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The Civil Rights Act of 1991's Answer to *Lorance v. AT&T Technologies, Inc.*

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I. INTRODUCTION

After two years of intense political warfare, two presidential vetoes, and two failed veto overrides, the Civil Rights Act of 1991 (Act) finally became law on November 21, 1991. In large part, the Act is a congressional response to a number of recent United States Supreme Court cases, which many believe have seriously threatened the vitality of civil rights in the work place. To neutralize the perceived effects of these cases, the Act explicitly modifies the holdings of no fewer than five Supreme Court cases.[1] One of the cases modified by the Act is *Lorance v. AT&T Technologies, Inc.*[2], the subject of this comment.

II. BACKGROUND

An employee that has suffered a harm recognized under Title VII must strictly comply with the procedural steps outlined below.

First, the employee must file a claim of employment discrimination within 180 days[3] of the incident with the Equal Employment Opportunity Commission (EEOC)[4] or corresponding state agency. This is a rigid statute of limitations requirement that swiftly cuts off untimely filed claims.

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1. Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (modified by S. 1745, 102d Cong., 1st Sess. § 105 (1991)); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) (modified by § 112); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (modified by § 105); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (modified by § 107); Martin v. Wilks, 490 U.S. 755 (1989) (modified by § 108).

2. 490 U.S. 900 (1989).

3. A proposal to increase the statute of limitations for Title VII and Age Discrimination in Employment Act (ADEA) violations from 180 days to two years was eventually rejected. This extension would have brought the duration of the statute of limitations applied to nonracially-based employment discrimination claims, 180 days, in line with the two year statute of limitations generally applied to racially-based employment discrimination claims brought under 42 U.S.C. § 1981 (West Supp. 1992). When this paper refers to the 180 day period, it is also making reference to the 300 day period a claimant has to file his or her claim with the EEOC when that claimant has first filed his or her claim with a state agency pursuant to 42 U.S.C. § 2000e-5(e) (1988).

4. 42 U.S.C. § 2000e-5(e) (1988).

If 180 days have passed before a claim is filed, the employee can only preserve the claim by showing that the statute was not triggered, the statute was tolled, or the continuous violation theory applies.[5]

If a claim is properly filed, the EEOC will examine the claim, negotiate with the employer, and eventually decide whether it will get involved in bringing the dispute to court.[6] If it chooses not to get involved in the suit, it will send a notice informing the employee of his or her right to sue.[7] The employee is then required to formally bring an action in court within ninety days of receipt.[8]

Like the 180 day statute of limitations, this ninety day period may be equitably tolled.[9] However, unlike the 180 day statute of limitations, the continuing violation theory cannot be relied upon.[10]

These limitation periods are rigidly adhered to and must be met in order for a court to hear a case on its merits.

III. MODIFYING *LORANCE*

In *Lorance*, the United States Supreme Court addressed the issue of when the 180 day statute of limitations period begins to run for Title VII employment claims of discrimination when the alleged injury arises from an employer's seniority system. The Court held that the 180 day statute of limitations for seniority systems is only triggered once, and begins when the system, insofar as it is non-discriminatory on its face, is adopted.

Lorance has primarily been criticized for categorically denying employees, hired more than 180 days after the adoption of the seniority system, the right to assert a claim against an employer's discriminatory seniority system.

The disdain for *Lorance* was shared by members from both political parties.[11] Therefore, the question was not whether

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5. *See* discussion *infra* part III(D)(5).
6. 42 U.S.C. § 2000e-5(f)(1) (1988).
7. *Id.*
8. *Id.*
9. *See* Rys v. Postal Serv., 886 F.2d 443 (1st Cir. 1989); Johnson v. Postal Serv., 861 F.2d 1475 (10th Cir. 1988); Jones v. American State Bank, 857 F.2d 494 (8th Cir. 1988).
10. Brown v. Hartshorne Pub. Sch. Dist. No. 1, 926 F.2d 959 (10th Cir. 1991).
11. *See, e.g.*, H.R. REP. NO. 40(II), 102d Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 694.

Lorance would be invalidated, but how it would be replaced.[12]

A. *Facts and Holding of* Lorance

Up until 1979, the length of an employee's plant-wide service was the basis for determining seniority at the AT&T facility where Lorance worked.[13] In 1979, a collective bargaining agreement was reached which changed the basis of seniority for "testers"—a job traditionally held by men—from duration of plant-wide service to that worked as a tester.[14] In 1982, a number of women, including Lorance, were demoted under the new seniority system.[15] The demoted women alleged that they would not have been demoted under the previous system based on plant-wide service and that the new seniority system based on time as a tester was adopted for the purpose of discriminating against women.

The Court held that the statute of limitations barred plaintiffs from challenging the seniority system.[16] The Court reasoned that when a seniority system is nondiscriminatory on its face, it is the alleged discriminatory adoption of the seniority system that is the "occurrence" of the discriminatory practice that triggers the statute of limitations.[17] Thus, the statute of limitations was only triggered when the employment practice

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12. The initial Democratic version of the Act added the following paragraph to 42 U.S.C. § 2000e-2 (1988):

> Where a seniority system or seniority practice is part of a collective bargaining agreement and such system or practice was included in such agreement with the intent to discriminate on the basis of race, color, religion, sex, or national origin, the application of such system or practice during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice.

136 CONG. REC. S1020 (daily ed. Feb. 7, 1990). The Republican Administration's original version read:

> [A]n unlawful employment practice occurs when a seniority system is adopted, when an individual becomes subject to a seniority system, or when a person aggrieved is injured by the application of a seniority system, or provision thereof, that was adopted for an intentionally discriminatory purpose, in violation of the Title, whether or not that discriminatory purpose is apparent on the face of the seniority provision.

136 CONG. REC. S1522 (daily ed. Feb. 22, 1990).

13. 490 U.S. at 901-02.
14. *Id.*
15. *Id.* at 902.
16. *Id.* at 912.
17. *Id.*

was adopted in 1979, not when the women were demoted in 1982. Because 180 days had passed from the time of adoption, the claim was time-barred.

B. Reasoning of the Court

1. Redefining the continuing violation standard

In reaching its result, the *Lorance* Court first redefined the so-called continuing violation theory.[18] Prior to *Lorance*, *Delaware State College v. Ricks*[19] and *United Air Lines, Inc. v. Evans*[20] were the primary cases dealing with the continuing violation theory. Collectively, *Ricks* and *Evans* stood for the proposition that the continuing impact of past discrimination is not actionable.

The *Lorance* Court redefined the continuing violation theory by incorporating the concept of "wholly dependant" into the verbal formulation. The Court stated, "A claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations [cannot constitute] a continuing violation."[21] Under the "wholly dependent" language, not only is the continuing impact of past discrimination not actionable, but also non-actionable is any event "well outside" the 180 day statute of limitations that is wholly dependant on prior discriminatory conduct. By barring claims dependant on past

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18. The continuing violation theory is a mainstay in Title VII jurisprudence. It allows an employee to file a claim that relates back to violation occurring before the 180 day period, as long as one of the incidents of discrimination occurred within the 180 day period and the employer's action constitutes a "pattern of discrimination." The most difficult part of the analysis is determining what constitutes a "pattern" and whether the incident occurring within the 180 day period is part of that pattern.

19. 449 U.S. 250 (1980). In *Ricks*, a university teacher was denied tenure. Ricks was permitted to stay for a year beyond the time that tenure was denied. Ricks brought suit when he was let go. The Court held that the statute of limitations began to run when the decision to deny tenure was communicated to Ricks. The eventual termination of employment was the "effect" of the denial of tenure and was neither a discriminatory occurrence nor an incident in a pattern.

20. 431 U.S. 553 (1977). In *Evans*, the plaintiff was not given seniority credit for her earlier service when she was rehired after being terminated under a discriminatory policy. The policy, which terminated stewardesses who became pregnant, was time barred. The loss of seniority resulting from the discharge was also time-barred and was held to be an effect. According to the Court, "a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer." *Id.* at 560.

21. 490 U.S. at 908.

discriminatory conduct, the modification circumvents the primary purpose underlying the continuing violation theory of allowing a claimant to relate back his or her claim by showing a pattern of discriminatory employment practices.

In practical terms, the "wholly dependent" concept makes it more difficult for a plaintiff to rely on the continuing violation theory because the concept makes a plaintiff walk a very fine line. On the one hand, a claimant must show that a pattern or policy of discrimination exists in order to come under the continuing violation theory. On the other hand, the events of discrimination need a certain level of disconnection or independence, or else the subsequent events could be deemed "wholly dependent" on the initial discriminatory event, and therefore non-actionable.[22]

While the Act modifies many aspects of *Lorance*, as discussed later, the Act failed to expressly invalidate this new verbal formulation of the continuing violation theory. The effect of this omission is uncertain. It is conceivable that this portion of *Lorance* may still be relied on by the courts in defining the nature of the continuing violation theory. This would be unfortunate.

2. *Special treatment of seniority systems under section 706(h)*

Having modified the continuing violation theory, the Court next made seniority systems practically invincible against legal challenges by deciding that the statute of limitations for a seniority system is triggered by its adoption.

The Court reached this conclusion by emphasizing the special treatment given to seniority systems by section 706(h). In point of fact, however, the Court reliance on section 706(h) is misplaced. Section 706(h) insures the validity of seniority systems that treat and compensate people differently when those differences are related to experience and work assignments. In other words, section 706(h) allows different treatment when

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22. A showing under this standard will also be difficult because a certain degree of dependency necessarily exists between all employment decisions. It is left, therefore, to the manipulation of the courts to decide whether a subsequent employment decision is sufficiently related to a prior decision so as to rise to the level of being "wholly dependent."

On the other hand, the word "wholly" might place sufficient limitations on this standard. If focus is given to the word "wholly," then perhaps a simple showing of some remote degree of independence would suffice. By showing independence, however, one still runs the risk of jeopardizing his or her continuing violation claim.

there is a legitimate, non-discriminatory reason for doing so. Relying on section 706(h) to validate differences based on discrimination, rather than merit, is wholly inconsistent with the underlying purpose of Title VII and is a serious misreading of section 706(h). The Court's ruling that the statute of limitations for seniority systems is only triggered at adoption makes all actions, decisions, and practices made in connection with a seniority system per se "dependent" actions. Under such a rule, an employee can never rely on the continuing violation theory in challenging employment decisions made pursuant to a seniority system.

3. *Public policy underlying* Lorance

In the final analysis, the majority, while mindful of the tremendous liability facing companies and the interests of workers benefitted, even unjustly, by seniority systems, elected to leave some employees suffering discrimination without a remedy. There is no question that workers, relying on seniority systems for job security, have a valid interest. Likewise, there is no question that declaring a long-standing seniority system discriminatory would have a tremendous economic impact on companies and would require restructuring seniority systems mid-stream. But these concerns cannot justify the complete disregard of the interests of discriminated employees. A better balance must be struck.

C. *Universal Criticism of* Lorance

Writers and politicians have almost universally criticized the *Lorance* decision.[23] The criticism has centered primarily on the difficult position in which *Lorance* places employees.[24]

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23. *See, e.g.*, H.R. REP. NO. 40(i)-(ii), 102d Cong., 1st Sess. (1991); 136 CONG. REC. H8045 (daily ed. Sept. 26, 1990); Sondra Hemeryck et al., *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475 (1990); Jeffery M. Fisher, *In the Wake of* Lorance v. AT&T Technologies, Inc.: *Interpreting Title VII's Statute of Limitations for Facially Neutral Seniority Systems*, 1990 U. ILL. L. REV. 711 (1990).

24. Hemeryck expressed concerns with *Lorance* in this way:

> The *Lorance* decision alters the direction of Title VII law in two significant respects and could prove extremely damaging if not corrected by legislation. First, the decision adopts an extremely broad interpretation of section 703(h) of the [sic] Title VII, which provides special protections for seniority plans, thus insulating many such plans from challenge [inso-

1. Employees forced to jeopardize employment relations

Lorance forces fully informed and legally adept employees to make a decision upon the adoption of a seniority system. The employee can either file a claim within 180 days of adoption and thereby jeopardize his relationship with his employer; or let the 180 days go by, hoping that the system will not adversely affect him or her in the future.

2. Speculative claims

Criticism has also pointed out the speculative nature of a claim filed within 180 days of adoption.[25] Because *Lorance* applies to facially neutral seniority systems, uncovering a discriminatory intent within the first 180 days is nearly impossible. A complaint filed with the EEOC within the first 180 days would likely be incomplete and unpersuasive, but the speculative nature of the claim becomes even more of a hindrance if it is filed in federal court, since it can be dismissed with prejudice.

3. Ripeness and standing

In order for a case to be heard by a federal court, the case must be ripe and the plaintiff must have standing.[26] Ripeness

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> far as the plan is facially neutral]. Second, the decision raises questions about the Court's acceptance of the continuing violations doctrine that has played an important role in Title VII litigation for almost two decades. While *Lorance's* rejection of this theory could be limited to cases involving seniority systems, the decision may have serious repercussions if its disapproval of the continuing violation theory is allowed to spread outside of this limited context.

Hemeryck, *supra* note 24, at 557-58. The comment goes on to criticize *Lorance* from a public policy perspective "[since] *Lorance* will force employees to file premature and often unnecessary claims in order to preserve their rights," and suggests that "the *Lorance* rule will waste valuable judicial resources and further strain an already overloaded administration system." *Id.* at 561-62. The comment ends by pointing out that "*Lorance* presents a trap for unknowledgeable employees, many of whom will be unaware that they must file a claim as soon as their employer adopts a new seniority system." *Id.* at 562-63.

25. *Id.*

26. Fisher points out the problem in this way:

> The claims of employees subject to a facially neutral seniority system involve future, speculative injuries which become distinct and palpable injuries when the seniority system concretely affects them. Therein lies the inconsistency inherent

requires that there be a concrete issue of contention upon which the parties have a stake in the outcome. Standing requires that the person bringing the lawsuit be a person sufficiently and directly injured by the defendant.

Lorance creates problems for a plaintiff since there may be little if any evidence of injury or discriminatory intent within the first 180 days of a facially neutral seniority system. A plaintiff's case, therefore, will inevitably be dismissed for lack of ripeness and/or standing if his claim is filed within the 180 day period.[27]

Moreover, under *Lorance*, a plaintiff who eventually has a ripe claim and who has suffered a direct and palpable injury will be barred from bringing suit by the 180 day statute of limitations, since, in most instances, the discriminatory intent of the system is not discoverable within the 180 day period. The plaintiff would, for all intents and purposes, be without a remedy.

4. *Spreading of the* Lorance *rationale*

Critics feared that Lorance's rationale of starting the statute of limitations upon the adoption of a policy or employment practice would spread beyond seniority systems. These fears were confirmed in *Davis v. Boeing Helicopter Co.*[28] and in *EEOC v. City Colleges of Chicago.*[29]

In *Davis*, the court held that a challenge of an allegedly

> in the *Lorance* framework; it requires that employees challenge a discriminatory system within 180 days of its adoption, perhaps well before any individual suffers concrete harm [constituting injury in fact] . . . .
>
> Ripeness cases generally relate to speculative future harm that courts are reluctant to hear until the controversy has become concrete and focused . . . .
>
> Under a strict interpretation of *Lorance*, plaintiffs' claims will be time barred either because they have sued too early and are barred from a decision on the merits because of the jurisdictional requirements of standing and ripeness, or because they have sued to late and are barred by the statute of limitations.

Fisher, *supra* note 24, at 731, 733-34.

27. The only possible way to avoid this result would be to allow a generic claim citing the possibility of future harm. This approach, however, would certainly not please most courts since allowing a generic claim to be filed would circumvent the entire purpose behind statutes of limitation.

28. 1990 WL 131539 (E.D. Pa. Sept. 12, 1990).

29. 944 F.2d 339 (7th Cir. 1991).

discriminatory promotional policy must be made at the time the policy was adopted rather than when the policy was applied to deny a promotion to a claimant. In *City Colleges of Chicago*, the same "adoption" rationale was used to bar an ADEA suit challenging application of an early retirement plan. Congress deliberately responded to this alarming trend by passing the 1991 Act.

D. How the Act Modifies Lorance

Both the Republican Administration and the Democratic leadership of Congress were in agreement on the need to invalidate *Lorance*, but they differed on how to replace it.[30] In its final form, the Act most closely resembles the Administration's version. Specifically, the Act adds the following paragraph to section 706(e) (now codified at 42 U.S.C. § 2000e-5(e) (1988)):

> For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.[31]

The Act leaves no doubt concerning the continuing viability of *Lorance*. *Lorance*, insofar as seniority systems are concerned, is dead.

1. Eliminating the distinction between facially neutral and facially discriminatory seniority systems

Contrary to *Lorance*, the Act makes no distinction between facially neutral and facially discriminatory seniority systems. Eliminating the distinction makes sense. Employers, who are as legally sophisticated as any single group, constitute a cross section of society, and as such, include many who abhor dis-

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30. *See supra* note 23.

31. 42 U.S.C.A. § 2000(e)-5(e)(2) (West Supp. 1992). The placement of this paragraph is interesting. Rather than being added to 42 U.S.C. § 2000e-2(h) (1988), dealing with seniority systems, the paragraph was added to 42 U.S.C. § 2000e-5(e), dealing with the time period within which a claim must be filed with the EEOC.

crimination as well as some who are biased. For those who so desired, *Lorance* made discrimination easy. An employer only had to make the seniority system neutral on its face and then let the short statute of limitations run out.[32]

Lorance, however, failed to recognize the fact that the intent to discriminate was the same, whether the seniority system was facially neutral or facially discriminatory. Likewise, *Lorance* failed to recognize that, regardless of the language of the system, the overall effect of a discriminatory seniority system on injured employees is essentially the same. The new Act corrects this senseless distinction and makes the intention to discriminate actionable, in spite of its window dressing.[33]

2. Any provision of a seniority system

The new Act also states that Title VII violations may arise from the discriminatory application of a seniority system or a provision of such a system. Thus, a plaintiff, rather than showing that the whole seniority system violates Title VII, needs only show that some part of it does.

The Act, however, fails to adequately clarify how this provision fits together with plaintiff's burden of showing that the seniority system was "adopted for an intentionally discriminatory purpose."[34] For example, must an employee only show that an intent to discriminate existed as to a single provision of the seniority system to successfully show the intent to discriminate, or must that employee show a predominant or underlying motive to discriminate as to the whole seniority system?

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32. It would, of course, be more challenging to draft a facially neutral, yet discriminatory seniority policy, but such a task would not pose much of a problem for imaginative employers.

33. One ironic aspect of *Lorance* is the fact that it permitted a facially discriminatory system to be challenged at anytime. This is ironic because a facially discriminatory system, since it is easier to recognize, is the only kind of seniority system that is likely be challenged within 180 days of adoption. Although facially neutral systems will now be subject to challenge after the 180 day period, facially neutral systems will enjoy more protection than facially discriminatory systems because a plaintiff will have the burden of showing that the seniority system or a provision of it was adopted with the intent to discriminate. Such a showing will be much more difficult when the intent to discriminate is not found on the face of the seniority system. Thus, by requiring the showing of intent, the new Act accommodates some of the concerns implicitly expressed in *Lorance*.

34. 42 U.S.C.A. § 2000e-5(e)(2) (West Supp. 1992).

It seems overly burdensome and somewhat inconsistent to require a plaintiff to show a predominant motive of intentional discrimination as to the whole of the system, if the plaintiff is only injured by the application of a single provision for which she can prove the requisite intent.

While the wording of the Act appears unclear, a careful reading suggests that an intent to discriminate can exist as to a single provision. This understanding is gleaned from the phrase "whether or not that discriminatory purpose is apparent on the face of the *seniority provision*."[35] This phrase seems to indicate that a showing of a discriminatory purpose as to a single provision is sufficient.[36]

3. Three events constituting occurrences under § 2000e-5(e)

The Act significantly adds to the concept of "occurrence." The word "occurrence" is a term of art located in section 2000e-5(e). Section 2000-5(e) requires that a charge of discrimination be filed with the EEOC "within 180 days after the alleged unlawful employment practice occurred." The word "occur," therefore, refers to the events which rise to the level of a Title VII violation, triggering the statute of limitations.

According to the Act, "An unlawful employment practice occurs when . . . the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or a provision of the system."[37]

a. Adoption of a seniority system. The first event constituting an "occurrence," triggering the statute of limitations, is the adoption of the system. This meaning of "occurrence" was the only one recognized by the Court in Lorance.

b. Becoming subject to a seniority system. The second event constituting an "occurrence," triggering the statute of limitations, is when a person becomes subject to the seniority system. Congress demonstrated great insight when they incor-

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35. 42 U.S.C.A. § 2000e-5(e)(2) (West Supp. 1992) (emphasis added).

36. Under the Democratic version of the Act, an employee would only have to show an intent to discriminate as to a single practice. That result is clearly expressed in the following language: "[w]here . . . such system or practice was included in such agreement with the intent to discriminate . . . the application of such system or practice . . . shall be an unlawful employment practice." 136 CONG. REC. S1020 (daily ed. Feb. 7, 1980).

37. 42 U.S.C.A. § 2000e-5(e)(2) (West Supp. 1992).

porated this event. One of the greatest shortcomings of *Lorance* is the effect it had of barring all claims of workers hired 180 days after the adoption of a seniority system.[38]

The new Act not only covers new employees, but also current employees who are transferred into or otherwise made subject to a different seniority system of the company. Protecting current employees is wise because the interest of an employee in a particular seniority system should attach when they become subject to that system.

The new Act also improves upon *Lorance* by ensuring that a constant stream of opportunities exist for challenging a discriminatory seniority system. By giving workers the opportunity to challenge a seniority system each time a new person becomes subject to it, Congress has provided the means by which the kinks and shortcoming of a discriminatory seniority system can be phased out. This fine tuning is much more advantageous than *Lorance's* position of preserving entrenched seniority systems and all their defects.

c. Persons aggrieved by the application of a seniority system. The third event constituting an "occurrence," triggering the statute of limitations is "when a person aggrieved is injured by the application of the seniority system or a provision of the system."[39] The key words upon which the meaning of this "occurrence" turn are "injured," "application," and "seniority system." These terms are discussed at length in the next section.

4. Core elements of a seniority system challenge under the Act

This section explores the issue of when and under what circumstances a claim can be brought under the Act's provisions. For the most part, this section outlines competing interpretations.

To begin with, it may help to characterize the provision in this way: the injury suffered must be the type which occurs as a result of a seniority system intentionally adopted for a discriminatory purpose. Stated this way, we understand that (1) a seniority system must be in place; (2) the seniority system or a

38. Arguably, an employee's only options would be to (1) not join the company if the discrimination was known, (2) stay on the job and endure the discrimination, or (3) quit.

39. 42 U.S.C.A. § 2000e-5(e)(2) (West Supp. 1992).

provision of the system must have been intentionally adopted for a discriminatory purpose; (3) an injury of discrimination has occurred; and (4) the injury of discrimination was caused by the discriminatory seniority system or a discriminatory provision.

a. Seniority system in place. Plaintiffs may find treatment under the seniority system theory more favorable than under the other theories of employment discrimination.[40] As a result, courts will have to develop rules describing what is and what is not a seniority system.[41]

To begin with, we know that a collective bargaining agreement is not a prerequisite for a seniority system, contrary to the Democratic version of the Act which specifically required that the seniority system be "part of a collective bargaining agreement."[42] Beyond this, however, little else is clear, since "Title VII does not define the term 'seniority system,' and [since] no comprehensive definition of the phrase emerges from the legislative history."[43]

The best guidance for defining a "seniority system" is found in *California Brewers Association v. Bryant*.[44] In *Bryant*, the Court held that an employment practice giving greater benefits to permanent employees than temporary employees and requiring a temporary employee to work at least 45 weeks in a single

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40. This is possible because § 112 of the new Act may make challenging a seniority system easier than challenging employment discrimination under some other theory.

41. A broad definition of a seniority system could be any arrangement, no matter how informal, that takes into account the duration of employment in determining compensation and/or benefits. Examples of this could include an informal practice by a fast food restaurant of giving scheduling preferences to those workers employed the longest.

42. 136 CONG. REC. S1020 (daily ed. Feb. 7, 1990). By limiting the section to collective bargaining agreements, the Democrats were trying to strike a balance between employers and employees. The Democrats reasoned that:

> [m]ost employer practices, such as salary structures and work rules, remain in effect indefinitely once adopted. but [sic] when a seniority system is embodied in a collective bargaining agreement that is . . . in force for only a limited period . . . the system must be reestablished . . . by each contract that follows to continue in effect.

H.R. REP. NO. 40, 102d Cong., 1st Sess., Part 1, at 62 (1991), *reprinted in* 1992 U.S.C.C.A.N. 549, 600. Thus stated, the Democratic version identified the need to protect the financial underpinnings of businesses by limiting the situations in which an entire employment system could be challenged.

43. California Brewers Ass'n v. Bryant, 444 U.S. 598, 605 (1980).

44. 444 U.S. 598 (1980).

calendar year before becoming a permanent employee was a seniority system for purposes of section 706(h).

The *Bryant* Court defined a seniority system in this way:

> In the area of labor relations, "seniority" is a term that connotes length of employment. A "seniority system" is a scheme that, alone or in tandem with non-seniority criteria, allots to employees ever improving employment rights and benefits as their respective lengths of pertinent employment increase. Unlike other methods of allocating employment benefits and opportunities, such as subjective evaluations or educational requirements, 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.[45]

As with all other claims of discrimination, deciding what is or is not a seniority system will be a fact intensive inquiry. Beyond the definition given in *Bryant*, a court may also want to consider the following factors in determining what constitutes a seniority system: (1) the formality of the system,[46] (2) the prevalence of the system,[47] and (3) the expectations of the employees.[48]

b. Intentionally discriminatory purpose. There are a couple of distinct issues that arise in connection with this element. First, does the intent to discriminate have to exist when the seniority system was initially adopted, or is it sufficient if it exists when it is actually applied with the intent to discriminate? Second, must the discriminatory intent exist as to the whole of the system, or is it sufficient if it only exists as to a discriminatory provision?[49] Third, how far will courts go in

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45. *Id.* at 605-06.

46. Evaluating the formality of a seniority system is helpful because it allows an objective outsider to determine whether employees have a reasonable reliance expectation in the seniority system, Things to consider when making this determination are: (1) Is there a writing evincing a seniority system? (2) Is each worker made aware of an over-arching seniority plan? (3) are rules in place and are they followed?

47. This goes to the issue of whether a system is selectively used to benefit or punish, or whether it is applied to all workers similarly situated.

48. This is a subjective standard that evaluates the understanding of an individual worker. It asks whether an employee has a bona fide right of expectation in a seniority system. Including this factor in the analysis is important because workers often don't see the whole picture; instead they see a picture painted by their immediate supervisor.

49. The Democratic version of the Act would have cleared up these ambiguities.

inferring a discriminatory intent from circumstantial evidence?

(1) Adoption or use? The Act tells us that in order for the section to apply we must have a "seniority system that has been adopted for an intentionally discriminatory purpose."[50] Clearly, the wording of the Act seems to cover the initial adoption of a seniority system. Thus read, the Act seems to imply that a seniority system must be somewhat formalistic and that a conscious decision to incorporate or follow a seniority plan must be made. The Act's wording, however, also leaves open the possibility of a second reading.

That second reading focuses more on the words "adopted for an intentionally discriminatory purpose."[51] By focusing on this language, one might argue that the section applies whenever a seniority system is used to intentionally discriminate, and not just when a seniority system is initially adopted to intentionally discriminate.

The second reading allows an employee to challenge a seniority system that is intentionally construed or manipulated in such a way as to be discriminatory, regardless of whether the seniority system was initially adopted for an intentionally discriminatory purpose. This reading rightfully takes another step forward in addressing the rights of employees. Why should it matter whether the seniority system was initially adopted for a discriminatory purpose, if subsequently it is used for such a discriminatory purpose? The injury, after all, is exactly the same.

My personal belief is that "when" the system is adopted is not as important as how it is used. I believe that when a company's top management, as opposed to middle management, decides to use a seniority system for a discriminatory purpose against certain employees, those employees should be able to challenge the discriminatory use of that system. I make a distinction between top management and middle management for the following reasons: (1) we are really interested in curing defects at the highest levels, since a decision to discriminate made at the highest levels will have the most far-reaching

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First, the intent to discriminate must exist at the time it was included in a collective bargaining agreement, and second, the intent to discriminate can exist as to a single provision.

50. 42 U.S.C.A. § 2000e-5(e)(2) (West Supp. 1992).

51. *Id.*

effect on workers; (2) a middle manager can manipulate a seniority system for an improper purpose, even though top management has exercised due care in avoiding discrimination; (3) the legal theories of disparate treatment and disparate impact exist to protect workers in situations where a middle manager intentionally discriminates against certain employees; and, (4) circumstantial evidence, which will have to be relied on when a challenge is made to a facially neutral seniority system, will indicate whether the discriminatory use of a seniority system has originated from top management or middle management, based on whether the discrimination is prevalent or isolated.

(2) Whole system or any provision. This issue was discussed in an earlier section. That section concluded that a careful reading of the provision indicates that showing an intent to discriminate as to a single provision is sufficient under the Act.

(3) Degree of circumstantial evidence. If something is not discriminatory on its face, the only way to prove that it is discriminatory is through circumstantial evidence or testimony from someone in management. Since this kind of testimony is unlikely to surface, the degree to which courts will be willing to infer the requisite intent through circumstantial evidence will bear significantly on the vitality of this provision. As with other issues, this issue requires that a proper balance be struck between two extremes.

On the one hand, if courts refuse to accept any circumstantial evidence, then the Act will have done very little to improve upon the rigidity and unfairness of *Lorance*. On the other hand, if courts go too far in relying on inferences drawn from circumstantial evidence, then the focus of a court's inquiry will be shifted from discriminatory intent to discriminatory impact. The legal rules and evidentiary principles associated with a claim for disparate treatment might be a good place to look for answers regarding how these concerns might best be balanced.

Generally speaking, the courts have used a burden-shifting approach in dealing with the issue of intent. A good example of this approach is *Watson v. Fort Worth Bank & Trust*.[52] In

52. 487 U.S. 977 (1988).

Watson, the burden-shifting approach was explained in this way:

> [T]he plaintiff is required to prove that the defendant had a discriminatory intent or motive. In order to facilitate the orderly consideration of relevant evidence, we have devised a series of shifting evidentiary burdens that are "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Under that scheme, a prima facie case is ordinarily established by proof that the employer, after having rejected the plaintiff's application for a job of promotion, continued to seek applicants with qualifications similar to the plaintiff's. The burden of proving a prima facie case is "not onerous," and the employer in turn may rebut it simply by producing some evidence that it had legitimate, nondiscriminatory reasons for the decision. If the defendant carries this burden of production, the plaintiff must prove by a preponderance of all the evidence in the case that the legitimate reasons offered by the defendant were a pretext for discrimination.[53]

Watson's burden-shifting approach, although slightly modified by the Act, may be helpful here.[54]

c. Injury. An injury must occur to the individual claimant. There are two aspects which a court may want to consider when determining whether an injury has occurred. The first aspect is the nature of the injury. The second aspect is the severity of the injury.

As to the first, the injury claimed must be the type which occurs as a result of a discriminatory seniority system. The best way to determine whether an injury is the result of a discriminatory system is to look at the types of practices pro

53. *Id.* at 986 (citations omitted).
54. S. 1745, 102d Cong., 1st Sess. § 105 (1991).

hibited by the Civil Rights Act[55] and the closeness of the causal connection between the seniority system and the injury.

As to the second, any injury, if it is the type that occurs from a discriminatory seniority system, will normally be sufficient to satisfy the element of injury. For example, under the Fair Housing Act cases, the injury element of a prima facie case is generally met if the plaintiff shows the injury required for standing.[56] Therefore, the severity of an injury will only be an issue of central importance when damages are considered.

d. Causation: Linking together the injury, the seniority system and the 180 day limitations period. Causation can be thought of as the glue which joins all of the various elements together. For a claim to be actionable, there must be a link between the injury suffered and the seniority system that has been intentionally adopted for a discriminatory purpose. The seniority system, in other words, must cause the harm. In defining the kind of connection required, the courts will look to the three triggering events. Of the three, the adoption of a seniority system and becoming subject to a seniority system are definite, one-time events that should be easy to apply here.

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55. 42 U.S.C. § 2000e-2 (1988) provides:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to 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.

42 U.S.C. § 2000e-2 (1988).

56. *See, e.g.*, Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) (deprivation of social and professional benefits of living in an integrated society defined in terms of city blocks in suburban neighborhood rather than in apartment buildings was sufficient injury); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (tenants' claimed lost benefits of living in an integrated world and harm from being stigmatized as residents of a "white ghetto" came within the definition of persons aggrieved). Compare this level of injury with the injury required for a § 1983 claim. *See* Hinojosa v. City of Terrell, 834 F.2d 1223 (5th Cir. 1988) (damages are only available for breaches of state torts arising from police conduct that cause meaningful injury, are grossly disproportionate to need presented, and are motivated by malice).

The application of a seniority provision is much less clear. Courts' interpretation of this "occurrence" will have a tremendous impact on the usefulness of the Act to discriminated employees. Application just might mean use; for example, a seniority system might be "applied" every time it is used or taken into consideration when making paychecks or duty rosters. On the other hand, application might be read narrowly so that a seniority system could only be applied when a significant and distinct employment decision has been made, such as a promotion, firing, or transfer. In light of the continuing violation theory, discussed at length in the next section, it might be advisable to embrace a more narrow reading.

5. The continuing violation theory

The continuing violation theory is a judicial response that counteracts the harsh results of the 180 day statute of limitations applied to Title VII claims. It is a highly complex, fact specific inquiry.

Under the theory, a plaintiff who files a claim within 180 days of a Title VII violation can include related discriminatory acts that occurred outside of the 180 day period. Permitting a plaintiff to "relate back" enables him or her to recover damages for all related events. Courts have also used the theory to connect violations occurring subsequent to the filing of a claim.[57] To come within the theory, a plaintiff must claim and prove either a continuing pattern of discrimination or a policy of discrimination.

a. Pattern of discrimination or serial violation. To prove a continuing pattern of discrimination, or what some circuits call a serial violation,[58] the plaintiff must show that

57. *See* Anderson v. Block, 807 F.2d 145 (8th Cir. 1986).

58. In Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179 (1st Cir. 1989), the court defined a serial violation in this way:

> What, then, is meant by the term "continuing violation?" In one incarnation, the theory recognizes that some acts are imbricated, i.e., they involve an interlinked succession of related events or a fully-integrated course of conduct. Although the limitations clock generally starts with the commission of a discriminatory act, a true "continuing violation" rewinds the clock for each discriminatory episode along the way. Citations omitted. Thus, if the later violations in the series are within the prescriptive period, an employee may

the most recent act of a discriminatory pattern occurred within the last 180 days. That act must constitute a new violation and cannot simply be the effects[59] of a discriminatory practice that occurred outside of the 180 day period.[60] A plaintiff cannot use the continuing violation theory to resurrect claims concluded in the past, even though the violation's effects may persist.

The plaintiff must next show that the act occurring within the 180 day period is the most recent act in a series of related acts. The recurring acts must be reasonably close in time and nature to constitute a continuing pattern of discrimination. The plaintiff must show by a preponderance of evidence more than the mere occurrence of isolated or sporadic acts of intentional discrimination.[61] As a general rule, a claimant who has been

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> pursue them despite the fact that earlier acts, forming part and parcel of the same pattern, have grown stale. Applying this reasoning, we held in *Cajigas v. Banco de Ponce*, 741 F.2d 464 (1st Cir. 1984), that although the primary discriminatory act of which plaintiff complained (a gender-based promotion) was time-barred, her action was nevertheless "timely with respect to at least the alleged discriminatory refusal [subsequently] to promote plaintiff to an available executive position for which she was qualified" and as to which the limitations period remained open.

Id. at 183 (citations omitted).

59. *See* Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation and Other Title VII Issues*, 49 LAW & CONTEMP. PROBS. 53 (1986). The author gives an insightful analogy to show the difference between a continuing effect and a continuing violation. He states it this way:

> If I run over a student with my car, the effects may last for the rest of his life. If he is paralyzed, he will probably be just as paralyzed at age eighty as he was at age twenty. No jurisdiction has ever thought he could sue me at any time in that sixty-year period. My violation of the law would be over in an instant of negligence, and the statute of limitations would run from that instant. Whatever the moral force of the argument that Congress should have tried to undo the effects of past discrimination, that argument has no basis in continuing violation theory.

Id. at 57.

60. *See, e.g.*, Delaware State College v. Ricks, 449 U.S. 250 (1980); United Airlines, Inc. v. Evans, 431 U.S. 553 (1977).

61. In Berry v. Board of Supervisors of Louisiana State University, 715 F.2d 971 (5th Cir.), *cert. denied*, 479 U.S. 868 (1986), the court discussed factors to be considered when determining a claim under the continuing violation theory. The court said:

> This inquiry, of necessity, turns on the facts and context of each particular case. Relevant to the determination are the following three factors, which we discuss but by no means consider to be exhaustive. The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them

denied hiring or has been terminated will find it difficult to prove a continuing violation.[62]

b. Policy of discrimination or systemic violation.[63] A policy of discrimination, or what some circuits call a systemic violation, may also constitute a continuing violation.

> [In] contrast [to] a serial violation, a systemic violation need not involve an identifiable, discrete act of discrimination transpiring within the limitations period . . . . A systemic violation has its roots in a discriminatory policy or practice; so long as the policy or practice itself continues into the limitation period, a challenger may be deemed to have filed a timely complaint.[64]

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in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., hiweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is the degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to he expected without heing dependent on a continuing intent to discriminate.

Id. at 981. *See also* Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989) (applying the three prong *Berry* analysis).

62. *See, e.g.*, CHARLES R. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS, C-34 (1988). There are a few exceptions to this rule. Take, for example, Roberts v. North Am. Rockwell Corp., 650 F.2d 823 (6th Cir. 1981). In *Roberts*, the court recognized that a continuous refusal to hire can constitute a continuing and ongoing violation. This result should be compared to a termination which is usually viewed as a one-time event, incapable of heing linked by a continuing violation theory. Allowing a person to apply for a job in order to create an event within the 180 day period and then use the that event to link back to past events, creates a significant opportunity for abuse. An example of a court finding a termination to be a continuing violation is Gray v. Phillips Petroleum Co., 858 F.2d 610 (10th Cir. 1988).

63. *See, e.g.*, Thelma A. Crivens, *The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing*, 41 VAND. L. REV. 1171 (1988) (suggests that there are three judicial standards of timeliness under Title VII, which are: (1) date-of-notification/injury standard, (2) manifestation/enforcement standard, (3) on going policy standard).

64. Jensen v. Frank, 912 F.2d 517, 523 (1st Cir. 1990) (citations omitted). In Green v. Los Angeles County Superintendent of Schs., 883 F.2d 1472 (9th Cir. 1989), the court explained: "The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company wide hasis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements." *Id.* at 1480.

> [A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee

The reasoning of this rule, at least in promotional settings,[65] has been explained in this way: "[A] challenge to systematic discrimination is always timely if brought by a present employee, for the existence of the system deters the employee from seeking his full employment rights or threatens to adversely affect him in the future."[66]

The court in *Williams v. Owens-Illinois*,[67] recognized that the systemic discrimination theory has limitations depending on the kind of practice involved. In *Williams*, the court explained:

> A refusal to hire or a decision to fire an employee may place the victim out of the reach of any further effect of company policy, so that such a complainant must file a charge within the requisite time period after their refusal to hire or termination, or be time-barred. If in those cases the victims can show no way in which the company policy had an impact on them within the limitations period, the continuing violation doctrine is of no assistance or applicability, because mere

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> and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions.

Williams v. Owens-Illinois, Inc. 665 F.2d 918, 924 (9th Cir.), *cert. denied*, 459 U.S. 971 (1982) (citations omitted).

65. In Higgins v. State of Oklahoma *ex rel.* Oklahoma Employment Sec. Comm'n, 642 F.2d 1199 (10th Cir. 1981), the court found that an action alleging a discriminatory promotion practice was timely filed even though there were no available promotions for Higgins within the 180 days of filing his charge. The court relied on Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975), in which the court held, "Discriminatory failure to promote [is] a continuing violation for purposes of Title VII filing requirements so long as the plaintiff is alleging such nonpromotion over a period of time." *Id.* at 1200.

66. Reed v. Lockheed Aircraft Corp., 613 F.2d 757, 761 (9th Cir. 1980) (citing Elliot v. Sperry Rand Corp, F.R.D. 580, 586 (D. Minn. 1978)). A variation of this argument was also expressed in Gray v. Phillips Petroleum Co., 858 F.2d 610 (10th Cir. 1988). In *Gray*, the court rejected a continuing violation theory of terminated employees. The court rejected the claim because:

> When an employee is terminated, the employment relationship ends; and the fear of reprisal and the reasons for allowing employees to claim a continuing discriminatory policy are removed. Moreover, if former employees were allowed to assert charges after 180 days had passed from the date of termination, the purpose of the statute of limitations would be undermined and employers could be exposed to unlimited suits.

Id. at 614.

67. 665 F.2d 918 (9th Cir. 1982).

> 'continuing impact from past violations is not actionable. Continuing violations are.'[68]

Some of the circuits, in contrast to those circuits that only require current employment and current application of the policy, require the plaintiff to show that the discriminatory policy in question was actually applied to that plaintiff during the 180 day period. The Fifth Circuit, for example, has held that

> to establish a continuing violation, a plaintiff must show some application of the illegal policy to him (or to his class) within the 180 days preceding the filing of his complaint. (Citations omitted). Just as there can be no negligence in the air, so the existence of a quiescent discriminatory policy is simply insufficient to toll the statute of limitations. To hold to the contrary would expose employers to a virtually open-ended period of liability and would, as we said, read the statute of limitations right out of existence.[69]

c. Which doctrine applies? The threshold question that must be asked here is which doctrine of the continuing violation theory should apply to seniority systems. Adopting the systemic, policy discrimination doctrine for seniority systems is the common sense answer to this question because a seniority system is probably the first thing a person thinks of when asked to name an employment policy.

On the other hand, an argument can be made that a seniority system should fall under the pattern of discrimination doctrine since discriminatory practices under a seniority system could easily be considered a pattern or series of related events, and there is no bright line test distinguishing patterns from policies.

Because courts may apply either continuing violation doctrine, it is necessary to examine what an employee would have to prove under each doctrine.

(1) Systemic, policy discrimination. Under the discriminatory policy doctrine, a claimant can attack and collect damages that have arisen since the inception of a seniority

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68. *Id.* at 924 (citations omitted).
69. Abrams v. Baylor College of Medicine, 805 F.2d 528, 533-34 (5th Cir. 1986).

system if the following conditions are met: the claimant is a current employee; the discriminatory policy adversely affected the claimant at some time; and the discriminatory policy is still in effect. In those circuits requiring it, a claimant will also need to show that the discriminatory event occurred within the 180 day period.

(2) Discriminatory pattern. Under the discriminatory pattern doctrine, a claimant will have to prove that an incident of discrimination has occurred within the 180 day period and that the incident is part of a pattern of discrimination. The relative ease or difficulty of making this showing will depend on how the concepts of "incident or injury" and "pattern of discrimination" are interpreted by the courts.

(a) "Incident or injury." Under a broad reading, "incident or injury" could mean any recurring effect of a discriminatory seniority system. For example, if a seniority system affected a person's pay, then each paycheck received could be considered an incident or injury. This would be consistent with equal pay cases that consider each paycheck to be a new violation. Likewise, if a seniority system affected a worker's schedule, then every day worked pursuant to such system would constitute a new injury.

On the other hand, a court may give the provision a more narrow reading. Under a narrow reading, only decisions impacting an employee's status would be considered an incident or injury. Thus, an injury or incident would only occur at the time a decision was made as to an employee's compensation, work schedule, demotion, transfer or termination.

In short, a broad reading of injury or incident would focus on recurring affects of a status-changing decision, while a narrow reading of it would focus on the status-changing decision itself.

(b) Pattern of discrimination. The concept of "pattern of discrimination" can also be read broadly or narrowly. A broad reading would lump all decisions and effects of a seniority system into one category. Thus, any employment related decision made pursuant to a seniority system would be a part of the discriminatory pattern, no matter how different the employment actions might be.

A narrow reading would compartmentalize employment

injuries into different groups of employment decisions. Accordingly, an employee seeking to establish a pattern of discrimination as to transfers could not rely on evidence of other kinds of employment discrimination.

d. Likely impact of the continuing violation theory. As mentioned above, the continuing violation theory is a judicial response to the harsh results of the 180 day statute of limitations. Arguably, the continuing violation theory as applied to seniority systems should be scaled back since Congress has significantly reduced the harshness of the short limitation period. If either the discriminatory pattern doctrine or the discriminatory policy doctrine is applied, seniority systems will be under all out attack since a claimant will find it relatively easy to relate back and link up all of his or her claims of discrimination.[70] If this happens, the statute of limitations and the objectives that underlie it might become meaningless.

IV. CONCLUSION

This paper has introduced and discussed some of the issues the judiciary will face in applying the Civil Rights Act of 1991 to seniority systems. In contrast to *Lorance*'s one-sided weighing of interests, it is my hope that the judiciary will adequately take into account the interests of all relevant parties in deciding these critical employment issues.

R. Chet Loftis

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70. The potential effect becomes even greater when this doctrine is coupled with the discovery strand of equitable tolling, allowing for the tolling of the statute of limitations until the discriminatory purpose is discoverable. It should also be noted that the legislative history suggests that:

> What [the seniority system amendment] does not do is affect existing law with respect to the "continuing violation" theory. Instead, this subsection of the legislation addresses discriminatory employment rules and decisions in their first application after adoption by the employer.
>
> The "continuing violation" theory generally arises where the employer's continuing conduct or pattern of ongoing discrimination causes multiple or repeated injuries to members of groups protected under the statute.

H.R. REP. NO. 40, 102d Cong., 1st Sess., Part 2 at 23 (1991), *reprinted in* 1992 U.S.C.C.A.N. 694, 716-17.