The Continuing Validity of Seniority Systems Under Title VII: Sharing the Burden of Discrimination

Carol L. McCully
The Continuing Validity of Seniority Systems Under Title VII: Sharing the Burden of Discrimination

INTRODUCTION

The impact of collective bargaining agreements on all sectors of the economy is demonstrated by the widespread interest in the expiration of major industrial contracts. Although disputes over wages normally attract the most public attention, a lesser publicized, but more deeply entrenched provision of collective bargaining agreements has potentially the farthest-reaching effects. This is the seniority provision. The notion of seniority is as old as organized labor itself. Protection against discharge and layoff forms the basis of job security for workers and seems to be the most important reason for the prevalence of seniority provisions in collective bargaining agreements. Indeed, almost every major industry has adopted seniority clauses in its union contracts. This article will analyze the continuing validity of such seniority systems in light of their demonstrated impact on minorities, whose rights to equal employment opportunities are guaranteed by Title VII of the Civil Rights Act of 1964. Focusig on two Supreme Court decisions, as well as on several lower court rulings, this article will examine whether Title VII objectives are being achieved.

The Court’s characterization of the impact of Title VII indicates that a sharing of the burden of past discrimination is “presumptive

3. In a recent survey, 92% of collective bargaining agreements contained seniority provisions. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 85 (8th ed. 1975).
Seniority Systems

necessary."" The delayed entry of blacks, women, and other minorities into the mainstream of employment has had a continuing adverse effect on these groups: failure to attain the seniority rights they would have earned in the absence of discrimination. This impact is as broad as the benefits that a seniority system is designed to bestow and protect. Of these, hiring, promotions, transfers, and layoffs are among the most significant. In many situations victims of past discrimination cannot be "made whole" in the absence of some alteration of the seniority rights of other employees. 8

A sharing of the burden of past discrimination necessarily involves at least four groups: (1) the ostensible victims—minorities and women—for whom the effect of relief may vary significantly depending upon whether it is addressed to individuals or to a class as a whole; (2) the white male employees who may become victims themselves, depending on the scope of a court award, as a result of their employer's and/or union's discriminatory practices; (3) the employers who have practiced discrimination in hiring, promotion, and transfers; and (4) the unions, who may have played a role in discriminatory employment practices.

The author suggests that judicial constructions of the remedial provisions of Title VII have not dealt squarely with the troublesome issues raised by seniority systems. The confusing legislative history of Title VII has prompted some courts to misplace their emphasis when relying upon it. Because of these deficiencies, more imaginative solutions are necessary if victims of discrimination are to be made whole.

**Seniority Systems**

Seniority provides a seemingly objective standard for the employment relationship on which employers, unions, and employees can rely. Length of service, either solely or in conjunction with other factors, determines priority for benefits such as promotions, transfers, order of layoff and recall, working conditions, overtime opportunities, vacation scheduling, and a host of other aspects of working life. Such "competitive status" seniority benefits are only one phase of the impact of the seniority system. The other phase, "benefit seniority," affects length of vacation, pension benefits, and pay

---


8. The Supreme Court stated the purpose of Title VII was to "make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 415, 418 (1975). The Supreme Court reaffirmed this in Franks, 424 U.S. at 762.
raise schedules. However, it is principally the former type which engenders conflicts between workers who have gained these rights, and those deprived of the opportunities for such status because of employer or union discrimination. "Competitive status" seniority reflects the relative rights of employees competing for the most desirable rewards based on length of service. If Title VII relief awards a victim enhanced seniority of this type, it would have the concomitant effect of reducing the importance of the actual seniority of other employees. Guiltless employees would then compete with a greater number of workers for the same number of benefits.

Unions appear to be totally dedicated to ensuring the future of the seniority system. Their support seems to stem from several factors: (1) employees are able to predict their future employment status with reasonable accuracy; (2) seniority diminishes the possibility of capricious or arbitrary management decisions regarding allocation of duties and benefits; and (3) the seniority system facilitates union supervision of disputes among its members on an impartial basis. While few employers would argue that the seniority system improves productivity, it does offer management some advantages. The seniority system reduces the possibility of employee discontent from management decisions which favor one employee over another on some unsubstantiated basis. Since seniority grants valuable incentives for workers to remain with the same employer, management is better able to retain its most valued employees. Furthermore, some systems assure that employees have the requisite experience to move up the job progression ladder.

The legal status of seniority rights is unclear. Supreme Court decisions and leading commentators agree that they are not indefeasibly vested rights, and so may be modified by statute or in

11. Id. at 1607. For example, a department in a factory may be rigidly structured in such a way that the foreman will have spent a certain amount of time working at every job in the department: each job above the entry position would incorporate the skills learned at the level just below, together with new skills to be mastered before another promotion is possible.
13. Aaron, supra note 1, at 1534-42; Cooper & Sobol, supra note 10, at 1605.
Seniority Systems

furtherance of public policy. Courts further recognize that they may be modified by collective bargaining agreements. This apparent agreement on what seniority rights are not, however, has not led to any agreement on what they are. The fact that Title VII makes specific reference to seniority systems indicates, perhaps, that Congress wished to accord some deference to rights earned under non-discriminatory systems.

TITLE VII: CONGRESSIONAL OBJECTIVES

Title VII of the Civil Rights Act of 1964 established certain non-discrimination requirements. Section 703(a) of the Act broadly defines unlawful employment practices for employers. They may not engage in practices which would "in any way . . . deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" on account of race, color, religion, sex, or national origin. Section 703(c) contains similar proscriptions with respect to unions. Another Title VII provision merits mention at this point. Section 706(g) grants considerable latitude to the court to fashion equitable remedies, including the power to "order such affirmative action as may be appropriate."

---

15. Section 703(a) states:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

16. Section 703(c) states:

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

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

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

17. The text of section 706(g) is set out more fully below:

(g) If the court finds that the respondent has intentionally engaged in or is inten-
There are, however, several exemptions from the general prohibitions of the Act, including that in section 703(h):

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. . . .

The difficulties experienced by the courts in dealing with this exemption language reflect, to a large degree, the confused state of the legislative history accompanying it. There are no committee reports to explain the exemption—it did not appear in the House bill, the Senate bill bypassed the committee stage altogether, and the compromise bill after Senate passage was an informal effort in which a joint committee did not participate. The insertion in the Congressional Record of several memoranda which appear inconsistent with the language in the Act compounds the problem. Although this history has been extensively analyzed, it is sufficiently murky to withstand further scrutiny. It is anomalous that the legislators expressed their awareness of the acute need for legislative history to assist courts in interpreting the Civil Rights Act, yet failed so egregiously, at least with respect to the seniority issue, to provide a unified, coherent statement of intent.

**Legislative History**

The bill on which the Act is based originated in the House of
Representatives and went to the Senate with its anti-discrimination language virtually unchanged. It contained no reference to seniority systems. Representative Dowdy introduced an amendment exempting seniority systems from the Act’s application, but the amendment was neither discussed nor debated on the House floor before its defeat. A dissenting minority of the House Judiciary Committee argued that the bill, under the guise of protecting the civil rights of certain minorities, would destroy the civil rights of all citizens affected by it, and would destroy seniority as well. The bill’s sponsors in the House gave certain assurances, principally emphasizing the limited role of the Equal Employment Opportunity Commission (EEOC), which were sufficient to secure the bill’s passage.

The Senate proved less tractable. The bill went to the Senate floor without the seniority provision, and an extended filibuster ensued. Opponents of the bill expressed fear for the “vested” rights of whites. On April 8, 1964, the bill’s co-sponsors, Senators Clark and Case, presumably attempted to quell the brewing storm by introducing three documents into the Congressional Record. One was their own interpretative memorandum dealing with the seniority and racial quota issues. Another was an interpretative memoran-

24. 110 CONG. REC. 2727-28 (1964). The amendment reads:
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, sex, or national origin.
Commentators have noted an obvious defect in that the amendment appears to exempt employers, not seniority practices. Cooper & Sobol, supra note 10, at 1609.
26. Id. at 2150.
27. 110 CONG. REC. 2804 (1964).
28. Id. at 7207. The relevant portion of this memorandum is as follows:
First, it has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining agreement 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. . . . It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is “low man on the totem pole” he is not being discriminated against because of his race.
dum prepared by the Department of Justice for Senator Clark.\textsuperscript{29} The third was a series of prepared responses to questions posed by Senator Dirksen.\textsuperscript{30} The thrust of the three documents was to emphasize the minimal effect of Title VII on existing seniority rights. There was no floor debate or commentary on these materials.

At a later date, an informal committee undertook the task of preparing various amendments to the bill.\textsuperscript{31} Their product, the so-called Mansfield-Dirksen substitute bill, was introduced by Senator Dirksen on May 26 to break the filibuster by vote of cloture. It added the seniority exemption contained in section 703(h).

“Bona fide” seniority systems were nowhere defined. Neither the section itself nor the debates that followed elaborated on the meaning. Senator Humphrey, who presented the bill, stated that the addition of this section to the bill merely clarified its present intent and effect, and would not narrow the scope of its application.\textsuperscript{32} Senator Dirksen, who submitted a written explanation, merely repeated its terms without elaboration.\textsuperscript{33} No other Senator attempted to debate or amend the substitute measure, and the bill passed as presented. Whatever the reason for each Senator’s vote on Title VII, the April 8 memoranda could not possibly be the Senate’s interpretation of the exemption language which was first introduced on May 26, 1964, nearly seven weeks later.\textsuperscript{34}

\textsuperscript{29.} Id. at 7212-15. The memorandum declared:

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 nondiscriminatory basis. He would not be obliged—or, indeed, permitted—to . . . give [Negroes] special seniority rights at the expense of the white workers hired earlier.

\textsuperscript{30.} Id. at 7217. One question and answer were as follows:

Question: Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for “last hired, first fired”. If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?

Answer: Seniority rights are in no way affected by the bill. If under a “last hired, first fired” agreement a Negro happens to be the “last hired,” he can still be “first fired” as long as it is done because of his status as “last hired” and not because of his race.

\textsuperscript{31.} Vaas, supra note 19, at 443.


\textsuperscript{34.} The memoranda were inserted in the record several weeks before section 703(h) was drafted. See Cooper & Sobol, supra note 10, at 1609-10.

A literal reading of the three documents would seem to assert that Title VII would have \textit{no} effect on established seniority rights. Several courts have rejected this notion as inconsistent
This kind of legislative history can be all things to all persons, depending on which portions the reader wishes to rely upon most heavily to support his position. Numerous courts and writers have given dispositive weight to the April 8 documents to support a broad exemption for seniority systems. Others, including the Supreme Court, have discounted portions of the *Congressional Record* where they appear to be in conflict with the broad purposes of the legislation.

The 1972 Amendments

The inadequacies of the 1964 legislative history may have been remedied, to some extent, when Congress amended Title VII in 1972. Although these amendments primarily gave the EEOC the power it lacked under the original statute to enforce its findings of discrimination, the legislative history accompanying the 1972 amendments is significant. The seniority exemption remained unchanged, but this history is a statement by a Congress with a far more sophisticated understanding of the pervasive effects of employment discrimination. The legislative intent acknowledges that discrimination is not an isolated series of independent actions, but a complex scheme involving employers and labor organizations with the ability to set policies, establish hiring, firing and promotion procedures, and draft collective bargaining agreements covering virtually every phase of an employee's activities.

The solidification of practices which perpetuate the effects of earlier discrimination is a powerful weapon not easily combated by


39. *H.R. REP. No. 238, 92nd Cong., 1st Sess. 8-9 (1972); S. REP. No. 415, 92nd Cong., 1st Sess. 5 (1972).*
precise statutory formulations. By 1972 Congress realized this, and emphatically reaffirmed the extensive power of the courts to fashion remedies which would not only eliminate discriminatory practices, but also, insofar as possible, restore victims to the positions they would have held absent the discrimination. Implicit in this affirmation is a rejection of the kinds of limitations found in the Clark-Case memorandum and the other statements of April 8, 1964. The understanding of Title VII evidenced in those statements was that it would have no effect on seniority rights accruing before the passage of the Act. If accepted, this position would severely restrict the power of the courts to fashion relief in many circumstances where the objectives of the Act could not be achieved without a seniority award to victims of discrimination. The availability of seniority relief under Title VII had been recognized by the courts long before the 1972 amendments, and these court awards of seniority significantly affected pre-1964 seniority rights. Congressional recognition of the continuing applicability of these decisions after the 1972 amendments is convincing evidence that the April 8 memoranda are a poor indication of congressional intent.

COURT INTERPRETATIONS OF TITLE VII

Court challenges to seniority systems have arisen in three important contexts: first, cases involving segregated plants which maintained separate seniority rosters for blacks and whites; second, cases in which union hiring hall policies came under fire; and most recently, litigation spawned by the economic recession arising out of the “last hired, first fired” provisions of seniority contracts.

40. Section-by-Section Analysis, supra note 12, at 7168.
41. See notes 28-30 supra.
42. For example, Representative Perkins noted, “In any area where the new law does not address itself . . . it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.” 118 CONG. REC. 7564 (1972) (remarks of Representative Perkins).
These disputes form the backdrop for the Supreme Court's decisions on the relief provisions of Title VII. A 1971 case involving an employer's hiring requirements, and not seniority, afforded the Court an opportunity to discuss the anti-discrimination provisions of the Act and the scope of relief available thereunder. However, the Supreme Court squarely considered the seniority exemption of Title VII for the first time in its 1976 decision, Franks v. Bowman Transportation Co.

The Segregated Plant Cases

Strict, formal segregation of industrial plants was a widespread phenomenon, particularly in the South, before the Civil Rights Act of 1964 became effective. Commonly, whole departments or lowly jobs within departments were filled only by blacks. Their promotion opportunities were restricted to black-only posts, and separate seniority rosters were maintained. When employers abandoned this practice and merged the departments and the seniority rosters, blacks found themselves on the bottom of the formerly white-only lists, despite their greater length of service with the employer.

Quarles v. Philip Morris Inc. was the first challenge to a departmental seniority system. In 1966, the defendant employer, who had previously maintained overtly segregated departments, allowed blacks to transfer to all-white departments. However, their seniority in the black departments was disregarded for purposes of computing seniority in their new positions. This use of job or departmental seniority meant that the blacks' entry was on the same terms as new employees. The district court found that the difference between black seniority and white seniority was based not on differences in qualifications, but on the past segregation. The court ordered the employer to discontinue the use of the departmental seniority system, and to permit blacks to compete with whites for future vacancies on the basis of their total plant seniority.

49. A discussion of the departmental and plantwide seniority systems appears in S. Slichter, J. Healy & E. Livernash, supra note 1, at 116 passim.
51. Id. at 513.
52. Id. at 520-21.
In imposing a plantwide seniority system, the court concluded that a "bona fide" seniority system is one that, at least, lacks discriminatory effect.\(^5\) Thus, the section 703(h) exemption could not validate the company's intentional discriminatory practices that existed before 1966. Such a literal reading of the legislative history might prevent the court from granting the relief necessary to prevent continuing discrimination. Although the court did not authorize affirmative hiring relief, the court found that Congress had not fully considered the problems of a departmental seniority system. Judge Butzner concluded, "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act."\(^4\)

The court suggested, however, that the rationale for striking down departmental or job seniority may not apply to plantwide systems.\(^5\) Tiptoeing into untested waters, the judge may have felt compelled to restrict his holding to invalidate only a departmental seniority system. In doing so, he created an unfounded distinction between departmental and plantwide systems that courts have relied upon ever since. This is not to say that no distinction exists; rather, there is no basis for ruling that the Act permits relief in the one instance and denies it in the other.

A seniority system, although plantwide, may contain the seeds of invidious discrimination to the same degree as a departmental system. Although it takes full account of all time worked by black employees in determining their position relative to white employees, it also reflects past discriminatory hiring and promotion decisions. Exclusionary hiring practices, in the absence of relief, relegate blacks to lower positions in the seniority roster after these practices terminate. In addition, experience in one position is often required before progression to the next is permitted. Since blacks have only recently been hired and permitted to work in these more desirable departments, they will lack the skills and experience to compete effectively with whites. Thus, the disparate impact continues even after the mechanisms of discrimination are removed.

One of the most influential decisions in this area is *Local 189, United Papermakers v. United States.*\(^6\) This case posed a problem similar to that in *Quarles,* but the employer had already merged its segregated job progression lines at the time suit was brought. How-

\(^5\) Id. at 517.
\(^4\) Id. at 516.
\(^5\) Id.
ever, the highest level black job in the plant was one step below the lowliest white level job in the new integrated departments. As a result of the merger, the entire black job progression ladder was “tacked” onto the bottom of the white job progression ladder. Consequently, blacks with many years experience held lowlier jobs than did new white employees. Judge Wisdom, writing for the Fifth Circuit, struck down this merger because it inherently carried forward the effects of the company’s former discriminatory practices. He ordered the company to institute a plantwide seniority system in lieu of its departmental system, so that equally skilled blacks and whites, in bidding for jobs at the next higher level, would be able to rely upon their total employment at the plant.

The decision in Local 189 was limited to the issue of invalidating job or departmental seniority systems in formerly segregated plants. However, its influence extended further. In a long passage of dicta, Judge Wisdom discussed the effects of a discriminatory refusal to hire, an issue that was not presented for the court’s review. He concluded that a black who had been refused a job because of race, if hired later by that employer, could not claim to have greater seniority than whites who were hired after his rejection. The court asserted: “It is one thing for legislation to require the creation of fictional seniority for newly hired Negroes, and quite another thing for it to require that time actually worked in Negro jobs be given equal status with time worked in white jobs.” But to deny seniority credit to blacks who attempted to work and were prevented from doing so by the employer’s discriminatory hiring practices has a curious effect. It effectively grants relief to blacks who have only been partially deprived of equal employment opportunities, but denies relief to the most serious victims: those prevented from working at all.

As one commentator has suggested, the court’s willingness to order employers to compute seniority on a plantwide basis is a form of fictional seniority. It grants blacks the seniority they would have had if they had worked in the more desirable departments. As a result, the same problem presents itself in both the departmental and plantwide seniority systems: present and future employment decisions that are nondiscriminatory simply cannot be made without altering the seniority expectations of white employees.

57. Id. at 988.
58. Id. at 995.
59. Id.
60. Note, Last Hired, First Fired Layoffs and Title VII, 88 Harv. L. Rev. 1544, 1566 (1975).
The Union Hiring Hall Cases

In most construction trades, contracts are negotiated between the majority of the contractors in the area and the local union representing the journeymen in a particular craft. When a contractor needs workers for a job, he usually, and in some cases must, contact the union hiring hall which selects the workers and refers them to the contractor. Under this system, priority is often given to workers with a certain amount of experience on union jobs. This ability of craft unions to control work opportunities through their referral system led to invidious discrimination. At one time, total exclusion of blacks from unions meant exclusion from these union-controlled job opportunities. Once unions were integrated, however, the discrimination took the form of priority to whites in job referral because of lack of experience of blacks in previous union-controlled jobs. Blacks who had the requisite experience, but in nonunion jobs, were prevented by the unions' prior exclusionary practices from competing effectively for union jobs after they were allowed to use the hiring halls. Finding the referral rules of hiring halls violative of Title VII, the courts uniformly ordered the unions to alter these rules so that workers with the requisite experience would receive top job priority, regardless of whether that experience was gained on union or non-union jobs. The courts were able to fashion these remedies with little or no reference to the legislative history of Title VII. Indeed, the courts readily imposed racial quotas and explicitly permitted relief to blacks who were not the actual victims of the unions’ prior discrimination.

The Last Hired, First Fired Layoff Cases

The hard-fought gains of minorities and women in the area of equal employment have eroded substantially in the wake of this nation's recent recession and its lingering effects. Many triumphs...

61. Cooper & Sobol, supra note 10, at 1624.
62. See, e.g., United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969). See also cases listed at note 45 supra.
over discrimination became hollow ones for persons who were laid off their jobs pursuant to "last hired, first fired" seniority provisions in collective bargaining agreements. While such systems may be nondiscriminatory on their face, their impact is greatest on minorities, for seniority is often directly related to prior discriminatory hiring practices.

1. Waters v. Wisconsin Steel Works

Waters v. Wisconsin Steel Works\textsuperscript{64} was the first of several unsuccessful attempts to challenge the use of last hired, first fired seniority principles. Plaintiff Waters was a black bricklayer hired by Wisconsin Steel in 1964, the first year that company had hired any black bricklayers. Waters had previously sought employment there in 1957. The company's collective bargaining agreement required ninety days service before workers achieved contractual seniority rights. Before Waters could complete this probationary period, he was laid off with other bricklayers when the company forecast a decrease in its bricklaying needs.\textsuperscript{65}

After Waters' initial layoff, Wisconsin Steel and the union negotiated a severance pay agreement with eight white bricklayers who had also been laid off. The agreement allowed them to either retain their contractual seniority rights or forfeit those rights and receive severance pay. The eight workers all elected the severance pay option. Later, the company realized it had underestimated its bricklaying requirements, and believed it had done an injustice to the eight workers. Accordingly, the company and the union entered into an amendatory agreement partially nullifying the prior severance pay agreement and restoring the contractual seniority rights of those eight workers for purposes of recall. As a result, three of the eight white workers accepted the recall and returned to work before Waters was recalled.\textsuperscript{66}

Plaintiff\textsuperscript{67} alleged those actions by the company and union vio-
lated Title VII and section 1981. The district court first found the amendatory agreement between the company and the union racially discriminatory. It further concluded that the company's seniority system was the product of a pre-Act pattern of racial discrimination. Consequently, the court held that the system was not bona fide under Title VII. Further, it found that both the agreement and the seniority system violated section 1981.

On appeal, the Seventh Circuit affirmed the finding of discrimination and agreed that the amendatory agreement violated both Title VII and section 1981. However, it disagreed with plaintiff's contention that the seniority system perpetuated the pre-Act discrimination and was thus invalid under both statutes. The court found that "Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination." It was noted that a seniority system based on the last hired, first fired principle does not of itself perpetuate past discrimination, and that Wisconsin Steel's was a plantwide system. From its examination of the legislative history of Title VII, the court concluded that a plantwide or employment seniority system is bona fide under the Act. The section 1981 claim was dismissed in a footnote, the court asserting that once the system passed scrutiny under Title VII, it was not violative of section 1981.

Several problems with the Seventh Circuit's analysis surface immediately. First, there is the court's misplaced reliance on the departmental-plantwide distinction, a distinction probably never valid in the first place and certainly not supported by the legislative history of Title VII. This distinction was at least relevant in the early segregated plant cases. But most layoff cases are an outgrowth of exclusionary hiring practices, a fundamentally different violation than one where the employer has hired minorities, but relegated them to inferior positions and computed their seniority separately. Yet once more, the judiciary's reluctance to award seniority to persons not actually hired penalizes those most seriously victimized by employers' past discriminatory practices.

69. 502 F.2d at 1320. The court found that the amendatory agreement was not discriminatory as to Waters' co-plaintiff Samuels, who was never hired. There seems to be no logical basis for this. It appears to be a result of the court's refusal to recognize harm done to one who has not actually worked for the employer.
70. Id.
71. Id. at 1318.
72. Id. at 1320.
The *Waters* court considered seniority awards to minorities previously excluded from employment as preferential treatment and noted that "Title VII was not designed to nurture such reverse discriminatory preferences."\(^73\) Concededly, the Act does not mandate reverse discrimination.\(^74\) But no plausible construction of the Act should prevent an award of retroactive seniority to a person who has been discriminatorily refused employment on the grounds that such award constitutes reverse discrimination. Indeed, a form of relief which comes much closer to a traditional perception of reverse discrimination, namely, court-imposed racial quotas, has been widely applied by the same circuits who decline to grant retroactive seniority.\(^75\)

The decision also appears to rely on the unstated presumption that the seniority expectations of white workers under plantwide systems deserve more deference than under departmental systems. Yet, there is a substantial body of case law which recognizes that seniority rights are not indefeasibly vested property rights, but may be altered to further public policy.\(^76\) These cases make no distinction among various types of seniority rights.

In rejecting an award of constructive seniority, the *Waters* court placed a great deal of emphasis on parts of the legislative history of Title VII, as well as on the *Local 189* dicta. Both *Quarles* and *Local 189* had suggested the distinction between departmental and plantwide seniority systems because an analysis of the apparent legislative intent could not otherwise justify an award of seniority relief in the departmental seniority cases before them. The April 8 statements appeared to be a substantial barrier to judicial interference with seniority rights. To circumvent this, the courts invented an artificial distinction that would enable them to grant seniority relief when blatant internal discrimination existed. Whether this analysis can be extended to other uses of seniority is questionable.

The *Waters* decision raises another problem that has reappeared in subsequent decisions: the abrupt dismissal of a section 1981 charge after a substantive ruling on the Title VII allegation. The desire to avoid inconsistent rulings on the two claims is understandable, but not easily forgivable. The statutes have been consistently

\(^73\) *Id.*

\(^74\) Section 703(j) of the Act provides: "Nothing contained in this title shall be interpreted to require any employer, employment agency, [or] labor organization . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group. . . ." 42 U.S.C. § 2000e-2(j) (1970).

\(^75\) *See note 63 supra.*

\(^76\) *See note 12 supra.*
Loyola University Law Journal

construed as completely independent avenues of redress. In one such decision, the Supreme Court noted, "It is well settled . . . that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." Thus, it seems quite reasonable that the uncertainties in Title VII's legislative history should not bar relief under section 1981.

2. Watkins v. Steelworkers Local 2369

The Fifth Circuit ruled on the Title VII validity of reverse seniority layoff systems in Watkins v. Steelworkers Local 2369. In that case, black workers at a Continental Can Company plant charged that its last hired, first fired seniority system unlawfully perpetuated the effects of the company's earlier discriminatory practices. Prior to 1965, the company hired no blacks, with the exception of two hired during World War II. Extensive layoffs beginning in 1971 meant that all blacks but those hired during wartime lost their jobs. The layoffs also affected whites with seniority dating back to 1951; nevertheless, the first 138 persons on the recall list were white.

Blacks who were laid off instituted a class action under both Title VII and section 1981, and the district court held that application of the company's presently neutral seniority system violated both statutes because blacks, as a class, had been precluded from gaining seniority. The last hired, first fired application perpetuated the effects of the company's prior unlawful practices.

The court of appeals reversed, basing its primary analysis on two factors: (1) the Local 189 dicta, which viewed seniority relief for new employees as preferential treatment; and (2) the fact that plaintiffs, with one exception, were not old enough to have been in the work force before the company ceased its discriminatory hiring practices. Again, as in Waters, the first basis of the court's decision inappropriately applies the plantwide-departmental seniority distinction. With the second factor, the court seems to require that plaintiffs be actual victims of the employer's discrimination, although Title VII contains no such requirement. Other courts, including the Watkins

80. 516 F.2d 41 (5th Cir. 1975).
Seniority Systems

The Fifth Circuit based its holding on plaintiffs' lack of standing to represent the true victims, this was not articulated.

The Watkins court also gave short shrift to the section 1981 claim. Once it found the seniority system valid under Title VII, the court refused to consider the section 1981 allegation separately, citing Waters as support. It has been argued that Watkins may represent the outer limits of Title VII relief available in a seniority context. Plaintiffs' inability to show that they personally had been victims of the employer's hiring discrimination was a complete bar to relief. Proof of the violation was not enough.

3. Jersey Central Power & Light Co. v. IBEW Local Unions

Jersey Central Power & Light Co. v. IBEW Local Unions arose in an unusual factual context. There, the employer sought a declaratory judgment from the district court to resolve apparent conflicts between its collective bargaining agreement, containing a last hired, first fired seniority provision, and an EEOC conciliation agreement, requiring the employer to hire an established proportion of minority and female workers. The company announced a layoff in 1974, and sought the declaratory judgment to determine exactly who would be laid off. The district court held that the seniority provisions of the collective bargaining agreement could not be construed so as to frustrate the purpose of the EEOC conciliation agreement. To the extent the two were in conflict, the conciliation agreement controlled. Thus, the court required that the EEOC-imposed ratio of minority and female workers existing before the layoff announcement be maintained throughout the layoff period.

The Third Circuit reversed, finding no express conflict between the two contracts. Because the EEOC agreement referred only to hiring requirements, it was not controlling on the layoff question. In response to arguments that such seniority provisions are contrary to public policy and against the general welfare, the court ruled that "Title VII reveals no statutory proscription of plant-wide seniority systems. To the contrary, Title VII authorizes the use of 'bona fide' seniority systems." The court found that a system could be bona

82. 516 F.2d at 50.
83. Poplin, supra note 2, at 229.
85. Id. at 705.
fide even if it continues the effect of past employment discrimination, and cited portions of the legislative history for support. It determined that "a facially neutral company-wide seniority system, without more, is a bona fide seniority system. . . ."\textsuperscript{87}

The problems with the Third Circuit's opinion are manifold. It continued the dubious plantwide-departmental seniority distinction; cited the legislative history of Title VII; and extended the Quarles-Local 189 rationale to presume plantwide systems bona fide per se. The court held that, once it found the system bona fide, any evidence of discrimination appearing in the record would not be probative to show a Title VII violation.\textsuperscript{88} Unfortunately, unlike Waters and Watkins, there was evidence to show that the company had continued its discriminatory hiring practices after the enactment of Title VII.\textsuperscript{89} Thus, the analogy to the earlier cases was not necessary or required. However, in the unusual procedural setting of a declaratory judgment action, the victims of this post-Title VII discrimination could not be parties.

Judge Garth, writing for the court, also held that specific intent to discriminate was the only factor which rendered an otherwise "bona fide" seniority system violative of Title VII.\textsuperscript{90} This clearly conflicts with the Supreme Court's interpretation of the intent provisions of Title VII enunciated in Griggs v. Duke Power Co.: that employers and labor unions need only intend the consequences of their actions.\textsuperscript{91}

4. The Second Circuit's Approach

Acha v. Beame\textsuperscript{92} was a Title VII class action suit brought by female police officers laid off by the New York City Police Department in the wake of that city's fiscal crisis. They complained that the seniority system, with its last hired, first fired layoff provision, violated Title VII because it perpetuated past discriminatory hiring practices. Prior to 1973, women were hired only for the job title Policewoman, for which there was an official quota amounting to

\textsuperscript{86} In quoting extensively from the April 8 memoranda, the court noted: "We believe that the legislative statements made prior to the introduction of § 703(h) and dealing directly with seniority systems are entitled to weight in interpreting congressional intent. . . ." Id. at 707 n.56.

\textsuperscript{87} Id. at 710. The Supreme Court granted certiorari and summarily disposed of the case by reversing and remanding for proceedings consistent with Franks. 425 U.S. 987 (1976).

\textsuperscript{88} Jersey Central Power & Light Co. v. IBEW Local Unions, 508 F.2d 687, 706 (3d Cir. 1975), vacated, 425 U.S. 987 (1976).

\textsuperscript{89} Id. at 694.

\textsuperscript{90} Id. at 704-06.

\textsuperscript{91} 401 U.S. 424, 432 (1971).

\textsuperscript{92} 531 F.2d 648 (2d Cir. 1976).
1.34 percent of the total number of police officers. Thereafter, job titles were merged and examinations and training were identical. However, the Police Department adopted an appointment ratio of four men to one woman. Thus, men who had received lower scores than women on identical examinations received earlier appointments to the force.

The Second Circuit ruled that if a female police officer could show that, except for her sex, she would have been hired early enough to accumulate sufficient seniority to withstand current layoffs, such layoff violated Title VII. In other words, the court awarded constructive seniority to these victims of prior discriminatory hiring practices. The court rejected defendants' contention that this award of constructive seniority was precluded by the section 703(h) exemption. Significantly, the court refused to restrict its consideration to the memoranda of April 8, finding the legislative history of this section sufficiently cloudy to warrant reliance on Title VII's general purposes and policies.

In identifying those women eligible for seniority relief, the court did not limit the class to women who applied for or inquired about positions after the effective date of Title VII. Presumably, a woman who initially inquired about employment before 1965, and was subsequently hired, could be awarded seniority retroactive to the date of her initial inquiry. Since the class represented by plaintiffs included only laid off police officers, the court did not address the problem of women who applied for positions, but were never hired because of the restrictive hiring quotas. Nor was it necessary to address the question of relief for women who would have applied for positions, but for their knowledge of those restrictive quotas.

A much broader class of plaintiffs was involved in another Second Circuit decision, Chance v. Board of Examiners. Although the case was brought under section 1981, and not Title VII, the court relied almost exclusively on Title VII case law. This class action attacked layoffs of supervisory personnel in the New York City school system. Plaintiffs were composed of two groups: supervisors who acquired their positions after judicial invalidation of a discriminatory examination which they had taken and failed; and supervisors who also acquired their positions after the examination was invalidated, but who had “failed to apply for or take such supervisory examination

93. Id. at 654. The district court, in a brief memorandum opinion, held that defendants could not have acted illegally in following the mandates of the New York Civil Service Law, which established a bona fide seniority system. Id. at 650.
94. Id. at 654.
95. 534 F.2d 993 (2d Cir.), on rehearing, 534 F.2d 1007 (1976).
because they reasonably believed [it] to be discriminatory and unrelated to job performance.\textsuperscript{96} The court ruled that both groups were entitled to constructive seniority relief, potentially enabling them to withstand the layoffs.

The award of relief to persons who had not taken the examination marked a clear departure from the more confining standards enunciated by other circuits. It should be noted, however, that the decision to award relief to the latter group was made after the Supreme Court's \textit{Franks v. Bowman Transportation Co.}\textsuperscript{97} opinion. Initially the court of appeals had denied relief to the group that had not taken the examination.

\textit{The Supreme Court Cases: Griggs and Franks}


\textit{Griggs v. Duke Power Co.}\textsuperscript{98} was not a seniority case, but presented the Supreme Court with an opportunity to discuss broadly the objectives of Title VII and permissible remedial action. The Court invalidated the company's requirement of a high school diploma and a passing score on a general intelligence test as conditions for employment. Evidence showed that the company had engaged in exclusionary hiring practices before passage of Title VII. Furthermore, the test was shown to have a discriminatory impact on minorities, which could not be justified by a showing of business necessity. The Court held:

\begin{quote}
The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor . . . white employees. . . . Under the Act, practices, procedures, or tests 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.\textsuperscript{99}
\end{quote}

The Supreme Court determined that Congress directed the thrust of the Act to the \textit{consequences} of the employment practices, not simply to the motivation of the employer.\textsuperscript{100} This "consequence test" has subsequently been relied upon by lower courts in finding the existence of employment discrimination. Thus, production of statis-

\begin{footnotes}
96. \textit{Id.} at 1007.
100. \textit{Id.} at 432.
\end{footnotes}
tics showing a disproportionate number of minority employees affected will usually warrant a finding of discrimination.101

The Court discounted language in the statute and in the legislative history which seemingly required a finding of subjective intent to discriminate on the part of the employer before a violation can be found. Section 706(g) appears to require a court determination that the employer or union has intentionally engaged in an unlawful employment practice.102 Similar language regarding intent can be found in the exemption for bona fide seniority systems. Section 703(h) states that the exemption applies unless the differences created by such seniority systems are the result of an intention to discriminate.103 When the Court addressed the seniority issue directly five years later, it once again elected to reach a conclusion that did not square with explicit language in the legislative history.

2. Franks v. Bowman Transportation Co.

The Court finally ruled on the question of retroactive or constructive seniority as an appropriate Title VII remedy in Franks v. Bowman Transportation Co.104 In that case, plaintiffs brought a class action against Bowman and their unions alleging both Title VII and section 1981 violations. The litigation involved several classes of victims, one of which included black applicants for over-the-road (OTR) truck driver positions who were victims of the company’s discriminatory refusal to hire blacks prior to 1972.105 The Fifth Circuit rejected the request for full seniority relief for the OTR applicants, holding that section 703(h) precluded such relief as a matter of law. The court found the seniority system “bona fide” and consequently protected, despite the company’s prior unlawful exclusion of blacks from enjoying the benefits of the seniority system.

The Supreme Court reversed, holding constructive seniority an appropriate relief for these plaintiffs. Finding this relief proper under the remedial sections of the Act, particularly section 706(g), the Court reaffirmed its earlier position: the central purpose of Title VII was “to make persons whole for injuries suffered on account of

105. This class was denominated Class 3. Class 4, to whom the appellate court did grant seniority relief, consisted of company employees who had sought to transfer to OTR positions prior to the same date. In the latter case, the facts were somewhat similar to those of the segregated plant cases: blacks were only hired for menial positions, and not permitted to transfer to the better jobs reserved for whites. Id. at 751-52.
unlawful employment discrimination." The district court had found that Bowman had continued to discriminate after the passage of Title VII. Noting this finding, the Court concluded: "There is no indication in the legislative materials that section 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved—as in the instant case, a discriminatory refusal to hire." In addition to the fact that plaintiffs were victims of post-Act discrimination, the Court characterized their status as "identifiable victims" of illegal hiring practices. Although the Court never defined the term "identifiable victims," the class represented was composed only of persons who had submitted applications for employment or transfer. This may have been a key factor in the Court's characterization.

The Supreme Court took full cognizance of the devastating impact of seniority systems in perpetuating the effects of past discrimination. It recognized that a hiring order, even coupled with back-pay, would be wholly inadequate in achieving the dual congressional objectives of the remedial provisions of Title VII: to forbid discrimination and to compensate its victims without granting preferential treatment to minorities. However, the Court found that the continuing effects of discrimination must be shared among the employees. Thus, the relief sought and granted did not include "bumping" whites who had been hired during the discriminatory period. The Court recognized that an award of retroactive seniority "in no sense constitutes complete relief. . . ." The blacks in their new positions, even with seniority dating back to their original applications, must still compete with a greater number of OTR drivers than they would have in the absence of discrimination.

In expressing its willingness to alter the structure of seniority systems for the purpose of accommodating victims of discrimination, the Supreme Court also maintained that a sharing of the bur-

107. 424 U.S. at 761-62. The Court reached this conclusion after noting the absence of any mention of seniority in the initial House bill or Judiciary Committee Report, as well as the absence of any committee report accompanying the compromise bill which did contain the seniority exemption. The majority opinion quoted at length from the April 8 memoranda but apparently did so more to emphasize the unusual nature of the legislative materials than to consider them as interpretative of the Act.
108. Id. at 779.
109. Section-by-Section Analysis, supra note 12, at 7565. See also notes 18 and 24 supra.
110. 424 U.S. at 777.
111. This has significant effects. The OTR drivers bid individually for upcoming trips on the basis of their seniority. Poplin, supra note 2, at 216-17.
den of past discrimination is "presumptively necessary." Blacks, women, and other minorities, as the most deeply affected victims of discrimination, have shouldered this burden alone in the past. Despite the Supreme Court's direction, recent court decisions modifying employee expectations under seniority systems are shifting only a part of this burden to the white beneficiaries of this discrimination.

**Remedies After Franks: Sharing the Burden**

The Supreme Court's pre-Act/post-Act distinction in Franks may insulate plantwide seniority systems of employers who did not engage in overt discrimination after Title VII became effective. The Franks decision may also signal a narrowing of the Court's earlier pronouncement in Griggs. Griggs had seemed to suggest that seniority systems which perpetuate the effects of pre-Act, as well as post-Act, discrimination could not be considered bona fide. The Court there ruled, "Under the Act, practices, procedures, or tests 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." On the other hand, the Franks opinion never discussed the validity of seniority systems which perpetuate the effects of pre-Act discrimination. In both Griggs and Franks the Court elected to ignore certain portions of the legislative history which could not be reconciled with its conclusion. This may restrict the relevance of these disregarded portions in future cases. But in doing so the Court left unresolved the possibility of broader relief for seniority discrimination through the application of section 1981. As a result, despite this clear mandate to eliminate subtle as well as overt discrimination, lower courts are reluctant to grant full and total relief to minorities.

**Minorities as Victims**

The possibility that minorities with newly acquired seniority may "bump" incumbent employees was not foreclosed by the Court, but

---

112. 424 U.S. at 777.
114. See text accompanying notes 99-103 supra; see also note 107 and accompanying text supra.
115. Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976), and Watkins v. Steelworkers Local 2369, 516 F.2d 41 (5th Cir. 1975) are typical of cases refusing to analyze a section 1981 claim independently of a Title VII claim, where doing so may well have achieved greater relief to the victims of discrimination. See text accompanying notes 78-79, 82 supra.
one court of appeals has refused to allow such relief. The prior reliance of appellate courts on the April 8 statements reveals a predisposition to leave white seniority rights undisturbed whenever possible, thereby giving a broad construction to section 703(h). This respect for seniority rights appears strongest where such rights are acquired under a plantwide seniority system, rather than under a departmental seniority system. That questionable distinction may have been implicitly upheld by the Franks Court since its decision focused on illegal hiring practices, rather than on the meaning of "bona fide" seniority systems. The bona fide seniority system question may resurface in future opinions.

One of the most significant aspects of the Franks decision may be the apparent adoption of an "identifiable victim" requirement. The Court may have coined this term for the simple purpose of narrowing its decision to the facts before it, not establishing a standing requirement. Nevertheless, there is an indication that lower courts are adopting the identifiable victim standard and denying relief to those who fail to meet it. This approach requires two separate factual determinations. First, the courts must determine the scope of the standard. The most likely construction is that it will encompass those who can show that, but for the employer's discriminatory practices, they would have been hired, promoted, or transferred.

Chance v. Board of Examiners, on rehearing after Franks, is an excellent example of this approach. The court there ruled that identifiable victims included those who could show that, because they reasonably believed that the supervisory examination was discriminatory and unrelated to job performance, they failed to apply for or take the examination. Once the examination requirement was invalidated by court order, the victims were promoted. Thereafter, they sought retroactive seniority. Since plaintiffs were already supervisors and had met the other requirements for the position, the court had little difficulty in concluding that most of them could quality for relief. Thus, the court found it reasonable to assume that at the time plaintiffs first became eligible for supervisory posts, they would have applied had it not been for their knowledge of the discriminatory effects of the examination.

The fate of another group of victims in the hands of a court apply-

117. E.g., Nance v. Union Carbide Corp., 540 F.2d 718 (4th Cir. 1976); Schaefer v. Tannian, 538 F.2d 1234 (6th Cir. 1976); Evans v. United Air Lines, Inc., 534 F.2d 1247 (7th Cir. 1976).
118. 534 F.2d 993 (2d Cir.), on rehearing, 534 F.2d 1007 (1976).
Seniority Systems

ing the identifiable victim standard is less clear. This is the class of persons who would have applied for positions, transfers, or promotions but for the employer's reputation and practice of not hiring or promoting blacks or other minorities. Unlike the victims in Chance, this group may never have received the positions, promotions, or transfers they wanted. Admittedly the administrative problems attending a court award to this group are significant, but not impossible to overcome.\textsuperscript{119}

The second decision to be made by trial courts applying an identifiable victim standard is an allocation of the burden of proof. Needless to say, this decision could be critical for both the employer and the alleged victims. Courts may shift the burden differently depending upon the nature of the class seeking relief. Where a plaintiff demonstrates that the employer has engaged in a pattern of discrimination, and that the plaintiff was actually rejected for employment, the burden shifts to the employer to prove that either there were no job openings at the time of plaintiff's application or that plaintiff was not qualified for any openings that did exist. In such cases, employers face an almost impossible burden of proof. However, in cases where the plaintiff's position as an identifiable victim is less certain, he may be forced to establish more before the burden will shift to the defendant.

\textit{White Males as Victims}

Each time a court awards constructive seniority to minorities, it impairs the expectations of white male employees. These policy considerations raised by the \textit{Franks} majority prompted partial dissents by Chief Justice Burger\textsuperscript{120} and Justice Powell.\textsuperscript{121} Both expressed concern over the fate of the white employees whose job expectations would be jeopardized. Even if the whites were not "bumped," the award of retroactive seniority increases the risk of layoff and decreases the opportunity for promotion. Scarce benefits allocated among the most senior employees must now be shared with the discriminatees. Justice Powell assailed the majority approach as inflexible in creating a presumption in favor of retroactive seniority awards.\textsuperscript{122} He stated that the decision, in effect, requires district courts not to weigh the equities in reaching a decision about

\textsuperscript{119} See Note, \textit{Last Hired, First Fired Layoffs and Title VII}, 88 \textsc{Harv. L. Rev.} 1544 (1975).

\textsuperscript{120} 424 U.S. at 780.

\textsuperscript{121} \textit{Id.} at 781.

appropriate remedies, despite a clear congressional mandate to do so.\textsuperscript{123}

White employees whose seniority rights are altered by a court order may well consider themselves victimized by the employer's past discrimination, even if their union was instrumental in perpetuating the discrimination.\textsuperscript{124} Although the \textit{Franks} Court reminded the parties that seniority rights are not indefeasibly vested,\textsuperscript{125} it did not say that whites have no avenue of redress themselves. The increasing frequency of court decisions that impair seniority rights of employees may prompt some whites to seek to intervene in court proceedings where their rights are at stake.\textsuperscript{126} More likely, perhaps, they may file grievances with their unions. When collective bargaining agreements are due to be renewed, they may seek assurances that they will be compensated in the event that constructive seniority is awarded to junior employees or to rejected job applicants.

The temptation may be great for some to disparage the "victim" status of whites who have long enjoyed the benefits of their employers' past discrimination. Most would argue that their potential injury is insubstantial when compared with the often irreparable injury suffered by those denied employment altogether by the employer, or systematically assigned to the most menial, lowest paying jobs. But this alone is no basis for denying relief to whites. If their contractual rights or expectations have been seriously impaired through no fault of their own, they deserve, at least, to have a determination made of the extent of their rights, if any, against their employer or union.

\textit{The Employer, the Union, and the Public}

In light of these adverse effects on white employees, more creative remedies are needed to make the employer or union bear the burden for remedying their past acts of discrimination. Chief Justice Burger, in his brief dissent in \textit{Franks}, suggested a "front pay" award instead of a retroactive seniority award.\textsuperscript{127} This monetary relief would serve the dual purpose of deterring the wrongdoing employer or union as well as protecting the rights of the innocent employees.\textsuperscript{128}

\begin{flushright}
123. \textit{Id.} at 790, 799.
124. The whites themselves may have been guilty of perpetuating the discrimination. The appellate court in \textit{Franks} noted that white OTR drivers refused to share routes with blacks. 495 F.2d at 411.
125. \textit{See} note 12 \textit{supra} and accompanying text.
127. 424 U.S. at 781 (Burger, C.J., dissenting).
128. \textit{Id.}
\end{flushright}
Seniority Systems

The propriety of back pay relief in Title VII cases is well settled since the Supreme Court's 1975 decision in Albemarle Paper Co. v. Moody. Under the broad principles enunciated there a "front pay" award would probably fall within the scope of relief available under section 706(g). Other suggestions for ways to allocate a more equitable share of the burden to the wrongdoers include a special benefit fund. In anticipation of layoffs, the employer might be required to contribute to a fund which would be distributed to laid off employees. This money, when combined with union benefits and unemployment compensation, could minimize the impact of the layoff on both whites and blacks. Where long-term severance is expected, the employer could be required to finance the cost of retraining laid off employees for other occupations.

Another suggestion, one that was ordered by the district court in Watkins, is that the employer simply not lay off the employees. The employer would have to retain both whites, who had sufficient seniority to withstand the layoff before the blacks' seniority was recomputed, and blacks whose new constructive seniority enables them to withstand the layoffs at the expense of the whites. This solution could be disastrous for both the employer and the employees in a marginal financial situation. However, a profitable, multimillion dollar corporation with numerous plants, when considering a temporary layoff at one plant, could sustain the impact of continuing to pay all its employees during the slack period. A district court, with its broad equitable powers under the Act, could naturally take all these factors into account in constructing a remedy.

Much of what has been said about the employer's share of the burden of past discrimination also applies to the unions. Under Title VII they are liable for their own acts of discrimination. To a certain extent, the union's role in establishing discriminatory pre-Act seniority systems should determine their liability under Title VII. Where the union has actually encouraged the employer's discriminatory policies, it cannot complain when the court orders it to share the cost of the award. Absent proof of such subjective intent, the Court's Griggs standard for intent may be sufficient to hold them liable. This might require proof only that the unions acquiesced in the acts whose consequences resulted in discrimination. In instances where union benefits are directly related to their mem-

129. 422 U.S. 405 (1975).
130. Sheeran, supra note 21, at 461-63.
131. Id.
132. See note 16 supra.
bers' seniority, the union should be required to readjust those benefits to eliminate the continuing effects of past discrimination.

Further, it cannot be denied that discrimination has its roots in societal prejudice. Employment discrimination is just one aspect of a pervasive phenomenon that has scarred its victims in every aspect of their lives: in social relationships, housing facilities, and educational opportunities, to name a few. It is perhaps not unfair if the employers and unions attempt to pass on these costs of discrimination in the form of higher prices to the consuming public.

**CONCLUSION**

Although few assumptions are safe in an area as thorny as this, at least one may be ventured with little risk of contradiction: the unions will continue to fight hard in the courts for preservation of seniority systems. Up to this time, the courts have shown no disposition for such sweeping reform as the abolition of seniority systems by judicial fiat. Despite the recognition by some courts that insulation of seniority systems from attack will preclude some victims of discrimination from obtaining relief, and even though some judges have substantially altered seniority expectations of employees, the continued existence of the systems seems assured.

If taken as an index of future court decisions, the Supreme Court's position in *Franks* may be disturbing and ultimately unsatisfying not only for unions and employers, but for discrimination victims as well. The Court seems to labor under the "all or nothing" assumption that there are a limited number of full time positions to be distributed among an always greater number of potential employees. This assumption has implications not only in layoff situations, but in hiring and promotion cases as well.

The prospect of continuing high unemployment is an important reason for considering alternatives to the "all or nothing" approach. The EEOC has suggested reduced workweeks, voluntary early retirement, elimination of overtime work, and work sharing formulas. Implementation of these approaches could open up more positions at higher levels as well as entry levels at which most employees are hired. Minorities, with their newly acquired seniority, could compete with white males for a greater number of promotional opportunities. The impact of a layoff could be greatly reduced as well.

To date the courts have shown little inclination to use their broad powers in fashioning remedies that would be classified as radical by earlier judicial standards. More creative solutions will have to come

---

from the courts if Title VII objectives are to be achieved. Reliance upon legislative memoranda as a basis for denying relief to victims of discrimination simply does not square with the broad objectives of the Act. Formulating overly restrictive standards or imposing impossible burdens of proof in defining victims of discrimination is equally repugnant. And adoption of a pre-Act/post-Act standard for relief where the effects of past discrimination are carried forward into the present further frustrates achievement of Title VII objectives.

Discrimination on the basis of race, religion, sex, or national origin has been outlawed for more than 100 years. Refusal to analyze a claim under the older Civil Rights Act (section 1981) independently of the new Act, when seniority systems are challenged, is inconsistent with court decisions that recognize Title VII as a supplemental avenue of relief. It was not intended to repeal the earlier Act, but to increase opportunities for victims of discrimination to seek redress.

One final consideration merits discussion. While a court should never lose sight of the terrible scars borne by victims of past discrimination, at the same time it should be acutely aware of the devastating effects of racial strife. It seems likely that any significant interference with the present structure of seniority systems will occasion further bad feelings between organized labor and minority employees. This alone is not a sufficient reason to reject a remedy, and warnings to the court that disruptive strikes or racial violence may break out as a result of the court's order should not prevent the court from imposing a necessary and just remedy. But the court might, when tempted to impose an order of far-reaching effect for the litigants, consider the possibility of allowing the parties to work out their own solution. The prospect of an unpalatable court order may be a sufficient stimulus. The court could of course retain jurisdiction while the parties attempted a settlement. The valuable role of an arbitrator could be considered as well.134

When cases do arise, as they will, where all else fails and the court is the final arbiter, the decisions thus far under Title VII will not pose a bar to a more creative or far-reaching award of relief. The courts have erected barriers, but they are not insurmountable. The Supreme Court rendered a careful opinion in Franks addressed to the facts of the case. That decision should not be read to preclude relief to victims of pre-Act discrimination, under either Title VII or

section 1981. Nor should it be read to require identifiable victims in all cases to be the beneficiaries of the relief being sought. Rather, it should be read as a mandate that minorities and whites, unions and employers alike must share the burden of past discrimination in as just a manner as a court can devise, and that continuing scrutiny of seniority systems is crucial where they may harbor, however secretly, the vicious effects of that discrimination.

CAROL L. McCULLY

AUTHOR'S NOTE

After this article went to press, the United States Supreme Court announced its decision in International Brotherhood of Teamsters v. United States, 45 U.S.L.W. 4506 (May 31, 1977). The United States brought a “pattern or practice” suit against a company found to have discriminated against blacks and Spanish-surnamed truck-drivers, hiring them only as local drivers while the OTR positions all went to whites. This author, in urging that a distinction between plantwide and departmental seniority systems is unfounded, never expected the Court to express its agreement by effectively upholding the latter type and overturning the unanimous conclusion of the appellate courts, the EEOC, and legal scholars. The Court ruled that maintaining separate seniority rosters for local and OTR drivers was not unlawful, despite its “locking-in” effect on minorities. The Court also ruled definitively that no seniority relief would be available to victims of pre-Act discrimination. The only respite afforded victims of discrimination from the devastating impact of the decision is the Court’s ruling that failure to apply for a “white-only” job was not a bar to an award of retroactive seniority. A person who could show that he was a potential victim of unlawful discrimination (e.g., he would have applied but for the knowledge of the futility of such an effort) will be treated as an applicant, and thus presumptively entitled to relief. The burden would then shift to the employer in the same manner as when a rejected applicant has shown the employer’s practice of discrimination.