

CASENOTE

Expanding Title VII's Exemption for Seniority Systems: *American Tobacco Company v. Patterson*¹ — Title VII of the Civil Rights Act of 1964² (the Act) is a broad remedial statute seeking to prohibit all forms of employment practices which discriminate on the basis of an individual's race, color, religion, sex, or national origin.³ On its face, Title VII prohibits intentionally discriminatory employment practices.⁴ In addition, judicial interpretation of the Act has established that it also proscribes those employment practices which are neutral on their face and in intent if they operate in a discriminatory manner.⁵

Congress recognized in drafting the Act, however, that blind pursuit of a policy of eradicating discriminatory employment practices may unnecessarily disturb the interests of innocent employees.⁶ Members of Congress were particularly concerned that Title VII might disturb the rights and expectations of non-minorities under seniority systems.⁷ In recognition of this, Congress afforded some measure of immunity to bona fide seniority systems in section 703(h) of the Act.⁸

¹ 456 U.S. 63 (1982).

² 42 U.S.C. §§ 2000e-1-2000e-17 (1976 & Supp. IV 1980).

³ *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 381 (1977) (Brennan, J., dissenting).

⁴ Section 703 of the Act provides:

(a) It shall be an unlawful employment practice for an employer —

...
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
...

(c) It shall be an unlawful employment practice for a labor organization —

...
(2) to limit, segregate, or classify its membership ... [on the basis of an] individual's race, color, religion, sex, or national origin. ...

42 U.S.C. § 2000e-2 (1976 and Supp. IV 1980).

⁵ *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971). The Court stated: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.*

⁶ *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 350 (1977); see also *infra* notes 42-56 and accompanying text.

⁷ See *infra* notes 42-56 and accompanying text discussing the legislative history of section 703(h).

⁸ Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1976 & Supp. IV 1980) provides in its entirety:

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, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differ-

Seniority systems have long been viewed as essential for providing objective standards by which to determine order of layoffs and recall, promotions, and distribution of benefits, thus providing protection from arbitrary management decisions.⁹ In addition, seniority systems provide a mechanism which enables employees to assess their vulnerability to layoffs relative to that of their coworkers, thus providing for job security and stability.¹⁰ Use of seniority as a criterion for distributing employment benefits may, however, serve to perpetuate the effects of prior discrimination.¹¹ For example, those employees who were denied access to certain positions in the past on the basis of their race, color, religion, sex, or national origin will have less accrued seniority than their fellow employees who faced no such discriminatory barriers in hiring and promotion decisions. Consequently, in times of economic recession and layoffs, minorities and women may find that employment positions opened to them by Title VII will be lost under last-hired, first-fired provisions commonly embodied in seniority systems.¹² Similarly, in those industries which utilize departmental, job, or line seniority systems under which seniority is measured by length of service within a particular department, job, or line of progression rather than by total length of service with an employer,¹³ minorities and women may often be deterred from taking advantage of their right to equal access to formerly all-white or all-male positions because doing so would mean forfeiture of previously accrued seniority.¹⁴

This potential for seniority systems to perpetuate the effects of prior discrimination creates a direct conflict between the expectations and rights of minorities¹⁵ to equal access to jobs and employment benefits, and the expectations of non-minority employees created by the continued operation of seniority systems. On the one hand, a successful Title VII challenge to the operation of a seniority system could seriously diminish the seniority system based rights and expectations of non-minority employees. On the other hand denying minorities such a cause of action would seriously impede Title VII's goal of removing all discriminatory barriers to equal employment opportunities. The central issue posed by section 703(h) is therefore the extent to which the provision limits Title

entiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

⁹ *Id.* See generally Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1534-42 (1962).

¹⁰ See Cooper and Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1604-05 (1969).

¹¹ See generally Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268, 278-80 (1969); Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1602-04 (1969); Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 46 UCLA L. REV. 177, 195 (1975).

¹² Comment, *Last Hired, First Fired Seniority, Layoffs, and Title VII: Questions of Liability and Remedy*, 11 COLUM. J. L. & SOC. PROBS. 343, 343-46 (1975).

¹³ Cooper & Sobel, *supra* note 10 at 1602.

¹⁴ Blumrosen, *supra* note 11, at 276-77. Seniority may be measured by a wide variety of means, including total length of employment with the employer, referred to as employment, mill, or plant seniority, length of service in a department, length of service in a line of progression, or length of service in a particular job. Cooper and Sobel, *supra* note 11 at 1602.

¹⁵ Title VII prohibits employment practices which discriminate on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1976) quoted *supra* at note 4. For purposes of brevity, this casenote will use the admittedly imprecise shorthand of "minorities" to refer to those groups of persons protected under Title VII.

VII's broad mandate against discriminatory employment practices in order to protect the interests and expectations of non-minority employees. The Supreme Court has repeatedly tried to balance these competing considerations in the context of interpreting section 703(h), most recently in *American Tobacco Company v. Patterson*.¹⁶

In *Griggs v. Duke Power Company*,¹⁷ the Supreme Court held that Title VII prohibits employment practices which perpetuate or freeze the status quo of prior discriminatory employment practices.¹⁸ The Court announced in *Griggs* that a prima facie violation of Title VII may be established by demonstrating that an employment practice which is neutral on its face and intent has a discriminatory impact on minorities.¹⁹ Thus, absent section 703(h), seniority systems that perpetuate prior discrimination would clearly be prima facie violative of Title VII under *Griggs*, even without any affirmative showing of intentional discrimination. The first courts to construe section 703(h) held that that provision does not preclude application of the *Griggs* standard to seniority systems, stating that seniority systems which perpetuate prior discrimination are not "bona fide" within the meaning of section 703(h).²⁰ This analysis, however, was rejected by the Supreme Court in *International Brotherhood of Teamsters v. United States*²¹ which held that under section 703(h), discriminatory intent must be proved to invalidate an otherwise neutral bona fide seniority system, and that discriminatory impact of a seniority system alone is insufficient to establish a prima facie violation of Title VII.²² Thus, prior to *Patterson* it had been established that section 703(h) was intended to favor the interests of non-minority employees under seniority systems over those of minority employees except in those instances when intentional discrimination could be demonstrated. Nevertheless, the United States Court of Appeals for the Fourth Circuit subsequently interpreted *Teamsters* to be limited to those seniority systems adopted prior to the enactment of Title VII and held that the *Griggs* analysis would continue to be available to minorities challenging a post-Act seniority system.²³ In *Patterson*, therefore, the Supreme Court was presented with another opportunity to consider the appropriate balance between the interests of minority and non-minority employees intended in section 703(h).

In 1969, John Patterson and other employees of the American Tobacco Company filed a complaint with the Equal Employment Opportunity Commission alleging that a seniority system adopted in 1968, subsequent to the effective date of Title VII, violated the Act.²⁴ Until 1963, both the American Tobacco Company and the union representing the hourly-paid production workers engaged in overt racial discrimination.²⁵ The union maintained segregated locals and black employees were assigned to lower paying and less desirable positions than whites.²⁶ Black employees of American Tobacco Company claimed that the effects of this prior discrimination were perpetuated by a seniority

¹⁶ 456 U.S. 63 (1982).

¹⁷ 401 U.S. 424 (1971).

¹⁸ *Id.* at 429-30.

¹⁹ *Id.* at 430-32.

²⁰ See, e.g., *Quarles v. Phillip Morris, Inc.*, 297 F. Supp. 505, 518 (E.D. Va. 1968); see also cases discussed *infra* notes 57-72 and accompanying text.

²¹ 431 U.S. 324 (1977).

²² *Id.* at 349, 353-54.

²³ *Patterson v. American Tobacco Company*, 634 F.2d 744, 749 (4th Cir. 1980).

²⁴ 456 U.S. at 66. The effective date of Title VII was July 2, 1965. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 716, 78 Stat. 241, 266 (1964).

²⁵ 456 U.S. at 65.

²⁶ *Id.*

system that adopted nine lines of progression as the hierarchy for promotions.²⁷ Each line of progression consisted of two related jobs; an employee was not eligible for a top position without first holding a bottom position.²⁸ Four of the lines of progression consisted of virtually all-white top positions in the more lucrative fabrication department paired with all-white bottom jobs in that department while two of the lines of progression paired all-black top jobs with all-black bottom positions in the prefabrication department.²⁹

The American Tobacco Company argued that the seniority system in question was fully insulated from a Title VII challenge by section 703(h).³⁰ Patterson contended that section 703(h) had no applicability to the seniority system in dispute because that section was only intended to protect those seniority systems adopted prior to the effective date of Title VII.³¹ The Supreme Court held that section 703(h) does not distinguish either on its face or in intent, between those seniority systems adopted prior to the effective date of Title VII and those adopted after Title VII's effective date.³² Instead, the Court held that under section 703(h), a challenge to both pre- and post-Act seniority systems must be accompanied by proof of discriminatory intent.³³

The significance of *American Tobacco Company v. Patterson* lies in the expansive answer it provides to the question of how extensively section 703(h) narrows the broad reach of Title VII. In the post-*Patterson* era, Title VII's protection may only be invoked in seniority system cases by those few minority employees who can demonstrate intentional discrimination. Because this burden is an extremely difficult one,³⁴ *Patterson* effectively limits Title VII as a tool for eliminating both forms of employment discrimination and the vestiges of prior discrimination.

This casenote will review the legislative history of section 703(h) and the judicial interpretation of that section prior to *Patterson*.³⁵ Next, the reasoning of the Court and that of the two dissenting opinions will be described.³⁶ The Court's decision that section 703(h) applies to both pre-Act and post-Act seniority systems will then be analyzed, as will be the alternative interpretations advocated in the two dissents.³⁷ It will be maintained that the Court's decision is inconsistent with the policy behind Title VII as well as the limited interests sought to be protected by the seniority system exemption.³⁸ It will be submitted that in its emphasis on the plain language of section 703(h), the Court failed to adequately examine the issues raised by this section.³⁹ Furthermore, it will also be contended that the Court's reliance on national labor policy favoring minimal interference with the collective bargaining process is misplaced.⁴⁰ Finally, it will be concluded that a distinction between post-Act and pre-Act seniority systems for the purposes of section 703(h) can be based on

²⁷ *Id.* at 66.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 67-68.

³¹ *Id.* at 68.

³² *Id.* at 69, 71-75.

³³ *Id.* at 75-76.

³⁴ See *Pullman Standard, Inc. v. Swint*, 456 U.S. 273, 277 (1982) (establishing discriminatory intent requires proof of actual motive); see also *infra* note 236.

³⁵ See *infra* notes 42-128 and accompanying text.

³⁶ See *infra* notes 157-210 and accompanying text.

³⁷ See *infra* notes 221-92 and accompanying text.

³⁸ See *infra* notes 241-63 and accompanying text.

³⁹ See *infra* notes 221-92 and accompanying text.

⁴⁰ See *infra* notes 256-63 and accompanying text.

the language of that section which states that a seniority system must be "bona fide" as well as not intentionally discriminatory in order to be immunized from Title VII, and that such an interpretation would serve to protect the interests intended protection while furthering the broad policy objectives of the Act.⁴¹

I. BACKGROUND OF SECTION 703(h)

In order to fully understand the significance of *Patterson* as well as to assess adequately the reasoning of the Court, it is necessary to view *Patterson* in the context of the Court's prior interpretations of section 703(h) and the legislative history of this provision. The following section, therefore, will briefly review the legislative history of section 703(h) and the Court's past treatment of the issues raised by 703(h).

A. Legislative History of Section 703(h)

The original version of Title VII reported out of the House Judiciary Committee⁴² and passed by the House did not contain section 703(h).⁴³ Neither the House Bill, nor the Majority Judiciary Committee Report mentioned the problem of seniority.⁴⁴ The Minority Judiciary Committee Report, however, alleged that Title VII would "grant the power to destroy union seniority. . . the extent of actions which would be taken to destroy the seniority system is unknown and unknowable."⁴⁵ Representative Dowdy, a signatory of the Minority Report, repeated this interpretation of Title VII on the House floor⁴⁶ and introduced an amendment exempting all hiring and employment practices governed by a seniority system from Title VII coverage.⁴⁷ This amendment was defeated without debate.⁴⁸

The House bill was sent directly to the Senate floor, without first being referred to the Senate Judiciary Committee.⁴⁹ The issue of seniority was raised in the Senate debates on the bill when opponents of Title VII claimed that the Act would destroy existing seniority rights and reverse the progress that organized labor had achieved.⁵⁰ This debate prompted Senators Clark and Case, the bipartisan floor managers of the Senate Bill, to introduce into the *Congressional Record* interpretive memoranda emphasizing that Title VII would have no retroactive effect on established seniority rights.⁵¹ Senators Clark

⁴¹ See *infra* notes 293-303 and accompanying text.

⁴² H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2391.

⁴³ H.R. 7152, passed by the House of Representatives, at 110 Cong. Rec. 2804, 88th Cong., 2d Sess. (1964).

⁴⁴ H.R. Rep. No. 914, *supra*, note 42.

⁴⁵ *Id.*, 1964 U.S. CODE CONG. & AD. NEWS at 2440 (Minority Report).

⁴⁶ 110 Cong. Rec. 2726 (1964).

⁴⁷ *Id.* at 2727. The text of the amendment provided:

The provisions of this title shall not be applicable to any employer whose hiring and employment practices are pursuant to (1) a seniority system; (2) a merit system; (3) a system which predicates its practice upon ability to produce either in quantity or quality; or (4) a determination based on any factor other than race, color, religion, or national origin.

Id. at 2727-28.

⁴⁸ *Id.* at 2738.

⁴⁹ See Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 443-44 (1966).

⁵⁰ See 110 CONG. REC. 486 (1964) (remarks of Sen. Hill). Senator Hill alleged that "benefits which organized labor had attained through the years would no longer be matters of right. . . ." *Id.*

⁵¹ *Id.* at 7207. The relevant passage of the Clark-Case Interpretive Memorandum is as follows:

and Case also introduced a Justice Department statement that "Title VII would have no effect on seniority rights existing at the time it takes effect."⁵²

It was not until several weeks after these debates that Senate majority leader Mansfield and Senate minority leader Dirksen introduced a substitute bill containing section 703(h).⁵³ Section 703(h) was apparently drafted with the intent of negating the earlier criticism that Title VII might destroy existing seniority rights.⁵⁴ There were no further debates on the issue. Senators Dirksen and Humphrey did, however, express the view that section 703(h) was not intended to alter the scope of Title VII, but rather "merely clarified its present intent and effect."⁵⁵ This compromise bill containing section 703(h) was enacted as Title VII of the Civil Rights Act of 1964 without a committee report and the usual accompanying legislative materials.⁵⁶ Despite the absence of these materials, the

Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged — or indeed, permitted — to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)

Id. at 7213. Senators Clark and Case also introduced a series of questions and answers about Title VII, the relevant portion of which provides:

Question. . . . Normally, labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?

Answer. . . . Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status of "last hired" and not because of his race.

Question. . . . If an employer is directed to abolish his employment list because of discrimination what happens to seniority?

Answer. . . . The bill is not retroactive, and it will not require an employer to change existing seniority lists.

Id. at 7217.

⁵² *Id.* at 7207. The pertinent portion of the Justice Department Memorandum provides: First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result.

Id.

⁵³ *Id.* at 11,926; see Vaas, *supra* note 49, at 445-46.

⁵⁴ See *Teamsters*, 431 U.S. at 352.

⁵⁵ 110 CONG. REC. 12,723 (1964).

⁵⁶ See Vaas, *supra* note 49, at 443-44, 457-58.

legislative history that is extant strongly suggests that section 703(h) was not intended as a substantial limitation on the scope of Title VII, but rather was only intended to protect the seniority based expectations of non-minorities that had arisen prior to the passage of Title VII.

B. Judicial Interpretation of Section 703(h) Prior to Patterson

The seminal case construing section 703(h) is *Quarles v. Phillip Morris, Inc.*⁵⁷ The defendant company in *Quarles* had maintained a formally segregated hierarchy of job positions until six months after the effective date of Title VII.⁵⁸ Because of this past hiring discrimination, black employees were concentrated in the lowest paying departments.⁵⁹ The collective bargaining agreement in operation at the defendant's plant provided for a departmental seniority system.⁶⁰ Consequently black employees could only transfer to the more desirable position in the previously all white departments by forfeiting all the seniority they had accrued in their former departments.⁶¹ The plaintiffs alleged that the departmental seniority system acted to deter interdepartmental transfers by blacks and thus perpetuated the effects of their employer's prior discrimination.⁶²

The district court rejected the defendant's argument that the seniority system was protected by section 703(h), holding that a departmental seniority system that had its genesis in racial discrimination and perpetuated the effects of the prior discrimination, was not bona fide and therefore not entitled to the protection of section 703(h).⁶³ After reviewing the legislative history of section 703(h), the *Quarles* court stated that Congress did not specifically address the validity of departmental seniority systems, but was concerned with employment seniority systems only.⁶⁴ The court concluded that the intent of section 703(h) was to ensure that the Act would not require preferential treatment of minorities over incumbent white employees with accrued employment seniority.⁶⁵ The court further stated that the legislative history of section 703(h) also demonstrated that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act."⁶⁶

The position of the *Quarles* court has received considerable support in the Circuit Courts of Appeal,⁶⁷ while the contrary position, that merely prolonging the effects of

⁵⁷ 279 F. Supp. 505 (E.D. Va. 1968).

⁵⁸ *Id.* at 508.

⁵⁹ *Id.* at 511.

⁶⁰ *Id.*

⁶¹ *Id.* at 513-14.

⁶² *Id.* at 514.

⁶³ *Id.* at 517. The court stated that:

Section 703(h) expressly states the seniority system must be *bona fide*. The purpose of the act is to eliminate racial discrimination in covered employment. Obviously one characteristic of a *bona fide* seniority system must be lack of discrimination. Nothing in § 703(h), or in its legislative history, suggests that a racially discriminatory seniority system established before the act is a *bona fide* seniority system under the act.

Id.

⁶⁴ *Id.* at 516.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ The *Quarles* holding was adopted by the Fifth Circuit in *Local 189, United Paper Makers & Paper Workers*, the first appellate decision addressing the validity under Title VII of departmental seniority systems that perpetuate the effects of prior discrimination. *Local 189, United Paper Makers & Paper Workers*, 416 F.2d 980, 995-97 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). The Fourth,

prior discrimination is not enough to take a plan outside the orbit of section 703(h), received comparatively little support.⁶⁸ Congress also indicated its approval of the *Quarles* approach in 1972 when it amended the Civil Rights Act of 1964 through the enactment of the Equal Employment Opportunity Act of 1972.⁶⁹ The reports of both the Senate Committee on Labor and Public Welfare⁷⁰ and the House Committee on Education and Labor⁷¹ cited *Quarles* with apparent approval.⁷²

The first case addressing the scope of section 703(h) to reach the Supreme Court was *Franks v. Bowman Transportation Corp.*⁷³ *Franks* did not involve a direct challenge to the operation of a seniority system, but rather raised the issue of whether or not retroactive seniority was a proper remedy for victims of post-Act discriminatory hiring and promotion practices.⁷⁴ The *Franks* Court, however, was not faced with defining the substantive scope of section 703(h), as the Court was in *Patterson*.⁷⁵ Nonetheless, the Court was presented with the same fundamental questions underlying section 703(h): do the goals of Title VII and the interests of victims of discrimination justify diminishing the seniority rights and expectations of third party employees?⁷⁶

Sixth, Eighth, and Ninth Circuits subsequently adopted the *Quarles* and *Local 189* view that seniority systems which perpetuate the effects of prior discrimination are not afforded immunity from Title VII by section 703(h). See, e.g., *Patterson v. American Tobacco Co.*, 535 F.2d 257, 266 (4th Cir. 1976), cert. denied, 429 U.S. 920 (1977); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 313-14 (6th Cir. 1975), vacated and remanded, 431 U.S. 951 (1977); *United States v. Navajo Freight Lines, Inc.*, 525 F.2d 1318, 1325-26 (9th Cir. 1975); *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 364 (8th Cir. 1973). Similarly, the Seventh and Tenth Circuits have also indicated their approval of *Quarles* and *Local 189*. See, e.g., *Bowe v. Colgate, Palmolive Co.*, 489 F.2d 896, 900-902 (7th Cir. 1973); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 250 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971).

⁶⁸ See, *Dobbins v. Local 212, International Brotherhood of Electrical Workers*, 292 F. Supp. 413, 443 (S.D. Ohio 1968); *United States v. H.K. Porter Co.*, 296 F. Supp. 40, 58 (N.D. Ala. 1968).

⁶⁹ Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980)).

⁷⁰ S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971).

⁷¹ H.R. REP. NO. 238, 92d Cong., 1st Sess. 8 (1971).

⁷² S. REP. NO. 415, 92d Cong., 1st Sess. 5 n.1 (1971); H.R. REP. NO. 238, 92d Cong., 1st Sess. 8 n.2 (1971). The committee reports also indicate recognition that the problem of employment discrimination was far more complex than originally thought in 1964, particularly that of neutral practices which discriminate in operation. S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971); H.R. REP. NO. 238, 92d Cong., 1st Sess. 8 (1971). For example, the Senate Report stated:

Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements. In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance and that the system complained of is unlawful.

S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971). It is also significant to note that an analysis of the 1972 amendments prepared by the Conference Committee stated that unless otherwise indicated, existing Title VII case law would continue to govern the application and construction of Title VII. 118 CONG. REC. 7166, 7563-64 (1972). No such contrary indication regarding the proper construction of section 703(h) can be found in the 1972 amendments. See 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. IV 1980).

⁷³ 424 U.S. 747 (1976).

⁷⁴ *Id.* at 750.

⁷⁵ See *infra* notes 152-159 and accompanying text.

⁷⁶ See 424 U.S. at 773-79. While the majority answered this question affirmatively, Chief Justice

The Court held that section 703(h) does not restrict or modify the relief otherwise appropriate under Title VII,⁷⁷ but rather delineates which employment practices are illegal and thereby prohibited and which are not.⁷⁸ The Court noted that the petitioners were not challenging the operation of a seniority system as violative of Title VII, but instead were challenging the use of a discriminatory hiring system and were seeking the seniority status they would have attained but for the discriminatory hiring policies.⁷⁹

After determining that section 703(h) was inapplicable to questions of relief available under Title VII, the Court held that victims of post-Act hiring discrimination would be presumptively entitled to an award of retroactive seniority.⁸⁰ The Court pointed to the ever-increasing role of seniority in allocating employment benefits and viewed retroactive seniority as crucial to fulfilling the "make whole" purposes of the Act.⁸¹ The Court rejected the argument that to award retroactive seniority to victims of hiring discrimination would unfairly infringe on the expectations of "arguably innocent employees,"⁸² stating that "a sharing of the burden of the past discrimination is presumptively necessary (and) is entirely consistent with any fair characterization of equity jurisdiction . . ."⁸³ Thus, by granting retroactive seniority to victims of discrimination, the Court effectively recognized that when faced with the difficult task of determining whether the interests of a protected class under Title VII or those of innocent third parties shall prevail, the goals of Title VII tip the balance in favor of the victims of unlawful discrimination.

The Court was again faced with this issue in *International Brotherhood of Teamsters v. United States*,⁸⁴ the next seniority case to reach the Supreme Court. Unlike *Franks, Teamsters* involved a direct challenge to the operation of a seniority system⁸⁵ and thus section 703(h) was considered to be directly applicable.⁸⁶ The seniority system in question allocated benefits, such as vacations, eligibility for pension plans, and other fringe benefits on the basis of an employee's total length of service within the company.⁸⁷ "Competitive Seniority," which determined order of layoff and recall and preference in bidding for promotions, however, was calculated according to an employee's length of service within a particular bargaining unit.⁸⁸ Due to intentional pre-Act discrimination, minorities had been confined to the less desirable and lower paying positions.⁸⁹ Although minorities could now transfer to more favorable positions, they could only do so at the cost of

Burger and Justice Powell, joined by Justice Rehnquist, both dissented from the majority's holding that victims of post-Act discrimination are presumptively entitled to a grant of retroactive seniority. *See id.* at 780-99. Chief Justice Burger stated that such a grant would inequitably infringe on the rights of innocent employees and advocated a monetary award in lieu of retroactive seniority. *Id.* at 780-81. Justice Powell contended that while § 703(h) is not directly applicable, this provision did represent Congressional concern with the rights of third parties. *Id.* at 791-92. The trial court sitting in equity, he continued, should therefore balance the interests of discriminatees and those of third parties in fashioning an appropriate remedy. *Id.* at 794.

⁷⁷ *Id.* at 762.

⁷⁸ *Id.* at 761.

⁷⁹ *Id.* at 758.

⁸⁰ *Id.* at 779 & n.41.

⁸¹ *Id.* at 766.

⁸² *Id.* at 773-74.

⁸³ *Id.* at 777.

⁸⁴ 431 U.S. 324 (1977).

⁸⁵ *Id.* at 329-30.

⁸⁶ *Id.* at 348-54.

⁸⁷ *Id.* at 343.

⁸⁸ *Id.* at 343-44.

⁸⁹ *See id.* at 344-45.

forfeiting all the competitive seniority they had accrued in their prior bargaining unit and therefore risk losing their jobs entirely in the event of layoffs.⁹⁰

The Court maintained that the clear import of section 703(h) was to protect the settled expectations of employees under seniority systems adopted prior to the effective date of Title VII.⁹¹ That is, no successful challenge could be made unless the seniority system could be shown to be discriminatory in intent and not merely in effect.⁹² In so holding, the Supreme Court rejected the reasoning that a neutral seniority system which perpetuates the effects of pre-Act discrimination could not be "bona fide" within the meaning of section 703(h), and thus could not be afforded the protection of that section.⁹³ The Court stated that section 703(h) precludes the application of the *Griggs* disparate impact test to seniority systems challenged under Title VII.⁹⁴

As a vigorous dissent written by Justice Marshall pointed out,⁹⁵ the majority's opinion in *Teamsters* marked a drastic change in Title VII jurisprudence.⁹⁶ The *Teamsters* Court overruled a decade of lower court decisions⁹⁷ and rulings of the Equal Employment Opportunity Commission⁹⁸ holding that seniority systems which perpetuate the effects of prior discrimination are not "bona fide" and therefore do not come under the protection of the section 703(h) exemption.⁹⁹

Justice Marshall contended that the Congressional intent behind section 703(h) was only to protect the seniority rights of nonminority employees from dilution by either grants of superseniority to members of minority groups based solely on their status as minority members or invalidation of a seniority system solely because of a disparate impact on newly hired minorities.¹⁰⁰ Justice Marshall was particularly concerned that the *Teamsters* holding would be applied to seniority systems that perpetuate post-Act as well as pre-Act discrimination.¹⁰¹ Relying on language in the legislative history of section 703(h) referring to "established seniority rights,"¹⁰² Justice Marshall maintained that the thrust of section 703(h) was to protect only those expectations arising prior to the adoption of Title VII and not all expectations based on seniority systems with a discriminatory impact.¹⁰³

In *United Air Lines v. Evans*,¹⁰⁴ a case decided the same day as *Teamsters*, the Court also rejected a challenge to a seniority system based on the system's perpetuation of the effects

⁹⁰ *Id.*

⁹¹ *Id.* at 352-54.

⁹² *Id.*

⁹³ *Id.* at 355-56.

⁹⁴ *Id.* at 349-50. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court held that a plaintiff in a Title VII case need not prove intent. *Id.* at 432. Rather, a Title VII plaintiff may establish a *prima facie* case of unlawful discrimination by demonstrating that an employment practice adversely has a disparate negative impact on minorities or women. *Id.* at 430-31.

⁹⁵ 431 U.S. at 377.

⁹⁶ *Id.* at 378-80.

⁹⁷ *Id.* at 378-79. See cases cited *id.* at 378 n.2.

⁹⁸ *Id.* at 379-80. See cases cited *id.* at 380 n.4. (Marshall, J., dissenting).

⁹⁹ *Id.* at 378.

¹⁰⁰ *Id.* at 385.

¹⁰¹ *Id.* at 383.

¹⁰² *Id.* at 385. Justice Marshall cited the Clark-Case Interpretative Memorandum as well as the Justice Department memorandum ("seniority rights existing at the time (Title VII) takes effect.") and the series of questions and answers prepared by Senators Clark and Case stating that Title VII is not retroactive. *Id.* For the text of these and the questions and answers, see *supra* notes 51-52.

¹⁰³ 431 U.S. at 384-85.

¹⁰⁴ 431 U.S. 553 (1977).

of a post-Act discriminatory employment practice. The respondent in *Evans*, a female flight attendant, was forced to resign when she married in 1968.¹⁰⁵ In a separate action in which Evans was not a party, United's policy of prohibiting female flight attendants from being married was struck down as violative of Title VII.¹⁰⁶ In 1972, Evans was rehired, but she was denied the seniority she had previously accrued as a United employee.¹⁰⁷ Evans sued for seniority retroactive to the date of her forced resignation, claiming that the seniority system gave present effect to the earlier discrimination since she had less seniority than she would have had but for the discriminatory discharge.¹⁰⁸

The Court held that she was not entitled to the relief requested.¹⁰⁹ The majority ruled that the employer was entitled to treat the discriminatory discharge as equivalent to pre-Act discrimination since it was not the subject of a timely charge to the Equal Employment Opportunity Commission.¹¹⁰ The Court stated that both male and female employees who had been terminated for discriminatory or nondiscriminatory reasons and had subsequently been rehired were denied previously accrued seniority.¹¹¹ The Court thus found that Evans' complaint failed to allege that the seniority system treated similarly situated males and females differently.¹¹² In a footnote, Justice Stevens noted that the instant case did not present the issue raised by the *Quarles* line of cases because Evans did not allege that a departmental seniority system deterred her from exercising any rights granted by Title VII.¹¹³ Emphasizing that the seniority system was neutral in operation, the Court held that section 703(h) precludes a plaintiff from basing a challenge to a neutral seniority system on the mere fact that the seniority system perpetuates the effects of a prior discriminatory act which has no current legal significance.¹¹⁴ To reach a contrary holding, the Court concluded, would allow claims for seniority in time-barred discrimination claims, frustrating the intent of section 703(h).¹¹⁵

While *Teamsters* set forth the proposition that established seniority systems which perpetuate the effects of prior discrimination would be immunized by section 703(h) if bona fide and neutral in intent, and *Evans* similarly established that section 703(h) precludes an attack on a neutral seniority system despite that system's effect of perpetuat-

¹⁰⁵ *Id.* at 554.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 555.

¹⁰⁸ *Id.* at 557.

¹⁰⁹ *Id.* at 560.

¹¹⁰ *Id.* at 558.

¹¹¹ *Id.* at 557.

¹¹² *Id.* at 558.

¹¹³ *Id.* at 558, n.10.

¹¹⁴ *Id.* at 560. The Court noted that Evans had not alleged that the seniority system was either not bona fide or intentionally discriminatory, and that:

The statute does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory. But such a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer.

Id. This language, as well as the statement that the system in question was not discriminatory in operation, seemed to leave open the possibility that a seniority system which perpetuates post-Act discrimination may be challenged on the basis of its disparate impact on women or minorities. Such a reading of *Evans*, however, was foreclosed by the Court in *Patterson*, which interpreted *Evans* and *Teamsters* to hold that section 703(h) precludes the application of a disparate impact analysis to all seniority systems, despite the systems' effect of perpetuating either pre- or post-Act discrimination. *Patterson*, 456 U.S. at 75-76.

¹¹⁵ 431 U.S. at 560.

ing a prior discriminatory act, these cases left open the question of what employment practices would be considered to be part of a seniority system and thus accorded the protection of that provision. In 1980, however, the Supreme Court addressed this issue in part in *California Brewers Association v. Bryant*.¹¹⁶ The issue presented to the Court in *Bryant* was whether a provision in a multi-employer collective bargaining agreement providing that an employee must work forty-five weeks within a single calendar year before attaining the status of a permanent employee was part of a seniority system and thus entitled to 703(h) immunity.¹¹⁷ Permanent employees enjoyed greater rights with respect to protection from layoff, preference in recall, and inter-plant bumping privileges, than did temporary employees.¹¹⁸ The California brewing industry, however, is seasonal. Consequently, an employee could work in the industry for several years and never attain permanent status.¹¹⁹ Black brewery workers brought Title VII charges alleging that this provision had a disproportionately adverse impact on blacks, none of whom had ever attained the status of a permanent employee.¹²⁰

The Court held that the "forty-five week" provision of the collective bargaining agreement at issue was a part of a seniority system, within the meaning of section 703(h).¹²¹ After noting that neither Title VII nor the legislative history of that Act defines seniority systems,¹²² the Court relied on "commonly accepted notions about 'seniority' in industrial relations,"¹²³ to define a seniority system for the purposes of section 703(h) as "a scheme that, alone or in tandem with non 'seniority' criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase."¹²⁴

Applying this definition of seniority systems for the purposes of section 703(h), the Court stated that the forty-five week rule served the necessary function of establishing eligibility for entrance into the permanent employee seniority track¹²⁵ and thus was a component of the seniority system entitled to the protection of section 703(h).¹²⁶ The Court noted, however, that on remand, the plaintiff in *Bryant* still could prevail if he could prove that the forty-five week rule was not "bona fide," or that the differences in employment engendered by the rule were the result of intentional racial discrimination.¹²⁷

Bryant, by interpreting the term "seniority system" for purposes of section 703(h) to

¹¹⁶ 444 U.S. 598 (1980).

¹¹⁷ *Id.* at 600-01.

¹¹⁸ *See id.* at 603-04.

¹¹⁹ *Id.* at 615 (Marshall, J., dissenting).

¹²⁰ *Id.* at 602.

¹²¹ *Id.* at 610.

¹²² *Id.* at 605.

¹²³ *Id.*

¹²⁴ *Id.* at 605-06. The Court noted that for a seniority system to function, it must contain rules that are not related to length of employment, such as rules determining when seniority will begin to accrue, how seniority may be forfeited, and what periods of employment will count towards an employee's accrued seniority. *Id.* at 607. The Court further supported its liberal definition of "seniority systems" for the purposes of section 703(h) by stating that Congress enacted the Civil Rights Act of 1964 against the historical context of a long tradition of freedom of collective bargaining and did not intend to prefer any one particular type of seniority system. *Id.* at 608.

¹²⁵ *Id.* at 609.

¹²⁶ *Id.* at 610.

¹²⁷ *Id.* at 610-11.

include "non-seniority criteria" related to the operation of a seniority system,¹²⁸ broadened the class of employment practices that would be protected by section 703(h), as interpreted by the Court in *Teamsters* and *Evans*. *Teamsters* and *Evans* had also afforded a broad construction to the scope of the immunity from Title VII provided by section 703(h) by holding that section to immunize those seniority systems that perpetuate the effects of pre-Act discrimination unless intentionally discriminatory as well as those neutral systems that perpetuate the effects of post-Act discrimination. It is against this background of the Court's broad interpretation of section 703(h) that the black employees of the American Tobacco Company sought to limit *Teamsters* to pre-Act seniority systems and thus attain relief under Title VII from a post-Act seniority system that adversely affected minority employees.

II. AMERICAN TOBACCO COMPANY V. PATTERSON

The seniority system challenged in *Patterson* allegedly violated Title VII because, although adopted subsequent to the Act, the plan penalized minority workers for leaving job patterns which were the result of prior discrimination.¹²⁹ The American Tobacco Company operated two manufacturing plants, each composed of a prefabrication and a fabrication department.¹³⁰ The Bakery, Confectionary, & Tobacco Workers' International Union and its local affiliate were the exclusive collective bargaining representatives of the hourly-paid production workers at both of these plants.¹³¹ Prior to 1963, both the employer and the Union engaged in overt racial discrimination.¹³² The Union maintained segregated locals and the employer assigned blacks to the prefabrication department, largely excluding them from the more desirable and more lucrative positions in the fabrication department.¹³³ An employee could only transfer departments by forfeiting all his accrued seniority.¹³⁴ In 1963, pressure from the federal government resulted in modifications of these practices.¹³⁵ The Union merged its previously segregated locals and a plantwide seniority system replaced the departmental seniority system.¹³⁶ Promotions were based on seniority plus other qualifications, and inter-plant transfers resulted in a loss of accrued seniority.¹³⁷ During this time, only white workers secured promotions to the fabrication departments from the prefabrication departments and thus the American Tobacco Company's plants remained racially stratified.¹³⁸

The seniority and promotions system again underwent revision in 1968.¹³⁹ The company proposed, and the union ratified, a promotions and seniority system based on nine lines of progression.¹⁴⁰ Each line of progression generally consisted of two related jobs.¹⁴¹ An employee was not eligible for the top job in a line of progression until he

¹²⁸ *Id.* at 606.

¹²⁹ *Patterson*, 456 U.S. at 66-67.

¹³⁰ *Id.* at 65.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 65-66.

¹³⁴ *Id.* at 66.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

worked the bottom job in the line.¹⁴² Six of the nine lines of progression were at issue in *Patterson*.¹⁴³ Four of the lines of progression consisted of virtually all white top jobs in the fabrication department paired with nearly all white bottom jobs in the same department, while two of the lines of progression consisted of all black top jobs in the prefabrication department linked with all black bottom prefabrication jobs.¹⁴⁴ The most lucrative positions in the American Tobacco Company's two plants were the top jobs in the white lines of progression.¹⁴⁵

In early 1969, John Patterson and two other black employees filed charges with the Equal Employment Opportunity Commission alleging that the American Tobacco Company and the Tobacco Workers' International Union had engaged in racially discriminatory employment practices.¹⁴⁶ After conciliation efforts failed, the black workers filed suit under Title VII.¹⁴⁷ The district court found that the defendants' seniority, promotion, and job classification policies were violative of Title VII.¹⁴⁸ The court enjoined further use of six of the nine lines of progression on the grounds that they perpetuated the effects of prior discrimination and were not justified by business necessity.¹⁴⁹ The Fourth Circuit affirmed the lower court's findings and remanded for further proceedings on the issue of remedy.¹⁵⁰ The Supreme Court denied certiorari.¹⁵¹

Following the district court's entry of a revised judgment in accordance with the circuit court's decision, the Supreme Court decided *Teamsters* and *Evans*. The Company moved for relief from judgment asserting *inter alia*, that section 703(h), as interpreted by *Teamsters*, insulates bona fide seniority systems from Title VII attack in the absence of a showing of discriminatory intent.¹⁵² The district court denied the motion, holding that the seniority system in question was not bona fide since it "operated right up to the day of trial in a discriminatory manner."¹⁵³ A divided panel of the Fourth Circuit affirmed, holding that *Teamsters* required no relief from judgment, since the lines of progression were not part of a seniority system within the meaning of section 703(h).¹⁵⁴ The Fourth Circuit then reheard the case *en banc*.¹⁵⁵ It did not determine whether the lines of progression were part of a seniority system, but rather held that assuming the lines of progression were part of a seniority system, they would not be protected by section 703(h) because Congress intended for that exemption to apply only to seniority systems adopted prior to the effective date of Title VII and to the post-Act application of those systems.¹⁵⁶

The Supreme Court, in a five to four decision, vacated the judgment below and remanded for further proceedings consistent with its opinion.¹⁵⁷ The majority decision,

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 67.

¹⁴⁸ *Id.* The district court's decision is unreported.

¹⁴⁹ *Id.*

¹⁵⁰ *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976).

¹⁵¹ *American Tobacco Co. v. Patterson*, 429 U.S. 920 (1976).

¹⁵² *Patterson*, 456 U.S. at 67. See *Teamsters*, 431 U.S. at 349, 353-54; see also *supra* notes 84-94 and accompanying text.

¹⁵³ 456 U.S. at 67. The district court's decision was unreported.

¹⁵⁴ *Patterson v. American Tobacco Co.*, 586 F.2d 300, 303 (4th Cir. 1978).

¹⁵⁵ *Patterson v. American Tobacco Co.*, 634 F.2d 744 (4th Cir. 1980).

¹⁵⁶ *Id.* at 748-49.

¹⁵⁷ 456 U.S. at 77.

written by Justice White, rejected the argument advanced by the employees and adopted by the Fourth Circuit, that the section 703(h) exemption only extends to pre-Act seniority systems.¹⁵⁸ The Court also rejected the position of the Equal Employment Opportunity Commission that section 703(h), by its terms, applies only to challenges to the application, and not the adoption, of a post-Act seniority system and thus does not preclude a challenge to the adoption of a seniority system that will have discriminatory consequences once applied, if that challenge is filed within 180 days of the adoption of the system.¹⁵⁹ The Court held that section 703(h) exempts both pre and post-Act seniority systems from Title VII's scrutiny in the absence of discriminatory intent.¹⁶⁰ Justice Brennan's dissent, joined by Justices Blackmun and Marshall, supported the position of the EEOC.¹⁶¹ Justice Stevens, dissenting separately, argued that the seniority system in question was not bona fide within the meaning of section 703(h) since it was violative at the time of adoption due to the system's adverse impact on a protected class.¹⁶²

The majority opinion was primarily based on the Court's reading of the language employed in section 703(h).¹⁶³ The Court emphasized that on its face, section 703(h) makes no distinction between pre and post-Act seniority systems.¹⁶⁴ The Court supported its strong reliance on the plain language of the statute by noting that the drafters of the Dirksen-Mansfield compromise bill, of which section 703(h) was a part, had spent "months of labor,"¹⁶⁵ on this bill, attempting "to be mindful of every word, of every comma, and of the shading of every phrase."¹⁶⁶ In addition, the Court noted that Congress had employed the use of an unambiguous grandfather's clause elsewhere in Title VII.¹⁶⁷ Therefore, reasoned the Court, if section 703(h) was intended as a grandfather or savings clause, the wording of this section would have reflected this intent in clear language.¹⁶⁸

The Court next addressed the position of the EEOC and Justice Brennan, similarly based, in part, on the plain language of section 703(h), advocating recognition of the distinction between adoption and application of a seniority system and concluded it to be untenable.¹⁶⁹ The Court noted that although section 703(h) does state that an employer

¹⁵⁸ *Id.* at 76.

¹⁵⁹ *Id.* at 69-71; *contra id.* at 77-86 (Brennan, J., dissenting). Section 706(e) of the Act requires aggrieved parties to file a complaint with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred. . . ." 42 U.S.C. § 2000e-5(e) (1976 & Supp. IV 1980).

¹⁶⁰ 456 U.S. at 76.

¹⁶¹ *Id.* at 77-86.

¹⁶² *Id.* at 86-90.

¹⁶³ *See id.* at 68-69.

¹⁶⁴ *Id.* at 69.

¹⁶⁵ *Id.* at 68, quoting 110 CONG. REC. 11935 (1964) (remarks of Senator Dirksen).

¹⁶⁶ 456 U.S. at 69.

¹⁶⁷ *Id.* The Court pointed to 42 U.S.C. § 2000e-(b) (1976) as an example of such a clause. 456 U.S. at 69. That provision as amended by Pub. L. 92-261, § 2(2), 86 Stat. 103, 103 (1972), defines an employer within the meaning of Title VII as a "person engaged in an industry affecting commerce who has fifteen or more employees . . . except that during the first years after March 24, 1972 persons having fewer than 25 employees . . . shall not be considered employers." 42 U.S.C. § 2000e-(b) (1976 and Supp. IV 1980). As originally enacted, 42 U.S.C. § 2000e-(b) defined employers as those persons employing twenty-five or more employees except that during the first year after the effective date of the Act, persons having fewer than one hundred employees were not to be considered employers within the meaning of Title VII. 42 U.S.C. § 2000e-(b) (1964).

¹⁶⁸ 456 U.S. at 69.

¹⁶⁹ *Id.*

may "apply" different terms of employment pursuant to a seniority system, no limit is placed on the date of adoption of such systems.¹⁷⁰ The Court also found the distinction between adoption and application of a seniority system to be logically unsupportable.¹⁷¹ The mere adoption of a seniority system could not give rise to a cause of action under Title VII because no discriminatory impact would result until the system was applied.¹⁷² The Court reasoned further that the EEOC's interpretation would create the situation of favoring those workers employed when a seniority system is adopted over later-hired employees, since presumably, only the former would normally be able to meet Title VII's 180 day filing requirement.¹⁷³ Finally, in rejecting the EEOC's interpretation of section 703(h), the Court stated that employers and unions would be discouraged from modifying pre-Act seniority systems since even if such modifications benefitted minorities, they would be subject to attack under the *Griggs* disparate impact standard.¹⁷⁴

After concluding that the plain language of section 703(h) was dispositive of the issue at bar, the Court proceeded to examine the legislative history of the section in response to the Fourth Circuit's finding that the intent of the drafters of section 703(h) was to protect only seniority systems adopted prior to the effective date of Title VII.¹⁷⁵ The Court rejected this reading of the legislative history, noting that it was inconclusive at best.¹⁷⁶ The Court pointed to statements in the legislative history stressing that Title VII would have no effect on seniority at all, as demonstrating a distinct lack of intent to distinguish between pre and post-Act seniority systems.¹⁷⁷ Those statements in the legislative history referring to "established,"¹⁷⁸ or "existing,"¹⁷⁹ seniority rights were made in response to specific allegations that Title VII would destroy established seniority rights and thus could not be considered to evidence an intent to limit section 703(h)'s coverage to pre-Act seniority systems.¹⁸⁰

The Court found further support for its construction of section 703(h) in its prior decisions.¹⁸¹ Recognition of a distinction in section 703(h) between pre and post-Act seniority systems, the Court stated, would be inconsistent with its holdings in *Teamsters* and *Evans*.¹⁸² The Court observed that *Teamsters* had construed section 703(h) to insulate seniority systems from a disparate impact analysis, even if the disparate effect of the operation of a seniority system flows from racially discriminatory pre-Act employment practices.¹⁸³ Similarly, the Court noted that by ruling in *Evans* that a discriminatory act not challenged in a timely manner is the legal equivalent of a pre-Act practice, section

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 69-70.

¹⁷³ *Id.* at 70.

¹⁷⁴ *Id.* at 71.

¹⁷⁵ *Id.* See *Patterson v. American Tobacco Co.*, 634 F.2d 744, 749 (4th Cir. 1980).

¹⁷⁶ 456 U.S. at 71.

¹⁷⁷ *Id.* at 72-74.

¹⁷⁸ 110 CONG. REC. 7213 (1964) (Clark-Case Interpretative Memorandum). See *supra* note 51 for a discussion of the Clark-Case Memorandum.

¹⁷⁹ 110 CONG. REC. 7207 (Justice Department Memorandum). See *supra* note 52 for a discussion of the Justice Department Memorandum.

¹⁸⁰ 456 U.S. at 73-74.

¹⁸¹ *Id.* at 75-76.

¹⁸² *Id.*

¹⁸³ *Id.* at 75. For a discussion of the *Teamsters* decision see *supra* notes 85-94 and accompanying text.

703(h) was also held to insulate seniority systems that perpetuate the effects of post-Act discrimination.¹⁸⁴

In concluding, the Court stated that its decision was consistent with national labor policy favoring minimal governmental interference with provisions of collective bargaining agreements.¹⁸⁵ Title VII's exemption for bona fide seniority systems, the Court stressed, represents the balance struck by Congress between the potentially conflicting interests of pursuing a policy of eradicating employment discrimination and a policy of freedom of collective bargaining.¹⁸⁶

Justice Brennan dissenting, joined by Justices Blackmun and Marshall, contended that by its terms, section 703(h) allows an employer to "apply" different conditions of employment "pursuant to" a bona fide seniority system, but does not protect the adoption of discriminatory seniority systems.¹⁸⁷ Even if the term "apply" were to be construed to include adoption, Justice Brennan reasoned, it would still remain inexplicable how a decision to adopt a seniority system could be made "pursuant to" the same system.¹⁸⁸ Justice Brennan also considered it significant that section 703(h) only refers to "employers" practices and not those of unions.¹⁸⁹ Application of a seniority system is usually the sole responsibility of the employer, whereas adoption of a seniority system generally requires agreement by both the employer and the union.¹⁹⁰ Therefore, concluded Justice Brennan, if section 703(h) were meant to protect adoption of a seniority system, this section would also refer to unions as well as employers.¹⁹¹

In addition to relying on the language of section 703(h), Justice Brennan also argued that his interpretation of the seniority system exemption was consistent with the intent of that provision as expressed in the legislative history.¹⁹² The purpose of section 703(h) according to Justice Brennan was to "protect the *expectations* that employees acquire through the continued operation of a seniority system,"¹⁹³ and not to protect the vesting of new rights under discriminatory seniority systems.¹⁹⁴ A timely challenge to the adoption of a seniority system with discriminatory effects would prevent employees from developing expectations of seniority right before the system was applied.¹⁹⁵

Justice Brennan also contended that limiting the section 703(h) exemption to the application of seniority systems would not, as the majority had claimed, lead to untenable results.¹⁹⁶ He asserted that the adoption of a seniority system would give rise to a cause of action since a cause of action arises immediately upon the discriminatory act and need not await the time when the consequences of the act are felt.¹⁹⁷ Finally, Justice Brennan stated that limiting the scope of section 703(h) to the application of seniority systems would not discourage unions and employers from making beneficial modifications of seniority

¹⁸⁴ 456 U.S. at 75. For a discussion of the *Evans* decision see *supra* notes 104-15 and accompanying text.

¹⁸⁵ 456 U.S. at 76-77.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 79-80.

¹⁸⁸ *Id.* at 80.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 80-84.

¹⁹³ *Id.* at 81 (emphasis in the original).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 84.

¹⁹⁷ *Id.* at 84-85 (quoting *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980)).

systems.¹⁹⁸ This is true, according to Justice Brennan, because only the modified provisions, not the entire seniority system, would be required to meet the disparate impact standard.¹⁹⁹ Those modifications favoring minorities who were the victims of previous discrimination would be valid under the Court's decision in *United Steel Workers of America v. Weber*.²⁰⁰ Justice Brennan, therefore, would have affirmed the Fourth Circuit's holding invalidating the six lines of progression under the *Griggs* disparate impact standard, if it were determined on remand that the employees had filed a timely challenge to the adoption of the seniority system in dispute.²⁰¹

Justice Stevens, dissenting separately, would have affirmed the lower court on the grounds that the seniority system did not fall under the protection of section 703(h) because it was not bona fide.²⁰² Justice Stevens asserted that the majority misread section 703(h) as precluding a challenge to any seniority system that is not intentionally discriminatory by overlooking the requirement in section 703(h) that a seniority system must also be "bona fide" to be afforded the protection of this exemption.²⁰³

Justice Stevens defined a bona fide seniority system as one legal when adopted.²⁰⁴ He then observed that Title VII prohibits employment practices that are "fair in form but discriminatory in practice."²⁰⁵ Thus, under Justice Stevens' view, a seniority system adopted after the effective date of Title VII that perpetuates prior discrimination, or has an adverse impact on persons covered by the Act, is violative of Title VII at its inception and therefore cannot be considered bona fide.²⁰⁶ The limitation in section 703(h) that a seniority system must not be the result of an intent to discriminate, argued Justice Stevens, was intended as denying the protection of section 703(h) to intentionally discriminatory seniority systems, rather than as the sole standard by which to measure all seniority systems.²⁰⁷

Justice Stevens considered the majority's "strained reading"²⁰⁸ of section 703(h) to be based on a fear of widespread invalidation of seniority systems.²⁰⁹ Such apprehension is unfounded, he argued, because even if a seniority system was found to violate the *Griggs* standard, the business necessity defense would be available to justify the use of a seniority system with a disparate impact if it is substantially related to a valid business purpose.²¹⁰

¹⁹⁸ 456 U.S. at 85-86.

¹⁹⁹ *Id.*

²⁰⁰ 443 U.S. 193 (1979) (affirmative action plan adopted by employer and union permissible under Title VII although it discriminated against nonminorities).

²⁰¹ 456 U.S. at 86.

²⁰² *Id.* at 90.

²⁰³ *Id.* at 87, 89.

²⁰⁴ *Id.* at 87-89.

²⁰⁵ *Id.* at 88 (quoting *Griggs*, 401 U.S. at 431).

²⁰⁶ 456 U.S. at 89.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 89-90. See *Griggs*, 401 U.S. at 431 (1971). Under *Griggs*, an employment practice which has a disparate impact on women or minorities does not violate Title VII if it can be demonstrated that the employment practice in question bears a "manifest relationship to the employment in question," *Id.* at 432. According to the *Griggs* Court, "[t]he touchstone is business necessity." *Id.* at 431.

III. A CRITIQUE OF *AMERICAN TOBACCO COMPANY V. PATTERSON*

The Supreme Court in *Griggs*, relying on Title VII's objective to eliminate those employment practices that serve as barriers to equal employment opportunities, even if neutral in intent, as well as those employment practices that are intentionally discriminatory,²¹¹ established that a Title VII claim need not be predicated on proof of discriminatory intent.²¹² Rather, the *Griggs* Court held that a prima facie violation of Title VII can be established by demonstrating that a neutral employment policy has a disproportionately adverse impact on a protected class.²¹³ It has been clear since *Teamsters*, however, that section 703(h) precludes the application of *Griggs* to seniority systems adopted prior to the passage of Title VII.²¹⁴ The *Patterson* Court extended this grant of immunity to systems adopted subsequent to Title VII as well.²¹⁵ Thus, in contrast to the normal Title VII case in which a plaintiff may establish a prima facie case of discrimination merely by demonstrating that a particular employment practice has an adverse impact on a protected class,²¹⁶ a plaintiff challenging the operation of a seniority system may only succeed upon proof of discriminatory intent.²¹⁷ The Court reached this holding by reading the language of section 703(h) as providing no basis for distinguishing between pre and post-Act seniority systems.²¹⁸ Additional support was found in prior Supreme Court decisions construing section 703(h)²¹⁹ and in the observation that national labor policy favors minimal governmental intrusion into the collective bargaining process.²²⁰ The Court failed, however, to address the issue in the larger context of Title VII and the Act's underlying policy objectives.

This section analyzes the majority's reasoning in *Patterson*. The validity and limitations of each of the dissents is discussed. It is maintained that, contrary to the majority's reading of section 703(h), the language of that section does not provide a dispositive guide to determining the true scope of the protection that Congress intended to provide seniority systems. It is submitted that the language of section 703(h) is ambiguous as to this issue and that, in accordance with established principles of statutory construction, it is therefore necessary to read that section in the context of both the legislative history of section 703(h) and Title VII as a whole to ascertain the Congressional intent behind the proviso. It is argued that proper consideration of these factors results in a less expansive reading of section 703(h) than that given by the *Patterson* Court. In addition, contrary to the position taken by the majority, neither the Court's prior decisions nor national labor policy adequately support the Court's interpretation of section 703(h). Finally, it is concluded that construing the language of section 703(h) in the context of the legislative history of that section and in the context of the Act as a whole, leads to the conclusion that Congress only intended to protect those seniority systems adopted prior to the enactment of Title VII from the Act's broad prohibitions against discriminatory employment practices.

²¹¹ 401 U.S. at 429-30.

²¹² *Id.* at 431.

²¹³ *Id.*

²¹⁴ See *supra* notes 85-94 and accompanying text.

²¹⁵ 456 U.S. at 75-76.

²¹⁶ *Griggs*, 401 U.S. at 431.

²¹⁷ See *Patterson*, 456 U.S. at 75-76.

²¹⁸ See *id.* at 68-69.

²¹⁹ *Id.* at 75-76.

²²⁰ *Id.* at 76-77.

A. The Flaws of American Tobacco Company v. Patterson

The major issue underlying the interpretation of section 703(h) concerns the extent to which Congress was willing to limit the broad mandate of Title VII prohibiting all forms of discriminatory employment practices in order to protect the expectations of third party employees that arise under the operation of seniority systems. This question is particularly perplexing because the interests of two innocent groups, discrimination victims and third party employees, neither of which is responsible for discriminatory employment practices, are in direct conflict. On the one hand, a court-ordered revision of a seniority system could significantly dilute the expectations of those nonminority employees who had worked for a company a number of years, assuming the seniority system in place would protect them from layoffs and provide increasing job benefits. On the other hand, if the victims of prior discrimination are not allowed to challenge seniority systems that perpetuate the effects of prior discrimination, then Title VII's promise of equal employment opportunities and eradication of discriminatory employment practices may remain unfulfilled for large numbers of minority employees.

As in all cases of statutory construction,²²¹ the starting point for discerning the balance that Congress had struck between these two competing interests is the language employed by Congress. The *Patterson* Court began its analysis of section 703(h) by stating that the precise language of this section was of particular importance as a guide to its meaning due to the unusual care taken in the drafting of Title VII.²²² The Court noted that section 703(h) was introduced as part of the Dirksen-Mansfield compromise bill²²³ which, according to its coauthor, Senator Dirksen, represented "months of labor,"²²⁴ during which time the authors had "tried to be mindful of every word, of every comma, and of the shading of every phrase."²²⁵ Having thus stressed the importance of the language of section 703(h), the Court proceeded to confine its analysis of the language of this section to the observation that on its face, section 703(h) does not distinguish between pre-Act and post-Act seniority systems.²²⁶ The Court considered this observation to be determinative of the issue at bar by noting that Congress had expressly employed grandfather clauses in other sections of Title VII.²²⁷ If Congress had intended section 703(h) to distinguish between pre and post-Act seniority systems, the Court wrote, it would have employed a similar clause.²²⁸ Because it did not choose to do so, the reasoning maintains that section 703(h) cannot be construed as distinguishing between seniority systems based on time of adoption.²²⁹

In its analysis of the language of section 703(h), the *Patterson* Court failed to follow its own advice to heed the "shading of every phrase,"²³⁰ employed in the statute. In particular, the Court failed to address the use of the word "bona fide" as qualifying those seniority systems that are entitled to the protection of section 703(h). In *Teamsters*, the Court did note that section 703(h) requires a seniority system to be both "bona fide" as well

²²¹ *Id.* at 68 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)).

²²² 456 U.S. at 68-69.

²²³ See *supra* notes 42-56 and accompanying text.

²²⁴ 456 U.S. at 68 (quoting 110 CONG. REC. 11935 (1964) (remarks of Sen. Dirksen)).

²²⁵ 456 U.S. at 69 (quoting 110 CONG. REC. 11935 (1964) (remarks of Sen. Dirksen)).

²²⁶ 456 U.S. at 69.

²²⁷ *Id.* The Court cited 42 U.S.C. § 2000e-(b) (1976 and Supp. IV 1980) as an example of such a clause. See *supra* note 167.

²²⁸ 456 U.S. at 69.

²²⁹ *Id.*

²³⁰ *Id.*

as not intentionally discriminatory to fall within the protection of that section,²³¹ but then failed to give that term a definition distinct from that of "intentionally discriminatory." After rejecting the government's definition of bona fide,²³² the *Teamsters* Court held that the seniority system in question was "entirely bona fide,"²³³ because it applied equally to members of all races, was rational and in accord with industry practice, consistent with precedents of the National Labor Relations Board, and did not have its genesis in racial discrimination.²³⁴ These same factors are the very ones that the Court has adopted; subsequent to *Teamsters*, in *Pullman-Standard, Inc. v. Swint*²³⁵ as the yardstick by which to determine if a seniority system is intentionally discriminatory.²³⁶ The Court, therefore, has equated 'bona fide' with 'not intentionally discriminatory' for the purposes of section 703(h). In doing so, the decisions in *Teamsters* and *Swint*, when read in conjunction, have made the clause requiring that seniority systems be bona fide redundant with the clause requiring seniority systems to be not intentionally discriminatory. Consequently, rather than having to meet two separate conditions in order to come within the ambit of section 703(h), a seniority system need only meet one set of criteria. By failing to further define the requirement that a seniority system be bona fide to be protected by section 703(h), and in effect accepting the *Teamsters* holding, the *Patterson* Court has rendered the bona fide clause meaningless. This result is particularly ironic given the Court's emphasis on the precise wording of the statute.²³⁷

This treatment of the bona fide clause is somewhat of a departure from prior interpretations. The term had previously been considered to have particular significance by the first decade of circuit and district court decisions construing section 703(h).²³⁸ Similarly, in his dissent, Justice Stevens maintained that for a seniority system to be protected by section 703(h), it must be bona fide as well as not intentionally discriminatory.²³⁹ In addition, the majority's failure to give substance to the term bona fide for the purposes of section 703(h) runs contrary to the canon of statutory construction that

²³¹ 431 U.S. at 353. See also *Evans*, 431 U.S. at 560 ("Since respondent does not attack the bona fides of United's seniority system and since she makes no charge that the system is intentionally designed to discriminate . . . § 703(h) provides an additional ground for rejecting her claim.").

²³² 431 U.S. at 353. The Justice Department had argued that no seniority system that perpetuates prior discrimination can be bona fide for purposes of section 703(h). *Id.*

²³³ *Id.* at 355.

²³⁴ *Id.* at 355-56.

²³⁵ 456 U.S. 273 (1982).

²³⁶ See *id.* at 279-82. In *Swint*, the Court cited with approval the test developed by the Fifth Circuit in *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), for determining if a seniority system is intentionally discriminatory. Relying on the criteria that the *Teamsters* Court deemed relevant for assessing the bona fides of the seniority system in dispute in *Teamsters*, the Fifth Circuit held that in determining if a seniority system is intentionally discriminatory, the court should look at "the totality of the circumstances in the development and maintenance of the system," *id.* at 351-52, with particular emphasis on the following factors: whether the system "operates to discourage all employees equally from transferring between seniority units," the rationality of the departmental structure upon which the seniority system relies in light of the general industry practice, "whether the seniority system had its genesis in racial discrimination," and "whether the system was negotiated and has been maintained free from any illegal purpose." *Id.* at 352. A thorough discussion of the standards for demonstrating that a seniority system is intentionally discriminatory for the purposes of section 703(h) is beyond the scope of this casenote.

²³⁷ See *supra* notes 221-25 and accompanying text.

²³⁸ See *supra* notes 57-72 and accompanying text.

²³⁹ 456 U.S. at 89.

effect should be given to each word of a statute to the greatest extent possible.²⁴⁰

Although the Court stressed primary reliance on the statutory language of section 703(h) in construing that provision, the majority's analysis of the language of section 703(h) however, is, as previously discussed, incomplete for it fails to define the term 'bona fide.' The use of the term 'bona fide' in section 703(h) creates an ambiguity in that provision, as the intended meaning of that term is not apparent from the language of the statute. The term 'bona fide' did not arise in any of the Congressional debates surrounding Title VII's potential effect on seniority systems.²⁴¹ Nor does the Act itself define this term. It is therefore necessary to go beyond the plain language of section 703(h) and examine the legislative history of that section to ascertain the intended meaning of that section.

The Court rejected the argument expressed by the Fourth Circuit that the basis for a distinction between pre-Act and post-Act seniority systems could be found in the legislative history of section 703(h), if not on the face of that section.²⁴² The lower court had pointed to statements in the legislative history that Title VII would not effect "established,"²⁴³ or "existing,"²⁴⁴ seniority rights. The Court declared that these statements could not be treated as authoritative indications of the intended meaning of section 703(h) because they were addressed to specific claims made by Title VII's critics that the Act would destroy already existing seniority rights.²⁴⁵ In contrast, the Court noted that other statements could be found in the legislative history speaking of seniority alone, not "existing" seniority rights.²⁴⁶ The Court particularly relied on the statement made on the Senate floor that "the bill would not affect seniority at all,"²⁴⁷ to support its interpretation of section 703(h) as making no distinction between pre and post-Act seniority systems.²⁴⁸

The basis for rejecting those portions of the legislative history that support the conclusion that Congress sought to protect only those seniority rights and expectations that had been developed prior to the adoption of Title VII, and thus only those seniority systems adopted prior to the Act, is rather strained. The recognition that the supporters

²⁴⁰ See, e.g., *United States v. Menasche*, 348 U.S. 529, 538-39 (1955); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882); *Tabor v. Ulloa*, 323 F.2d 823, 824 (9th Cir. 1963); *Donaldson, Hoffman & Goldstein v. Gaudio*, 260 F.2d 333, 336 (10th Cir. 1958); *Skovgaard v. The M.V. Tungus*, 252 F.2d 14, 17 (3rd Cir. 1957) ("It is presumed that the legislature did not employ useless verbiage and that each word has independent meaning."). See also C. SANDS, *STATUTES AND STATUTORY CONSTRUCTION* § 46.06 (4th ed. 1973).

²⁴¹ See Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv. L. Rev. 1544, 1550 (1975).

²⁴² 456 U.S. at 75. See *Patterson v. American Tobacco Co.*, 634 F.2d 744, 749 (4th Cir. 1980).

²⁴³ *Patterson v. American Tobacco Co.*, 634 F.2d 744 n.5 (4th Cir. 1980) (quoting 110 CONG. REC. 7213 (1964) (Clark-Case Interpretive Memorandum)). See *supra* note 51 for the text of the Memorandum.

²⁴⁴ *Id.* (quoting 110 CONG. REC. 7207 (1964) (Justice Department Memorandum)). See *supra* note 52 for the text of the Memorandum.

²⁴⁵ 456 U.S. at 74.

²⁴⁶ *Id.* (citing 110 CONG. REC. 7207 (1964) (remarks of Sen. Clark), 110 CONG. REC. 7217 (1964) (Clark-Case Questions and Answers); 110 CONG. REC. 5423 (1964) (remarks of Sen. Humphrey); 110 CONG. REC. 6564 (1964) (remarks of Sen. Kuchel); 110 CONG. REC. 6565-66 (1964) (Memorandum prepared by House Republican Sponsors); 110 CONG. REC. 11768 (1964) (remarks of Sen. McGovern); 110 CONG. REC. 14329 (1964) (letter from Senator Dirksen to Senator Williams); 110 CONG. REC. 14331 (1964) (remarks of Sen. Williams)). For the text of the Clark-Case Questions and Answers, see *supra* note 51.

²⁴⁷ 456 U.S. at 74 (quoting 110 CONG. REC. 7207 (1964) (remarks of Sen. Clark)).

²⁴⁸ 456 U.S. at 71, 75.

of Title VII were seeking to appease the concerns of the Act's opponents suggests that the drafters of section 703(h) were likewise only attempting to meet the limited objections raised to the effect that the Act would destroy rights based on seniority systems adopted prior to Title VII, and were not attempting to carve out a broad exception to the Act. The Court had previously stated in *Teamsters* that section 703(h) was drafted to rebut the criticism by the Act's opponents that Title VII would destroy seniority rights that had accrued prior to the effective date of Title VII.²⁴⁹ Reading the legislative history in this context supports the conclusion that the drafters of that section did not intend for section 703(h) to be any broader than necessary to meet the objections of their opponents.²⁵⁰ In addition, the Court's reliance on those statements in the legislative history that Title VII would not affect seniority at all, seems somewhat misplaced. As the Court itself noted, these statements are not entirely accurate because seniority rights are affected when a plaintiff in a Title VII case is awarded retroactive seniority as a remedy for unlawful discrimination.²⁵¹ In addition, section 703(h) by its terms, permits interference with seniority systems that are intentionally discriminatory.²⁵²

Given the differing remarks appearing in the legislative history, a better approach for discerning the Congressional intent behind section 703(h) would be to view the various remarks made about the effect of Title VII on seniority systems in the context of the debates giving rise to these comments. The legislative history of section 703(h) contains discussions of the potential effects of Title VII on plant-wide seniority systems, those which measure seniority by total length of service with an employer, containing a last-hired, first-fired provision.²⁵³ In contrast, a review of the legislative history of section 706 reveals no reference to those seniority systems which measure seniority by length of service within a particular department or job and the effects of such systems on incumbent minority employees. For example, the remarks of Senator Clark stating that seniority rights would be undisturbed by Title VII, quoted by the *Patterson* Court, were followed with an example of last-hired, first-fired seniority.²⁵⁴ From these remarks, it appears that Congress was addressing the situation in which an employer had refused to hire minorities on discriminatory grounds prior to the adoption of Title VII but subsequently hired the minority employee after the adoption of Title VII. In this situation, Senator Dirksen stated that it would be permissible for the employer to lay off the newly hired minority under a last-hired, first-fired provision despite the fact that the minority's low ranking on the seniority hierarchy was due to the employer's past discrimination.²⁵⁵ To reach a contrary conclusion, and require an employer to disregard the seniority ladder that had been built prior to the enactment of Title VII, would in effect, provide minorities with grants of seniority for periods beginning before the minority's employment, and diminish the value of the seniority nonminorities had accrued prior to the adoption of Title VII. Given that the legislative history of section 703(h) only contains references to the above situation which arises under plant-wide last-hired, first-fired provisions, the

²⁴⁹ 431 U.S. at 352.

²⁵⁰ This conclusion is further supported by the remarks of Senator Humphrey made after the introduction of the Mansfield-Dirksen compromise bill that section 703(h) did not alter the scope of Title VII, but rather, "clarified its present intent and effect." 110 CONG. REC. 12723 (1964).

²⁵¹ 456 U.S. at 74, n.15.

²⁵² See *Teamsters*, 431 U.S. at 352-56.

²⁵³ See, e.g., Clark-Case Interpretive Memorandum, quoted at *supra* note 51 and Justice Department Memorandum, quoted at *supra* note 52.

²⁵⁴ 110 CONG. REC. 7207 (1964) (remarks of Sen. Clark).

²⁵⁵ *Id.*

legislative history supports a finding that section 703(h) was intended to protect only previously established seniority rights.

In addition to relying on the plain language of section 703(h), the *Patterson* Court found further support for its holding in both its prior decisions²⁵⁶ and in national labor policy.²⁵⁷ Neither of these grounds, however, provide a satisfactory rationale for the Court's failure to recognize any distinction in section 703(h) between pre and post-Act seniority systems. In *Patterson*, the Court characterized section 703(h) as reflecting the balance that Congress has struck between the policy of eliminating employment discrimination and that of "favoring minimal supervision by courts and other governmental agencies over the substantive terms of collective bargaining agreements."²⁵⁸ This characterization misstates the issue underlying section 703(h) by focusing on the collective bargaining process rather than on the underlying rights and expectations of nonminority employees under seniority systems produced by the collective bargaining process.²⁵⁹

There is no evidence in the legislative history of a Congressional desire to protect seniority systems in order to insulate the collective bargaining process, nor is there any extrinsic policy that provides a convincing rationale for subordinating the interests of discriminatees to a policy of freedom of collective bargaining. Title VII is expressly applicable to labor unions as well as employers.²⁶⁰ As demonstrated by the facts in *Patterson*, unions have engaged in intentional and invidious racial discrimination.²⁶¹ In addition, as the Court stated in *Franks*, seniority systems are not inviolate and may be modified by statute in furtherance of public policy objectives.²⁶² Similarly, the Court has rejected arguments that grants of retroactive seniority to victims of discrimination impermissibly punish the union that negotiated that seniority system rather than punish the employer, the true wrongdoer.²⁶³

In addition to relying on national labor policy, the *Patterson* Court found further support for its holding in its prior decisions. As the Court stated, *Teamsters* and *Evans* stand for the proposition that section 703(h) immunizes all bona fide seniority systems that are not intentionally discriminatory despite the system's effect of perpetuating either pre-Act or post-Act discrimination.²⁶⁴ Neither *Teamsters* nor *Evans*, however, specifically addressed the issue of whether or not section 703(h) insulates both pre- and post-Act seniority systems.²⁶⁵ The Court did note in *Patterson* that the *Teamsters* Court did not discuss the date of adoption of the seniority system in dispute.²⁶⁶ Much of the reasoning employed in *Teamsters*, however, does suggest that the *Teamsters* Court was addressing a pre-Act seniority system. *Teamsters* relied heavily on those statements in the legislative

²⁵⁶ 456 U.S. at 75-76 (citing *Trans World Airlines v. Hardison*, 432 U.S. 63, 81 (1977); *Evans*, 431 U.S. at 533; *Teamsters*, 431 U.S. at 348 n.30.

²⁵⁷ 456 U.S. at 76-77.

²⁵⁸ *Id.*

²⁵⁹ See *supra* notes 42-55 and accompanying text.

²⁶⁰ 42 U.S.C. § 2000e-2(c) (1976 & Supp. IV 1980).

²⁶¹ 456 U.S. at 65. For example, prior to 1963 the collective bargaining representative of the hourly-paid production workers, the Bakery, Confectionary & Tobacco Worker's International Union, maintained segregated locals at the American Tobacco Company's two plants. *Id.*

²⁶² 424 U.S. at 778.

²⁶³ *Zipes v. Trans World Airlines*, 455 U.S. 385, 398-400.

²⁶⁴ 456 U.S. at 75-76. See *Evans*, 431 U.S. at 558; *Teamsters*, 431 U.S. at 348 n.30, 349.

²⁶⁵ *Patterson v. American Tobacco Co.*, 634 F.2d 744, 749 n.5 (4th Cir. 1980).

²⁶⁶ 456 U.S. at 76 n.16.

history referring to "established,"²⁶⁷ and "existing,"²⁶⁸ seniority rights.²⁶⁹ The *Teamsters* Court concluded that section 703(h) was drafted to allow for "full exercise of seniority accumulated before the effective date of the Act The Congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees" ²⁷⁰ In essence, therefore, prior decisions provide no explicit guidance leading to the conclusion that post-Act systems should fall under section 703(h); rather, they seem to suggest that such systems could not be so protected.

In his dissenting opinion in *Patterson*, Justice Stevens observed that the majority's liberal construction of section 703(h) appeared to have been motivated by a concern that were section 703(h) interpreted to allow a prima facie case against the validity of a post-Act seniority system to be established by a showing of disparate impact, mass invalidation of seniority systems would follow.²⁷¹ Justice Stevens noted that this would not, however, be the inevitable result, for the business necessity defense²⁷² would be available to protect those seniority systems that are related to a valid business purpose.²⁷³

Justice Steven's analysis would seem to dispose of the objection that applying the disparate impact standard to seniority systems would threaten all seniority systems. According to the majority, another objection remains to allowing post-Act seniority systems to be challenged on the basis of disparate impact, that of undue interference with the collective bargaining process.²⁷⁴ Concerns about government intrusion into the collective bargaining process, however, do not justify insulating all but intentionally discriminatory seniority systems from the reach of Title VII. Given the purpose of collective bargaining to provide workers with a voice in the terms of their employment, and the purpose of Title VII to eradicate discriminatory employment practices,²⁷⁵ an approach consistent with both these policies would be to allow an examination and subsequent invalidation of those provisions in a post-Act seniority system that have an adverse impact on minorities while serving no legitimate business purpose. That is, to allow the application of the *Griggs* standard to post-Act systems. Those seniority systems that further only the interests of non-minority employees, rather than those of all employees to the greatest extent possible, are consistent with neither the goals of Title VII nor those of union representation of employees. Although *Patterson* does not leave union leadership the discretion to engage in intentional discrimination, it does allow unions to negotiate seniority systems without the necessity of considering the effect such systems may have on the union's minority members. This result is the most disturbing consequence of *Patterson*.

This neglect of the interests of minority employees could have been avoided had the majority recognized the ambiguity in the language of section 703(h), particularly the ambiguity created by the term 'bona fide.' In the alternative, the Court might have sought

²⁶⁷ 110 CONG. REC. 7213 (1964) (Clark-Case Interpretive Memorandum).

²⁶⁸ 110 CONG. REC. 7207 (1964) (Justice Department Memorandum).

²⁶⁹ See 431 U.S. at 350-52.

²⁷⁰ *Id.* at 352-53 (emphasis added). The EEOC interpreted *Teamsters* as not addressing the applicability of section 703(h) to post-Act seniority systems. See EEOC Notice N 915 (July 14, 1977), reprinted in EEOC COMPLIANCE MANUAL 6500 (section 703(h) has no applicability to seniority systems adopted subsequent to the effective date of Title VII). At least one other commentator has similarly read *Teamsters* as inapplicable to post-Act seniority systems. See Note, 52 TULANE L. REV. 397, 405 (1978).

²⁷¹ 456 U.S. at 89.

²⁷² See *supra* note 210.

²⁷³ 456 U.S. at 89-90.

²⁷⁴ *Id.* at 76-77.

²⁷⁵ See *supra* notes 2-14 and accompanying text.

to resolve this ambiguity by construing section 703(h) in the larger context of Title VII, and by following the canon of statutory construction that remedial statutes are to be interpreted liberally, and exceptions thereto interpreted narrowly.²⁷⁶ The Court has emphasized in a long line of cases the broad remedial nature of Title VII,²⁷⁷ and has intoned that other exceptions and defenses to Title VII are to be applied strictly.²⁷⁸ It cannot be explained, therefore, why section 703(h) should not be construed in a similar fashion.

In its treatment of section 703(h), the Court has also departed from precedent by failing to construe that section in the context of the larger policy objectives of Title VII. For example, *Griggs*, itself created the disparate impact standard²⁷⁹ for establishing a prima facie violation of Title VII by basing its reasoning on the broad objectives of the Act to eliminate all forms of employment discrimination, rather than in the precise language used in any particular provision of Title VII.²⁸⁰ The *Griggs* Court noted that the Congressional objective behind 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."²⁸¹ The Court held, therefore, that Title VII prohibits not only intentionally discriminatory employment practices, but also those neutral practices that operate to maintain the status quo of prior discrimination.²⁸² Similarly, in *United Steelworkers of America v. Weber*,²⁸³ the Court upheld an affirmative action plan favoring minority employees for entrance into a crafts training program despite the fact that it discriminated against white employees. The Court emphasized that Title VII's prohibition against discrimination must be read "against the background of the legislative history of Title VII and the historical context from which the Act arose,"²⁸⁴ and upheld the affirmative action plan because its goal of removing discriminatory employment barriers that had relegated blacks to inferior positions, mirrored the goals of Title VII.²⁸⁵

Viewing section 703(h) in the context of Title VII as a whole supports a narrower construction of section 703(h), than that provided by the *Patterson* Court. Title VII is a broad remedial statute prohibiting all forms of discriminatory employment practices.²⁸⁶

²⁷⁶ See, e.g., *Piedmont & Northern R. Co. v. ICC*, 286 U.S. 299, 311-12 (1932); *Spokane & Inland R. Co. v. United States*, 241 U.S. 344, 350 (1916); *United States v. Dickson* 40 U.S. (15 Pet.) 141, 165 (1841).

²⁷⁷ See, e.g., *Franks*, 424 U.S. at 763; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Griggs*, 401 U.S. at 429-30.

²⁷⁸ See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977), construing the bona fide occupation qualification exception to Title VII as "an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Id.* at 334.

²⁷⁹ See *supra* note 94.

²⁸⁰ See 401 U.S. at 429-36. The *Griggs* Court concluded that an employer may not require a high school diploma or a passing grade on an intelligence test as a prerequisite to employment where a smaller percentage of blacks than whites could meet these requirements, when such requirements are not necessary for adequate job performance. *Id.* at 431-32, 436. In reaching this holding, the Court noted that although remarks could be found in the legislative history stating that under Title VII an employer may set his job qualifications as high as he pleased, see 110 CONG. REC. 7213 (1964) (Clark-Case Interpretive Memorandum), subsequent statements indicated that such qualifications must be related to the job in question. 401 U.S. at 434 n.11.

²⁸¹ 401 U.S. at 429-30.

²⁸² *Id.* at 430.

²⁸³ 443 U.S. 193 (1979).

²⁸⁴ *Id.* at 201.

²⁸⁵ *Id.* at 208.

²⁸⁶ See *supra* note 4.

The framers of that Act considered economic equality and access to employment opportunities unfettered by discriminatory barriers to be both a practical as well as a moral necessity.²⁸⁷ In addition, as part of the Civil Rights Act of 1964, Title VII is part of a comprehensive statutory scheme seeking to eliminate discrimination in public accommodations,²⁸⁸ public facilities,²⁸⁹ education,²⁹⁰ and in voting rights²⁹¹ as well as in employment. The Congress that passed the Civil Rights Act of 1964 thus recognized that discrimination and racial stratification is a persistent and nationwide problem. Employment discrimination was viewed as a particularly critical link in the chain of interrelated factors contributing to the continuation of discrimination in American society.²⁹² These objectives of Title VII and the canon of statutory construction that exceptions to remedial statutes should be strictly construed provide the foundation for construing the somewhat ambiguous language of section 703(h) as intended to protect only those seniority systems adopted prior to Title VII from a challenge based on the disparate impact standard.

B. An Alternative Construction of Section 703(h): Recognizing the Requirement that a Seniority System be Bona Fide.

The construction of section 703(h) advocated by Justice Stevens provides an interpretation of that provision that is both grounded in the language of the statute, and is consistent with the broad policy objectives of Title VII. Justice Stevens observed that section 703(h) requires a seniority system to be both bona fide and not intentionally discriminatory in order to be insulated from Title VII.²⁹³ In order to be bona fide, he continued, a seniority system must be legal at the time of its adoption.²⁹⁴ Consequently, those seniority systems adopted prior to Title VII and its prohibition against employment practices both discriminatory in intent or in effect, would not be subject to the disparate impact standard, while those seniority systems adopted after the enactment of Title VII would have to meet the same standards as other employment practices.²⁹⁵

As Justice Stevens also stated, invalidation of a seniority system would not automatically follow a prima facie case of discrimination based on disparate impact.²⁹⁶ Rather, only those seniority systems with a disparate impact that are not related to a valid business purpose, would be found to violate Title VII.²⁹⁷ In contrast, allowing those post-Act seniority systems which perpetuate the effects of prior discrimination, and thus perpetuate racial stratification and invidious barriers to equal employment opportunities, to

²⁸⁷ *Teamsters*, 431 U.S. at 388 (Marshall J., dissenting) (citing 110 CONG. REC. 6547 (1964) (remarks of Sen. Humphrey); *id.* at 6562 (remarks of Sen. Kuchel); *id.* at 7203-04 (remarks of Sen. Clark); H.R. REP. NO. 914, pt. 2, 88th Cong., 1st Sess. 26-29 (1963)).

²⁸⁸ 42 U.S.C. §§ 2000a-a(6) (1976 and Supp. IV 1980).

²⁸⁹ 42 U.S.C. §§ 2000b-b(3) (1976 and Supp. IV 1980).

²⁹⁰ 42 U.S.C. §§ 2000c-2000c-9 (1976 and Supp. IV 1980).

²⁹¹ 42 U.S.C. §§ 1971(a)(2)(A)-(c) (1976 and Supp. IV 1980).

²⁹² See, e.g., *Weber*, 443 U.S. at 202-03; 110 CONG. REC. 6547 (1964) (remarks of Sen. Humphrey) ("What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill? What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a Negro child be motivated to take full advantage of integrated educational facilities if he has no hope of getting a job where he can use that education?").

²⁹³ 456 U.S. at 89-90, (Stevens, J., dissenting).

²⁹⁴ *Id.* at 87-88, 89 (Stevens, J., dissenting).

²⁹⁵ *Id.* (Stevens, J., dissenting).

²⁹⁶ *Id.* at 89-90 (Stevens, J., dissenting).

²⁹⁷ *Id.* at 90 (Stevens, J., dissenting). See *Griggs*, 401 U.S. at 431-521.

remain unchallenged when such seniority systems do not serve a valid business purpose is inconsistent with Title VII's goal of eliminating employment discrimination.

A construction of section 703(h) which protects pre but not post-Act seniority systems admittedly would work some hardships on third party employees whose expectations of increased employment benefits with increased length of service were developed under post-Act seniority systems. This interpretation, however, would not mean total abrogation of the fundamental objectives of seniority systems; namely to increase employment benefits as length of service increases and to provide protection from arbitrary management decisions with respect to the distribution of scarce benefits.²⁹⁸ A revised seniority system could still serve these purposes by recomputing seniority benefits by length of service while also providing recognition for the time spent by minorities in those positions to which they were assigned because of their minority status. Thus, the seniority rights of nonminority employees could therefore be diluted, but would not be totally destroyed.

This same result occurs when a successful plaintiff in a Title VII action is awarded retroactive seniority. The award of retroactive seniority, particularly in large class actions, can significantly lower a nonminority's position on the seniority ladder. Yet, this result was considered an insufficient rationale for denying an award of retroactive seniority by the *Franks* Court.²⁹⁹ In *Franks*, the Court noted that sharing the burdens of prior discrimination is "presumptively necessary,"³⁰⁰ and that "[i]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."³⁰¹

Indeed, the Court's construction of section 703(h), when juxtaposed with the *Franks* holding that a victim of employment discrimination is presumptively entitled to retroactive seniority,³⁰² creates something of an anomaly within Title VII. Under *Franks*, retroactive seniority may be granted to minorities, and thus the seniority rights of nonminorities are diminished following a finding that an employer engaged in illegal discrimination either intentionally or by the use of a neutral employment practice with a discriminatory impact.³⁰³ Nonetheless, under *Patterson*, when a seniority system is challenged directly, the seniority system, and the seniority interests of third party employees, can only be disrupted if the system is intentionally discriminatory. It is in the latter situation, however, where employees through the vehicle of union representation, have some opportunity to prevent the creation and adoption of seniority systems that will operate in a discriminatory manner. The application of the *Griggs* standard, that is, allowing challenges to post-Act seniority systems which have a disparate adverse impact upon minorities, would place such an affirmative burden upon unions and employers while allowing for reasonable protection for the expectations of nonminority employees.

²⁹⁸ See *supra* notes 9-10 and accompanying text.

²⁹⁹ 424 U.S. at 773-75.

³⁰⁰ *Id.* at 777.

³⁰¹ *Id.* at 775 (quoting *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971)).

³⁰² 424 U.S. at 779 n.41.

³⁰³ *Franks* held that victims of illegal hiring discrimination are entitled to grants of retroactive seniority, and did not distinguish between violations of Title VII based on intentional discrimination and violations based on the use of a neutral employment practice with a disparate impact on women or minorities. *Id.*

CONCLUSION

Congress was prompted, in part, to enact Title VII because of its concern over the disproportionate rate of unemployment and under-employment among minorities.³⁰⁴ It was thought that if discriminatory practices were eliminated, all groups would attain equality in employment opportunities.³⁰⁵ The *Patterson* holding that section 703(h) protects both pre-Act and post-Act seniority systems from attacks based on the disparate impact standard, restricts the utility of Title VII as a weapon against barriers to equal employment opportunities. *Patterson* will prevent minorities continuing to suffer the effects of prior discriminatory employment practices through the operation of seniority systems that restrict advancement, from realizing the benefits sought to be achieved by Title VII. This result, based on the Court's liberal interpretation of section 703(h), is inconsistent with the objectives of Title VII and finds little support in either the Court's strict adhesion to the plain language of section 703(h) or in the policy of respecting the insular nature of collective bargaining. An interpretation of section 703(h) that recognizes that by its terms, section 703(h) requires a seniority system to be bona fide, with bona fide defined as legal at time of adoption, would avoid the harsh result of *Patterson* and further the objectives of Title VII.

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³⁰⁴ *Weber*, 443 U.S. at 202. See, e.g., 110 CONG. REC. 7270 (1964) (remarks of Sen. Clark) ("The rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and a social situation which we should not tolerate. That is one of the principle reasons why the bill should pass.").

³⁰⁵ H.R. REP. NO. 238, 92d Cong., 1st Sess. 8, reprinted in 1972 U.S. CODE CONG. & AD NEWS 2139.