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# Seniority Systems: California Brewers Association v. Bryant

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ard supplemented by a "conscientiously held" standard or simply a "conscientiously held" standard, its introduction of this good faith element by either means is not inconsistent with the purpose of Title VII. As noted earlier, that purpose is the elimination of employment discrimination.<sup>62</sup> When there is no unlawful discrimination in fact, however, effectuation of the act's purpose is not aided by allowing the protection of section 704(a) to an employee who does not sincerely believe that the policy or practice in question is discriminatory even if a reasonable person in the employee's position would so believe. To provide protection through section 704 in these circumstances would be to allow the Act's remedial purpose to be subverted for personal motives and benefit. No end consonant with Title VII's purpose is served by allowing one who knows that the employer's practice is lawful to use the protection of section 704(a) as a sword against compliance with the employer's legitimate demands or as a means of disrupting the employer's place of business.

Despite this value as a prophylactic measure, however, the use of the subjective approach, whether alone or in conjunction with the reasonable belief approach, has some drawbacks. Its primary disadvantage is that it requires a court to determine the employee's intent in engaging in the opposition. In addition, the subjective approach can lead to a situation where identical acts may be protected under section 704(a) in one case but unprotected in another. The primary benefit of the objective approach, on the other hand, is that it avoids this necessity of probing the employee's state of mind. Since the subjective test is used successfully in other contexts,<sup>63</sup> however, these practical problems do not seem of sufficient magnitude to outweigh its benefits. Such an approach extends section 704 protection to the employee who sincerely but unreasonably believes his employer is unlawfully discriminating, minimizes misuse of Title VII for illicit personal benefit, and reduces the possibility of successful use of the Act for unfounded disruption of the employer's business. Because the subjective approach offers these advantages, the First Circuit's approach in *Monteiro* is defensible and desirable.

### C. Seniority Systems: California Brewers Association v. Bryant\*

Title VII of the Civil Rights Act of 1964<sup>1</sup> prohibits practices, procedures, or tests that operate to "freeze" the status quo of prior discriminatory employment practices.<sup>2</sup> Seniority systems, however, are exempted from this prohibition by section 703(h). This exemption permits an employer to use different standards of compensation and other employment benefits where such differences are based on a seniority or merit system.<sup>3</sup> The exemption is not available where such differences arise out of the employer's intent to discriminate on ac-

<sup>62</sup> See text at note 55 *supra*.

<sup>63</sup> See, e.g., *St. Amant v. Thompson*, 390 U.S. 727 (1968) (defamation); *St. Joseph Hosp. v. Corbetta Constr. Co.*, 21 Ill. App. 3d 925, 316 N.E.2d 51 (1975) (fraud).

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<sup>1</sup> Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1976).

<sup>2</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

<sup>3</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1976).

count of race.<sup>4</sup> In *International Brotherhood of Teamsters v. United States*,<sup>5</sup> the Supreme Court of the United States interpreted this exception as intended to "make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII . . . even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes."<sup>6</sup> Title VII does not define "seniority system" nor is this term defined by legislative history.<sup>7</sup> In the *Survey* year decision of *California Brewers Association v. Bryant*,<sup>8</sup> however, the Supreme Court for the first time undertook to define "seniority system" as used in section 703(h).

In *Bryant* the respondent challenged the purported "seniority system" contained in the multi-employer collective bargaining agreement between the California Brewers Association and the Teamsters.<sup>9</sup> This system operated by defining permanent, temporary, and new employees and by articulating the rights of each employee class regarding hiring and lay-offs.<sup>10</sup> Respondent claimed, *inter alia*, that the agreement's requirement that an employee work forty-five weeks in a calendar year in order to acquire permanent status barred him and the members of his putative class from achieving, or from having a reasonable opportunity to achieve, permanent status.<sup>11</sup> Therefore, respondent argued, the forty-five-week rule perpetuated historical racial discrimination.<sup>12</sup>

The District Court for the Northern District of California dismissed the complaint for failing to state a claim on which relief could be granted.<sup>13</sup> Although no opinion accompanied this order the court's decision probably rested on its conclusion that the rule was part of a bona fide seniority system. The Ninth Circuit Court of Appeals reversed this decision,<sup>14</sup> ruling that the forty-five-week provision was not a seniority system nor was it a part of one within the meaning of Title VII.<sup>15</sup> The court of appeals reasoned that to qualify as a seniority system, the forty-five-week rule would have to provide for an in-

<sup>4</sup> *Id.*

<sup>5</sup> 431 U.S. 324 (1977).

<sup>6</sup> *Id.* at 352.

<sup>7</sup> See 110 CONG. REC. 1518, 5423, 7207, 7213, 7217, 12723 (1964).

<sup>8</sup> 444 U.S. 598 (1980).

<sup>9</sup> *Id.* at 600-01.

<sup>10</sup> *Id.* at 602-03. Respondent had been employed intermittently by one of the petitioners, the Falstaff Brewing Corporation, since 1968. Because he had not worked more than 45 weeks in any one calendar year, he had never qualified as a permanent employee under the terms of the multi-employer collective bargaining agreement between the California Brewers Association (the petitioner brewing companies) and the Teamsters Brewery and Soft Drink Workers Joint Board of California (the defendant-employee unions). *Id.* at 601-02.

<sup>11</sup> *Id.* at 602.

<sup>12</sup> *Id.* at 601-02. Respondent brought this suit as a class action on behalf of himself and other Negroes similarly situated against petitioner and several unions. He filed a complaint in the United States District Court for the Northern District of California alleging that defendants had discriminated against the putative class in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e and of 42 U.S.C. § 1981. *Id.* at 601. The complaint also asserted under 29 U.S.C. §§ 159 & 185 that the defendant unions had breached their duty by, among other things, the negotiation of unreasonable privileges for some employees and not others. *Id.* at 601 n.3. The Supreme Court, however, considered only the Title VII claim. *Id.*

<sup>13</sup> This decision is unreported. See 444 U.S. at 601.

<sup>14</sup> *Bryant v. California Brewers Ass'n*, 585 F.2d 421 (9th Cir. 1978).

<sup>15</sup> *Id.* at 427.

crease in employment rights as the duration of employment increased.<sup>16</sup> The rule, however, did not achieve this end since employees would be terminated shortly before completing a forty-five-week period of employment. They subsequently would be rehired and the forty-five-week period would begin to run anew. Consequently, employees could work for great lengths of time while never satisfying the forty-five-week requirement. Thus the rule effectively barred many long term employees from attaining permanent work status.<sup>17</sup> The court, therefore, characterized the rule as "simply a classification device to determine who enters the permanent employee seniority line" and it concluded that "this function does not make the rule part of a seniority system."<sup>18</sup> It remanded the case to the district court for trial to determine whether the forty-five-week standard had a discriminatory impact on blacks.

The Supreme Court granted certiorari<sup>19</sup> to determine the scope of the seniority system exception under Title VII of the Civil Rights Act of 1964. In deciding whether the forty-five-week provision qualified as a seniority system, the Court found it necessary to define the term "seniority system" within the meaning of Title VII. To do so, it relied upon "commonly accepted notions about 'seniority' in industrial relations"<sup>20</sup> and considered such concepts in light of Title VII and national labor policy.<sup>21</sup> It noted first that "seniority" connotes length of employment and that a "seniority system" conditions improved employment rights and benefits upon increased lengths of employment.<sup>22</sup> Thus, the Court agreed with the court of appeals that the essential element of a seniority system is the enhancement of employment rights as a function of an increase in employment duration.

Unlike the court of appeals, however, the Supreme Court held that seniority systems could encompass provisions that would not in themselves provide for increased benefits based on the length of employment,<sup>23</sup> provided such rules were necessary to make the system as a whole function.<sup>24</sup> The Court characterized the forty-five-week requirement as such a rule.

The Court supported its rather flexible delineation of Title VII's use of the term "seniority system" with a cursory examination of the nation's labor policy. It observed that the structure of a particular seniority system is the product of the collective bargaining process in a particular business or industry.<sup>25</sup> As a result, it must be expected that the characteristics of seniority systems will vary depending on the parties to the agreement.<sup>26</sup> The Court con-

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<sup>16</sup> *Id.* at 426.

<sup>17</sup> *Id.* at 426-27.

<sup>18</sup> *Id.* at 427 n.11.

<sup>19</sup> 442 U.S. 916 (1979).

<sup>20</sup> 444 U.S. at 605.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 605-06.

<sup>23</sup> *Id.* at 606-07.

<sup>24</sup> *Id.* at 607-08. For example, such rules could define the types of employment conditions that would be affected by seniority and set out the circumstances under which seniority would be forfeited.

<sup>25</sup> *Id.* at 608.

<sup>26</sup> *Id.*

cluded that section 703(h) is not intended to prefer any particular type of seniority system over another.<sup>27</sup>

The Court tempered its malleable interpretation of a section 703(h) seniority system by stating that employment rules that "depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system" cannot qualify for the section 703(h) exception merely by being labeled as part of a seniority system.<sup>28</sup> It implied that section 703(h) only applies to those employment rules that clearly are based on length of employment and to those rules that, though not directly time-related, are necessary to make the seniority system work.<sup>29</sup> Thus, in the Court's view, a threshold requirement for entering a seniority tract that has no direct or indirect relation to durational considerations cannot qualify for a section 703(h) exemption.<sup>30</sup>

Applying these principles to the facts of this case, the Court found that the agreement created two parallel seniority tracts, one for temporary employees and another for permanent employees.<sup>31</sup> The Court characterized the forty-five-week provision as defining the threshold qualification required to enter the permanent employee seniority track.<sup>32</sup> Because this provision focused on length of employment, the Court found it to be a component of a seniority system within the meaning of section 703(h).<sup>33</sup> Accordingly, the Court reversed the court of appeals and held that the forty-five-week rule was a part of a section 703(h) seniority system.<sup>34</sup> It noted, however, that on remand to the district court, respondent still could invalidate the rule if it could show either that the seniority system established by the agreement was not "bona fide," or that the differences in employment conditions attributable to the agreement were the product of international racial discrimination within the meaning of section 703(h).<sup>35</sup>

Justice Marshall, joined by Justices Brennan and Blackmun, dissented, finding the majority's opinion inconsistent with the purposes and intent of section 703(h).<sup>36</sup> He agreed with the Court that a seniority system is " 'a scheme that, alone or in tandem with non-'seniority' criteria allots to employees ever imposing employment rights and benefits as their relative lengths of pertinent employment increase.' "<sup>37</sup> He maintained, however, that the forty-five-week rule was not a bona fide element of a permissible seniority system because it operated to prevent certain employees from acquiring improved rights and

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 608-09. The Court mentioned educational pre-requisites, physical or aptitude tests, and "subjective standards" as examples of threshold requirements that bear no direct or indirect relation to the duration of employment. *Id.* at 609-10.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 609.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 610-11.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* Justice Powell and Stevens took no part in the consideration or decision of this case.

<sup>37</sup> *Id.* at 614 (quoting majority opinion at 605-06).

benefits as their length of service increased.<sup>38</sup> Justice Marshall noted that because the industry was seasonal and because a temporary employee easily could be replaced by a permanent employee or otherwise laid-off, the forty-five-week rule did not focus on time, but on circumstances beyond the employee's control.<sup>39</sup> Since the forty-five-week provision functioned in this manner, Justice Marshall found it at odds with common notions of seniority and, therefore, not a part of a section 703(h) seniority system.<sup>40</sup>

Justice Marshall's opinion reflects a concern that the forty-five-week rule easily could be abused by employers desiring to keep minorities out of permanent positions. Although it reached an opposite result, the Court, to some extent shared this concern. The majority observed that freedom of collective bargaining must not be allowed to sweep within the ambit of section 703(h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system simply because those rules are dubbed "seniority" provisions or have some nexus to an arrangement that concededly operates on the basis of seniority.<sup>41</sup> Competing with this concern, however, was the Court's determination to leave unfettered the freedom of employers and unions to design differing seniority systems through collective bargaining. The Court correctly reconciled the need for this freedom with the dangers of abusing the 703(h) exemption by a loosely defining seniority system. In doing so, it implicitly recognized that checks on such abuse are not to be imposed by limiting definitions but are to be found instead in section 703(h)'s prescription of "seniority systems" which are not "bona fide" and which are the product of racial discrimination. In sum, the decision provided employers and unions with general guidelines for determining what may and may not be included in a section 703(h) seniority system, while maintaining freedom of collective bargaining to the fullest extent possible.

The majority's opinion leaves open two avenues of attack on provisions that allegedly are not within the section 703(h) exemption. First, it may be argued that the rule or provision does not conform to commonly accepted notions of seniority because it does not focus on the enhancement of employee privileges conditioned by the length of employment because it gives effect to subjective qualifications.<sup>42</sup> It was this argument that was advanced by respondent in *Bryant*, but it failed since the Court found that the challenged provisions did condition employment benefits on the length of employment. The Court expressly noted, however, that a second line of argument remained available to respondent on remand.<sup>43</sup> Thus, if a rule is found to constitute a seniority provision, it may be asserted that the rule does not comply with the section 703(h) requirement that the seniority system be bona fide and without racial intent to qualify for the exemption.

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<sup>38</sup> *Id.* at 615.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 615-16.

<sup>41</sup> *Id.* at 609.

<sup>42</sup> The majority and the dissenters agree that educational and physical standards or tests are "subjective" criteria while the length of employment is "objective." *Id.* at 609, 618.

<sup>43</sup> *Id.* at 610-11.

Consequently, Justice Marshall's concern that the forty-five-week rule was an abuse of the exemption might be alleviated by respondent's showing that even though the rule is a component of a seniority system, it nevertheless is employed to perpetuate intentional racial discrimination. Such a showing would preclude the characterization of the seniority system as "bona fide" within the meaning of section 703(h) and bar the availability of the exemption. Because respondent in *Bryant* had not advanced this argument, there was no finding before the Court as to whether the termination of temporary employees shortly before the completion of a forty-five-week period was the product of intentional racial discrimination or the result of a seasonal demand for labor in the California brewing industry.

The adequacy of the Court's delineation of the scope of the seniority system exemption can be determined only by more litigation. Through the interpretation and application of the holding in *Bryant*, it will become evident whether the Court's safeguards are sufficient to prevent Justice Marshall's concerns from becoming a reality.

### III. DISCRIMINATION IN SKILLED AND UNSKILLED POSITIONS

#### A. *Qualifications for Unskilled Labor: Holder v. Old Ben Coal Co.*\*

In a Title VII<sup>1</sup> action, the plaintiff must carry the initial burden of establishing a prima facie case of sex discrimination. This may be done, in part, by showing that the plaintiff was qualified for the position sought.<sup>2</sup> It is clear that when an employer seeks applicants for a skilled position for which there are minimum objective qualifications, the plaintiff must show that she has met these standards. When the employer, however, seeks applicants for an unskilled position for which there are no articulated requirements, the question arises whether a plaintiff must show he is qualified for an unskilled job in order to establish a prima facie case of discrimination in accordance with the standard of proof enunciated by the Supreme Court in *McDonnell Douglas Corp. v. Green*.<sup>3</sup> The standards laid down by the Court in *McDonnell Douglas* places the initial burden of establishing a prima facie case of discrimination with the complainant.<sup>4</sup> Once this step has been completed the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions.<sup>5</sup> Lastly, once the defendant-employer has convinced the court of the legitimacy of its

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<sup>1</sup> 42 U.S.C. § 2000e et. seq. (1976).

<sup>2</sup> In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), the Supreme Court described the initial burden of proof which a plaintiff must meet in an employment discrimination case. The complainant in a Title VII suit must carry the initial burden of proof by establishing a prima facie case of racial discrimination. This may be done by showing (i) that the plaintiff belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected for the job; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

<sup>3</sup> 411 U.S. 792, 802 (1973).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*