Title VII: Treatment of Seniority Systems

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TITLE VII: TREATMENT OF SENIORITY SYSTEMS

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Seniority systems are a commonplace aspect of American labor relations. In enacting Title VII of the Civil Rights Act of 1964, Congress provided a special exemption for seniority systems. The prevalence of seniority provisions in many workplaces makes the interpretation of the seniority exemption very important to both those who support the protection of seniority systems and those who support the broadest possible application of the proscriptions of Title VII.

The Supreme Court has recently addressed a number of important questions raised by the seniority exemption. The basic framework established by the Court includes: an attempt to define the concept of “seniority systems,” the standard by which the legality of seniority systems is to be measured, and the availability of seniority as part of the “make whole” relief granted to a discriminatee. This article will raise some of the questions which are presented by the seniority exemption and review the courts’ answers to these questions.

I. THE CONCEPT OF SENIORITY

Seniority entails a system of employment preference based on length of service. As an employee’s length of service increases, his employment benefits and rights will improve. Seniority may play a role in determining an employee’s job

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security, priorities for promotion, shift preference, receipt of fringe benefits and many other job-related matters.

The two basic types of seniority are competitive seniority and benefit seniority. Competitive seniority determines priorities for job security, promotion, transfer, prerogative in scheduling, training opportunities and "entitlement to other scarce benefits among competing employees." Benefit seniority involves entitlement to certain types of fringe benefits without regard to the status of other employees.

Labor has been the strongest proponent of seniority. A seniority system provides objectivity to employment relations. An employer's use of discretion is limited by the operation of a seniority system. Three labor-oriented advantages may be readily found in a seniority system: 1) employees become to some degree independent of the employer's subjective determinations regarding who is to be laid off, promoted, etc.; 2) the union is guided by a seniority system regarding whose interests it is to defend as between employees; 3) an employee is able to predict his future employment status by reference to the seniority system.

Some employer-oriented advantages may be found in the use of seniority. First, employers may be able to retain their most senior and valuable employees through the use of a seniority system which provides incentives. Secondly, some seniority systems will assure the employer that employees ready for promotion are experienced individuals.

While the great majority of major collective bargaining agreements contain seniority provisions, seniority is not considered an inherent aspect of employment relations. A seniority system must be established through collective bargaining, or as the result of a management decision. Nevertheless, the wide use of the seniority concept in labor relations accentuates its importance in Title VII jurisprudence.

5. Id. at 780-81. (Burger, C.J., concurring in part, dissenting in part).
8. Id.
Seniority systems may take various forms. An employee's seniority may be measured by his length of service with an employer or at a plant, in a department or division, in a job, or in a line of progression. Seniority may be a determinative factor in employment preference or it may just be one consideration.

In summary, seniority involves an employment preference system based on length of service. Seniority systems may vary in form and application. Because of their prevalence in American labor relations, seniority systems have a great impact on the distribution of employment benefits throughout the United States.

II. TITLE VII LAW

This article analyzes the Title VII exemption for seniority systems. In order to fully understand the impact of such an exemption it is necessary to review the general principles of Title VII law. Title VII prohibits discrimination in employment on the basis of race, color, creed, national origin, and sex. Chief Justice Burger has stated that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Discrimination is defined in the broadest sense throughout Title VII.

In Griggs v. Duke Power Company, the Supreme Court determined the scope of the prohibition on discrimination in employment under Title VII. Griggs defined discrimination in terms of effect rather than motive or purpose. The Court noted that "[u]nder the Act, practices, procedures, or tests neutral on their face, or even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of..."
prior discriminatory employment practices . . . . If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. 14 This case provided plaintiffs in Title VII litigation with a strong weapon since the subjective motive of the defendant would not be essential to the presentation of a prima facie case of discrimination.

Since plaintiffs in Title VII litigation could rely on proof of discriminatory consequences to prove a prima facie case under the disparate impact test, the use of statistics became very important. The Court, in Hazelwood School District v. United States, 15 noted that statistics can be an important source of proof in employment discrimination cases, since "absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." 16

A plaintiff's case under the disparate impact rule consists basically of establishing discriminatory effects of an employment practice. Discriminatory purpose and intent is unnecessary to establish a cause under Title VII. This general background of Title VII will aid in understanding the impact the seniority exemption has on Title VII law.

III. SENIORITY AND SECTION 703(h)

Section 703(h) of the Civil Rights Act provides in part:

Notwithstanding 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 system, or a system which measures earnings by quantity or quality of production or employees who work in different locations, provided that such differences are not

14. Id. at 430-31.


the result of an intention to discriminate because of race, color, religion, sex or national origin.\textsuperscript{17}

The development of the interpretation of this section has proved one of the more complicated problems in Title VII jurisprudence. Title VII does not provide a definition of the term seniority. The treatment of seniority systems has also had subsumed within it the problem of the retroactive application of Title VII, the standard for joint union-management liability, and the treatment of relief as well as the treatment of seniority systems.

The answer to four questions will explain or at least reveal many of the problems that have emerged from the treatment of seniority systems:

1. Is a seniority system, which in its operation has a disproportionate impact on women and/or minorities or which perpetuates the effects of pre-Act discrimination, unlawful under Title VII?
2. Are victims of post-Act discrimination entitled to receive seniority as a part of a court-ordered remedy?
3. What types of employment policies or practices are within the notion of a "seniority system"?
4. How may the bona fide nature of a seniority system be attacked?

IV. \textbf{THE HISTORY OF THE INTERPRETATION OF SECTION 703(h)}

The best way to understand the answers ultimately given to the four questions asked above is to trace the treatment of section 703(h) from its beginning in some of the earliest Title VII law. \textit{Quarles v. Philip Morris, Inc.}\textsuperscript{18} is the seminal case. Before Title VII was enacted and for six months after its effective date, the employer maintained a formally segregated job structure with the lower paying jobs concentrated in the black departments. The collective bargaining agreement provided for competitive seniority by department. Transfer among departments was historically prohibited and later restricted. Those employees who transferred started at the bottom of the seniority list in the new department and forfeited

\textsuperscript{18} 279 F. Supp. 505 (E.D. Va. 1968).
their old seniority. Blacks, hired before Title VII became effective, were concentrated in the formerly all black departments and were hindered in transferring because that entailed the loss of seniority. Declaring that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act," the district court found the operation of the departmental seniority system to be present discrimination. "The differences that originated before the act are maintained now. The act does not condone present differences that are the result of [an] intention to discriminate before the effective date of the act. . . ."20

The Quarles rule extended the Griggs effects or consequences doctrine to challenges involving the application of a seniority system. A seniority system which perpetuated the effects of a pre-Act discriminatory practice would not be considered bona fide. The Fifth Circuit adopted the Quarles test in Local 189, Papermakers v. United States,21 a case involving a formal system of race segregation in a paper plant. To satisfy the notion that Title VII was prospective only, the court distinguished pre-Act job applicants, who were the victims of hiring discrimination, from incumbent employees who were the present victims of the operation of the line-of-progression seniority system that restricted their transfer opportunities. "Fictional" or constructive seniority would not be granted to victims of discrimination who had never worked for the employer because that would give retroactive effect to Title VII.22 However, incumbent black workers were entitled to credit for time worked in black jobs to give them equal status with the time worked by whites in white jobs. The remedy was to order the use of plant-wide seniority as a basis for bidding on future job openings. This so-called "rightful place" doctrine,23 based on plant-wide or company-wide seniority, had the inevitable effect of pushing employers and unions to adopt plant-wide seniority. The "present effects" test of dis-

19. Id. at 516.
20. Id. at 517-18.
22. Id. at 995.
crimination became the universal method the courts used to treat seniority issues under Title VII. Under it, the answer was yes to question 1; that is, employees or groups which were victims of pre-Act employment discrimination which is perpetuated because of the operation of a seniority system do have a Title VII claim for relief. As will be seen, however, the Supreme Court took a different view of the matter.

The first Supreme Court decision to deal with seniority under Title VII was *Franks v. Bowman Transportation Co.* 24 The case, as it reached the Court, did not involve a challenge to the operation of a seniority system but instead dealt with the claim for a make-whole remedy, including a grant of competitive seniority, to victims of post-Act hiring discrimination. Although it ordered that these victims of hiring discrimination be hired as jobs opened up, the Fifth Circuit had denied them competitive seniority back to the date they would have been hired but for the employer's hiring discrimination. 25 Because the discrimination occurred after the effective date of Title VII, there was no question of retroactive application. Instead, the Fifth Circuit looked to the seniority rights of incumbent white employees and held that Congress, in enacting section 703(h), meant to insulate the incumbent employees' seniority from dilution or diminution that would result from the grant of constructive seniority to victims of hiring discrimination.

The Supreme Court reversed, rejecting the Fifth Circuit's distinction between fictional seniority and time actually worked, and its reliance on section 703(h). The Court found that section 703(h) was not involved since it defines which seniority systems are discriminatory but does not "expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII." 26 Given that a principal purpose of Title VII was "to make persons whole for injuries suffered on account of unlawful employment discrimination," 27 the Court held that identifiable victims of post-Act hiring discrimination were presumptively entitled to a grant

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25. 495 F.2d 398 (5th Cir. 1974).
26. 424 U.S. at 758.
27. Id. at 163, (quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)) (presumption of back pay).
of remedial seniority: "Without an award of seniority dating from the time when he was discriminatorily refused employment, an individual [victim of hiring discrimination] will never obtain his rightful place in the hierarchy of seniority. . . ." Thus, the answer to question 2 — whether a victim of post-Act hiring discrimination is entitled to a remedial grant of seniority — is yes.

In 1977 the Supreme Court took its second seniority case, International Brotherhood of Teamsters v. United States, and used it to fundamentally alter the jurisprudence of Title VII, especially as concerns the treatment of seniority. Teamsters, like Franks, was a truck driver case concerning over-the-road or line-driver jobs. The Fifth Circuit held that the use of separate seniority for city and line-driver units operated to lock minority drivers, concentrated in the city unit because of hiring and assignment discrimination, out of line-driver jobs since transfer required the forfeiture of seniority. Because the employer and union created and maintained the seniority system, they were found jointly liable under the present effects of past discrimination standard. The relief provided that incumbent minority employees were entitled to use company seniority to bid for line-driver jobs when openings occurred even if their company seniority predated the effective date of Title VII.

The Court rejected the approach of the Fifth Circuit, finding that victims of pre-Act discrimination could not challenge that discrimination. "[A]n otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." Since the language of section 703(h) does not in any way bear on the question of the prospective or retroactive application of Title VII, the Court relied on the legislative history of Title VII preceding the addition of section 703(h):

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

28. Id. at 168.
30. Id. at 353-54.
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 white workers hired earlier. 31

Thus, the Court rejected the Quarles and Local 189, Papermakers approach which held that seniority systems perpetuating pre-Act discrimination in effect cause new, post-Act discrimination. Title VII, the Court held, has no effect on seniority systems even where, owing to pre-Act discrimination, white males had more seniority than minority group members and women. "[T]hat conclusion is inescapable even in a case, such as this one, where the pre-Act discriminatees are incumbent employees who accumulated seniority in other bargaining units." 32 At least in regard to seniority systems, the Court turned Quarles on its head: Congress did intend to freeze an entire generation of employees into discriminatory patterns that existed before Title VII was enacted. The answer to question 1, which since Quarles and Local 189, Papermakers had been yes, was now no.

The Court thus confronted a challenge to the operation of a seniority system by victims of hiring discrimination that occurred after Title VII's effective date. In dealing with the challenge, the Court appeared first to abrogate entirely the present effects test of discrimination and, second, to restrict the application of disparate impact discrimination in cases challenging seniority systems. The present effects test of discrimination as applied to departmental or job seniority systems favored plant-wide seniority since the concentration of minority workers in the less desirable jobs was reinforced through the operation of departmental seniority. The Court rejected the notion that Title VII required such a result:

In addition there is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate de-

31. Id. at 350-51, (quoting Interpretive Memorandum of Senators Clark and Case, 110 Cong. Rec. 7213 (1964)) (emphasis added by Court). See also, 110 Cong. Rec. 7207, 7217 (1964).
32. 431 U.S. at 354.
partmental seniority systems than to plant-wide seniority systems. Then, as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression. . . . The legislative history contains no suggestion that any one system was preferred.33

That rather oblique rejection of the present effects of past discrimination standard in Teamsters became more clear-cut with the Court's decision in United Airlines, Inc. v. Evans.34 In Evans plaintiff had been discharged under a policy struck down as discriminatory in a separate action. When the policy was rescinded, she reapplied and was rehired but was denied her previously accumulated seniority. Because she had not challenged her original discharge, and because the discriminatory policy underlying her original discharge was no longer in force, plaintiff had nothing to challenge as discriminatory except the operation of the seniority system which carried into the present the past effects of discrimination. That is, her earlier discharge still had impact on her present employment opportunities since she had less seniority than she would have had absent that earlier discrimination. Despite this present effect of past discrimination, the Court found that she had no Title VII cause of action. Plaintiff "is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act [her discharge] as lawful after [plaintiff] failed to file a charge of discrimination within [the statutory time limit]."35

Evans and Teamsters indicate the demise of the present effects test of discrimination. Teamsters also restricts the application of the disparate impact doctrine. When women and minorities are concentrated among the most recently hired employees, a downturn will cause them to be disproportionately laid off pursuant to a last-in, first-out seniority system. The Court acknowledged that: "Were it not for § 703(h), the seniority in this case would seem to fall under the Griggs rationale,"36 but the section provides full immunity from such

33. Id. at 355, n.41.
35. Id. at 558.
36. 431 U.S. at 349.
analysis. Further, the Court found that no alteration of the seniority system was needed to give a full remedy to all the victims of post-Act hiring and assignment discrimination under the *Franks* principle: "Post-Act discriminatees . . . may obtain full 'make whole' relief, including retroactive seniority [to the date they would have become line drivers but for the company's discrimination] without attacking the legality of the seniority system as applied to them."37

V. ATTACKING THE BONA FIDES OF A SENIORITY SYSTEM UNDER Teamsters

The answers to the first two questions appear to be as follows: (1) Victims of pre-Act employment discrimination are not entitled to a Title VII remedy where the effects of that past discrimination continue into the present or where the present operation of a seniority system has a disproportionate impact on women and minority employees. (2) Victims of post-Act discrimination are entitled to a grant of seniority as a remedy measured from the time the initial discrimination occurred.

It must, however, be noted that the operation of seniority systems is not completely immunized from Title VII attack. While acknowledging that "the routine application of a bona fide seniority system would not be unlawful under Title VII,"38 the *Teamsters* Court does allow an avenue of attack on a seniority system itself. Even the victims of pre-Act discrimination can challenge a seniority system if it is not bona fide or if differences in treatment pursuant to a seniority system are the result of an intention to discriminate. The source for the standard, specially applicable to seniority systems, is the language of section 703(h): "To be sure, § 703(h) does not immunize all seniority systems. It refers only to 'bona fide' systems, and a proviso requires that any differences in treatment not be 'the result of an intention to discriminate because of race . . . or national origin.'"39 The Court uses this to save the decision in *Quarles* by treating it as a case involving a seniority system that was not bona fide:

37. *Id.* at 347.
38. *Id.* at 352.
39. *Id.* at 353.
Insofar as the result in *Quarles* and in the cases that followed it depended upon findings that the seniority systems were themselves "racially discriminatory" or had their "genesis in racial discrimination," . . . the decisions can be viewed as resting upon the proposition that a seniority system that perpetuates the effects of a pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption.\(^40\)

This test for attacking the bona fide nature of a seniority system could be a powerful tool, since many of these systems were originally adopted before Title VII was enacted and they frequently formally segregated on the basis of race or gender. However, the Court's treatment of the issue in *Teamsters* seems to restrain the attack: the employer had been found guilty of intentional discrimination\(^41\) so it should have been easy for the Court to conclude that at least one party to the collective bargaining agreement that produced the seniority system lacked good faith. Instead, the Court treated the bona fide nature of the seniority system as an entirely separate issue and found both union and employer free of liability.

The seniority system in this litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it "locks" employees into non-line-driver jobs, it does so for all. The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white. The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with NLRB precedents. It is conceded that the seniority system did not have its genesis in racial discrimination, that it was negotiated and has been maintained free from any illegal purpose.\(^42\)

While the city drivers were not all minority group members, the employer was found guilty of intentional discrimination in the almost total exclusion of minority drivers from the line-driver jobs. That exclusion could not have been main-

\(^{40}\) *Id.* at 346, n.28.

\(^{41}\) *Id.* at 336-43.

\(^{42}\) 431 U.S. at 356 (footnote omitted).
tained by the employer through its hiring and initial assignments alone. The seniority system was necessary to keep minority employees from freely transferring into the line-driver unit. So, while the Court concluded that the union's conduct in agreeing to and maintaining the system did not violate Title VII, the union's agreement was necessary to keep minorities out of the line-driver jobs. Unfortunately, the lower courts did not focus on either company or union conduct in creating the seniority system because of the ease with which joint liability could be found as to union and management under the Quarles present effects of past discrimination standard. In any event, given the summary fashion in which the Court found no liability for union and management in *Teamsters*, the standard may now have gone too far to the other extreme.

VI. BEYOND *Teamsters*

The two major questions concerning seniority systems that remain after *Teamsters* are: first, what types of policies or practices are within the notion of a seniority system?; second, how can the bona fide nature of a seniority system be attacked?

If the first question is answered broadly enough, a wide range of employment decisions concerning job rights, from transfer and promotion to layoff, could be insulated from attack because of the operation of section 703(h). The most expansive reading of that section would shelter most job-related decisions except hiring, since these could be linked somehow to length of service. The first problem is whether the term "bona fide seniority system" contemplates only agreements between union and management or whether an employer-initiated system relying on the length of service can also be insulated by section 703(h).

Seniority is one of the classic issues of unionism and its core usage connotes a collective bargaining agreement providing layoff by length of service, with the most senior employee the last to be laid off. Further, the seniority cases treated by the Supreme Court have all involved seniority provisions agreed to by unions and management in collective bargaining. Nevertheless, the first court to deal with the issue found that an employer-initiated promotional system that relied on length of service was a seniority system and therefore was in-
sulated by section 703(h). Finding nothing in the language of 703(h), its legislative intent or history that limited section 703(h)'s insulation of union-negotiated seniority provisions, the court applied it to protect a plan unilaterally adopted by the employer: "That a current employee expects to have certain seniority rights because of a plan adopted at the employer's initiative, as opposed to a plan negotiated between labor and management in no way diminishes that employee's expectations and it is those expectations which section 703(h) was designed to protect."43

A second problem consists of the actual policies and practices that are protected by section 703(h). In Alexander v. Machinists, Aero Lodge 375,44 a case involving a union-negotiated collective bargaining agreement, the court allowed section 703(h) to shelter a provision that actually violated or operated as an override to the principal of seniority. While seniority was generally measured by length of plant-wide service, a unique "job equity" feature gave preference, whenever there was a job vacancy, to an employee with prior experience in that job. The employee with job equity was always preferred over employees without job equity, even over those well-qualified to do the job and with longer plant-wide seniority. Given the history of exclusion of minorities from the more desirable jobs traditionally held by whites, the job equity principle had a disparate impact on minority employees. Nevertheless, the Sixth Circuit sheltered the job equity provision behind section 703(h):

With regard to the job equity features of the collective bargaining agreements, it could be argued that they are not a facet of the seniority system but a separate element affecting job competition and hence not immune under § 703(h) of the Act. The Act, however, speaks not simply of seniority but of a bona fide seniority . . . system. A preference to those with experience in a given occupation is in a sense limited occupational seniority and we see nothing in the statute or in Teamsters to indicate that it shall stand on a different footing than traditional plant-wide or departmental seniority. It is a contractual provision neutral on its face and is, in

our view, an integral part of Avco's unique but nonetheless
bona fide seniority system.45

Beyond using job equity to stretch section 703(h) to en-
compass a contractual provision that is not itself a seniority
provision, the court in Alexander went further in expanding
the scope of section 703(h). The company had two divisions
operating in one plant, one making aircraft parts and the
other building furniture. Many of the most senior employees
in terms of company seniority were in the furniture division
because of constant fluctuations in employment in the aircraft
division. But early in 1971 the company phased out its furni-
ture division. None of the furniture employees were qualified
for aircraft jobs and, under the union contract, these furniture
workers were not entitled to be laid off when the furniture
division closed. Partially in response to pressure by the union,
the employer retrained the furniture employees to do the air-
craft job and hired them into it. The effect of this was to place
seventy-three white employees ahead of those who had accu-
mulated less than eleven years of seniority. Shortly thereafter
an earlier projected layoff in the aircraft division terminated
all regular assemblers, leaving only the former furniture divi-
sion employees who had been in the aircraft division only two
or three months. This layoff had a disparate impact on blacks
since none of the furniture division employees were black and
since forty-two percent of the laid off aircraft division assem-
biers were black. Despite the absence of any arguable basis in
a seniority system for protecting the decision to put these
white employees over black employees when a layoff was ex-
pected to eliminate the black employees' jobs, the Sixth Cir-
cuit found no violation.

We are loath to hold that the practice of a company and a
union of retraining its older employees so that they could
enjoy the benefit of continued employment is discriminatory
in nature simply because its implementation tends to ad-
versely affect the racial composition of the company.46

The notion that section 703(h) should insulate many on-
the-job issues from Title VII scrutiny may flow from the

45. Id. at 1378 (footnote omitted).
46. Id. at 1381.
rather cursory treatment given the facts by the Supreme Court in Teamsters. There is, however, authority taking a stricter view of what constitutes a seniority system. In Dicker-
son v. United States Steel Corp., the plaintiff challenged a transfer provision in a labor contract that allowed the management to select the crews without regard to seniority when a new facility opened. The court refused to dismiss the claim that this agreement with the union had a disparate impact and found that it was not sheltered by section 703(h). "The plaintiff's second attack on the transfer policies at [the plant] is the exemption of the new facilities from seniority require-
ments. Since this is an explicit exemption to the seniority sys-
tem it cannot be immunized by section 703(h)." In Parson v. Kaiser Aluminum and Chemical Corp., the Fifth Circuit ap-
peared to view the scope of a seniority system in a narrow sense. In Parson, an employee that transferred from one de-
partment to another would be required to enter at the lowest level job and remain there for ten days or until a higher level job in the department opened. Blacks had in the past been victims of discrimination, being assigned to the less paying nonproduction departments. This ten-day bottom entry re-
quirement was part of the seniority provision of the collective bargaining agreement; nonetheless, the court addressed its le-
gality by simply looking at the effect of the provision. While the court did not explicitly hold so, it is apparent that the court found this provision to be outside the scope of the se-
niority system protection of section 703(h).

Fisher v. Procter and Gamble Manufacturing Co., was another Fifth Circuit decision which seemed to view the se-
niority system protection as a narrow exemption. In Fisher, the promotion system was based on a combination of skills and work assessment, plus seniority. Seniority would be the deciding factor between two generally equivalent applicants for a transfer. It was also the practice to give the more senior employee the job if his rating was "acceptable," even if the less senior bidder was rated "strong" for the position. The

48. Id. at 72.
49. 575 F.2d 1374 (5th Cir. 1978).
50. 613 F.2d 527 (5th Cir. 1980).
Court utilized a disparate impact test to analyze the legality of the promotion system. Even though seniority played an important role in the promotion system, the court noted that “[t]he existence of a bona fide seniority system, however, does not shield the Company from ‘other illegal acts, so long as those are independently actionable.’”

The collective bargaining provisions that were not protected by 703(h) in Parson and Fisher were part of the seniority provisions, but were not directly related to the length of service of the employee. The EEOC appears to support this position which calls for a narrow interpretation of the employment practices that are protected by section 703(h). The test proposed by these courts appears to be that a collective bargaining provision, challenged because it operates with a disparate impact, will be insulated by section 703(h) only if its operation is by length of service. Exceptions to the use of length of service, while encompassed in the terms of a seniority provision of a collective bargaining agreement, will be subject to attack under the general notions of disparate impact discrimination and not subject to the more difficult test established by section 703(h).

More oblique, but perhaps more important, authority for a narrow view of what types of employment decisions were sheltered by section 703(h) came from the Supreme Court itself. In Nashville Gas Co. v. Satty, a case decided after Teamsters, the employer required pregnant employees to take a formal leave of absence that carried with it the loss of all accumulated seniority. An employee coming back from pregnancy leave was essentially treated as a new employee since her old job was not held open for her during the leave. Although the Court concluded that the employer’s “policy of denying accumulated seniority to female employees returning from pregnancy leave violated section 703(a)(2) of Title VII,” the opinion nowhere dealt with section 703(h). There were several explanations other than inadvertence. First, the seniority policy and the leave of absence provision denying seniority to

51. Id. at 542.
54. Id. at 139.
pregnant employees were initiated by the employer and did not involve a union negotiated collective bargaining agreement. That explanation of Satty puts the DuPont decision in doubt. A second interpretation of Satty is that the policy challenged, the denial of accumulated seniority for pregnant employees, does not turn on length of service. If this explanation were correct the decision in Alexander was perhaps wrong since the court sheltered behind section 703(h) the provisions of a collective bargaining agreement concerning job equity even though it did not decide job questions on length of service. Satty certainly put into jeopardy the broadest part of Alexander, upholding an employer decision to transfer white employees into a department where their presence will produce a layoff with a disparate impact on minority employees.

The questions presented by these divergent opinions were addressed by the Supreme Court in a recent case. In California Brewers Ass'n v. Bryant the Supreme Court treated the question of the definition of a seniority system. Plaintiff challenged a provision in a collective bargaining agreement which required that an employee work at least 45 weeks in one calendar year to attain permanent employee status. Not a single black employee in the state's brewing industry had acquired permanent employee status and thus the rule was challenged under the disparate impact notion of discrimination. In fact, the party that actually commenced the action had worked with a brewery for five years, but had not acquired permanent status. Defendant argued that rather than the Griggs disparate impact test, this employment practice was sheltered by section 703(h) and the Teamsters test. The Ninth Circuit had held that the 45-week requirement was not a component of a seniority system since it did not turn on length of employee service: employees could work up to 45 weeks each year for many years without ever making favored permanent status because the "45-week requirement [did] not involve an increase in employment rights or benefits based upon the length of the employee's accumulated service," the court applied the effects doctrine to test the legality of the 45-week rule.

55. 100 S. Ct. 814 (1980).
56. Bryant v. California Brewers Ass'n, 585 F.2d 421, 426-27 (9th Cir. 1978).
The Supreme Court, in a four-to-three decision, reversed. The Court commenced its analysis by pointing out that Title VII does not define seniority, and that the Court had “not previously purported to delineate the contours of its meanings.” The Court chose three areas of inquiry to determine the meaning of “seniority system.” First, the Court would look at the commonly accepted notions concerning seniority in industrial relations. Secondly, the Court would consider those concepts in the context of Title VII, and thirdly, would consider the national labor policy in regard to seniority.

In labor relations, the Court found, “seniority is a term that connotes length of employment. A ‘seniority system’ is a scheme that, alone or in tandem with non-seniority criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increases.” The basic feature of all seniority systems “is that preferential treatment is dispensed on the basis of some measure of time served in employment.” With these basic notions of seniority as a background, the Court reviewed seniority within the context of Title VII and national labor policy.

Emphasizing that Congress had utilized the word “systems” in formulating 703(h), the Court found that:

Congress in 1964 quite evidently intended to exempt from the normal operation of Title VII more than simply those components of any particular seniority scheme that, viewed in isolation embody or effectuate the principle that length of employment will be rewarded. In order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment.

After providing a list of such “ancillary rules,” the Court noted that, long-standing labor policy provided that collective bargaining should be the means of establishing conditions of

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57. Justices Powell and Stevens took no part in the case; Justices Brennan, Marshall and Blackmun dissented.
58. 100 S. Ct. at 819.
59. Id.
60. Id.
61. Id.
62. Id. at 820.
While recognizing that 703(h) would protect "seniority systems" and their "ancillary rules," the Court was quick to point out that 703(h) is not to be given "a scope that risks swallowing up Title VII's otherwise broad prohibition of 'practices, procedures, and tests' that disproportionately affect members of those groups that the Act protects." While freedom should be provided to employers and employees in developing seniority systems, "that freedom must not be allowed to sweep within the ambit of 703(h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system. . . ."

In applying the above mentioned rules to the case at hand, the Court found the 45-week rule was a proper means of establishing a threshold requirement for entry into the permanent employee seniority track. The temporary and permanent employee status were seen as two distinct seniority tracks. The Court noted that between temporary employees, those with the most seniority received preference in terms of layoffs and bumping rights, so that a seniority track existed that consisted of temporary employees. This two track seniority system was compared to the two track seniority system in Teamsters and found to be similar in nature.

The test that the Court proposes seems to be a historical one. The historical or industrial custom approach seems inherently unsatisfactory. While employment tests or educational prerequisites have not so far been common as thresholds to seniority systems, there may well be pressure in future collective bargaining to include them in seniority provisions. How will the courts be able to determine what is the appropriate bargaining history or industry custom when the process of collective bargaining is so fluid? While the Court treated application of its rule to the instant case as straightforward, that may not be so easy in other circumstances. The majority argues that the more senior temporary employees are more likely to satisfy the 45-week requirement. But the dissent by

63. Id.
64. Id.
65. Id. at 820-21.
66. Id. at 821.
Justice Marshall points out that the requirement is subject to manipulation. Unlike seniority generally, the 45-week rule is very unpredictable.

Indeed, cumulative length of service is only incidentally relevant to the 45 week rule. The likelihood that a temporary employee will attain permanent employee status is largely unpredictable. The 45 week period, . . . represents almost 90 percent of the calendar year. Even if an employee is relatively senior among temporaries, his ability to work 45 weeks in a year will rest a large part on fortuities over which he has no control. The most obvious reason that employees have been prevented from attaining permanent employee status — a reason barely referred to by the Court — is that the brewing industry is a seasonal one.67

In sum, the decision in California Brewers adopts a middle ground position as to what is sheltered by section 703(h)'s definition of a seniority system. Such traditional seniority related questions as to the separate tracks of seniority in departmental or job classification systems will be sheltered. In contrast, test or educational requirements will not be sheltered. Section 703(h) should shelter only a provision of a collective bargaining agreement which turns on length of service. Using section 703(h) to create a broader shield for on-the-job policies and practices would exceed its purpose, which is to accommodate seniority agreements (that safeguard employee expectations of protection from layoff that increase with length of service) with the obligation to provide equal employment opportunity. The California Brewers decision will obviously trigger continued litigation over the issue of what is sheltered by the term seniority system, since the decision fails to establish any clear-cut test. More litigation is likely because of the importance of the issue.

Once it has been decided what types of employment policies and practices are sheltered by section 703(h), the second question is what the standard should be when 703(h) seniority systems are challenged and how that standard should be applied. In James v. Stockham Valves & Fitting Co.,68 the court described the Teamsters standard for deciding whether a se-

67. Id. at 824.
68. 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978).
niority system was bona fide as involving "four factors."

1. Whether the seniority system operates to discourage all employees equally from transferring between seniority units;
2. Whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
3. Whether the seniority system had its genesis in racial discrimination; and
4. Whether the system was negotiated and has been maintained free from any illegal purpose.

In sum, the Fifth Circuit characterized the inquiry as fact laden — "the facts of a particular seniority unit are critical" — and distinguished Teamsters as a case where the plaintiffs conceded that the seniority system did not have its genesis in racial discrimination and that it was negotiated and maintained free from any illegal purpose. There is no such concession here. The seniority system at Stockham was adopted in a collective bargaining agreement in 1949, when segregation in the South was standard operating procedure. . . . [On remand the] district court should give careful consideration to the negotiations involving the seniority system at Stockham and to the employment practices underlying such negotiations.

The Fifth Circuit has thus endorsed an approach that is realistic in testing the bona fide nature of a seniority system. Taking a similar realistic approach, the district court in Chralpliwy v. Uniroyal, Inc. struck down a seniority system finding that the system was not bona fide. Citing evidence that before passage of Title VII the defendants kept gender segregated seniority lists and that after passage the formal lists were changed to "A" and "B" lists which were "only a disguise to the former segregated system," the court found that "the employment system at Uniroyal has had as its genesis discriminatory conduct both before and after the passage of the Act."

The Teamsters standard focuses on the intent or purpose

69. Id. at 352.
70. Id. at 352-53.
71. 15 FAIR EMPL. PRACT. CAS. 822 (N.D. Ind. 1977).
72. Id. at 826.
to discriminate associated with the creation or operation of a seniority system. The *James* decision provided a useful test to show the bona fide nature of a seniority system. The burden imposed on the plaintiff is not impossible, but it still involves a strong showing of purposeful discrimination. The Supreme Court has faced the issue of proving intentional discrimination in a number of cases. *Washington v. Davis* and *Arlington Heights v. Metropolitan Housing Corp.* have been two of the most recent pronouncements on this issue. From these cases some general guidelines may be extracted that are helpful to understand the necessary proof in challenges to seniority systems. First of all, the Court considers disproportionate impact to be relevant to a finding of discriminatory intent. In fact, Justice Stevens, in his concurring opinion in *Washington* found objective evidence, such as statistics, to frequently be the most probative evidence of discriminatory intent. Secondly, the challenged action does not have to be the result of solely discriminatory purposes. Justice Powell in *Arlington* recognizes that very seldom is a single concern the basis of a particular discriminatory action. The "subjects of inquiry" proposed by the Court in *Arlington* to determine discriminatory intent included: 1) historical background; 2) the specific sequence of events leading up to the action; 3) any departures from normal procedures followed by the decision-maker; 4) any documented evidence of discriminatory intent or purpose. These guidelines have been basically incorporated in the *James* factors.

**VII. Conclusion**

The Supreme Court has provided answers to a number of seniority-related Title VII issues. The "present effects" or "disparate impact" tests are no longer viable means of challenging the creation or operation of seniority systems. Plaintiffs are now required to show a purpose or intent to discriminate in the formulation or operation of a seniority system. It is now necessary to see if the tests adopted by the courts to

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73. See notes 38-40 and accompanying text supra.
74. 426 U.S. 229 (1976).
76. 426 U.S. at 253.
77. 429 U.S. at 265.
determine discriminatory intent will be realistic and practical as proposed by the James court.

Seniority may be granted to a victim of discrimination as part of a court-ordered remedy. The granting of seniority as part of a court-ordered remedy is in line with the "make whole" policy of Title VII.

The Supreme Court has attempted to provide a definition for "seniority." The approach taken by the Court is one that stresses historical practice and industry custom. The definition is a broad one which will require further litigation in order to determine its actual limits.

The use of seniority is prevalent throughout American industrial relations. There is no reason to believe that its presence will diminish significantly. The lower courts will now be handed the responsibility of properly applying the guidelines set out by the Supreme Court. Further statements by the Supreme Court will be needed to address developing issues in the seniority area.