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SENIORITY LAYOFFS: THE BITTER FRUITS OF VICTORY

ANDREA KRILL*

CHORUS: *That which was expected has not been accomplished, for that which was unexpected has god found the way.*

From *Andromache* by
Euripides

INTRODUCTION

IT IS UNDENIABLE that the inertia of the civil rights laws has speeded the progress of equal employment opportunity. Minorities and women at last have enjoyed some measure of increased job entries and upward mobility. The current recession threatens to reverse this process.

Seniority is the ambrosia of the working classes conferring a kind of employment immortality in return for their efforts. Those who have drunk deeply from the cup are secure, for their longer service renders them impervious to the furies of economic change. In many instances, those who have merely whetted their thirst are the more recently hired women and minorities. Seniority offers them only partial protection; when a slowing economy necessitates layoffs, they must be cast out according to the sacred "last hired, first fired" rule.

Absent divine intervention or judicial relief, it would appear that the vision of equal opportunity has turned into the myth of Sisyphus, destined to ascend with economic upswings and then descend during recessions. Those attempting to solve this dilemma should posit two questions. First, how much of this injustice should be allocated to discriminatory employment practices, and what portion reflects broader economic repercussions? Once this is determined, what remedies should be fashioned to alleviate the inequity? Despite the lack of unanimity of answers to these questions, few would deny that the key lies in the history of the decade-long conflict between the revered traditions of seniority, and the equally respected goals of the civil rights laws.

The framers of Title VII did not realize that they had opened a Pandora's box in their attempts to legislate the subject of seniority. It was left to the courts to resolve conflicting expectations while trying to maintain a sense of form and logic in their decisions. Therefore, it seems appropriate to view the issue in terms of a classical drama. The judicial arena becomes the stage

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where the heroic figures of Seniority Protection and Equal Opportunity engage in a continuous battle. This characterization of the legal question will not be used to distract the reader from the material. Rather, it serves as a reminder that the seniority layoff cases have resulted from the court's attempts to harmonize two equally important national policies.

I. THE PROTAGONIST: SENIORITY

A. Definitions

The word "seniority" has a variety of connotations depending on which viewpoint you select: the emotional, the practical, or the legal. The more colorful phrases sympathetic to labor are the "sacred cow",¹ and "the raison d'être for the union's existence".² Attempts to disturb seniority as a symbol of job protection are often considered an outright "castration" of labor's rights.³ A second perspective views seniority in functional terms as it operates within the American economy.

Seniority has become a widespread and fundamental concept in America not because employers necessarily need it or want it, but because workers view it as tantamount to a property right. In a credit-oriented economic system where a worker's regular flow of pay checks may well be his only significant asset, there is much truth in organized labor's position that the only security for the industrial worker, whether man or woman, is in earned seniority.⁴

The legal analysis of seniority rejects the emotional and sociological definitions. Seniority is dismissed as an unvested,⁵ non-property right that is strictly contractual and subject to alteration by statutes and parties to the agreement.⁶ The refusal to regard seniority as a property right is aptly explained by Professor Benjamin Aaron, who compared it with pension benefits under the collective bargaining agreement.⁷ Pension rights were described

¹ Fine, *Plant Seniority and Minority Employees: Title VII's Effect on Layoffs*, 47 U. COLO. L. REV. 73 (1975) [hereinafter cited as Fine].

² Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOW. L.J. 1, 5 (1967) [hereinafter cited as Gould, *Employment Security*].

³ Youngdahl, *How Can Seniority, Anti-Discrimination and Affirmative Action Be Reconciled in a Layoff Economy: The Union Viewpoint*, 28 N.Y.U. CONFERENCE ON LABOR 297, 302 (1976) [hereinafter cited as Youngdahl].

⁴ Friedman & Katz, *Retroactive Seniority for the Indentifiable Victim Under Title VII—Must Last Hired, First Fired Give Way*, 28 N.Y.U. CONFERENCE ON LABOR 263, 280 (1976) [hereinafter cited as Friedman & Katz].

⁵ Gould, *Seniority and the Black Worker: Reflections on Quarles and its Implications*, 47 TEXAS L. REV. 1039, 1070 n.119 (1969) [hereinafter cited as Gould, *Seniority and the Black Worker*].

⁶ *Id.* at 1039 n.2.

⁷ Aaron, *Reflections of the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1332, 1341 (1962) [hereinafter cited as Aaron].

as vested legal benefits that would survive a change in the contract. With this he contrasted

[A] laid-off employee with specified recall rights under a collective bargaining agreement. Those rights are not vested in the sense that they cannot be changed without his consent; the union can in good faith negotiate an agreement which would wipe them out completely.⁸

It is interesting to note that Professor Aaron prophesied the extinction of the concept of seniority due to the ominous potential of increasing technology.⁹ How could he possibly have foreseen that seniority would survive the changes in industrial methods only to meet its nemesis in forces dedicated to the protection of individual rights and federal Constitutional guarantees?

Perhaps this carefully-guarded right is best understood by presenting an unembellished statement of how it operates.

Seniority is generally defined as the principle whereby employees are granted preference in certain phases of their employment based on the relative length of time they have been employed by the company or within a particular department, occupation, or line of progression within the company.¹⁰

This definition refers to different *phases* of employment, and the *different sources* from which seniority may be computed. These two aspects of seniority provisions must be kept distinct, for they later become significant considerations in decisions and remedies formulated to combat discriminatory seniority systems.

B. *Types of Seniority*

It has been said that "seniority provisions assume an almost infinite variety, and are constantly being altered and reinterpreted to meet changing or unforeseen situations."¹¹ The "sources" of seniority are the units for measurement of the benefits awarded under the contract. This can be determined by the length of employment in an entire plant, a department, a progression line, or even a particular job.¹² The initial civil rights attacks focused on blatant abuses of departmental, line of progression, and job seniority systems.

⁸ *Id.* at 1541.

⁹ *Id.* at 1563.

¹⁰ Comment, *Artificial Seniority for Minorities as a Remedy for a Past Bias vs. Seniority Rights of Non-minorities*, 9 U. SAN FRANCISCO L. REV. 344, 347 n. 8 (1974) [hereinafter cited as Comment, *Artificial Seniority*].

¹¹ Aaron, *supra* note 7, at 1534.

¹² See Note, *Title VII Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1263 (1967) [hereinafter cited as Note, *The Incumbent Negro*]; Survey, *The Survival of "Last Hired, First Fired" Under Title VII and Section 1981*, 6 LOY.-CHI. L. J. 386, 388 (1975) [hereinafter cited as Note, *Survival*].

"Phases" of seniority refers to the contractual benefits earned through the seniority systems. These benefits are usually divided into two categories: competitive benefits and fringe benefits.¹³ The major competitive benefits involve promotions, transfers, and layoffs. Others affect shift preference, vacation-scheduling prerogatives, "bumping", training, and overtime.¹⁴ Typical examples of "benefit seniority" are the fringe benefits often given by employers such as hospitalization, sickness and accident benefits, and pensions. These distinctions should be reconsidered when examining the proper scope of suggested remedies to alleviate disproportionate layoffs.

C. Seniority Patterns in Union Contracts

Since not all employment relationships are governed by bargaining agreements, the only objective evaluation of seniority's role must be obtained from an examination of the union contract. The Bureau of National Affairs provides a helpful breakdown of contract patterns. Of its "Basic Patterns Sample", 92 percent of the contracts contain some type of seniority provision.¹⁵ Of these contracts, an undesignated fraction of five percent compute seniority with some consideration given to actual job qualifications.¹⁶ Thus the majority of provisions reflect only time worked or continuous service. This miniscule reflection of job ability in seniority calculations is precisely why pressure is increasing to abandon the use of seniority in determining layoffs. "Seniority is not determinative of job capability, and therefore has no necessary relation to the order of layoffs."¹⁷

The "non-job-relatedness" attack is buttressed by statistics. Of the 90 percent of contracts that contain layoff provisions, 85 percent list seniority as a factor in the mechanics of those layoff provisions. Seniority is the sole factor in layoff procedures in 42 percent of the contracts, the determining factor in 30 percent, and of secondary consideration in 11 percent. The percentages of seniority as a layoff factor in manufacturing industries generally exceed the overall average while those of non-manufacturing industries fall below the overall average.¹⁸ No generalizations can be made as to the reasons for this difference, especially since there is a wide range of variance within each category. What is significant is the extent to which seniority, as a consideration in layoffs, can vary from four percent in the construction

¹³ Stacy, *Title VII Seniority Remedies in a Time of Economic Turndown*, 28 VAND. L. REV. 487, 489-90 (1975) [hereinafter cited as Stacy]; Note, *Survival*, *supra* note 12, at 388.

¹⁴ Stacy, *supra* note 13, at 490.

¹⁵ 2 BNA COLL. BARG. NEG. & CONTS. 75:1 (1975).

¹⁶ *Id.*

¹⁷ Note, 43 GEO. WASH. L. REV. 947, 968 (1975) [hereinafter cited as Note, 43 GEO. WASH. L. REV.].

industry to 100 percent in lumber, manufacturing, and utilities industries.¹⁹ The import is clear: seniority is not a monolithic entity that can be viewed in the abstract; its operation can vary according to industry and company. Thus, any attempt to identify discrimination and fashion an appropriate remedy should avoid stereotyping, and deal instead with the case at hand.

D. *Justification or Motivations*

The concept of seniority did not arise during the Industrial Revolution. One author has traced seniority rights to ancient times.²⁰ It is submitted by many that this much-maligned system benefits both labor and management.²¹ Its origins are more closely connected with pressure from the labor force. "Seniority has traditionally been championed by labor rather than management, and has usually been adopted not because the employer thinks it necessary or even helpful, but because of the bargaining strength of the union."²²

The advantages seniority bestows on labor are: (1) the reliability of predicting and protecting future employment positions, especially for older workers; (2) the reduction of managerial discretion in controlling work conditions; (3) an objective guideline for determining labor disputes within the union, and (4) the reduction of opportunity for discrimination due to anti-union bias.²³ By far the most important benefit to employees is the protection seniority provides against losing a job. "More than any other provisions of the collective agreement including union security provisions under existing law, seniority affects the economic security of the individual employee covered by its terms."²⁴

Advantages of seniority for management are balanced and sometimes outweighed by the disadvantages, according to the specific issue at hand. There is little doubt that the reward of seniority protection for an employee's loyalty is an important factor in reducing turnover, limiting the number of labor grievances, and boosting worker morale in general. In some cases, a job advancement based on seniority may result in experienced people being

¹⁹ *Id.* at 75:5.

²⁰ Kovarsky, *Current Remedies for the Discriminatory Effects of Seniority Agreements*, 24 VAND. L. REV. 683, 684 (1971) [hereinafter cited as Kovarsky].

²¹ See, e.g., Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promoting*, 82 HARV. L. REV. 1598, 1604-05 (1969) [hereinafter cited as Cooper & Sobol]; Craft, *Equal Opportunity and Seniority: Trends and Manpower Implications*, 26 LAB. L. J. 750 (1975) [hereinafter cited as Craft]; Kovarsky, *supra* note 20, at 684; Note, *Survival*, *supra* note 12, at 387.

²² Cooper & Sobol, *supra* note 21, at 1604.

²³ See authorities cited note 21 *supra*.

²⁴ Aaron, *supra* note 7, at 1335.

promoted.²⁵ Seniority can be a useful management tool in that it provides a simple solution for implementing plans introduced by labor during negotiations. The disadvantages of seniority may depend on management's perception of it. Some will regard it as a per se invasion of the broad powers of management.²⁶ A more specific managerial objection would be the lack of freedom to allocate and assign work according to ability.²⁷

An unexpected albatross for management has been the repercussions of the last hired, first fired (LIFO) aspect of seniority during layoff periods. The "ethics of queue"²⁸ has caused difficulty both directly and indirectly. The LIFO method of layoff can at times be contrary to management's instinct to retain skilled workers regardless of employment credits.

In layoff situations management would prefer to minimize the retaining, transfers and "bumping" of junior employees implicit in a seniority system by dispensing first with those least qualified to perform the remaining work.²⁹

Although the layoff issue is the most recent ramification of seniority problems for employers, they have already been required to modify seniority arrangements where discrimination was involved. Numerous legal scholars now believe that even affirmative action employers should be pressured into assuming liability for disproportionate layoffs despite the fact that the seniority provisions and the general economy are not within the exclusive control of management.³⁰

E. Seniority Modification—Theories

A Harvard Law Review Note published in 1967 proposed three theories for remedying discriminatory seniority systems.³¹ This creative analysis was adopted in many subsequent court decisions regarding the validity of seniority systems. Since the proposed theories became slogans in the continuing judicial debate concerning seniority, they will be examined at this initial stage of the drama.

The first theory may be characterized as the "status quo" doctrine which "would leave the seniority rights of white workers intact, at least

²⁵ Kovarsky, *supra* note 20, at 684.

²⁶ E.g., Note, *Survival*, *supra* note 12, at 387.

²⁷ Cooper & Sobol, *supra* note 21, at 1604.

²⁸ Craft, *supra* note 21, at 752 n.8.

²⁹ Stacy, *supra* note 13, at 489.

³⁰ See, e.g., Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268 (1969) [hereinafter cited as Blumrosen]; Note, *Title VII and Work Force Reductions*: 8 CONN. L. REV. 159 (1975); Note, *The Problem of Last Hired First Fired: Retroactive Seniority As a Remedy Under Title VII*, 9 GA. L. REV. 611 (1975).

³¹ Note, *The Incumbent Negro*, *supra* note 12, at 1268-69.

where giving current effect to these rights would not involve the direct application of a racial principle."³² In effect, facially neutral seniority systems would be preserved. For example, where a company currently has a policy of job advancement which is devoid of any racial basis, there would be no adjustment required in the comparative seniority rankings, even though minority workers had been discriminated against in the past in matters of promotion and transfers. The only protection afforded by this theory is against future discrimination.

The second theory advanced is the "rightful place" doctrine. This doctrine holds:

that the *continued maintenance* of the relative competitive disadvantage imposed on Negroes by the past operation of a discriminatory system violates Title VII, just as the continued use of the discriminatory rules which created the differential would violate it.³³ (emphasis added.)

This means that adjustments in competitive standing would have to be made only as to future vacancies or bid positions. A good illustration of this approach is the substitution of plant seniority for departmental seniority. This method permits minorities, who have been blocked from entering more desirable departments, to use the length of their employment service when bidding on openings. Although this frees the minority for future upward movement, there is no compensation for past promotions denied.

The third theory is the "freedom now" approach which argues that the "maintenance of the distribution of jobs established by a discriminatory system after Title VII became law constitutes an unlawful employment practice."³⁴ The application of this theory would result in the immediate displacement of white incumbents.³⁵ The "freedom now" theory goes one step beyond the "rightful place" doctrine, in that under the former theory, the aggrieved worker would not have to wait for future vacancies in order to take advantage of the newly computed plant seniority. As soon as it were determined what job was commensurate with the new qualifications, the minority worker could take over that position even though it required the removal of a white incumbent. This remedy awards full compensation to the employee held back by discrimination at the expense of fellow employees who had benefited from company's previous discrimination.

The Harvard Note advocated the use of the rightful place theory where

³² *Id.* at 1268.

³³ *Id.*

³⁴ *Id.* at 1268-69.

³⁵ Comment, *Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB*, 123 U. PA. L. REV. 158, 165 (1974) [hereinafter cited as Comment, *Inevitable Interplay*].

seniority practices were found to be discriminatory.³⁶ With few exceptions, it will be seen that courts have clung tenaciously to this doctrine in forming their remedies. This theory has been successfully applied to promotion and transfer rights, but has encountered vituperative opposition when applied to layoffs. Opponents of the "freedom now" approach have justified their opposition by pointing to the disastrous economic consequences peculiar to the layoff situation.³⁷ There is merit in the "freedom now" approach, but if "crucial economic effect" is to become the banner, then the courts, in all fairness, must consider that effect on minorities and incumbents alike.

II. THE ANTAGONIST: LEGISLATION & DEBATE

A. 42 U.S.C. §1981

Even before the civil rights legislation of the 1960's, Congress had enacted legislation to remedy the effects of racial discrimination. Pursuant to its Thirteenth Amendment power to eliminate the badges and incidents of slavery, Congress enacted a statute comparable in language to Section 1981 as part of the Civil Rights Act of 1866.³⁸ Presently, the statute, as enacted in the 1870 Enforcement Act, provides that:

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.³⁹

Plaintiffs complaining of discriminatory seniority systems have availed themselves of this protection relying on the language protecting the right to make and enforce contracts, and guarantying the equal benefit of all laws for the security of persons and property. Complaints grounded on Section 1981 have been upheld despite attacks on grounds of jurisdiction and substantive conflict with recent civil rights legislation dealing specifically with seniority.

B. *The Economic Arena*

The observation of one author that the history of equal opportunity parallels economic conditions is most convincing.⁴⁰ During the years from 1958 to 1960 the nation experienced a recession compared with the economic

³⁶ Note, *The Incumbent Negro*, *supra* note 12, at 1282.

³⁷ Comment, *Inevitable Interplay*, *supra* note 35, at 167, *citing* *Rowe v. General Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972); *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970).

³⁸ Civil Rights Act, ch. 31, §1, 14 Stat. 27 (1866).

³⁹ 42 U.S.C. §1981 (1974).

⁴⁰ *Id.*, *supra* note 1, at 77.

expansion enjoyed between 1960 and 1964.⁴¹ Perhaps the Equal Employment Opportunity Commission (EEOC) is indeed an economic dream-maker conceived in posterity. One analysis is that "[t]he facts concerning economic inequality apparently belie the American Dream of equal opportunity. Thus, they cannot be ignored by the agencies whose responsibility it is to make that dream a reality."⁴²

The recession of the mid-1970s has cramped both economic expansion and the growth of jobs and employment rights enjoyed by minorities and women.⁴³ After the initial implementation of the 1964 Act, a noted economist postulated that

By far the most powerful factor determining the economic status of Negroes is the overall state of the U.S. economy. A vigorously expanding economy with a steadily tight labor market will rapidly raise the position of the Negro.⁴⁴

A counterpart to that prediction summarizes the present dilemma. "In periods of economic downturn, nondiscrimination alone may not increase minority employment or promote the integration of work forces."⁴⁵ Thus, in balancing the equities of current seniority problems, courts must give consideration to the role that economy has played. This is vital not only for determining culpability, but in assuring the effectiveness of remedies prescribed.

C. *The Passage of the 1964 Act*

The House of Representatives sparked the Promethean fire that was to become Title VII. The relevant language is contained in Section 703(a) of the Civil Rights Act of 1964:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment oppor-

⁴¹ *Id.* at 77-78.

⁴² Jain & Ledvinka, *Economic Inequality and the Concept of Employment Discrimination*, 26 LAB. L. J. 579 (1975) [hereinafter cited as Jain & Ledvinka].

⁴³ Sheeran, *Title VII and Layoffs Under the "Last Hired, First Fired" Seniority Rule: The Preservation of Equal Employment*, 26 CASE W. RES. L. REV. 409, 447 (1976) [hereinafter cited as Sheeran].

⁴⁴ Fine, *supra* note 1, at 77, citing Tobin, *On Improving the Economic Status of the Negro*, DAEDALUS 878-79 (Fall, 1965).

⁴⁵ Comment, *Last Hired, First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544 (1975) [hereinafter cited as Comment, *Last Hired, First Fired*].

tunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.⁴⁶

Section 703(c) of the Act prohibits similar illegal acts by unions in the context of the selection and classification of its membership, and causing or attempting to cause an employer to violate 703(a) prohibitions.

The House Bill was questioned by certain members of the House Judiciary Committee on the grounds that it would require a revision of seniority practices in companies where blacks had encountered discriminatory hiring practices.⁴⁷ This fear was verbalized on the House floor by Representative Dowdy of Texas and was not then contradicted by the sponsors of the bill.⁴⁸ Representative Dowdy attempted to correct the omission of any reference to seniority by proposing an amendment excluding seniority systems from the coverage of the Act. The amendment suffered a peremptory defeat.⁴⁹

The House bill was brought to the Senate floor without the benefit of the committee report.⁵⁰ Senators Clark of Pennsylvania and Case of New Jersey were chosen as the bipartisan captains of Title VII.⁵¹ These two men issued three interpretative memoranda that have since been the source of raging controversy in the never-ending battle to determine legislative intent. The problem is largely due to the fact that Senator Clark introduced the documents into the record on April 8, 1964, when they were accepted without a reading or debate.⁵² All three memoranda attempted to reassure legislators who feared changing seniority structures as the result of the passage of Title VII.

Memorandum One dealt with the prospective effect of Title VII and embodies the rightful place doctrine.

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 non-discriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or once

⁴⁶ 42 U.S.C. §2000e-2(a) (1964). For a summary of the legislative history of the 1964 Act, see Cooper & Sobol, *supra* note 21, at 1608-10.

⁴⁷ Cooper & Sobol, *supra* note 21, at 1608.

⁴⁸ 110 CONG. REC. 2726 (1964).

⁴⁹ *Id.* at 2728.

⁵⁰ Cooper & Sobol, *supra* note 21, at 1609.

⁵¹ *Id.*; Note, *Survival*, *supra* note 12, at 390.

⁵² Cooper & Sobol, *supra* note 21, at 1610.

Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.⁵³

Memorandum Two was in response to questions raised by Senator Dirksen and spoke specifically of the LIFO principle of layoff.

Question: 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 requires they be first fired and the remaining employees are white?

Answer: Seniority rights are in no way affected by the title. 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.⁵⁴

The final Memorandum Three was written by the Justice Department and also addressed itself to the issue of layoff.

Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining 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. . . . It is perfectly clear that when a worker is laid off or denied a chance for promotion because of established seniority rules he is "low man on the totem pole", he is not being discriminated against because of his race.⁵⁵

Thus ends the tripartite "apology" that has eluded a definitive judicial interpretation. Subsequent decisions may well ignore it completely, and the ambiguities that have delighted treatise writers will continue to endure.

The memoranda did not close the curtain on the seniority issue in the 1964 deliberations. On May 26, the Mansfield-Dirksen Amendment was offered, and became the basis for the final form of Title VII.⁵⁶ Unlike the old bill, the new version contained language specifically dealing with seniority as embodied in present Section 703(h).

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . .

⁵³ 110 CONG. REC. 7213 (1964).

⁵⁴ *Id.* at 7217.

⁵⁵ *Id.* at 7207.

⁵⁶ *Id.* at 11,935-36 (1964).
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provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .⁵⁷

This provision along with the rest of the bill in the new Mansfield-Dirksen form became law on July 2, 1964.⁵⁸

The 1964 Civil Rights Act contained Section 703(j) which also applied to seniority issues. Preferential treatment was not to be granted on account of existing number or percentage imbalance.

Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group . . . on account of an imbalance which may exist with respect to the total number or percentage of persons . . . in comparison with the total number or percentage of persons of such race, . . . sex, . . . in any community, state, section, or other area, or in the available work force in any community, state, section, or other area.⁵⁹

Despite this prohibition against preferential treatment, courts have balanced this section with the purposes of the Act to justify remedial quotas in certain situations. Still, Section 703(j) is a much favored defense to attempts to force the apportionment of layoffs.

D. 1971 Senate & House Joint Report

The riddle of legislative history concerning job discrimination is incomplete without mention of a more recent memorandum or report concurrent with the passage of the Equal Opportunity Act of 1972. The import of the statement has been described as a recognition of changing perceptions of the nature of discrimination in employment and an affirmation of an effect-oriented approach.⁶⁰

In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events for the most part due to ill-will. . . .

Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with lines of progression, perpetuation of the present effect of pre-Act discriminatory practices through various institutional devices. . . . In short the problem is one whose resolution in many instances

⁵⁷ 42 U.S.C. §2000e-2(h) (1971).

⁵⁸ 110 CONG. REC. 17,783 (1964).

⁵⁹ 42 U.S.C. §2000e-2(j) (1971).

⁶⁰ Comment, *Layoffs and Title VII: The Conflict Between Seniority and Equal Employment Opportunities*, 1975 WIS. L. REV. 791, 825 [hereinafter cited as Comment, *Layoffs and Title*

requires not only expert assistance, but also the technical perception that the problem exists in the first instance.⁶¹

Thus, Congress came to the realization that employment discrimination involved more problems than first perceived, and that fashioning remedies for disproportionate layoffs would necessarily involve becoming familiar with the many facets of industrial relations including seniority.

III. CASES AND BATTLEGROUNDS

*Of course seniority is literally discriminatory per se against minority employment because of its well-known "last to be hired first to be fired effect". . . . An attempt to establish a statutory violation on the basis of deprivation of seniority which is attributable to minority unemployment, however would be revolutionary as well as industrially chaotic.*⁶²

Comment by W. Gould, former Consultant to the EEOC on seniority problems.

ACT I—*Quarles* (Jan. 4, 1968)

Although layoff was not at issue, *Quarles v. Phillip Morris Inc.*,⁶³ was the first judicial discussion of seniority after the passage of Title VII in 1964.⁶⁴ It is not surprising after the mystery surrounding the impact of Title VII on seniority, that the first problem thrown to the judiciary involved a discriminatory departmental seniority system.

The *Quarles* case arose at Phillip Morris, Inc., a cigarette and tobacco plant that utilized a departmental seniority system. In addition, the company had segregated departments and separate seniority rosters based on race. The use of departmental service as the measure of seniority resulted in one type of inequity. Thus it was possible that the person with the shortest service in one department would be laid off, while someone with less employment service would be retained in another department because he had the good fortune to outrank someone there. This type of seniority determination contains an element of inherent unfairness for all workers, but it is not by itself racially discriminatory. The second practice, that of segregated departments, is blatant discrimination. As the history of the company indicated, the departments open to blacks were the least desirable and the most underpaid positions available. The separate seniority roster exacerbated the problem of funneling blacks into low level jobs. The only opportunity to escape the restraint of this system was to bid on jobs available in white departments,

⁶¹ S. REP. NO. 415, 92nd Cong. 1st Sess. 5 (1971); H.R. REP. NO. 238, 92d Cong., 1st Sess. 8, reprinted in [1971] U.S. CONG. & AD. NEWS 2137, 2143-44.

⁶² Gould, *Employment Security*, *supra* note 2, at 8.

⁶³ 279 F. Supp. 505 (E.D.Va. 1968).

⁶⁴ Gould, *Seniority and the Black Worker*, *supra* note 5, at 1043.

but the price extracted was the loss of all seniority accumulated in the black departments.

Plaintiffs Quarles and Oatney brought the action on behalf of themselves and Negroes as a class who were receiving lower wages than white employees doing comparable work. Before plaintiffs brought their action, the company had made some efforts to comply with Executive Orders prohibiting discrimination by government contractors and "requiring employment and promotion without regard to race."⁶⁵ The court had no difficulty recognizing present discrimination where it resulted from past hiring and promotion violations, but the holding was narrow, both in the designation of the affected class, and the remedy.

Several points were made in the opinion:

(1) Both the union and the employer were joined as defendants, thereby recognizing the discrimination as a joint effort.

(2) The court relied on the "rightful place" analysis to conclude that "a departmental seniority system that has its genesis in racial discrimination is not a bona fide seniority system."⁶⁶

(3) The court looked at the legislative history⁶⁷ of the Act including the Clark Memoranda to conclude:

(a) Title VII applies to departmental seniority despite the fact that express references spoke only of employment seniority.

(b) "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act."

(c) "Congress did not intend to require 'reverse discrimination'; that is the act does not require that Negroes be preferred over white employees who possess employment seniority."⁶⁸

(4) The Court implemented the "rightful place" doctrine by refusing plaintiffs backpay, and instead provided machinery to enable future transfers of the aggrieved class to better paying jobs with a retention of their employment seniority.⁶⁹ The court left undisturbed the use of a non-discriminatory departmental seniority system.

(5) The court refused to consider as members of the aggrieved class

⁶⁵ 279 F. Supp. at 508.

⁶⁶ *Id.* at 517.

⁶⁷ *Id.* at 515-17.

⁶⁸ *Id.* at 516.

⁶⁹ *Id.* at 520-21. <http://ideaexchange.uakron.edu/akronlawreview/vol10/iss2/11>

any persons hired after the date that marked the beginning of the company's nondiscriminatory hiring policy.⁷⁰

In conclusion, Judge Butzner made the first attempt to construe the legislative history of Title VII to effectuate the purposes of the Act. In doing so, he provided some guidelines and much language that would shape future opinions.

ACT II — *Local 189* (July 28, 1969).

The *Local 189, United Papermakers and Paperworkers v. United States*⁷¹ case (hereinafter referred to as the *Local 189*) began as a suit by the United States against Crown Zellerbach Corporation and Paperworkers Local to set aside their job seniority system as inherently discriminatory. At the time of the suit, the Union was divided into two sections: 189 (white) and 189A (black). Prior to this date, Crown had received assurances on two occasions that less drastic measures of reform would be tolerated. In late 1965, Crown received a letter from the Executive Director of the EEOC approving the nondiscriminatory seniority agreement provided that the segregated progression lines were discontinued.⁷² Crown complied with this request, but the result was the mere "tacking" of the Negro lines to the bottom of the white line.⁷³ In February 1967, the Office of Federal Contract Compliance acting under Executive Order 11246 proposed an A+B system of seniority.⁷⁴ This method of seniority computation would combine the employee's job credit below the job vacancy and his total employment credit. The proposal sparked a vote to strike by Local 189. In response to the threat the Government sought an anti-strike injunction and changed its demand to requiring "that mill experience alone become the standard of seniority."⁷⁵

The District Court ordered "the abolition of job seniority in favor of mill seniority"⁷⁶ in all circumstances in which one or more competing employees was hired prior to the time of the merger of the lines of progression (January 16, 1966). At a later point, the court also ordered the merger of Local 189 and Local 189A. The issues before Judge Wisdom in the Court of Appeals were the unlawfulness of the job seniority system, and if so found the "appropriate standards or guideline for identifying the

⁷⁰ *Id.* at 520.

⁷¹ 416 F.2d 980 (5th Cir. 1969), *aff'g* 301 F. Supp. 906 (E.D. La. 1968), *cert. denied*, 397 U.S. 919 (1970).

⁷² 416 F.2d at 984.

⁷³ *Id.*

⁷⁴ *Id.* at 984-85.

⁷⁵ *Id.* at 985.

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⁷⁶ *Id.*, *citing* 301 F. Supp. at 919.

seniority of employees for purposes of promotion or demotion."⁷⁷ The district court decision was affirmed. Refinements of *Quarles* and intervening cases were utilized to form a guideline for seniority modifications.

The significant portions of the appellate decision were:

(1) The judge "in his wisdom" relied heavily on *Quarles*, the Harvard Note, and Section 703(h).⁷⁸

(2) The three theories of the Harvard Note were discussed. Crown Zellerbach Corporation urged the "status quo" doctrine as a defense, but the court chose the "rightful place" theory as more consistent with Title VII and *Quarles*.⁷⁹

(3) The Court introduced a "but for" test as a justification for judicial relief for pre-Act racial classification that "inevitably" resulted in present injustices.

The translation of racial status cannot obscure the hard cold fact that Negroes at Crown's mill will lose promotions which, *but for* their race, they would surely have won. . . . It is not decisive therefore that a seniority system may appear to be neutral on its face if the *inevitable* effect of tying the system to the past is to cut into the employee's present right not to be discriminated against on the ground of race.⁸⁰ (emphasis added)

(4) The court rejected the concept of "fictional seniority" in limiting the scope of its remedy to those employed before the nondiscrimination period began. The rationale for this decision was to prevent the court's remedial powers from exceeding the prohibition on preferential treatment as outlined in Section 703(j):

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. . . . In other words creating fictional employment time for newly hired Negroes would comprise preferential rather than remedial treatment.⁸¹

(5) The court examined the meaning of the word "intent" in Section 703(h)'s definition of bona fide seniority systems. The judge concluded, citing *Quarles*, that non-accidental acts and their results satisfied the requirement of an intention to discriminate on the basis of race.⁸²

⁷⁷ *Id.* at 986.

⁷⁸ *Id.* at 988.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 995.

⁸² *Id.* at 995-96 n.15.

(6) The defense of "business necessity" was limited to methods or procedures affecting safety and efficiency, and such an argument requires substantial proof. In this case, it was no bar to the change in the seniority structure, but the court did uphold some protective measures such as maintaining ability and residency requirements.⁸³

ACT III — *Watkins I: Enter Layoffs* (Jan. 14, 1974)

In keeping with the chronological review of seniority cases the District Court decision in *Watkins v. United Steel Workers, Local 2369*⁸⁴ will be discussed separately as *Watkins I*.

The *Watkins* case began as a class action against United Steelworkers of America. It relied on Title VII and Section 1981 to challenge the use of plant seniority for the purpose of layoff and recalls. The defendant, Continental Can, had been in operation for many years, but had hired only two blacks prior to 1965. Blacks were not hired in substantial numbers until the late 60's and early 70's. A cutback beginning in 1971 eliminated all but two blacks by 1973, and the first 138 persons in line for recall were white. The court agreed with plaintiff's argument that the use of length of service for layoff was discriminatory because blacks were prevented, by the company's white-only hiring policy, from acquiring long years of service. The court found a violation of both statutory prohibitions (*i.e.* Title VII & Section 1981), and deferred the method of modification pending a joint proposal by the parties concerned.

Judge Cassibry dispensed with the argument that legislative history showed an intent to exempt existing seniority agreements (referring especially to Clark Memoranda Two and Three). Instead, he felt it proper to rely more heavily on the widely-accepted interpretations of 703(h) given by Judge Butzner in *Quarles*:

Section 703(h) expressly states the seniority system must be *bona fide*. The purpose of the act is to eliminate racial discrimination in covered employment. Obviously one characteristic of a *bona fide* seniority must be lack of discrimination.⁸⁵

Judge Cassibry applied the *bona fide* test and found a violation in this case, since the past prevention of seniority accumulation was the proximate cause of the disproportionate layoffs.

The court de-emphasized the language of *Local 189*, stating that the Clark Memoranda did not apply to formerly segregated plants. Instead, Judge

⁸³ *Id.* at 989-90.

⁸⁴ 369 F. Supp. 1221 (E.D.La. 1974) *rev'd on other grounds*, 516 F.2d 41 (5th Cir. 1975).

⁸⁵ 369 F. Supp. at 1228, *citing* *Quarles v. Philip Morris Inc.* 279 F. Supp. at 517.

Cassibry stressed that *Local 189* did in fact ignore the Clark statements to allow seniority modification where equal access had been denied.⁸⁶

The issue of "intent" was regarded as irrelevant as the court adhered to the standard set out in *Rowe v. General Motors*.

The *only* justification for standards and procedures which may even inadvertently eliminate or prejudice minority group employees is that such standards or procedures arise from a nondiscriminatory business necessity.⁸⁷

The defense of preferential treatment was likewise dismissed⁸⁸ on the grounds of the holding in *Jones v. Leeway Motor Freight*, which said that "the present correction of past discrimination is not preferential treatment."⁸⁹

The opinion went on to break new ground taking great care to explain what it was not saying as well as what it was affirming. In examining the past immunity of plant seniority to judicial encroachment, the court said, "plant seniority was held to be a racially neutral standard in those cases, not because it is per se valid, but because blacks had not been excluded from the plant . . . and thus had been able to earn plant seniority."⁹⁰ The judge relied on cases dealing with job or departmental seniority⁹¹ and job referral rules⁹² to emerge with a single principle banning the "perpetuation" of effects of past discrimination.

Employment preferences cannot be allocated on the basis of length of service or seniority, when blacks were, by virtue of prior discrimination prevented from accumulating relevant seniority. And this principle applies to invalidate the layoff and recall rules in the case at bar.⁹³

Although Judge Cassibry stated that Section 1981 was not restricted by the legislative history of Title VII, he did admit that the two acts are generally enforced in one proceeding. Furthermore, he regarded it as an

⁸⁶ *Id.* at 1229.

⁸⁷ *Id.* at 1224 n.3, citing *Rowe v. General Motors Corp.*, 457 F.2d 348, 354 (5th Cir. 1972).

⁸⁸ *Id.* at 1230 n.7.

⁸⁹ 431 F.2d 245, 250 (10th Cir. 1970).

⁹⁰ 369 F. Supp. at 1226.

⁹¹ 369 F. Supp. at 1225, citing *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *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, 657-59 (2d Cir. 1971); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971); *United States v. Local 189*, 416 F.2d 980 (5th Cir. 1969); *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

⁹² 369 F. Supp. at 1226, citing *United States v. Sheet Metal Workers*, 416 F.2d 123 (8th Cir. 1969); *EEOC v. Plumbers Local 189*, 311 F. Supp. 468 (S.D. Ohio 1970), vacated on other grounds, 438 F.2d 408 (6th Cir. 1971); *Dobbins v. Electrical Workers, Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968).

⁹³ 369 F. Supp. at 1226.

“undesirable result to construct two separate bodies of substantive law for the enforcement of the two statutes.”⁹⁴

The *Watkins I* decision was truly innovative in the sense that it extended benefits to persons who were not victims of past discrimination. This departure from the narrow view taken in *Local 189* was given three justifications. First, the court saw its temporary quotas as an example of how courts in Title VII cases sometimes benefitted “persons not themselves victims of original discrimination.”⁹⁵ Next, Judge Cassibry cited the affirmative action programs instituted in compliance with Executive Orders.⁹⁶ Thirdly, the judge pointed out that the class remedies awarded in segregated plant cases provided no guarantee that every black, free of the discriminatory advancement restraints, would qualify for the more desirable jobs.⁹⁷

Despite its brave departure from the narrow holdings of past seniority cases, the court was receptive to the participation of labor and management in the fashioning of a remedy. Among the possible suggestions were apportionment, recall with reduced working hours, and lump sum payments coupled with recall priority for blacks remaining on the list.⁹⁸ The judge anticipated that the remedies would frustrate the white incumbents, but stated that this possible disappointment of expectations of white employees was not a sufficient business consideration to block the relief measures now required by law.⁹⁹

Act IV—*The “Waters” Retreat* (Aug. 26, 1974)

After *Watkins I*'s liberal opinion, the Seventh Circuit Court of Appeals dealt a substantial blow to those who would attack a plant seniority scheme on the basis of discriminatory layoff policies.

In *Waters v. Wisconsin Steelworkers*,¹⁰⁰ an Illinois Federal District Court found Title VII and Section 1981 violations in the general LIFO method of layoff “in two amendatory agreements to the collective bargaining contract entered between Wisconsin Steel and Local 21 (the bargaining unit for the bricklayer: at the steelworks) which affected employees recall rights and seniority status.”¹⁰¹ Judge Swygert in the Court of Appeals reversed the decision in part, finding discrimination only as to one plaintiff on the issue of the amendatory agreement.

⁹⁴ *Id.* at 1230.

⁹⁵ *Id.* at 1231.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1231-32.

⁹⁸ *Id.* at 1232.

⁹⁹ *Id.* at 1232 n.8.

¹⁰⁰ 502 F.2d 1309 (7th Cir. 1974).

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¹⁰¹ *Id.* at 1312-13.

The suit was brought by two journeymen bricklayers, Waters and Samuels. Named as defendants were Wisconsin Steel Works and United Order of American Bricklayers and Stone Masons, Local 21. The appeals court agreed with the lower court's finding that "Wisconsin Steel engaged in racially discriminatory hiring policies with respect to the position of bricklayer prior to the enactment of Title VII."¹⁰² Despite this concession, the court went on to decide that the plant seniority system was racially neutral, and that layoffs pursuant to that scheme did not violate Title VII or 42 U.S.C. §1981.

We are of the view that Wisconsin Steel's employment seniority system embodying the "last hired, first fired" principle of seniority is not of itself racially discriminatory or does it have the effect of perpetuating prior racial discrimination in violation of the strictures of Title VII.¹⁰³

The court's rationale was a retreat to the cases and reasoning set forth in the pre-*Watkins* cases.

The *Waters* court referred to the Clark Memoranda to conclude that "the legislative history of Title VII [is] supportive of the claim that an employment seniority system is a 'bona fide' seniority system under the act."¹⁰⁴ Judge Swygert also relied on *Quarles* and *Local 189* in rejecting "fictional seniority" as preferential¹⁰⁵ and speaking instead of the "earned expectations of long service employees" that distinguished employment seniority from job or department seniority.¹⁰⁶ 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.¹⁰⁷ Despite this concern for the unfairness to white incumbents, the Judge did find that the Local 21 as a signatory to the contract was jointly liable for a discriminatory amendment reinstating recall rights to three white bricklayers.¹⁰⁸ Unlike the layoff provisions, the special amendment could not meet the test of business necessity.¹⁰⁹

The court anticipated criticism of the conservative balance struck between claims of discrimination and charges of preferential treatment.

We recognize that it is a fine line we draw between plaintiffs' claim of discrimination and defendants' counter-charge of reverse discrimination.¹¹⁰

¹⁰² *Id.* at 1316.

¹⁰³ *Id.* at 1318.

¹⁰⁴ *Id.* at 1318-19.

¹⁰⁵ *Id.* at 1319.

¹⁰⁶ *Id.* at 1320.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1320-21.

¹⁰⁹ *Id.* at 1321.

¹¹⁰ *Id.* at 1320.

Thus, on the layoff issue, the court viewed the company's position as "a racially precarious position—indeed at the brink of present discrimination."¹¹¹ That vague boundary was crossed only by the restoration of contract seniority to whites where it actually prejudiced the rights of black employees who had superior recall rights prior to the amendment.

Act V—*Jersey Central*

The case of *Jersey Central Power & Light Co. v. IBEW, Local Unions*¹¹² is certainly unique in its origins. Even more significant is that the unusual fact situation gave it the chance to articulate the true nature of the conflict underlying all seniority cases, that is, the right of the Union to bargain collectively for terms of employment guaranteed under the National Labor Relations Act¹¹³ versus the duty of company management to comply with Civil Rights laws to end discrimination.

Jersey Central Power and Light Co. is a large public utility. As of June 29, 1974 it employed 3,859 employees, approximately two-thirds of whom were represented by local and international unions. As a result of charges filed with the EEOC in 1972, a conciliation agreement was signed in January 1974, effective from December 1973 through December 1977. The agreement's main purpose as stated in several sections was to provide improved promotion and transfer opportunities for minorities and females in addition to establishing a five-year affirmative action program for that same group.¹¹⁴

Due to economic considerations, in July 1974 the company announced a layoff pursuant to its plant-wide seniority system. In August, an arbitrator found this to be in compliance with the non-discrimination clause in the collective bargaining contract. At the same time, the company instituted a declaratory judgment action to resolve the possible conflict between the union contract and the purposes of the conciliation agreement. The District Court of New Jersey construed the seniority provisions as a frustration of the conciliation agreement and ordered proportionate layoffs.

In vacating the lower court's decision, Judge Garth agreed with the District Court's contractual approach, but found the conclusions based on such arguments clearly erroneous. The court first decided that there was neither an express nor implied conflict in the two agreements.¹¹⁵ To rebut the argument of express conflicts, the court noted the silence of the concilia-

¹¹¹ *Id.* at 1321.

¹¹² 508 F.2d 687 (3d Cir. 1975).

¹¹³ 29 U.S.C. §151-68 (1959).

¹¹⁴ 508 F.2d at 694.

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¹¹⁵ *Id.* at 704.

tion agreement on the issue of seniority and layoff, thus constituting a relinquishment of that issue to the union contract.¹¹⁶ The language supporting this was the reference to new hires in Section III, Paragraph 9 of the conciliation agreement, and Paragraph 1 of the affirmative action program.¹¹⁷ Furthermore, the recruitment and hiring section provided that:

The wages, benefits, other conditions of employment and seniority date of such employee shall be determined in accordance with the provisions of the Collective Bargaining Agreement.¹¹⁸

Finally, a promotion and transfer section specifically stated that "vacancies occasioned by layoff . . . shall not be considered as vacancies."¹¹⁹ The omission of language on layoffs and emphasis on new hires also defeated the EEOC's argument of implied contract.¹²⁰

The court rejected *Watkins*'s statement of legislative history and sided instead with the interpretations given in *Quarles* and *Local 189*.¹²¹

Congress did not intend the chaotic consequences that would result from declaring unlawful all seniority systems which may disadvantage females and minority group persons, . . .¹²²

The court went on to say that:

Whether we adopt the *Watkins* or *Waters* interpretation of legislative history, we nevertheless conclude that public policy does not proscribe seniority provisions such as those at issue here.¹²³

Judge Garth spent considerable time on evidentiary consideration yet refused to allow for the probative value of evidence of past discrimination in this case.

We believe that Congress intended to bar proof of the "perpetuating" effect of a plant-wide seniority system as it regarded such systems as "bona fide."¹²⁴

¹¹⁶ *Id.* at 701.

¹¹⁷ *Id.* Section III, paragraph 9 of the conciliation agreement reads in pertinent part:
Respondent Company shall make a reasonable effort to recruit minorities and females into those craft areas where such jobs are to be filled by new hires, where they have heretofore been underutilized or not employed. To this end, Respondent Company agrees that in each instance where a job is not to be filled from within, pursuant to the Collective Bargaining Agreement and practices thereunder, reasonable efforts will be made to secure a minority or female as outlined in paragraph 1 of the Affirmative Action portion of this Agreement.

¹¹⁸ *Id.* at 702.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 703.

¹²¹ *Id.* at 707.

¹²² *Id.* at 708.

¹²³ *Id.* at 705 n.48.

¹²⁴ *Id.* at 706.

This disregard for proof might have been due, in part, to the inadequacy of the record before the court. The concurring opinion did not foreclose the possibility of other "affected" parties bringing suit under Title VII or U.S.C. §1981. Still the majority opinion was viewed as carrying great weight in these possible future suits.¹²⁵

In conclusion, the *Jersey Central* case is an amusing example of a continuous relay of responsibility for an unpopular policy. The EEOC and union contracts placed the burden on the employer who wisely placed his dilemma before the federal courts. Of course, he was fortunate that the court accepted jurisdiction based on Section 301 of the Taft-Hartley Act.¹²⁶ Jurisdiction was also recognized as arising under the laws of the United States, 28 U.S.C. §1331, or, in the alternative, as ancillary to the Section 301 cause of action.¹²⁷ The Appellate Court's majority view challenged the legislature to take up the baton and change the court's interpretation of the law.

If a remedy is to be provided alleviating the effects of past discrimination perpetuated by layoffs in reverse order of seniority, we believe such remedy must be prescribed by the legislature and not by judicial decree.¹²⁸

Act VI—*Watkins II: Return to the Fold* (July 16, 1975)

Recognizing the field of seniority law as active and developing, Judge Roney of the Fifth Circuit curtailed that growth with a reversal of *Watkins I*, in *Watkins v. United States Steelworkers, Local 2369*¹²⁹ Roney said:

We hold that, regardless of an earlier history of employment discrimination, when present hiring practices are nondiscriminatory and have been for over ten 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 §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

¹²⁵ *Id.* at 710 n.1.

¹²⁶ 29 U.S.C. §185 (a) (1965) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

¹²⁷ 508 F.2d at 699. Section 1331 provides in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

¹²⁸ 508 F.2d at 710.

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¹²⁹ 516 F.2d 41 (5th Cir. 1975).

under the system have not themselves been the subject of prior employment discrimination.¹³⁰

The court's rationale centered primarily on the requirement that there be an identifiable class that had suffered personal discrimination.

The court rebutted the argument that this was a *Griggs*¹³¹ "effects" case by distinguishing the effects of discriminatory departmental seniority as opposed to a racially neutral plant seniority system. Unlike the former cases, the employees of Continental Can had achieved their own "rightful place" of employment.¹³²

The plaintiffs could not be an affected class because they were too young to work at the time the company initiated its equal hiring policy. "Age, not race, is the principal reason the plaintiffs in this case did not have sufficient seniority to withstand layoff."¹³³

The court rejected the awarding of "fictional seniority" as being consistent with *Local 189's* avoidance of preferential treatment.¹³⁴ The Court cited *Franks v. Bowman Transportation Co.*¹³⁵ for its refusal to award retroactive seniority even where the plaintiff had suffered actual discrimination. Almost anticipating the subsequent reversal in *Franks*, the court emphasized that its decision upholding the seniority layoffs was justified since there was no truly affected class as in *Franks*. Thus it was concluded that, "[f]ailure to grant a preference to an employee who has attained his own rightful place cannot be held to be discriminatory."¹³⁶

Referring back to legislative history, Judge Garth stated that "there was an express intent to preserve contractual rights of seniority as between whites and persons who had not suffered any effects of discrimination."¹³⁷ The opinion rested its argument on the justification that, "[t]he collective bargaining agreement was, in fact, color blind."¹³⁸ In accordance with his reasoning, the Second Circuit in *Chance v. Board of Examiners*¹³⁹ has recently held that the non-remedial distortion of a seniority system through

¹³⁰ *Id.* at 44-45.

¹³¹ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹³² 516 F.2d at 46.

¹³³ *Id.*

¹³⁴ *Id.* at 47.

¹³⁵ 495 F.2d 298 (5th Cir. 1974), *rev'd*, 96 S.Ct. 1251 (1976).

¹³⁶ 516 F.2d at 46.

¹³⁷ *Id.* at 48.

¹³⁸ *Id.* at 50.

preferential treatment based solely upon race is a form of reverse discrimination specifically proscribed by Congress."¹⁴⁰

Act VII—*The Aftermath*

As the judges became familiar with the nuances of seniority, the courts seemed to participate in a game of "one-man upmanship" in discerning the true meaning of statutory material and Congressional memoranda. *Watkins I* miraculously rose above all this in an attempt to promote the "spirit" of the Civil Rights Act. *Jersey Central* and *Watkins II* heralded a quiet retreat to the historical approach. It is clear that the courts have become immobilized by policy matters and practical considerations. After a decade of experience with the complex remedies of quotas and affirmative action, the courts might well flinch at the thought of being responsible for enforcing yet another convoluted remedy. This abhorrence of implementing technical, unpopular relief has been suggested as the motivating force for refusing to extend the line drawn by judicial opinion on seniority layoffs. "[T]he 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."¹⁴¹

The question as to the significance of the legislative history of the act is still a raging controversy. It cannot be circumvented by basing the action on Section 1981 since even *Watkins I* admitted that §1981 is construed so as not to conflict with the substantive law of Title VII. One author would give more weight to the memoranda as indicative of its sponsors' intent.¹⁴² Another firmly insists that "[m]embers of Congress were aware of the industry-wide acceptance of 'last hired, first fired' seniority systems and were adamant in their intent to protect these systems under the law."¹⁴³ Professor Gould provides the best analysis by referring to the Congressional debate as a skirmish in the night resulting in no definite answers for the courts.¹⁴⁴ Although agreeing with his statement that "past exclusion cannot be used as a 'grandfather clause' to stultify the present advance of minority employment,"¹⁴⁵ this author does not share his implicit faith in the expertise of the EEOC to suggest and implement viable remedies in the area of layoff. The EEOC is certainly an expert at discerning possible discrimination, but its enormous backlog suggests that the agency cannot keep pace with the implementation of the plans it conceives. The layoff problem demands more immediate attention. In any event the memoranda should be dismissed as

¹⁴⁰ *Id.* at 998.

¹⁴¹ Comment, *Title VII and Seniority Systems: Back to the Foot of the Line?* 64 *KY. L.J.* 114, 116 (1975-76) [hereinafter cited as Comment, *Title VII and Seniority Systems*].

¹⁴² Friedman & Katz, *supra* note 4, at 274.

¹⁴³ Note, *Survival*, *supra* note 12, at 405.

¹⁴⁴ Gould, *Employment Security*, *supra* note 2, at 19.

ambiguous at best. The problem demands an examination of the issues by viewing the totality of circumstances in each instance.

Much of the dialogue over the proper meaning of bona fide seniority and intent to discriminate revolves around the familiar arguments about legislative intent. It seems clear that Congressional intent will forever remain an enigma, and is mostly irrelevant after the dramatic developments that have occurred in the area of equal employment. Therefore, the controversies are best explained with somewhat of an historical detachment.

At the outset, there are those who feel that as a result of *Jersey Central*, "bona fide" has become synonymous with "absent an intent to discriminate."¹⁴⁶ The argument goes that "if bona fide" requires specific intent as suggested by the Third Circuit, then the language "not the result of an intention to discriminate" would be meaningless.¹⁴⁷ This surplusage argument is weak when applied to statutory language that was obviously the child of rather shortsighted political compromise. Many of the civil rights measures were enacted with a superficial and simplistic understanding of the problems sought to be remedied.

Section 703(h)¹⁴⁸ was not then the product of calm reflection and expert draftsmanship. The use of "bona fide" was no doubt a concession that non-bona fide seniority systems could exist. Nevertheless, the phrase was probably an admission of Congressional ignorance of industrial complexities and not an indication that the distinction was crucial.¹⁴⁹ As one author suggested, "Congress chose to leave its resolution to the courts rather than codify it in the Act."¹⁵⁰ Whether intent was considered one element of bona fide systems, or a qualification apart, it was quite understandably the focal point of Congressional concern.

The matter of "the" intent proscribed in Section 703(h) is more easily explained. The most convenient analogy is the tort concept of wilful commission of an act and responsibility for its foreseeable consequences.¹⁵¹ Furthermore, the discriminatory intent need not be the sole motivation for the act committed. In the context of discrimination, this intent can be found whether the vehicle is blatantly biased or facially neutral. This broader definition was necessary to reach discrimination shielded by facially neutral policies, but is now causing difficulties with the new issue of layoffs.

¹⁴⁶ Fine, *supra* note 1, at 92.

¹⁴⁷ *Id.*

¹⁴⁸ See note 57 *supra*.

¹⁴⁹ But see Fine, *supra* note 1, at 101-04.

¹⁵⁰ Comment, *Last Hired, First Fired*, *supra* note 45, at 1550. See also Blumrosen, *supra* note 30, at 289.

¹⁵¹ Blumrosen, *supra* note 30, at 283.

Those who view disproportionate layoffs as discriminatory per se, resort to the maxim that where "the operation of the system is predictable" then "the results of its operation are therefore intended."¹⁵² This inflexible rule seems fair when applied to systems drafted over ten years ago when racial bias was ever a latent consideration. Cooper and Sobol have commented, "[a]t the time the employer and the union agreed on the seniority layoff provision, they knew what the probable racial consequences would be."¹⁵³ Yet even their prediction of future dissension growing out of necessary layoffs assumed computations from "discriminatory seniority" plans.¹⁵⁴ Although the impact of current layoffs falls unequally on all workers it is difficult to brand as discriminatory a neutral procedure that has been operating for years in the context of non-discriminatory hiring policies and affirmative action plans. Furthermore, the "unequal impact" test is an inadequate and overly-simplistic approach to layoffs, since it was equally foreseeable that young white males would also be members of the class susceptible to layoffs.

Waters, *Jersey Central*, and *Watkins II* have established the boundaries of preference and retroactivity in layoff. In plant seniority situations at least those circuits will not reach past the effective date of the Act (July 2, 1964). In fact, if nondiscriminatory hiring began after that date and the plaintiffs then first applied and were accepted, *Watkins II* would not view them as an affected class. This statute of limitations for layoff complaints is rigid even where as in *Waters* there were two men who had faced pre-Act discrimination by the company. Although retroactive benefits have been awarded for past discrimination, they have not been layoff remedies.¹⁵⁵

Two authors suggest Title VII's enactment date as the limit to its retroactive reach, since it was then that employers were put on notice to change their hiring policies.¹⁵⁶ This rule should be amended in situations such as *Watkins* where although the nondiscriminatory hiring began at a later date, the complaining class was not and could not have been aggrieved before that date. Thus retroactivity should be measured from the enactment date or that of the commencement of neutral employment practices, depending on who constitutes the class of plaintiffs.

Throughout the enforcement of Title VII, everyone has been concerned with avoiding the ban on preferential treatment contained in Section 703(j).¹⁵⁷

¹⁵² *Id.* at 286.

¹⁵³ Comment, *Inevitable Interplay*, *supra* note 35, at 166.

¹⁵⁴ *Id.* at 165.

¹⁵⁵ See *Franks v. Bowman Transp. Co.*, 96 S.Ct. 1251 (1976).

¹⁵⁶ *Stacy*, *supra* note 13, at 513; *Sheeran*, *supra* note 43, at 481.

¹⁵⁷ See note 59 *supra*.
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The abundance of quota systems and affirmative action programs are evidence that courts have found a middle ground between the goals of Title VII and the prohibition of 703(j). That position was best explained in *United States v. Local 38, IBEW*:¹⁵⁸

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 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 1964.¹⁵⁹

The problem with current layoff cases is that seniority is a time-honored protection of workers of *all races and sexes*. It cannot be equated with segregated departments or discriminatory hiring procedures. Despite the fact that it lacks the status of a property right, seniority serves legitimate purposes for labor and management among which is the promotion of industrial peace. As one author noted, "where seniority rules are applied without modification, the break between the past and future which Congress sought to bring about will not be achieved."¹⁶⁰ This suggests the obvious answer that no one, including Congress, intended a complete break with the past, but rather only an end to practices that discriminated against minorities in the working phase of their lives.

The current layoffs plainly place a heavier burden on women and minorities. Yet, where layoff discrimination is charged, statistics alone are insufficient proof of any statutory violations. The purpose of Title VII was to provide equal *opportunity*. A finding of discrimination is warranted where this has been denied, whether the damage is past, present or future. Once this opportunity has been provided, and an uncontrollable variable such as the economic cycle intervenes, a simplistic numerical test is inappropriate.

Disproportionate layoffs should not be construed as per se discriminatory. The burden of unemployment lies heavily on every man or woman. If remedies, voluntary or otherwise, are to be fashioned to correct the statistical balance, then let it be done in the name of statistics alone and dispense with the costly and time-consuming procedure of straining backwards in time to find some shred of culpability.¹⁶¹ Otherwise, we would have the

¹⁵⁸ 428 F.2d 144 (6th Cir. 1970).

¹⁵⁹ *Id.* at 149-50.

¹⁶⁰ Comment, *Last Hired, First Fired*, *supra* note 45, at 1552.

¹⁶¹ *But see Note, Last Hired, First Fired. Seniority, Layoffs, and Title VII: Questions of Liability and Remedy*, 11 *Colum. J. Law & Soc. Prob.* 343, 384 (1975).

anomalous situation of post-1965 companies with equally disproportionate layoffs being immune to seniority modification. This would develop despite the fact that women and minorities might only quite recently have begun to represent a significant part of their workforce. With a broader approach, the investigation could still consider actual discrimination, but would go further to evaluate the impact of layoff on the individuals and family units affected.

This problem of neutral plantwide seniority systems that result in disproportionate layoffs has put a strain on the present Title VII meaning of discrimination. Assuming arguendo a finding of discrimination, the procedure is clear. The respondent must make a showing of business necessity which has been narrowed from the old safety and efficiency test.¹⁶² Evidence of a legitimate function is not enough; there must be an irresistible demand and no reasonable alternative.¹⁶³ If the employer cannot carry the burden of proof, then the EEOC, with labor and management, must meet to shape a "triangularly adjusted decree,"¹⁶⁴ or conciliation agreement.

Alfred W. Blumrosen has traced the changes in the definition of discrimination since the inception of Title VII.¹⁶⁵ According to his analysis, the definition has progressed from prejudiced intentional treatment to unequal treatment, and finally to the unequal impact advocated by *Griggs*.¹⁶⁶ One writer has commented that "Seniority based layoffs are the most stringent test to date of Blumrosen's third definition of discrimination."¹⁶⁷ Clearly, *Jersey Central* and *Watkins II* represent a refusal to recognize this third kind of discrimination in disproportionate layoffs.

Those who would extend the *Griggs* "effect" test to find layoffs discriminatory, argue that the perpetuating effect negates the bona fide nature of the system.¹⁶⁸ Those who oppose an extension of the test to layoffs offer in support the 703(h) exemption for bona fide seniority systems. In addition, they believe that the "effects" test should be used only in situations similar to *Griggs* where the method under attack is an attempt to measure ability

¹⁶² 416 F.2d at 997.

¹⁶³ See Sibbernsen, *A Review of Job and Seniority Structures in Light of EEOC Liability*, 26 LAB. L. J. 666, 671 (1975) [hereinafter cited as Sibbernsen].

¹⁶⁴ See generally Comment, *Labor Relations: Racially Discriminatory Seniority System Unjustified by Business Necessity Held to Violate Title VII of the Civil Rights Act of 1964*, 1969 DUKE L. J. 1091.

¹⁶⁵ Jain & Ledvinka, *supra* note 42; at 580 discussing Blumrosen, "Strangers in Paradise," *Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59-110 (1972).

¹⁶⁶ Blumrosen, "Strangers in Paradise," *supra* note 165, at 59 n.1.

¹⁶⁷ Jain & Ledvinka, *supra* note 42, at 584.

¹⁶⁸ Comment, *Unjustified Layoffs: First Fired, supra* note 45, at 1562.

for hiring or promotional purposes.¹⁶⁹ The application of the *Griggs'* analysis to layoff is both an unwarranted extension of the rule¹⁷⁰ and a blatant disregard for significant factual differences. Resorting to a tort analogy, it might be said that the recessionary layoffs of the 1970's are so remote from early 1960's discrimination that the chain of proximate causation is broken.

IV. REMEDIES: IS JUST RETRIBUTION POSSIBLE?

A. *Contract Patterns*

The hardship of layoff is not simply the loss of earnings, but the loss of seniority and all its accompanying privileges. According to the BNA survey, seniority is lost after layoff in 88 percent of the contracts, though 65 percent specify a grace period (often a year) before it is lost, and 23 percent tie retention of seniority to length of service.¹⁷¹

The majority of contracts (75 percent) provide for recall of employees in reverse order of layoff, although 61 percent impose the additional requirement that employees be qualified for the jobs available. Only 23 percent of the contracts give laid-off employees a preference over new hires.¹⁷² This does not negate the possibility that some employers might award this privilege as a standing policy.

Exceptions to the layoff rules are often made for certain classes of individuals. Forty-six percent of contracts in the BNA study contain such exceptions. Examples include the superseniority awarded union officials (75 percent) and specially skilled employes, mostly in manufacturing contracts (19 percent).¹⁷³ Such provisions grant these individuals the privilege of being the last employees to be laid off.

Statistics show that seniority is a significant influence on layoff in most collective bargaining agreements. Contractual exceptions exist apart from the issue of civil rights in about half of the agreements sampled, so the idea of layoff modifications is not new. The statistics also show that there is no consensus on the application of seniority provisions. Furthermore, these figures do not take into account the many non-unionized companies that may or may not utilize seniority for determining layoff. Seniority can be a creature of contract or a matter of past practice. In either situation, it is clearly capable of being changed and therefore vulnerable to attempts of modification for purposes of equal employment.

¹⁶⁹ *Id.* at 1561-62.

¹⁷⁰ *Id.* at 1563.

¹⁷¹ BNA COLL. BARG., *supra* note 15, at 75:1.

¹⁷² *Id.* at 60:4.

¹⁷³ *Id.* at 60:9.

B. Plant Seniority as a Remedy

Even though plant seniority has recently encountered its share of discrimination charges, it is a wise preventive measure for employers still using the job classification system. This is especially true since plant seniority has received an untouchable status as a result of *Waters*, *Watkins II*, and *Jersey Central* decisions.

A union view favors this system as being consistent with the collective bargaining process and Title VII.¹⁷⁴ For those who have made such a change, the anticipated problems of employee resistance¹⁷⁵ and increased costs have not proved insurmountable. Despite the attractiveness of the plant seniority remedy for alleviating promotional discrimination, the layoff cases have shown that "it is of no use where the past discrimination consisted of the total exclusion of these groups [minorities and women] from employment."¹⁷⁶

C. Retroactive Seniority

Though the award of retroactive seniority is not without precedent,¹⁷⁷ it seems to have become a deadlock when suggested in the context of layoff. Everyone has come to recognize that "retroactive seniority is . . . closely entwined with the problem of disproportionate layoffs,"¹⁷⁸ but it has not been able to shake the opposition to fictional or "phantom seniority."¹⁷⁹ One writer, after noting the preference given to veterans, made the comment that "a cynic might contend that the country's legal system seems to accept fictional seniority where it benefits white males, but reject it where it hurts white males."¹⁸⁰

Those who have gone beyond the almost instinctive aversion to fictional seniority see problems in determining the affected class, and informing its members of the new benefits.¹⁸¹ The notice issue does not present a problem in layoffs, but the affected class question could cause considerable difficulties. Should all women and minorities be afforded the benefit, or should there be limitations? Some believe that class members must qualify on grounds of age, skill, and inferior job position.¹⁸² Others would simply adopt "date of

¹⁷⁴ Youngdahl, *supra* note 3, at 299.

¹⁷⁵ Gould, *Employment Security*, *supra* note 2, at 27.

¹⁷⁶ Comment, *Seniority-based Layoffs and Title VII: Problems and Possible Alternatives*, 5 MEMPHIS ST. L. REV. 554-55 (1975).

¹⁷⁷ See, e.g., *Franks v. Bowman Transp. Co.*, 96 S.Ct. 1251 (1976).

¹⁷⁸ Friedman & Katz, *supra* note 4, at 266.

¹⁷⁹ *Id.* at 263 n.1.

¹⁸⁰ Ross, *Reconciling Plant Seniority with Affirmative Action and Anti-Discrimination*, 28 N.Y.U. CONFERENCE ON LABOR 231, 251 (1976) [hereinafter cited as Ross].

¹⁸¹ Stacy, *supra* note 13, at 497.

¹⁸² Comment, *Last Hired, First Fired*, *supra* note 45, at 1558.

application" seniority as was awarded in the *Jurinko* and *Franks* cases.¹⁸³ One author who does not foreclose the award of fictional seniority believes that it should have a lesser effect in the context of layoff.¹⁸⁴

Despite the courts' failure to inject fictional seniority in layoff cases, the scholarly opinions on the matter remain diametrically opposed. "Retroactive seniority is 'fictional' only in the same sense that most other standard remedies for Title VII violations are fictional."^{184a}

The civil rights movement needs the help of organized labor to make gains in obtaining concessions from employees. Because the use of seniority is a treasured prize of labor unions, any mutation of the seniority system caused by the granting of retroactive seniority will contribute to upsetting this alliance.^{184b}

Retroactive seniority should not be the relief granted for disproportionate layoffs. Future layoff situations will benefit indirectly from the recent *Franks* decision where the court felt that awarding retroactive seniority was equally important as the job itself.¹⁸⁵ Thus, at least where actual hiring discrimination is found, there is now the comfort that plaintiffs will be awarded their "rightful place" including their rank for future layoffs. This limited recognition of retroactive seniority should be sufficient in light of the other remedies available for disproportionate layoffs.

D. Quotas

This country has had much experience with racial and sex quotas in the area of employment, so it is not surprising that some advocate that layoffs be apportioned on the basis of the proportion of these groups to the total work force.¹⁸⁶ *Watkins I* considered this approach along with the suggestion of separate seniority lists for layoff.¹⁸⁷

There are many who favor this use of layoff quotas. They prefer this method for its equal impact on all groups.¹⁸⁸ In addition, it does not require a change to plant seniority, and it continues to protect those with the greatest seniority.

¹⁸³ Comment, *Title VII and Seniority Systems*, *supra* note 141, at 137, citing *Franks v. Bowman Transp. Co.*, 96 S.Ct. 1251 (1976), and *Jurinko v. Edwin L. Weigand 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).

¹⁸⁴ Gould, *Employment Security*, *supra* note 2, at 45.

^{184a} Friedman & Katz, *supra* note 4, at 283.

^{184b} Rains, *Title VII v. Seniority Based Layoffs: A Question of Who Goes First*, 4 HOF. L. REV. 49, 68 (1975).

¹⁸⁵ 96 S.Ct. at 1265.

¹⁸⁶ Comment, *Inevitable Interplay*, *supra* note 35, at 169.

¹⁸⁷ 369 F.Supp. at 1232.

¹⁸⁸ Ross, *supra* note 180, at 259.

The psychological implications of using quotas have usually been phrased in positive terms. One writer fears that the denial of its use for layoffs will discourage minority applications for employment.¹⁸⁹ Another views quotas as being the least of all evils and "even more necessary in the depressed situation than in the healthy one."¹⁹⁰ The reason given for the preference is the ease of identifying the affected class and the avoidance of the issue of merit.¹⁹¹

The use of quotas does indeed seem to be one of the milder remedies for the layoff problem, but the sole criteria should not in all fairness be minority group membership. The economic origins of this dilemma cannot be ignored. Economic facts of those threatened with layoff should be carefully examined. A quota that still results in the layoff of a woman who is the sole support of three children will not appear noble or fair. Since a recession is to a great extent the real villain in a layoff situation, there is no reason why quotas computed on figures correlated with what percentage of support will be lost to the individual or his dependents should not be applied. No doubt, a class designated on this basis will include many minority and female workers, but not to the exclusion of white incumbents who also face financial ruin. This procedure of considering employee obligations would cause the burden of unemployment to be shared more equitably, and should not be discounted simply because it would require more research than a cursory notation of race and sex.

E. Backpay and Damages

For obvious reasons Unions have strongly advocated that management be required to make monetary compensation for "discriminatory" employment practices including unequal layoffs. Although private plans and public subsidies are given as alternate sources of funds, the primary burden would be on the employer. "Employer paid damages would be most consistent with concepts of fault and responsibility in our legal system, sharply focused by Title VII."¹⁹² Cases awarding damages are *Robinson v. Lorillard Corp.*¹⁹³ *Stamps v. Detroit Edison*,¹⁹⁴ and *Watkins I.* Other proponents of money damages favor the idea of an "Equal Opportunity Fund."¹⁹⁵

The opponents of back pay remedies in layoff cases cite the problem

¹⁸⁹ Comment, *Layoffs and Title VII*, *supra* note 60, at 830.

¹⁹⁰ Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 U.C.L.A. L. REV. 177, 233 (1975) [hereinafter cited as Poplin].

¹⁹¹ *Id.* at 234.

¹⁹² Youngdahl, *supra* note 3, at 314.

¹⁹³ 444 F.2d 791 (4th Cir. 1971).

¹⁹⁴ 365 F. Supp. 87, 124 (E.D. Mich. 1973).

¹⁹⁵ Comment, *Title VII and Seniority Systems*, *supra* note 141, at 137.

of finding identifiable victims of actual discrimination.¹⁹⁶ Others object to this punitive approach, and prefer to remain with remedies that focus on job advancement.¹⁹⁷ However, the strongest argument against backpay in layoffs has been entirely overlooked. If employers are forced for economic reasons to reduce their workforce, then any demand on them to exact monetary payments will exacerbate the situation, and quite likely force even further layoffs. One cannot forget that the employee-employer relationship is symbiotic and almost totally economic in nature. In addition to this economic objection, it is a distortion of the facts for unions to attempt to escape liability by pointing the finger at management. In the typical plant seniority layoff, the union's privity to the bargaining agreement makes them equally culpable or blameless as the case may be.

F. *Older Workers First. (OWF!)*

As the heading indicates, this creative idea is vulnerable to attack for several reasons. The suggestion to schedule layoffs according to chronological age, oldest first, was initially greeted with much enthusiasm. It would provide a "rest for the weary" and could operate as a temporary measure until younger workers achieved sufficient seniority to withstand layoffs.¹⁹⁸

Unfortunately, this remedy overlooks two significant problems, one practical and one legal. Imposing the status of layoff on older people first ignores the fact that in our youth-oriented society older people are the least likely to be successful in gaining employment elsewhere and the most vulnerable to inflation. Secondly, just because a worker has reached a certain chronological age does not mean that he desires an early retirement. It is not a coincidence that the employer adopting this remedy could run into an age discrimination problem under the Federal Act Against Age Discrimination in Employment.¹⁹⁹ It is plain that a layoff of the most senior employees will be acceptable only if it is voluntary. Equally clear is that an employee will want some quid pro quo for agreeing to such an arrangement. Therefore, this kind of remedy will most likely be found in private agreements that would award benefits to complying older workers in conjunction with the implementation of other alternative remedies.

G. *Work Sharing*

Of all remedies, work sharing seems to be the most favored²⁰⁰ and is

¹⁹⁶ See Friedman & Katz, *supra* note 4, at 276.

¹⁹⁷ Gould, *Employment Security*, *supra* note 2, at 38.

¹⁹⁸ Comment, *Inevitable Interplay*, *supra* note 35, at 168.

¹⁹⁹ 29 U.S.C. §621 (1975).

²⁰⁰ See, e.g., Fine, *supra* note 1; Summers & Love, *Work Sharing as an Alternative to Layoffs by Seniority: Title VII Remedies in Recession*, 124 U. PA. L. REV. 893 (1976); Comment, *Inevitable Interplay*, *supra* note 35.

actually provided for in 20 percent of collective bargaining agreements sampled.²⁰¹ Among those putting this plan into effect are the Amalgamated Clothing Workers and the Communication Workers of America (AT&T).²⁰² The AT&T four point program calls for (1) the removal of temporary and part-time help first, (2) the awarding of overtime only in emergencies, (3) an end to contracting out, and (4) approval of early vacations and leaves of absence.²⁰³

The proponents of work sharing see many advantages to the use of such a plan. One author feels that work sharing is in the true spirit of collective bargaining since the majority of agreements do not promise a guaranteed work week anyway.²⁰⁴ Furthermore, research shows that work sharing was not disfavored by arbitrators even before Title VII.²⁰⁵ This is supportive of the argument that layoffs should be regarded according to their economic impact on individual workers. Another writer advocating work sharing would make it a mandatory subject of bargaining.²⁰⁶ Some legal critics are more conservative and would limit it to a temporary or proportionately small layoff.²⁰⁷

Work sharing has not escaped criticism despite the accolade of approval from writers and certain industries with democratic tendencies. A typical anti-work sharing slogan proclaims that "work sharing" is no more than poverty sharing.²⁰⁸ Practical disadvantages do exist. Straight layoff is cheaper than work sharing, but there is some relief in that during layoff there is an increase in the employer's unemployment compensation experience-based tax rates.²⁰⁹ Work sharing is certainly a costly proposal. In one comparison of remedies, it had a 25 million dollar cost estimate as opposed to 5.6 million dollars for working alternate weeks, and 3.3 million dollars for adding workers on to shifts to achieve proper percentages.

Despite the technical difficulties of operating the plan, it does seem to be the best solution so far, and could be used in conjunction with layoffs governed by economic quotas. Although it has been proven successful, it cannot be disputed that everyone takes a monetary loss in the interests of

²⁰¹ BNA COLL. BARG., *supra* note 15, at 60:5.

²⁰² Fine, *supra* note 1, at 105-11.

²⁰³ *Id.* at 111.

²⁰⁴ Blumrosen & Blumrosen, *The Duty to Plan for Fair Employment Revisited: Work Sharing in Hard Times*, 28 RUTGERS L. REV. 1082, 1092 (1975) [hereinafter cited as Blumrosen & Blumrosen].

²⁰⁵ *Id.* at 1093.

²⁰⁶ Comment, *Inevitable Interplay*, *supra* note 35, at 169.

²⁰⁷ Note, 43 GEO. WASH. L. REV., *supra* note 17, at 967.

²⁰⁸ Youngdahl, *supra* note 3, at 308.

²⁰⁹ Blumrosen & Blumrosen, *supra* note 204, at 1102.

the majority. Therefore, in proposing such a plan to employees, the scheme cannot be justified by saying that they must "share in the responsibility of rectifying past inequities which continue to affect those who have been victims of discrimination."²¹⁰ That will have little appeal to non-prejudiced workers facing a pay cut for the benefit of some who may never have encountered actual job discrimination. Therefore the proposition should be phrased in terms of the greatest good for the greatest number of workers, and reliance placed in the employees' vestigial loyalty to the principle of survival of the nation as a whole.

H. *The Steel Consent Decree*

Remedies emerging from protracted legal battles are often costly and lack the immediacy of relief that is sought. Therefore, it is the conclusion of one writer that the best remedy for layoffs is prevention at the bargaining table and promotion to job classifications not as susceptible to layoff. The enforcement of these policies would rest with the NLRB and the arbitration process,²¹¹ as would any contractual provision. The Steel Consent Decree is an example of such an attitude, since its beginnings came before the enactment of Title VII.

The decree was adopted in 1973 by the International Executive Board of the United Steelworkers of America. It includes provisions for (1) plantwide seniority, (2) carryover and rate retention in transfers, (3) controls against improper use of tests, and (4) an affirmative action program for apprenticeships. Pertinent to the issue of layoff was the shift to plant service for all purposes including layoff. Plant service was to be used within lines of progression so long as they remained nondiscriminatory. Recall was to be to the same job before a reduction in the work force. It is interesting to note that such a comprehensive decree in 1973 did not anticipate or provide further relief for disproportionate layoffs. It has since successfully resisted attack similar to the *Watkins I* rationale.²¹²

I. *The Emotional Repercussions—Catharsis*

No matter how it is explained to white incumbents that they are indirectly the beneficiaries of past discrimination, that appeal cannot be expected to make modified layoff plans entirely palatable to them.²¹³ "Whether one

²¹⁰ Comment, *Title VII and Seniority Systems*, *supra* note 141, at 141.

²¹¹ *Id.* at 144.

²¹² Kleinman & Frankel, *Seniority Remedies under Title VII: The Steel Consent Decree—A Union Perspective*, 28 N.Y.U. CONFERENCE ON LABOR 177, 219 [hereinafter cited as Kleinman & Frankel].

²¹³ Ross, *supra* note 180, at 255.

worker stands ahead of another for promotion, transfer and layoff purposes is a political and volatile issue even without the racial factor."²¹⁴

The prediction of employee dissension and racial hostility over seniority modifications manifested itself through the "Third World Organizing Committee" and "Rights for Whites", established at the Bethlehem Steel Corporation's plants in Lackawanna, New York,²¹⁵ in connection with the Steel Consent Decree. If this kind of factionalism is possible after such a carefully evolved agreement, it is even more likely to result from externally imposed court ordered remedies.

It appears that the unions bear the brunt of employee dissatisfaction. The integrity of the union is often threatened by increased grievances, schisms within the unit, and resentment at outside interference.²¹⁶

The recent decisions and decrees affecting the unit of seniority and the use of seniority in layoff situations seems to incorporate much of what is needed to create the factionalism and instability in a number of local unions and possibly in a national union.²¹⁷

Regardless of the intensity of union opposition, courts have decided that labor opposition is no defense to Title VII discrimination.²¹⁸

One article from a union viewpoint insists that there is no single union point of view in respect to equal opportunity law.²¹⁹ According to the breakdown on specific remedies,²²⁰ only a minority oppose quotas and affirmative action, and there is a split on the vested right concept of seniority. Many splits occur between local and international unions within the same industry. Finally, the issue is so much in a state of confusion that some unions would welcome an amendment of Title VII to clarify the seniority problems that have arisen. The significance of this conflict for minorities' goals is capsulized by the author.

Minority and female advocates should know about the union diversity, because they might well find a cooperative labor response to joint attack on employer discrimination in certain situations.²²¹

This is a generous offer of union assistance to minorities. The "common

²¹⁴ Gould, *Seniority and the Black Worker*, *supra* note 5, at 1041.

²¹⁵ Kleiman & Frankel, *supra* note 212, at 196.

²¹⁶ Craft, *supra* note 21, at 756-57.

²¹⁷ *Id.* at 757.

²¹⁸ Stacy, *supra* note 13, at 518 *citing* United States v. Bethlehem Steel, *supra* note 93 and Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 58 n.22 (5th Cir. 1974).

²¹⁹ Youngdahl, *supra* note 3, at 297.

²²⁰ *Id.* at 298.

²²¹ *Id.* at 299.

enemy" approach is also an ingenious method for escaping joint liability in discrimination suits. Yet, regardless of motivation, the bargaining approach is a desirable vehicle for change.

It should also be realized that minorities themselves are not unanimously in favor of seniority modification. At a conference for Black union activists, Bayard Rustin took the view that seniority lines should be maintained.²²² Rustin viewed the problem as economic in nature: "The government is pitting poor people against each other The real problem is eliminating poverty and getting jobs for people."²²³

This emphasis on employee and union unrest does not mean to imply that employers have not had adverse reactions to the plans that have been foisted on them. No doubt, the threat of penalties and a host of civil rights complaints has made their posture more one of fear of retaliation and worries over maintaining a going concern despite these complications. In any event, the solution for the discrimination dilemma in layoffs makes even more urgent a resort to the procedures and policies of collective bargaining.

It is a well known legal cliché that "the law makes strange bedfellows." In this area of equal employment opportunity, both labor and management have responsibilities which they must mutually recognize and work out together.²²⁴

J. Responsibility: Who Shall Atone?

Most writers and labor representatives automatically put the burden of remedial measures totally on the employer.²²⁵ It is difficult to comprehend why writers have embraced this philosophy when *Quarles*, *Watkins*, and *Waters* all concerned acts of joint discrimination. Why is the employer regarded as a pariah in these layoff situations when it might well have a ten year record of laudable affirmative action plans and conciliatory response to civil rights grievances? Unions especially blame employers for the "grotesque situation" which employees are suffering during the recession.²²⁶ Even where neutral employment practices have been in effect for years, and no victims of actual discrimination can be found, there are those who see the disproportionate layoffs as imposing a duty on the employer to rectify the situation.

The employer has a duty to plan operations to provide equal employ-

²²² FEP SUMM. OF LATEST DEVELOPMENTS, No. 268, 1, 8 (May 29, 1975).

²²³ *Id.* at 2.

²²⁴ Sibbersen, *supra* note 163, at 667.

²²⁵ E.g., Blumrosen, *supra* note 30, at 275; Ross, *supra* note 180, at 255; Youngdahl, *Suggestions for Labor Unions Faced with Liability Under Title VII of the Civil Rights Act of 1964*, 27 ARK. L. REV. 631, 643 (1973).

²²⁶ Youngdahl, *supra* note 3, at 302.

ment opportunity and that compliance with this duty will minimize the potential conflict associated with the layoff problem.²²⁷

In this narrow situation of layoff, the burden should be shared equally between labor and management. Otherwise, as one writer stated, too great of an economic burden is placed on the employer.²²⁸ Not only does this impede the atmosphere of conciliation, but it affects the productivity of the very industries providing employment. Furthermore, this punitive attitude is unwarranted in most layoffs since the past exclusion is now so remote. As it was said in *Local 189*, "The crux of the problem is how far the employer must go to undo the effects of past discrimination."²²⁹ Many employers have sufficiently purged themselves of the taint of past discrimination through enormous expenditures on affirmative hiring plans and endless settlements of individual grievances. It is not fair to view recessionary layoffs simply as the fruits of prior discrimination. Corporations may last into perpetuity, but no one can deny the metamorphosis they have undergone since the enactment of the civil rights laws. The contractual nature of seniority means that all parties to the agreement must share equally in the rights and duties emanating from their bargain. The fact that the duty means economic loss does not change the nature or share of their commitment.

K. Barriers to Enforcement

As the *Jersey Central* case so well illustrated, an ultimate agreement as to remedial measures does not necessarily guarantee immediate enforcement. Since the burden of enforcement is usually placed on the company, management is currently faced with three alternatives²³⁰ to union opposition. It can take unilateral action by going to the EEOC or OFCC with its complaint. Secondly, it can try injunctive relief against the union. Finally, it can use the *Jersey Central* approach and seek an injunction against the agency order, if carrying out the proposals would put management in breach of the bargaining agreement.

If remedies are directed to layoffs, these enforcement problems should be avoided if at all possible since there are many pitfalls to the various avenues of recourse. The major hurdles are those of jurisdiction and case and controversy.²³¹ One employer tried to mimic *Jersey Central's* approach by ignoring the seniority provisions in awarding a promotion. Its defense was Executive Order 11246 which requested a review of seniority practices

²²⁷ Blumrosen & Blumrosen, *supra* note 204, at 1087.

²²⁸ Comment, *Artificial Seniority*, *supra* note 10, at 350.

²²⁹ 416 F.2d at 988.

²³⁰ See Stacy, *supra* note 13, at 518-20.

²³¹ [1975] BNA LAB. REP.: FEP DECISIONS, Part II: *Laying Off Employees Pursuant to a Seniority System* 8, 86A, Vol. 88, No. 15.

for any discriminatory effects. The arbitrator ruled that until a particular provision was legally adjudged discriminatory, the employer could not anticipate later federal retaliation, and must instead abide by the contract.²³² The "moral" is clear: unilateral action is unwise because it invites resistance and risks failure through premature timing.

V. POWERS THAT ENFORCE: FOR WHOM THE INCENSE BURNS

It is well known that the EEOC must enforce its proposals through the courts. Still there is some apprehension on the part of employers that any forthcoming EEOC guidelines on seniority will change the courts' stance on the layoff issue. As one writer remarked, the EEOC admits that disproportion is not equal to past discrimination, "but it tends to reach the conclusion that discrimination has been practiced much more readily than the courts do."²³³ Still, there is the strong possibility that the *Jersey Central* and *Watkins II* retreat to legislative history will not permit any extension of the law by an agency's proposals.

Once guidelines are adopted by an agency charged with the administration of the statutes, a judicial deference comes into play and defense counsel must show not just that its reading is the more plausible, but rather that it clearly contravenes the legislative history.²³⁴

A lesson to be learned from the Steel Consent Decree is that whatever modifications of seniority are mandated, the enforcement requires much supervision of the day to day implementation of the plan. Thus, the Steel Workers rely on Implementation Committees, Audit and Review Committees, and the continuing jurisdiction of a U.S. District Court.²³⁵

Suggestions directed for the enforcement of layoff remedies include a joint review board of union, company and EEOC,²³⁶ and intervention by the NLRB who would adopt EEOC policies.²³⁷ The reasons given for the injection of the NLRB into this civil rights area are:

1. The *Mansion House*²³⁸ case which decided that the NLRB remedies are unavailable to unions that discriminate,
2. The history of the NLRA involvement in race relations and labor,

²³² Bliss & Loughlin Industries, Inc., 64 Lab. Arb. 146 (1974) (McKenna, Arb.).

²³³ Rains, *Title VII v. Seniority Based Layoffs: A Question of Who Goes First*, 4 HOF. L. REV. 49, 69 (1975) [hereinafter cited as Rains].

²³⁴ Stacy, *supra* note 13, at 516.

²³⁵ Kleiman & Frankel, *supra* note 212, at 210-12.

²³⁶ Comment, *Artificial Seniority*, *supra* note 10, at 358.

²³⁷ Comment, *Inevitable Interplay*, *supra* note 35, at 179.

²³⁸ *NLRB v. Mansion House Center Management Corp.*, 473 F.2d. 471 (8th Cir. 1973).

3. The federal courts' power to modify the collective bargaining agreements protected under the NLRB, but conflicting with Title VII.²³⁹

This reliance on the NLRB to save the day is subject to the same criticism of similar reliances on the EEOC. Although both agencies become involved in facets of employment, neither one is equipped to single-handedly plan and administer layoff remedies. That duty should be distributed among all concerned parties. Furthermore, the NLRB has been known to take a "hands-off" approach to civil rights issues, which are more properly brought before the EEOC.

If voluntary plans are not forthcoming, the best approach would follow the steel industry's experience; the use of experimental decrees that would reserve some latitude for adjustment.²⁴⁰ Whether it be the use of arbitrators,²⁴¹ NLRB procedures,²⁴² masters (court-appointed administrators),²⁴³ or the EEOC,²⁴⁴ it is clear that the courts do not have the labor expertise to shape and administer the remedies without assistance. Any attempt to do so results in, as one writer phrased it, "Alice in Wonderland" "concocted remedies".²⁴⁵

Courts unlike the parties themselves are not particularly adept at the interpretation of collective bargaining agreements and problems arising therefrom . . . the above noted judicial weakness will be demonstrated more dramatically when courts become deeply involved in seniority.²⁴⁶

Although the present layoff cases have halted the imposition of court-ordered remedies for the problem, there is still the possibility that such measures will come about as voluntary concessions in more comprehensive EEOC conciliation agreements. There is also the chance that certain unions and employers will take it upon themselves to alleviate the layoff inequities. Whatever broad goal is set, and whatever the impetus, the best chances for implementing such policies will come from the cooperation of unions, employers and potential grievants to work out the details.²⁴⁷

Caroline Poplin likewise emphasizes the unique and sensitive nature of each layoff case, and urges a consideration of all possible alternatives to accomplish the relief sought.^{247a} It is crucial that arbitrary approaches be

²³⁹ Comment, *Inevitable Interplay*, *supra* note 35, at 185-86.

²⁴⁰ Comment, *Title VII and Seniority Systems*, *supra* note 141, at 142-43.

²⁴¹ Coulson, *The Emerging Role of Title VII Arbitration*, 26 *L.A.B. L. J.*, 263, 269 (1975) [hereinafter cited as Coulson].

²⁴² Sheeran, *supra* note 43, at 464.

²⁴³ Coulson, *supra* note 241, at 267.

²⁴⁴ Gould, *Employment Security*, *supra* note 2, at 31.

²⁴⁵ Rains, *supra* note 233, at 53.

²⁴⁶ Gould, *Employment Security*, *supra* note 2, at 30.

²⁴⁷ Sheeran, *supra* note 43, at 464.

^{247a} Poplin, *supra* note 190, at 234.

abandoned for a more benevolent consideration of the parties involved. It should also be recollected that the impact of seniority on layoff must be viewed within the confines of each contract.

In times of economic stagnation and high unemployment rates, nothing is more important than identifying the most humane and productive strategies for handling such problems.^{247b}

VI. THE FUTURE OF LAYOFFS: PROPHECY

As one author noted, the Mansfield-Dirksen substitute bill of Title VII has successfully introduced confusion into the judicial treatment of Title VII issues. The *Jersey Central* decision has caused further divisiveness among legal scholars. Those in opposition to the court's reliance on legislative history say:

It is difficult to understand how the *Jersey Central* decision can survive critical scrutiny in the light of the Supreme Court's conclusion that "Congress directed the thrust of the act to the consequences of employment practices, not simply the motivation."²⁴⁸

Others are in accord with the *Jersey Central* rationale and predict its survival. "Title VII impact on seniority may have been stretched to its judicial capacity."²⁴⁹

Some of those who anticipate guidelines on seniority from the EEOC are confident that *Jersey Central* will prevail. Their argument is that the labor experience of the new EEOC Chairman will temper any suggestions to reflect "an appreciation of the emotional and practical meaning of seniority on manpower decision-making."²⁵⁰ The critics of *Jersey Central* expect the EEOC to completely overturn that decision, but express a hope for cogent language in the remedial measures.

There is an obligation on the part of the commission to those same parties to speak with clarity and authority about what must be created to take the place of what has been invalidated.²⁵¹

No matter what rationale is advanced, there exists an acute anxiety that total inaction as to the recessions' layoffs will negate the achievements of the past decade.

There has been a deep concern that . . . rights won in the 60's might be eroded in the 70's. Minorities and women might once again, as in

^{247b} Coulson, *supra* note 241, at 269.

²⁴⁸ Fine, *supra* note 1, at 92.

²⁴⁹ Youngdahl, *supra* note 3, at 303.

²⁵⁰ Craft, *supra* note 21, at 757.

²⁵¹ Gould, *Employment Security*, *supra* note 2, at 35.

World War II, be used as a reserve labor pool, to be called upon only during emergency or prosperity.²⁵²

Although this is an exaggerated prediction, it contains enough truth in it to urge joining with those who hope for economic or bargained for change to soften the impact of recent decisions.^{252a} Disproportionate unemployment of women and minorities is not consistent with the view that "fair employment is not simply a luxury, a bonus of prosperity and abundance, but a permanent commitment whatever the future fortunes of the economy."²⁵³

The evolution of the seniority issue in the courts has been an intense process that has grinded to a halt in the layoff cases. The opinions began by facing a cacophony of views on legislative interpretation. The decisions progressed to the chorus of law reviews until recent layoff cases came to an agreement as to the proper chord to be struck between justice and the law as it is written. *Waters, Jersey Central*, and *Watkins II* sounded a victory for seniority, despite the fear that it would prove to be labor's Achilles' heel.

Jersey Central is a calmly stated climax to the bitter conflict over seniority modification. The nature of the denouement is uncertain and future legislative clarification is unlikely. Those fearing a visitation of "sins of the past" should remember that equal opportunity had a meaning even before 1964. For those who experienced the 30's depression, it meant "pulling together" so that everyone could survive economically until better times arrived. It is this historical lesson that points to work sharing and economically based quotas as the best remedies for disproportionate layoffs and the general economic hardships of a recession.

The layoff issue may be the cutting edge of larger national solutions. The adoption of the underlying concept that the only fair way to handle the recession is to require a sharing of its burdens will facilitate national solutions to related issues.²⁵⁴

Watkins I recognized the need for an equal sharing of layoff's hardships and attempted to ease the way by judicial mandate. Despite the reversal, it contributed much to the solution for unequal layoffs. Not only did it identify the issue with clarity, but it conceded that successful remedies must come from the parties familiar with the complexities of industry and collective bargaining.

²⁵² Blumrosen & Blumrosen, *supra* note 204, at 1085.

^{252a} Rains, *supra* note 233, at 67.

²⁵³ Poplin, *supra* note 190, at 234.

²⁵⁴ Blumrosen & Blumrosen, *supra* note 204, at 1106.

CONCLUSION

Soothsayers of the law predict dire consequences from the court's position on layoffs. My prognostication is less fatalistic. Despite the economic cycles, and instances of "Deus ex machina" that plague our country, we should and will endeavor to restructure our rules to further the goals of economic security and equal employment opportunity for all. We should not be discouraged by the limitations perceived by the judiciary. They do not preclude the possibility of relief from economic legislation or collective bargaining proposals. The resolution to the problem will test our ability to learn from the past and our commitment to the furtherance of everyone's "pursuit of happiness" in the true bicentennial spirit.

CHORUS: *Farewell! The mortal that can fare well, and meets no hard calamity, will have happy days.*

From *Electra* by Euripides