Defining Title VII's Seniority Exemption: *California Brewers Association v. Bryant*

This note explores the scope of the seniority exemption of Title VII of the Civil Rights Act of 1964. It analyzes the U.S. Supreme Court's attempt to define "seniority system" in California Brewers Association v. Bryant, *and suggests that an alternate approach might better effectuate Title VII's policy of eliminating employment discrimination.*

INTRODUCTION

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on race, color, sex, religion or national origin.[1] Title VII proscribes both intentional discrimination and

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[1] 42 U.S.C. §§ 2000e-2000e-17 (1976).

Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a)(1976) provides:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or to refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
> (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex or national origin.

Section 703(c), 42 U.S.C. § 20003-2(c) (1976), makes it is unlawful for a union

> (1) to exclude or to expel from its membership, or otherwise to discriminate against any individual because of his race, color, religion, sex or national origin;
> (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color,

employment practices which, while neutral on their face, have a discriminatory impact on minorities.[2] Section 703(h) of Title VII exempts bona fide seniority systems from the Act's broad prohibition of employment discrimination.[3] More specifically, that section provides that differences in compensation or terms of employment resulting from the operation of bona fide seniority system are not unlawful under Title VII, as long as the differences do not result from intentional discrimination.[4]

Section 703(h) does not define either "seniority" or "seniority system."[5] In the field of labor relations, "seniority" is uniformly

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religion, sex or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

[2] The Supreme Court defined "discriminatory impact" in Griggs v. Duke Power Co., 401 U.S. 424 (1971), as "practices that are fair in form but discriminatory in operation. . . . If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.

Remedies for violation of Title VII include injunction from further discrimination, court-ordered reinstatement, hiring or promotion of discriminatees, awards of back pay and seniority, and "any other equitable remedy as the court deems appropriate." Civil Rights Act of 1964, § 706(g) 42 U.S.C. § 2000e-5(g) (1975); *see* Franks v. Bowman Transp. Co., 424 U.S. 747, 762 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

[3] 42 U.S.C. § 2000e-2(h) (1976). Section 703(h) provides, in pertinent part:

> 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. . . system, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin.

Courts interpreting Title VII at first characterized "bona fide" as requiring lack of discrimination. *See* note 37 and accompanying text *infra*. In 1977, however, the Supreme Court held that otherwise neutral seniority systems which perpetuated prior discrimination were bona fide. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); *see* notes 49-53 and accompanying text *infra*.

[4] Whether or not a seniority system results from intentional discrimination is closely tied to the question of whether or not the system is bona fide. Swint v. Pullman-Standard, 624 F.2d 525, 530 (5th Cir. 1980); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 351 (5th Cir. 1977). *See also* note 53 *infra*. Intentional discrimination in this context means intentional discrimination in the negotiation, adoption and maintenance of the seniority system itself. International Bhd. of Teamsters v. United States, 431 U.S. 324, 355 (1977).

[5] Although the legislative history of Title VII includes several examples of

defined as the principle that rewards the employee's length of service and gives preference to the senior worker.[6] Although collective bargaining agreements between labor and management usually establish seniority systems,[7] the term "seniority system" has no standard definition.[8] Rather, seniority systems vary greatly from one collective bargaining agreement to another.[9] Seniority systems may measure an employee's seniority in a number of ways[10] and may establish a variety of rewards on the basis of seniority.[11]

Until 1977 courts construed the seniority exemption of section 703(h) narrowly.[12] Under this narrow interpretation, section 703(h) did not bar plaintiffs who alleged that a seniority system was illegal because it perpetuated the effects of prior discrimina-

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the effect of the Act on employees' seniority rights, it does not contain a definition of seniority system. *See* notes 83-86 and accompanying text *infra*.

[6] S. SLICHTER, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 104 (1969); Cooper & Sobol, *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).

[7] Eighty-eight percent of collective bargaining agreements analyzed in a 1979 survey contained seniority provisions. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACT 73 (1979).

[8] H. DAVEY, CONTEMPORARY COLLECTIVE BARGAINING 228 (1972); Cooper & Sobol, *supra* note 6, at 1602.

[9] S. SLICHTER, *supra* note 6, at 116.

[10] For example, plant-wide seniority measures an employee's total length of service with an employer. In contrast, under a departmental seniority system, employees accrue seniority within a particular department and may lose their accumulated seniority rights upon transfer to another department. Job seniority measures length of service in a particular job, while bargaining unit seniority refers to length of time in a particular collective bargaining unit. S. SLICHTER, *supra* note 6, at 116-17, 161-62.

[11] For example, benefit status seniority governs employees' rights to vacations, health benefits, retirement benefits, sick leave and the like. Benefit status seniority involves those rights and privileges to which an employee is entitled because he or she has worked a certain number of years for an employer.

Competitive status seniority, on the other hand, determines an employee's status in relation to other employees. Competitive status seniority may govern employees' rights to promotion and transfer, choice of vacation time or shift and chance to be retained during layoff periods. *Id.* at 106.

[12] *See, e.g.*, Robinson v. Lorillard Co., 444 F.2d 791 (4th Cir. 1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). *See also* cases cited in International Bhd. of Teamsters v. United States, 431 U.S. 324, 378 n.2, 379 n.3 & 380 n.4 (1977) (Marshall, J., dissenting).

tion.[13] Consequently, the lack of a uniform definition of "seniority system" did not concern Title VII plaintiffs. However, in 1977 the U.S. Supreme Court held in *International Brotherhood of Teamsters v. United States*[14] that section 703(h) insulated from Title VII attack otherwise neutral seniority systems which perpetuated past discrimination.[15] It therefore became more important for Title VII litigants to know whether or not an employment provision complained of as discriminatory was part of a seniority system. But the Court in *Teamsters* did not define "seniority system" or indicate how seniority rights were to be distinguished from other employment benefits.[16]

In *California Brewers Association v. Bryant*,[17] decided three years after *Teamsters*, the Court defined "seniority system" for the purpose of section 703(h). Writing for the majority,[18] Justice Stewart held that a seniority system has two components. First, seniority rights are based on "some measure of time served in employment."[19] Second, seniority systems include "ancillary rules" which govern accrual of seniority.[20]

This note suggests that the *California Brewers Association* definition of "seniority system" is unclear and overbroad, and hinders Title VII's purpose of eliminating employment discrimination.[21] This note will first review concepts of seniority devel-

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[13] Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[14] 431 U.S. 324 (1977).

[15] *Id.* at 354.

[16] The employment provision complained of in *Teamsters* was a typical departmental seniority system. *Id.* at 344.

[17] 444 U.S. 598 (1980).

[18] Chief Justice Burger and Justices White and Rehnquist joined in Justice Stewart's opinion. Justice Marshall filed a dissenting opinion in which Justices Brennan and Blackmun joined. Justices Powell and Stevens did not participate in the decision.

[19] California Brewers Ass'n v. Bryant, 444 U.S. 598, 606 (1980).

[20] *Id.* at 607. Justice Stewart described several examples of such "ancillary rules." Among them are rules which prescribe whether or not probationary periods are counted for seniority purposes, *id.* n.17, whether seniority is measured by department, plant or bargaining unit, *id.* n.19, and what employment conditions seniority will govern. *Id.* n.20.

[21] The primary objective of Title VII is to "achieve equality of employment opportunities." Griggs v. Duke Power Co., 401 U.S. 424, 429 (1970). Another important purpose of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976) (quoting Albermarle Paper Co. v. Moody,

oped in decisions predating *California Brewers Association.* It will then analyze *California Brewers Association* and consider the impact of the case on Title VII litigation. Finally, the note will propose an alternate definition of "seniority system" based partly on an earlier Supreme Court decision.

I. Seniority in Prior Law

Outside the context of Title VII, the Supreme Court has analyzed seniority provisions in circumstances ranging from determining veterans' seniority rights[22] to adjudicating employees' seniority rights when two plants merge.[23] From this analysis emerges the concept that seniority rights are expectancies based on the employment contract, rather than "vested" rights.[24] Generally, seniority rights are created by collective bargaining agree-

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422 U.S. 405, 418 (1975)).

[22] Section 9 of the Military Selective Service Act, 38 U.S.C. § 2021(a) (1976), requires employers to rehire employees who had left to join the military and to restore them to positions of "like seniority, status and pay." The Supreme Court has construed this provision to protect veterans from loss of seniority rights and to preserve the rights that they had upon entering the service. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946). *See also* Alabama Power Co. v. Davis, 431 U.S. 581 (1977); Accardi v. Pennsylvania R.R., 383 U.S. 225 (1966); Tilton v. Missouri Pac. R.R., 376 U.S. 169 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Trailmobile Co. v. Whirls, 331 U.S. 40 (1947).

[23] Humphrey v. Moore, 375 U.S. 335 (1964). Here the same union represented employees of two companies under identical collective bargaining agreements. One company sold to the other its right to carry automobiles from a Ford plant in Kentucky. The collective bargaining agreement provided that if the employer absorbed the business of another company, employee seniority rights should be "determined by mutual agreement between the Employer and the Unions. . . ." *Id.* at 338. The Court held that the sale of rights was an "absorption" and that an agreement between the union and the employers to dovetail the seniority lists of the two employers was proper. *Id.* at 350-51.

[24] Trailmobile Co. v. Whirls, 331 U.S. 40, 53 n.21 (1946). *See also* Elder v. New York Cent. R.R., 152 F.2d 361, 364 (6th Cir. 1945). *See generally* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights,* 75 Harv. L. Rev. 1532 (1962); Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964,* 13 How. L.J. 1 (1967).

"Vested" may be defined as "[h]aving the character or giving the rights of absolute ownership; not contingent." Black's Law Dictionary 1401 (5th ed. 1979). A "vested" right is one which has "become a title, legal or equitable, to the present or future enforcement of a demand." Aetna Ins. Co. v. Richardelle, 528 S.W.2d 280, 284 (Tex. Civ. App. 1975).

ments.[25] They do not exist independently of the instrument that created them,[26] and they may be modified by expiration or modification of the collective bargaining agreement.[27] In addition, statutes may create and modify seniority rights. Section 9 of the Military Selective Service Act,[28] for example, awards veterans the seniority that they would have accrued had they not entered the armed forces.[29]

The Supreme Court first approached the task of distinguishing seniority rights from other employment benefits in a case involving a veteran's seniority rights. In *Alabama Power Co. v. Davis*,[30] the Court developed a two-pronged test for determining whether or not an employment benefit is a seniority right guaranteed by the Military Selective Service Act to veterans. First, to be a seniority right the benefit must reward the length of time that the employee has held the job, rather than compensate the employee in the short term for the amount of work accomplished.[31] Second, there must be a "reasonable certainty" that the benefit would have accrued had the employee not left to

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[25] Trailmobile Co. v. Whirls, 331 U.S. 40, 53 n.21 (1946). The discretion of union representatives to negotiate seniority rights in collective bargaining agreements is not absolute. Rather, it is limited by the requirement of a good-faith effort to protect union members' interests. Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38 (1953); Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202 (1944).

[26] Aaron, *supra* note 24, at 1549.

[27] Humphrey v. Moore, 375 U.S. 335, 350-51 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330, 338-39 (1953).

[28] 38 U.S.C. § 2021 (1976).

[29] *Id.* § 2021(a); Accardi v. Pennsylvania R.R., 338 U.S. 225, 228-29 (1966). The need to protect the rights of veterans justifies this interference with the process of collective bargaining. Fishgold v. Sullivan Drydock & Repair Co., 328 U.S. 275, 285 (1945).

[30] 431 U.S. 581 (1977). Justice Marshall, writing for a unanimous court, summarized the prior veterans' seniority cases. Neither Justice Stewart's opinion nor Justice Marshall's dissent in *California Brewers Association* discusses *Davis*, despite the fact that the case could have guided the Court in the search for a definition of "seniority system." In *California Brewers* Justice Stewart does refer to other veterans' seniority cases. California Brewers Ass'n v. Bryant, 444 U.S. 598, 608 (1980). Justice Marshall's dissent analyzes seniority in terms similiar to those used in *Davis*. *Id.* at 614-16. *See* notes 71-73 and accompanying text *infra*.

[31] Alabama Power Co. v. Davis, 431 U.S. 581, 589 (1977). The Court distinguished reward for "longevity with an employer" (seniority benefits) from "short-term compensation for work performed" (e.g., vacation benefits which increase in proportion to overtime worked). *Id.*

serve in the military.[32] In other words, the more the accrual of the benefit depends on the employer's discretion, the less likely it is to be a seniority right.[33]

One of the first cases to consider the meaning of the seniority exemption in section 703(h) was *Quarles v. Philip Morris*.[34] The employer in *Quarles* had originally organized his factory into wholly segregated departments, relegating black workers to the lower paying departments. In 1966 the employer adopted a new non-discriminatory employment policy. However, under the departmental seniority system, black workers who transferred into higher paying departments lost the seniority that they had accrued earlier.[35]

The court held that this departmental seniority system was illegal because it perpetuated the effects of the employer's earlier discrimination.[36] The court reasoned that the seniority exemption in section 703(h) did not protect such a system because it was not "bona fide." The court stated the the mark of a "bona fide" seniority system was a lack of discrimination.[37]

Franks v. Bowman Transportation Co.[38] was the first Title VII case in which the Supreme Court discussed seniority. The

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[32] *Id. Accord,* Tilton v. Missouri Pac. R.R., 376 U.S. 169, 179-81 (1963).

[33] Alabama Power Co. v. Davis, 431 U.S. 581, 585-86 (1977). For example, a promotion which depends on the employee's performance and upon the employer's discretion would not be a seniority benefit because of the "contingent nature of [the employee's] expectation." *Id.* at 585.

[34] 279 F. Supp. 505 (E.D. Va. 1968).

[35] *Id.* at 508.

[36] *Id.* at 510.

[37] *Id.* at 516-17. The court said, in what was to become a widely quoted passage:

> It is . . . apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the [Civil Rights Act of 1964]. . . . Obviously one characteristic of a *bona fide* seniority system must be lack of discrimination. Nothing in section 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. . . [A] departmental seniority system that has its genesis in racial discrimination is not a *bona fide* seniority system.

Id. For a discussion of the line of decisions that followed this narrow interpretation, see Note, *The Seniority System Exemption in Title VII: International Brotherhood of Teamsters v. United States*, 6 HOFSTRA L. REV. 585, 591-96 (1978). *See also* cases cited in note 12 *supra.*

[38] 424 U.S. 747 (1976).

plaintiffs had asked for retroactive seniority as a remedy for the employer's illegal discrimination in hiring and conditions of employment.[39] They did not claim that the seniority system itself was discriminatory or ask that it be modified.[40] The Supreme Court held that section 703(h) did not bar a federal court from awarding retroactive seniority to successful Title VII plaintiffs.[41] Rather, section 703(h) applied only where plaintiffs complained that a seniority system itself was illegal because it perpetuated the effects of discrimination which occurred prior to the enactment of Title VII.[42]

The Court stated that, under section 706(g) of Title VII,[43] federal courts could award retroactive seniority in order to "make whole" the victims of illegal employment discrimination.[44] The fact that seniority relief could adversely affect the seniority status of other employees did not warrant denial of such relief.[45] The *Franks* court characterized the seniority expectancies of the non-minority employees as "conflicting interests," rather than as vested rights.[46]

Quarles and *Franks* are consistent with the seniority cases arising outside the context of Title VII. Both recognize that seniority rights are creatures of collective bargaining agreements or statutes and hence are not vested. The *Quarles* court noted that the seniority rights that white workers had accumulated under the departmental system were merely "expectancies derived from the collective bargaining agreement and subject to modification."[47] In *Franks* the Court stated that awarding retroactive seniority to victims of illegal racial discrimination did not deprive other employees of indefeasibly vested seniority rights. The Court explained that employees' seniority rights may be modified by "statutes furthering a strong public policy interest" and that Title VII was such a statute.[48]

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[39] *Id.* Plaintiffs also requested an award of back pay. *Id.*

[40] *Id.* at 758.

[41] *Id.* at 757.

[42] *Id.* at 761.

[43] 42 U.S.C. § 2000e-5(g) (1976).

[44] Franks v. Bowman Transp. Co., 424 U.S. at 747, 764 (1976).

[45] *Id.* at 774.

[46] *Id.*

[47] Quarles v. Philip Morris, 279 F. Supp. 505, 520 (C.D. Va. 1968).

[48] Franks v. Bowman Transp. Co., 424 U.S. 747, 778 (1976). The Court noted that plaintiffs sought only seniority relief retroactive to the date of their indi-

One year after *Franks*, in 1977, the United States Supreme Court decided *International Brotherhood of Teamsters v. United States*[49] and implicitly overruled *Quarles* and its progeny.[50] In *Teamsters* the plaintiffs alleged that where jobs had originally been racially segregated, a departmental seniority system was illegal under Title VII because it discouraged minorities from transferring into previously all white departments.[51] Plaintiffs claimed, under the theory first adopted in *Quarles*, that such a seniority system could not be "bona fide" because it perpetuated the effects of prior discrimination. For this reason, plaintiffs argued, section 703(h) did not protect the seniority system from attack under Title VII.[52]

The Supreme Court disagreed. The Court held that section 703(h) immunized otherwise neutral seniority systems that perpetuated prior employment discrimination.[53] The Court said that victims of employment discrimination occurring after the effective date of Title VII could obtain seniority relief under

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vidual applications for employment, and did not seek to deprive of their seniority white employees in "positions they would not have obtained but for the illegal discrimination." *Id.* at 776. The seniority relief awarded was thus not complete relief. Rather, the remedy established a "sharing of the burden of past discrimination" between victims of discrimination and other employees. *Id.* at 777.

[49] 431 U.S. 324 (1977).

[50] The Court acknowledged that the *Quarles* view—that § 703(h) does not immunize seniority systems that perpetuate the effects of prior discrimination—had "enjoyed wholesale adoption in the Courts of Appeals." *Id.* at 346 n.28. However, the Court stated that in the Supreme Court the issue was an open one, *id.*at 346, and limited the *Quarles* view to seniority systems that had been adopted with intent to discriminate. *Id.* at 346 n.28.

[51] *Id.* at 344.

[52] *Id.* at 346.

[53] *Id.* at 348 n.30 & 353-54. *See also* Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1189 (5th Cir. 1978); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 351 (5th Cir. 1977). The *Teamsters* Court thus rejected the notion that a seniority system that perpetuated pre-Title VII discrimination could not be bona fide. International Bhd. of Teamsters v. United States, 431 U.S. 324, 353 (1977).

The *James* court established a test for determining whether or not a seniority system is bona fide after *Teamsters*. The test focuses on "whether the seniority system had its genesis in racial discrimination," whether it "was negotiated and has been maintained free from any illegal purpose," whether it affects all employees equally, and whether it conforms with industry practice. 559 F.2d at 352.

Franks without attacking the legality of the seniority system.[54]

The Court observed that in enacting Title VII Congress did not intend to "destroy or water down the vested seniority rights of employees" under a seniority system that perpetuated past discrimination.[55] The Court's characterization of seniority rights as vested contrasts with earlier judicial descriptions of seniority rights as expectations which may be modified.[56]

II. *California Brewers Association v. Bryant*

A. Facts

The plaintiff in *California Brewers Association*[57] was a black man who was first employed by the Falstaff Brewing Corporation in 1968.[58] The collective bargaining agreement under which he was hired classified employees as "permanent" (those who had worked at least forty-five weeks in one calendar year), "temporary" (those who had worked at least sixty days during the preceding calendar year) and "new" (all others).[59] The agreement gave preference to permanent employees in a variety of areas, including dispatch by the union to jobs, bumping rights and retention during periods of layoffs.[60]

In 1973 Bryant sued, alleging that the Brewers Association

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[54] International Bhd. of Teamsters v. United States, 431 U.S. 324, 353 (1977). However, the Court also limited the seniority relief available under Title VII, holding that "[t]hose employees who suffered only pre-Act discrimination are not entitled to relief, and no person may be given retroactive seniority to a date earlier than the effective date of the Act." *Id.* at 356-57. The Court said that holding a seniority system unlawful would in no way enlarge the relief to be awarded. *Id.* at 348 n.30. *See also* Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1189 (5th Cir. 1978).

[55] International Bhd. of Teamsters v. United States, 431 U.S. 324, 353 (1977). The Court also said that "Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees." *Id.* at 354. *But see* Franks v. Bowman Transp. Co., 424 U.S. 747, 778 (1976).

[56] *See* notes 24-27, 47 & 48 and accompanying text *supra*.

[57] California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980).

[58] *Id.* Bryant was employed under a single collective bargaining agreement covering all of the California breweries. He joined as defendants seven individual breweries, several unions, the Brewers Association and the Teamsters Brewery and Soft Drink Workers Joint Board of California, which had negotiated the employment contract on behalf of the unions. *Id.*

[59] *Id.* at 602-03.

[60] *Id.*

and the unions had discriminated in the past against blacks in hiring and conditions of employment.[61] Specifically, he claimed that the requirement that a temporary employee work forty-five weeks within one calendar year to achieve permanent status perpetuated this prior discrimination in violation of Title VII.[62] Bryant asserted that a variety of factors beyond the employee's control combined to make it virtually impossible for a temporary employee to work forty-five weeks within one calendar year. Among these factors were the seasonal nature of the work, a decline in the breweries' demand for labor and the scheduling of layoffs and vacations by the breweries.[63]

Nevertheless, the district court held that the 45-week rule was "analogous to the 'last hired-first fired' practices" protected by section 703(h)[64] and dismissed Bryant's complaint.[65] The Ninth Circuit Court of Appeals reversed, holding that the 45-week rule was not part of a seniority system and therefore was not protected by section 703(h).[66]

The Supreme Court reversed the Court of Appeals.[67] Writing for the majority, Justice Stewart stated that the seniority system exemption in section 703(h) protected not only "the principle that length of employment will be rewarded" but also "ancillary rules" not necessarily "directly related to length of employ-

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[61] *Id.* at 601.

[62] *Id.*

[63] Bryant alleged that the chances of a temporary employee achieving permanent status under the 45-week rule were "haphazard" at best. Brief for Respondent at 5. Among the factors that he believed made the accrual of permanent status uncertain were the low demand for labor and the fact that temporary employees' seniority within their temporary classification "determines only their eligibility to be sent out at a given time, not whether they will get a job." *Id.* Additionally, he alleged that accrual of permanent status could be prevented by intentionally or unintentionally discriminatory exercise of managerial discretion in assigning vacation time or layoff. *Id.* For example, a temporary employee could lose her or his chance to achieve permanent status simply by being assigned a vacation in December rather than January.

[64] Bryant v. California Brewers Ass'n, 585 F.2d 421, 424 (9th Cir. 1978) (summarizing the analysis of the unreported district court decision), *rev'd*, 444 U.S. 598 (1980).

[65] Bryant v. California Brewers Ass'n, No. 73-1866 (N.D. Cal., filed Oct. 19, 1973), 585 F.2d 421 (9th Cir. 1978), *rev'd*, 444 U.S. 598 (1980).

[66] Bryant v. California Brewers Ass'n, 585 F.2d 421, 428 (9th Cir. 1978), *rev'd*, 444 U.S. 598 (1980).

[67] California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980).

ment."[68] Justice Stewart characterized the 45 week requirement as such an ancillary rule.[69] Consequently, even if Bryant could prove his allegation that the 45-week rule perpetuated past discrimination, the rule would not be illegal under Title VII.[70]

In his dissent, Justice Marshall argued that seniority should be defined in terms of an employee's cumulative length of service.[71] Justice Marshall reasoned that cumulative length of service was the only objective and certain measure of employees' seniority rights. Under the 45-week requirement, employees' rights were not based on cumulative length of service but rather on amount of service within separate calendar years.[72] Thus, according to Justice Marshall, the 45-week requirement was not part of a seniority system and was not immunized by section 703(h).[73]

B. Analysis

The majority held that the basic purpose of a seniority system is to reward length of time spent in employment.[74] This generality is part of the Supreme Court's definition of seniority benefit in *Alabama Power Co. v. Davis*,[75] and is agreed upon by all courts and commentators.[76] However, Justice Stewart expanded

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[68] *Id.* at 607; *see* note 20 *supra.*

[69] *Id.* at 609. The procedural posture of the case required the Court to accept as true Bryant's allegation that under the 45-week rule a temporary employee was unlikely ever to achieve permanent status. (For the purpose of a motion to dismiss, the factual allegations of a complaint must be taken as true. Conley v. Gibson, 355 U.S. 44, 45 (1957)). Nonetheless, the Court stated that the rule "focuses on length of employment [and] does not distort the operation of the . . . Agreement which rewards employment longevity with heightened benefits." California Brewers Ass'n v. Bryant, 444 U.S. 598, 610 (1980).

[70] Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h) (1976). *See* text accompanying notes 4, 14, 15, 53 & 54 *supra.*

[71] California Brewers Ass'n v. Bryant, 444 U.S. 598, 611 (1980).

[72] *Id.* at 615. Justice Marshall observed that whether or not a temporary employee will be able to work the requisite 45 weeks in one year depends "on fortuities over which he has no control" and is "largely unpredictable." Justice Marshall said that the seasonal nature of the brewing industry as well as "replacement by permanent employees or an employer's unexpected decision to lay off a particular number of employees during the course of a year" prevents temporary employees from acquiring permanent status. *Id.* at 615.

[73] *Id.* at 618.

[74] *Id.* at 606.

[75] 431 U.S. 581, 589 (1977). *See* notes 30-33 and accompanying text *supra.*

[76] *See* California Brewers Ass'n v. Bryant, 444 U.S. 598, 606 n.14 & 613 n.4

this concept and defined length of employment as "some measure of time served,"[77] allowing the majority to declare that the 45-week rule "focuses on length of employment."[78]

But this expanded definition is overbroad. The 45-week rule focuses on length of employment only in the restricted sense that it rewards the employee who manages to work forty-five weeks within one calendar year. However, under the rule, a temporary employee's progression to permanent status is by no means automatic, depending as it does upon "fortuities over which the employee has no control."[79] Thus, in practical terms, the 45-week rule does not reward length of employment.

The majority also held that section 703(h) insulated from Title VII attack "ancillary rules" necessary to the operation of a seniority system but not themselves directly related to length of employment.[80] The Court reasoned that, by referring in section 703(h) to seniority "systems," Congress intended to include within that section rules that govern the operation of the principle that length of employment is to be rewarded.[81]

The only support for the majority's view of congressional intent is the Court's definition of "system"—*i.e.*, a "complex unity composed of many diverse parts subject to a common plan or serving a common purpose."[82] But under this definition, "seniority system" is susceptible of at least one other interpretation which the Court fails to discuss. While seniority "rights" may refer to the expectations of one worker, seniority "system" could refer to the provision in a collective bargaining agreement that establishes seniority rights for all employees.

Furthermore, the legislative history of section 703(h) does not support the majority's conclusion that Congress intended the se-

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(1980). *See also* note 6 and accompanying text *supra*.

[77] California Brewers Ass'n v. Bryant, 444 U.S. 598, 606 (1980).

[78] *Id.* at 610.

[79] *Id.* at 616 (Marshall, J., dissenting); *see* notes 63, 69 & 72 *supra*.

[80] California Brewers Ass'n v. Bryant, 444 U.S. 598, 607 (1980); *see* note 20 *supra*.

[81] California Brewers Ass'n v. Bryant, 444 U.S. 598, 606-07 (1980). *But see* Patterson v. American Tobacco Co., 586 F.2d 300, 303 (4th Cir. 1978) (holding that even under *Teamsters*, § 703(h) is a narrow exception to Title VII, insulating only that part of a promotional system which has to do with length of employment).

[82] California Brewers Ass'n v. Bryant, 444 U.S. 598, 606 n.15 (1980), (quoting WEBSTER'S NEW 3RD INT'L DICTIONARY 2322 (Unabridged ed. 1961)).

niority exemption to protect ancillary rules. During consideration of Title VII, members of Congress most frequently described seniority as "last hired-first fired,"[83] a phrase referring to the principle that seniority rewards length of employment. The majority contended that Congress used "last hired-first fired" merely as one example of seniority.[84] But there is no convincing evidence to support that position.[85] The legislative history of section 703(h) is sparse, and all statements about the effect of Title VII on seniority were made before Congress added section 703(h) to Title VII.[86]

Even if some ancillary rules should be part of seniority systems, the Court did not clarify which ancillary rules fall within the protection of section 703(h).[87] On one hand, the Court said that ancillary rules need not be directly related to length of em-

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[83] *See, e.g.*, 110 CONG. REC. 7207, 7213, 7217 (1964).

[84] California Brewers Ass'n v. Bryant, 444 U.S. 598, 605 n.10 (1980).

[85] The dissent suggested that the phrase "last hired-first fired" implied that Congress meant to define seniority as cumulative length of service. *Id.* at 612 n.2.

[86] The bill that became the Civil Rights Act of 1964 originated in the House of Representatives and went to the Senate containing no mention of seniority systems. H.R. 7152 (1963); *see* H.R. REP. No. 914, 88th Cong., 1st Sess. (1963). On April 8, 1964, during the Senate's debate of the bill, Senator Clark introduced three documents into the record concerning the effect of Title VII on established seniority systems. Cooper & Sobol, *supra* note 6, at 1609. These documents denied that Title VII would undermine pre-existing seniority rights of white employees. 110 CONG. REC. 7207, 7213-15, 7217 (1964). There was no discussion on the floor of the Senate of the documents or of the issue of seniority rights under Title VII. Cooper & Sobol, *supra* note 6, at 1610. The amendment containing § 703(h) (the Mansfield-Dirksen amendment, which was proposed as a substitute for the entire bill) was presented to the Senate on May 26, 1964. 110 CONG. REC. 11,935-36 (1964); *see* Cooper & Sobol, *supra* note 6, at 1610. This bill passed the Senate and the House with no debate and little discussion of § 703(h) or seniority. 110 CONG. REC. 14,511, 15,897 (1964); *see* Cooper & Sobol, *supra* note 6, at 1611. For a thorough discussion of the legislative history of Title VII, see Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966).

[87] Although the question for decision was whether § 703(h) exempted the 45-week rule from the normal operation of Title VII, the majority discussed at some length other "ancillary rules" which § 703(h) would cover. California Brewers Ass'n v. Bryant, 444 U.S. 598, 607 (1980). In contrast, the dissent argued that the majority's discussion of these rules was "gratuitous" and that the case did not require the Court to "canvass and evaluate rules 'ancillary' to seniority systems." *Id.* at 619 n.10 (Marshall, J., dissenting).

ployment.[88] But then the Court concluded that the 45-week rule was acceptable as a seniority rule *because* it focused on length of employment.[89]

The only employment rules that the majority specifically excludes from protection under section 703(h) are educational prerequisites, height requirements, aptitude tests and subjective standards.[90] This sweeps too wide a range of employment provisions under the protective mantle of section 703(h). For instance, the Fourth Circuit held, on the authority of *California Brewers Association,* that a provision restricting job bids for vacancies in a particular department to employees already working in that department was a seniority rule protected by section 703(h).[91] Consequently, even if the job-bid restriction has a discriminatory effect on minorities, it is not illegal under Title VII.[92]

Not only is the scope of ancillary rules protected by section 703(h) unclear and overbroad, the majority's conclusion that the 45-week rule was an ancillary seniority rule is poorly reasoned. The Court equated the 45-week rule to a departmental seniority rule.[93] Under such a rule, an employee could accrue seniority in

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[88] *Id.* at 607-08.

[89] *Id.* at 610. The Court said, "The 45-week rule does not depart significantly from commonly accepted concepts of 'seniority'. . . . [L]ike any 'seniority' rule, the 45-week requirement focuses on length of employment." *Id.* at 609-10.

[90] *Id.* The Court had held in Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), that education and aptitude test requirements which operated to exclude minorities from jobs were prohibited under Title VII unless the employer could show them to be related to job performance. In Dothard v. Rawlinson, 433 U.S. 321 (1977), the Court held that the *Griggs* rule applied to height requirements as well. The court in Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1382-83 (4th Cir.), *cert. denied,* 409 U.S. 982 (1972), held that an employer's use of subjective standards in hiring and promotion corroborated a statistical pattern of discrimination.

[91] Younger v. Glamorgan Pipe & Foundry Co., 621 F. 2d 96, 97 (4th Cir. 1980).

[92] *Id. California Brewers* also leaves open the possibility that § 703(h) protects a rule that an employee can only accrue seniority after a two-year period, a rule that only employees in a particular department can accrue seniority and a rule making seniority status contingent on working ten hours a day. *See generally* California Brewers Ass'n v. Bryant, 444 U.S. 598, 616-17 (1980) (Marshall, J., dissenting).

[93] California Brewers Ass'n v. Bryant, 444 U.S. 598, 609 (1980). The Court equated the 45-week rule to the departmental seniority system approved in

Department A, but lose all seniority upon transfer to Department B. Justice Stewart found the two provisions analogous, in that starting to work in Department B would be a threshold requirement for accruing seniority in Department B, just as working forty-five weeks within one calendar year was a threshold requirement for acquiring permanent employee status.[94]

The similarities between the two provisions, however, are only superficial. An employee who leaves a department after accruing seniority to work in another department where seniority must be built up again makes a choice, albeit a difficult and unpleasant one. In contrast, the 45-week requirement subjects the employee's work status to the fluctuation of the industry and to chance. In *Alabama Power Co. v. Davis*, the Court characterized seniority by the "reasonable certainty" with which it accrues.[95] While a departmental seniority rule provides such certainty, the 45-week rule does not.[96]

In addition, the Court's holding in *California Brewers Association* does little to further the policies underlying Title VII. The Court analyzed the 45-week rule in light of the policy of giving unions and employers "the freedom through collective bargaining to establish conditions of employment."[97] The majority said that courts should not interfere with the process of collective bargaining or with the resulting contract provisions.[98] Accordingly, it concluded that courts may not construe section 703(h) to prefer one sort of seniority system over another. Ruling that section 703(h) did not protect the 45-week rule would, the Court implied, require an impermissible value judgment about seniority systems.[99]

In construing section 703(h), the Court should have placed more emphasis on the policy expressed by Title VII than on the policy of judicial non-interference with collective bargaining.[100]

International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[94] California Brewers Ass'n v. Bryant, 444 U.S. 598, 609 (1980).

[95] 431 U.S. 581, 585-86 (1977); *see* notes 30-33 and accompanying text *supra*.

[96] *See* notes 63, 72 & 79 and accompanying text *supra*.

[97] California Brewers Ass'n v. Bryant, 444 U.S. 598, 608 (1980).

[98] *Id.*

[99] *Id.* The fact that the Court assumed that the 45-week rule was part of a seniority system weakens this argument. If, in fact, the 45-week rule is not part of a seniority system, excluding it from the protection of 703(h) does not necessitate preferring one sort of seniority system over another.

[100] The Court did state that § 703(h) should not be given a scope that "risks

Title VII is a remedial statute expressing a strong national policy of eliminating employment discrimination.[101] As an exception to Title VII, section 703(h) should have been narrowly construed.[102]

Implicit in the majority's view that courts should not interfere in the process of collective bargaining is the notion that negotiated seniority rights are vested rights. Until *Teamsters,* courts had recognized that it was misleading to define seniority rights as vested.[103] Not only may seniority expectations be modified by statutes, they may also be lost by the expiration or alteration of the collective bargaining agreement that created them.[104]

If the Supreme Court continues to characterize seniority rights as vested, unfortunate consequences may ensue. Vested seniority expectancies of white workers could make seniority remedies unavailable to victims of illegal employment discrimination.[105] Furthermore, the view that seniority rights are vested could have an impact outside Title VII litigation. For example, it could make more difficult the resolution of seniority disputes when two companies merge.[106]

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swallowing up Title VII's otherwise broad prohibition of practices . . . that disproportionately affect members of those groups that the Act protects." *Id.*

[101] *See* note 21 *supra.*

[102] California Brewers Ass'n v. Bryant, 444 U.S. 598, 618 (1980) (Marshall, J., dissenting); Patterson v. American Tobacco Co., 634 F.2d 744, 749 n.5 (4th Cir. 1980) (holding that § 703(h) immunizes only seniority systems that existed when Title VII was enacted). *See also* Parson v. Kaiser Aluminum & Chemical Co., 583 F.2d 132 (5th Cir. 1978) (construing § 703(h) narrowly to protect only the principle that seniority rewards length of employment).

[103] *See* notes 24-29, 47 & 48 and accompanying text *supra. See generally* Aaron, *supra* note 24.

[104] Humphrey v. Moore, 375 U.S. 335 (1964), *discussed in* note 23 *supra.*

[105] In Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), the Court indicated that the fact that seniority rights are not vested made the award of retroactive seniority conceptually easier. *Id.* at 778. In United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980), the defendant union argued that a consent decree imposing a seniority system in a Title VII case was invalid because the seniority rights of employees under the old system were vested. The court held, however, that "even expectancies characterized as 'vested rights' . . . must fall before a court adjudication that mandates the expectancies not be fullfilled." *Id.* at 1341.

[106] *See* Humphrey v. Moore, 375 U.S. 335 (1964), *discussed in* note 23 *supra. See generally* Aaron, *supra* note 24.

III. PROPOSAL

Courts could avoid the problems created by *California Brewers Association* by adopting a functional test for determining whether or not a particular contract provision is part of a seniority system. This test would limit the seniority exemption of section 703(h) to employment provisions that reward the employee's length of service and accomplish the purposes underlying the widespread use of seniority systems in collective bargaining agreements.[107] Seniority systems serve two functions generally.[108] First, seniority provides an objective standard by which an employee's rights can be measured, protecting employees from subjective decisions by employers.[109] Second, seniority provisions enable employees to predict accurately their future work status.[110] Thus, if the provision in question rewarded length of service, was objective and gave a high degree of predictability to the employee's work status, courts would hold it a seniority provision. An employee who alleged that such a provision was discriminatory could not prevail, because section 703(h) would protect the provision from illegality under Title VII.

Prior Supreme Court seniority decisions support the adoption of a functional approach to defining "seniority system" for purposes of section 703(h). In particular, the Court in *Alabama Power Co. v. Davis* stated that "reasonable certainty" of accrual distinguished seniority benefits from other employment provisions.[111] Clearly, "reasonable certainty" is an attribute of an employment provision that enables an employee to predict future work status accurately.[112]

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[107] Most collective bargaining agreements contain seniority provisions. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 73 (1979), *supra* note 7.

[108] *See* Cooper & Sobol, *supra* note 6, at 1604-05. *See also* California Brewers Ass'n v. Bryant, 444 U.S. 598, 614 (1980) (Marshall, J., dissenting).

[109] *See* H. DAVEY, *supra* note 8, at 229; Cooper & Sobol, *supra* note 6, at 1604-05.

[110] California Brewers Ass'n v. Bryant, 444 U.S. 598, 615-16 (1980) (Marshall, J., dissenting); *see* Cooper & Sobol, *supra* note 6, at 1605.

[111] Alabama Power Co. v. Davis, 431 U.S. 581, 585-86 (1977); *see* notes 30-33 and accompanying text *supra*.

[112] Justice Marshall advocated an approach similar to the proposed functional test in his dissent in *California Brewers Ass'n*. Justice Marshall said that cumulative length of service was the best definition of seniority because it was in "accord with the policies underlying the recognition of seniority rights."

Under a functional test, the 45-week rule would not be part of a seniority system. It rewards length of employment only in the sense that it rewards employment over forty-five weeks within one calendar year. The rule does not protect employees from an employer's arbitrary decisions regarding who will work at least forty-five weeks within a given year. Consequently, the rule is not objective, and permanent status does not accrue under it with any certainty. Instead, it subjects an employee's work status to fortuities which the employee can neither predict nor control.

CONCLUSION

Since the Supreme Court decided *International Brotherhood of Teamsters v. United States* in 1977, section 703(h) of the Civil Rights Act of 1964 has assumed increasing importance as an obstacle to Title VII plaintiffs who complain that a seniority system perpetuates the effects of past discrimination. After *Teamsters,* courts and litigants needed a standard for determining which employment provisions were part of seniority systems within section 703(h).

While the Court set forth such a standard in *California Brewers Association v. Bryant,* that standard is inadequate. The Court held that section 703(h) barred Title VII plaintiffs who alleged that an employment provision governing the use of seniority had a discriminatory effect. By failing to clarify which ancillary rules section 703(h) protects, the Court also opened the way for section 703(h) to immunize employment provisions with only a tangential relation to length of service.

This note proposes a functional test for deciding whether or not an employment provision is part of a seniority system for purposes of section 703(h). Under this test, section 703(h) would insulate only employment provisions that reward length of employment, are objective and enable employees to predict future work status accurately. Such a test would bring the application of section 703(h) in line with the policies underlying the wide use of seniority systems in collective bargaining agreements, as well as with the national policy of eliminating employment discrimination expressed in Title VII.

Whitney Rogge

California Brewers Ass'n v. Bryant, 444 U.S. 598, 614 (1980).