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TITLE VII v. SENIORITY BASED LAYOFFS: A QUESTION OF WHO GOES FIRST

By Harry H. Rains*

The recent recession and consequential mass layoffs have created a significant area of conflict between organized labor on the one hand and minority and women bargaining unit members on the other. If such layoffs take place under traditional last hired, first fired seniority systems, the first to go are often newly hired women and minorities. An employer who lays off these recently hired workers in such a fashion risks violating Title VII of the Civil Rights Act of 1964; however, an employer who devises a scheme for layoffs other than by simple seniority may be violating the provisions of a collective bargaining agreement. The responsible federal administrative agencies are, in turn, concerned with preserving the embryonic integrated work forces which have developed as a result of Title VII and related legislation.

The establishment of seniority systems simply on the basis of last in, first out, has long been one of the most highly treasured prizes of organized labor. Sometimes, of course, this has involved departmental or job seniority, where layoffs are done departmentally on a last in, first out basis.

Recently, a number of cases have reached the courts on the issue of conflicts between layoffs in reverse order of seniority and Title VII. Before discussing these cases in more detail, it is necessary to provide some background in the general area of Title VII

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The author first presented this analysis at the 1975 mid-year meeting of the American Bar Association Committee on Development of the Law under the National Labor Relations Act.

3. In a recent layoff case, United Affirmative Action Comm. v. Gleason, 10 BNA FEP Cas. 64 (D.C. Ore. 1974), the court stated that "seniority seems to be the prevalent way in this country for determining the layoff responsibility." The court "shuddered" at the thought of using the merit system for layoffs, and noted that such a system runs counter to Civil Service rules as well as traditional union rules.
4. Departmental seniority refers to length of service in a specific department (e.g., maintenance) where one facet of an employer's work is performed. Job seniority is similar in that it refers to length of service in a particular job (e.g., Maintenance Worker I).
litigation concerning seniority, but involving promotion or level of pay issues, rather than layoffs.

Most of the cases have involved formerly segregated plants. When Congress adopted Title VII, or shortly before, a considerable number of these plants were integrated for the first time. The great majority of them had job or departmental seniority systems, so that minorities accumulated seniority only within a minority department, or minority job progression line. After integration, a minority worker had to begin anew the accumulation of seniority if he transferred into what was formerly an all-white department. Often this would involve a pay cut for a senior black worker, and the possible loss of seniority accrual that protected him against layoff. Consequently, the Equal Employment Opportunity Commission (EEOC) and minority workers litigated cases challenging promotion based on such job or departmental seniority.

One of the most troublesome tasks facing the courts in resolving these attacks on departmental or job seniority systems was interpreting the legislative history of Title VII. During debate of the statute's effect on seniority rights, Senator Joseph Clark, (Democrat-Pennsylvania), a floor leader of the 1964 Civil Rights Act, made several statements and circulated a Justice Department memorandum indicating that the bill would not affect seniority rights. For example, one prepared response to an inquiry by Senator Everett Dirksen, (Republican-Illinois), read: "If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race."5

As finally adopted, Title VII contains the following language specifically addressed to its effect on seniority:6

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

Significantly, the legislative efforts in the House and the Senate failed to accomplish an outright exception or exemption for seniority practices established before Title VII's enactment. At best, the reference to seniority in the legislative history is ambiguous and could well be meaningless for litigation purposes. Most courts treated this part of the legislative history as not controlling the perpetuation of prior discrimination in the case of job or departmental seniority systems in a formerly segregated plant. The real problem confronting the courts in the formerly segregated plant promotion cases has been structuring an adequate remedy. The remedies which courts have devised fall into three basic categories: the “freedom now,” the “status quo,” and the “rightful place” approaches.

Under the “freedom now” approach, blacks have been allowed to “bump” white employees out of their jobs after transferring to a department within which they would have had more seniority but for past segregation. Due to the Title VII language forbidding “preferential treatment,” many courts have rejected the “freedom now” approach.


8. The term “bump” refers to the act of ousting a co-worker from a position he previously held. See note 11 infra.

9. In Patterson v. American Tobacco Co., 8 FEP Cas. 778 (E.D. Va. 1974), an employer who discriminated against blacks and women was ordered to institute a company-made posting and bidding program for non-supervisory jobs. The only necessary qualifications were seniority and willingness to learn the job. The displaced incumbent employees who were “bumped” to a job with a lower classification had their wages “red circled,” i.e., maintained at the same level until the new wage reached their previous pay level. The court realized that those who were “bumped” to lower paying jobs would suffer morale- and economically, but rationalized that the relief was warranted because past discrimination had allowed “those persons greater job opportunity than more senior blacks and women.” Id. at 783-84.

Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer . . .

11. See, e.g., Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969),
Courts which have found that an employer's promotion practice does not violate the Act have adopted what has been classified as the “status quo” approach.\textsuperscript{2} Most courts, however, have adopted the “rightful place” approach and have devised several distinct remedies relating to future job openings.\textsuperscript{3} For example, plant-wide seniority has been substituted for departmental seniority, at least for transferring blacks.\textsuperscript{4} As a remedy, such substitution could prove ephemeral at best, or more harmful than the ailment at worst. In the alternative, pay cuts at entry levels in formerly all-white departments have been eliminated for transferring blacks.\textsuperscript{5}

These “rightful place” courts have placed great emphasis upon whether special qualifications are necessary for the performance of jobs in separate departments. When special qualifications have been found truly necessary, for example in maintenance divisions where dangerous chemicals are used, the courts have found the continuation of departmental or job seniority justified.\textsuperscript{6} Furthermore, progression lines\textsuperscript{7} have been permitted when a lower-rung job provides needed training for the next job up the ladder.\textsuperscript{8} When faced with permissible job or progression line sen-

\textsuperscript{2} cert. denied, 397 U.S. 919 (1970). Although the \textit{Papermakers} court dealt with seniority and promotion, it offered the following dicta to govern Title VII challenges to seniority based layoffs:

It is one thing for legislation to require the creation of \textit{fictional} seniority for newly hired Negroes, and quite another for it to require that time \textit{actually worked} in Negro jobs be given equal status with time worked in white jobs. . . . [C]reating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment.

\textit{Id.} at 995.


\textsuperscript{4} See, e.g., Local 189, \textit{Papermakers} v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970). The court in \textit{Papermakers} set forth the manner in which the “rightful place” theory is applied:

A “rightful place” theory stands between a complete purge of “but for” \textit{[sic]} effects maintenance of the status quo. The Act should be construed to prohibit the future awarding of vacant jobs on the basis of a seniority system that “locks in” prior racial classification. White incumbent workers should not be bumped out of their present positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of [Title VII].

\textit{Id.} at (988). \textit{See also} EEOC v. Detroit Edison Co., 10 BNA FEP Cas. 239, 250 (6th Cir. 1975).

\textsuperscript{5} See, e.g., Local 189, \textit{Papermakers} v. United States, 416 F.2d 980 (5th Cir. 1969).

\textsuperscript{6} See, e.g., Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974).


\textsuperscript{9} “Progression line” refers to a customary line of promotion which depends on the accumulation of skills, knowledge or years of experience.
iority, accompanied by past segregation of the job or progression line, however, courts adhering to the "rightful place" doctrine have asked which blacks were qualified for such specialty jobs in formerly white-only departments, and have awarded seniority from the date that specific black workers would have transferred to the departments had they not been segregated. 19

The "Alice in Wonderland" approach of these court-concocted remedies (whether retroactively applied or devised for prospective protection against discrimination) indicates an inadequate consideration of the equity rights of the unwitting employees who benefited from their employer's prior discriminatory hiring practices. These employees are not implicated in the employer's discriminatory practices even though these practices may have been conceived and administered with the blessing and consent of the employees' union representatives.

Most of the courts and the advocate parties involved in this conflict have taken notice of the fact that the use of straight seniority is a well established employment practice which is easily understood and administered. These pragmatic considerations justify the use of seniority in employer-employee relations. With this background in mind, the courts approached the layoff cases.

Layoff Cases

In Jersey Central Power & Light Co. v. Local 327, IBEW, 20 a federal district court in New Jersey was confronted with an action for a declaratory judgment brought by an employer faced with the economic necessity of laying off a substantial portion of its work force. Jersey Central sought to determine whether the layoffs should take place in accordance with the seniority provisions of its collective bargaining agreement, as claimed by the union, or whether (as the EEOC contended) the layoffs should be pursued in a manner which would not result in the extensive discharge of recently employed women and minorities who had been hired in accordance with a conciliation agreement reached with the EEOC.

The district court ruled that the conciliation agreement took precedence over the collective bargaining agreement and ordered Jersey Central to lay off employees in a manner designed to pre-

20. 8 FEP Cas. 690 (D.N.J. 1974).
serve the same percentages of minorities and women as existed one month prior to the commencement of the layoffs.\textsuperscript{21} The district court did not reach the issue of whether there had been past discrimination, since its ruling that the EEOC conciliation agreement took precedence made such a finding unnecessary. The court further indicated that the collective bargaining agreement was to be preserved whenever it was not inconsistent with the conciliation agreement, \textit{i.e.}, a white employee with greater seniority than a junior black might be laid off first, but as between white males and as between blacks, seniority rights were to prevail. Despite the court's careful reference to preservation of the collective bargaining agreement, the court manifestly stepped in and rewrote the collective bargaining agreement in an important substantive area.

The Third Circuit reversed,\textsuperscript{22} primarily because the panel found no conflict between the conciliation agreement and the collective bargaining contract. Paragraph 10 of the conciliation agreement stated: "The wages, benefits and conditions of employment and seniority date of such employee shall be determined in accordance with the provisions of the collective bargaining agreement."\textsuperscript{23} The higher court also noted the fact that in the discussions leading to adoption of the conciliation agreement, the EEOC had backed a proposal to negotiate a seniority system that would have given minorities and women a degree of superseniority.\textsuperscript{24} The EEOC dropped its proposal after it was rejected by the IBEW.

Relying on several other contract provisions, the court determined that the thrust of the conciliation agreement covered only "new hires" and, except for the provision quoted above, was silent on the question of bumping and layoffs. Hence, the court found the two contracts perfectly consistent because both upheld layoffs on the traditional "last hired, first fired" basis.

Next, the court determined that the seniority provisions of the collective bargaining agreement were not per se inconsistent with public policy because no court had ever found a per se violation of Title VII based on seniority alone, even though they had

\textsuperscript{21} \textit{Id.} at 693-94.
\textsuperscript{22} \textit{Jersey Central Power & Light Co. v. Local 327, IBEW, 508 F.2d 687, 695 (3d Cir. 1975).}
\textsuperscript{23} \textit{Id.} at 695.
\textsuperscript{24} \textit{Id.} at 695-96 n.20.
found violations based upon a showing of perpetuation of past discrimination.\textsuperscript{25}

Finally, the Third Circuit considered what standard the district court should apply on remand in considering whether Title VII had been violated, since the issue had not been reached in the previous district court opinion. In considering this issue, the court of appeals determined that the legislative history of Title VII showed that Congress had intended to exempt "last hired, first fired" provisions from the coverage of the Act, and to proscribe seniority systems only when they perpetuated differences based on prior segregation, not upon prior refusal to hire. Thus, the court said, "Congress exempted from the antidiscrimination requirements only those seniority systems that gave white workers preference over junior Negroes."\textsuperscript{26}

Hence, plant-wide seniority systems are exempt from the Act's prohibitions in the view of the Third Circuit, but job seniority or departmental seniority systems developed in a context of segregated departments or job lines are not exempt from Title VII's antidiscrimination mandate. In this manner, the court distinguished the holdings that Title VII could work to strike down such departmental or job seniority provisions where they worked to perpetuate inequality based on past segregation.

Similarly, in \textit{Waters v. Wisconsin Steel Works},\textsuperscript{27} Chief Judge Swygert rejected the argument that the company had violated Title VII of the Civil Rights Act of 1964\textsuperscript{28} and the Civil Rights Act of 1866\textsuperscript{29} by laying off black bricklayers on the basis of the company's traditional "last hired, first fired" policy. Wisconsin Steel conceded that it had discriminated in the past, with the result that blacks were unable to accumulate the necessary seniority to prevent their being laid off. As in \textit{Jersey Central}, the court specifically held that the legislative history of Title VII made it clear that the Act did not reach such past discrimination.\textsuperscript{30}

The \textit{Waters} court distinguished cases in which courts had modified departmental or job seniority systems—where there had previously been segregated job or departmental lines—on the

\textsuperscript{25} Id. at 704-05.
\textsuperscript{26} Id. at 709, quoting \textit{Local 189, Papermakers v. United States}, 416 F.2d 980, 995 (5th Cir. 1969).
\textsuperscript{27} 502 F.2d 1309 (7th Cir. 1974).
\textsuperscript{30} \textit{Waters v. Wisconsin Steel Works}, 502 F.2d 1309, 1318-19 (7th Cir. 1974).
ground that Wisconsin Steel had used the clearly neutral standard of plant-wide seniority. In doing so, it relied heavily on the seniority provision of Title VII, on the statement of Senator Clark, and upon the Justice Department's memorandum circulated by Senator Clark when Title VII was debated.

The court, however, did grant relief to one of the black bricklayers on the basis of a subsequent modification of the seniority provisions of the collective bargaining agreement, and awarded him back pay up to the date he had been refused reinstatement. His claim was upheld over the claims of senior whites who had taken severance pay in lieu of their seniority rights; however, the court rejected the argument that the seniority system itself was violative of Title VII in light of prior discrimination.

Completely in agreement with Waters and Jersey Central is the Court of Appeals for the Fifth Circuit's decision in Watkins v. Steel Workers Local 2369. This decision reversed a district court ruling which strongly favored the minority workers involved. In Watkins, the Continental Can Company plant in Harvey, Louisiana, was found to have hired no blacks prior to 1965, except for two hired during the exigencies of World War II. Thus, as in Waters, past discrimination was evident. Continental had, however, hired a number of blacks to comply with Title VII. As in Waters and Jersey Central, the employer (Continental) had laid off employees in accordance with a plant-wide "last hired, first fired" seniority provision.

Unlike the Third and Seventh Circuits, the district court in

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31. See text accompanying note 5 supra.
32. Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1320-21 (7th Cir. 1974).
33. In Jones v. Pacific Intermountain Express, 10 BNA FEP Cas. 913 (N.D. Cal. Apr. 23, 1975), several over-the-road drivers sought a preliminary injunction against the use of the seniority system maintained by the employer and the union. The drivers asked the court to examine the order of layoffs which had occurred and those which the employer threatened to institute in the future. After agreeing with the conclusion reached by the Third Circuit in Jersey Central and the Seventh Circuit in Waters on the seniority issue, the court further stated that its finding would be the same even if the seniority system was invalid. This result would be required because the plaintiffs' seniority "cannot be dated back to when they would have applied for work... but for [the employer's] alleged reputation for racial discrimination." Id. at 914. The Jones court, in agreement with the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), felt that this remedy "would be inconsistent with the requirement that one seeking to prove racial discrimination against him in hiring show he actually applied for the desired position." Jones v. Pacific Intermountain Express, 10 BNA FEP Cas. 913, 914 (N.D. Cal. Apr. 23, 1975).
Watkins found the prior attacks on departmental and job seniority systems to be controlling. It also relied on past decisions which held union referral systems violative of Title VII's antidiscrimination provisions.\footnote{35.}{The referral system decisions concerned craft unions which had discriminated against blacks in the past and which, after beginning to admit blacks, applied referral rules. This granted priorities to those with long working experience, leaving blacks in the lowest group for referrals because of their prior exclusion from the unions. These referral systems were then held unlawful under Title VII because "they perpetuated the effect of past discrimination against blacks, and presently deprived blacks of equal employment opportunity." Watkins v. Steel Workers Local 2369, 369 F. Supp. 1221, 1226 (E.D. La. 1974). See United States v. Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969); Dobbins v. Local 212, Electrical Workers, 292 F. Supp. 413 (S.D. Ohio 1968); cf. Local 53, Heat Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).}

As in Waters and Jersey Central, the issue of legislative history was raised. The district court specifically rejected the conclusions and holding later reached by the Waters court, that the legislative history ultimately relied upon in Waters was inconsistent with the prior rulings on departmental and job seniority.\footnote{36.}{Watkins v. Steelworkers Local 2369, 369 F. Supp. 1221, 1227-28 (E.D. La. 1974).}

Hence, the court felt that it had already been established that the legislative history was not to be viewed as controlling. The court viewed as anomalous the application of legislative history to preserve plant-wide seniority systems in the case of an employer who had hired no blacks previously, but not to preserve seniority in the case of a formerly segregated plant. The court observed that under such a standard, the employer who had at least hired blacks, even if they were given inferior jobs, would be punished more harshly than the employer who had gone even further by hiring no minorities at all.


The Watkins court noted that even if the legislative history of Title VII made the instant layoffs unreachable under the provisions of the 1964 Act, such legislative history could not possibly control the application of the 1866 Act.

The lower court in Watkins did acknowledge one difference between the case of the formerly all-white employer and the case of the previously segregated employer. It was that the class of those who had been previously discriminated against was clearly identifiable in the case of the previously segregated plant,
whereas the newly hired minority workers in the previously all-white plant could not be said to have been the direct victims of the company's past discrimination. The white workers in the previously segregated plant could be said to be directly benefited, vis-a-vis identifiable blacks from the past segregation. The white workers in the previously all-white plant, however, could not be said to have benefited vis-a-vis the blacks now being laid off, many of whom were too young to have been the victims of the company's prior discrimination.  

The district court ultimately resolved this difficulty by applying a unique remedy. It ordered the immediate reinstatement of enough blacks to restore the same percentage of black workers as there had been prior to the layoffs. These workers were to be determined on the basis of black seniority and given back pay; however, no white workers were to be displaced by the reinstatement of the improperly laid-off blacks, even though this resulted in a larger work force than was necessary to carry out the level of the company's then current operation. Furthermore, this artificially enlarged work force had to be paid on the basis of a 40-hour week, although this amount of work clearly was not then available.

The possibility of reinstating some already laid off minorities also arose in the decision of the district court in *Jersey Central* since layoffs in accordance with the collective bargaining contract had preceded the court's action. There the court realized that reinstatement would cause severe practical problems, and as a result held that the percentage of women and minorities retained after all layoffs could be within 15 percent of the percentage of minorities and women employed prior to the beginning of the layoffs. Moreover, the district court did not order *Jersey Central* to retain white workers, as the lower court in *Watkins* had done; this was a fundamental difference between the remedies ordered. Thus, the white workers' seniority expectations in *Watkins* were honored, but these same expectations were found wanting by the

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39. In remarks delivered before the New York City Bar Association, William J. Kilberg, Solicitor of Labor, noted that the black employee plaintiffs in *Watkins* were in their twenties and had been employed by the company from three to five years, making them too young to work for Continental Can in 1965. Therefore, none of these plaintiffs had actually been denied employment by the employer due to discrimination. Kilberg vigorously criticized the grant of fictional seniority to those workers because the plaintiffs claim was based "on allegedly discriminatory refusals to hire other unnamed blacks at unstated times prior to 1964." 89 LAB. REL. REP. 139 (1975).

lower court in *Jersey Central*, although both cases involved minority workers who could not be said to have been the direct victims of past discrimination. Indeed, the *Jersey Central* court never reached the issue of *Jersey Central*'s past discrimination.\(^{41}\)

In reversing the district court ruling in *Watkins*, the court of appeals relied heavily on the facts surrounding plaintiffs' claim. The court carefully pointed out that none of the plaintiffs actually had their hiring delayed by Continental's discriminatory practices. As a result, the Title VII claims were not personal to plaintiffs, but were based on general discrimination against other blacks practiced prior to passage of the Civil Rights Act. The court placed considerable emphasis on this fact in holding: \(^{42}\)

\[
\text{[R]egardless of an earlier history of employment discrimination, when present hiring practices are non-discriminatory and have been for over ten years, an employer's use of a long-established seniority system for determining who will be laid off and who will be rehired, adopted without intent to discriminate, is not a violation of Title VII or § 1981, even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination.}
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Because the plaintiffs had not suffered from the employer's prior discrimination, the court felt that they were already in their "rightful place" and therefore not entitled to a remedy. The black plaintiffs received the identical employment benefits, terms, and conditions as their white counterparts under a "color blind" collective bargaining agreement. \(^{43}\) It was further stated that Title VII's protection of bona fide seniority would have exempted the

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\(^{41}\) The legal conclusions reached by the lower court in *Watkins* were expressly adopted in *Delay v. Carling Brewing Co.*, 10 BNA FEP Cas. 164 (N.D. Ga. 1974). In *Delay*, the defendant employer engaged in discriminatory practices in hiring which he discontinued just prior to enactment of the 1964 Act. Although blacks were hired in a non-discriminatory manner, the seasonal nature of the business resulted in layoffs of the black employees for four to six months per year. Plant-wide seniority governed layoffs and prevented the black employees from becoming eligible for full-time employment. Plaintiff's sued to enjoin the use of seniority. In denying the employer's motion for summary judgment, the court conceded that the layoff policy was "facially non-discriminatory" but it felt that "affirmative action is required to eliminate such vestiges of past racial discrimination." *Id.* at 165.

\(^{42}\) *Watkins v. Steelworkers Local 2369*, 10 BNA FEP Cas. 1297, 1300 (5th Cir. July 16, 1975).

\(^{43}\) *Id.* at 1304.
The contested seniority system from the Act's prohibition even if it was found to be discriminatory.\textsuperscript{44}

The facts regarding plaintiffs' hiring also governed the determination of the recall issue created by the district court's reinstatement order. Although the plaintiffs claimed that the recall of white employees before blacks would sanction Continental's prior discriminatory practices, the court responded by stating:\textsuperscript{45}

The [plaintiffs'] argument is historical, not personal. Plaintiffs, who have never suffered discrimination at the hands of the Company are in no better position to complain of the recall system than are the white workers who were hired contemporaneously with them.

In \textit{Loy v. City of Cleveland},\textsuperscript{46} the district court's decision in \textit{Watkins} was cited with approval in Judge Lambro's opinion granting the plaintiff's motion for a temporary restraining order. The plaintiffs were women police officers. The city had announced layoffs which would have included 87 percent of the women police officers hired in 1973. The layoff was to be made partially on the basis of date of appointment, partially on the basis of test score, and also in such a manner as to preserve the ratio of 18 percent minorities in the 1973 police class. Thus, Cleveland had taken action to protect its minority police, but not the newly hired women, even though women made up only 1.9 percent of the city police. Prior to 1973 there had been no female police officers, and the number of female police was restricted by a city ordinance to a maximum of 50. Based on the statistical evidence and on its approval of the district court decision in \textit{Watkins}, the court found a likelihood of ultimate success. As a result, the court issued a temporary restraining order, noting that this order would mean that other newly hired police would be laid off, instead of the women. Thus, although approving the lower court's decision in \textit{Watkins}, the court, sub silentio, disapproved the \textit{Watkins} remedy of retention of whites and blacks in greater numbers than work available.

The \textit{Cleveland} case involved something of a unique factual background. The opinion never mentioned a union or a collective bargaining agreement. Apparently, the city decided on its own to

\textsuperscript{44} Id. at 1301-02.
\textsuperscript{45} Id. at 1307.
\textsuperscript{46} 8 FEP Cas. 614 (N.D. Ohio 1974).
Seniority Based Layoffs

use a semi-seniority basis for determining who was to be laid off,\(^47\) even though the white male workers had seniority expectations based on a local civil service rule.\(^48\) The court never had to decide upon a remedy because the case was dismissed as moot when the city announced the rescission of its layoff plans.\(^49\)

*Cox v. Allied Chemical Corp.*\(^50\) (also decided before the reversal of *Watkins*) is the only layoff case to involve a formerly segregated plant, rather than an employer who previously refused to hire blacks. The *Cox* court specifically disapproved what it termed the "freedom now" approach of the lower court in *Watkins*.\(^51\) It followed, instead, the "rightful place" approach, finding that the special safety and proficiency requirements of the maintenance department justified departmental seniority.\(^52\) However, the court granted relief to two black workers who had been qualified on the basis of prior training for transfer to the maintenance department. The court reasoned that these two workers, in all likelihood, would have transferred previously if the maintenance department had not been segregated.

Thus, the court reasoned that these workers should not be laid off in advance of more junior maintenance department employees merely because they had remained in another department after integration in order to preserve their job seniority. Since these workers were qualified to perform maintenance department work and would have transferred to the maintenance department long ago had it not been segregated, the court indicated that the employer should have laid off the junior maintenance department whites before the two blacks. The court also stated that in its view, the district court decision in *Watkins* went beyond permissible relief under Title VII by ordering "preferential treatment" for blacks who were not readily identifiable as the victims of past discrimination.\(^53\)

*Schaefer v. Tannian*\(^54\) is the most recent example of success in fighting seniority based layoffs. In this case, earlier litigation

\(^{47}\) The city chose to base its layoffs on the scores received by the last-hired patrolmen on their 1972 Police Entrance Examination.

\(^{48}\) Rule 8.20 of the Cleveland Civil Service Commission requires officers to be laid off in inverse order of their appointment.

\(^{49}\) Loy v. City of Cleveland, 8 FEP Cas. 614 (N.D. Ohio 1974).

\(^{50}\) 382 F. Supp. 309 (M.D. La. 1974).

\(^{51}\) Id. at 319.

\(^{52}\) Id. at 320.

\(^{53}\) Id. at 319.

had resulted in a finding that the City of Detroit had practiced discrimination in the hiring and promotion of women in its police department. Pursuant to court order, the city hired 100 women police officers and promoted 18 others to higher positions within the department. When budgetary cuts by the city necessitated layoffs and demotions, the newly hired female officers were to be laid off and the recently promoted women were to be demoted in compliance with the seniority provisions of the collective bargaining agreements between the City of Detroit and two Detroit police unions—the Detroit Police Officers Association (DPOA) and the Detroit Police Lieutenants’ and Sergeants’ Association (DPLSA). In a class action, the female police officers sought a preliminary injunction to prevent the layoffs and demotions. In addition to the argument that the city’s action violated the spirit of the earlier court orders, the plaintiffs contended that the seniority based layoffs and demotions would perpetuate the present effects of past discrimination, thus violating Title VII.

The court did not question the facial neutrality of the “last hired, first fired” provision, but felt that a “disproportionately heavy burden” would fall on the women as a result of past discrimination. The planned demotions were readily enjoined in reliance on *United Papermakers*, because the women to be demoted were more senior in total length of service than the men who would retain their positions. Since departmental seniority was based on separate lines of progression for men and women and was not justified by business necessity, the contract provisions for demotions failed to constitute a bona fide seniority system.

The *Schaefer* court encountered greater difficulty in deciding the layoff question in view of the legislative history of Title VII and the conflicting decisions of other courts. Acknowledging that *Waters* and *Jersey Central* supported the city’s position, it chose instead to reject those decisions in favor of others which held that seniority based layoffs which perpetuated past discrimination violated Title VII. The court noted that the facts of the *Loy* case

56. The police had refused the opportunity to avoid layoffs by passing up scheduled pay increases. Wall St. J., July 25, 1975, at 18, col. 1.
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were "closely analogous" to the situation it faced. As mentioned earlier, the Loy court decided that a seniority system based on prior discrimination which operates "to freeze the effects of past discrimination" is not "bona fide" under Title VII. In addition, the court adopted the position assumed in Watkins and Delay v. Carling Brewing Co. in connection with the express rejection of the dicta in United Papermakers which supported the city's position. It chose to disregard the legislative history (which bolstered the legitimacy of seniority) in favor of earlier holdings that this history did not control the language of the statute as finally enacted. Several instances of congressional non-support of the seniority system were cited in order to cloud what had previously appeared to be a one-sided legislative endorsement of the continuing validity of seniority in spite of Title VII's enactment. The opinion quoted a decision of the EEOC insofar as the court failed to discern any legal difference between departmental seniority of the type condemned in United Papermakers and plant-wide seniority which perpetuates past discrimination by requiring layoffs of workers whose hiring was discriminatorily delayed.

After resolving the discrimination issue in favor of the women, the court gingerly approached the most perplexing facet of the Title VII-seniority conflict: the question of fashioning an equitable remedy. Two Sixth Circuit cases were cited as authority for the use of retroactive seniority as a remedy. One was Meadows v. Ford Motor Co., where the court of appeals stated that there was no statutory prohibition against retroactive seniority even though such a concept is directly at odds with the precepts which buttress the use of the seniority system. The Meadows court realized that "the burden of retroactive seniority for determination

60. Loy v. City of Cleveland, 8 FEP Cas. 614, 615 (N.D. Ohio 1974).
62. See note 13 supra.
65. Decision No. 71-1447, 3 FEP Cas. 391 (1971). The Schaefer court added weight to Decision No. 71-1447 in noting that:
   The district court in [Watkins v. Steelworkers Local 2369, 369 F. Supp. 1221
   (E.D. La. 1974)] noted this decision and further remarked that in Griggs v.
   Duke Power Co., 401 U.S. 424 (1971), the Supreme Court stated that EEOC
   interpretations of Title VII are entitled to great deference in the courts.
66. 510 F.2d 363 (6th Cir. 1975).
of layoff would fall directly upon other workers who have themselves had no hand in the [employer's] wrongdoing” and recognized the “genuine difficulties” in imposing upon these workers. Nevertheless, the possibility of granting retroactive seniority was left open. A similar result was reached by the same court in *EEOC v. Detroit Edison.* Although a district court grant of retroactive seniority was reversed in that case, the possibility that it might be granted under other circumstances was carefully kept intact.

The *Schaefer* court felt that retroactive seniority was the proper remedy for the female police officers; however, a special factual situation prevented the grant of retroactive seniority from adversely affecting many officers with more years of service. Most of the last hired police officers (including all of the female plaintiffs) were paid primarily with federal funds. In order to save enough money to meet the budgetary cut, 825 officers were to be laid off because most of the 825 were paid with federal as well as city funds. Yet the court found that only 550 city-funded officers would have to be laid off to match the cut. Therefore, the judge ordered that no federally-funded officers, either male or female, could be laid off. In effect, this granted retroactive seniority to these officers. The court eased its conscience about the layoff of more senior officers by noting that this remedy would leave more officers on Detroit’s streets, and that no officer would be laid off who was not originally scheduled for layoff anyway. Although this order would decrease the percentage of female representation in the department, this minor decrease was deemed to be insignificant. It is important to note that the court clearly believed that the 100 new hires would have become officers long ago were it not for the delay occasioned by Detroit’s discrimination in hiring. This was a crucial factor in the decision reached.

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67. *Id.* at 949.
68. 10 BNA FEP Cas. 239 (6th Cir. Mar. 11, 1975).
69. These officers were hired under the Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C.A. § 811 (1975).
71. *Lum v. Civil Service Comm’n,* 10 BNA FEP Cas. 365 (S.D.N.Y. Jan. 31, 1975) is an even clearer example of a layoff caused by past discrimination in hiring. The plaintiff in that case had applied for a position as a patrolman, but had had his hiring delayed by an allegedly discriminatory height requirement. When New York City’s budgetary cuts led to plaintiff’s notice of termination, he sought a preliminary injunction to keep him on the force. The court granted the request because the city failed to disprove the plaintiff’s contention that he would have been immune from layoff but for the height requirement.
Since the time the decision was issued, a compromise has been reached at the insistence of the district court judge. To avoid any layoffs, the police have agreed to take off 14 days without pay over 18 months.\footnote{Wall St. J., July 25, 1975, at 18, col. 2. City officials apparently dislike this arrangement because they believe that it saves less money than required. \textit{Id}.}

\textbf{The Implications of Recent Layoff Cases}

In its incipiency, the conflict between Title VII and seniority based layoffs caused a rash of conflicting decisions. With the reversal of \textit{Watkins}, three circuits have now unanimously held that "last in, first out" seniority is permissible, even where past discrimination in hiring is proven, and even if it means the loss of most of the recent employment gains for women and minorities. In view of these holdings, an employer who has made affirmative good faith efforts to eliminate the disproportionately low representation of women and minority group members should be safe from Title VII proscription so long as no worker scheduled for layoff has personally suffered from the employer's prior discriminatory refusal to hire. Apparently, the combination of Title VII's legislative history and the facially neutral quality of seniority as a method of determining layoffs sufficiently outweighs the recent employment losses suffered by minorities and women. This view is further supported by the long-standing popularity of seniority as an employer's guide to discharge and promotion.

However, a thorny issue remains. The \textit{Watkins} court specifically chose not to determine "the rights of a laid-off employee who could show that but for the discriminatory refusal to hire him at an earlier time than the date of his actual employment, or but for his failure to obtain earlier employment because of exclusion of minority employees from the work force, he would have sufficient seniority to insulate him against layoff."\footnote{Watkins v. Steelworkers, Local 2369 10 BNA FEP Cas. 1297, 1305 (5th Cir. July 16, 1975).} The heavy weight of authority presently seems to ride against the employee on this issue.\footnote{See Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974); Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974), \textit{cert. granted}, 95 S. Ct. 1421 (1975); Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), \textit{cert. denied}, 397 U.S. 919 (1970).} This authority nevertheless appears to conflict with the judiciary's avowed intent to eradicate and remedy perpetuated past discrimination.\footnote{Recently, in Albemarle Paper Co. v. Moody, 95 S. Ct. 2362 (1975), the Supreme Court of the United States reversed the Fifth Circuit's decision and held that "last in, first out" seniority is impermissible. See \textit{Albemarle Paper Co. v. Moody}, 95 S. Ct. 2362 (1975).} It is also possible that insufficient attention...
has been paid to the numerous statements in the Act, its legislative history, and court decisions interpreting it which expressed the view that a court has the power and the duty to fashion the most complete relief possible where Title VII is violated. 76

Despite legislative history and statutory provisions which seemingly exempt plant-wide seniority systems from Title VII's prohibitions, the facts of some cases make it difficult to find that past discrimination is not being perpetuated by employers in violation of Title VII. This is particularly true when last hires would have accrued greater seniority and avoided layoff if prior discrimination had not actually delayed their hiring. 77 As previously noted, a finding of perpetuated discrimination should not result if the employees scheduled for layoff fail to prove that they would have applied for employment earlier but for reputed discriminatory practices, 78 or if the employees are not old enough to have suffered from prior discrimination. 79 Of course, it is more difficult for an employee to prove substantive harm in alleged discriminatory layoff cases than in departmental discrimination cases because it is not always clear that the employee would have worked for that employer earlier were it not for past discrimination. 80 Undoubtedly, this standard of proof will preclude success

76. 42 U.S.C. § 2000(e)-(5)(g) provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

See Albemarle Paper Co. v. Moody, 95 S. Ct. 2362 (1975), and Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974), cert. granted, 95 S. Ct. 1421 (1975), for a lengthy discussion of a district court's extensive duty and power to remedy Title VII violations.


78. See note 33 supra.


80. In Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969) the court remarked that:

[|R]equiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual
in many discrimination claims. But when a layoff is directly attributable to past discrimination which delayed hiring of the employee(s) to be discharged, it violates the language of Title VII regardless of the legislative history of the Act.\textsuperscript{81}

Although the hoped-for improvement of economic conditions should ease the deleterious effect of \textit{Jersey Central}, \textit{Watkins} and \textit{Waters} on minority representation in employment, it does not presently provide an answer to the employer faced with a pressing need to lay off workers. An employer confronted with a collective bargaining agreement providing for some form of “last in, first out” layoff formula would be well advised to take the approach of \textit{Jersey Central} and seek a declaratory judgment if needed layoffs would, under the formula, displace a disproportionately high number of newly hired women and/or minorities.\textsuperscript{82}

If it is concluded that planned layoffs based upon plant-wide or company-wide seniority systems violate Title VII, a court must face the Sisyphean labor of structuring an equitable remedy. Rarely will a court have before it the convenient set of facts for fashioning a remedy that confronted the \textit{Schaefer} court. More often, courts will be forced to choose between ordering the discharge of more senior workers (an act in direct conflict with the firmly entrenched principles of the seniority concept)\textsuperscript{83} and compelling the employer to retain all of his employees\textsuperscript{84} (an act which may endanger the continued existence of the employer company).

Adoption of the first remedy has some devastating ramifica-

\textsuperscript{81} 42 U.S.C. §§ 2000(e)-(2)(a) (1970) prohibits the discharge of any individual because of such individual’s race, color, sex or national origin.

\textsuperscript{82} Thus, at least presumably, the employer would avoid the calamitous result, to an already economically pinched company, of having to retain both whites with seniority expectations and minority workers in numbers greater than the work force needed, as ordered by the district court in \textit{Watkins}.

\textsuperscript{83} In Meadows v. Ford Motor Co., 510 F.2d 939, 949 (6th Cir. 1975), the court stated that:

[Seniority] is justified among workers by the concept that the older workers in point of service have earned their retention of jobs by the length of prior services for the particular employer. From the employer’s point of view, it is justified by the fact that it means retention of the most experienced and presumably most skilled of the work force. Obviously, the grant of fully retroactive seniority would collide with both of these principles.

\textsuperscript{84} This was the remedy chosen by the district court in \textit{Watkins}. 

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\textit{Id.} at 997.
tions. Although there is an intense desire to vitiate the impact of past discrimination, a court which places too much emphasis on this consideration shows a cavalier disregard for a segment of third parties to this conflict. These third parties are the non-minority employees who have invested a substantial portion of their working lives in a company whose discriminatory hiring practices they could not control. A grant of retroactive seniority to discriminatees which causes the layoff of non-minority workers can only intensify anti-minority feeling among these workers. Moreover, any meddling with the normal operation of the seniority system will drive a wedge between minority group members and organized labor. The civil rights movement needs the help of organized labor to make gains in obtaining concessions from employers. Because the use of seniority is a treasured prize of labor unions, any mutation of the seniority system caused by the granting of retroactive seniority will contribute to upsetting this alliance. These considerations undoubtedly help to explain why the district court in Watkins balked at granting retroactive seniority to the minority group plaintiffs and instead forced the employer to keep all of his workers.

This issue will be confronted by the Supreme Court in Franks v. Bowman Transportation Co. in the near future. In Franks, several black over-the-road drivers applied for positions with Bowman, but their hiring was delayed by the company's discriminatory hiring practices. The Court of Appeals for the Fifth Circuit refused to grant constructive seniority to these employees when they eventually were hired. Although the plaintiffs seek construc-

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85. This desire tends to reduce the discrimination question to a "moral issue" in which Supreme Court Justices reflect "our national sense of guilt" for past discrimination. Wall St. J., July 1, 1975 at 22, col. 3.

86. In Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1320 (7th Cir. 1974) the court remarked that:

An employment seniority system, embodying the "last hired, first fired" principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences. Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971).

87. But see Jersey Central Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975) and Loy v. City of Cleveland, 8 FEP Cas. 614 (N.D. Ohio 1974) where the courts were more receptive to the laying off of non-minority workers with seniority.

88. 495 F.2d 398 (6th Cir. 1974), cert. granted, 420 U.S. 989 (1975). In addition, the EEOC has petitioned the Supreme Court for certiorari in the Jersey Central case. The EEOC contends that a closer review of the discrimination alleged in that case is required.

89 LAB. REL. REP. 3 (May 5, 1975).
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tive seniority to aid in promotion rather than to prevent layoff, the Supreme Court must nevertheless decide if constructive seniority can be granted under any circumstances.89

On its face, the alternate remedy of compelling an employer to retain all of his employees seems more equitable. It effectively avoids discharging the workers with greater accrued seniority and punishes the primary perpetrator of past discrimination—the employer—by compelling him to pay wages to people for whom he has no work. Although the punitive nature of this remedy is acceptable in view of the employer's responsibility for past discrimination, it may have the repugnant effect of causing business failure. Obviously, a remedy which results in the ultimate discharge of all the plant workers is the least desirable solution. Also, this punishes an employer who may have taken great strides towards creating a fair balance of whites and minorities in his work force.

The EEOC is considering guidelines to govern situations where an employer must lay off workers under circumstances that warrant a finding of past discrimination. The means suggested by the Commission call for employers to use work sharing,90 reduced workweeks, elimination of overtime work, and voluntary early retirement.91 The Commission concedes that seniority based layoffs are “bona fide” even if they disproportionately affect blacks so long as there has been no past discrimination,92 but it tends to reach the conclusion that discrimination has been practiced much more readily than the courts do.93 A vote on these guidelines was recently delayed,94 quite possibly because of the apparent difficulty in providing solutions which are simultaneously equita-

89. Solicitor of Labor William J. Kilberg has stated that:
There is a general consensus (among government agencies) that the Franks decision, insofar as it denied seniority to the individual plaintiff who proved that he suffered a discriminatory refusal of employment, stretched [the bona fide seniority provision of Title VII] beyond its natural limits.
89 LAB. REL. REP. 139 (June 16, 1975).
91. See U.S. Delays Bias Decision on Layoffs, 98 MONTHLY LAB. REV. 64 (June, 1975).
94. See note 91 supra. The guidelines are being discussed with the other members of the Equal Employment Opportunity Coordinating Council.
ble and effective.95

Obviously there will be situations where past discrimination will be found and where the remedies described above will prove to be too unpalatable for adoption. Although these situations should be few in number because of the standard of proof which should be required from a plaintiff, a court presently confronted with such a problem must devise a remedy on an ad hoc basis. Any remedy should carefully balance the harm inflicted on more senior workers against the disproportionate reduction of women and minority-group members in the work force. Both groups must make sacrifices if a less harmful remedy cannot be devised.

Conclusion

The cases on the layoff question clear the way for the use of plant-wide seniority to govern layoffs in most situations. In those cases where an actual discriminatory delay in hiring is proven, the number of successful plaintiffs will be small due to the burden of proof required. As a practical matter, this precludes the necessity of granting retroactive (constructive) seniority to these workers. Since those requiring relief are few in number, other remedies may be substituted which avoid the need to discharge anyone. A grant of retroactive seniority is the least equitable remedy because the wrong parties are punished and anti-minority feeling is exacerbated. A more definite answer on the use of retroactive seniority as a remedy should be forthcoming when the Supreme Court decides the appeal of Franks v. Bowman Transportation Co.94 Even if the court decides that constructive seniority is an acceptable remedy in discriminatory promotion cases, this should not be read as a mandate for the use of this remedy in layoff cases. The remedy has greater importance in promotion cases because it may be used to determine future employment advancement; it should not be used to determine the order of discharge whenever layoffs can be avoided by the use of other remedies.97

The EEOC is interested in protecting the employment gains of women and minorities and avoiding any increased hostility

95. For a discussion of the arbitrator's role in this conflict, see Coulson, The Emerging Role of Title VII Arbitration, 26 LAB. L.J. 263 (1975).
96. 495 F.2d 398 (5th Cir. 1974), cert. granted, 420 U.S. 989 (1975).
97. In the settlement negotiated after Schaefer v. Tannian, 10 BNA FEP Cas. 897 (E.D. Mich. May 13, 1976), the layoff of 550 police officers was avoided by adoption of a work-sharing program. Detroit Police Layoff Averted, 98 MONTHLY LAB. REV. 57 (July, 1975).
towards these groups during the recession. The Commission further wishes to avoid increasing the divisiveness which evolved between organized labor and minority groups as a result of seniority's role in recent layoffs.98

Whenever a fact situation is presented where a remedy seems appropriate, the popular view espoused by the courts and the EEOC is that discharge should be avoided. In most situations, contractual seniority rules will be permitted to operate in an ordinary fashion. Any other resolution could only result in excessive disruption of a long-standing and workable employment practice which is designed to impartially govern the discharge of employees.

98. The new chairman of the Equal Employment Opportunity Commission, Lowell W. Perry, has announced this intention. He also assumed that "there are some union leaders who feel they could support the work-sharing proposition [adopted after Schaefer v. Tannian]." N.Y. Times, July 31, 1975, at 12, col. 5.