The Supreme Court's broadening interpretation of the protection afforded seniority systems within Section 703 (h) of the Civil Rights Act of 1964

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Published in North Atlantic Regional Business Law Review, vol. 16, pp. 53-59, Spring 1983

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North Atlantic Regional

Business Law Review

THE OFFICIAL PUBLICATION
OF THE NORTH ATLANTIC REGIONAL BUSINESS LAW ASSOCIATION
THE SUPREME COURT'S BROADENING INTERPRETATION OF THE PROTECTION AFFORDED SENIORITY SYSTEMS WITHIN SECTION 703(h) of THE CIVIL RIGHTS ACT OF 1964 by Christine Neylon O'Brien*

Recent opinions of the United States Supreme Court interpreting the protection afforded seniority systems under §704(h) of Title VII of the Civil Rights Act of 1964 represent an ideological retrenchment from the Supreme Court decisions of the early 1970s. Section 703(h) provides in relevant part:

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority 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 an 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. . .

In Griggs v. Duke Power Co.2 a group of Negro employees sued an employer alleging that the requirement of a high school education and the passing of two standardized general intelligence tests as a condition of employment in or transfer to certain jobs within the company violated Title VII of the Civil Rights Act of 1964. Neither standard was shown to be significantly related to successful job performance, and both requirements operated to disqualify a disproportionately higher rate of negroes than whites. The jobs with these employment requirements had been filled with white employees until 1965 when the employer ended its longstanding practice of restricting negro employees to the company's labor department. The company's overt racial discrimination occurred prior

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to the enactment of Title VII and the company successfully convinced the Court of Appeals that a subjective test of its intent should determine whether diploma and test requirements violated Title VII. The appellate court ruled that there was no showing of a racial purpose or invidious intent, and thus no violation of the statute.\textsuperscript{3}

The Supreme Court in the \textit{Griggs} case stated that 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. The Court interpreted Congress' mandate to require the removal of artificial, arbitrary, and unnecessary barriers to employment even when the barriers are fair in form, but operate to discriminate where the job requirements are not justified by business necessity.\textsuperscript{4} The Court observed that the thrust of Title VII is directed at the consequences of employment practices, not simply at the motivation of the employer.

In \textit{Albemarle Paper Company v. Moody},\textsuperscript{5} a case involving a class of Negro employees' challenge of a plant's seniority system and employment testing, the Supreme Court ordered the company to establish a plantwide seniority system for the members of the class to remedy a system which locked Negro employees into lower paying classifications. The Supreme Court took issue with the District Court's statement that backpay should not be awarded merely because the employer's actions were not in "bad faith." The Court in \textit{Albemarle} stated that "a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.'"\textsuperscript{6}

In 1976, the Supreme Court decided \textit{Franks v. Bowman Transportation Co., Inc.}\textsuperscript{7} another case involving Section 703(h) of Title VII. The \textit{Franks} case involved applicants for employment who were discriminatorily denied jobs after the effective date of Title VII. The Court established in \textit{Franks} the appropriateness of an award of retroactive seniority to place applicants in the position within the seniority system where they would have been but for an illegal discriminatory refusal to hire. The \textit{Franks} opinion stated that Section 703(h) does not bar such relief because the "underlying legal wrong affecting . . . [the discriminatees] . . . is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system."\textsuperscript{8} The Supreme Court in \textit{Franks} stated that the lower court's reasoning that a discriminatory refusal to hire 'does not affect the bona fides of the seniority system' was "clearly erroneous."\textsuperscript{9}

The \textit{Franks} opinion also held that "the thrust of . . . §703(h) . . . is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act. There is no indication in the
legislative materials that §703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved . . ." 10 The Franks opinion also discussed the inadequacy of relief which denies a seniority remedy which places the victim in the position in the seniority system that would have been the victim's place absent the discriminatory refusal to hire. 11

In May of 1977 the Supreme Court issued opinions in two seniority cases: Teamsters v. United States 12 and United Air Lines v. Evans. 13 In United Air Lines a female flight attendant, Evans, was terminated upon her marriage in 1968 pursuant to a company policy. It was later determined that this policy violated Title VII in Sprogis v. United Air Lines 14 but Evans was not a party in that case and did not file a claim based on her termination. Evans repeatedly sought reinstatement from United Air Lines and was finally hired as a new employee by United Air Lines on February 16, 1972. Evans' prior service with United Air Lines was not included in the computation of her seniority. Seniority at United Air Lines determined wages, duration and timing of vacations, rights regarding layoff, recall, and preferential selection of flight assignments. 15 When Evans' request for a recalculation of her seniority met with no success, she filed a complaint which was dismissed by the District Court on the basis that the claim was time-barred because Evans failed to file a charge within 90 days of her separation in 1968. Evans argued that the current computation of her seniority amounted to a continuing violation and that the seniority system gave present effect to a past illegal act which perpetuated the consequences of forbidden discrimination. 16 The Supreme Court found no continuing or present violation of the statute, and noted that Evans' charge was filed February 21, 1973, more than 90 days after her rehire and assignation of her seniority credit on February 16, 1972. (Ninety days was the applicable statute of limitations at the time of her filing pursuant to §706(d).) 17

The holding in the Evans case is actually a narrow one. The Court stated that "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." 18 The Court equates a time-barred claim to pre-Act discrimination with the predictable result that it finds no illegality in the present operation of a seniority system which the Court finds is neutral in its application to males/females and females terminated pursuant to the no-marriage policy versus all others who resigned, or were terminated for reasons other than the no-marriage policy and were later rehired. Specifically, the system provided that all employees accumulate seniority from the date of their most recent hiring. Evans did not attack the "bona fides" of United's seniority system nor did she allege that the system was intentionally designed to discriminate. 19 The Court interpreted
§703(h) as not foreclosing attacks on the current operation of seniority systems which are subject to challenge as discriminatory.20

Teamsters v. U.S.21 involved a suit against a nationwide common carrier, T.I.M.E.-D.C., Inc., and the Teamsters union which represented a substantial number of the company's employees. Both the company and union were signatories to collective bargaining agreements which embodied the seniority system in question. The challenged seniority system allocated seniority for benefit purposes (vacation and other fringe benefits) on the basis of tenure with the company, but allocated competitive seniority (seniority which determines preference on bidding, and rights concerning layoff, recall, and promotion, transfer, etc.) on the basis of seniority in each bargaining unit.22 Negro and Spanish-surnamed persons had been discriminated against with respect to hire and transfer into the more desirable jobs,23 both before and after the effective date of Title VII.24

The Court in the Teamsters case disposed of the challenge to the seniority system on the basis that all post-Act discriminatees could obtain full make-whole relief, including retroactive seniority in accordance with Franks v. Bowman, supra,25 and that §703(h) and the legislative history of Title VII immunize the seniority system from the challenge of pre-Act discriminatees.26

The Court specifically rejected the Government's argument that no seniority system which tends to perpetuate pre-Act discrimination can be "bona fide,"27 ruling that the seniority system was entirely "bona fide," even though the system "locked" both white and minority employees into non-line-driver jobs (which were less desirable).28

Trans World Airlines v. Hardison29 was a case of alleged religious discrimination. Hardison's religious beliefs prevented him from working on Saturdays, and as an employee with low seniority in a department, he was unable to obtain a shift with Saturdays off. The Supreme Court concluded that the employer through its seniority system, had made a reasonable accommodation to both religious and secular needs of employees. Since no discriminatory purpose was apparent in the seniority system, the Court interpreted §703(h) as protecting the application of this bona fide system to Hardison.30

In 1980, the Supreme Court decided a case entitled California Brewers Assn. v. Bryant31 which involved a challenge to a requirement of 45 weeks of continuous work in a calendar year in order to obtain the preferred status of a "permanent" employee. The Ninth Circuit Court of Appeals' decision that the requirement was not part of a "seniority system" within the meaning of §703(h) was reversed by the Supreme Court. Citing Teamsters v. U.S., supra, as an analogous "separation of

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seniority tracks," the Court labelled the 45-week rule a threshold requirement for entry into the permanent-employee seniority track. The problem with the Court's analysis in California Brewers Assn. is its failure to question the "bona fides" of the seniority system in a meaningful manner. To consider the facial language and structure of the seniority system without attributing any weight to the effects of the operation of the system in the company and/or industry in question provides no significant analysis of the "bona fides" of the system. At what point does the discriminatory impact of a facially neutral seniority system put a company (and a union) on notice that continued application of such a system will amount to intentional discrimination?

The Court does not refer to a definition of "bona fides" or "good faith" as, for example in Black's Law Dictionary where "bona fide" is defined as:

In or with good faith; honestly, openly and sincerely; without deceit or fraud. Truly; actually; without simulation or pretense. Innocently; in the attitude of trust and confidence; without notice of fraud, etc. Real, actual, genuine and not feigned. See also Good Faith.

Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, . . . Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious.

American Tobacco Company v. Patterson continues the evolution and application of the Supreme Court's dogma concerning §703(h): that the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proven. In Pullman-Standard v. Swint the Court finally recognizes that discriminatory impact is part of the evidence to be considered by the trial court in reaching a finding (of fact) on whether there was a discriminatory intent, but states that the intent must be "actual motive; . . . not a legal presumption to be drawn from a factual showing of something less than actual motive." Both American Tobacco and Pullman-Standard involved unsuccessful challenges to seniority systems which had a racially discriminatory impact.
In Ford Motor Co. v. EEOC, a sex discrimination case under Title VII, the Supreme Court, in a 5-4 decision takes one step further away from redressing the inequalities created by employment discrimination. The Court in Ford Motor Co. held that an employer may stop the accrual of back pay liability by offering a complainant a job without seniority retroactive to the date of the alleged discrimination. In the Ford case, both complainants had acquired considerable seniority at another automobile plant at the time of Ford's offer. The majority's opinion ignores the real value of such an offer and the risks inherent in the acceptance of such an employment offer in an ailing industry.

The Court claims that its decision serves Title VII's objectives since it encourages voluntary compliance. What the decision encourages is an incomplete offer from any employer who is responding to a complaint of employment discrimination. The employer may thus stop short the accrual of back pay liability by a job offer which is unacceptable to the complainant who has acquired seniority elsewhere in accordance with his/her duty to mitigate damages.

The Ford decision requires an unemployed or underemployed complainant to accept such a job offer or else lose prospective damages. The Court characterizes its decision as one which best fills the claimant's basic immediate need for a job. This characterization ignores the increased probability of layoff encountered by claimants with no seniority, as well as the significant role which seniority plays in other areas of a worker's life. The Court's decision in Ford encourages employers to avoid a make-whole remedy for a victim of the employer's discrimination. The Court's arguments in support of its decision are not persuasive. Although the decision may encourage employers to make a job offer to a complainant, the Court forces the employee to gamble on the success of the employee's lawsuit against its employer for retroactive seniority. Before the resolution of that suit, the discriminatee may have been laid off from the job, worked in less desirable areas or on less desirable shifts, received less vacation, etc. Whereas in the Ford case, the discriminatees had accumulated some seniority at another company, why should they be forced to make that choice or lose prospective back pay?

Over the past few years, the Supreme Court has interpreted §703(h) of the Civil Rights Act of 1964 to elevate seniority systems to a level best described as sacrosanct. The intent of §703(h) was to protect existing vested seniority rights within bona fide systems upon the passage of Title VII, to assure that the effect of Title VII would be prospective; not to eliminate challenges to seniority systems which perpetuate employment discrimination which took place after the effective date of the Act. The Court's current interpretation of the protection afforded by §703(h) creates an unintended, excessively broad loophole in Title VII. The subjective motive of the
creator of a seniority system should not determine the rights
of a victim of discrimination who may suffer without a remedy
under a facially neutral seniority system which perpetuates
past discrimination. The Court in its course of opinions seems
unconcerned with the motives of an employer at the time when
the employer (ostensibly intentionally) excluded protected
classes of applicants from its work force after the effective
date of the Act, perhaps because as the Court concluded in
United Air Lines v. Evans, a time-barred claim is not legally
cognizable, and thus not of any concern to the Court's interpre­
tation and application of the mandates of Title VII.

FOOTNOTES

3. Id. at 429.
4. Id. at 431.
5. 422 U.S. 405 (1975).
6. Id. at 422.
8. Id. at 758.
9. Id. at 757.
10. Id. at 761-762.
11. Id. at 765.
14. 444 F.2d 1194 (7th Cir. 1971), cert. denied, 404 U.S. 991
   (1971).
15. United Air Lines v. Evans, supra at 555.
16. Id. at 557.
19. Id. at 560.