Layoffs and Equal Employment: Retroactive Seniority as a Remedy Under Title VII

This article sketches the history of Title VII seniority remedies, culminating in the Supreme Court's decisions in FRANKS v. BOWMAN TRANSPORTATION CO. and INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. UNITED STATES. It proposes a means by which courts can implement these decisions in the face of layoffs. This proposal would maximize the preservation of equal employment progress in local governments and in the private sector.

Over a period of 18 months in 1974 and 1975, New York City reduced its work force by one-third, laying off women and minorities in greater proportions than white males.[1] These cutbacks almost completely eliminated women and minorities from city agencies in which previously they had been greatly under-represented.[2] These facts illustrate a more general problem. An employer which has discontinued a discriminatory practice and has begun hiring women and minorities to comply with Title VII of the Civil Rights Act of 1964,[3] but which encounters fiscal difficulties requiring work force reductions, faces a difficult decision. When an employer reduces its work force, it is customary to use seniority systems that eliminate the most recently hired, often women and minorities. Because the operation of seniority systems frequently eradicates equal employment gains,[4] an important question is whether Title VII provides a means which will preserve these gains in the face of necessary layoffs.

The stated purpose of Title VII is to promote equal employment for those protected groups[5] who have traditionally been denied em-

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[1] The percentage reduction for whites was 22%; for Hispanics 51.2%; for blacks 35%; for other minorities (including both Asian and Native Americans) 30%; for women 33%. N.Y.C. COMMISSION ON HUMAN RIGHTS, CITY LAYOFFS: THE EFFECT ON WOMEN AND MINORITIES 8-9 (April, 1976).

[2] *Id.* at 13-15.

[3] Civil Rights Act of 1964, §§ 701-718, 42 U.S.C. § 2000e (1970).

[4] For a case involving these facts, *see, e.g.*, Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975), *vacated and remanded sub nom.* EEOC v. Jersey Cent. Power & Light Co., 425 U.S. 987 (1976).

[5] Protected group members as used here are those persons who have historically suffered employment discrimination because of their race, sex, color, reli-

ployment opportunities.[6] Under judicial interpretations of Title VII, plaintiffs need not show direct injury, but only that the employer maintains some non-job-related discriminatory practice that has a disparate effect on the class of which the plaintiff is a member.[7] Where the employer fails to overcome this presumption of discrimination, courts grant injunctive relief.[8] They only grant a "make whole" remedy (one that restores plaintiffs to the places they would have occupied absent the employer's discrimination) to persons who can demonstrate that they have personally suffered an injury.[9]

The courts have held that it is not discriminatory to use a last hired, first fired seniority system[10] even if many of those laid off under the system are women and minorities hired after a discriminatory practice is discontinued.[11] Unless the employer presently maintains a discriminatory practice, such individuals arguably suffer no direct injury. In such cases, the courts deny make whole seniority remedies.[12]

The courts are cautious in interpreting the often ambiguous and conflicting language of Title VII.[13] They sometimes note that seniority systems may hinder equal employment by securing the positions of the most senior employees who achieved their seniority ranking while the employer discriminated against protected group mem-

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gion, or national origin. It is this group which Title VII protects. H.R. REP. NO. 914, 88th Cong., 1st Sess. 26, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2401.

[6] *Id.* at 2393.

[7] International Bhd. of Teamsters v. United States, 45 U.S.L.W. 4506, 4509 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 429-32 (1971).

[8] International Bhd. of Teamsters v. United States, 45 U.S.L.W. 4506, 4515 (1977).

[9] *Id.* A "make whole" remedy includes back pay, fringe benefits, seniority, and promotion. Albermarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975). Rightful place seniority is the seniority component of the make whole remedy. It places plaintiffs in the position they would have occupied absent the employer's discrimination. Rightful place seniority may consist of retroactive seniority which is a grant of fictional seniority back to the date an employer would have hired the plaintiff absent the discriminatory hiring practice. Rightful place seniority has also included retention of seniority on transfer as compensation for an employer's discriminatory practice. *See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1975).

[10] In a last hired, first fired seniority system, employers lay off employees with the least amount of service first whenever there is a work force reduction. In private industry this procedure is either traditional or mandated by union contract. In local government, it is often required by law. *See, e.g.*, CAL. GOV'T CODE § 45100 (West 1966); SAN DIEGO, CAL., MUN. CODE § 23.1207 (1966); LOS ANGELES, CAL., ADMIN. CODE vol. 1 § 4.37 (1969).

[11] Watkins v. United Steelworkers Local 2369, 516 F.2d 41 (5th Cir. 1975).

[12] *Id.* at 44, 47.

[13] *See, e.g.*, Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687, 704-10 (3d Cir. 1975), *vacated and remanded sub nom.* EEOC v. Jersey Cent. Power & Light Co., 425 U.S. 987 (1976).

bers.[14] Nevertheless, their decisions consistently reflect the attitude that seniority rights are vested ones; they resolve the conflict between those rights and Title VII in favor of the white male majority, unless protected group members prove that some past discrimination directly affected them.[15] Yet this continued narrow construction of Title VII undermines the Act's purpose and its underlying policy. If equal employment is to be a reality, courts cannot refuse to recognize the impact of past discrimination on protected groups because of seniority systems.

Through an analysis of remedial seniority as applied by the courts, this article proposes extending the remedy in layoff situations to preserve the gains made under Title VII. Although much of this discussion is applicable to private employers covered by Title VII,[16] the article focuses on the particular problems of local governments. The first section outlines the competing interests involved in the conflicts over seniority rights in Title VII cases. A brief synopsis of the background of the legislative policy underlying Title VII follows. Subsequent discussion of the case law shows the ways in which courts have contended with these conflicts, culminating in the Supreme Court's decisions in *Franks v. Bowman Transportation Company*[17] and *International Brotherhood of Teamsters v. United States.*[18] Finally, the article proposes a new solution for resolving these conflicts to maximize the retention of Title VII gains in the face of layoffs without substantially modifying the use of seniority as a means of ranking employees.

I. Seniority Interests and Title VII

In fashioning any seniority[19] remedy under Title VII, courts consider a variety of competing interests. First, the Act protects the interests of persons who, but for the discrimination of the employer, would have accumulated seniority commensurate with the white

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[14] International Bhd. of Teamsters v. United States, 45 U.S.L.W. 4506, 4512 (1977).

[15] *Id.*

[16] 42 U.S.C. § 2000e (b) (1970 & Supp. V 1975).

[17] 424 U.S. 747 (1976).

[18] 45 U.S.L.W. 4506 (1977).

[19] Seniority actually embraces a number of rights and protects a number of interests. Benefit seniority provides a ranking of employees for such purposes as choice of vacation and job assignments and for other benefits of employment. Competitive status seniority governs the order in which employees can be promoted, laid off, and transferred. *See generally* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969). The measure of seniority has traditionally been by length of service of the employee in the particular job, department, or with the employer overall. Often, different standards are applied for benefit and competitive status seniority. Employees may be able to use their entire seniroity with the employer for the purpose of obtaining benefits, but only their seniority within a department for competitive purposes.

male majority.[20] Second, the male majority who comprise the work force of employers guilty of past and present discriminatory practices fear that Title VII complainants, who may be awarded remedial seniority, will displace them.[21] Third, society has an interest in effecting equal employment.[22]

After considering the conflicting interests, courts decline to infer from their broad equitable remedy powers under Title VII that they should go beyond awarding affirmative relief to individuals who demonstrate a direct injury. They do not note that this is a piecemeal approach to achieving the Act's broad purpose.[23] Part of their reluctance can be traced to the legislative history of Title VII which is the initial focus of this article.

A. The Legislative Background of Title VII

The stated purposes and policies of Title VII evolved in a unique social atmosphere. Passed in response to political pressures following the civil unrest of the early 1960s, the Act is a legislative remedy for the long-standing problem of employment discrimination in the United States. Twelve days of Congressional hearings on employment discrimination highlighted the severity of the problem.[24] The House Committee on Education and Labor concluded that probably fifty percent of the people of this country who were seeking employment suffered job discrimination because of their race, religion, color, national origin, ancestry or age.[25] The Committee's findings demonstrate that discrimination is not limited to one section of the country or to any one industry.[26]

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[20] *See* 42 U.S.C. § 2000e-5(g) (1970).

[21] When Congress enacted Title VII, legislators concerned about those interests assumed that limitations in the Act would protect the majority's job security. International Bhd. of Teamsters v. United States, 45 U.S.L.W. at 4512-14.

[22] A significant force behind the passage of the Civil Rights Act of 1964 was the need to solve social problems that existed because employers excluded groups of persons from employment opportunities. The policy behind the Act suggests that it should be used to integrate permanently protected groups as a whole into previously segregated work forces. *See* S. REP. NO. 872, 88th Cong., 2d Sess. 8-9, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2355, 2362-63.

[23] *See generally* Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687, *reversed and remanded sub nom.* EEOC v. Jersey Cent. Power & Light Co., 425 U.S. 987 (1976); Watkins v. United Steelworkers Local 2369, 516 F.2d 41 (5th Cir. 1975).

[24] The hearings were held on a forerunner to Title VII, the Equal Employment Opportunity Act of 1962. H.R. 10144, 88th Cong. 2d Sess., 108 CONG. REC. 2707 (1962).

[25] H.R. REP. NO. 1370, 87th Cong., 2d Sess. 1 (1962), *reprinted in* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLE VII AND XI OF CIVIL RIGHTS ACT of 1964, at 2155 (1968).

[26] H.R. REP. NO. 1370, 87th Cong., 2d Sess. 1-2 (1962), *reprinted in* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLE VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2155-56 (1968).

In 1964, when it passed the Civil Rights Act, Congress declared as its intent "that all persons within the jurisdiction of the United States [should] have a right to the opportunity for employment without discrimination on account of race, color, religion, or national origin."[27] It also declared a national policy of protecting each person's right to be free from such discrimination.[28]

The version of Title VII presented to the Senate provided the tools to implement this policy: judicial remedies and an administrative agency to oversee enforcement of Title VII.[29] To meet the objections of its opponents, the proponents agreed to add various provisions limiting these enforcement mechanisms.[30] These limitations confront the courts in their attempts to apply the broad remedial provisions of the Act.[31]

Two limitations are particularly significant in restricting the use of seniority remedies. Section 703(h)[32] protects seniority rights by making it lawful to apply different standards, terms, conditions or privileges of employment pursuant to a bona fide seniority system. Section 703(j)[33] is a Congressional statement that nothing in Title VII shall be interpreted as mandating preferential treatment to correct any deficiency in the total number or percentage of persons of any race, color, religion, sex or national origin in an employer's work

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[27] H.R. REP. NO. 914, 88th Cong., 1st Sess. 26, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2401.

[28] *Id.*

[29] The original version of the bill provided that the EEOC would have enforcement power similar to that of the National Labor Relations Board. However, civil rights proponents were fearful that limiting relief to administrative procedures would curtail the effectiveness of the enforcement efforts. They were successful in restricting the role of the EEOC, thus allowing individual complainants more direct access to the federal courts. Vass, *Title VII: Legislative History*, 7 B.C. INDUS. AND COM. L. REV. 431, 436-37 (1966). As originally passed, Title VII allowed protected group members to file complaints of discrimination with the EEOC. The Act empowered the agency to investigate and attempt to formally correct discriminatory employment practices by conciliation and mediation. If the EEOC were unsuccessful in informally resolving the complaint of discrimination, the agency was to notify the complaining party or the party in whose interest the EEOC pursued the alleged discrimination. The aggrieved person could then commence a civil action against the offending employer within thirty days. 42 U.S.C. § 2000e-4 (1970). With the passage of the Equal Employment Opportunity Act of 1972, Congress empowered the EEOC to bring a civil action against any respondent not a governmental agency or political subdivision. 42 U.S.C. § 2000e-5(f)(1) (1970 & Supp. V 1975). Also, the Attorney General could bring civil actions against governmental agencies upon referral by the EEOC. *Id.*

[30] Because of the concern of their colleagues that Title VII would destroy employment rights of white workers, Senators Mansfield and Dirksen proposed these sections to muster support for the Act. For a complete discussion of the political maneuvering that went into Title VII, *see* Vass, *Title VII: Legislative History*, 7 B.C. INDUS. AND COM. L. REV. 431 (1966).

[31] International Bhd. of Teamsters v. United States, 45 U.S.L.W. at 4512-14.

[32] Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h) (1970).

[33] Civil Rights Act of 1964, § 703(j), 42 U.S.C. § 2000e-2(j) (1970).

force. Since the passage of Title VII, the conflict between these provisions and the policy of effectuating equal employment has resulted in a continuing tension when the courts consider seniority remedies.[34] They balance using the Act as a vehicle for changing the employment status of groups of persons who have historically suffered discrimination against the interests protected by 703(h) and 703(j) and interpret Title VII as limiting seniority remedies to individuals who are the actual targets of overt discriminatory practices.[35]

B. 1972 Amendments

In its original version, Title VII did not cover state and municipal employment practices as the Act's definition of employer specifically excluded "a State or political subdivision thereof."[36] Prior to 1972, some employers in the private sector discontinued discriminatory employment practices by voluntary action; court orders forced others to implement equal employment plans. Conciliation agreements resulting from Title VII enforcement efforts eliminated many discriminatory practices.[37] Due to lack of statutory authority, no parallel assault on employment discrimination occurred in the public sector. In 1969, a report of the United States Commission on Civil Rights examined public employment in eight urban areas throughout the country.[38] The report found that:

> State and local governments have failed to fulfill their obligation to assure equal job opportunity. . . . [N]ot only do State and local governments consciously and overtly discriminate in hiring and promoting minority group members, but they do not foster positive programs to deal with discriminatory treatment on the job.[39]

Motivated largely by this report, Congress demonstrated its commitment to equal employment when it brought state and local government employers under the Act.[40] When it amended Title VII, it

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[34] *See, e.g.*, Watkins v. United Steelworkers Local 2369, 516 F.2d 41, 44-49 (5th Cir. 1975).

[35] *See* International Bhd. of Teamsters v. United States, 45 U.S.L.W. at 4515-17; Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687, 710 (3d Cir. 1975), *vacated and remanded sub nom.* EEOC v. Jersey Cent. Power & Light Co., 425 U.S. 987 (1976).

[36] 42 U.S.C. § 2000e(b) (1970).

[37] *See generally* U.S. COMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT-1974, Vol. V. TO ELIMINATE EMPLOYMENT DISCRIMINATION 549-70 (1975).

[38] U.S. COMMISSION ON CIVIL RIGHTS, FOR ALL THE PEOPLE. . . BY ALL THE PEOPLE: A REPORT ON EQUAL OPPORTUNITY IN STATE AND LOCAL GOVERNMENT EMPLOYMENT (1969).

[39] *Id.* at 131.

[40] In so doing, Congress re-emphasized its purpose by declaring that "[s]tate and local governmental units have not instituted equal employment required by the national policy to eliminate discrimination in employment." H.R. REP. NO. 929238, 92d Cong., 2d Sess. 17, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2153. Congress realized that, despite the Civil Rights Act of 1964,

thus extended those protections already in force in the private sector to state and municipal employers.[41] However, this strong declaration of national policy does little to overcome the stated limitations of the Act which face the courts and the EEOC as they attempt to award seniority remedies under Title VII. Unless seniority remedies are available to minimize the impact of cutbacks in personnel on the recent equal employment gains, municipal work forces will likely return to the pre-1972 amendment status quo.

II. JUDICIAL RESPONSE TO SENIORITY REMEDIES UNDER TITLE VII

For nearly a decade the courts have sought to establish the limits of seniority relief given both the competing interests of employees and the conflict between the policy of Title VII and its specific limiting provisions. The federal courts' reasoning often differed, but the results were usually the same. In *Franks v. Bowman Transportation Co.*,[42] the Supreme Court synthesized and articulated for the first time two general principles which evolved from the earlier case law. First, the granting of seniority is a proper equitable remedy under Title VII, and second, this relief is appropriate when it makes whole an actual discriminatee.[43] Expanding its discussion of seniority remedies in *International Brotherhood of Teamsters v. United States*,[44] the Court affirms its holding in *Franks*, but narrows the circumstances under which seniority is available as a remedy. In *Teamsters*, the Court reversed a settled principle subscribed to by most of the circuits. It interpreted section 703(h) as prohibiting granting a seniority remedy when seniority practices perpetuate past discrimination. These two opinions define the general parameters of the Supreme Court's current position on seniority remedies. Retroactive seniority is always

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discrimination against women and minorities continued in all sectors. In attempting to remedy this problem by strengthening the EEOC's enforcement powers, Congress concluded that the "persistence of discrimination and its detrimental effects require a reaffirmation of our national policy of equal opportunity in employment." H.R. REP. NO. 929238, 92d Cong., 2d Sess. 3, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 2139.

[41] 42 U.S.C. § 2000e(b) (1970 & Supp. V 1975), *as amended by* Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103. After Congress enacted the amendments to Title VII, municipal governments began to correct their discriminatory practices to conform to the requirements of the Act and to take affirmative action to remedy the effects of past abuses on protected groups. Consequently, they hired and promoted women and minorities in greater numbers to those positions where they had been previously under-represented due to past discriminatory practices. Recently, feeling the pressures of inflation and shrinking tax revenues, local governments have begun to lay off and demote employees using last hired, first fired seniority systems. Women and minorities recently hired under affirmative action plans and court orders lack seniority to withstand layoffs and thus find their jobs endangered.

[42] 424 U.S. 747 (1976).

[43] *Id.* at 770-71.

[44] 45 U.S.L.W. 4506 (1977).

available as a remedy to make whole actual discriminatees, but it can only be awarded to individuals for direct post-Act discrimination which caused them some injury.

A difficult problem after *Franks*, not entirely clarified in *Teamsters*, is what protected group members must show to establish their status as actual discriminatees. This determination becomes even more critical after *Teamsters* because it is now obvious that without such status plaintiffs never have a remedy. It is the position of this article that the Court's articulation of seniority remedies in *Franks* and *Teamsters* is not only inadequate to effect the broad purposes and policies of Title VII, but has also complicated further the lower courts' task of constructing seniority remedies.

To provide background for proposing a means by which courts can mitigate the problems posed in making these determinations, it is important to consider the judicial development of seniority remedies. The treatment begins with a review of the courts' resolution of the conflict between any make whole seniority remedy and section 703(h), followed by the courts' development of the permissible scope of such a remedy. The discussion then turns to the conflict which can result between this limited scope and the policy behind Title VII. Finally, as an illustration of this conflict, the analysis focuses on the difficulties the courts encounter in attempting to preserve gains made under Title VII in the face of layoffs in local governments.

A. Historical Development

Given the limitation in section 703(h), historically the first question the courts reached was whether any seniority remedy was appropriate under Title VII. Plaintiffs did not ask courts to construct remedies for last hired, first fired seniority systems because these systems were not viewed as overtly discriminatory. Consequently, the issue of seniority remedies first arose in cases where employers had eliminated overtly discriminatory practices,[45] but seniority systems carried over the effects of these practices. These cases occurred in the situation where the complaining party was employed at the time the employer eliminated the practice and thus was an obvious candidate for a make whole remedy.[46] To provide such a remedy,

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[45] When employers discontinued overtly discriminatory hiring practices such as racially segregated departments and refusal to hire blacks, they sometimes substituted subtle forms of discrimination such as non-job-related testing and discriminatory educational requirements which accomplished what overt practices had previously effected. *E.g.*, Pettway v. American Cast Iron Co., 494 F.2d 211 (5th Cir. 1974).

[46] These cases usually involved racially segregated departments with a no-transfer rule which discriminated against the employees on the job. *E.g.*, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1975).

it was necessary to place the employees in their rightful places within the seniority system. Before doing so, however, the courts had to decide that section 703(h) did not bar such a remedy.

In *Quarles v. Philip Morris, Inc.*,[47] the seminal Title VII seniority case, the court required modification of a seniority system that carried over the effects of an eliminated discriminatory practice.[48] The court declared that a seniority system which perpetuated past discrimination could not be bona fide, and therefore was not protected under section 703(h). Because the court was granting a remedy to those employed during the period of the discriminatory practice, there was no question that relief was warranted. In order to make whole these individuals, the remedy had to go beyond the mere elimination of the practice and place the affected individuals in their rightful positions within the seniority ranks.[49]

The court focused on the extent to which the company's seniority system was bona fide and, therefore, protected by section 703(h). It decided that a bona fide seniority system must be one that is free from discriminatory effects. While the company's use of seniority appeared fair on its face, the court found that the system perpetuated the effects of past discrimination and was therefore not bona fide.[50]

Although *Quarles* was a district court decision, it significantly influenced later case law.[51] Soon after *Quarles*, the Fifth Circuit, in deciding *Local 189, United Paperworkers and Papermakers v. United States*,[52] relied heavily on *Quarles*, thus giving added authority to these principles. Following *Quarles* and *Local 189*, federal courts began to extend rightful place seniority to all existing employees who were victims of past discriminatory practices.[53] The courts re-

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[47] 279 F. Supp. 505 (E.D. Va. 1968).

[48] Specifically, Philip Morris had racially segregated the departments in its tobacco processing plant and prohibited interdepartmental transfers. In 1966, the company discontinued the discriminatory practice of segregating departments and allowed interdepartmental transfers. The employees, however, were required to forfeit their earned seniority upon transfer. This practice discouraged the company's black employees who were eligible for transfer to previously all white departments since they would be the least senior employees in the new department and therefore most vulnerable to future layoffs. *Id.* at 508, 514.

[49] *Id.* at 513-20.

[50] *Id.* at 517-18.

[51] After *Quarles*, a number of cases were decided which reached the same result—the seniority system was found not to be bona fide under § 703(h) because it perpetuated the effects of past discrimination. Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); Pettway v. American Cast Iron Co., 494 F.2d 211 (5th Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).

[52] 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[53] Any discriminatory practice which deprives an individual of rightful place seniority can be a basis for an award of seniority. *See* Nance v. Union Carbide

quired that such employees be given whatever seniority was necessary to make them whole.

B. Scope of the Remedy

Once the courts decided that a seniority remedy was appropriate where the seniority system perpetuated the effects of some past discriminatory practice, they only awarded limited relief. In *Quarles* and *Local 189*, rightful place seniority meant that blacks hired before elimination of the discriminatory practice could retain their full plant or company seniority on transfer to a previously all white department. For those blacks hired after the employer eliminated the discriminatory practice, however, the courts would not order that they retain this seniority on transfer. The courts reasoned that those blacks, hired after the employer eliminated the discriminatory hiring practice and integrated all departments, held positions in a bona fide seniority system protected by section 703(h).[54] Similarly, in *United States v. Bethlehem Steel Corp.*,[55] where the discriminatory practice perpetuated by the seniority system was the exclusive assignment of blacks to the lower-paying, less desirable departments, the courts only awarded rightful place seniority to actual discriminatees. The court did not afford any remedy to whites assigned to these departments because their initial assignment was not based on race. The court limited the remedy to black employees hired before the discrimination ceased.[56]

In an effort simply to make whole the complaining employees who are actual discriminatees, the courts have limited the amount of seniority granted as well as the class which qualifies for relief. In *Bing v. Roadway Express Co.*,[57] a trucking company maintained a transfer rule that required persons to relinquish all of their company seniority on transferring from city driver positions to the more lucrative over-the-road (OTR) positions. In line with the company policy of not hiring black OTR drivers, the company had previously maintained a no-transfer rule, refusing to allow blacks already employed as city drivers to transfer to OTR positions. The court ordered that

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Corp., Consumer Prod. Div., 540 F.2d 718 (4th Cir. 1976) (women laid off because weight requirements prohibited their bidding on jobs); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971) (decisions to hire, assign to jobs, and promote made discriminatorily on the basis of race); Taylor v. Goodyear Tire & Rubber Co., 6 Fair Empl. Prac. Dec. 50 (N.D. Ala. 1972) (women employees laid off because they were not allowed to bid on certain jobs which were classified as male jobs).

[54] Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d at 995; Quarles v. Philip Morris, Inc., 270 F. Supp. at 520.

[55] 446 F.2d 652 (2d Cir. 1971).

[56] *Id.* at 655-66.

[57] 485 F.2d 441 (5th Cir. 1973).

persons affected by the no-transfer rule retain the amount of seniority that they would have accumulated had they transferred to the OTR positions upon qualifying to do so. While granting relief to all employees who suffered discrimination because of the no-transfer policy, the court limited the amount of seniority to be retained to an individual determination: the time elapsed since the date when the discriminatee would have transferred absent the discriminatory practice.[58]

These court decisions made clear that a seniority remedy was appropriate when the seniority system was not bona fide and therefore not protected by section 703(h). To determine if a seniority system was bona fide, courts asked whether the system perpetuated the injury suffered by an actual discriminatee. If so, the system was not bona fide and a seniority remedy was possible. By granting seniority remedies only to actual discriminatees, without considering the implications of a seniority system as a whole, the courts failed to reconcile the broad purposes of Title VII with the narrow scope of relief they had made available. A seniority system can frustrate the goals of Title VII by perpetuating the effects of past discrimination on protected groups because individuals who seek relief are not actual victims of discrimination.

C. Conflict between Seniority Remedy Limitations and Title VII Policy

The Supreme Court's decision in *Franks v. Bowman Transportation Co.* continued the idea that seniority is an appropriate remedy wherever it is needed to make a plaintiff whole. In *International Brotherhood of Teamsters v. United States*, the Court elaborated on *Franks* by requiring each plaintiff to show direct post-Act discrimination, not merely that the seniority system perpetuated past discrimination. Because the facts in neither case presented the issue, the Court has not faced the question of whether such remedy is also appropriate to preserve equal employment gains in layoff situations. It is in these instances that the policy of effecting equal employment clashes with the limitations in the scope of the remedy. The effect of layoffs is often to obliterate the protected group population from

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[58] *Id.* at 451. On fact patterns similar to *Bing*, other courts specifically limited the amount of seniority on transfer by granting it only back to six months after the employees requested transfer or six months after they filed an EEOC complaint. Thornton v. East Texas Motor Freight, 497 F.2d 416, 422 (6th Cir. 1974); *see also* Sagers v. Yellow Freight System, Inc., 529 F.2d 721, 734 (5th Cir. 1976); Hairston v. McLean Trucking Co., 520 F.2d 226, 234-35 (4th Cir. 1975); Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100, 1113 (N.D. Ga. 1976); Johnson v. Ryder Truck Lines, Inc., 10 Empl. Prac. Dec. 6234, 6251 (W.D. N.C. 1975).

the work force because the courts do not find the individuals deserving of a make whole remedy. Two recent courts of appeals cases illustrate this problem. These courts' treatment of seniority remedies in layoff situations provides a useful framework for the consideration of the *Franks* and *Teamsters* rationales which follow.

In *Jersey Central Power and Light Co. v. Local 327, IBEW*,[59] the court found that a plant-wide, facially neutral seniority system in the collective bargaining agreement was bona fide and protected under section 703(h).[60] Although layoffs under the seniority system disproportionately affected minorities and women, these persons had been hired after the discriminatory practice had been eliminated; therefore, the court refused to grant any seniority remedy. The court explicitly recognized that the layoffs would essentially destroy the intended result of the EEOC'S enforcement effort. It refused, however, to tamper with what it felt to be a bona fide seniority system.[61]

A similar layoff problem arose in *Watkins v. United Steelworkers*.[62] Between 1971 and 1973, Continental Can Co. laid off employees in reverse order of hiring according to the terms of the collective bargaining agreement.[63] As a result, it laid off all black employees. The district court granted relief to these employees based on the disproportionate effect of the layoffs.[64] The court of appeals reversed, holding that the long-established seniority system was bona fide despite the fact that using it to lay off employees resulted in the obliteration of the black work force. The circuit court noted that seniority remedies are improper in cases where individual employees who suffer layoffs have not themselves been the subjects of prior employment discrimination. Since here the company hired these individuals after eliminating the discriminatory practice, the court reasoned that the employer could not have discriminated against them.[65]

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[59] 508 F.2d 687 (3d Cir. 1975), *vacated and remanded sub nom.* EEOC v. Jersey Cent. Power & Light Co., 425 U.S. 987 (1976).

[60] The company had a conciliation agreement with the EEOC which required it to establish a goal with respect to the quantity of women and minority employees and a timetable for implementation. The collective bargaining agreement between the employer and the union provided for layoffs in reverse order of hiring. When Jersey Central had to cut back its work force, it sought declaratory relief on its obligations under those agreements. Since women and minorities hired as a result of the conciliation agreement with EEOC were the most recently employed, they were the most vulnerable to layoffs. This situation posed a dilemma for the company: to lay off these employees would prevent the employer's meeting its affirmative action goals, but to retain them would violate the collective bargaining agreement. *Id.* at 691.

[61] *Id.* at 706.

[62] 516 F.2d 41 (5th Cir. 1975).

[63] In that case, Continental Can Co., which had hired only two blacks before 1965, had employed fifty blacks (out of 400 hourly employees) by 1971. *Id.* at 43-44.

[64] 369 F. Supp. 1221 (E.D. La. 1974).

[65] 516 F.2d at 49.

Watkins expressly left unresolved the question whether individuals who were not part of the employer's work force before the elimination of the discriminatory practice, but were denied employment because of that discrimination, were eligible for fictional or retroactive seniority as part of a make whole remedy.[66] *Franks v. Bowman Transportation Co.*[67] raised the issue. Bowman not only refused to hire black OTR drivers, but also denied transfers to blacks from lower paying city driver positions to OTR jobs. The complaint joined two classes of plaintiffs: employees Bowman had refused to transfer to OTR positions and individuals it had refused to employ as OTR drivers. The Supreme Court eventually awarded both groups seniority relief upon a showing of some direct injury.

The district court enjoined Bowman's practice of excluding blacks from OTR positions. It did not, however, afford a remedy to individual members of the classes.[68] The court of appeals awarded back pay and retention of seniority upon transfer to those employees who the company refused to transfer.[69] The circuit court, however, refused relief to the class of employees who had applied for OTR positions, but who Bowman refused to hire.[70] When the Supreme Court considered the denial of a remedy to job applicants, it granted seniority relief to this class of plaintiffs as well. Instead of focusing on the nature of the seniority system with respect to section 703(h), the Court declared that Congress did not intend that this section bar relief that was otherwise appropriate.[71]

The *Franks* decision synthesized the case law on seniority remedies and simplified the determination of when such a remedy is appropriate. The earlier cases found a seniority remedy appropriate through a convoluted analysis of the seniority system. *Franks* focused instead on whether the plaintiff was an actual discrimination victim.[72] The Court in *Franks* did not find it necessary to decide whether the seniority system was bona fide because it did not consider section 703(h) to be a bar to the remedies appropriate under Title VII.[73] Unlike the earlier courts that found it necessary to label the seniority system not bona fide before a remedy could be granted, the Supreme Court in *Franks* simply made whole the discriminatees without focusing on the seniority system itself.

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[66] The court did not reach this issue because of the facts of the case. *Id.* at 44-45.
[67] 424 U.S. 747 (1976).
[68] *Id.* at 751.
[69] 495 F.2d 398, 422-23.
[70] *Id.* at 418.
[71] 424 U.S. at 757.
[72] *Id.* at 774.
[73] *Id.* at 758.

Finally, in *International Brotherhood of Teamsters v. United States*,[74] the Court did consider the meaning and effect of section 703(h). Adhering to the theory it began in *Franks*, the Court upheld the granting of seniority to actual discriminatees, but disapproved of a blanket remedy for protected group employees simply because the seniority system perpetuated past discrimination. T.I.M.E.-D.C. was a trucking company which maintained discriminatory practices similar to those of Bowman Transportation. The district court found that the operation of the seniority system impeded the transfer of minority employees within the company. It allowed this class of employees to bid on vacant OTR driver lines using varying amounts of carry-over seniority. The circuit court expanded the remedy to allow all minority employees to use their total company seniority to bid on these jobs, whether it was accumulated before or after the Act's effective date. It limited its award only by a "qualification date formula."[75]

The Supreme Court found that both lower courts had misconstrued section 703(h). It interpreted that section to bar granting to a class of employees seniority relief when a seniority system was bona fide.[76] In contrast to the rule enunciated in *Quarles* and *Local 189*, the Court declared that a seniority system is always bona fide under section 703(h) unless it intentionally discriminates.[77] The Court admitted that absent section 703(h) a seniority system which perpetuates past discrimination would be discriminatory.[78] It found, however, that the intent behind section 703(h) precludes using this theory to directly attack seniority systems.[79]

With *Teamsters* and *Franks*, the Court has eliminated the possibility that lower courts can consider revamping seniority systems, or their application, as a Title VII remedy. The Court recognized that rightful place seniority is an appropriate remedy under Title VII, but viewed Section 703(h) as a bar to analyzing the nature of seniority systems as a whole, absent intentional discrimination. Nor do these decisions allow recognizing the effect of seniority systems on the expressed national policy of equal employment. Courts now must focus instead on the individual plaintiff. If individuals, on a case by case

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[74] 45 U.S.L.W. 4506 (1977).

[75] *Id.* at 4507-08.

[76] *Id.* at 4513-14.

[77] *Id.* at 4514.

[78] *Id.* at 4512. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court held that a facially neutral employment practice which perpetuates past discrimination is illegal under Title VII. In that case, the practice instituted by the employer was a non-job-related test. Section 703(h) allows the use of "professionally developed ability tests" if they are not designed, intended or used to discriminate. It is somewhat anomalous that the Supreme Court has not interpreted § 703(h) to allow all facially neutral seniority systems, but not facially neutral ability tests if they perpetuate past discrimination. *Id.* at 429-32.

[79] 45 U.S.L.W. at 4514.

basis, can prove that their employer discriminated against them, and but for this discrimination they would have a higher seniority rank, courts will award retroactive seniority to make the discriminatees whole. However, courts will no longer be able to grant class seniority relief solely on a showing that the operation of the seniority system perpetuates past discrimination. While the Supreme Court has not yet considered the issue, circuit courts have recently extended the use of retroactive seniority to employees facing layoffs who the employer would have hired earlier in their present jobs but for the discriminatory practice.

D. Application to Local Government Layoffs

Several cases involving layoffs in local governments are good examples of the difficulty of applying retroactive seniority principles.[80] Such cases interpreted *Franks* to say that fictional seniority is a proper remedy for applicants not hired as well as for employees who, facing layoffs, would have been hired earlier but for the employer's discriminatory practice. Because neither *Franks* nor *Teamsters* involved a layoff situation, these local government cases have expanded the retroactive seniority theory. The major problem in applying this formulation is deciding precisely what employees facing layoffs must show to establish that, before they were employed, they were victims of hiring discrimination. Specifically, the question is what constitutes sufficient proof of actual discriminatee status, qualifying the employee for retroactive seniority under *Franks*. The local government cases demonstrate that the courts have required an individual determination of whom the employer discriminatorily refused to hire. This general approach was affirmed in *Teamsters*, but what evidence of refusal to hire will be sufficient is not entirely clear. An incumbent employee's failure to apply for the job is not a bar, but the burden of proof in such a case is likely to be a heavy one.[81]

In *Acha v. Beame*,[82] this individual determination resulted in affording summary relief to some plaintiffs and an opportunity to others to make a showing that would entitle them to relief. Plaintiffs were a class of women police officers who were laid off during New York City's fiscal crisis. Before 1972, the New York City Police Department discriminated against women. The Department had maintained separate eligibility lists for and administered different physical and mental tests to men and women. Women had been confined to jobs as police matrons. When these hiring policies were

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[80] *E.g.*, Acha v. Beame, 531 F.2d 648 (2d Cir. 1976), *disposition on remand*, 12 Empl. Prac. Dec. 5151 (2d Cir. 1976).

[81] 45 U.S.L.W. at 4516-17.

[82] 531 F.2d 648 (2d Cir. 1976).

equalized, the Department continued to discriminate by hiring police officers at a ratio of one woman to four men regardless of their place on the eligibility list. The result was that some men with lower test scores were appointed ahead of women with higher scores. In June, 1975, the Department laid off a sizeable group of police officers.[83] Even though in absolute numbers more men than women were laid off, the percentage reduction of women officers was three times that of the men.[84]

A group of women police officers filed suit, claiming that the civil service provision requiring a last hired first fired seniority system perpetuated past discriminatory hiring practices and therefore violated Title VII. Before it would grant the requested relief, the court of appeals required plaintiffs to show prior discriminatory practices that directly affected their employment opportunities,[85] thereby restricting relief to actual discriminatees who were on the job and facing layoffs.[86] The circuit court observed that the plaintiffs might meet this burden if they had filed applications, had written letters complaining about the hiring policy, or had expressed desires to become police officers but were deterred by the unlawful employment practices of the department.[87] The court's examples suggest that although the showing required is minimal, it is, as a practical matter, often difficult.

The Supreme Court's subsequent decision in *Teamsters* indicates that the Second Circuit was correct in requiring these individual determinations. The *Teamsters* decision clearly allows non-applicant plaintiffs, such as those in *Acha*, to attempt to show that they are actual discriminatees, but left it up to trial courts to decide equitably how non-applicants can meet this burden. The Second Circuit did not base its decision on the ground that the seniority system perpetuated past discrimination; it merely found that plaintiffs were actual discriminatees. The Supreme Court's decision in *Teamsters*

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[83] *Id.* at 650.

[84] *Id.*

[85] The district court dismissed the bill without leave to amend. 401 F. Supp. 817 (S.D. N.Y. 1975). The court of appeals reversed and remanded in light of its finding that women officers who could show that they were actually affected by the Department's hiring practices should be entitled to seniority retroactive to the date when they would have been hired but for the unlawful practices. 531 F.2d at 656.

[86] By the time the district court heard the remand, *Franks* had been decided and the court followed the *Franks* decision to the letter. It granted a partial summary judgment to 38 of the class members who clearly would have been hired in 1970 when 125 men were hired but for the discriminatory practice of the Department. The court also appointed a master to determine if the other class members could establish that absent discriminatory practices they would have become police officers in time to put them higher on the civil service list. 12 Empl. Prac. Dec. 5151.

[87] 531 F.2d at 656.

supports the *Acha* holding.[88] In *Acha*, the court found the plaintiffs to be victims of premature layoffs because of post-Act discrimination and therefore its remedy simply made them whole. The continuing discrimination (refusing to hire and rank women employees equally with male officers) was a present illegal act, not just a perpetuation of past discrimination.[89]

Acha demonstrates, particularly in light of *Teamsters*, that the critical determination in layoff cases is whether employees can demonstrate that they are actual discriminatees. Where they lack clear documentary evidence of actual injury, it will be difficult for them to make the required showing that the employer's hiring practices affected them directly. This was the problem that the district court attempted to resolve in *Schaefer v. Tannian.*[90] Recognizing a need to protect equal employment gains, the district court decided that seniority relief should be a possibility to preserve equal employment gains solely on a showing that layoffs result in a disproportionate number of protected group members losing their jobs. When the case was heard on appeal after *Franks*, the circuit court increased the burden on the plaintiffs by requiring individual determinations of actual discriminatee status.[91]

In *Schaefer*, Detroit Police Department policies had discriminated against women applicants. After the department hired 100 women as

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[88] In fact the Supreme Court cites *Acha* as authority for the proposition that the court should award retroactive seniority to non-applicants who can prove themselves victims of discrimination. 45 U.S.L.W. at 4517.

[89] The Supreme Court's recent decision in Evans v. United Air Lines, 45 U.S.L.W. 4566 (1977), may pose a problem for plaintiffs facing layoffs. In that case, United Air Lines maintained a practice of requiring female flight attendants to resign if they married. Evans did so, but was rehired several years later after the practice was enjoined in other court proceedings. Some time after she returned to work, Evans filed an EEOC complaint alleging that she was entitled to retroactive seniority for her prior service with United because she had been a victim of its discrimination. The Supreme Court reversed the court of appeals. It found that Evans was barred from obtaining seniority relief because she had not filed an EEOC claim within 90 days of the employer's discriminatory act.

The Court distinguishes Evans' situation from one in which there is continuing discrimination. When there is such continuing discrimination, plaintiffs may file a claim at any time. Layoffs in the wake of a discriminatory hiring practice might be viewed as the point at which plaintiffs can file a complaint. To be safe, however, protected group members should file such a complaint, to obtain retroactive seniority, before they are hired or 90 days after their tenure as employees begins.

It is not entirely clear that the Supreme Court will apply *Evans* to layoff situations. If it were to use *Evans* to bar relief to plaintiffs facing layoffs who were victims of discrimination, it would be in the untenable position of allowing relief to employees who had been on the job less than 90 days and barring that same relief to employees who had been there longer. Such a holding would require district courts to inequitably apply the theory of retroactive seniority.

[90] 394 F. Supp. 1136 (D.C. Mich. 1975), *partially vacated and remanded*, 538 F.2d 1234 (6th Cir. 1976).

[91] 538 F.2d 1234.

a result of a court order, the City of Detroit began to lay off police officers. Because the women were recently hired, all were scheduled to lose their jobs. The plaintiffs sued contending that the layoffs and demotions based on seniority alone perpetuated the effects of past discrimination and thus violated Title VII. The district court held that seniority relief should be available to those protected group members suffering from a lack of seniority because of past discrimination.[92] When *Schaefer* was appealed, the Sixth Circuit remanded[93] for a determination in light of *Franks*, and required that remedial seniority status be accorded to actual victims of discriminatory hiring practices. This case by case determination required by the court of appeals results in fewer plaintiffs receiving a remedy than received relief under the district court's approach. The circuit court's limitations on relief frustrated the district court's attempt to apply the remedial provisions of Title VII to effect its policies. Nevertheless, this approach is more likely to withstand the *Teamsters* holding than is the remedy which the district court applied.

In *Chance v. Board of Examiners*,[94] plaintiffs were a group of newly appointed supervisors in New York City schools. In a previous Title VII suit, the court had held that the examination for promotion to supervisor discriminated against black and Puerto Rican persons who, as a consequence, were under-represented in supervisorial positions. Shortly after it began to promote blacks and Puerto Ricans as ordered by the court, the school system, because of fiscal difficulties, began formulating rules for excessing[95] school supervisors whenever layoffs became necessary. Because the system planned to carry out the excessing on a last hired, first fired basis, the procedure would have a disproportionate impact on recently promoted Puerto Ricans and blacks. These newly appointed supervisors returned to court to challenge the excessing plan, contending that it perpetuated past discrimination.

In this case, the district court devised an elaborate scheme of pro-

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[92] After a lengthy discussion in which it attempted to reconcile the conflicting authority on when a seniority system can be declared not bona fide under Title VII, the court concluded that any system which perpetuates this discrimination is not bona fide and is therefore subject to remedial adjustment. 394 F. Supp. at 1142. The court, however, did not actually fashion a remedy. Because all the women were employed with federal funds, the court simply required that they retain such positions since the city did not expend its own funds for their salaries. *Id.* at 1149-50.

[93] 538 F.2d 1234.

[94] 534 F.2d 993 (2d Cir. 1976).

[95] "Excessing rules provide in brief that when a position is eliminated, the least senior person in the job classification used to fill that position shall be transferred, demoted or terminated." *Id.* at 995. Both the New York Education Law and the Board's collective bargaining agreement required this practice. *Id.* at 995-96.

portionate layoffs.[96] The court of appeals reversed the district court's remedy, calling the plan a racial quota.[97] While the plan would benefit actual discriminatees, the appellate court ruled that the district court judge had exceeded his authority by granting a remedy to protected group members in general.[98] The circuit court termed the excessing plan instituted by the system facially neutral and thus protected by section 703(h) of Title VII. Labelling the proportionate excessing relief ordered by the district court preferential treatment under section 703(j), the court of appeals indicated that if employers denied workers their rightful places in the seniority system due to their inability to pass a discriminatory test, then the courts could properly grant them preferential treatment of rightful place or fictional seniority.[99] The court required that each plaintiff prove actual discriminatee status by sustaining a narrow burden: the person took the discriminatory exam and failed to pass it.

The dissent in *Chance* argued that, to redress past discrimination, the court should afford some excessing relief to the black and Puerto Rican supervisors who had not taken the exam.[100] Like the district court opinion in *Schaefer*,[101] the significance of the *Chance* dissent is that the courts at least openly recognize the need for some remedy where layoffs disproportionately affect protected group members, particularly just as the process of equalizing that group's place in the employment system is being effectuated. This reasoning, however, represents a minority viewpoint since most courts cautiously apply their Title VII remedial powers. Even when they concede that this cautious approach destroys equal employment gains, they do not feel that seniority remedies are appropriate unless plaintiffs are actual discriminatees.[102]

After *Franks* was decided, the Second Circuit reheard *Chance*[103] and modified its previous remanding order that had allowed constructive seniority only to those who failed the discriminatory exam. The court expanded this remedy to those plaintiffs who could show that they did not take the exam because they reasonably believed it to be discriminatory and unrelated to job performance.[104]

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[96] Black and Puerto Rican supervisors could be excessed only if the percentage of those black and Puerto Rican supervisors to be excessed did not exceed the percentage of that protected group in the affected district's supervisory work force. 11 Empl. Prac. Dec. 6649, 6651 (S.D. N.Y. 1975).

[97] 534 F.2d at 998.

[98] *Id.* at 998-99.

[99] *Id.* at 999.

[100] *Id.* at 1000-01.

[101] 394 F. Supp. at 1149.

[102] International Bhd. of Teamsters v. United States, 45 U.S.L.W. at 4512; *see also* Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d at 706.

[103] 534 F.2d at 1007.

[104] The court did not specify how the plaintiffs would make this showing. *Id.*

In these local government cases, the courts have recognized that present employees who, but for a past discriminatory policy, would have been hired sooner and thus have achieved greater seniority status, are actual discriminatees deserving retroactive seniority. Additionally, the courts have agreed that it is proper for employees suffering discrimination in layoffs because of a past practice to seek relief when the layoffs are imminent.

In summary, the courts have historically extended individual Title VII remedies to include awarding seniority, where appropriate, as part of a make whole remedy. They have concurrently continued to narrow the scope of such a seniority remedy to actual discriminatees. This limitation of seniority relief can operate to frustrate the equal employment goal of Title VII, as is exemplified by cases involving extensive layoffs in local governments. What *Franks* did not define and *Teamsters* has not clarified is precisely what plaintiffs must show to establish their status as actual discriminatees so that they can qualify for such relief.

III. Eligibility for Relief: The Burden of Proof

A critical factor in granting seniority relief in layoff cases is what the courts will require of plaintiffs to establish actual discriminatee status. If employees were on the job during the period when the employer maintained a post-Act discriminatory practice, such as the no-transfer rule in *Teamsters* and *Franks*, and were directly affected by that practice, they are clearly actual discriminatees and entitled to retroactive seniority. Since the Supreme Court's decision in *Teamsters*, however, it is not assumed that these employees suffered a direct injury; they must prove their status as discriminatees. If applicants or employees subsequently hired can demonstrate they applied for a job and would have been hired earlier absent the employer's hiring discrimination, the court will grant retroactive seniority because, under *Franks*, they are actual discriminatees. Where the employees cannot show that they actually applied for a job, however, the courts have yet to delineate what showing of the effect of a discriminatory practice on the individual employee will suffice to accord actual discriminatee status.

Plaintiffs facing layoffs often find themselves in this latter category, encountering difficult problems in proving themselves subjects of the employer's previous discriminatory practices.[105] Municipal em-

[105] This is well demonstrated by *Jersey Central* where the court refused to grant relief and the employer was not allowed to take independent action to retain the women and minorities who had been added to the work force as a result of EEOC enforcement efforts. 508 F.2d at 710. The Supreme Court

ployees on civil service eligibility lists may have little trouble demonstrating that employers passed over them because of their race, sex, national origin, ethnicity or religion.[106] The vast majority of protected group members, however, will not have such a convenient form of proof. Considering the complexity of the civil service application process, many persons who know they have little chance of being hired because of discriminatory practices will not have weathered the application procedures; they may now possess no competent evidence of their frustrated application efforts. In fact, many may have never attempted to apply because rejection seemed inevitable.[107] The courts have recognized that seniority remedies are appropriate for present employees who would have attained more status but for the employer's past discriminatory practice. Requiring protected group members facing layoffs to prove that they were actual victims of employment discrimination imposes retrospectively a burden on many who are unlikely to have taken the necessary steps to secure evidence of actual discrimination against them. This is particularly a problem where the employer is a local government and the employees are protected group members hired after the elimination of the discriminatory practice. Municipal governments are the primary providers of human services. Since protected group members often have frustrating experiences as recipients of services of local government, they are unlikely to have complied with the complicated civil service application procedure and therefore cannot document any attempts to secure employment with that body. Consequently, they will have difficulty proving their discriminatee status. In a real sense, these individuals suffered from the discriminatory practice of the employer as much as those who actively applied and were denied employment. Following this argument, *Teamsters* allows application of the retroactive seniority principle to these non-applicants. The Court there recognized that denying such persons relief would "exclude from the Act's coverage the victims of the most entrenched forms of discrimination."[108] The Court did not enunciate, however, any standard for when the heavy burden on non-applicant discriminatees is met, but left such a determination to trial courts in the exercise of their equitable powers. This article proposes a method of fixing discriminatee status.

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denied *certiorari* to *Jersey Central* and vacated and remanded for consideration in light of *Franks*. 425 U.S. 987 (1976). Perhaps this indicates that the Supreme Court, without deciding whether any relief can be granted when minorities and women as protected groups are disproportionately affected by layoffs, requires some determination of actual discrimination before relief is appropriate.

[106] Acha v. Beame, 12 Empl. Prac. Dec. 5151.

[107] *See* Bem & Bem, *Does Sex-biased Job Advertising "Aid and Abet" Sex Discrimination?*, 3 J. APPLIED SOC. PSYCH. 6, 13-14 (1973).

[108] 45 U.S.L.W. at 4516-17.

IV. AN ALTERNATIVE SOLUTION

Not infrequently, protected group members hired since the extension of Title VII to local governments have not accumulated sufficient seniority and are consequently the first to be laid off when fiscal crises arise. In layoff situations, seniority remedies are critical to the preservation of Title VII gains. If equal employment is to become more than just an empty promise, courts must insure that Title VII gains are maintained by giving seniority remedies to all plaintiffs in appropriate circumstances.[109] Three types of judicial remedies would provide a means of protecting equal employment gains: 1) retained seniority on transfer or promotion; 2) retroactive seniority to date of application; and 3) presumptive retroactive seniority.

Presently the courts are willing to grant rightful place seniority to those persons who were part of the work force while the employer maintained a discriminatory practice and who were affected by that post-Act practice. This rightful place remedy takes the form of retained seniority: municipal employees who have been employed for some time by city government, but who were denied advancement or transfer because of race or sex, retain on being placed in a new job that seniority accumulated in a former position that they would have had in the new one absent the discrimination. While it is a common use of rightful place seniority in the private sector,[110] to date, the courts have not applied this remedy to municipal governments.

Retroactive seniority awarded to victims of hiring discrimination is another court-sanctioned rightful place remedy. Under the *Franks* principle, discriminatees must show that they were actually affected by a discriminatory hiring practice in the past and that but for this post-Act practice they would have accumulated seniority back to the date of the discriminatory refusal to hire.[111] The *Franks* principle also requires that the plaintiff be qualified to be hired before the

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[109] In reality, the only real avenue to equal employment is full employment. Until there are enough jobs that provide adequate incomes for all those who wish to work, no one can equitably resolve the conflicting interests. Restructuring employment in general may be the only way to achieve full employment and equal employment. When layoffs are necessary, employers and employees have a perfect opportunity to consider some alternatives to layoffs that involve rethinking concepts of employment. *See generally* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969); Craft, *Equal Opportunity and Seniority Trends and Manpower Implications*, 26 LAB. L.J. 750 (1975); Ross, *Reconciling Plant Seniority with Affirmative Action and Anti-Discrimination*, 28 NYU CONF. ON LAB. (1975); E. LYNTON, ALTERNATIVES TO LAYOFFS (1975) (based on conferences held by N.Y.C. Comm'n on Human Rights) (available from the N.Y.C. Comm'n on Human Rights).

[110] *See, e.g.*, Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980; Quarles v. Philip Morris, Inc., 279 F. Supp. 505.

[111] Schaefer v. Tannian, 538 F.2d 1234; Acha v. Beame, 12 Empl. Prac. Dec. 5151.

seniority remedy operates.[112] In layoff situations, individuals are already on the job and have therefore demonstrated their qualifications. They need only show that they were also qualified at the time the employer would have hired them absent its discriminatory practice. In many cases, civil service lists and exam records may provide municipal employees with proof sufficient to meet this burden.

It is likely, however, that a large number of protected group members facing layoffs must bear a heavy burden of proof to qualify for either retained or retroactive seniority. They were not hired until after the elimination of the discriminatory practice and therefore do not qualify for retained seniority. Many have not retained any documentary evidence, such as job applications, civil service notifications, or exam records, to demonstrate that the municipality's discriminatory hiring practice affected them. Often no such evidence exists as some of these people were discouraged from ever applying because they knew that the employer's practice would make such application fruitless.[113]

The Supreme Court in *Teamsters* approved of extending retroactive seniority to this group. A suggested method for implementing the Court's decision is to create a presumption of discriminatee status. Before the presumption will operate, the plaintiffs must establish two elements. First, unless the issue has already been litigated, the plaintiffs must demonstrate the existence of a post-1972 discriminatory practice, followed by layoffs that have a disproportionate effect upon protected group members. In all Title VII cases, this showing of a practice that has a disproportionate effect shifts the burden to the employer to prove the absence of discrimination.[114] Second, the plaintiffs must show that, during the time of the municipality's post-1972 discriminatory practice, they were old enough to have held the job; they lived within the geographical area from which the employer drew personnel; and they were, at the time, qualified to hold the job. Upon proof of these three facts, the court should grant individuals the presumptive status of actual discriminatees because plaintiffs have provided strong circumstantial evidence that they could well have suffered from the employer's discrimination.[115]

Discriminatee status is crucial to the employee's seniority remedy. Once the discriminatory practice is demonstrated, the showing of actual injury, namely loss of a job in the layoff situation because the employer's discrimination kept the plaintiffs from their rightful places in the seniority ranks, is dispositive of the issue. When the above-

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[112] Franks v. Bowman Transp. Co. 424 U.S. 747, 772 n.31.

[113] *See* International Bhd. of Teamsters v. United States, 45 U.S.L.W. at 4516-17; 3 J. APPLIED SOC. PSYCH, *supra* note 107.

[114] International Bhd. of Teamsters v. United States, 45 U.S.L.W. at 4509 & n.15.

[115] *See id.* at 4516-17.

described presumption operates, the plaintiffs are accorded the same status as the plaintiff in *Franks.*[116] The court will award these persons seniority back to a date when absent the discriminatory practice they would have been hired. In local governments, this fictional date can be no earlier than 1972 when the Act became applicable. Age and experience bear a sufficient enough relationship to hiring dates to measure the amount of seniority to be awarded to presumptive discriminatees. The courts could award seniority dates that are the same as non-protected group members with comparable age and experience hired during maintenance of the discriminatory practice, but after the Act was extended to local governments.[117]

Creating a presumption of discriminatee status would provide a remedy to a larger group of protected individuals and help effect the policy of implementing equal employment.[118] Inevitably, though, in a limited resource situation such as employment opportunity, when benefits are bestowed on one class, attendant burdens fall on other employees and on the employer as well. Competing with the interests of protected group members are the interests of the non-protected group member employees. Non-minority employees view these job security interests as vested rights. The courts' awarding seniority remedies which alter their status jeopardizes these rights by making them pay for the employer's past wrongs.

The courts, however, have not recognized seniority rights as vested and thus do not feel restrained in adjusting seniority.[119] The courts' reasoning here is two-fold. Initially, judges recognize that the remedy is necessary to restore discriminatees to their rightful places. In addition, more courts are realizing that the job security expectations of non-protected group members must be tempered by the reality that but for the discriminatory practice of the employer they would not enjoy the priority status which they now feel is being wrested from them.[120]

Inextricably linked with the interests of the employees are the interests of the unions that represent them. The unions want to maintain their positions as bargaining representatives. Unions oppose seniority remedies because they are under pressure from the rank and file membership to maintain the seniority system to preserve the job security of their membership. If unions were voluntarily to agree to an adjustment of seniority as an equal employment measure, they would face not only opposition from the rank and file, but also the

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[116] *Id.* at 4517.

[117] *Id.* at 4513; *contra,* Stern, *Retroactive Seniority as a Remedy for Title VII Violations: Relief to Newly Hired and Incumbent Employees in Light of Franks v. Bowman,* 22 LOY. L. REV. 923, 944 (1976).

[118] International Bhd. of Teamsters v. United States, 45 U.S.L.W. at 4516.

[119] Franks v. Bowman Transp. Co., 424 U.S. at 778.

[120] United States v. Bethlehem Steel Corp., 446 F.2d at 663.

possibility that their rank and file support might be diluted by the new workers who may not support the existing leadership.[121] Moreover, in considering the opposition of unions, it is important to remember that historically unions themselves have been and today continue to be barriers to equal employment.[122]

The employer also has interests that would be affected by a court-ordered seniority remedy. Besides the general complaints that such action would affect the morale of the workers, local governments may face economic burdens as a result of awarding seniority to discriminatees. Awarding seniority to these persons would not require the employer to add or to retain any more employees than it would otherwise have in its work force. The remedy will place discriminatees in their rightful places in the seniority ranks; therefore, it will distribute layoffs according to this new seniority order, preserving the jobs of some of the presumptive discriminatees and some of the majority work force. Consequently, not all the jobs of protected group members will be preserved; the employer would not have to continue employees when financial considerations make this impossible.

Out of consideration for the adverse economic impact that fictional seniority remedies could have on public employers, the courts could limit the remedy to use for layoff purposes. In this way, the courts avoid any substantial economic consequences to the employer when remedial seniority includes pay rate adjustments and increased fringe benefits because of longer service. The plaintiffs retain their actual time on the job for pay rates and other benefit seniority purposes; the fictional date applies only for layoff and recall determinations. By narrowly devising the remedy, the economic burdens for the employer are minimal.[123]

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[121] Because of the historically discriminatory posture of unions with respect to women and minorities, *see* note 122 *infra*, protected group members may be less likely to embrace the policies and support the leadership of unions they may be required to join.

[122] Since Title VII includes unions in its definition of those who are prohibited from discriminating, 42 U.S.C. § 2000e-2(c) (1970), where appropriate, courts do not have difficulty awarding a remedy against unions as well as employers. Among the practices that have been commonly maintained by unions are refusal to admit to union membership protected group members, *e.g.*, Kaplan v. Int'l Alliance of Theatrical & Stage Employees & Motion Picture Operators, 525 F.2d 1354 (9th Cir. 1975); sex and race segregated unions, *e.g.*, United States v. Chesapeake & Oh. Ry., 471 F.2d 582 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); collective bargaining agreements that prohibit employers from hiring minorities or women, *e.g.*, United States v. St. Louis-S.F. Ry., 464 F.2d 301 (8th Cir. 1972).

[123] If the discriminatory practice has been established in prior litigation, and the seniority awarded to a presumptive discriminatee is limited to use for layoff and recall purposes, the employer, because of lack of economic burdens, has no incentive to aggressively represent the interests of non-protected group employees. When this is the case, the courts should encourage and perhaps require

The final interest that might be jeopardized by awarding presumptive retroactive seniority is that of other protected group members. The remedy proposed here is not meant to preserve the job of every protected group person, but rather to insure that persons affected by an illegal practice do not suffer the continued effects of past discrimination. In some circumstances, when the court awards discriminatees rightful place remedies, the discriminatee might displace minorities or women as well as white men. Though this result might seem inequitable, the key to fairness in these situations is that protected group discriminatees deserve a make whole remedy, including rightful place seniority, irrespective of whom they displace.[124]

Although it may appear that a presumption of discriminatee status is a radical departure from the usual case for which courts order relief, such a departure is not unprecedented where the policy considerations are strong enough. After World War II, Congress required employers to grant veterans uninterrupted seniority for jobs they left to serve in the armed forces.[125] Additionally, the Supreme Court allowed employers to extend voluntarily such seniority benefits to veterans who had not been formerly employed, justified by the governmental policy of helping reintegrate veterans into the work force.[126] For a period of time, special dispensation was awarded to a defined group without any demonstration that the individual had been disadvantaged in his employment opportunities by military service.

Awarding retroactive seniority to presumptive discriminatees is analogous to such veteran's preference. For a period of time, until equal employment progress is secured by the passage of time and the natural accumulation of seniority, it is necessary to provide a degree of preference to protected group members.[127] This theory does not depart from the traditional notions of employment discrimination; part of the presumptive discriminatee's proof is that a discriminatory

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either unions or non-protected group members to become parties. This will assure the court's being on notice as to the effects of the remedy on non-protected group persons.

[124] In *Teamsters*, the Court clearly leaves this "balancing the equities" to trial courts, exercising their equitable powers. 45 U.S.L.W. at 4519.

[125] Selective Training & Service Act of 1940, 50 U.S.C. § 459 (1970).

[126] In Ford Motor Co. v. Huffman, the government policy of requiring employers to grant veterans seniority for jobs they left to serve in the armed forces was extended to allow Ford to grant such seniority even if the employee had never worked for the employer before serving in World War II. 345 U.S. 330, 331 (1953).

[127] By this reasoning, the proposed remedy appears broad enough to apply to private employers back to 1965. If they have been working toward equal employment, however, their work forces should be substantially integrated. In such cases, notions of fairness would mitigate against applying the remedy. On the other hand, if the employer has continued discriminatory practices since 1965, the courts can equitably apply the remedy. *See* International Bhd. of Teamsters v. United States, 45 U.S.L.W. at 4512.

practice was in operation. The proposition is merely that the class of persons to whom a remedy will be extended to effect the policy of integrating protected group members into the mainstream of the work force be expanded. One result of this proposal is to vindicate individual rights. In the long run, however, the broader effect is to preserve any gains made toward equal employment.

In summary, allowing a presumption of discriminatee status under these narrowly defined conditions provides individuals with seniority for layoff purposes which in turn stabilizes equal employment gains in the face of layoffs. Often collective bargaining agreements or civil service statutes prohibit an employer's adjusting seniority. Unless such a remedy is adopted, employers who want to preserve the progress they have made in integrating their work forces face either destruction of such progress or vulnerability to legal action for violation of these agreements or statutes. Implicit in this proposed remedy is the assumption that it is only an interim measure, like much of the court ordered Title VII relief, that operates until a work force is in compliance with the Act. No less than the public policy of reintegrating veterans into the work force,[128] permanently integrating minorities and women into the economic mainstream is critical to achieving the equality of opportunity in our society envisioned by the drafters of the Civil Rights Act. The courts' cautious implementation of Title VII forms the foundation for the extension of seniority as an appropriate Title VII remedy. To avoid the turnstile effect that layoffs have on newly hired women and minorities in recently integrated work forces and to realize Title VII's goal of equal employment, the courts must embrace this means of effecting the remedy approved in *Teamsters.*

The dearth of legislative history on the remedial aspects of Title VII does not make the courts' implementation of Title VII remedies easy. They are forced to divine the Congressional intent; not surprisingly, this guesswork has led to varying results. As this article has attempted to demonstrate, the courts have cautiously broadened their interpretation of Title VII remedies for actual discriminatees. Awarding retroactive seniority to presumptive discriminatees seems logically to be the next incremental expansion.

Arguably, clarification of the permissible extent of Title VII remedies should be a legislative decision. In the absence of Congressional action, the courts are in the position of interpreting broadly written legislation in narrow circumstances that were never contemplated when the Act was deliberated. The courts have defined Congressional intent with respect to Title VII for a decade without interference. In fact, the only Congressional re-examination of Title VII expanded

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[128] Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

enforcement and strongly restated the broad purposes.[129] If Congress is not content with the direction of the courts, it can respond by imposing limitations.[130]

V. CONCLUSION

When a municipal government is required to reduce its work force, persons recently hired find themselves deprived of the jobs they have only recently entered. To eliminate this turnstile effect, courts can take various approaches. The rightful place seniority concept may be applied to relieve identifiable discriminatees. Since many protected group members facing layoffs will have difficulty bearing the burden of proving themselves actual discriminatees, their rightful place in the work force will evade them.

To insure some of these individuals some remedy under Title VII, the courts should apply the concept of awarding retroactive seniority to non-applicants, presuming these persons to be actual discriminatees. The presumption would operate upon a factual showing that the plaintiff, during the maintenance of the employer's discriminatory practice, was qualified for the position, lived in the geographical area from which the employer drew its personnel, and was old enough to have held the job.

If the courts' adoption of the presumptive discriminatee theory goes beyond what Congress feels is the permissive scope of Title VII remedies, Congress is free to respond. It could clarify the obfuscated intent of section 703(h) of the Act, thereby enabling the courts to apply seniority remedies as they grant other Title VII relief.

This article urges adoption of reasonable and permissible remedies under Title VII to combat the threat layoffs pose to equal employment gains made in the public sector. It remains for the judiciary to recognize the critical role it must play not only in achieving equal employment opportunity for each individual but also in preserving the gains made under Title VII.

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[129] Equal Employment Opportunity Act of 1972, § 2(1)(a), 42 U.S.C. § 2000e (a) (1970 & Supp. V 1975).

[130] A reconsideration of Title VII might endanger its reappearance in substantially the same form. Rather than resolving the inconsistencies and ambiguities which plague the courts in the direction of strengthening the impact of the Act on equal employment, Congress might dilute its strength by imposing restrictions in favor of non-protected groups. The political strength of the male majority is still overwhelming when compared with those Title VII was written to protect.