AFFIRMATIVE ACTION AND THE BONA FIDE SENIORITY SYSTEM: *FIREFIGHTERS LOCAL UNION NO. 1784 v. STOTTS*

Title VII of the Civil Rights Act of 1964[1] prohibits employment discrimination based upon race, color, religion, sex or national origin.[2] In framing this legislation, Congress intended to provide equal employment opportunities for all citizens and to remove any barriers operating to preserve the effects of prior discriminatory practices.[3] Employers and unions, however, due to the widespread use of "last hired, first fired" seniority systems,[4] have eliminated many of the gains made by

1. 42 U.S.C. §§ 2000e to 2000e-17 (1982) [hereinafter cited as the Act].

2. 42 U.S.C. § 2000e-2(a) (1982) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin: or
>
> (2) to limit, segregate, or classify his employees or applicants for employment, in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

3. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Supreme Court stated: "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 429-30.

4. In a 1983 survey the Bureau of National Affairs found seniority provisions in 89% of all collective bargaining contracts. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 74 (1983). The Bureau learned that employers used seniority as the sole factor in determining layoffs in 59% of the agreements, compared to 46% in 1975 and 42% in 1973. *Id.* at 52. *See generally Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1156 (1971).

The Supreme Court has defined a "seniority system" as "a scheme that, alone or in tandum 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, 606 (1980). *See also* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach of Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1601-02 (1969).

minorities under the Act.[5] In response to this development, minorities have recently turned to the courts for resolution of the conflicts between existing seniority systems and the various remedial provisions adopted pursuant to Title VII.[6] In *Firefighters Local Union No. 1784 v. Stotts*,[7] the United States Supreme Court held that a district court could not unilaterally modify a consent decree such that it interferes with the provisions of a bona fide seniority system, where the decree is silent regarding the policy to be followed in the event of future layoffs.[8]

In *Stotts*, black members of the Memphis Fire Department sought a preliminary injunction to enjoin the City of Memphis from carrying out proposed layoffs.[9] The members argued that the layoffs would negate much of the affirmative action progress achieved through a re-

5. The relationship between seniority systems and the layoff of minorities is a logical one. Due to an employer's past discriminatory practices, white males will invariably have accumulated the most seniority. Statistics support this proposition. *See* U.S. COMM'N ON CIVIL RIGHTS, LAST HIRED, FIRST FIRED 24-26 (1977) ("In some areas where minorities represented only 10 to 12 percent of the work force, they accounted for 60 to 70 percent of those being laid off in 1974.").

6. The court's authority to provide relief for violations of Title VII is found in 42 U.S.C. § 2000e-5(g) (1982), which provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is 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, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, . . . or any other equitable relief as the court deems appropriate. . . .

The Code of Federal Regulations defines an affirmative action program as "a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The objective of these procedures plus such efforts is equal employment opportunity." 41 C.F.R. § 60-2.10 (1984). Employers adopt such programs voluntarily or pursuant to a court order. When a court concludes that an employer violated Title VII, it will usually order the offending party to submit a plan outlining how it intends to make restitution to the individual victims and, further, how it intends to alter hiring practices to prevent future violations. Often, these plans contain "hiring goals" whereby the employer undertakes, in good faith, to increase the percentage of minority workers over a period of time, usually to a level that approximates the percentage of minority workers in the work force. *See* R. FULLINWIDER, THE REVERSE DISCRIMINATION CONTROVERSY, 158-62 (1980).

7. 104 S. Ct. 2576 (1984).

8. *Id.* at 2585-90.

9. *See Memphis Fire Dep't.*, 679 F.2d 541, 546 (6th Cir. 1982). The city claimed that the lay-offs were necessary because of unanticipated decreases in revenue funds and general increases in operating expenses. The appeals court found that the Mayor had ultimate authority to determine which classifications the layoffs would affect. *Id.* at 549.

cently enacted consent decree.[10] The district court granted the injunction, concluding that the proposed layoffs would be racially discriminatory and that the city's seniority system was non-bona fide.[11] The Court of Appeals for the Sixth Circuit affirmed the first part of the district court's opinion,[12] stating that a court is authorized to modify a consent decree where layoffs caused by an unanticipated economic crisis threaten to frustrate the decree's purpose.[13] Because the district court found that the city's layoff policy was not adopted with a discriminatory purpose, the court of appeals held that the lower court erred in ruling the seniority system non-bona fide.[14] On writs of certiorari, the Supreme Court reversed.[15] The Court held that the district court lacked equitable power to modify provisions in a consent decree relating to the operation of a bona fide seniority system.[16]

---

10. The consent decree resulted from a 1977 class action suit filed by Carl Stotts against the Memphis Fire Department, alleging that various hiring and promotion policies violated Title VII. *Id.* at 546. Stotts based the allegations on statistics showing a wide discrepancy between the number of black and white firemen hired or promoted between 1950 and 1976. *Id.* at 550. In settling the claim, the parties entered a consent decree in 1980. The decree's purpose was to "remedy the past hiring and promotion practices of the Memphis Fire Department with respect to the employment of blacks." *Id.* at 575. Specifically, the city agreed to award 50% of all future vacancies to qualified black applicants. The city further agreed to provide $60,000 in immediate back pay to be distributed among certain members of the class. *Id.* at 576.

At the time the city announced the 1981 proposed lay-offs, 18 minority members had been hired pursuant to the decree. Of these 18, the city slated 15 to be laid off. Similarly, of the 18 blacks the city had promoted under the decree, 14 would be demoted. *See* Brief for Plaintiffs at 54, Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984) [hereinafter cited as Brief for Plaintiffs].

11. The district court granted the injunction in an unpublished decision. Stotts v. Memphis Fire Dep't, No. 77-2014 (W.D. Tenn. 1980) (oral ruling of court granting an injunction).

12. 679 F.2d 541, 563.

13. *Id.*

14. *Id.* at 551, n.6.

15. 104 S. Ct. at 2590. After the district court issued a temporary restraining order forbidding the city to layoff any black employee, the parties consented to the intervention of Firefighters Local Union 1784. 679 F.2d at 549. Both the city and the union filed petitions for certiorari.

16. 104 S. Ct. at 2586-90. The Court first recognized the authority of a district court to modify a consent decree in United States v. Swift & Co., 286 U.S. 106 (1932). In *Swift*, defendants requested relief from a consent decree that prohibited their entry into certain specified businesses. The Court stated that it could not lift the requirements of the decree when the reasons stated in the complaint continued to exist. Nevertheless, the Court did acknowledge the inherent "power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent." *Id.* at 114. *See also* Hughes v. United States, 342 U.S. 353 (1952) (consent decree authorizing

Concern about the possible effect of Title VII's remedial provisions[17] on accrued seniority rights surfaced during the congressional debates over the Act.[18] To ensure passage of the legislation, drafters added section 703(h)[19] to the proposed statute which stated that an employer could lawfully apply different benefit standards under a bona fide seniority system.[20] By granting this measure of immunity to bona fide

---

ownership of stock cannot be modified without adequate hearing); Chrysler Corporation v. United States, 316 U.S. 556 (1942) (modification proper where changed circumstances would serve to thwart basic purpose of original consent decree). *See generally* Rightmeyer and Evans, *Brown v. Neeb: Sisyphus at the Summit?*, 13 U. TOL. L. REV. 711 (1982) (sketches development of modification doctrine).

The plaintiffs in *Stotts* argued that while there were no "changed conditions" to justify a modification under the *Swift* approach, the proposed layoffs would "thwart the basic purposes" of the 1980 consent decree and, therefore, modification was warranted under *Chrysler*. *See* Brief for Plaintiffs, *supra* note 10, at 67-68. *See generally* STATES COMM'N ON CIVIL RIGHTS, CLEARINGHOUSE PUBLICATION 85, TOWARD AN UNDERSTANDING OF *STOTTS* (January 1985).

17. Section 706(g) of Title VII codified at 42 U.S.C. § 2000e-5(g) (1982) contains the Act's remedial provisions. *See supra* note 6 for text of section. Apparently Congress intended courts to have wide discretion in fulfilling their remedial role. The legislative history of the 1972 amendments to the Act provides:

> The provisions of this subsection are intended to give the courts wide discretion [in] exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

SECTION-BY-SECTION ANALYSIS OF H.R. 1746, 118 CONG. REC. 7166, 7168 (1972).

18. *See* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLE VII AND XI OF CIVIL RIGHTS ACT OF 1964. *See also* Joseph, *Last Hired, First Fired Seniority, Lay-offs, and Title VII: Questions of Liability and Remedy*, 11 COLUM. J. OF L. & SOC. PROB. 343, 362-74 (1975) (a concise account of Title VII legislative history).

19. The text of section 703(h), codified at 42 U.S.C. § 2000e-2(h) (1982), provides in pertinent part: "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. . . ." *Id.*

20. Opposition to Title VII centered around the fear that the bill would undermine existing seniority rights. *See* Joseph, *supra* note 18, at 363. To pacify these concerns, Senators Clark and Case, bi-partisan captains of the bill, issued interpretative memoranda insuring that Title VII would not effect vested seniority rights. *See* 110 CONG. REC. 7206-07, 7212-15 (1964). Nevertheless, the bill met substantial resistance in the Senate, which prompted an informal conference between Senators Dirksen, Mansfield, Kuchel and Humphrey. At this conference, the participants worked out the bill that

seniority systems, the Act embraced two competing policies: the overall goal of eliminating discrimination in employment, and the desire to insulate the collective bargaining process from excessive judicial and governmental interference.[21]

The initial court decisions dealing with the conflict between seniority systems and efforts to ensure equal employment opportunity reveal the courts' tendency to seek the immediate elimination of discrimination.[22] This predisposition often resulted in the displacement of facially neutral seniority systems that served to "lock-in" the effects of past discrimination.[23] In *Quarles v. Philip Morris, Inc.*,[24] a group of black employees alleged that the company's use of a departmental seniority system[25] violated Title VII. The company asserted that because the

---

eventually became law. As explained by Senator Humphrey, the conferees added a new subsection, 703(h), which "provid[ed] that it is not unlawful employment practice for an employer to maintain different terms, conditions, or privileges . . . pursuant to a seniority . . . system, provided that the differences are not the result of an intention to discriminate." 110 CONG. REC. 12723 (1964).

Because the drafters formulated the bill at an informal conference, there was no formal committee report from which to gauge legislative intent. These gaps have led both courts and commentators to question the validity of any conclusions drawn from statements made during the congressional debates. *See* Joseph, *supra* note 18, at 369 (pointing out that ". . . section 703(h) is not simply a recapitulation of the Clark views but a new provision reflecting the outcome of the process of reconciling opposing viewpoints . . ."); *See also* Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (legislative materials "singularly uninstructive on seniority rights"). Despite these conflicting views, the Supreme Court has viewed these statements as the genesis of the bona fide seniority system exemption under section 703(h). *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 350 (1977).

21. American Tobacco Co. v. Patterson, 456 U.S. 63 (1982). The Court observed that "Congress was well aware in 1964 that the overall purpose of Title VII, to eliminate discrimination in employment, inevitably would, on occasion, conflict with the policy favoring minimal supervision by courts and other governmental agencies over the substantive terms of collective bargaining agreements." *Id.* at 76-77.

22. *See, e.g.*, United States v. Chesapeake & Ohio R. Co., 471 F.2d 582, 587-88 (4th Cir. 1972), *cert. denied*, 93 S. Ct. 1893 (1973) (departmental seniority systems not exempt under section 703(h)); United States v. Bethlehem Steel Corp., 446 F.2d 652, 658-60 (2d Cir. 1971) (departmental seniority system perpetuates past discrimination policies); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 995 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (section 703(h) merely proscribes creation of fictional seniority); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968) (Congress never intended to immunize seniority systems that lock in effects of past discrimination).

23. *See supra* note 22 and accompanying text.

24. 279 F. Supp. 505 (E.D. Va. 1968).

25. There are three basic types of seniority systems, though each may have many

system applied equally to all employees it fell within the section 703(h) exemption for bona fide seniority systems.[26] The district court rejected this argument, concluding that Congress, by extending this immunity, never intended to validate present differences in seniority resulting from intentional discriminatory policies.[27]

Other courts have followed the *Quarles* court's reasoning.[28] The Court of Appeals for the Fifth Circuit in *Local 189 United Papermakers and Paperworkers v. United States*,[29] considered a case factually similar to *Quarles*. The court, applying *Quarles*, observed that Title VII did not protect departmental seniority systems that perpetuated or exaggerated the prior effects of discrimination,[30] and confirmed the district court's authority to modify the system to eliminate such effects.[31]

---

variations. Cooper & Sobol, *supra* note 4, at 1602. The first type, "employment seniority," is the most common. Under the employment systems a worker's seniority is determined by the total number of years he has worked with the company. The second type, "departmental seniority," requires a worker, upon transfer to a new department, to forfeit his accumulated seniority and start at the bottom of the ladder in the new department. The third type of system is based on "lines of progression." The company ranks different jobs according to their desirability, and when a vacancy opens the company awards the job to the worker with the most seniority in the job below.
Cooper & Sobol, *supra* note 4, at 1602.

26. *See supra* note 19 for pertinent text of the section.

27. 279 F. Supp. at 518. The Supreme Court adopted the *Quarles* approach in *Griggs Co.*, 401 U.S. 424 (1971), a case that dealt with diploma and intelligence testing requirements as a criteria of employment or job transfers. In *Griggs*, the Court stated that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432 (emphasis in original). Chief Justice Burger further asserted in the Court's opinion that "[u]nder 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.

Some commentators have relied on this statement to argue that section 703(h) never was intended to protect seniority systems that perpetuate past discrimination. *See generally* Joseph, *Last Hired, First Fired Seniority*, *supra* note 18; Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967).

28. *See supra* note 27.

29. 416 F.2d 980 (5th Cir. 1969).

30. *Id.* at 990. The Court's language, however, seemed to imply exception to this rule. It stated that "[t]o the extent that Crown and the White union insisted upon carrying forward exclusion of a racially-determined class, *without business necessity*, they committed, with the requisite intent, in the statutory sense, an unfair employment practice as defined by Title VII." *Id.* at 997 (emphasis in original). This concern for requisite intent established the fissure which, in later cases, becomes a clear break with traditional reasoning. *See infra* notes 55-57 and accompanying text.

31. 416 F.2d at 989 (citing *Local 53 of Int' Ass'n of Heat and Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969)).

The *Papermakers* Court then addressed two issues that the *Quarles* court failed to confront. Although the court first recognized that adjusting seniority rights of minorities might affect incumbent employees,[32] it nevertheless determined that in this case the adjustments were designed to minimize such an effect.[33] The court reasoned that because department seniority remained between white employees bidding for the same job, it was displacing only the expectations created by prior discriminatory practices.[34] Second, and of larger implication, the court interpreted section 703(h) as proscribing the creation of fictional seniority for newly hired minorities and stated that a system could only base adjustments in minority seniority rights on time actually worked.[35]

Significantly, the decisions following *Quarles* and *Papermakers*[36] all have involved departmental seniority systems rather than employment seniority systems.[37] In *Waters v. Wisconsin Steel Workers of International Harvester*,[38] the Court of Appeals for the Seventh Circuit based its holding on this distinction.[39] In *Waters*, the district court applied

32. *Id.* at 994-95. The *Papermakers* court imposed an employment seniority system on the company that, in effect, displaced the expectations of incumbent white employees who as a result would now have to compete with minority workers from other departments for future job openings. *Id.* at 995. The court sought to minimize this displacement by allowing white employees to retain their department seniority status when bidding against other white employees. *Id.* at 998.

33. *Id.* at 998.

34. *Id.* at 988. The court further pointed out that under the district court's order minorities would be eligible to compete only for the vacancies immediately above them. *Id.* at 985. This provision lessened the disruptive impact that the modification had on the existing order because minorities would still have to move up job by job. *Id.*

35. *Id.* at 995. The view that Congress never contemplated fictional, or "retroactive," seniority stems from the belief that Congress' primary concern was to compensate only the actual victims of discrimination. Thus, the court in *Papermakers* stated: "requiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of the previous discrimination. . . . The clear thrust of the Senate debate [on Title VII] is directed against such preferential treatment on the basis of race." *Id.* While the courts are still concerned with limiting relief to actual victims of discrimination, they deny that Congress intended Title VII to proscribe an award of retroactive seniority. *See* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (adequate relief would be denied absent an award of retroactive seniority).

36. *See supra* note 22 for a list of cases following *Quarles* and *Papermakers*.

37. *See supra* note 25 for a discussion of the distinctions between the various types of seniority systems.

38. 502 F.2d 1309 (7th Cir. 1974).

39. *Id.* at 1321.

the *Quarles* rule to find that Wisconsin Steel's employment seniority system was not bona fide because the company had engaged in discriminatory hiring practices.[40] The court of appeals confirmed the district court's finding of discriminatory hiring practices, but disagreed with its application of the *Quarles* reasoning.[41] The court distinguished an employment seniority system based on the "last hired, first fired" principle from a departmental seniority system.[42] In the court's view, only a "last hired, first fired" system created "artificial expectations" of seniority on behalf of white employees having equal or fewer years of service than minority employees.[43] The court concluded, therefore, that because the employment system equally recognized an employee's total length of service, the system did not *of itself* perpetuate past discrimination, and was therefore protected under section 703(h) of the Act.[44]

After *Waters*, courts were prone to find that seniority systems violated Title VII if they rested upon prior discriminatory job assignments or contained unreasonable barriers to inter-departmental transfer, but not when the system based seniority on the length of company employment.[45] Consistent with *Quarles* and *Papermakers*, courts customarily looked upon section 703(h) as little more than a bar to an award of constructive seniority.[46] Not until 1976 did the Supreme Court address this view.

In *Franks v. Bowman Transp. Co.*,[47] a trucking company engaged in a pattern of racial discrimination in the hiring of people for its higher paying positions. The plaintiff class consisted of both black employees who had been denied transfer to the more lucrative spots and non-

40. *See* Waters v. Wisconsin Steel Workers of Int'l Harvester, 301 F. Supp. 663, 665 (N.D. Ill. 1969).

41. 502 F.2d at 1320.

42. *Id.*

43. *Id.* For example, in a departmental seniority system, two employees, one black and one white, are hired at the same time. Due to the racial barriers to interdepartment transfer white employees move into new departments much sooner than black employees. The white employee's expectations of greater seniority within the department are thus artificial because both employees have worked the same number of years.

44. *Id.* (emphasis added).

45. *See* Comment, *Employment Discrimination—Seniority Systems Under Title VII*, 62 N.C.L. REV. 357, 363 (1984). *See also* Watkins v. United Steelworkers, Local 2369, 516 F.2d 41, 44-45 (5th Cir. 1975) (plant-wide seniority system, despite disparate *effect* on minorities during periods of layoff, treats all employees equally) (emphasis added).

46. *See supra* note 35.

47. 424 U.S. 747 (1976).

employees whose applications the company turned down outright. Writing for the majority, Justice Brennan abandoned the restrictive view of section 703(h)[48] and awarded constructive seniority to both classes of discrimination victims.[49] Justice Brennan asserted that reading section 703(h) to bar constructive seniority would contravene the congressional policy of "make-whole" relief expressed in other provisions of Title VII.[50]

While *Franks* expanded the relief available to post-Act discrimination victims, it left unresolved the issue of whether or not section 703(h) immunized seniority systems that perpetuated pre-Act discrimination. The Court, in *International Brotherhood of Teamsters v. United States*,[51] settled this controversy by holding that a seniority system does not become unlawful under Title VII merely because it preserves the effects of pre-Act discrimination.[52] The *Teamsters* fact situation was similar to *Franks*. Both cases involved trucking companies that

48. *Id.* at 761-62.

49. *Id.* at 767-69. Applying the *Papermakers* reasoning, the district court denied the award of any constructive seniority. The court of appeals affirmed the denial of constructive seniority to the nonemployees who had been hired subsequently, but awarded seniority to the employees who had been denied transfer. *See* 424 U.S. at 752. Justice Brennan found no support for this distinction in either the body of Title VII or its legislative history. *Id.* at 768. In collapsing the distinction between discriminatory hiring and discriminatory job assignments, Brennan laid the groundwork for the Court's decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). *See infra* notes 51-59 and accompanying text for a discussion of *Teamsters*.

50. 424 U.S. at 758. Justice Brennan specifically cited certain amendments to § 706(g) made in 1972 as authorizing the grant of constructive seniority. *See supra* note 6 for text of section as amended. The new § 706(g), Justice Brennan reasoned, conferred broad powers on the courts to fashion the most complete relief possible. 424 U.S. at 764. He then pointed out that, absent an award of constructive seniority, the individual victim "will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to those [seniority-related] benefits his inferiors." To support his views on "make-whole" relief, Justice Brennan relied on statements made during the congressional debates on the amended provisions:

> The provisions are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. . . . [T]he Act is intended to make the victim of unlawful employment discrimination whole, and . . . the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practices be . . . restored to a position where they would have been were it not for the unlawful discrimination.

Id. at 764, *quoting*, 118 CONG. REC. 7166, 7168 (1972) (section-by-section analysis). *See also* note 17 for discussion of policies behind Title VII remedial provisions.

51. 431 U.S. 324 (1977).

52. *Id.* at 353-54.

denied minorities applications for more desirable "line-driver" jobs.[53] In *Teamsters*, however, the company maintained a departmental seniority system that required employees transferring to line driver positions to forfeit their prior company seniority.[54] The Court upheld this system as bona fide while maintaining that under *Franks*, post-Act victims of discrimination,[55] either in initial application for employment or application for interdepartment transfer, could obtain retroactive seniority effective to their date of application.[56]

The *Teamsters* Court employed a two-pronged test for determining whether a seniority system was bona fide.[57] Under this test, if the provisions of the system apply equally to all workers, and if the system is not adopted for any illegal or discriminatory purpose, then it is lawful under Title VII.[58] Therefore, unless one could prove that a company adopted its seniority system with an intent to discriminate, the system

53. *Id.* at 329. Line drivers are long distance drivers who drive between the company terminals. These jobs are more desirable because a part of an employee's wages are determined by the mileage he travels. *See id.* at n.3.

54. *Id.* at 344. This system affected minority seniority rights the same way as the systems in *Quarles* and *Papermakers* did. *See supra* notes 24-35 and accompanying text for a discussion of *Quarles* and *Papermakers*. Minority employees who eventually received line-driver jobs were "forever junior to white line drivers hired" at the same time. 431 U.S. at 344 n.27.

55. *Id.* at 347. Though *Teamsters* purports to limit relief to individual post-Act discriminatees, it is unclear whether, in Title VII class actions, courts must always limit relief in this manner. In University of California Regents v. Bakke, 438 U.S. 265, 301 (1978), the Supreme Court recognized that race-conscious remedies are sometimes appropriate for Title VII violations. Though the Court emphasized that in every case where such relief had been granted there was a determination of previous discrimination, it stopped short of requiring that individuals within the class show personal injury. *Id.*

56. 431 U.S. at 363-64. The Court did not limit the group of victims allowed to recover to those who actually applied for the line driver openings. If nonapplicants could prove that but for the well known discriminatory hiring practices they *would* have applied for the job, they would be eligible for seniority retroactive to the date at which the vacancy opened. The Court noted, however, that proving such claims would be very difficult. *Id.*

57. *Id.* at 356.

58. *Id.* In effect, the *Teamsters* decision overrules the distinction between departmental and company-wide seniority systems with respect to differences caused by pre-Act discriminatory practices. The Court observed that "[a]lthough a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the 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." *Id.* at 353.

fell within the protection of section 703(h).[59]

The Supreme Court, however, had still not decided whether an affirmative action program designed to remedy prior discrimination could override the provisions of a bona fide seniority system. The lower courts had dealt with this issue since 1975, but produced inconsistent decisions due to differing views concerning a court's authority to modify a consent decree that was silent regarding the employer's policy on layoffs.[60]

In *Jersey Power & Light Co. v. IBEW*,[61] an employer, anticipating layoffs, faced a conflict between following a conciliation agreement outlining a five year minority hiring plan or abiding by a collective bargaining agreement containing a "last hired, first fired" provision.[62] Relying on basic contract principles,[63] the Third Circuit Court of Appeals held that the collective bargaining agreement controlled because the parties directed the conciliation agreement only at new hiring.[64] In dicta, the court remarked that public policy supports a facially neutral seniority system, and thus a court could not modify the system by

59. *See* Pullman-Standard v. Swint, 456 U.S. 273, 277 (1982) ("showing of disparate impact is insufficient to invalidate a seniority system, even though the result may be to perpetuate pre-Act discrimination."); American Tobacco Co. v. Patterson, 456 U.S. 63, 65 (1982) ("the fact that a seniority system has a discriminatory impact is not, by itself, sufficient to invalidate the system; actual intent to discriminate must be proved."). *See generally* Comment, *Employment Discrimination*, *supra* note 45.

60. *See infra* notes 61-73 and accompanying text.

61. 508 F.2d 687 (3d Cir. 1975).

62. *Id.* at 696.

63. The Supreme Court explained the rule governing the construction of consent decrees in United States v. Armour and Co., 402 U.S. 673, 681-82 (1971):

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation. . . . For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purpose of one of the parties to it. . . . [T]he instrument must be construed as it is written, and not as it might have been written. . . .

Id. See also United States v. ITT Continental Baking Co., 420 U.S. 223, 236 (1975) ("Since consent decrees and orders have many of the attributes of normal contracts, they should be construed basically as contracts.").

64. 508 F.2d at 702.

decree.[65]

The Sixth Circuit Court of Appeals, however, in *Brown v. Neeb*,[66] held that a district court had inherent authority to modify a consent decree to prohibit layoffs based upon seniority, if such layoffs destroyed affirmative action progress.[67] The court found power to override the collective bargaining agreement and the relevant Ohio statute[68] in the supremacy clause.[69] The court distinguished *Teamsters*[70] by pointing out it was a Title VII decision, whereas the *Brown* plaintiffs based their complaint on 42 U.S.C. §§ 1981 and 1983.[71]

Other circuit courts have followed the reasoning in *Brown*.[72] These

65. *Id.* at 705. *See supra* note 16 for a discussion of the scope of a court's authority to modify a consent decree.

66. 644 F.2d 551 (6th Cir. 1981).

67. *Id.* at 560.

68. OHIO REV. CODE ANN. § 124.37 (Page 1984) provides: "When it becomes necessary in a police or fire department, through lack of work or funds . . . to reduce the force in such department, the youngest employee in point of service shall be first laid off."

69. The court adopted the position that nothing in the district court's order actually forced the city to violate the statute or the collective bargaining agreement. The city could decline to lay off any personnel and balance its budget in other ways. 644 F.2d at 563. Because the city chose to layoff personnel, the supremacy clause, U.S. CONST. art. VI, cl. 2, required that the federal court order supersede state law. 644 F.2d at 563.

In concurrence, Judge Brown found it ill-advised to invoke the supremacy clause to uphold the district court order. In his view, both the court order and the collective bargaining agreement remained enforceable against the city. This put the burden on the city to decide how it would swallow the losses that its own former discriminatory policies created. *Id.* at 564-66.

The Supreme Court recently applied this approach in W.R. Grace & Co. v. Local Union 759, 103 S. Ct. 2177 (1983). The union alleged that the company violated the seniority provisions of a collective bargaining agreement by laying off members. In upholding the award of relief, the Court recognized the company's dilemma, but stated that the company could blame only itself. *Id.* at 2184.

70. 431 U.S. 324 (1977).

71. 644 F.2d at 564. Perhaps recognizing the tenuous nature of this distinction, the *Brown* court stated that it did "not think that *Teamsters* can bar relief sought to remedy constitutional violations under § 1983, *or under a consent decree.*" *Id.* (emphasis added). This passage strongly suggests that the court would have authorized modification even if the suit had been brought under Title VII.

72. *See* Boston Chapter NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982) ("remedial relief for the effects of past discrimination need not be color blind . . . use of minority-conscious percentage goals . . . is constitutionally permissible."); Stotts v. Memphis Fire Dept., 679 F.2d 541 (6th Cir. 1982) (trial court had authority to override the firefighter's union seniority provisions to effectuate the purpose of the 1980 Decree); Sisco v. J.S. Alberici Constr. Co., Inc., 655 F.2d 146 (8th Cir. 1981) (employer can temporarily override the provisions of a collective bargaining agreement pursuant to a

courts were willing to modify seniority provisions if the effectiveness of court-ordered relief was at stake.[73] This willingness, however, potentially conflicted with the Supreme Court's more restrictive position established in *Teamsters*.[74] The Sixth Circuit's decision in *Stotts*[75] prompted the Supreme Court to finally confront this line of reasoning.

After disposing of an initial mootness issue,[76] the Court in *Stotts* addressed the Sixth Circuit's contention that the injunction merely enforced the terms of the agreed upon consent decree.[77] Justice White,

---

valid affirmative action plan); Bolden v. Penn. State Police, 578 F.2d 912 (3d Cir. 1978) (modification is appropriate where bona fide seniority system operates to hinder remedies designed to eliminate discrimination). *But see* Youngblood v. Dalzell, 568 F.2d 506 (1978) (affirmed district court's refusal to modify consent decree where unanticipated layoffs had devastating effect on minority hiring goals).

73 *See supra* note 72 and accompanying text.

74. *Teamsters* clearly established that the discriminatory impact caused by the application of an otherwise neutral seniority system was alone insufficient to render that system unlawful. 431 U.S. 324, 352-53. By modifying consent decrees to circumvent bona fide seniority systems, however, the lower courts were ruling that companies could not emulate systems having a discriminatory effect. The court in *Brown* noted that "[w]hile a bona-fide seniority system may not itself violate the law, such a system cannot be allowed to obstruct remedies designed to overcome past discrimination." 644 F.2d at 564.

75. 679 F.2d 541 (6th Cir. 1982).

76. The respondents argued that the 1981 preliminary injunction did not permanently enjoin the city from conducting layoffs in accordance with its existing seniority system; the injunction, they claimed, pertained only to the 1981 layoffs. The city had since returned all employees laid off or demoted as a result of the injunction to their former positions. The respondents contended, therefore, that the injunction was no longer effective and the case was moot. *See* Brief for Plaintiff, *supra* note 10.

Justice White rejected this argument. First, he asserted that the court never vacated the injunction and thus it would "appear" that the city must comply with the order in the event of future layoffs. 104 S. Ct. at 2583. Second, even if the injunction applied only to the 1981 layoffs, Justice White expressed concern that the rulings upon which the injunction was predicated might have some precedential effect in future litigation. *Id.* Last, Justice White pointed out that while all the jobs may have been restored, the issues of back pay and lost seniority still existed. *Id.*

In dissent, Justice Blackmun formulated a strong argument. Relying on Article III of the Constitution, he reminded the Court that a justiciable controversy must precede the exercise of federal jurisdiction. In his opinion, none existed. Further, he stated that the Court's usual practice of vacating the judgment and remanding with orders to dismiss would resolve any res judicata concerns the majority might have. *Id.* at 2596 (Blackmun, J., dissenting).

77. *Id.* at 2585. The relevant portions of the consent decree read as follows:

> This Decree is entered into as a settlement of an existing dispute between plaintiffs and defendants as to appropriate and valid procedures for the hiring and promotion of Fire Department personnel for the City of Memphis. It also provides for specific, definable and good faith efforts to be made by defendants to achieve cer-

writing for the majority, relied on the "four-corners" approach to refute this argument.[78] Because the decree failed to mention the city's layoff and demotion policy, Justice White concluded that it would be unreasonable to assume that the parties intended to alter the seniority system or the city's arrangements with the Union;[79] a modification to this effect, therefore, would exceed the district court's authority to enforce the terms of the decree.[80]

In determining the scope of a district court's authority to modify a consent decree, Justice White relied on the *Teamsters* decision and statements made during congressional debates over Title VII.[81] These sources indicated that courts could grant specific, "make whole" relief only to actual victims of illegal discrimination.[82] Justice White thus concluded that even if the district court had found that a pattern or practice of discrimination existed,[83] it would have been inappropriate

---

tain goals of employment of blacks. This Consent Decree satisfies and resolves all claims of plaintiffs . . . of racial discrimination. . . . The purpose of this decree is to remedy the past hiring and promotion practices of the Memphis Fire Department with respect to the employment of blacks. . . . Goals established herein are to be interpreted as objectives which require reasonable, good faith efforts. . . . Both plaintiffs and the class they represent shall seek no further relief for the acts, practices or omissions alleged in the complaints save to enforce the provisions of this Decree. . . .

679 F.2d 541, 574 (1982).

The respondents argued that because the Mayor was responsible for classifying which employees were subject to layoffs, his decision to include in that classification the jobs with the largest ratio of blacks constituted a breach of the decree's good faith requirements. *See* Supplemental Memorandum in Support of a Preliminary Injunction at 2-3, Stotts v. Memphis Fire Department, No. 77-2014 (W.D. Tenn. 1980).

78. *See supra* note 63 for a discussion of the four-corners approach.

79. 104 S. Ct. at 2586.

80. *Id.*

81. *Id.* at 2588-90 (citing 110 CONG. REC. 6549 (1964) and 118 CONG. REC. 7167 (1972)). *See also supra* notes 51-59 for a discussion of International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

82. 104 S. Ct. at 2590 n.15. *See supra* note 50 for a discussion of the Court's views on proper scope of make-whole relief. Justice White realized that only individuals able to prove the discriminatory practice affected them should receive relief. 104 S. Ct. at 2589.

83. 104 S. Ct. at 2588. Justice White cited the fact that the lower court did not litigate the factual issue of whether the city had discriminated, and that the city, in the consent decree, expressly denied having engaged in any discriminatory activity. *See* Stotts v. Memphis Fire Department, 679 F.2d 541, 573-78 (1982), for the text of consent decree. Prior to *Stotts*, all the circuit courts granting modification found the employer discriminated. *See supra* notes 66-72 and accompanying text for a discussion of the circuit court holdings.

for the court to modify the decree and grant specific relief.[84] Implicit in the Court's analysis is the assumption that the district court's preliminary injunction constituted individual awards of constructive seniority.[85]

In his dissent, Justice Blackmun admonished the Court for ignoring the appropriate standard of review for a preliminary injunction.[86] By treating the district court proceedings as a request for a permanent injunction, the Court, in effect, deprived the respondents of an opportunity to substantiate their discrimination claims, and then penalized them for not having done so.[87]

Justice Blackmun stated that, had the case gone to trial, the respondents might well have shown that the city violated the decree's good faith requirements.[88] In such case, the injunction would have been proper as enforcing the terms of the decree.[89] Finally, Justice Blackmun argued that in Title VII class action suits the concept of race conscious affirmative relief was often appropriate.[90] Although individual

84. 104 S. Ct. at 2588.

85. Justice Blackmun strenuously objected to this characterization of the district court order. He remarked:

> In the instant case, respondents' request for a preliminary injunction did not include a request for individual awards of retroactive seniority—and, contrary to the implication of the Court's opinion, the District Court did not make any such awards. Rather, the District Court order required the city to conduct its layoffs in a race-conscious manner . . .

104 S. Ct. at 2606 (Blackmun, J., dissenting).

86. *Id.* at 2600-62 (Blackmun, J., dissenting). The Court articulated the proper standard in Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975), where it stated that "the standard of appellate review is simply whether the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion." *Id.* In contrast, a court issues a permanent injunction after a full trial on the merits and the decision is therefore open to full judicial review. University of Texas v. Camenisch, 451 U.S. 390, 396 (1981). Justice Blackmun asserted that rather than reviewing the propriety of granting the preliminary injunction, the Court erroneously undertook an evaluation of the underlying legal claims. 104 S. Ct. at 2602.

In a separate concurrence, Justice O'Connor replied to this argument by pointing out that the respondents had no chance of succeeding on the merits of their claim and that, therefore, the Court merely denied the district court's order as an abuse of discretion. *Id.* at 2594 (O'Connor, J., concurring).

87. *Id.* at 2603.

88. *Id.*

89. *Id.* at 2603-04. Justice Blackmun thought the respondents based their respect for injunctive relief on this claim. He disagreed with the Court's view that the respondents were interested mainly in the modification of the decree. *Id.* at 2603.

90. *Id.* at 2609.

class members have no claim to the relief, in such cases they avoid having to show a personal injury resulting from the discrimination.[91]

Firefighters Local Union No. 1784 v. Stotts clearly follows the *Teamsters* approach of protecting bona fide seniority systems from Title VII scrutiny.[92] Unlike the *Quarles* and *Papermakers* courts, the Supreme Court accords little weight to the disparate impact a seniority system may have on minorities.[93] Instead, the Court valued Congress' legitimate concern that affirmative action not be taken at the expense of incumbent employees.[94] In recognizing this concern, however, the Court fails to articulate a reason why affirmative action may be impeded at the expense of innocent minorities. Finally, the *Stotts* opinion reflects the current disfavor with which the Court looks upon the idea of race-conscious relief in situations where vested seniority rights are at stake.[95] The Court continues to view such a remedy as inconsistent with a clear congressional intent to limit Title VII to actual victims of discrimination.[96]

The Court's decision may warrant criticism for its failure to consider the countervailing factors that will inevitably result. Having forfeited their right to pursue alternative remedies,[97] the respondents will invariably shoulder the burden of future layoffs. The city, free to conduct layoffs in accordance with the collective bargaining agreement, need no longer consider the racial imbalances that will result from such layoffs. Under the Court's opinion, it is of no consequence that such imbal-

---

91. *Id.*

92. *See* 431 U.S. at 324, 352-53 (1977). *See supra* notes 51-59 for a discussion of *Teamsters.*

93. *See supra* notes 24-35 and accompanying text.

94. *See supra* notes 17-20 and accompanying text.

95. This attitude, however, does not extend to situations where cities adopt affirmative action programs voluntarily. In United Steelworkers of America v. Weber, 443 U.S. 193 (1979), a union and a company voluntarily entered a collective bargaining agreement designed to "eliminate conspicuous racial imbalances." *Id.* at 198. Under the agreement, the company established job training programs to teach unskilled workers the skills necessary to become craft workers. The company reserved 50% of the openings in these programs for blacks and thus many of the black employees admitted had less seniority than rejected white applicants. In upholding this agreement, the Court stated that Title VII did not forbid "private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences. . . ." *Id.* at 200.

96. 104 S. Ct. at 2588 (citing *Teamsters*, 431 U.S. 324, 367-71 (1977)).

97. *See supra* note 77 for text of consent decree.

ances are a result of the city's former discriminatory hiring practices.[98] The Court responds to this charge by baldly asserting that no actual finding of discrimination had ever been made.[99]

Despite this apparent inequity, the *Stotts* opinion deserves praise for the role it will play in facilitating voluntary settlement of Title VII disputes. In light of *Stotts*, attorneys negotiating future consent decrees will be more careful to spell out the policies for determining layoffs and demotions.[100] A possible result of more thoughtful drafting, however, may be greater reluctance of employers to engage in voluntary settlements. Companies are unlikely to enter into consent decrees containing specific provisions on layoff procedures if such provisions conflict with the terms of their collective bargaining agreements.[101] Rather, they may take their chances in court and leave to minority plaintiffs the difficult task of proving an employer's subjective intent to discriminate in adopting its seniority system.[102] What remains clear from the *Stotts* opinion is that, absent a specific provision to the contrary, employers are free to conduct layoffs according to a bona fide seniority system.

Eugene A. Boyle

98 *See supra* note 69.

99. 104 S Ct. at 2588. As the dissent points out in the following passage, this assertion penalizes the respondents for failing to prove an issue that never went to trial: The whole point of the consent decree in these cases . . . is for both parties to avoid the time and expense of litigating the question of liability and identifying the victims of discrimination In the instant consent decree, the city expressly denied having engaged in any discrimination at all. Nevertheless the consent decree in this case provided several persons with promotions and back pay
Id. at 2607 (Blackmun, J., dissenting).

100. *See* Brief for Plaintiffs, *supra* note 10, at 69.

101 *See supra* note 69 for a discussion of the Court's opinion in W.R. Grace & Co. v. Local Union 759, 103 S. Ct. 2177 (1983).

102. *See supra* note 59.