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Affirmative Action Versus Seniority Layoffs: Must the Last Always be First

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AFFIRMATIVE ACTION VERSUS SENIORITY LAYOFFS: MUST THE LAST ALWAYS BE FIRST?†

So the last will be first, and the first last.

MATTHEW 20:16

I. Introduction

The current recession's impact on the field of labor relations has given new meaning to this familiar biblical passage. As job layoffs have become more frequent, a conflict has arisen between affirmative action programs seeking to remedy past discrimination and the seniority system of layoffs used by many employers. The purpose of federally supported affirmative action programs is to eliminate present inequities created by past discrimination. The seniority system, on the other hand, perpetuates those inequities, whether intentionally or not, by mandating that the workers who are the last to be hired are the first to be laid off.

This "Last Hired-First Fired" rule has disproportionately affected women, blacks, and other minorities. These groups were already victims of discriminatory hiring practices before the passage of the Civil Rights Act of 1964, and consequently are often the groups with the least seniority. As a result, their members are the first to be laid off and are forced to bear the major burden of employment cutbacks. Minority groups contend that any seniority system which results in placing such an inordinate burden on them violates Title VII of the Civil Rights Act of 1964 by furthering the present effects of past discrimination.

Several recent federal court decisions have considered this question and have reached varying results. The courts have discussed such factors as the legislative history of Title VII, the "business necessity" defense to discriminatory practices,[1] and prior decisions concerning seniority. The result has been a partial retreat from

† During the time between the completion of this article and its publication, the Fifth Circuit rendered a decision on the *Watkins* appeal and reversed the district court's ruling that the seniority system of layoffs furthered the effects of past discrimination. Watkins v. Steel Workers Local 2369, 44 U.S.L.W. 2045 (5th Cir. July 16, 1975). The court emphasized the fact that the particular employees involved had not shown that they personally were discriminated against in the past. Absent such a showing, the court expressed the view that to recall black workers before senior white workers because other members of the black race had been discriminated against would be to accord them preferential treatment on the basis of their race, a preference prohibited by § 703(j) of the Act.

By adopting this rationale, the court avoided the effects-intent issue, preferring instead a case-by-case search for proven individual discrimination. It is likely that this decision will be appealed to the Supreme Court.

1 If racial discrimination is found in an employment practice, it may still be justified on the basis of "business necessity." As a practical matter, the burden of proof is so great that this defense presents no real obstacle to the modification of a seniority system to eliminate racial discrimination. A seniority system is not a business necessity unless it is *essential* to the safety and efficiency of the operation of the business. If a "reasonably available alternate system" with less discriminatory effects is feasible, the seniority system must be modified. *See* United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971). Fear of labor unrest and morale problems is not sufficient to justify perpetuation of discriminatory practices. *Id.* at 662-63. Courts will make every effort to deny a business necessity justification for racial discrimination, even to the extent of ordering instruction and on-the-job training of minorities to alleviate any safety and efficiency problems. *See* Taylor v. Armco Steel Corp., 373 F. Supp. 885, 907-08 (S.D. Tex. 1973).

the earlier policy of modifying seniority systems which perpetuate the *effects* of past discrimination.[2] The recent decisions introduce *intent to discriminate* as a requisite element for finding a Title VII violation.

Questions of social policy pervade even these judicial decisions which purport to dispassionately state the law. In view of the apparent judicial retreat from the outer limits of Title VII enforcement, the advocates of affirmative action may well seek solutions and compromises outside the courtroom. Efforts aimed at direct negotiations with the companies and unions themselves, with the attendant threat of litigation, may lead to more voluntary solutions in the future. Before considering this future, however, a closer look at the origins and development of the issue is necessary.

II. History

A. *Conflict Between Affirmative Action and LIFO Layoffs*

Traditionally, most companies rely upon plantwide seniority to determine whom to lay off during employment cutbacks.[3] The shorthand phrase for this practice, "Last In-First Out" (LIFO), graphically illustrates its effect: the most recently hired employees are the first to be laid off. On its face, this is an equitable method of reducing a work force. An inequity arises, however, in that prior to the Civil Rights Act of 1964 "discrimination in employment was being openly practiced."[4] Many women and blacks were excluded from certain jobs and industries until enforcement of the Act.[5] Consequently, these employees have substantially less seniority than do their white male counterparts and therefore they are the initial subjects of layoffs under a LIFO system.

Any system of layoffs based upon seniority, then, affects women and minorities disproportionately and may undercut many of the gains made by affirmative action programs over the past decade. It is this effect which elicits the civil rights challenge to the seniority method of determining layoffs.

B. *The Nature of Seniority*

Seniority may be measured by length of service in an entire plant, in a department, or in a particular job.[6] Any rights flowing from seniority typically result from the collective bargaining agreement between union and management.[7] Even in the absence of a collective bargaining agreement many employers use seniority in deciding upon promotions or layoffs. Since seniority benefits are

2 *See* text accompanying note 11 *infra*.

3 For statistics on use of seniority to determine layoffs, see BNA TECHNIQUES AND TRENDS IN UNION CONTRACTS ¶ 16:945 (1972).

4 Craver, *Minority Action versus Union Exclusivity: The Need to Harmonize NLRA and Title VII Policies*, 26 HASTINGS L.J. 1, 12-13 (1974).

5 Title VII became effective on July 2, 1965.

6 *See* Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1263 (1967) [hereinafter cited as *Title VII*].

7 Fivehouse v. Passaic Valley Water Comm'n, 127 N.J. Super. 451, 453, 317 A.2d 755, 757 (App. Div. 1974).

essentially contractual in nature, they are subject to modification by the courts to the same extent as other contract rights.[8] Congress recognized this in passing Title VII of the Civil Rights Act of 1964. At the same time, the legislators admitted the validity of seniority systems in general. Section 703(h) of Title VII provides in part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges, of employment pursuant to a *bona fide seniority or merit system* . . . provided that such differences are not the result of an *intention* to discriminate because of race, color, religion, sex, or national origin. . . .[9]

The specific nature of a "bona fide" seniority system is the subject of much dispute. It is at the heart of the layoff issue, and is the critical factor in determining the courts' ability to modify seniority systems. It is necessary, therefore, to consider those situations in which the courts have modified or eliminated a seniority system.

C. *Judicial History of Seniority Modification*

Courts have not hesitated to modify seniority systems found to "perpetuate the effects of past discrimination, including discrimination that occurred before the effective date of the Act."[10] However, until recently, such modifications were exclusively restricted to departmental or job seniority systems. In those instances, companies had segregated the departments or jobs on a racial basis, and when forced to integrate them by the Civil Rights Act, refused to allow the transfer of seniority from one department or job to another. The courts readily invalidated such practices under Title VII.[11] These decisions, however, dealt solely with seniority's discriminatory effect on promotion and job assignment, not with layoffs. Furthermore, most of these courts subsequently ordered the institution of plantwide seniority systems as the proper remedy,[12] the very practice currently at issue. The Fifth Circuit, in *Local 189, Papermakers v. United States,*[13] specifically rejected the creation of "fictional seniority" for "newly-hired Negroes" as distinguished from the mere grant of equal status for time "actually worked" in the plant.[14]

8 *See* Franks v. Bowman Transp. Co., 495 F.2d 398, 415 (5th Cir. 1974); United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971); Bush v. Lone Star Steel Co., 373 F. Supp. 526, 534 (E.D. Tex. 1974); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 520 (E.D. Va. 1968).

9 42 U.S.C. § 2000e-2(h) (1970) (emphasis added).

10 Watkins v. Steel Workers Local 2369, 369 F. Supp. 1221, 1224 n.4 (E.D. La. 1974).

11 *See* Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974) (departmental seniority); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971) (departmental seniority); Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970) (job seniority); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968) (departmental seniority).

12 Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1374 (5th Cir. 1974); United States v. Bethlehem Steel Corp., 446 F.2d 652, 660-64 (2d Cir. 1971); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 521 (E.D. Va. 1968).

13 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970).

14 416 F.2d at 995.

These cases, while theoretically accepting the principle that seniority systems may be modified to remedy the present effects of past discrimination, did not specifically address the precise issue of plant seniority modifications with regard to layoffs. The economic recession, however, has brought this question before several courts within the space of a year.

III. Current Legal Status of Seniority Layoffs

A. *Retreat from the "Discriminatory Effects" Standard*

1. The *Watkins* Case.

In *Watkins v. Steel Workers Local 2369*,[15] the district court for the Eastern District of Louisiana ruled that a plantwide seniority system used to determine order of layoffs was violative of Title VII. The court determined that the system unlawfully perpetuated the effects of past discrimination[16] regardless of the "intent" with which it was designed and utilized.[17] It has been a common practice of courts deciding Title VII cases to look at the discriminatory effects of employment practices regardless of their on-the-face neutrality or the intention with which they are adopted.[18] As the Fifth Circuit stated, "[E]mployment practices which operate to discriminate . . . violate Title VII, even though the practices are fair on their face and even though the employer had no subjective intention to discriminate."[19]

The *Watkins* court dealt exhaustively with many of the arguments voiced against modification of plantwide seniority.[20] It found these objections unpersuasive in light of the Title VII policy favoring adoption of liberal remedies to redress the effects of past discrimination. The court determined that the cases which adopted plant seniority as a remedy did so not because it was valid per se, but because the blacks in those cases had not been excluded from the plant and thus had been able to accumulate plant seniority.[21] Unlike other courts, it did not find the legislative history of Title VII an obstacle to the modification of plant seniority.[22] Neither was the court deterred by the possibility of awarding relief to minority employees who were not victims of the original discrimination. Classwide relief, it was feared, would aid those who had never been discriminated against and accord them preferential treatment.[23] *Watkins* cited court-approved affirmative action programs in other areas which had the same effect.[24]

15 369 F. Supp. 1221 (E.D. La. 1974), *argued on appeal,* 5th Cir., Jan. 20, 1975.
16 *Id.* at 1226.
17 *Id.* at 1224 n.3.
18 Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1377 (5th Cir. 1974); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).
19 Rowe v. General Motors Corp., 457 F.2d 348, 355 (5th Cir. 1972).
20 Among these arguments are: the legislative history of Title VII; the difficulty of identifying the discriminatees; and that plant seniority merits treatment different from job or departmental seniority.
21 369 F. Supp. at 1225.
22 369 F. Supp. at 1228-29.
23 Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970).
24 369 F. Supp. at 1231.

It considered the primary purpose of such class relief to be the prevention of future discrimination and not necessarily the compensation of those actually discriminated against in the past.

The *Watkins* case has been appealed to the Fifth Circuit. Two intervening circuit court decisions cast some doubt upon its ability to survive this appeal.

2. The *Waters* Case.

In the first of these decisions, *Waters v. Wisconsin Steel Works*,[25] the Seventh Circuit upheld the validity of a plantwide seniority system used to determine job recalls and layoffs. In an interesting analysis, the court said that the LIFO principle of layoffs was "not of itself racially discriminatory *nor does it have the effect of perpetuating prior racial discrimination. . . .*"[26] The court cited the legislative history of Title VII in support of its claim that such a seniority system is "bona fide" under the Act.[27] *Waters* determined that "an employment [i.e., plantwide] seniority system is properly distinguished from job or departmental seniority systems for purposes of Title VII,"[28] because in the former there is "equal recognition of employment seniority which preserves only the *earned expectations* of long-service employees."[29] The latter systems, on the other hand, presumably could be used to foster unearned expectations by discriminating against long-service minority employees. Noting that Title VII speaks only to the "future," the court determined that holding that an employment seniority system perpetuates past discrimination would be "tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer."[30]

The *Waters* court apparently was motivated by a desire to escape the rationale of the "effects" cases, where neutral employment practices were overturned when they perpetuated the present effects of past discrimination.[31] Rather than distinguishing those cases on the ground that they involved different types of seniority, the court chose to espouse the view that the LIFO principle did not itself perpetuate past discrimination. This is a middle ground: The court upheld plantwide seniority layoffs while remaining consistent with the view that employment practices which perpetuate the effects of past discrimination violate Title VII and may be modified. As a practical matter this position implicitly establishes the finding of intent to discriminate as a necessary prerequisite to judicial modification of facially neutral plantwide seniority systems. By stating that the LIFO principle itself must perpetuate past discrimination to be violative of Title VII, *Waters* necessarily means either that the system must be discriminatory on its face, or that it must be applied with discriminatory intent. Otherwise, it is difficult to accept an assertion that a layoff system which results in disproportionate minority layoffs does not perpetuate the "effects" of past discrimi-

25 502 F.2d 1309 (7th Cir. 1974).
26 *Id.* at 1318 (emphasis added).
27 *Id.*
28 *Id.* at 1320.
29 *Id.* (emphasis added).
30 *Id.*
31 For a representative list of such cases, see note 18 *supra.*

nation. These disproportionate layoffs are the direct, present results of past discriminatory practices in hiring, and no exercise in semantics can disguise that conclusion. Despite efforts to remain consistent with the "effects" principle, the *Waters* position is actually a retreat from the "effects" standard of finding a Title VII violation.

The court in *Waters* partially justified its position by arguing that if plant seniority is held to perpetuate past discrimination, then white employees would be shackled with the burden of past discriminatory practices in which they did not join. Whether such a consideration should influence an objective decision concerning the perpetuating effects of employment practices is debatable. It ignores the view of several courts that white employees' hopes of benefiting from a discriminatory seniority system may be frustrated whether or not those employees acquiesced in the discrimination. Their expectations may be judicially frustrated because they arise out of an "illegal system."[32] The Seventh Circuit in *Waters,* perhaps feeling uneasy about the strength of its rationale, did concede that there was a "fine line" to be drawn between claims of discrimination and reverse discrimination, and counseled employers to be "discreet" in devising employment seniority systems.[33]

3. The *Jersey Central* Case.

In *Jersey Central Power & Light Company v. IBEW,*[34] the Third Circuit came full circle, avoided the semantics of *Waters,* and openly declared that a plantwide seniority system would be overturned only if discriminatory on its face or adopted with an intent to disguise discriminatory practices. In *Jersey Central,* an employer sought a declaratory judgment as to whether it should follow the seniority provision of its collective bargaining agreement or an agreement with the Equal Employment Opportunity Commission (EEOC). The employer could not lay off employees without violating one of the two agreements. The district court held that the employer should follow the EEOC agreement whenever it conflicted with the collective bargaining agreement.[35] The Third Circuit vacated and remanded, holding that a seniority system which provides for layoffs in reverse order of seniority was "not contrary to public policy and welfare and consequently not subject to modification by court decree."[36] This was true even if female and minority employees were disadvantaged by the system.[37]

Citing the legislative history of Title VII, the majority concluded that Congress "intended a plantwide seniority system, facially neutral but having a disproportionate impact on female and minority group workers, to be a bona

32 United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971). *See also* Bush v. Lone Star Steel Co., 373 F. Supp. 526, 534 (E.D. Tex. 1974).

33 502 F.2d at 1320. The court was able to give the plaintiff relief on other grounds without modifying the seniority system.

34 508 F.2d 687 (3d Cir. 1975).

35 Jersey Central Power & Light Co. v. IBEW, 8 Fair Emp. Prac. Cas. 690 (D.N.J., filed Sept. 5, 1974), *supplemented,* 8 Fair Emp. Prac. Cas. 959 (D.N.J., filed Sept. 23, 1974), *vacated and remanded,* 508 F.2d 687 (3d Cir. 1975).

36 508 F.2d at 705.

37 *Id.* at 710.

fide seniority system within the meaning of § 703(h) of the Act."[38] The court defined a "bona fide" plantwide seniority system as one which is facially neutral and was neither designed nor intended to disguise discriminatory practices.[39] In requiring that intent to discriminate be present to establish a Title VII violation, it concluded that "a facially neutral company-wide seniority system, *without more,* is a bona fide seniority system and will be sustained even though it may operate to the disadvantage of females and minority groups as a result of past employment practices."[40] Considering this to be the proper interpretation of the legislative intent of § 703(h), the majority concluded that any remedy alleviating the present effects of past discrimination concerning layoffs would have to come from the legislature and not from the courts.[41]

The concurring opinion in *Jersey Central* found fault with the majority's interpretation of the legislative history of Title VII, and instead considered the *Watkins* view of that history to be more accurate. Disagreeing with the necessity of finding "subjective discriminatory intent," Judge Van Dusen concluded that Congress, in enacting Title VII, did "not intend to preclude remedies altering plant seniority which perpetuates discrimination."[42] Indeed, congressional intent remains the subject of much dispute whenever seniority problems arise in a Title VII context.

B. *Legislative History of Title VII*

Despite the view that "the legislative history of [Title VII] is singularly uninstructive on seniority rights,"[43] this same legislative history has been discussed repeatedly in cases dealing with modification of seniority systems pursuant to Title VII.[44] The dispute centers around statements made by Senator Joseph Clark on the Senate floor and on memoranda authored by Senator Clark, Senator Clifford Case, and the Justice Department.

Senators Clark and Case were the Senate floor managers of the Title VII bill. Their Interpretive Memorandum provided in part that, "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective."[45] In response to a question posed by Senator Everett Dirksen, Senator Clark stated:

> If under a "last hired, first fired" agreement a Negro happened to be the "last hired," he can still be the "first fired" as long as it is done because of his status as "last hired" and not because of his race.[46]

38 *Id.* at 706.
39 *Id.* at 706 n.54.
40 *Id.* at 710 (emphasis supplied).
41 *Id.*
42 *Id.* at 712 (Van Dusen, C.J., concurring) (footnote omitted).
43 Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970).
44 *See, e.g.,* Jersey Central Power & Light Co. v. IBEW, 508 F.2d 687, 707-08 (3d Cir. 1975); United States v. Bethlehem Steel Corp., 446 F.2d 652, 661 (2d Cir. 1971); Watkins v. Steel Workers Local 2369, 369 F. Supp. 1221 (E.D. La. 1974), *argued on appeal,* 5th Cir., Jan. 20, 1975.
45 110 CONG. REC. 7213 (1964) (remarks of Senator Clark).
46 110 CONG. REC. 7217 (1964) (remarks of Senator Clark).

A memorandum from the Justice Department presented by Senator Clark expressed the following view:

> If . . . a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where, owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.[47]

These statements appear to be explicit indications of legislative purpose; indeed, the court in *Watkins* admitted that "if they accurately defined the meaning of the statute, the defendants [those utilizing the seniority system] would prevail."[48]

The *Watkins* case, however, argues that these statements were made before subsequent amendments to the bill, and that the amendments included a new fair employment title which dealt directly with seniority for the first time in § 703(h).[49] The court expressed the view that, "In light of Section 703(h), the courts have not accepted the Clark statements as reflecting the meaning of the Act as to seniority."[50] The opinion then notes that many courts have modified seniority systems in spite of defenses based on the Clark statements. The court therefore concluded that the statements themselves have been rejected as an interpretive guide.[51]

Watkins correctly notes that many courts have modified seniority systems despite the Clark statements, but the exclusion of this legislative history as an interpretive guide may be premature. The cases which circumvent these statements deal with job and departmental seniority systems, not with plantwide systems.[52] In *United States v. Bethlehem Steel Corp.*,[53] the Second Circuit modified a departmental seniority system, finding the Clark memorandum no barrier. In doing so, however, the court stated that the memorandum "seems to say at most that the seniority of a white on a job will not be affected by the claims of blacks *hired after he was*."[54] The court proceeded to order plantwide seniority as the proper remedy.[55] As previously indicated, both the *Waters*[56] and the *Jersey Central*[57] cases relied on these statements and memoranda as indicative of legislative intent to sustain neutral plantwide seniority systems. It must also be remembered that § 703(h), providing an exemption for "bona fide" seniority systems, was molded in part by Senator Dirksen,[58] the very person who questioned Title VII's effect on seniority systems, and who received the Clark statements in response to those questions.

47 110 CONG. REC. 7207 (1964) (remarks of Senator Clark).
48 369 F. Supp. at 1228.
49 *Id. See* text accompanying note 11 *supra.*
50 *Id.*
51 *Id.* at 1229.
52 *See, e.g.*, Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (job seniority).
53 446 F.2d 652 (2d Cir. 1971).
54 *Id.* at 661 (emphasis added).
55 *Id.* at 664.
56 502 F.2d at 1318-19.
57 508 F.2d at 706-07.
58 *See Title VII, supra* note 6, at 1272.

A § 703(h) "bona fide" system has been defined as one which "can be explained or justified on nonracial grounds."[59] In practice, this definition may well beg the issue. Proponents of affirmative action contend that any system furthering the effects of past discimination cannot be "bona fide," while supporters of plantwide seniority view it as inherently "bona fide" if it is not created with the intent to discriminate and is neutral on its face.[60] Again, this is merely a restatement of the "effects" versus "intent" standard for finding a Title VII violation. As noted, the most recent case law adopts the requirement of an intent to discriminate as a necessary prerequisite to finding such a violation.[61]

A close reading of § 703(h), considering the Clark statements which preceded it and that Senator Dirksen helped draft it, seems to support the *Jersey Central* analysis. Section 703(h) clearly states that differences in terms, conditions and privileges of employment pursuant to bona fide seniority systems are valid provided they are not the result of an "intention" to discriminate.[62] Though courts have expanded this standard in the past in different contexts, the *Jersey Central* retreat to the "intent" standard finds apparent justification in the explicit language of the statute, in its legislative history, and in the different context in which it is applied—that of plantwide seniority. Thus, the *Jersey Central* rationale stands on solid legal ground;[63] plantwide seniority as a method of determining layoffs, applied neutrally, does not violate Title VII. Beyond the legal arguments, however, remain important questions of policy which must be considered. These policy questions have influenced court decisions in this area and will further influence the implementation of those decisions.

IV. Social Policy Considerations

A. *Labor Opposition, Judicial Reluctance, and the Likelihood of Legislative Relief*

The conflict between affirmative action and seniority raises serious questions of social policy. Minorities and women who have borne the effects of discrimination for years should not be forced to continue bearing those effects in the future. Yet there remains a duty to protect the interests of the longtime employee. Even granting that this older worker may have indirectly profited from the discrimination against his minority contemporaries, denial of his seniority rights based on arguments of moral responsibility is tenuous.

59 *Id.*
60 508 F.2d at 710.
61 *E.g.*, Jersey Central Power & Light Co. v. IBEW, 508 F.2d 687 (3d Cir. 1975).
62 42 U.S.C. § 2000e-2(h) (1970). *See* text accompanying note 9 *supra.*
63 One method of overcoming the obstacle of Title VII's legislative history is the use of § 1981 of the 1866 Civil Rights Act, dealing with freedom to contract. 42 U.S.C. § 1981 (1970). This section is not restricted by Title VII legislative history and has been interpreted as conferring a right of action against racial discrimination in employment. *See* Watkins v. Steel Workers Local 2369, 369 F. Supp. 1221, 1230 (E.D. La. 1974). Section 1981's applicability to layoffs remains unclear, however, since freedom of contract appears more applicable to discrimination in hiring than to layoffs of minority employees who have already been hired.

1. Labor Opposition

Organized labor can be expected to strongly oppose any drastic modification of seniority rights. Seniority is one of the precepts upon which the labor movement is based. Its purpose, in part, is to remove a source of worker discontent by substituting an objective standard for job priorities in place of what might otherwise be an arbitrary or subjective decision by the employer or the union.[64] Modifying this system with regard to promotions or transfers is already objectionable to many union members; modifying it with regard to layoffs is unthinkable. Moreover, such a modification by the courts might well exacerbate racial tensions. And while this is not, and never has been, a reason for retarding the elimination of racial discrimination and its effects, it must be considered in fashioning solutions to the present problem.

2. Judicial Reluctance

These considerations may explain the judicial reluctance to modify seniority systems as applied to layoffs. Both *Jersey Central* and *Waters* rejected attempts to modify or eliminate plantwide seniority systems which resulted in disproportionate minority layoffs. In addition, *Watkins,* while critical of such a system, was more restrained in its remedy. The court pointed out that it was "disinclined toward any remedy for the 1971-73 layoffs which would cause the immediate displacement of any incumbent employee."[65] In a later hearing on appropriate remedies, the court ordered future layoffs to be apportioned according to the relative percentages of whites and minorities in the work force regardless of seniority. It further ordered the reinstatement with back pay of enough minority workers to give minorities the same proportionate percentage of those employees still working as they had of the total work force. But no white incumbent workers who had not been laid off were to be laid off under this reinstatement. Everyone was to receive 40 hours of wages even if the combination of a lack of work and an increased work force required less than 40 hours of work.[66] It must be noted that this order was made possible, at least in part, by the fact that the plant in question employed only 400 workers. Whether a similar order would be viable in the case of massive layoffs in giant corporations employing thousands of workers is doubtful. The *Watkins* court was not faced with the ultimate choice between laying off disproportionate numbers of minority employees and laying off white workers with more seniority. To date, no court-ordered modification of a seniority system has necessitated the latter result.

3. The Likelihood of Legislative Relief

The *Jersey Central* court advised the minority plaintiffs to seek a legislative

64 Gardner, *An Overview of the Civil Rights Act of 1964 and Its Effect on Labor Organizations—A Look Ahead,* 17 LOYOLA L. REV. 1, 4 (1970).

65 369 F. Supp. at 1232.

66 2 CCH EMPLOYMENT PRACTICES ¶ 9766 (E.D. La. 1974). The court determined that placing this heavy financial burden on the company rather than on the employees was justified by the company's role in fostering past discrimination.

solution to the problem.[67] But legislative action in this area may be difficult to obtain, since any attempt at a legislative solution would raise substantial political problems. The combination of organized labor and more traditional opponents of civil rights legislation would present an insurmountable obstacle to legislative relief. Other political considerations, such as preservation of the fragile black-labor coalition in the Democratic Party, might make many legislators skeptical of seeking a legislative solution to such an explosive issue.

The courts might well consider, as a viable alternative, the granting of equitable relief on a case-by-case basis, despite the sound legal arguments upholding seniority layoffs. The courts have broad equitable powers to remedy discrimination pursuant to Title VII.[68] Were a court to find, for instance, union participation in prior discriminatory practices, it might be less reluctant to modify a seniority system found to perpetuate the effects of those practices. Such a finding would taint the "innocence" of those relying on the seniority system.[69]

B. *Relief Outside the Courtroom*

Despite the various legal positions, the issue probably will be resolved outside the courtroom, where many efforts to deal with the problem of disproportionate minority layoffs are presently being effected. The New York City Commission on Human Rights has issued a memorandum urging alternatives to layoffs of minorities. They include reduction of personnel costs other than wages, institution of a four-day workweek, seeking volunteers to take temporary leave, and conducting layoffs on a rotating or alternating basis.[70] Another alternative is "inverse seniority," which would oblige older employees with high, contractual unemployment benefits to bear the major burden of the layoffs.[71]

The EEOC is considering the issuance of guidelines, similar to those of the New York City Commission, which would prohibit layoffs that have a "disparate impact" on women and minorities.[72] Employers forced to reduce costs would be required to take other measures before resorting to layoffs, measures such as:

67 *See* text accompanying note 41 *supra.*

68 *See* Franks v. Bowman Transp. Co., 495 F.2d 398, 414 (5th Cir. 1974); Rowe v. General Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972). *See also* Comment, *Labor Law Meets Title VII: Remedies for Discrimination in Employment,* 6 CONN. L. REV. 66, 83 (1973).

69 *See, e.g.,* Stamps v. Detroit Edison Co., 365 F. Supp. 87, 115 (E.D. Mich. 1973). The court there found two unions liable for their negotiation of discriminatory seniority provisions and acquiescence in racial discrimination, stating that the unions had "failed in their obligation under the National Labor Relations Act and Title VII to protest racially discriminatory employer hiring practices . . . ." *See also* Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1381 (5th Cir. 1974) (union held responsible for the natural consequences of its efforts in negotiating a collective bargaining agreement); Sabala v. Western Gillette, Inc., 362 F. Supp. 1142, 1153 (S.D. Tex. 1973) (union's affirmative obligation under § 1981 to protect members from illegal discrimination includes responsibility to determine if the agreements it negotiates lock in past discrimination); Taylor v. Armco Steel Corp., 373 F. Supp. 885, 906 (S.D. Tex. 1973) (union meeting its statutory duty of fair representation under the National Labor Relations Act does not shield it from liability under Title VII).

70 New York City Comm'n on Human Rights, Interpretive Memorandum Concerning Procedures Required by Federal, State, and Local Anti-Discrimination Laws When an Employer Is Planning Reduction in Labor Costs That Could Result in Layoffs, January 31, 1975 (on file at the Notre Dame Center for Civil Rights, Notre Dame Law School).

71 One manufacturer, Deere & Co., developed such a plan on a voluntary basis. TIME, Feb. 3, 1975, at 58, col. 1.

72 88 LAB. REL. REP. 216 (1975).

reducing wages or hours, seeking voluntary retirements, or closing the plant for a day or more during the week.[73] If layoffs were the only feasible solution, the employer would have to use such systems as rotating layoffs or a *Watkins*-type apportionment formula.[74] The proposed guidelines interpret § 703(h) as not exempting seniority systems from the Act's coverage. They define a "bona fide seniority system" as one which does not displace a disproportionate number of female or minority group employees from the work force as a result of the employer's past discriminatory hiring, recruitment, or other employment practices.[75]

The issuance of these guidelines would be significant since the Supreme Court has previously noted that EEOC guidelines are "entitled to great deference."[76] Action on these guidelines, however, has been deferred pending further discussion.[77] The Justice and the Labor Departments oppose issuance of the guidelines; both view the layoff-seniority issue as one which should be decided by the courts, not the EEOC.[78] The courts, therefore, may not be presented with the option of deferring to the guidelines.

In seeking voluntary modifications of seniority layoff practices, however, the advocates of affirmative action need not rely entirely upon the good will of employers and unions. Even though the legal arguments suggest that plantwide seniority systems will be upheld in the abstract, there is sufficient doubt about the outcome in individual cases to give minority forces some bargaining power vis-a-vis the unions and employers.[79] This doubt, coupled with the potentially enormous back pay damages for which the unions and employers would be liable should they fail in court,[80] may be enough to obtain some "voluntary" modifications.

V. Conclusion

The conflict between affirmative action and plantwide seniority layoffs remains a critical issue, one that can be expected to become even more critical if the economic recession worsens. The judicial trend, culminating in *Jersey Central,* is away from court-ordered modification of seniority layoffs in the absence of an intent to discriminate. The courts are turning away from sweeping changes in labor policy in favor of deferring to legislative efforts and voluntary action. In so doing, the courts are on firm legal ground, as evidenced by statutory

73 *Id.*
74 *Id.*
75 88 LAB. REL. REP. 313 (1975).
76 Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971). *But see* Albemarle Paper Co. v. Moody, 95 S. Ct. 2362 (1975) (an opinion relying heavily upon *Griggs,* in which Chief Justice Burger, concurring in part and dissenting in part, condemned "slavish adherence to the EEOC Guidelines," *id.* at 2388).
77 88 LAB. REL. REP. 313 (1975).
78 *Id.*
79 This "doubt" may be strengthened by the *Watkins* case, in that *Waters* admitted there was a "fine line" between the arguments, and that *Jersey Central* was a 2-1 decision on the issue of the seniority system.
80 Youngdahl, *Suggestions for Labor Unions Faced with Liability Under Title VII of the Civil Rights Act of 1964,* 27 ARK. L. REV. 631, 649 (1973).

language and legislative history.[81] Such a position also reflects extralegal considerations of social policy. However, should such voluntary solutions or legislative efforts fail to eliminate the problem, the courts can and should consider invoking their broad equitable powers on a case-by-case basis to prevent minority workers from once again bearing the effects of past discrimination. Extralegal, voluntary solutions remain the most promising method of achieving an equitable distribution of the economic burdens. If these extralegal responses fail to adequately resolve the problem, however, the threat of court action remains.

William Ferguson

81 "[I]t seems unlikely that Congress expected Title VII in any circumstances to operate directly to remove a white employee from his job." *Title VII, supra* note 6, at 1274.