. 330; *Aeronautical Lodge v. Campbell,* 337 U.S. 521. As we made clear in the *Teamsters* case, seniority may be "measured in a number of ways" and the legislative history of § 703(h) does not suggest that it was enacted to prefer any particular variety of seniority system over any other. 431 U.S., at 355, n.41. . . . Significant freedom must be afforded employers and unions to create differing seniority systems.

California Brewers, 444 U.S. at 608.

natory effects. The *James* test of bona fide illustrates the problem; it considers both evidence relevant to the system's bona fides (its rationality and neutrality) and evidence more appropriately considered in determining the defendant's intent (the system's impact, its genesis, and the defendant's purpose in maintaining the system).

The proposed model for seniority system cases uses a three step analysis. First, the plaintiff is required to make out a prima facie case of discrimination under one of the prevailing theories of Title VII liability.[133] Second, as an affirmative defense, the defendant may seek to establish that the personnel decisions involved were made pursuant to a bona fide seniority system. Here, the burden is on the defendant to prove two elements of the bona fide seniority system defense. First, he must show that the challenged practice falls within the scope of section 703(h). Second, he must prove that the seniority system was bona fide. In order to establish that the system is bona fide, however, the defendant need show only that the system is facially neutral and rationally related to some legitimate employer or employee purpose. Evidence concerning intent would not be considered at this stage. If the defendant establishes the bona fide seniority system defense, the plaintiff may overcome the defense by showing that the system "results from an intention to discriminate." In this third step, the burden of proof is on the plaintiff. All evidence relevant to the defendant's intent may be considered, including the system's genesis, the quantum of disparate impact, the defendant's past behavior, the exclusion of minority input from the collective bargaining process, and the defendant's subjective intent.

Under this model, section 703(h) is characterized as an affirmative defense. This is consistent with recent developments in Title VII law,[134] and

133. Broadly speaking, a violation of Title VII may be found under one of two theories, disparate impact or disparate treatment. Disparate treatment is the ordinary form of discrimination, in which the plaintiff alleges that he was denied a job because of intentional discrimination on some prohibited ground.

The ordinary disparate treatment case proceeds as follows: The plaintiff must show that he is a member of a protected group, that he applied for a position, that he was qualified for the position, that the employer rejected him, and that the employer continued to seek applications from others with similar qualifications. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If the plaintiff proves the foregoing elements, he has established a prima facie case and the burden of production shifts to the defendant to "articulate a legitimate, non-discriminatory reason" for the challenged decision. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) (quoting *McDonnell Douglas,* 411 U.S. at 802). *See* Board of Trustees of Keene State College v. Sweeny, 439 U.S. 24 (1978) (per curiam); Furnco Const. Co. v. Waters, 438 U.S. 567 (1978). If the defendant successfully rebuts the plaintiff's case, the burden of production returns to the plaintiff, who must then prove that the defendant's articulated reason was pretextual. Proof of discriminatory intent is crucial at this stage. *See Burdine*, 450 U.S. 248; *McDonnell Douglas*, 411 U.S. 792; *see also Furnco,* 438 U.S. 567.

Disparate impact theory is designed to address a more subtle form of discrimination. In a disparate impact case, the plaintiff alleges that some practice of the defendant's, though facially neutral, disproportionately disadvantages members of minority groups. Intent to discriminate is not an element of a disparate impact case. Proof of disparate impact virtually always involves the use of statistics. Regarding disparate impact theory see Hazlewood School Dist. v. United States, 433 U.S. 299 (1977); *Teamsters*, 431 U.S. 324; Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971). Regarding the use of statistics see B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1161-93 (1976) & 318-29 (Supp. 1979).

134. *See* County of Washington v. Gunther, 452 U.S. 161, 170-71 (1981) (statutory exceptions

with conventional principles of statutory construction. Generally, one who seeks exemption from a statute's prohibitions is required to prove that his case falls within the exception.[135]

Three arguments support requiring the defendant to shoulder the burden of proof at the second stage. First, such an interpretation is consistent with the court's allocation of burdens under other remedial statutes.[136] Second, since the defendant asserts the affirmative proposition, he should bear the burden of proof. Third, the defendant will have greater knowledge of general industry and labor practice, both of which can be important indicia of a system's rationality.[137]

The second stage thus differs from the rebuttal stage of a disparate treatment case, in which the defendant bears only the burden of production.[138] The heavier burden reflects the difference in the purpose of the defendant's rebuttal. In the second stage of a disparate treatment case the defendant is seeking only to rebut a judicially created presumption of discrimination that arises when the plaintiff meets the requirements for a prima facie case. The presumption is created not because the plaintiff has shown actual discrimination, but because "common experience" indicates that the facts required to make out a prima facie case of disparate treatment, when unexplained, usually indicate discriminatory intent.[139] In the typical seniority system case, however, the plaintiff will have already proved that the seniority system has a disparate impact on members of a protected group. Thus the plaintiff has proved a violation of the statute itself, and must prevail unless the defendant can successfully establish an affirmative defense.

At the second stage, the issues are limited to: (1) whether the practice is within the scope of section 703(h); and (2) whether the system is bona fide. For example, subjective evaluations, educational prerequisites, and unvalidated tests, even though used in conjunction with seniority, should be regarded as outside the scope of section 703(h).[140] In assessing the system's bona fides, the court should consider only whether the system is facially neu-

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to the Equal Pay Act incorporated by reference into § 703(h) are affirmative defenses); Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1013 (11th Cir. 1982) (section 703(h) is an affirmative defense for purposes of FED. R. CIV. P. 8(c)). *But see* Younger v. Glamorgen Pipe & Foundry Co., 20 Fair Empl. Prac. Cas. (BNA) 776, 784 (W.D. Va. 1979), *aff'd*, 621 F.2d 96 (4th Cir. 1980) (per curiam) (plaintiff has burden of proving the system not bona fide). *See generally* Hillman, *supra* note 7, at 724-35.

135. *See* United States v. First City Nat'l Bank, 386 U.S. 361, 366 (1967) (citing FTC v. Morton Salt Co., 334 U.S. 37, 44-45 (1948)).

136. *See, e.g.*, United States v. First City Nat'l Bank, 386 U.S. 361 (1967) (defendant who seeks exemptions from antitrust laws of 12 U.S.C. § 1828(c)(5)(B) (1982) has burden of proving that they come within the exemption).

137. *See generally* MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE §§ 337, 786-89 (2d ed. 1972).

138. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1971).

139. Furnco Const. Co. v. Waters, 438 U.S. 67, 577-78 (1978).

140. *See* Guardians Ass'n v. Civil Service, 633 F.2d 232 (2d Cir. 1980), *cert. granted*, 102 S. Ct. 997 (1982). There is some controversy over whether promotional systems that rely on seniority, alone or in conjuction with objective criteria, are within the ambit of § 703(h). *See* Hillman, *supra* note 7, at 727 n.132.

tral and whether it rationally furthers some legitimate employer or employee purpose. Because Congress intended that section 703(h) protect a relatively wide range of possible seniority systems,[141] the relevant inquiry is whether the system is within the range of allowable choices.[142]

In the third stage, the plaintiff bears the burden of proving that the otherwise bona fide seniority system results from an intent to discriminate. Again, the burden of proof is on the party asserting the affirmative proposition. Furthermore, this allocation of the burden of proof is consistent with current practice under any theory of liability when intentional discrimination is an issue.[143] Intent may be shown by either direct or circumstantial evidence. The defendant's past behavior, the genesis and operation of the system, a lack of minority input into the collective bargaining process, and foreseeable disparate impact are all relevant. In evaluating the possibility of dicriminatory intent, two elements of the *James* test that were excluded at the "bona fide" stage are relevant. "Whether the system had its genesis in racial discrimination," and "whether the system was negotiated and has been maintained free from any illegal purpose" are both attempts to discern intent. Likewise, discrimination by the defendant in other decisions after the effective date of Title VII may indicate that an intent to discriminate entered into the adoption of a seniority system.[144]

While evidence that an employment practice has disparate impact does not conclusively show discriminatory intent, the courts have recognized the relevancy of such evidence. The "intent to discriminate" proviso of section 703(h) is intended to limit the freedom of the collective bargaining process. It marks the point at which equal employment concerns predominate over the policy of deferring to collective bargaining. This view of the purpose of the "intent to discriminate" proviso requires a flexible concept of the requisite intent. The Supreme Court's recent decisions indicate that intent is to be

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141. *See supra* text accompanying notes 124-29.

142. It is important that the system advance a *legitimate* interest. In Sears v. Atchison, T. & S.F. Ry., 645 F.2d 1365 (10th Cir. 1981), *cert. denied,* 456 U.S. 964 (1982), defendant unions and employer maintained separate seniority lists for porters and brakemen. Both jobs had in the past involved functionally equivalent duties. Historically, blacks had been assigned as chair car attendants, a job category from which one was promoted to porter, another all black job category. Whites were assigned as brakemen. In 1959 the National Railway Adjustment Board, at defendant union's instigation, issued Award 19324, which held that only porters with seniority prior to April 20, 1942 could perform braking duties. All other porters were demoted to chair car attendants and were prohibited from performing braking duties. The performance of braking duties entitled one to extra pay. *Id.* at 1369.

Although the Tenth Circuit found the seniority system not bona fide under the *Teamsters* test, *id.* at 1374, it is arguable that the system could have been held to be outside the scope of § 703(h). The only interest advanced by defendant's maintenance of separate seniority rosters was the preservation of a de facto segregated job structure, an interest that can hardly be described as legitimate.

143. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 137 n.14 (1976) (citing *Albemarle*, 422 U.S. 405, 425; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). The plaintiff has "the traditional civil litigation burden of establishing that the acts [he] complain[s] of constituted discrimination in violation of Title VII." General Elec. Co. v. Gilbert, 429 U.S. 125, 137 n.14 (1976).

144. *See* United States v. Bethlehem Steel, 446 F.2d 652, 659 (2d Cir. 1971).

equated with "actual motive," but arguably when the disparate impact is extreme, intent can be inferred from the defendant's institution of the system with knowledge of its consequences.[145] Particularly when minorities have been denied effective representation in the collective bargaining process, the institution of a seniority system with an extreme disparate impact may be a powerful indicator of a discriminatory motive.

Whether minority employees have been effectively represented is also independently relevant in determining intent. Prior to Title VII, the courts recognized that a labor organization owed a duty of fair representation to its minority members.[146] When minority employees have been denied fair representation, the legitimacy of the collective bargaining process is clouded, and a resulting agreement adverse to the interests of minority employees may indicate a discriminatory purpose.

III. CONCLUSION

The allocation of the burden of proof in seniority system cases has been the subject of several conflicting decisions. Some courts have placed the burden of proof on the plaintiff to show the system's lack of bona fides; others have viewed section 703(h) as an affirmative defense, with the defendant having the burden of proof. The vice of the first approach is that it places the plaintiff in the unenviable position of proving a negative as an element of his case. This approach might be justified if absence of intent to discriminate were regarded as an element of bona fide; in such a case, the plaintiff would then have to show intent to discriminate, a traditional part of the plaintiff's burden in Title VII cases. If absence of intent to discriminate is an element of bona fide, requiring the defendant to prove the system's bona fides requires the defendant to show absence of intent to discriminate, a heavy burden.

By separating intent to discriminate from bona fide, the proposed model gives each party the affirmative proposition. Furthermore, the model will help focus the court's decisionmaking on the two conflicting policies expressed in section 703(h). It requires each party to show how the policy favorable to their case applies to the facts of the litigation. By requiring from each party a clear presentation of the relevent facts and arguments, the model promotes greater clarity and consistency in the Title VII seniority system adjudication.

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145. *See supra* note 114.

146. *See* Steele v. Lousiville & Nashville R.R. Co., 323 U.S. 192 (1944); Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1967); Cox, *The Duty of Fair Representation,* 2 VILL. L. REV. 151 (1957)