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THE SCOPE AND IMPLEMENTATION OF RETROACTIVE COMPETITIVE-STATUS SENIORITY AWARDS UNDER TITLE VII

*Jonathan F. Myers**

In this article Mr. Myers discusses the various methods of implementing retroactive competitive-status seniority awards mandated by Title VII of the Civil Rights Act of 1964 as interpreted by the Supreme Court of the United States in Franks v. Bowman Transportation Co.

INTRODUCTION

Title VII of the Civil Rights Act of 1964 (the Act or Title VII)[1] prohibits all practices which create unequal employment opportunities based upon racial, sexual, religious or ethnic discrimination.[2] These prohibitions were designed to guarantee individual rights by insuring to each employee discrimination-free employment.[3] In contrast to this policy, the National Labor Relations Act[4] and the Labor-Management Relations Act[5] seek to secure the collective rights of employees to bargain with their employers over the terms

* B.A., Yale University; J.D., Georgetown University.

[1] 42 U.S.C. §§ 2000e to 2000e-17 (1976).

[2] Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

[3] Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974). *See also* H.R. REP. NO. 914, 88th Cong., 2d Sess. 26–32 (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2401–08. Although enforcement proceedings often seek to benefit a class of persons, their ultimate goal is to protect the individual employee from discrimination. 415 U.S. at 45.

[4] 29 U.S.C. §§ 151–69 (1976).

[5] 29 U.S.C. §§ 141–44 (1976).

and conditions of their employment.[6] Inevitably, enforcement of Title VII, geared as it is to the vindication of individual rights, has brought federal antidiscrimination policy into apparent conflict with federal policies governing collective bargaining in cases where the employees' rights are determined under a collective bargaining agreement.

In 1974 the Supreme Court resolved one of the first such conflicts when it concluded in *Alexander v. Gardner-Denver Co.*[7] that the federal policy favoring binding arbitration of contractual disputes between labor and management[8] must yield to the federal policy expressed in Title VII favoring individual suits in the federal courts to remedy employment discrimination.[9] The Court held that the individual employee's statutory right to a trial de novo under the Act was not foreclosed by the prior submission of his employment discrimination claim to binding arbitration under the anti-discrimination clause of the collective bargaining agreement between his employer and his union representative.[10]

Approximately one year later, the Supreme Court resolved another significant conflict between general federal labor law policies and anti-discrimination goals in *Emporium Capwell Co. v. Western Addition Community Organization.*[11] There, the Court balanced the objective of providing the speediest and most effective remedy for racially motivated employment discrimination against the federal policy, embodied in section 9(a) of the Labor-Management Relations Act, favoring exclusive representation of organized workers by their certified bargaining representative.[12] The Court concluded that in the collective bargaining context the exclusive representation principle must be preserved and held that minority group employees could not lawfully circumvent their elected collective bargaining representative

[6] N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967). In a discussion of the National Labor Relations Act, the Court noted:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.

Id. at 180.

[7] 415 U.S. 36 (1974).

[8] This policy was first articulated in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), and was elaborated on in considerable detail in the famous "Steelworkers Triolgy": United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

[9] 415 U.S. at 44, 47–56.

[10] *Id.* at 59–60.

[11] 420 U.S. 50 (1975).

[12] 29 U.S.C. § 159(a) (1976).

to bargain separately with their employer over the elimination of racially discriminatory employment practices.[13]

During the 1975 and 1976 terms, the Supreme Court encountered perhaps the most difficult and significant conflict between Title VII anti-discrimination policies and general federal labor policies to date. In *Franks v. Bowman Transportation Co.*[14] and *International Brotherhood of Teamsters v. United States*,[15] the Court balanced Title VII's provision of an effective remedy for employment discrimination based upon race[16] against the general federal labor law policy favoring seniority systems, a standard feature of collective bargaining agreements in virtually every industry. The seniority/Title VII dilemma has been particularly controversial[17] and much litigated,[18] primarily because the minority individuals who suffer from the present effects of prior employment discrimination through the operation of an existing seniority system can be adequately compensated, in

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[13] 420 U.S. at 52, 65–70. The Court reasoned that such independent bargaining would "shortcut" the orderly collective bargaining process contemplated by the NLRB by: (1) fragmenting the collective bargaining unit; and (2) subjecting the employer to conflicting and often irreconcilable demands of competing employee groups. *Id.* at 65–70. The Court reasoned further that the high probability of strike and deadlock in such a situation would hinder, rather than assist, the elimination of discriminatory practices. *Id.* at 68–69.

[14] 424 U.S. 747 (1976).

[15] 431 U.S. 324 (1977).

[16] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–22 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

[17] *E.g.*, W. GOULD, BLACK WORKERS IN WHITE UNIONS—JOB DISCRIMINATION IN THE UNITED STATES 67–92 (1977); Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268 (1969); Cooper & Sobel, *Seniority Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV.L. REV. 1598 (1969); Fine, *Plant Seniority and Minority Employees: Title VII's Effect on Layoffs*, 47 U. COLO. L. REV. 73 (1975); Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications*, 47 TEX. L. REV. 1039 (1969); Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 U.C.L.A. L. REV. 177 (1975); Rains, *Title VII v. Seniority Based Layoffs: A Question of Who Goes First*, 4 HOFSTRA L. REV. 49 (1975); Stacy, *Title VII Seniority Remedies In a Time of Economic Downturn*, 28 VAND. L. REV. 487 (1975); *Developments in the Law—Employment Discrimination and Title VII of Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1155–64 (1971); Comment, *Last Hired First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544 (1975) [hereinafter cited as Comment, *Layoffs*]; Comment, *Title VII and Seniority Systems: Back to the Foot of the Line?*, 64 KY. L. REV. 114 (1975); Comment, *Layoffs and Title VII: The Conflict Between Seniority and Equal Employment Opportunities*, 1975 WIS. L. REV. 791 (1975); *Last Hired, First Fired Seniority, Layoffs, and Title VII: Questions of Liability and Remedy*, 11 COLUM. J.L. & SOC. PROB. 343 (1975); Note, *The Problem of Last Hired, First Fired: Retroactive Seniority as a Remedy Under Title VII*, 9 GA. L. REV. 611 (1975); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967) [hereinafter cited as Note, *Seniority Discrimination*].

[18] In addition to the lower court decisions in *Franks* and *Teamsters*, *see* Watkins v. USW Local 2369, 516 F.2d 41 (5th Cir. 1975); Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. (1975), *cert. denied*, 425 U.S. 987 (1976); Resendis v. Lee Way Motor Freight, Inc., 505 F.2d 69

large part, only at the expense of the incumbent employees[19] who were hired pursuant to, but are not responsible for, their employers' discriminatory employment policies.

This Article first will review the characteristics of and rationale for seniority systems, and the course of the conflict between Title VII and seniority systems in both Congress and the lower federal courts, in order to focus clearly on the competing policies and their possible reconciliation. The Supreme Court's resolution of this conflict and the nature and shortcomings of the retroactive seniority remedy sanctioned by the Court in *Franks* and *Teamsters* will then be examined. Finally, the Article will analyze several alternative methods of implementing the *Franks* and *Teamsters* seniority remedy available to the courts which more completely fulfill Title VII's prophylactic policies, and more adequately recognize the equitable position of the incumbent employees and accommodate federal labor policies favoring seniority systems.

TITLE VII'S IMPACT ON SENIORITY SYSTEMS

The Nature of Seniority Systems

Although seniority systems vary considerably in their individual features and serve several functions, they are all based upon a time-in-service principle.[20] The employee who has worked for a particular employer the longest period of time is entitled to, or is preferred in, the allocation of privileges and benefits arising from that employment.[21]

(5th Cir. 1974), *cert. denied*, 425 U.S. 991 (1976); Herrera v. Yellow Freight Sys., Inc., 505 F.2d 66 (6th Cir. 1974), *cert. denied*, 425 U.S. 991 (1976); Rodriquez v. East Tex. Motor Freight, 505 F.2d 40 (5th Cir. 1974); Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1973); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *petition for cert. dismissed*, 404 U.S. 1106 (1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

[19] Of course, all of an employer's present employees are "incumbents," including those minority or female individuals who were initially hired but who have suffered employment discrimination in promotions, transfers, etc. As used in this article, "incumbent employee" refers only to those employees who are not victims of the employer's discriminatory employment practices.

[20] *See generally*, S. SLICHTER, J. HEALEY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 104–41 (1960) [hereinafter cited as S. SLICHTER].

[21] *See id.* at 104, 116. Viewed historically, this principle would seem to be derived, albeit indirectly, from the famous common law property maxim "first in time, first in right." *See*

In a typical seniority system, the concept of "seniority" may have two distinct aspects—"benefit seniority" and "competitive-status seniority."[22] Benefit seniority entitles the individual employee to certain privileges after he has completed a specified period of service with his employer, regardless of the service credits earned by his co-workers,[23] and has no impact upon an individual's rights in relation to his fellow employees.[24] Benefit seniority is used to determine, among other things, the right to and amount of vacation time and paid sick leave, eligibility for pension and disability retirement payments, and eligibility for participation in a profit-sharing plan and entitlement to special bonus payments.[25]

Competitive-status seniority is determined by rules negotiated by labor and management which govern job movements and the distribution of benefits among employees in a particular employment unit.[26] These rules are used to allocate limited opportunities, such as promotions or transfers,[27] and are based upon the length of an individual's work experience compared with that of co-workers. Thus, unlike benefit seniority, competitive-status seniority governs the individual employee's rights *in relation to* all other employees in his particular seniority unit.[28]

The adoption of a seniority system in collective bargaining reflects the belief of both management and labor that individual workers with long-term service to the employer should be entitled to greater job security and superior benefits as a matter of equity.[29] Unions have embraced this principle as a basic regulatory mechanism because its objectivity thwarts employer favoritism toward the employees, and saves the union from the political thicket in which it would become enmeshed if union officials were required to make the

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Willoughby v. Willoughby, 99 Eng. Rep. 1366, 1372 (Ch. 1756).

[22] *See, e.g.*, S. SLICHTER, *supra* note 20, at 106; W. GOULD, *supra* note 17, at 68.

[23] W. GOULD, *supra* note 17, at 68; S. SLICHTER, *supra* note 20, at 106.

[24] W. GOULD, *supra* note 17, at 68; S. SLICHTER, *supra* note 20, at 106.

[25] S. SLICHTER, *supra* note 20, at 109–114.

[26] S. SLICHTER, *supra* note 20, at 104–20; Note, *Seniority Discrimination*, *supra* note 17, at 1263–64.

[27] Competitive-status seniority is also used to determine an employee's suscepibility to layoff, to allocate specific job or work assignments, to fulfill the shift preferences of individual employees, to distribute overtime and to decide whether an employee will be allowed "days off" and vacations at the times of his choice. S. SLICHTER, *supra* note 20, at 106–09. Competitive-status seniority may even be used to allocate seemingly trivial yet limited "perks," such as the most convenient parking spaces in the company parking lot and the right to "punch out" first at the time clock at the end of the shift. *Id.* at 109 & n.1.

[28] W. GOULD, *supra* note 17, at 68; S. SLICHTER, *supra* note 20, at 106; *see* text accompanying notes 31–34 *infra*.

[29] S. SLICHTER, *supra* note 20, at 104.

"uncomfortable and unpopular judgments" of "merit" among its members' competing claims.[30]

Seniority systems vary in their definition and measurement of "service" and "seniority unit."[31] Particular systems may define service as the length of the employee's employment with the employer ("company-wide" seniority), his work in a particular plant operated by the employer ("plant-wide" or "mill-wide" seniority), his experience in a specific department within the employer's plant ("departmental" seniority), his service within a "line of progression" within a particular department ("progression-line" seniority) or his service in a single job at the plant ("job" seniority).[32] Thus, the relevant seniority unit may be the company, the plant, the department, the line of progression of jobs or the particular job.[33]

It is not unusual for benefit seniority to be based on service in one of these types of seniority units, often "company-wide," while competitive-status seniority is based upon yet another type, frequently one determined by length of service in some smaller, theoretically skill-related, unit,[34] such as a particular job or department. Indeed, the narrower scope of the competitive-status seniority unit and the frequent non-transferability of service earned within such units are perhaps the most controversial features of seniority systems in the Title VII context.[35] Once a minority job applicant is hired, his benefit seniority usually accrues as long as he works for the

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[30] W. GOULD, *supra* note 17, at 68.

[31] S. SLICHTER, *supra* note 20, at 116–17.

[32] *Id.* at 116–17, 161–62.

[33] *See id.* at 116–17. It is easy to confuse the measurement of service with the definition of the seniority unit. For example, layoffs made according to "departmental seniority" may refer to layoffs of the least senior employees within the department based upon their company-wide service, or upon their service within the particular department.

[34] *Id.* at 117; W. GOULD, *supra* note 17, at 68–69.

[35] As a matter of practice, benefit seniority is usually retained when an employee transfers from one department or job to another. W. GOULD, *supra* note 17, at 68; S. SLICHTER, *supra* note 20, at 117. On the other hand, competitive-status seniority often cannot be carried over when the employee transfers to another job outside his previous line of job progression. W. GOULD, *supra* note 17, at 69; S. SLICHTER, *supra* note 20, at 117. Such "sacrifice" of accrued departmental seniority rights has been a major feature of most of the litigated seniority cases. *E.g.*, Franks v. Bowman Transp. Co., 495 F.2d 398, 411 (5th Cir. 1974), *rev'd and remanded*, 424 U.S. 747 (1976); Local 189, United Papermakers & Paperworkers v. United States, 416 F. 2d 980, 984 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

One commentator implicitly recognized the importance of the scope of the seniority unit when he stated that

> [h]owever seniority is measured, its effect largely depends upon the range of jobs for which a man holding a particular position can compete when openings occur and from which he can "bump" a less senior man if he is displaced from his present position.

Note, *Seniority Discrimination*, *supra* note 17, at 1263.

employer in any capacity.[36] Absent layoffs, the minority employee's entitlement to benefit seniority is largely unaffected by his employer's prior or current discriminatory employment practices.[37] On the other hand, that same employee's right to competitive-status seniority is often directly affected by the employer's prior and present discriminatory employment practices, particularly those policies which limit minorities to certain departments or progression lines of jobs.

Both benefit and competitive-status seniority, in part, are designed to perpetuate previous employment decisions made with respect to the employees.[38] Title VII is implicated when the previous employment decision perpetuated by the seniority system was made for discriminatory reasons or had a disparate impact on a protected employee. It is this inherent "perpetuation of past discrimination" effect of competitive-status seniority measured on some basis other than the employee's company-wide or plant-wide service which led to the thorny issues of liability and remedy confronted by the Supreme Court in the *Franks* and *Teamster* cases.[39]

Sections 706(g) and 703(h) of Title VII

Section 706(g), the remedial provision of Title VII, invests federal courts with broad discretion in fashioning relief for intentional discrimination, past or present.[40] A court may require, in addition to reinstatement and back pay, "such affirmative action" or "equitable relief as [it] deems appropriate."[41] Apparently aware that such rem-

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For a thorough discussion of the discriminatory effects of departmental competitive-status seniority systems upon minority employees, *see* Blumrosen, *supra* note 17, at 299.

[36] Cooper & Sobel, *supra* note 17, at 1601–02.

[37] *See* W. GOULD, *supra* note 18, at 68. Entitlement to benefit seniority must be distinguished from the amount of the benefit, which is usually linked to the level of the employee's salary and is in turn affected by prior discrimination in promotions. While the amount of the benefit, like the amount of the salary, is usually restricted by prior employment discrimination, absent hiring discrimination, the amount of benefit seniority is usually unaffected.

[38] *See* Krill, *Seniority Layoffs: The Bitter Fruits of Victory*, 10 AKRON L. REV. 283, 286–87 (1976).

[39] *See* notes 60–124 *infra* and accompanying text.

[40] Section 706(g) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice, charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g) (1976).

[41] *Id.*

edies imposed on behalf of individual discriminatees might impinge on the rights of incumbent employees,[42] Congress also enacted section 703(h) of Title VII.[43] This section provides that

> [n]otwithstanding any other provision of this title, 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 . . . .[44]

Thus, an employer may compensate or otherwise treat employees differently if such treatment occurs in accordance with a "seniority or merit system" which can be deemed "bona fide."[45] Although the term "bona fide" is not specifically defined, a proviso included in section 703(h) indicates that systems which discriminate expressly on the basis "of race, color, religion, sex or national origin" cannot qualify as bona fide.[46] Clearly, Congress did not intend to protect seniority systems discriminatory on their face nor to prohibit seniority systems facially neutral and non-discriminatory in effect. Congressional intent with regard to systems neutral on their face yet discriminatory in effect, however, is much more obscure. May such systems be considered bona fide?

H.R. 7152, the original draft of Title VII,[47] did not contain section 703(h) and made no other reference to seniority systems.[48] When originally sent to the Senate, it was feared that the bill would "undermine the basic fabric of unionism, the seniority system," by requiring unions and employers to achieve specified racial balances in their work forces despite established seniority systems.[49] In response,

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[42] For example, during the initial House consideration of Title VII in January 1964, House Judiciary Committee Chairman Cellar alluded to the arguments raised by Title VII's opponents that "the bill would destroy worker seniority systems and employee rights vis-à-vis the union and the employer." 110 Cong. Rec. 1518 (1964). Even before the initial Senate debate on the House version of Title VII began, Senator Hill, echoing the concerns raised in the House, argued that the bill would weaken accrued employee expectations under existing seniority systems by mandating the maintenance of specified racial balances in an employer's workforce. *Id.* at 486, 487–88 (1964).

[43] 42 U.S.C. § 2000e-2(h) (1976).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] H.R. 7152, 88th Cong., 2d Sess. (1964).

[48] *See* Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 445–47, 449 (1966).

[49] 110 CONG. REC. 486, 487–88 (1964). *See* 110 CONG. REC. 6549, 6563–64 (1964).

Senators Clark and Case, the bill's floor managers in the Senate, submitted two interpretive memoranda to the Senate, denying that the bill would affect existing seniority rights.[50] Paraphrased, these memoranda assured Senate critics that (1) accrued seniority expectations would be immune from attack under Title VII as discriminatory employment practices even though the employer had previously engaged in discriminatory hiring and promotion practices, and (2) layoffs pursuant to accrued seniority would not violate the Act.[51] The only prerequisite to this immunity is facial neutrality of the seniority system, *i.e.*, that the seniority rules do not specify such things as the layoff of all blacks before all whites.[52]

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[50] Senators Clark and Case submitted a memorandum discussing the impact of H.R. 7152 on seniority systems, prepared by the Justice Department ("Justice Department Memorandum"). 110 CONG. REC. 7207, (1964). They also introduced a separate memorandum addressing specific questions on seniority issues raised by Senator Dirksen ("Reply Memorandum"). *Id.* at 7216–17. These memoranda are referred to collectively as the "Clark-Case Memoranda."

The Reply Memorandum stated:

> 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.

Id. at 7216–17.

The Justice Department memorandum presents even stronger and more detailed disclaimers:

> 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 race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. . . . But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of race. Any difference in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

Id. at 7207.

[51] 110 CONG. REC. 7207, 7216–17.

[52] *Id.* at 7207.

During the Senate debate, a bipartisan group of senators introduced Amendment No. 656, a comprehensive substitute for H.R. 7152,[53] known as the Mansfield-Dirksen substitute. This amendment contained a provision dealing with seniority systems which eventually became section 703(h).[54] Because the present language of 703(h) was introduced and adopted during debate on the Senate floor, there is no committee report of either house which discusses, let alone explains exactly what Congress intended by its choice of the phrase "bona fide seniority or merit system."[55]

Beyond any inferences which may be drawn from the amendment process itself, the only formal expression of congressional concern for seniority rights is contained in the Clark-Case memoranda. Because these memoranda predated both the introduction and adoption of section 703(h), some have regarded them as being of limited utility in determining the meaning of "bona fide."[56] However, the fact that the congressional protests about H.R. 7152's effect on accrued seniority rights were apparently silenced by the inclusion of section 703(h) in the compromise bill strongly suggests that section 703(h) represents the codification of the unambiguous assurances presented to Senate critics of H.R. 7152 in the Clark-Case memoranda.[57] Thus, it can be argued that the facial neutrality re-

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[53] *Id.* at 11926, 11935–36. This substitute version was negotiated in a series of conferences between Senators Dirksen, Mansfield, Humphrey and Kuchel, the Attorney General and other Justice Department officials. Vaas, *supra* note 48, at 445–46.

[54] The language which became section 703(h) survived the introduction of a second complete substitute bill, Amendment No. 1052, 110 CONG. REC. 13310–19 (1964), as well as other amendments. Vaas, *supra* note 48, at 445–46, 447.

[55] Senator Dirksen introduced a prepared explanation of the section which simply paraphrased the substitute's language. 110 CONG. REC. 12818–19 (1964). Senator Humphrey stated that the section "does not narrow the application of the title, but merely clarifies its present intent and effect." *Id.* at 12723.

[56] Cooper & Sobel, *supra* note 17, at 1613; Fine, *supra* note 17, at 101. Commentators believe that the memoranda may reflect concerns embodied in an unsuccessful amendment to Title VII, which would have completely insulated existing seniority systems from attack. Cooper & Sobel, *supra* note 17, at 1609 nn. 35–36, 1612–13. The amendment was proposed by Representative Dowd, and provided:

> The provisions of this title shall not be applicable to any employer whose hiring and employment practices are pursuant to (1) a seniority system; (2) a merit system; (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). This amendment was rejected without debate. *Id.* at 2728. As Cooper & Sobel acknowledge, an obvious defect in this amendment is that it appears to immunize the employer, rather than his seniority practices alone. Cooper & Sobel, *supra* note 17, at 1609 n. 35.

[57] *Contra*, Comment, *Layoffs*, *supra* note 17, at 1550–52. Hence, viewed in light of the legislative history, section 703(h) is a qualifier on the inclusion of seniority systems within the

quirement of the Clark-Case memoranda is encompassed by the term "bona fide" in section 703(h). The legislative history of the 1972 amendments to section 703 [58] does not warrant any change in this interpretation of section 703(h) because Congress did not modify the language in section 703(h) dealing with seniority systems.[59]

Among the cross-currents in the legislative history of section 703(h), there is a recurring concern for the accrued seniority interests of incumbent employees. While this congressional concern is discussed in terms of seniority systems, inherent in the concern is a recognition that incumbent employees affected by, but not responsible for, previous employment discrimination cannot simply be ignored in the process of providing an equitable remedy for that discrimination. While Congress left unanswered most of the detailed

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Act's definition of discriminatory employment practices. The limits of the section 703(h) are not expressly stated, beyond the facial neutrality requirement. Although neither section 703(h) nor the Clark-Case memoranda specifically mention a pre-Act, post-Act distinction, the concern of the congressional critics of H.R. 7152 for seniority expectations accrued before enactment of Title VII would justify the limitation of the section 703(h) qualifier to pre-July 2, 1965 seniority expectations earned under a facially neutral seniority system. Theoretically, employers and unions were on notice that after the Act's effective date even facially neutral seniority systems would themselves violate Title VII's requirements if they perpetuated the effects of other employment discrimination that occurred before July 2, 1965. However, there is no literal basis for this limitation in either the section or the Clark-Case Memoranda and it can be argued that the section addresses all facially neutral seniority systems regardless of the Act's effective date.

[58] *See* 118 CONG. REC. 7166–69 (1972).

[59] Section 8(c) of H.R. 1746 as originally reported by the House Committee on Education and Labor would have amended section 703(h) to codify the Supreme Court's conclusions on employment tests announced in Griggs v. Duke Power Co., 401 U.S. 424 (1971). H.R. 1746, 92d Cong., 1st Sess., § 8(c) (1971); H.R. REP. NO. 238, 92d Cong., 1st Sess. 20–22 (1971). This language was deleted from the final bill passed by the House, and although amendments were made in section 703(a) and (c)(2) by the final version of the bill, no further modification of section 703(h) was attempted. Admittedly, there is a reference in the Senate report to "the mechanics of seniority and lines of progression, [and] perpetuation of the present effect of pre-Act discriminatory practices through various institutional devices." S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971). In addition, the Section-by-Section Analysis of the 1972 amendments states that revisions in section 706 give the EEOC power to "prevent persons from engaging in unlawful employment practices under sections 703 and 704 of Title VII" and that "[t]he unlawful employment practices encompassed by sections 703 and 704 which were enumerated in 1964 by the original Act, and as defined and expanded by the courts, remain in effect." 118 CONG. REC. 7167, 7564 (1972). However, the House and Senate Reports, *see* H.R. REP. NO. 238, 92d Cong., 1st Sess. 1–70 (1971); S. REP. NO. 415, 92d Cong., 1st Sess. 1–79 (1971), the Conference Committee's Report, *see* 118 CONG. REC. 6643–48 (1972), and the Section-by-Section Analysis, *see* 118 CONG. REC. 7166–69, 7563–67 (1972), do not specifically endorse or adopt the perpetuation interpretation of section 703(h) adopted by the lower federal courts prior to 1972. Hence, the rather oblique and ambiguous reference in the Section-by-Section Analysis hardly amounts to a ringing endorsement of the perpetuation interpretation, or an exhaustive discussion of the proper interpretation to be applied to the seniority language in section 703(h). *Contra*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 381–83 (Marshall, J., concurring in part, dissenting in part).

questions which later arose in litigation concerning the legality of seniority systems under the Act, in a general way it did attempt to insulate seniority systems and seniority rights existing at the time of the Act's passage from attack.

*Pre-*Franks *Judicial Interpretations of Title VII*

Before the Supreme Court rendered its decision in *Franks*, several lower federal courts determined what types of pre-Act seniority systems were valid under Title VII with widely varying results. One of the first cases to deal with the effect of Title VII on established seniority systems was *Quarles v. Philip Morris, Inc.*[60] In *Quarles*, two black employees of the Philip Morris tobacco company charged that the company's departmental seniority system violated Title VII.[61] At the time the suit was filed, union employees of Philip Morris worked in one of four departments "each [with] its own job progression ladder and . . . seniority roster."[62] Under the company's departmental seniority system, most opportunities for job advancement were within the department in which an employee worked and were based on his departmental seniority.[63] There existed a limited ability to transfer into other departments but strict requirements militated against such transfer.[64] The alleged infirmity of the transfer and seniority provisions stemmed from the fact that prior to January 1, 1966, Philip Morris segregated its work force, with most black workers assigned to departments containing lower pay

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[60] 279 F. Supp. 505 (D.Va. 1968).

[61] *Id.* at 507, 510. The plaintiffs brought individual and class actions against their employer and their union, alleging numerous racially discriminatory employment practices. *Id.* at 507. The only claim pertinent to this discussion dealt with the validity of the company's seniority policy. *Id.*

[62] *Id.* at 511. The four departments were the green leaf stemmery, prefabrication, fabrication, and warehouse receiving and shipping. *Id.* at 511–12.

[63] *Id.* at 512–13.

[64] *Id.* Two alternatives were available to employees who wished to transfer to another department. *Id.* Under one arrangement, a limited number of workers were permitted to transfer to the predominantly white fabrication department every six months. *Id.* at 512. However, in order for a black worker to transfer into fabrication, he had to compete on the basis of departmental seniority with any other workers in his department who wished to transfer. *Id.* at 513. On the other hand, it was possible for a white employee, with less employment seniority than many of his black counterparts, to avoid these limited transfer restrictions since, by virtue of the company's past discriminatory policies, he was originally assigned to the fabrication department. *Id.*

The other mode of transfer between departments was through a note of intent which allowed an employee to request a transfer to either fabrication or shipping and receiving. *Id.* at 512–13. This method, however, required that the transferee give up his accumulated seniority and start in his new position with no departmental seniority. *Id.* at 512–13.

scales than the departments to which white workers were assigned.[65] The combination of this past policy of discrimination and the company's departmental seniority system precluded blacks from progressing into higher paying jobs in the predominantly white fabrication department.[66]

The defendants claimed that the existing seniority and transfer systems were valid because the mechanics of the systems were nondiscriminatory and any discriminatory impact resulted from past conduct not covered by Title VII. [67] They cited the legislative history of Title VII, including the Clark-Case memoranda, as support for their position that the Act was to be applied prospectively.[68]

The district court rejected the defendants' interpretation of the legislative history.[69] It noted that "Congress did not intend to freeze an entire generation of black employees into discriminatory patterns that existed before the Act."[70] In the district court's opinion, one prerequisite of a bona fide seniority system required by section 703(h) of the Act was that it have a nondiscriminatory effect.[71] The court concluded that the defendant's departmental seniority system was not bona fide because it served to perpetuate past racial discrimination against incumbent black employees.[72] The court ordered that all incumbent black employees who were discriminated against through the company's past segregation be afforded the opportunity to compete for future vacancies in the fabrication department.[73] Vacancies were to be offered to the competing employee with the greatest amount of company-wide employment seniority regardless of his race.[74]

The Fifth Circuit court of appeals adopted the *Quarles* rationale in a similar case, *Local 189, United Papermakers and Paperworkers*

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[65] *Id.* at 508, 511–12.

[66] *Id.* at 513.

[67] *Id.* at 515.

[68] *Id.* at 515–16. For a discussion of the Clark-Case memoranda, see notes 47–55 *supra* and accompanying text.

[69] 279 F. Supp. at 516. The court observed that the legislative history made no specific reference to departmental seniority systems and most remarks were obviously made in reference to employment (company-wide) seniority systems. *Id.* It was noted "that a discriminatory seniority system established before the Act cannot be held lawful under the Act." *Id.*

[70] *Id.*

[71] *Id.* at 517.

[72] *Id.*

[73] *Id.* at 519–20.

[74] *Id.* at 521. The only other requirements beside seniority were that the employee have "the ability, merit and qualifications to do the work." *Id.*

v. United States.[75] In *Papermakers*, the United States brought an action to have an employer's job seniority system declared illegal under Title VII[76] because it perpetuated the formerly segregated job lines. The appellate panel agreed with the district court's decision and held that the seniority provisions, which had a present discriminatory impact on the rights of incumbent black employees discriminatorily slotted into "black jobs" when initially hired, were unlawful unless justified by a compelling "business purpose."[77] Finding no overriding business reason, the court ruled that the job seniority system violated Title VII.[78]

Three alternative theories for remedying the effects of the unlawful seniority system were discussed in the opinion.[79] The Fifth Circuit settled on a "rightful place" approach, which would allow the victims of the past discrimination to bid on future job openings based upon their plant-wide employment seniority.[80] The court remarked that the "rightful place" theory comported with the intention of Congress in passing Title VII.[81]

Like *Quarles* before it, the *Papermakers* court restricted the scope of its holding to cover only those incumbent minority employees who were actually discriminated against in the past.[82] No

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[75] 416 F.2d 980 (5th Cir. 1969).

[76] *Id.* at 985. The company had maintained racially segregated job lines until 1964. *Id.* Employment positions were organized in job lines which were set up so that training in one job prepared the workers for the next job in that line. *Id.* at 983. In 1966, the job lines in each department were merged according to existing wage rates but this amounted to no more than adding the black job lines to the bottom of each white line. *Id.* at 984. Promotions were offered to the man with the most job seniority in the job slot immediately below the vacancy. *Id.* This system served to prevent blacks from being promoted to "white jobs" since blacks had no experience in white jobs. *Id.* The court concluded that this job seniority system perpetuated the effects of pre-Act discrimination since "Negroes . . . will lose promotions which, *but for* their race they surely would have won." *Id.* at 989 (emphasis in original).

[77] *Id.* at 989–90.

[78] *Id.* at 990. The court ruled that the "mill [or plant-wide] seniority system" ordered by the lower court was an effective alternative to the discriminatory "job seniority" system. *Id.*

[79] *Id.* at 988. The three possible approaches were " 'freedom now,' " " 'status quo,' " and " 'rightful place' " theories. *Id.* Under the freedom now theory, black employees would be entitled to undo existing seniority rankings which locked in the competitive disadvantage imposed upon them, by displacing white incumbent employees from their jobs. *Id.* The appellants advocated a status quo approach which would leave white employees' seniority rights intact, since the employer was no longer actively discriminating against blacks. *Id.* The third theory discussed was a rightful place approach under which victims of past discrimination would be allowed to bid on future job openings based upon their company-wide seniority. *Id.*

[80] *Id.* at 988.

[81] *Id.* The court interpreted Title VII as requiring the abolition of seniority systems which perpetuated past discrimination while preserving the present positions of incumbent white employees. *Id.* at 997–98.

[82] *Id.* at 995.

new employees were to benefit under the ruling, regardless of whether they would have been hired at an earlier date but for the company's prior discrimination.[83] A distinction was made between altering an existing seniority system in order that time actually worked in black jobs be given equal status with time worked in white jobs and the granting of "fictional" seniority to new employees.[84] The appellate court reasoned that granting retroactive "fictional" seniority to newly hired minorities would constitute preferential treatment expressly prohibited by Title VII.[85]

The Fifth Circuit's view that retroactive "fictional" seniority could never be an appropriate remedy in a Title VII action was rejected by the Sixth Circuit in *Meadows v. Ford Motor Co.*[86] The court of appeals in *Meadows* perceived no restriction in Title VII on granting retroactive seniority and held that both back pay and application-date seniority[87] were permissible remedies in a Title VII action where, but for the employer's past discrimination, the plaintiffs would have been hired at an earlier date.[88] However, the Sixth Circuit acknowledged that the grant of retroactive seniority presented special problems which would require the district court on remand to balance the plaintiffs' rights against the interests of the incumbent

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[83] *Id.* The court pointed to two problems which militated against the granting of retroactive seniority to newly hired minorities: (1) in requiring employers to remedy their pre-Act discrimination by granting "fictional seniority" to all newly hired blacks, the court could not be sure that it was giving relief to those who were actually refused employment due to discrimination; and (2) even assuming the seniority credit was given only to those who proved that they were actually discriminated against by the employer, the court could not be sure how much credit to give them because "there would be no way of knowing whether, after being hired, they would have continued to work for the same employer." *Id.*

[84] *Id.* The granting of "fictional seniority" was viewed as "reverse discrimination," which Congress intended to prohibit in passing section 703(h) and (j) of the Act. *Id.* at 994–95.

[85] *Id.* at 995.

[86] 510 F.2d 939, 949 (6th Cir. 1975), *cert. denied*, 425 U.S. 987 (1976). In 1969, Meadows, a woman, applied for employment in a new truck assembly plant operated by Ford, near Louisville, Kentucky. 510 F.2d at 940. Over 900 production workers were initially hired at the plant, all of them men. *Id.* After the EEOC informed her of her right to sue, Meadows brought this action charging that Ford discriminated against women by imposing a 150 pound minimum weight requirement on production line employees. *Id.* Although the district court found that the weight restriction violated Title VII, and enjoined Ford permanently from applying the weight requirement in hiring new employees for the production line of the plant, the court refused to grant Meadows backpay and retroactive seniority from the date she was discriminatorily denied employment. *Id.* at 940–41. Rather, the circuit court remanded to the district court for a determination of whether the plaintiff's rights outweighed the interests of incumbent employees. *Id.* at 949.

[87] Application-date seniority or job seniority consists of granting constructive seniority status to discriminatees retroactive to the date of their original application for employment. *See id.*

[88] *Id.* at 948–49.

employees and the employer's right to an "experienced work force."[89]

The lower federal courts also confronted questions concerning grants of retroactive seniority in cases dealing with the order of employee layoffs. The 1973-1974 recession caused many employers who had only recently hired significant numbers of minority and female employees to lay off workers, usually beginning with the employees possessing the least seniority.[90] These layoffs decimated recent gains in minority hiring and revealed the consequences of court decisions which did not grant retroactive seniority benefits as a remedy for Title VII violations.

The problems created by layoffs of minority employees pursuant to a "last hired, first fired" employment seniority system[91] were first examined in *Waters v. Wisconsin Steel Works.*[92] In *Waters*, the Seventh Circuit reversed a lower court holding that company-wide seniority used to calculate the order of layoffs violated Title VII because it perpetuated pre-Act discrimination by Wisconsin Steel.[93] Although the court acknowledged that the employer discriminated against blacks in its hiring practices prior to April 1964, it concluded that the employment seniority system, which measured seniority on the basis of an employee's overall length of service with the company, was lawful under Title VII.[94] Citing the legislative history of the Act and the judicial interpretations of that history in *Quarles* and *Papermakers*, the court concluded that Title VII did not require "that a worker be granted fictional seniority or special privileges because of his race."[95] The appellate court distinguished the types of departmental seniority systems invalidated in *Quarles* and *Papermakers*,

[89] *Id.* at 949. The court specifically referred to the fact that retroactive seniority grants would clash with a system which was already agreed upon as fair by the employer and incumbent employees and would penalize employees who had no responsibility for their employer's past wrongs. *Id.*

[90] *E.g.*, N.Y. Times, Nov. 10, 1974, § 3, at 1, 5; Wall Street Journal, Nov. 5, 1974, at 1, col. 6; N.Y. Times, Mar. 9, 1975, § 4, at 1, col. 4; N.Y. Times, Jan. 29, 1975, at 17, col. 1.

[91] The United States Department of Labor "found that seniority played some role in determining layoffs 99% of the time; it was a major factor 44% of the time; and it played no role in determining layoffs in less than 1% of all agreements surveyed." Note, *Retroactive Seniority as a Remedy for Past Discrimination:* Franks v. Bowman Transp. Co., 51 ST. JOHN'S L. REV. 181, 181 n.1 (1976).

[92] 502 F.2d 1309 (7th Cir. 1974). Waters alleged that the company's last hired, first fired seniority system violated Title VII since it served to perpetuate "prior discriminatory policies and hiring practices of the defendants." *Id.* at 1312.

[93] *Id.* at 1317–18. The district court had concluded that the company's seniority system was not "bona fide" under section 703(h) of the Act. *Id.* at 1317.

[94] *Id.* at 1316, 1318.

[95] *Id.* at 1318–20. The court agreed with the Fifth Circuit's assessment in *Papermakers*, that any grant of fictional seniority as a remedy would itself violate the Act. *Id.* at 1319–20.

noting that, unlike a departmental system, an employment seniority system gives equal weight to the length of service of all employees.[96]

Within months of the *Waters* decision, the Third Circuit confronted the same issue in a different procedural context in *Jersey Central Power & Light Co. v. IBEW Local Unions*.[97] The parties in *Jersey Central* had agreed in collective bargaining that layoffs and demotions would be conducted according to a plant-wide seniority system.[98] However, there also existed a conciliation agreement entered into by Jersey Central, the unions, and the EEOC in 1974 which provided that the company pursue a five-year affirmative action hiring program designed to increase the percentages of female and minority employees.[99] When the company informed the local unions of planned layoffs in 1974, the unions demanded that the layoffs be conducted in accordance with the collective bargaining contract, while the EEOC warned that seniority-based layoffs with a disproportionate impact upon recently hired minority and female employees "would violate . . . the conciliation agreement and Title VII."[100]

Confronted by this dilemma, Jersey Central sought a declaratory judgment against the EEOC and the unions to determine its rights and obligations under the collective bargaining contract and the conciliation agreements.[101] The Third Circuit held that: (1) the conciliation and collective bargaining agreements were not conflicting; (2) public policy did not compel alteration of the layoff provisions of the collective bargaining agreement; and (3) Congress, in passing Title VII, acknowledged the validity of company-wide seniority systems regardless of their potential for continuing the effects of past discrimination.[102] The court relied on the Clark-Case memoranda and the

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[96] *Id.* at 1320.

[97] 508 F.2d 687 (3d Cir. 1975), *vacated and remanded*, 425 U.S. 987 (1976).

[98] *Id.* at 696.

[99] *Id.* at 694–96. The conciliation agreement resulted from charges, filed with the EEOC in 1972, that the company was guilty of sex and race discrimination. *Id.* at 694. The agreement made no specific mention of the seniority regulations contained in the collective bargaining agreement. *Id.* at 695.

[100] *Id.* at 696.

[101] *Id.* at 697.

[102] *Id.* at 700–10. In holding that the two contracts were not contradictory, the court noted that the primary aim of the conciliation agreement was an increased percentage of minority and female workers through a change in the company's hiring policy. The agreement lacked any layoff provisions and made no attempt to alter the layoff policies set forth in the collective bargaining agreement. *Id.* at 701. Hence, the court concluded that all workers were to be governed by the provisions of the collective bargaining agreement once employment commenced. *Id.* at 702.

In disposing of the public policy issue, the court looked to the language of Title VII and, finding no statutory prohibition against plant-wide seniority systems, ruled that "Congress did

rationale of the *Papermakers* and *Waters* decision in concluding that Congress, by use of the term "bona fide" in section 703(h), intended to sanction company-wide seniority systems.[103]

In *Watkins v. United Steel Workers, Local 2369*,[104] the Fifth Circuit court of appeals similarly confronted a challenge to a company-wide seniority system with a last hired, first fired layoff provision. Reviewing a class action attacking the disproportionate impact of layoffs on minority employees, the Fifth Circuit reversed a lower court decision and held that the company-wide system did not violate Title VII since no discrimination was shown against the laid off black employees.[105] The court relied on the fact that only one of the black employees affected by the layoffs was over the minimum age for employment at the plant when the company began its equal opportunity hiring policy.[106]

The validity of last hired, first fired layoff provisions in seniority systems covering New York City's school teachers and police officers was considered by the Second Circuit in 1976.[107] Pursuant to the seniority arrangements under review in *Chance v. Board of Examiners*,[108] the New York City School Board would transfer, demote, or

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not intend that a per se violation of the Act occur whenever females and minority group persons are disadvantaged by reverse seniority layoffs." *Id.* at 704–05. Reliance was placed on the language of section 703(h). *Id.*

[103] *Id.* at 706–09. In the Third Circuit's opinion, Congress made a choice between authorizing this type of seniority system and "upsetting all collective bargaining agreements with such provisions." *Id.* at 706.

[104] 516 F.2d 41 (5th Cir. 1975). Defendant, Continental Can Company's plant in Harvey, Louisiana, had employed almost entirely white workers until 1965, and not until 1969 were blacks hired in any substantial number. *Id.* at 43. From 1971 through 1973, the company laid off more than 50% of its employees, including virtually all minority employees, according to the last hired, first fired company-wide seniority system negotiated by Continental and Local 2369. *Id.* at 43–44.

[105] *Id.* at 46. The court expressly limited its holding to the facts of the case and refused to decide what would have resulted had any of the laid-off employees been able to prove that but for past discrimination they would have possessed enough seniority to withstand the layoffs. *Id.* at 45.

[106] *Id.* at 46. Judge Powers, writing for the court, stated:

> regardless of an earlier history of employment discrimination, when present hiring practices are non-discriminatory and have been for over ten years, an employer's use of a long-established seniority system for determining who will be laid-off, and who will be rehired, adopted without intent to discriminate, is not a violation of Title VII . . . , even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual employees who suffer the layoff under the system have not themselves been the subject of prior employment discrimination.

Id. at 44–45.

[107] Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976); Acha v. Beame, 531 F.2d 648 (2d Cir. 1976).

[108] 534 F.2d 993.

lay off the person possessing the least seniority in a particular job classification within the entire school system when that position was eliminated in a particular school district.[109] Puerto Rican and black school supervisors claimed that the Board's procedures for "excessing"[110] employees were discriminatory because they had a disproportionate impact upon minority groups.[111] The district court ordered that "excessing" be carried out in a manner which preserved the relative percentages of Puerto Rican and black supervisors within the various school districts at the same levels as had existed prior to the excessing.[112]

On appeal, a split panel of the Second Circuit reversed.[113] The majority aligned themselves with the position taken in *Watkins* that Congress intended to preserve the seniority rights of white workers against challenges by minorities who had not actually been discriminated against in the past.[114] The court observed that the district court's remedy was not limited to aiding those who had suffered past discrimination but was designed to insure that a fixed percentage of minorities were employed.[115] The case was remanded to the district court with the suggestion that the court consider the adequacy of the Board's offer to credit constructive seniority to any minority supervisor who was actually injured by the original discriminatory practice by giving him an appointment date which was the "mean appointment date" of those who suffered no actual injury.[116]

A different panel of the Second Circuit, in *Acha v. Beame*,[117] recognized the validity of retroactive seniority as a remedy in a Title VII action involving a last hired, first fired layoff policy.[118] The plaintiffs in *Acha* were a class of women police officers who were laid off in June, 1975, as a result of New York City's fiscal crisis.[119] Because many of the women officers were hired only after the police

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[109] *Id.* at 995. This system was used pursuant to New York state law and the collective bargaining agreement between the Board and the teachers. *Id.* at 995–96.

[110] The court provided an explanation of excessing: "Excessing rules provide in brief that when a position in a school district is eliminated, the least senior person in the job classification used to fill that position shall be transferred, demoted or terminated." *Id.* at 995.

[111] *Id.* at 996.

[112] *Id.* at 996–97.

[113] *Id.* at 993.

[114] *Id.* at 998.

[115] *Id.*

[116] *Id.* at 999.

[117] 531 F.2d 648 (2d Cir. 1976).

[118] *Id.* at 654.

[119] *Id.* at 650. The layoffs were conducted in accordance with a New York state civil service which provided that layoffs be conducted on a last hired, first fired basis. *Id.*

force ceased certain discriminatory hiring practices in 1973, it was alleged that the layoffs affected women officers disproportionately.[120] In reversing the district court's dismissal of the case, Judge Feinberg stated that "[i]f a female officer can show that, except for her sex, she would have been hired early enough to accumulate sufficient seniority to withstand the current layoffs, then her layoff violates [the Act] since it is based on sexual discrimination."[121] The panel rejected any distinction between departmental and plant-wide seniority systems, reasoning that neither type is bona fide under section 703(h) if it perpetuates the effects of past discrimination. The court read the *Chance* opinion as disapproving only of granting retroactive seniority to parties who have not proved that they actually suffered from past discriminatory policies[122] and therefore concluded that a grant of retroactive seniority to a person who proved that he had been a victim of past discrimination would not constitute preferential treatment in violation of Title VII.[123] The court remanded the case to the district court to determine which of the plaintiffs would have been hired early enough to have earned sufficient seniority to have avoided the layoffs had the police department not discriminated against them individually.[124]

On the eve of the *Franks* decision, the lower federal courts were divided on the scope of remedies available in certain types of Title VII cases. Virtually all federal courts agreed that departmental seniority systems, which served to perpetuate pre-Act discrimination against incumbent minority employees, were unlawful and that the district courts had the power to order conversion to company-wide or plant-wide seniority to eliminate the future discriminatory impact of such systems. In situations involving charges of past hiring discrimination, the majority of the circuits held that section 703(h) prohibits the granting of "fictional" retroactive seniority back to the date that the

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[120] *Id.*

[121] *Id.* at 654.

[122] *Id.*

[123] *Id.* at 656. The court remarked that the grant of retroactive seniority in these circumstances was "a remedial device well within the broad power conferred on the district court by section 706(g)." *Id.*

[124] 531 F.2d at 656. The court of appeals "suggested" that the plaintiffs should bear the burden of proof on this issue by the preponderance of the evidence. *Id.* The court stated that an individual plaintiff might meet her burden of proof "by demonstrating that she actually filed an application for employment or wrote a letter complaining about the hiring policy early enough during the period of discrimination, or offer proof that she had expressed a desire to enlist in the police force but was deterred by the discriminatory practice barring females." *Id.*

employee would have been hired but for the discrimination. Two circuits, however, recognized the validity of retroactive seniority grants to any newly-hired employee who actually suffered from an employer's discriminatory policies. When confronted with challenges to seniority systems containing last hired, first fired layoff provisions, the majority of circuits agreed that the last hired, first fired feature of a company or plant-wide seniority system is bona fide under section 703(h). Consequently, the layoffs made pursuant to such systems were upheld as legal under the Act despite their disproportionate impact upon recently hired minority and women employees. The Second Circuit, however, went on record in *Acha* as favoring retroactive seniority grants to women who were able to prove that absent employer discrimination, they would have earned sufficient seniority to escape layoff under a last hired, first fired policy.

THE *FRANKS V. BOWMAN TRANSPORTATION CO.* DECISION

In *Franks*, two blacks[125] brought a class-action suit against Bowman,[126] an interstate trucking company, charging Bowman with racially discriminatory policies and practices in hiring, promoting and transferring individuals for jobs in all its departments,[127] including

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[125] 495 F.2d 398, 403 (5th Cir. 1974), *rev'd and remanded*, 424 U.S. 747 (1976). Petitioner Franks had worked as a tire man in the tire shop of the Atlanta terminal of Bowman from 1960 to mid-1968. *Id.* His "tire man" job was within the maintenance department, which consists of the tire shop, the tractor shop, and the trailer shop, and employs a total of 120 workers. *Id.* at 409. The higher paying jobs within the maintenance department are in the tractor and trailer departments. *Id.* On several occasions, Franks had unsuccessfully attempted to change jobs within the terminal, but Bowman employed blacks only in the tire shop. *Id.* at 403. Franks filed a complaint with the EEOC in 1968, charging that Bowman had refused to promote him because of its racially discriminatory policy, restricting blacks to "tire shop" jobs. *Id.* Within hours after the EEOC had visited the Bowman terminal to investigate these charges, Franks was discharged for allegedly using company vehicles for personal errands. *Id.*

Petitioner Lee, an experienced truck driver, was denied employment with Bowman upon his application in 1970. *Id.* at 406. He too filed a complaint with EEOC, charging Bowman with discriminatory refusal to hire blacks in any capacity other than as tire men. *Id.*

[126] Franks represented the classes of all black employees at the Atlanta terminal hired prior to August 15, 1968, and all blacks employed at the Atlanta terminal in the maintenance department prior to May 1, 1968. 5 Fair Empl. Prac. Cas. 421, 422–23 (N.D. Ga. 1972). Lee intervened on behalf of the classes of all black applicants who applied for positions as truck drivers prior to January 1, 1972, and all black employees of Bowman who applied to transfer to driver positions prior to January 1, 1972. *Id.*

[127] Bowman's departments are the over-the-road (OTR) drivers, the city drivers and dock workers, the maintenance department, and the office, sales and clerical employees. *Id.* at 410.

"over-the-road" driving jobs.[128] After trial, the district court found that Bowman engaged in a full panoply of racially discriminatory employment practices, including flat bans on hiring blacks in certain departments,[129] separate, non-transferable departmental seniority lines,[130] and racially keyed bans on intra- and inter-departmental transfers and promotions.[131] Petitioners' backpay claims were granted and Bowman was ordered to permit incumbent black employees to transfer to higher paying jobs, both within the maintenance department and in other departments on the basis of their actual accumulated seniority from date of hire up to the date that the district court found that Bowman stopped discriminating in granting such promotions and transfers.[132] Bowman was further ordered to hire as drivers qualified black applicants who previously had been rejected pursuant to its racially discriminatory policy.[133] The district court refused, however, to grant such applicants retroactive seniority back to the date of application.[134]

On appeal, the Fifth Circuit expanded the remedial order of the district court by allowing incumbent black employees to transfer intra- and inter-departmentally based upon their entire accumulated company seniority for "all purposes" and "for a reasonable time" after transfer into the new department.[135] The Fifth Circuit refused,

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[128] Over-the-road drivers drive tractor trailers between the company's terminals in various cities and are not required to load or unload their trucks.

[129] *Id.* at 425–29.

[130] *Id.* The district court found that the continued viability of departmental seniority penalized senior blacks attempting to transfer to other departments in relation to junior whites in that department. *Id.* at 410–11.

[131] 5 Fair Empl. Prac. Cas. 421, 422–26 (N.D.Ga. 1972). Prior to 1967, Bowman flatly prohibited inter-departmental transfer. After 1967, Bowman acceded to such transfers in the collective bargaining agreement, but the contract continued to recognize departmental seniority. 495 F.2d at 410–11.

[132] *Id.* at 426–27. The Fifth Circuit was somewhat mystified at the district court's definition of the various classes as terminating on specific dates. 495 F.2d at 413. For example, the district court defined a class of "[a]ll Black applicants who applied for positions as over-the-road drivers prior to January 1, 1972" and another class of "[a]ll Black employees who applied to transfer to over-the-road driver positions prior to January 1, 1972." *Id.* at 412. The court of appeals surmised that the "district court believed discrimination in the relevant areas ceased on approximately the days indicated," despite the fact that "[t]he dates used to define the . . . classes [were] not tied to concrete events in the record . . . ." *Id.* at 413. What led the district court to conclude that Bowman had stopped discrimination in hiring, transfer and promotion into OTR jobs on January 1, 1972, is unclear.

[133] 5 Fair Empl. Prac. Cas. at 425.

[134] *Id.* at 426.

[135] 495 F.2d at 416. Effectively, the Fifth Circuit applied a "rightful place" analysis in permitting incumbent black employees to use their entire company-wide seniority from date of hire to date of bid to transfer, rather than cutting the seniority carry-over off at the date presumed

however, to alter the district court's denial of constructive retroactive seniority to discriminatorily rejected applicants.[136] The court reasoned that Title VII only required that a seniority remedy be based on actual time worked as an employee and did not mandate "creat[ion of] constructive seniority for applicants who had never worked for the company."[137] Relying on its previous *Papermakers* decision,[138] the court concluded that section 703(h) barred awards of constructive seniority to newly-hired, previously rejected black job applicants, because such awards "would constitute preferential rather than remedial treatment."[139]

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by the district court to mark the end of Bowman's discriminatory conduct. *Id.* The Fifth Circuit reasoned that

> [t]o allow for purposes of transfer—*i.e.*, bidding on a new job in a different department—the use of company seniority accumulated only up to the date on which discrimination in hiring at the terminal ceased in the past would force discriminatees to compete with non-discriminatees on an unequal footing in the present.

Id. Thus, the court of appeal's first modification of the district court's decree concerned the amount of company-wide seniority that could be carried-over by the discriminatees. *Id.* In Bing v. Roadway Express, Inc., 485 F.2d 441, 449–51 (5th Cir. 1973), Judge Thornberry ably discussed, *inter alia*, the various alternatives confronting the court in determining how much company seniority the court should permit the discriminatee to carry-over in order to put the discriminatee in his "rightful place." *Id.*

A further problem confronting the court of appeals was the length of time that the discriminatees were to be permitted to carry over the seniority. 495 F.2d at 416. The court held that the incumbent minority employees "should be allowed a reasonable time for using company seniority to escape the racial patterns created in the past [although] [t]he right of the discriminatee to transfer with . . . company seniority need not be extended indefinitely into the future." 495 F.2d at 416–17. In a footnote, the court suggested that a "one-transfer-only" limitation be imposed "since the discriminatee stands on a substantially equal footing with his white contemporaries once he has escaped the confines of the racial pattern in which he has been trapped." *Id.* at 417 n.16. In "suggesting" this gloss on its "reasonable time" holding, the court relied upon its prior holding in United States v. Jacksonville Terminal Co., 415 F.2d 418, 458–59 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), which permitted company-wide seniority carry-over "until [discriminatees] successfully bid for and retain[ed] jobs after any on-the-job probationary or training period," 495 F.2d at 415–16, and upon the Second Circuit's decision in United States v. Bethlehem Steel Corp., 446 F.2d 652, 666 (2d Cir. 1971), which allowed discriminatees to transfer with seniority carry-over "only once, and only during the next two years." 495 F.2d at 416. *Cf.* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 248–49 (5th Cir. 1974) (court prescribes variety of injunctive orders suspending departmental and progression line seniority in favor of plant-wide seniority without indicating time limitation).

Finally, it should be noted that neither the district court nor the court of appeals abolished Bowman's departmental seniority system. Rather, the system was suspended as to the incumbent discriminatees until they can escape its "locked-in" racial discrimination. 405 F.2d at 418. Research has disclosed only one case in which a departmental seniority system has been totally abolished with respect to incumbent discriminatees. *See* United States v. Local 189, United Papermakers & Paperworkers, 282 F.Supp. 39, 41 (E.D.La. 1968).

[136] 495 F.2d at 416–18.

[137] *Id.*

[138] *Id.* at 417.

[139] *Id.* at 417–18 (quoting 416 F.2d at 995). Thus, despite the fact that the black OTR appli-

The Supreme Court rejected the reasoning employed by the Fifth Circuit.[140] Finding the "make whole" objectives of Title VII predominant, the Court held that when a district court is confronted with post-Act hiring discrimination perpetuated by a seniority system, retroactive seniority credit from the date of application should ordinarily be granted despite the facial neutrality of the system itself.[141] The Court reasoned that section 703(h), on its face, is merely a definitional provision describing which employment practices are illegal and which are not, and that it does not expressly qualify or proscribe relief otherwise appropriate under section 706(g) when an illegally discriminatory act or practice is found to have occurred after the effective date of the Act.[142] The Court found nothing in the legislative history of section 703(h) to support the Fifth Circuit's interpretation, and therefore held that the section did not bar, as a matter of law, an award of seniority relief.[143]

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cants had been rejected as a result of Bowman's discriminatory employment policies, the Fifth Circuit "did not agree that constructive seniority may be created and awarded to those who are not employees." 495 F.2d at 418.

[140] 424 U.S. at 747.

[141] 424 U.S. at 772. The Court made a threshold determination that the case was not moot. *Id.* at 756. Bowman had argued in a supplemental brief to the Court that Lee, the sole named representative of the class of rejected black OTR job applicants, had no personal stake in the outcome of the case since he had already been hired by Bowman, and subsequently properly fired for cause, and therefore would not be eligible for any hiring or seniority relief that might be granted by the Court in favor of the class. *Id.* at 752–59. Bowman contended that Lee's lack of a personal stake in the suit rendered the question of the denial of retroactive seniority relief to the class moot. *Id.* at 753.

Relying on its holding in Sosna v. Iowa, 419 U.S. 393 (1975), the Court concluded that the certification of the class by the district court preserved an article III "case and controversy" because the unnamed class members acquired a legal interest separate from that of the named plaintiff, Lee. 424 U.S. at 755. The Court further reasoned that a "live" controversy remained during review before the Supreme Court because an adversary relationship sufficient to sharpen the presentation of issues continued

> as respects [the class'] assertion that the relief they have received in entitlement to consideration for hiring and backpay is inadequate without further award of entitlement to seniority benefits . . . in light of the fact that [n]o questions are raised concerning the continued desire of any of these class members for the seniority relief presently in issue.

Id. at 755–56. While the Court acknowledged that *Sosna* involved an instance of the "capable of repetition, yet evading review" aspect of the mootness doctrine, the Court cautioned that

> nothing in . . . Sosna . . . holds or even intimates that the fact the named plaintiff no longer has a personal stake in the outcome of a certified class action renders the class action moot in the absence of an issue "capable of repetition, yet evading review."

Id. at 754.

Justices Powell and Rehnquist concurred in the Court's holding on the mootness issue. *Id.* at 781. The Chief Justice did not express an opinion specifically on the question, although he did express general agreement with Justice Powell. *Id.*

[142] 424 U.S. at 761–62.

[143] *Id.* at 762.

The majority further held that an award of retroactive seniority to rejected applicants was "appropriate" under section 706(g).[144] Noting that Congress intended to bar all discriminatory employment practices based on race, sex, national origin or religion,[145] and relying on the broad equitable jurisdiction conferred on federal courts in furtherance of Title VII's make-whole objectives,[146] the Court viewed retroactive seniority as an essential element of any remedy which realistically seeks to achieve the Act's make-whole purpose.[147] Without seniority running from the date of the actual discrimination, the Court observed that an individual who would have been hired, but for the employer's discriminatory policy, would "perpetually remain subordinate to persons who . . . would [otherwise] have been . . . his inferiors" in terms of status and benefits.[148] Therefore, the Court rejected any distinction between grants of seniority credit to incumbent employees and grants of seniority to discriminatorily rejected job applicants.[149]

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[144] *Id.*

[145] *Id.* at 763. The Court relied upon its previous rulings in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), McDonnell Douglass Corp. v. Green, 411 U.S. 792 (1973), Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968).

[146] 424 U.S. at 763. The Court noted that this objective "is emphatic[ally] confirm[ed]" by the legislative materials supporting the 1972 amendments to Title VII. *Id.* at 764. The Court particularly relied upon the Section-by-Section Analysis of H.R. 1746, accompanying 118 CONG. REC. 7166, 7168 (1972):

> [t]he Act is intended to make the victims of unlawful employment discrimination whole and . . . the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, insofar as possible, restored to a position where they would have been were it not for the unlawful discrimination.

The Court also stated in a footnote that "[t]he Reports of both Houses of Congress indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." 424 U.S. at 764 n.21.

[147] *Id.* at 765–66. Given the overriding importance of Title VII's "make-whole" objective, the Court reasoned that a denial of seniority relief slotting the discriminatee in the position in the seniority hierarchy that would have been his but for the employer's discrimination would deny the discriminatee the most complete possible restitution intended by Congress. *Id.* at 764.

[148] *Id.* at 767–68.

[149] *Id.* at 768–69. The Court found no support for such a distinction in Title VII's legislative history, and analogized a Title VII seniority remedy to cases construing section 160(c), of the National Labor Relations Act, 29 U.S.C. § 160(c) (1976), which states that the NLRB may require that the employer hire employees who have been discriminatorily refused employment and also award seniority equivalent to that which the employees would have enjoyed but for the illegal conduct, in order to make "the employee [whole], and thus restor[e] the economic status quo that would have obtained but for the company's wrongful [act]." *Id.*, (quoting NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969)). In addition, the Court relied upon Local 60, United Bhd. of Carpenters and Joiners v. NLRB, 365 U.S. 651 (1961); *In re* Nevada Consolidated Copper Corp., 26 NLRB 1182 (1940), *enforced*, 316 U.S. 105 (1942); and *In re* Phelps Dodge Corp., 19 NLRB 547 (1940), *modified on other grounds*, 313 U.S. 177 (1941).

Although the Court recognized that awards of retroactive seniority might not be appropriate in all circumstances and that the district court must exercise its discretion in fashioning remedies under section 706(g), the Court ruled that

> [n]o less than with the denial of the remedy of backpay, the denial of seniority relief to victims of illegal racial discrimination in hiring is permissible "only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination . . . and making persons whole for injuries suffered through past discrimination." [150]

Applying this standard to the district court's denial of retroactive seniority, the Court noted that the district court assumed that some members of the class of discriminatees may have been unqualified for the position sought and, therefore, could not actually be considered victims of discrimination.[151] The Supreme Court found this concern to be premature, cautioning that although certain individuals might not, in fact, be entitled to relief, such a possibility may not "serve as a justification for the denial of relief to the entire class."[152] The Court held that once discriminatory hiring patterns have been demonstrated, the presumption arises that retroactive seniority is an appropriate form of class relief.[153] The employer may attempt to rebut this presumption by demonstrating that specific individuals should be excluded from the class and, therefore, denied relief.[154]

Turning to Bowman's alternative argument that an award of seniority credit to the discriminatees would adversely affect the economic interests of incumbent employees, the Court observed that prior decisions had established clearly that seniority "expectations" were not indefeasibly vested rights, and that such expectations could be modified by statute to further a strong public policy interest.[155] Rejecting as "untenable" any limitation on seniority relief because of

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[150] 424 U.S. at 771 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975)).

[151] 5 Fair Empl. Prac. Cas. at 426.

[152] 424 U.S. at 772.

[153] *Id.*

[154] *Id.* The Court held that when the unnamed class members seek OTR jobs, Bowman could introduce evidence that particular individuals were not actual victims of discrimination which may be submitted, but that "[o]nly if this burden is met may retroactive seniority—if otherwise determined to be an appropriate form of relief under the circumstances of the case—be denied individual members [of the class]." *Id.* at 773.

[155] *Id.* at 778. The Court relied, *inter alia*, upon Tilton v. Missouri Pac. R.R., 376 U.S. 169 (1964), which construes section 459 of the Universal Military Training and Service Act of 1948, 50 U.S.C. § 459(c)(1),(2) (1976), and holds that re-employed, returning veterans should be given the seniority credit that they would have enjoyed but for their military service. 424 U.S. at 778.

its impact on incumbent employees,[156] the Court stated that the award of retroactive seniority would distribute "the burden of the past discrimination in hiring . . . with respect to competitive status benefits . . . among discriminatee and non-discriminatee employees"[157] and that this "sharing of the burden of past discrimination [was] presumptively necessary . . . ."[158]

Justice Powell, concurring in part and dissenting in part,[159] agreed with the majority that section 703(h) is not a bar to an award of retroactive seniority credit to persons discriminatorily refused employment after the effective date of the Act.[160] However, Justice Powell could not subscribe to the majority's "absolutist" approach to implementation of Title VII's make-whole objective.[161] He objected to expanding the remedies available to individual discriminatees at the expense of deterring discrimination by employers—an equally

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[156] *Id.* at 773. The Court flatly rejected this argument, reasoning

> that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make-whole" objective of Title VII.

Id. at 774. The Court also stated that it rejected Bowman's argument because the district court did not rely upon these considerations in its order denying seniority relief. *Id.*

[157] *Id.* at 777.

[158] *Id.* The Court viewed this burden-sharing as equitable because the discriminatees were not getting "complete relief":

> No claim is asserted that nondiscriminatee employees holding OTR positions they would not have obtained but for the illegal discrimination should not be deprived of the seniority status they have earned. It is therefore clear that even if the seniority relief petitioners seek is awarded, most if not all discriminatees who actually obtain OTR jobs under the court order will not truly be restored to the actual seniority that would have existed in the absence of the illegal discrimination. Rather, most discriminatees even under an award of retroactive seniority status will still remain subordinated in the hierarchy to a position inferior to that of a greater total number of employees than would be a case in the absence of discrimination.

Id. at 776–77.

[159] *Id.* at 781 (Powell, J., concurring in part, dissenting in part).

[160] *Id.* at 781–82 (Powell, J., concurring in part, dissenting in part). Justice Powell agreed with the majority's reading of section 703(h)

> insofar as it determines the "thrust" of § 703(h) of Title VII to be the insulation of an otherwise bona fide seniority system from a challenge that it amounts to a discriminatory practice because it perpetuates the effects of pre-Act discrimination.

Id. at 181 (Powell, J., concurring in part, dissenting in part).

[161] *Id.* at 782 (Powell, J., concurring in part, dissenting in part). Justice Powell dissented from the majority's conclusion that section 706(g) requires the district court, in determining the appropriate equitable relief in cases of discriminatory refusals to hire minority applicants,

> to ignore entirely the equities that may exist in favor of innocent employees . . . and to recognize no meaningful distinction, in terms of the equitable relief to be granted, between "benefit"-type seniority and "competitive"-type seniority.

Id. (Powell, J., concurring in part, dissenting in part).

important goal of Title VII.[162] Justice Powell believed that both policies were promoted by the grant of retroactive benefit seniority because this seniority remedy "penalizes the wrongdoer economically at the same time that it tends to make whole the one who was wronged."[163] As to grants of retroactive competitive-status seniority, however, he argued that although such grants promote the make-whole policy of Title VII, they "caus[e] only a rearrangement of employees along the seniority ladder without any resulting increase in cost [to the employer]."[164] Compounding this lack of prophylactic effect was the direct negative impact that grants of competitive-status seniority have on the seniority "expectations" of innocent incumbent employees.[165] Justice Powell observed that those who bear the cost of a grant of competitive status seniority "are not the wrongdoers . . . , but rather are innocent third parties."[166] Thus, the absence of de-

[162] *See id.* at 782–85 (Powell, J., concurring in part, dissenting in part). Justice Powell started his analysis by noting that even remedies such as backpay, which are specifically mentioned in section 706(g), are a matter for the district court's sound equitable discretion under the Court's holding in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). 424 U.S. at 782–83 (Powell, J., concurring in part, dissenting in part). To guide the exercise of its discretion, Justice Powell argued that the district court should consider the Act's "primary objective" of preventing further employment discrimination and removing barriers that operated in the past to favor white employees over others, and its "second purpose"of making the victims of employment discrimination whole for the injuries they have suffered. *Id.* at 783 (Powell, J., concurring in part, dissenting in part). In Justice Powell's view, while the "expansive" language of section 706(g) and the legislative history of the 1972 amendments show that Congress intended a "general directive" to district courts to issue "make-whole" relief liberally, "[t]here is nothing in either of those sources . . . to suggest that rectifying economic losses from past wrongs requires the district courts to disregard normal equitable considerations." *Id.* at 785 (Powell, J., concurring in part, dissenting in part). Justice Powell focused upon a portion of the Section-by-Section Analysis accompanying the Conference Committee Report on the 1972 amendment to section 706(g), which states that Congress meant the amendment "to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible." *Id.* (Powell, J., concurring in part, dissenting in part) (quoting 118 CONG. REC. 7168 (1972)). Thus, Justice Powell read the statutory scheme as requiring the district court to employ traditional equitable criteria in fulfilling the Congressional mandate of fashioning "the most complete relief possible." 424 U.S. at 785 (Powell, J., concurring in part, dissenting in part).

[163] *Id.* at 787 (Powell, J., concurring in part, dissenting in part).

[164] *Id.*

[165] *Id.*

[166] *Id.* at 789 (Powell, J., concurring in part, dissenting in part). Justice Powell rejected the suggestion that the seniority expectations of incumbent employees were somehow illegitimate because they result from past discrimination by the employer against others. *Id.* at 789 n.7 (Powell, J., concurring in part, dissenting in part). He found this argument "badly flawed," noting that

> [a]bsent some showing of collusion, the incumbent employee was not a party to the discrimination by the employer. Acceptance of a job when offered hardly makes one an accessory to a discriminatory failure to hire someone else. Moreover, the incumbent's expectancy does not result from discrimination against others, but is based on his own efforts and satisfactory performance.

Id. at 788–89, 789 n.7 (Powell, J., concurring in part, dissenting in part).

terrent effect in competitive-status relief requires that the appropriateness of such an award under section 706(g) be determined by an equitable equation different from that employed in backpay and benefit seniority situation—a balancing of the equities without imposition of the presumption established by the majority.[167] Using this approach to decide whether to grant retroactive competitive-status seniority, a district court would weigh the competing claims of both nonincumbent discriminatees and incumbent employees,[168] and might well find retroactive competitive-status seniority to be a less "appropriate" form of relief than backpay or retroactive benefit seniority.[169] In Justice Powell's view, the majority was removing from district courts their statutory authority to make such a determination.[170]

Chief Justice Burger, expressing general agreement with Justice Powell's opinion, distinguished sharply between benefit and competitive-status seniority, and concluded that granting

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[167] *Id.* at 789–90 (Powell, J., concurring in part, dissenting in part). Justice Powell read section 706(g)'s failure to underscore seniority relief as it had underscored backpay as signaling Congress' intention to leave the entire question of retroactive seniority credit to "the discretion of the district court, a discretion to be exercised in accordance with equitable principles." *Id.* (Powell, J., concurring in part, dissenting in part).

[168] *Id.* at 790 (Powell, J., concurring in part, dissenting in part).

[169] *Id.* at 794 n.14, 797 n.18 (Powell, J., concurring in part, dissenting in part). Justice Powell found statutory support for this "balancing" approach to the competitive-status seniority remedy first in section 706(g)'s express reference to "appropriate" affirmative action and "other equitable relief as the court deems appropriate." *Id.* at 789 (Powell, J., concurring in part, dissenting in part). In addition, Justice Powell argued that "the congressional debates leading to the introduction of § 703(h) indicate a concern that Title VII not be construed as requiring immediate and total restitution to the victims of discrimination regardless of cost in terms of other workers' legitimate expectations." *Id.* at 791 (Powell, J., concurring in part, dissenting in part). While he agreed that section 703(h) does not restrict the remedial powers of the district court, Justice Powell argued that the Fifth Circuit "properly recognized that the section does reflect congressional concern for existing rights under a 'bona fide seniority or merit system' " that should guide the court's determination of "appropriate" equitable relief under section 706(g). Finally, while acknowledging that a grant of competitive seniority to an identifiable victim of discrimination was not preferential treatment flatly prohibited by section 703(j), Justice Powell argued that this remedy is nevertheless a preference in the seniority hierarchy based on a "fiction," rather than on time actually worked on the job, which requires the district court to assume that nothing would have interrupted progression up the seniority ladder. *Id.* at 792–93 (Powell, J., concurring in part, dissenting in part). Justice Powell acknowledged that backpay awards and grants of retroactive benefit seniority are based on a similar fiction, but distinguished such awards on the basis that "no innocent persons are harmed by the use of the fiction, and any uncertainty about whether the victim of discrimination in fact would have retained the job and earned benefits is properly borne by the wrongdoers." *Id.* at 793 n.12 (Powell, J., concurring in part, dissenting in part). He concluded that "[t]he congressional bar to one type of preferential treatment in § 703(j) should at least give the Court pause before it imposes upon district courts a duty to grant relief that creates another type of preference." *Id.* at 793 (Powell, J., concurring in part, dissenting in part).

[170] *Id.* at 798–99 (Powell, J., concurring in part, dissenting in part).

"competitive-type seniority relief at the expense of wholly innocent employees can rarely, if ever, be equitable if that term retains traditional meaning."[171]

In fashioning the appropriate Title VII remedy, the majority declined to recognize the inherently different nature of competitive-status seniority and benefit seniority. While the Court correctly concluded that presumptive awards of benefit seniority serve both the make-whole and the prophylactic objectives of the Act, the majority failed to recognize that presumptive awards of competitive-status seniority advance the make-whole policy of Title VII without burdening the employer with the consequences of his illegal conduct.[172] The Court's approval of presumptive awards of competitive-status seniority also unnecessarily and perhaps unjustly burdens incumbent employees, an effect inconsistent with the policies of justice and fair play upon which Title VII is based.[173]

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[171] *Id.* at 780–81 (Burger, C.J., concurring in part, dissenting in part).

[172] All that the remedy does to the employer is indicate to him the order in which his work force, which is now composed of the original incumbents and the newly-hired discriminatees, is to be laid off in work reduction situations. The remedy does not add to the employer's costs by limiting his right of layoff, or by requiring him to pay employees disadvantaged by the remedy if he does lay them off, and hence, the prophylactic purpose of Title VII is not promoted at all by the remedy.

[173] The majority justified the imposition of the presumption with the argument that the discriminatees were not receiving complete relief and that therefore the burden of the seniority remedy was being shared. 424 U.S. at 777. The "shared burden" reasoning of the majority is inadequate for two reasons. First, this argument glosses over the fact that the wrongdoing employer is not penalized at all by the grant of competitive-status seniority to the discriminatees. Secondly, this "shared burden" theory is flawed by the underlying assumption of complicity between the incumbent employees and their employer. The majority implies that the continued presence of the incumbents *at all* in the seniority hierarchy is illegitimate because their present position is based upon jobs and seniority credit that they would not have presumably received had the employer not discriminated. Thus, the Court's decision to permit the incumbents to remain in their present jobs without the threat of "bumping" by the discriminatees is apparently thought to be sufficient compensation for the economic disadvantage caused to the incumbents by the grant of seniority. Although not clearly stated by the Court, this inability of the discriminatees to use the seniority credit to "bump" incumbents apparently is the basis for the Court's claim that the discriminatees have been granted incomplete relief.

As Justice Powell points out, the incumbents have not become the accessories to the employer's discrimination merely by accepting the jobs discriminatorily denied to others. *Id.* at 788 n.7. (Powell, J., concurring in part, dissenting in part). In addition, the incumbent employee's seniority expectation results from his own efforts and satisfactory performance, rather than from the discriminatory refusal to hire others. *Id.* Further, the Court's references to incomplete relief cloud the issue before the Court. Theoretically, even the "freedom now" remedial approach is not as complete as some other remedies that could be imagined. For example, ordering the employer to immediately dismiss all employees hired after the date of the proven discrimination against the plaintiff in a Title VII suit, and requiring the employer to replace the fired incumbents with minority workers who could prove that they were subjected to discrimination, would theoretically provide more "complete" relief than even the "freedom now" approach. As Justice Powell cogently argues, the inquiry should be whether the proposed

THE *INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. UNITED STATES* DECISION

Little more than a year after its landmark decision in *Franks*, the Supreme Court in *International Brotherhood of Teamsters v. United States* [174] found that a nationwide motor freight carrier and its representative union had violated Title VII by engaging in a pattern and practice of employment discrimination against blacks and Spanish-surnamed Americans, particularly in recruiting, hiring, promoting and transferring individuals into line-driver positions.[175] The government's main charge against the company, T.I.M.E.-D.C., Inc., focused upon the company's discriminatory practice of refusing to hire minority individuals as line-drivers, and perpetuating that discrimination by refusing to promote or transfer minority employees to the higher paying, more desirable job classification.[176] Relying heavily upon graphic statistical evidence and supporting testimony offered by the government,[177] the district court concluded that the company and

remedial approach was permitted by Congress, and whether it would be equitable to all those affected by it. The "completeness" of the remedy must be balanced against the impact on incumbent employees, and should not be focused upon myopically as the only consideration to be viewed by the district court. *Id.* at 789–90 (Powell, J., concurring in part, dissenting in part).

[174] 431 U.S. 324 (1977). The Court decided the *Teamsters* case along with *T.I.M.E.-D.C. v. United States*, *id.*, as the two actions had been consolidated for trial in the federal district court. *Id.* at 328–29. Both actions were initiated by the United States against T.I.M.E.-D.C. on charges of employment discrimination. The International Brotherhood of Teamsters (Teamsters) was joined in one suit. *Id.* T.I.M.E.-D.C. had entered into 124 separate collective bargaining agreements with 83 individual union locals at many of its 51 terminals. United States v. T.I.M.E.-D.C., 517 F.2d 299, 305 (5th Cir. 1975), *vacated and remanded*, 431 U.S. 324 (1977).

[175] 431 U.S. 337. Employees working as line-drivers engaged in long distance hauling between the terminals of the company and were a distinct bargaining unit from that representing drivers who made deliveries within the immediate areas of a particular terminal, known as "city drivers." *Id.* at 329–30 n.3.

[176] *Id.* at 329; *see* United States v. T.I.M.E.-D.C., 517 F.2d at 303–04.

[177] *See* United States v. T.I.M.E.-D.C., 517 F.2d at 307–17. The government's statistical evidence compared the ratio of black to white citizens in certain census areas and in each company terminal city with the ratio of black to white employees at the terminals. *Id.* at 307. Additionally, comparative statistics were offered from selected major metropolitan terminals showing the complete racial breakdown in each job classification. *Id.* The statistics revealed that, as of the time when the government instituted the employment discrimination action, the company had approximately 6,472 employees, of which 314 (5%) were blacks and 257 (4%) were Spanish-surnamed Americans. *Id.* at 311. While 260 (83%) of the black employees and 199 (78%) of the Spanish-surnamed employees were assigned to city operation or serviceman jobs, only 8 (0.4%) of the blacks and 5 (0.3%) of the Spanish-surnamed American persons were employed as line-drivers. *Id.* at 311–12. Moreover, all of the 8 blacks had been hired as line-drivers after the government's Title VII suit had commenced. *Id.* at 312. Prior to the filing of the suit, only one black employee had ever been employed as a line-driver by T.I.M.E.-D.C. or any of its predecessor companies. *Id.* T.I.M.E.-D.C. was at that time a product of ten mergers over a period of seventeen years. *Id.* at 304.

the union had engaged in an extensive pattern of discriminatory employment practices.[178] The court accepted the government's contention that the affected class of discriminatees included all incumbent minority employees who had been hired as city operators or servicemen during the period in which T.I.M.E.-D.C., Inc. was engaged in the discriminatory assignment and transfer practices.[179] The district court ruled that this entire class of employees, whether hired before or after the effective date of Title VII, was entitled to preference over all other applicants for all future vacancies in line-driver positions.[180] Determining that some discriminatees had been more severely harmed than others, the court divided the affected class into three sub-classes for the purpose of awarding bidding preference rights with retroactive competitive-status seniority.[181] However, the district court also ordered that the recall rights of previously laid-off line-drivers be honored before the discriminatees were permitted to fill such vacancies.[182]

The Fifth Circuit court of appeals unanimously affirmed the district court's finding that the company and union had engaged in a pattern and practice of employment discrimination in its hiring and transfer of line-drivers, and that the seniority system established by the collective bargaining agreement violated Title VII to the extent that it prevented a minority city driver or serviceman from carrying accumulated competitive-status seniority into a line-driver position.[183] However, the court of appeals rejected the district court's

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[178] *Id.* at 316–17. The memorandum decision of the district court is reported at 6 Fair Empl. Prac. Cas. 690 (N.D. Tex. 1974) and 6 EPD § 8979. *Teamsters*, 431 U.S. at 324 n.5.

[179] 517 F.2d at 317.

[180] 431 U.S. at 331.

[181] *Id.* at 331–32. To the subclass of thirty discriminatees who had been most severely harmed by the discrimination, the district court awarded bidding preference rights on line-driver vacancies with retroactive seniority back to either July 2, 1965, the effective date of the Act, or to the date of his initial employment by the company, whichever was later. *Id.* at 331–32 & n.8. The subclass of four discriminatees whom the court judges to be very likely harmed by the discriminatory practice were offered bidding preference rights with an award of retroactive seniority back to January 14, 1971, the date the government filed its system-wide pattern and practice suit. The remaining three hundred members of the affected class, about whom the government had offered no evidence of harm, would be considered for line-driver vacancies before outside applicants, but behind the other two subclasses, and would receive no retroactive seniority.

[182] 431 U.S. at 331–32. The district court limited the preference given to these recall rights by permitting the laid-off line-drivers to exercise the preference only at their home terminals. 517 F.2d at 309.

[183] *Id.* at 311–17. The court of appeals rejected the company's and union's attack on the government's comparative statistical evidence. *Id.* at 315. The court concluded that the evidence "viewed as a whole quite definitely support[ed] the finding that the pattern and practice

tripartite division of the affected class, and concluded that all incumbent minority employees were entitled to bid for future line-driver vacancies based upon their accumulated company seniority and to retain their company seniority for all purposes.[184] The appellate court also rejected the lower court's ruling that the discriminatees would fill future line-driver vacancies subject to the recall rights of previously laid-off line-drivers, and held that discriminatees could use their retroactive seniority to compete with laid-off line-drivers for the vacancies.[185]

The Supreme Court, in an opinion by Justice Stewart,[186] affirmed the findings of both the district court and court of appeals that the government had sustained its burden of proving "by a preponderance of the evidence that racial discrimination was the company's standard operating procedure."[187] In so doing, the Court strongly reaffirmed the use of statistical evidence as prima facie proof of discriminatory hiring and promotion policies, noting that while such statistical analyses are not "irrefutable," they are as competent in raising an inference of employment discrimination as they are in estab-

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of discrimination literally occurred." *Id.* The lop-sided ratios revealed by the statistical evidence raised the inference of discriminatory employment practices. Once these revelations present a prima facie case of a discriminatory practice, the onus of going forward with the evidence and the burden of persuasion is on the company to rebut the plaintiff's prima facie case, Rodriguez v. East Tex. Motor Freight, 505 F.2d 40, 53–54 (5th Cir. 1974); United States v. Hayes Int'l Corp., 456 F.2d 112, 120 (5th Cir. 1972). Here, the Fifth Circuit court of appeals affirmed the conclusion of the district court that the company and the union failed to discredit the inference that they had engaged in a system-wide pattern and practice of employment discrimination. 517 F.2d at 314–17.

[184] *Id.* at 317–18. The court of appeals also flatly rejected the district court's limitation of transferable seniority to post-Act seniority as inconsistent with the *Quarles* theory of liability for the present perpetuation of pre-Act discrimination. *Id.* at 320. Finding no authority for limiting carry-over seniority to post-Act seniority, the court of appeals ordered that discriminatees who successfully transferred into line-driver positions could carry all their accumulated company seniority with them, regardless of the effective date of the Act. *Id.* at 320–21.

[185] *Id.* at 322–23. Laid-off employees were allowed to retain their prior recall rights only as to "purely temporary" vacancies. *Id.* The court affirmed the district court's directive that discriminatees be permitted to fill vacancies ahead of laid-off line-drivers from other terminals, and extended that right to all of the affected class in the wake of its rejection of the district court's tripartite division of discriminatees. *Id.* at 323. The court of appeals remanded the case to the district court to apply these and other modifications to the remedy. *Id.* at 324.

[186] Justice Stewart was joined by Chief Justice Burger and Justices White, Blackmun, Powell, Rehnquist and Stevens. 431 U.S. at 327. Justice Marshall, with whom Justice Brennan joined, filed an opinion concurring in part and dissenting in part. *Id.* at 377.

[187] *Id.* at 324, 336. In finding a "systemwide pattern or practice of resistance to the full enjoyment of Title VII rights," the Court looked very closely to the legislative background of the language of section 707(a) of Title VII. *Id.* at 336 n.16.

lishing prima facie cases of racial discrimination in jury selection.[188] The Court then turned to the legality of the seniority system as applied to victims of discrimination which occurred prior to the effective date of Title VII.[189] The majority acknowledged that the seniority system perpetuated both pre-Act and post-Act discrimination, and that but for section 703(h), all discriminatees would be entitled to retroactive seniority relief under the rationale sanctioned by *Franks*.[190] Although the Court recognized the seniority system operated to perpetuate past discriminatory practices, it read "both the literal terms of section 703(h) and the legislative history of Title VII" as immunizing otherwise neutral, legitimate seniority systems from retrospective scrutiny under Title VII.[191] The Court concluded that the congressional intent propelling section 703(h) was that "Title VII should not . . . outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act."[192]

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[188] *Id.* at 339. The Court reasoned that statistical evidence of "gross disparities" between the racial composition of the work force and that of the general population is "often a telltale sign of purposeful discrimination [because] . . . it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the [general] population." *Id.* at 339–40 n.20. The Court also rejected the company's argument that the government had erroneously relied upon statistics alone, noting that the government had introduced live testimony from individual discriminatees "about their personal experiences with the company [which] brought the cold numbers convincingly to life." *Id.* at 339.

[189] *Id.* at 348. The Court first identified the crux of the liability theory embraced by the court of appeals and the district court. The minority applicant who was initially refused a line-driver job by the company, and who finally obtained a line job after sacrificing his competitive-status seniority in order to transfer into the line classification, "will never be able to 'catch up' to the seniority level of his contemporary who was not subject to discrimination." *Id.* at 344. Because the discriminatee suffers from this "continued, built-in disadvantage" under the seniority rules negotiated by the parties, both the lower courts held that the seniority system itself perpetuated the effects of the initial discrimination, and therefore constituted a continuing violation of Title VII. *Id.* at 344–45.

[190] *Id.* at 349. The Court observed that all post-Act discriminatees would be entitled to the full retroactive seniority relief sanctioned by *Franks* "without attacking the legality of the seniority system as applied to them." *Id.* at 347. The majority apparently reasoned that *Franks* does not require the invalidation of a seniority system which perpetuates post-Act discrimination because the decision provides that the post-Act discriminatee be awarded complete retroactive seniority, so that he attains his "rightful place" within the system. *Id.* at 347–49.

[191] *Id.* at 350–54. Essentially, the majority rejected the wide-spread opinion that the legislative history of section 703(h) was at best ambiguous, and at worst misleading. *Id.* The Court read the seniority disclaimers in the Clark-Case memoranda as a literal and specific explication of Congress' desire to leave existing seniority rights undisturbed by the passage of the Act. The Court's interpretation of the legislative history probably is an accurate reflection of the policy compromise reached by Congress on the seniority issue at that time.

[192] *Id.* at 352–53.

The Court also rejected the argument that the limitation of section 703(h)'s protection to "bona fide" seniority systems excludes all seniority systems which perpetuate prior employment discrimination, whether pre- or post-Act.[193] The Court upheld the T.I.M.E.-D.C./Teamsters seniority system under a more limited, three-part definition of bona fide, first examining whether the system was, in fact, facially neutral,[194] secondly whether the seniority system had its "genesis" in racial discrimination,[195] and finally whether the system

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[193] *Id.* The Court declined the government's "invitation to disembowel § 703(h)" and ruled that a facially neutral seniority system does not become non-bona fide solely because it perpetuates the effects of pre-Act employment discrimination. *Id.* at 353. Any other interpretation would, in the Court's view, "pervert" the congressional purpose of permitting employees with accumulated seniority rights to continue to exercise them "even at the expense of pre-Act discriminatees." *Id.* at 353–54.

[194] *Id.* at 355–56. The Court explained that "[t]o the extent that it 'locks' employees into non-line-driver jobs, it does so for all." *Id.*

[195] *Id.* at 356. The Court noted that all parties agreed that the seniority system did not have its genesis in racial discrimination, and hence did not elaborate on this part of the definition. *Id.* The Fifth Circuit in James v. Stockham Valves & Fittings Co., 559 F.2d 310, 352–53 (5th Cir. 1977), directed the district court on remand to examine the "clouded" bargaining history between the parties in the "context" of the employer's discriminatory employment practices for evidence that the seniority system has its genesis in discrimination, noting that

> Stockham's failure to go along with revisions in the [departmental] seniority system must be evaluated in the context of the company's extensive unlawful employment practices during the period of the negotiations and its intransigent adherence to wide-spread segregated facilities at the plant, at least until 1974. In addition, Stockham's resistance to revisions in the seniority system must be considered in light of the union's firm support for such changes and its willingness to strike for the proposed modifications in 1970. . . . The district court should give careful consideration to the negotiations involving the seniority system at Stockham and to the employment practices of the company underlying such negotiations.

Id. at 353. Among other things, the appellate court observed that the seniority system has been adopted in the 1949 collective bargaining agreement between the parties, "when segregation in the South was standing operating procedure." *Id.* at 352.

Presumably, any seniority system negotiated prior to the effective date of the Act during a period when the employer engaged in discriminatory employment practices would have its "genesis" in discrimination under the standard suggested in *James*. Indeed, citing *James*, the district court in Sears v. Santa Fe Ry. Co., 17 Fair Empl. Prac. Cas. 1138 (D. Kan. 1978), came to just such a conclusion. The Court reasoned:

> Here, we have a seniority system which was adopted and maintained during a period when segregation was standard operating procedure on the Santa Fe. The seniority system was created by collective bargaining at a time when there were no black brakemen and no white train porters, at a time when blacks as a class performed only the most menial tasks on the railroad. It would not be until 1918 that "colored men employed as firemen, trainmen, and switchmen [were] paid the same rate of wages as [were] paid white men in the same category," and that only by order of the United States Government. . . . The unions which maintained the seniority system through negotiations and collective bargaining with the Santa Fe had clauses in their Constitutions which limited membership to white males. This written prohibition of black membership lasted at least from the 1930's to the 1960's, and there were no blacks in the unions before the 1930's. Since blacks were

had been negotiated and administered to serve any "illegal purpose."[196]

With regard to post-Act discrimination,[197] the Court rejected the petitioner's argument that in order for seniority relief to be afforded to alleged discriminatees, the government must fulfill the burden of proving that each individual discriminatee had unsuccessfully sought a position for which the employer continued to seek applicants with

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> not eligible for membership in the unions, they could not be employed as brakemen or conductors, and they could not be eligible for the economic protection of the seniority systems in question. It was not until 1950 that chair car attendants had a written seniority system which was established through collective bargaining with the Santa Fe, and the train porters never had a written seniority system at all. The seniority system was used by the unions to deprive blacks of their train porter positions.
>
> In sum, we conclude and so hold that the seniority system had its genesis in racial discrimination and was created and maintained with illegal purpose . . . .

Id. at 1155 (citation omitted). Although the parameters of the *James* and *Sears* view are anything but clear, the basic analysis appears to be a kind of guilt-by-association with the employer's discriminatory employment practices. Hence, as the court in *Sears* held, nonbonafideness under *Teamsters* can be found even though the seniority system is facially neutral and based upon some rational bargaining unit structure if the system was negotiated at a time when other discriminatory practices were being committed by the employer. *Accord*, Chrapliwy v. Uniroyal, Inc., 15 Fair Empl. Prac. Cas. 822 (N.D. Ind. 1977). *See* EEOC Interpretive Memorandum DAILY LAB. REP. NO. 134 (BNA) D-1 (July 12, 1977).

This view was rejected by the district court in Swint v. Pullman-Standard, 17 Fair Empl. Prac. Cas. 730 (D. Ala. 1978). Noting that the seniority system involved in the case had become "essentially fixed" in 1954, when racial segregation was widely practiced both inside the plant and in local society in general, the court reasoned that the seniority system "had its genesis at a time when there was widespread racial segregation but not as a result of, nor in furtherance of, such discrimination." *Id.* at 739. The court relied, in part, upon the very pervasiveness of discriminatory practices which rendered a racially motivated seniority system "unnecessary" to the achievement of segregation, *id.* at 737, and upon the fact that the unionization of the employer had been "[o]ne of the few mutual and common ventures of blacks and whites at Pullman's . . . plant . . . ." *Id.* at 738. Thus, under the *Swint* view, the seniority system does not have its genesis in discrimination merely because it was negotiated at a time of general employment discrimination by the employer. *See* Croker v. Boeing Co., 437 F. Supp. 1138, 1187 (E.D. Pa. 1977).

If the *Sears* view of the *Teamsters* "genesis" test is used, it is probable that all seniority systems invalid under Title VII before *Teamsters* for their perpetuating effect will be invalid after *Teamsters* because they had their genesis in discrimination. Hence, the interpretation of section 703(h) will be effectively nullified. On the other hand, if the *Swint* view is accepted, it is difficult to see what analytic use the "genesis" test has beyond restating the requirement that the seniority system not have been negotiated for an illegal purpose. *See* Swint v. Pullman Standard, 17 Fair Empl. Prac. Cas. at 737 n.20. Whatever the outcome, the Supreme Court's reference to the "genesis" test is likely to spawn further litigation over the legality of seniority systems under Title VII.

[196] 431 U.S. at 356.

[197] The Court noted that under its interpretation of section 703(h), discriminatees who suffer only pre-Act discrimination were not eligible for seniority relief, and that seniority relief granted to other discriminatees could be retroactive only to July 2, 1965, the Act's effective date. 431 U.S. at 356–57.

similar qualifications.[198] Rather, citing *Franks*, the Court held that once Title VII plaintiffs had fulfilled the initial burden of raising an inference of individual discriminatory employment practices by " 'demonstrating the existence of a discriminatory hiring pattern and practice' "[199] in the liability stage of the trial, they need prove during the remedial stage only that particular discriminatees applied unsuccessfully for a specific job.[200] Once this inference is raised, the burden shifts to the defendant to rebut the presumption of the illegality of its hiring and promoting practices by demonstrating that individual minority applicants were denied employment opportunities for lawful reasons.[201]

The Court rejected the company's claim that a nonapplicant could never be awarded seniority relief under Title VII, a question left unanswered by *Franks*.[202] Relying upon both the prophylactic and the "make-whole" purposes of the Act, the Court reasoned that those nonapplicants who are aware of an employer's consistently enforced discriminatory policy, and who are deterred from undergoing the "humiliation of explicit and certain rejection" of a formal job application, are as much victims of discrimination as are rejected applicants.[203] Moreover, the Court recognized that the per se denial of relief to nonapplicants would effectively immunize "the most entrenched forms of discrimination," those so effective that potential

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[198] *Id.* at 357–58.The petitioners urged that the burden of proof in a discriminatory pattern or practice case must meet these specific requirements as outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The Court, however, concluded that *McDonnell Douglas* set no inflexible standard, but simply stands for the principle that the Title VII plaintiff must come forward with evidence that creates an inference of employment discrimination. 431 U.S. at 358.

[199] *Id.* at 358–59. The Court reaffirmed that the government, as the plaintiff in the pattern and practice action, had through its statistical evidence proven a systemwide company policy of employment discrimination. *Id.* at 362.

[200] *Id.*

[201] *Id.* at 360. Consequently, as in *Franks*, once the remedial stage of the action is reached, the illegality of hiring and promoting practices is presumed, and the employer must rebut this presumption with evidence that no vacancy existed at the time the minority individual applied, that the applicant lacked the requisite legitimate qualifications, or that some other lawful reason justified the employer's decision. *Franks*, 424 U.S. at 773 n.32. The Court offered guidance for the district court reviewing the particular facts on remand, noting that the presumptive entitlement to relief must be dispelled only where the employer demonstrates "that its earlier refusal to place the applicant in a line-driver job was not based on its policy of discrimination." 431 U.S. at 362.

[202] *Id.* at 363–64. The queston was not answered by *Franks* because the affected class in that case included only " 'identifiable applicants who were denied employment . . . after the effective date . . . of Title VII.' " *Id.* at 363 (quoting *Franks*, 424 U.S. at 750).

[203] 431 U.S. at 465–66.

minority applicants had been completely deterred.[204] Nonapplicants, however, have a "difficult task of proving" that they are entitled to the benefits of the presumption raised by an initial showing of a pattern or practice of employment discrimination.[205] To establish that a nonapplicant was a victim of unlawful discrimination, he must prove that he would have applied for the job but for his knowledge of a company's discriminatory practices.[206] Assumptions will not satisfy this burden of proof; rather, the government, as the plaintiff, is required to prove that each individual nonapplicant was, at the time he claims he was deterred by the discriminatory policy, qualified for and desirous of the particular job.[207] Only then will the *Franks* standard apply to shift the burden to the employer to show that the nonapplicant would not have been discriminatorily rejected.[208]

Acknowledging without deciding the challenge to the court of appeals' decision to void the preference given to the recall rights of laid-off line-drivers over the bidding opportunities for discriminatees, the Court remanded the case to the district court for "the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing,"[209] noting that the district court should exercise its discretion

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[204] *Id.* at 367.

[205] *Id.* at 364.

[206] *Id.* at 367–68.

[207] *Id.* at 371–72. Observing that "the desirability of [line-driver job] is not so self-evident as to warrant a conclusion that all employees would prefer to be line-drivers if given a free choice," the Court rejected the presumption indulged in by the court of appeals that qualified nonapplicants are entitled to seniority relief even in the absence of proof that they actually desired a line job. *Id.* at 369. The Court noted the discriminatee's present desire for a particular job is insufficient evidence because the award of retroactive seniority tilts the balance in favor of taking the desired job. *Id.* at 371. Rather, the government must show that the discriminatee desired the job at the time of the alleged deterrence with "evidence of an employee's informal inquiry, expression of interest, or even unexpressed desire [if] credible and convincing." *Id.* at 371 n.58.

It is unclear what convincing evidence of an "unexpressed desire" the Court contemplated. Aside from the non-applicant's own testimony that he harbored such a desire, perhaps the government might introduce testimony of the non-applicant's family or friends about his desire for the job which he did express to them but did not express to the company because of its discriminatory policies. Of course, if the non-applicant lacked the good fortune or the foresight to express his job desires to someone, he may not be able to corroborate his own testimony of his desire for the job. Much will probably depend upon the district court's finding on the desirability of the job involved. Presumably, the more desirable the job sought, the more likely the non-applicant would have harbored an inchoate and informally expressed desire for it and hence the more credible the non-applicant's testimony about his unexpressed desire will appear.

[208] *Id.* at 369 n.53. The majority suggests that employer rebuttal evidence might show that other, more qualified applicants would have been chosen over the non-applicant had he applied, or that a non-applicant's qualifications were not sufficient. *Id.*

[209] *Id.* at 372.

according to "basic principles of equity."[210] The Court cited the limited facts on the record—particularly the district court's failure to state its reasons for giving laid-off incumbent line-drivers preference rights for future line-driver vacancies, and the probability that both the size and composition of the affected class entitled to relief might change substantially as a result of the Court's other determinations—as reasons for leaving to the district court the task of striking the "equitable balance . . . between the statutory rights of victims and the contractual rights of nonvictim employees."[211]

In a concurring and dissenting opinion, Justice Marshall strongly disagreed with the majority's conclusion that section 703(h) immunizes seniority systems which perpetuate pre-Act employment discrimination.[212] Reminding the majority of the broad remedial purposes of Title VII and its sweeping prohibitions, Justice Marshall argued that section 703(h)'s exemption for "bona fide" seniority systems should be narrowly construed, and that seniority systems which perpetuate past discrimination are not protected unless they fall "plainly and unmistakably within [the] terms and spirit" of the provision.[213] Justice Marshall read the proviso in section 703(h) as limiting the section's protection to seniority systems that do not perpetuate different employment conditions which result from previous intentional discrimination.[214] Justice Marshall argued that the proviso, read literally, applied to the T.I.M.E.-D.C./Teamsters seniority system because that system perpetuated employment conditions resulting from prior intentional discrimination, and he accused the majority of "reconstruct[ing] the literal terms of section 703(h) to afford protection to systems that do not have their " 'genesis in racial discrimination' " and are administered without " 'any illegal purpose.' "[215]

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[210] *Id.* at 375.

[211] *Id.* at 376.

[212] *Id.* at 377–80 (Marshall, J., concurring in part, dissenting in part).

[213] *Id.* at 381 (Marshall, J., concurring in part, dissenting in part) (quoting A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945)). Justice Marshall stated that section 703(h) is not " 'plainly and unmistakably' " applicable to systems that perpetuate past discrimination. 431 U.S. at 381 (Marshall, J., concurring in part, dissenting in part).

[214] The section 703(h) proviso states:

> [I]t 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 . . . system . . . provided that such differences are not the result of an intention to discriminate because of race. . . .

42 U.S.C. § 2000e-2(h) (1976).

[215] 431 U.S. at 382 (Marshall, J., concurring in part, dissenting in part). Justice Marshall argued that it was only through this avoidance of the literal reading of section 703(h) that the majority was able to find that the section immunized the T.I.M.E.-D.C./Teamsters seniority system. *Id.* (Marshall, J., concurring in part, dissenting in part).

The dissent found no basis in the legislative history of section 703(h) for the majority's reading of the proviso or for their conclusion that, in enacting section 703(h), "Congress intended to legalize seniority systems which perpetuate [pre-Act] discrimination."[216] Justice Marshall concluded that the EEOC's consistent view that seniority systems which perpetuate prior discrimination violate Title VII[217] and indications in the legislative history of the 1972 amendments to the Act that Congress "approved the lower court decisions invalidating seniority systems that perpetuate discrimination,"[218] refuted the majority's holding on the congressional intent underlying section 703(h).[219]

The *Teamsters* decision did not answer the broader questions posed by *Franks*. The decision simply holds that a seniority system which perpetuates the effects of pre-Act discrimination, if it is neither established nor maintained with an intent to discriminate, is a bona fide system under section 703(h). If a system which perpetuates pre-Act discrimination, however, is found to have been either established or maintained for a discriminatory purpose, retroactive competitive-status seniority could still conceivably be used by the courts as a remedy under the principles of *Franks*.[220]

Not only did the Court in *Teamsters* fail to address the potential inequities of the retroactive seniority remedy sanctioned in *Franks*, it has extended that remedy to nonapplicant discriminatees who can satisfy the burden of proof set forth in *Teamsters*. Indeed, with the Court's extension of potential Title VII relief to nonapplicant discriminatees, it is probable that innocent incumbent employees will be

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[216] *Id.* at 383 (Marshall, J., concurring in part, dissenting in part). The dissent literally blasted the majority's discussion of the continued viability of the seniority system despite its admitted perpetuation of post-Act discrimination. *Id.* (Marshall, J., concurring in part, dissenting in part). Justice Marshall reasoned that the legislative materials demonstrated that section 703(h) was directed at seniority "expectations" that had arisen prior to the enactment of Title VII, and not at those expectations "arising thereafter to the extent that those expectations were dependent on whites benefitting from unlawful discrimination." *Id.* at 384 (Marshall, J., dissenting). In Justice Marshall's view, the repeated insistence in the Clark-Case Memoranda that Title VII was intended to be "prospective" only shows that section 703(h) was certainly not enacted to legalize a seniority system which perpetuates post-Act seniority expectations arising from post-Act discrimination. *Id.* at 384–85 (Marshall, J., concurring in part, dissenting in part).

[217] *Id.* at 390 (Marshall, J., concurring in part, dissenting in part). *See* cases cited by the dissent, *id.* at n.4.

[218] *Id.* at 391 (Marshall, J., concurring in part, dissenting in part). For a discussion of the legislative history of the 1972 amendments, see note 59 *supra*.

[219] 431 U.S. at 394 (Marshall, J., concurring in part, dissenting in part).

[220] *See* United States v. East Tex. Motor Freight Sys., 564 F.2d 179, 183 (5th Cir. 1977).

penalized even more by the awarding of retroactive competitive-status seniority rights.

EQUITABLE METHODS OF IMPLEMENTING RETROACTIVE COMPETITIVE-STATUS SENIORITY AWARDS

In both *Franks* and *Teamsters*, the Supreme Court failed to prescribe specific methods for granting retroactive competitive-status seniority relief as part of an overall equitable Title VII remedy.[221] This section will explore the availability and practicality of various methods of implementing such awards and the extent to which these methods serve both the make-whole and the prophylactic purposes of the Act.

Displacement

The grant of retroactive competitive-status seniority sanctioned by *Franks* could be most effectively implemented by allowing the dicriminatees to displace or "bump" incumbents from jobs previously governed by the employer's discriminatory policies.[222] However, the lower federal courts have generally refused to use displacement as an application of the *Franks'* remedy.[223] The legislative history of the Act indicates that Congress intended it to apply prospectively only,[224] and unequivocally states that the Act is not to be used to displace incumbent workers.[225] In addition, while displacement coupled with back-pay and adjustments to benefit seniority achieves the make-whole objectives of Title VII,[226] it does not serve the Act's prophylactic purposes because it shifts the assessment of damages for the

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[221] *See* notes 125–220 *supra* and accompanying text. In his concurrence in *Franks*, Justice Powell argued that the district court has the discretion under the Act to consider the impact of competitive-status seniority awards upon incumbent employees in fashioning an overall remedy. 424 U.S. at 785–90 (Powell, J., concurring in part, dissenting in part). Chief Justice Burger was in general agreement with this criticism, and suggested that front pay would be a more equitable award than retroactive competitive-status seniority. *Id.* at 781 (Burger, C.J., concurring in part, dissenting in part).

[222] Comment, *Racial Discrimination In Employment: Retroactive Seniority Awarded Job Applicants As A Title VII Remedy For Hiring Discrimination*, 8 U. TOL. L. REV. 397, 432 (1977). This approach has been characterized as the "freedom now" theory. Note, *Seniority Discrimination, supra* note 17, at 1268 n.2.

[223] *E.g.*, Patterson v. American Tobacco Co., 535 F.2d 257, 267–69 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976); E.E.O.C. v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated and remanded*, 431 U.S. 951 (1977); United Papermakers & Paperworkers v. United States, 416 F.2d at 988.

[224] "Reply Memorandum," *supra* note 50, at 7216–17; International Brotherhood of Teamsters v. United States, 431 U.S. at 350–54.

[225] "Reply Memorandum," *supra* note 50, at 7216–17.

[226] Jones, *Title VII, Seniority, And The Supreme Court; Clarification Or Retreat?*, 26 KAN. L. REV. 1, 55 (1978). In discussing displacement, one commentator stated that "[t]he argument

employer's Title VII violations to the incumbent employee whose job is awarded to the discriminatee.[227] Hence, displacement is not a remedial device expressly or impliedly sanctioned by Congress in the Act, and its harsh impact on incumbent employees is irreconcilable with the recognition of the interests of incumbents evident in the legislative history.

Displacement carries with it a number of practical drawbacks as well. Although the Supreme Court stated in *Franks* that accrued seniority expectations are not indefeasibly vested rights,[228] seniority is based upon time-in-service and is viewed by workers as an earned right.[229] Because displacement directly and immediately threatens the incumbent's job and nullifies accrued seniority,[230] incumbent workers are likely to be hostile toward displacing discriminatees.[231] Polarization of employee interests along racial lines may develop in the work force, in turn, breeding production and morale problems.[232] Displacement, and the attendant incumbent hostility, would certainly hamper the Congressional goal of voluntary compliance by employers and unions with Title VII.[233] Further, as the continuing interpretation of Title VII leads to the definition of new

for allowing the immediate displacement of incumbents is that discriminatees have previously been locked into inferior employment positions and that bumping thus must be allowed in order to correct such discriminatory effects." Comment, *supra* note 222, at 432.

[227] Burke & Chase, *Resolving the Seniority/Minority Layoffs Conflict: An Employer Targeted Approach*, 13 HARV. C.R.-C.L.L. REV. 81, 90 (1978). Although the employer may experience marginal increased costs due to increased fringe benefit payments and training costs, the employer will still be escaping from Title VII liability relatively undamaged. Comment, *supra* note 222, at 433. Obviously, the dimensions of these costs will vary with the size of the corporation and the extent of the need for specialized training. *See id.* at 433. However, the employer is generally in a better position to absorb the economic burden than either the discriminatee or the non-minority incumbent employee. It seems unlikely that these peripheral costs would be sufficient to render the employer insolvent.

Title VII liability, under accepted legal principles, has usually been assessed against the employer and adherence to these principles mandates that the employer suffer the consequences of any remedial action. *See* Burke & Chase, *supra* note 227, at 90, n.35.

[228] Franks, 424 U.S. at 778. *Cf.* International Brotherhood of Teamsters v. United States, 431 U.S. at 350–54 (incumbents' pre-Act seniority rights are vested, despite perpetually discriminatory effect).

[229] Jones, *supra* note 226, at 4.

[230] Burke & Chase, *supra* note 227, at 93–94; Comment, *supra* note 222, at 433.

[231] Comment, *supra* note 222, at 433; Burke & Chase, *supra* note 227, at 94.

[232] Burke & Chase, *supra* note 227, at 94. In discussing this problem, the authors state:

> [D]isplacement of whites lends credence to the idea that majority-minority interests are inherently opposed; that the subjugation of blacks is requisite to the well-being of whites; that blacks can best improve their position by attacking the interests of whites.

Id.

[233] Patterson v. American Tobacco Co., 535 F.2d at 268. The Congressional goal of voluntary compliance, stated 42 U.S.C. § 2000(e)-5, was recently buttressed in United Steelworkers v. Weber, 47 U.S.L.W. 4851 (U.S. Sup. Ct., June 27, 1979).

unlawful employment practices, the employer, the union, and incumbents may face the prospect of periodic rearrangement and administrative disruption of their work place by court-ordered bumping.[234] Finally, these practical complications will clearly become more severe when economic considerations cause the employer's work force to remain static or to contract.[235]

In light of the practical disadvantages of displacement and the absence of Congressional authorization for this drastic application of retroactive competitive-status seniority, a district court should avoid its use.

Front Pay

Because courts have generally refused to order the immediate displacement of incumbent employees by minority discriminatees,[236] the actual attainment of the discriminatee's rightful place may not occur until some time after the date of the court's decree.[237] To compensate discriminatees waiting to assume their rightful place for prospective injury courts have fashioned awards of front pay.[238]

Front pay has been described as "an affirmative order designed to compensate the [discriminatee] for economic losses that have not occurred as of the date of the court decree, but that may occur as the [discriminatee] works toward his or her rightful place."[239] Under a front pay remedy, the discriminatee is awarded monetary compensation for the additional injury that he may suffer before he is made

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[234] Patterson v. American Tobacco Co., 535 F.2d at 268–69.

[235] Jones, *supra* note 226, at 55. In an expanding economy, the absorption of discriminatees into the work force could be accomplished relatively easily, with only minor displacements of incumbent employees. However, as the size of the corporate entity decreased and/or the economic atmosphere caused a corporation's work force to contract, granting discriminatees retroactive competitive-status seniority and allowing them to "bump" incumbents would result in loss of employment for incumbent employees. *Id.* Ultimately, this could lead to litigation based on breach of the seniority provisions of the collective bargaining agreement.

[236] *See* notes 222–35 *supra* and accompanying text.

[237] In light of *Franks*, it is clear that monetary compensation in the form of backpay is an appropriate remedy in employment discrimination cases. *See* notes 125–73 *supra* and accompanying text. Although this form of retroactive benefit seniority furthers the prophylactic and deterrent purposes of Title VII, it falls short of making the discriminatees whole for the injuries suffered on account of the discriminatory employment practices.

[238] Note, *Front Pay—Prophylactic Relief Under Title VII of the Civil Rights Act of 1964*, 29 VAND. L. REV. 211, 212 (1976). Especially in promotion cases, the requirement that discriminatees await future openings at rightful job levels "create[s] a gap in relief" between the award of backpay as of the date of the court's decree and the date the discriminatee is finally made whole. *Id.* at 218.

[239] Comment, *supra* note 222, at 427; Note, *supra* note 238, at 212.

whole. Unlike displacement, front pay effectively makes the discriminatee whole to the fullest equitable extent without destroying the seniority expectations of innocent incumbents.[240] Moreover, the remedy promotes Title VII's prophylactic purposes because the economic burden of remedying the unlawful discrimination is borne by the wrongdoing employer, not the innocent incumbent employees.

The simplest method of implementing the front pay remedy is through wage circling.[241] Under this system, the employer pays the discriminatee the salary commensurate with the position deemed to be the victim's rightful place until the discriminatee actually achieves the position.[242] In addition to compensating the discriminatee, wage circling also provides the employer with an incentive to place the discriminatee in his rightful place as soon as possible because an employer generally wants an employee to produce the work for which he is being paid.[243]

While federal courts usually provide front pay in the form of wage circling,[244] at least one court has provided for a lump sum award of front pay.[245] In the fashioning of a backpay remedy, the granting of lump sum awards for injuries suffered as a result of discrimination prior to the court decree can be reasonably identified and

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[240] Note, *Superseniority for Minority Workers*—Franks v. Bowman, 26 DEPAUL L. REV. 158, 165 (1976).

[241] Comment, *supra* note 222, at 427; Note, *supra* note 238, at 212.

[242] Note, *supra* note 238, at 212. It has been suggested that the remedy may be terminated at such time when the discriminatee assumes the rightful position, refuses an offer to assume it, or stops working for the employer. *Id.* at 212–13.

[243] "Red circling" wages in transfer cases serves the same purpose served by wage circling in promotion and hiring cases. Comment, *supra* note 222, at 427. In cases involving racially segregated, departmental lines of progression, simply permitting blacks to transfer into entry level jobs in a formerly white line of progression carrying initially lower wages and benefits does not adequately compensate the discriminatee. *See* Swint v. Pullman-Standard, 539 F.2d 77, 100 (5th Cir. 1976). Red circling requires the employer to pay the transferring discriminatee the higher wages and benefits he would have received in his old department until he has learned the skills necessary to progress in the new department to a wage level equal to his old departmental wage. *Id.* at 100; Burke & Chase, *supra* note 227, at 92–93. Like wage circling, red circling compensates the discriminatee until he has achieved his rightful place while burdening the employer by forcing it to pay the discriminatee a higher wage for the entry level job than it would have paid an entering non-discriminatee. *Id.* at 93.

[244] *See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976); Cross v. Board of Education, 395 F.Supp. 531 (E.D. Ark. 1975).

[245] United States v. United States Steel Corp., 371 F. Supp. 1045 (N.D. Ala. 1973), *modified on other grounds*, 520 F.2d 1043 (5th Cir. 1975).

measured. In the front pay context, however, neither the length of time it will take the discriminatee to achieve his or her rightful place, nor the fact of its achievement can be determined with any reasonable degree of certainty.[246]

Awarding front pay in a lump sum reduces the incentives of both employer and employee to fulfill the goals of Title VII as quickly as possible.[247] By comparison, under a wage circling approach, the employer can minimize its excessive compensation losses by placing the discriminatee in his or her rightful position as soon as possible after the court decree.[248] In layoff situations, an effective and equitable variation of front pay is the "front pay-save harmless" remedy proposed by Local 862, United Automobile Workers, as amicus curiae in *Franks*.[249] As proposed by Local 862, discriminatees would be awarded competitive-status seniority retroactive to the date they would have been hired or promoted but for the employer's discrimination. In addition, however, the employer would be "required to hold harmless against losses that number of incumbent employees which is equivalent to the number of discriminatees hired with retroactive seniority."[250] If subsequent layoffs affect incumbents hired after the date the discriminatees were unlawfully refused employment, but before the date the discriminatees were actually hired, the employer would be required to provide full pay and benefits to those incumbents, who would not have been laid off had the awarding of retroactive competitive-status seniority to discriminatees not altered their seniority standing.[251] The employer would be allowed to lay off

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[246] Note, *supra* note 238, at 225–26.

[247] *Id.*

[248] *Id.* at 227.

[249] Brief for Local 862 as Amicus Curiae at 5–6, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). *See* Burke & Chase, *supra* note 227, at 95–97.

[250] *Id.*

[251] *Id.* at 6–7. The mechanics of this proposal are somewhat subtle. The seniority rights of incumbent employees hired before the date of the employer's discrimination are not affected by the grant of constructive seniority back to that date. By the same token, incumbent employees hired after the date the discriminatees were actually hired will be laid off before the discriminatees whether constructive seniority is granted to them or not, and therefore their rights are left unaffected by the remedy as well. Thus, the save-harmless aspect of the proposal applies only to those incumbent employees whose seniority rights would be prejudiced by the grant of fictional seniority, *i.e.*, those incumbents hired between the date of the first discriminatory refusal to hire and the date the last discriminatee was actually employed by the employer.

In the case of work reductions by the employer, if the layoffs go back to employees who were hired prior to the date of the initial discriminatory refusal to hire, the save-harmless feature of the remedy is irrelevant because the discriminatees would be laid off even if they

"saved harmless" employees in order to avoid laying off the newly hired discriminatees, but it would be required to continue to pay the laid-off employees their wages and benefits.[252]

Local 862 argued in its amicus curiae brief that the "save harmless" remedy accomplishes the policy objectives of Title VII without unduly burdening the employer. The congressional purpose of providing "make-whole" relief is fulfilled by giving discriminatees the seniority they would have earned but for the discrimination. The remedy exacts the cost of the discrimination from the employer by requiring it to pay both discriminatees and incumbents during periods of layoffs, rather than allowing the effectively displaced incumbent to bear the burden alone. Recognizing that Title VII rem-

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were to receive seniority credit, while the incumbents would lose their jobs even though the discriminatees were not granted fictional seniority credit. On the other hand, if the layoff was so limited that it only reached back to employees hired after the date the discriminatees were actually hired, the save-harmless remedy is again irrelevant because the incumbent employees who are laid-off would lose their jobs regardless of whether the discriminatees receive fictional seniority credit or not. Hence, only if proposed layoffs reach back to employees who were hired during the period of discrimination would the save-harmless remedy be applicable.

In its presentation to the court, Local 862 illustrated the operation of the save-harmless remedy as follows: 35 discriminatees were actually hired in 1974, and were discriminated against as early as 1969. Assuming layoffs of 35 employees which reach into but not beyond the ranks of employees with seniority dates between 1969 and 1974, the first 35 persons (excluding those hired more recently than the discriminatees) affected by the layoff would be held harmless, i.e., the employers would be required to pay those employees if they are laid-off. *Id.* at 7. As Local 862 explained it,

> [i]f the remedy should go to the 35 discriminatees, they are in effect given the wage and fringe benefit protection they would have had had they not been wrongfully rejected. . . . If it goes to the 35 incumbents, they in turn are protected against any loss caused by the grant of retroactive seniority to the discriminatees.

Id. Likewise, if less than 35 employees were to be laid-off, say only 20 employees, then only the first 20 employees with seniority dates (whether achieved by constructive seniority or "actual" seniority) inside the 1969 to 1974 "window" would be saved-harmless. Thus, if only one incumbent within the period was to be laid off due to the grant of constructive seniority, then only he or she would be given the benefit of the remedy.

Another way to look at this remedy is to imagine that there might be 100 incumbent employees with hire dates between 1969 and 1974. Once the discriminatees are given fictional seniority, they would be "meshed" into the seniority hierarchy at appropriate places, usually according to their application dates. At the seniority date where the discriminatee is to be inserted into hierarchy, rather than moving the incumbent employee down the seniority ladder, there would now be two workers with that seniority "number", and the incumbent would be moved, if at all, laterally. Thus, after all the discriminatees are given seniority credit and "meshed", the seniority hierarchy between 1969 and 1974 hired dates would have parallel lines to denote the saved-harmless employees' places.

[252] By the granting of retroactive competitive-status seniority to discriminatees, incumbent employees with earned seniority benefits would be subordinated to discriminatees who had no earned seniority. If the order of layoffs were based upon this altered competitive-status order without any sort of "hold harmless" provision, the remedy would inequitably deprive incumbents of their earned seniority expectation while leaving the employer completely unburdened.

edies must be workable as well as equitable, Local 862 contended that the front-pay, save-harmless remedy is feasible because the number of discriminatees actually hired in Title VII cases is minimal,[253] employers are usually able to find productive work for employees on their payroll,[254] and the payments themselves would not greatly endanger profits.[255] Thus, the remedy is a viable and equitable balance of the competing interests involved, for it imposes upon the wrongdoing employer the expense of his discriminatory conduct, and it makes the discriminatees whole by giving them their "rightful place" in the competitive-status seniority hierarchy, without completely divesting the incumbent employee of earned seniority expectations.[256]

To the extent that it lends itself to an equitable balance of the competing interests of discriminatees and incumbent workers, front pay is a method of implementing a competitive-status seniority award which must be seriously considered by the district courts. The fact that it requires courts to determine the rightful place of each member of the affected class poses no unreasonable burden because such determinations are made in awarding backpay, which is presumptively available in all successful cases, and the same methods of calculation can be used.[257] It has been noted that "[l]ike back pay, front pay should never be denied in a class action under the rationale that the computation is difficult."[258] The remedy may be inequitable when enforced against an employer, presumably a smaller one, who would be threatened with insolvency or economic ruin if forced to shoulder this burden. In the usual circumstances, however, front pay will be more equitable than the *Franks* retroactive competitive-status senior-

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[253] It was noted that in Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975), fewer than 35 employees in Ford's truck assembly plant, which employed 1000 production employees, were entitled to be hired under the district court's remedial decree. Brief for Local 862 as Amicus Curiae, *supra* note 250, at 8–10.

[254] Brief for Local 862 as Amicus Curiae, *supra* note 250, at 10. The union cited examples of employers who retain and reassign employees for other positions rather than layoff experienced and valued employees. *Id.* at 10 n.10.

[255] For an excellent analysis of the various financial incentives for employee layoffs, the validity of perceived financial obstacles to imposition of a save-harmless remedy and suggested guidelines for its use, *see* Burke & Chase, *supra* note 227, at 99–115.

[256] Alternatively, the "front pay, save harmless" remedy could be implemented so as to conduct layoffs pursuant to usual last hired-first fired practices, and hold newly hired discriminatees harmless from layoff losses by providing full pay and benefits during the layoff period. Comment, *supra* note 222, at 429.

[257] Note, *supra* note 238, at 231–33.

[258] *Id.* at 233.

ity award which shifts the burden of past discrimination onto the incumbents and leaves the employer relatively unburdened.

Work Sharing

Work sharing programs, through which an employer allocates available work among his entire work force, have been hailed by a number of writers as the most equitable method of implementing retroactive competitive-status seniority awards where layoffs are determined by a last hired, first fired seniority provision.[259] Proponents of work sharing point out that it eliminates the effects of past hiring abuses while protecting the interests of employers, incumbent employees and the last hired discriminatees.[260] "Bona fide" seniority systems are preserved and the need for granting retroactive "competitive-status" seniority is said to be eliminated by the use of work sharing alternatives.[261]

Two types of work sharing programs have been suggested by authorities as acceptable alternatives to last hired-first fired layoffs.[262] One approach requires the employer to compute the total number of man hours needed to operate the business during a week, divide that number by the number of employees in the work force,[263] and arrive at a reduced work week for all employees.[264] The consequences of such an arrangement are steady, if not full, employment for the discriminatees, shorter work weeks with resultantly lower salaries for incumbent employees, and higher fringe benefit costs for the employer than he would have incurred in the event of layoffs.[265] One commen-

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[259] Krill, *supra* note 38, at 317; Summers & Love, *Work Sharing as an Alternative to Layoffs by Seniority: Title VII Remedies in Recession*, 124 U.PA. L. REV. 893, 898–99 (1976); Wood, *Equal Employment Opportunity and Seniority: Rights in Conflict*, 26 LAB. L.J. 345, 347–48 (1975); Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB*, 123 U.PA. L. REV. 158, 169 (1974). While not as popular today, as it once was, work sharing has historically been employed in labor agreements to deal with work shortages. Fine, *supra* note 17 at 107. Summers & Love, *supra*, at 926.

[260] Summers & Love, *supra* note 259, at 918; *see* Blumrosen & Blumrosen, *The Duty to Plan for Fair Employment Revisited: Work Sharing in Hard Times*, 28 RUTGERS L. REV. 1082, 1091–92 (1975).

[261] Summers & Love, *supra* note 259, at 918.

[262] *Id.* at 928–33. Summers and Love also mentioned periodic shutdowns of an employer's operations as another alternative which would bring about the desired results of work sharing. *Id.* at 933–34. Periodic shutdowns would have effects similar to those of the rotating employment method. *See* notes 263–69 *infra* and accompanying text.

[263] *See* Summers & Love, *supra* note 259, at 926–27.

[264] *Id.*

[265] *Id.* at 928–29. Summers and Love point out that most fringe benefits costs "will remain the same regardless of whether an employee works thirty or forty hours each week." *Id.* at 929.

tator has observed that this method is particularly objectionable to the employees, however, because unlike other work sharing remedies, the employees usually are ineligible for unemployment benefits for the time not worked during the reduced work week.[266]

Another approach to work sharing, "rotating employment,"[267] permits an employer to reduce the total number of employment positions but mandates that employees be rotated in and out of jobs so that all employees continue to work an equal amount of time. For instance, if XYZ company is forced to cut operations by 25%, and if layoffs pursuant to a last hired, first fired seniority provision would violate Title VII because of the employer's post-Act discriminatory hiring policies, a court could order the employer to lay off one-fourth of his workers each week. Every week a different quarter of the work force would be laid-off. This remedy is considered more favorable to the employees than a reduced work week because in most states laid-off employees would be entitled to unemployment compensation for the week that they were out of work.[268] In the event of a long layoff this would ease considerably the economic burden to the employees and increase the costs to the employer in the form of higher unemployment insurance contributions.[269]

Most authorities would limit the application of a work sharing approach to situations involving short term work reductions or cutbacks, of less than one-third[270] because long layoffs or large reductions in work time would place too great a burden on employees.[271] This limitation exposes the major drawback of the work sharing approach—the employees are forced to bear the cost of their employers' unlawful conduct. Under a work sharing program, the discriminatees are guaranteed no more than a part-time job. Thus, the "make-whole" objectives of Title VII are not fulfilled. The incumbent employees likewise are forced to accept less than full-time employ-

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[266] *Id.* at 929. Employees in most states must work less than a three day week before becoming eligible for unemployment compensation. *Id.* This loss of unemployment benefits is a benefit to the employer since his unemployment insurance rates are normally based on the amount of benefits paid to his employees. *Id.*

[267] *Id.* at 932–33.

[268] *Id.* at 932. There is often a one week waiting period before unemployment benefits will be paid but, after meeting that requirement once, an employee is eligible to collect benefits for any week that he is out of work in the next twelve months. *Id.*; U.S. Dep't. of Labor, Comparison of State Unemployment Insurance Laws 3–5, 6 (rev. ed. Jan. 1975).

[269] Summers & Love, *supra* note 259, at 932–33.

[270] *Id.* at 935; *see* Wood, *supra* note 259, at 348; Note, *Title VII of the 1964 Civil Rights Act—A Seniority System Which Bases Lay-offs and Recalls on Length of Employment is Bona Fide Under Title VII Since It Does Not Perpetuate the Effects of Past Hiring Discrimination;* 43 GEO.WASH. L. REV. 947, 967 (1975).

[271] Wood, *supra* note 259, at 348; *see* Summers & Love, *supra* note 259, at 935.

ment, contrary to their legitimate expectations. On the other hand, the employer's additional expenses under work sharing are limited to the payment of fringe benefits for employees who would otherwise have been laid off and, in some instances, to increased unemployment taxes.[272] These expenses would most likely be insignificant to the large corporate employer and might be offset by lower overhead costs resulting from work sharing.[273] Consequently while work sharing may be an appropriate remedy in a case where an employer is financially unable to fully assume the cost of a Title VII remedy, absent such circumstances, a district court should consider other possible remedies that place the costs of the remedial action where they belong—on the guilty employer.

Work sharing has never been recommended as a method of implementing retroactive competitive-status seniority awards where discriminatees seek to be promoted to their "rightful place" in the employment hierarchy.[274] This probably results from the complex administrative problems posed by implementing a work sharing program in such a situation, especially where a discriminatee's "rightful place" is a supervisory or skilled position in a large company.[275] It is likely that the application of work sharing under these circumstances would, at the very least, significantly disrupt the efficiency of an employer's operations.[276]

Remedies of Incumbent Employees Adversely Affected by Retroactive Competitive-Status Seniority Awards

In responding to the dissenters' arguments that awards of competitive-status seniority would unfairly disadvantage innocent in-

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[272] *See* Summers & Love, *supra* note 259, at 928–33.

[273] Since the employees shoulder most of the burden for their employer's past unlawful conduct, the public's interest in deterring discriminatory employment practices is not fulfilled by a work sharing remedy.

[274] Under the "rightful place" theory endorsed by the Supreme Court in *Franks*, victims of post-Act discrimination are entitled to the position in the company that they would have attained, but for their employer's discriminatory practices. 424 U.S. at 757–62.

[275] Requiring incumbent employees to share their job positions with discriminatees might, for example, result in lower quality work, wage disputes, since incumbents would be working part-time at lower paying positions, and disputes over who should work preferred shifts, the incumbent or the discriminatee. Morale problems among workers could be an especially troublesome consequence of work sharing between experienced and less experienced employees.

[276] Plant or warehouse productivity could foreseeably suffer as a result of the continuous rotation of individuals into positions. Administratively, the work sharing remedy would require employers to devise new work schedule and salary provisions to reflect the changes in job assignments.

cumbent employees, the *Franks* majority alluded to possible measures which could be employed by the district court to shift the impact of such awards from the innocent incumbents to the wrong-doing employer.[277] In a subsequent district court decision, *McAleer v. American Telephone & Telegraph Co.*,[278] the district court for the District of Columbia employed this allusion in *Franks* as a basis for awarding damages to a white male incumbent employee disadvantaged by such an award.

In *McAleer*, A.T. & T.'s collective bargaining agreement with its unions specified that non-managerial promotions would be given to the most qualified employee with the greatest seniority, so that the more senior of two or more equally qualified employees would receive the promotion.[279] In order to settle sex discrimination charges brought against it by its female employees, A.T. & T. entered into a nationwide consent decree with the EEOC which provided, among other things, that A.T. & T. would have to depart from the contract and implement a "seniority override" program.[280] In operation, this program required the promotion of less qualified, less senior minority and female employees in place of white male employees where necessary to achieve the affirmative action goals and timetables established by the decree.[281] It was undisputed that the plaintiff was entitled under the collective bargaining agreement to promotion, and that a less qualified, less senior female employee was promoted in his place pursuant to the consent decree.[282] Plaintiff sued A.T. & T. under Title VII for promotion and damages, arguing that he had been illegally discriminated against on the basis of sex.

District Judge Gesell, after reviewing the record, noted that the parties did not dispute plaintiff's contention that he would have received the promotion awarded to the female employee but for his gender.[283] The court concluded that the facts presented a "classic case" of sex discrimination proscribed by Title VII.[284] However, the court reasoned that the consent decree had finally established A.T. & T's prior sex discrimination against its women employees, and con-

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[277] 424 U.S. at 777 n.38.

[278] 416 F. Supp. 435 (D.D.C. 1976).

[279] *Id.* at 437.

[280] *Id.* at 439–40. The litigation which precipitated the Consent Decree is reported at EEOC v. American Tel. & Tel. Co., 365 F. Supp. 1105 (E.D.Pa. 1973), *aff'd. in part, remanded in part*, 506 F.2d 735 (3d Cir. 1974), *on motion to modify*, 419 F. Supp. 1022 (E.D.Pa. 1976).

[281] 416 F. Supp. at 437.

[282] *Id.* at 439.

[283] *Id.*

[284] *Id.*

cluded that plaintiff was not entitled to receive the promotion as a remedy for the sex discrimination visited against him because *Franks* required that an "eligible and presently qualified candidate who was a victim of prior discrimination . . . should receive a 'scarce' benefit . . . such as promotion to a particular position, even at the expense of other, innocent employees."[285]

Having affirmed the denial of the promotion, the district court, relying upon the Supreme Court's reference in *Franks* to possible compensation to incumbents disadvantaged by seniority remedies, held that the plaintiff was entitled to monetary damages from his employer under Title VII for the loss of the promotion.[286] Echoing Justice Powell's dissent in *Franks*, Judge Gesell reasoned that in "equitably distributing" the burden of remedying past discrimination, the "principal burden" should fall upon A.T. & T., the wrongdoer, rather than upon McAleer, who "had no responsibility for A.T. & T.'s past sex discrimination."[287]

Judge Gesell's reasoning certainly takes the Supreme Court's suggestion literally, particularly the Chief Justice's comments in his concurrence and dissent.[288] The argument adopted by the district court raises some problems, however. The notion that an employer is engaging in sex discrimination prohibited by Title VII when it complies with the terms of a consent decree entered into and approved by the national governmental agency charged with eliminating employment discrimination is startling, to say the least. In effect, the district court in *McAleer* has concluded that any employer or union which complies with any decree requiring the award of retroactive competitive-status seniority, admittedly at the expense of incumbent employees, is violating the very statute that the decree is presumably designed to enforce. This rationale places the district judge who enters that decree in the novel position of ordering the parties to violate Title VII in the future as the remedy for Title VII violations in the past.

The references made by the Chief Justice and the majority in *Franks* to possible equitable adjustments for the innocent incumbents were made with the intent that the district court entering the award of retroactive competitive-status seniority could, if appropriate, include features, such as front pay in the decrees, which would compensate the incumbents for the loss of their seniority expectations.

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[285] *Id.*

[286] *Id.* at 440.

[287] *Id.*

[288] 424 U.S. at 780–81 (Burger, C.J., concurring in part, dissenting in part).

Neither the majority nor the dissenters contemplated separate causes of action under Title VII for damages on behalf of disadvantaged incumbents on the theory that their employer has violated their Title VII rights in obeying a decree to give retroactive seniority to those employees subjected to discrimination in the past.

A seemingly sounder vehicle for the accommodation of the innocent incumbents' interests would be to allow the incumbents to intervene in the original discrimination suit,[289] either through their union representative,[290] or through a separate class representative.[291] Such a procedure would assemble all interested parties in a single judicial forum, and would permit the district court to mold a decree in light of all the equitable considerations favoring the discriminatees and favoring the incumbents. Had this procedure been available to Judge Gesell,[292] McAleer's complaint should have been dismissed.

A further problem with the McAleer approach is its feasibility in the event of a class action suit.[293] The economic impact of damages awards to a large class of incumbent employees could conceivably put the employer out of business.[294] Thus, *McAleer*-type damages may only be feasible with respect to large corporations or, in the case of union complicity, to unions capable of sharing the cost.[295]

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[289] Judge Gesell anticipated this sort of suggestion in *McAleer:*

> It is unnecessary to elaborate on the obvious fact that the Consent Decree expressly did not and could not have conclusively determined the rights of nonparties such as plaintiff McAleer. . . . Moreover, to require AT&T employees from all over the country to litigate such claims in Philadelphia would as a practical matter nullify their Title VII rights.

416 F. Supp. at 439.

[290] Often, the union's political willingness to represent the interests of the incumbent employees will be open to question. For example, the A.F.L.-C.I.O. argued in an amicus curiae brief to the Supreme Court in *Franks* for full retroactive competitive-status seniority awards despite the obvious impact of such awards on incumbent employees. Brief for A.F.L.-C.I.O., Amicus Curiae at 2, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). The union's position may also be affected by whether it has been charged with discrimination by the plaintiffs or the EEOC. *See* EEOC v. American Tel. & Tel. Co., 365 F. Supp. at 1109, 1110. *See also* 506 F.2d at 741–42.

[291] For an exhaustive discussion of the procedural problems in class action litigation, *see Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976).

[292] Judge Gesell obviously could not order intervention in the A.T.&T. case because a "Consent Decree is a final judgment of the United States District Court for the Eastern District of Pennsylvania and is not subject to review or modification in any other court." 416 F. Supp. at 438.

[293] *See* Stern, *Retroactive Seniority As A Remedy for Title VII Violations: Relief to Newly Hired and Incumbent Employees in Light of Franks v. Bowman*, 22 LOY. L. REV. 923, 958 (1976).

[294] *Id.*

[295] *Id.*

CONCLUSION

The district court faces a difficult task when it attempts to implement the *Franks* retroactive competitive-status seniority award as a part of an equitable Title VII remedy. The court can use front pay in conjunction with retroactive competitive-status seniority to adequately compensate the discriminatees for promotion and hiring discrimination, and use the "save harmless" proposal during layoffs to insulate the incumbent employees from the most drastic effects of the competitive-status seniority awards to the discriminatees. Work sharing is a less desirable alternative during layoffs because it does not serve the Act's prophylactic objectives by shifting the impact of the competitive-status seniority awards to the employer. In addition, the court should consider permitting the intervention of the incumbent employees through a representative independent of their union in order to provide adequate consideration of their interests and to forestall the problems arising from separate suits by incumbents. The district judge should apply whatever mix of the available methods of implementing the *Franks* competitive-status seniority remedy are most appropriate to the particular facts before him, a mix which serves both the make-whole and prophylactic purposes of the Act.