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Exemption of Seniority Systems Under Title VII

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In *State v. Weedon*,[55] Justice Tate's views became the majority opinion as the court held that an accused who had been advised by his attorneys that he could answer any questions asked of him at his booking did not waive his rights against self-incrimination and right to counsel. The defendant made extremely prejudicial remarks to the booking officer in response to questioning which violated an agreement between his attorneys and state police officers. Justice Tate again cited *Brewer* and reasoned that the state cannot be permitted to prejudice the accused's constitutional rights by disregarding an agreement not to question him unless his attorneys are present.[56]

Brewer strengthens the right to counsel afforded criminal defendants, broadly interprets the meaning of "interrogation," and indicates that the Court will strictly construe the requirements for a valid waiver. However, it is important to note that the Court has apparently returned to a more particularized, case-by-case approach to the confession and right to counsel issues, emphasizing the factual aspects of the case as was done in decisions prior to *Miranda*. Therefore, the prosecution might well be successful in convincing the Court to distinguish future cases from *Brewer*.

Revealing a new trend in the Court's attitude toward criminal procedure cases, *Brewer v. Williams* reverts to the traditional pre-*Escobedo* and pre-*Miranda* method of dealing separately with fifth and sixth amendment problems. Heralded by the news media and interested parties as the decision in which *Miranda's* fate would be determined, *Brewer* presents a great surprise to the unsuspecting reader as the Court barely mentions *Miranda*. *Brewer* is especially noteworthy in demonstrating the reluctance of five present justices to overrule *Miranda* and their possible future preference to sidestep such a major issue by basing decisions on the sixth amendment or other relatively uncontroversial grounds.

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EXEMPTION OF SENIORITY SYSTEMS UNDER TITLE VII

Litigation was instituted against a nationwide common carrier of motor freight and a union representing a large group of the carrier's employees alleging that the seniority system established by the collective-

55. 342 So. 2d 642 (1977), *rehearing denied* on March 3, 1977.
56. *Id.* at 645.

bargaining agreement between the defendants was in violation of the Civil Rights Act of 1964.[1] Under the seniority system, an employee who transferred between bargaining units was required to forfeit all previously accumulated bargaining unit seniority. The federal court of appeals determined that since racial and ethnic minorities had never been hired into the line driver bargaining unit,[2] the seniority system perpetuated the effects of pre-Act discrimination by 'locking in' minorities into city driver positions.[3] The United States Supreme Court reversed that finding and *held* that a seniority system which did not have its genesis in racial discrimination is exempt from the prohibitions of Title VII of the Act and does not become illegal for the sole reason that the system may perpetuate pre-Act discrimination. *International Brotherhood of Teamsters v. United States*, 97 S.Ct. 1843 (1977).

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment relations on the basis of race, color, sex, religion, or national origin. Its primary purpose is to "assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[4] Any employer who is engaged in an "industry affecting commerce"[5] with twenty-five or more employees and labor organizations with twenty-five or more members employed by a covered employer[6] are subject to the prohibitions of the Act.[7]

Under the Act, the Equal Employment Opportunity Commission is empowered to investigate charges that an employer or labor organization

1. Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e (1970 and Supp. IV 1974), *as amended* by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. Also contained in the Act are provisions on voting, public accommodations, public education and federally assisted programs. *See generally* Note, *The Civil Rights Act of 1964*, 78 HARV. L. REV. 684 (1965).

2. Line drivers are engaged in long hauling between company terminals and are paid more than city drivers. The lower court determined that in general the line driver position was the more desirable of the driving jobs; that finding was explicitly left undisturbed by the Court in the instant case. International Bhd. of Teamsters v. United States, 97 S. Ct. 1843, 1872 n.55 (1977). Separate bargaining units for the two groups are provided for in the collective bargaining agreement. *Id.* at 1851 n.3.

3. United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299 (5th Cir. 1975).

4. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). *See generally* Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 34 HARV. L. REV. 1109, 1113 (1971). *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971).

5. 42 U.S.C. § 2000e(b) (1970 and Supp. IV 1974).

6. 42 U.S.C. § 2000e(d) & (e) (1970 and Supp. IV 1974).

7. For a discussion of the coverage of Title VII in general see Benewitz, *Coverage Under Title VII of the Civil Rights Act*, 17 LAB. L.J. 285 (1966).

is engaging in a pattern or practice of discriminatory conduct.[8] If the Commission finds reasonable cause to believe the charges, it is bound to attempt to eliminate the practice by conciliation.[9] If those efforts fail, the Commission may bring suit to enjoin the discrimination.[10] Additionally, the individual discriminatees may sue to enjoin the practice and to recover damages.[11]

Title VII not only makes it an unlawful employment practice for an employer to discriminate in hiring, but also for an employer to discriminate against an individual with respect to his "compensation, terms, conditions, or privileges of employment" or to "limit, segregate, or classify" an employee in any manner which would tend to deprive the employee of employment opportunities.[12] The Act also forbids a labor organization from causing the employer to discriminate.[13] Consequently, a person who has been hired but placed into an inferior job classification or given inferior conditions of employment because of his minority status may bring an action under Title VII.[14]

The Civil Rights Act took effect July 2, 1965;[15] discriminatory practices occurring prior to that date may not serve as the basis for a Title VII claim. However, the use of a departmental seniority system[16] which 'locks in' employees into inferior jobs and perpetuates the effects of the pre-Act discrimination has been found to constitute a present and continu-

8. 42 U.S.C. § 2000e-6(e) (1970 and Supp. IV 1974).

9. 42 U.S.C. § 2000e-5(b) (1970 and Supp. IV 1974). The procedures followed by the E.E.O.C. are: charge, notice of charge, investigation, determination of reasonable cause, endeavor to conciliate, and the filing of suit. E.E.O.C. v. Raymond Metal Products Co., 385 F. Supp. 907 (D.C. Ark. 1974).

10. 42 U.S.C. § 2000e-6(c) (1970 and Supp. IV 1974). Originally, the Commission had no independent enforcement powers but would refer cases to the Attorney General. See materials cited in note 1, *supra*.

11. 42 U.S.C. § 2000e-5(f) (1970 and Supp. IV 1974). Bringing the charge of discrimination before the E.E.O.C. is a prerequisite to an individual suit. *See, e.g.*, Kaplowitz v. University of Chicago, 387 F. Supp. 42 (D.C. Ill. 1974). For a discussion of remedies available to individuals under the Act see Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. IND. & COM. L. REV. 495, 496-98 (1966).

12. 42 U.S.C. § 2000e-2(a) (1970 and Supp. IV 1974).

13. *Id.* § 2000e-2(c) (1970 and Supp. IV 1974).

14. See note 11, *supra*.

15. *See* materials cited in note 1, *supra*.

16. For the purposes of this casenote, a seniority system may be defined as a set of rules governing job movements, including promotion, transfer, downgrading and layoff in a bargaining unit. *See* Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1263 (1967) [hereinafter cited as *Seniority Discrimination*].

ing violation of the Act. For example, a company may have hired blacks prior to the Act only into its lowest paying and less desirable departments. After the effective date of the Act, the company would now be required to hire minorities into all departments. However, an employee wishing to transfer out of the less desirable department might be required to forfeit all seniority[17] accumulated in the department. Consequently, the transferee would be subject to layoffs and have comparatively less seniority[18] with which to bid on jobs. The employee would always be inferior in seniority to an employee hired at the same time but not discriminated against in hiring. The employee would therefore be discouraged from transferring[19] and be effectively locked into his present inferior job. Consequently, the effects of the pre-Act discrimination would be perpetuated.

The discriminatory nature of such seniority systems has been consistently recognized by the federal courts. Early in the history of Title VII litigation, the disparate impact theory[20] was developed by the Supreme Court in *Griggs v. Duke Power Co.*,[21] when the Court stated: "Congress not only proscribed overt discrimination but also practices that are fair in form, but discriminate in operation."[22] Although *Griggs* did not involve a discriminatory seniority system, the lower federal courts applied the

17. Seniority rights may be derived from the collective bargaining agreement between employer and union. Where such an agreement exists, both union and employer have been held liable for a discriminatory seniority system. *See, e.g.*, United States v. U.S. Steel Corp., 520 F.2d 1043, 1059 (5th Cir. 1975); Johnson v. Goodyear Tire and Rubber Co., 491 F.2d 1364, 1381 (5th Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir. 1971).

18. Competitive status seniority delegates priorities among employees for promotion, job security, shift preference, and other employment advantages. It is to be contrasted with benefit seniority which grants rights, such as pension benefits or vacation time to all workers based on time served. Competitive seniority rights are based on the length of service either within a certain bargaining unit (departmental seniority) or service on the job (plant seniority). Workers possessing the greatest seniority, provided they are qualified, are given first choice in job movements. *See* S. SLICHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 106-14 (1960). *See also* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1602 (1969). This casenote is primarily concerned with competitive status seniority.

19. Although this casenote will focus on the impact of seniority systems on departmentalized work schemes, its application is relevant to any restrictions placed on transfer between departments.

20. For application of the disparate impact theory, *see, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972); General Electric v. Gilbert, 429 U.S. 125 (1976).

21. 401 U.S. 424 (1971).

22. *Id.* at 431.

Griggs rationale to such cases, holding that a seniority system which is objective on its face but which gives present effects to the past discrimination is violative of the Act.[23] That view, although not specifically accepted by the Supreme Court, was adopted by a majority of the federal courts of appeals.[24]

The jurisprudence indicates that several factors may be pertinent in establishing a prima facie case of discrimination through the use of a departmental seniority system. Initially, it must be proven that the employer hired minority employees before the effective date of the Act.[25] In addition, employees must have been discriminated against before the effective date of the Act.[26] In this particular type of case, the discrimination usually took the form of assignment to a department in which the conditions of employment were less desirable. However, it was not necessary to show economic loss or assignment to a less desirable department to prove a prima facie case of discrimination, since the Act mandates equal opportunity for *any* job.[27] Additionally, statistics showing the stratification of minorities among the less desirable departments have played an important role in proving discrimination.[28] Most importantly, a necessary element in proving a prima facie case of discrimination is evidence that the seniority system served to 'lock in' the effects of the pre-Act discrimination.[29]

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23. *See, e.g.*, Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970); Local 189, United Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

24. See note 51, *infra*.

25. Numerous cases have indicated that the legislative history of section 703(h) makes it clear that no remedy would be available to workers not hired before the Act because of discrimination but later hired. *See, e.g.*, Jersey Central Power and Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975), *vacated and remanded* 96 S. Ct. 2196 (1976); Waters v. Wisconsin Steel Works of Int. Har. Co., 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976). *But see* Acha v. Beame, 531 F.2d 648 (2d Cir. 1976) (court felt the legislative history was "cloudy" and allowed remedy).

26. *See, e.g.*, Carey v. Greyhound Bus Co., 500 F.2d 1372 (5th Cir. 1974); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); Dobbins v. Local 212, I.B.D.S., 292 F. Supp. 413 (D.C. Ohio 1968).

27. Swint v. Pullman-Standard, 539 F.2d 77 (5th Cir. 1976). *See also* United States v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972); United States v. National Lead Co., 438 F.2d 935 (8th Cir. 1971).

28. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970).

29. Heard v. Mueller Co., 464 F.2d 190 (6th Cir. 1972): "Under the Civil Rights

Once a prima facie case of discrimination was established, the business necessity of the practice was the only defense available to the employer;[30] good faith was no defense.[31] Business necessity meant that the practice was necessary to the safety and efficiency of the enterprise.[32] The defense was difficult to maintain[33] because the courts required proof that the necessity of the system outweighed its discriminatory impact[34] and that no less discriminatory alternative was available to the employer.[35] Consequently, the defense was rarely successful.[36]

Because of the difficulty in defending a practice on the ground of business necessity, defendants in this type of litigation soon began raising the defense that seniority systems are exempted from Title VII by § 703(h) of the Act.[37] That section provides that the maintenance of a 'bona fide'

Act of 1964, the Federal Courts have consistently held that seniority provisions are illegal only if they tend to freeze or perpetuate the effects of historic or traditional discrimination in hiring or promotion." *See* Johnson v. Goodyear Tire and Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Bailey v. American Tobacco Co., 462 F.2d 160 (6th Cir. 1972). Other restrictions which are not necessarily embodies in the seniority system are subject to a similar attack. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1970) (educational requirements); Palmer v. General Mills, Inc., 513 F.2d 1040 (6th Cir. 1975) (departmental transfers); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir.), *cert. denied*, 401 U.S. 954 (1970) (no transfer rules). See also note 19, *supra*.

30. *See, e.g.*, Rogers v. Int'l Paper Co., 510 F.2d 1340 (8th Cir.), *vacated*, 423 U.S. 809 (1975); Carey v. Greyhound Bus Co., 500 F.2d 1372 (5th Cir. 1974).

31. *See, e.g.*, Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973).

32. *See, e.g.*, Long v. Georgia Kraft Co., 450 F.2d 557 (5th Cir. 1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 244 (10th Cir. 1970).

33. Sagers v. Yellow Freight Sys., Inc., 529 F.2d 721 (5th Cir. 1976).

34. *See, e.g.*, Palmer v. General Mills, Inc., 513 F.2d 1040 (6th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).

35. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Rogers v. Int'l Paper Co., 510 F.2d 1340 (8th Cir. 1975), *vacated*, 423 U.S. 809 (1976).

36. *See* cases cited in notes 33-35, *supra*. *But see* Williams v. American Saint Gobain Corp., 447 F.2d 561 (10th Cir. 1971).

37. 42 U.S.C. § 2000e-2(h) (1970 and Supp. IV 1974), provides in part: "Notwithstanding any other provision of this subsection, 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 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 . . . ." The section also regulates the use of ability tests by employers. Discrimination on the basis of religion, sex, and national origin, if these factors are bona fide occupational qualifications, and discrimination for reason of communist party membership or national security is also excepted from Title VII. 42 U.S.C. §§ 2000e-2(e)-(g) (1970 and Supp. IV 1974).

seniority system shall not be unlawful solely because it results in differences in treatment of employees, provided that the resulting differences in treatment are not due to an intent to discriminate. Section 703(h) was written to define which practices are illegal when the post-Act operation of a seniority system is challenged as perpetuating pre-Act discrimination.[38]

In *Quarles v. Phillip Morris, Inc.*,[39] a landmark federal district court decision in this area, the defense that all seniority systems are exempted from Title VII by § 703(h) was first rejected.[40] The *Quarles* case involved a departmentalized seniority system in the tobacco industry in which blacks hired before the effective date of Title VII were almost exclusively assigned to the lower paying, less desirable departments. In rejecting the defense that the seniority system was exempt from Title VII, the court defined a "bona fide" seniority system as one characterized by a lack of discrimination.[41] The court in *Quarles* determined that despite § 703(h), the Act does not sanction present inferior conditions of employment which are the result of an intent to discriminate.[42] The court noted that the fact that the intent to discriminate occurred before the effective date of the Act was irrelevant since § 703(h) does not distinguish between pre-Act and post-Act intent.[43] Thus, a seniority system which perpetuates pre-Act discrimination and effectively "locks in" minority employees into less desirable jobs cannot be "bona fide" under § 703(h). The decision concludes that "it is apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act."[44]

Several points concerning the meaning of § 703(h) were clarified by the jurisprudence which followed the *Quarles* decision. The definition of "bona fide" was limited to include only those seniority systems which could be explained on nonracial grounds and which did not unnecessarily

38. Franks v. Bowman Transp. Co., 424 U.S. 747, 761 (1976).

39. 279 F. Supp. 505 (E.D. Va. 1968). Judge Butzner, writing the opinion for the court in *Quarles*, acknowledged that he was freely drawing from a recent law review note, *Seniority Discrimination, supra* note 16.

40. *See also* United States v. Chesapeake & O. R.R., 471 F.2d 582 (4th Cir.), *cert. denied*, 411 U.S. 939 (1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Local 189, United Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); United States v. Sheetmetal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

41. Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 517 (E.D. Va. 1968).

42. *Id.*

43. *Id.* at 518.

44. *Id.* at 517.

inhibit the progress of previously excluded minorities.[45] Intent was broadly defined to mean merely that the employer did what he intended to do. Discriminatory intent was required to be but one motivating factor in the adoption of a seniority system.[46] Drawing from the language and legislative history of § 703(h),[47] the courts found additional evidence that Congress did not intend to immunize seniority systems which perpetuate pre-Act discrimination.[48] Many courts concluded that Congress only intended to protect whites with seniority from displacement by junior minority employees.[49] In their opinion, Congress did not intend to cause the present and future subordination of minorities to whites or the widening of the economic gap between the two groups.[50] After the adoption of the *Quarles* decision by the majority of the courts of appeals,[51] the defense that § 703(h) extends immunity to departmental seniority systems was seldom raised until the instant case.

Justice Stewart, writing for the majority,[52] acknowledges in the instant case that but for § 703(h) the seniority system in question would be a continuing violation of Title VII. However, the Court concludes, contrary to the majority of the courts of appeals, that both the language and legislative history of § 703(h) evidence that Congress intended to extend a "measure of immunity" to such systems. The Court states that the mere

45. *See* Local 189, United Paperworkers v. United States, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Cooper & Sobol, *supra* note 18, at 1612; *Seniority Discrimination, supra* note 16, at 1270.

46. *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 244 (10th Cir. 1970).

47. The legislative history of § 703(h) includes three interpretive memoranda introduced into the Congressional Record by the bipartisan managers of Title VII. The memoranda state that Title VII, because its effect is prospective and not retrospective, would not affect existing seniority rights. Therefore, according to the memoranda, a black would not be given seniority rights at the expense of a white worker and a black could be fired pursuant to a "last hired, first fired" system provided it was done because of his "last hired" status and not because of race. 110 CONG. REC. 7207, 7212-17 (1964). *See generally* Vass, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

48. See the cases cited in note 40, *supra*.

49. *See, e.g.*, United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Local 189, United Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

50. *Seniority Discrimination, supra* note 16, at 1270. See also the cases cited in note 40, *supra*.

51. Justice Marshall, in his dissenting opinion, cites over thirty cases in which six courts of appeal indicated agreement with the holding of *Quarles*. International Bhd. of Teamsters v. United States, 97 S.Ct. 1843, 1876 n.2 (1977) (Marshall, J., dissenting).

52. Justice Marshall filed an opinion dissenting from the Court's holding concerning seniority systems, in which Justice Brennan concurred.

fact that a seniority system may perpetuate the effects of pre-Act discrimination does not of itself prevent the system from being a "bona fide" seniority system.

Bona fide was functionally defined by the Court in relation to the defendants' seniority system. The seniority system in the instant case is composed of two bargaining units, the line driver unit and the city driver unit. Whites are assigned to both units according to the company's needs; however, prior to the enactment of Title VII minorities were assigned only to the lower paying city driver unit. The Court noted that the system applies equally to both whites and minorities in the inferior department and that all are discouraged from transferring. The Court also observed that the "placing of line drivers in a separate bargaining unit from other employees is rational, in accord with industry practice, and consistent wtih N.L.R.B. precedents."[53] Noted, without explanation by the Court, was the fact that the system did not have its genesis in racial discrimination and is maintained free from any illegal purpose. The single factor that the seniority system perpetuates the pre-Act discrimination does not in the Court's opinion render it illegal.

The impact of the instant case upon seniority systems adopted before the Civil Rights Act of 1964[54] will only be realized through further litigation. At a minimum, the decision will immunize many seniority systems in which the discriminatory impact of the system is minimal. Alternatively, the ruling could extend immunity to all but the most intentionally discriminatory seniority systems. However, several passages from the decision suggest a more restrictive interpretation. Initially, the majority points out that "703(h) does not immunize all seniority systems."[55] Moreover, Justice Stewart acknowledges that insofar as *Quarles* and its progeny stood for a view that a system which is "discriminatory itself" or had its "genesis in racial discrimination" cannot be bona fide, such decisions are consistent with the instant case.[56] The possibility that systems different from the one encountered in the instant case may not be exempted is clearly implied by the Court.

Factual distinctions existing between the seniority system dealt with in *Teamsters* and those treated by past jurisprudence suggest the impact of

53. 97 S. Ct. at 1865.

54. Relief to post-Act discriminatees posed no problem in *Teamsters* since the Court had previously decided that § 703(h) does not bar retroactive seniority to post-Act discriminatees. *See* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

55. 97 S.Ct. at 1863.

56. *Id.* at 1860 n.28.

the instant case may be limited. In a practical sense, because the present seniority system is peculiar to the freight carrier industry, most freight carrier seniority systems will now meet the "bona fide" test. However, some distinctions suggest that the systems in *Quarles* and many of the cases following it may not have met the test set forth by the Court. First, many of the seniority systems challenged in the past had departments composed entirely of minority employees. Secondly, while minorities comprised only a small proportion of the less desirable department in *Teamsters*, in much of the jurisprudence minorities were almost the sole members of the less desirable classification. The seniority systems which had been challenged in much of the prior jurisprudence may have had their "genesis in racial discrimination" and may not have been maintained "free from any illegal purpose" if a department was maintained exclusively for minorities. Moreover, there existed no rational basis for the departmentalization scheme in many of the past cases and few were consistent with N.L.R.B. precedents. Although many of the earlier cases had seniority systems based on the practice of the industry, this standard would certainly become less important where it could be shown that the industry practice itself was discriminatory.

The above distinctions, if valid, suggest that in seniority systems where minorities have been exclusively and overtly segregated into the less desirable departments, the system could not be "bona fide" under the present ruling. Additionally, these factual distinctions imply that the Court would be less likely to find a system bona fide where the discriminatory impact of the system upon minorities is great when balanced with the relative competitive loss to whites also employed in the less desirable departments. Consequently, proof of an absence of white workers in the less desirable departments may become more important than proof that few minorities are employed in the more desirable departments.

Teamsters is significant in that it demonstrates the Court's tendency to relieve employers and unions of responsibility for their pre-Act discrimination, which admittedly was not an illegal practice when committed. Civil rights advocates and minority workers will view the decision as a setback in the movement for economic equality. In overruling the unanimous opinion of the courts of appeals for the second time in the current term concerning Title VII,[57] the Court shows an increasing tendency to limit the scope of the Act.

57. In *General Electric v. Gilbert*, 429 U.S. 125 (1976), a majority of the Court overturned the unanimous opinion of the courts of appeals in finding that petitioner's disabilities benefits plan was not violative of Title VII for failure to cover pregnancy related disabilities. *See* 97 S.Ct. at 1878 (Marshall, J., dissenting).

The majority also demonstrates an inclination to retreat from the *Griggs* rationale of recognizing discrimination by the impact, rather than the intent, of the practice. Since the Court will now uphold a seniority system whose adoption was not racially motivated, the test of discrimination will focus on the intent in adoption rather than on the discriminatory effects of the seniority system. Good faith, although not a defense under the disparate impact theory, presumably could be a valid defense to discrimination thus defined. These consequences are inevitable in the shift from the prior jurisprudential test of "perpetuation" to the new test of "motivation."

Teamsters marks a departure from the more easily proved *Quarles* rationale by distinguishing between a discriminatory seniority system and a seniority system which is not exempt from Title VII. While *Quarles* and its progeny essentially equated discriminatory with non-exempt, the majority now holds that a seniority system may be discriminatory in operation but be immunized from Title VII prohibitions. New factors introduced by the Court demonstrate that a greater amount of evidence of motivation will be necessary to prove that a seniority system is not bona fide. However, the exact quantum of proof will only be defined in future litigation.

Wayne A. Shullaw

THE TRADITIONAL BAN ON ADVERTISING BY ATTORNEYS AND THE EXPANDING SCOPE OF THE FIRST AMENDMENT

As a part of its regulation of the State Bar, the Arizona Supreme Court imposed and enforced a disciplinary rule that restricted advertising by attorneys. In March of 1974 the defendants, members of the State Bar, opened a "legal clinic" intending to provide legal services at modest fees to people of moderate income who did not qualify for government sponsored legal aid. The attorneys relied on a high volume, low profit per client practice and handled only routine matters that could be disposed of speedily. After two years of limited success, the defendants placed an advertisement in a newspaper which stated that they offered "legal services at very reasonable fees" and which listed their fees for certain services. Both defendants admitted that the advertisement was a clear violation of the Arizona State Bar Association's Disciplinary Rules. The United States Supreme Court ***held*** in a 5-4 decision that the regulation