St. John's Law Review

Volume 54
Number 4 *Volume 54, Summer 1980, Number 4*

Article 2

July 2012

Teamsters, California Brewers, and Beyond: Seniority Systems and Allocation of the Burden of Proving Bona Fides

Peter N. Hillman

TEAMSTERS, CALIFORNIA BREWERS, AND BEYOND: SENIORITY SYSTEMS AND ALLOCATION OF THE BURDEN OF PROVING BONA FIDES

PETER N. HILLMAN*

INTRODUCTION

In *International Brotherhood of Teamsters v. United States,*[1] the Supreme Court unsettled years of Title VII jurisprudence[2] by declaring that section 703(h)[3] of the Civil Rights Act of 1964[4] immunizes bona fide seniority systems[5] from challenge, even where such systems operate to perpetuate the effects of pre-Title VII discrimination.[6] Yet, the significance of the *Teamsters* holding re-

---

* B.A., Williams College, 1975; J.D., Columbia University School of Law, 1978. Associate, Chadbourne, Parke, Whiteside & Wolff, New York, N.Y.

[1] 431 U.S. 324 (1977).

[2] *See* Recent Development, *Title VII—Seniority—The Relevant Scope of Inquiry for Determining the Legality of a Seniority System,* 31 VAND. L. REV. 151, 170 (1978).

In the *Teamsters* majority opinion, Mr. Justice Stewart conceded that there was "much support" for the view that section 703(h) did not immunize seniority systems that perpetuate the effects of past discrimination. 431 U.S. at 346 n.28. The leading case in this line of decisions, Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), held that if a seniority system had its "genesis" in racial discrimination, it was not bona fide within section 703(h). For a listing of over thirty decisions where the *Quarles* approach was followed, see 431 U.S. at 378 & n.2 (Marshall, J., concurring in part, dissenting in part). Justice Marshall also pointed out that the Equal Employment Opportunity Commission invariably reached the same conclusion as the *Quarles* court. *Id.* at 379-80 & n.4 (Marshall, J., concurring in part, dissenting in part).

[3] Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1976), provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

[4] 42 U.S.C. §§ 2000e to -17 (1976 & Supp. II 1978).

[5] *See* note 92 *infra.*

[6] 431 U.S. at 353-54. In *Teamsters,* the United States brought suit on behalf of certain employees of a nationwide carrier alleging, *inter alia,* that the seniority system contained in the collective bargaining contract between the company and the Teamsters Union violated Title VII. *Id.* at 329-30. Specifically, the Government alleged that the effects of the carrier's

mains shadowed by the Court's failure to resolve the critical question of which party has the burden of proving that a seniority system is or is not bona fide. Lower courts have been forced to confront this question in the context of complex employment discrimination litigation with little guidance from *Teamsters,* and have responded with a variety of approaches.[7]

---

pre-Act practice of hiring minorities solely for inferior positions was perpetuated by its present seniority system. *Id.* at 329. Under that system, minority employees who transferred to the more desirable positions were forced to forfeit their seniority. *Id.* at 329-30. The district court found that the seniority system violated Title VII since it impeded "transfer of minority groups into and within the company." *Id.* at 331. The Fifth Circuit Court of Appeals agreed, holding that an employee who transferred to a more desirable position was entitled to use his full company seniority for all purposes, regardless of whether the seniority would predate the effective date of Title VII. *Id.* at 333.

On appeal, the Supreme Court made a distinction between those employees who were victimized by discrimination before Title VII, and those discriminated against after the Act took effect. *Id.* at 347-57. Post-Act discriminatees are clearly entitled to retroactive seniority under the authority of a previous decision of the Court, which stated that section 703(h) would not bar such an award. *Id.* at 346; *see* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). However, section 703(h) would bar retroactive relief to pre-Act discriminatees because the purpose of this section was to declare that "routine application of a bona fide seniority system would not be unlawful under Title VII." 431 U.S. at 352. In arriving at this conclusion, the Court looked not only to the language of section 703(h), but also to its legislative history, which indicated that the section was added to placate those critics of the Act who complained that it would destroy existing seniority rights. *Id.* at 350. For a discussion of the effect of *Teamsters* on seniority systems in general, see Sellinger, *Seniority and the Perpetuation of Past Discrimination,* 4 N.Y.U. SCH. OF L. ANN. SURVEY OF AM. L. 749 (1978).

[7] *See* notes 116-19 and accompanying text *infra.* The *Teamsters* Court not only failed to resolve the issue of who has the burden of proving bona fides, but also left unresolved the issue of which employment practices were part of a "seniority system" and, therefore, subject to a bona fides test. *See* notes 132 & 133 and accompanying text *infra.* Recently, however, in *California Brewers Ass'n v. Bryant,* 444 U.S. 598 (1980), the Court took a significant step in clarifying this latter issue. The *California Brewers* Court noted that the "principal feature of any and every 'seniority system' is that preferential treatment is dispensed on the basis of some measure of time served in employment." *Id.* at 606. In addition, the Court observed that "ancillary rules"—rules specifying the onset of seniority rights, rules describing the forfeiture of seniority rights, rules defining seniority accruals, and rules particularizing the employment conditions that will be governed or influenced by seniority—although not dependent on the length of employment, could nonetheless be identified as part of a "seniority system." *Id.* at 607. Thus, a rule requiring that employees work 45 weeks before they receive preferential treatment in hiring and layoffs was considered such an "ancillary rule" or threshold requirement for application of other seniority rules. Consequently, the *California Brewers* Court held that the provision was part of the "seniority system." *Id.* at 609. For a more complete discussion of the nature of seniority rights, see Sellinger, *supra* note 6, at 765-68.

Although the issue of burden of proof as to bona fides was not presented to the *California Brewers* Court, Justice Stewart, author of the plurality opinion, after having concluded that a seniority system was implicated, observed that the plaintiffs were "free to show that . . . the seniority system . . . [was] not 'bona fide,' or that the differences in employment

Regardless of whether the discrimination being analyzed is overt and purposeful, ("disparate treatment") or the result of facially neutral programs, ("disparate impact") the Supreme Court has affirmed that the burden of proof in Title VII cases is the same as that in other forms of civil litigation. Plaintiffs who seek to establish discrimination, whether suing as individuals or as a class, "have the traditional civil litigation burden of establishing that the acts they complain of constituted discrimination in violation of Title VII."[8] The conclusion herein, that plaintiffs should have the burden of proving non-bona fides is in harmony with disparate treatment analysis and is also supported by general concepts of statutory interpretation that place on plaintiffs the burden of proving the nonexistence of an exception, such as section 703(h), which is part of the general clause or paragraph of the statute that creates and defines the right relied upon.[9] Accordingly, plaintiffs who allege that a challenged act or practice of the employer violates the primary prohibition of Title VII must prove by a preponderance of the evidence that the act or practice is indeed an "unlawful employment practice" as that term is defined by section 703(a).[10]

---

conditions that it [had] produced [were] 'the result of an intention to discriminate because of race.'" 444 U.S. at 610-11.

[8] General Elec. Co. v. Gilbert, 429 U.S. 125, 137 n.14 (1976); *see, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. at 367-68; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Notions of burden of proof in employment discrimination litigation have evolved in a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). As in other forms of civil litigation, the burden may shift from party to party. *See* McDonnell Douglas Corp. v. Green, 411 U.S. at 802-03. Thus, if a plaintiff has established a prima facie case, the burden shifts to the defendant to rebut the inference of a violation. *See id.* If the defendant successfully rebuts the inference, the burden is shifted back to the plaintiff to show that the employer's purported reason for its practice is in fact pretext. *See* International Bhd. of Teamsters v. United States, 431 U.S. at 360-61; McDonnell Douglas Corp. v. Green, 411 U.S. at 804-05.

[9] *See* notes 90 & 91 and accompanying text *infra*.

[10] Section 703(a) of Title VII, 42 U.S.C. § 2000e-2 (1976), provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. Section 703(a) is one of several clauses in Title VII defining and conferring a right to

The central thesis of this Article is that, given the underlying policy considerations, the burden of proving the bona fides of a seniority system should be allocated as it is in disparate treatment cases.[11] Discriminatory motive, which is critical in these cases, must be proved by the plaintiffs.[12]

General Concepts of Burden of Proof in Employment Discrimination Litigation

Burdens of Proof in Cases of Disparate Treatment

Although Title VII does not define "discrimination,"[13] Congress obviously contemplated that the term would include the employer who treats individuals differently because of personal antipathy toward the minority group that includes those individuals.[14] To implement the Congressional purpose of discouraging employers who overtly distinguished among individuals because of race, the concept of disparate treatment evolved.[15] The critical element for proving this type of discrimination became the presence or absence of the employer's unlawful subjective intent.[16] In developing the concepts of burden of proof in disparate treatment cases, the Supreme Court has never lost sight of the principle that the bur-

---

seek redress for unlawful job discrimination. Other "unlawful employment practices" are defined and proscribed with respect to practices by employment agencies, section 703(b), 42 U.S.C. § 2000e-2(b) (1976), by labor organizations, section 703(c), 42 U.S.C. § 2000e-2(c) (1976), and as part of training programs, section 703(d), 42 U.S.C. § 2000e-2(d) (1976).

[11] It must be recognized that the phrase "burden of proof," as applied in this Article, embodies two concepts: (1) the burden of persuasion as to a fact or issue, which generally rests on the party asserting or pleading it to finally establish by the requisite degree of proof; and (2) the burden of production or going forward, a shifting burden which can be defined as the necessity that a party establish a prima facie case in his favor or refute evidence introduced against it at specified times during a trial. *See* Northwestern Elec. Co. v. Federal Power Comm'n, 134 F.2d 740, 743 (9th Cir. 1943), *aff'd*, 321 U.S. 119 (1944); Pacific Gas & Elec. Co. v. SEC, 127 F.2d 378, 382 (9th Cir. 1942), *aff'd per curiam*, 324 U.S. 826 (1945); Wong Kam Chong v. United States, 111 F.2d 707, 710 (9th Cir. 1940).

[12] *See* International Bhd. of Teamsters v. United States, 431 U.S. at 335-36 n.15.

[13] *See* 42 U.S.C. §§ 2000e, 2000e-2(h) (1976 & Supp. II 1978).

[14] S. Rep. No. 872, 88th Cong., 2d Sess. (1964), *reprinted in* [1964] U.S. Code Cong. & Ad. News 2355, 2356; H.R. Rep. No. 914, 88th Cong., 1st Sess. 18, *reprinted in* [1964] U.S. Code Cong. & Ad. News 2391, 2393; *see* Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971).

[15] *See* International Bhd. of Teamsters v. United States, 431 U.S. at 335 n.15; 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey).

[16] International Bhd. of Teamsters v. United States, 431 U.S. at 335 n.15; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973). In *Teamsters*, the Court noted that although "proof of discriminatory intent is critical," it can sometimes "be inferred from the mere fact of differences in treatment." 431 U.S. at 335 n.15.

den is on the plaintiff to prove the defendant's discriminatory animus in order to establish that a violation has occurred.[17] Such proof of racial animus can be direct, when there is a deliberate denial of employment opportunities based on overt discriminatory acts, or indirect, established by inference from circumstantial evidence that reveals the employer's state of mind.[18]

In *McDonnell Douglas Corp. v. Green*,[19] the Supreme Court faced the "critical issue" of "the order and allocation of proof in a private, non-class action challenging employment discrimination."[20] In resolving this question, the Court enunciated a three-step process for distributing burdens among the parties and set forth the elements of proof necessary to establish a disparate treatment case under Title VII. The first step requires that the plaintiff establish a prima facie case of racial discrimination by showing that he was a member of a racial minority group; that he applied for a job for which applicants were being sought; that although qualified, he was rejected; and that after his rejection, the employer continued to seek equally qualified applicants.[21]

Once the plaintiff establishes a prima facie case sufficient to support an inference of discrimination, the burden of production

---

[17] International Bhd. of Teamsters v. United States, 431 U.S. at 335 n.15 (citing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977)); *see* Naraine v. Western Elec. Co., 507 F.2d 590, 593 (8th Cir. 1974).

[18] *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1154 & n.16 (1976) & 300-01 (Supp. 1979). Although statistical evidence has often been used to establish discriminatory purpose in cases of disparate impact, such evidence alone may no longer be sufficient in cases of disparate treatment. *See* International Bhd. of Teamsters v. United States, 431 U.S. at 339-40.

[19] 411 U.S. 792 (1973).

[20] *Id.* at 800.

[21] *Id.* at 802; *see* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). The *McDonnell Douglas* Court pointed out, however, that the proof required of a plaintiff to establish a prima facie case will vary with "differing factual situations." 411 U.S. at 802 n.13. This caveat was reiterated by the Court in Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), wherein the Court stated:

> The central focus of the inquiry in [disparate treatment cases] is always whether the employer is treating "some people less favorably than others because of their race, color, religion, sex, or national origin." The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.

Id. at 576-77 (quoting International Bhd. of Teamsters v. United States, 431 U.S. at 335 n.15).

shifts to the defendant to rebut the inference.[22] *McDonnell Douglas* described this burden on the defendant as that of "articulat[ing] some legitimate, nondiscriminatory reason for the employee's rejection."[23] Assuming the defendant can articulate some legitimate nondiscriminatory reason for its action, its burden of production is satisfied, the inferences drawn from the plaintiff's prima facie case have been rebutted, and the burden of production shifts again.[24] The plaintiff must then show that the presumptively valid reasons for his rejection were mere pretext and "in fact a coverup for a racially discriminatory decision."[25] By placing the burden of showing pretext on the plaintiffs in these disparate treatment cases, the Court implemented traditional burden of proof principles in consonance with the underlying congressional policy proscribing overt acts of discrimination.[26]

Burdens of Proof in Cases of Disparate Impact

In the first years after the enactment of Title VII, courts defined discrimination in terms of the employer's good or bad subjec-

---

[22] 411 U.S. at 802; *see* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[23] 411 U.S. at 802. It should be noted that there is a "significant distinction between merely 'articulat[ing] some legitimate, nondiscriminatory reason' and 'prov[ing] absence of discriminatory motive.' " Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978) (per curiam) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. at 802); *see* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579-80 (1978). In other words, if a plaintiff makes a *McDonnell Douglas* prima facie showing, the burden shifts to the defendant, not to prove that it acted without discriminatory animus, but to " '[explain] what he has done' or 'produc[e] evidence of legitimate nondiscriminatory reasons.' " 439 U.S. at 25 n.2 (quoting dissent of Justice Stevens, *id.* at 28-29). Prima facie evidence does not constitute a finding of discrimination, but merely creates an inference of discriminatory motive "because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." Furnco Constr. Corp. v. Waters, 438 U.S. at 580. *Furnco Constr. Corp.* and *Sweeney* have been followed by the lower courts. *See, e.g.*, Cartagena v. Secretary of the Navy, 618 F.2d 130, 133 (1st Cir. 1980) (per curiam); Reilly v. Board of Educ., 458 F. Supp. 992, 996 (E.D. Wis. 1978). *But see* Burdine v. Texas Dep't of Community Affairs, 608 F.2d 563, 567 (5th Cir. 1979), *cert. granted*, 100 S.Ct. 3009 (1980) (rebuttal of plaintiff's prima facie case requires "legally sufficient proof" of nondiscriminatory reasons). *See also* Johnson v. Olin Corp., 484 F. Supp. 577, 581 n.2 (S.D. Tex. 1980).

[24] *See* 411 U.S. at 804-05.

[25] *Id.* The *McDonnell Douglas* Court suggested what evidence would be relevant to a showing of pretext, all of which bears on the pivotal question of the defendant's discriminatory intent. *See id.* at 804-05. For example, if the defendant's refusal to rehire the minority employee was purportedly based on one nondiscriminatory criterion, an inference of racial animus might still be drawn if that criterion was not applied alike in decisions to rehire white employees. *See id.* at 804.

[26] *See* note 14 and accompanying text *supra*.

tive intent.[27] Even before *McDonnell Douglas*, however, a second concept of discrimination had emerged, focusing more on the consequences of an employer's actions, than on the employer's state of mind.[28] Under this rationale, Title VII was interpreted to reach actions by employers that had an adverse, or "disparate," impact on minorities, even though the particular employer might not have had a history of practicing overt discrimination.[29] This sharp conceptual shift from subjective to objective circumstances required separate principles of burden of proof.

A review of these early disparate impact cases reveals that the mechanics of seniority and lines of progression were crucial considerations in shaping disparate impact analysis.[30] In *Quarles v. Philip Morris, Inc.*,[31] for example, the employer's policy of segregated departments had been abolished earlier, but a current system of restrictive interdepartmental transfers, with accompanying loss of competitive seniority, was alleged to perpetuate unlawfully the effects of past discrimination.[32] The employer contended that there was no intent to discriminate, since the seniority system was facially neutral, and its application restricted alike the transfers of all employees.[33] Consequently, the employer argued, it should be protected by section 703(h) of Title VII.[34]

Notwithstanding the employer's arguments in *Quarles*, District Judge Butzner concluded from the section's legislative history that Congress, without endorsing reverse discrimination, "did not intend to freeze an entire generation of Negro employees into dis-

---

[27] *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791, 796-97 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[28] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); United States v. Bethlehem Steel Corp., 446 F.2d 652, 658 (2d Cir. 1971); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 510 (E.D. Va. 1968).

[29] *See* cases cited in note 28 *supra*.

[30] *See, e.g.*, United States v. Chesapeake & Ohio Ry., 471 F.2d 582, 587 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); United States v. Bethlehem Steel Corp., 46 F.2d 652, 659 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791, 795-96 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). *See also* California Brewers Ass'n v. Bryant, 444 U.S. 598, *rehearing denied*, 444 U.S. 957 (1980).

[31] 279 F. Supp. 505 (E.D. Va. 1968).

[32] *Id.* at 507-08. The plaintiff in *Quarles*, a black worker, sought with other workers to enjoin certain employment practices of the defendant company, alleging that Philip Morris did not "hire, promote, . . . pay, advance and transfer" black employees as it did white employees. *Id.* at 507.

[33] *Id.* at 515.

[34] *Id.*; *see* note 3 *supra*.

criminatory patterns that existed before the Act."[35] He held that a seniority system having its genesis in past discrimination, such as a history of segregated departments, was not bona fide because it perpetuated the effects of a pre-Act policy of discriminatory job assignment.[36]

The Court of Appeals for the Fifth Circuit adopted the *Quarles* approach in *Local 189, United Papermakers & Paperworkers v. United States.*[37] In condemning a departmental seniority system over the defendant's argument that the facially neutral practice was "merely an ineradicable consequence of extinct racial discrimination,"[38] the court emphasized that discrimination in the seniority system context should be analyzed in terms of the present consequences of past discrimination.[39] Other courts began to accept this emphasis on the present consequences of past discrimination,[40] and the Supreme Court finally approved the theory in a different factual context in *Griggs v. Duke Power Co.*[41]

In *Griggs,* the Court was faced with a class action challenging the legality of an employer's use of high school diplomas and general intelligence tests as employment requirements, both of which operated to render a disproportionate number of blacks ineligible for employment.[42] The tests were challenged under the second part of section 703(h), which proscribes the application of tests

---

[35] 279 F. Supp. at 576.

[36] *Id.* at 519.

[37] 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970).

[38] *Id.* at 986. Prior to May 1964, the lines of progression in the paper mill which employed the *Local 189* plaintiffs were segregated according to race. *Id.* at 983. These divided lists were subsequently merged, with rank on the new list supposedly based on seniority. *Id.* But more seniority was given to those on the pre-1964 "white" lists than to those on the "black" lists. *Id.* at 983-84.

[39] *Id.* at 989, 994. The court's language made clear that, in contrast to disparate treatment cases, the employer's present good or bad subjective intent was immaterial:

> Every time a Negro worker [who was] hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias. It is not decisive therefore that a seniority system may appear to be neutral on its face if the inevitable effect of tying the system to the *past* is to cut into the employees *present* right not to be discriminated against on the ground of race.

Id. at 988 (emphasis in original).

[40] *See, e.g.,* Robinson v. Lorillard Corp., 444 F.2d 791, 795 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971). Justice Marshall, dissenting in *Teamsters,* cited thirty decisions of six courts of appeals which had held that a seniority system is unlawful if it perpetuates the effects of prior discrimination. *See* 431 U.S. at 378 n.2 (Marshall, J., dissenting).

[41] 401 U.S. 424 (1971).

[42] *Id.* at 425-28.

"designed, intended or used to discriminate."[43] The district court found that the defendant had ceased its policy of overt racial discrimination upon the adoption of Title VII.[44] The Court of Appeals for the Fourth Circuit agreed with the district court that there was no showing of a "racial purpose" or "invidious intent" by the employer in adopting the diploma requirement and intelligence test.[45] Moreover, the standard had been applied fairly to all, regardless of race.[46] Since there was no showing that the defendant had acted with discriminatory intent, the court of appeals found the practices to be lawful under Title VII.[47]

The Supreme Court reversed,[48] stating that Title VII proscribed "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[49] In reaching this conclusion, the Court determined that the policy behind the Title VII proscription extended beyond cases of overt disparate treatment,[50] stating that "Congress directed the thrust of the [Civil Rights] Act to the consequences of employment practices, not simply the motivation."[51] Clearly, under this approach, evidence of the employer's good or bad subjective intent was immaterial. Furthermore, in the view of the *Griggs* Court, Congress had assigned to the employer the "burden of showing that any given requirement [has] a manifest relationship to the employment in question."[52]

To reflect the shift away from the employer's subjective intent, variations had to be incorporated into the levels of burden of proof. The initial burden on plaintiffs in disparate impact cases is to show "that the tests [or other facially neutral requirements] in question select applicants for hire or promotion in a racial pattern

---

[43] *See* 42 U.S.C. § 2000e-2(h) (1976).

[44] Griggs v. Duke Power Co., 292 F. Supp. 243, 251 (M.D.N.C. 1968), *modified*, 420 F.2d 1225 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971).

[45] 420 F.2d at 1232-33.

[46] *Id.*

[47] *Id.* at 1235-36 & n.10.

[48] 401 U.S. at 436.

[49] *Id.* at 431.

[50] *Id.* at 429-32. The *Griggs* Court stated that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430.

[51] *Id.* at 432 (emphasis deleted).

[52] *Id.* The *Griggs* Court explained that while Title VII preserves an employer's right to impose criteria which bear directly on job qualifications, *id.* at 434, criteria which are "artificial, arbitrary, and unnecessary barriers" to equal employment opportunities must be removed. *Id.* at 431. *See* note 59 *infra.*

significantly different from that of the pool of applicants."[53] The most frequent way of satisfying this initial burden is by evidence of statistical disparity, a device used since the first days of Title VII litigation.[54] The burden of production then shifts to the employer to show "that any given requirement [has] a manifest relationship to the employment in question."[55]

If the defendant can meet its burden of showing that its requirements are "job-related," the burden of production shifts again to the plaintiffs to show pretext, that the defendant had available alternative testing or selection devices which would "serve the employer's legitimate interest in 'efficient and trustworthy workmanship,' " while not producing an "undesirable racial effect."[56]

In summary, the distinguishing feature of disparate impact cases is that the plaintiff is asserting that a facially neutral qualification standard constitutes an "artificial, arbitrary, and unnecessary barrier" that disproportionately excludes minorities from the

---

[53] Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). In *Albemarle*, the plaintiff class of present and former black workers sought injunctive relief for what was alleged to be a discriminatory seniority system. *Id.* at 408-09. They claimed that the pre-1968 lines of progression were overtly racist and that a 1968 collective bargaining agreement "locked" the black workers into lower paying jobs by placing the black lines of progression beneath white seniority lists. *Id.* at 409. Also at issue were the defendant's policies of requiring a high school diploma and using the Beta and Wonderlic tests to test nonverbal and verbal skills, respectively. *Id.* at 427. The Court found defects in the employer's validation study which showed a correlation between the test results and job performance. *Id.* at 431. In support of this conclusion, the Court noted that the Beta test showed a substantial correlation in less than half of the contested lines of progression, *id.* at 431-32, that the study validated test results with "subjective supervisorial rankings," *id.* at 432-33, that the study centered on those employees close to the top of their lines of progression, *id.* at 433-34, and that the study focused on experienced white workers, while the tests were given to new job applicants who were usually younger, inexperienced, and nonwhite, *id.* at 435.

[54] *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977); International Bhd. of Teamsters v. United States, 431 U.S. at 339, 342 n.23; Green v. McDonnell Douglas Corp., 528 F.2d 1102, 1105 (8th Cir. 1976). *See generally* Peters v. Jefferson Chemical Corp., 516 F.2d 447, 450 (5th Cir. 1975). For an extended discussion of the accepted use of statistics in proving a prima facie case of employment discrimination, see B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976 & Supp. 1979).

[55] *See* Griggs v. Duke Power Co., 401 U.S. at 432. In seeking a "manifest relationship" between employment requirements and job qualifications, the courts should approve a test that will "measure the person for the job and not the person in the abstract." *Id.* at 436. *See* Washington v. Davis, 426 U.S. 229 (1976); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973). For the federal guidelines to be used in determining a test's validity in relation to the job sought, see 29 C.F.R. § 1607 (1979).

[56] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973)). *But see* Wallace v. Debron Corp., 494 F.2d 674, 677 (8th Cir. 1974) (*employer's* duty to show that there was no less discriminatory method of achieving the same goal). *See also* 29 C.F.R. § 1607.3(B) (1979).

terms and benefits of employment.[57] "The gist of the [plaintiff's] claim," the Supreme Court stated in a recent disparate impact case, "does not involve an assertion of purposeful discriminatory motive."[58] Thus, under disparate impact analysis, plaintiffs need not prove the employer's discriminatory motive; instead, the employer must justify its practice by proving "business necessity."[59]

Early Application of Disparate Impact Theory to Seniority Systems

In reviewing the legislative history of section 703(h), Judge Butzner, in *Quarles*, concluded that Congress could not have envisioned "freezing" an entire generation of blacks into inferior positions.[60] This language with respect to the present consequences of past discrimination was drawn on heavily by Chief Justice Burger in his opinion in *Griggs*.[61] Although *Griggs* did not deal with seniority systems, it is not surprising that there was little challenge in the period between *Griggs* and *Teamsters* to the view that a seniority system could be attacked under disparate impact analysis as maintaining the unlawful effects of past discriminatory practices.[62]

Once courts had decided that challenges to seniority systems invoked the same sort of policy considerations as presented by

---

[57] *See* Griggs v. Duke Power Co., 401 U.S. at 429-31.

[58] Dothard v. Rawlinson, 433 U.S. 321, 328 (1977).

[59] Griggs v. Duke Power Co., 401 U.S. at 431. *See* International Bhd. of Teamsters v. United States, 431 U.S. at 335-36 n.15. Exactly what constitutes "business necessity" has been the subject of considerable disagreement. *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 18, at 132-65; Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 81-89 (1972). Some courts have considered efficiency as well as economy as bases for business necessity, *see, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971), while other courts have stressed that a concern must be absolutely essential to meet the "business necessity" requirement, *see, e.g.*, United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 549 (1971); *accord*, United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

[60] 279 F. Supp. at 516-17.

[61] *Compare* Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971) *with* Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968).

[62] *See, e.g.*, Kaplan v. International Alliance of Theatrical & Stage Employees, 525 F.2d 1354, 1360 (9th Cir. 1975); Gamble v. Birmingham So. R.R., 514 F.2d 678 (5th Cir. 1975); Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975). For a discussion of the perpetuation of discrimination theory, see *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1210-12 (1971).

challenges to employment tests and educational requirements,[63] it was easy to apply the disparate impact levels of burden of proof to the seniority system case.[64] Accordingly, under disparate impact analysis, the defendant had to show business necessity to justify a seniority system which perpetuated the effects of past discrimination,[65] whereas plaintiffs could establish a prima facie case by showing that the seniority system functioned as a barrier to the eradication of past discriminatory practices.[66]

Given the analytical hindsight of *Teamsters*, it seems apparent that *Quarles* and its progeny did not recognize the policy considerations that were the basis of section 703(h).[67] Influenced first by *Quarles* and then *Griggs*, courts failed to consider the possibility that Congress intended to protect the interests of employees with vested seniority rights, absent overt acts of discrimination in the seniority system itself.[68] The courts, however, too quickly applied disparate impact analysis on the assumption that Congress intended to outlaw the present consequences of past discrimination. A less automatic response would have revealed that Congress intended instead to carve out of the prohibitory language of section 703(a) a special exception from liability for bona fide seniority systems, an exception according immunity to defendants absent a showing of overt discrimination.[69] It is submitted that such a show-

---

[63] *See, e.g.*, Watkins v. United Steel Workers, Local 2369, 516 F.2d 41, 45-46 (5th Cir. 1975).

[64] *See* notes 37-40 and accompanying text *supra*.

[65] *See* United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); note 59 and accompanying text *supra*. In *Jacksonville Terminal*, the Fifth Circuit held that management convenience alone could not constitute "business necessity" and thereby validate its seniority system. 451 F.2d at 451. Rather the defendant must prove that the seniority system is essential to the goals of safety and efficiency of operation. *Id.*

[66] *See, e.g.*, Gibson v. Local 40, Int'l Longshoreman's and Warehouseman's Union, 543 F.2d 1259, 1267-68 (9th Cir. 1976); EEOC v. Detroit Edison Co., 515 F.2d 301, 313-14 (6th Cir. 1975), *vacated*, 431 U.S. 951 (1977); United States v. N.L. Indus., Inc., 479 F.2d 354, 366-67 (8th Cir. 1973); United States v. Chesapeake & Ohio Ry., 471 F.2d 582, 587-88 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973).

[67] *See, e.g.*, United States v. Chesapeake & Ohio Ry., 471 F.2d 582, 587-88 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); United States v. Bethlehem Steel Corp., 446 F.2d 652, 658-59 (2d Cir. 1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 987-88 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[68] *See* International Bhd. of Teamsters v. United States, 431 U.S. at 346 & n.28, 352-53.

[69] *See id.* at 352-53; 110 CONG. REC. 7207, 12723 (1964); notes 82-84 *infra*.

ing requires proof of discriminatory motive.

Franks *and* Teamsters*: Redefining the Meaning of Section 703(h)*

Franks v. Bowman Transportation Co.[70] was the first Supreme Court case to interpret the policy behind section 703(h). The *Franks* Court held, *inter alia,* that section 703(h) did not prohibit the retroactive award of seniority status to plaintiffs who were denied employment because of their race in violation of Title VII.[71] In reaching its conclusion, the Court emphasized that the plaintiffs were not challenging the present seniority system, but were merely seeking the seniority status "they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire."[72] This distinction was of crucial significance, since the Court stressed that Title VII was to have no effect on existing, pre-Act seniority rights.[73] Referring to Senator Humphrey's statement that "section 703(h) was not designed to alter the meaning of Title VII generally, but rather 'merely clarifies its present intent and effect,' "[74] the *Franks* Court read section 703(h) as being definitional only, intended by Congress to clarify "what is and is not an illegal discriminatory practice" under section 703(a) in cases challenging the present operation of seniority systems which perpetuate pre-Act discrimination.[75]

The scope of section 703(h) was addressed by the Court the following year in *International Brotherhood of Teamsters v. United States.*[76] In *Teamsters,* the Court faced the question of whether section 703(h) could be interpreted as protecting a bona fide seniority system which perpetuated pre-Title VII discrimination.[77] The Government in this "pattern or practice" case,[78] argued

---

[70] 424 U.S. 747 (1976).

[71] *Id.* at 761-62.

[72] *Id.* at 758. Section 703(h), said the Court, "does not expressly purport to qualify or proscribe relief otherwise appropriate" under Title VII when a violation of the Act is demonstrated. *Id.* Nor, the Court explained, may such limitations on relief be found in the legislative history to section 703(h). *Id.* at 757-58.

[73] *Id.* at 759-61. *See* H. REP. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391; 110 CONG. REC. 7207, 7217, 12723 (1964). *See generally* Vaas, *Title VII: Legislative History,* 7 B.C. INDUS. & COM. L. REV. 431 (1966).

[74] 424 U.S. at 761 (quoting 110 CONG. REC. 12723 (1964) (remarks of Sen. Humphrey)).

[75] 424 U.S. at 761.

[76] 431 U.S. 324 (1977).

[77] *Id.* at 348; *see* note 6 and accompanying text *supra.*

[78] The Equal Employment Opportunity Commission is authorized to "investigate and act on a charge of a pattern or practice of discrimination . . . on behalf of a person claiming

that no seniority system could be "bona fide" within the ambit of section 703(h) if it tended to perpetuate past discrimination.[79] The *Teamsters* Court rejected this argument, however, stating that its acceptance would "disembowel" section 703(h) and thwart the congressional policy of protecting the vested seniority rights of employees.[80] Noting that "Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees,"[81] the *Teamsters* Court held that an otherwise bona fide seniority system is immunized under Title VII from challenges that it perpetuates pre-Title VII discrimination.[82]

The *Teamsters* Court never reached the questions of what constitutes "bona fides" and which party has the burden of proof on those issues, since the Government had conceded that the seniority system involved had been negotiated and maintained free from any illegal purpose.[83] Since the policy behind section 703(h) was the congressional intent to immunize seniority rights absent a showing of overt discrimination,[84] it would seem that after *Teamsters,* it is necessary to establish that invidious discrimination motivated the adoption, negotiation, or maintenance of the seniority system. Without such proof of invidious discrimination, there can be no violation of section 703(a). The traditional civil litigation burden, therefore, remains on the plaintiff to prove the lack of bona fides in order to establish a violation. This emphasis on discriminatory intent places seniority systems squarely under the dis-

---

to be aggrieved . . . ." 42 U.S.C. § 2000e-6 (1976).

[79] 431 U.S. at 353.

[80] *Id.*

[81] *Id.* at 354. The Court in expressing its sweeping interpretation of section 703(h) stated:

> Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination . . . the Congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

Id. at 352-53.

[82] *Id.* at 353-54.

[83] *See id.* at 355-56. Subsequent to *Teamsters* some courts have suggested that the totality of the circumstances surrounding the alleged discrimination should be scrutinized to determine bona fides. *See, e.g.,* Winfield v. St. Joe Paper Co., 20 Fair Empl. Prac. Cas. 1103, 1131 (N.D. Fla. 1979); Swint v. Pullman Standard, 17 Fair Empl. Prac. Cas. 730, 739 (N.D. Ala. 1978), *rev'd on other grounds,* 624 F.2d 525 (5th Cir. 1980).

[84] *See* notes 80-82 and accompanying text *supra.*

parate treatment burden of proof analysis.[85] Since the plaintiffs in cases of disparate treatment carry the ultimate burden of persuasion on the issue of the defendant's good or bad subjective intent,[86] it would seem to follow that the plaintiffs in a section 703(h) case carry the similar burden of showing that a system is not "bona fide." The view that the plaintiff has the burden of showing the lack of bona fides of a seniority system is also supported by several longstanding maxims of statutory interpretation.

MAXIMS OF STATUTORY CONSTRUCTION FOR BURDENS OF PROOF AND EXCEPTIONS

In *General Electric Co. v. Gilbert*,[87] the Supreme Court emphasized that Title VII plaintiffs "have the traditional civil litigation burden of establishing that the acts they complain of constituted discrimination in violation of Title VII."[88] Plaintiffs cannot meet their traditional burden of persuasion unless they prove, by a preponderance of the evidence, the existence of an "unlawful employment practice."[89]

It is a general maxim of pleading and proof that a party who seeks to except himself from a statute must prove that his case

---

[85] By its terms, section 703(h) immunizes bona fide seniority systems "provided that [differences in terms, conditions or privileges] are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(h) (1976). Prior to *Teamsters*, this intention proviso of section 703(h) offered little assistance to defendants, since under disparate impact analysis, the employer's good or bad subjective intent is immaterial. *See* notes 28-29 and accompanying text *supra*. One court has stated that if "the conduct engaged in had racially-determined effects, the requisite intent may be inferred from the fact that the defendants persisted in the conduct after its racial implication had become known to them." Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 997 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

The question arises whether the Supreme Court contemplated different approaches to the determination of bona fides and the application of the intention proviso. In discussing bona fides in a footnote to *Teamsters*, Mr. Justice Stewart explained that a seniority system may have its genesis in discrimination "if an intent to discriminate entered into its very adoption." 431 U.S. at 346 n.28. The Court apparently believed that such intention at the time of adoption, insofar as it warranted a finding of unlawful genesis and non-bona fides, was also sufficient to make a seniority system fail to satisfy the intention proviso of section 703(h). *See* Note, *The New Definition of Seniority System Violations Under Title VII: "He Who Seeks Equity . . .,"* 56 TEX. L. REV. 301, 317 (1978).

[86] *See* notes 13-16 and accompanying text *supra*.

[87] 429 U.S. 125 (1976).

[88] *Id.* at 137 n.14 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

[89] *See* note 10 *supra*.

falls within the exception,[90] unless application of the statute is conditioned on the nonexistence of the exception.[91] This maxim seemingly is applicable where a statute, such as section 703 of the Civil Rights Act of 1964, creates a substantive right while simultaneously providing for exceptions to that right.[92] The maxim is easier to state than to apply, however, since it is not always clear from the face of a statute whether the nonexistence of an exception is made a condition to its application. One must scrutinize the general clause to determine whether it incorporates the exception directly, by specific reference, or indirectly, by policy, legislative history, or proximity. A look at some examples indicates that if an exception is designed to define, limit, or clarify a substantive right simultaneously conferred, then the party asserting the benefits of the substantive right should have the burden of proving that the definition, limitation, or clarification does not destroy his claim to the substantive right.

Exception Incorporated Within the General Clause. Freight forwarders, for example, are subject to the permit provisions of Part IV of the Interstate Commerce Act.[93] A "freight forwarder" is

---

[90] *See, e.g.*, Everts v. Jorgensen, 227 Iowa 818, 289 N.W. 11, 13 (1939); Clubb v. Hetzel, 165 Kan. 594, 198 P.2d 142, 147 (1948); Hunter v. American Ry. Express, 4 S.W.2d 847, 850 (Mo. Ct. App. 1928). Similarly, a party must also prove that he comes within a statutory exception. Sherman Inv. Co. v. United States, 199 F.2d 504, 507 (8th Cir. 1952); Automatic Canteen Co. v. FTC, 194 F.2d 433, 438 (7th Cir. 1952), *rev'd on other grounds*, 346 U.S. 61 (1953); *see* Sullivan v. Ward, 304 Mass. 614, 24 N.E.2d 672, 673 (1939). *But see* Schlemmer v. Buffalo, Rochester & Pittsburgh Ry., 205 U.S. 1, 10 (1907).

[91] *See, e.g.*, Protective Life Ins. Co. v. Swink, 222 Ala. 496, 132 So. 728, 729 (1931). The *Swink* court stated:

> If there be an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but if there be an exception in a subsequent clause or subsequent statute, that is a matter of defense, and is to be shown by the other party.

Id.

This maxim of statutory interpretation is derived from the common law approach to contract interpretation. In pleading on a contract, under common law, if a general clause is followed by a separate, distinct clause which effectively removes something from the general clause, the party pleading the general clause need not prove the negative of the exception clause. He must so prove, however, if the exception is incorporated into the general clause. J. GOULD, PLEADING, §§ 20-21 (1972); 2 J. SAUNDERS, PLEADING & EVIDENCE 1025-26 (2d ed. 1973).

[92] *See* 42 U.S.C. § 2000e-2 (1976). Simply stated, section 703(a) proscribes "unlawful employment practices." *Id.* § 2000e-2(a) (1976); *see* note 10 *supra*. Section 703(h) immunizes "bona fide seniority or merit" systems from the operation of section 703(a), provided those systems do not reflect "an intention to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(h) (1976); *see* note 3 *supra*.

[93] *See* 49 U.S.C. §§ 1001-1022 (1976 & Supp. II 1978).

defined in section 1002(a)(5) of that act,[94] but "shipper associations" are specifically precluded from regulation by section 1002(c).[95] Confronting the question of who had the burden of proving that a shipper association did or did not fall within the statutory exception, one court held that the burden is on the party asserting that an entity does not meet the statutory definition of a shipper association.[96] Important to this conclusion was the determination that the legislative history and the administering agency regarded the section 1002(c) preclusion as a clarification of the section 1002(a)(5) definition, and not as a separate exemption.[97] The party asserting the applicability of the general clause thus had the burden of proving that the clarification, which would have emasculated the general clause, did not apply even though the clarification appeared in a different subsection.[98]

Exception Styled as Special Defense Not Located in Statute That Creates the Claim. Where the statutory provision is intended as something more than a mere clarification of the general clause, however, the burden of proof will be allocated differently. One such provision in the Bank Merger Act of 1966[99] provides banks with a defense or justification for potential antitrust violations if "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."[100] In an action brought by the United States challenging two bank mergers as violative of section 7 of the Clayton Act,[101] the Supreme Court held that the banks had the burden of proving that they came within the Bank Merger Act exception, citing the "general rule where one claims the benefits of an exception to the prohibition of a statute."[102] The Court reasoned that Congress apparently regarded the provision as a distinct exception

---

[94] *See* 49 U.S.C. § 1002(a) (1976).

[95] *See id.* § 1002(c) (1976).

[96] National Motor Freight Traffic Ass'n v. United States, 242 F. Supp. 601, 605 (D.D.C. 1965) (citing Philadelphia Co. v. SEC, 175 F.2d 808, 818 (1949)).

[97] 242 F. Supp. at 605 (citing H.R. REP. No. 1172, 77th Cong., 1st Sess. 5-6 (1941)).

[98] *See* National Motor Freight Traffic Ass'n v. United States, 242 F. Supp. 601, 605 (D.D.C. 1965). *See also* Kimm v. Rosenberg, 363 U.S. 405, 406-08 (1960).

[99] 12 U.S.C. § 1828 (1976 & Supp. II 1978).

[100] *Id.* § 1828(c)(5)(B).

[101] 15 U.S.C. § 18 (1976 & Supp. II 1978).

[102] 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)); *accord,* SEC v. American Int'l Sav. & Loan Ass'n, 199 F. Supp. 341 (D. Md. 1961).

to the general antitrust laws, and referred to the remarks of several congressmen that the banks should shoulder the burden of proof.[103]

Exception Appearing in Separate Section of Statute That Creates the Claim. The Fair Labor Standards Act[104] (FLSA) regulates minimum wages and maximum hours, with general prohibitions set forth in sections 206 and 207.[105] Congress created exemptions from these prohibitions, however, and placed them in a different section of the FLSA,[106] thus styling them in the nature of affirmative defenses rather than clarifications. Accordingly, the cases under the FLSA have held that the employer has the burden of proving that any of the exemptions apply.[107]

Section 703(h) of Title VII

In Title VII actions challenging the bona fides of a seniority system, successful application by an employer of the general maxims on exceptions will turn on convincing a court that the language of section 703(h)[108] was not intended as an affirmative defense, but rather as an explanation or clarification of what constitutes an unlawful employment practice under section 703(a).[109] *Franks*[110] and *Teamsters*[111] offer the best ammunition for this argument. In *Franks,* the Court's review of the legislative history led to the conclusion that "the thrust [of section 703(h)] is directed toward defining what is and is not an illegal discriminatory practice."[112] Sen-

---

[103] 386 U.S. at 366.

[104] 29 U.S.C. §§ 201-219 (1976 & Supp. II 1978).

[105] 29 U.S.C. §§ 206, 207 (1976 & Supp. II 1978).

[106] *See* 29 U.S.C. § 213 (1976 & Supp. II 1978). Section 213, captioned "Exemptions," includes an exemption for a "bona fide executive" from the proscriptions of sections 206 and 207. 29 U.S.C. § 213(a)(1) (1976 & Supp. II 1978).

[107] *See, e.g.,* Wirtz v. Modern Trashmoval, Inc., 323 F.2d 451, 464 (4th Cir. 1963), *cert. denied,* 377 U.S. 925 (1964); Wirtz v. Patelos Door Corp., 280 F. Supp. 212, 216 (E.D.N.C. 1968). Important to this conclusion is the maxim that exemptions to a remedial statute are to be narrowly construed. *See* note 115 *infra.*

[108] 42 U.S.C. § 2000e-2(h) (1976). The employer could also argue that in enacting Title VII, Congress knew how to frame an affirmative defense which places the burden on the employer, but apparently chose not to phrase section 703(h) in such a way. *Cf.* 42 U.S.C. § 2000e-12(b) (1976) (providing immunity if the employer can prove his conduct in good faith and pursuant to EEOC interpretations).

[109] *See* note 10 *supra.*

[110] 424 U.S. 747 (1976); *see* notes 70-75 and accompanying text *supra.*

[111] 431 U.S. 324 (1977); *see* notes 6, 76-82 and accompanying text *supra.*

[112] 424 U.S. at 758-61. In *Teamsters* the Supreme Court reiterated its holding in *Franks,* but noted that *Franks* merely reflected the "general purpose" of section 703(h), and

ator Humphrey told Congress that section 703(h) "merely clarifies [Title VII's] intent and effect,"[113] and the draftsmen stated that one of the principal goals of section 703(h) was to resolve ambiguities in earlier drafts of Title VII.[114]

As a clarification or definition of what constitutes an "illegal employment practice," and since it closely follows the language in section 703(a), section 703(h) should be read as part of the general clause which confers the substantive right. Therefore, the nonexistence of the exception is a condition to the application of section 703(a), and a party asserting rights under that statute should have the burden of proving that a seniority system is not bona fide.[115]

THE BURDEN OF PROOF QUESTION AFTER *Teamsters*

While the Supreme Court's retreat from disparate impact analysis in cases concerning seniority systems suggests an emerging emphasis on a showing of discriminatory motive or lack of bona fides as part of a disparate treatment analysis,[116] none of the

---

that a much more rigorous statutory analysis was necessary to resolve the controversy at issue. 431 U.S. at 346-67.

[113] 110 CONG. REC. 12723 (1964) (remarks of Sen. Humphrey) (quoted in International Bhd. of Teamsters v. United States, 431 U.S. at 352).

[114] *See* 431 U.S. at 352; *cf.* EEOC v. McCall Corp., 16 Empl. Prac. Dec. (CCH) ¶ 5448, 5451 (S.D. Ohio 1978) (section 703(h) "delineates" those employment practices which are illegal and those which are not).

[115] On the other hand, plaintiffs are entitled to the counter-argument that exceptions to a remedial statute such as Title VII are to be narrowly construed. *See* California Brewers Ass'n v. Bryant, 444 U.S. 598, 611 (1980) (Marshall, J., dissenting). The *California Brewers* plurality did not mention the maxim that exemptions to remedial statutes are to be narrowly construed. On the contrary, the Court stated that the Congress that enacted Title VII "quite evidently intended to exempt from the normal operation of Title VII [seniority systems coming in all] sizes and shapes." *Id.* at 607.

Swint v. Pullman-Standard, 17 Fair Empl. Prac. Cas. 730 (N.D. Ala. 1978), *rev'd on other grounds*, 624 F.2d 525 (5th Cir. 1980), is the only case where the statutory construction of section 703(h) was explored in any depth. The district court in *Swint* concluded that section 703(h) was an "affirmative defense," with the defendants bearing the burden of proof on the issue of bona fides. 17 Fair Empl. Prac. Cas. at 732. *Accord*, Griffin v. Copperweld Steel Co., 22 Empl. Prac. Dec. (CCH) ¶ 30,637 (N.D. Ohio 1979).

[116] *See* California Brewers Ass'n v. Bryant, 444 U.S. 598, 607, 608 (1980); International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977); United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977). Disparate treatment necessarily involves proof of discriminatory motive by employers. *See* notes 16 & 17 and accompanying text *supra*. Employment practices which have a disparate impact on minorities, by contrast, are "facially neutral in their treatment" but in fact hurt one group more than another. 431 U.S. 324, 335-36 n.15 (1977); *see* text accompanying notes 28-29 *supra*. The Court in *Teamsters* noted that the main aim of Title VII was to stop disparate treatment. *Id.* at 335 n.15. Similarly, in *Evans*, the Court rejected a female plaintiff's discrimination claim because she did not "attack the

Court's decisions has dealt specifically with the question of burden of proof. Lower courts, forced to confront the issue amid complicated fact patterns, have in effect been left in the woods without a map. For the most part, however, courts addressing the issue of bona fides[117] have analyzed seniority practices under the four factors extracted from *Teamsters* by the Fifth Circuit in *James v. Stockham Valves & Fittings Co.*[118] Under the *James* four-part analysis, a court will consider whether a seniority system applies evenly to employees of all races:

> 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.[119]

The Fourth Circuit's Approach

A close examination of the recent cases in the Fourth Circuit involving seniority systems highlights the judicial need for theoretical, conceptual guidance on the burden of proof question. In *Sledge v. J.P. Stevens & Co.*,[120] a three-judge panel recognized that disparate impact analysis could not be used to challenge a departmental seniority system which fixed layoff and recall rights.[121] Judge Field, writing for the unanimous court, stated that seniority systems represent "[t]he one exception [to the] application of the prima facie 'disparate impact' principle."[122] The implication of the

---

bona fides" of the system and there was no allegation of intentional discrimination. 431 U.S. 553, 560 (1977). Most recently, in *California Brewers*, the Court noted that on remand respondent could win by showing an "*intention* to discriminate because of race." 444 U.S. at 611 (emphasis added).

[117] *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1189 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); Domingo v. New England Fish Co., 445 F. Supp. 421, 436 (W.D. Wash. 1977).

[118] 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978).

[119] 559 F.2d at 352. It should be noted that it is beyond the scope of this paper to enter into an extended discussion of the probative value that should be assigned to the various pieces of evidence offered under the four-factor bona fides framework.

[120] 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

[121] 585 F.2d at 636.

[122] *Id.*

Sledge court was clear; a challenge to the bona fides of a seniority system requires that the plaintiffs show that the alleged discriminatory practices were "racially motivated."[123] Indeed, since proof of racial motivation is tantamount to a finding of "discriminatory purpose" in the adoption or maintenance of the system—a factor crucial to a finding of a lack of bona fides—it seems logical that plaintiffs should bear this burden. The *Sledge* decision thus demonstrates a judicial awareness of the different concepts of discrimination and their accompanying burdens of proof. Moreover, it suggests that a burden of proof argument framed in terms of disparate treatment might get a receptive hearing in the Fourth Circuit.[124]

Circuit Judge Widener, sitting as a district judge by designation in *Younger v. Glamorgan Pipe & Foundry Co.*,[125] has given the clearest indication of who bears the burden on the question of bona fides after *Teamsters*. In his original opinion on liability, Judge Widener found Glamorgan's seniority system to be in violation of Title VII.[126] The Supreme Court, however, decided *Franks* and *Teamsters* subsequent to that opinion, and in light of those decisions, the Court of Appeals for the Fourth Circuit vacated Judge Widener's opinion, stating cryptically: "*Teamsters* makes clear who has the burden of proof of a *prima facie* case, how one may be proved and how the burden of proof may shift thereafter."[127] On remand, Judge Widener noted that the success of a

---

[123] *See id.* at 635. The Fourth Circuit in *Sledge* did not have to assess the plaintiffs' claim under disparate treatment analysis because *Teamsters* was decided after the district court had rendered its decision, and the plaintiffs in their original complaint did not challenge the bona fides of the seniority system. *Id.* at 636.

[124] *Cf.* Wright v. National Archives & Records Serv., 609 F.2d 702, 713 (4th Cir. 1979) (the integrity of disparate impact as a "rational judicial construct . . . should not be compromised by undisciplined extensions"). *See also* Kirby v. Colony Furniture Co., 613 F.2d 696 (8th Cir. 1980). Although the *Sledge* opinion does not address a challenge to seniority practices, the "critical issue of discriminatory motive" would seem to logically match the critical issue of proving the non-bona fides of a seniority system in a section 703(h) case. By parallel reasoning, then, defendants should approach a court with the theory that, since proof of discriminatory motive is mandatory for a finding of non-bona fides, the ultimate burden of persuasion rests with plaintiffs. *See* Kohne v. IMCO Container Co., 480 F. Supp. 1015 (W.D. Va. 1979).

[125] 20 Fair Empl. Prac. Cas. 766 (W.D. Va. 1979), *aff'd*, 621 F.2d 96 (4th Cir. 1980) (per curiam).

[126] 418 F. Supp. 743, 764 (W.D. Va. 1976), *vacated and remanded*, 561 F.2d 563 (4th Cir. 1977) (per curiam).

[127] Younger v. Glamorgan Pipe & Foundry Co., 561 F.2d 563, 565 (4th Cir. 1977) (per curiam). The Fourth Circuit's cursory statement in *Younger* that "*Teamsters* makes clear who has the burden of proof," *id.*, does not mark the first time that a court has failed to anticipate the evolution of judicial thinking on section 703(h). *Cf.* United States v. Jackson-

plaintiff's attack on the "current operation of a seniority system" requires "proof that the system was adopted or maintained for a discriminatory purpose."[128] In examining the evidence offered on bona fides, and applying the four-factor analysis suggested by *Teamsters*,[129] Judge Widener found that the plaintiffs had failed to prove a lack of bona fides by Glamorgan.[130] In so ruling, Judge Widener apparently construed the Fourth Circuit's remand order to mean that the plaintiff carries the burden of proving non-bona fides.[131]

Recent Cases Exploring the Burden of Proof Issue

Before a court can address the issue of bona fides, it must determine the threshold issue of whether various practices are or are not components of a "seniority system."[132] Failure to characterize a

---

ville Terminal Co., 451 F.2d 418, 447 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972) (*Griggs* "may be the last word" on the issue of the consequences of past discrimination on present seniority systems); EEOC v. American Tel. & Tel. Co., 419 F. Supp. 1022, 1048 (E.D. Pa. 1976), *aff'd*, 556 F.2d 167 (3d Cir. 1977) (*Franks* "authoritatively interpreted" section 703(h)).

[128] 20 Fair Empl. Prac. Cas. at 784. Judge Widener first made a preliminary determination that Glamorgan's "no-transfer" rule was part of a seniority system. *Id.* at 783. The no-transfer rule provided that an employee who transferred from one department to another would lose all seniority accumulated in the prior department. *Id.* Other practices also have been held to be part and parcel of a seniority system. *See, e.g.*, Alexander v. Aero Lodge No. 735, International Ass'n of Machinists, 565 F.2d 1364, 1378-79 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); Griffin v. Copperweld Steel Co., 22 Empl. Prac. Dec. (CCH) ¶ 30,637 (N.D. Ohio 1979); Kohne v. IMCO Container Co., 480 F. Supp. 1015 (W.D. Va. 1979); Freeman v. Motor Convoy, Inc., 20 Empl. Prac. Dec. (CCH) ¶ 30,090 (N.D. Ga. 1979).

[129] 20 Fair Empl. Prac. Cas. at 785; *see* notes 118-119 and accompanying text *supra*.

[130] 20 Fair Empl. Prac. Cas. at 788. Judge Widener observed that the only "substantive attack" on bona fides concerned the maintenance and operation of the security system, but he dismissed this attack because the "plaintiffs provided not a single witness" in support of their claim. *Id.* at 787. *See also* Coleman v. Seaboard Coast Line R.R., 18 Empl. Prac. Dec. (CCH) ¶ 8812 (E.D. Va. 1978).

Judge Widener's opinion appears to have foreshadowed Justice Stewart's language in California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980). *Compare* Younger v. Glamorgan Pipe & Foundry Co., 20 Fair Empl. Prac. Cas. at 784 *with* California Brewers Ass'n v. Bryant, 444 U.S. at 610-11.

[131] *See* Younger v. Glamorgan Pipe & Foundry Co., 621 F.2d 96 (4th Cir. 1980) (per curiam), *aff'g*, 20 Fair Empl. Prac. Cas. 776 (W.D. Va. 1979). In affirming Judge Widener's opinion, the Fourth Circuit stated that "[a]ny doubt concerning the [lower] court's interpretation of the statutory language of § 703(h) was resolved by the decision of the Supreme Court in *California Brewers Ass'n v. Bryant* . . . ." 621 F.2d at 97 (citation omitted). *See* note 127 *supra*.

[132] Bona fides analysis, of course, cannot enter the picture until a given practice is interpreted to be part of the "seniority system." *See* note 133 and accompanying text *infra*. An additional question generated by *Teamsters*, and perhaps still open after *California*

practice as part of the seniority system usually results in application of disparate impact analysis wherein the defendant carries the difficult burden of proving the "business necessity" of the practice.

The pivotal nature of defining a practice as part of a "seniority system" is typified by the Supreme Court's recent decision in *California Brewers Association v. Bryant.*[133] In that case, the plaintiffs challenged a 20-year-old provision in statewide brewery industry collective bargaining agreements that defined "permanent employee," for purposes of benefit and competitive seniority, as an employee who had worked at least 45 weeks in one calendar year.[134] In the California brewery industry, permanent employees have preference over temporary employees with respect to layoffs, recall, bumping, unemployment benefits, wages, vacation choice, and pay.[135] Because of the changing nature of the business, it had become "virtually impossible" for any employee—black or white—to satisfy the 45-week requirement.[136] The plaintiffs, an uncertified class of temporary, black employees, brought suit under Title VII challenging the practice as discriminatory.[137]

The Ninth Circuit ruled that the practice was not part of a bona fide seniority system, but rather a classification device—like the requirement of a high school diploma—to determine who could

---

Brewers, is whether the practice of awarding promotions on the basis of "qualifications plus seniority" is entitled to bona fides scrutiny as part of a "seniority system." *See* Pate v. Transit Dist., 21 Fair Empl. Prac. Cas. 1228, 1235 (N.D. Cal. 1979) (system of awarding promotions on the basis of "seniority and qualifications" subjected to bona fides analysis). If the term "qualifications" implies that prior experience in a particular job is required before one can bid for a better job, as in the typical line of progression, the promotion practice would be part of a seniority system. *See* California Brewers Ass'n v. Bryant, 444 U.S. 598, 607 n.17 (1980). *See also* Edmonds v. Southern Pac. Transp. Co., 19 Fair Empl. Prac. Cas. 1052, 1073 (N.D. Cal. 1979). Several cases suggest that if promotions are awarded on the basis of seniority where "qualifications" are essentially equal, the promotion practice is entitled to section 703(h) protection if the system is bona fide. *See, e.g.*, Movement for Opportunity & Equality v. Detroit Diesel, 18 Fair Empl. Prac. Cas. 557, 569 (S.D. Ind. 1978); Winfield v. St. Joe Paper Co., 15 Fair Empl. Prac. Cas. 1497, 1503 (N.D. Fla. 1977), *motion for summary judgment denied*, 20 Fair Empl. Prac. Cas. 1103 (N.D. Fla. 1979). *Cf.* Cartagena v. Secretary of Navy, 618 F.2d 130, 134-35 (1st Cir. 1980) (per curiam) (practice of according priority to employees who had previously held the position in question but had been demoted through no fault of their own, in part of a seniority system and thus suitable for bona fides analysis).

[133] 444 U.S. 598 (1980).

[134] *Id.* at 600-01.

[135] *Id.* at 603 & n.7.

[136] Bryant v. California Brewers Ass'n, 585 F.2d 421, 424 (9th Cir. 1978), *vacated and remanded*, 444 U.S. 598 (1980).

[137] 444 U.S. at 601.

enter the seniority line.[138] "Because the 45-week provision is not part of a seniority system," the court concluded, "plaintiff is not required to prove any form of intentional discrimination to make out a Title VII violation."[139] Instead, the court would have allowed plaintiff to proceed under the *Griggs* disparate impact analysis. The implication from the court's language certainly seemed to be that if the practice were part of the seniority system, the plaintiff would have to prove lack of bona fides. The Supreme Court, in a plurality opinion, vacated and remanded the lower court decision, holding that the 45-week requirement was part of a "seniority system."[140] The Court concluded, therefore, that it was the plaintiffs' responsibility "to show" that the system was not bona fide or that differences produced by the system were " 'the result of an intention to discriminate because of race.' "[141]

In *Swint v. Pullman-Standard,*[142] however, Judge Pointer likened the section 703(h) exception to an affirmative defense, placing the burden of proving bona fides on the defendants.[143] The *Swint* court squarely held that after the plaintiffs establish a prima facie case of disparate impact, the defendants have the burden of proving that a challenged seniority system is bona fide.[144] Alluding to the statutory construction argument, Judge Pointer noted, but did not agree, that defendants "could, with considerable logic, argue that section 703(h) is interrelated with section 703(a) in delineating an 'unlawful employment practice,' " thereby placing on the plaintiff "the burden of establishing inapplicability of section 703(h)."[145]

If other courts similarly fail to characterize section 703(h) as a

---

[138] 585 F.2d at 427 & n.11.

[139] *Id.*

[140] 444 U.S. at 610-11.

[141] *Id.*

[142] 17 Fair Empl. Prac. Cas. 730 (N.D. Ala. 1978), *rev'd on other grounds,* 624 F.2d 525 (5th Cir. 1980).

[143] 17 Fair Empl. Prac. Cas. at 732. In two recent decisions, Judge Pointer has continued to place on defendants the "burden of persuasion" on the issue of a bona fide seniority system. *See* Faulkner v. Republic Steel Corp., 22 Fair Empl. Prac. Cas. ¶ 30,698 (N.D. Ala. 1979); Terrell v. United States Pipe & Foundry Co., 22 Fair Empl. Prac. Cas. ¶ 1695 (N.D. Ala. 1979).

[144] *Id.* Although Judge Pointer's decision in *Swint* was subsequently reversed by the Fifth Circuit, Swint v. Pullman-Standard, 624 F.2d 525, 536 (5th Cir. 1980), that court did not address the issue of allocating the burden of proof on the bona fides issue.

[145] 17 Fair Empl. Prac. Cas. at 732 (citing Franks v. Bowman Transp. Co., 424 U.S. 747, 758 (1976)); *see* notes 108-115 and accompanying text *supra.*

clarification or delineation of section 703(a), a defendant may be successful in avoiding an unfavorable burden of proof allocation by relying on the policies underlying disparate impact and disparate treatment analysis. Notably, the Supreme Court in *Teamsters* rescued seniority systems from disparate treatment analysis by attributing to section 703(h) a congressional intent and policy that seniority rights not be diluted without evidence of overt discrimination.[146] The *Swint* court arguably failed to recognize that policy, as evidenced by Judge Pointer's reliance[147] on *Griggs v. Duke Power Co. Griggs,* however, concerned the Title VII policy of prohibiting the artificial, arbitrary, and unnecessary barriers which perpetuate past discrimination.[148] *Teamsters* made clear, however, that in enacting section 703(h), Congress determined that seniority systems are not artificial, arbitrary, or unnecessary barriers to equal employment opportunity.[149]

The uncertainty after *Teamsters* in allocating the burden of proving bona fides lies in the fact that courts have allocated that burden—albeit not uniformly—without clearly indicating their approach to the issue.[150] In other words, the cases have not revealed whether the allocation of the burden was based on a statutory construction theory,[151] a disparate impact[152] or disparate treatment theory,[153] or simply on the four-factor bona fides framework.[154] One court,[155] for example, recognized the "debate" between the

---

[146] *See* International Bhd. of Teamsters v. United States, 431 U.S. at 353.

[147] *See* 17 Fair Empl. Prac. Cas. at 732. Judge Pointer also placed reliance on Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), another disparate impact case dealing with the present effects of past discrimination, *id.* at 425. *See* 17 Fair Empl. Prac. Cas. at 732.

[148] Griggs v. Duke Power Co., 401 U.S. at 431; *see* text accompanying notes 50-51 *supra.*

[149] *See* International Bhd. of Teamsters v. United States, 431 U.S. at 353-54. The *Teamsters* Court expressly stated that it would be a "perversion of the congressional purpose" to hold that any seniority system which perpetuates pre-Title VII discrimination cannot be bona fide. *Id.* at 353.

[150] *See, e.g.,* Acha v. Beame, 570 F.2d 57 (2d Cir. 1978); Southbridge Plastics Div. v. Local 759, International Union of Rubber Workers, 565 F.2d 913 (5th Cir. 1978); James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), *cert. denied,* 434 U.S. 1034 (1978).

[151] *See* text accompanying notes 108-09 *supra.*

[152] *See* text accompanying note 144 *supra.*

[153] *See* text accompanying note 86 *supra.*

[154] *See* text accompanying note 119 *supra.*

[155] *See* Broadnax v. Missouri Pacific R.R., 20 Empl. Prac. Dec. (CCH) 11,692 (E.D. Ark. 1978). In *Broadnax,* an action was brought alleging discrimination in the defendant railroad's age and minimum education requirements, promotion practices, and seniority system.

parties over who bears the burden of proving bona fides, yet the court "assume[d], without deciding that the defendants were required to bear the burden of establishing that this seniority system was entitled to the immunity conferred by statute."[156]

Not surprisingly, the failure to articulate a policy-based standard for allocating the burden of proving the bona fides of an alleged discriminatory seniority system has resulted in a split of authority on that issue. Although *Swint v. Pullman-Standard* clearly holds that the defendant has the burden of proving that its system is bona fide,[157] there is authority from district courts within the Fifth Circuit which indicates that the plaintiff must prove the non-bona fides of an alleged discriminatory system. In *Harris v. Anaconda Aluminum Co.*,[158] the plaintiffs attacked a promotion practice which, in accordance with a plant-wide seniority program, gave preference to employees from within the same division.[159] After finding that the divisional preference was part of a seniority system,[160] the court applied the *James* four-factor analysis to conclude that the system was bona fide.[161] Although the *Harris* court did not state which party had the burden of proof, the court did state in its lengthy opinion that the "[p]laintiffs . . . must prove a racially discriminatory purpose to prevail on their claims . . . of 'disparate treatment' under Title VII,"[162] and that "the ultimate issue is intentional discrimination in the creation or maintenance of a seniority system."[163] The entire tenor of the court's discussion

---

Id. at 11,708. The court examined the promotion practices using disparate treatment analysis, and applied disparate impact analysis in reviewing the age and minimum education requirements. *Id.* at 11,695-701. The focus of the plaintiffs' claim, however, was on the company's seniority system which included a no-transfer rule. *Id.* at 11,708-10. While noting that this challenge had to be analyzed strictly "in the wake of *Teamsters*," the *Broadnax* court merely assumed "without deciding" that the defendant bore the burden of proving his good faith. *Id.* at 11,708.

[156] *Id.*

[157] 17 Fair Empl. Prac. Cas. at 732; *see* note 144 and accompanying text *supra.*

[158] 479 F. Supp. 11 (N.D. Ga. 1979).

[159] *Id.* at 22. Since a transferring employee would come into the new division at a bottom level job, the plaintiffs argued that the divisional preference discouraged blacks from transferring to divisions from which they historically had been excluded. *Id.* at 23.

[160] *Id.* at 28. Relying on a footnote in *Teamsters, see* 431 U.S. at 355 n.41, the court concluded that section 703(h) protected the "divisional aspects of [a] seniority system which could operate to protect less senior plantwide employees over more senior plantwide employees . . . ." 479 F. Supp. at 27; *accord,* Pate v. Transit District, 21 Fair Empl. Prac. Cas. 1228 (N.D. Cal. 1979).

[161] 479 F. Supp. at 28-33.

[162] *Id.* at 21.

[163] *Id.* at 29.

of section 703(h) suggests that in its view, the plaintiffs had failed to carry their burden of proving non-bona fides.

The significance of the *Harris* decision on the section 703(h) burden of proof issue is clouded, however, by the equivocal language in two other decisions from district courts within the Fifth Circuit.[164] In *Scarlett v. Seaboard Coast Line R.R.*,[165] the plaintiffs moved for an adjudication that they had established a prima facie case of non-bona fides in the defendant's seniority system.[166] In denying their motion, Judge Alaimo stated, "If plaintiffs are successful in proving that the seniority system is not bona fide and that it perpetuates the effects of pre-Act discrimination, they will have proved their case under Title VII."[167] Subsequently, however, the court examined materials submitted by the parties at trial, and, applying the *James* four-factor bona fides framework, found that even though the plaintiffs had established the requisite seniority, they had never been called for promotion.[168] While this alone might have stripped the seniority system of section 703(h) protection, the plaintiffs also had elicited testimony that the defendants maintained the system, at least in part, for the purpose of racial discrimination.[169] Although "[a]rguably the burden was on the defendants,"[170] the *Scarlett* court concluded that—"[e]ven placing the burden on the plaintiffs"—the plaintiffs' evidence established that the system was not bona fide.[171]

In *Winfield v. St. Joe Paper Co.*,[172] the other district court decision within the Fifth Circuit to have hedged on the burden of proof issue, a class action was brought alleging discrimination in

---

[164] *See* Scarlett v. Seaboard Coast Line R.R., 20 Empl. Prac. Dec. (CCH) ¶ 30,123, *opinion after trial*, 21 Empl. Prac. Dec. (CCH) ¶ 30,320 (S.D. Ga. 1979); Winfield v. St. Joe Paper Co., 15 Fair Empl. Prac. Cas. 1497 (N.D. Fla. 1977). *But see* Fowler v. Birmingham News Co., 608 F.2d 1055, 1057 (5th Cir. 1979); United States v. Georgia Power Co., 470 F. Supp. 649, 652 (N.D. Ga. 1979); Freeman v. Motor Convoy, 20 Empl. Prac. Dec. (CCH) ¶ 30,090, at 11, 493 (N.D. Ga. 1979).

[165] 20 Empl. Prac. Dec. (CCH) ¶ 30,123, *opinion after trial*, 21 Empl. Prac. Dec. (CCH) ¶ 30,320.

[166] 20 Empl. Prac. Dec. at 11,649.

[167] *Id.* at 11,648.

[168] *Id.* at 11,649. While the seniority system dictated that the order in which trainmen were "called" to take promotional examinations for conductor positions was based on seniority, black trainmen had been by-passed in favor of less senior white employees. *Id.*

[169] *Id.* at 11,650.

[170] 21 Empl. Prac. Dec. ¶ 30,320, at 12,728.

[171] *Id.*

[172] 15 Fair Empl. Prac. Cas. 1497 (N.D. Fla. 1977).

several of the defendant's employment practices.[173] In granting the plaintiffs' motion to amend their complaint in light of *Teamsters,* the court stated that the "plaintiffs must be accorded an opportunity to demonstrate that the seniority provisions . . . are purposely discriminatory or 'have their genesis in racial discrimination.' "[174] The intimation was that the plaintiffs would have the burden of proving the non-bona fides of the seniority system. Yet, on the plaintiffs' subsequent motion for a preliminary injunction,[175] the court concluded that it was "unnecessary in the current instance to resolve the issue of assigning the burden of proof" since it would not affect the outcome of the court's decision.[176] Since the plaintiffs had demonstrated a likelihood of success on the merits regarding post-Act discrimination in hiring and job assignment,[177] retroactive seniority status could be granted under the *Franks* rationale without attacking the legality of the seniority system.[178] Nevertheless, the court denied the preliminary injunction since there was no showing that irreparable harm was likely to result.[179]

There are decisions of district courts within other circuits as well which indicate that the plaintiff must bear the burden of proof on section 703(h) bona fides.[180] In *Dickerson v. United*

---

[173] *Id.* at 1500.

[174] *Id.* at 1504.

[175] Winfield v. St. Joe Paper Co., 20 Fair Empl. Prac. Cas. 1103 (N.D. Fla. 1979).

[176] *Id.* at 1130. Although not deciding the issue, the *Winfield* court did note the split in authority over the assignment of proving section 703(h) bona fides. *See id.* at 1129-30. In a subsequent certification proceeding under 28 U.S.C. § 1292(b), however, Judge Stafford once again confronted the burden of proof issue. The plaintiffs moved for a determination of the appealability of the court's earlier ruling that the seniority system was bona fide. Winfield v. St. Joe Paper Co., 20 Fair Empl. Prac. Cas. 1144, 1145 (N.D. Fla. 1979). The court denied the motion, noting that "[t]his court's determination that insufficient facts have been presented to establish that the system is *not* bona fide is not the proper subject of a § 1292(b) appeal . . . ." *Id.* at 1146 (emphasis added).

[177] *Id.* at 1129. The court concluded that as a result of discrimination "in the initial assignment of blacks to the lowliest jobs in the plant," both before and after the effective date of Title VII, the plaintiffs had been "victims of institutionalized discrimination." *Id.*

[178] *Id.; see* notes 70-72 and accompanying text *supra.* As for the victims of pre-Act discrimination in employment, the *Winfield* court noted that a preliminary injunction would clearly have been warranted under a "perpetuation of past discrimination" theory. 20 Fair Empl. Prac. Cas. at 1129. But since "*Teamsters* [had] totally changed the rules of the game," the court held that a preliminary injunction could not issue absent a showing that the seniority system was non-bona fide. *Id.*

[179] 20 Fair Empl. Prac. Cas. at 1137.

[180] *See, e.g.,* Trent v. Allegheny Airlines, Inc., 471 F. Supp. 448, 451 (W.D. Pa. 1979); Chrapliwy v. Uniroyal, Inc., 15 Fair Empl. Prac. Cas. 822, 824 (N.D. Ind. 1977).

States Steel Corp.,[181] the court held that a no-transfer rule was protected as part of a bona fide system under section 703(h) where the "[p]laintiffs have not presented any evidence that the practice of maintaining the separate units is not 'rational, [and] in accord with the industry practices.' "[182] A fair reading of the case would suggest that Judge Newcomer placed at least the burden of production on plaintiffs, if not the burden of persuasion.[183] In a recent case involving a seniority system with advancement dependent upon qualification plus seniority, the United States District Court for the Northern District of California squarely placed on the plaintiff the burden of proving non-bona fides. In *Edmonds v. Southern Pacific Transportation Co.*,[184] the plaintiffs' single witness on the bona fides issue testified merely as to the alleged potential discriminatory effects of a recent collective bargaining agreement.[185] The *Edmonds* court expressly stated this showing of mere potential discrimination was not sufficient for the plaintiffs to sustain "their burden of proving that the seniority systems involved are not bona fide under § 703(h)."[186] Indeed, applying a detailed four-factor analysis, the court repeatedly emphasized that the "plaintiffs presented no evidence" on any of the factors sufficient to support a finding of non-bona fides.[187]

In the wake of *Teamsters*, courts continue to struggle with the issue of which party bears the burden of proving bona fides or lack thereof under section 703(h).[188] Indeed, in light of the significance

---

[181] 439 F. Supp. 55 (E.D. Pa. 1977), *vacated and remanded on other grounds sub nom.* Worthy v. Dickerson, 616 F.2d 698 (3d Cir. 1980).

[182] *Id.* at 73 (quoting International Bhd. of Teamsters v. United States, 431 U.S. at 355).

[183] When *Dickerson* is read in conjunction with Croker v. Boeing Co., 437 F.2d 1138 (E.D. Pa. 1977), an earlier opinion by Judge Newcomer, it appears evident that Judge Newcomer is willing to differ with the *Swint* approach, *see* text accompanying note 144 *supra*, and to place on the plaintiff the burden of proving that a seniority system is not bona fide. *See* Croker v. Boeing Co., 437 F.2d at 1187.

[184] 19 Fair Empl. Prac. Cas. 1052 (N.D. Cal. 1979).

[185] *Id.* at 1071-72.

[186] *Id.* at 1071.

[187] *Id.* at 1077-78.

[188] Several commentators, discussing the effects of *Teamsters*, have suggested that the burden is on plaintiffs to prove the non-bona fides of a seniority system. *See, e.g.*, S. AGID, EMPLOYMENT LITIGATION 537 (2d ed. 1978); Note, *Executive Order 11,246 and Reverse Discrimination Challenges: Presidential Authority to Require Affirmative Action*, 54 N.Y.U.L. REV. 376, 381 n.35 (1979); Note, *Title VII in the Supreme Court: Equal Employment Opportunity Bows to Seniority Rights*, 1978 UTAH L. REV. 249, 261-62. *See generally Oversight on Federal Enforcement of Equal Employment Opportunity Laws: Hearing Before the Subcomm. on Employment Opportunities of the Comm. on Education and Labor*, 95th

of the question, Supreme Court resolution appears inevitable.

CONCLUSION

Few other areas of the law present the same demands on parties, counsel, and the courts as does the field of employment discrimination litigation. Past, present, and future employees, in classes and subclasses, must often weave, and the employer must address, a complex case of statistical disparity merged with claims of individual and systematic wrongdoing. It is not surprising that in this context a number of suits filed in the infancy of Title VII litigation are still inching their way to resolution. Along the way, these cases have helped establish some of the parameters of Title VII. Yet, prior findings of liability in many of these cases must now be reconsidered,[189] and all future cases involving seniority systems must be examined, in the wake of *California Brewers* and *Teamsters*.

Resolution of the burden of proof and bona fides questions may depend on whether courts read section 703(h) as an affirmative defense, or as a clarification of the general proscriptions of section 703(a). Since a result-oriented court is free to choose the semantic approach that supports its purpose, a complete argument should address the different policies underlying the disparate treatment and impact concepts of discrimination. The allocation, quality, and quantity of burden of proof all depend on which of these basic concepts of discrimination is applied. In dealing now with seniority systems and burden of proof, the courts need careful briefing by litigants that builds upon these well-established concepts of discrimination. The challenge is to coordinate the interest protected by section 703(h)—legitimate seniority expectations of incumbent employees are protected absent a discriminatory purpose to the seniority system—with the interests protected by the disparate treatment and impact approaches. *Teamsters* instructs that Congress did not view seniority systems as artificial, arbitrary, and unnecessary barriers, or as a built-in headwind. Rather, in enacting section 703(h), Congress considered that a seniority system

---

Cong., 2d Sess. 358-67 (1978) (Testimony of Barry Goldstein, Ass't Gen. Counsel for NAACP Legal Defense & Educ. Fund).

[189] *See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976), *aff'd in part and vacated and remanded in part in light of Teamsters*, 586 F.2d 300 (4th Cir. 1978), *reconsideration en banc granted*, No. 78-1083 (4th Cir., April 2, 1979).

designed to protect and define the past, present, and future rights of employees is entitled to special protection, absent proof of intentional discrimination. Since proof of discriminatory intent is required for a seniority system to be non-bona fide, disparate treatment, which requires proof of discriminatory motive, is the proper approach. Under that framework, the burden of proving unlawful intent rests with plaintiffs. Absent such a showing, the statute and the policy behind it have not been offended.