DISCRIMINATION—TITLE VII—LAYOFFS OF WOMEN AND MEMBERS OF MINORITY GROUPS PURSUANT TO A PLANT-WIDE SENIORITY SYSTEM CONTAINED IN A COLLECTIVE BARGAINING AGREEMENT HELD NOT TO VIOLATE TITLE VII—*Jersey Central Power & Light Co. v. Local 327, IBEW*, 508 F.2d 687 (3d Cir. 1975).

In January of 1972, a charge was filed with the Equal Employment Opportunity Commission (EEOC) alleging that Jersey Central Power & Light Company,[1] and seven local affiliates of the International Brotherhood of Electrical Workers[2] were maintaining certain employment practices which effectively discriminated against women and minority groups in violation of Title VII of the Civil Rights Act of 1964.[3] After investigating the complaint, the EEOC found a reasonable basis for concluding that the company had discriminated in its hiring and promotion policies. As a result, in December of 1973, a conciliation agreement was negotiated between the company, the EEOC, and the unions.[4] According to the pertinent provisions of that agreement, the company stipulated that it would refrain from discriminating against women and minority groups with respect to their hiring and advancement,[5] and further pledged that an "affirmative action program" would be established to increase the percentages of those workers on the company's payroll over a five year period.[6]

In July of 1974, the company announced that due to adverse economic circumstances it would be necessary to lay off a substantial number of employees. After being informed of the plan, the

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[1] Jersey Central is a large public utility located in New Jersey and involved in the generation and distribution of electric power to forty-three percent of the state. Brief for Appellee at 4, Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975) [hereinafter cited as Brief for Appellee].

[2] The unions involved were Locals 327, 749, 1289, 1298, 1303, 1309 and 1314, with whom Jersey Central had collective bargaining agreements. Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687, 692 n.2 (3d Cir. 1975).

[3] *Id.* at 694. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 *et seq.* (1970), broadly "prohibits employment discrimination on the basis of race, color, religion, sex or national origin." NATIONAL EMPLOYMENT LAW PROJECT, LEGAL SERVICES MANUAL FOR TITLE VII LITIGATION 4 (rev. 1973) (footnotes omitted) [hereinafter cited as TITLE VII MANUAL]. The Act created the Equal Employment Opportunity Commission (EEOC), conferring upon that office the authority to investigate charges of discrimination and to arbitrate conciliation agreements. Additionally, the Equal Employment Opportunity Act of 1972 granted the EEOC the authority to bring actions on behalf of individuals against employers suspected of discrimination. *Id.* at 1-2.

[4] Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687, 694 (3d Cir. 1975).

[5] *Id.*

[6] *Id.* at 695.

unions responded by insisting that workers be laid off in accordance with the plant-wide seniority system which was set forth in the collective bargaining agreement.[7] In response, the EEOC maintained that a layoff procedure based solely upon plant-wide seniority would have a disproportionate impact upon the recently hired women and members of minority groups, in violation of both the conciliation agreement[8] and Title VII.[9] To resolve the apparent conflict between the conciliation agreement and the collective bargaining contract, the company instituted an action for a declaratory judgment[10] in order to determine which of the two covenants was to govern its actions in the laying off of employees.[11]

The district court stated in an oral opinion that, to the extent that the two contracts were inconsistent, the conciliation agreement was to prevail. The court emphasized that to lay off employees according to the seniority provisions of the collective bargaining contract would have a disproportionate effect on women and

[7] *Id.* at 696. According to the terms of the collective bargaining agreement, workers would be laid off in reverse order of seniority. Pursuant to that agreement, " '[s]eniority is defined as length of continuous service with the Company.' " *Id.*

In addition to plant-wide seniority (sometimes referred to as "mill" seniority), other types of seniority systems presently utilized are: departmental seniority (measuring seniority by length of service in a particular department); progression line seniority (measuring seniority by length of service in a line of progression, where jobs within each line serve as training for the next); and job seniority (measuring seniority by length of service in a particular job). Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1602 (1969). *See also* S. SLICHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 161 (1960) [hereinafter cited as SLICHTER].

[8] Brief for the United States Equal Employment Opportunity Commission as Appellee at 30, Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975).

[9] *Id.* at 36.

[10] Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687, 697 (3d Cir. 1975).

The defendants in the action were the seven local affiliates of the International Brotherhood of Electrical Workers (IBEW), the EEOC, the United States Office of Federal Contract Compliance (OFCC), the United States General Services Administration (GSA), and the New Jersey Division of Civil Rights, Department of Law and Public Safety. Brief for Appellee, *supra* note 1, at 2.

On August 23, 1974, Jersey Central moved for an order to show cause why a summary judgment should not be granted, declaring the rights and duties of the company according to the two agreements negotiated among the company, the unions and the EEOC. On September 5, 1974, defendants GSA and OFCC moved to dismiss the complaint for failure to state a claim upon which relief could be granted and for lack of subject matter jurisdiction in the federal district court. The EEOC opposed the plaintiff's motion for summary judgment, claiming that material facts were in dispute. 508 F.2d at 692. The New Jersey Division of Civil Rights did not file a response to the complaint and failed to take part in any stage of the proceedings. *Id.* at 692 n.4.

[11] Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687, 691 (3d Cir. 1975).

minority groups, "in frustration of" the objectives of the conciliation agreement.[12] Therefore, a partial declaratory judgment was entered[13] in which the company was ordered to lay off employees in a manner that would avoid a reduction of the percentage of women and members of minority groups in the work force, rather than in strict accordance with the procedure that was outlined in the collective bargaining contract.[14]

The United States Court of Appeals for the Third Circuit, in *Jersey Central Power & Light Co. v. Local 327, IBEW,*[15] reversed the district court, holding that the two contracts did not conflict[16] and that the procedure for layoffs should be governed by the seniority provisions of the collective bargaining agreement.[17] The court rejected the EEOC's argument that "an implicit inconsistency exist-[ed] between the two" covenants[18] which necessitated a modifica-

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[12] Jersey Cent. Power & Light Co. v. Local 327, IBEW, Civil No. 74-1083, at 9 (D.N.J., Sept. 5, 1974).

[13] *Id.*

[14] Specifically, the district court ordered that the layoff procedure should not reduce the minority group and female worker ratios below those percentages existing on July 27, 1974, one month before the layoff procedure began. *Id.* at 12-13.

Additionally, the district court's order required that at the end of five years, women and minority group workers should constitute a ratio of the company's work force approximately equal to the percentages of those groups in the relevant labor market. Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687, 693 (3d Cir. 1975).

[15] 508 F.2d 687 (3d Cir. 1975). The court was satisfied that jurisdiction had been established on two grounds. First, the complaint had properly invoked jurisdiction on the basis of section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) (1970), since the company sought a declaration of its rights under the collective bargaining agreement. 508 F.2d at 698-99. Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1970). The court noted that the district court had incorrectly applied New Jersey law in construing the contract. Even in state courts, such actions are governed by federal substantive law. 508 F.2d at 699 n.32. *See* Local 721, United Packinghouse Workers v. Needham Packing Co., 376 U.S. 247, 250 (1964). Jurisdiction over the collective bargaining agreement based on section 301 also provided the court with ancillary jurisdiction over the EEOC conciliation agreement. 508 F.2d at 699.

Alternatively, the court found that jurisdiction over both the collective bargaining agreement and the conciliation agreement was properly predicated on 28 U.S.C. § 1331 (1970). 508 F.2d at 699. That section gives district courts jurisdiction in actions "aris[ing] under the Constitution, laws, or treaties of the United States," where the amount in controversy exceeds $10,000. 28 U.S.C. § 1331(a) (1970). Although no figure was specified, the court was satisfied that information contained in the company's complaint and affidavit established liability in an amount that exceeded $10,000. 508 F.2d at 699 n.33.

[16] 508 F.2d at 704.

[17] *Id.* at 691.

[18] *Id.* at 702-03.

tion of the collective bargaining contract.[19] The EEOC had maintained that since the objective of the conciliation agreement was to increase the company's percentages of female and minority workers, enforcement of the seniority provisions of the collective bargaining contract could only have the effect of thwarting that purpose.[20]

The court, however, stressed that the EEOC had only partially articulated the goals of the conciliation agreement.[21] According to the court's evaluation, "the true objective" of that agreement was the *hiring* of females and minorities,[22] and that *once hired,* employees in those groups should be controlled by the provisions of the collective bargaining contract.[23] Moreover, it was asserted that in order for a contract to be modified by a subsequent agreement, "the terms of the second contract must be so inconsistent with those of the first that both contracts cannot stand together."[24] Emphasizing that the conciliation agreement contained no provision pertaining to seniority or layoffs and that the only objective of the agreement was the hiring of a greater percentage of women and minority groups,[25] the court found that the terms of the conciliation agreement in fact incorporated the seniority provisions of the collective bargaining contract.[26] Therefore, the court concluded that the terms of the conciliation agreement could not be interpreted as explicitly or implicitly affecting the seniority provisions of the collective bargaining contract.[27]

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[19] *Id.* at 702.

[20] *Id.* at 702-03.

[21] *Id.* at 703.

[22] *Id.* The court noted that section III, paragraph 9, of the conciliation agreement provided:

> "*Respondent Company shall make a reasonable effort to recruit minorities and females into those craft areas where such jobs are to be filled by new hires,* where they have heretofore been underutilized or not employed."

Id. at 701 (emphasis by the court).

[23] *Id.* at 702. The court noted that section III, paragraph 10, of the conciliation agreement supported its evaluation of the agreement. That section provides:

> "The wages, benefits, *other conditions of employment and seniority date of such employee* shall be determined in accordance with the provisions of the Collective Bargaining Agreement."

Id. (emphasis by the court).

Furthermore, the court noted that during negotiation of the conciliation agreement, the EEOC had attempted to modify the seniority provisions of the collective bargaining contract so that minority groups and women hired under the agreement would be given greater seniority. However, the unions rejected all such suggestions of modification. *Id.* at 695-96 n.20.

[24] *Id.* at 703 (footnote omitted).

[25] *Id.* at 701.

[26] *Id.* at 702.

[27] *Id.* at 704.

Furthermore, in the court's opinion, considerations of public policy did not require modification of the collective bargaining contract[28] since it had been the intent of Congress to protect facially neutral plant-wide seniority systems, even though they might operate to the disadvantage of women and minority groups.[29] Additionally, it was determined that the only evidence which could be presented in challenging a facially neutral plant-wide seniority system would be "evidence directed to ascertaining an intent or design to disguise discrimination."[30]

The determination of whether a particular seniority system is violative of the Act depends upon statutory interpretation. As a result, the focus of judicial inquiry has been upon "the legislative intent underlying Title VII."[31] Prior to the passage of the Civil Rights Act of 1964, members of the Senate and the House of Representatives expressed concern that sections of Title VII could jeopardize firmly established seniority systems.[32] Consequently, an amendment to the Act was passed "to protect the 'bona fide seniority' " plans which were "not the result of an 'intention to discriminate.' "[33]

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[28] *Id.* at 705.

[29] *Id.* at 706.

[30] *Id.* (footnote omitted).

[31] Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 102 (1974).

[32] Cooper & Sobol, *supra* note 7, at 1608-09; *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1159 (1971).

The portion of Title VII which caused the concern among some legislators was section 703(a). *Id.* Section 703(a) provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual . . . because of . . . race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees in any way which would deprive . . . any individual of employment opportunities or otherwise adversely affect his status as an employee, because of . . . race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1970).

Section 703(c) provides similar prohibitions with respect to unions, making it unlawful for a labor union

> (2) to limit, segregate, or classify its membership . . . in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin: or
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> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Id. § 2000e-2(c).

[33] *Developments in the Law*, *supra* note 32, at 1159 (footnote omitted) (quoting from 42 U.S.C. § 2000e-2(h) (1970)).

The amendment 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

Subsequent interpretation of this amendment, section 703(h), has been the subject of much litigation[34] and commentary.[35] According to some authorities, it was the intent of Congress to protect facially neutral seniority systems regardless of whether the system had the effect of perpetuating prior discriminatory employment practices.[36] Other commentators have maintained that the legislature's approval of seniority systems was not so broad,[37] and that it was not Congress' intent to protect those seniority systems that were facially neutral and had a disproportionate impact upon women and members of minority groups.[38]

Part of the difficulty in evaluating the legislative intent underlying Title VII arises from the fact that supporters of the bill were able to bring it to the floor of the Senate without prior consideration by any committee. As a result, no Senate committee report, an important reference for interpreting the legislative history of a federal statute, was ever published.[39] Consequently, most courts have relied on the series of statements introduced by Senator Clark in the House of Representatives as the primary source for evaluating the legislative intent underlying the Act.[40] These statements, termed "interpretative memorand[a],"[41] supported the position

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compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h) (1970).

[34] For a compilation of cases involving the validity of seniority systems within the meaning of section 703(h) of Title VII see BNA EMP. PRACTICES MAN. 421:551, 554-60 (1975).

[35] *See, e.g.*, Cooper & Sobol, *supra* note 7, at 1610-14; Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 448-49 (1966); *Developments in the Law, supra* note 32, at 1159-60; Note, *supra* note 31, at 104 n.31.

[36] *Developments in the Law*, *supra* note 32, at 1159. *See, e.g.*, Note, *supra* note 31, at 100 n.17.

[37] *Developments in the Law, supra* note 32, at 1160. *See, e.g.*, Cooper & Sobol, *supra* note 7, at 1611-14.

[38] Cooper & Sobol, *supra* note 7, at 1614.

[39] *See id.* at 1609.

[40] *See, e.g.*, 508 F.2d at 707-08; Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1318-19 (7th Cir. 1974); Local 189, United Papermakers v. United States, 416 F.2d 980, 987 & n.8 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 515-16 (E.D. Va. 1968). *Contra*, Watkins v. United Steel Workers of America, Local 2369, 369 F. Supp. 1221, 1228 (E.D. La. 1974).

[41] Cooper & Sobol, *supra* note 7, at 1609.

The statements were an interpretive memorandum compiled by the Department of Justice, an interpretive memorandum formulated by Senators Clark of Pennsylvania and Case of New Jersey, and a series of answers prepared by Senator Clark in response to questions that had been presented by Senator Dirksen of Illinois. *Id.* at 1609-10.

that Title VII was not intended to effect major revisions in established plant-wide seniority systems.[42]

However, these memoranda were silent as to departmental seniority systems,[43] and the early cases presented courts with the problem of evaluating the validity of such systems in light of Title VII. *Quarles v. Philip Morris, Inc.*[44] was the first case to find that a seniority system, which measured a black employee's promotion rights according to his departmental seniority, was not a bona fide seniority system within the meaning of Title VII.[45] Prior to 1965, the company had organized its employees into all-black and all-white departments.[46] After passage of the Act, black employees were permitted to transfer to the previously all-white departments.[47] However, because the higher paying jobs were filled on the basis of seniority within each department,[48] black workers were unable to acquire sufficient seniority to qualify for the higher paying jobs.[49]

Finding that the differences in the conditions of employment for blacks and whites were the result of the company's previous discriminatory policy of excluding blacks from certain departments, the court held that the departmental seniority system was not "*bona fide*" within the meaning of the Act.[50] The court explained that "[t]he act does not condone present differences that are the result of intention to discriminate before the effective date of the act,"[51] and further held that "a departmental seniority system that has its genesis in racial discrimination is not a *bona fide* seniority system."[52]

The situation in *Local 189, United Papermakers v. United States*[53] was similar to that evaluated in *Quarles*.[54] Finding that the

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[42] *Id.* at 1609. The statements were introduced in the House by Senator Clark for the purpose of rebutting the contrary interpretation of Title VII as expressed by Senator Hill of Alabama. *Id.*

[43] A departmental seniority system measures seniority by length of service in a particular department. *See* note 7 *supra*.

[44] 279 F. Supp. 505 (E.D. Va. 1968).

[45] Cooper & Sobol, *supra* note 7, at 1617-18.

[46] 279 F. Supp. at 508.

[47] *Id.* at 512.

[48] *Id.*

[49] *Id.* at 513.

[50] *Id.* at 517-18 (emphasis in original).

[51] *Id.* at 518.

[52] *Id.* at 517 (emphasis in original).

[53] 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[54] In *United Papermakers*, prior to 1964, the company had organized jobs through the use of progression lines within each department. Under this procedure, jobs within each line served as training for the next line. Promotion within each line was determined by job

employer maintained a departmental seniority system which had the effect of perpetuating past discriminatory employment practices, the court held that the system was unlawful under Title VII.[55] It was further reasoned that a seniority system which "carr[ied] forward the effects of former discriminatory practices"[56] could only be justified if it was "essential to the safe and efficient operation of [the company]."[57] Once it had determined that the system could not be justified as essential to the business operations of the company,[58] the court found it necessary to modify the seniority system. To effect this, the remedy utilized in *Quarles* was adopted[59] and the departmental seniority system was supplanted with plant-wide seniority.[60] Citing the *Quarles* court's interpretation

seniority, so that the person who had worked the longest in the progression line below received the job. 416 F.2d at 983. After passage of the Act, the company merged the progression lines within each department. However, all jobs performed by black employees were ranked beneath the jobs performed by whites in the same department. Permanently ranked behind new white employees, blacks with years of service were unable to attain sufficient seniority to be eligible for the higher paying jobs. *Id.* at 984.

[55] *Id.* at 983.

[56] *Id.*

[57] *Id.* at 989. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court held that a discriminatory employment practice would be violative of Title VII unless it could be shown that the practice constituted a "business necessity." *Id.* at 431. In that case, it was found that the employer's practice of requiring a high school diploma and sufficient scores on intelligence tests as part of the hiring process could not be justified as a "business necessity." *Id.*

Generally, courts have interpreted the "business necessity" requirement of *Griggs* as permitting an employment practice that has a disparate impact on blacks only if such practice is essential to the safe and efficient operation of a valid business purpose. *See, e.g.*, United States v. N.L. Indus., Inc., 479 F.2d 354, 364-65 (8th Cir. 1973); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970). In each of these cases, the court found that a departmental seniority system which perpetuated the effect of prior discriminatory employment practices could not be justified according to the business necessity test. 479 F.2d at 366; 446 F.2d at 662; 444 F.2d at 799-800; 431 F.2d at 249.

For a thorough examination of the concept of business necessity see Note, *supra* note 31.

[58] 416 F.2d at 989.

[59] 279 F. Supp. at 521.

[60] 416 F.2d at 988. This remedy, called the "rightful place" approach, permits the black employee to compete for employment preferences on the basis of his company or plant-wide seniority rather than by length of service in his previous department or job. *Developments in the Law, supra* note 32, at 1158.

Two other approaches that have been used to resolve the problems presented by discriminatory seniority systems are the " 'freedom now' " approach and the " 'status quo' " approach. The " 'freedom now' " approach permits blacks to replace white incumbents who have jobs, which "but for" prior discriminatory policies, blacks would have had. The " 'status quo' " approach provides that where the seniority system is facially neutral, it should not be altered in any way. *Id.*

A majority of courts have adopted the rationale of the " 'rightful place' approach" because

of the legislative history of Title VII,[61] the court noted that it was the intent of Congress to protect plant-wide seniority systems as "bona fide" within the meaning of the Act.[62]

Consistent with the decisions in *Quarles* and *United Papermakers*, courts have generally held that employment preferences, based upon seniority in jobs or departments from which blacks have been previously excluded because of race, are discriminatory in violation of Title VII.[63] However, courts have differed on the question of whether layoffs based upon plant-wide seniority are discriminatory when newly hired members of protected groups are the first to be fired under the last-in, first-out priority of most seniority schemes.[64]

That was the very question confronting the court in *Waters v. Wisconsin Steel Works of International Harvester Co.*[65] Although blacks

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it is viewed as preventing the perpetuation "of past discrimination without granting preferential treatment to any racial group." BNA EMP. PRACTICES MAN. 421:551, 552 (1975). *See, e.g.*, Franks v. Bowman Transp. Co., 495 F.2d 398, 422-23 (5th Cir. 1974); United States v. N.L. Indus., Inc., 479 F.2d 354, 374-75 & n.17 (8th Cir. 1973); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971).

In contrast to the evaluation of most courts that the rightful place approach measures an employee's seniority from the date the worker entered the company, some courts have interpreted the rightful place approach as being a remedy by which only *some* seniority that an employee has acquired in his old job, is transferred to the new job. BNA EMP. PRACTICES MAN. 421:551, 556-57 (1975). *See Developments in the Law, supra* note 32, at 1158. *Compare* Thornton v. East Tex. Motor Freight, 497 F.2d 416, 419-20 (6th Cir. 1974) *with* Bing v. Roadway Express, Inc., 485 F.2d 441, 451 (5th Cir. 1973). Although both courts found that the rightful place approach was the proper remedy, they differed as to how much seniority could be transferred to the new job. In *Bing*, the court indicated that black employees' seniority should be computed from the time they became qualified to transfer. 485 F.2d at 451. In *Thornton*, the court rejected that approach, maintaining that it would result in the preferential treatment of blacks. 497 F.2d at 420-21. Thus, the *Thornton* court concluded that seniority should date from the time the black employees first applied for a transfer to the new job or from the time the worker first filed the complaint against the employer. *Id.* at 420.

[61] 416 F.2d at 987-88.

[62] The court stated:

> We conclude, in agreement with *Quarles*, that Congress exempted from the anti-discrimination requirements only those seniority rights that gave white workers preference over junior Negroes.

Id. at 995.

[63] *See, e.g.*, Franks v. Bowman Transp. Co., 495 F.2d 398, 414 (5th Cir. 1974); United States v. Jacksonville Terminal Co., 451 F.2d 418, 453 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); United States v. Bethlehem Steel Corp., 446 F.2d 652, 658-59 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314, 323 (E.D. La. 1970); United States v. Continental Can Co., 319 F. Supp. 161, 166 (E.D. Va. 1970).

[64] *Compare* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1320 (7th Cir. 1974) *with* Watkins v. United Steel Workers of America, Local 2369, 369 F. Supp. 1221, 1228 (E.D. La. 1974).

[65] 502 F.2d 1309 (7th Cir. 1974).

had been seeking employment at the company since 1947, it was not until the passage of the Civil Rights Act of 1964 that the company hired a black worker.[66] As a result, black employees were unable to acquire sufficient seniority to survive layoffs.[67] Waters, a black employee, claimed that the seniority system at the plant was unlawful under Title VII because it perpetuated the effects of the company's previous discriminatory policy.[68]

Agreeing with the evaluation of the legislative history in *Quarles* and *United Papermakers,* the *Waters* court found that Congress intended to protect plant-wide seniority as a bona fide system within the meaning of Title VII.[69] The court rejected the plaintiff's claim that the seniority system should be altered because it perpetuated the effects of past discrimination.[70] Distinguishing the prior cases in which courts had modified seniority systems, it was emphasized that those situations involved challenges with respect to departmental seniority.[71] In contrast to a system based upon departmental seniority, a plant-wide seniority system did "not of itself" perpetuate the effects of past discrimination.[72] The court stated that

> through a department or job seniority policy . . . blacks would be given no credit for their previous years of employment with the employer and would be placed at the bottom of the employee roster . . . .[73]

Under plant-wide seniority, however, it was noted that workers were given "equal credit for actual length of service with the employer."[74] Additionally, it was pointed out that in modifying departmental seniority systems, courts frequently employed plant-wide seniority "as a racially neutral and adequate remedy to the discriminatory impact of the prior seniority systems."[75]

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[66] *Id.* at 1316.

[67] *See id.* at 1318.

[68] *Id.* at 1317.

[69] *Id.* at 1318-20.

[70] *Id.* at 1318.

[71] *Id.* at 1317-18.

[72] *Id.* at 1318. The court implied that a bona fide seniority system cannot in fact perpetuate the effects of past discrimination. *Id.*

[73] *Id.*

[74] *Id.* at 1317-18.

[75] *Id.* at 1318. In addition to Waters' challenging the seniority system at the plant, Waters and Samuels, a new black applicant at the plant, claimed that "two amendatory agreements to the collective bargaining contract" between the company and the union were discriminatory and in violation of Title VII. *Id.* at 1312-13, 1320.

Prior to 1965, the company did not have a provision for severance pay in the collective bargaining contract. After the company realized that it would be necessary to lay off eight

Facts very similar to those in *Waters* were contrastingly evaluated by a district court in *Watkins v. United Steel Workers of America, Local 2369.*[76] Due to the company's prior discriminatory hiring policy,[77] black workers hired after the passage of Title VII were unable to acquire sufficient seniority to withstand layoffs initiated in 1971.[78] Since recall rights were also based upon length of service with the company, it was unlikely that a black worker would be recalled.[79]

The court held that the company's use of plant-wide seniority as the basis for deciding which workers should be laid off was racially discriminatory in violation of Title VII.[80] This holding was based upon the decisions in the departmental seniority cases[81] and the referral system cases.[82] According to the court's analysis, these two groups of decisions established the principle that

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white workers with five to six years seniority, in addition to other junior black workers, the company and the union negotiated an amendatory agreement directed exclusively to the eight white employees. *Id.* at 1313. The agreement provided that the eight workers had the option of either retaining their contract seniority rights or receiving $966.00 in severance pay. *Id.* The workers chose to give up their contract seniority rights in favor of receiving severance pay. *Id.* at 1314. Since company policy granted workers with the most seniority priority for the purposes of recall, the eight workers, in effect, chose to forfeit their right to recall. *Id.* at 1313-14.

When the company realized that it had underestimated its need for workers, employees were recalled in the order of their seniority. However, as a result of the recall situation at the plant, the company negotiated a second amendatory agreement with the union. This agreement was made for the purpose of recalling the workers who had previously exchanged their seniority rights, and therefore their right to recall, in favor of receiving severance pay. At the trial Waters and Samuels claimed that the second amendatory agreement was discriminatory because it had the effect of advancing the three white workers who had elected to return to the plant ahead of them on the hiring and recall list. *Id.* at 1314.

The court found that the company's action toward Waters, with respect to the granting of priority to white workers who had previously forfeited their contract seniority rights in favor of severance pay, was discriminatory because it "project[ed] the company into the realm of presently perpetuating the racial discrimination of the past." *Id.* at 1320-21. Rejecting the company's contention that the amendatory agreement was justified as a "business necessity," the court emphasized that "an employment practice 'can be justified only by a showing that it is necessary to the safe and efficient operation of the business.' " *Id.* at 1321 (quoting from Robinson v. Lorillard Corp., 444 F.2d 791, 797 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971)). The court further noted that the company's goodwill and concern for possible labor problems did not meet the requisites for a showing of business necessity. 502 F.2d at 1321.

For a discussion of the business necessity test see note 57 *supra.*

[76] 369 F. Supp. 1221 (E.D. La. 1974).

[77] Except for two black workers who had been hired in the 1940's, until 1965 only whites were employed at the plant. *Id.* at 1223.

[78] *Id.* at 1224.

[79] *Id.*

[80] *Id.* at 1228.

[81] *Id.* at 1225. *See* note 63 *supra.*

[82] 369 F. Supp. at 1226. *See, e.g.,* United States v. Sheet Metal Workers Int'l Ass'n,

> employment preferences cannot be allocated on the basis of length of service or seniority, where blacks were, by virtue of prior discrimination, prevented from accumulating relevant seniority.[83]

Finding that blacks at the company were prevented from acquiring such seniority due to prior hiring practices, the court asserted that the plant-wide seniority system perpetuated the effects of past discrimination and was therefore not a bona fide system within the meaning of Title VII.[84]

The court acknowledged the fact that plant-wide seniority was considered to be a racially neutral system in the departmental seniority cases, but maintained that this was not because such a system was "*per se* valid."[85] In analyzing the departmental seniority cases, it noted that because blacks had been excluded only from certain jobs, they had acquired sufficient years of service with the company to enable them to compete equally with the white workers for plant-wide seniority.[86] However, those situations were viewed as being easily distinguishable from *Watkins,* in which blacks had been previously excluded from the plant itself and were thus prevented from earning sufficient plant-wide seniority to withstand layoffs.[87]

Local 36, 416 F.2d 123 (8th Cir. 1969); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969); EEOC v. Plumbers Local 189, 311 F. Supp. 468 (S.D. Ohio 1970), *vacated on other grounds*, 438 F.2d 408 (6th Cir. 1971); Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968).

The *Watkins* court noted that the cases concerning referral rules most frequently involved contractors in the construction trades who were required by the collective bargaining contract to hire craftsmen referred by the union. Under this procedure blacks were systematically excluded from craft work under the collective bargaining contract. 369 F. Supp. at 1226.

Although blacks were subsequently admitted into the unions, the referral rules were maintained. Because the referral rules gave a job preference to workers with the longest service, blacks were placed in the lowest group for the purposes of referral. *Id.*

The *Watkins* court stressed that in all of these cases, the referral systems were found to be violative of Title VII because "they perpetuated the effect of past discrimination against blacks, and presently deprived blacks of equal employment opportunity." *Id.*

[83] 369 F. Supp. at 1226.

[84] *Id.* at 1228.

[85] *Id.* at 1226 (emphasis in original).

[86] *Id.*

[87] *Id.* Furthermore, the court noted that the evaluation of section 703(h) of Title VII, as expressed by the court in *Quarles,* supported a finding that a plant-wide seniority system could be violative of Title VII. *Id.* at 1228. Citing Judge Butzner's analysis of section 703(h) in *Quarles*, it was emphasized that

> "Section 703(h) expressly states the seniority system must be *bona fide.* The purpose of the act is to eliminate racial discrimination in covered employment. Obviously one characteristic of a *bona fide* seniority system must be lack of discrimination."

Id. (quoting from Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 517 (E.D. Va. 1968))

Finally, the court rejected the defendant's contention that modification of a plant-wide seniority system was not a valid remedy because it would not help the victims of the original discrimination who had not been hired because of the company's previous discriminatory practices.[88] It was recognized that in Title VII cases, frequent use has been made of remedies benefiting individuals other than those who were originally discriminated against, in order to prevent the perpetuating effects of prior discrimination.[89]

In essence, the courts in *Waters* and *Watkins* differed in their interpretations of what would qualify as a bona fide seniority system.[90] The court in *Waters* found that plant-wide seniority was a bona fide system because it was neutral on its face and "of itself" did not perpetuate past discrimination.[91] In *Watkins*, however, it was asserted that a facially neutral plant-wide seniority system could not be a bona fide seniority system if it continued the effects of past discriminatory practices.[92]

Against this background, *Jersey Central* represents a significant step toward insulating from attack systems based upon plant-wide seniority that have a disproportionate effect upon women and members of minority groups.[93] Consistent with the interpretation of the legislative history in *Quarles* and *United Papermakers*, the court in *Jersey Central* found that Congress intended a facially neutral plant-wide seniority system to be bona fide even though it operated to the disadvantage of protected groups.[94] To support this evaluation of the legislative history of Title VII, the court relied primarily upon the interpretive memoranda introduced into the record by Senator Clark during debate in the House.[95] Thus, it rejected the conclusion reached in *Watkins* that the interpretive memoranda were not a valid basis for evaluating the legislative intent underlying Title VII because the statements were made prior to its adoption.[96] Emphasizing that "the legislative

(emphasis in original). Therefore, the court in *Watkins* asserted that because the employer perpetuated the effects of past discrimination, the system did not have the essential characteristics of a bona fide seniority system—namely, lack of discrimination. 369 F. Supp. at 1228.

[88] 369 F. Supp. at 1231.

[89] *Id.*

[90] *See* 508 F.2d at 705 n.48.

[91] 502 F.2d at 1318.

[92] 369 F. Supp. at 1228.

[93] 88 LAB. REL. REP. 21, 24 (1975).

[94] 508 F.2d at 710.

[95] *Id.* at 707-08 & n.56.

[96] *Id.* at 707 n.56.

history of Title VII [was] largely uninstructive with respect to seniority rights"[97] and finding that the congressional statements dealt directly with seniority systems, the court maintained that the memoranda were useful as a primary source in evaluating the legislative intent.[98]

Acknowledging the potential hardship to some individuals,[99] the court stressed that to modify the seniority provisions of the collective bargaining contract, so that women and members of minority groups would not be adversely affected, would necessitate the creation of " *'fictional seniority.'* "[100] It was maintained that such an approach would involve " *'preferential rather than remedial treatment'* " in violation of section 703(j) of Title VII.[101] Thus, the court reasoned that

> Congress, while recognizing that a bona fide seniority system might well perpetuate past discriminatory practices, nevertheless chose between upsetting all collective bargaining agreements with such provisions and permitting them despite the perpetuating effect that they might have.[102]

Because it had determined that Congress intended to protect plant-wide seniority, the court found that it would be improper to modify such systems on the basis of public policy.[103] It emphasized that with "Title VII, Congress . . . supplanted with its own views any judicial determination of public policy."[104] Furthermore, it was asserted that any remedy which "alleviat[ed] the effects of past discrimination" would have to come from the Congress, "and not by judicial decree."[105]

Even more basic to the court's decision than the public policy issue was its definition of a bona fide seniority system: "[A] bona

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[97] *Id.* at 705.

[98] *Id.* at 707.

[99] *See id.* at 710.

[100] *Id.* at 709 (quoting from Local 189, United Papermakers v. United States, 416 F.2d 980, 995 (5th Cir. 1969)) (emphasis by the court).

[101] 508 F.2d at 709 (quoting from Local 189, United Papermakers v. United States, 416 F.2d 980, 995 (5th Cir. 1969)) (emphasis by the court).

Section 703(j) provides in pertinent part:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee . . . to grant preferential treatment to any individual or to any group . . . on account of an imbalance which may exist with respect to the total number . . . of persons of any race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(j) (1970).

[102] 508 F.2d at 706.

[103] *Id.* at 704-05, 710.

[104] *Id.* at 704-05 (footnote omitted).

[105] *Id.* at 710.

fide plant-wide seniority system is one which is facially neutral and was neither designed nor intended to disguise discriminatory practices."[106] Therefore, in contrast to the majority of cases,[107] the court maintained that an aggrieved party would be required to submit evidence showing a subjective intent to discriminate in order to successfully challenge a facially neutral plant-wide seniority system.[108] Evidence of nothing more than the fact that a system perpetuated the discrimination of the past was found to be "without probative value in challenging a bona fide seniority system."[109]

Analyzing the proper procedure for introducing evidence in the proceeding to uncover such an intent to discriminate, the court found that the district court should have viewed the evidence in two stages. Initially, only "evidence directed either to the neutrality of the seniority system or evidence directed to ascertaining an intent or design to disguise discrimination" would be permitted.[110] If after considering such evidence, the court concluded that the seniority system was bona fide, no further evidence would be allowed. However, where evidence supported a finding that the seniority system was not bona fide, a second evidentiary stage would be made available to the complainant so that he might introduce "all evidence relevant to a Title VII proceeding, including but not limited to past discriminatory employment practices."[111]

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[106] *Id.* at 706-07 n.54.

[107] Many courts have maintained that proof of a subjective intent to discriminate is not required to show that an employment practice is discriminatory under Title VII. TITLE VII MANUAL, *supra* note 3, at 40. Section 703(h) protects different terms and conditions of employment which are applied "pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate." 42 U.S.C. § 2000e-2(h) (1970).

In *United Papermakers* the court considered section 703(g) of Title VII and determined that "the statute, read literally, requires only that the defendant meant to do what he did, that is, his employment practice was not accidental." 416 F.2d at 996. Consequently, the court rejected the defendant's contention that the seniority system was protected by the statute because the system was not maintained with the *intent* to discriminate. *Id.* at 996-97. It concluded that "[t]he requisite intent may be inferred from the fact that the defendants persisted in the conduct after its racial implications had become known to them." *Id.* at 997.

Similarly, the Supreme Court in Griggs v. United States Power Co., 401 U.S. 424 (1971), indicated that a subjective intent to discriminate was not required, noting that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432 (emphasis in original). *See also* Rowe v. General Motors Corp., 457 F.2d 348, 355 (5th Cir. 1972); Robinson v. Lorillard, 444 F.2d 791, 796 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971).

[108] 508 F.2d at 706.

[109] *Id.*

[110] *Id.* at 706-07 & n.54 (footnote omitted).

[111] *Id.* at 706-07 n.54. It has been suggested that because most of the pertinent informa-

In his concurring opinion, Judge Van Dusen disagreed with the court's interpretation of the legislative history of the Act and the public policy behind Title VII.[112] He found persuasive the view expressed in *Watkins* that Congress did not intend a facially neutral plant-wide seniority system that perpetuated the effects of past discrimination to be a bona fide system which would be immune to judicial modification.[113] Drawing an analogy to the departmental seniority cases, he emphasized that plant-wide systems having the same effect should also be subject to modification.[114]

Furthermore, Judge Van Dusen rejected the majority's view that Title VII alone provided the formulation of public policy with respect to seniority, noting that

> the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.[115]

By implication, the court in *Jersey Central* indicated that there exist two means of obtaining modification of a facially neutral plant-wide seniority system that perpetuates the effects of past discrimination. First, the court observed that through the express terms in a conciliation agreement, the parties could modify the seniority provisions of the collective bargaining contract.[116] However, it is unlikely that any union would agree to such a modifica-

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tion relevant to a Title VII proceeding "is in the hands of the defendants," the complainant rarely has an opportunity to collect that which would be necessary to show discrimination. TITLE VII MANUAL, *supra* note 3, at 32. As a result, the courts have permitted "a very liberal approach to allowing proof of discrimination" through pre-trial discovery. *Id.* at 35.

The sources of information permitted in such a proceeding have included civil rights organizations' case histories on employers suspected of discrimination and governmental agencies' statistical data indicating that an employment practice is discriminatory. *Id.* at 32-33.

[112] 508 F.2d at 710.

[113] *Id.* at 712. At least one study has indicated that the interpretive memoranda, so heavily relied upon by a number of courts as the primary tool in evaluating the legislative intent underlying Title VII, may represent an inaccurate evaluation of the statute with respect to the issue of seniority. Cooper & Sobol, *supra* note 7, at 1611. They emphasized that none of the congressional statements introduced by Senator Clark were ever presented on the floor of the Senate, and that there was no debate of their contents or discussion of the issue of seniority. *Id.* at 1610. Furthermore, the writers stressed that the congressional statements were made prior to the addition of section 703(h) to Title VII, and could not therefore have been interpretive of that provision. *Id.* at 1613.

[114] 508 F.2d at 711.

[115] *Id.*

[116] *See id.* at 701.

tion. This was precisely the case in *Jersey Central.*[117] Unions have resisted modification of established seniority systems because nearly all of the benefits negotiated in the collective bargaining contract during the last two decades have been predicated upon a worker's seniority status.[118] Additionally, workers have valued their seniority rights so highly because, as a standard for determining the allocation of work, they offer a large degree of objectivity which protects the worker from the "personal preferences" of the employer.[119]

Second, the court implied that a facially neutral plant-wide seniority system could be modified if the aggrieved party could show a subjective intent to discriminate.[120] However, because of the difficulty in proving such a subjective intent, the effect of the court's decision is to almost completely "insulat[e] plant-wide seniority systems from attack."[121]

Although the court did consider circumstances under which a plant-wide seniority system could be modified, conspicuously absent from the court's analysis was any discusssion of remedial measures that would be available if it could be shown that a system was maintained with the intent to discriminate. Presented with a questionable legislative history that was "largely uninstructive with respect to seniority,"[122] the court was left with no alternative but to phrase the issues before it narrowly. Consequently, the court indicated that without any legislative direction as to affirmative relief that would be appropriate,[123] it would be necessary to uphold the seniority rights of the incumbent white workers.[124]

Further compounding the problem, however, is the strong possibility that Congress will not provide prescriptive legislation.[125] The major reason for this apparent inaction is that any potential solution which has been proposed thus far would inevitably work a detrimental effect upon a substantial segment of the labor force.[126]

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[117] *Id.* at 695-96 n.20.

[118] *See* SLICHTER, *supra* note 7, at 104-05.

[119] Cooper & Sobol, *supra* note 7, at 1602-04. *See* SLICHTER, *supra* note 7, at 104-05.

[120] *See* 508 F.2d at 706-07 & n.54.

[121] 88 LAB. REL. REP. 21, 24 (1975).

[122] 508 F.2d at 705.

[123] *Id.* at 710.

[124] *Id.* at 691.

[125] According to one undisclosed source, the possibility of Congress' passing prescriptive legislation was remote: " 'Legislation? Are you crazy? We're not kamikazes over here.' " N.Y. Times, Mar. 9, 1975, § 4, at 1, col. 5.

[126] Work-sharing programs have been suggested as an alternative to layoffs whereby work would be allocated throughout the company on a more limited scale so that each

Therefore, in the absence of further guidance from the legislature, and in light of the questionable legislative history, courts will continue to be presented with the dilemma of balancing the need for relief for women and members of minority groups[127] with the potential harm to the seniority rights and job security of the incumbent white workers.

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employee would work shorter hours. *See* SLICHTER, *supra* note 7, at 142. However, within the past few years there has been strong resistance on the part of unions to adopting such a procedure. In addition to the union's objection to " 'sharing [the] misery,' " the principal reason for labor's position has been the fact that unemployment compensation benefits have increased to such a degree that a shortened work week would not provide any more compensation to the worker than that which would be received under state unemployment programs and the collective bargaining contracts. *Id.* at 152-53.

Another remedy that has been suggested is implementation of a system whereby layoffs could be accomplished according to the employee's seniority and ability. *Id.* at 155. However, such a procedure would probably be opposed by the unions because an evaluation of an employee's ability might subject the worker to the "personal preferences" of the employer. *See* Cooper & Sobol, *supra* note 7, at 1603-04.

A plan also under consideration would involve the use of a short-term inverse seniority system whereby an employee who has attained a year's seniority could receive up to a full year's pay through a combination of state unemployment insurance and supplemental layoff benefits. N.Y. Times, Nov. 10, 1974, § 3, at 4, col. 5. However, in a period of recession, where the likelihood is that many individuals laid off will remain out of work, the value of these types of compensation is questionable. *See id.*, Mar. 9, 1975, § 4, at 1, col. 1.

Finally, separate seniority lists have been suggested as a remedy whereby different records would be devised for minorities, women, and white male workers. However, a question has been raised with regard to where black and white female employees would be listed. Jersey Cent. Power & Light Co. v. Local 327, IBEW, Civil No. 74-1083, at 18 (D.N.J., Sept. 5, 1974) (oral opinion). Furthermore, this procedure, which was used extensively twenty years ago, was rejected by the unions precisely because it was usually implemented with the result of "restrict[ing] the competitive status" of these groups. SLICHTER, *supra* note 7, at 135. Although this procedure has been omitted from most collective bargaining contracts, there is some indication that separate seniority lists are still in use in particular industries. *Id.*

[127] For a discussion of the unemployment statistics with respect to women and members of minority groups see N.Y. Times, Mar. 9, 1975, § 4, at 1, col. 4.