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Civil Rights: Recession Layoffs and Title VII, Rightful Place or Status Quo

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judicial functions and may result in harsh convictions of unsuspecting corporate officers.

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CIVIL RIGHTS: RECESSION LAYOFFS AND TITLE VII, RIGHTFUL PLACE OR STATUS QUO?

Watkins v. United Steel Workers, Local 2369, 516 F.2d 41 (5th Cir. 1975)

Plaintiffs[1] brought suit against the United Steel Workers of America, Local 2369,[2] in a class action charging that layoffs or recalls[3] on the basis of a companywide seniority system violated the Civil Rights Act of 1964[4] and the Civil Rights Act of 1866.[5] Plaintiffs argued that, under prevailing circumstances, it was racially discriminatory to use length of service to the company as a standard for determining which employees should be laid off and subsequently recalled. Since the company had previously discriminated on the basis of race, plaintiffs claimed that blacks as a class could not attain sufficient seniority to withstand layoff.[6] The district court awarded summary judgment for the plaintiffs, finding that the system perpetuated the effects of past racial discrimination[7] and ordered that a conference be held between the parties to develop a remedy.[8] The Fifth Circuit reversed and HELD, use of a long-established seniority system was not unlawful where the individual employees who had been laid off under the system had not been personally subject to prior discrimination.[9]

The modern collective bargaining agreement commonly provides for competitive status seniority, wherein transfers, layoffs, and recalls are

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1. This action was brought by black employees of the Continental Can Company in Harvey, Louisiana, all of whom were laid off or discharged by the company due to a decline in business. Watkins v. United Steel Workers, Local 2369, 369 F. Supp. 1221, 1223 (E.D. La. 1974).

2. The Continental Can Company was joined as a defendant. *Id.* at 1223.

3. The company had hired two black workers during World War II, but no others were hired until 1965. By 1971 there were over 50 blacks out of a total of 400 hourly employees. Because of a decline in business, employment cutbacks were begun in 1971. By April 1973, there remained only 152 hourly employees. All of the black employees, except the two hired in the 1940's, were laid off. The first 138 persons on the recall list were white. *Id.* at 1223-24.

4. 42 U.S.C. §§2000e — e-17 (1970).

5. 42 U.S.C. §1981 (1970).

6. All parties acknowledged that the company had discriminated racially in the past. 369 F. Supp. at 1223.

7. *Id.* at 1226.

8. *Id.* at 1233. The purpose of the conference was to design a remedial system. For text of the enforcement order see 8 F.E.P. Cases 729 (1974).

9. Watkins v. United Steel Workers, Local 2369, 516 F.2d 41 (5th Cir. 1975).

scheduled according to the length of time an employee has served his employer.[10] Time in service is usually calculated according to the employee's time worked in his current department if the agreement provides for departmental seniority or according to the time in service to the company if the agreement specifies companywide seniority.

The Civil Rights Act of 1964[11] has raised perplexing questions regarding the legality of some competitive status seniority systems. Many employers had discriminated in hiring on the basis of race prior to the passage of Title VII of the Act. Although these employers subsequently desisted from discriminating, minority workers never accumulated the seniority that they were denied by the employer's prior discrimination. Recent layoffs as a result of poor economic conditions have presented several courts with the questions of whether and under what circumstances these minority workers should be awarded additional seniority, to the inevitable disadvantage of their nonminority colleagues.[12]

In *Local 189, Papermakers v. United States*,[13] the employer had maintained racially segregated departments within his plant.[14] A departmental seniority system provided by the collective bargaining agreement called for promotion of the employee who had the most seniority in the job immediately below a vacancy. This effectively precluded minority workers from promotion because they had been foreclosed from accruing seniority in the skilled lines of progression because of previous discrimination. The Fifth Circuit reasoned that the employer's use of departmentwide seniority served to perpetuate the past effects of discrimination and constituted a violation of Title VII.[15]

In *Local 189* the court first surveyed two alternatives to the approach it adopted for determining the legality of a seniority system under Title VII.[16]

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10. Competitive status seniority establishes a ranking for purposes of promotions, transfers, bumps, and layoffs. Benefit seniority determines such perquisites as vacations, pensions, and other fringe benefits. *See Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1156 (1971).

11. 42 U.S.C. §§2000e—e-17 (1970).

12. *E.g.*, Jersey Central Power & Light Co. v. Local 327, Electrical Workers, 508 F.2d 687 (3d Cir. 1975); Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974); Cox v. Allied Chem. Corp., 382 F. Supp. 309 (M.D. La. 1974). For a comprehensive analysis of this problem, *see* Stacy, *Title VII Seniority Remedies in a Time of Economic Downturn*, 28 VAND. L. REV. 487 (1975); Note, *Last Hired, First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544 (1975).

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

14. Segregated departments existed where "two or more groups of related jobs have been organized into separate seniority districts, but each group of jobs considered as a whole has little functional relation to the other. Only blacks were hired for jobs in one group, only whites for jobs in the other. . . . When they were abolished after the passage of Title VII, blacks were on the bottom, behind many junior whites. The application of facially neutral seniority principles at this point could serve to keep them there for the indefinite future." *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1158 (1971).

15. 416 F.2d at 997.

16. The court borrowed the analysis from a law review note entitled *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1268-69 (1967). 416 F.2d at 983, n.2, 988.

The status quo approach interprets an exemption for "bona fide seniority systems" found in section 703(h) to exempt any system that is racially neutral on its face and was instituted without discriminatory intent.[17] In contrast to the status quo approach, the freedom now theory would allow minority employees to displace incumbent nonminority employees where necessary to achieve the positions the minority workers *might* have achieved had they not been past victims of discrimination.[18]

In *Local 189* the Fifth Circuit rejected both the status quo and freedom now theories, relying instead on the rightful place approach.[19] That approach attempts to restore minority employees to the competitive posture they would have assumed had they not been discriminated against in the past.[20] The court approved the rightful place theory as in harmony with the intent of Title VII[21] – that minority workers who had been individually harmed by past discrimination might be allowed to recoup their lost seniority. Consequently, the court in *Local 189* ordered that competitive status seniority be computed on a companywide, rather than a departmental basis. Black workers thus received credit for time worked in previously segregated jobs and could compete for promotions on the basis of all the time they worked for the company.[22] This remedy allowed the minority employees to achieve their rightful place despite past discrimination.

The court made it clear, however, that seniority would accrue only for time actually worked. Fictional seniority awarded for time not actually worked would, according to the court, "comprise preferential rather than remedial treatment."[23] Such preferential treatment would be inconsistent with the letter

17. This status quo approach to Title VII is distilled from Whitfield v. United Steelworkers, Local 2708, 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959). There the court upheld a seniority system that had removed barriers to blacks entering the skilled lines of job progression but required that they forfeit the seniority earned in their old jobs and take a reduction in salary in some cases to do so. To the contention that this system perpetuated the effects of past discrimination, the court replied: "We might not agree with every provision, but they have a contract that *from now on* is free from any discrimination based on race. Angels could do no more." *Id.* at 551. The decision may have been overruled by Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969). Although Title VII does not explicitly forbid its retroactive application, statements in the legislative history support that view. *See* 110 CONG. REC. 7212, 7213 (1964) (Clark-Case Memorandum). The courts have agreed. *See, e.g.*, Local 189, Papermakers v. United States, 416 F.2d 980, 988 (5th Cir. 1969).

18. Although the freedom now approach has gained little support, one circuit court decision affirmed a freedom now order granting Negroes who were victims of discrimination the wages they had lost, and all seniority rights, training privileges, assignments, and opportunities they otherwise would have had. Central of Georgia Ry. v. Jones, 229 F.2d 648, 650 n.3 (5th Cir.), *cert. denied*, 352 U.S. 848 (1956).

19. 416 F.2d at 988.

20. "White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation." *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 995.

and spirit of Title VII, section 703(j),[24] which provides that the Act does not intend to foster preferential treatment solely on account of one's race.

Two circuits have upheld the legality of companywide seniority systems of the type approved in *Local 189*. The Seventh Circuit, in *Waters v. Wisconsin Steel Works*,[25] held a last hired, first fired companywide seniority system immune from attack since it found that all employees were given equal credit for the actual amount of time they had worked. Plaintiff Waters challenged the rehiring of white bricklayers who had given up their contractual seniority rights in exchange for a cash payment when they were laid off. Although the court found this particular practice to be discriminatory, it felt that last hired, first fired companywide seniority systems do not of themselves perpetuate past discrimination.[26] To hold otherwise, in the court's opinion, would result in "shackling white employees with a burden of past discrimination created not by them but by their employer."[27] The Seventh Circuit then relied on the legislative history of Title VII[28] in determining that the seniority system being challenged was exempt from the antidiscrimination requirements of Title VII,[29] even though the plaintiff had been discriminatorily refused employment in the past. The court found a valid distinction between the challenged companywide seniority system and the departmental seniority system that was successfully challenged in *Local 189*. The companywide system, in the Seventh Circuit's view, gave each employee credit for all time actually worked, whereas the departmental systems did not.[30] The Third Circuit agreed in *Jersey Central Power & Light Co. v. Local 327, Electrical Workers*,[31] holding that a plantwide seniority system that was

24. Civil Rights Act of 1964, Title VII, §703(j), 78 Stat. 255, *codified* as 42 U.S.C. §2000e-2(j) (1970). The section reads, *inter alia*: "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group."

25. 502 F.2d 1309 (7th Cir. 1974).

26. *Id.* at 1318.

27. *Id.* at 1320.

28. *See* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1607-14 (1969); Stacy, *Title VII Seniority Remedies in a Time of Economic Downturn*, 28 VAND. L. REV. 487, 494-96 (1975); Vaas, *Title VII Legislative History*, 7 B.C. IND. & COMM. L. REV. 431 (1966); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1159-60 (1971).

29. There are two prevailing interpretations of the legislative history of Title VII. Some authorities view the remarks in Congress to the effect that existing seniority rights would not be tampered with to be determinative. Accordingly, they view Title VII as having only a prospective effect. *See, e.g.*, Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974). Other authorities view the cited legislative colloquy as irrelevant, since it occurred before §703(h) (42 U.S.C. §2000-2(h) (1970)) was adopted. The section exempts only bona fide seniority systems. These courts regard the Civil Rights Act of 1964 as prohibiting employment practices that perpetuate the invidious discrimination of the past. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). Yet even these courts have rejected preferential treatment of any group because of race.

30. 502 F.2d at 1320.

31. 508 F.2d 687 (3d Cir. 1975). The employer brought a declaratory judgment action to determine whether he should lay off employees pursuant to either the collective

facially neutral and instituted without discriminatory intent was bona fide within the meaning of Title VII, section 703(h),[32] even though it provided for layoffs in reverse order of seniority.[33] The Third Circuit felt that any remedy for the continuing discriminatory effects of facially neutral companywide seniority systems was in the province of the legislature, not the courts.

Plaintiffs in the instant case relied on *Griggs v. Duke Power Co.*[34] to challenge a companywide last hired, first fired seniority system[35] similar to those challenged in *Waters* and *Jersey Central.* In *Griggs* the Supreme Court invalidated a series of employment requirements that were not significantly related to successful job performance, disqualified blacks at a substantially higher rate than whites, and applied only to formerly white positions.[36] Even though facially nondiscriminatory, the practices were condemned because they tended to freeze the status quo and perpetuate the effects of past discrimination.[37] The instant plaintiffs claimed that the companywide seniority system perpetuated past discrimination against blacks by making it impossible for them to withstand layoffs.

The present court found the *Griggs* standard inapposite to the case at bar. In *Griggs* black applicants were denied employment and so had not reached the same place in the employment hierarchy that they would have reached had no discrimination existed;[38] however, in the instant case, "[e]ach [plaintiff] has his rightful place in the employment hierarchy, without regard to race."[39] Of the instant plaintiffs, all but one came of legal working age after the company instituted equal opportunity employment practices. None of them alleged having been denied employment because of race or having been discouraged from applying for employment because of the employer's past discriminatory practices.[40] The court held that to allow these plaintiffs to be placed at the top of the recall list "requires a determination that blacks not

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bargaining agreement with the union or the provision of a conciliation agreement he had made with the Equal Employment Opportunity Commission. The collective bargaining agreement called for laying off on a last hired, first laid off scheme based on companywide seniority. The conciliation agreement provided that the percentages of minority and female employees not be reduced by any layoffs. All parties agreed that layoffs in reverse order of seniority would have a disproportionate effect on minority groups and female employees.

32. The interpretation of "bona fide" in this context has not been harmonious. One court has held that any companywide last hired, first fired seniority system is per se bona fide within the meaning of Title VII, §703(h)(42 U.S.C. §2000e-2(h) (1970)). Jersey Central Power & Light Co. v. Local 327, Electrical Workers, 508 F.2d 687, 706 (3d Cir. 1975).

33. 508 F.2d at 701.

34. 401 U.S. 424 (1971).

35. This system provides that when layoff becomes necessary, employees are laid off in reverse order of their length of service.

36. 401 U.S. at 431.

37. *Id.*

38. *Id.* at 427, 428.

39. 516 F.2d at 45.

40. *Id.* at 46.

otherwise personally discriminated against should be treated preferentially over equal whites."[41]

The instant court rested its decision on the fact that the plaintiffs were not personally subjected to discrimination in the past and reasoned that there was no discrimination that the system could possibly perpetuate.[42] The court avoided the issue of whether the seniority system would be valid if the plaintiffs had been personally victimized by the invidious practices of the past. In an illuminating dictum, however, it said that even if this seniority system could possibly be called discriminatory, it would be exempt from challenge because of the specific proviso of Title VII, section 703(h).[43] This section of the Act exempts bona fide seniority systems from the other provisions of the Act, provided that the system was not the "result of an intention to discriminate because of race. . . ."[44]

The principal case proclaims the soundness of a policy of avoiding preferential treatment for blacks who suffered no personal discrimination.[45] What result would follow if the plaintiffs were in fact discriminated against and consequently enjoyed less seniority than they would otherwise? An analysis of the policy distinctions in awarding companywide seniority to blacks working in formerly segregated jobs and awarding fictional seniority for time not actually worked by the minority plaintiffs provides the answer; in either case the seniority system would be altered. Yet in the former situation all workers are given equal credit for the time actually worked, reflecting the policy most courts have found consonant with the intent of Title VII.[46] In the latter situation the minority worker would receive credit for time he did

41. *Id.*

42. The court is referring to the opinion of the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), which stated that the Civil Rights Act of 1964 holds that employment practices "neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430.

43. 42 U.S.C. §2000e-2(h) (1970). The section provides: "(h) Seniority or Merit System — Ability Tests. Not withstanding 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, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. §206(d))."

44. *Id.*

45. 516 F.2d at 46.

46. *See, e.g.*, Jersey Central Power & Light Co. v. Local 327, Electrical Workers, 508 F.2d 687 (3d Cir. 1975); Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974); Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).