Kentucky Law Journal

Volume 64 | Issue 1 Article 6

1975

Title VII and Seniority Systems: Back to the Foot of the Line?

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COMMENTS

TITLE VII AND SENIORITY SYSTEMS: BACK TO THE FOOT OF THE LINE?

INTRODUCTION

The "peaceful and voluntary" settlement of the persistent problem of discrimination[1] was the *raison d'etre* of Title VII of the Civil Rights Act of 1964.[2] Title VII was to insure an abolition of "the racial and sexual caste systems which had remained ingrained in the American economy since slavery and coverture."[3] Congress recognized that equal employment opportunity is one of the fundamental preconditions to elimination of barriers to full equality and human dignity in this society. Therefore, not only did Congress ban discrimination in employment practices, but it also ordered that where past discrimination had prevailed, affirmative action would be appropriate to remedy that discrimination.[4] The implementation of these affirmative action plans has enabled women[5] and minorities[6] to achieve some initial gains toward employment equality.

In a contracting economic situation, consideration of the necessity for worker layoffs is inevitable. Pursuant to the terms of most collective bargaining agreements, when there is a cutback in employment, layoffs are based on seniority (*i.e.*, the length of time the worker has been employed), so that the last person hired is the first to be fired.[7] Likewise, employees who

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[1] S. REP. No. 872, 88th Cong., 2d Sess. 1 (1964).

[2] 42 U.S.C. §§ 2000e-15 (1964), *as amended* 42 U.S.C. §§ 2000e-15 (Supp. 1972).

[3] United States v. Georgia Power Co., 474 F.2d 906, 921 (5th Cir. 1973).

[4] 42 U.S.C. § 2000e-5(g)(1964).

[5] Comment, *Sex Discrimination in Employment: What Has Title VII Accomplished for The Female*, 9 RICH. L. REV. 149 (1974).

[6] Federal regulations, in placing some limitation on "minority," refer to an affirmative action program's beneficiaries as "members of an 'affected class' who by virtue of past discrimination continue to suffer the present effects of that discrimination." 41 C.F.R. § 60-2.1 (Supp. 1975). Therefore, one could have a situation where women had been discriminated against but blacks had not, or vice versa. Thus, an affirmative action plan would be applicable only to women in the first instance or only to blacks in the second, provided there is a showing of present effects of that past discrimination.

[7] Ninety percent of all collective bargaining agreements have provisions on seniority. Gould, *Employment Security, Seniority and Race: The Role of Title VII of the*

have been laid off are placed on a recall list and are rehired as needed in reverse order of layoffs. Thus, the senior employee is also the first to be reemployed.[8] Such competitive seniority systems clash with the employment gains realized by minorities and women as a result of affirmative action plans. Because of past employment discrimination, women and minorities have only recently begun to acquire jobs in meaningful numbers.[9] Yet, as the most recently hired, they are the first fired when layoffs are ordered.

Women and minorities now argue that the progress in achieving equal employment opportunities is being aborted by seniority systems which are superimposed upon a history of race and sex discrimination. Past discrimination has deprived these groups of an opportunity to accumulate the seniority necessary to protect their newly-acquired jobs and to further their advancement.[10] The unions, on the other hand, contend that seniority, which establishes an objective criterion for layoff and recall, is essential to prevent employer favoritism and arbitrary employer decisions as to who will be laid off. The unions also believe that workers who have invested their working efforts in a particular job should be able to expect some guarantee of job security.[11]

Civil Rights Act of 1964, 13 How. L.J. 1, 2 (1967); Developments in the Law, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1156 (1971) [hereinafter cited as *Developments in the Law*].

[8] For a general discussion of the basic premises and importance of seniority systems, see S. SLICHTER, J. HEALY, & R. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 104-41 (1960) [hereinafter cited as SLICHTER]. For a discussion of the role of seniority in promotions and layoffs, *see Developments In the Law, supra* note 7, at 1155-63.

[9] The unemployment rate of blacks and other minority races fell from 8.1 percent in 1965, the effective date of Title VII, to 6.4 percent in 1969; but in 1973, it again rose to 8.9 percent and by early 1975 sharply increased to 13.4 percent. Stacy, *Title VII Seniority Remedies in a Time of Economic Downfall*, 28 VAND. L. REV. 487, 507 (1975) [hereinafter cited as *Seniority Remedies*], *citing* U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES 1973, at 15 (1974) and Wall Street J., Feb. 10, 1975, at 3, col. 2.

[10] Emotions run high on this issue. For recent public reactions to layoffs and their effect on affirmative action, *see* TIME MAGAZINE, Feb. 3, 1975 at 58; Louisville Courier-Journal & Times, Dec. 1, 1974, at A1, col. 1; Louisville Courier-Journal & Times, Nov. 17, 1974, at A12, col. 1; New York Times, March 9, 1975, § 4 at 1, col. 5.

[11] The expectation of job security guaranteed by seniority may prove to be illusory in the wake of rapid technological change. Seniority does not guarantee a job; it only provides preferences where jobs exist. If the job is eliminated by technological innova-

The legal question now being submitted to the courts is "how to reconcile equal employment opportunity *today* with seniority expectations based on *yesterday's* built-in racial discrimination."[12] In analyzing the legal Gordian knot presented by the seniority versus affirmative action controversy, the first determination must be whether the seniority system as utilized constitutes an unlawful employment practice within the meaning of Title VII or whether the system challenged is a bona fide seniority system outside the scope of Title VII. Secondly, if the system is in violation of the statute, what are the acceptable and appropriate remedies? Although sound legal reasoning would dictate that the determination of the first issue ought to control the second, in practice the opposite is true. The ability or inability of the courts to find a socially and politically acceptable remedy will likely determine their findings on the substantive issue of law.

I. UTILIZATION OF A DISCRIMINATORY SENIORITY SYSTEM AS AN UNLAWFUL EMPLOYMENT PRACTICE

An unlawful employment practice is a failure or refusal to hire, a discharge or any other practice which discriminates against any person because of race, color, religion, sex, or national origin.[13] Any limitation, segregation, or classification of employees which deprives any person of employment opportunities or adversely affects his or her status as an employee on account of race, color, sex, religion, or national origin is also an unlawful employment practice.[14] However, § 703(h) of Title VII[15] provides an exemption for application of different terms of employment pursuant to a bona fide seniority system if such differences are not the result of an intention to discriminate

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tions, seniority is meaningless. One commentator writes: "The very concept of seniority is doomed to extinction, because the economic system upon which it is based is even now in the process of fundamental and irrevocable change." Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1563 (1962).

[12] Papermakers Local 189 v. United States, 416 F.2d 908, 982 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[13] 42 U.S.C. § 2000e-2(a)(1)(1964).

[14] 42 U.S.C. § 2000e-2(a)(2)(1964).

[15] 42 U.S.C. § 2000e-2(h)(1964).

because of race, color, religion, sex, or national origin.[16] Although only nondiscriminatory seniority systems are exempt, Congress did not define a bona fide seniority system. Therefore, the arduous task of determining what constitutes the bona fide character of a seniority system has been left to the judiciary.

A. *Bona Fide Seniority Systems*

1. *Introduction*

An employment practice may be neutral on its face, in that it does not explicitly classify employees according to race or sex, and its implementation may not have been motivated by a discriminatory purpose. Nevertheless, if it has a discriminatory effect, it may be held to be an employment practice prohibited by Title VII. As the Supreme Court wrote in *Griggs v. Duke Power Co.*,[17] its first decision interpreting Title VII: "Under the Act [Title VII], 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."[18] The Court held that the absence of discriminatory intent, or even the presence of good intent, "does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[19] Other courts have

[16] 42 U.S.C. § 1981 also confers a right of action against racial discrimination in employment. Hill v. American Airlines Inc., 479 F.2d 1057 (5th Cir. 1973); Sanders v. Dobbs House, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). There is no exemption for bona fide seniority systems. Thus, there may be a separate question as to whether seniority systems perpetuating past discrimination violate § 1981. However, the courts have tended to enforce Title VII and § 1981 together and to impose Title VII limitations on § 1981. *See* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974); Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974). Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974). "Legislative enactments in this area [civil rights] have long evinced a general intent to accord parallel or overlapping remedies against discrimination." Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1971). Sex discrimination, however, is not covered by 42 U.S.C. § 1981, so that to deny racial minorities relief from seniority systems under Title VII and to grant them relief only if action were brought under § 1981 would result in women not having a remedy for the same discriminatory action. This Comment, however, deals only with challenged activities under Title VII.

[17] 401 U.S. 424 (1970).

[18] *Id.* at 430.

[19] *Id.* at 432.

stated that it is enough that the challenged policy is followed "deliberately, not accidentally."[20] This is congruent with the objective of Title VII, which is to unshackle minorities and women from past discrimination and to grant them relief from that past. The statute was not enacted to punish "wrong thinking," but rather to compensate the victims of discrimination.[21]

Since motivation or subjective intent in the implementation of facially neutral practices is not the determinative criterion of an unlawful employment practice, one must look to the *effect* of such practices. Again the Supreme Court has spoken: "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[22] Use of the "consequences test" has led many courts to hold that the demonstration of a statistical imbalance of female and minority employees is sufficient to create a prima facie case of discrimination.[23] Therefore, where neutral policies can be shown to have a demonstrable adverse impact on minorities and women, they are held to be violative of Title VII.[24]

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[20] Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). *See also* Papermakers Local 189 v. United States, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[21] *See* Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971); Fraser, *Facially Neutral Criteria and Discrimination Under Title VII: "Built-In Headwinds" or Permissible Practices?*, 6 U. MICH. J. L. REFORM 97, 101 (1972-73). Only very recently the Supreme Court held that one need not demonstrate bad faith to be granted back pay awards upon a finding of discriminatory practices under Title VII. The Court reasoned that:

> If back pay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the "make whole" purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in "bad faith."

Albemarle Paper Co. v. Moody, 95 S. Ct. 2362, 2374 (1975).

[22] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1970). *See also* Albemarle Paper Co. v. Moody, 95 S. Ct. 2362, 2374 (1975).

[23] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); United States v. Hayes Int'l Corp., 456 F.2d 112, 120 (5th Cir. 1972); Bing v. Roadway Express, Inc., 444 F.2d 687 (5th Cir. 1971); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426 (8th Cir. 1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). *See also Recent Developments, Civil Rights—Employment Discrimination—Preferential Minority Treatment as an Appropriate Remedy Under Section 703(j) of Title VII*, 42 TENN. L. REV. 397, 400 (1975) [hereinafter cited as *Civil Rights*].

[24] Neutral systems ruled illegal under Title VII as perpetuating effects of discrimination include: policies basing promotion on length of service where use of written tests

2. *Federal District Court Decisions*

Suits attacking the use of seniority systems as the basis for layoffs where there is an adverse impact on women and minorities have met with some success at the district court level. The district court in *Watkins v. United Steel Workers of America Local 2369*,[25] applying the "consequences test" to a seniority system which was facially neutral, ruled that use of the seniority system for purposes of layoffs was an unlawful employment practice proscribed by Title VII. The court was faced with a situation where layoffs based on employment seniority at the once all-white company resulted in the dismissal of all blacks hired after 1965, the effective date of Title VII. After the layoffs only two blacks remained employed in the entire plant. Because recalls were also based on seniority, there was little chance that the blacks who stood at the bottom of the recall list would be rehired very soon. The court held that where there has been a history of hiring discrimination, a plantwide seniority system which perpetuates that discrimination cannot be a bona fide seniority system protected by § 703(h). The court reasoned that in this case, the use of a system to layoff workers which was based on length of service was not neutral in its effect because minorities had been precluded from accumulating enough relevant seniority to withstand layoffs. Thus, employment preferences on the basis of length of service unlawfully facilitated the systematic exclusion of minorities from the work force.[26]

In enjoining use of this employment seniority system as an unlawful employment practice, the court in *Watkins* relied upon a series of cases challenging the legality of departmental or job seniority systems[27] in factories which had once main-

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had discriminated against blacks in hiring, Allen v. City of Mobile, 466 F.2d 122 (5th Cir. 1972); limiting transfers to entry level jobs, United States v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972); system of departmental seniority, Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); and a no transfer rule, Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

[25] 369 F. Supp. 1221 (E.D. La. 1974), *rev'd*, 44 U.S.L.W. 2045 (5th Cir., July 16, 1975).

[26] *Id.* at 1226.

[27] *See* SLICHTER, *supra* note 8, at 105-41. Job or departmental seniority systems measure length of service on a particular job or in a particular department. Employ-

tained segregated work forces.[28] Without exception, these seniority systems have been found to be unlawful under Title VII.[29] Employment decisions as to promotions and transfers based on length of service on jobs or in departments from which women and minorities had been excluded have been held to perpetuate past discrimination. Length of service is a functional equivalent of race or sex where past hiring discrimination has occurred. In these cases, the seniority system, though neutral on its face, had the "inevitable effect of tying the system to the *past*" and consequently "cut into the employees' *present* right not to be discriminated against on the grounds of race."[30] Such seniority systems, originating as they do in race or sex discrimination, are not bona fide systems within the proviso of § 703(h) of Title VII.

Other district courts have employed reasoning similar to that of *Watkins*. In *Delay v. Carling Brewing Co.*[31] it was held that where past discrimination in hiring coupled with the use of a seniority system in layoffs resulted in a disproportionate number of layoffs of blacks, affirmative action must be taken to eliminate the continuing effects of that past discrimination.

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ment seniority, also referred to as plantwide seniority, grants workers equal credit for actual length of service with that employer regardless of transfers in jobs or departments.

[28] These challenges generally have their origin where black employees had been relegated to low paying jobs and later were permitted to transfer to formerly all-white departments. Upon transferring to a new department or job, however, they lost all seniority and were once again placed at the end of the roster. *See* United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971).

[29] United States v. Georgia Power Co., 474 F.2d 906, 927 (5th Cir. 1973); United States v. Chesapeake & Ohio Ry., 471 F.2d 582, 593 (4th Cir. 1972); United States v. Hayes Int'l Corp., 456 F.2d 112, 117 (5th Cir. 1972); United States v. Jacksonville Terminal Co., 451 F.2d 418, 453 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); United States v. Bethlehem Steel Corp., 446 F.2d 656 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791, 795-96 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971); Papermakers Local 189 v. United States, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Local 53, Heat and Frost Insulators v. Vogler, 407 F.2d 1047, 1054 (5th Cir. 1969); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

[30] Papermakers Local 189 v. United States, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[31] 9 E.P.D. ¶ 9877 (N.D. Ohio 1974).

In *Loy v. City of Cleveland*,[32] allocating jobs according to seniority would have resulted in the layoff of 87 percent of the females compared with 42.5 percent of the males. The court issued a restraining order enjoining the use of the seniority system, stating that there was a "strong likelihood that the plaintiffs will be able to show that the seniority system is based on past discriminatory hiring and further to show that the court's duty to affirmatively correct past discrimination would warrant preclusion of the use of seniority."[33]

The Equal Employment Opportunity Commission (EEOC), the administrative agency charged with enforcement of Title VII,[34] has also held that where statistical evidence showed that minority employees were disproportionately represented among the last-hired employees, the seniority-based layoff system had an adverse impact on minority employees as a class and was, therefore, an unlawful employment practice.[35] EEOC analyzed the statistics of minorities in the company's work force since 1930. Finding no significant hiring of blacks until 1965, the Commission inferred a pattern or practice of past discrimination.

Thus, it appears from these decisions that, in challenging a facially neutral seniority system, it must be shown not only that past discrimination has occurred but also that the present effects of that discrimination are imposed upon women and minorities through the use of the system.[36] Therefore, a seniority system can be found illegal only if the employer once had a discriminatory hiring policy.[37] If the employer's business has

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[32] 8 F.E.P. Cas. 614, *dismissed as moot*, 8 F.E.P. Cas. 617 (N.D. Ohio 1974).

[33] *Id.* at 616.

[34] 42 U.S.C. § 2000e-5(1964).

[35] 2 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6448 (1975) (EEOC, Decision No. 75-251).

[36] Title VII is not retroactive in the sense that it does not provide relief for victims of pre-Act discrimination for their pre-Act injury. Title VII does prohibit, however, practices which result in the continuance of present effects of past discrimination including discrimination occurring before July 2, 1965, the effective date of the Act. Robinson v. Lorillard, 444 F.2d 791, 795 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971).

[37] A district court refused to enjoin a layoff based on a seniority system even though women and minorities would be disproportionately affected because the plaintiffs failed to show that the employer had engaged in discrimination in the past. United Affirmative Action Comm. v. Gleason, 10 F.E.P. Cas. 64 (D.C. Ore. 1974).

always been integrated, then a seniority system would be as beneficial to minorities and women as it is to white males. At least one court has also required proof that the use of the challenged seniority system has resulted or will result in a disproportionate percentage of minority and female workers being laid off.[38]

3. *Circuit Court Decisions*

Women and blacks have not fared as well in the appellate courts. Although the bases of their decisions differ somewhat, the three circuit courts which have ruled on the issue have rejected the district court reasoning. In reversing *Watkins*, the Fifth Circuit held that the use of a plantwide seniority system violated neither Title VII nor 42 U.S.C. § 1981.[39] The court distinguished the departmental seniority system cases relied upon by the district court on the basis that the plaintiffs involved in those cases were "employees who had not attained, as individuals, their own rightful places of employment. Discriminatory . . . transfer practices served as obstacles to their gaining the employment place they would have been in, but for prior discrimination as to them."[40] Emphasizing that the plaintiffs in *Watkins* would have to show that the past discrimination was being perpetuated against them personally, the appellate court concluded that plaintiffs in *Watkins* had already obtained their "rightful place" and, therefore, could not claim that they personally suffered the continuing effects of past discrimination. They were not, then, entitled to a remedy.

In so holding, however, the Fifth Circuit continued to ignore the evidence of the adverse impact upon blacks as a class which results from the use of seniority systems where there has been prior hiring discrimination.[41] The court refused to apply

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[38] In Dawkins v. Nabisco, Inc., 7 F.E.P. Cas. (N.D. Ga. 1973), the black plaintiffs-employees failed to get an injunction against use of a plantwide seniority system. The court, in examining the present effect of the system, found that black employees were protected from layoffs in numbers and percentages commensurate with their representation in the plant population.

[39] 44 U.S.L.W. 2045 (5th Cir. July 16, 1975).

[40] *Id.* at 2046.

[41] *See Summary and Analysis*, 44 U.S.L.W. 1017 (July 29, 1975) quoting the Fifth Circuit in *Watkins*:

the consequences test as set forth in *Griggs*. Furthermore, this decision is impliedly contradictory to the same circuit's opinion in *Franks v. Bowman Transportation Co.*[42] In *Franks*, the court found that the plaintiffs had each applied for a job, but were unlawfully refused employment for discriminatory reasons. Nevertheless, the court held that these plaintiffs, who had definitely been discriminated against individually, were not entitled to retroactive seniority as of the date of first refusal to hire.[43] Obviously these plaintiffs were personally suffering the continuing effects of past discrimination and would have been entitled to relief under the court's *Watkins* test.[44] The Fifth Circuit further failed to recognize that it is not uncommon for courts to enjoin the perpetuation of the effects of past discrimination, even though such a remedy may benefit persons other than those who were victims of the initial discrimination.[45]

In *Jersey Central Power & Light Co. v. IBEW*[46] and *Waters v. Wisconsin Steel Works of International Harvester Co.*,[47] the

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> [R]egardless of an earlier history of employment discrimination, when present hiring practices are nondiscriminatory and have been for over 10 years, an employer's use of a long-established seniority system for determining who will be laid-off, and who will be rehired, adopted without intent to discriminate, is not a violation of Title VII or [42 U.S.C.] § 1981, even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual employees who suffer layoff under this system have not themselves been the subject of prior employment discrimination.

[42] 495 F.2d 398 (5th Cir. 1974), *cert. granted*, 420 U.S. 989 (1975). Certiorari has been granted by the Supreme Court upon petition by the NAACP Legal Defense Fund.

[43] *Id.* at 417-18.

[44] For a criticism of the *Franks* decision, *see Seniority Remedies, supra* note 9, at 506.

[45] *Cf.* Bing v. Roadway Express, Inc., 485 F.2d 441, 451 (5th Cir. 1973) (minority drivers were all granted seniority dating from time they would have qualified for transfer, whether they applied for transfer or not. Since such a request would have been futile, it was not made a prerequisite to recovery.); United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 132 (8th Cir. 1969) (The court did require proof that each individual black had been specifically discriminated against by the union.); EEOC v. United Ass'n of Journeymen, 311 F. Supp. 468, 474 (S.D. Ohio 1970) (Each individual black recipient of the remedied seniority group did not have to show that he had applied to the union, because it had a reputation for discrimination in the community. The district court emphasized that because the Negro community had been denied entrance, the remedy would be directed toward that minority, not simply to the few who had formerly applied.). *See* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969) [hereinafter cited as Cooper & Sobol],

Third and Seventh Circuits, respectively, likewise distinguished departmental seniority systems cases. In so doing, these courts distinguished the departmental and job seniority cases on the basis of the legislative history of § 703(h) rather than on the theory that the principles invalidating those seniority systems were logically inapplicable to employment seniority cases.[48] It is the opinion of these courts that, regardless of the fact that plantwide seniority systems superimposed upon past discrimination in hiring perpetuate that discrimination, Congress intended to exempt such systems. The Third Circuit explicitly stated that it was "not fatal that a seniority system continues the effect of past employment discrimination" and that "this result was recognized and left undisturbed by Congress in its enactment of § 703(h) and (j)."[49]

In assessing congressional intent, the Third and Seventh Circuits cited three sources: (1) Interpretative Memorandum of Senators Clark and Case, floor managers for Title VII in the Senate;[50] (2) Senator Clark's response to written questions

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in which the authors argue that where the exclusionary practices of a company became well known in a community, thus discouraging minorities from even applying, it would be inappropriate to limit the class to previously refused applicants. The better approach, they suggest, is to define the scope of the affected class as all minority individuals hired within a specific period. *Id.* at 1634-35. *See also, Recent Decisions, Labor Law—Title VII of the 1964 Civil Rights Act*, 43 GEO. WASH. L. REV. 947, 964 (1975) [hereinafter citd as *Recent Decisions*]; Note, *Last Hired, First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544 (1975). In this note, the author argues that where there has been past discrimination, use of a plant seniority system in layoffs may operate in a discriminatory fashion. Where this is so, the remedy of retroactive seniority should be limited to those minority employees who are likely to have actually been in the work force at the time of the past hiring discrimination. *Id.* at 1570.

[46] 508 F.2d 687 (3d Cir. 1975).

[47] 502 F.2d 1309 (7th Cir. 1974).

[48] 508 F.2d 687, 712 (3d Cir. 1975) (concurring opinion of Van Dusen, J.):

> [T]he basis for such distinction has been the court's view of the legislative history of the Act, rather than any conclusion that the principles which required modification of other seniority practices did not apply to plant seniority. I disagree with the interpretation of the legislative history expressed in *Waters* . . . as well as by the majority at pp. 707-10. *Id.* at 712.

[49] *Id.* at 706-07.

[50] 110 CONG. REC. 7213 (1964):

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or

posed by Senator Dirksen;[51] and (3) a memorandum from the Department of Justice presented by Senator Clark to the Senate.[52] Yet, none of these documents were read on the Senate floor, and there was no congressional discussion of their contents.[53] Furthermore, these documents were introduced *prior* to the introduction of the Dirksen-Mansfield Amendment, which

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indeed permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held to be an unlawful subterfuge to accomplish discrimination.)

[51] 110 CONG. REC. 7217 (1974):

Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract required that they be first fired and the remaining employees are white?

Answer. Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired", he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.

Question. If an employer is directed to abolish his employment list because of discrimination what happens to seniority?

Answer. This bill is not retroactive, and it will not require an employer to change existing seniority lists.

[52] 110 CONG. REC. 7207 (1964):

Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. . . . But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII. . . . Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

[53] Cooper & Sobol, *supra* note 44, at 1610.

became § 703(h), and so are not really interpretative of the Act's qualifying language of exempting only bona fide seniority systems.[54] The only remark relating directly to § 703(h) was Senator Hubert Humphrey's statement that the purpose of the provision was to clarify application of the statute and not to narrow its scope.[55]

It is also important to note that an amendment to the Title VII bill which was offered in the House and which would have exempted all plantwide seniority systems was rejected without debate.[56] The version of Title VII sent to the Senate by the House made no reference to seniority systems at all.[57] When the bill returned to the House from the Senate with the Dirksen-Mansfield Amendment attached, exempting certain bona fide seniority systems, it was passed once more without debate on the seniority issue.[58] In light of the chronology of the congressional statements relied on by the Third and Seventh Circuits and the dearth of legislative history regarding § 703(h), greater reliance should be placed on the language of the statute and its broad purposes in interpreting the Act on questions of seniority.[59]

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[54] The bill was brought to the Senate floor without prior reference to any standing committee, so that there is not even a committee report to look to as a source of legislative history. Cooper & Sobol, *supra* note 44, at 1609. *See also* Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 443-44 (1966); *Recent Decisions, supra* note 45, at 949-50; *contra* Note, *The Survival of Last Hired, First Fired Under Title VII and Section 1981*, 6 LOYOLA L.J. 386, 390-92 (1975).

[55] "Thus this provision makes clear that it is only discrimination on account of race, color, religion, sex or national origin, that is forbidden by the title. Then [the] change does not narrow application of the title, but merely clarifies its present intent and effect." EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3005 (1965).

[56] The amendment offered by Representative Dowdy read: "The provisions of this title shall not be applicable to any employer, whose hiring and employment practices are pursuant to (1) a seniority system; (2) a merit system. . . ." The amendment was rejected without debate. 110 CONG. REC. 2727, 2728 (1964) (amendment offered by Representative Dowdy).

[57] *Compare* the House bill (H.R. 7152) *with* the Senate bill after Dirksen's amendment. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLE VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3049, 3051 (1965).

[58] *But see* 110 CONG. REC. 15893 (1964) (remarks of Representative McCulloch).

[59] The paucity of legislative history on the meaning of a bona fide seniority system is crucial for another reason. The Equal Employment Opportunity Commission filed an amicus brief with the Fifth Circuit in support of the district court's holding in *Watkins*. EEOC argued that an employment seniority system which perpetuates the

Both the Third and Seventh Circuits believe, however, that Congress chose to permit plantwide seniority systems, despite their disproportionate adverse effect on minorities and women, to avoid upsetting all collective bargaining agreements with "last hired, first fired" provisions. Their interpretation was that "Congress did not intend the chaotic consequences that would result from declaring unlawful all seniority systems which may disadvantage females and minority group persons."[60] These courts presumed that Congress was concerned not with the disparate effect of such systems on the employment opportunities of the persons for whom Title VII was enacted, but rather with the effect a remedy of such discriminatory practices would have on white male employees. The Seventh Circuit's holding that an employment seniority system was not discriminatory showed that its real concern was for the effect a contrary holding would have on white employees:

> An employment seniority system embodying the "last hired, first fired" principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer.[61]

Ultimately, then, in these two circuits the distinction between the test for a bona fide seniority system as applied to departmental seniority and that applied to plantwide seniority lies in the action necessary to remedy the present discriminatory ef-

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effects of past discrimination is not bona fide within the meaning of § 703(h). D. Stacy, Regional Counsel for EEOC, discusses the EEOC amicus brief in his article *Seniority Remedies, supra* note 9, at 512-13.

Currently EEOC is also in the process of adopting guidelines on layoff. 88 L.R.R. 216 (1975). Once these guidelines are adopted by EEOC, which is charged with the administration of Title VII, they will be "entitled to great deference" by the courts. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 433 (1970). The effect is that the party challenging the guidelines "must show not just that its reading [of the statute] is the more plausible, but rather that the agency's reading clearly contravenes the legislative history." *Seniority Remedies, supra* note 9, at 516. Thus, the position of women and minorities in challenging plantwide seniority systems engrafted upon past discrimination would be strengthened greatly and the importance of *Waters, Jersey Central,* and *Watkins* would be diminished if EEOC were to adopt guidelines along the same vein as its amicus brief in *Watkins.*

[60] Jersey Cent. Power & Light Co. v. IBEW, 508 F.2d 687, 708 (3d Cir. 1975).

[61] Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1320 (7th Cir. 1974).

fects.[62] The courts rationalized that the only remedy for discriminatory effects caused by use of plantwide seniority systems in layoffs would be fictional seniority and that the granting of such a remedy would constitute "preferential treatment" prohibited by § 703(j) of Title VII.[63]

The remedying of present effects of past discrimination,

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[62] Both appellate courts adopted the reasoning of Papermakers Local 189 v. United States, 416 F.2d 980, 994-95 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), which stated:

> No doubt, Congress, to prevent "reverse discrimination" meant to protect certain seniority rights that could not have existed but for previous racial discrimination. For example a Negro who had been rejected by an employer on racial grounds before passage of the Act could not, after being hired, claim to outrank whites who had been hired before him but after his original rejection, even though the Negro might have had senior status but for the past discrimination. As the Court pointed out in *Quarles*, the treatment of "job" or "department seniority" raises problems different from those discussed in the Senate debates: "a department seniority system that has its genesis in racial discrimination is not a bona fide seniority system." 279 F. Supp. at 517.
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> It is one thing for legislation to require the creation of *fictional* seniority for newly hired Negroes, and quite another thing for it to require that time *actually worked* in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of the previous discrimination. There would be no guaranty that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. In other words, creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment. The clear thrust of the Senate debate is directed against such preferential treatment on the basis of race.
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> . . . .
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> We conclude, in agreement with *Quarles*, that Congress exempted from the anti-discrimination requirements only those seniority rights that gave white workers preference over junior Negroes. This is not to say that *Whitfield* and *Quarles* and Title VII prohibit an employer from giving compensatory training and help to the Negro workers who have been discriminated against. Title VII's imposition of an affirmative duty on employers to undo past discrimination permits compensatory action for those who have suffered from prior discrimination.

See also Jersey Cent. Power & Light Co. v. IBEW, 508 F.2d 687 (3rd Cir. 1975); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1319 (7th Cir. 1974); Franks v. Bowman Transp., Inc., 495 F.2d 398, 417 (5th Cir. 1974), *cert. granted*, 420 U.S. 989 (1975).

[63] 42 U.S.C. § 2000e-2(j) (1964).

however, is not "preferential treatment."[64] The courts' approach obviously presupposed that the challenged seniority systems were bona fide, for if the systems were discriminatory, the relief granted would not be "preferential treatment." Moreover, the courts unimaginatively assumed that *fictional seniority* is the sole remedy. Thus, the consideration of remedies controls the decision on the substantive issue, and the courts have circumvented the direct question of whether employment seniority systems which continue the effects of past discrimination are violative of Title VII.

Through this approach, the courts have ignored the actual consequences of the utilization of seniority systems on the employment opportunities of minorities and women, thereby severely diluting the remedial effect of Title VII. The overall purpose of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[65] Congress has required the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[66] Using length of service as the criterion for retaining employment where women and minorities have been previously denied employment, is utilizing a functional equivalent of race or sex to deprive minorities and women of employment and to benefit an "identifiable group of white employees." Such a seniority system should not be regarded as a bona fide seniority system because it allows an employer to do in firing what he could not do in hiring: consistently and systematically deny employment on the basis of sex and race. Seniority systems superimposed upon discrimination in hiring create differences in treatment which are the direct result of prior intentional exclusion of women and minorities and, as such, are not within the exemption set forth in § 703(h).[67]

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[64] *See* United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408, 413 (2d Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); United States v. Local 38, IBEW, 428 F.2d 144, 149 (6th Cir. 1970).

[65] Griggs v. Duke Power Co., 401 U.S. 424, 429 (1970).

[66] *Id.* at 431.

[67] The impetus of § 703(h) could be maintained and congressional intent satisfied

B. *Business Necessity*

Even if it is demonstrated that the use of an employment seniority system perpetuates discrimination against women and minorities, the system may be validated by the courts upon a showing by the employer that the system is indispensable to "an overriding legitimate, non-racial business purpose."[68] Where there is a facially neutral employment practice with discriminatory results, the practice is prohibited if it cannot be shown to be business related. "The touchstone is business necessity."[69] To comply with the business necessity test, an otherwise illegal seniority system must be proven to have a "manifest relationship to the employment in question."[70] The challenged practice must be "necessary to the safe and efficient operation of business,"[71] and it must be sufficiently compelling, in that "there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact."[72] The burden is on the party supporting the practice to prove its business necessity.[73]

In the departmental seniority cases, the courts have consistently rejected the argument that the need for experienced

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by interpreting this section to validate all seniority systems except those which perpetuate differences in treatment which have resulted from actual *intent* to discriminate. When there has been no history of discriminatory hiring practices, there could not be a successful challenge to the *bona fide* character of the seniority system in question. *Recent Decisions, supra* note 45, at 960. *Cf.* Cooper & Sobol, *supra* note 44, at 1613.

[68] Papermakers Local 189 v. United States, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[69] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1970).

[70] *Id.* at 432.

[71] Franks v. Bowman Transp. Co., 495 F.2d 398, 415 (5th Cir. 1974), *cert. granted*, 420 U.S. 989 (1975); Jones v. Lee Way Motor Freight, 431 F.2d 245, 249 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

[72] Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971); *See also* Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974).

[73] Griggs v. Duke Power Co., 401 U.S. 424, 433 (1970). It should be noted that where sex discrimination is involved an employer may have an additional statutory defense under the "bona fide occupational qualification" exemption of § 703(e) of Title VII. For a thorough discussion of the difference between "BFOQ" defenses and business necessity, *see* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 348-49 (1975).

workers constitutes a business necessity.[74] Certainly in cases of layoff and recall, seniority systems should not stand as being essential to a legitimate, nonracial, nonsexist business purpose. In these cases, workers are not attempting to get new jobs but rather to keep the jobs for which they are already implicitly qualified. Seniority is, according to one court, "an inefficient means of assuring sufficient prior job experience."[75] Layoffs based on seniority are based only on length of service, not ability.[76] Though the employer might argue that retention of the more experienced workers is a legitimate concern, that concern or interest is not so compelling that the seniority system should be upheld despite its perpetuation of sex and race discrimination. Nor has the threat of "[l]abor unrest stemming from interference with the expectations of whites" been held to constitute a business necessity.[77] Thus, it appears that it is particularly difficult to justify a seniority system in terms of business necessity.

II. THE REMEDIES FOR AN UNLAWFUL SENIORITY SYSTEM

A. *Scope of Remedies Under Title VII*

Once it is determined that discrimination has occurred and is continued by an unlawful employment practice, the problem of developing an appropriate remedy must be met. Section 706(g) of Title VII[78] provides that the court may enjoin an unlawful employment practice and order affirmative action

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[74] *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971); United States v. Hayes Int'l Corp., 415 F.2d 1038 (5th Cir. 1969).

[75] Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971).

[76] United States v. N.L. Indus., Inc., 479 F.2d 354, 366 (8th Cir. 1973). *See also* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1321 (7th Cir. 1974).

[77] Rodriquez v. East Texas Motor Freight, 505 F.2d 40, 57-58 n.22 (5th Cir. 1974).

[78] If the court finds that the respondent has intentionally engaged in, or is intentionally engaging in, the unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate. . . .

42 U.S.C. § 2000e-5(g) (1964).

where necessary upon the court's finding that the respondent has intentionally engaged in, or is now intentionally engaging in, an unlawful employment practice.[79] By enactment of this provision, Congress intended to grant the courts wide discretion in exercising their equitable powers to fashion the "most complete relief possible."[80] Thus, the courts are not limited to simply "parroting the Act's prohibition but are permitted, if not required, to order such affirmative action as may be appropriate."[81] The courts, in administering equitable relief pursuant to a statute, must responsibly exercise "official conscience on all the facts of a particular situation in the light of the purpose for which the power exists."[82] Therefore, the objective of Title VII, *i.e.*, the elimination of all vestiges of race and sex discrimination, must at all times be uppermost in the minds of the decision-makers.

Three approaches to fashioning an adequate remedy against seniority systems which have discriminatory effects have been suggested in the cases involving departmental seniority: "status quo," "rightful place," and "freedom now."[83] The "status quo" approach would support the continued use of a seniority system which was not facially discriminatory and would not require a remedy for present effects of past discrimination so long as present explicit discrimination had ended. This theory has been continually rejected by the courts which have preferred to use the "rightful place" approach.[84] This lat-

[79] "Intentionally engaging in" simply means that "[a]lthough the company did not adopt the policy with the intention of discriminating, the practice was followed deliberately, not accidently." Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). *See* text accompanying note 21 *supra* for a discussion of the element of intent under Title VII.

[80] 118 CONG. REC. 7168 (1972) (Equal Employment Opportunity Act of 1972—Conference Report).

[81] Local 53, Heat and Frost Insulators v. Vogler, 407 F.2d 1047, 1052 (5th Cir. 1969). *See also* Vogler v. McCarty, Inc., 451 F.2d 1236, 1238 (5th Cir. 1971).

[82] Bowles v. Goebel, 151 F.2d 671, 674 (8th Cir. 1945).

[83] The three approaches were first fully developed in Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1268 (1967). [hereinafter cited as Note]. *See also* Papermakers Local 189 v. United States, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). On the inadequacy of these approaches, *see* A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 200, 202 (1971) [hereinafter cited as BLUMROSEN].

[84] Franks v. Bowman Transp. Co., 495 F.2d 398, 415 (5th Cir. 1974), *cert. granted*, 420 U.S. 989 (1975); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir.

ter remedial approach proscribes the awarding of future vacant jobs on the basis of job or departmental seniority which "locks in" prior discrimination caused by former segregation. The effect of the "rightful place" approach in those cases was to base promotions and transfers to new jobs within the plant upon employment seniority rather than departmental seniority.[85] Although such a remedy is appropriate in cases of promotion and transfer, the granting of plantwide seniority where layoffs are imminent is of no help because the "plantwide seniority system is the instrument perpetuating the discrimination."[86] Obviously, it would not serve as a remedy in such cases.

The only viable approach in cases challenging use of plantwide seniority systems is "freedom now." This remedy requires a total purge of the "but-for" effects of past discrimination.[87] As the Supreme Court has stated, "the court has not merely the power but the duty to render a decree which will so far as possible remedy the discriminatory effects of the past as well as bar like discrimination in the future."[88] In compensating for past discrimination, the courts are to make "whole" those who suffered from the past discrimination and eliminate its effects as far as possible.[89] Congress has also recognized that the accomplishment of this objective

> . . . rests not only upon the elimination of the particular unlawful employment practice complained of, *but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.*[90]

1971), *cert. denied*, 406 U.S. 906 (1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971); Papermakers Local 189 v. United States, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[85] *See* cases cited in note 84 *supra*.

[86] Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB*, 123 U. PA. L. REV. 158, 166 (1974) [hereinafter cited as Comment].

[87] Note, *supra* note 83, at 1268-69.

[88] Louisiana v. United States, 380 U.S. 145, 154 (1965).

[89] Vogler v. McCarty, Inc., 451 F.2d 1236, 1238 (5th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 721 (7th Cir. 1969).

[90] 118 CONG. REC. 7168 (1972), *supra* note 80 (emphasis added).

Thus, an adequate and appropriate remedy where minorities and women have been prohibited from obtaining jobs due to discriminatory hiring practices is one which will put them in the positions they would have occupied but for the discrimination.

The relief granted, however, may not go so far as to constitute "preferential treatment" banned by § 703(j).[91] Literally construed, this section prohibits the application of an absolute hiring quota reflecting the percentage of minorities and women within the population at large.[92] The prohibition against "preferential treatment" does not preclude affirmative action against facially neutral practices which perpetuate the adverse effects of past discrimination. Stated differently, "[p]resent correction of past discrimination is not preferential treatment."[93] In fact, Congress has mandated the "removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications[s]."[94] As the Sixth Circuit has stated:

> When the stated purposes of the Act and the broad affirmative relief authorization . . . are read in context with § 2000e-2(j), we believe that section cannot be construed as a ban on

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[91] Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentages of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, state, section or other area, or in the available work force in any community, state, section or other area.

42 U.S.C. § 2000e-2(j)(1972).

[92] Comment, *supra* note 86.

[93] Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). *See also* United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971); Contractors' Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971); Local 53, Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969). As the court in Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968) wrote: "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act."

[94] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1970).

> affirmative relief against continuation of effects of past discrimination resulting from present practices (neutral on their face) which have the practical effect of continuing past injustices.
>
> Any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964.[95]

Therefore, where the courts find that the use of length of service as the determining factor in layoffs perpetuates past discrimination, thus constituting an unlawful employment practice, and that some other system which will not have such a severe adverse impact on women and minorities should be created to allocate jobs, women and minorities are entitled to relief from that unlawful employment practice. Such relief, in whatever form, is not "preferential treatment" but simply a remedy prescribed by Title VII.[96] The courts in *Waters*,[97] *Watkins*,[98] and *Jersey Central Power & Light Co.*[99] failed to recognize this fact. The courts in those cases determined that use of employment seniority in layoffs, even though it may perpetuate past discrimination and have a grossly unequal effect on minorities and women, is not violative of Title VII based on the assumption that the only remedy available for an unlawful system is "fictional seniority." Such a remedy, according to those courts, is preferential treatment proscribed by § 703(j). This would appear to be circular reasoning, for if the courts had first decided the substantive issue and determined that utilization of seniority to allocate jobs in a layoff situation is an unlawful employment practice, they would then have had "wide discretion" in ordering a remedy which would grant the "most complete relief possible"[100] to female and minority employees. "Fictional seniority," if used as a remedy for past illegal discrimination, would not then constitute "preferential treatment." Yet, the courts, in erroneously assuming that "fictional seniority" is the only remedy, allowed their abhorrence of such

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[95] United States v. Local 38, IBEW, 428 F.2d 144, 149-50 (6th Cir. 1970).

[96] *Cf.* Slate, *Preferential Relief in Employment Discrimination Cases*, 5 LOYOLA L.J. 315 (1974).

[97] Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974).

[98] Watkins v. Steel Workers Local 2369, 44 U.S.L.W. 2045 (5th Cir. July 16, 1975).

[99] Jersey Cent. Power & Light Co. v. IBEW, 508 F.2d 687 (3d Cir. 1975).

[100] 118 CONG. REC. 7168, *supra* note 80.

relief to determine their decision of the substantive issue. They never reached the point of examining the full scope of remedies available to rectify the discriminatory acts.

B. *Alternative Remedies*

1. *Employer Responsibility*

An appropriate remedy, as discussed above, must be one which will both undo the results of past discrimination and prevent future inequities.[101] In selecting the type of relief to be granted, it is essential not to view the problem simply as one of balancing the competing interests of minorities and women against those of white male workers. Such an analysis fails to include the employer, who must assume the ultimate responsibility for the initial discrimination in hiring. The erroneous use of the proverbial balancing test in this situation not only distorts the legal problem but also limits the scope of remedies by ignoring the possibility of damages from the employer as an appropriate remedy.[102]

Damages in lump sum payments could be awarded to the members of the discriminated class at the rate they would now be earning but for the discrimination.[103] This would place the impact of the burden of protecting the equal opportunity rights of women and minorities on the employer, rather than on other workers. In a very recent decision, the Supreme Court reemphasized the remedy of awarding damages to victims of unlaw-

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[101] *See* Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038, 1047 (3d Cir.), *vacated and remanded on other grounds*, 414 U.S. 970 (1973), *reinstated*, 497 F.2d 403 (3d Cir. 1974).

[102] Alfred Blumrosen, former Director of Compliance for the Equal Employment Opportunity Commission, has made such a suggestion:

> New attention to the damage remedy in seniority cases is now required because Title VII . . . creates a federal cause of action for employment discrimination. Under the Title, the federal courts may award all appropriate relief, including both specific performance and damages.
>
> The ideas of employer responsibilities and the damage remedy converge with the traditional idea of reform of seniority systems to suggest a comprehensive remedy for discriminatory seniority arrangements. This remedy would include both reform of the system to increase minority employment opportunities and a species of damage remedy to cover those losses which may not appropriately be dealt with by specific performance.

BLUMROSEN, *supra* note 83, at 159-60.

[103] Cooper & Sobol, *supra* note 45, at 1679; Note, *supra* note 83, at 1281-82.

ful employment discrimination in order to make them "whole" under Title VII.[104] Once there has been a finding of unlawful discrimination, wrote the Court, "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[105]

It has been suggested that employers, with the cooperation of the government and labor, could develop a special fund to assist displaced workers and reimburse for loss of earnings "arising out of the need to meet current demands of social justice."[106] This "Equal Opportunity Fund" could be modeled on the "automation funds" which were accumulated to assist workers who were displaced by new automated equipment.[107]

Furthermore, where layoffs will have a disparate effect on women and blacks due to the use of seniority systems, the burden should be on the employer to avoid layoffs if at all possible. The Equal Employment Opportunity Commission is considering proposals that employers should be required to show that there is a business necessity requiring layoffs if those layoffs would have an adverse impact on minorities and women.[108] Use of the business necessity test would place a burden upon the employer to show that there is no reasonable alternative to such layoffs. Some cost-cutting measures which an employer might use to avoid layoffs include eliminating overtime or shutting down plants one day a week without cutting salaries.[109] Employers might also encourage "early-out" retirement programs on a voluntary basis. Use of such "inverse seniority" would allow older workers near the retirement age to retire with the benefit of pensions and Social Security.[110]

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[104] Albemarle Paper Co. v. Moody, 95 S. Ct. 2362 (1975).

[105] *Id.* at 2373.

[106] BLUMROSEN, *supra* note 83, at 208-11.

[107] *Id.* at 209.

[108] The Equal Employment Opportunity Commission is currently developing guidelines for employers as to what action they should take before beginning layoffs which will have a differential impact on women and minorities. 88 L.R.R. 216 (1975).

[109] Hyatt, *The Recession and Jobs*, 1 WOMEN'S L. REP. 215, 216 (1975) [hereinafter cited as Hyatt].

2. *Date-of-Application Seniority*

Retroactive seniority has been recognized by the courts[111] as a necessary element of compensation for *individuals* who have applied for but been illegally denied employment on the basis of race or sex since the effective date of Title VII.[112] The seniority is awarded as of the date of the prior application.[113] In addition, unit or job seniority has been held to date from the time an employee qualified for the job even though that person had not made an application for a transfer to the white-only unit. In so holding, one court recognized that some employees, being aware of the prevailing discriminatory hiring practice, had not bothered to apply.[114] A few may have had "the courage to fight 'the system', but it is equally certain that others must have been intimidated and discouraged by [the company's] discriminatory practices."[115]

The courts have granted retroactive seniority to women and minorities but only if they had applied prior to the elimination of the discriminatory hiring practice. For instance, the Third Circuit in *Jurinko* v. *Edwin L. Wiegand Co.*[116] granted retroactive seniority to women who applied for jobs but had been refused employment solely because of their sex. The seniority was to attach as of the date of the unlawful practice, *i.e.*, the date the women were denied the positions. In so doing, the court recognized its "duty to grant relief which so far as possible eliminates effects of the past as well as bars like discrimination in the future."[117] Yet, in *Jersey Central Power & Light*

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[110] *Id. See* Cooper & Sobol, *supra* note 45, at 1636. One agricultural manufacturer, Deere & Co., has already worked out such a plan on a voluntary basis with some success. TIME, Feb. 3, 1975, at 58.

[111] Bowe v. Colgate-Palmolive Co., 489 F.2d 896 (7th Cir. 1973); Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3d Cir.), *vacated and remanded on other grounds*, 414 U.S. 970 (1973), *reinstated*, 497 F.2d 403 (3d Cir. 1974); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); United States v. Lee Way Motor Freight, Inc., 7 E.P.D. ¶ 9066 (W.D. Okla. 1973); Hester v. Southern Ry., 349 F. Supp. 812 (W.D. Ga. 1972), *vacated and remanded on other grounds*, 497 F.2d 1374 (5th Cir. 1974).

[112] Title VII became effective on July 2, 1975. *See* § 716 of Pub. L. 88-352.

[113] United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

[114] Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973).

[115] *Id.* at 451.

[116] 477 F.2d 1038 (3d Cir.), *vacated and remanded on other grounds*, 414 U.S. 970 (1973), *reinstated*, 497 F.2d 403 (3d Cir. 1974).

[117] *Id.* at 1046.

Co.,[118] the same court found that the granting of fictional seniority as relief from a seniority system perpetuating past discrimination would constitute "preferential treatment" banned by Title VII.

The Sixth Circuit, in *Meadows v. Ford Motor Co.*,[119] was hesitant to grant retroactive competitive seniority[120] to women who had proven hiring discrimination because of the possible adverse effect such relief would have on other workers. However, the court did instruct the district court that retroactive seniority is not proscribed by the § 703(j) prohibition against preferential treatment. This issue is now before the Supreme Court in *Franks v. Bowman Transportation Co.*[121] In *Franks*, the Fifth Circuit refused to grant date-of-application seniority even though it found that the particular individuals before it had been personally denied a job due to their race. Such a holding precludes full remedy for an injury inflicted after the effective date of Title VII.[122]

3. *Modification of Collective Bargaining Agreements*

Where mass layoffs have occurred or are imminent and the use of the "last hired, first fired" policy will have a disproportionately adverse effect on the minority employees recently hired pursuant to affirmative action, the burden of a remedy may have to shift somewhat to workers who have not suffered discrimination. Therefore, even though the collective bargaining agreement may mandate the use of seniority systems in

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[118] 508 F.2d 687 (3d Cir. 1974).

[119] 510 F.2d 939 (6th Cir. 1975).

[120] Competitive seniority systems determine the relations of employees to each other and establish an internal ranking among union members in the event of promotion, transfer, "bumps," or layoffs. Benefit seniority, however, is used to determine vacations, pensions, parking privileges, and other such interests. Since the latter involved only the relation between the employee and the employer, the court did not hesitate to grant retroactive benefit seniority. *Id.* at 949.

[121] 495 F.2d 398 (5th Cir. 1974), *cert. granted*, 420 U.S. 989 (1975).

[122] The brief for EEOC as amicus curiae at 12, Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975) reasons that:

> . . . if seniority is not adjusted to the date these women would have been hired, they will continuously suffer from less job security and poorer upward mobility than those men who filed applications at the same time and were hired, merely because they were prevented from commencing employment and accumulating seniority by Ford's discriminatory weight requirements.

layoffs, the courts may modify these agreements to prevent the continuing effects of past discrimination.[123] The interests of workers in seniority are "not indefeasibly vested rights but mere expectations derived from a bargaining agreement subject to modification."[124] Although circumvention of the seniority system during layoffs may frustrate the expectations of white male employees,

> . . . Title VII guarantees that all employees are entitled to the same expectations regardless of "race, color, religion, sex or national origin." Where some employees now have lower expectations than their coworkers because of the influence of one of these forbidden factors, they are entitled to have their expectations raised even if the expectations of others must be lowered in order to achieve the statutorily mandated equality of opportunity.[125]

The fact is that where there has been a history of discriminatory hiring against women and minorities, the seniority expectations of white male workers are grounded in that unlawful discrimination. When seniority provisions are modified, the "white employees will fare no worse as a result of the proposed remedies than they would had [the employer] hired women and blacks on a fair basis throughout the years."[126] After all, white male employees have benefitted from the discrimination because more jobs have been available for them in the past due to discriminatory policies. It is necessary for them to understand that, in essence, they "suffer no inequity by being deprived only of that which they received as a consequence of discrimination."[127] If relief under Title VII is denied simply because white males "who have not suffered discrimination will be unhappy, then there is little hope of correcting the

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[123] Vogler v. McCarty, Inc., 451 F.2d 1236 (5th Cir. 1971); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); Local 53, Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

[124] Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 520 (E.D. Va. 1968); *cf.* Humphrey v. Moore, 375 U.S. 335 (1964).

[125] Robinson v. Lorillard Corp., 444 F.2d 791, 800 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971).

[126] Watkins v. Steel Workers Local 2369, 369 F. Supp. 1221, 1230 n.7 (E.D. La. 1974), *rev'd*, 44 U.S.L.W. 2045 (5th Cir. July 16, 1975).

[127] United States v. Roadway Express, Inc., 457 F.2d 854, 856 (6th Cir. 1972).

wrongs to which the Act is directed."[128] It must also be recognized that the unions themselves have often discriminated against women and blacks, and that they too have played an important role in excluding these groups from employment or, at least, in relegating them to inferior jobs.[129] Whether or not the union has so discriminated in the past ought to be considered by the courts in shaping a remedy. This is not to say that the reaction of workers to modification of bargaining agreements merits no consideration. It is simply necessary to point out that those workers who are not former victims of discrimination must recognize that they too share in the responsibility of rectifying past inequities which continue to affect those who have been victims of discrimination.

Perhaps the most equitable and acceptable method of allocating jobs when an employer has no other alternative for cutting costs is a forced worksharing plan. This kind of plan is not a new concept. Ninety percent of the collective bargaining agreements in the apparel industries have worksharing clauses in lieu of clauses providing for layoff procedures.[130] Such plans reduce the work week or adopt a rotational system of worksharing.[131] Some unions, however, argue that the "share-the-work" principle is simply shared misery and that short work weeks provide little more remuneration than state unemployment benefits augmented by negotiated supplementary benefits.[132] The AFL-CIO has suggested a 35-hour work week to help preserve the number of jobs.[133] Costs may also be reduced by eliminating paid holidays.

Where worksharing plans are unacceptable and layoffs are unavoidable, one solution which would insure the continued representation of minorities and women in the work force is to

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[128] United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971).

[129] *Cf.* Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); United States v. Int'l Longshoreman's Ass'n, 460 F.2d 497 (4th Cir. 1972), *cert. denied*, 409 U.S. 1007 (1972); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971). *See also* Note, *The Civil Rights Act of 1964: Racial Discrimination by Labor Unions*, 41 ST. JOHN'S L. REV. 59 (1966).

[130] SLICHTER, *supra* note 8, at 104-54.

[131] *Id.* at 152.

[132] *Id.*

[133] Hyatt, *supra* note 109, at 217.

apportion layoffs among white men, minorities, and women on the basis of the proportion of each group within the work force of that employer.[134] Individuals in each group could be laid off according to their seniority in that group, thus retaining an objective standard which precludes an employer from making arbitrary decisions as to who goes and who stays. In this way, the burden of present adverse conditions is placed on all in an "aliquot fashion," and the proportion of minority and female employees in the work force will be protected.[135]

4. *Experimental Decrees*

There may be many more possibilities which would be more equitable and effective. Each possibility should be examined carefully with the goal of developing an alternative to discriminatory seniority systems which is least harmful to the employment interests of all workers. This goal may be best met by the courts through the issuance of experimental decrees[136]

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[134] Loy v. City of Cleveland, 8 F.E.P. Cas. 614 (N.D. Ohio, filed March 29, 1974), *dismissed as moot*, 8 F.E.P. Cas. 617 (N.D. Ohio 1974). *See* N.Y. Times, March 9, 1975, § 3, at 1, col. 1; *id.*, § 1, at 1, col. 1.

[135] This alternative would not violate § 703(j) which prohibits absolute quotas based on race or sex intended to reflect the percentage of each in the population at large. Where there are present effects of past discrimination being perpetuated and the courts have found an employment practice to be unlawful, numerical goals have been upheld by eight circuits as a legitimate remedy. *See* United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408 (2d Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir. 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971); Local 53, Heat and Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969). *See Civil Rights, supra* note 23, at 400. When Congress amended Title VII in 1972, it specifically rejected proposals which would have prohibited this form of remedy. 118 CONG. REC. 1662-76 (1972). *See also Recent Decisions, supra* note 45, at 968, n.149.

[136] *See* Sedler, *Conditional, Experimental and Substitutional Relief*, 16 RUTGERS L. REV. 639, 716 (1962) [hereinafter cited as Sedler]. The benefits of the use of experimental decrees are more clearly expounded by Professor Sedler:

> Practical considerations may militate against giving full or immediate protection to the plaintiff's interest. When a court attempts to make this adjustment, it is said that it is administering experimental relief—it attempts to secure the interests of both parties, realizing that it may have to make further modifications if the results do not accord with the prediction; in some instances the results cannot be fully predicted at the time of the decree. Experimental relief benefits both the plaintiff and the defendant. It enables

similar to that issued by the Supreme Court in *Brown v. Board of Education*,[137] which ordered desegregation of schools "with all deliberate speed." Such a decree is flexible, declaring what must or must not be done but reserving the means of performance to the defendant's discretion after consultation with the plaintiff. By issuing experimental decrees,

> the court attempts to secure to both parties whatever benefits they are entitled to receive under a particular transaction. The decrees in these cases are referred to as experimental because of their underlying purpose—to secure benefits to one party without destroying the legitimate interests of the other. In some instances the decree may also have to be modified if the anticipated results are not achieved.[138]

Experimental decrees place the responsibility of developing an acceptable, viable remedy upon the parties involved—women, minorities, unions, and employers. An administrator or master could be appointed to guide the negotiations in the shaping of a remedy and to monitor its implementation.[139]

The advantages of the experimental decree in this type of case are obvious. Instead of forcing upon the parties a remedy which the court may have developed too quickly and without the benefit of expertise in the field of labor relations, this kind of decree compels the parties themselves to sit down together and work out their differences. This approach avoids creating resentment and possible labor strife, for the remedy recommended by the parties involved will be the one most readily accepted and least resisted by them.

> the defendant to satisfy the duty the court finds owing, but at the same time to minimize the adverse effect on his interests. It enables the plaintiff to obtain some measure of relief, when otherwise any relief might have to be refused due to hardship, impracticability or the like.

Id.

[137] 349 U.S. 294, 300 (1954):

> In fashioning and effectuating the decrees the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.

[138] Sedler, *supra* note 136, at 725.

[139] *See* Harris, *The Title VII Administrator: A Case Study in Judicial Flexibility*, 70 CORNELL L. REV. 53 (1974).

CONCLUSION

The most desirable answer to the entire problem of conflicts between seniority systems and affirmative action plans is to prevent the conflicts from the beginning at the bargaining table.[140] An agreement should be forged which includes a means of allocating jobs during layoffs other than by length of service or other criteria which result in the continuation of past discrimination. Once the courts have held that employment seniority is not a bona fide seniority system when it is superimposed upon past discriminatory hiring practices, it is likely that employers and unions will be more willing and sincere in their efforts to reach an agreement acceptable to minority and women employees. Another method of avoiding the problem of mass layoffs of female and minority employees is for employers to develop affirmative action plans insuring the assignment, training, and promotion of blacks and women to job classifications less sensitive to fluctuating economic conditions and thus less susceptible to layoffs.[141]

It has also been suggested that the procedural structure set forth in the National Labor Relations Act for dealing with certification and unfair labor practice cases could be used to prevent discrimination before it occurs or is brought to court.[142] Lastly, arbitration might be utilized to deal with seniority systems proven to have a discriminatory impact. The advantage of these approaches is the preservation of labor peace by encouraging negotiation and compromise instead of forcing the imposition of a decision. Even if the affected classes do not get satisfaction from arbitration, the courts can and will consider any claims under Title VII in a trial de novo.[143]

When such a case is brought to court, the proviso of § 703(h) exempting bona fide seniority systems should be narrowly construed to extend only to those systems which are not

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[140] Kovarsky, *Current Remedies for Discriminatory Effects of Seniority Agreements*, 24 VAND. L. REV. 683, 696 (1971). *See also* Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications*, 47 TEX. L. REV. 1039 (1969).

[141] Krislov, Adams & Lairson, *Plantwide Seniority, Black Employment and Employment Affirmative Action*, 26 IND. & LABOR REL. REV. 686 (1972-73).

[142] *See* Comment, *supra* note 86.

[143] The submission of a claim to the NLRB does not preclude its later submission to the courts under Title VII. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

the result of an intent to discriminate. That is, a seniority system should be considered bona fide only if it has not been engrafted upon past discriminatory hiring practices. To hold otherwise, where women and minorities have been deprived of an opportunity to accumulate working time equal to that of white males, would mean that the white men who enjoy preferred positions over women and blacks would forever be ahead of women and minorities, who would once again go to the "foot of the line,"[144] thus rendering the goal of equal employment for all wholly illusory, and Title VII little more than a paper fantasy.

Rebecca Westerfield

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[144] Rowe v. General Motors Corp., 457 F.2d 348, 358 (5th Cir. 1972).