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Title VII - Seniority - The Relevant Scope of Inquiry for Determining the Legality of a Seniority System

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RECENT DEVELOPMENT

Title VII—Seniority—The Relevant Scope of Inquiry for Determining the Legality of a Seniority System

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964,¹ which became effective on July 2, 1965, was enacted to eliminate artificial barriers to employment that historically have deprived minorities and women of employment opportunities. Section 703 of the Act thus makes discrimination on the basis of race, color, religion, sex, or national

1. 42 U.S.C. §§ 2000e to 2000e-15 (1970), as amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V 1975)).

origin an unlawful employment practice.² In order to obtain relief from a discriminatory employment practice, an aggrieved party must demonstrate that the defendant intentionally engaged in the unlawful practice.³ Because the broad language of sections 703(a), 703(c), and 706(g) fails to define the terms "discriminate" and "intentionally," the effectiveness of title VII in eliminating artificial employment barriers depends upon the interpretation of these terms by the federal courts.⁴ In its first major title VII case, *Griggs v. Duke Power Co.*,⁵ the United States Supreme Court rejected the argument that a redressable violation of title VII requires a demonstration that the defendant had a subjective intent to discriminate,⁶ thereby establishing the effect of an employment practice on the employment opportunities of minorities and women as the important inquiry.⁷ The Court held that a facially neutral employment practice depriving minorities and women of employment opportunities at a rate higher than the rate at which it deprives other employees constitutes a redressable violation of title VII.⁸

A seniority system, although neutral in its operation and in its intent, can have the effect of depriving minorities and women of employment opportunities at a rate higher than the rate at which

2. Section 703 of the Act provides:

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

.....

(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.

.....

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

.....

(2) to limit, segregate, or classify its membership . . . [on the basis of an] individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (Supp. V 1975).

3. Section 706(g) of the Act provides: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate." 42 U.S.C. § 2000e-5(g) (Supp. V 1975).

4. For a thorough discussion of the first ten years of federal court interpretation of title VII, see Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 St. Louis L.J. 225 (1976).

5. 401 U.S. 424 (1971).

6. *Id.* at 432.

7. The Court stated: "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Id.* (emphasis in Court's opinion).

8. The Court stated: "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." *Id.* at 430.

it deprives other individuals.⁹ A seniority system with such effect would be unlawful according to *Griggs*. Section 703(h)¹⁰ of title VII, however, immunizes "bona fide" seniority systems from illegality. Because neither the language nor legislative history of title VII defines the term "bona fide," its definition has depended upon federal court interpretation. The District Court for the Eastern District of Virginia in *Quarles v. Phillip Morris, Inc.*¹¹ suggested that section 703(h) did not protect a seniority system that perpetuated the effects of past discrimination. Other federal courts adopted *Quarles'* theory of discrimination to invalidate facially neutral seniority systems. Two recent United States Supreme Court decisions, *International Brotherhood of Teamsters v. United States*¹² and *United Air Lines, Inc. v. Evans*,¹³ undermine the theory of discrimination enunciated in *Quarles* and followed by courts in other circuits. The purpose of this Recent Development is to examine the impact of these two decisions on the meaning of the term "bona fide" and to reassess the relevant scope of inquiry for determining the legality of a seniority system.

II. LEGAL BACKGROUND

A. *The Legislative History of Section 703(h)*

The Civil Rights Act of 1964 as originally introduced in the House of Representatives contained no reference to title VII's effect on seniority systems.¹⁴ Opponents of the bill both in the House

9. For the purposes of this Recent Development, a seniority system can be defined as a set of rules by which scarce employment opportunities are allocated on a competitive basis between employees. An example of a competitive seniority system is a departmental seniority system, in which opportunities are allocated on the basis of time spent in a given department. An individual who transfers to a new department forfeits for competitive purposes all of the seniority accumulated in the old department and enters the new department with no seniority. Benefits such as pension rights and vacations generally are not allocated on a competitive basis, but on the basis of total time with the employer. See W. GOULD, *BLACK WORKERS IN WHITE UNIONS* 68-69 (1977); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1263 (1967).

10. Section 703(h) provides:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(h) (Supp. V 1975).

11. 297 F. Supp. 505 (E.D. Va. 1968).

12. 97 S. Ct. 1843 (1977).

13. 97 S. Ct. 1885 (1977).

14. See Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1608 (1969).

Judiciary Committee and on the House floor objected that title VII would impair existing seniority rights, and supporters of title VII did not controvert these assertions.¹⁵ Without debate the House defeated an amendment¹⁶ proposed by title VII opponents that would have assured the protection of existing seniority rights.¹⁷

In the Senate title VII supporters brought the bill directly to the Senate floor.¹⁸ Consequently, no Senate committee report exists from which legislative intent can be ascertained.¹⁹ Title VII opponents in the Senate revived their House counterparts' fear that title VII would impair existing seniority rights. During a debate on April 8, 1964, Senator Clark responded to this fear by introducing into the record three documents²⁰ to establish that title VII would not affect

15. *Id.*

16. The amendment provided:

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

110 CONG. REC. 2727-28 (1964).

17. See Cooper & Sobol, *supra* note 14, at 1608-09.

18. See Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 443-44 (1966).

19. See Cooper & Sobol, *supra* note 14, at 1609.

20. The first document, Senator Clark's responses to questions of Senator Dirksen, provided:

Question. 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.

Question. If an employer is directed to abolish his employment list because of discrimination what happens to seniority?

Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists.

110 CONG. REC. 7217 (1964).

The second document, a memorandum prepared by Senators Clark and Case, the bipartisan captains of the bill in the Senate, provided:

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 fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)

Id. at 7213.

existing seniority rights.²¹ A bipartisan group prepared a new bill containing section 703(h),²² which passed the House and Senate with no further debate on the seniority issue.²³

Several commentators interpreting the legislative history of section 703(h) have indicated that Congress intended to protect all seniority rights that accrued before the effective date of title VII.²⁴ One commentator has observed, however, that Congress could not have intended to protect all seniority rights accruing before July 2, 1965, because section 703(h) exempts only bona fide seniority systems from the coverage of the Act.²⁵ Another suggests that the conclusion one draws from the legislative history of section 703(h) will depend upon whether one believes that the application of a neutral seniority system can constitute discrimination.²⁶ Reliance upon the legislative history of section 703(h) to determine a seniority system's legality thus produces different results because the ambiguity of the history invites different interpretations.

The third document, a Justice Department memorandum, provided:

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 contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

Id. at 7207.

21. See Cooper & Sobol, *supra* note 14, at 1609.

22. The group presented the new bill to the Senate on May 26, 1964.

23. See Cooper & Sobol, *supra* note 14, at 1610-11.

24. See, e.g., Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. INDUS. & COM. L. REV. 473, 478 (1966); Note, *The Civil Rights Act of 1964: Racial Discrimination by Labor Unions*, 41 ST. JOHN'S L. REV. 58, 78 (1966).

25. See GOULD, *supra* note 9, at 70.

26. See Cooper & Sobol, *supra* note 14, at 1611.

B. *The Judicial Interpretation of Section 703(h) and Congressional Approval of This Interpretation*

Quarles v. Phillip Morris, Inc. presented the first challenge to a departmental seniority system under title VII.²⁷ The defendant company in *Quarles* was organized into four departments, each having a job progression ladder and seniority roster. Because of past discriminatory hiring practices, blacks were concentrated in two departments generally less desirable than the predominantly white departments. Although prior to 1961 blacks could not transfer to the more desirable departments, in 1961 and 1963 the company and union established systems enabling a limited number of blacks to transfer to predominantly white departments. These limited transfer agreements, however, did not eliminate the racial character of the departments created by the company's discriminatory hiring policy. The district court found that because the company had discontinued its discriminatory hiring practices before January 1, 1966,²⁸ plaintiffs no longer were entitled to relief from those practices.²⁹ Plaintiffs contended, however, that blacks hired before January 1, 1966, continued to be deprived of employment opportunities because of their race.³⁰ According to plaintiffs, blacks were deterred from transferring to the more desirable departments because they would have to forfeit their accumulated seniority. Plaintiffs observed that blacks who did transfer continued to be disadvantaged because once in the new department they were forced to compete with whites on the basis of departmental seniority that they had been unable to accumulate because of the company's past discriminatory practices.³¹ Plaintiffs further argued that a black employee would never be able to attain all the employment opportunities enjoyed by white employees hired at the same time who had not been discriminatorily placed in the less desirable departments.³² Plaintiffs therefore alleged that the seniority system violated section 703 because the system perpetuated the effects of past racial discrimination. Defendant maintained that the seniority system

27. 279 F. Supp. 505 (E.D. Va. 1968) (Circuit Judge Butzner sitting by designation). For commentary on *Quarles*, see GOULD, *supra* note 9, at 74-75; Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications*, 47 TEX. L. REV. 1039 (1969); Comment, 46 N.C.L. REV. 891 (1968).

28. 279 F. Supp. at 508.

29. No complaint alleging that the hiring policy was an unlawful employment practice had been filed with the EEOC within the required time period.

30. 279 F. Supp. at 514.

31. *Id.*

32. *Id.*

awarded employment opportunities on a nondiscriminatory basis and, relying on the legislative history of section 703(h),³³ contended that the present consequences of past discrimination fall outside the coverage of title VII.³⁴

The district court³⁵ quoted the legislative history relied upon by defendant and observed that this material did not address the effect of section 703(h) on departmental seniority systems. The court noted that references to seniority in the legislative history suggested that Congress included section 703(h) in title VII merely to ensure that innocent employees would not be deprived of their accumulated seniority.³⁶ The court thus determined that the legislative history indicated that a discriminatory seniority system established before the effective date of title VII would not be "bona fide" under section 703(h).³⁷ The court relied on the language of section 703(h) and the general purpose of title VII to support its interpretation of the section's legislative history.³⁸ The court stated that lack of discrimination is one characteristic of a bona fide seniority system³⁹ and then held that a bona fide seniority system cannot have its "genesis" in discrimination.⁴⁰

According to the court the issue also could be resolved by the proviso in section 703(h).⁴¹ The court held that the present differences between the employment opportunities for blacks and whites allocated by defendant's seniority system violated title VII because they arose from an intention to discriminate against blacks in hiring prior to January 1, 1966.⁴² The court ordered the company to allow qualified black employees hired before January 1, 1966,⁴³ to transfer

33. The defendants quoted the documents presented in note 20 *supra*. *Id.* at 516.

34. *Id.* at 515.

35. In the text of its opinion the district court stated that it had "freely drawn" from the analysis in Note, *supra* note 9. *Id.* at 510.

36. *Id.* at 516.

37. *Id.* at 517. The legislative history does not support this conclusion, but neither does it support the contrary conclusion. The Court concluded its observations of the legislative history in the following language, which has been quoted in many cases since *Quarles*: "It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." *Id.* at 516.

38. *Id.* at 517.

39. *Id.*

40. *Id.*

41. *Id.* The proviso provides: "provided that such differences are not the result of an intention to discriminate." 42 U.S.C. § 2000e-2(h) (1970).

42. 279 F. Supp. at 517-18.

43. With respect to blacks hired after January 1, 1966, the court commented: "The departmental seniority status of Negroes hired after January 1, 1966 is predicated on a *bona fide* seniority system that did not result from an intention to discriminate on the ground of race." *Id.* at 520.

to predominantly white departments and fill vacancies on the basis of their employment seniority. Blacks who obtained positions in the more desirable departments would be allowed to compete for employment opportunities on the basis of employment seniority.⁴⁴

Quarles left open the question whether a seniority system is illegal if it perpetuates the effects of an act of discrimination that occurred prior to July 2, 1965.⁴⁵ In *Local 189, United Papermakers and Paperworkers v. United States* the Fifth Circuit addressed the issue and held that a seniority system with such characteristic violates title VII.⁴⁶ The defendant company in *Local 189* had maintained segregated lines of job progression and had placed blacks in the less desirable line. Although the lines were merged before the effective date of title VII, blacks continued to be treated unfavorably because they occupied the lower levels of the single progression line. The company's abolishment of the discriminatory practice before the effective date of title VII was irrelevant to Judge Wisdom, who agreed with *Quarles'* interpretation of the legislative history of title VII⁴⁷ and its evaluation of the nature of a bona fide seniority system.⁴⁸ Judge Wisdom, in addition to accepting *Quarles'* definition of discrimination, enunciated the Fifth Circuit's interpretation of the term "intentionally" in section 706(g). The court held that to satisfy the intent requirement a plaintiff must show only that the defendant intended to adopt the employment practice, not that he subjectively intended to discriminate.⁴⁹ The court inferred the intent necessary to satisfy section 706(g) from defendant's continuation of the employment practice after its discriminatory propensity had become apparent.⁵⁰

The Second Circuit, which adopted *Quarles'* theory of discrimination in *United States v. Bethlehem Steel Corp.*,⁵¹ sought to assure

44. *Id.* at 521.

45. See GOULD, *supra* note 9, at 75.

46. 416 F.2d 980 (1969), *cert. denied*, 397 U.S. 919 (1970).

47. *Id.* at 987-88.

48. See *id.* at 994-95. *Local 189* is not the only Fifth Circuit case that expresses approval of *Quarles*. See, e.g., *Resendis v. Lee Way Motor Freight, Inc.*, 505 F.2d 69 (5th Cir. 1974), *cert. denied*, 425 U.S. 991 (1976); *Herrera v. Yellow Freight Sys., Inc.*, 505 F.2d 66 (5th Cir. 1974), *cert. denied*, 425 U.S. 991 (1976); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

49. 416 F.2d at 996.

50. *Id.* at 997.

51. 446 F.2d 652 (2d Cir. 1971). Although on appeal liability was not at issue, the court stated that it approved the district court's application of the *Quarles* theory of discrimination. The Second Circuit said that "[t]he pervasiveness and longevity of the overt discriminatory hiring and job assignment practices . . . compel the conclusion that the present seniority and transfer provisions were based on past discriminatory classifications." *Id.* at 659. Another Second Circuit case approving *Quarles* is *Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976).

that black employees would not be deterred from transferring to formerly white departments. The court found that the company's seniority and transfer systems in two ways deterred such transfers. First, blacks hesitated to transfer to the predominantly white departments because they would lose their accumulated seniority and in many cases would suffer a wage reduction.⁵² Second, blacks who transferred to more desirable departments thereafter would be forced to compete on the basis of departmental seniority that they had been unable to accumulate.⁵³ To eliminate the deterrent effect of the seniority system the court ordered the company to pay transferees a wage at least as great as the wage they received in their old jobs and to allow transferees to compete for promotions in the new departments on the basis of employment seniority rather than departmental seniority.⁵⁴

Congress indicated its approval of the *Quarles* line of cases when it enacted the Equal Employment Opportunity Act of 1972,⁵⁵ which amended the Civil Rights Act of 1964. A Senate report from the Committee on Labor and Public Welfare⁵⁶ and a House report from the Committee on Education and Labor⁵⁷ both found the concept of discrimination much more complex than had been imagined in 1964.⁵⁸ Both reports cited *Quarles* and *Local 189* with apparent

52. 446 F.2d at 658.

53. *Id.*

54. *Id.* at 666. The Fourth, Sixth, Eighth, and Ninth Circuits also have approved *Quarles*' theory that a seniority system perpetuating the effects of past discrimination violates title VII. See, e.g., *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1977); *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *vacated and remanded*, 97 S. Ct. 2669 (1977); *United States v. N.L. Indus., Inc.*, 479 F.2d 354 (8th Cir. 1973); *United States v. Navajo Freight Lines, Inc.*, 525 F.2d 1318 (9th Cir. 1975). The Seventh and Tenth Circuits have suggested their approval of *Quarles*. See, e.g., *Bowe v. Colgate, Palmolive Co.*, 489 F.2d 896 (7th Cir. 1973); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). Commentators also have expressed their approval of this element of *Quarles*. See, e.g., GOULD, *supra* note 9; Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268 (1969); Cooper & Sobol, *supra* note 14; Fine, *Plant Seniority and Minority Employees: Title VII's Effect on Layoffs*, 47 U. COLO. L. REV. 73 (1975); Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 U.C.L.A. L. REV. 177 (1975); Ross, *Reconciling Plant Seniority with Affirmative Action and Anti-Discrimination*, 28 N.Y.U. CONF. LAB. 231 (1976).

55. Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V 1975)).

56. S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971).

57. H.R. REP. NO. 238, 92d Cong., 1st Sess. 8 (1971).

58. The Senate committee remarked:

Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the litera-

approval, and the Senate report noted the works of several commentators approving *Quarles*.⁵⁹ The House report commented that *Local 189* had made a significant contribution toward the elimination of employment discrimination.⁶⁰ The floor managers of the 1972 amendment placed into the *Congressional Record* an analysis of all the sections of the bill prepared by the Conference Committee of the House and Senate,⁶¹ which stated that unless otherwise indicated existing title VII case law would remain in effect.⁶² Nothing in the 1972 amendment indicated the invalidity of the judicial interpretation of section 703(h).

In *Franks v. Bowman Transportation Co.*,⁶³ the first United States Supreme Court decision interpreting section 703(h), the Court held that the section does not bar the award of retroactive seniority as a remedy under section 706.⁶⁴ The Court stated that the purpose of section 703(h) is to determine whether an unlawful employment practice exists when a seniority system is alleged to perpetuate the effects of discrimination that occurred before the effective date of title VII.⁶⁵ Resolution of the issues in *Franks* did not compel the Court to decide whether a seniority system with that effect is unlawful. At that time, however, lower federal courts, Con-

ture on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements. In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful.

S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971).

59. *Id.* at n.1; H.R. REP. NO. 238, 92d Cong., 1st Sess. 8 n.2 (1971).

60. H.R. REP. NO. 238, 92d Cong., 1st Sess. 13 (1971).

61. 118 CONG. REC. 7166, 7563 (1972).

62. The analysis provided: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." *Id.* at 7564. More specifically, in discussing § 706(a) of the Act the analysis stated that "[t]he unlawful employment practices encompassed by sections 703 and 704, which were enumerated in 1964 in the original Act, and as defined and expanded by the courts remain in effect." *Id.*

63. 424 U.S. 747 (1976).

64. *Id.* at 762.

65. The Court said:

[W]hatever the exact meaning and scope of § 703(h) in light of its unusual legislative history and the absence of the usual legislative materials . . . it is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act.

Id. at 761.

gress, and commentators agreed that a seniority system perpetuating the effects of past discrimination violated title VII.

III. TWO RECENT UNITED STATES SUPREME COURT DECISIONS AND LOWER COURT RESPONSES TO THESE DECISIONS

A. *United Air Lines, Inc. v. Evans*

In *United Air Lines, Inc. v. Evans*⁶⁶ the Supreme Court faced the issue whether a seniority system that perpetuates the effects of a past discriminatory practice violates title VII. The plaintiff in *Evans* was a female flight attendant forced to resign in 1968 because the defendant company refused to allow female flight attendants to continue employment after they married. In 1971 the Seventh Circuit held that the company's marriage policy violated title VII.⁶⁷ Defendant rehired plaintiff in 1972, but refused to credit her with seniority acquired before her 1968 discharge.⁶⁸ Plaintiff contended that the seniority system constituted a present, continuing violation of title VII because it treated her less favorably than males hired between her 1968 discharge and her 1972 reemployment, thereby perpetuating the effects of the company's past discriminatory policy.⁶⁹ The United States District Court for the Northern District of Illinois dismissed plaintiff's complaint,⁷⁰ but the Seventh Circuit Court of Appeals reversed.⁷¹ The Supreme Court held that the district court properly had dismissed plaintiff's complaint.⁷²

Writing for the Court, Justice Stevens conceded that some males with less total service with the defendant company than the plaintiff nevertheless had greater seniority.⁷³ Justice Stevens observed, however, that females hired between 1968 and 1972 also had

66. 97 S. Ct. 1885 (1977).

67. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). The plaintiff in *Evans* was not a party to the *Sprogis* litigation, nor was she included in the group reinstated because of that decision. Plaintiff failed to file a timely charge based on her discharge with the Equal Employment Opportunity Commission (EEOC). Consequently, an action based on her discharge was time barred. 97 S. Ct. at 1887-88.

68. Plaintiff was rehired on February 16, 1972, but did not file charges with the EEOC until February 21, 1973. The Court held that plaintiff could not claim jurisdiction based on the defendant's initial refusal to credit her with previously acquired seniority because she failed to file a timely charge with the EEOC. 97 S. Ct. at 1888 n.9.

69. *Id.* at 1888.

70. 12 F.E.P. 287 (1975).

71. 534 F.2d 1247 (7th Cir. 1976). For commentary on the court of appeals resolution of this case, see 53 CHI.-KENT L. REV. 520 (1976).

72. 97 S. Ct. at 1888.

73. *Id.*

greater seniority than plaintiff.⁷⁴ In addition, he noted that all employees whose employment had been discontinued for discriminatory or nondiscriminatory reasons and who later had been rehired also had been denied previously acquired seniority.⁷⁵ Justice Stevens thus found that plaintiff's complaint failed to allege that the seniority system treated similarly situated males and females differently.⁷⁶ Although the Court agreed that the seniority system perpetuated the effects of a past discriminatory policy, it stated that because plaintiff failed to file a timely charge with the Equal Employment Opportunity Commission, the defendant was entitled to treat the past policy as lawful.⁷⁷ Emphasizing that the seniority system was neutral in its operation,⁷⁸ the Court held that the mere fact that the seniority system perpetuates the effects of a past discriminatory act does not establish a violation of title VII.⁷⁹ In a footnote Justice Stevens attempted to distinguish the *Quarles* line of cases by observing that plaintiff in *Evans* did not allege that a departmental seniority system deterred the exercise of rights guaranteed by title VII.⁸⁰

Justice Stevens continued by stating that section 703(h) supplied alternative grounds for dismissing plaintiff's complaint.⁸¹ Although recognizing that section 703(h) does not bar suits alleging a discriminatory seniority system,⁸² the Court held that no actionable claim exists when a neutral seniority system merely perpetuates the effects of a past act of discrimination that has no "present legal significance."⁸³ The Court observed that a contrary view would allow claims otherwise barred by limitation periods to be revived by a claim for seniority credit, thus defeating the purpose of section 703(h) and provisions in title VII that limit the time within which actions must be brought.⁸⁴

74. *Id.*

75. *Id.*

76. *Id.* at 1888-89.

77. The Court stated:

A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

Id. at 1889.

78. *Id.*

79. *Id.*

80. *Id.* at n.10.

81. *Id.* at 1890.

82. *Id.*

83. *Id.*

84. *Id.* Justice Marshall, with whom Justice Brennan joined, dissented. Marshall con-

B. *International Brotherhood of Teamsters v. United States*

The Court again examined section 703(h) in *International Brotherhood of Teamsters v. United States*,⁸⁵ in which the government brought suit against a company and a union,⁸⁶ alleging that the company's hiring, assignment, and promotion policies discriminated against blacks and Spanish-surnamed persons⁸⁷ and that the seniority system in the collective bargaining agreement between the company and the union discriminated with respect to promotions and transfers.⁸⁸ The government claimed that, although the seniority system deterred all employees from transferring to line driver jobs, blacks and Spanish-surnamed persons suffered more than others because they discriminatorily had been denied the opportunity to become line drivers when initially employed.⁸⁹ The government also contended that a black or Spanish-surnamed individual having to surrender his seniority in order to gain a line driver position would never attain the employment opportunities he would have enjoyed in the absence of discrimination,⁹⁰ and that a seniority system perpetuating the effects of either post-Act or pre-Act discrimination could never be bona fide under section 703(h).⁹¹ Defendants responded that the seniority system, when considered in light of its history, intent, application, and the circumstances surrounding its creation and maintenance, was bona fide within the meaning of section 703(h),⁹² which immunizes seniority systems that merely

tended that the relevant consideration was that "[b]ut for her sex, [plaintiff] presently would enjoy all the seniority rights that she seeks through this litigation." *Id.* at 1890. Marshall also asserted that § 703(h) does not validate a seniority system that perpetuates the effects of past discrimination. *Id.* at 1890.

85. 97 S. Ct. 1843 (1977).

86. Section 707(a), which allows the government to bring title VII suits, provides: Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of rights herein described, the Attorney General may bring a civil action in the appropriate district court.

42 U.S.C. § 2000e-6(a) (Supp. V 1975).

87. The most desirable jobs with the defendant company were line driver positions, which constituted a separate bargaining unit within the company. The generally less desirable, lower paying jobs were those in city operations and servicemen positions. The government supplied statistics demonstrating that only 0.4% of the line drivers were black and 0.3% were Spanish-surnamed persons. Most blacks (83%) and Spanish-surnamed persons (78%) who worked for the company held jobs in city operations and servicemen positions.

88. 97 S. Ct. at 1851.

89. *Id.* at 1859. Other workers when initially hired either did not seek employment as line drivers or were denied such employment for nondiscriminatory reasons.

90. *Id.*

91. *Id.* at 1860.

92. *Id.* at 1859.

perpetuate the effects of past discrimination.⁹³ The United States District Court for the Northern District of Texas held that the company had engaged in an unlawful pattern of discrimination and that the union also had violated title VII by aiding the company in its maintenance of a seniority system that deterred blacks and Spanish-surnamed persons from exercising rights guaranteed by the Act.⁹⁴ The Fifth Circuit agreed with the district court conclusions, but held that the district court prescribed inadequate relief.⁹⁵

The primary issue before the Supreme Court was whether a seniority system perpetuating the effects of past discrimination violates title VII.⁹⁶ Observing that the company had discriminated both before and after the effective date of the Act, Justice Stewart focused first on post-Act discrimination and reasoned that *Franks* entitled those discriminated against after the effective date of title VII to retroactive seniority regardless of the legality of the seniority system.⁹⁷ The lower court's injunction against the union, however, forced the Court to determine the legality of the seniority system. The Court relied upon *Evans* to hold that a seniority system does not violate title VII merely because it perpetuates the effects of post-Act discrimination.⁹⁸

In determining whether the seniority system was illegal because it perpetuated the effects of pre-Act discrimination, the Court recognized that the system would be illegal according to *Griggs* unless immunized by section 703(h).⁹⁹ Justice Stewart conceded that the seniority system distributed employment opportunities in a disproportionate manner,¹⁰⁰ but after considering the language of section 703(h) and its legislative history,¹⁰¹ he concluded that Congress nevertheless had extended a degree of immunity to otherwise neutral

93. *Id.*

94. *United States v. T.I.M.E.-D.C., Inc.*, 6 F.E.P. 690 (1972).

95. 517 F.2d 299 (5th Cir. 1975).

96. Another issue with which the Court dealt was raised by defendant's allegation that the United States had failed to establish a *prima facie* case of discrimination because statistics formed the hulk of the government's evidence. The Court held that the evidence was adequate to establish a *prima facie* case of a pattern or practice of discrimination. 97 S. Ct. at 1854-58.

97. *Id.* at 1860.

98. *Id.* at 1861 n.30.

99. *Id.* at 1862.

100. *Id.*

101. See notes 13-22 *supra* and accompanying text. For a discussion of the legislative history surrounding the 1972 amendments, see notes 63-70 *supra* and accompanying text. After commenting that the legislative history was subject to different interpretations, the Court stated that the views of the 1972 Congress were unimportant in determining the intent of the 1964 Congress. 97 S. Ct. at 1864 n.39.

seniority systems.¹⁰² The Court rejected the government's contention that a bona fide seniority system must not perpetuate the effects of pre-Act discrimination because this proposition would "disembowel" section 703(h).¹⁰³ The Court observed that section 703(h) protects only seniority systems that are bona fide and do not intentionally discriminate on the basis of race.¹⁰⁴ Although the Court cited *Quarles*, *Local 189*, and *Bethlehem Steel* as strong support for the government's proposition, it stated that:

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 pre-Act discrimination cannot be bona fide if an intent to discriminate entered into *its very* adoption.¹⁰⁵

Justice Stewart commented that Congress had not intended to invalidate the exercise of vested seniority rights at the expense of pre-Act discriminatees.¹⁰⁶

Examining the challenged seniority system, the Court emphasized the government's concession that the seniority system had a genesis free from discrimination and that it had no illegal purpose in its creation or maintenance.¹⁰⁷ The Court also observed that the seniority system's deterrent effect did not discriminate against blacks and Spanish-surnamed employees because it deterred equally all employees within the system.¹⁰⁸ The Court found that the separate bargaining unit for line drivers was rational, consistent with industry practice, and consistent with NLRB decisions.¹⁰⁹ The Court thus concluded that the seniority system was bona fide and protected by section 703(h).¹¹⁰

Justice Marshall, joined by Justice Brennan, challenged the Court's conclusion that section 703(h) might immunize a seniority

102. *Id.* at 1863.

103. *Id.*

104. *Id.*

105. *Id.* at 1860 n.28 (emphasis added).

106. *Id.* at 1864.

107. *Id.* at 1865.

108. *Id.*

109. *Id.*

110. *Id.* The Court continued in its opinion to resolve issues of individual relief to which post-Act discriminatees were entitled. In resolving one issue the Court held that an individual's failure to apply for a line driver's position did not foreclose the possibility of his receiving retroactive seniority. The Court recognized that the company's notorious discrimination may have deterred individuals from making what they thought to be useless applications. The Court, however, stated that an individual who did not apply has a heavy burden of proof. *Id.* at 1868-73.

system even though it perpetuates past discriminatory practices.¹¹¹ Justice Marshall asserted that the legislative history of section 703(h),¹¹² subsequent lower federal court¹¹³ and administrative interpretations of the section,¹¹⁴ and subsequent legislative developments¹¹⁵ controverted the Court's conclusion. Despite the Court's conclusion, Justice Marshall suggested that the *Quarles* line of cases could survive *Teamsters* because they could be distinguished on their facts.¹¹⁶

C. Lower Federal Court Responses to *Evans and Teamsters*

Several lower federal courts have followed Justice Marshall's suggestion and have attempted to distinguish *Teamsters* from cases before them for review.¹¹⁷ In *Younger v. Glamorgan Pipe & Foundry Co.*¹¹⁸ the Fourth Circuit vacated and remanded a district court decision, instructing the lower court to consider *Franks* and *Teamsters*. The court informed the lower court that discrimination in a company's hiring practices constitutes a relevant consideration in determining the legality of a seniority system.¹¹⁹ In *James v. Stockham Valve & Fitting Co.*¹²⁰ Judge Wisdom instructed the district court to consider the "totality of circumstances" in determining the legality of the challenged seniority system. According to Judge Wisdom, a bona fide seniority system must satisfy four criteria. First, to the extent the system has a deterrent effect, it must deter equally all employees within the system. Second, seniority units composing separate bargaining units must be rational and in

111. *Id.* at 1875.

112. *Id.* at 1882.

113. *Id.* at 1876 n.2.

114. *Id.* at 1877 n.4.

115. *Id.* at 1883-84.

116. Justice Marshall said:

I agree with the Court, . . . that the results in a large number of the *Quarles* line of cases can survive today's decision. That the instant seniority system "is rational, in accord with the industry practice, . . . consistent with NLRB precedents[,] . . . did not have its genesis in racial discrimination, and . . . was negotiated and has been maintained free from any illegal purposes," . . . distinguishes the facts of this case from those in many of the prior decisions.

Id. at 1877 n.3.

117. *James v. Stockham Valves & Fitting Co.*, 46 U.S.L.W. 2164 (5th Cir. Oct. 4, 1977); *Younger v. Glamorgan Pipe & Foundry Co.*, No. 76-2278 (4th Cir. Sept. 23, 1977); *Chrapliwy v. Uniroyal, Inc.*, 15 F.E.P. 822 (N.D. Ind. Sept. 9, 1977); *Myers v. Gilman Paper Corp.*, 15 F.E.P. 680 (5th Cir. July 29, 1977).

118. No. 76-2278 (4th Cir. Sept. 23, 1977). Judge Butzner, the author of *Quarles*, sat on the three judge panel vacating the lower court decision.

119. *Id.* at 7.

120. 46 U.S.L.W. 2164 (5th Cir. Oct. 4, 1977).

conformance with industry standards. Third, the seniority system must not have had its genesis in racial discrimination, and fourth, the system must not have been negotiated or maintained for an illegal purpose.¹²¹ Distinguishing *Teamsters*, Judge Wisdom observed that in *James* the plaintiff did not concede that the genesis of the seniority system was free from racial discrimination.¹²² Judge Wisdom noted the prevalence of segregation in the South at the time of the adoption of the seniority system¹²³ and instructed the lower court in determining the validity of the seniority system to pay careful attention to the negotiations of the system and employment practices underlying these negotiations.¹²⁴ To determine the vitality of *Quarles* and the limitations on *Teamsters*, the relevance of the facts upon which these lower federal courts have attempted to distinguish *Teamsters* must be determined.

IV. THE RELEVANT SCOPE OF INQUIRY FOR DETERMINING THE LEGALITY OF A SENIORITY SYSTEM

A. *The Effect of Teamsters on the Quarles Method of Inquiry*

The meaning of the term "genesis" as applied to seniority systems has remained ambiguous since the *Quarles* decision. Inquiry into the genesis of a seniority system might be limited to an analysis of the system's establishment isolated from surrounding employment practices. A seniority system thus would violate title VII only if it alone demonstrates the employer's intention to discriminate. Alternatively, inquiry into the genesis of a seniority system might permit an examination of the total environment in which the system was established. Under this inquiry, a seniority system established while other discriminatory practices existed could be found to have its genesis in discrimination even though no discrimination could be ascertained by an examination of the system alone. Apparently the *Quarles* court engaged in the latter type of inquiry and imputed discriminatory intent from the defendant's hiring policy to its seniority system, concluding that the system was not bona fide because it had its genesis in discrimination.¹²⁵

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 2165.

125. The uncertainty over the inquiry in which the *Quarles* court engaged arises from the court's making the broad statement that a seniority system is not bona fide if it has its genesis in racial discrimination, stating that § 703(h) "touches upon the issue," and then imputing the discrimination to the seniority system from the hiring practice. 279 F. Supp. at 517-18; see text accompanying notes 39-42 *supra*.

Teamsters failed to eliminate the ambiguity of the term "genesis" as applied to seniority systems.¹²⁶ Consequently, the *Teamsters* Court left open the question whether discriminatory intent can be imputed to a neutral seniority system from other employment practices.¹²⁷ If a facially neutral seniority system is adopted to complement a discriminatory hiring policy, arguably an intent to discriminate entered into "its very adoption," and the system itself discriminates.¹²⁸ By using the words "themselves" and "its very," however, the *Teamsters* Court may have limited the scope of inquiry into the genesis of a seniority system to the system isolated from other employment practices.¹²⁹ Because the meaning of the term "genesis" remains ambiguous after *Teamsters*, lower federal courts continue to apply the *Quarles* method of inquiry to determine the legality of a seniority system.¹³⁰

B. *The Effect of Evans on the Relevant Scope of Inquiry For Determining the Legality of a Seniority System*

Although Justice Stevens attempted to distinguish *Evans* from the *Quarles* line of cases,¹³¹ plaintiff's allegation in *Evans*¹³² that the seniority system gave present, continuing effect to past discrimination was indistinguishable from plaintiffs' allegations in *Teamsters* and *Quarles*.¹³³ The narrow holding in *Teamsters* established that a seniority system that merely perpetuates the effects of pre-title VII discrimination is lawful.¹³⁴ *Teamsters* relied upon *Evans* to hold that a seniority system that merely perpetuates post-Act discrimination also does not violate title VII.¹³⁵ The Court's reliance on *Evans* in *Teamsters* to resolve the issue of the perpetuation of post-Act discrimination and the identical nature of the plaintiff's claims in *Evans* and *Teamsters* severely undermine the ground upon which

126. In *Teamsters* the issue of genesis was conceded. See text accompanying note 107 *supra*.

127. See text accompanying note 105 *supra*.

128. *Id.*

129. *Id.*

130. See text accompanying notes 118-24 *supra*.

131. See text accompanying note 80 *supra*. The seniority systems in *Teamsters* and the *Quarles* line of cases were not alleged to discriminate because of their deterrent effects. Everyone within the system experienced the deterrent effect. Blacks, however, suffered more than whites because of the defendant's past discriminatory practice. Only by reference to the past act of discrimination could blacks establish a violation of title VII.

132. See text accompanying note 69 *supra*.

133. See text accompanying notes 30-33 & 87-91 *supra*.

134. See text accompanying notes 99-103 *supra*.

135. See text accompanying note 98 *supra*.

Justice Stevens attempted to distinguish *Evans* from the *Quarles-Teamsters* type cases.

The scope of inquiry for determining the legality of a seniority system alleged to perpetuate the effects of past discrimination should not differ merely because the discrimination occurred before rather than after the effective date of title VII. Consequently, the kind of facts considered relevant in *Teamsters* for determining the legality of a seniority system alleged to perpetuate the effects of pre-Act discrimination should not have differed from the kind of facts considered relevant in *Evans* for determining the legality of a seniority system alleged to perpetuate the effects of post-Act discrimination. Examination of the scope of inquiry in *Evans* thus reveals those facts that the *Teamsters* Court deemed relevant in examining the legality of the seniority system, thereby clarifying *Teamsters'* ambiguous reference to the genesis of a seniority system.¹³⁶

In *Evans* the Court established that a seniority system is illegal only if it is not "neutral in its operation."¹³⁷ The Court apparently meant that the seniority system's criteria for allocating employment opportunities must not be based upon an employee's race, color, religion, sex, or national origin. Consequently, the most important facts in determining the legality of a seniority system are those that disclose the criteria upon which employment opportunities are allocated. The Court in *Evans* stated that other employment practices were "relevant background evidence,"¹³⁸ but its determination that the seniority system was neutral in its operation rendered irrelevant the Seventh Circuit's decision that the employment practice whose effects were perpetuated by the seniority system violated title VII.¹³⁹ By focusing on the mechanics of the seniority system, the *Evans* Court narrowed the relevant scope of inquiry for determining the legality of a seniority system to the system isolated from its environment.

The lower federal courts presently interpreting *Teamsters* continue to examine all of the defendant's employment practices in determining the legality of a seniority system.¹⁴⁰ By continuing the *Quarles* practice of imputing discrimination to a seniority system from other employment practices, the lower federal court interpretation of *Teamsters* conflicts with *Evans*. The ambiguous references

136. See text accompanying notes 126-30 *supra*.

137. See text accompanying notes 75-78 *supra*.

138. See note 77 *supra*.

139. See note 67 *supra* and accompanying text.

140. See text accompanying notes 118-24 *supra*.

in *Teamsters* to the genesis of a seniority system cannot be interpreted to allow the imputation of discriminatory intent to a seniority system from other employment practices because *Evans* places these other employment practices outside the relevant scope of inquiry. Because *Evans* and *Teamsters* limit the facts that are relevant for determining the legality of a seniority system, *Teamsters* is more difficult to distinguish from the *Quarles* line of cases, and as a result, *Quarles* has less vitality.

V. CONCLUSION

Section 703(h) exempts all seniority systems from the effects of title VII except those that are not bona fide and those that intentionally discriminate on the basis of race, color, religion, sex, or national origin. Because of the difficulty in proving that a seniority system intentionally discriminates, the most practical means by which to establish the illegality of a seniority system is to attack its bona fide character. *Quarles* interpreted narrowly the term bona fide by holding that a seniority system that has its genesis in discrimination is not bona fide. According to *Quarles*, a seniority system, although neutral in its intent and operation, had its genesis in discrimination if adopted in an environment in which discriminatory employment practices existed. *Teamsters* and *Evans* combine to eliminate the *Quarles* concept of genesis because the two cases consider employment practices other than the seniority system irrelevant in determining a seniority system's legality. In order to establish the illegality of a seniority system, plaintiffs now must demonstrate one or more of the following: (1) the mechanics of the system are such that it allocates employment opportunities on the basis of race, color, religion, sex, or national origin; (2) the system is irrational; (3) the system is inconsistent with industry practice or NLRB decisions; (4) intent to discriminate entered into the creation or maintenance of the system. The intent necessary to establish a violation of title VII cannot be inferred from the employer's continued use of a seniority system after its discriminatory effects have become known¹⁴¹ since the discriminatory effect arising from a seniority system's perpetuation of past discrimination is lawful according to *Teamsters* and *Evans*. Consequently, plaintiffs face the difficult task of proving a subjective intent to discriminate in the creation or maintenance of the seniority system. *Teamsters* and *Evans* therefore expand the meaning of a bona fide seniority system and

141. See text accompanying notes 49-50 *supra*.

limit the lower federal court interpretation of the term "intentionally" as applied to seniority systems. Because seniority systems that satisfy the Supreme Court's definition of a bona fide seniority system and that lack subjective discriminatory intent nevertheless can have discriminatory effects, the Court's decisions reduce title VII's effectiveness in eliminating artificial barriers that limit employment opportunities for minorities and women.

JAMES D. SPRATT, JR.

