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Superseniority for Minority Workers - Franks v. Bowman Transportation Co., Inc.

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SUPERSENIORITY FOR MINORITY WORKERS— *FRANKS V. BOWMAN TRANSPORTATION CO., INC.*

The recent economic recession has focused widespread attention on the alleged conflict between the equal employment opportunity laws and the continued use of seniority in allocating scarce employment rights and benefits. It has been argued by some commentators that the allocation of employment rights and benefits on the basis of seniority is a discriminatory practice, in that due to their past exclusion from the workforce, women and minorities have been unable to accumulate sufficient seniority to compete with incumbent employees.[1] The availability of seniority remedies under Title VII of the 1964 Civil Rights Act[2] has been the subject of considerable controversy, particularly in view of §703(h),[3] which protects the operations of bona fide seniority systems. In *Franks v. Bowman Transportation Co., Inc.*,[4] the Supreme Court had its first opportunity to examine the seniority provisions of §703(h). The Court held that §703(h) does not bar grants of fictional seniority, retroactive to the date of employment application, to minority workers who are the victims of an illegal, post-Act discriminatory refusal to hire. Additionally, the Court held this granting of application date seniority to be virtually mandated in most cases by the central statutory purposes of Title VII.

The *Bowman* decision is subject to criticism in that the constructive seniority remedy penalizes not only the wrongdoing employer, but also the perfectly innocent incumbent employees. This Note will point out, however, that the constructive remedy will be available only in a somewhat limited number of situations. It will be demonstrated that

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1. *See, e.g.*, Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1602-37 (1969); Note, *Layoffs and Title VII: The Conflict Between Seniority and Equal Employment Opportunities*, 1975 WIS. L. REV. 791. *But see* Note, *The Survival of "Last Hired, First Fired" Under Title VII and Section 1981*, 6 LOYOLA (Chi.) L.J. 386 (1975).

2. 42 U.S.C. §2000e *et seq.* (1970), *as amended*.

3. *Id.* §2000e-2(h), which provides, in relevant part:

> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

4. 424 U.S. 747 (1976).

Title VII affords no remedy to the plaintiff who fails to prove that he or she has been the victim of individual, post-Act discrimination, and that the *Bowman* decision cannot be used as a basis for abandoning seniority based layoffs. Furthermore, it will be shown that incumbent employees might intervene in Title VII actions so as to protect their own interests, insofar as possible, under the *Bowman* decision.

FACTS

Bowman Transportation Co. is an interstate trucking firm with terminals scattered throughout the South. Until September of 1970, Bowman pursued an unwritten policy of refusing to hire blacks as over-the-road (OTR) drivers.[5] Petitioner Johnny Lee originally applied for an OTR job with Bowman in January of 1970. Although he had an excellent driving record and seven years experience, he was not hired. Upon hearing that Bowman had hired a white driver shortly after his rejection, petitioner filed a complaint with the Equal Employment Opportunity Commission (EEOC). Lee was thereafter hired in September of 1970, but was discharged in March 1971.[6] He then filed another complaint with the EEOC, which authorized petitioner to commence Title VII actions with respect to both the allegedly discriminatory refusal to hire and the discharge.

The district court certified the action as a proper class action and found that Lee represented all black applicants who sought to be hired or who sought transfer to OTR positions prior to January 1, 1972.[7] In its final order, the court subdivided the class represented by Lee into two classes; one consisting of black nonemployee applicants for OTR positions, and another consisting of black employees who had applied for transfer to OTR positions. The court enjoined Bowman from perpetuat-

5. Prior to 1968, Bowman pursued a conscious policy of segregating its employees by race. Blacks were employed primarily in the Tire Shop, which contained the most menial and lowest paying jobs. (There were, however, two blacks employed as "cleanup men" in the Trailer Shop.) Despite a 1967 collective bargaining agreement in which Bowman agreed to allow transfers and to hire without regard to race, it largely continued its discriminatory policies in the years following. Franks v. Bowman Transp. Co., Inc., 495 F.2d 398, 409-11 (5th Cir. 1974), *rev'd*, 424 U.S. 747 (1976).

6. Petitioner had been discharged pursuant to a longstanding company policy requiring mandatory discharge of an employee whose fuel pump had been tampered with. Lee had been found with a "stinger" (a wooden peg used to override the engine's governor) in the fuel pump of his engine. The district court later found that Lee's discharge had not been the result of racial discrimination. *Id.* at 406-07.

7. Franks v. Bowman Transp. Co., Inc., (unreported, N.D. Ga., June 29, 1972). The district court's opinion may be found in the Petitioner's Brief for Certiorari at A45, Franks v. Bowman Transp. Co., Inc., 424 U.S. 747 (1976).

ing discriminatory practices found to exist. However, it denied certain specific relief sought by members of both classes, including seniority retroactive to the date of application for an OTR position.[8]

On appeal to the Fifth Circuit Court of Appeals, the judgment was reversed insofar as it failed to grant seniority relief to the class of employee plaintiffs.[9] However, the court affirmed the denial of seniority relief to the nonemployee plaintiffs.[10] It was on this issue that petitioners appealed to the Supreme Court.

THE COURT'S OPINION

The Supreme Court reversed the decision of the court of appeals denying seniority relief to nonemployee discriminatees. Justice Brennan, speaking for a five man majority, delivered the opinion of the Court. He labeled as "clearly erroneous" the holding of the appellate court that §703(h) protects the differences in benefits and conditions of employment which a seniority system accords to older and newer employees in the face of a discriminatory refusal to hire.[11]

Examining the language and legislative history of §703(h),[12] the Court

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8. *Id.* at A54.

9. Franks v. Bowman Transp. Co., Inc., 495 F.2d 398, 417 (5th Cir. 1974).

10. *Id.* at 417-18. The court felt that a grant of fictional seniority was barred by §703(h).

11. 424 U.S. at 757.

12. As originally enacted by the House of Representatives, Title VII contained no express reference to seniority systems. The original bill touched off a flood of national concern that it would require employers to maintain racial balance in their work forces, and would destroy the seniority rights of white employees. A three month filibuster, led by Senator Hill of Alabama, began in the Senate. In order to allay the fears that Title VII would destroy seniority rights, the Senate floor managers of the bill, Senators Clark and Case, introduced three interpretative memoranda into the record. The first of these was prepared by the Department of Justice, and asserted that Title VII would have no effect on vested seniority rights, even where blacks had been prevented from accruing seniority due to employer discrimination in previous years. The Justice Department memorandum stated, in part:

> Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race.

110 CONG. REC. 7207 (1964). The second memorandum submitted by Senators Clark and Case stated:

concluded that §703(h) is a definitional provision,[13] delineating which employment practices are illegal when the post-Act operation of a seniority system is challenged on the grounds that it perpetuates the effects of pre-Act discrimination. The Court found no indication that §703(h) was intended to modify or restrict relief otherwise appropriate once a post-Act discriminatory practice,[14] such as the discriminatory refusal to hire in the present case, is proven.[15] Thus, the Court concluded that

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> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

Id. at 7213. The third memorandum submitted by Senator Clark came in the form of a written answer to one of several questions proffered by Senator Dirksen relating to the scope and meaning of the bill. The question and answer were as follows:

> Question: Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
>
> Answer: Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.

Id. at 7217. Despite these efforts to allay the fears of the opposition, it became necessary to include explicit language on the questions of seniority and racial balance in order to end the filibuster. Thus, §703(h) was introduced on the seniority question. *See* note 3 *supra*. On the question of racial balance and reverse discrimination, the present §703(j), 42 U.S.C. §2000e-2(j) (1970), was introduced to provide that no employer should be required to grant preferential treatment to any individual in order to correct a racial imbalance in that employer's workforce. The bill, as amended by these and other sections, which was known as the Mansfield-Dirksen substitute, was then enacted into law.

13. That is, its purpose is to define what is and what is not an unlawful employment practice under certain circumstances.

14. However, this post-Act discriminatory practice should not be based upon the present application of a facially neutral, bona fide seniority system. *But see* note 61 *infra*.

15. 424 U.S. at 762. In its consideration of the legislative history, the Court evidently rejected appellant's contention that any controlling force of the Clark-Case memoranda, *supra* note 12, was rendered null by the subsequent enactment of §703(h). Brief for Petitioner, *supra* note 7, at 28. *See also* Cooper & Sobol, *supra* note 1, at 1613. This contention also is discredited by the legislative history itself, in the comments of Senator Humphrey, a strong supporter of the bill. Senator Humphrey explained that the Senate amendments to Title VII had merely been added "to remove certain ambiguities and uncertainties which existed in the House text," 110 CONG. REC. 12575 (1964), and explained that:

§703(h) is not, as a matter of law, a bar to the award of retroactive seniority in a case where such relief is otherwise appropriate.[16]

Having decided that seniority relief was not barred by §703(h), the Court then moved to the question of whether such relief is appropriate under §706(g),[17] the remedial provision of the Act. Noting the "make whole" purpose of Title VII[18] and the "rightful place" objective of the relief accorded thereunder,[19] the Court felt that adequate relief would be denied petitioners absent a grant of application date seniority.[20] It

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The basic coverage and the substantive prohibitions of the title remain unchanged . . . [N]or have there been any significant changes in the sections specifying what actions constitute unlawful employment practices.

Id. at 12721. Speaking specifically of §703(h), Senator Humphrey stated that "The change does not narrow the application of the title, but merely clarifies its present intent and effect." *Id.* at 12723.

16. 424 U.S. at 762.

17. 42 U.S.C. §2000e-5(g) provides:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

18. Quoting from the Conference Report on the 1972 amendments to §706(g), the Court stated that:

[T]he Act is intended to make the victims of unlawful employment discrimination whole and . . . the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practices be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

424 U.S. at 764, *quoting* 118 CONG. REC. 7166, 7168 (1972).

19. *Id.* at 764 n.21. *See* notes 51-55 and accompanying text *infra*.

20. *Id.* at 764-65. Justice Brennan elaborated on this point, stating that:

Without an award of seniority dating from the time at which he was discriminatorily refused employment, an individual who applies for and obtains employment as an OTR driver pursuant to the District Court's order will never obtain his rightful place in the hierarchy of seniority according to which these various

therefore held that "[T]he denial of seniority relief to victims of illegal racial discrimination in hiring is permissible 'only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.' "[21]

Two specific arguments raised in support of the lower court's denial of seniority relief then were refuted by the Court. The first was that an award of retroactive seniority might benefit some individuals who were not in fact the victims of racial discrimination. Justice Brennan, however, said that this concern would become material when such persons reapply for OTR positions pursuant to the district court's order. At this time, if Bowman is able to prove that the applicant was not actually the victim of racial discrimination, it may deny such individual seniority relief.[22] The second argument in favor of the lower court's judgment was that such relief, if granted, would interfere with the economic interests of other, perfectly innocent employees. However, the Court was of the opinion that a denial of seniority relief on this ground would, if applied generally, frustrate the "make whole" objective of Title VII.[23] Additionally, the relief which petitioners sought did not constitute "complete relief" in Justice Brennan's opinion, in that should an award of retroactive seniority be granted, petitioners still would remain subordinated in the employment hierarchy to a greater total number of employees than would have been the case absent any illegal discrimination. Thus, the retroactive seniority remedy, according to Justice Brennan, provides for a division of the burden of the employer's past discrimination among the discriminatees and incumbent employees. The Court thought this sharing of the burden of past discrimination to be presumptively necessary.[24] However, the holding of the Court, that retroactive seniority must be

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employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors.

Id. at 767-68.

21. *Id.* at 771, *quoting* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

22. 424 U.S. at 772. Evidence which the Court indicated may prove lack of discrimination against a particular applicant would include "[e]vidence of a lack of vacancies in OTR positions at the time the individual application was filed, or evidence indicating the individual's lack of qualification for the OTR positions—under nondiscriminatory standards *actually applied* by Bowman to individuals who were in fact hired. . . ." *Id.* at 773 n.32.

23. *Id.* at 774.

24. *Id.* at 777. Although the Court held that seniority relief may not be denied "on the abstract basis of adverse impact upon interests of other employees," it may be denied "on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases." *Id.* at 779 n.41.

granted notwithstanding its adverse impact upon the rights of innocent employees, is a basis of criticism of the Court's decision.

ANALYSIS AND FUTURE IMPLICATIONS

a. Criticism

In ruling that grants of retroactive, competitive-type[25] seniority to the identifiable victims of post-Act hiring discrimination are required in most cases, the Court virtually brushed aside the equitable considerations that weigh in favor of protecting the seniority rights of incumbent employees. Justice Brennan argued for the majority that a grant of application date seniority does not constitute "complete relief"[26] because discriminatees remain subordinated in the employment hierarchy to a greater total number of employees than would have been the case in the absence of discrimination.[27] While this is true in most cases where seniority relief is granted to a number of victims, it is not so when only one individual is involved. An individual plaintiff is made entirely whole by an award of application date seniority and in this case, the burden of the employer's past discrimination with regard to competitive seniority rights falls wholly upon the incumbent employees.

This can best be demonstrated by the following example. Assume that five incumbent employees are working for the defendant employer at the time the plaintiff brings his suit. These five employees are: employee *1* who has a seniority date of January 1; employee *2* with a seniority date of February 1; employee *3* with a seniority date of March 1; employee *4* with a seniority date of April 1; and employee *5* whose seniority date is May 1. Plaintiff *X* upon proving that he applied for employment on March 15, but was rejected due to his race, is given a seniority date of

25. "Competitive-type" seniority refers to the use of seniority credit to determine the rights of an employee vis-à-vis his fellow employees, in regard to such issues as job assignments, promotions, layoffs, and the like. "Benefit-type" seniority, on the other hand, refers to the use of seniority credit to determine the level of fringe benefits awarded to all workers, for example, length and time of vacations, pension rights, insurance coverage, etc.

26. 424 U.S. at 777.

27. *Id.* at 776-77. In the dissenting portion of his opinion, Justice Powell criticizes this argument for its "opacity" and its "misperception of the nature of Title VII relief." He points out that specific relief under Title VII focuses upon the individual victim of discrimination, and not upon some "class" of victims. Therefore, the question of whether or not the remedy somehow "divides the burden" of past discrimination is not relevant. Rather, the question for the district courts should be whether it is equitable to grant full competitive seniority to the individual victim (thus granting him complete relief in Justice Powell's view) despite the adverse impact upon all incumbents hired after the date of his original application. *Id.* at 790 n.8 (Powell, J., dissenting).

March 15 and is therefore inserted between employees *3* and *4* in the seniority hierarchy. Now assume that plaintiff *Y* comes along and proves that he applied for employment on February 15, but also was rejected due to his race. *Y* is therefore granted seniority retroactive to February 15, and is inserted between *2* and *3* in the seniority hierarchy. The seniority hierarchy now stands as follows: *1, 2, Y, 3, X, 4,* and *5*. Since it is possible that *3* may not have been hired had *Y* been hired at the time of his application, it can be seen that there are now four employees above plaintiff *X*, whereas in the absence of discrimination there may have been only three. It can also be seen that the burden of the employer's past discrimination is borne by *3* and *X* who are each subordinated to one additional employee, and by *4* and *5* who are each subordinated to two additional employees. However, it can also be seen that plaintiff *Y* has been made entirely whole by the award of application date seniority.

However, regardless of whether the burden of past discrimination is made to fall partially or wholly upon the incumbent employees, the question remains whether it is equitable to place that burden upon the perfectly innocent incumbents,[28] rather than upon the offending employer. Justice Burger, in his dissent, felt that a grant of retroactive seniority relief could rarely, if ever, be equitable in view of its effect upon wholly innocent employees. Rather, he argued that an award of "front pay" to the discriminatee could replace the need for competitive-type seniority relief.[29] Under this "front pay" concept, the newly hired discriminatee would be given an award of monetary damages designed to compensate him for the injury he will suffer as a consequence of his lost seniority.[30] A grant of "front pay" may be more equitable than competitive seniority relief because it provides relief to the victim of unlawful discrimination, while having no adverse impact upon the rights or ex-

28. It has been urged by some commentators that the seniority expectations of incumbent employees which have been acquired during a period of racial discrimination are somehow illegitimate in that they result from past discrimination against others. Therefore, these seniority rights should be ignored by the district courts. *See* Cooper & Sobol, *supra* note 1, at 1605-06. Justice Powell, in his dissenting opinion answers that:

> Such reasoning is badly flawed. Absent some showing of collusion, the incumbent employee was not a party to the discrimination by the employer. Acceptance of the job when offered hardly makes one an accessory to a discriminatory failure to hire someone else. Moreover, the incumbent's expectancy does not result from discrimination against others, but is based on his own efforts and satisfactory performance.

424 U.S. at 788-89 n.7 (Powell, J., dissenting).

29. 424 U.S. at 781 (Burger, C.J., dissenting).

30. Brief for the EEOC as Amicus Curiae at 27, Franks v. Bowman Transp. Co., Inc., 424 U.S. 747 (1976).

pectations of innocent parties. Additionally, it places the burden of past discrimination upon the shoulders of the guilty party, the employer.[31]

Justice Powell, also dissenting, argued that the majority's decision strips the district courts of their statutory equitable powers.[32] Justice Powell concluded that under §706(g), Congress gave the district courts the power, in fashioning a remedy, to consider the impact of that remedy upon incumbent employees, and to weigh the equities involved.[33] He pointed to the opinion of the Sixth Circuit in *Meadows v. Ford Motor Co.*,[34] which held that although retroactive seniority relief was not barred by § 703(h), the district court should consider its impact upon incumbent employees and upon the employer before granting such relief.[35] Additionally, the *Meadows* court held that representatives of the

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31. With regard to "benefit-type" seniority, however, the situation is different than that applying to "competitive-type" seniority. When retroactive benefit-type seniority is granted, the burden of past discrimination falls precisely where it should—upon the employer, the perpetrator of the discriminatory act, and not upon the innocent party. Thus, a grant of retroactive benefit-type seniority would normally be equitable to all parties involved.

32. 424 U.S. at 786 (Powell, J., dissenting).

33. *Id.* at 785-86 (Powell, J., dissenting). Justice Powell pointed to the specific language of §706(g), which provides that the court may order "such affirmative action as may be appropriate," and such "equitable relief as the court deems appropriate." *Id.* at 786. He maintained that although a grant of constructive seniority is a remedy which is available under §706(g), such a remedy is not always appropriate. *Id.* at 794 n.14.

34. 510 F.2d 939 (6th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3670 (U.S. May 24, 1976).

35. The *Meadows* court stated:

> Whatever the difficulties of determining back pay awards, the award of retroactive job seniority offers still greater problems. . . .
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> [W]here the burden of retroactive pay falls upon the party which violated the law, the burden of retroactive seniority for determination of layoff would fall directly upon other workers who have themselves had no hand in the wrongdoing found by the District Court.
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> There is, however, no prohibition to be found in the statute we construe in this case which prohibits retroactive seniority and, of course, the remedy for the wrong of discriminatory refusal to hire lies in the first instance with the District Judge. For his guidance on this issue we observe, however, that a grant of retroactive seniority would not depend solely upon a record sufficient to justify back pay. . . . The court would, in dealing with job seniority, need also to consider the interests of the workers who might be displaced as well as the interests of the employer in retaining an experienced workforce. We do not assume . . . that such reconciliation is impossible, but as is obvious, we certainly do foresee genuine difficulties.

510 F.2d at 948-49. *But see* Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3d Cir.), *vacated and remanded on other grounds*, 414 U.S. 970 (1973), in which the court ordered the granting of seniority relief from the date of the unlawful employment practice to the date of reinstatement without any discussion of the impact of §703(h) or the equitable considerations involved.

incumbent employees should be allowed to protect their interests by intervening in the action before the district court.[36]

b. Protection of Incumbents' Rights Through Intervention

As Justice Burger also stressed in his dissent, the decision of the majority did not foreclose the right of employees who might be injured by a grant of competitive seniority to petition the district court for equitable relief in their own behalf.[37] While *Bowman* has stripped the district courts of most of their equitable discretion to withhold seniority relief, they still retain the power to grant equitable relief to incumbent employees. Thus, incumbent employees hired after the discriminatee's original rejection, but before their ultimate hiring, could seek an injunction holding themselves harmless against any losses they might suffer due to their lost seniority status.[38] In a layoff situation, the employer would therefore be required to pay the full salaries of those employees who, but for their displacement in the seniority system by discriminatees, would not have been laid off. The practical effect of this proposal, for a large employer, would be that such incumbent employees would actually remain at work, since an employer generally finds work for those he must pay.[39] However, a small employer who must lay off employees often has problems meeting current monetary obligations. A court order to pay full salaries to employees who were laid off may result in additional layoffs or other cutbacks to avoid a fiscal crisis. This type of remedy is not equitable when directed against an employer who is struggling to remain solvent.

Alternatively, incumbent employees could petition the district court for an award of monetary damages or "front pay" for each employee bearing part of the burden of the employer's past discrimination. The court could also order a combination of the above two types of relief; for example, a hold harmless injunction to protect the affected incumbents in a layoff situation, and front pay as compensation for a possible future loss of promotion to a newly placed discriminatee with constructively

36. 510 F.2d at 949. *See* notes 37-40 and accompanying text *infra*.

37. 424 U.S. at 781 (Burger, C.J., dissenting).

38. *Id.* at 777 n.38 (majority opinion). This remedy was proposed by the United Auto Workers in their brief as Amicus Curiae, at 3-11, Franks v. Bowman Transp. Co., Inc., 424 U.S. 747 (1976).

39. Since the number of discriminatees who actually take advantage of an award of class-based relief is usually small, the application of this proposal would not place an undue financial burden upon the employer. For example, of the 166 rejected Negro applications placed into evidence in the *Bowman* case, only about 5-7 individuals were actually hired pursuant to the district court's order. 424 U.S. at 776 n.36.

greater seniority.[40] However, such a monetary award again would work a hardship on the employer who is struggling to keep the business going. The trial court must then balance the competing interests and tailor a remedy to fit each individual situation.

c. *Restrictions Upon the Remedy*

The decision in *Bowman*, however, is not as broad as it first might appear. It is apparent that the Court has placed several restrictions upon the circumstances in which relief may be granted. First, the Court has limited the class of persons to whom seniority relief may be granted to those who are the individual, identifiable victims of post-Act discrimination.[41] Thus, superseniority may not be granted to a plaintiff who has suffered no individual discrimination; nor may such relief be granted to one who has suffered pre-Act but not post-Act hiring discrimination.[42] This confirms the results reached in two prior Title VII cases, *Waters v. Wisconsin Steelworks*,[43] and *Watkins v. United Steelworkers of America, Local 2369*,[44] both of which involved the effects of Title VII upon seniority based layoffs. In the *Watkins* case, black workers, threatened by a seniority based layoff which would have virtually eliminated blacks from the workforce, were held to have no cause of action under Title VII because no individual member of the plaintiff class had been a victim

40. *Id.* at 777 n.38.

41. Quoting from the legislative history of Title VII, the Court indicated that the seniority rights of incumbent employees which vested prior to the effective date of the Act could not be altered, regardless of the employer's past history of discrimination. 424 U.S. at 759-60. *See also* note 12 *supra*. However, the Court held that §703(h) was not intended to "modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved. . . ." 424 U.S. at 761-62. Therefore, it can be seen that seniority relief would be available only to the victims of post-Act discrimination.

The Court indicated that seniority relief, as any other relief under Title VII, would be available only to identifiable victims of discrimination; *id.* at 771, 774, 779; and stated that if respondent could prove that particular persons were not in fact victims of racial discrimination, retroactive seniority relief could be denied these particular class members. *Id.* at 773. *See* note 22 *supra*.

42. The Second Circuit, in Acha v. Beame, 531 F.2d 648 (2d Cir. 1976), held that retroactive seniority would be available to one who has suffered pre-Title VII hiring discrimination, but has subsequently been hired some years after the effective date of the Act. *Id.* at 657 (Kaufman, J., concurring). However, in light of the Supreme Court's holding in *Bowman* that seniority rights vesting prior to the effective date of Title VII cannot be altered, *see* note 41 *supra*, relief will no longer be available to pre-Act discriminatees.

43. 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 44 U.S.L.W. 3670 (U.S. May 24, 1976).

44. 516 F.2d 41 (5th Cir. 1975).

of the employer's past discrimination.[45] In *Waters*, it was held that a black who had been refused employment but later hired in pre-Title VII years could not challenge the seniority system under which he subsequently was laid off.[46]

A second limitation of the remedy is derived from the Court's conclusion that the operation of a bona fide[47] seniority system may not be attacked as a present discriminatory practice because it perpetuates the

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45. *Id.* at 45. The court stated that:

> To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites. . . . The result which plaintiffs seek, therefore, is not that personal immediate relief available under Title VII, but rather a preferential treatment on the basis of race which Congress specifically prohibited in Section 703(j).

Id. at 46. The court went on to hold that in light of §703(h), the use of employment seniority to determine the layoffs of plaintiffs could not constitute an unlawful employment practice. *Id.* at 46-49.

46. Relying upon the legislative history of §703(h), the court concluded that a last hired, first fired seniority system is not of itself racially discriminatory, nor does it have the effect of perpetuating the effects of past discrimination in violation of Title VII. Speaking upon the latter point, the court stated:

> Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the "last hired, first fired" principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences.

502 F.2d at 1320.

47. Although the term "bona fide" is not defined in the legislative history, it was probably used to insure that a seniority system which is being used as a mere cloak for discrimination should not be given protection under the Act. Such a construction would be in accord with the definition of the term given in Black's Law Dictionary: "In or with good faith; honestly, openly, and sincerely; without deceit or fraud." BLACK'S LAW DICTIONARY 223 (4th ed. 1968).

In Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975), *rev'd sub nom.*, EEOC v. Jersey Cent. Power & Light Co., 44 U.S.L.W. 3669 (U.S. May 24, 1976), the court held that in order to impeach the "bona fides" of a seniority system, plaintiffs must present "evidence directed either to the neutrality of the system or evidence directed to ascertaining an intent to disguise discrimination." 508 F.2d at 706. It has been argued that a seniority system which had its genesis in a period of racial discrimination cannot be bona fide. This contention was specifically rejected in Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 44 U.S.L.W. 3670 (U.S. May 24, 1976). *See* note 46 and accompanying text *supra*. Employment seniority systems embodying the "last hired, first fired" principle have been found to be "bona fide" seniority systems under §703(h). *Waters, supra* at 1318; *Jersey Central, supra* at 710; Watkins v. United Steelworkers of America, 516 F.2d 41, 49 (5th Cir. 1975). *See* note 38 and accompanying text *supra*.

effects of an employer's pre-Act discrimination against minorities.[48] Thus, it may no longer be argued, as it was argued by plaintiffs in the *Watkins* case, that a seniority based layoff is a present discriminatory practice where the employer's pre-Act discrimination has prevented minorities as a class from acquiring sufficient seniority to withstand layoff.[49] It of course follows that superseniority may not be granted solely to prevent minority group members from being laid off in the above situation.[50]

The third limitation upon the remedy also would prohibit superseniority from being used as a tool to prevent minority workers from losing their jobs in a seniority based layoff. The Court has indicated that "rightful place" is the proper theory of relief to be applied under Title VII.[51] Under the "rightful place" theory, the worker is entitled to that place in the seniority system which he would have occupied absent the illegal discrimination. However, incumbent employees are not to be displaced from their present jobs by minority workers even though those minority workers, absent discrimination, would have occupied certain jobs now held by incumbents.[52] In other words, a discriminatee may bump an incumbent down one rung on the seniority ladder, but will not bump him from his present job. Thus, it can be seen that constructive seniority will not be available solely to prevent a seniority based layoff from disproportionately affecting newly hired women and minority

48. 424 U.S. at 757-62, 781 (Powell, J., concurring).

49. In *Watkins*, the district court accepted this contention, holding that the last hired, first fired layoff perpetuated the effects of the employer's past discrimination against blacks. Watkins v. United Steelworkers of America, Local 2369, 369 F.Supp. 1221, 1226 (E.D. La. 1974). The Fifth Circuit reversed on this point, *see* note 45 and accompanying text *supra*, and also held that the seniority system was protected by §703(h). Watkins v. United Steelworkers of America, Local 2369, 516 F.2d 41, 46-49 (5th Cir. 1975).

50. It also should be noted here, as discussed in notes 41-46 and accompanying text *supra*, that although a last hired, first fired layoff would not be an unlawful employment practice even in the face of *post-Act* hiring discrimination, those employees who had themselves been the identifiable victims of such post-Act hiring discrimination might be eligible for seniority relief under *Bowman*. *See* note 54 *infra*.

51. 424 U.S. at 764 n.21.

> The reports of both Houses of Congress indicated that "rightful place" was the intended objective of Title VII and the relief accorded thereunder. . . . [R]ightful place seniority, implicating an employee's *future* earnings, job security and advancement prospects, is absolutely essential to obtaining this congressionally mandated goal.

Id. The "rightful place" analysis was first developed in Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967).

52. Thus, the seniority credit awarded to discriminatees may be used in bidding for *present* and *future* job *vacancies* only. *See* Note, *supra* note 51.

workers.[53] To grant such relief would be to allow workers who themselves had suffered no discrimination[54] to attain greater than their rightful places in the seniority hierarchy, at the expense of the incumbents. This would be contrary not only to the rightful place objective, but also to the Court's decision that seniority relief should be available only to the individual victims of unlawful discrimination.[55]

Finally, the Court in *Bowman* held that the rightful place objective requires the granting of seniority relief retroactive only to the discriminatee's date of employment application.[56] Seniority may not be made retroactive to any date earlier than that of the employment application because prior to this date, the employer has not discriminated against the individual plaintiff.[57] While it may be true that an individual victim did not file his application at an earlier date because he knew that members of his race were not hired by defendant employer, the seniority rights of incumbent employees should not be altered in the absence of actual, individual discrimination against the plaintiff at this earlier date.

The Ninth Circuit recognized this limitation upon *Bowman* in *Jones v. Pacific Intermountain Express, Inc.*[58] In that case, minority job applicants sought seniority retroactive to the date they first *thought* of apply-

53. Several lower courts have held that a reverse seniority layoff constitutes an unlawful employment practice under Title VII when such a layoff affects minority group employees in disproportionate numbers. *See, e.g.*, Chance v. Board of Examiners, 10 FEP Cases 1023 (S.D.N.Y. 1975), *rev'd*, 534 F.2d 993 (2d Cir. 1976) (initially decided under 42 U.S.C. §1981; reversed on Title VII grounds); Schaefer v. Tannian, 394 F.Supp. 1136 (E.D. Mich. 1975). Although *Chance* was reversed on appeal, *Schaefer* was not appealed. However, in light of the holding of *Bowman*, the *Schaefer* decision and decisions in similar cases can no longer stand.

54. Of course, if the employee facing layoff were himself a victim of post-Act hiring discrimination, he would be eligible for seniority relief under the *Bowman* decision if his complaint regarding the illegal refusal to hire had been brought before the EEOC within 180 days of the alleged hiring discrimination. *See* Title VII, §706(e), 42 U.S.C. §2000e-5(e) (Supp. IV, 1974). Such relief would be based upon the fact that the employee is entitled under *Bowman* to be made whole from the effects of the *hiring discrimination* rather than upon any discriminatory impact of the seniority system.

55. *See* notes 41-46 and accompanying text *supra*.

56. 424 U.S. at 767.

57. Prior to *Bowman*, in Acha v. Beame, 531 F.2d 648 (2d Cir. 1976), the court implied that a member of the plaintiff class (female police officers threatened by a last hired, first fired layoff) would be entitled to constructive seniority dating from the time at which she first complained of defendant's discriminatory hiring policy, or expressed a desire to join the police department, but was deterred from doing so by defendant's policy barring women. *Id.* at 656. However, in light of *Bowman*, retroactive seniority can no longer be made to predate the actual date of application.

58. 536 F.2d 817 (9th Cir. 1976).

ing for the positions but failed to do so. The Ninth Circuit held, however, that any relief to which the plaintiffs might be entitled under *Bowman* "would date back only to the time the plaintiffs submitted their applications for employment to employer defendants."[59]

CONCLUSION

Although it is desirable to make persons whole, insofar as possible, from the effects of illegal racial discrimination, the Supreme Court in *Bowman* went too far when it declared that competitive-type seniority must be granted in virtually every case. Unlike benefit-type seniority, which should in all cases be granted,[60] a grant of competitive seniority interferes with the rights of innocent employees. The burden of "making whole" for the discriminatory act should fall entirely upon the wrongdoer, and not upon innocent parties. Thus, the interests of doing equity to all parties concerned would be better served by a grant of "front pay," rather than competitive seniority, to the discriminatee.

The Court's decision in *Bowman* is not as broad as might first appear, however. It does not give the district courts license to use superseniority as a cure for all the supposed evils and inequities inherent in a seniority system. The circumstances in which a grant of constructive seniority under *Bowman* would be available are somewhat limited. First, the remedy would be available only to the individual victims of post-Act discrimination. Second, constructive seniority may not be awarded to minority group members solely to prevent their layoff in a last hired, first fired situation. Third, the discriminatee is entitled only to be inserted in his "rightful place" in the seniority system: that place in the employment hierarchy which he would have occupied absent unlawful discrimination against him. Finally, the constructive seniority granted cannot predate the application date of the discriminatee.

Under the *Bowman* decision, incumbent employees will be forced to intervene in Title VII actions if they wish to protect their own rights.

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59. *Id.* at 819.

60. *See* note 31 *supra*.

Considering the impact of the constructive seniority remedy upon innocent incumbents, courts should not engage in unwarranted extentions of the *Bowman* decision.[61]

Robert Glick

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61. It can be argued that the *Bowman* decision has been extended by a recent Seventh Circuit case. In *Evans v. United Airlines, Inc.*, 534 F.2d 1247 (7th Cir.), *cert. granted*, 45 U.S.L.W. 3329 (U.S. Oct. 29, 1976), plaintiff, a stewardess, had been discriminatorily discharged in 1968. She was rehired as a new employee with a new seniority date in 1972, and in 1973, more than five years after the wrongful discharge, she filed a complaint with the EEOC. Plaintiff admitted that her claim of wrongful discharge was barred by the statute of limitations. However, she alleged that the operation of United's admittedly facially neutral seniority system perpetuated the effects of that discharge and was therefore a present discriminatory practice. The court agreed; holding that under *Bowman*, the present application of a seniority plan which perpetuates the effects of a prior wrongful discharge is a discriminatory practice. *Id.* at 1250-51. However, in *Bowman*, the Supreme Court stressed that the underlying wrong affecting plaintiffs was not the operation of a discriminatory seniority system, but was rather a discriminatory refusal to hire. 96 S.Ct. at 1261. The question of whether an unlawful employment practice may be founded upon the continuing application of an admittedly facially neutral seniority system was not at issue in *Bowman*. *Id.* It may be argued, therefore, that *Evans* extended the rationale of *Bowman* to hold that even the operation of a facially neutral seniority system may be found to be a discriminatory practice. The *Evans* decision is contrary to the specific language of §703(h). The error of this decision is that the plaintiff's claim for seniority relief had lapsed with the passage of the statute of limitations, barring her claim for the wrongful discharge. The subsequent application of the seniority system, applying equally to plaintiff and all other new employees, should have been held to be protected under the explicit language of §703(h).