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Employment Discrimination and the Seniority System Exception: American Tobacco Co. v. Patterson

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NOTES

EMPLOYMENT DISCRIMINATION AND THE SENIORITY SYSTEM EXCEPTION: *AMERICAN TOBACCO CO. V. PATTERSON*

THE American Tobacco Company operated two plants that manufactured tobacco products in Richmond, Virginia. The Tobacco Workers' International Union[1] and its affiliate Locals 182 and 216[2] were the collective bargaining agents for hourly paid production workers at the company's plants. Each plant was divided into two departments,[3] and prior to 1963 the workers in these departments were racially segregated due to discriminatory policies followed by the company and the union.[4] Under government pressure,[5] the company and the union corrected some of their discriminatory practices in 1963,[6] but the departments

1. This litigation began in 1969. In 1978 the Tobacco Workers' International Union merged with the Bakery and Confectionary Workers' International Union to form the present Bakery, Confectionary and Tobacco Workers' International Union. This merger explains the different names by which the union is referred to in the various court opinions. Brief for Petitioner Bakery, Confectionary and Tobacco Workers' International Union at 1 n.1.

2. White employees were represented by Local 182; black employees were represented by Local 216. Patterson v. American Tobacco Co., 535 F.2d 257, 263 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976).

3. Each plant was divided into prefabrication and fabrication departments. The prefabrication departments blended and prepared the tobacco, and the fabrication departments manufactured the final product. Jobs in the fabrication department of each plant were generally more desirable because of the nature of the work and the higher pay. 535 F.2d at 263. Before 1963 the company usually placed blacks in the prefabrication departments and reserved the higher paying fabrication department jobs for whites. Blacks were discouraged from transferring into the fabrication departments because each department had a separate seniority roster, and in order to transfer to a new department, an employee had to forfeit his seniority. *Id.*

4. For a detailed discussion of the history of discrimination against blacks in the tobacco industry, see H. NORTHRUP, THE NEGRO IN THE TOBACCO INDUSTRY (1970); G. STARNES & J. HAMM, SOME PHASES OF LABOR RELATIONS IN VIRGINIA 36-70 (1934).

5. The Defense Supply Agency, a government procurement agency, threatened to cancel all government contracts with the company if it continued to follow certain racially discriminatory practices. Brief for Respondents John Patterson, *et al.* at 11 n.12. An executive order relating to the formation of government contracts with companies following discriminatory employment practices prompted the agency threats. 535 F.2d at 263.

6. The separate black and white locals were merged into Local 182, and the company abolished its policy of keeping separate seniority rosters for each department, switching to a plant-wide seniority system. 535 F.2d at 263.

of each plant remained largely segregated.[7] In 1968 the company suggested nine lines of progression as a method for determining advancement of employees from lower paying to higher paying jobs.[8] The union accepted these lines of progression in 1969. Shortly thereafter, John Patterson and two other black employees filed charges with the Equal Employment Opportunity Commission[9] alleging that the lines of progression were racially discriminatory[10] in violation of title VII of the Civil Rights Act of 1964.[11] Following unsuccessful conciliation efforts, Patterson and other black employees filed a class action against the company and the union in federal district court.[12] The district court found that all nine lines of progression perpetuated past racial discrimination, but concluded that discrimination was justified by business necessity in three of the lines.[13] Although the United States Court of Appeals for the Fourth Circuit affirmed the district court in part, it modified in part and remanded the case for further proceedings on the issue of remedies.[14] While the case was on remand, the United States Supreme Court rendered two decisions[15] interpreting the protection extended to seniority systems by section 703(h) of

7. Despite the change from departmental to plant-wide seniority, from 1963 to 1968 only ten black employees were added to the predominantly white fabrication departments. Brief for Respondents John Patterson, *et al.* at 13-15. The company's use of unwritten, subjective selection procedures perpetuated the segregation of departments. 535 F.2d at 263.

8. The lines of progression basically consisted of two jobs: an employee had to work in the bottom job of a line before he was eligible for promotion to the top job.

9. Under title VII's enforcement provisions, an aggrieved party may file a charge with the EEOC within a specified time after the occurrence of an unfair employment practice. Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5 (1976). The EEOC is then directed by the statute to conduct an investigation, and if it finds reasonable cause to believe the charge is true, it is authorized to attempt to obtain conciliation. When conciliation efforts are unsuccessful, the Commission may bring a civil action against the respondent. If the EEOC does not sue, the charging party may request a right-to-sue letter, which, if granted, allows him to bring suit against the respondent. *Id.* § 2000e-5(f)(1). *See* C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 266-361 (1980) [hereinafter cited as C. SULLIVAN]. *See generally* Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. INDUS. & COM. L. REV. 495 (1966).

10. Seven of the nine lines of progression linked nearly all-white top jobs from the fabrication departments with nearly all-white bottom jobs from those departments. The other two lines linked nearly all-black top jobs from the prefabrication departments with nearly all-black bottom jobs in prefabrication. Brief for Respondents John Patterson, *et al.* at 20 nn. 21-22.

11. Civil Rights Act of 1964, § 703(a), (c), 42 U.S.C. § 2000e-2(a), (c) (1976). Title VII of the Act makes it unlawful for an employer or labor union to "discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." *Id.*

12. The class action brought by Patterson also alleged violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1976). The class action was consolidated for trial with a subsequent action filed by the EEOC alleging both race and sex discrimination.

13. Patterson v. American Tobacco Co., 8 Fair Empl. Prac. Cas. (BNA) 778, 782-83 (E.D. Va. 1974). The business necessity test, as formulated by the Fourth Circuit, determines whether an employment practice is "necessary to the safe and efficient operation of the business" such that it overrides any racially discriminatory impact. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971).

14. Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1975), *cert. denied*, 429 U.S. 920 (1976).

15. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); United Airlines, Inc. v. Evans, 431 U.S. 553 (1977). For a discussion of these cases, see *infra* notes 77-90 and accompanying text.

title VII.[16] On the basis of these decisions, the company and the union moved to vacate the district court's orders and to dismiss the complaints.[17] The district court denied the motion,[18] stating that the lines of progression were not bona fide and therefore not protected by section 703(h).[19] A divided panel of the Fourth Circuit held that the motions were properly denied[20] and concluded that the six lines of progression at issue were not protected by section 703(h) because they were not part of a seniority system.[21] The Fourth Circuit reheard the case en banc and held that section 703(h) protected only those seniority systems in existence at the time of title VII's effective date.[22] The United States Supreme Court granted certiorari. *Held, reversed*: Section 703(h) applies to all bona fide seniority systems, regardless of whether they were established before or after the effective date of title VII. *American Tobacco Co. v. Patterson*, 102 S. Ct. 1534, 71 L. Ed. 2d 748 (1982).

I. HISTORICAL DEVELOPMENT OF THE SENIORITY SYSTEM EXCEPTION

A. Legislative History of Section 703(h)

The early 1960s found the United States embroiled in an era of racial unrest. Studies during that period indicated that racially discriminatory

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16. 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 natural origin . . . .

Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h) (1976).

17. Patterson v. American Tobacco Co., 634 F.2d 744, 746 n.1 (4th Cir. 1980) (en banc). The motions were apparently made under Federal Rule of Civil Procedure 60(b)(5), which authorizes relief from a final judgment when the judgment is based upon a prior judgment that "has been reversed or otherwise vacated." FED. R. CIV. P. 60(b)(5).

18. 18 Fair Empl. Prac. Cas. (BNA) 371, 377 (E.D. Va. 1977).

19. The test for determining whether or not a seniority system is bona fide has been described as involving four factors:

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

Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527, 542 (5th Cir. 1980) (citing James v. Stockham Valves & Fittings Co., 559 F.2d 310, 352 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978)); *see* S. AGID, FAIR EMPLOYMENT LITIGATION 537 (2d ed. 1979); C. SULLIVAN, *supra* note 9, at 136.

20. 586 F.2d 300, 305 (4th Cir. 1978).

21. *Id.* at 303. A seniority system has been defined as "a scheme that, alone or in tandem with non-'seniority' criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." California Brewers Ass'n v. Bryant, 444 U.S. 598, 605-06 (1980); *see infra* note 53.

22. 634 F.2d 744 (4th Cir. 1980) (en banc). The effective date of title VII was July 2, 1965, one year after its enactment. Civil Rights Act of 1964, § 716, 42 U.S.C. § 2000e (1976).

employment practices were contributing to a depressed economic situation among black Americans.[23] On June 19, 1963, President Kennedy, in a special message to Congress, expressed concern over "a rising tide of discontent that threatens the public safety" and called for legislative action.[24] The following day, H.R. 7152, the ancestor of the Civil Rights Act of 1964, was introduced in the House of Representatives.[25] During consideration of the bill, Representative Dowdy proposed an amendment similar to section 703(h),[26] but the amendment was defeated without discussion or debate.[27] The initial bill, as passed by the House nearly eight months after its introduction, did not contain an equivalent to section 703(h) or any other reference to seniority.[28]

The issue of seniority rights received little attention until the bill reached the floor of the Senate.[29] During a floor debate that lasted more than eighty days,[30] some Senators criticized the bill by claiming it would destroy existing seniority systems.[31] In response to this criticism, Senators Clark and Case[32] placed three documents into the *Congressional Record* expressing the view that title VII would not affect existing seniority systems. These documents were a statement prepared by the Department of

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23. U.S. COMM'N ON CIVIL RIGHTS, EMPLOYMENT REPORT (1961), *summarized in* 48 LAB. REL. REFERENCE MANUAL 103 (1961).

24. 109 CONG. REC. 11,174 (1963). This message was the second special message on civil rights submitted by President Kennedy to Congress within a five-month period. *See* Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 432 (1966).

25. 109 CONG. REC. 11,252 (1963). H.R. 7152, as introduced in the House, appears in *Civil Rights: Hearings on H.R. 7152 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 649-60 (1963).

26. 110 CONG. REC. 2727-28 (1964). Representative Dowdy offered the amendment for the purpose of making "the seniority or merit system of hiring an exception to the rule of race, color, creed, and so on, in order that an employer may make a hiring decision or determination based on the merit system or seniority system . . . ." *Id.* at 2725.

27. *Id.* at 2728.

28. *Id.* at 2804; *see* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria for Hiring and Promotion*, 82 HARV. L. REV. 1598, 1608 (1969). Although the bill passed the House without an exception for seniority systems, it was not passed without criticism. *See* H.R. REP. No. 914, 88th Cong., 1st Sess. 71 (1963) (minority report of the House Judiciary Committee: "Seniority is the base upon which unionism is founded. Without its system of seniority, a union would lose one of its greatest values to its members. *The provisions of this Act grant the power to destroy union seniority*." (emphasis in original)).

29. The supporters of the bill were able to bring the bill directly to the Senate floor before referring it to any standing committee. Senator Morse moved to refer the bill to the Judiciary Committee. The Morse motion, however, was tabled and the Senate proceeded to debate the bill before the whole body. 110 CONG. REC. 6417-55 (1964); *see* Vaas, *supra* note 24, at 444.

30. For a full discussion of the protracted legislative history of title VII, see Vaas, *supra* note 24.

31. *See, e.g.*, 110 CONG. REC. 486 (1964) (statement of Sen. Hill: Title VII "would undermine a basic fabric of unionism, the seniority system."); *id.* at 7091 (statement of Sen. Stennis: Title VII would require "[p]referential advance of minorities so as to destroy seniority in employment.").

32. Proponents of the bill had organized "bipartisan captains" for each important title of the bill. Senators Clark and Case were the bipartisan captains in charge of explaining, defending, and leading discussion on title VII. *Id.* at 6528 (statement of Sen. Humphrey); *see* International Bhd. of Teamsters v. United States, 431 U.S. 324, 351 n.35 (1977); Vaas, *supra* note 24, at 444-45.

Justice,[33] an interpretive memorandum prepared by Senators Clark and Case,[34] and written responses by Senator Clark to questions asked earlier by Senator Dirksen.[35] Although these documents were not read on the floor of the Senate[36] and were introduced prior to the drafting of section 703(h), they have been held to be "authoritative indicators" of the purpose of that section.[37]

While debate on the bill continued on the Senate floor, a bipartisan group led by Senators Mansfield and Dirksen was engaged in informal conferences trying to reach agreement on amendments to the bill.[38] These efforts produced a substitute for the entire bill, the Mansfield-Dirksen amendment.[39] This substitute bill included section 703(h), which was added to insure that differences in employment conditions pursuant to a bona fide seniority system would not be considered an unfair employment practice absent an intent to discriminate.[40] The Senate passed the Mansfield-Dirksen substitute as amended,[41] and following concurrence by the House and signing by the President, it became the Civil Rights Act of 1964.[42]

In the Senate, the entire consideration of the bill took place on the floor and consequently no committee report exists to which courts can turn in

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33. 110 CONG. REC. 7207 (1964). The text of the statement pertaining to seniority reads:

> 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. . . . [I]n 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. . . . Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

Id.

34. *Id.* at 7212. The memorandum stated: "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective." *Id.* at 7213.

35. *Id.* at 7216-17. Two of the questions and responses pertain to seniority:

> 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.

Id. at 7217.

36. *See* Cooper & Sobol, *supra* note 28, at 1610.

37. *Teamsters*, 431 U.S. at 352.

38. Vaas, *supra* note 24, at 445.

39. 110 CONG. REC. 11,935-36 (1964).

40. Two Mansfield-Dirksen substitute bills were actually proposed. *Id.* at 11,931 (first amendment), 13,310-19 (second amendment). Section 703(h) was the same in both substitutes. Vaas, *supra* note 24, at 447.

41. 110 CONG. REC. 14,511 (1964). The Senate accepted five amendments to the Mansfield-Dirksen substitute bill. Vaas, *supra* note 24, at 446.

42. Vaas, *supra* note 24, at 457.

interpreting the Act.[43] Thus, the legislative history of section 703(h) is largely contained in the *Congressional Record*.[44] Courts are not accustomed to relying on this type of legislative history, and this fact may serve as a partial explanation for the differing constructions courts have given section 703(h).[45]

B. Judicial Interpretations of Section 703(h)

As finally enacted, title VII makes it unlawful for employers or labor organizations to discriminate against employees on the basis of "race, color, religion, sex, or natural origin."[46] The United States Supreme Court first interpreted the scope of title VII in *Griggs v. Duke Power Co.*[47] *Griggs* involved a class action brought by black employees who alleged that the company's practice of using professionally developed aptitude tests to make hiring and transfer decisions was racially discriminatory in violation of title VII.[48] The employer contended that although the tests had a discriminatory impact on blacks, they were not illegal under title VII since they were not used with an intent to discriminate.[49] The Supreme Court rejected this argument and held that title VII proscribes practices that may be fair in form, but operate with a discriminatory impact.[50] Thus, the *Griggs* decision defined discrimination in terms of effect rather than intent.[51] Title VII provides an exception to this general rule, however, in section 703(h).[52] That section provides that bona fide seniority systems discriminatory in operation are not unlawful as long as they are not the result of any intent to discriminate.[53]

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43. Cooper & Sobol, *supra* note 28, at 1609.

44. *See* Vaas, *supra* note 24, at 457-58.

45. *Id.*

46. The Civil Rights Act of 1964, § 703(a), (c), 42 U.S.C. § 2000e-2(a), (c) (1976).

47. 401 U.S. 424 (1971).

48. *Id.* at 426-28. The company had engaged in open discrimination on the basis of race prior to July 2, 1965, the effective date of title VII. On that date the company instituted the test requirement, which operated to disqualify black applicants at a higher rate than white applicants. *Id.*; *see* Note, Griggs v. Duke Power Co.: *The First Landmark Under Title VII of the Civil Rights Act of 1964*, 25 Sw. L.J. 484, 485 (1971).

49. Griggs v. Duke Power Co., 420 F.2d 1225, 1233 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971). The company also contended that the tests were not a violation of title VII, because they were professionally developed and instituted on the theory that they would improve the quality of the work force. *See* Bernhardt, Griggs v. Duke Power Co.: *The Implications for Private and Public Employers*, 50 TEX. L. REV. 901, 907 (1972).

50. 401 U.S. at 431.

51. *See* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 62 (1972).

52. Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h) (1976); for the text of § 703(h), see *supra* note 16.

53. "Seniority system" as used here and throughout this Note refers to competitive status seniority. Competitive status seniority is a method of determining which employees get certain benefits, such as promotions, job security, or shift preference, based on the amount of time they have worked. The longer an employee works the better his opportunities for advancement. *See* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1534 (1962); Cooper & Sobol, *supra* note 28, at 1601-02; Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOW. L.J. 1, 1-3 (1967).

The unusual legislative history of section 703(h) has contributed to this section's being one of the most complex problems in title VII litigation.[54] A most troublesome aspect of the protection given seniority systems by section 703(h) is that, although these systems are important and serve many useful purposes,[55] they also have the undesirable effect of preserving the effects of earlier discrimination.[56] A district court wrestled with this problem in one of the earliest title VII cases, *Quarles v. Philip Morris, Inc.*[57] Prior to the enactment of title VII, Philip Morris had engaged in overt racial discrimination by maintaining segregated departments at its Richmond plant, with the lower paying jobs concentrated in the all-black departments.[58] After the effective date of title VII, blacks were allowed to transfer into the formerly all-white departments, but by doing so they would forfeit their seniority and start at the bottom of the seniority roster in the new department.[59] Thus, the seniority system operated to lock blacks, who were hired before title VII became effective, into the segregated departments. After reviewing the statements relating to seniority introduced by Senator Clark,[60] the court found that section 703(h) did not protect this seniority system because "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act."[61] To support this conclusion, the court held that a seniority system is not bona fide if it has a discriminatory effect.[62]

Quarles was the first in a series of cases that followed the "present effects of past discrimination" test.[63] Under this test, seniority systems that per-

54. C. SULLIVAN, *supra* note 9, at 126.

55. Seniority systems serve several legitimate functions. For the employer, seniority systems are attractive because they promote efficiency; they encourage new employees to stay with the company by enticing them with the prospect of advancement, and they reduce the amount of retraining necessary. For the employee, seniority systems provide protection from the whims or personal preferences of management and give all employees a basis for predicting their future employment positions. *See* Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 513 (E.D. Va. 1968); Cooper & Sobol, *supra* note 28, at 1604-05.

As a result of their usefulness, "[s]eniority systems . . . are of vast and increasing importance in the economic employment system of this Nation." Franks v. Bowman Transp. Co., 424 U.S. 747, 766 (1976) (citing S. SLICHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 104-15 (1960)); *see* Gould, *supra* note 53, at 1.

56. For example, a black is hired by American Tobacco before 1965, when overt discrimination is still practiced. As a result he is assigned a low paying position in the prefabrication department. After 1965, discriminatory employment practices are unlawful, but the black worker will be discouraged from transferring from the low paying prefabrication department to the higher paying fabrication department because, under a departmental seniority system, transferring would mean losing all of his old department seniority and starting on the bottom rung in the fabrication department. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 344 n.27 (1977).

57. 279 F. Supp. 505 (E.D. Va. 1968).

58. *Id.* at 508.

59. *Id.* at 513.

60. *See supra* notes 33-35 and accompanying text.

61. 279 F. Supp. at 516.

62. *Id.* at 517.

63. *See* United States v. Chesapeake & O.R.R., 471 F.2d 582, 587-88 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); United States v. Bethlehem Steel Corp., 446 F.2d 652, 658-59 (2d Cir. 1971); United States v. Sheet Metal Workers Int'l Ass'n Local Union No. 36, 416 F.2d 123, 133 n.20 (8th Cir. 1969).

petuated the effects of past discrimination were not considered bona fide and thus were not protected by section 703(h).[64] The Court of Appeals for the Fifth Circuit adopted this interpretation of the seniority system exception in *Local 189, United Papermakers v. United States*,[65] a case involving facts similar to *Quarles*. The Fifth Circuit declared that the departmental seniority system in question was unlawful because it perpetuated the effects of pre-Act discrimination without any business necessity justification,[66] and thus was not a bona fide seniority system.[67] In addition, the Fifth Circuit found that a seniority system that perpetuated intentional discrimination was not protected by section 703(h)[68] because it was the "*result of an intention to discriminate*."[69]

The United States Supreme Court first attempted to clarify the meaning of section 703(h) in *Franks v. Bowman Transportation Co.*[70] *Franks* presented the issue of whether a post-Act discriminatee could be awarded retroactive seniority to place him in the position he would have otherwise occupied but for the discriminatory practices.[71] The argument against granting such relief was that it would dilute the seniority rights of incumbent employees and thereby violate section 703(h).[72] Following a detailed analysis of the legislative history of section 703(h),[73] the Supreme Court rejected this argument and held that section 703(h) merely defined which seniority systems are discriminatory.[74] The Court concluded that section 703(h) imposed no limit on the equitable relief authorized by title VII's remedial provisions.[75] By holding that awards of retroactive seniority did not undermine the protection given seniority systems by section 703(h), the Court in *Franks* construed that section as a narrow exception to the general rule of title VII.[76]

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64. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 346 n.28 (1977).

65. 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

66. *See supra* note 13; *infra* note 131.

67. 416 F.2d at 988.

68. *Id.* at 995-96.

69. *Id.* at 995 (emphasis in original) (quoting Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h)(1976)); *see supra* note 16.

70. 424 U.S. 747 (1976).

71. *Id.* at 750.

72. *Id.* at 757; *see* Franks v. Bowman Transp. Co., 495 F.2d 398, 417 (5th Cir. 1974), *modified*, 424 U.S. 747 (1976).

73. 424 U.S. at 759-62; *see supra* notes 23-45 and accompanying text.

74. 424 U.S. at 761. The Court stated, "[I]t is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice . . . ." *Id.*

75. *Id.* at 761-62; *see* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 508-09 (1976).

76. By allowing the equitable remedy of retroactive seniority awards, the Court implicitly decided that the policy of eliminating discrimination outweighed the policy of protecting seniority rights. Awarding retroactive seniority to a discriminatee diminishes the established seniority rights of other employees. *See* B. SCHLEI & P. GROSSMAN, *supra* note 75, at 508; Note, *Civil Rights—Section 703(h)—Post-Act Perpetuation of Pre-Act Discrimination Through An Established Seniority System is Not Illegal*, 52 TUL. L. REV. 397, 404 (1978). Thus, by subordinating the seniority rights of incumbent employees to the rights of other employees to be free from discrimination, the Court in *Franks* supported the view that § 703(h) should be construed as a narrow exception to title VII.

In 1977 the Supreme Court reexamined section 703(h) in *International Brotherhood of Teamsters v. United States*[77] and gave the section a broader construction. *Teamsters* involved a departmental seniority system, like those in *Quarles* and *Local 189*, that had the effect of locking minority employees into lower paying positions.[78] The Fifth Circuit used the *Local 189* "present effects of past discrimination" test and struck down the seniority system as a violation of title VII.[79] The Supreme Court rejected the Fifth Circuit's approach and held that bona fide seniority systems are protected by section 703(h), even if such systems perpetuate the discriminatory impact of employment practices that antedate the Act.[80] The Court acknowledged that the purpose of the Act was to eliminate both overt and subtle employment practices that discriminate in effect against a particular group[81] and that many seniority systems " 'operate to "freeze" the status quo of prior discriminatory employment practices.' "[82] The Court held, however, that both the plain language and the legislative history of section 703(h) indicate that Congress was aware of the discriminatory effect of many seniority systems but nevertheless "extended a measure of immunity to them."[83]

On the same day it decided *Teamsters*, the Court rendered its decision in *United Airlines, Inc. v. Evans*.[84] *Evans* involved a stewardess who had been discharged under a post-Act policy that was struck down as discriminatory in a separate action.[85] She reapplied and was rehired, but United treated her as a new employee and denied her previously accumulated seniority.[86] In its opinion the Court extended the holding of *Teamsters* by stating that section 703(h) protects seniority systems that perpetuate the discriminatory effects of post-Act practices, if those practices were not the subject of a timely complaint.[87] The decisions in *Teamsters* and *Evans*

77. 431 U.S. 324 (1977).

78. *Id.* at 329-31. In *Teamsters* the United States brought an action against a nationwide common carrier of freight and the union representing many of its employees. The Government alleged that the company and union had discriminated against blacks and Spanish-surnamed persons by placing them in lower paying servicemen positions and local city driver positions while placing whites in the more desirable line-driver jobs. The discriminatees were discouraged from transferring to line-driver jobs by a seniority system that required forfeiture of seniority upon transfer. *Id.* at 328-32.

79. United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299, 317-18 (5th Cir. 1979), *vacated*, 431 U.S. 324 (1977) (consolidated on appeal with *Teamsters*).

80. 431 U.S. at 353-54. The Court stated, "[W]e hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." *Id.*

81. *Id.* at 348.

82. *Id.* at 349 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971)).

83. 431 U.S. at 350.

84. 431 U.S. 553 (1977).

85. *Id.* at 554-55. In 1968, when the plaintiff was discharged, United adhered to a policy that required all flight attendants to be single. Consequently, when the plaintiff married, she was forced to resign. *Id.* at 554.

86. *Id.* at 555.

87. *Id.* at 558. The Court declared, "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." *Id.*

represent a retreat from the narrow construction given to section 703(h) in *Franks*.[88] The Court in *Teamsters* and *Evans* implicitly found that Congress *did* "intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act"[89] when this perpetuation is accomplished through a bona fide seniority system.[90]

These decisions by the Supreme Court shed some light on the scope of the seniority exception embodied in section 703(h), but none of them considered the specific question of whether section 703(h) applies to seniority systems established after the effective date of the Act. Although no lower court decisions had expressly dealt with this issue, several courts apparently assumed that section 703(h) applied equally to both pre- and post-Act seniority systems. In *Alexander v. Aero Lodge No. 735, Int'l Ass'n of Machinists*[91] the Sixth Circuit upheld a seniority system established after the effective date of the Act[92] and applied the bona fide test of section 703(h)[93] rather than the disparate impact test of *Griggs v. Duke Power Co.*[94] The court drew no distinction between pre- and post-Act seniority systems. The Eighth Circuit, in *Hameed v. International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 396*,[95] held that a seniority system established in 1972 must be judged in light of *Teamsters* and *Evans*, which "immunize bona fide seniority systems which have a disproportionate impact on blacks or other minorities, provided that any disparity is not the result of intentional discrimination."[96] Numerous district courts have also required proof of discriminatory intent before striking down post-Act seniority systems as unlawful.[97]

While all of these decisions assumed that section 703(h) applies to post-Act seniority systems, none of them confronted the issue directly.[98] Apparently, the issue was not raised or considered, and the relevant legislative history was not discussed in any of these cases.[99] The Fourth Circuit,

88. *See supra* note 76 and accompanying text.

89. *See supra* note 61 and accompanying text.

90. *Teamsters*, 431 U.S. 352-54; *see* C. SULLIVAN, *supra* note 9, at 130.

91. 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978).

92. 565 F.2d at 1379. Collective bargaining agreements establishing or revising the seniority system were signed in 1965, 1968, and 1971. *Id.* at 1376.

93. *See supra* note 19 and accompanying text.

94. *See supra* notes 46-51 and accompanying text.

95. 637 F.2d 506 (8th Cir. 1980).

96. *Id.* at 516.

97. *See, e.g.*, Johnson v. Burroughs Corp., 24 Fair Empl. Prac. Cas. (BNA) 963 (S.D. Fla. 1980) (seniority system established in 1974 analyzed for bona fides under § 703(h)); Sanders v. Sherwin Williams Co., 495 F. Supp. 571 (E.D. Mich. 1980) (post-Act revisions to seniority system analyzed for bona fides under § 703(h) despite claim of disparate impact); Edmondson v. United States Steel Corp., 20 Fair Empl. Prac. Cas. (BNA) 1745 (N.D. Ala. 1979) (seniority system established in 1973 ruled bona fide under § 703(h) over claim of adverse impact); *see also* Brief of Petitioners The American Tobacco Company and American Brands, Inc. at 25 n.32, American Tobacco Co. v. Patterson, 102 S. Ct. 1534, 71 L. Ed. 2d 748 (1982), and cases cited therein.

98. *See* Brief for Respondents John Patterson, *et al.* at 35 n.28, *American Tobacco Co.*

99. *Id.*

in its en banc opinion in *Patterson v. American Tobacco Co.*[100] was the first circuit to examine expressly the question of whether post-Act seniority systems are protected by section 703(h). The Fourth Circuit's holding that section 703(h) did not apply to post-Act seniority systems conflicted with the decisions of other circuits and readied the issue for Supreme Court review.

II. *AMERICAN TOBACCO CO. V. PATTERSON*

In *American Tobacco Co. v. Patterson* the Supreme Court limited its review to the construction of section 703(h); more specifically, the Court addressed the question of whether section 703(h) applies to all seniority systems or just those established prior to the Civil Rights Act of 1964.[101] The Court held that section 703(h) applies to all seniority systems, whether adopted before or after the effective date of the Civil Rights Act.[102] Justice White, writing for the majority,[103] relied heavily on what he called the "plain language" of section 703(h).[104] The Court first noted the scrutiny the language of the Act had received during its drafting.[105] As the section does not expressly distinguish between pre- and post-Act seniority systems, the Court concluded that Congress did not intend to make such a distinction.[106] In support of this conclusion the Court compared section 703(h), which does not contain a grandfather clause,[107] to section 701(b),[108] which contains such a clause, and stated that this difference "increases our reluctance to transform a provision that we have previously described as . . . a definitional clause into a grandfather clause."[109]

The Court found more support for its holding in the legislative history

100. 634 F.2d 744 (4th Cir. 1980) (en banc), *rev'd*, 102 S. Ct. 1534, 71 L. Ed. 2d 748 (1982).

101. 102 S. Ct. at 1537, 71 L. Ed. 2d at 754.

102. *Id.* at 1542, 71 L. Ed. 2d at 760.

103. Justice White was joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor.

104. The Court's reliance on plain language may be misplaced. The language of § 703(h) appears to be all but plain as indicated by the lower courts' struggle with the section in the noted case. *See supra* notes 17-22 and accompanying text.

105. 102 S. Ct. at 1537, 71 L. Ed. 2d at 755. "As Senator Dirksen explained, 'I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase.' " *Id.* (quoting 110 CONG. REC. 11,935 (1964) (statement of Sen. Dirksen)); *see also* Vaas, *supra* note 24, at 444.

106. 102 S. Ct. at 1538-39, 71 L. Ed. 2d at 757.

107. A "grandfather clause" is a "[p]rovision in a new law or regulation exempting those already in or a part of the existing system which is being regulated." BLACK'S LAW DICTIONARY 629 (rev. 5th ed. 1979). Such clauses are "calculated to prevent hardship by saving accrued rights and interests from the operation of a new rule." 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 47.12 (4th ed. Supp. 1982).

108. Civil Rights Act of 1964, § 701(b), 42 U.S.C. § 2000e(b) (1976). Section 701(b) calls for the definition of "employer" to be applied on a "step-down" basis; during the first year after the Act's effective date, persons with 25 or more employees were considered employers, during the second year anyone with 15 or more employees was considered an employer, etc. *Id.*

109. 102 S. Ct. at 1537, 79 L. Ed. 2d at 755 (citing Franks v. Bowman Transp. Co., 424 U.S. 747, 761 (1976)).

of section 703(h).[110] The Court noted the unusual character of the Act's history and acknowledged that much of the debate surrounding section 703(h) concerned its effect on established seniority rights.[111] Reasoning that the Senators used these terms only in response to specific charges that the bill would destroy existing seniority rights, the majority, however, refused to read the references to established rights as limiting the scope of the section.[112] The Court admitted that the legislative history did not provide much guidance on the issue under consideration,[113] but concluded that, at the very least, the legislative history did not indicate any congressional intent contrary to the plain language of the section.[114]

Relying on its prior decisions, the Court stated that both *Teamsters*[115] and *Evans*[116] reflect the Supreme Court's view that title VII gives special treatment to seniority systems.[117] The Court stated that those two decisions stand for the proposition that " '[s]ection 703(h) on its face immunizes *all* bona fide seniority systems.' "[118] The Court strained to find support for its holding in those two cases, however, for the issue in each case was only whether section 703(h) protected seniority systems that perpetuated the effects of past discriminatory acts. When the Court announced in *Teamsters* that section 703(h) applied to "all" seniority systems, it meant that section 703(h) does not distinguish between seniority systems that perpetuate prior discrimination and those that do not. The Court did not use "all" in the sense that section 703(h) applies to all seniority systems whether adopted before or after the Act.[119] The issue of the applicability of section 703(h) to post-Act seniority systems was never raised or discussed in either *Teamsters* or *Evans*, and thus those cases are,

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110. *Id.* at 1539-40, 71 L. Ed. 2d at 757-58. The Court cited to its previous description of the legislative history of § 703(h) in *Franks*, 424 U.S. at 759-61.

111. 102 S. Ct. at 1540, 71 L. Ed. 2d at 758; *see supra* notes 33-45 and accompanying text.

112. 102 S. Ct. at 1540, 71 L. Ed. 2d at 758.

113. *Id.* at 1539, 71 L. Ed. 2d at 757. "The most which can be said for the legislative history of § 703(h) is that it is inconclusive with respect to the issue presented in this case." *Id.*

114. *Id.* at 1540, 71 L. Ed. 2d at 759.

115. *See supra* notes 77-83 and accompanying text.

116. *See supra* notes 84-86 and accompanying text.

117. 102 S. Ct. at 1541, 71 L. Ed. 2d at 759. The Court also cited Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 81 (1977), in which the Court stated that "seniority systems are afforded special treatment under Title VII itself."

118. 102 S. Ct. at 1541, 71 L. Ed. 2d at 759 (emphasis in original) (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 348 n.30 (1977)).

119. In deciding *Teamsters*, the Court did not directly deal with the applicability of § 703(h) to post-Act seniority systems, but implicitly indicated that § 703(h) was designed to protect only pre-Act seniority systems:

> Title VII would not outlaw such differences in treatment among employees as flowed from a bona fide seniority system that allowed for full exercise of *seniority accumulated before the effective date of the Act*. . . .
>
> . . . [T]he congressional judgment was that Title VII should not outlaw the use of *existing* seniority lists and thereby destroy or water down the *vested* seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

431 U.S. at 352-53 (emphasis added; citations and footnotes omitted).

at best, inconclusive on the issue that confronted the Court in *American Tobacco Co.*

Finally, the court gave a policy reason for not restricting the application of section 703(h) to pre-Act seniority systems. A national labor policy favoring minimal government intervention, said the Court, clashes at times with the policy of eliminating discrimination reflected in title VII.[120] According to the Court, Congress realized that these two policies would at times oppose each other and Congress adopted section 703(h) as the balance between them.[121] This conclusion is somewhat remarkable in light of the Court's prior discussion of the legislative history, which nowhere indicates that Congress, in considering section 703(h), was concerned with striking a balance between the purposes of title VII and a national labor policy favoring freedom in collective bargaining.[122] Congress's concern lay rather, as Justice Brennan pointed out, with balancing the vested seniority rights of incumbent employees against the policy of eliminating discrimination.[123]

Justice Brennan, in a dissenting opinion joined by Justices Marshall and Blackmun, agreed with the majority that the plain language of section 703(h) should be controlling, but disagreed as to what that plain language meant.[124] Justice Brennan's dissent noted that section 703(h) expressly refers to only the application of a seniority system[125] and therefore concluded that the adoption or establishment of a seniority system is not covered by the section. Thus, under Justice Brennan's reading of the section, the post-Act adoption of a seniority system would be tested under the *Griggs* disparate impact test, while the application of such a system would be tested under the section 703(h) bona fide test.[126]

Justice Brennan also viewed the legislative history in a somewhat different light than the majority. He agreed with the majority that many of the references in the legislative history appeared to be concerned with the effect of section 703(h) on seniority rights in existence as of the effective date

120. 102 S. Ct. at 1541, 71 L. Ed. 2d at 760. The Court cited Humphrey v. Moore, 375 U.S. 335, 346 (1964), and Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 79 (1977), for the proposition that seniority provisions are important in collective bargaining. The Court concluded that a national labor policy favoring freedom in collective bargaining mandated that restrictions on seniority systems should be limited. 102 S. Ct. at 1541, 71 L. Ed. 2d at 760.

121. *Id.* at 1541, 71 L. Ed. 2d at 760.

122. All of the Court's references to the legislative history, in both *American Tobacco Co.* and *Franks*, reflect a congressional concern with only the effect § 703(h) would have on the vested seniority rights of incumbent employees.

123. 102 S. Ct. at 1545, 71 L. Ed. 2d at 765 (Brennan, J., dissenting). "Congress saw § 703(h) as focusing on the protection of employee *expectations* that develop during the pendency of a seniority plan." *Id.* at 1545, 71 L. Ed. 2d at 764 (emphasis in original).

124. *Id.* at 1543, 71 L. Ed. 2d at 762.

125. "[I]t shall not be an unlawful employment practice for an employer to *apply* different standards . . . ." Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h) (1976) (emphasis added).

126. 102 S. Ct. at 1538 n.4, 71 L. Ed. 2d at 756 n.4; *see supra* notes 19 & 46-51 and accompanying text.

of the Act.[127] Unlike the majority, however, Justice Brennan concluded that these references were fashioned in terms of "established" rights, because these were the only rights that section 703(h) was intended to protect.[128]

In a separate dissent Justice Stevens responded to the majority's policy argument by concluding that the argument was prompted by fears that virtually all post-Act seniority systems would be unlawful if not protected by section 703(h).[129] Justice Stevens noted that even under the *Griggs* disparate impact test a number of seniority systems would still survive if they were substantially related to a valid business purpose.[130] Thus Justice Stevens considered the Court's fears to be unfounded.[131]

The Court's holding in *American Tobacco Co.* follows the lead of *Teamsters* and *Evans* in construing section 703(h) as a broad exception to the provisions of title VII. The impact of the *American Tobacco Co.* decision remains to be seen, but it will certainly close one avenue of redress for individuals locked into the discriminatory effects of previous employment practices by a seniority system. Other sources of protection for the discriminatee do exist. The Civil Rights Acts of 1866[132] and 1871[133] provide some aid to victims of discrimination, and employees may have a cause of action against their union under the National Labor Relations Act[134] for discriminatory practices.[135] These alternative remedies, however, may not help to remedy the plight of that generation of minorities who were the

127. 102 S. Ct. at 1545, 71 L. Ed. 2d at 765 (Brennan, J., dissenting).

128. *Id.* at 1544, 71 L. Ed. 2d at 763. "Congress' basic purpose in adding [§ 703(h)] was to protect the *expectations* that employees acquire through the continued operation of a seniority system." *Id.* (emphasis in original).

129. *Id.* at 1548, 71 L. Ed. 2d at 769. Without the protection of § 703(h), seniority systems would be subjected to the *Griggs* standard of disparate impact. Justice Stevens stated that it would be "virtually impossible to establish a seniority system whose classification of employees will not have a disparate impact on members of some race or sex." *Id.*

130. For example, the District Court in *American Tobacco Co.* found that three of the original nine lines of progression were justified by business necessity. *See supra* note 13 and accompanying text.

131. The business necessity defense may not be as helpful in protecting seniority systems as Justice Stevens believes. In order to establish this defense the employer may be required to show that, without the seniority system, employees would be able to perform the job adequately. *See* Watkins v. Scott Paper Co., 530 F.2d 1159, 1181 (5th Cir.) (educational requirements), *cert. denied*, 429 U.S. 861 (1976). The employer may be required to meet a heavy burden of demonstrating that the seniority system is necessary to maintain safety and reduce economic and human risks. *See* Spurlock v. United Airlines, Inc., 475 F.2d 216, 219 (10th Cir. 1972) (educational requirements). For a more complete discussion of the business necessity defense, see S. AGID, *supra* note 19, at 527-31; Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974).

132. 42 U.S.C. § 1981 (1976).

133. *Id.* §§ 1983, 1985, 1986 (1976 & Supp. IV 1980).

134. 29 U.S.C. §§ 151-168 (1976 & Supp. IV 1980).

135. Other means of protection are available, such as that afforded by executive orders. *See, e.g.*, Exec. Order No. 11,246, 3 C.F.R. 169 (1965), *reprinted in* 42 U.S.C. § 2000e app. at 1232-36 (1976), *as amended by* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967), *reprinted in* 42 U.S.C. § 2000e app. at 1233 (1976); Exec. Order No. 11,478, 3 C.F.R. 207 (1969), *reprinted in* 42 U.S.C. § 2000e app. at 1236 (1976). For a full discussion of alternative remedies for employment discrimination, see B. SCHLEI & P. GROSSMAN, *supra* note 75, at 599-768.

victims of discriminatory employment practices prior to the effective date of title VII and who must now continue to suffer the effects of this discrimination as the result of a seniority system.

III. CONCLUSION

In *American Tobacco Co. v. Patterson* the United States Supreme Court construed section 703(h) of title VII of the Civil Rights Act of 1964 as applicable to all bona fide seniority systems, whether established before or after the effective date of the Act. The Court based its decision on the plain language of the section, the Act's legislative history, the *Teamsters* and *Evans* decisions, and a national labor policy favoring freedom in collective bargaining. The Court broadly interpreted section 703(h), which excepts seniority systems from the employment practices made unlawful by title VII. Seniority systems that perpetuate the effects of past discrimination are now protected by section 703(h) even if they are adopted after the effective date of the Act. While the Court's interpretation of section 703(h) will by no means defeat the underlying purpose of title VII, it will make equal employment opportunity difficult for many employees to attain. Congress's overall purpose in enacting title VII was the elimination of discrimination in employment; the Court's decision in *American Tobacco* will retard the attainment of this goal.

Kevin Edmund Teel