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The Survival of "Last Hired, First Fired" under Title VII and Section 1981

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THE ISSUE

A predictable result of the current reduction in work force needs[1] has been the increased attention focused on the validity of industry-wide layoff procedures under Title VII of the 1964 Civil Rights Act[2] and section 1 of the Civil Rights Act of 1866[3] (hereinafter referred to as Title VII and section 1981). Title VII defines unlawful employment practices and section 1981 is a general prohibition against discrimination.

The principle that differences in length of service merit special consideration in the event of layoffs has received wide acceptance in both the private and governmental employment sectors.[4] Seniority rules are designed by parties to collective bargaining agreements as a means of granting the least advantages to new employees in the work unit and the greatest advantages to the most senior employees. Generally, these seniority provisions are racially neutral in nature. In their application to minority workers, the plans are intended to have the same impact as they would have on any new admittee to the unit.[5] A special problem is raised, however, where employers, guilty of discriminatory

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1. The unemployment rate in the United States was 8.2 percent as of January, 1975. There were 7.5 million civilians out of work. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 21-7, EMPLOYMENT AND EARNINGS (1975).

2. 42 U.S.C. § 2000e-2(a)-(j) (1974). These provisions describe unlawful employment practices by an employer, employment agency, labor organization or joint labor-management committee.

3. 42 U.S.C. § 1981 (1974), provides:

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

4. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1209, ANALYSIS OF LAYOFF, RECALL, AND WORK-SHARING PROCEDURES IN UNION CONTRACTS 19 (March 1957).

5. Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1603 (1969) [hereinafter cited as Sobol].

hiring practices before the enactment of Title VII,[6] apply a "last hired, first fired" seniority system in determining layoff orders. In such instances, minority employees who were denied work in the past and thus a chance to acquire seniority in a given unit, find themselves bearing the brunt of today's mass layoffs. In contrast, their white colleagues, who gained employment and acquired seniority during a time when employers refused to hire minorities, have been able to maintain continual employment under the system.

This article critically analyzes the following proposition: The present continuation of a "last hired, first fired" employment seniority system for layoff determinations by employers who implemented discriminatory hiring practices before 1964 perpetuates the effects of such practices and therefore is not a bona fide seniority system under Title VII and section 1981.

THE SIGNIFICANCE OF SENORITY

Of the many provisions found in collective bargaining contracts, those governing the operation of seniority systems are of major importance to the contracting parties. A 1971-72 study conducted by the United States Department of Labor disclosed that 75 percent of all major collective bargaining agreements contain seniority provisions.[7]

Both labor and management share in the realization that the existence of an objective standard based on seniority is a necessary and beneficial means of allocating employment rights. Labor's demand for the application of seniority systems can be attributed to three fundamental factors. First, seniority systems provide all employees with a basis for reliably predicting their future employment positions.[8] Adherence to an objective seniority system by management has become an essential step in labor's continuous pursuit of increased economic

6. 42 U.S.C. § 2000e-(2)-(5) (1974), which defines unlawful employment practices and the related conciliation and enforcement procedures, was enacted on July 2, 1964, but did not become effective until 1 year later.

7. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 1425-14, MAJOR COLLECTIVE BARGAINING AGREEMENTS: ADMINISTRATION OF SENIORITY 32 (1972). For this study of selected provisions pertaining to the administration of seniority, the Bureau examined 1,974 major collective bargaining agreements, each covering 1000 workers or more, representing almost all agreements of this size in the United States, except those in the railroad and airline industries and in government. The agreements, which were current at the beginning of 1971, applied to more than 8.2 million workers or nearly half the total coverage of collective bargaining agreements outside the excluded industries.

8. *See generally* Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 How. L.J. 1, 5-7 (1967) [hereinafter cited as Gould]; S. SLICHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 104 (1960) [hereinafter cited as SLICHTER].

security. In industries characterized by a steady reduction in total employment, the employees' length of service is their principal protection against the loss of their jobs.[9] Second, seniority enables labor to reduce management's options in determining work conditions.[10] Third, seniority, as a basic regulatory mechanism, provides unions with an objective standard for resolving internal disputes concerning employee status.[11]

Employers have also found seniority systems to be advantageous in the management of business operations. Seniority systems enable employers to retain their most senior employees who are often their most valuable workers by providing them with an important incentive to remain.[12] Management also has recognized that some seniority systems assure that employees eligible for promotion will have acquired valuable experience.[13]

Seniority is the product of private arrangements between unions and employers incorporated into collective bargaining agreements.[14] A seniority system may be broadly defined as a set of rules governing job movements and benefits in an employer unit, under which the most senior person among a group of competing workers is preferred.[15] The set of rights which make up seniority are conveniently divided into two categories: (1) competitive seniority, which includes the rights of an employee relative to other employees in competitive situations, such as layoffs, promotions and transfers; and (2) benefit seniority, which guarantees the rights of the employee to benefits, usually financial, that increase automatically with the length of service.[16] Seniority may be measured by total length of employment with an employer (employment seniority), in a department (department seniority), in a line of progression (progression line seniority) or in a job (job seniority).[17] This article is primarily concerned with the status of competitive employment seniority in situations demanding layoffs.

A basic issue which often arises between labor and management relates to the specific weight to be assigned to length of service in de-

9. *See generally* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1535 (1962).
10. *Id.* at 1535.
11. *See* SLICHTER, *supra* note 8, at 104.
12. *See* Sobol, *supra* note 5, at 1606-07.
13. *Id.* at 1607.
14. *See* Gould, *supra* note 8, at 5-7.
15. *See generally* Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1263 (1967).
16. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-14, MAJOR COLLECTIVE BARGAINING AGREEMENTS: ADMINISTRATION OF SENIORITY 7 (1972).
17. SLICHTER, *supra* note 8, at 116-17.

termining the order of layoffs as opposed to the amount of discretion to be reserved to management. The prevailing importance attached to the use of seniority provisions in determining layoff orders is underscored by the following statistics: Of all the major collective bargaining agreements studied in 1970-71 by the United States Department of Labor, seniority played some role in determining layoffs 99 percent of the time; seniority was the sole factor in determining layoffs 28 percent of the time; seniority was a primary factor in determining layoffs 44 percent of the time; and in less than 1 percent of those agreements surveyed seniority played no role in determining layoffs.[18] Therefore, it is clear that actions which challenge the validity of seniority systems may jeopardize the job security of many workers and lead to labor unrest.

The most basic form of seniority used in allocating layoffs is the "last hired, first fired" system. Under this type of seniority system, those employees with the least amount of employment time are the first to be laid off. While a "last hired, first fired" seniority system is in itself racially neutral, serious questions concerning the application of such a procedure by employers who have followed discriminatory hiring practices in the past are presently being litigated. Minorities, claiming that the direct effect of this practice is the perpetuation of prior racial discrimination, have challenged its lawfulness under Title VII and section 1981.

"Last Hired, First Fired" Under Title VII

Congress, by enacting Title VII, indicated its determination that private employers were not exerting sufficient efforts to eliminate racial discrimination in employment. Section 703(h) of Title VII is specifically addressed to the use of seniority systems by employers. This provision establishes broad guidelines which must be satisfied before such systems will be found nondiscriminatory in nature and in practice:

> 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

18. U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-13, Major Collective Bargaining Agreements: Layoff, Recall, and Worksharing Procedures, at 54, Table 11 (1972). The Bureau conducted an intense and detailed examination of the layoff provisions in a sample of 364 agreements, covering 2.1 million workers. Each collective bargaining agreement covered 1,000 workers or more. All agreements studied were due to expire in 1971 or later.

> intention to discriminate because of race, color, religion, sex or national origin . . . .[19]

Therefore, the lawfulness of a "last hired, first fired" seniority provision is dependent upon whether it qualifies as a bona fide seniority or merit system.

Legislative History

Where statutory language, such as bona fide seniority system, is not self explanatory, courts must often rely heavily upon legislative history in ascertaining congressional intent.[20] Title VII originated in the House of Representatives and consisted of the language now found in section 703(a) of the Act.[21] The draft, as submitted by the House Judiciary Committee[22] and passed by the House[23] made no express reference to seniority systems. This bill was brought to the Senate floor by Senators Clark of Pennsylvania and Case of New Jersey, who were appointed bipartisan captains of Title VII.[24] Three interpretative

19. 42 U.S.C. § 2000e-2(h) (1974) (emphasis added).

20. The Supreme Court relied on relevant legislative history in construing 42 U.S.C. § 2000e-2(h) (1974) to require that employment tests be job related. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971). In reference to the Miller-Tydings Act, 15 U.S.C. § 1 (1973), the Supreme Court declared: "It is the sponsors that we look to when the meaning of the statutory words is in doubt." Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 394-95 (1950). The Supreme Court, in reference to section 4 of the Portal-to-Portal Act, 29 U.S.C. § 254 (1965), stated: "The language of section 4 is not free from ambiguity and the legislative history of the . . . Act becomes important." Steiner v. Mitchell, 350 U.S. 247, 254 (1956).

21. 42 U.S.C. § 2000e-2(a) (1974), in generally outlining unlawful employment practices by employers, provides:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) To fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

22. H.R. REP. No. 914, 88th Cong., 1st Sess. 10 (1963).

23. 110 CONG. REC. 2510-804 (1964). Section 703(a) appeared as section 704(a) in the House bill. Before the bill passed the House, Representative Dowdy, fearing that the bill's failure to speak directly to seniority systems would require the revision of established seniority rights by plants that had previously discriminated against blacks, proposed a last minute amendment. The amendment, which was quickly defeated, stated that the provisions of Title VII:

> shall not be applicable to any employer whose hiring and employment practices are pursuant to (1) a seniority system; (2) a merit system; (3) a system which predicates its practices upon ability to produce, either in quantity or quality; or (4) a determination based on any factor other than race, color, religion, or national origin.

110 CONG. REC. 2727-28 (1964). Because the House disposed of the amendment without any debate, it is not possible to determine whether its rejection was based on substantive deficiencies or due to faulty drafting.

24. 110 CONG. REC. 6528 (1964). The bill was brought directly to the floor of the Senate without any committee hearings.

documents were submitted by Senator Clark, each of which expressly declared that a "last hired, first fired" employment seniority system would be preserved under Title VII even in those instances where an employer had discriminated in hiring in past years. The first of these documents, introduced by both Clark and Case, explained that:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.[25]

Senator Clark, in responding to questions raised by Senator Dirksen of Illinois, who later co-sponsored section 703(h) as an amendment to the bill, again stressed that the adoption of Title VII would have no prohibitory effect on "last hired, first fired" provisions.[26] Clark also entered into the record an interpretative memorandum written by the Justice Department, which substantiated the Senator's belief that a "last hired, first fired" seniority system would not be violative of Title VII.[27]

The Mansfield-Dirksen amendments were later presented on the Senate floor as substitutes for the entire bill.[28] One of these clarifying amendments was offered to alleviate any doubts regarding the validity

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25. *Id.* at 7213.

26. Question: Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for "last hired, first fired". If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
Answer: Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.
Id. at 7217.

27. The Justice Department memorandum stated:
Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race.
Id. at 7207. These three documents were never read or discussed on the Senate floor, but were entered into the record.

28. *Id.* at 11,930.

of seniority systems under Title VII and included the language now found in section 703(h).[29] Senator Humphrey of Minnesota, a proponent of section 703(h), expressly negated any suggestion that the amendment altered the prior construction of the bill offered by Clark and Case:

> The basic coverage and the substantive prohibitions of [Title VII] remain almost unchanged. . . . [N]or have there been any significant changes in the sections specifying what actions constitute unlawful employment practices.[30]

Humphrey also pointed out that the amendments had been added in order to "remove certain ambiguities and uncertainties which existed in the House text."[31]

The bill passed the Senate in the basic form of the Mansfield-Dirksen amendment.[32] Just before House approval of the bill,[33] Representative McCulloch of Ohio, a supporter of the legislation, declared: "The bill does not permit the Federal Government to destroy the job seniority rights of either union or nonunion employees."[34]

The general language of section 703(a),[35] defining unlawful employment practices, receives a more specific meaning through the express reference in section 703(h) to bona fide seniority or merit systems. The introduction to section 703(h) "[n]otwithstanding any other provision of this chapter"[36] reflects the intended qualifying nature of that section with respect to section 703(a). The presence of the three interpretative memoranda provided by Clark and Case and the subsequent enactment of section 703(h) without any restrictions on the prior interpretations as offered indicate that Congress did realize the potential uses of "last hired, first fired" seniority provisions. Congress in no way sought to limit the application of these seniority rules, even in those cases where white workers had acquired more seniority than their minority counterparts due to discriminatory hiring practices prior to the effective date of Title VII.

Conflicting Judicial Views on "Last Hired, First Fired"

In *Waters v. Wisconsin Steel Works of International Harvester Co.*,[37]

29. 42 U.S.C. § 2000e-2(h) (1974). The relevant portions of this subsection are quoted in text accompanying note 19 *supra.*
30. 110 CONG. REC. 12,721 (1964).
31. *Id.* at 12,725.
32. *Id.* at 14,511.
33. *Id.* at 15,897.
34. *Id.* at 15,893.
35. 42 U.S.C. § 2000e-2(a) (1974).
36. *Id.* § 2000e-2(h).
37. 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed,* 43 U.S.L.W. 3475 (U.S. March 4, 1975) (74-1064).

the Seventh Circuit dealt directly with the issue of whether a "last hired, first fired" employment seniority clause, used in determining layoffs by a plant which had discriminated against blacks before 1964, serves to perpetuate past racial discrimination and therefore constitutes an unfair employment practice. The court held that such a seniority provision was racially neutral, qualified as a bona fide seniority system and in no way violated the mandate of Title VII.[38]

In *Waters* it was established at trial that since 1946 the defendants'[39] collective bargaining contracts had provided for a "last hired, first fired" seniority system for bricklayers. Seniority vested after a 90-day probationary period and could be forfeited by layoffs of more than 2 years. The seniority system governed the order of layoffs and recalls for bricklayers. The company did not hire its first black bricklayer until 1964, although blacks had made employment inquiries as early as 1947.

The suit was maintained by two blacks,[40] one of whom (Waters) had inquired about employment with the company in 1957 and was not hired until 1964. Two months after being hired, he was laid off before he could complete his probationary period and achieve contractual seniority status. Waters' layoff was one of several during late 1964 and 1965 which occurred as a result of an anticipated decrease in the steel plant's bricklaying needs. By March, 1965, over 30 bricklayers with up to 10 years seniority had been laid off. In March of 1967, Waters was recalled by the company and accepted reinstatement.

38. Plaintiffs in *Waters* brought suit under 42 U.S.C. § 2000e-2(h) (1974) and 42 U.S.C. § 1981 (1974). The court held that defendant's employment seniority provision violated neither statute. 502 F.2d at 1320.

39. The co-defendants were Wisconsin Steel Works of International Harvester Co. and Local 21, United Order of American Bricklayers and Stone Masons.

40. Plaintiffs originally initiated their suit as a class action against both Wisconsin Steel and Local 21. On Wisconsin Steel's motion, plaintiffs' claims were dismissed by the district court on numerous procedural grounds. The trial court held that suits for private racial discrimination in employment could not be brought under 42 U.S.C. § 1981 (1974), and that even if such a cause of action existed prior to 1964, it was, nevertheless, preempted by the enactment of Title VII in 1964. The court also concluded that any action under section 1981 would be barred by the 120-day filing period of the Illinois Fair Employment Practices Act, ILL. REV. STAT. ch. 48, § 858 (1974). The court disposed of plaintiffs' count against Local 21 by holding that the union could not be joined as a defendant since plaintiffs had not previously charged the local with discriminatory practices in a proceeding before the United States Equal Employment Opportunity Commission (hereinafter referred to as EEOC). The court further held that the action against Wisconsin Steel should also be dismissed. Since Local 21 and individual white bricklayers could be adversely affected if plaintiffs' action continued, Local 21 and the bricklayers were necessary parties for just adjudication under FED. R. CIV. P. 19. 301 F. Supp. 663, 665-67 (N.D. Ill. 1969). On appeal, the trial court was reversed and the cause remanded for trial. Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970). Thereafter, plaintiffs abandoned their class allegations and proceeded to trial on claims of individual discrimination against the two defendants.

Three months later he was again laid off because of a plant slowdown. Waters later was recalled but refused this third offer of employment because he had another job and also because he believed that his return might prejudice his pending charges with the Equal Employment Opportunity Commission[41] against Wisconsin Steel which he had filed in May, 1966. The district court held that the "last hired, first fired" seniority system negotiated between Wisconsin Steel and Local 21 for purposes of determining job layoffs and recalls had its genesis in a period of racial discrimination and thus failed as a bona fide seniority system under Title VII and section 1981.[42]

On appeal,[43] Waters contended that Wisconsin Steel's employment seniority system perpetuated the effects of past discrimination. He relied on the facts that blacks were laid off before and recalled after certain whites who might not otherwise have acquired seniority had Wisconsin Steel not discriminated in hiring prior to 1964. Waters argued that such a system facilitated a return to the status quo of the era when the company had hired no black bricklayers.[44] Wisconsin Steel based its defense upon the reasoning that:

> Length of service is recognized in law and in fact as a racially neutral criterion. The "last hired, first fired" seniority principle, strictly and fairly applied, benefits not only senior employees but also short-service workers who as yet have no contractual seniority but do have an interest in achieving job security as they advance in age and experience.[45]

The *Waters* court primarily relied upon the substantial weight of the three Clark memoranda in reaching its decision that the legislative history of section 703(h) is "supportive of the claim that an employment seniority system ["last hired, first fired"] is a bona fide seniority system under theAct."[46]

41. Before filing suit, plaintiffs, in May of 1966, registered complaints with the Illinois Fair Employment Practices Commission and the EEOC, charging Wisconsin Steel with racial discrimination in its hiring and layoff procedures. Both commissions dismissed the charges for cause. As a result of new evidence, the EEOC, on July 10, 1968, reassumed jurisdiction and determined that plaintiffs had cause to sue under 42 U.S.C. § 2000e-2(h) (1974).

42. 502 F.2d at 1317.

43. Both parties appealed the district court's decision. Plaintiffs' appeal rested on the alleged inadequacy of the trial court's calculation of back pay and attorney's fees. *See* Brief for Plaintiffs-Appellants at 13-20, Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3475 (U.S. March 4, 1975) (74-1064).

44. *See generally* Reply Brief for Plaintiffs-Appellants at 23-24, Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3475 (U.S. March 4, 1975) (74-1064).

45. Brief for Defendant-Appellant at 17-18, Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3475 (U.S. March 4, 1975) (74-1064).

46. 502 F.2d at 1318-19. The court's reliance on the Clark memoranda was but-

The *Waters* rationale upholding the lawfulness of "last hired, first fired" was later adopted by the Third Circuit in *Jersey Central Power & Light Co. v. The International Brotherhood of Electrical Workers.*[47] The *Jersey* court concluded that a facially neutral, company-wide seniority system, such as "last hired, first fired", is a bona fide seniority system and should be sustained even though it may operate to the disadvantage of females and minority groups as a result of past employment practices. Through an analysis of the legislative history of section 703, the court found that Congress intended to bar proof of the perpetuating effect of a plant-wide seniority system since it regarded such a system as bona fide. The court reasoned that the only evidence probative in a challenge to a plant-wide seniority system would be evidence directed either to the neutrality of the seniority system or evi-

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tressed by the previous judicial recognition of their importance in Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 519 (E.D. Va. 1968), and Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 994-95 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

47. 508 F.2d 687 (3d Cir. 1975). In 1972, the EEOC found reasonable cause to believe that Jersey Central, a large public utility which employed over 3,859 employees, had discriminated against minorities and females with respect to hiring and job assignments. In 1974, a conciliation agreement was entered into by the company, the EEOC and the unions. The agreement obligated the company to make reasonable efforts to recruit minorities and females into jobs where they had in the past been under-utilized or not employed. A 5-year affirmative action program was designed by the parties to increase the percentage of minority employees. The conciliation agreement, which was primarily concerned with the hiring, promotion and transfer of female and minority group employees, contained no express seniority provision. Prior to the execution of the conciliation accord, the company and the unions entered into a collective bargaining agreement which provided for the application of a "last hired, first fired" employment seniority system in regard to layoff orders.

Because of an economic slowdown in July of 1974, the company was compelled to lay off 400 workers by December, 1974. The unions required strict adherence by the company to the "last hired, first fired" provisions of the collective bargaining agreement. The EEOC countered by claiming that layoffs determined by seniority alone would violate the provisions of the conciliation agreement and Title VII. Confronted with two seemingly conflicting contracts, the company sought a judgment declaring its rights and duties under each. The company also sought a declaratory judgment with respect to its obliations under Executive Order 11,246, 3 C.F.R. 169 (1974), 42 U.S.C. § 2000e and Title VII.

The district court, in granting the company's motion for summary judgment, declared that the provisions of the conciliation agreement should prevail over the provisions of the collective bargaining agreement to the extent that the two agreements were in conflict. 8 FEP 690, 693 (D.C.N.J. 1974). The trial court ruled that the company's work force should be kept as integrated as it was before the layoffs began in July of 1974, even if this meant the establishment of three separate seniority lists for minority workers, women and all other employees. *Id.* at 695. The district court specifically refused to consider the issues involving Executive Order 11,246 and Title VII violations and instead based its decision on an interpretation of the two contracts.

On appeal, the Third Circuit reversed the trial court and found that no conflict existed between the contracts with respect to layoffs. 508 F.2d 687 (3d Cir. 1975). The court held that the conciliation agreement's objective of increasing the percentage of female and minority employees would have to be achieved by an affirmative hiring practice and not by resort to a system of artificial seniority in firing situations. The court regarded the conciliation agreement as unambiguous in its requirements that an increased proportion of females and minorities be hired. Once hired, however, workers in these classes were to be controlled by the terms and conditions of employment as set forth in the collective bargaining agreement. *Id.* at 701-02.

dence directed to ascertaining an intent to disguise discrimination.[48]

A fact situation similar to that found in *Waters* confronted the district court in *Watkins v. United Steel Workers, Local 2369.* This court, however, reached a totally different conclusion regarding the validity of a "last hired, first fired" employment seniority system under Title VII.[49] The court ignored the importance of the legislative history of Title VII and relied on the holdings of prior cases concerned with job or department seniority in transfer situations and union work referrral systems. Judge Cassibry reasoned that a "last hired, first fired" seniority provision, although neutral on its face, served to perpetuate past discriminatory practices by formerly all-white plants and, therefore, did not qualify as a bona fide seniority system under section 703(h).[50]

The *Watkins* trial court found that the Continental Can plant in Harvey, Louisiana, had been in operation for many years, but, with the exception of two blacks hired during World War II, only whites were hired at this plant until 1965. The company began hiring some black workers in 1967 and 1968 and substantially increased the number of black employees in 1969, 1970 and 1971. The period between 1971 and 1974 marked a noticeable cutback in employment at the Harvey plant. Pursuant to the terms of the collective bargaining agreement between Continental Can and Local 2369, layoffs were made on the basis of total employment seniority under a "last hired, first fired" process. As a result, all of the black employees hired after 1965 were laid off and the company's work force became all white except for the two blacks hired in the 1940's.

Of particular importance in reaching its decision was the court's dismissal of the interpretative memoranda introduced by Senator Clark before the passage of Title VII.[51] Judge Cassibry emphasized:

> The Clark statements in the Senate certainly speak to the question before the court, and if they accurately defined the meaning of the statute the defendants would prevail. I am convinced, however, in light of the subsequent amendments to the bill in Congress, and the judicial decisions under the Act, that Title VII has a broader reach on questions of seniority.[52]

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48. *Id.* at 706.
49. 369 F. Supp. 1221 (E.D. La. 1974), *app. pending* (oral arguments were heard on Jan. 20, 1975). Plaintiffs, black workers laid off by Continental Can Company, brought this class action suit against the company and Local 2369 under 42 U.S.C. § 2000e-2(h) (1974) and 42 U.S.C. § 1981 (1974). The trial court held that the employment seniority system was invalid under both statutes.
50. *Id.* at 1226.
51. 110 CONG. REC. 7207, 7213, 7217 (1964).
52. 369 F. Supp. at 1228.

The court based its rejection of the Clark memoranda on strictly chronological grounds. According to the court's reasoning, the Clark works became discredited expressions of congressional intent when Congress subsequently passed section 703(h) which deals directly with seniority.[53] The *Watkins* court, however, evaded the comments made by Senator Humphrey, a sponsor of the Mansfield-Dirksen amendment,[54] which negated any suggestion that section 703(h) altered the prior construction of the bill as offered by Senators Clark and Case.[55]

If the continued usefulness of the Clark memoranda was in doubt, one would expect the United States Supreme Court to make that determination when presented with such question. However, the Supreme Court, in *Griggs v. Duke Power Co.*, emphatically relied upon the memoranda advanced by Clark and Case[56] for a proper interpretation of section 703(h).[57] In construing the testing provision of section 703(h) the court accorded great weight to two interpretative memoranda, even though, as in the case of the three statements on seniority, they antedated the drafting of that section of Title VII.

The *Watkins* court drew on two lines of cases in reaching its decision to strike down the "last hired, first fired" seniority system as an unlawful employment practice. In the first series of cases the courts held that department or job seniority systems[58] were in violation of

53. *Id.* at 1229.
54. *See* 110 CONG. REC. 11,930-34 (1964).
55. *Id.* at 12,721, 12,725; see text accompanying notes 30 and 31 *supra.*
56. *Id.* at 7247, 13,504.
57. 401 U.S. 424, 436 (1971). The Supreme Court reasoned: "From the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of § 703(h) to require that employment tests be job related comports with congressional intent." The Third Circuit, in Jersey Central Power & Light Co. v. The International Brotherhood of Electrical Workers, 508 F.2d 687 (3d Cir. 1975), utilized the three Clark memoranda as a primary source in interpreting congressional intent concerning the lawfulness of seniority systems under Title VII. In addressing the contention that the Clark works should be rejected as an interpretive guide because of the subsequent enactment of section 703, the court in *Jersey* held:

> We believe that the legislative statements made prior to the introduction of § 703(h) and dealing directly with seniority systems is entitled to weight in interpreting congressional intent as to seniority systems, as the enactment of § 703(h) was not designed to change the intent and effect of Title VII.

Id. at 707 n.56. For use of the Clark memoranda before *Griggs* and *Jersey*, *see* Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 519 (E.D. Va. 1968); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 994-95 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); United States v. Sheet Metal Workers Int. Ass'n, Local 36, 416 F.2d 123, 134 n.20 (8th Cir. 1969). The relevance of the three Clark memoranda has been acknowledged by legal scholars as well. *See* Gould, *supra* note 8, at 8-9; Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1270-71 (1967); Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964*, 84 YALE L.J. 98, 100-01 n.17 (1974).

The *Watkins* court's outright rejection of the Clark memoranda receives its sole support from an earlier work written by plaintiff's counsel in *Watkins*. Sobol, *supra* note 5, at 1611-14.

58. For a general discussion on the types of seniority, see text accompanying note 17 *supra.*

Title VII when used to preclude blacks from attaining employment in more desirable departments. Typically, black employees had been limited to a few low paying jobs in separate departments or lines of progression. With the passage of Title VII, employers were moved to nominally lift restrictions on job transfers. However, many employers were quick to devise job or department seniority procedures which precluded transferring minority employees from maintaining their previously earned seniority in the segregated units. Those minorities desiring other work opportunities were placed at the bottom of the employee roster in the formlerly all-white department to which they transferred.

As a result of this seniority practice, minorities were effectively deterred from seeking transfers to white departments. These seniority systems have uniformly been found racially discriminatory on the ground that employment preferences cannot be determined on the basis of length of service in jobs or departments from which blacks have been excluded. Instead, the courts have sought to remedy such discrimination by allowing blacks transferring to formerly all white departments to take with them their total employment seniority.[59]

From these cases which dealt exclusively with department or job seniority systems, the *Watkins* court extracted the principle that "employment preferences cannot be allocated on the basis of length of service or seniority, where blacks were, by virtue of prior discrimination, prevented from accumulating relevant seniority."[60] The court broadly applied this reasoning in invalidating layoff procedures under a "last hired, first fired" employment seniority system.

Judge Cassibry admitted that ". . . the case at bar involves the very factual situation that was used as an example of the generality in the Clark statements, while most of the decided cases involve situations that are technically different."[61] The court nevertheless failed to recognize the importance of the distinction between the application of

59. *See* Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971), in which the court imposed a one-time or 2-year limitation on blacks' right to transfer with full seniority carryover; Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. denied,* 404 U.S. 1006 (1971); Rock v. Norfolk & Western Ry. Co., 473 F.2d 1344 (4th Cir.), *cert. denied,* 412 U.S. 933 (1973); United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582 (4th Cir. 1972), *cert. denied,* 411 U.S. 939 (1973); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied,* 406 U.S. 906 (1972) where blacks were allowed by the court to use company seniority for transfer purposes for one time.

60. 369 F. Supp. at 1226.

61. *Id.* at 1229.

a "last hired, first fired" job or department seniority provision and the use of a "last hired, first fired" employment seniority system. Under the former, continuing restrictions on transfer and promotion create unearned or artificial expectations of preference in favor of white workers when compared with incumbent minorities having an equal or greater length of service with the employment unit. This situation is remedied by allowing transferring blacks to carry their total or actual employment seniority into white units. Blacks are not afforded artificial or constructive seniority at the expense of whites—they merely retain what they have actually earned. Also, those minorities who are aided by the above mentioned remedy are the actual victims of the previous discrimination.

This court-enforced remedy is inappropriate in the context of employment seniority systems. Under this type of system, there is, by definition, equal recognition of employment seniority which preserves only the actual earned expectations of long-service employees. Attempts such as those made by the *Watkins* court to disband employment seniority systems and allow blacks with little employment seniority to acquire constructive seniority equal to or greater than that held by whites, lead to reverse discrimination through preferential treatment granted to minorities. In *Quarles v. Phillip Morris, Inc.*,[62] the court distinguished employment seniority rules in the light of legislative history when it held: "[T]he legislative history [of section 703(h)] leads the court to conclude that Congress did not intend to require 'reverse discrimination'; that is the act does not require that Negroes be preferred over white employees who possess employment seniority."

In *Local 189, United Papermakers & Paperworkers v. United States*,[63] The Fifth Circuit, in relying upon the legislative history of

62. 279 F. Supp. 505, 516 (E.D. Va. 1968). In *Quarles*, employees of Phillip Morris were historically assigned to four separate departments, each of which had its own job progression ladder and its own seniority roster. Until 1966, interdepartmental transfers by blacks were prohibited. After 1966, blacks were allowed to transfer to other departments but were prohibited from carrying with them their earned employment seniority. Because most of the opportunities for advancement or for exercising other privileges such as preferential day shifts and avoidance of layoffs were dependent upon department seniority rather than employment seniority, blacks were reluctant to transfer to higher departments and give up valuable seniority time. The court found that blacks did not seek to oust white employees with less employment seniority, but rather demanded only an opportunity to be trained and promoted to fill future vacancies on the same basis as whites with equal ability and employment seniority. *Id.* at 514. The court held that future seniority rights of employees qualified to transfer must be determined on the basis of total employment seniority. *Id.* at 520-21.

63. 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). In *Local 189*, unlike *Waters* and *Watkins*, blacks were not treated according to their actual length of service with their employer. Instead, the court found that the job seniority system applied by defendant Crown Zellerbach perpetuated prior discriminatory practices by deny-

Title VII, carefully explained that it was the purpose of the Act to safeguard actual earned seniority, not to create special privileges in the form of constructive seniority for minority employees:

> No doubt, Congress, to prevent "reverse discrimination" meant to protect certain seniority rights that could not have existed but for previous racial discrimination. For example a Negro who had been rejected by an employer on racial grounds before passage of the Act could not, after being hired, claim to outrank whites who had been hired before him but after his original rejection, even though the Negro might have had senior status but for the past discrimination. . . . [T]he treatment of "job" or "department seniority" raises problems different from those discussed in the Senate debates . . . .
>
> It is one thing for legislation to require the creation of *fictional* seniority for newly hired Negroes, and quite another thing for it to require that time *actually worked* in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of the previous discrimination. There would be no guaranty that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. In other words, *creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment* . . . . We conclude, in agreement with *Quarles*, that Congress exempted from the anti-discrimination requirements only those seniority rights that gave white workers preference over junior Negores.[64]

The lawfulness of a "last hired, first fired" employment seniority policy was even conceded by the prevailing counsel for the United States in *Local 189*. The government specifically acknowledged that

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ing transferring blacks employment seniority which they had compiled while in segregated departments.

64. 416 F.2d at 994-95 (emphasis added). Sentiment against preferential treatment on the basis of race was codified in 42 U.S.C. § 2000e-2(j) (1974), which provides:

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

such a system "does not give any class preferential treatment over another" and that "competition for future job vacancies [would be on] the basis of total length of service in the plant, a system which is fairer and even handed by all."[65]

The other line of cases relied upon by the *Watkins* court involved union work referral rules in previously all-white craft unions. Under these union policies,[66] priority was given to those employees with long work experience under a contract or in the particular industry. As a result of their prior exclusion from craft work under union contracts, blacks later found themselves in the lowest strata for purposes of job referral by the unions. In all of these cases the referral systems were held unlawful under Title VII, on the grounds that they perpetuated the effects of past discrimination against blacks and presently deprived them of an equal employment opportunity.[67]

The *Watkins* court borrowed the uniform holdings from these work referral cases and relied on them as a basis for invalidating an employer's layoff practice under a "last hired, first fired" employment seniority provision.[68] The court reasoned that union work referral rules and employers' seniority systems are to be accorded identical treatment under section 703(h). However, section 703(h) is only addressed to employer-adopted seniority systems[69] and does not pertain to work referral systems used by unions to control access to new job openings.[70]

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65. Brief for United States at 28-29, Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). The *Local 189* reasoning was followed by the Fifth Circuit in Franks v. Bowman Transportation Co., 495 F.2d 398, 417 (5th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3510 (U.S. March 25, 1975) (74-728), where the court refused to grant constructive seniority to black job applicants who were unlawfully denied employment in the post-Act period.

66. In Teamsters Local 357 v. N.L.R.B., 365 U.S. 667, 674 (1961), the Supreme Court ruled that union work referral systems are valid under the National Labor Relation Act §§ 7, 8(a)(1), (3), *as amended* 29 U.S.C. § 158 (1973), so long as they are not used to create a closed shop.

67. *See* Dobbins v. Electrical Workers, Local 212, 292 F. Supp. 413, 445 (S.D. Ohio 1968). The court held that a policy which grants priority in work referral to persons who have experience under the local's collective bargaining agreement is discriminatory when competent blacks have previously been denied work under the agreement by reason of their race. A memorandum by Senator Clark [110 CONG. REC. 6986 (1964)] was also cited by the court as evidence that Title VII does not require an employer to achieve racial balance in his work force by giving preferential treatment to any individual or group. *See also* United States v. Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969).

68. 369 F. Supp. at 1226.

69. *See* text accompanying note 19 *supra*.

70. A labor organization applying a work referral system which systematically excludes blacks from receiving employment violates 42 U.S.C. § 2000-2(c) (1974), which provides:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for mem-

The idea that distinct treatments should be afforded to union work referral rules and employers' seniority systems was advanced by Senators Clark and Case through a memorandum. They indicated that although Title VII might not have the effect of requiring the displacement of incumbent white workers, even where the incumbent work force was restricted to whites, it does prohibit the use of referral lists for future employment compiled on a discriminatory basis.[71]

Both the legislative history and the language of section 703(h) warrant the conclusion that a union work referral system was never intended to receive the same protection accorded a bona fide employer's seniority system under Title VII. Therefore, decisions involving work referral rules in previously all-white unions shed no reflection on the lawfulness of employer-adopted employment seniority systems under section 703(h).[72]

While the *Watkins* court did not hesitate to strike down the "last hired, first fired" employment seniority system, the court was prepared only to suggest possible remedies.[73] The court intimated that the best remedy available would involve "the apportionment of layoffs among whites and blacks on the basis of the proportion of each group to the total workforce. Then the employees to be laid off could be selected within each racial group on the basis of plant seniority."[74] However,

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bership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

71. The distinction between treatments afforded to union work referral systems and employers' seniority systems under Title VII, as raised by the Clark-Case memorandum [110 CONG. REC. 6992 (1964)] was relied on in United States v. Sheet Metal Workers, F.2d 123, 134 n.20 (8th Cir. 1969). The court, while quoting the memorandum as support for the invalidation of a union work referral system applied in a discriminatory manner, also acknowledged that the Clark-Case statement stood as an indication of the separate protection to be accorded seniority systems under Title VII.

72. As support for its decision to restrict the use of the "last hired, first fired" employment seniority system by employers who formerly discriminated in hiring, the *Watkins* court also cited Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) and Allen v. City of Mobile, 331 F. Supp. 1134 (S.D. Ala. 1971). In *Rowe* and *Allen*, blacks who sought access to new job opportunities in services previously restricted to whites challenged employment practices which dealt in part with the use of seniority in allocating promotions and job assignments. These decisions do not involve the issue of whether layoff determinations based solely on an employee's total length of service violate Title VII or 42 U.S.C. § 1981 (1974).

73. Plaintiffs, in their motion, requested the court to defer the question of remedy so that the parties could have an opportunity to confer on the matter and possibly propose a joint remedy. This request was granted. 369 F. Supp. at 1232.

74. *Id.* In finding that neither the union nor its members contributed substantially to Continental Can's all-white hiring policy, the court proposed that the company, rather than a few white employees, should bear the primary burden of correcting the discrimi-

such a proposal, as later emphasized by the court in *Waters*,[75] would invariably lead to a form of reverse discrimination by shackling white employees with a burden of a past discrimination created not by them but by their employer. Allowing blacks with less seniority than whites to retain their jobs would be tantamount to the creation of "fictional employment time for newly hired blacks" and would comprise the "preferential treatment" which the court in *Local 189* specifically warned against.[76] The clear thrust of Title VII is directed against just such a form of preferential treatment on the basis of race. As the Supreme Court explained in *Griggs v. Duke Power Co.*:

> The Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. *Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.*[77]

TITLE VII vs. SECTION 1981: SUBSTANTIVE INCONSISTENCIES?

Minorities have also challenged the validity of "last hired, first fired" employment seniority systems under section 1981.[78] Plaintiffs in *Watkins* and *Waters* pleaded alternatively under Title VII and section 1981.[79] The latter, which has been interpreted as a general prohibition against discrimination,[80] has also been construed to confer a right of action against racial discrimination in employment.[81] The federal

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nation that had occurred since the 1971 layoffs. However, its suggestion that the company reemploy blacks who were laid off discriminatorily since 1971, and utilize a larger work force with some reduction in working hours until normal attrition reduces the work force to its most efficient level, would also grant privileges to blacks at the expense of innocent whites. Under this proposal, whites would suffer a loss in work hours and pay. Another remedy suggested by the court would have blacks, who are on the recall list with little seniority, receive priority rights to employment in the next openings. Here again, blacks with less seniority than laid off white workers would be granted special treatment at the expense of the latter.

75. 502 F.2d at 1320.

76. 416 F.2d at 994-95 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); see text accompanying note 64 *supra*.

77. 401 U.S. at 430-31 (1971) (emphasis added).

78. For complete text of 42 U.S.C. § 1981 (1974), see note 3 *supra*.

79. In Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970), the court held on appeal that plaintiffs had an independent remedy under 42 U.S.C. § 1981 (1974), without first exhausting their rights under Title VII.

80. In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Supreme Court was asked to determine the scope and constitutionality of 42 U.S.C. § 1981 (1974). Both 42 U.S.C. § 1981 and 42 U.S.C. § 1982 were derivatives of section 1 of the Civil Rights Act of 1866. The Court held that section 1, and its derivatives, prohibit "all racial discrimination, private as well as public, in the sale or rental of property. . . ." 392 U.S. at 437. The Court also noted that "the right to contract for employment [is] a right secured by 42 U.S.C. § 1981. . . ." 392 U.S. at 442 n.78.

81. *See* Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970); Sanders v. Dobbs House, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); Boudreaux v. Baton Rouge Marine Contracting Co., 437

courts have uniformly affirmed the position that the equal employment provisions of Title VII do no supersede the provisions of section 1981. Additionally, the specific remedies fashioned by Congress in Title VII were not intended to preempt the general remedial language of section 1981.[82] Congress has defeated amendments drawn to establish Title VII as the exclusive remedy for employment discrimination,[83] and as a result, litigants have relied on Title VII and section 1981 for procedurally separate courses of relief.[84]

A question remains whether section 1981 may be used to invalidate a seniority system that is valid under Title VII. The argument has been advanced that section 1981 is not restricted by any of the legislative history of Title VII which was enacted 98 years later and, therefore, that one may prevail under the older Civil Rights Act regardless of the outcome of one's case under Title VII.[85] The court in *Waters* rejected this reasoning and held that a seniority system which is acceptable under Title VII must also be deemed lawful under section 1981.[86] The *Watkins* court acknowledged the possibility that an employment practice could be held lawful under one statute and unlawful under the other but quickly added that ". . . it would clearly be an undesirable result to construct two separate bodies of substantive law for the enforcement of the two statutes."[87] While courts have found that remedial differences may at times exist under the two acts, no decision has been rendered which would sanction substantive inconsistencies between Title VII and section 1981.[88] Instead, the courts have

F.2d 1011 (5th Cir. 1971); Hill v. American Airlines Inc., 479 F.2d 1057 (5th Cir. 1973); Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974).

82. In Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1971), the Supreme Court explained: "[T]he legislative history of Title VII manifests a Congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *See also* Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011, 1017 (5th Cir. 1971).

83. 110 CONG. REC. 13,650-52 (1964); 118 CONG. REC. 1524-26 (1972).

84. For a thorough discussion of employment discrimination under 42 U.S.C. § 1981 (1974), see Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 56, 68-84 (1972); Comment, *Is Section 1981 Modified by Title VII of the Civil Rights Act of 1964?* 1970 DUKE L.J. 1223, 1235.

85. Reply Brief for Plaintiffs-Appellants at 25, Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3475 (U.S. March 4, 1975) (74-1064).

86. 502 F.2d at 1320 n.4.

87. 369 F. Supp. at 1230.

88. *See* Reply Brief for Defendant-Appellant at 14, Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3475 (U.S. March 4, 1975) (74-1064) in which defendant maintained that Congress did not intend substantive inconsistencies to exist between the two statutes. Defendant argued that Title VII's explicit approval of bona fide seniority systems should modify and control the application of seniority provisions under 42 U.S.C. § 1981 (1974). This reasoning finds support in Tillman v. Wheaton-Haven Recreation Ass'n, 451 F.2d 1211, 1214-15 (4th

held that conflicts between the two acts should be resolved whenever possible.[89] The Supreme Court, in *Alexander v. Gardner-Denver Co.* has recently held that "[l]egislative enactments in this area [civil rights] have long evinced a general intent to accord parallel or overlapping remedies against discrimination."[90] Therefore, in fashioning a body of substantive law under section 1981, and as a means of avoiding undesirable substantive law conflicts, the courts should look to the specific principles of law created under Title VII for direction.

CONCLUDING REMARKS

Title VII and section 1981 are directed against those employment practices which allocate layoffs on the basis of race, color, religion, sex or national origin. An employer has the absolute duty under each of these acts to order layoffs and fill vacancies on a nondiscriminatory basis. Title VII, however, specifically guarantees the existence of those seniority rules which are racially neutral and thus qualify as bona fide systems under section 703(h). In their search for the meaning of bona fide seniority system, most courts have received guidance through examination of the legislative history behind Title VII. The congressional records reveal, first, that Title VII was designed to have no effect on those seniority rights established before 1964. The effect of Title VII is prospective and not retrospective. Second, the drafters of Title VII did not intend to destroy seniority provisions which use total length of service as the sole basis for determining layoff and recall orders. Instead, Congress exempted from the anti-discrimination requirements of the Act those seniority systems that give senior workers preferred rights over junior employees.

The legislative history of Title VII, and in particular the three memoranda on seniority presented by Senators Clark and Case, establish that the members of Congress were aware of the industry-wide acceptance of "last hired, first fired" seniority systems and were adamant in their intent to protect these systems under the Act. Race is not a criterion in the operation of a "last hired, first fired" employment seniority system. Such a system operates on the sole objective element

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Cir. 1971), *rev'd in part*, 410 U.S. 431 (1973). The circuit court held that since the 1964 Civil Rights Act contains an exception to the ban on racial discrimination in a given area it will effectively amend the earlier and more general section 1981 in any case where the 1866 Act prohibits the same conduct which is saved as lawful by the terms of the 1964 Act.

89. Waters v. Wisconsin Steel Works, 427 F.2d 476, 485 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

90. 415 U.S. at 47.

of actual length of service. Under Title VII, the "last hired" employee can be the "first fired" as long as he is released because of his status as "last hired" and not because of his race. This holds true even in those situations where because of pre-1964 discriminatory hiring practices, minorities have been unable to compile enough seniority to secure their jobs against layoffs. The crux of the law is whether the employer honors each worker's earned seniority and thus gives equal effect to white and black time actually spent on the job.

It is true that the legislative history of Title VII does not predetermine the outcome of employment discrimination suits under section 1981. However, it is equally obvious that substantive harmony under two federal statutes pertaining to the same area in the law of civil rights is not only desirable but of practical necessity for the smooth and consistent operation of our legal system. The creation of two substantive bodies of law, conflicting in their application would be intolerably unfair to prospective litigants faced with the task of defending their conduct. Instead, the sanctions devised under the latter and more specific Act of 1964, which expressly protect a "last hired, first fired" seniority system, must be respected by courts entertaining suits under section 1981.

Assaults by the courts against the operation of "last hired, first fired" seniority systems under the guise of fostering racial justice constitute patent examples of judicial legislation which should not be condoned.

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