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Joseph D. McCluskey
University of Richmond

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EMPLOYMENT DISCRIMINATION—SENIORITY SYSTEMS UNDER TITLE VII: *AMERICAN TOBACCO CO. v. PATTERSON AND PULLMAN-STANDARD v. SWINT*

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] "is a broad remedial measure designed 'to assure equality of employment opportunities.' "[2] The Supreme Court, in the seminal Title VII employment discrimination case, *Griggs v. Duke Power Co.*,[3] stated that "[t]he objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[4] The *Griggs* decision has provided the basic framework for analyzing employment discrimination cases. The Court held that any employment practices, procedures or tests (employment practices) that had the *consequences* of favoring white employees over other employees was proscribed by Title VII.[5] The *Griggs* Court perceived that Congress' intent was to remove all barriers to employment which operate to discriminate against blacks and all other protected classes.[6] Discriminatory intent was not necessary.[7] Any act of an employer[8] that operated to "freeze the status quo of prior dis-

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1. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980)).

2. Pullman-Standard v. Swint, 102 S. Ct. 1781, 1783-84 (1982) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)).

3. 401 U.S. 424 (1971).

4. *Id.* at 429-30.

5. *Id.* at 432. In *Griggs*, the Court stated that "Congress directed the thrust of the Act to the consequences of employment practices, not simply to motivation." *Id.*

6. "What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." *Id.* at 431.

7. The Court stated that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432. *See generally* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); McNeil v. McDonough, 515 F. Supp. 113 (D.N.J. 1980), *aff'd*, 648 F.2d 178 (3d Cir. 1981).

8. Title VII defines an employer's illegal employment practice as follows:

> (a) Employer practices
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> 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, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of

criminatory employment practices"[9] was deemed illegal unless excused by "business necessity."[10] Congress' clear intent in including Title VII in the Civil Rights Act of 1964 was to remove barriers to employment for minorities and to force *employers* to make employment decisions on the basis of job qualifications rather than on the basis of "race, sex, religion or national origin."[11] Congress included sanctions in Title VII against an employer whose employment practices discriminate against a qualified job applicant or employee. Section 706(g)[12] empowers the courts to enjoin the employer "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 . . . or any other equitable relief as the court deems appropriate."[13]

When the Civil Rights Act of 1964[14] was introduced in Congress there was widespread concern that Title VII of the Act would destroy one of "the benefits which organized labor had attained through the years [—] . . . the seniority system."[15] During the pre-enactment debates on the Act, numerous statements[16] and documents[17] were entered into the *Con-*

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such individual's race, color, religion, sex or national origin.

Title VII § 703(a), 42 U.S.C. § 2000e-2(a) (1976).

9. 401 U.S. at 430.

10. *Id.* at 431. *Cf.* Business necessity is also referred to by the courts as business purpose. In *Robinson v. Lorillard Corp.*, the Court of Appeals for the Fourth Circuit in defining business purpose stated that

> [t]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to overrule any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve, and there must be available no acceptable alternative policies or pratices which would better accomplish the business purpose advanced or accomplish it equally well without a lesser differential impact.

444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

11. 401 U.S. at 429-31. *See generally* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

12. Title VII § 706(g), 42 U.S.C. § 2000e-5(g) (1976).

13. *Id.* The Supreme Court has held that the granting of retroactive seniority relief to a discriminatee is one of the equitable remedies allowed under section 706(g). Franks v. Bowman Transp. Co., 424 U.S. 747, 763-64 (1976).

14. H.R. 7152, 88th Cong., 2d Sess., 110 CONG. REC. 17,783 (1964) (current version at 42 U.S.C. ch. 21 (1976 & Supp. IV 1980)).

15. 110 CONG. REC. 486 (1964) (comments of Sen. Hill). *See* American Tobacco Co. v. Patterson, 102 S. Ct. 1534, 1539 (1982) (citing H.R. REP. No. 914, 88th Cong., 1st Sess. 64-65 (1963)) ("[T]he House Minority Report warned that the bill, if enacted, would destroy seniority."). *See also* 110 CONG. REC. 11,472 (1964) (Governor Wallace's view is that "[u]nion seniority systems will be abrogated under the unlimited power granted to Federal inspectors to regulate hiring, firing, promoting and demoting.").

16. *See, e.g.*, 110 CONG. REC. 7207 (1964) (comments of Sen. Clark). "The bill would not affect seniority at all." *Id.*

17. *See, e.g., id.* at 7213 (interpretive memorandum submitted jointly by Sens. Clark and

gressional Record which were intended to allay the fears that Title VII would affect seniority systems adversely. After extensive debate and study, the Mansfield-Dirksen substitute bill[18] was introduced in the Senate.[19] Section 703(h) of Title VII,[20] a part of the Mansfield-Dirksen substitute bill, was intended to placate those who thought Title VII would harm existing seniority rights. Section 703(h) provides, in part:

> Notwithstanding any other provisions of this title . . . 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 . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.[21]

In his remarks to the Senate accompanying the introduction of the Mansfield-Dirksen substitute bill, Senator Everett Dirksen stated that

> [a]s I look back now now [sic] upon the time that has been devoted to the bill, I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase.[22]

Despite the great care taken in drafting, the failure of Congress to clearly define terms and establish limits has rendered the application of section 703(h) one of the most perplexing problems facing the courts under Title VII.[23] In litigation regarding seniority systems, the courts have been struggling over Congressional intent embodied in the terms "intention to discriminate" and "bona fide seniority system" as well as whether seniority systems adopted after the Act were intended to come under section 703(h) immunity.

Two of the Supreme Court's recent decisions addressed several of the problems raised by section 703(h). *Pullman-Standard v. Swint*[24] did much to define the requisite "intent" necessary under section 703(h) and to define a "bona fide seniority system." In *American Tobacco Co. v. Patterson*,[25] the Court settled the issue of whether seniority systems adopted

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Case). "Title VII would have no effect on established seniority rights." *Id.*

18. *Id.* at 11,926.

19. *See generally* Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966) (discussing the legislative history of the adoption of Title VII).

20. 110 CONG. REC. 11,931 (1964). Section 703(h) was enacted during the same wording as that of the Mansfield-Dirksen substitute bill proposal. Title VII § 703(h), 42 U.S.C. § 2000e-2(h) (1976).

21. 42 U.S.C. § 2000e-2(h) (1976).

22. 110 CONG. REC. 11,935 (1964) (remarks of Sen. Dirksen).

23. Local 189, United Papermakers & Paperworkers Union v. United States, 416 F.2d 980, 982-83 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

24. 102 S. Ct. 1781 (1982).

25. 102 S. Ct. 1534 (1982).

after the effective date of Title VII are protected under section 703(h). This comment examines these decisions and their effect on Title VII as well as other litigation surrounding this important legislation.

II. BACKGROUND

Congress clearly intended that the consequence of an employer's employment practice be the determining factor in judging discrimination under Title VII. Section 703(h) makes bona fide seniority systems immune from the "consequences test"[26] by requiring a showing of an intent to discriminate. Congress realized that invalidating a seniority system penalized the employees who had contracted for seniority rights with the employer and did little to punish the discriminating employer. In *International Brotherhood of Teamsters v. United States*,[27] the Supreme Court stated that "Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employers had engaged in discrimination. . . ."[28] The main thrust of Title VII is to assure "equality of employment opportunities"[29] without unduly jeopardizing the vested seniority rights of the employee.

A number of courts, in ruling on the validity of seniority systems, have apparently failed to see, or have chosen to ignore, the inherent distinction between seniority systems and other employment practices under Title VII. Some of these courts, unable to find an intention to discriminate, have circumvented this requirement and used the "consequences test" to find that a system is not bona fide. For example, in *Kaplan v. International Alliance of Theatrical and Stage Employees and Motion Picture Machine Operators of the United States and Canada*,[30] the Ninth Circuit Court of Appeals held that "[w]here a seniority system perpetuates the effects of past discrimination, such a system is not 'bona fide' within the meaning of Title VII."[31]

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26. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1972). *See supra* note 7 and accompanying text.

27. 431 U.S. 324 (1977).

28. *Id.* at 353-54. *See* Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 520 (E.D. Va. 1968) ("Seniority rights . . . are expectancies derived from the collective bargaining agreement."). *See also* Franks v. Bowman Transp. Co., 424 U.S. 747, 778 (1976) ("there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights"). *See generally* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1319-20 (7th Cir. 1974) (In discussing seniority systems the court said that if seniority systems were invalidated because they perpetuate the effects of past discrimination it "would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer."), *cert. denied*, 425 U.S. 997 (1976).

29. 401 U.S. at 429.

30. 525 F.2d 1354 (9th Cir. 1975).

31. *Id.* at 1362. *See also* Stevenson v. International Paper Co., 516 F.2d 103, 118 (5th Cir.

Other courts, failing to distinguish between seniority and seniority systems, have ordered that plantwide seniority systems replace nondiscriminatory departmental seniority systems to "make right" prior acts of discrimination unrelated to the seniority system.[32] A better solution might have been for the courts to grant the retroactive seniority relief allowed under section 706(g) rather than to invalidate the whole system.

III. THE *Pullman-Standard v. Swint* DECISION

A. *Facts*

In *Pullman-Standard v. Swint*,[33] Swint, a black employee, and other black employees instituted a Title VII challenge to the validity of a departmental seniority system that was negotiated and maintained by the Pullman-Standard Company (Company) and the United Steelworkers of America and its Local 1466 (collectively "USW").[34] Swint alleged that the departmental seniority system at the Company's Bessemer plant was discriminatory in that it "perpetuated the effects of past discrimination."[35] Before and after its unionization in the 1940's, the plant was divided into a number of operational departments.[36] Until 1965,[37] the Company discriminated on the basis of race in making job assignments.[38] The majority of the departments at Bessemer were integrated, however, each job type within a particular department was categorized as either a "black" or "white" job. There were no lines of progression or promotion between the black and white jobs.[39] This effectively kept the races segregated.

The seniority system challenged by Swint was adopted by the Company in 1954 as the result of a negotiated, collective bargaining agreement between the Company and the USW.[40] Under the system, seniority was

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1974), *cert. denied*, 425 U.S. 950 (1975); Bing v. Roadway Express, Inc., 485 F.2d 441, 450 (5th Cir. 1973); United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973).

32. *See, e.g.*, Myers v. Gilman Paper Corp., 544 F.2d 837, 852 (5th Cir.), *modified*, 556 F.2d 758 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977). The Supreme Court in *California Brewers Ass'n v. Bryant* distinguished between seniority and seniority systems when it stated that " '[S]eniority' is a term that connotes length of employment. A 'seniority system' is a scheme that . . . allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." 444 U.S. 598, 605-06 (1980).

33. 102 S. Ct. at 1781 (1982).

34. *Id.* at 1783.

35. Swint v. Pullman-Standard, 624 F.2d 525 (5th Cir. 1980), *rev'd*, 102 S. Ct. 1781 (1982).

36. 102 S. Ct. at 1784 n.3 ("[P]rior to unionization, the Bessemer plant was divided into 20 departments. By 1954, there were 28 departments. . . . The departments remained essentially unchanged after 1954.").

37. Title VII went into effect on July 5, 1965, one year after the Civil Rights Act of 1964 was passed. American Tobacco Co. v. Patterson, 102 S. Ct. at 1535 n.1 (1982).

38. 102 S. Ct. at 1785.

39. 624 F.2d at 527.

40. 102 S. Ct. at 1785.

measured by the length of continuous service within a department.[41] When an employee transferred from one department to another, his departmental seniority was forfeited.[42] Initially, departmental seniority was used only in transferring, laying off, and rehiring employees, however, beginning in 1956 the system was also used for promotional purposes.[43] There were no significant changes made to the seniority system between 1956 and 1971, the time the lawsuit was commenced.[44] At that point USW represented twenty-six of the departmental units in the Bessemer plant, involving approximately an equal number of black and white employees.[45]

B. *Decision*

At trial, the United States District Court for the Northern District of Alabama, sitting without a jury, ruled that the seniority system was valid and did not intentionally discriminate against black employees; consequently, the system was protected under section 703(h).[46] The Fifth Circuit Court of Appeals, after reviewing the facts, reversed the district court, finding the seniority system to be discriminatory under the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure.[47] The court of appeals concluded that

> [a]n analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made. There is no doubt, based upon the record in this case, about the existence of a discriminatory purpose.[48]

The issue on appeal to the Supreme Court was

> whether a Court of Appeals is bound by the "clearly erroneous" rules of Fed. Rules Civ. Proc. 52(a) in reviewing a District Court's finding of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system; and whether the court below applied wrong legal criteria in determining the *bona fides* of the seniority systems.[49]

The Supreme Court reversed the Fifth Circuit's decision, determining that two errors had been committed in their reversal of the district court. The court held that the court of appeals had made an independent deter-

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41. *Id.*
42. *Id.*
43. *Id.* An employee did not lose accumulated seniority when he transferred at the company's request or when he transferred to avoid being laid off. *Id.* at 1785 n.6.
44. *Id.* at 1785.
45. *Id.* at 1784, 1784 n.3.
46. 624 F.2d at 528.
47. 102 S. Ct. at 1783.
48. 624 F.2d at 533 (footnote omitted).
49. 102 S. Ct. at 1783.

mination of the issues after reviewing the facts rather than a determination that the district court's findings of fact were "clearly erroneous."[50] The Supreme Court also held that the court of appeals erred when it failed to remand the case to the district court for further proceedings after it determined that the district court had made an error in interpreting the law.[51]

C. *Analysis and Significance*

The significance of the *Pullman-Standard*[52] decision in relation to section 703(h)[53] is the Court's definitive statement concerning the necessary requirements to prove an "intention to discriminate" and the guidelines it adopted to determine whether a seniority system is bona fide. Prior to *Pullman-Standard* no clear guidelines existed. For example, in *Trans World Airlines, Inc. v. Hardison*,[54] the Supreme Court ruled that before a seniority system is determined violative of Title VII, actual proof of intent to discriminate must be shown under section 703(h).[55] The Court, however, failed to explain in *Hardison* or in any other case prior to *Pullman-Standard* what the minimum requirements for proof of intent to discriminate entail.

The Supreme Court began its discussion of "intent" in *Pullman-Standard* by stating that intent to discriminate is a question of fact to be determined by the trial court.[56] The Court stated categorically that the disparate impact test, used in determining whether employment practices violated Title VII, was not sufficient to invalidate a seniority system. The Court reasoned that since section 703(h) specifically requires an "intent to discriminate . . . it would make no sense . . . to say that the intent . . . may be presumed from such an impact."[57] The Court stated that intent, as it relates to section 703(h), requires actual motive and that some legal presumption "drawn from a factual showing of something less

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50. *Id.* at 1791-92. An appellate court in reviewing the decision of a lower court is not empowered to "retry issues of fact or substitute its judgment with respect to such issues for that of the trial court." Cleo Syrup Corp. v. Coca-Cola Co., 139 F.2d 416, 417 (8th Cir. 1943), *cert. denied*, 321 U.S. 781 (1944). *See also* United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 495 (1950); Lundgren v. Freeman, 307 F.2d 104, 114 (9th Cir. 1962); Kansas City Stockyards Co. v. Anderson, 199 F.2d 91, 93 (8th cir. 1952).

51. 102 S. Ct. at 1792. Although the application of Rule 52(a) by the circuit court of appeals was the central issue to be decided by the Supreme Court, further discussion of this subject is beyond the scope of this comment.

52. 102 S. Ct. 1781 (1982).

53. Title VII § 703(h), 42 U.S.C. § 2000e-2(h) (1976). *See supra* text accompanying note 21.

54. 432 U.S. 63 (1977).

55. *Id.* at 83 n.13 ("[Section] 703(h) unequivocally mandates that there is no statutory violation in the absence of a showing of disciminatory purpose").

56. 102 S. Ct. at 1790.

57. *Id.*

than actual motive"[58] would not meet this burden. In determining whether intention to discriminate exists for section 703(h) purposes, the courts are not to be concerned with the discriminatory impact or consequences that a seniority system has. Rather, the central question to be asked when considering the existence of discriminatory intent is "[w]as the system *adopted because* it would have a racially discriminatory impact?"[59] Discriminatory intent can be found only if the basic reason for the adoption of the seniority system is that it will serve to discriminate against a particular class of employees.[60]

Congress included section 703(h) in Title VII to protect the vested seniority rights of employees.[61] If Congress had intended that discrimination in seniority systems and other employment practices be judged by the same standards, the part of section 703(h) which pertains to seniority systems would be mere surplusage.[62] It appears that Congress balanced its goal of achieving equality in employment[63] with its goal of protecting employees' seniority expectations[64] and reached a compromise. Congress did not preclude the possibility of declaring a seniority system invalid, nor did it allow the burden of proof of discrimination to be met so easily that any time an employee could show a system had an adverse impact on him the system would be invalidated.

Section 706(g) of Title VII provides employees various remedies, including retroactive seniority, if their employer's employment practices adversely affect their employment opportunities.[65] By allowing retroactive seniority relief, the discriminatee is placed in the position he would have been "but for" the employer's actions. While this does affect the seniority expectations of other employees, the consequences are not as drastic as if the entire seniority system were invalidated.[66]

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58. *Id.* at 1791.

59. *Id.* at 1784 (emphasis added).

60. *Id. See* Sears v. Bennett, 645 F.2d 1365, 1374 (10th Cir. 1981), *cert. denied sub nom.* United Transp. Union v. Sears, 102 S. Ct. 2045 (1982); Cates v. Trans World Airlines, Inc., 561 F.2d 1064, 1074 (2d Cir. 1977).

61. *See supra* text accompanying notes 19, 20.

62. 102 S. Ct. at 1790.

63. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 774-75 (1976); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

64. *See* American Tobacco Co. v. Patterson, 102 S. Ct. 1534, 1540 (1982); *see also* International Bhd. of Teamsters, 431 U.S. 324, 354 (1977) ("Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights.").

65. *See supra* note 13.

66. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 775 (1976); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Volger v. McCarty, Inc., 451 F.2d 1236, 1239 (5th Cir. 1971); *cf.* Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 520 (E.D. Va. 1968) ("[S]eniority rights of white employees . . . are not vested, indefeasible rights. . . . They are expectancies derived from the collective bargaining agreement and are subject to modification." (citations omitted)).

The courts are cognizant of the difficult burden a plaintiff bears in proving discriminatory intent. In *General Building Contractors Association v. Pennsylvania*,[67] it was acknowledged that some discriminatory policies are cleverly masked and that "proof of actual intent is nearly impossible."[68] The test adopted by the Supreme Court in *Pullman-Standard* does not lessen the burden placed on the plaintiff to show discriminatory intent, but it does give him clearer insight into what proof the courts require.

In *International Brotherhood of Teamsters v. United States*,[69] the Court held that the seniority system in question was "bona fide" because the system "applies equally to all races and ethnic groups, . . . is in rational accord with industry practice, . . . did not have its genesis in racial discrimination, . . . [and] was negotiated and has been maintained free from any illegal purpose."[70]

D. *The* Stockham *Test*

In *James v. Stockham Valves and Fittings Co.*,[71] the United States Court of Appeals for the Fifth Circuit construed *Teamsters* to stand for the proposition that an investigation into discriminatory intent could not be completed merely by looking at the seniority system itself but must involve examination of the totality of the circumstances surrounding the adoption and continued existence of the seniority system.[72] The *Stockham* court, in interpreting *Teamsters*, said that the determination of intent to discriminate in a seniority system is "integral to a determination that the system is or is not bona fide."[73] The court of appeals in *Stockham* then adopted the elements used in *Teamsters* as a means of judging the bona fides of a seniority system and employed them as a test for determining whether an employer intentionally had discriminated in establishing a seniority system.[74]

The District Court for the Northern District of Alabama, in *Pullman-*

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67. 102 S. Ct. 3141 (1982).

68. *Id.* at 3162 (Marshall, J., dissenting). Justice Marshall also stated that "[t]oday, although flagrant examples of intentional discrimination still exist, discrimination more often occurs 'on a more sophisticated and subtle level' the effects of which are often as cruel and devastating as the most crude form of discrimination." *Id.* at 3161 (quoting Pennsylvania v. Local 542 Int'l Union of Operating Eng'rs, 469 F. Supp. 329, 337 (E.D. Pa. 1978), *aff'd*, 648 F.2d 922 (3d Cir. 1981).

69. 431 U.S. 324 (1977).

70. *Id.* at 355-56.

71. 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978).

72. 559 F.2d at 352 (citing *Teamsters*, 431 U.S. 324 (1977)).

73. 559 F.2d at 351 (citing *Teamsters*, 431 U.S. at 355).

74. 102 S. Ct. at 1785 (citing *Stockham*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978)).

Standard v. Swint,[75] used the *Stockham* test to determine whether the seniority system negotiated by the Pullman-Standard Company and the United Steelworkers Union was adopted with the intent to discriminate.[76] The Supreme Court in *Pullman-Standard* approved the district court's criteria for determining the intent to discriminate necessary for a seniority system to be invalidated.[77] By doing so, the Court accepted the *Stockham* rationale as a test to determine "intention to discriminate."[78]

The "intention to discriminate test" adopted by the Court in *Pullman-Standard* requires an inquiry into four areas to determine whether a particular seniority system is bona fide.[79] In a footnote to the opinion, the Court stated that these four areas were not necessarily the only factors a court "might or should consider in making a finding of discriminatory intent,"[80] although the Court did not elaborate on other elements a court could consider. However, it does appear that an inquiry limited to these four elements would satisfy the required investigation into intent.

The first factor a court must consider is "whether the system 'operates to discourage all employees equally from transferring between seniority units.' "[81] This element necessarily requires that the seniority system be neutral on its face and apply equally to all employees regardless of race.[82] The neutrality and equal applicability element is not limited to transfers, but also is applicable to promotions, layoffs, rehiring, and any other personnel actions covered by the seniority system.[83] Disparate impact on a group is not the determinant in this area of inquiry because the court is

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75. 102 S. Ct. 1781 (1982).

76. *Id.* at 1785.

77. The Court did not expressly adopt the *Stockham* test, but did state, in referring to the *Stockham* court's use of the bona fide passage in *Teamsters*, that it "was not meant to be an exhaustive list of all the factors that a district court might or should consider in making a finding of discriminatory intent." *Id.* at 1785 n.8 (quoting *Teamsters*, 431 U.S. at 355-56; citing *Stockham*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978)). By implication, the Court was holding that the *Stockham* test was valid.

78. 42 U.S.C. § 2000e-2(h) (1976).

79. 102 S. Ct. at 1785.

80. *Id.* at 1785 n.8 (quoting *Teamsters*, 431 U.S. at 355-56; citing *Stockham*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978)).

81. 102 S. Ct. at 1785 (quoting *Stockham*, 559 F.2d at 352). *See also Teamsters*, 431 U.S. at 355 ("The seniority system . . . is entirely bona fide. It applies equally to all races and ethnic groups."); Johnson v. Ryder Truck Lines, Inc., 575 F.2d 471, 474 (4th Cir. 1978) ("The seniority provision of the bargaining contract was facially neutral, applying to both white and black employees . . . [c]onsequently [there can be no relief], because this statute [Title VII] confers on black persons only the same rights possessed by white persons."), *cert. denied*, 440 U.S. 979 (1979).

82. 102 S. Ct. at 1785.

83. The *Pullman-Standard* Court addressed transfers between seniority units. However, there is no reason to believe that the test should vary from one aspect of a seniority system to another.

focusing on intention rather than consequences.[84] In its inquiry into the seniority system of the Pullman-Standard Company, the district court found that the system applied equally to all races and that the system was neutral on its face.[85] In *McNeil v. McDonough*,[86] the District Court for the District of New Jersey stated that "[i]n a true seniority system, the employee with the most seniority has first call, at his choice, .. for the next promotion."[87] In 1964, the Justice Department submitted a memorandum to Congress concerning Title VII. It gave the following example of a seniority provision that did not apply equally to all races: "If a rule were to state that all Negroes must be laid off before any white men, such a rule could not serve as the basis for a discharge subsequent to the effective date."[88] Thus, to be a bona fide seniority system under this test, the seniority provision must treat all races equally. It must be neutral on its face and offer the person with the most seniority the first opportunity to accept or reject the transfer, promotion, etc.

"Second, a court must examine the rationality of the departmental structure, upon which the seniority system relies in light of the general industry practice."[89] There are two basic questions to be asked during this inquiry. The first is whether the composition of the seniority unit is rationally related to the nature of the work done within the company.[90] In *Sears v. Bennett*,[91] a seniority system was not exempted by section 703(h) because the court found that the system "was not based on a rational craft delineation. . . ."[92] In answering this question, the courts have also focused on whether the seniority system is related to "business necessity."[93] It does not appear that the absence of business necessity would be sufficient cause to invalidate an entire system, however, a showing of business necessity would be a defense to a charge that the seniority system was discriminatory. In a National Labor Relations Board case, the Board

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84. *Id.* at 1784 (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 82 (1977)). The Supreme Court in *Teamsters* acknowledged that disparate impact could be considered, but that the disparate impact standing by itself would not be sufficient under this inquiry. 431 U.S. at 336 n.15, 343 n.20.

85. 102 S. Ct. at 1784. *See also* United Air Lines, Inc. v. Evans, 431 U.S. 553, 557-58 (1977) ("Nothing alleged in the complaint indicates that United's seniority system treats existing female employees differently from existing male employees . . . ."); *Teamsters*, 431 U.S. at 355 (The seniority system "applies equally to all races and ethnic groups.").

86. 515 F. Supp. 113 (D.N.J. 1980), *aff'd*, 648 F.2d 178 (3d Cir. 1981).

87. *Id.* at 144.

88. 110 CONG. REC. 7213 (1964) (statement submitted by Justice Department).

89. 102 S. Ct. at 1786 (citing *Stockham*, 559 F.2d at 352).

90. 102 S. Ct. at 1786.

91. 645 F.2d 1365 (10th Cir. 1981), *cert. denied sub nom.* United Transp. Union v. Sears, 102 S. Ct. 2045 (1982).

92. *Id.* at 1374.

93. *See Teamsters*, 431 U.S. 324 (1977); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

justified the separation of local drivers and over-the-road drivers "where they are shown to be clearly defined, homogeneous and functionally distinct groups with separate interests. . . ."[94] Similarly, the trial court in *Pullman-Standard* found that the seniority system was rational in that it developed from the evolving influences of the unions in different departments at the company.[95] The second question related to this inquiry is whether the seniority unit is in conformity with other like units within the industry. Thus, the court should look at industry-wide practices to determine if the company whose seniority system is being judged has departed unjustifiably from these practices.[96]

The third element of the test is "whether the seniority system had its genesis in racial discrimination."[97] In *Quarles v. Philip Morris, Inc.*,[98] the District Court for the Eastern District of Virginia found that a seniority system was not bona fide because it had its "genesis in racial discrimination."[99] The *Quarles* court made this determination when it found that the "differences between the terms and conditions of employment for white[s] and Negroes . . . [were] the result of an intention to discriminate in hiring policies on the basis of race. . . ."[100] The court did not look at the genesis of the seniority system, rather it examined other employment practices of Philip Morris. The *Quarles* holding would not meet the Supreme Court's scrutiny if it were reviewed today. The Court requires that there be a motive to discriminate in adopting the seniority system, as opposed to discrimination generally in other employment practices. If the *Quarles* genesis analysis were the standard, all companies which adopted a seniority system at a time when they were discriminating in other areas of employment could be found to have had an "intention to discriminate" in adopting their seniority system. This result is contrary to the Congressional goal of protecting vested seniority rights.[101]

The district court in *Pullman-Standard* found that "[t]he seniority system . . . had its genesis . . . at a period when racial segregation was certainly being practiced; but this system was not itself the product of this bias. The system rather came about as a result of colorblind objec-

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94. *Teamsters*, 431 U.S. at 356 n.42 (quoting Georgia Highway Express, 150 N.L.R.B. 1649, 1651).

95. 102 S. Ct. at 1786 n.10.

96. *Id.* at 1786. *See* California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980); *Teamsters*, 431 U.S. 324 (1977).

97. 102 S. Ct. at 1786 (quoting *Stockham*, 559 F.2d at 352).

98. 279 F. Supp. 505 (E.D. Va. 1968).

99. *Id.* at 517. *See Stockham*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

100. 279 F. Supp. at 517.

101. *See supra* notes 15, 16, 17, 28 and accompanying text.

tives of a union which . . . was not an arm of a segregated society."[102] The district court's conclusion in *Pullman-Standard* seems to be more compatible with the Supreme Court's views. A court must find that the system was adopted because of an intent to discriminate, not because a seniority system has discriminatory consequences resulting from other discriminatory employment practices. As noted earlier, section 706(g) allows retroactive seniority relief for employees who have lost seniority standing as a result of an employer's discriminatory employment practices.[103]

The fourth element of the test asks "whether the system was negotiated and has been maintained free from any illegal purpose."[104] The central question in this regard is whether the class alleging discriminatory intent was adequately represented by the bargaining agent. In *Pullman-Standard*, the district court reviewed the records of the negotiations as well as the contracts between the union and the company and found no evidence that blacks were represented inadequately.[105] In *Local 189, United Papermakers and Paperworkers v. United States*,[106] the Fifth Circuit Court of Appeals found that a seniority system had been maintained for an illegal purpose.[107] The court reviewed the negotiations between the company and the union and found that both "insisted upon carrying forward exclusion of a racially-determined class."[108] The court found the requisite intent from the fact that the company and the union continued to ratify the same seniority system after the "racial implications [of the system] had become known to them."[109] In *James v. Stockham Valves and Fittings Co.*[110] the Fifth Circuit Court of Appeals found the company guilty of discrimination because it consistently refused the union's requests to make changes in the seniority system.[111] The courts recognize, however, that "[s]ignificant freedom must be afforded employers and unions to create differing seniority systems."[112] In the absence of a showing of unequal representation or refusal to alter a system that is known to be discriminatory, the courts will not find discriminatory intent under the fourth element of the test.

The Court's analysis in *Pullman-Standard* firmly establishes that proof

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102. 102 S. Ct. at 1786 (quoting App. to Petn. for Cert. at A-144, Swint v. Pullman-Standard, 624 F.2d 525 (5th Cir. 1980) (No. 80-1190)).

103. *See supra* note 13 and accompanying text.

104. 102 S. Ct. at 1786 (quoting *Stockham*, 559 F.2d at 352).

105. *Id.* at 1786.

106. 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

107. *Id.* at 997.

108. *Id.*

109. *Id.*

110. 559 F.2d 310 (5th Cir.), *cert. denied*, 434 U.S. 1034 (1977).

111. *Id.* at 352-53.

112. California Brewers Ass'n v. Bryant, 444 U.S. 602, 608 (1980).

of actual intent to discriminate is required to invalidate a seniority system. Recognizing that proof of actual intent is a very difficult burden on employees, the Court adopted the "intent to discriminate" test, allowing employees to focus their attack on the bona fides of the employer's seniority system. A question left unresolved by *Pullman-Standard* is whether Congress intended that the immunity provided by section 703(h) protect only those systems in existence prior to the enactment of Title VII. In *American Tobacco Co. v. Patterson*,[113] the Supreme Court was asked to resolve this question.

IV. THE *American Tobacco Co. v. Patterson* DECISION

A. *Facts*

American Tobacco Co. v. Patterson was a Title VII challenge to the validity of the American Tobacco Company's "seniority, wage and job classification practices."[114] The American Tobacco Company owns and operates a cigarette manufacturing plant and a pipe tobacco manufacturing plant in Richmond, Virginia. Each plant is subdivided into prefabrication and fabrication departments.[115] Historically, the jobs in the prefabrication departments were lower paying and had been held almost exclusively by blacks.[116] The fabrication department jobs paid more and were primarily reserved for whites.[117] The exclusive bargaining agent for all of the hourly paid production workers at both plants was the Bakery, Confectionery and Tobacco Workers International Union and its affiliate, Local 182.[118]

The company and the union both admitted to practicing overt racial discrimination against black employees prior to 1963.[119] Due to pressure from the federal government to cease discriminatory employment practices, American Tobacco revised its seniority system, providing that promotions were to be based on both plantwide seniority and "job qualifications."[120] In 1968, American Tobacco proposed a job progression system to replace the seniority/qualifications system,[121] and in 1969, the union

113. 102 S. Ct. 1534 (1982).

114. *Id.* at 1536.

115. *Id.* at 1535-36.

116. *Id.* at 1536.

117. *Id.*

118. *Id.*

119. Prior to 1963, the union maintained separate locals for black and white union members. *Id.*

120. Job qualifications were appraised by the subjective determinations of departmental supervisors. Between 1963 and 1968, virtually no blacks were deemed "qualified to work in the white fabrication departments." *Id.*

121. Job progression is a ranking of jobs according to pay. An employee must start working in the lowest paying job and move up the line (usually on the basis of seniority) job by job until he reaches the highest paying job. *See* Patterson v. American Tobacco Co., 535

ratified the company's proposed system.[122] The new job progression system established nine lines of progression, six of which were contested in the lawsuit. Most lines of progression had two jobs.[123] An employee could not work in the higher paying job in a particular line until he had worked in the lower paying one.[124] Traditionally, nearly all the jobs in two of the contested lines had been reserved for blacks while the jobs in the other four lines were reserved for whites.[125]

After the job progression system went into effect, Patterson, a black employee, and two other black employees filed a claim with the Equal Employment Opportunity Commission (EEOC) alleging that the job progression system operated to discriminate against them.[126] Patterson contended that, because of prior exclusion of black employees from jobs in the fabrication plants, they were prevented from moving into the higher paying jobs in the fabrication plant even though they had more company seniority than other employees.[127] After the EEOC conciliation attempts failed, the employees filed a class action suit in the Federal District Court for the Eastern District of Virginia on behalf of all black employees at American Tobacco, alleging violations of Title VII.[128] A subsequent action filed by the EEOC alleging race and sex discrimination was consolidated for trial with the class action suit.[129]

B. *Decision*

The district court found that American Tobacco's "seniority, promotion, and job classification practices violated Title VII."[130] The court held that the effect of the lines of progression was similar to that of the company's formerly segregated departmental seniority system and that it operated to perpetuate the effects of prior discrimination.[131] The district court ordered American Tobacco to "institute companywide seniority, eliminate certain lines of progression from lower to higher paying jobs, . . . grant back pay, and adjust pensions and profit sharing plans. . . ."[132] The court also ordered that white incumbents be bumped from jobs for which senior black employees were qualified."[133]

F.2d 257, 264 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976).

122. 102 S. Ct. at 1536.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. Patterson, 535 F.2d at 264.
128. 102 S. Ct. at 1536.
129. *Id.* (citing *Patterson*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976)).
130. 535 F.2d at 264.
131. *Id.*
132. *Id.* at 262.
133. *Id.*

On appeal, the Fourth Circuit Court of Appeals affirmed the decision but "remanded for further proceedings with respect to remedy."[134] The court of appeals ruled that the district court erred in ordering the adoption of a companywide seniority system and in ordering that white employees be removed from their jobs in favor of blacks and women who had been victims of discrimination.[135] On remand to the district court, a motion was made by American Tobacco and the union to dismiss the complaint on the grounds that the job progression system was protected by section 703(h) of Title VII.[136] The district court denied the motion. The court of appeals affirmed, holding that even if the lines of progression were a part of a seniority system, they would not be protected by section 703(h).[137] The United States Supreme Court reversed the decision of the Court of Appeals for the Fourth Circuit.[138]

C. *Analysis and Significance*

The issue on appeal to the Supreme Court was whether the Fourth Circuit Court of Appeals was correct in holding that "Congress intended the immunity accorded seniority systems by section 703(h) to run only to those systems in existence at the time of Title VII's effective date, and of course to routine post-Act application of such systems."[139]

Employee Patterson argued that the section 703(h) immunity was meant to apply only to seniority systems existing at the time Title VII went into effect.[140] The EEOC contended that section 703(h) protected "post-Act *application* of a bona fide seniority system but not the post-Act *adoption* of a seniority system or [the adoption of] an aspect of a seniority system."[141] The American Tobacco Company argued that sec-

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134. 102 S. Ct. at 1536.

135. 535 F.2d at 266-70.

136. 102 S. Ct. at 1536. The American Tobacco Company and the union cited *International Bhd. of Teamsters v. United States*, which held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 U.S. 324, 353-54 (1977).

137. 102 S. Ct. at 1537 (citing Patterson v. American Tobacco Co., 634 F.2d 744, 749 (4th Cir. 1980) (en banc), *rev'd*, 102 S. Ct. 1534 (1982)).

138. 102 S. Ct. at 1537.

139. *Id.* (quoting *Patterson*, 634 F.2d at 749). In *Teamsters*, the Supreme Court ruled that a bona ride seniority system established before the effective date of Title VII, which did not result in intentional post-Act discrimination, was valid. 431 U.S. 324 (1977).

140. 102 S. Ct. at 1537. In employment discrimination cases not protected by the section 703(h) "intention to discriminate" immunity, establishing a prima facie case of discrimination is much less burdensome. The plaintiff need show only the adverse impact of an employment practice. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 424 (1975) (prima facie case made out when plaintiff "has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that pool of applicants").

141. 102 S. Ct. at 1537.

tion 703(h) applied to all bona fide seniority systems regardless of when the system was adopted.[142]

To determine whether Congress intended to treat pre-Act and post-Act seniority systems differently under section 703(h), the Court first looked at the plain meaning of the words contained in the section.[143] The Court did not find from "the ordinary meaning of the words used"[144] that there was any distinction made between pre-Act and post-Act systems.[145] Clearly, there is no express wording in section 703(h) that the section should apply only to those systems established at the time the section went into effect.[146] To satisfy the "ordinary meaning of the words used"[147] standard, it would be necessary to insert the phrase "established before the effective date of Title VII" into that part of section 703(h) referring to "bona fide seniority systems."[148]

The court then looked to the legislative history to see whether there was any clear expression by Congress that the language employed in the Act was to be accorded any special meaning.[149] There is express language in the legislative history referring to existing seniority systems and the impact of section 703(h) on them.[150] However, as the Court pointed out, these references were intended to rebut arguments that existing seniority rights would be destroyed by Title VII.[151] There are a number of neutral references in the legislative history concerning which seniority systems are immune to attack under section 703(h).[152] The Court did not find any conclusive evidence in the legislative history that Congress intended section 703(h) to apply only to pre-Act seniority systems[153] and reiterated that "[a]bsent a clearly expressed legislative intention to the contrary [the plain language of the statute] . . . must ordinarily be regarded as

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142. *Id.*

143. *Id. See supra* text accompanying note 21.

144. 102 S. Ct. at 1537 (quoting Richards v. United States, 369 U.S. 1, 9 (1962)).

145. 102 S. Ct. at 1537.

146. *See supra* text accompanying note 23.

147. Richards v. United States, 396 U.S. 1, 9 (1962).

148. *See supra* text accompanying note 23.

149. 102 S. Ct. at 1537 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). *See* United States v. Turkette, 452 U.S. 576 (1981).

150. "Title VII would have no effect on seniority rights *existing* at the time it takes effect." 110 CONG. REC. 7207 (1964) (reply to arguments made by Sen. Hill) (emphasis added). "Title VII would have no effect on *established* seniority rights." *Id.* at 7213 (interpretive memorandum by Sens. Clark and Case) (emphasis added). "The bill is not retroactive, and it will not require an employer to change *existing* seniority lists." *Id.* at 7217 (response to Dirksen memorandum by Sen. Clark) (emphasis added).

151. 102 S. Ct. at 1540.

152. "Seniority rights are in no way affected by the bill." 110 CONG. REC. 7217 (1964) (response to Dirksen memorandum by Sen. Clark). "The title contains no provisions which jeopardize union seniority systems. . . ." *Id.* at 15,866 (a Concise Explanation of the Civil Rights Act of 1964 by Sen. Humphrey).

153. 102 S. Ct. at 1539 n.6.

conclusive."[154]

Another indication that section 703(h) was intended to apply to all seniority systems was found by comparing that section with other sections of Title VII.[155] Upon examining Title VII, the Court determined that there were specific "grandfather clauses"[156] in other sections,[157] which indicated to the Court that had Congress intended a "grandfather clause" it would have expressly included one in section 703(h). The Court stated that "had Congress intended so fundamental a distinction, it would have expressed that intent clearly in the statutory language or the legislative history."[158]

The distinction offered by the EEOC between application of and adoption of seniority systems was also found untenable.[159] The Court recognized that a seniority system cannot have a discriminatory effect until it

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154. *Id.* at 1537 (quoting *Consumer Prod. Safety Comm'n*, 447 U.S. 102, 108 (1980)).

155. 102 S. Ct. at 1537. *See* Cherokee Intermarriage Cases, 203 U.S. 76, 89 (1906) ("[T]he language of a statute is to be interpreted . . . by other parts of the act, and the words used may be qualified by their surroundings and connections."). *Cf.* National Labor Relations Bd. v. Lion Oil Co., 352 U.S. 282, 297 (1957) ("It has thus become a judicial responsibility to find that interpretation which can most fairly be said to be embedded in the statute, in the sense of being most harmonious with its scheme and with the general purpose that Congress manifested.").

156. 102 S. Ct. at 1537. A grandfather clause is a provision in a law that exempts systems in operation at the time of enactment of the law from being regulated by the law. *See* Transamerican Freight Lines, Inc. v. United States, 51 F. Supp. 405, 409 (D. Del. 1943).

157. Section 701(b) of Title VII is an example of a Title VII section that contains a grandfather clause. Section 701(b) reads, in part:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees. . . . Provided, that during the first year after the effective date . . . persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers.

Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 253-54 (1964) (codified as amended at 42 U.S.C. § 2000e-(b) (1976)). *See also* Title VII of the Civil Rights Act of 1964 § 701(e), Pub. L. No. 88-352, § 701(e) 78 Stat. 254 (1964) (codified as amended at 42 U.S.C. § 2000e-(e) (1976). Section 701(e) provides:

> A labor organization shall be deemed to be engaged in an industry affecting commerce if . . . the number of its members . . . is (A) one hundred or more during the first year after the effective date . . . (B) seventy-five or more during the second year after such date or fifty or more during the third year, or (C) twenty-five or more thereafter . . . .

Id.

158. 102 S. Ct. at 1539 n.6.

159. There is virtually no difference in Patterson's and the EEOC's claims. Patterson contends that only bona fide systems adopted before the Act's effective date are protected from the discriminatory impact test. Therefore, logically, he also contends, as does the EEOC, that the discriminatory impact test should be applied to all post-Act seniority systems.

is applied.[160] Therefore, according to the Court, the only way a seniority system "adopted" but not yet "applied" could be discriminatory would be if there were proof of a discriminatory purpose.[161] Since discriminatory purpose is the present standard to show "intention to discriminate" under section 703(h),[162] the Court could find no logical reason advanced by the EEOC to apply a different standard for seniority systems adopted after enactment of Title VII.

In addition, the EEOC interpretation was rejected on the grounds that if a disparate impact test were applied to newly adopted or modified seniority systems, the application of such a test actually would discourage companies from trying to lessen the discriminatory effect of a seniority system.[163] For example, if a company modified its pre-Act seniority system so that it had a fifty percent less discriminatory effect than the previous system, but still had a discriminatory impact, the company would be in violation of Title VII. Therefore, the company, knowing that the pre-Act system would continue to be immune to a Title VII action, would be less likely to implement a new system that possibly could be found to violate Title VII. The Court viewed this result as contrary to the stated purpose of Title VII[164] and held that "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."[165] The Court also pointed out that seniority provisions are important factors in collective bargaining negotiations, and that both Congress and the courts have favored minimal supervision of collective bargaining agreements.[166] Section 703(h) was perceived by the Court as an attempt by Congress to balance the important goals of Title VII against the national labor policy "favoring minimal governmental intervention in collective bargaining."[167]

By reading the plain language of section 703(h), by failing to discover a clear legislative intent to the contrary, by looking at Title VII *in toto*, and

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160. 102 S. Ct. at 1538.

161. *Id.*

162. *Id.*

163. *Id.*

164. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 85 (1977) ("[T]he paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment."). *See also supra* text accompanying notes 2, 4.

165. 102 S. Ct. at 1538. *See* Sierra Club v. Train, 557 F.2d 485, 490 (5th Cir. 1977) (In construing a statute "[t]he interpretation should be reasonable, and where the result of one interpretation is unreasonable while the result of another interpretation is logical, the latter should prevail.") (citing C. SANDS, SUTHERLAND'S STATUTORY CONSTRUCTION § 45.14 (4th ed. 1973)); *Cf.* United States v. Campos-Serrano, 404 U.S. 293, 298 (1971) ("If an absolutely literal reading of a [criminal] statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered.").

166. 102 S. Ct. at 1541 (citing Humphrey v. Moore, 375 U.S. 335, 346 (1964); California Brewers Ass'n. v. Bryant, 444 U.S. 598, 608 (1980)).

167. 102 S. Ct. at 1541 n.17.

by considering section 703(h) in relation to national labor policy, the Court concluded that Congress intended section 703(h) to apply to both pre-Act and post-Act seniority systems.

V. Conclusion

The goal of Congress in enacting Title VII was to assure all persons equal employment opportunities. Congress mandated that employers are not to make employment decisions that favor or harm an identifiable class of persons. When an employer's actions have the effect of discriminating against a protected class, the employer will be enjoined from continuing the discriminatory practice and will be directed to make right their discriminatory acts by putting the discriminatees in the position in which they would have been but for the employer's discrimination.

Congress did not intend that employees be penalized for the actions of their employer. Realizing that invalidating a seniority system would punish the innocent employee rather than the discriminating employer, Congress included section 703(h) in Title VII which immunizes a seniority system from the discriminatory consequences test. The section does not bar a discriminatee from being awarded seniority relief; it merely protects the seniority system, without jeopardizing other employees' seniority rights. Section 706(g) allows a discriminatee to be inserted in the seniority system in the position in which he would have been had there been no discrimination.

The decisions of the Supreme Court in *Pullman-Standard* and *American Tobacco Co.* are consistent with the legislature's aim of protecting the vested seniority rights of innocent employees. The *Pullman-Standard* decision firmly establishes that absent proof of actual intention to discriminate in the adoption of a seniority system, a system will not be invalidated by the courts. The *American Tobacco Co.* decision accurately reflects congressional intent that a bona fide seniority system be protected by section 703(h) regardless of the time the system was adopted.

Joseph D. McCluskey