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ALTERNATIVES TO SENIORITY-BASED LAYOFFS: RECONCILING TEAMSTERS, WEBER, AND THE GOAL OF EQUAL EMPLOYMENT OPPORTUNITY

Minorities and women entered the workforce in increasing numbers during the 1970's.¹ These employees, though, are typically the first to lose work during economic downturns, and compared with other groups of employees, they lose jobs in disproportionate numbers.² The major obstacle to job security for minority and female employees has been the common practice of seniority-based layoffs, where the last hired are the first fired.³ Title VII of the Civil Rights Act of 1964 ("Title VII")⁴ forbids neutral employment practices having an adverse impact on minorities and women; this prohibition, however, does not extend to bona fide seniority systems.⁵ Employers are thus not obliged to modify seniority-based layoff policies.

Disproportionate minority and female unemployment could be alleviated if employers and unions were voluntarily to develop alternatives to seniority-based layoffs. Although the Supreme

1. According to the Bureau of Labor Statistics, minority and female representation in the labor force increased from 1970 to 1979 as follows:

	1970 (in thousands)	1979 (in thousands)	% increase
White Males	46,013	53,074	15%
Total Minority	9,197	12,306	34
Minority Male	5,182	6,433	24
Minority Female	4,015	5,863	46
Total Female	31,520	43,391	38
White Female	27,505	37,528	36
Black Female	4,015	5,863	46

See BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, HANDBOOK OF LABOR STATISTICS 10-12 (1980).

2. See Edwards, *Affirmative Action or Reverse Discrimination: The Head and Tail of Weber*, 13 CREIGHTON L. REV. 713, 722-32 (1980).

3. See Burke and Chase, *Resolving the Seniority/Minority Layoffs Conflict: An Employer Targeted Approach*, 13 HARV. C.R.-C.L. L. REV. 81, 82 (1978) (white males are able to maintain seniority over females and minorities through recurring slumps).

4. 42 U.S.C. § 2000e to 2000e-17 (1976 & Supp. III 1979).

5. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

Court has not outlawed voluntary modifications,⁶ two key problems arise with such efforts. Employers and unions may perceive no compelling reasons to modify a protected seniority system voluntarily, and not all alternatives to seniority-based layoffs are permissible.

This Note advocates the use of legal incentives for adopting nonpreferential alternatives to seniority-based layoffs. Part I analyzes the impact of bona fide seniority systems on recently hired minorities and women. Part II discusses existing legal incentives for unions and employers to seek alternatives to strict seniority layoffs and for courts to enjoin such layoffs, thereby forcing the parties to negotiate over alternatives. Finally, part III examines two kinds of potential alternatives: racially preferential alternatives, which are prohibited under Title VII, and nonpreferential options, which are permissible and should be used increasingly.

I. THE BURDEN OF SENIORITY-BASED LAYOFFS UPON MINORITY AND FEMALE WORKERS

Employers have traditionally responded to economic downturns by laying off workers on the basis of strict seniority.⁷ Seniority-based layoffs often disadvantage minorities and women even if a facially nondiscriminatory seniority system is in effect;⁸ an employer who only recently abandoned discriminatory practices or initiated an affirmative action hiring program, will lay off proportionately more minorities and women than white male

6. See *infra* notes 18-26 and accompanying text.

7. According to a recent Bureau of National Affairs survey of 400 major collective bargaining agreements, seniority is the sole or determining factor for layoffs in two-thirds of the agreements. See 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) 60:1 (1979) [hereinafter cited as BNA SURVEY]; see also Zimmer, *Title VII: Treatment of Seniority Systems*, 64 MARQ. L. REV. 79, 80 (1980) (discussing benefits for employers, unions, and employees when seniority is used).

Seniority used to calculate eligibility for benefits, such as vacation and pension benefits, is termed benefit seniority. Competitive seniority, in contrast, determines the priorities among employees for layoffs, promotions, transfers, and the like. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 343-44 (1977). For a general discussion of seniority's importance, see Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1534-42 (1962); Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1601 n.1 (1969); Marinelli, *Seniority Systems and Title VII*, 14 AKRON L. REV. 253, 253-55 (1980). For examples of contract provisions with varying uses of seniority in layoffs, see BNA SURVEY, *supra* at 60:61-67.

8. For a discussion of bona fide seniority systems, see *infra* notes 15-17 and accompanying text.

workers when laying off according to seniority.⁹ A volatile economy exacerbates the problem, especially for workers in industries with cyclical demand. Recurring slumps prevent many minorities and women, typically junior employees, from acquiring sufficient seniority for job security.¹⁰

Employment practices that perpetuate the effects of past discrimination ordinarily violate Title VII.¹¹ Section 703(h) of Title VII, however, exempts all "bona fide" seniority systems from Title VII's prohibitions. In *International Brotherhood of Teamsters v. United States*,¹² the Supreme Court held that even though a seniority system may perpetuate the effects of past discrimination, it can be "bona fide" within the meaning of section 703(h).¹³ Adverse impact alone is insufficient to "outlaw the use of existing seniority lists."¹⁴

According to *Teamsters*, a seniority system is bona fide if: (1) it applies equally to all groups; (2) it is rational and in accordance with industry practice; (3) it did not have its genesis in racial discrimination; and (4) it has been neither negotiated nor maintained for an illegal discriminatory purpose.¹⁵ The common

9. Suppose, for example, that an employer has a work force of 1,000, 2% of which is black, in a labor market which is 20% black. After altering its discriminatory hiring practices, the employer may hire 25 more whites and 20 more blacks during a two year period, thereby increasing minority representation to 4%. If that employer were to lay off workers with two years or less seniority, 80% of those affected would be minorities, and the minority representation would decrease from 4% to 2%.

10. It has been suggested that "loss of employment, rather than inability to obtain employment, may be the most significant cause of black joblessness." Burke and Chase, *supra* note 3, at 82.

11. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). To understand how past discrimination is perpetuated, suppose that an employer refused to hire blacks in 1961 for discriminatory reasons. A black hired in 1965, after passage of Title VII, will be forever junior to whites hired between 1961 and 1965. Although the discrimination predated Title VII, the seniority system operates to carry the effects of that discrimination into the future. Perpetuation of past discrimination is usually a violation of Title VII under *Griggs's* disparate impact theory of discrimination.

12. 431 U.S. 324 (1977).

13. Section 703(h) reads in pertinent part:

Notwithstanding any other provision of this title . . . it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . .

42 U.S.C. § 2000e-2(h).

14. 431 U.S. at 353.

15. *Id.* at 355-56; accord *James v. Stockham Valves & Fitting Co.*, 559 F.2d 310, 352 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). These factors, though, are not meant to be an exhaustive list of considerations in determining bona fides. See *Pullman-Standard v. Swint*, 102 S.Ct. 1781, 1785 n.8 (1982). Whether a seniority system has been negotiated or maintained for an illegal purpose is a question of fact to be resolved by the trial court, not a question of law or a mixed question of fact and law. *Id.* at 4429.

"last-hired, first-fired" system exemplifies a seniority structure satisfying *Teamsters's* criteria;¹⁶ Title VII thus does not require abrogation of such systems notwithstanding their disproportionate impact on minorities and women.¹⁷

Employers and unions may, however, agree voluntarily to modify or abandon a bona fide system. Although *Teamsters* referred to seniority rights as "vested,"¹⁸ a close examination of that opinion and others indicates that such rights, where they exist, are not indefeasibly vested.¹⁹ Seniority rights are contractual only, and may be altered or eliminated through the collective bargaining process.²⁰

In *Franks v. Bowman Transportation Co.*,²¹ for example, the Supreme Court sanctioned awards of constructive seniority to individual victims of discrimination.²² Providing constructive se-

16. It was apparently this very structure that Congress contemplated when it provided § 703(h) protection. See, e.g., 110 CONG. REC. 7217 (1964) (remarks of Senator Clark) ("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.").

17. This principle is now accepted outright under Title VII in a majority of the circuits. See, e.g., *Hameed v. International Ass'n of Bridge Workers, Local No. 396*, 637 F.2d 506, 516 n.11 (8th Cir. 1980); *Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978), cert. denied, 440 U.S. 979 (1979); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979); *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978); *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977); *Jersey Central Power & Light Co. v. IBEW Local Unions*, 508 F.2d 687 (3d Cir. 1975), vacated and remanded sub. nom. *EEOC v. Jersey Central Power & Light Co.*, 425 U.S. 987 (1976), on remand, 542 F.2d 8 (3d Cir. 1976); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976).

The rule has been extended to protect systems from attack under 42 U.S.C. § 1981 (1976), see, e.g., *Pettway*, 576 F.2d at 1191 n.37; *Johnson*, 575 F.2d at 474, and Executive Order 11,246, 3 C.F.R. 339 (1965), see, e.g., *United States v. Trucking Management, Inc.*, 662 F.2d 36 (D.C. Cir. 1981); *United States v. East Texas Motor Freight Systems, Inc.*, 564 F.2d 179 (5th Cir. 1977).

Teamsters was reaffirmed by the Supreme Court in *TWA v. Hardison*, 432 U.S. 63, 83 (1977), and § 703(h) protection was extended to non-length-of-service elements of seniority systems in *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980) (plurality opinion). Most recently, the Supreme Court held that § 703(h) applies to bona fide seniority systems adopted after the effective date of Title VII. Thus, plaintiffs attacking any bona fide seniority system, under § 703(h), must prove intent to discriminate. See *American Tobacco Co. v. Patterson*, 102 S.Ct. 1534 (1982).

18. 431 U.S. at 353.

19. See, e.g., *id.* at 347-48; *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (employer permitted to give seniority credits to veterans); see also *Aaron*, *supra* note 7, at 1541 ("seniority rights, unless protected by statute, are always subject to the union's power to change them" and are not truly vested).

20. See *Aaron*, *supra* note 7, at 1536, 1540-41. An employer need not even include seniority at all. See *supra* note 7.

21. 424 U.S. 747 (1976).

22. *Id.* at 774, 778.

niority entails modifying existing seniority lists: discriminatees are placed ahead of other employees who have worked longer.²³ Such relief is nevertheless justified because it furthers the "central 'make-whole' objective" of Title VII.²⁴ Similar objectives permit employers and unions to modify "last-hired, first-fired" seniority systems even if these modifications affect the expectations of nonminority workers.²⁵

Because employers and unions are not obliged by Title VII to modify seniority systems, they may perceive no incentives to abrogate layoff policies having a disproportionately adverse impact on minorities and women. Unless an employer closes its business, most workers — usually white males — have little reason to encourage layoff alternatives. On the contrary, these employ-

23. *Id.* at 774.

24. *Id.* at 778-79; *cf.* *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (seniority credits given to army veterans).

25. Such modifications are also supported by the public policy behind labor-management relations. The longstanding policy of collective bargaining is particularly well-suited to voluntary solutions of problems which either antedate Title VII or are not covered by its reach. See Moskowitz, *New Opportunities for Unions to Foster Equal Employment Opportunity*, 15 VAL. U.L. REV. 1, 5 (1980).

In developing modifications, the parties must balance the group interest in a layoff alternative with the interest of individual employees to be free from discrimination. Title VII strictures present an absolute "congressional command that each employee be free from discriminatory practices." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). Title VII proscribes employment discrimination against *individual* members of protected classes. See *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) (involving sex discrimination); see also Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1976) ("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 . . . because of such individual's race, color, religion, sex, or national origin. . . ."). Moreover, Title VII protects white employees as well as nonwhites. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

There are, however, two general exceptions to Title VII's proscriptions. First, an employer may provide constructive seniority to individual victims of employment discrimination entitled to make-whole relief, thereby discriminating against nonvictims. See *supra* notes 21-24 and accompanying text. Second, discrimination against individuals may be permitted under an affirmative action program implemented, *inter alia*, after a finding of discrimination, in compliance with federal regulations, or as a voluntary program covering a traditionally segregated job category. See, e.g., *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (voluntary program); *Hunter v. St. Louis-San Francisco Ry.*, 639 F.2d 424, 426 (8th Cir. 1981) (employer allowed to discriminate against individual woman in compliance with Executive Order 11,246; "race is a legitimate non-discriminatory reason in a gender suit"); *Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975) (court ordered affirmative action). This second exception is narrowly circumscribed, especially when it involves voluntary plans. Its applicability will turn upon the degree to which group preferences interfere with the rights of individual non-group members. See *infra* notes 87-94 and accompanying text. For an analysis of group rights as they conflict with individual rights, see A. GOLDMAN, *JUSTICE AND REVERSE DISCRIMINATION* 76-120 (1979).

ees, protected by seniority and interested solely in their own job security, will pressure union leaders and employers to preserve the status quo. American labor has long favored the use of strict seniority systems because of the job security they foster.²⁶ Length of service provides a uniform objective standard by which an employer may measure benefits such as pension rights, promotions, transfers, and job protection.²⁷ Seniority thus eliminates subjective or arbitrary treatment of employees in such matters.²⁸

Economic considerations can sometimes require employers and unions to examine layoff alternatives. The immediate and long run costs associated with layoffs — turnover costs, severance payments, and increased contributions to state unemployment insurance funds — can be extremely burdensome to employers.²⁹ Recurring layoff patterns can imperil a union's status by disillusioning workers with union leaders who fail to provide job security. The current recession vividly demonstrates this phenomenon in both the public and private sectors of the economy.³⁰ For example, the decline in automobile sales has threatened thousands of workers in auto-related industries with indefinite layoffs.³¹ As a result, many workers, including the most senior, have successfully sought job security through vari-

26. See, e.g., Blumrosen and Blumrosen, *The Duty to Plan for Fair Employment Revisited: Work Sharing in Hard Times*, 28 RUTGERS L. REV. 1082, 1085 (1975); Burke and Chase, *supra* note 3, at 93-94. The results of the 1982 negotiations between the United Automobile Workers and the automobile manufacturers reflect the importance of job security. See, e.g., Nehman, *The Reasons for Historic Opening of Auto Contracts*, Detroit News, Jan. 17, 1982, at E1, col. 1.

27. See *supra* note 7.

28. See, e.g., Marinelli, *supra* note 7, at 253; Zimmer, *supra* note 7, at 80. Indeed, one article describes seniority as the most valuable "capital asset" an employee can accumulate during long service. Summers and Love, *Work Sharing as an Alternative to Layoffs by Seniority: Title VII Remedies in Recession*, 124 U. PA. L. REV. 893, 902 (1976).

29. See Ronces, *Response to Recession: Reduce Hours or Jobs?*, 104 MONTHLY LAB. REV. 3 (Oct. 1981). In addition, if laid-off workers find jobs elsewhere, an employer may face high training costs for newly-hired employees during economic recovery. *Id.* at 5-6.

The number of articles on work sharing which developed out of the economic slump of the mid-1970's indicates the interest in layoff alternatives during bad economic times. See, e.g., Blumrosen and Blumrosen, *supra* note 27; Levitan and Belous, *Work Sharing Initiatives at Home and Abroad*, 100 MONTHLY LAB. REV. 16 (Sept. 1977); Summers and Love, *supra* note 28.

30. See, e.g., Ruben, *Organized Labor in 1981: A Shifting of Priorities*, 105 MONTHLY LAB. REV. 21, 25-26 (Jan. 1982); Serrin, *Does Labor Face a Year of Cutbacks?*, N.Y. Times, Jan. 10, 1982, National Economic Survey, at 16.

31. See, e.g., Holusha, *Leaders of Locals Endorse Ford Pact*, N.Y. Times, Feb. 18, 1982, at 10, col. 1 (reporting 140,000 workers on indefinite layoff at General Motors Corporation); Ford and the UAW: *A Historic Deal*, Newsweek, Feb. 22, 1982, at 61 (reporting 54,830 workers at Ford Motor Company on indefinite layoff).

ous cost-saving alternatives.³²

II. LEGAL IMPETUS FOR ADOPTING ALTERNATIVES TO SENIORITY-BASED LAYOFFS

Economic pressures alone, however, are insufficient to encourage some employers and unions to pursue alternatives to seniority-based layoff policies protected by *International Brotherhood of Teamsters v. United States*³³ and its progeny. In such cases, minorities and women may invoke other statutory rights as an impetus to modify bona fide seniority systems. Unions and employers would seek possible layoff alternatives if they recognized that not doing so could result in legal liability to minorities and women. They would then discuss alternatives with the twin goals of saving money and eliminating the disparate impact of seniority-based layoffs.³⁴

A. *The Union's Duty of Fair Representation*

A union may be compelled to seek layoff alternatives to satisfy its duty of fair representation.³⁵ This duty would be breached if, for example, a union received a grievance concerning a seniority-based layoff system's disparate impact and refused to seek layoff alternatives.³⁶ In *Teamsters* the Court absolved the union from

32. See, e.g., Ruben, *supra* note 30, at 25-26 (citing pay and benefit concessions in airline, trucking, rubber, and meatpacking industries); Willing, Nehman, and Robinson, *Union Wins Security, Company Trims Costs*, Detroit News, Feb. 14, 1982, at A1, col. 5 (analyzing Ford-UAW contract).

33. 431 U.S. 324 (1977).

34. The obligation here would not be to adopt alternatives, but to discuss them. Employers and unions are likely to find alternatives through discussion. Cf. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981) (recognizing possibility of plant closing alternatives developing out of negotiations). Certain conditions may, of course, require layoffs, e.g., an unexpected sharp drop in demand, and in such circumstances layoffs pursuant to bona fide seniority systems are permissible. Absent such exigent circumstances, though, legal incentives can be used to compel the parties to discuss alternatives.

35. See generally Blumrosen, *The Race to the Bargaining Table and/or the Court House*, [1978] 1 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) 16:981.

36. The extent to which a union has an affirmative obligation to protect its members from discriminatory employer conduct is not settled. Compare *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973) (union held to have affirmative obligation to avoid discrimination), and Note, *Seniority Systems and the Duty of Fair Representation: Union Liability in the Teamsters Context*, 14 HARV. C.R.-C.L. L. REV. 711, 748 (1979) (union has affirmative duty to represent members) [hereinafter cited as *Duty of Fair Representation in the Teamsters Context*], with *Thornton v. East Texas*

Title VII liability and did not raise this issue.³⁷ Potential liability under the National Labor Relations Act ("NLRA")³⁸ can, however, supplement Title VII's coverage in the layoff context.³⁹

The Supreme Court first identified a duty of fair representation in *Steele v. Louisville & Nashville R.R.*⁴⁰ In *Steele*, the Court held that a collective bargaining representative has a duty under the Railway Labor Act⁴¹ to exercise its powers on behalf of all its members, including racial minorities without discrimination.⁴² Representatives certified under the NLRA have a similar obligation of nonarbitrary, nondiscriminatory conduct;⁴³ this obligation extends to negotiation, enforcement, and administration of the collective bargaining agreement.⁴⁴ The duty of fair representation encompasses both adequate representation of and protection for minority and female employees' interests.⁴⁵

Motor Freight, 497 F.2d 416, 424-26 (6th Cir. 1974) (union held not to have breached its duty in the absence of a filed grievance), and Note, *Union Liability for Employer Discrimination*, 93 HARV. L. REV. 702, 722-23 (1980) (criticizing *Macklin v. Spector Freight Systems*) [hereinafter cited as *Union Liability*].

A related and equally unsettled issue is the standard by which union conduct is measured for a breach of its duty of fair representation. See Note, *Can Negligent Representation Be Fair Representation? An Alternative Approach to Gross Negligence Analysis*, 30 CASE W. RES. L. REV. 537 (1980) (analyzing the varying standards and concluding that courts should apply a negligence standard for procedural matters and a stronger due care standard for discretionary substantive matters). This Note advocates a negligence standard to prove a prima facie case against a union that has failed to seek alternatives to seniority-based layoffs. See *infra* text accompanying note 50.

37. *Teamsters*, 431 U.S. at 356.

38. 29 U.S.C. § 151 (1976).

39. Title VII was designed to supplement existing labor laws, not supplant them. *Alexander v. Gardner-Denver*, 415 U.S. 36, 49 (1974). One commentator has interpreted the duty of fair representation quite broadly to impose an affirmative obligation on unions to dismantle seniority systems permitted under Title VII. See *Duty of Fair Representation in the Teamsters Context*, *supra* note 36, at 763, 768-70. This interpretation seems unreasonable in light of the broad reading given *Teamsters* in the courts, and its extension to other statutes. See cases cited *supra* notes 16-17. The duty of fair representation need not be used to emasculate *Teamsters*. The analysis below advocates using NLRA rights as a means of encouraging parties to discuss modifications, not to affirmatively require results. Compare *infra* notes 35-58 and accompanying text (possible union liability for failure to advocate minority interests) and *infra* notes 59-70 and accompanying text (possible employer liability for refusal to discuss the effects of layoff decisions) with *Duty of Fair Representation in the Teamsters Context*, *supra* note 36, at 768-70 (union liability even if employer's intransigence prevented modification).

40. 323 U.S. 192 (1944).

41. 45 U.S.C. § 151 (1976).

42. 323 U.S. at 204.

43. See *Syres v. Oil Workers Local 23*, 350 U.S. 892 (1955); see also *Vaca v. Sipes*, 386 U.S. 171 (1967); *Local Union No. 12, United Rubber Workers of America v. NLRB*, 368 F.2d 12 (5th Cir. 1966).

44. See, e.g., *Conley v. Gibson*, 355 U.S. 41 (1957); *Ivey v. Western Electric Co.*, 16 Empl. Prac. Dec. (CCH) ¶ 8297 (N.D. Ga. 1977).

45. See, e.g., *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S.

A union's simple acquiescence to bona fide strict seniority lay-offs does not imply inadequate protection from discrimination.⁴⁶ The disproportionate effect of such layoffs is not discriminatory under *Teamsters*,⁴⁷ and a union does not subject any of its members to discriminatory treatment solely by permitting the bona fide system.

A passive union, however, fails to represent adequately the interests of minorities and women facing disproportionate layoffs. Unions often represent conflicting groups, some of which may be affected adversely by particular collectively bargained decisions.⁴⁸ The duty of fair representation is the quid pro quo for minorities and women bound by those decisions:⁴⁹ it assures that affected workers, "stripped of traditional forms of redress," can pursue their interests.⁵⁰ The duty of fair representation suggests unions should seek to eliminate the adverse impact on minorities and women by pursuing alternatives to seniority-based layoffs. A union which negligently abides by majority will and fails to pursue the interests of minority and female members has breached its duty of fair representation.⁵¹

In *NAACP v. Detroit Police Officers Association*,⁵² union members raised a similar claim of inadequate representation. The plaintiffs, black Detroit police officers, suffered disproportionately from seniority-based layoffs. They claimed that the union's failure to negotiate for layoff alternatives violated its

59, 64 (1975) (describing duty to represent minority interests and protect minorities from racial discrimination).

46. If the system is not bona fide, then the union could be liable along with the employer under *Teamsters*. Cf. *Teamsters*, 431 U.S. at 356 (implying that if system was not protected by § 703(h), union's conduct in maintaining the system would have violated Title VII).

47. The term "discrimination" is used here in the same sense that it is used in Title VII.

48. See, e.g., *Emporium Capwell Co. v. Western Addition Community Org.*, 421 U.S. 59, 62 (1975); *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964); *Johnson v. Airline Pilots of Northwest Airlines*, 650 F.2d 133, 137 (8th Cir. 1981), cert. denied, 102 S. Ct. 614 (1982).

49. See, e.g., *Emporium Capwell Co. v. Western Addition Community Org.*, 429 U.S. 59, 64 (1975); *Duty of Fair Representation in the Teamsters Context*, supra note 36, at 765.

50. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); accord *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976).

51. This point again raises the issue of group rights versus individual rights. See supra note 25. The duty of fair representation is better suited than Title VII to handle group grievances because unions, under the NLRA, are viewed as representatives of group interests as well as individual complaints, whereas Title VII's focus is on the individual.

52. 525 F. Supp. 1215 (E.D. Mich. 1981).

duty of fair representation.⁵³ In support of this claim, the plaintiffs alleged that the union never intended to negotiate in good faith and that only when subsequent layoffs threatening nonminority officers became imminent did the union make concessions to avert layoffs. The district court denied the union's summary judgment motion, holding that the plaintiffs alleged sufficient factual issues to raise a question of fair representation.⁵⁴

Minority and female union members would, then, state a prima facie claim of unfair representation if their union refused to seek and negotiate for permissible alternatives to seniority-based layoffs.⁵⁵ A union can never force an employer to accept layoff alternatives.⁵⁶ Its failure to secure adoption of an alternative could be defended if the options were economically unfeasible or if the union legitimately sought alternatives but the employer rebuffed its efforts. Thus, the union's only escape from liability is to negotiate with the employer over alternatives.⁵⁷ This incentive should encourage unions to pursue layoff alterna-

53. *Id.* at 1218-20. The plaintiffs alleged that "the [union] was motivated to accept the layoffs in order to reduce black voting strength within the union." *Id.*

54. *Id.* at 1220-21. Presumably, at trial the union could establish a defense by demonstrating that it sought alternatives but was rebuffed by the city-employer. See *infra* notes 56-57 and accompanying text.

The most obvious defense arises where an employer refuses categorically to discuss alternatives. An employer might, however, be more subtle in its refusal to bargain. Suppose, for example, that an employer agreed to discuss alternatives on the condition that union members sacrificed pay. If the employer did not make a reciprocal commitment to save jobs, the union should not be penalized for rejecting the offer. The employer's proposal may simply indicate a desire to get something from the union without having to give in return — hardly the give and take bargaining contemplated under the NLRA. Cf. *NLRB v. Katz*, 369 U.S. 736, 747 (1962) (employer's unilateral acts held to violate NLRA because they inhibited process of discussion and reflected "cast of mind against reaching agreement"); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956) (finding duty on employer to provide wage data in negotiations, and to ensure good faith bargaining and honest claims in give and take of bargaining).

55. Cf. *Terrell v. United States Pipe & Foundry Co.*, 26 Empl. Prac. Dec. (CCH) ¶ 31,856 (5th Cir. 1981) (union not liable under Title VII since it sought alternatives to a non-bona fide system even though the system was continued by the employer). Union liability in such a case would be more certain if the union refused or perfunctorily processed minority workers' grievances. See *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965).

56. See NLRA § 8(d), 29 U.S.C. § 158(d) (1976). Such an obligation would be inconsistent with *Teamsters* as well as the NLRA. Thus, it is unlikely that the duty of fair representation could be used to erode these principles. But see *supra* note 39.

57. The employer's duty to bargain during the contract term would be subject to any waiver in the contract or any precontract discussions. See *infra* note 68 and accompanying text. Such a waiver is unlikely to arise, though, since the union would have to waive its desire to discuss the disparate impact of any future layoffs. This action could easily be construed as an attempt by the union to avoid representing its minority and female members — a clear breach of its duty of fair representation. See *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 59, 64 (1975).

tives, even when faced with opposition from senior white male workers.

B. *The Employer's Duty to Bargain*

Although employer obstinacy may exonerate a union which has unsuccessfully sought alternatives to strict seniority layoffs, minorities and women are not necessarily remediless. This obstinacy could engender a claim against the stubborn employer. As with unions, the spectre of legal action should furnish the employer with adequate incentive to seek layoff alternatives.

A cause of action would arise, for example, if an employer refused to bargain with a union over the disparate impact of a layoff decision. An employer clearly has the ultimate prerogative to respect and follow an existing bona fide seniority provision in determining whom to lay off.⁵⁸ Yet it could be compelled to bargain over the disparate effect of such a decision.

The Supreme Court has never held the impact of seniority-based layoffs to be a mandatory subject of bargaining,⁵⁹ such that a refusal to bargain would violate the NLRA.⁶⁰ The limits of mandatory subjects of bargaining were, however, recently discussed by the Supreme Court in *First National Maintenance Corp. v. NLRB*.⁶¹

58. See *Teamsters*, 431 U.S. at 353, 354.

59. A mandatory subject of bargaining is one that falls in the category of "wages, hours, and other terms and conditions of employment" described in section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1976). An employer's unilateral change of or refusal to bargain over such a matter violates the statutory duty to bargain. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The parties must bargain over such matters and may insist on their inclusion in the contract to the point of impasse. See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). On the other hand, matters that are not mandatory may be bargained over, but the parties may not insist on the issue to impasse. *Id.*; see also *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209-11 (1964).

60. A refusal to bargain over a mandatory subject violates sections 8(a)(5) and 8(d) of the NLRA. Section 8(a)(5) of the NLRA reads in pertinent part:

It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees

29 U.S.C. § 158(a)(5) (1976). Section 8(d) reads in pertinent part:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment

29 U.S.C. § 158(d) (1976). See cases cited *supra* note 59; *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

61. 452 U.S. 666 (1981). Although *First Nat'l Maintenance* involved a plant closing in response to economic pressure, *id.* at 686, n.22, the Court's description of which management decisions are mandatory subjects of bargaining is equally appropriate in the

Justice Blackmun described three general categories of management decisions. The first category consists of decisions having only an indirect, attenuated relationship to employment: those decisions regarding, e.g., advertising or product design.⁶² Such decisions are solely within management's prerogative and, under the Supreme Court's analysis, are not mandatory subjects of bargaining.⁶³ Thus, a decision to produce one product rather than another could lead to layoffs disproportionately affecting minorities and women; yet, an employer could refuse to bargain over that decision notwithstanding its attenuated connection to disproportionate layoffs.

At the other extreme, however, are decisions so inextricably tied to the labor-management relationship — such as whether or when seniority rights will vest — that employers and unions must bargain over them.⁶⁴ If a union sought to effect a change in the vesting of seniority that would mitigate the impact of layoffs on minorities and women, and the employer refused to negotiate, the employer would be liable under sections 8(a)(5) and 8(d) of the NLRA for refusal to bargain.⁶⁵

Decisions falling in the third, intermediate category discussed

layoff context.

First National Maintenance Corp. provided cleaning services for its customers; the contract at issue was with a nursing home. After a dispute with the home over a management fee, First National decided to terminate the contract and discharge employees at that location. The Court's broad summary of the types of management decisions which are and are not mandatory is helpful. The Court emphasized the limits of its holding, however, by listing specific facts of the particular case, such as absence of desire to relocate, absence of antiunion animus, and the union's arrival after First National's economic troubles had begun. See 452 U.S. at 687-88. The extent to which these limitations affect the Court's discussion of mandatory subjects of bargaining is not clear.

62. *Id.* at 676-77; see also *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

63. *First Nat'l Maintenance*, 452 U.S. at 677; cf. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268-69 (1965) (decision to close business is peculiarly matter of management prerogative and does not, alone, constitute violation of provision against interference, restraint, or coercion of employees).

64. *First Nat'l Maintenance*, 452 U.S. at 677; cf. *Awrey Bakeries, Inc. v. NLRB*, 548 F.2d 138 (6th Cir. 1976) (layoffs are mandatory subjects of bargaining).

65. For example, an employer using departmental seniority lists and "last-hired first-fired" could be faced with a significant disparate impact if one department had discriminated in the past. A union could force an employer to bargain over a change in the vesting of seniority rights from departmental seniority to plantwide seniority, thereby eliminating that impact. See generally *infra* notes 126-28 and accompanying text (discussing modification of departmental seniority systems). This cause of action, however, will usually be limited to precontract discussions, since most contracts already establish an order for layoffs, thereby freeing the employer from an obligation to discuss mandatory subjects during the contract term. See *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214, 1216-17 (1951). See generally Note, *Mid-Term Modification of Terms and Conditions of Employment*, 1972 DUKE L.J. 813 (1972).

in *First National Maintenance* also may create a duty to bargain. An employer's decision may have a direct impact on the employment relationship, but if economically motivated, it is at the heart of management prerogative.⁶⁶ *First National Maintenance* described a plant closing decision in these terms, and stated that an employer must bargain over the effects of such a decision.⁶⁷ An employer's decision to lay off workers for economic reasons also falls into this category: it has a direct impact on the employment relationship, yet is an important management prerogative. If a union requests bargaining over the effects of such a decision, the employer should similarly be required to bargain. This obligation would continue during the contract term unless the union has expressly waived this particular right in the contract.⁶⁸

The duty to bargain over the effects of the layoff decision is especially compelling when layoffs will disproportionately affect minorities and women. Negotiations prompted by this duty are likely to achieve constructive results, though the employer is not obliged to agree to union proposals.⁶⁹ The collective bargaining process handles particularly well employment problems of this nature which are outside the procedural or substantive ambit of Title VII.⁷⁰

C. Judicial Initiatives

Where statutory duties provide inadequate incentive, courts themselves may have powerful means to encourage employers to modify seniority-based layoff policies. Suppose, for example, a court order governs a particular employer's hiring practices but is silent as to layoffs.⁷¹ Depending on future circumstances, a court might have discretion to alter the terms of the prior order

66. 452 U.S. at 677-79.

67. *Id.* at 677, n.15 (dictum).

68. See Note, *supra* note 65, at 818-22; see also *supra* note 57 (discussing likelihood of waiver). A cause of action would be still more certain if the contract provided for management-union consultation over proposed layoffs. For examples of such provisions, see BNA SURVEY, *supra* note 7, at 60:11.

69. See *First Nat'l Maintenance*, 452 U.S. at 681.

70. See Moskowitz, *supra* note 25, at 5.

71. Such an order could follow a finding of discriminatory hiring practices. See, e.g., *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974); *NAACP v. Allen*, 492 F.2d 614 (5th Cir. 1974). Alternatively, the court could enter a consent decree altering hiring practices without admitting discrimination. See, e.g., *Youngblood v. Dalzell*, 568 F.2d 506 (6th Cir. 1978); *EEOC v. AT&T*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

and force the parties to consider layoff alternatives.

A court can modify the terms of any decree due to changed circumstances.⁷² If a court had previously entered a decree requiring that certain hiring goals be achieved, or certain racial or sexual disparities be eliminated, and layoffs threatened to reduce the representation of blacks and women, the decree's goals might never be achieved, nor the disparities eliminated. The layoff decision would, in effect, prevent the employer from meeting the prior decree's terms. Absent some compelling justification for the circumvention, then, a court could enforce its decree by enjoining seniority-based layoffs.

*Brown v. Neeb*⁷³ exemplifies an appropriate exercise of judicial discretion in this area. In *Brown*, the Sixth Circuit affirmed a lower court decision enjoining the City of Toledo from laying off its firefighters on the basis of seniority. Toledo had entered into a consent decree requiring the implementation of an affirmative action plan with a five-year timetable and percentage goals. Despite the plan, the city had made only marginal progress after seven years. Layoffs threatened further to retard that progress. To ease the problem, the district court enjoined the city from implementing a layoff plan that would have decreased minority representation.⁷⁴ The court of appeals agreed, holding that although the consent decree did not mention layoffs, the district court could proscribe layoffs by seniority.⁷⁵

The majority⁷⁶ was concerned by the city's failure to achieve

72. See, e.g., *Hughes v. United States*, 342 U.S. 353 (1953); *United States v. Swift & Co.*, 286 U.S. 106 (1932); *United States v. Georgia Power Co.*, 634 F.2d 929, 932-33 (5th Cir. 1981).

73. 644 F.2d 551 (6th Cir. 1981).

74. *Id.* at 554-57.

75. *Id.* at 563, 565 (Brown, J., concurring).

76. The majority opinion in *Brown* is described misleadingly in West's Federal Reporter as a concurring opinion by Judge Brown. As indicated in the slip opinion, Judge Keith delivered the court's judgment and an opinion. *Brown v. Neeb*, Nos. 80-3468, 80-3476, slip op. at 1 (6th Cir. Mar. 3, 1981). The judgment affirmed the district court's decision. Keith's opinion expressed his belief that the lower court's injunction compelled representational layoffs. 644 F.2d at 563-64. The slip opinion also noted that Judge Brown delivered a separate opinion in which Judge Wiseman, the third judge on the panel, joined. Slip op. at 1. Brown dissociated himself from Keith's views regarding representational layoffs stating that such layoffs would violate the collective bargaining agreement and Ohio law. 644 F.2d at 565-66. Judges Brown and Wiseman, the majority, thus affirmed the lower court's injunction and forced the parties to consider layoff alternatives other than representational layoffs. See *infra* notes 77-79 and accompanying text.

While the slip opinion noted the relationship between the two opinions, West Publishing Company deleted the explanation in the official reporter. Letter from S. Edward Wagner, Associate Editor of West Publishing Co. to author (April 16, 1982) (discussing omission of explanatory statement in published opinion) (on file with the *Journal of Law Reform*). This omission has led some courts and plaintiffs to the erroneous conclusion

the consent decree's goals. Its opinion reflects an implicit belief that economic conditions did not compel layoffs;⁷⁷ the city had other options available and need not have pursued a layoff policy.⁷⁸ The court in *Brown* constructively forced the parties to negotiate over alternatives to a bona fide seniority system unless the city could demonstrate both the economic necessity of the layoffs and its good faith effort to meet the consent decree's terms.⁷⁹

III. ALLOWABLE ALTERNATIVES — PREFERENTIAL OR NONPREFERENTIAL?

Economic incentives and a variety of legal incentives — the duty of fair representation, the duty to bargain collectively, and the courts' power to modify decrees — all encourage utilizing alternatives to seniority-based layoffs. Once employers and unions admit their responsibility to seek such alternatives, they must develop them. Two types of alternatives exist: racially preferential layoffs,⁸⁰ which violate Title VII, and nonpreferential options,⁸¹ which do not. If minorities and women use the devices available to them to promote nonpreferential alternatives, the goal of equal employment opportunity will remain a realistic one regardless of economic fluctuations.

that Judge Keith's views on representational layoffs are controlling. *See, e.g.*, *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 972, 978 (1st Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3140 (U.S. Aug. 9, 1982) (No. 82-259) (finding "considerable support" in *Brown* and erroneously citing Keith's opinion as controlling); *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 566 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3120 (U.S. Aug. 5, 1982) (No. 82-229) (Keith, J., erroneously citing his earlier *Brown* opinion as controlling); *United States v. District of Columbia*, 654 F.2d 802, 803 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 637 (1981) (court erroneously citing *Brown*); *NAACP v. Detroit Police Officers Ass'n*, 525 F. Supp. 1215, 1220 (E.D. Mich. 1981) (plaintiffs relying on Keith's opinion as controlling). To the extent that these cases rely on Judge Keith's opinion as controlling in *Brown*, they are mistaken. *See Stotts*, 679 F.2d at 568 (Martin, J., concurring in part, dissenting in part) (explaining that Keith's opinion is not controlling); Letter, *supra*.

77. *Brown*, 644 F.2d at 565-66 (Brown, J., concurring).

78. This is supported by the numerous references to possible alternatives (four such references in a two-page opinion). *Id.* at 564-66 (Brown, J., concurring).

79. *Cf. Youngblood v. Dalzell*, 568 F.2d 506 (6th Cir. 1978) (per curiam) (layoffs by seniority not enjoined where city made progress in meeting consent decree which was silent as to layoffs).

80. *See infra* pt. III A.

81. *See infra* pt. III B.

A. Preferential Alternatives to Seniority-Based Layoffs

Under a preferential layoff system, an employer establishes separate seniority lists for, e.g., minorities and nonminorities,⁸² and as layoffs become necessary, discharges enough workers from each list to maintain prelayoff minority representation. This option involves an overt preference because it ultimately accords the benefits of job security to low seniority workers by virtue of race or sex. Such a preferential system, though voluntary, is prohibited by Title VII.⁸³

The only Supreme Court case focusing on voluntary preferences in the employment context is *United Steelworkers of America v. Weber*,⁸⁴ in which the Court permitted Kaiser Aluminum to adopt voluntarily a preferential training and promotion program. The Court warned, however, that not every plan would be permissible under Title VII.⁸⁵ It upheld Kaiser's plan on the

82. Female-male lists, or even three lists — minority, nonminority female, and nonminority male — are also possible.

83. Several commentators, including the EEOC, have concluded that voluntary affirmative action or preferential treatment is permissible in the layoff context as an extension of *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). See, e.g., EEOC statement on Affirmative Action, 29 C.F.R. § 1608.3(c)(4) (1981); 1 A. LARSON, EMPLOYMENT DISCRIMINATION § 26.21 (1981); ELKISS, *Modifying Seniority Systems Which Perpetuate Past Discrimination*, 31 LAB. L.J. 37, 44-45 (1980); Johnson, *Voluntary Affirmative Action in the Post-Weber Era: Issues and Answers*, 32 LAB. L.J. 609, 614-16 (1981); Marinelli, *supra* note 7, at 259-66; Case Note, *The Impact of United Steelworkers of America v. Weber On Affirmative Action Planning*, 7 OHIO NORTH. U.L. REV. 987, 996-97 (1980); Case Note, *Civil Rights — Employment Discrimination — Voluntary Affirmative Action Allowed*. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), 3 U. ARK. LITTLE ROCK L.J. 481, 490, 491 n.57 (1980). These commentators, however, did not independently analyze the *Weber* test as it applied to layoffs, but simply presumed *Weber* allows layoff preferences. Another commentator reasons that since *Weber* actually involved seniority rights, employers and unions voluntarily may negotiate preferences into competitive seniority systems. Boyd, *Affirmative Action in Employment — The Weber Decision*, 66 IOWA L. REV. 1, 38-40 (1980). Although *Weber* did involve seniority rights to the extent that they determined selection among Kaiser's employees for a new training program, 443 U.S. at 198-99, it did not raise the issue of abrogation of preexisting seniority rights. 443 U.S. at 215 (Blackmun, J., concurring). Because *Weber's* underlying rationale is based on balancing affected employees' interests, the degree to which an employer interferes with existing expectations is quite important. See *infra* notes 88-94 and accompanying text. But see Boyd, *supra*, 66 IOWA L. REV. at 27 (suggesting difference in seniority expectations between Kaiser's new training program and other contexts is not important).

84. 443 U.S. 193 (1979).

85. *Id.* at 208; see also *Parker v. Baltimore & O. R.R.*, 652 F.2d 1012, 1014 (D.C. Cir. 1981) ("We do not believe that *Weber* supports the proposition that no purported affirmative action plan is ever unlawful unless it requires discharge, permanently bars advancement, or maintains racial balance . . ."); *Setser v. Novack Investment Co.*, 657 F.2d 962, 968-69 (8th Cir. 1981) (discussing burden of proof where attacking a voluntary affirmative action plan).

ground that Title VII permits some voluntary efforts designed to eliminate traditionally segregated jobs.⁸⁶

Group remedial efforts appear to be incompatible with Title VII's focus on the individual.⁸⁷ The Court in *Weber*, though, felt that such efforts are permissible if they balance the group interest in affirmative action against the individual nonminority applicant's (or worker's) expectations of nondiscriminatory⁸⁸ treatment.⁸⁹ Any group remedial plan must attempt to accommodate both sets of goals to the greatest extent possible. Thus, in seeking remedial responses to racial disparities in their work forces, employers must adopt a balancing approach.⁹⁰

In pursuing this approach, the *Weber* Court noted five key elements in Kaiser's program.⁹¹ Kaiser's plan was voluntary and had been collectively bargained. More significantly, the Court found that it did not unnecessarily trammel nonminority interests, bar advancement of nonminorities on account of race, replace nonminorities with minorities on account of race, or maintain percentages of representation.⁹² Although *Weber* did not explicitly depict any of these factors as determinative of a plan's validity, the Court did find all of them to be present in sustaining Kaiser's plan. It seems likely that while the absence of any single factor is not necessarily fatal to a voluntary plan, the absence of several indicates an impermissible remedial program.

Based on this reasoning, voluntary preferential layoff plans are impermissible; they fail to accommodate group and individual interests.⁹³ Use of collective bargaining to develop preferential

86. *Weber*, 443 U.S. at 208-09.

87. *See supra* note 25.

88. In this context, "discriminatory" is used in the sense of an arbitrary distinction or classification as opposed to any definition implying legal consequences. *Compare infra* note 47 and accompanying text.

89. Such a balancing approach is implicit in the Court's description of Kaiser's plan. 443 U.S. at 207-09.

90. In *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), the Court described the judicial process of developing a reasonable remedy as a balancing approach. *Id.* at 375. Balancing should be required equally when the parties to a contract consider remedial devices. *See Edwards, supra* note 2, at 752-53 ("An employer's voluntary preference will stand or fall on its own strength as a remedy.")

91. Other factors, such as duration, or the fact that the *Weber* plan gave white employees a training program they never had before, are important for distinguishing future cases from *Weber*, but are essentially factual instances of the five inquiries set forth above.

92. 443 U.S. at 208.

93. *Cf. Lehman v. Yellow Freight Sys., Inc.*, 651 F.2d 520-27 (7th Cir. 1981) (*Weber* attempts to balance societal interests in affirmative action with the individual's right to be free from discrimination); *Setser v. Novack Investment Co.*, 657 F.2d 962, 968 (8th Cir. 1981) (plan must be reasonable in light of remedial purpose); *Parker v. Baltimore & O. R.R.*, 652 F.2d 1012, 1013 (D.C. Cir. 1981) (must employ a delicate balancing of all

layoff plans does not make them permissible. Collective bargaining is just one factor to consider in determining validity, and its presence is not alone determinative. An agreement to lay off employees of one race or sex would surely be prohibited even though it was a collectively bargained preference.⁹⁴ A remedial program is permissible only if an analysis of the other *Weber* factors is also satisfactory. Preferential layoff plans cannot withstand such scrutiny.

1. *Nonminority workers' interests*— Seniority rights are essential in allocating job benefits and underscore the importance of the expectations workers have built during their length of service. Indeed, the Supreme Court has recently acknowledged the “overriding importance” of seniority interests.⁹⁵ Emphasizing the strength of these expectations, the Second Circuit has refused to extend quota relief to the layoff context:⁹⁶ the effect on a small number of readily identifiable nonminority workers was too harsh to justify layoff protection based on race alone.⁹⁷ Expectations are no less intense when a plan is imposed voluntarily

interests involved); Rabin, *Fair Representation Constraints in the Voluntary Elimination of Job Discrimination*, 5 EMP. REL. L.J. 337, 338-39 (1979-80) (*Weber* implies that voluntary collectively bargained plans do not violate Title VII if they are within *Weber*'s guidelines).

Applying *Weber* to the layoff context is admittedly an extension of the opinion; however, this application should not be precluded. See *Tangren v. Wackenhut Servs. Inc.*, 480 F. Supp. 539, 548 (D. Nev. 1979)(applying *Weber* criteria to the layoff context), *aff'd*, 658 F.2d 705 (9th Cir. 1981). Commentators have been willing to extend *Weber* to the layoff context, but have not fully analyzed its impact. See *supra* note 83. Furthermore, at least one court has engaged in a misguided attempt to apply *Weber* to layoffs. See *infra* note 108.

94. Such an agreement clearly violates § 703(a), which reads:

It shall be an unlawful employment practice for an employer—

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). See also *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (Title VII covers white employees as well as blacks).

95. *American Tobacco Company v. Patterson*, 102 S.Ct. 1534, 1541 (1982) (citing *Humphrey v. Moore*, 375 U.S. 335, 346 (1964)).

96. See *Chance v. Board of Examiners*, 534 F.2d 993, 998-99 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977).

97. *Id.* The court distinguished outright quota relief from constructive seniority, which also affects a small number of identifiable nonminorities. Constructive seniority does not dispense benefits on the basis of race alone. Rather, seniority credit is given to identifiable victims of discrimination because and to the extent that they have been discriminated against. 534 F.2d at 999.

by a union and an employer; therefore, such plans unnecessarily trammel nonminority workers' interests.⁹⁸

2. *Advancement of nonminority and male workers*— An employer choosing to lay off a white employee with greater seniority than a retained black employee erects both a direct and an indirect obstacle to the white employee's advancement. The direct barrier is the absence of a job — promotion is impossible when the worker is out of work. Indirectly, the employee's advancement is affected because various benefits and recall rights are lost over time, setting back future advancement if the employer rehires that individual.⁹⁹ The decision of whom to lay off, made solely on the basis of race, therefore unreasonably bars the advancement of the laid-off employee.

This reasoning is consistent with *Weber*. A preferential hiring system bars a potential white employee's advancement by never hiring him. Also, in the hiring context, no assurance exists that all who apply will be hired. *Weber's* concern was the advancement of persons already hired, not individuals who were never hired.¹⁰⁰ Preferential layoffs are thus an impermissible form of group relief even though preferential hiring systems may be legitimate.

3. *Replacing nonminorities with minorities*— Preferential layoffs directly replace nonminority or male employees with minority or female workers of lower seniority status on the basis of race or sex. Ordinarily, an employer using a preferential layoff system follows normal seniority lists until the percentage of minorities and women laid off will be too high. At that point, white or male workers with greater seniority lose their protection and a minority or female worker fills the position.¹⁰¹ Overt displacement of this nature contrasts sharply with the training program upheld in *Weber* where "no whites were fired, laid off or demoted to make room for black workers."¹⁰² Preferential layoffs

98. Kaiser's program defeated the expectations of an identifiable group of employees consisting of all Kaiser nonminority employees, such as Brian Weber, who were denied a place in the training program although they had greater seniority than minority acceptees. 443 U.S. at 199. The plan, though, established a new training program and was not designed to defeat existing contract rights and expectations. A preferential layoff plan, in contrast, would involve abrogating existing seniority rights and is distinguishable from the *Weber* plan. *Id.* at 215 (Blackmun, J., concurring); see also *supra* note 83.

99. For a discussion and analysis of various contract provisions regarding layoffs and their effect on seniority rights, see BNA SURVEY, *supra* note 7, at 75:1, 75:122-24.

100. See *Weber*, 443 U.S. at 208.

101. See, e.g., *Tangren v. Wackenhut Servs., Inc.*, 480 F. Supp. 539, 541 (D. Nev. 1979).

102. Edwards, *supra* note 2, at 758. While Professor, now Judge, Edwards is an advocate of reasonable hiring preferences, he also recognizes that such preferences cannot

thereby violate *Weber's* nondisplacement command by unreasonably replacing incumbent nonminority males with minorities or females.¹⁰³

4. *Maintaining percentages of minorities and women*— Preferential layoff policies aim to maintain percentages of women and minorities during the layoff period¹⁰⁴ despite *Weber's* prohibition of maintaining percentage representations of certain groups. *Weber* discussed Title VII's legislative history, which suggests that all preferential treatment is forbidden, and concluded that its prohibitions apply only to plans which maintain existing percentages.¹⁰⁵ Plans designed as temporary measures to attain goals, in contrast, are permissible.¹⁰⁶ While this distinction can be criticized,¹⁰⁷ plans based on racial preferences designed to maintain percentages — such as preferential layoffs — clearly are impermissible under *Weber*.

A court applying all of *Weber's* tests to preferential layoffs must necessarily conclude that they are illegal.¹⁰⁸ Preferential

extend to layoffs. 13 CREIGHTON L. REV. at 720-21 (“*Teamsters* clearly rejects remedies that result in direct displacement of incumbent nonminority employees . . . and it impliedly prohibits ‘fictional seniority’ for minorities as a way to offset the effects of last-hired first-fired.”).

103. A rule of nondisplacement is referenced in the legislative history of Title VII. See Interpretive Memorandum of Floor Managers, Senators Clark and Case, 110 Cong. Rec. 7213 (1964) (An employer “would not be obligated — or indeed permitted — to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.”).

104. Alternatively, a plan could be designed to achieve racial percentages. For example, an employer could decide to lay off as many white employees as necessary to achieve a percentage of black employee representation greater than that before the layoffs. This would be an even more unreasonable situation, however, because it clearly replaces white workers with blacks. See *supra* notes 101-03 and accompanying text.

105. *Weber*, 443 U.S. at 207 n.7 & 216 (Blackmun, J., concurring).

106. The plan would have to satisfy *Weber's* other criteria as well. See *supra* notes 91-92 and accompanying text.

107. For one such criticism, see *Weber*, 443 U.S. at 240 n.19 (Rehnquist, J., dissenting).

108. This conclusion was rejected in *Tangren v. Wackenhut Servs., Inc.*, 480 F. Supp. 539 (D. Nev. 1979). The court's analysis of *Weber*, however, was too superficial to justify its conclusion.

For example, the court noted the maintain/achieve distinction of *Weber*, but failed correctly to apply the standard. The majority found that a seniority override provision, guaranteeing that percentages would be maintained during the layoffs, was intended to achieve certain goals and was therefore permissible. 480 F. Supp. at 541, 547. This analysis, though, effectively ignores the *Weber* Court's intention to disallow plans maintaining certain goals.

Moreover, the court found that the seniority provision did not require the replacement of white workers with blacks. 480 F. Supp. at 549. This conclusion is contradicted by a later statement that the provision obliged white employees to “go before those minority employees” hired pursuant to the employer's affirmative action plan. *Id.* In these two re-

layoff systems fail four of the five key *Weber* factors: they unnecessarily trammel nonminority and male expectations, bar advancement of nonminority males, replace nonminority males solely because of race or sex, and maintain percentages of minority and female workers.¹⁰⁹

B. *Nonpreferential Alternatives to Seniority-Based Layoffs*

Alternatives to layoffs, such as work sharing¹¹⁰ and contract concessions,¹¹¹ benefit all workers equally and burden all workers economically without regard to race or sex. Such plans do not violate Title VII¹¹² and are compatible with the collective bargaining process under the NLRA. Because collective bargaining necessarily involves substantial give-and-take¹¹³ a union securing jobs for all its members, including minorities and women, can make concessions which affect all workers without breaching its duty of fair representation.¹¹⁴ So long as its decisions are not guided by discriminatory reasons and are not implemented unilaterally,¹¹⁵ an employer can pursue a number of nonpreferential alternatives to seniority-based layoffs.¹¹⁶

spects, the *Tangren* court misapplied the *Weber* test.

109. The one *Weber* test preferential layoff systems may pass is that they are voluntary.

110. See *infra* notes 117-19 and accompanying text.

111. See *infra* notes 120-24 and accompanying text.

112. This assumes that the alternative does not violate the disparate impact standard for discrimination set out in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* established that facially neutral employment practices that have an adverse impact on protected groups and are not justified by business necessity violate Title VII. See generally Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

113. See, e.g., *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964) (purpose of NLRA is to promote peaceful settlement of industrial disputes through negotiation).

114. Such decisions are nonarbitrary, nondiscriminatory decisions permitted under the duty of fair representation. See *supra* notes 40-50 and accompanying text.

115. Unilateral changes by the employer may violate the contract and the NLRA. See, e.g., *A. Hoen & Co.*, 64 Lab. Arb. (BNA) 197 (1975) (Feldesman, Arb.) (employer violated contract by unilaterally altering the work week to respond to economic hardship). But see *Ambridge Borough*, 73 Lab. Arb. (BNA) 810 (1979) (Dean, Arb.) (absent clear contract provision to the contrary, employer may alter work week).

116. Perhaps the best example of an employer which has given job security to its workers through layoff alternatives is the Pennsylvania Bell Telephone Company. While computerization and modernization led to massive job loss in the telephone industry, Pennsylvania Bell avoided layoffs by adopting various proposals suggested below. The company froze hiring, moved workers temporarily to departments where they were needed, offered retraining and income maintenance programs, eliminated the use of contract labor, and instituted work sharing in protecting Bell workers. See Wallace, *Industrial Relations in a Job-Loss Environment, The Telephone Industry in Pennsylvania*,

1. *Work sharing options*— Perhaps the most common alternative to layoffs is work sharing.¹¹⁷ Essentially, a work sharing plan allocates available work to all workers already employed. Suppose, for example, that an employer has 160 employees working 8-hour days, or 1280 worker hours of production per day. If the employer must reduce production by an equivalent of 160 hours per day, it could either lay off 20 workers or have the same 160 workers share the work by working 7-hour days. Such a plan may be combined with incentives for early retirement, voluntary layoffs, and voluntary transfers to increase the availability of work for those retained.¹¹⁸ An employer might also agree to stop hiring temporary or new workers in other departments if its current workers facing layoffs could fill those positions.¹¹⁹

2. *Wage and work rule concessions*— Over the past few years, many unions made contract concessions in return for job security. These concessions typically have been a response to potential job loss for all workers in a given bargaining unit, rather than to the disparate impact layoffs could have on some workers.¹²⁰ Nevertheless, contract concessions can prevent layoffs for

31 LAB. L.J. 473 (1980).

117. Sixteen percent of major contracts contain work sharing provisions. See BNA SURVEY, *supra* note 7, at 60:3; see also *supra* note 29.

118. See, e.g., Summers and Love, *supra* note 28, at 924-25. Supplemental unemployment benefit plans can be used as incentives for voluntary layoffs. See Summers and Love, *supra* note 28, at 924 n.90. For a discussion of supplemental unemployment benefit plans in contractual settings, see BNA SURVEY, *supra* note 7, at 53:4-7, 53:601. Work sharing plans as alternatives to layoffs have been implemented with success on a wide scale in Western Europe and in limited instances in the United States. See Levitan and Belous, *supra* note 29, at 18.

119. Other acceptable modifications of a work sharing plan might be rotational layoffs or periodic plant shutdowns, depending upon which was more adaptable to a specific industry. See Summers and Love, *supra* note 28, at 932-35.

One drawback to work sharing is that employees lose take-home pay since they work fewer hours. But this loss of wages may be alleviated through a change in unemployment compensation laws or employer's supplemental unemployment benefit plans ("SUB's"). SUB's are additional payments to workers who lose jobs and collect state unemployment compensation. Collecting state benefits is often a prerequisite to collecting SUB payments. See generally BNA SURVEY, *supra* note 7, at 53:4-7, 53:601; Note, *Supplemental Unemployment Benefits: Perquisite of Seniority or Deferred Compensation for Returning Veterans?*, 30 CASE W. RES. L. REV. 494, 496-99 (1980). A bill is pending in Congress which, if passed, would provide strong encouragement for states to give partial unemployment benefits to "individuals whose workweek is reduced pursuant to an employer plan under which such reductions are made in lieu of total layoffs." H.R. 3005, 97th Cong., 1st Sess. (1981). California has adopted a statute which provides for unemployment benefits for shortened work weeks. See Cal. Unem. Ins. Code § 1279.5 (West Supp. 1981), as amended, Act of Sept. 7, 1979, ch. 506, § 2. The EEOC has also advocated these changes in a recent statement on layoff alternatives. 45 Fed. Reg. 60, 832 (1980).

120. See, e.g., Williams, *Savings Jobs by Cutting Wages*, N.Y. Times, Jan. 25, 1981, at A1, col. 3; 104 LAB. REL. REP. (BNA) 267-68 (1980) (United Rubber Workers accepted

the present and allow newly hired minority and female workers to accumulate sufficient seniority to withstand future downturns.

Concessions might be wage and benefit concessions¹²¹ or work rule concessions, e.g., agreements to cancel certain shifts or provide voluntary overtime rules.¹²² Contract concessions might appropriately be combined with the measures outlined in a work sharing program.¹²³ In addition, if an employer is faced with an extraordinary economic burden, and must lay off workers, it could provide for retraining programs and seniority accumulation during attendance in such programs.¹²⁴ While this would not eliminate the disparate impact of the original layoff, it would provide the laid off workers, most of whom are minorities or women, with a foundation upon which to build job protection for the future.

3. *Other seniority system modifications*— Quite apart from alternatives attempting to avoid layoffs altogether, certain modifications of seniority systems themselves can eliminate the impact of layoffs on minorities and women. For example, an employer and a union can agree to consolidate the seniority lists at two separate plants.¹²⁵ Consolidation may lessen the impact of layoffs on minorities and women by spreading layoffs over a larger pool of employees. Because the goal of consolidation is to achieve equal opportunity in a nondiscriminatory fashion, and in compliance with Title VII, a union could pursue such a change without breaching its duty of fair representation.¹²⁶

Alternatively, a plant might convert from a departmental seniority system¹²⁷ to a plantwide seniority system. An employer using a departmental seniority system may have discriminated

12.9% cuts in wages to preserve jobs); *Detroit's Largest Union Agrees to a Wage Freeze*, N.Y. Times, July 2, 1981, at A14, col. 6.

121. See *supra* note 120.

122. See, e.g., Robinson, *Workers Pass Concessions*, Detroit News, Oct. 29, 1981, at B1, col. 4.

123. See, e.g., 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, 460-64 (1976).

124. See generally *id.*; 105 LAB. REL. REP. (BNA) (1980) (discussing "model" plant closing strategy covering, inter alia, retraining programs and seniority rights).

125. See, e.g., *Burchfield v. United Steelworkers of America*, 577 F.2d 1018 (5th Cir. 1978).

126. See, e.g., *id.* at 1020.

127. This system measures seniority by total length of service in a particular department. See Cooper and Sobol, *supra* note 7, at 1602. Such a system can be bona fide. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 356 n.41 (1977); see also *Carroll v. United Steelworkers of America*, 23 Fair Empl. Prac. Cas. (BNA) 238 (D. Md. 1980) (departmental seniority system held bona fide).

in the past only in certain departments. When discrimination ceases, many minorities and women may transfer from their old departments to formerly "white-male" departments. When a layoff comes, these new transfers will be among the earliest laid off in the new department. Had a plantwide seniority system existed, which accounted for total length of service in all departments, those workers might have been protected. Plantwide seniority has been suggested by the Equal Employment Opportunity Commission as an alternative to reduce the impact of layoffs on minorities and women.¹²⁸ Such a system was also adopted by a consent decree covering nine major steel companies.¹²⁹

CONCLUSION

Job security concerns all workers, especially in troubled economic times. The concern is felt most deeply by women and minorities who are entering the work force in increasing numbers due to nondiscriminatory hiring policies and affirmative action plans. Unions and employers that rely on the well-established principles of "last-hired, first-fired" contribute to this insecurity, but face no Title VII liability despite the disparate impact of seniority-based layoffs. The statutory duty of fair representation, the duty to bargain, and the judicial power to modify and enforce decrees are all means to achieve the goals of Title VII. Use of these means will help bring about Title VII's policy of equal employment opportunity in times of adversity as well as prosperity.

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128. See, e.g., EEOC statement on alternatives to layoffs, 45 Fed. Reg. 60,832 (1980).

129. See *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826 (5th Cir. 1975) (upholding consent decree). The consent decree is reprinted in 8 LAB. REL. REP. (BNA) 431:125-52 (seniority provision at 431:133).