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Civil Rights -- Racially Discriminatory Employment Practices Under Title VII

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proved, it would seem that intrabrand restrictions would become less important to the franchisees and eventually could be lifted.

Sealy adds a new dimension to the law of antitrust because it is the first case in which the agreements of firms with little market power to divide territory have been found unlawful.[22] Yet because the Court used the presence of price fixing to find the agreements per se unlawful, it is possible to argue that not *all* horizontal agreements to divide territory need be per se unlawful. It would seem that it might be possible to convince the Court to apply the rule of reason favorably, especially where the success of a new entry or a group of failing firms was at stake.

HENRY C. MCFADYEN

Civil Rights—Racially Discriminatory Employment Practices Under Title VII

In *Quarles v. Phillip Morris, Incorporated,*[1] the United States District Court for the Eastern District of Virginia held that present differences in departmental seniority of Negroes and whites that resulted from the company's past and intentional racially discriminatory hiring policy were unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964.[2] *Quarles* was the first such case to be litigated under Title VII.[3]

Prior to 1966, Phillip Morris employed Negroes only in one of three departments covered by a collective bargaining agreement with Local 203 of the Tobacco Workers International Union, the prefabrication department.[4] The jobs available in prefabrication were generally lower paying and less desirable than those in either

[22] Cases behind the rule in *White Motor,* all involving firms with large market power, are Timkin Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. National Lead Company, 332 U.S. 319 (1947); Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899).

[1] 279 F. Supp. 505 (E.D. Va. 1968).

[2] Pub. L. No. 88-352, 78 Stat. 241. There were also allegations of racial discrimination in the employer's hiring practices, employment and promotion of supervisory personnel, and the payment of wages. The court summarily dismissed the first two issues, and found racial discrimination in the payment of wages only as to two Negro employees.

[3] 42 U.S.C. §§ 2000e to 2000e-15 (1964).

[4] Negroes were also employed for seasonal work in another department, but this was covered by a different collective bargaining agreement.

the fabrication or the warehouse and shipping departments for which whites were hired. Each department had its own job progression ladder and seniority roster, and Phillip Morris usually hired employees for entry level positions in a department, filling higher rated jobs by advancement based primarily on departmental seniority. Further, the company prohibited interdepartmental transfers by Negroes until 1961, when the collective bargaining agreement was changed to permit a few transfers each six months. The employees competed for the transfers on the basis of seniority, merit and ability. Later a provision was added to allow transfers in the discretion of management, but transfers were conditioned on the loss of departmental seniority. However, in the event of layoff, the employee could return to his previous department with his employment date seniority unimpaired. The effect of all this was to "lock in" the Negro employees in the less desirable jobs while whites with no seniority in the company were hired into the better jobs off the streets. After exhausting his administrative remedies,[5] the plaintiff brought this action on behalf of the Negro employees as a class who had been hired and had continued to work under these conditions. The Negro employees sought to be trained and promoted to fill vacancies on the same basis as white employees with equal ability and employment seniority.

Although racial discrimination in employment has been dealt with previously by other measures,[6] Title VII of the Civil Rights

[5] In Quarles v. Phillip Morris, Inc., 271 F. Supp. 842 (E.D. Va. 1967), the court held that the plaintiffs had sufficiently exhausted their administrative remedies.

Title VII provides for the complainant to file with the Equal Employment Opportunity Commission "within ninety days after the alleged unlawful employment practice occurred. . . ." After investigation, if the commission determines that there is reasonable cause to believe that the charge is true, the commission must attempt to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. If voluntary compliance fails, the complainant has thirty days to commence suit in the appropriate federal court. Further, upon timely application, the court in its discretion may allow the Attorney General of the United States to intervene if he certifies that the case is of general public importance. Also, in certain instances the Attorney General may bring suit on his own initiative. 42 U.S.C. §§ 2000e-5-6 (1964).

[6] The first attempt by the government to eliminate discrimination in employment was in the form of an executive order issued by President Roosevelt in 1941. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941). It prohibited discrimination in government and defense industries. An executive order issued by President Johnson requires that all government agencies include a nondiscrimination clause in all of their contracts. However, contractors

Act of 1964 represents "the first time the Congress of the United States has declared racial discrimination in private employment unlawful."[7] Following the pattern established by state fair employment practice laws, Title VII makes it an "unlawful employment practice" for any employer covered by the Act:[8]

> 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. . . .[9]

Nor may an employer, on such grounds, "limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee. . . ."[10] Labor organizations covered

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are to undertake not merely to refrain from discrimination; in addition, they are to promise to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color or national origin." Exec. Order No. 11246, 3 C.F.R. 167-68 (Supp. 1965). To process complaints, each President created a Committee on Fair Employment Practices or, as it was called under President Kennedy, the President's Committee on Equal Employment Opportunity.

Many states attempted to eliminate racial discrimination in employment by enacting state fair employment practice laws. In 1945 New York, the first of thirty-six states to pass such a statute, established a commission and directed it "to eliminate and prevent discrimination in employment . . . because of race, creed, color, or national origin. . . ." Ch. 118 [1945] N.Y. Sess. Laws 125. Further, the statute specified a number of "unlawful employment practices." Ch. 118 [1945] N.Y. Sess. Laws 131.

The National Labor Relations Act and the Railway Labor Act have also offered assistance in the elimination of racial discrimination in employment. Since the statutes provide for the representative union to be the exclusive representative of the employees, a duty of fair representation has been imposed on the union. Wallace Corp. v. NLRB, 323 U.S. 248 (1944); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Local 12, URW v. NLRB, 368 F.2d 12 (5th Cir. 1966); Hughes Tool Co., 147 N.L.R.B. 1573 (1964). For discussions of this duty, see Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Rosen, *The Law and Discrimination in Employment*, 53 CALIF. L. REV. 729 (1965); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962).

Although Title VII is the latest and most comprehensive governmental action for the elimination of racial discrimination, the above mentioned methods should continue to be used to supplement it. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 205-13 (1966) [hereinafter cited as SOVERN].

[7] SOVERN 101.

[8] Employers covered by the Act with some exceptions include all employers "engaging in an industry affecting commerce" who have twenty-five or more employees. 42 U.S.C. § 2000e(b) (1964).

[9] 42 U.S.C. § 2000e-2(a)(1) (1964).

[10] *Id.* at § 2000e-2(a)(2).

by the act[11] may not deny membership to a worker or act to deprive him of or limit his employment opportunities or "otherwise adversely affect his status as an employee or as an applicant for employment" because of his race, religion, sex or national origin.[12] In addition, labor organizations cannot lawfully "cause or attempt to cause an employer to discriminate against an individual" in violation of the duties imposed on the employer by Title VII.[13] Finally, employers and labor organizations may not discriminate in programs of apprenticeship or retraining.[14]

The court apparently assumed that any racial discrimination in employment, unless specifically condoned by the Act, would violate Title VII, since it failed to analyze the Act's provisions as they related to the particular facts of the case. Thus, the basic inquiry was whether racial discrimination did in fact exist. In resolving this question, the court closely scrutinized the plight of Negroes hired during the period when Phillip Morris maintained its discriminatory hiring policy. It noted that the Negroes, to be eligible to compete for the better jobs, first had to transfer to either the fabrication or warehouse and shipping department. But to transfer they had to either compete with Negroes of greater seniority in the prefabrication department or transfer with a loss of departmental seniority. Upon transfer, they were at the bottom of the seniority roster in the new department, regardless of their overall plant seniority. In case of lay-off, they were the first to go, although they could return to the old department with seniority accumulated while working there. Further, the Negroes, while waiting for an opportunity to transfer, continued to be paid less than the white employees in other departments. On the other hand, white employees of equal ability and equal or less company-wide tenure would already be in the department to which the Negroes were attempting to transfer. Furthermore, the whites' departmental seniority would be greater than or at least equal to the seniority which the Negroes could acquire if and when they were allowed to transfer. This situation led the court to conclude that, although the restrictive

[11] Labor organizations covered by the Act, in general, include all unions which represent or seek to represent employees of covered employers, and which have twenty-five or more members. *Id.* at §§ 2000e(d)-(e).

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transfer provisions were now being administered on a nondiscriminatory basis and Phillip Morris was no longer discriminating in its hiring in any department as of 1966, the restrictive transfer provisions continued to perpetuate the past discrimination and amounted to present discrimination in violation of Title VII.[15]

NLRB v. Local 267, IBEW,[16] which was litigated under the National Labor Relations Act, supports the premise that past discrimination can not be perpetrated by continued use of an employment practice even though it is not itself discriminatory on its face. There the union had maintained a hiring hall and in the past had preferred union members to nonmembers for work referrals. Further, priority in referral had been and continued to be based upon past employment. The court reasoned that, although section 8(f)(4) of the NLRA specifically sanctioned priority based on experience, the subsection did not sanction "the use of seemingly objective criteria as a guise for achieving illegal discrimination."[17]

The congressional hearings and debates do not lend substantial support to either the court's viewpoint or a contrary position.[18] Congress never discussed *departmental* seniority, which was involved in *Quarles*. But the legislators did state that Title VII would not affect established *employment* seniority rights, i.e., since the Act was "prospective and not retrospective,"[19] it would not require subsequently hired Negroes to be preferred on the basis of race over previously hired whites.[20] In fact, section 703(j)[21] specifically barred this "reverse discrimination." At any rate, the court appears correct in concluding that congressional debate did not significantly weaken its position.

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[15] 279 F. Supp. at 518, 19.

[16] 357 F.2d 51 (3d Cir. 1966).

[17] *Id.* at 57.

[18] *See*, BUREAU OF NATIONAL AFFAIRS, THE CIVIL RIGHTS ACT of 1964 (1964); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967). The court acknowledged that it relied heavily on this note.

[19] 110 CONG. REC. 6992 (daily ed. April 8, 1964).

It should be noted that, although a finding of discrimination would not cause the Act to apply retroactively, the court's remedy could still be retroactive. For a discussion of this and the remedy in *Quarles*, see note 29 *infra*.

[20] *Quarles* does not require any change of employment seniority. It only requires that Negro employees transferring to other departments compete with white employees on the basis of their length of time in the company's employment, i.e., on the basis of employment seniority, rather than on the basis of their length of time in that department.

[21] 42 U.S.C. § 2000e-2(j) (1964).

Although the congressional discussion alone is not very instructive as to what effect Title VII was intended to have on pre-existing departmental seniority rights, a proviso to section 703 which was added as an amendment has some bearing on this determination. In particular, section 703(h)[22] states that, notwithstanding other provisions of Title VII, an employer may:

> apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race. . . .[23]

It has been suggested that this proviso, read in light of the congressional discussion, "reflects a congressional consensus favoring the protection of all seniority rights existing before Title VII's effective date."[24] But, however one reads the proviso,

> it does not seem possible to interpret it as providing a blanket exemption for all differences in treatment resulting from seniority arrangements set up before Title VII came into force. The proviso does not expressly refer to such preexisting systems, but to all "bona fide" systems. A "bona fide" seniority system seems to be one which can be explained or justified on nonracial grounds.[25]

Whitfield v. United Steelworkers,[26] decided prior to passage of Title VII, is the only case either before or after the passage of Title VII in which there were similar facts. Phillip Morris and Local 203 relied heavily on *Whitfield,* which held that there was no discrimination even though the Negro employees with greater seniority had to go to the bottom when they transferred departments.[27] However, the court in *Quarles* distinguished *Whitfield* on the grounds that the skills obtained in the departmental pro-

[22] This was one of a series of amendments negotiated to gain the support of a group of Senators headed by Senator Dirksen against the filibuster conducted by southern opponents of the Civil Rights Act. Vaas, *Title VII: Legislative History,* 7 B.C. IND. & COM. L. REV. 431, 449 (1966).

[23] 42 U.S.C. § 2000e-2(h) (1964).

[24] Note, *Title VII, Seniority Discrimination, and the Incumbent Negro,* 80 HARV. L. REV. 1260 at 1272; *accord,* Note, *The Civil Rights Act of 1964: Racial Discrimination by Labor Unions,* 41 ST. JOHN'S L. REV. 58, 78 (1966).

[25] Note, *Title VII, Seniority Discrimination and the Incumbent Negro,* 80 HARV. L. REV. 1260 at 1272.

[26] 263 F.2d 546 (5th Cir. 1959), *cert. denied,* 360 U.S. 902 (1959).

[27] *Id.* at 551.

gression were necessary for advancement to higher level jobs.[28] In *Quarles,* the only skills required, if any, were those that each employee, whether white or Negro, had to acquire on the particular job or through training just prior to taking the job.

Under Title VII, the court must find that "the respondent has intentionally engaged in . . . an unlawful employment practice" before it can enjoin the practice and "order such affirmative action as may be appropriate. . . ."[29] The court concluded that Phillip Morris and Local 203 had intentionally engaged in unlawful employment practices by discriminating on the grounds of race without discussing what was necessary to constitute the requisite intent. The court did state that the defendants' pre-Title VII hiring practices were intentionally discriminatory and this conclusion appears to be justified by the evidence.[30] However, surely the court did not intend that this should suffice as the neccessary intent, because such an interpretation would seem susceptible to the objection of retroactivity. In fact, it appears difficult to allege realistically that the condemned practices by themselves were intentionally dis-

[28] 279 F. Supp. at 518.

[29] 42 U.S.C. § 2000e-5(g) (1964).

In fashioning a remedy which would award the complainants "affirmative relief," the court had two basic choices which have been referred to as the "rightful place" remedy and the "freedom now" remedy. 80 HARV. L. REV. at 1268. The "rightful place" remedy

> would allow an incumbent Negro to bid for openings in "white" jobs comparable to those held by whites of equal tenure, on the basis of his full length of service with the employer. If he met the existing ability requirements for such a job, he would be entitled to fill it, without regard to the seniority expectations of junior white employees. The "rightful place" approach requires an adjustment in competitive standing with regard to future job movements arising in the ordinary course of an employer's business.

Id. In contrast, the "freedom now" remedy would displace whites for Negroes who would have had the job if there had not been originally a discriminatory hiring policy. The court, after considering the merits of the efficiencies obtained through the company's present departmental organization and the economic losses to the Negro employees, awarded a variation of the "rightful place" remedy. Any lesser relief, e.g., allowing Negroes to transfer to entry level positions in the other departments when vacancies occurred, would have continued to subordinate the Negroes to the white employees. The "freedom now" approach insofar as it would reverse job awards made before Title VII became law "seems vulnerable to the charge that it is retroactive," although this is only one of many reasons why this remedy does not seem viable.

For an example of a pre-Title VII remedy similar to that in *Quarles,* see Central of Ga. Ry. Co. v. Jones, 229 F.2d 648 (5th Cir. 1956), *cert. denied,* 352 U.S. 848 (1956).

[30] 279 F. Supp. 518.

criminatory. It was never contended that the restrictive transfer policies were conjured up to defeat the intent of Title VII, and, in fact, this arrangement had been in effect previously. Further, the court recognized that the departmental system in combination with the restrictive transfer system had offered the company many legitimate benefits.[31] However, in support of the court's decision, it seems that discriminatory intent can be inferred from the employer's continued use of its restrictive transfer system, since the employer must have known that the practical effect would be to discriminate against senior Negro employees in the prefabrication department.[32]

Although *Quarles* appears to be consistent with the overall intent of Title VII,[33] in the absence of clarifying congressional amendment, the continued use of Title VII for the elimination of present differences in seniority caused by prior racial discrimination in hiring will raise three problems—whether such differences are in fact discriminatory; what is required to establish the requisite intent; and what effect qualifications of skill and ability have on the issues of intent and discrimination.

It seems that an argument equally meritorious to that of the court in *Quarles* can be made to the effect that, if an employer has discontinued his racially discriminatory practices, there is no present discrimination although vestiges of the old system remain in the form of differences in seniority.[34] Further, assuming no present intent can be found, it can be argued that *Quarles* applies the act retroactively.

Convincingly showing the necessary intent is the second major obstacle in upholding the *Quarles* interpretation. If a court requires a demonstration of a particular state of mind, the burden of proof could be almost insurmountable. On the other hand, if the court reasons that the parties intended the natural and probable consequences of their actions, the problem will be less significant.[35]

Finally, although qualification requirements for promotion were

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[31] *Id.* at 513.

[32] *See* Note, *The Civil Rights Act of 1964: Racial Discrimination by Labor Unions,* 41 ST. JOHN'S L. REV. 58, 77 (1966).

[33] BUREAU OF NATIONAL AFFAIRS, THE CIVIL RIGHTS ACT OF 1964 at 160 (1964).

[34] This was the position of the defendants in *Quarles.*

[35] *See* Rachlin, *Title VII: Limitations and Qualifications,* 7 B.C. IND. & COM. L. REV. 473, 479-80 (1966).

not in issue in *Quarles,* they will be an important factor in many future cases.[36] The easiest situation is where an employer's qualification requirements are only a facade. In such instances, upon a showing of sufficient evidence, the court will probably consider this only as evidence of the company's intention to discriminate. Another situation is like that in *Quarles* where the company maintains a training program to qualify employees for higher level positions. Title VII specifically states that such training programs will be administered without discrimination.[37] The most difficult type case arose in *Whitfield,* where the qualification requirements were legitimate and the white employees obtained the skills by progression through the department.[38] The court in *Quarles* implied that Title VII would not damage the *Whitfield* finding of no discrimination.[39] However, it can be contended that, although the Negro employees would have to go to the bottom of the department to obtain the necessary skills, they should not lose their seniority as they did in *Whitfield.* This would allow the Negroes to progress as quickly as they grasped the required skills for advancement and as soon as vacancies for which they were qualified came open. In *Whitfield,* the court emphasized the good faith of the union in fairly representing all the employees.[40] Under Title VII, it appears that the elimination of seniority rights upon transfer, whether the employee has to obtain skills or not, would continue to perpetuate the past discrimination and, therefore, under *Quarles* should be in violation of the Act.

Although employers and unions may be faced with practical problems in complying with Title VII as interpreted in *Quarles,* Congress expressed its intention to eliminate racial discrimination in employment and, because of the magnitude of the evil to be eliminated, did not provide for any balancing of interests. *Quarles* is consistent with this general purpose of Title VII, but the court could have augmented the significance of its decision by analyzing the pertinent provisions of the Act and pointing out which facts demonstrated a violation of which provisions.

WILLIAM H. LEWIS, JR.

[36] *Id.* at 476-8.
[37] 42 U.S.C. § 2000e-2(d) (1964).
[38] 263 F.2d at 550.
[39] 279 F. Supp. at 518.
[40] 263 F.2d at 551.