DOCUMENT RESUME

ED 136 408 EA 009 328

TITLE	Seniority and Layoffs: A Review of Recent Court Decisions and their Possible Impact on the New York City Public School System. Working Note No. 1 in a Series: Assuring Equal Employment Opportunities in the City School District of New York.
INSTITUTION	New York City Board of Education, Brooklyn, N.Y.
PUB DATE	Nov 75
NOTE	128p.; Prepared by the Office of the Deputy Chancellor, Educational Policy Development Unit
EDRS PRICE	MF-$0.83 HC-$7.35 Plus Postage.
DESCRIPTORS	Boards of Education; Court Cases; *Court Litigation; Elementary Secondary Education; *Equal Opportunities (Jobs); *Federal Legislation; Industry; *Job Layoff; *Racial Discrimination; Sex Discrimination; Tables (Data); *Teachers; Urban Education
IDENTIFIERS	*Civil Rights Act 1964 Title VII; New York (New York)

ABSTRACT

As a result of the Civil Rights Act of 1964 and numerous federal district court rulings, during the last 10 years many employers have actively recruited and hired individuals from the groups that previously suffered the most from job discrimination. A conflict is now arising between the need for equal job opportunities and seniority-based job layoffs. The "last in first out" (LIFO) layoff procedure is facing legal tests. In the private sector, the courts are willing to intrude on LIFO systems only if there is clear and convincing evidence that recently hired minority group employees have sustained personal injury as a result of their employer's prior discrimination. The situation is less clear in the public sector. This document presents an overview of the conflict between equal opportunities and seniority-based layoffs, outlines provisions of Title VII of the 1964 Civil Rights Act, and reviews court cases in the public and private sectors. Numerous tables are included, and an appendix presents abstracts of the cases referred to in the report. (Author/IRT)

SENIORITY AND LAYOFFS: A REVIEW OF RECENT COURT DECISIONS AND THEIR POSSIBLE IMPACT ON THE NEW YORK CITY PUBLIC SCHOOL SYSTEM

WORKING NOTE NO. 1 IN A SERIES: ASSURING EQUAL EMPLOYMENT OPPORTUNITIES IN THE CITY SCHOOL DISTRICT OF NEW YORK

NOVEMBER 1975

BOARD OF EDUCATION OF THE CITY OF NEW YORK

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PREFACE

The following analysis of the conflict between commonly accepted notions of equal employment opportunity and the state mandated requirement that layoffs proceed strictly on the basis of seniority, is meant to inform the Board of Education, school system personnel, and the beleaguered taxpayers of New York City about the issues underlying the present debate regarding seniority based layoff plans.

After we undertook the preparation of a memorandum on the layoff problem, it soon became apparent that only a major research effort would suffice to cover the topic. Much of the legal research and expertise necessary for the preparation of this report was supplied by Beth Swartz, a third year Fordham Law student who worked in my office this past summer as an intern. Douglas Libby, a staff member in the Board's Law Office, also provided research support. However, before I was rescued from my amateurish attempt at legal research by Beth and Doug (both of whom joined the Board after this effort commenced), I received much advice and guidance, reprints of law review articles, and most importantly, instructions on how to "look up a case" from Ida Klaus, until recently the Executive Director of the Office of Labor Relations and Collective Bargaining. Her insights and observations were always useful and kept me from getting bogged down in a morass of detail.

Richard Guttenberg and Catherine Lyon, members of my personal staff, provided argument laden memorandums and thus stimulated many heated, but always illuminating, conversations; and, in Richard's case, considerable editorial assistance was also provided. They join Beth and me as junior authors in this enterprise. However, as senior author, I accept fully the responsibility for the sentiments and ideas expressed in this report. I also want to protect the reputation of those good and honorable people whose advice I solicited but subsequently chose to ignore.

BERNARD R. GIFFORD
Deputy Chancellor

* * * * * *

This report is the first in a series of working notes that the Educational Policy Development Unit in the Office of the Deputy Chancellor will be issuing on the subject of assuring equal employment opportunity in the New York City public schools.

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I. AN OVERVIEW OF THE CONFLICT BETWEEN EQUAL EMPLOYMENT OPPORTUNITY AND SENIORITY SYSTEM LAYOFFS

Title VII of the 1964 Civil Rights Act

The United States Congress promulgated Title VII of the 1964 Civil Rights Act in order to equalize employment opportunities for all citizens. In part, Title VII specifies that:

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

As a result of this statute, and numerous federal district court rulings on employee selection procedures, "affirmative action plans," and discriminatory seniority rules, some progress has been made in reducing employment discrimination throughout the country. During the past ten years, many employers have actively recruited and hired individuals from those groups -- most notably blacks, Hispanics, Orientals, and women -- which previously have suffered the most from job discrimination.

Staff Integration in the New York City Public Schools

The New York City Board of Education and the thirty-two community school boards have not been immune to the forces set in motion by the 1964 Civil Rights Act. Due to a variety of social and historical factors, including recent court decisions, there have been modest gains in the number of minority teachers and administrators employed by the school system during the past five years. Evidence of these gains is tabulated in the following table.

Table I

ETHNIC CENSUS OF TEACHING STAFF
TOTAL - NEW YORK CITY
INCREASE/DECREASE FROM 1970-1971 TO 1973-1974*

	1970-1971	1973-1974	# CHANGE	% CHANGE
Black	4,601	5,623	+1,022	+22.2
Spanish Surnamed American	803	1,529	+ 726	+90.4
Oriental	211	325	+ 114	+54.0
Total Minority	5,615	7,477	+1,862	+33.2
Other	54,060	53,575	- 485	- 0.9
TOTAL	59,675	61,052	1,377	+ 2.3

In 1970-1971, the first year in which accurate ethnic census data were collected, 5,615 of New York City's public school teachers were from

*Source: Basic Educational Data System, State Education Department, State of New York. The 1973-1974 figures have been adjusted upwards to 100% totals based on a 92% sample of the teaching staff.

minority groups (black, Hispanic, and Oriental). By 1973-1974,* this figure had increased by 33.2 percent to a total of 7,477. Seen from a different angle, according to the data presented in Table II, minority group teachers constituted 9.4 percent of the total teaching staff in 1970-1971 and 12.9 percent in 1973-1974, an increase of 3.5 percent.**

Much of the recent improvement in the staff integration of the school system can be attributed to a reform in employment practices resulting from passage of the Decentralization Law of 1969. Under certain circumstances, community school districts are now authorized to hire 1) teachers out of rank order from the eligibility list, and 2) non-licensed (i.e., not certified by the Board of Examiners) pedagogical personnel who have passed the National Teachers Examination (NTE).*** As Table III demonstrates, the community school districts have exercised their NTE option with increasing vigor:

---

*Data related to the integration of the pedagogical staff during the 1974-1975 school year are not reliable. The collection of such data depends on the cooperation of school principals. On October 22, 1974, the Council of Supervisors and Administrators' Executive Board passed a resolution that CSA members "shall not complete any survey forms requesting information regarding ethnicity, race, sex, religion, or national origin..." The lack of cooperation of CSA members has seriously handicapped the collection of data on the integration of pedagogical staff.

**Tables VII, VIII, and IX contain additional data related to the integration of the pedagogical staff of New York City's high schools, special schools, and community school districts.

***Title 2590j(5) of the Decentralization Law specifies that out of rank order teachers and NTE qualified personnel may only be hired by those schools scoring in the lower 45 percent on a comprehensive reading examination administered annually to all pupils under the jurisdiction of community districts.

Table II

ETHNIC CENSUS OF TEACHING STAFF
TOTAL - NEW YORK CITY
1970-1971 and 1973-1974

BOROUGHS	BLACK		SPAN. SURNAMED AMERICAN		ORIENTAL		TOTAL MINORITY		OTHER		TOTAL NUMBER
	No.	%	No.	%	No.	%	No.	%	No.	%	
Manhattan											
1970-1971	1,348	12.7	268	2.5	134	1.3	1,516	16.5	8,860	83.5	10,610
1973-1974	1,460	14.4	475	4.7	192	1.9	2,127	21.0	8,012	79.0	10,139
Bronx											
1970-1971	946	7.6	304	2.4	18	0.1	1,268	10.2	11,176	89.8	12,444
1973-1974	1,300	10.0	558	4.3	35	0.3	1,893	14.5	11,126	85.5	13,018
Brooklyn											
1970-1971	1,519	6.9	169	0.8	32	0.1	1,720	7.8	20,462	92.2	22,182
1973-1974	1,979	9.0	385	1.8	43	0.2	2,407	11.0	19,566	89.0	21,974
Queens											
1970-1971	751	6.2	55	0.5	24	0.2	830	6.9	11,216	93.1	12,046
1973-1974	829	6.0	96	0.7	50	0.4	975	7.5	11,974	92.5	12,949
Richmond											
1970-1971	37	1.6	7	0.3	3	0.1	47	2.0	2,346	98.0	2,393
1973-1974	54	1.8	16	0.6	4	0.2	74	2.6	2,897	97.4	2,972
Total NYC											
1970-1971	4,601	7.6	803	1.4	211	0.4	5,615	9.4	54,060	90.6	59,675
1973-1974	5,623	9.2	1,529	2.5	325	0.5	7,477	12.9	53,575	87.1	61,052

Source: Basic Educational Data System, State Education Department, State of New York. The 1973-1974 figures have been adjusted upwards to 100% totals based on a 92% sample of the teaching staff.

Table III

NTE APPOINTMENTS TO NEW YORK CITY COMMUNITY SCHOOL DISTRICTS

1971-1972 THROUGH 1974-1975*

SCHOOL YEAR	NTE APPOINTMENTS		
	MINORITY	OTHER	TOTAL
1971-1972	96	145	241
1972-1973	213	320	533
1973-1974	388	583	971
1974-1975	327	489	816
TOTAL	1,024	1,537	2,561

Following the intent of the New York State Legislature to improve the quality of education by increasing non-white participation at the faculty level, many of the city's community school districts have exercised their "out of rank order" and NTE options by hiring a significant number of minority group teachers. Of the 2,561 NTE appointments made since the 1971-1972 school year, approximately 40 percent (i.e., 1,024 teachers) are black and hispanic.**

Even allowing for the improvement in the staff integration of the school system, the New York City Public Schools still lag far behind those in most major cities in terms of the ratio between minority group teachers and students.

*Source: Director of the Office of Personnel Data, Research and Reports, Division of Personnel, New York City Board of Education. The data here are based on interviews with NTE appointees.

**Comparable data for teachers hired through the "out of rank order" option are not available. Indications are, however, that of the 5,159 "out of rank order" teachers hired since the 1971-1972 school year, the percentage of minority group appointments is at least equal to, and probably actually exceeds, the percentage of minority group NTE appointments.

Of course, this is not meant to imply that the correlation between minority group teachers and students should be perfect. Such an assertion would represent an insidious and virulent form of racism. But the lag in staff integration in New York City's public school system is rather startling. According to information collected in 1972 by the U.S. Department of Health, Education, and Welfare/Office of Civil Rights, 64.4 percent of New York's public school students, but only 11.4 percent of its teachers, are from minority groups. (See Table IV and Figure I.) This compares very unfavorably with the minority student-teacher ratios in most other major U.S. cities. In fact, among those cities having minority group student populations of 60 to 70 percent, New York has the lowest percentage of minority group teachers. (See Table V.)

The Conflict Between Equal Employment Opportunity and Seniority System Layoffs

The problem now facing the Board of Education is whether and how it can resolve a serious new conflict between the public policy objective of equal employment opportunity, its commitment to staff integration, and the contractually established labor relations practice of sole dependence on seniority to determine who shall be laid off when cutbacks in staff are required. This conflict is the result of New York City's worst financial crisis since the 1930's. Drastic cuts in the Board's expense budget have compelled a substantial reduction in personnel throughout the school system. For example, all regular substitute teachers, approximately 7,600 assigned during the 1974-1975 school year, have not been rehired. In addition, all elementary school teachers (holding common branch and early childhood licenses) hired since February, 1973 have been laid off. This means, among other things,

Table IV

ETHNIC CENSUS OF STUDENTS AND STAFF 1971-1972
MAJOR U.S. CITIES

CITIES	AMERICAN INDIAN No.	%	BLACK No.	%	ORIENTAL No.	%	SPAN. SURNAMED AMERICAN No.	%	OTHER No.	%	TOTAL No.
ATLANTA, GA.											
Students	6	*	73,985	77.1	60	0.1	272	0.3	21,683	22.6	96,006
Teachers	0		2,477	62.1	2	0.1	3	0.1	1,506	37.8	3,988
BALTIMORE, MD.											
Students	0		129,250	69.3	0		0		57,350	30.7	186,600
Teachers	0		4,155	59.3	0		0		2,856	40.7	7,011
BIRMINGHAM, ALA.											
Students	7	*	34,290	59.4	31	0.1	29	0.1	23,372	40.5	57,729
Teachers	0		1,101	50.1	0		0		1,096	49.9	2,197
BOSTON, MASS.											
Students	97	0.1	31,728	33.0	1,871	1.9	5,138	5.3	57,405	59.6	96,239
Teachers	1	*	356	7.2	18	0.4	34	0.7	4,534	91.7	4,943
BUFFALO, N.Y.											
Students	537	0.8	26,548	41.3	92	0.1	1,844	2.9	35,275	54.9	64,296
Teachers	5	0.2	337	10.1	3	0.1	19	0.6	2,958	89.0	3,332
CHICAGO, ILL.											
Students	1,153	0.2	315,940	57.1	4,453	0.8	61,423	11.1	170,373	30.8	553,342
Teachers	7	*	8,228	37.7	144	0.7	259	1.2	13,170	60.4	21,808
CINCINATTI, OHIO											
Students	26	*	36,808	47.3	193	0.2	88	0.1	40,763	52.3	77,878
Teachers	1	*	775	25.2	7	0.2	0		2,297	74.6	3,080
CLEVELAND, OHIO											
Students	319	0.2	83,596	57.6	248	0.2	2,844	2.0	58,189	40.1	145,196
Teachers	1	*	2,068	40.2	11	0.2	9	0.2	3,060	59.4	5,149
COLUMBUS, OHIO											
Students	40	*	31,312	29.4	259	0.2	125	0.1	74,852	70.2	106,588
Teachers	3	0.1	627	14.8	7	0.2	2	*	3,597	84.9	4,236
DALLAS, TEXAS											
Students	523	0.3	59,638	38.6	298	0.2	15,908	10.3	78,214	50.6	154,581
Teachers	3	*	1,800	28.5	4	0.1	129	2.0	4,388	69.4	6,324
DETROIT, MICH.											
Students	213	0.1	186,994	67.6	540	0.2	4,512	1.6	84,396	30.5	276,655
Teachers	52	0.5	4,563	46.5	39	0.4	58	0.6	5,109	52.0	9,821
GARY, INDIANA											
Students	34	0.1	31,200	69.6	50	0.1	3,636	8.1	9,910	22.1	44,830
Teachers	0		1,102	61.3	1	0.1	40	2.2	655	36.4	1,798
HOUSTON, TEXAS											
Students	157	0.1	88,871	39.4	819	0.4	37,281	16.5	98,282	43.6	225,410
Teachers	0		2,975	36.0	24	0.3	203	2.5	5,053	61.2	8,255
INDIANAPOLIS, IND.											
Students	57	0.1	38,522	39.3	159	0.2	259	0.3	59,079	60.2	98,076
Teachers	0		940	23.9	7	0.2	2	0.1	2,978	75.8	3,927
JACKSON, MISS.											
Students	14	*	19,708	65.9	16	0.1	4	*	10,153	34.0	29,895
Teachers	0		621	42.1	0		0		854	57.9	1,475
JACKSONVILLE, FLA. (1)											
Students	0		37,100	32.6	0		0		76,544	67.4	113,644
Teachers	0		1,361	29.7	0		0		3,228	70.3	4,589

*Less than .1%.
(1)Duval County.

Table IV (Cont'd)

ETHNIC CENSUS OF STUDENTS AND STAFF 1971-1972
MAJOR U.S. CITIES (CONT'D.)

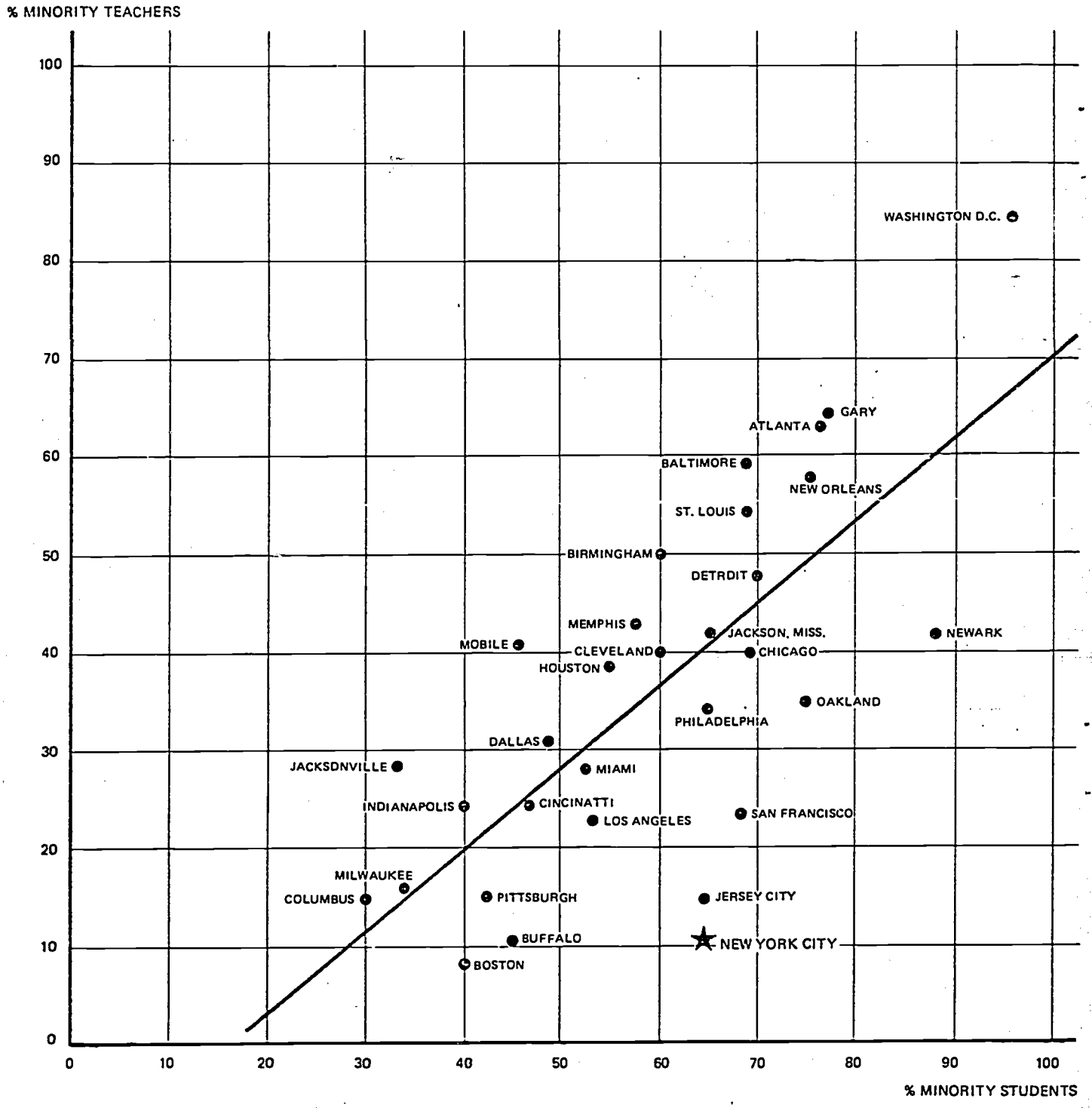
CITIES	AMERICAN INDIAN No.	%	BLACK No.	%	ORIENTAL No.	%	SPAN. SURNAMED AMERICAN No.	%	OTHER No.	%	TOTAL No.
JERSEY CITY, N.J.											
Students	22	0.1	17,548	45.4	228	0.6	6,906	17.9	13,912	36.0	38,616
Teachers	0		241	14.3	2	0.1	20	1.2	1,424	84.4	1,687
LOS ANGELES, CALIF											
Students	1,347	0.2	156,680	25.2	21,220	3.4	148,109	23.9	293,303	47.3	620,659
Teachers	25	0.1	3,382	14.5	1,173	5.0	660	2.8	18,078	77.5	23,318
MEMPHIS, TENN.											
Students	28	*	80,158	57.8	171	0.1	48	*	58,309	42.0	138,714
Teachers	0		2,370	42.9	2	*	2	*	3,155	57.1	5,529
MIAMI, FLORIDA (2)											
Students	236	0.1	63,826	26.4	598	0.2	60,210	24.9	116,939	48.4	241,809
Teachers	3	*	2,089	22.2	11	0.1	502	5.3	6,791	72.3	9,396
MILWAUKEE, WIS.											
Students	771	0.6	38,060	29.7	309	0.2	4,460	3.5	84,386	65.9	127,986
Teachers	0		792	14.8	20	0.4	26	0.5	4,512	84.3	5,350
MOBILE, ALA.											
Students	4	*	30,255	45.7	14	*	47	0.1	35,943	54.2	66,263
Teachers	0		983	41.0	0		0		1,416	59.0	2,399
NEWARK, N.J.											
Students	21	*	56,736	72.3	116	0.1	11,981	15.3	9,638	12.3	78,492
Teachers	0		1,573	39.4	12	0.3	130	3.3	2,281	57.1	3,996
NEW ORLEANS, LA.											
Students	37	*	77,504	74.6	141	0.1	1,622	1.6	24,535	23.6	103,839
Teachers	1	*	2,262	57.3	6	0.2	13	0.3	1,669	42.2	3,951
NEW YORK, NEW YORK											
Students	400	*	405,177	36.0	20,474	1.8	298,903	26.6	400,495	35.6	1,125,449
Teachers	18	*	4,884	8.8	243	0.4	1,239	2.2	49,404	88.6	55,788
OAKLAND, CALIF.											
Students	682	1.0	39,121	60.0	3,986	6.1	5,412	8.3	16,048	24.6	65,189
Teachers	6	0.2	754	29.6	107	4.2	58	2.3	1,620	63.7	2,545
PHILADELPHIA, PA.											
Students	0		173,874	61.4	0		9,550	3.4	99,541	35.2	282,965
Teachers	0		4,006	33.7	0		0		7,893	66.3	11,899
PITTSBURGH, PA.											
Students	12	*	29,274	41.8	190	0.3	120	0.2	40,484	57.8	70,080
Teachers	0		517	15.8	5	0.2	2	0.1	2,741	84.0	3,265
ST. LOUIS, MO.											
Students	54	0.1	72,629	68.8	99	0.1	203	0.2	32,632	30.9	105,617
Teachers	1	*	2,128	53.7	9	0.2	5	0.1	1,822	46.0	3,965
SAN FRANCISCO, CA.											
Students	249	0.3	25,055	30.6	19,088	23.3	11,511	14.0	26,067	31.8	81,970
Teachers	10	0.2	409	9.8	350	8.4	183	4.4	3,239	77.3	4,191
WASHINGTON, D.C.											
Students	18	*	133,638	95.5	598	0.4	818	0.6	4,928	3.5	140,000
Teachers	0		4,995	84.6	7	0.1	25	0.4	875	14.8	5,902

*Less than .1%.
(2)Dade County.

Source: Directory of Public Elementary and Secondary Schools In Selected Districts: Enrollments and Staff by Racial/Ethnic Group, Fall 1972. Report OCR 74-75.

Figure 1

PERCENT MINORITY STUDENTS AND PERCENT MINORITY TEACHERS
MAJOR U.S. CITIES — 1972
(REGRESSION LINE)
% MINORITY TEACHERS = −13.42 + 0.83 (% MINORITY STUDENTS)



SOURCE: DIRECTORY OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS IN SELECTED DISTRICTS: ENROLLMENTS AND STAFF BY RACIAL/ETHNIC GROUP, FALL 1972. REPORT OCR 74-5.

Table V

MINORITY STUDENTS AND MINORITY TEACHERS
IN NINE MAJOR U.S. CITIES
HAVING 60-70 PERCENT MINORITY STUDENT POPULATIONS

	MINORITY STUDENTS	MINORITY TEACHERS	% MINORITY STUDENTS	% MINORITY TEACHERS	CONCENTRATION INDEX OF MINORITY TEACHERS TO MINORITY STUDENTS*	RANK ORDER**
Baltimore	129,250	4,155	69.3	59.3	4.8	1
Chicago	382,969	8,638	69.2	39.6	3.2	5
Detroit	192,259	4,712	69.5	48.0	3.9	3
Jackson	19,742	621	66.0	42.1	3.6	4
Jersey City	24,704	263	64.0	15.6	1.4	8
New York	724,954	6,384	64.4	11.4	1.0	9
Philadelphia	183,424	4,006	64.8	33.7	2.9	6
St. Louis	72,985	2,143	69.1	54.0	4.4	2
San Francisco	55,903	911	69.2	22.7	1.9	7

Source: Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollments and Staff by Racial/Ethnic Group, Fall, 1972. Report DCR 74-75.

*The concentration index value for each city was arrived at by way of the following two-step process: (1) $\frac{\%\text{ minority teachers}}{\%\text{ minority students}} = x$; (2) $\frac{x}{.1770}$ = concentration index value. The lower this value, the greater the disparity between % minority teachers and % minority students.

**1 = the city with the least disparity between % minority teachers and % minority students; 9 = the city with the greatest disparity between % minority teachers and % minority students.

that 1,787 NTE teachers (i.e., 70 percent of all NTE teachers) hired under the provisions of the Decentralization Law have lost their jobs. (See Table III.) Among high school teachers, guidance counselors, assistant principals, and other types of professional personnel, layoffs have hit those who were hired even earlier than 1973. In the case of guidance counselors, for example, layoffs have eliminated those hired after October 1970.

By following the principle of "last-in, first-out" (LIFO) layoffs, the school system will undo the first real progress it has made in the area of equal employment opportunity and staff integration. Although the exact numerical impact of seniority system layoffs is impossible to calculate at this time, we do have accurate data for certain cohorts within the total teacher population. We know, for example, that although minority group teachers constitute less than 13 percent of all teachers in the New York City public schools, they represent 40 percent (i.e., 718 teachers) of the 1,787 NTE teachers who have been laid off and 27 percent (i.e., 2,052 teachers) of the 7,600 regular substitute teachers who were not reassigned at the beginning of the 1975-1976 school year.

Table VI

ETHNIC CENSUS OF NTE TEACHERS LAID OFF AND REGULAR SUBSTITUTE TEACHERS NOT REASSIGNED, 1975-1976*

	MINORITY		OTHER		
	NUMBER	PERCENT	NUMBER	PERCENT	TOTAL
NTE	718	40.0%	1,069	60.0%	1,787
Regular Substitute	2,052	27.0	5,548	73.0	7,600
TOTAL	2,770	30.0%	6,617	70.0%	9,387

The bald fact is that a substantial and disproportionate percentage of minority group personnel have been discharged since they are among the least senior employees in the school system.**

To a great extent, changes in the employment profile of the New York City public schools -- and a rather vigorous debate on whether these changes

*Source: Director of the Office of Personnel Data, Research, and Reports, Division of Personnel, New York City Board of Education, October 1975. The data here are based on interviews of NTE appointees and a study based on a random sample of regular substitute teachers during the 1974-1975 school year.

**Though not immune to layoffs, many Hispanic teachers who recently lost their jobs either have been or shortly will be rehired to staff bilingual education programs which are required under the provisions of the Consent Decree in ASPIRA of New York v. Board of Education. Although this represents a form of relief for Hispanic personnel, it raises two ancillary "layoff" issues: 1) "rehiring" Hispanic personnel, but only under the condition that they teach in bilingual programs may itself be a form of discrimination; 2) retaining Hispanic teachers increases the layoff burden on other minority group personnel, and increases tension between Hispanic and non-Hispanic minority personnel.

Table VII

ETHNIC CENSUS OF TEACHING STAFF
NEW YORK CITY HIGH SCHOOLS
1970-1971 AND 1973-1974

HIGH SCHOOLS	BLACK		SPAN. SURNAMED AMERICAN		ORIENTAL		TOTAL MINORITY		OTHER		TOTAL NUMBER
	No.	%	No.	%	No.	%	No.	%	No.	%	
Manhattan											
1970-1971	192	7.0	71	2.6	27	1.0	290	10.6	2,452	89.4	2,742
1973-1974	201	7.0	117	4.1	47	1.6	365	12.8	2,496	87.2	2,861
Bronx											
1970-1971	145	5.7	56	2.2	1	-	202	7.9	2,358	92.1	2,560
1973-1974	199	6.7	75	2.5	11	.4	285	9.6	2,684	90.4	2,968
Brooklyn											
1970-1971	194	3.6	37	.7	10	.2	241	4.5	5,119	95.5	5,360
1973-1974	261	4.6	73	1.3	15	.3	349	6.2	5,293	93.8	5,642
Queens											
1970-1971	131	3.7	30	.9	7	.2	168	4.7	3,373	95.3	3,541
1973-1974	125	3.1	37	.9	18	.5	180	4.5	3,806	95.4	3,987
Richmond											
1970-1971	13	2.2	3	.5	0	0	16	2.7	569	97.3	585
1973-1974	16	1.9	3	.4	0	0	19	2.2	861	97.8	880
Total NYC											
1970-1971	675	4.6	197	1.3	45	.3	917	6.2	13,871	93.8	14,788
1973-1974	802	4.9	305	1.9	91	.6	1,198	7.3	15,140	92.7	16,339

Source: Basic Educational Data System, State Education Department, State of New York. The 1973-1974 figures have been adjusted upwards to 100% totals based on a 92% sample of the teaching staff.

Table VIII

ETHNIC CENSUS OF TEACHING STAFF
NEW YORK CITY SPECIAL SCHOOLS
1970-1971 AND 1973-1974

SPECIAL SCHOOLS	BLACK		SPAN. SURNAMED AMERICAN		ORIENTAL		TOTAL MINORITY		OTHER		TOTAL NUMBER
	No.	%	No.	%	No.	%	No.	%	No.	%	
Manhattan											
1970-1971	45	10.4	3	.7	1	.2	49	11.3	385	88.7	434
1973-1974	92	12.5	8	1.0	4	.6	104	14.1	617	85.9	737
Bronx											
1970-1971	48	36.6	0	0	0	0	48	36.6	83	63.4	131
1973-1974	59	20.8	1	.4	0	0	60	21.2	223	78.8	283
Brooklyn											
1970-1971	32	24.4	1	.8	1	.8	34	25.9	97	74.1	131
1973-1974	82	28.6	3	1.2	1	.4	86	29.8	199	70.2	285
Queens											
1970-1971	18	19.2	1	1.1	0	0	19	20.2	75	79.8	94
1973-1974	25	15.7	1	.7	0	0	26	16.3	134	83.7	160
Richmond											
1970-1971	3	5.2	0	0	0	0	3	5.2	55	94.8	58
1973-1974	5	4.9	3	2.9	0	0	8	7.8	95	92.2	103
Total NYC											
1970-1971	146	17.2	5	.6	2	.2	153	18.0	695	82.0	848
1973-1974	263	16.8	16	1.0	5	.3	284	18.1	1,282	81.8	1,567

Source: Basic Educational Data System, State Education Department, State of New York. The 1973-1974 figures have been adjusted upwards to 100% totals based on a 92% sample of the teaching staff.

Table IX

ETHNIC CENSUS OF TEACHING STAFF
IN NEW YORK CITY COMMUNITY SCHOOL DISTRICTS
1970-1971 AND 1973-1974

	BLACK		SPAN. SURNAMED AMERICAN		ORIENTAL		TOTAL MINORITY		OTHER		TOTAL NUMBER
	No.	%	No.	%	No.	%	No.	%	No.	%	
MANHATTAN											
DISTRICT 1											
1970-1971	41	3.7	20	1.8	17	1.5	78	7.0	1,037	93.0	1,115
1973-1974	40	4.1	65	6.6	16	1.7	121	12.3	798	87.7	985
DISTRICT 2											
1970-1971	37	2.9	52	4.1	67	5.3	156	12.4	1,105	87.6	1,261
1973-1974	51	4.3	21	1.7	66	5.6	138	11.5	1,057	88.5	1,195
DISTRICT 3											
1970-1971	196	15.2	35	2.7	6	.5	236	18.4	1,049	81.6	1,286
1973-1974	241	21.0	99	8.6	4	.4	344	29.9	804	70.1	1,149
DISTRICT 4											
1970-1971	163	12.6	39	3.0	2	.1	204	15.7	1,092	84.3	1,296
1973-1974	143	14.4	65	6.5	3	.3	211	21.2	785	78.8	997
DISTRICT 5											
1970-1971	545	36.8	10	.7	4	.3	559	37.7	923	62.3	1,482
1973-1974	534	45.2	18	1.6	37	3.1	589	49.9	591	51.1	1,180
DISTRICT 6											
1970-1971	129	13.0	38	3.8	10	1.0	177	17.8	817	82.2	994
1973-1974	157	15.1	82	7.9	14	1.4	253	24.4	784	75.6	1,036
TOTAL MANHATTAN											
1970-1971	1,111	15.0	194	2.6	106	1.4	1,411	19.0	6,023	81.0	7,434
1973-1974	1,166	17.8	350	5.4	141	2.2	1,657	25.3	4,884	74.7	6,541
BRONX											
DISTRICT 7											
1970-1971	150	9.6	82	5.2	4	.3	236	15.0	1,335	85.0	1,571
1973-1974	184	12.8	126	8.8	3	.2	313	21.8	1,123	78.2	1,436
DISTRICT 8											
1970-1971	118	6.9	38	2.2	3	.2	159	9.2	1,560	90.8	1,719
1973-1974	168	9.6	77	4.4	4	.3	249	14.2	1,507	85.8	1,757
DISTRICT 9											
1970-1971	160	8.4	44	2.3	2	.1	206	10.9	1,690	89.1	1,896
1973-1974	295	15.3	141	7.3	7	.3	443	22.9	1,489	77.1	1,932
DISTRICT 10											
1970-1971	33	2.5	7	.5	2	.2	42	3.2	1,272	96.8	1,314
1973-1974	53	3.4	28	1.8	4	.3	85	5.4	1,486	94.6	1,572
DISTRICT 11											
1970-1971	102	7.9	7	.6	2	.2	111	8.7	1,172	91.3	1,283
1973-1974	120	8.2	14	1.0	3	.2	137	9.4	1,318	90.6	1,455
DISTRICT 12											
1970-1971	190	9.6	70	3.6	4	.2	264	13.4	1,706	86.6	1,970
1973-1974	223	13.8	95	5.9	2	.1	320	19.8	1,297	80.2	1,616
TOTAL BRONX											
1970-1971	753	7.7	248	2.5	17	.2	1,018	10.4	8,735	89.6	9,753
1973-1974	1,042	10.7	482	4.9	24	.2	1,548	15.8	8,220	84.2	9,768

Table IX (Cont'd)

ETHNIC CENSUS OF TEACHING STAFF
IN NEW YORK CITY COMMUNITY SCHOOL DISTRICTS
1970-1971 AND 1973-1974

	BLACK		SPAN. SURNAMED AMERICAN		ORIENTAL		TOTAL MINORITY		OTHER		TOTAL NUMBER
	No.	%	No.	%	No.	%	No.	%	No.	%	
BROOKLYN											
DISTRICT 13											
1970-1971	257	16.9	17	1.1	4	.3	278	18.2	1,247	81.8	1,525
1973-1974	392	30.2	36	2.8	4	.3	432	33.3	865	66.7	1,298
DISTRICT 14											
1970-1971	133	7.8	30	1.8	3	.2	166	9.7	1,539	90.3	1,705
1973-1974	136	8.6	52	3.3	1	.1	189	12.0	1,383	88.0	1,572
DISTRICT 15											
1970-1971	42	2.9	20	1.4	2	.1	64	4.4	1,392	95.6	1,456
1973-1974	50	3.3	46	3.0	2	.1	98	6.4	1,435	93.6	1,533
DISTRICT 16											
1970-1971	321	16.1	19	1.0	3	.2	343	17.2	1,653	82.8	1,996
1973-1974	378	35.3	9	.8	2	.2	389	36.3	683	63.7	1,072
DISTRICT 17											
1970-1971	129	9.4	8	.6	0	0	137	10.0	1,232	90.0	1,369
1973-1974	187	13.2	12	.8	5	.4	204	14.4	1,216	85.6	1,421
DISTRICT 18											
1970-1971	28	2.7	4	.4	0	0	32	3.0	1,021	7.0	1,053
1973-1974	7	.6	0	0	0	0	7	.6	1,088	99.4	1,097
DISTRICT 19											
1970-1971	133	6.5	14	.7	3	.2	150	7.4	1,887	92.6	2,037
1973-1974	130	7.6	39	2.3	0	0	169	9.9	1,538	90.1	1,708
DISTRICT 20											
1970-1971	10	.7	1	.1	2	.1	13	.9	1,384	99.1	1,397
1973-1974	10	.7	16	1.1	3	.2	29	2.0	1,415	98.0	1,445
DISTRICT 21											
1970-1971	20	1.4	4	.3	1	.1	25	1.8	1,394	98.2	1,419
1973-1974	21	1.5	3	.2	1	0	25	1.8	1,352	98.2	1,377
DISTRICT 22											
1970-1971	3	.3	0	0	0	0	3	.3	1,179	99.7	1,182
1973-1974	12	1.0	0	0	0	0	12	1.0	1,212	99.0	1,224
DISTRICT 23											
1970-1971	217	14.0	14	.9	3	.2	234	15.1	1,318	84.9	1,552
1973-1974	222	19.4	48	4.2	3	.3	270	23.8	872	76.2	1,145
DISTRICT 32											
1970-1971	373	13.0	19	.7	3	.1	395	13.7	2,484	86.3	2,879
1973-1974	92	8.0	48	4.1	4	.4	144	12.4	1,015	87.6	1,160
TOTAL BROOKLYN											
1970-1971	1,666	8.5	150	.8	24	.1	1,840	9.4	17,730	90.6	19,570
1973-1974	1,637	10.2	309	1.9	27	.2	1,973	12.3	14,074	87.7	16,047

Table IX (Cont'd)

ETHNIC CENSUS OF TEACHING STAFF
IN NEW YORK CITY COMMUNITY SCHOOL DISTRICTS
1970-1971 AND 1973-1974

	BLACK		SPAN. SURNAMED AMERICAN		ORIENTAL		TOTAL MINORITY		OTHER		TOTAL NUMBER
	No.	%	No.	%	No.	%	No.	%	No.	%	
QUEENS											
DISTRICT 24											
1970-1971	33	3.3	2	.2	3	.3	38	3.8	963	96.2	1,001
1973-1974	57	3.0	11	.9	7	.5	55	4.4	1,187	95.6	1,241
DISTRICT 25											
1970-1971	24	2.1	4	.4	2	.2	30	2.6	1,109	97.4	1,139
1973-1974	25	2.0	7	.5	2	2.2	34	2.7	1,247	97.3	1,276
DISTRICT 26											
1970-1971	19	2.0	1	.1	0	0	20	2.1	933	97.9	953
1973-1974	3	.3	0	0	1	.1	4	.4	968	99.6	973
DISTRICT 27											
1970-1971	77	5.3	4	.3	3	.2	84	5.8	1,364	94.2	1,448
1973-1974	111	7.6	9	.6	4	.3	124	8.5	1,337	91.5	1,461
DISTRICT 28											
1970-1971	204	14.4	4	.3	2	.1	210	14.9	1,203	85.1	1,413
1973-1974	201	14.7	17	1.3	7	.5	225	16.5	1,139	83.5	1,364
DISTRICT 29											
1970-1971	196	15.5	3	.2	0	0	199	15.8	1,064	84.2	1,263
1973-1974	259	20.1	3	.3	2	.2	264	20.5	1,026	79.5	1,290
DISTRICT 30											
1970-1971	49	4.1	6	.5	7	.6	62	5.2	1,132	94.8	1,194
1973-1974	43	3.6	11	.9	9	.7	63	5.3	1,134	94.7	1,197
TOTAL QUEENS											
1970-1971	602	7.2	24	.3	17	.2	643	7.6	7,768	92.4	8,411
1973-1974	679	7.7	58	.7	32	.4	769	8.7	8,034	91.3	8,803
RICHMOND											
DISTRICT 31											
1970-1971	21	1.2	4	.2	3	.2	28	1.6	1,722	98.4	1,750
1973-1974	33	1.6	10	.5	4	.2	47	2.4	1,941	97.6	1,988
TOTAL NYC COMMUNITY SCHOOL DISTRICTS											
1970-1971	4,153	8.9	620	1.3	167	0.3	4,940	10.5	41,978	89.5	46,918
1973-1974	4,557	10.6	1,209	2.8	228	0.5	5,994	13.9	37,153	86.1	43,147

Source: Basic Educational Data System, State Education Department, State of New York. The 1973-1974 figures have been adjusted upwards to 100% totals based on a 92% sample of the teaching staff.

are "right" or "wrong" -- have been stimulated by forces outside of the school system, especially by the courts. In the case of Chance v. Board of Education, for example, the federal courts ruled that the Board of Examiners' procedures for licensing supervisors were discriminatory towards blacks and Hispanics. A similar court case, Rubinos v. Board of Education, is now in litigation. In Rubinos, the plaintiffs allege that the Board of Examiners' teacher selection procedures also discriminate against blacks and Hispanics.

Judicial Trends Regarding Equal Employment Opportunity and Seniority System Layoffs

The legal and policy issues underlying the conflict between equal employment opportunity and seniority are very problematic. For example, in passing Title VII, did Congress intend to promote the hiring of people from minority groups only to have these new employees discharged due to lack of seniority? Was it the intention of Congress to lock newly hired minority personnel into a pattern of short-term employment? The United States Supreme Court gave a partial answer to these questions in the landmark case of Griggs v. Duke Power Co. in 1971:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

If one follows the Supreme Court's reasoning in the Griggs decision, the Congressional intent underlying Title VII casts serious doubt on the legality of seniority systems insofar as they operate "to 'freeze' the status quo of prior discriminatory employment practices."

Since the application of the "last-in, first-out" seniority rule for layoffs clearly results in the elimination of most gains in minority employment and staff integration accomplished during the past several years, Board of Education members are increasingly being asked "what policy and social purposes are served by the seniority system." Seniority has long been championed by working people, and the unions which represent them, for three main reasons:

> 1) seniority offers employees an impartial substitute for arbitrary management decisions and favoritism;
>
> 2) seniority gives unions a method of resolving disputes among their members, and hence prevents an ad hoc preference for one member's grievance over that of another;
>
> 3) seniority provides employees with a basis for predicting their future employment position in terms of promotion and transfer, and offers them a certain measure of protection against layoffs.

The first two purposes served by seniority are reasonable and valid under the provisions of Title VII and the Griggs decision. The validity

of the third purpose, however, recently has been questioned by the courts. It might be, for example, that the position occupied by a senior employee is based on prior discrimination by management or labor -- an activity outlawed by the 1964 Civil Rights Act. If the "expectancy interest" of senior employees locks newer minority employees into a discriminatory pattern, the interest is hardly enforcable under the provisions of Title VII and the reasoning of Griggs decision.

Equal employment opportunity has, in fact, taken precedence over expectancy interests in a number of recent court decisions. Most of these cases have involved job-related seniority systems which operated against the promotion and transfer of black workers, and kept them in undesirable positions. The courts mandated modifications of these seniority systems, changes that would allow blacks to compete equally with whites on a plant-wide basis for the more desirable jobs.

Now that Title VII motivated intrusions on the "expectancy interest" have become an accepted practice in the courts, the courts have begun to move, albeit cautiously, against discriminatory layoff plans. During the past seven years, there has been a great deal of important and complex federal court litigation involving the conflict between last-in, first-out layoffs and equal employment opportunity. Although the law with regard to these cases is still in a state of flux, certain judicial trends are discernible.

In cases involving private sector employers, the courts are now willing to intrude upon LIFO seniority systems, but only if there is

clear and convincing evidence that recently hired minority group employees have sustained personal injury as a result of their employer's prior discrimination. According to the courts, ordering a remedy in the face of anything short of "personal injury" would constitute unlawful preferential treatment of minority group employees.

In cases involving public sector employers, the courts have been somewhat more lenient in granting remedies to recently hired minority group employees facing layoff situations. When granted, these remedies have followed no over-arching rule, but rather have been tailored to fit the unique set of facts associated with the particular case. Even in the public sector, however, the courts seem to be aiming towards the strict requirement of "personal injury" now prevalent in the private sector layoff cases. In addition, since remedies often involve an extra expense for the employer, the courts are beginning to show a special concern for the financial burden which such remedies place on the taxpaying public.

Litigation Involving the New York City Board of Education

The legal issue of equal employment opportunity versus last-in, first-out layoffs has recently been brought home to New York City, in fact, to the Board of Education's doorstep, as part of Chance v. Board of Examiners, an extensive lawsuit which has been in litigation for five years. What began as a case in protest over the discriminatory nature of tests used by the Board of Examiners to qualify school supervisors,

has recently become a fight to retain those black and Hispanic supervisors hired since the cessation of the discriminatory testing procedures. On February 7, 1975, Judge Tyler of the District Court for the Southern District of New York modified the strict LIFO layoff system that had previously been used for supervisors in the New York City public school system. Judge Tyler's order stated that the percentage of black and Hispanic school supervisors who can be excessed or laid off shall not exceed the percentage of black and Hispanic supervisors presently in the school system.

The impetus for Judge Tyler's order was the court's prior finding that "the examinations and testing procedures prepared and administered by the Board for the purpose of determining which candidates will be licensed as supervising personnel have the effect of discriminating against [b]lack and Puerto Rican candidates." Given this finding, the race-proportional excessing and layoff scheme ordered by Judge Tyler thus represents an attempt to remedy past "wrongs" suffered by minority group supervisors as a class. Although Judge Tyler concluded his order by stating, "To the maximum extent possible, this order shall be construed consistently with all other relevant laws, contracts, policies, by laws, and agreements ...", the fact is that this order constitutes a situational abrogation of LIFO provisions in the State Education Law* and in the contract

*Section 2585(3) of the State Education Law reads:

> Whenever a board of education abolishes a position under this chapter, the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued.

between the Board of Education and the Council of Supervisors and Administrators.*

An appeal of Judge Tyler's order is presently being considered by the United States Court of Appeals for the Second Circuit. Among other things, the appellants (i.e., the Board of Education and the Board of Examiners) have raised the issue of "reverse discrimination." They note, in their brief, that Judge Tyler's order offers relief to minority group supervisors as a class, in spite of the fact that many members of this class, because of age, would not have achieved eligibility for supervisory positions when the discriminatory examinations were being used. In other words, the appellants claim that unlawful reverse discrimination is the result of awarding "super-seniority" rights to members of a class who are too young to have sustained "personal injury."**

Although a decision from the Court of Appeals is imminent, neither the attorneys for the plaintiffs nor those for the defendants are willing to

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*In part, Article VII L. of the Board of Education - Council of Supervisors and Administrators contract reads:

> If a city-wide excess condition causes a layoff of staff in any licensed position, the provisions of law will be followed to determine the staff member to be laid off, without fault and delinquency with the understanding that said member of staff is to be placed on a preferred list. Such excessed staff member shall be the last person appointed in license on a city-wide basis.

**Prior to Judge Tyler's order, the Board of Education actually proposed (in a letter from Leonard Bernikow, Assistant Corporation Counsel to Judge Tyler, dated January 1, 1975) granting "super-seniority," but only to those who suffered "personal injury" due to a previously discriminatory examination.

speculate about whether Judge Tyler's remedy will be sustained, modified, or overruled. In this case, the attorneys' reluctance to speculate is not simply a matter of discretion; the fact is that the law vis-a-vis public sector layoffs and equal employment opportunity is in an unsettled, unpredictable state.

Regardless of the final disposition of the Chance litigation, the Board of Education faces still more minority group employee pressure with regard to equal employment opportunity. In a case which is presently pending, Rubinos v. Board of Education, the Board of Examiners' teacher selection procedures are under fire as being discriminatory towards blacks and Hispanics. If the plaintiffs are successful in Rubinos, they are likely to follow the example set by black and Hispanic supervisors by seeking relief from the court in the area of layoffs.

Very recently (September 30, 1975) two additional suits related to equal employment opportunity and seniority-based layoffs were brought against the Board of Education. In both suits, Community School District No. 5 v. Board of Education and Efferson et al. v. Board of Education, the plaintiffs have challenged the Board's contractually established policy of last-in, first-out layoffs on the grounds that it unlawfully discriminates against minority group teachers hired by community school districts under the "NTE provisions" of the Decentralization Law of 1969. Among the allegations made by plaintiffs in support of their challenge are the following:

1) Children in the public schools have a right to be taught by an integrated faculty. The creation of such a faculty and the redress of past discriminatory hiring practices made available under the Decentralization Law are sound educational practices.

2) As a result of last-in, first-out layoffs ordered by the Board of Education, nearly all NTE teachers throughout the school system will lose their jobs.

3) The Decentralization Law vests in community school boards the power to determine whether to hire, excess or layoff NTE teachers. The Board of Education cannot seize this power from community school boards, nor can it attempt to control their exercise of this power through a collectively bargained agreement.

4) The disparate impact of the proposed layoffs on NTE teachers a) would, because it constitutes a violation of the 1964 Civil Rights Act, give these teachers an impetus to sue community school boards and the Board of Education, and b) would violate Executive Order 11246 requiring staff integration on programs operated with federal funds.

A factor which figured prominently in the disposition of the Chance case was the plaintiffs' presentation of persuasive statistical back-up data. Quite likely, this same factor will be given serious consideration by the courts in the cases of Rubinos, Community School District No. 5, and Efferson. The legal ramifications of such data are ominous for the Board, especially, for example, if presented in terms of the ratio between minority teachers and minority students in the New York public school system (See Tables IV and V, and Figure I). In many previous equal employment opportunity cases, great statistical disparities (e.g. between minority group members in the work force and those in the general population) have stood as prima facie evidence of discrimination. In such instances, the burden of disproving discrimination has fallen on the defendants.

Other Forms of Pressure on the New York City Board of Education

Expressions of deep concern regarding the inequitable impact of last-in, first-out layoffs on minority group personnel have not only come in the form of law suits against the Board of Education, but also have been expressed by top-level managers of the school system's programs. In August of 1975, for example, the Director of the Bureau of Educational and Vocational Guidance, expressed concern in a strongly worded letter to the Executive Director of the Division of Personnel. This letter began with the following admonition:

> From all the information received thus far, it seems clear that a substantial number of guidance counselors may be laid off. May I urge in the strongest possible terms that action in this matter be deferred until all possible alternatives have been explored, including changes in the by-laws and/or possible amendments to the State Education Law.
>
> If counselors are laid off in reverse order of seniority ... all our efforts to recruit black and Hispanic counselors during the past few years would come to naught, because these would be the first to be laid off ....

Among New York City's community school districts, the reaction against last-in, first-out layoffs has been even stronger. Dismayed over the devastating impact of seniority-based layoffs on recent efforts to bring about staff integration and quality education, the Superintendent of District No. 5 sent the following memorandum (dated September 4, 1975) to the Chairman of Community School Board No. 5:

> Sir, may I again request that we seek an injunction to prevent the implementation of the Central Board's excessing guidelines relative to teachers and guidance counselors.
>
> At present, approximately 11% of the professional staff (city-wide) is black; in our district, since decentralization, we have a well integrated staff (60% white, 40% black). The effect of the excessing is that we may go to 90% white and 10% black -- losing not only our black teachers, but our flexible young teachers. They, most likely, will be replaced by the same teachers who fled this district five to ten years ago.
>
> If an injunction is not the way to go, then perhaps we should insist that the issue of the retention of black teachers be an issue in the current negotiations.
>
> Perhaps we should investigate to see if any H.E.W. guidelines are being violated.
>
> Certainly we should move before the excessing is finalized.

Eleanor Holmes Norton, New York City Human Rights Commissioner, has brought external pressure to bear on the Board of Education. On November 25, 1974 she addressed a letter to the heads of all city agencies which stated in part:

> City agencies, as a result of economic measures designed to reduce escalating city costs, may be required to reduce staff by layoff ... We have advised the Mayor and indicated to him that we would be advising you of ways to avoid legal difficulties that could arise under federal, state, and city anti-discrimination laws ... Recent court decisions and the guidelines of the federal agencies from which the city receives funds, may subject the city to legal liability if layoffs have a disproportionate racial impact ... The Administrative Code, state and federal laws and regulations regarding discrimination in employment, require a close look at the extent of layoffs on

> equal employment ... We are concerned that economic measures which the city may be forced to take, not erode the substantial advances the city government is already making to afford equal employment opportunity.

This letter represents yet another type of pressure which the Board of Education must bear: intervention by another branch of government. Once again the Board is being urged to avoid retreat from recent advances in the field of equal employment opportunity. And once again, the Board is being asked to achieve layoffs in a manner which has the least possible impact on recently hired minority group personnel.

Conclusion

In toto, the New York City Board of Education is caught in a web of fiscal, legal, management, labor, and governmental pressures with regard to the conflict between last-in, first-out layoffs and staff integration/ equal employment opportunity. The Board must not only contend with these internal and external pressures in order to resolve the present conflict, but also must anticipate future problems in order to avoid losing its policy making prerogatives to the courts. In the Chance case, for example, although the courts have no particular expertise in school system matters, they have dictated the resolution of the controversies. The Rubinos case could well be a repeat performance of Chance.

The courts may eventually order changes in the seniority rules spelled out in the contract between the Board of Education and the United Federation

of Teachers,* and in Section 2585(3) of the Education Law of New York State. The courts have intruded on such rules and laws in the past. Although these changes may be necessary in order to implement Title VII of the 1964 Civil Rights Act, if they are court-mandated rather than negotiated, they could easily lead to considerable conflict between minority and non-minority school personnel. The facts of the present situation indicate that consideration, action, and leadership by the Board of Education is necessary at this time.

RECOMMENDATION #1

Upon the exhaustion of preferred eligible lists in license areas where there were layoffs during the 1975-1976 school year (including personnel who were nominated by community school districts during the spring of 1975 under the two alternative methods of appointment to positions effective September 1975), or upon requests for the appointment of teachers in license areas where layoffs did not occur, pedagogical staff needs for school years 1975-1976 to 1977-1978 should be met by drawing personnel from a list of regular substitute teachers. This list should be composed of all individuals who received assignments as regular substitute teachers during

*In part, Article IV F7 of the Board of Education-United Federation of Teachers contract reads:

> If a city-wide excess condition causes a layoff of staff in any licensed position, applicable provisions of law will be followed to determine the staff member to be laid off, without fault and delinquency with the understanding that said member of staff is to be placed on a preferred list. Such staff member shall be the last person appointed in the license on a city-wide basis.

the 1974-1975 school year. Order of appointment from this list should be based on satisfactory regular substitute service (within license area only) accrued since September 1972. For individuals who appear on this list who previously worked either as Educational Associates* or Auxiliary Trainers,** service accrued in such positions (but not exceeding a total of three years) should be counted for the purpose of calculating substitute service.***

RECOMMENDATION #2

As an alternative to Recommendation #1 (or in combination with Recommendation #1 where feasible), the Board of Education should submit to the New York State Legislature, the following amendments to section 2590-j of the State Education Law:

1) Any contrary provisions of this chapter notwithstanding, appointments of persons to vacancies in the schools of the City of New York shall be made in the following order:

---

*Educational requirement: 60 semester hours of approved college courses and two years of experience as an Educational Assistant, or 90 semester hours of approved college courses and one year of experience in the program.

**Educational requirement: 60 semester hours of approved college courses and three years of experience as an Educational Assistant or Educational Associate, or both, or 90 semester hours of approved college courses and two years of experience in the program.

***There is a compelling economic reason for counting a teacher's former paraprofessional experience in these two categories. Since the Board of Education subsidizes paraprofessionals to upgrade their skills through teacher training programs, the Board gets a return on this "investment in human capital" only insofar as these personnel remain employees of the school system.

(a) Persons on preferred eligible lists established in accordance with section 2585 of this chapter;

(b) persons on eligible lists who served as regular substitutes in the subject of the list continuously from the full term of 1973 through and including the spring term of 1975;

(c) persons on eligible lists who served as regular substitutes in the subject of the list for any two semesters between the opening of school in September of 1973 and the closing of school in June of 1975;

(d) all others, as prescribed in this chapter.

Appointments under (a) and (b) above shall be made in the order prescribed in subdivision 10 of section 2573 as if the persons covered by those paragraphs represented the entire lists.

2) All existing eligible lists shall remain in force and effect for a period of eight years.

RECOMMENDATION #3

In accordance with federal regulations,* the Board of Education should direct each community school district to prepare a comprehensive plan for improving staff integration in its schools. The Board of Education should also prepare such a plan for all schools under its administrative jurisdiction.

After the recall of all regularly appointed teachers laid off during the 1975-1976 school year and the reassignment of all regular substitute teachers who worked during the 1974-1975 school year (via implementation

*Title 41, Chapter 60, Part 60-2 of the Code of Federal Regulations requires federal contractors to file "affirmative action compliance programs." Under these regulations, the Board of Education is a federal contractor.

of Recommendation #1), the Board of Education should permit all community school districts, high schools, and special schools to meet further pedagogical staff needs by hiring qualified personnel 1) who have passed the National Teachers Examination within the past two years at a pass mark equivalent to the average pass mark required of teachers during the prior year by the five largest cities in the United States which use the National Teachers Examination as a qualification, or 2) whose names appear on an appropriate eligible list, to serve in 50 percent of the vacant positions in all schools not presently eligible for NTE and "out of rank order" appointments.

RECOMMENDATION #4

The Board of Education should seriously consider granting "performance" or "competency certificates" to pedagogical and supervisory personnel who possess, and have objectively demonstrated special skills 1) in the area of educating children with special educational needs; 2) required for successful work in non-traditional education programs (e.g., open classrooms, prison schools, alternative schools, specially funded remedial reading and mathematics programs, etc.). In making personnel decisions based on seniority, where two teachers (or supervisors) have equal service but only one holds a "performance certificate," preference should be awarded to the teacher (or supervisor) holding the certificate.

II. TITLE VII OF THE 1964 CIVIL RIGHTS ACT

Seniority systems are a touchstone of the American employment system. They are symbols of job security for workers and of employee security for employers. Yet, beginning with the Congressional hearings prior to the passage of the 1964 Civil Rights Act, seniority systems have become the subject of vigorous debate and extensive litigation in the federal courts. The original questions with respect to seniority, which were asked during the 1960s' economic boom, dealt with the relationships among hiring, promotion, and departmental versus plantwide seniority systems. The present economic recession has created a shift in focus to the relationship between layoffs and seniority systems. In order to understand the reasoning underlying court decisions with regard to layoffs and seniority, it is first necessary to examine the legislation which has been at the center of so much controversy.

Title VII of the 1964 Civil Rights Act provides in part:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for any employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system ... provided that such differences are not the result of an intention to discriminate because of race, color, sex, or national origin ...

While this section originally applied only to private employers, the 1972 amendments to the 1964 Civil Rights Act extended the coverage of the act to public employers. Since literally all employers in the U.S. are

subject to the above language, some indication of its intended meaning would be helpful. Unfortunately, Congress purposely gave this section a certain amount of vagueness, preferring to leave interpretation of the touchy seniority issue to the courts. A slight indication of Congressional intent can be gleaned from the act's legislative history.

In 1963, the Civil Rights Bill was subjected to over 500 hours of debate on the Senate floor after it had passed in the House of Representatives. During one of these debates, Sen. Hill (D.,Ala.) stated that Title VII of the bill was a threat to organized labor and would undermine the vested rights of seniority. In response to this charge, the Justice Department prepared a memorandum which floor manager Clark (D.,Pa.) asked to be published in the Congressional Record:

> ... 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. Of course, if the seniority rule itself is discriminatory it would be unlawful under Title VII ... But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title ...

Subsequent to the publication of the Justice Department memorandum, Sen. Dirksen (R.,Ill.), in the midst of an attempt to amend the bill into a document which would pass the Senate, questioned Sen. Clark with respect to his interpretation of Title VII:

> Question. ... 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.

While the Justice Department memorandum and the Dirksen-Clark dialogue have often been cited by those attempting to prevent court interference with seniority systems, two points must be made concerning this legislative history. First, Congressional hearings and debate occurred at a time when Title VII contained no specific provision regarding seniority systems. Second, since the case of Quarles v. Phillip Morris, Inc.,* the courts have consistently interpreted Title VII as allowing them to invade established seniority schemes which they found discriminatory, despite the contrary opinion expressed in the Congressional hearings.

*279 F.Supp. 505 (E.D.Va., 1968).

III. PRIVATE EMPLOYERS: TITLE VII OF THE 1964 CIVIL RIGHTS ACT AS APPLIED TO REVERSE SENIORITY LAYOFFS

Quarles v. Philip Morris, Inc.

The first blows of a two-round battle in the courts were struck in 1968 in the case of Quarles v. Philip Morris, Inc., (1/4/68). The Quarles defendants had effectively frozen blacks into jobs in the most undesirable departments in their plant by making seniority dependent upon the amount of time worked in a department rather than in the plant as a whole. Under the defendant's scheme, transferring to a more attractive department would mean losing seniority and its concomitant chances for promotion and insurance against the possibility of layoff. Most blacks who had worked for the defendant before the effective date of the 1964 Civil Rights Act were literally forced to stay in their traditionally all-black departments. The United States District Court for the Eastern District of Virginia defined a "bona fide seniority system," under Title VII, to exclude systems which perpetuated pre-act discrimination against blacks:

> The company and the union contend that the present departmental seniority system is not unlawful because it limits on a nondiscriminatory basis the transfer privileges of individual Negroes assigned to the [undesirable to most employees] prefabrication department years ago pursuant to a policy of segregation which has long since been abolished. This point is crucial to the defendants' case. It is based upon the proposition that the present consequences of past discrimination are outside the coverage of the act. The defendants rely on legislative history to sustain their thesis; the text of the act does not support it. The plain language of the act condemns as an unfair practice all racial discrimination affecting employment without excluding present discrimination that originated in seniority systems devised before the effective date of the act....

> ....[T]he legislative history ... contains no express statement about departmental seniority. Nearly all of the references are clearly to employment seniority. None of the excerpts upon which the company and the union rely suggests that as a result of past discrimination a Negro is to have employment opportunities inferior to those of a white person who has less employment seniority... [T]he legislative history indicates that a discriminatory seniority system established before the act cannot be held lawful under the act. The history leads the court to conclude that Congress did not intend to require "reverse discrimination"; that is, the act does not require that Negroes be preferred over white employees who possess employment seniority. It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act.

The court concluded its opinion by invalidating the departmental seniority system:

> ....[Title VII] declares that it shall not be an unlawful employment practice for an employer to apply different standards pursuant to a *bona fide* seniority system "... provided that such differences are not the result of an intention to discriminate because of race ..." The differences between the terms and conditions of employment for white and Negroes about which plaintiffs complain are the result of an intention to discriminate in hiring policies on the basis of race before January 1, 1966. The differences that originated before the act are maintained now. The act does not condone present differences that are the result of intention to discriminate before the effective date of the act, although such a provision could have been included in the act had Congress so intended. The court holds that the present differences in departmental seniority of Negroes and whites that result from the company's intentional, racially discriminatory hiring policy before January 1, 1966 are not validated by the *proviso* of [Title VII].

The remedy proposed by the court was the establishment of a plantwide seniority scheme, in which an employee transferring from one department to another would carry with him seniority established as of the date on which that

employee was hired. This remedy was aimed at putting blacks and whites on an equal footing to compete for more attractive jobs.

Local 189, Papermakers and Paperworkers, AFL-CIO v. United States*

One year after the decision in Quarles, the first round of the court battle abruptly ended. The case of Local 189, Papermakers and Paperworkers, AFL-CIO v. United States (7/28/69) added strength to the Quarles precedent of superceding a job seniority scheme with a plantwide seniority framework:

> Title VII of the Civil Rights Act of 1964 prohibits discrimination in all aspects of employment. In this case we deal with one of the most perplexing issues troubling the courts under Title VII: how to reconcile equal employment opportunity *today* with seniority expectations based on *yesterday's* built-in racial discrimination. May an employer continue to award formerly "white jobs" on the basis of seniority attained in other formerly white jobs, or must the employer consider the employee's experience in formerly "Negro jobs" as an equivalent measure of seniority? We affirm the decision of the district court. We hold that Crown Zellerbach's job seniority system in effect at its Bogalusa Paper Mill prior to February 1, 1968, was unlawful because by carrying forward the effects of former discriminatory practices the system results in present and future discrimination. When a Negro applicant has the qualifications to handle a particular job, the Act requires that Negro seniority be equated with white seniority.

However, the dicta of Local 189 were to prove far more important than the ratio decidendi. The dicta defined the Title VII concept of "preferential treatment" as not condoning grants of retroactive seniority or bumping privileges to black employees. The Local 189 decision stated that plantwide seniority could be asserted only with respect to job vacancies and not with respect to presently filled jobs; in other words, a black with more plantwide seniority could not simply decide that he wanted a different job and

*416 Fed.2d 980 (5th Cir., 1969).

thereby displace an incumbent white employee who had less plantwide seniority. Also, the decision held that even if new employees had actually suffered discrimination in the form of job applications rejected because of race, they were not to be granted fictional seniority. The court specifically warned the plaintiffs that it was not the policy of Title VII to make incumbent white employees suffer for the past discriminatory acts of their employer.

Hence, with the advent of the Local 189 decision, the extensive remedy and court intrusion into the seniority establishment initiated by Quarles, was limited. The first round of the battle to achieve an expanded breadth of available civil rights relief was lost.

Vogler v. McCarty, Inc.*

For the next two years, Local 189's dicta was often cited as authority for the limitation of remedies in hiring and promotion situations. But the case of Vogler v. McCarty, Inc. (11/17/71), initiated an era of questioning the Local 189 decision. In Vogler, the District Court for the Eastern District of Louisiana ordered that separate hiring books were to be kept for blacks and whites, with the more experienced persons within each race preferred for job referral over the less experienced within each race; black and white referrals were to alternate on a one-to-one basis. When long layoffs caused many white workers to lose their hospitalization and pension benefits, a modification of the court order was sought and entered.** The amended order created increased employment opportunity for more experienced

*451 Fed.2d 1236 (5th Cir., 1971).
**4 FEP 11 (E.D.La., 1971).

whites at the expense of opportunity for less experienced whites, without affecting the rights of black workers. While the plaintiffs, who were less experienced whites who had lost their job opportunities, argued that the district court had abused its discretion in entering the modified order, the Fifth Circuit Court of Appeals held that adequate protection of the rights of blacks under Title VII might necessitate the adjustment of the rights of some white employees. In so stating, the circuit court directly confronted the Local 189 admonition against making employees suffer for the past transgressions of their employer, since in Vogler, the "less experienced" whites were being denied employment; their jobs were being diverted in favor of even less experienced blacks and more experienced whites. Indeed, the one-to-one referral arrangement, which placed whites with 6,000 hours of experience on equal footing with blacks with a total of 500 hours of experience, was equivalent to a very anti-Local 189 grant of fictional seniority.

EEOC Decision #71-1447*

The Equal Employment Opportunity Commission (EEOC) chose to reject the meaning which the Local 189 decision had injected into the words "preferential treatment." The EEOC Decision #71-1447 (3/18/71) held that in a plant in which no blacks had been hired before 1964, it was unfair, as between whites and newly hired blacks, to use straight seniority as a sole basis for promotions. By advocating the use of a non-seniority factor on which to base promotions, the EEOC was condoning "preferential treatment" according to the ruling of Local 189.

*3 FEP 391 (EEOC, 1971).

Watkins v. United Steelworkers of America, Local 2369*

While under the reasoning of Griggs v. Duke Power Co. (3/8/71),** EEOC decisions are to be accorded "great deference," no court case clearly followed the #71-1447 reasoning until 1974. At this time, in response to the layoffs prompted by the economic downturn, the case of Watkins v. USW Local 2369 (1/14/74) initiated round two of the seniority battle. The plaintiffs challenged layoffs and recalls on the sole basis of seniority as being racially discriminatory; they charged that the defendant company's history of racial discrimination made it impossible for blacks to have sufficient seniority to withstand layoff. The District Court for the Eastern District of Louisiana agreed with the plaintiffs that the defendant's seniority system was not bona fide, and held that EEOC Decision #71-1447 implied that constructive seniority was a valid approach to the layoff problem. The remedy*** which followed from this ideology was indeed radical, yet it followed the Local 189 decision in so far as it attempted to place the burden of remedy on the defendant company rather than on the incumbent white employees. The remedy proposed the rehiring of blacks who had been laid off as "least senior employees" during a work slowdown, and then letting these rehired persons share all available work with incumbent employees. All employees were to be paid as if they were working full time, even if they were working less than full time. Future layoffs, if necessary, were to be made so that the racial proportions of the work force would remain constant.

*369 F.Supp. 1221 (E.D.La., 1974).
**401 U.S. 424 (1971).
***8 FEP 729 (E.D.La., 1974).

Unfortunately for the Watkins plaintiffs, the district court's radical decision and remedy were overturned by the Fifth Circuit Court of Appeals (7/16/75).* Recognizing that the "last-in, first out" (LIFO) seniority plan had a harsher impact on black employees than on white employees, the court nevertheless held that the plan was bona fide in this instance:

> We hold that, regardless of an earlier history of employment discrimination, when present hiring practices are non-discriminatory and have been for over ten years, an employer's use of a long-established seniority system for determining who will be laid-off, and who will be rehired, adopted without intent to discriminate, is not a violation of Title VII ..., even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination.

The threefold rationale of the decision was: 1) that the real reason why the black employees had insufficient seniority to withstand layoff was their age; 2) that they were too young to have applied for employment with defendant during its days of discriminatory hiring; 3) that plaintiffs had actually been hired and allowed to achieve their rightful place in the employment hierarchy without regard to race. The Fifth Circuit Court of Appeals strictly limited its decision to the facts of this case:

> We specifically do not decide the rights of a laid-off employee who could show that, but for the discriminatory refusal to hire him at an earlier time than the date of his actual employment, or but for his failure to obtain earlier employment because of exclusion of minority employees from the work force, he would have sufficient seniority to insulate him against layoff.

The court also found that a decision declaring the LIFO system invalid would

*516 Fed.2d 41 (5th Cir., 1975).

result in treating blacks, who had not personally suffered discrimination, preferentially to similarly situated whites.

Since the Fifth Circuit Court of Appeals held that the LIFO system did not discriminate against the plaintiffs, it also found that recall on the basis of total employment seniority (i.e., in reverse order of layoffs) was valid. The court stated that recall of plaintiffs before senior whites would constitute preferential treatment in violation of Title VII.

Delay v. Carling Brewing Co.*

A decision in the case of Delay v. Carling Brewing Co. (6/25/74) came a month after the district court's remedial order in Watkins; on the basis of very similar facts, it fully supported the district court's approach to layoffs. However, from a legal standpoint, the impact of the decision was minimal; since the defendant closed its Atlanta brewery, the decision could never be implemented. Consequently, the Delay decision has not become an important part of the legal fray with respect to seniority based layoffs.

Waters v. Wisconsin Steel Works of International Harvester Co.**

Waters v. Wisconsin Steel Works (8/26/74), on the other hand, entered the thick of the seniority battle a mere two months after Delay was handed down and long before the Court of Appeals decision in Watkins. In Waters case, plaintiffs, black laid off employees of the defendant, claimed that except for defendant's pre-1964 hiring discrimination, they would have had enough seniority to withstand a round of layoffs. Hence, they contended

*10 FEP 164 (N.D.Ga., 1974).

**502 Fed.2d 1309 (7th Cir., 1974), certiorari filed 2/24/75.

that the last-hired, first-fired seniority system was unfair to them. The court held that the reasoning of Local 189 dictated that the defendant's seniority system was bona fide; and so, the court ordered strict adherence to this system.[1] It found that retaining recently hired black employees (under the argument that "they would have been hired earlier except for discrimination") while laying off more senior whites, would constitute reverse discrimination or preferential treatment in violation of Title VII:

> Under the [defendant's] employment seniority system there is equal recognition of employment seniority [of Black and white workers] which preserves only the earned expectations of long-service employees.
>
> Title VII speaks only to the future. Its backward gaze is found only in 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.

In the private sector, round two of the seniority battle has been a repeat of round one. Once again, a "liberal" decision intruding upon non-bona fide discriminatory seniority systems was subsequently limited by decisions focusing on the unlawful "preferential treatment" that would result from court-ordered remedies. A glance at the cases occurring in between Waters and the Court of Appeals decision in Watkins supports the theory that round two will end with the same sort of limiting trend as that which ended round one.

Cox v. Allied Chemical Corp.*

In the case of Cox v. Allied Chemical (9/23/74) the defendant switched from a unit to a plantwide seniority system in 1971; but before the new plan became effective, two black employees lost their positions under the old seniority scheme. They contended that if they had not been locked into their jobs by the unit system, they could have transferred to another unit which would have allowed them to withstand layoffs through assertion of plantwide seniority. While the court agreed that these two plaintiffs had been personally injured, and awarded them back pay, it questioned the earlier Watkins decision. Title VII, said the Cox court, required a showing of personal injury by a discriminatory act under a seniority system in order to find that system non-bona fide in character. The district court in Watkins was seen to have missed the point of Title VII by requiring the employer to award relief to all black employees whether or not they proved personal injury. Following the lead established by Waters, the Cox court held that a class award without proof of personal injury would constitute preferential treatment.

EEOC Decision #75-037**

After the Cox decision, the EEOC, in Decision #75-037 (10/10/74) looked backwards and reiterated that when layoffs are made based on merit rather than seniority, white senior employees with objectively inferior job performance (as against recently hired minority employees with objectively superior job performance) have no cause for action based on reverse discrimination. While the Waters court, for fear of being charged with reverse

*382 F.Supp. 309 (M.D.La., 1974).
**10 FEP 285 (EEOC, 1974).

discrimination, had shied away from layoff remedies which had a favorable impact on minorities, the EEOC held that charges of reverse discrimination required a high degree of proof; in other words, a remedy giving the appearance of reverse discrimination must be closely scrutinized before a finding to that effect would be made. This ruling can be interpreted as a reprimand to the Waters decision which suggested that charges of reverse discrimination or of preferential treatment could be easily found and supported.

Bales v. General Motors Corp.*

The case of Bales v. General Motors Corp. (1/27/75) extended the principals of Waters into the sex discrimination field. Here female employees contended that GMC's previous sex based discrimination had caused them to have little seniority, making them susceptible to layoff under GMC's LIFO plan. The plaintiffs asked that the collective bargaining agreement between defendant union and defendant corporation be amended to give female employees job protection against layoffs resulting from the retention of more senior male employees. The court held that the defendant's seniority system was bona fide. Also, it found that plaintiffs would not suffer irreparable injury, if laid off, since their unemployment benefits under the collective bargaining agreement would amount to 95% of their usual weekly take home pay.

Perhaps the relief which plaintiffs requested in the Bales case was rash. A request for a work sharing plan might have been more palatable to the court. Also, the court may have been influenced by the extensive nature of plaintiffs' unemployment benefits. Even so, the crux of the

*9 FEP 234 (N.D.Calif., 1975).

court's decision is the finding that GMC's seniority system was bona fide despite the fact that layoffs would nullify the effects of a recently implemented affirmative action plan.

Jones v. Pacific Intermountain Express*

Very recently, the plaintiffs in Jones v. Pacific Intermountain Express (4/12/75) asked for less radical relief than that requested by the plaintiffs in Bales. The Jones plaintiffs were black truck drivers who had recently been hired by the defendant, an employer who previously had not hired blacks. They were laid off pursuant to a last-hired, first-fired provision in their union contract. The plaintiffs contended that the LIFO provision was itself illegal under Title VII and asked that 1) enforcement of the provision be enjoined and that the laid off drivers be reemployed under a plan in which all Pacific Intermountain Express (P.I.E.) drivers would share available work equally and that; 2) they be awarded seniority retroactive to the dates when they would have applied for work at P.I.E except for its reputation for discrimination.

The seniority system was held bona fide in spite of its deleterious effect on the blacks who had been hired subsequent to P.I.E.'s recent cessation of discrimination. As in the Cox case, the court in Jones found that the second form of relief requested by plaintiffs would have been permissible under the earlier reasoning of the earlier Watkins case, but that this Watkins decision was mistaken. The court held that Title VII required a demonstration of personal injury, and that it could not award relief to

*10 FEP 913 (N.D.Calif., 1975).

persons who might not actually have applied for employment at an earlier date. In Jones, the District Court for the Northern District of California followed the lead of Waters.

EEOC Decision #72-251*

A final attempt to uphold the reasoning of the district court's decision in the Watkins case was made by the EEOC. In EEOC Decision #72-251 (5/8/75), the plaintiffs maintained that the defendant's LIFO plan, which had a disproportionate impact on blacks as a class due to prior hiring discrimination, violated Title VII. Relying heavily on statistical data, the EEOC found that the LIFO plan had an adverse effect on blacks as a result of past hiring discrimination, and that this adverse effect was not justified by business necessity. The Commission then held that the LIFO plan was not bona fide. Although no particular remedy was prescribed, the EEOC clearly thought that relief was in order here, in spite of the fact that the plaintiffs had offered no evidence of personal injury due to discrimination. By stressing the statistical approach used in Griggs, the EEOC may have been trying to devise a new strategy for upholding the earlier Watkins decision in situations where personal injury would be impossible to prove. Since the later Watkins decision avoided reference to the EEOC Decision #72-251, presumably the Fifth Circuit Court of Appeals believes that the "statistical approach" should be limited to hiring situations, and that the "personal injury approach" should be used in deciding future layoff cases.

The trend in the private sector, which was initiated by the Waters decision and became concrete in the Fifth Circuit Court of Appeals' decision

*10 FEP 1405 (EEOC, 1975).

In Watkins, dictates that only those employees who can demonstrate personal injury as the result of a discriminatory hiring or promotional system may be eligible for affirmative relief with respect to layoffs. The trend further establishes that a seniority system with no discriminatory intent may be bona fide even if the operation of its LIFO provisions results in a disparate impact on minority employees hired only after passage of the 1964 Civil Rights Bill. Since the Waters decision, the courts have consistently found that a grant of retroactive seniority, whether or not those requesting such relief advocate a work sharing plan, would constitute unlawful preferential treatment under Title VII. It must be noted, however, that even though courts in the Fifth and Seventh Circuits have generally upheld the validity of private sector LIFO systems and have been reluctant to order remedies suggesting "preferential treatment," these decisions do not constitute binding precedents on situations concerning New York City. A Second Circuit or Supreme Court decision in this area would be necessary to establish a pattern which the City's private sector must follow. Hence, the second round of the seniority battle has not yet ended in the local circuit, despite the fact that a national trend to limit affirmative relief for layoffs has been set.

IV. PRIVATE SECTOR: SENIORITY BASED LAYOFF PROBLEMS WHICH INVOLVED THE OFFICE OF FEDERAL CONTRACT COMPLIANCE

When a private enterprise enters into a contract to produce goods or services for a unit of government, its production could be said to take on a quasi-public character. The question which must be asked at this juncture is whether this quasi-public character of a company affects the way it must handle the question of seniority-based layoffs.

Savannah Printing Specialties and Paper Products Local Union 604 v. Union Camp Corp.*

In the case of Savannah Printing Union v. Union Camp Corp. (11/10/72), the defendant had entered into an Office of Federal Contract Compliance (OFCC) compliance program; it abolished its job seniority system, and substituted for it a scheme which utilized division seniority as the sole basis on which blacks hired previous to the 1970 cessation of hiring discrimination could be promoted. Plaintiffs, some of whom were blacks hired post-1970, complained that they had been laid off under the new seniority system, although they would not have been under the old system. They demanded that their employer arbitrate this grievance. The court held that it would not compel arbitration which would undo the effects of the affirmative action plan that was mandated by public law and policy. While the court recognized that employers under non-governmental contracts are not required to comply with Executive Order #11246 (which mandated that private employers hire a racially balanced work force to accomplish the goals of their contracts with the federal government), the court found that government contracts constituted

*350 F.Supp. 632 (S.D.Ga., 1972).

such a large proportion of defendant's business that it would be impracticable for the defendant to stay in business without such contracts. The court also stated that even if the defendant operated entirely in the private sector, Title VII would subject it to an affirmative action plan, part of which would entail the maintenance of a division seniority system. Hence, even though implementation of the OFCC compliance program meant hiring blacks under a division seniority system and then subsequently undoing the effects of the hiring by firing them under LIFO, the court held that both the purpose of the program, (i.e., the hiring of a racially balanced work force) and the effects of the LIFO layoffs mandated by the collective bargaining agreement were valid under Title VII. It concluded that the plaintiffs, who wished to tamper with the OFCC program, stated no claim on which relief could be granted. Essentially, the court found that the OFCC compliance program dictated affirmative action hiring only, while layoffs were purely a seniority matter, and thus were not to be subjected to quotas.

Jersey Central Power and Light Co. v. Local Unions of the International Brotherhood of Electrical Workers*

Jersey Central v. IBEW (2/14/75) posed a problem similar to that in Savannah. A government contractor had to decide which of two conflicting documents to follow with respect to layoffs, an EEOC conciliation agreement or a union contract. The EEOC agreement provided for layoffs of women and minorities in proportion to their percentage in the workforce, whereas the union contract provided for strict LIFO. Citing the Waters decision, the Justice Department's memorandum, and the Dirksen-Clark dialogue appearing

*508 Fed.2d 687 (3d Cir., 1975).

in the Congressional Record, the Third Circuit Court of Appeals held the union contract's plantwide seniority plan to be bona fide:

> Our reading of Title VII reveals no statutory proscription of plant-wide seniority systems. To the contrary, Title VII authorizes the use of "bona fide" seniority systems: "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system."
>
> ....While the legislative history of Title VII is largely uninstructive with respect to seniority rights, it is evident to us that Congress did not intend that a *per se* violation of the Act occur whenever females and minority group persons are disadvantaged by reverse seniority layoffs... Accordingly, we hold that a seniority clause providing for layoffs by reverse order of seniority is not contrary to public policy and welfare and consequently is not subject to modification by court decree... Congress, while recognizing that a bona fide seniority system might well perpetuate past discriminatory practices, nevertheless chose between upsetting all collective bargaining agreements with such provisions and permitting them despite the perpetuating effect that they might have. We believe that Congress intended a plant-wide seniority system, facially neutral but having a disproportionate impact on female and minority group workers, to be a bona fide seniority system within the meaning of ... [Title VII] of the [1964 Civil Rights] Act.

It further held that the conciliation agreement applied only to hiring, and that once a person became an employee he became subject to the union contract's LIFO provision.

The similarities between the Savannah and Jersey Central cases are easily discernible. In both, the questioned seniority systems were held bona fide. In the Savannah case, this was true despite the fact that upholding the system meant laying off persons who had been recently hired under an affirmative

action plan. In the Jersey Central case, the system was held bona fide despite the finding that the system had a disproportionately harsh impact on recently hired minorities and women. Hence, in the quasi-public sector of government contracts with private employers, a Waters-type view prevails. That is, hiring guidelines may be government-dictated, but the formulation of layoff guidelines shall be the sole province of the union or employer as long as the guidelines which are established are not blatantly discriminatory. The courts are willing to permit a negation of results achieved under affirmative action hiring plans in order to find seniority based layoff systems bona fide and avoid being accused of "preferential treatment."

Little difference exists between this sector and the purely private sector with respect to present attitudes towards last-in, first-out layoffs. While the original Watkins decision presented some moderating influence in the private sector, the Fifth Circuit Court of Appeals' Watkins decision followed Jersey Central's cue of adhering to a seniority-based layoff plan, despite a disparate impact on recently hired or promoted minority and female employees. Since it will no longer be necessary for courts to reason their way around the district court's decision in Watkins, a concurrence of private and quasi-public sector opinion on the issue of LIFO layoffs can be expected in the future. In short, in an effort to avoid preferential treatment, courts will uphold LIFO systems despite their unintentional disparate impact, absent a demonstration of personal injury through discriminatory hiring policies, in both the private and quasi-public sectors.

V. RECALLS IN THE PRIVATE SECTOR

Williamson v. Bethlehem Steel Corp.*

In 1975, the problem of discriminatory layoffs has been exacerbated through a dramatic downturn in the United States' economy. In the future, if the economy makes its predicted upswing, a new problem will emerge, that of recalls. To date, Williamson v. Bethlehem Steel Corp. (11/3/72) stands as sui generis in the field of recalls. In this case, the U.S. Court of Appeals for the Second Circuit held that a recall system which operated to the residual disadvantage of blacks who had previously been discriminated against by a departmental seniority system would violate Title VII, and was subject to judicial modification. Hence, this case followed the Quarles approach of permitting court interference with seniority systems, despite the legislative history of Title VII. Williamson also followed Vogler by finding that rights of senior white employees could be adjusted, over their objections, in the name of fairness to blacks under Title VII. Therefore, by permitting its own interference in a senicrity scheme and not finding this the equivalent of preferential treatment, the Williamson decision followed precedents set in two very "liberal" cases.

One might conclude that the Williamson decision requires the Second Circuit to order remedies entailing special treatment of previously injured racial minorities and women in recall problem situations; also it would be easy to conclude that the problems which Jersey Central found in affirmative

*468 Fed.2d 120 (2d Cir., 1972).

action as applied to layoffs would not arise in recall problems, since recalls are analogous to "hiring" and not to "firing." However, such conclusions would amount to gross oversimplification.

The Williamson case was decided in 1972 and has been construed only once with respect to its statements on recall since then, in the Fifth Circuit Court of Appeals' 1975 Watkins opinion. The Watkins construction sharply limited Williamson, holding that its judicial modification of recall privileges was justifiable only because of the plaintiffs' proof of personal injury through the operation of a job seniority system; the Watkins court further stated that such judicial interference would not be tolerated where a bona fide plant seniority system was in operation. Although the Fifth Circuit Court of Appeals' limitation of the Williamson decision does not bind courts in the Second Circuit, it clearly expresses the present trend. The U.S. economy has changed for the worse since 1972. Now the courts will be especially hesitant to order remedies which would cause hardship for already financially unstable companies since any further burden could mean their demise and a total loss of the employment opportunities which they offer. Yet another damper on layoff remedies are the recent court decisions which have held that such remedies would constitute unlawful preferential treatment. Hence, although the Williamson case now stands as the only precedent in the recall field, it may not be predictive of the reasoning which courts will apply in future recall cases.

VI. PUBLIC EMPLOYMENT: TITLE VII OF THE 1964 CIVIL RIGHTS ACT AS APPLIED TO REVERSE SENIORITY LAYOFFS

In the public employment field, courts have interpreted Title VII's "no preferential treatment" language less strictly than they have in the private sector. Although the court interpretations have been fairly "liberal" in the public employer-layoff cases, they have not followed consistent remedy-formulating procedures. As a result, there are no clear precedents which could act as specific guidelines if more of these cases arise in the future. However, the judicial exercise of equity powers and the adaptation of a remedy to each particular set of facts may be an example of the sort of implementation of Title VII which Congress intended. The court decisions in the public employment sector may serve as the basis for a generous application of equity in the future. The flexible approach in the public sector -- the tailoring of the remedy to the situation -- contrasts sharply with the "avoidance of remedy formulation" followed in the private sector since the Waters case.

Loy v. City of Cleveland*

Loy v. City of Cleveland (6/4/74) was the first layoff case decided in the public employment sector. The plaintiffs, female patrol officers who were notified of their termination because of budgetary cutbacks, first asserted that the defendant police department had exhibited a continuing anti-female bias in its hiring policies. The plaintiffs next argued that the defendant's layoff plan, one which eliminated employees on the basis

*8 FEP 614 (N.D.Ohio, 1974).

of their Police Entrance Examination scores, violated Title VII since 87% of the females (compared with only 42% of the males) hired in 1973 would be laid off. Even though this was not a situation involving LIFO layoffs, the court agreed that the defendant's hiring discrimination had prevented plaintiffs from accruing greater seniority, and decided that the equitable way to deal with the situation would be to permit the percentage of layoffs of least senior females among all laid off persons to equal the percentage of females hired by the police department in 1973. While the case was later declared moot* (since the planned layoffs were never carried out) the court's reasoning was innovative in that it attempted to permit layoffs of females in a fair percentage without resorting to a complicated system involving grants of retroactive seniority or work sharing. Yet, the remedy must be recognized as a modification of the proportional layoff approach of the district court's decision in Watkins. The remedy ordered in the Loy decision meant the layoff of higher scoring males; this decision thus placed the burden of remedy on employees rather than the employer, an approach which many court decisions have found to be "preferential treatment" in contravention of Title VII. Clearly, the Loy court construed "preferential treatment" narrowly, and found its "fair proportion" layoff to be non-preferential.

EEOC Decision #74-106**

Prior to the declaration of mootness in Loy, the EEOC partially set forth its policy on layoffs in the public sector in Decision #74-106

*8 FEP 617 (N.D.Ohio, 1974).

**10 FEP 269 (EEOC, 1974).

(4/2/74). This case involved layoffs of white instructors and retention of black instructors in a public college. The scope of the EEOC's decision was limited by the fact that the layoffs were not based on LIFO, but instead on false assumptions with respect to the needs of black and white students, and on overly subjective criteria with respect to individual instructors. But in a footnote, the EEOC cautioned that the use of a strict ratio (such as a black student-black faculty ratio) as an employment policy would come dangerously close to the sort of preferential treatment forbidden by Title VII. While Decision #74-106 found that no strict ratio had been used at the college, but nevertheless that white instructors had been discharged discriminatorily on the basis of their race, the EEOC's negative attitude on strict ratios in layoffs was clearly stated without language limiting its application to non-reverse-seniority layoffs. This EEOC opinion might have avoided the strict percentage formula which was adopted but never implemented in Loy. However, it appears that this opinion has neither been cited nor followed since its publication.

United Affirmative Action Committee v. Gleason*

The first conflict between civil servants and a LIFO system arose in United Affirmative Action Committee v. Gleason (7/24/74). The court in Gleason found that even though most minority group county employees had little seniority and thus would be more harshly affected by the proposed last-in, first out layoff than white county employees, the statistics which the plaintiffs presented to support their charge of racial discrimination were unconvincing. Absent this requisite proof of discrimination, the

*10 FEP 64 (D.C.Ore., 1974).

court declined to interfere with the proposed layoffs. While this decision superficially resembled that in the Waters case by denying relief in the form of an alteration in a LIFO scheme, a close examination reveals a basic difference between these two cases. In the Waters decision, relief was denied in the face of actual past hiring discrimination against blacks in general since the plaintiffs could not demonstrate personal injury due to that discrimination. On the other hand, in the Gleason decision, no past hiring discrimination against minorities was proven. Even the earlier Watkins decision required the plaintiff to prove a threshold level of hiring discrimination against blacks as a class before relief could be granted. Since the Gleason plaintiffs failed to demonstrate a threshold level of hiring discrimination, even the most liberal court could not have granted affirmative relief.

Lum v. New York City Civil Service Commission*

While Loy and Gleason were class action suits, the next case in the public employment layoff series, Lum v. New York City Civil Service Commission (1/31/75), involved an individual plaintiff. In the original court action, the plaintiff complained that his application to the police department was denied because of his failure to meet the minimum height requirement; he further claimed that this requirement was set at a point designed to exclude certain racial and ethnic groups. This suit resulted in the plaintiff's acceptance by the department, and his appointment as a probationary officer.

The plaintiff's next court action alleged that he and other probationary

*10 FEP 365 (S.D.N.Y., 1975).

officers were going to be laid off, but that he would have progressed beyond the probationary stage (and thus immune to the present layoff) if he had not been originally rejected on the basis of the discriminatory height requirement. Agreeing with the plaintiff, the court enjoined the police department from laying him off; it stated that the department's burden of retaining the plaintiff was much smaller than the burden which he would have to bear if he was laid off. Hence, demonstrating its flexibility, the court in Lum created an exception to the seniority rules for one man. If complainant in this situation had been a class of persons rather than an individual, the burden on the police department of retaining the class would probably have been found to outweigh the personal burdens of the plaintiffs.

Chance v. Board of Examiners*

A radical approach similar to that taken by the district court in the Watkins case was followed by the Southern District Court of New York in the case of Chance v. Board of Examiners (2/7/75). At the outset of his opinion Judge Tyler stated:

> In fairness to the parties and counsel, it perhaps should be observed that the undersigned is and has been aware of the relatively recent cases dealing with the issue of fashioning decrees, pursuant to Title VII of the Civil Rights Act of 1964, which protect minorities in lay-off situations... I have considered [these cases] before filing the so-called final "excessing" order or decree today... Arguably, the reasoning of those cases is inapposite here because (1) the facts are somewhat different and (2) this case is not based upon Title VII of the 1964 Act... Specifically, I believe that the better view in support of the excessing order here is to be found in such recent authorities as [the district

*10 FEP 1023 (S.D.N.Y., 1975).

> court's opinion in] Watkins... Moreover, I am inclined to think that the Court of Appeals for this circuit has already adopted a different view of racial quotas under Title VII than that of the Third and Seventh Circuits [which decided the Jersey Central and Waters cases, respectively]... Aside from the fact that I personally find the rationale of this circuit to be more persuasive, this court is bound to follow it in any event.

After laying this foundation for a "liberal" opinion, Judge Tyler decided that minority supervisors who had recently been hired under an affirmative action plan should not be laid off on a strict LIFO basis in the event that layoffs became necessary. Rather, the court found that layoffs of minority persons in proportion to their percentage in the workforce would be more equitable. The court developed its remedial scheme very thoroughly and gave exact tolerances within which the percentages of laid off minority persons were to fall. This plan is clearly contrary to a warning against the use of such strict ratios in EEOC Decision #74-106. Though not discussed in its decision, the Chance court may have ignored the EEOC for two reasons: 1) EEOC decisions are not binding on courts, although according to Griggs v. Duke Power Co. they are to be given great deference; 2) the "no-strict-ratios" language of Decision #74-106 was mere dictum in a case which involved non-seniority based layoffs.

The excessing and layoff scheme mandated by the Chance decision is even more extensive than the one ordered in Lum. Even if extended to a class of employees rather than an individual, the Lum decision would simply dictate the retention of excess personnel and place the burden of their salaries on the city. The Chance decision, on the other hand, actually requires the layoff of senior whites and the retention of recently hired

blacks in order to maintain the percentage of minority personnel in the workforce. Only two previous decisions, those in the cases of Watkins and Delay, have involved remedies which would cause senior white workers to bear some of the burden for their employer's past discrimination. Decisions coming from the most recent cases in the private sector indicate that this type of strict proportional layoff scheme will be found in violation of Title VII unless there is a demonstration of personal injury due to past hiring discrimination. Even if the private sector trend is applied, the remedy ordered in the Chance decision may be permitted to stand because of the unique circumstances behind the case. In the first place, the Chance case has involved a considerable amount of litigation. Second, the past inequity to minority group persons wishing to become supervisors is so strong that it might be equivalent of personal injury due to discriminatory practices.

Schaefer v. Tannian*

In the case of Schaefer v. Tannian (5/13/75), the court found that the Detroit Police Department (DPD) had discriminated against females with respect to recruiting, hiring, examination, promotion, and compensation. An affirmative action hiring and promotion plan was then instituted by the DPD in 1974. However, most of the females hired in 1974 were scheduled to be demoted or laid off because of a union contract which provided for demotions and layoffs (in the event of budgetary cutbacks) on the basis of time in rank rather than total length of service. These newly hired or promoted female plaintiffs alleged that implementation of

*394 Supp. 1136 (E.D.Mich., 1975).

the "time in rank" LIFO plan would violate Title VII. The court agreed with the plaintiffs that: 1) females with greater total length of service, but less time in rank than similarly situated males, would be demoted while the males would be retained; 2) the female plaintiffs had been personally deprived of time in rank by the former discrimination of the defendant. Balancing was stressed in the explanation of the court's remedy. The court found that most of the least senior police department personnel were hired under a federal program, and stated that no one hired under this program could be laid off. Therefore, instead of the originally scheduled layoff of 825 federally and city-funded officers, only the 550 city-funded officers were to be laid off according to the seniority provisions in their contract. The court stated, as one of its reasons for this plan, that the group of 550 included a smaller percentage of women than the original group of 825. It also stated that no officer originally scheduled for retention would be laid off under the remedy; specifically, no senior males would be laid off in order to retain recently hired females. The court recognized that under its remedy the percentage of females in the Detroit Police Department would decrease from the peak percentage which was achieved under the affirmative action plan, but found that as many females were being retained as was practicable. Hence, in Schaefer, the court devised a remedy by balancing tangible factors and injecting a basic sense of "fairness" or "equity" for all concerned.

Driscoll v. Jefferson*

One month later, the Eastern District Court of Michigan was asked to

*11 FEP 308 (E.D.Mich., 1975).

decide another layoff case, this time involving the Detroit Fire Department (DFD). In Driscoll v. Jefferson (6/24/75), black firefighters who had been hired under an affirmative action plan following the cessation of hiring discrimination by the DFD in 1970 were to be laid off under a LIFO plan due to Detroit's financial crisis. They claimed that since there was documented proof of pre-1970 hiring discrimination, they should be granted retroactive seniority, and should be retained on the force while white firefighters with more years of actual service should be laid off. After examining statistical evidence, the court concluded that, on the average, the plaintiffs were too young to have been personally subjected to the pre-1970 discrimination. Absent this proof of personal injury due to discrimination, the court found that under its interpretation of the language of Title VII, it was forced to deny the requested relief, regardless of the acknowledged and unfortunate impact which the LIFO layoffs would have on the plaintiffs. After citing the strong seniority-preservation reasoning of Waters and Jersey Central with approval, the present case was distinguished from Schaefer v. Tannian by the court's finding that the plaintiffs in the latter case had in fact made the demonstration of personal injury which it found to be a prerequisite to the granting of relief.

In Driscoll as in Schaefer, the Eastern District Court of Michigan had to deal both with economic realities and with the very human and emotional issue of layoff. The later case clearly limited the impact of the earlier case, by stating that utilization of the balancing remedy of Schaefer could not be considered until a foundation of personal injury was established. Driscoll clearly stressed most strongly the necessity of

proving personal injury, while Schaefer glossed over this threshold consideration and appeared to concentrate on the problem of remedy formulation. Perhaps the two Eastern District of Michigan cases, when viewed objectively, should not be taken to differ as much in terms of proving personal injury as in terms of the availability of funds to support a remedy. In Schaefer the available federal funds were used to retain some of the police officers who were originally scheduled for layoff; in Driscoll, such an alternative to the insufficient city funding was not available.

Acha v. Beame*

The Southern District Court of New York, in Acha v. Beame (7/1/75), did not follow a trend established in the two cases (i.e., Lum and Chance) which could have served as precedents in this district. In the Acha case, female police officers, who because of budgetary cutbacks were scheduled for layoff under a LIFO system mandated by state law, alleged that they had suffered discrimination on account of their sex. They made this allegation based on these facts: 1) that women were not permitted to take the competitive Police Entrance Examination from 1963 to 1969; 2) that women were allowed to take the exam only once, in 1969; 3) that between 1963 and 1972 the exam was administered for "men only" at least five times; 4) that the layoffs would mean the discharge of 73.5 percent of the females on the police force, but only 23.9 percent of the males. Using the decisions in Jersey Central and Waters as precedents, the Southern District Court found the LIFO system in Acha bona fide, and the state law's mandate of seniority based layoff permissible under the provisions of Title VII.

*10 FEP 1237 (S.D.N.Y., 1975).

The court then held that the injunction against dismissal which plaintiffs had requested would amount to unlawful preferential treatment.

While drawing the "strict-adherence-to-LIFO" precedent of the Jersey Central decision into the previously "liberal" public sector may be somewhat frightening to persons favoring affirmative action toward layoff situations, the Acha decision, like Driscoll v. Jefferson, is not the regression which, at first glance, it appears to be. First, the prior New York cases of Lum and Chance, like the Sixth Circuit's Schaefer case, involved demonstrations of personal injury due to hiring discrimination. These cases were probably considered inapplicable as precedents because the plaintiffs in Acha were unable to prove personal injury. In future cases, the courts may still follow extensive reinstatement, retroactive seniority, or proportional layoff schemes if the requisite proof of personal injury is made. Second, sensitivity to economic situations has been consistently stressed in the public sector cases. The relief requested by the plaintiffs in Acha, like that requested in Jefferson, would have amounted to a tremendous financial burden for the city; a convenient budget-affirmative action compromise layoff plan (such as that utilized in Schaefer) was not readily available here. The court simply could not impose the burden of a Chance-type proportional layoff scheme without the unique facts underlying that case. Additionally, the Lum decision emphasized the fact that the re-instatement of a single employee would not place a great financial burden on the city; this rationale could not logically be extended to the great numbers of people involved in the Acha case. The Acha decision is not necessarily a regression from the "liberal" characteristics of Lum, but merely involves such different facts and fiscal impact that the same

degree of "liberalness" could not be applied. The Second Circuit's Lum-Acha progression of facts and reasoning clearly follows the Sixth Circuit's Schaefer-Driscoll evolution. Hence, the Acha decision does not rule out the possibility of the Second Circuit's resolution of future public employee layoff cases with remedies which have only a minor impact on municipal budgets.

Three conclusions regarding the future disposition of public sector layoff cases can be drawn. First, the courts will require some showing that plaintiffs (who are about to be, or recently have been laid off) were personally discriminated against with respect to hiring or promotion. Second, the courts will attempt to shape a remedy which fits the particular facts of the case. The Southern District of the New York District Court has shown, for example, that greater flexibility or generosity of remedy may be possible in an individual layoff situation than in a class action (e.g., see Lum as opposed to Acha), and a more extensive remedy may be dictated by a very strong showing of consistent and persistent past discrimination (Chance). Third, the courts will hold their remedies within the bounds of fiscal responsibility. The Loy, Lum, Schaefer, Driscoll, Chance and Acha decisions all demonstrated a sympathy for the public pocketbook. The balancing of these three factors by the courts may yet create remedies in the public sector which have not been forthcoming from court decisions involving layoffs in the private sector.

VII. CONCLUSION

Will there be a future reconciliation of the differences between those court decisions upholding strict LIFO plans in the private sector and those decisions ordering ad hoc modifications of seniority systems in the public sector? While no law review articles or cases have yet dealt with this particular clash, it appears that the differences in reasoning with respect to layoffs in the public and private sectors are contrary to the policy of Title VII. Nowhere does the 1964 Civil Rights Act dictate that remedies for public and private employers should be different from one another. In fact, since the 1972 amendments to the act, it seems clear that public and private employers must be treated in the same way. When and if the argument of equal treatment under the law reaches the courts, judges will be faced with the conflicting precedents of prior decisions regarding layoffs.

How will the courts approach and resolve the dichotomy represented by conflicting precedents? In the private sector, it may turn out that they have upheld strict LIFO plans only because plaintiffs have failed to demonstrate personal injury, and not because of an opinion that remedies necessarily involve unlawful preferential treatment. In the public sector, on the other hand, the courts may continue to temper their remedies on the anvil of fiscal responsibility. Whatever approach the courts eventually take, as long as there is a conflict between equal employment opportunity and the seniority system, further litigation is sure to ensue. Short of a near miraculous economic recovery, the provisions of the 1964 Civil Rights Act can only be enforced if the courts are willing to take a firm stand

against adherence to the mere expediency of layoffs conducted on a strict last-in, first-out basis.

APPENDIX

ABSTRACTS OF CASES REFERRED TO IN THIS REPORT

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COURT AND DATE:

U.S. District Court, Eastern District of Virginia, 1/4/68.

ALLEGATION:

Plaintiffs brought a class action on behalf of themselves and all other black employees of Philip Morris who were similarly situated against defendant company and defendant union, to enjoin the defendants from violating Title VII of the 1964 Civil Rights Act. The plaintiffs contended that defendants' restrictive departmental transfer and seniority provisions, as dictated by defendants' collective bargaining agreements, were intentional and unlawful employment practices, since they were superimposed on a departmental structure that was organized on a racially segregated basis.

Defendants contended that the present consequences of past discrimination, e.g. locking blacks into undesirable jobs through implementation of a departmental seniority system, were outside of the coverage of the 1964 Civil Rights Act.

DECISION:

The court found that the basic question was whether present consequences of past discrimination were covered by the 1964 Civil Rights Act. Findings of fact were set forth. The defendant corporation maintained departments for the purpose of classifying related jobs. These departments had previously (before 1966) been segregated into all-white and all-black divisions. Within each department, persons were hired at entry level, lowest paying positions, and advanced primarily on the basis of departmental seniority accrued. While interdepartmental transfers were once prohibited, they were presently permitted under three different agreements, specifying two types of seniority arrangements: (1) after transfer, employment date seniority was used to determine departmental rights with a stipulation that the employee had no right of return to his former department; (2) after transfer, transfer date seniority was used to determine departmental rights, with right to return to former department with employment-date seniority unimpaired. The latter arrangement had created for the named plaintiff a situation in which he had declined to transfer since it would have meant losing employment seniority; he knew that if he had decided to transfer, he would have become junior in terms of departmental seniority to whites who had less employment seniority, all because of defendant company's previous discrimination against blacks.

It was held that the 1964 Civil Rights Act did not condone present differences which were the result of pre-Act intention to discriminate, and there-

fore that defendant company's departmental seniority system violated the Act.

However, the court found that the Act did not require that defendants promote plaintiffs to positions for which they were not qualified.

REMEDY ORDERED:

All qualified blacks who were hired before 1/1/66, the date on which defendants' hiring discrimination ceased, were to be allowed to seek transfer from their traditionally all-black jobs into all-white jobs, while retaining their employment-date seniority. The defendants were enjoined from enforcing any part of their collective bargaining agreement which conflicted with this decree.

Plaintiffs were awarded costs and attorneys' fees, to be jointly donated by the defendants.

CASES CITED:

None relevant.

CASE:

LOCAL 189, PAPERMAKERS AND PAPERWORKERS, AFL-CIO, v. UNITED STATES, 416 Fed.2d 980.

COURT AND DATE:

United States Court of Appeals, Fifth Circuit, 7/28/69.

ALLEGATION:

Plaintiffs, black employees of Crown-Zellerbach, Inc. (co-defendant) and members of defendant union, contended that defendants' practice of awarding positions on the basis of job rather than mill seniority discriminated against blacks, since they had been unable to obtain job seniority in formerly white job slots until the recent (1968) desegregation of the plant. Plaintiffs contended that defendants' practice would carry forward the effects of past racial discrimination without a demonstration of business necessity.

Defendants contended that their merger of formerly white and black lines of progression, along with their practices of awarding higher positions based on job seniority, constituted a bona fide seniority system within the meaning of the 1964 Civil Rights Act. They stated that their use of job seniority as a promotion qualification was necessary in order to insure that persons bidding for jobs were qualified to fill them. They also alleged that introduction of a plant seniority system would be tantamount to reverse discrimination.

DECISION:

The court found that the basic question of the case was whether a seniority system based on pre-Act work constituted present discrimination.

Finding that the seniority system constituted present discrimination in violation of Title VII, the court followed the rightful place approach, allowing blacks to assert plant seniority only with respect to new job openings; e.g. blacks with greater plant seniority were not allowed to bump white incumbents from their present positions. The court further found that a pure job seniority system was not essential to the safe and efficient operation of defendant's plant, but that use of a job credit system which imposed "residency" requirements in positions along the job progression was preferable to insure that employees could only bid for jobs which they were able to perform. This system was to be used in situations in which there were no blacks who had been hired before 9/1/66 bidding for a job for which they were in line.

Holding that creation of fictional seniority for blacks was not the correct solution to the present manifestations of past discrimination, the court decided that such preferential treatment was not condoned by Title VII.

Title VII was construed to mean that if an employer intended to act as he did, and if that action had a discriminatory impact, the employer would be liable for violation of Title VII, although it was not the effect, but the action which created the effect, which was intentional.

REMEDY ORDERED:

The order of the district court was affirmed. This order had provided for the abolition of job seniority, in favor of mill seniority in all circumstances in which employees bidding for a job in their line of progression were black and hired prior to 1/16/66.

CASES CITED:

Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D.Va., 1968).

CASE:

VOGLER v. MCCARTY, INC., 4 FEP 11.

COURT AND DATE:

U.S. District Court, Eastern District of Louisiana, 1/25/71.

ORDER:

Modifying 2 FEP 491 2/19/70 order pursuant to agreement of U.S. (as plaintiff) and union (as defendant).

Work referral register to be maintained, to consist of separate books for mechanics and improvers, and to be further broken down:

a. White mechanics book A: to include all white applicants for referral as mechanics who have 5-200 hour years of service at the insulating trade.

b. White mechanics book B: to include all white applicants for referral as mechanics who have worked 4800 hours at the insulating trade.

c. White mechanics book C: to include all white applicants for referral as mechanics who do not meet book A or B requirements.

d. Black mechanics book A: to include all black applicants for referral as mechanics who have worked 500 hours at the insulating trade, plus other specified persons who have worked less than 500 hours.

e. Black mechanics book B: to include all black applicants for referral as mechanics who do not meet the requirements for placement in book A.

f. White improvers book A: to include all white applicants for referral as improvers who have worked 1200 hours at the insulating trade.

g. White improvers book B: all white applicants who do not meet A requirements.

h. Black improvers book A: to include all black applicants for referral as improvers who have worked 250 hours at the insulating trade.

i. Black improvers book B: all black applicants who not meet B requirements.

A to be preferred over B or C; B to be preferred over C; but such preferences to be given only within racial groups.

CASE:

VOGLER v. MCCARTY, INC., 451 Fed.2d 1236.

COURT AND DATE:

U.S. Court of Appeals, Fifth Circuit, 11/17/71.

ALLEGATION:

The defendant employer contended that the district court was without discretion to enter its modified order of 1/25/71 since it affected only white union members, and since it imposed on the defendant terms of employment which should have been subject to collective bargaining.

DECISION:

It was found necessary to reiterate these facts of the case: On May 31, 1967 the district court held the union had denied blacks opportunity for referral and membership, and ordered the union to effectuate a system of alternating black-white referrals, and to establish new admissions criteria. Problems arose between the parties, leading to the 2/19/70 court order. This order provided for the maintenance of four separate hiring books: black mechanics, white mechanics, black improvers, white improvers. Black-white referrals were to alternate on a 1-to-1 basis, with preference being given to Class A persons over Class B persons and Class B persons over Class C. A modification of the order was later sought, when economic pressures caused a backlog of persons under the orlginally ordered system, such that many white mechanics on long layoffs lost their hospitalization and pension benefits. The modified order of 1/25/71 created increased employment opportunities for more experienced whites at the expense of less experienced whites, but had no effect on black workers.

The court then held that adequate protection of the rights of blacks under Title VII might necesitate the adjustment of the rights of some white employees, and that the district court did not abuse its discretion in entering the modified order.

REMEDY ORDERED:

Enforcement of modified order.

CASES CITED:

None relevant.

CASE:

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DECISION #71-1447, 3 FEP 391.

DATE:

3/18/71.

ALLEGATION:

Complainant employee charged that defendant employer: (1) denied overtime to black employees; (2) refused to hire blacks as supervisors.

DECISION:

The EEOC noted that after the enactment of Title VII of the 1964 Civil Rights Act the employer ceased discrimination against blacks with respect to hiring them for un- or semi-skilled production and maintenance jobs. However, after 1964 there were yet no blacks in the more skilled, white collar positions; from these facts the EEOC inferred that defendant employer still discriminated against blacks in its hiring for or promotion to these positions.

It was found that the employer-union collective bargaining agreement provided for promotions on the basis of departmental seniority, and required in at least some instances that persons promoted to supervisory positions had high school diplomas. Since the relevant population contained whites at 43.7% high school graduates and blacks at 14.5% high school graduates, and since this education was not essential to the safe and efficient operation of defendant's plant, the requirement was found arbitrary and discriminatory against blacks, and thus in violation of Title VII. The departmental-seniority-based promotion system was found to violate Title VII in that it maintained black employees in jobs with low pay and negligible opportunity for advancement.

In addition to the class of non-promoted black discriminatees, defendant was found to have created a second class of discriminatees composed of those persons who had applied for employment and were denied work because of their race and those who would have applied for employment and would have been presently employed and accruing seniority but for defendant's reputation as an employer of whites only. The seniority system was held to discriminate also with respect to offers of overtime employment, since the senior employees were given the first chance to work overtime; since most blacks had been hired recently there was no overtime left for them after the senior employees had made their choices.

The EEOC asserted that the legal consequences for the creation of each of these classes of discriminatees should be identical. While awards of fictional seniority were seen as unnecessary, the EEOC decided that the present system, which continued to penalize discriminatees for past discrimination, needed replacement with a genuinely non-discriminatory system.

REMEDY ORDERED:

While a decision with respect to layoffs was reserved because layoffs were held to be distinct from promotion and overtime, the EEOC held the existing seniority system unlawful under Title VII, and in need of replacement with a truly nondiscriminatory system.

CASES CITED:

None relevant.

CASE:

GRIGGS v. DUKE POWER AND LIGHT CO., 401 U.S. 424.

COURT AND DATE:

United States Supreme Court, 3/8/71.

ALLEGATION:

The plaintiffs alleged that the defendent's employee selection procedure, which required candidates for employment to have a high school diploma or to pass intelligence tests, was in violation of Title VII of the Civil Rights Act. The result was a disproportionately high disqualification rate for blacks. The company admitted that it had openly discriminated prior to the enactment of the Civil Rights Act, but the lower court had found that any current discrimination was not intentional.

STATISTICAL DISPARITY:

Prior to the filing of charges with the EEOC, all of the defendant's black employees were employed in its labor department. The labor department was only one of five operating departments in the plant. Jobs in that department paid less than those in any other department. With regard to the requirement of a high school diploma, the Court noted that in North Carolina, while 34% of white males had completed high school, only 12% of Negro males had done so. With respect to standardized tests, the Court noted that an EEOC test sample which included the exams used by Duke "resulted in 58% of whites passing the tests, as compared with only 6% of the blacks."

DECISION:

The Supreme Court held that regardless of the company's present lack of intent to discriminate, the thrust of the Act was directed at the consequences of employment practices, not simply the motivation. Where an employment practice results in discrimination, it can only be sustained by a showing that it bears a demonstrable relationship to the successful performance of the jobs for which it was designed. In other words, employers must show that the employment standards they impose are "job related."

REMEDY ORDERED:

The Court reversed a lower court ruling which held that the diploma and aptitude test requirements were not in violation of the Act.

CASES CITED:

None relevant.

KEY CASES EXCERPTS:

"The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices. ...

Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. ...

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. ...

Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question. ...

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."

CASE:

WATKINS v. UNITED STEELWORKERS OF AMERICA, LOCAL 2369, 369 F.Supp. 1221.

COURT AND DATE:

U.S. District Court, Eastern District of Louisiana, 1/14/74.

ALLEGATION:

Plaintiffs, former employees of defendant company, challenged its use of length of service as the sole criterion for determining which employees to lay off; the plaintiffs alleged that this lay off scheme was discriminatory since defendants had previously maintained a white-only hiring policy which presently kept blacks from accruing sufficient seniority to avoid layoff. The plaintiffs claimed that defendant's racially discriminatory layoff and recall practices violated Title VII of the 1964 Civil Rights Act.

Defendants alleged that plaintiffs demanded preferential treatment which Title VII did not condone.

DECISION:

The court first stated the principle that employment preferences could not be allocated on the basis of length of service or seniority, where blacks were, because of prior discrimination, prevented from accumulating relevant seniority. It then used this principle to invalidate defendant's layoff system.

It was then noted that although on its face Title VII would not affect seniority systems, in many previous cases the courts modified existing seniority systems which they found to be non-bona fide. The court decided that the present case was one in which the seniority system should be modified in order to carry out the purpose of Title VII, since workers at defendant's plant had been denied seniority against a back-drop of prior discrimination.

The court quashed the defense, stating that present correction of past discrimination did not constitute the type of preferential treatment which Title VII prohibited.

REMEDY ORDERED:

Question of remedy deferred to allow parties to confer with the judge.

CASES CITED:

Local 189, United Papermakers and Paperworkers, AFL-CIO v. United States, 416 Fed.2d 980 (5th Cir., 1969); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D.Va., 1968); Griggs v. Duke Power Power Co., 401 U.S. 424 (1971).

WATKINS v. UNITED STEEL WORKERS OF AMERCIA LOCAL 2369 - 8 FEP 729 (5/14/74).

REMEDIAL ORDER

Laid off blacks were to be reinstated, with back pay, so that their proportion in the present, smaller work force would be equivalent to that in the larger, 1971 work force after the affirmative action hiring plan had been implemented. No incumbents were to be laid off to facilitate reinstatement. Rather, all employees were to share available work, and to be paid for full time work, even if they worked less than full weeks.

Future layoffs were to be accomplished so that the number of blacks and whites laid off would be proportional to their total number in the work force.

CASE:

WATKINS v. UNITED STEELWORKERS OF AMERICA LOCAL 2369, Civ. #74-2604 (Slip Opinion).

COURT AND DATE:

U.S. Court of Appeals, Fifth Circuit, 7/16/75.

ALLEGATION:

Plaintiffs, black employees of Continental Can Company who were laid off under their union contract's LIFO plan, brought a class action suit against the union and their employer, alleging that the LIFO plan was not bona fide and that their discharge perpetuated the employer's past discrimination in violation of Title VII. They claimed that while the LIFO plan appeared on the surface, to be neutral, it was in fact discriminatory since defendents' prior discrimination had prevented blacks from gaining sufficient seniority to withstand lay off. Plaintiffs also contended that the collectively bargained recall-in-reverse-order-of-layoff system was unlawful.

DECISION:

The court first noticed the facts of the case. Defendant company had hired only two blacks prior to 1965; from 1966 to 1969, some blacks were hired; and from 1969-1971 substantial numbers of blacks were hired. From 1971-1973, layoffs became necessary, and were accomplished through the reverse seniority plan embodied in plaintiff's collective bargaining agreement. Under this agreement, recall was to be accomplished in reverse order of layoff. All blacks except the original two, who were hired in the 1940's, were laid off. After the laid off plaintiffs won their suit in the district court, an order was issued, which stated, in essence, that blacks were to be rehired with back pay in order to establish the 1971 black-white ratio; all employees were to share available work and be paid for full-time work; future layoffs were to be allocated among blacks and whites in proportion to their ratio in the work force.

It was then held that although the employment seniority system and its LIFO plan had a more harsh impact on the black employees, it was bona fide and not in violation of Title VII, since the complainants had not themselves previously suffered discrimination at the hand of defendants. It was held that the black plaintiffs here had, as individuals, achieved their rightful places in the employment hierarchy without regard to race. The court decided that the actual reason why the black plaintiffs had insufficient seniority to withstand layoff was their age; that they were too young to have applied for employment with the company during its days of discriminatory hiring. Furthermore, it was found that a declaration that the LIFO plan was discriminatory would entail treating blacks who had not been personally discriminated against preferentially to equivalent whites.

The total employment seniority system was held bona fide since it granted to plaintiffs their rightful place without granting fictional seniority.

Recall on the basis of total employment seniority was seen as not perpetuating the effects of past discrimination against the plaintiffs. Since the court previously held that defendant company did not discriminate in hiring plaintiffs, there was no discrimination which could be perpetuated. If the plaintiffs were to be recalled before senior whites, the court found that this would constitute preferential treatment in violation of Title VII. Citing Williamson, the Fifth Circuit recognized that in a job seniority situation, extended layoffs dictated that recall privileges which operated to the residual disadvantage of blacks violated Title VII and were subject to judicial modification; however, the court noted that Watkins utilized plant seniority for recalls. In conclusion, the court held that if layoffs by reverse seniority were bona fide under Title VII, then by analogy, recalls in reverse order of layoffs were bona fide.

REMEDY ORDERED:

Reversed and remanded.

CASES CITED:

Watkins v. United Steelworkers of America Local 2369, 369 F.Supp. 1221 (E.D.La., 1974); Jersey Central Power and Light Co. v. Local Unions of the International Brotherhood of Electrical Workers, 508 Fed.2d 687 (5th Cir., 1969); (3rd Cir., 1975); Waters v. Wisconsin Steel Works, 502 Fed.2d 1309 (7th Cir., 1974); Schaefer v. Tannian, 10 FEP 897 (E.D.Mich., 1975); Delay v. Carling Brewing Co., 10 FEP 16, (N.D.Ga., 1974); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Local 189, Papermakers and Paperworkers, AFL-CIO v. United States, 416 Fed.2d 980 (5th Cir., 1969); Williamson v. Bethlehem Steel Corp., 468 F.2d 1201 (2nd Cir., 1972).

CASE:

DELAY v. CARLING BREWING CO., 10 FEP 164.

COURT AND DATE:

U.S. District Court, Northern District of Georgia, 6/25/74.

ALLEGATION:

Plaintiff contended that defendant was obligated to act to remove the vestiges of its pre-1964 discrimination which resulted in extensive annual layoffs of black employees.

Defendant admitted that the result of the layoff policy was discriminatory, but argued that it had no obligation to remedy the result of a discriminatory policy which it utilized prior to the effective date of the 1964 Civil Rights Act.

DECISION:

The court first reviewed the facts of the case. Defendant was found to have discriminated against blacks until 1964, when it ceased this practice and began hiring blacks. It had a seniority system based solely on years of service with the company which was used as the root of defendant's layoff and recall scheme. Since defendant's business was highly seasonal, many employees were laid off for up to six months per year. And since the more junior employees were the ones laid off, the result was that all blacks were laid off for 6 months per year. These blacks thereby lost their opportunity for health benefits. Also, there was no possibility that their annual layoffs would end as long as defendant was in business.

REMEDY ORDERED:

The Court held that defendant was required to eliminate the annual layoff of all black employees, and denied defendant's motion for summary judgment.

CASES CITED:

Watkins v. United Steel Workers Local 2369, 7 FEP 90 (E.D.La., 1974).

CASE:

WATERS v. WISCONSIN STEELWORKS OF INTERNATIONAL HARVESTER CO., 502 Fed. 2d 1309.

COURT AND DATE:

U.S. Court of Appeals, Seventh Circuit, 8/26/74.

ALLEGATION:

Plaintiffs, black bricklayers who had been in defendant's employment for too short a time to accrue seniority rights before their layoffs, charged that defendant's last-hired-first-fired seniority system violated their rights under Title VII of the 1964 Civil Rights Act. Plaintiff also alleged that the recall of eight men, who had been given severance pay in exchange for forfeiture of their contractual seniority rights, discriminatorily advanced these men ahead of plaintiffs on the seniority roster. The final contention of the plaintiffs was that defendant's seniority system perpetuated the effects of past discrimination.

Defendant contended that it had not engaged in discriminatory hiring policies prior to 1964. It also stated that their seniority system was racially neutral, and that it found plaintiff's demands as equivalent to a call for reverse discrimination.

DECISION:

The court held that defendant's employment seniority system granted workers equal credit for actual length of service with defendant, and was not of itself racially discriminatory but was, rather, racially neutral. It was held that workers were not to be granted special privileges or fictional seniority because of race; that employees were not to be shackled with the burdens of their employers' past discrimination.

The court found, however, that the reinstatement of the persons who had been given severance pay constituted present perpetration of a past, discriminatory practice.

REMEDY ORDERED:

Plaintiffs were to receive damages equal to the difference between plaintiffs' actual earnings for the period and those which he would have earned absent the discrimination of defendants. The dollar value of this award was to be calculated on remand. Plaintiff's counsel was awarded attorney's fees, dollar value to be calculated on remand.

CASES CITED:

Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D.Va., 1968); Local 189, International Papermakers and Paperworkers, AFL-CIO v. United States, 416 Fed.2d 980 (5th Cir., 1969); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

CASE:

COX v. ALLIED CHEMICAL CORP., 382 F.Supp. 309 (1974).

COURT AND DATE:

U.S. District Court, Middle District of Louisiana, 9/23/74.

ALLEGATION:

Plaintiffs, two black and one white former employees of defendant company ("Allied"), who had been hired before 5/2/69, alleged that certain policies of Allied and defendant union ("Local 216") carried forward the effects of past discrimination because of race, and violated Title VII of the 1964 Civil Rights Act. These policies were embodied in the unit seniority system found in the present and all prior collective bargaining agreements between Allied and Local 216. Under this system, employees were to accrue seniority only within the unit of the plant in which they worked, such seniority to be wholly forfeited on transfer to another unit. Also, when a reduction in unit personnel was necessary employees in jobs to be eliminated were allowed to displace the least senior employees in their job classification; the displaced employees were in turn allowed to displace the least senior employees in the next lower classification; these procedures were to be followed until the least senior unit employees were laid off.

Plaintiffs argued that they should have been allowed to use their total plant seniority to protect them against personnel reduction layoffs, since prior discrimination had locked them into their units. They indicated that employees who worked in formerly all white units, and who had less total plant seniority than plaintiffs, were not being laid off during plaintiffs' unit's personnel reduction.

Defendants claimed that maintenance of the unit seniority system was dictated by business necessity.

DECISION:

On the basis of Local 189's reasoning, the court concluded that it had the power to eliminate the present effects of past discrimination by altering a seniority system, racially neutral on its face, absent a sufficient showing by defendant of business necessity.

Following "rightful place" reasoning, the court found that the 1971 EEOC Conciliation Agreement and the special provision of the 1973 Collective Bargaining Agreement, which gave blacks hired during Allied's pre-1969 discriminatory hiring period the opportunity to be credited with total plant seniority

for the purpose of promotion, layoff or recall if they transferred between units, a reasonable implementation of Title VII with respect to promotions and transfers only. Also, the court questioned whether plaintiffs had had an opportunity to act under the effect of these provisions, or whether their 10/22/71 layoffs had precluded their taking advantage of the newer system.

With respect to layoff, the court found the application of law to facts in Watkins to have been misguided. Rather it was decided in the present case that employers were not required, under Title VII, to grant preferential treatment in the form of quotas to minority persons who were not proven to have been injured by their employers' prior discriminatory treatment. A finding of injury to a specific minority person was found to require a showing that: (1) an employee who was locked into his unit was laid off under the unit seniority system while a person in another unit with less total plant seniority was not laid off; (2) the laid off employee would have transferred to that other unit but for defendants' use of the unit seniority system; (3) the laid off person would have been capable of performing the duties of the retained junior employee in the other unit.

As to the two black plaintiffs, the court found all elements of the above three-fold causation tests fulfilled, while the white plaintiff was found to fail the test. The black plaintiffs were held entitled to relief under Title VII.

REMEDY ORDERED:

Allied and Local 216 were held equally liable for the back pay to which plaintiffs were entitled. Attorneys' fees were also awarded to plaintiffs.

The court declined to grant reinstatement, although it acknowledged that it was authorized to grant such relief, since it could have required removal of incumbent employees.

CASES CITED:

Local 189, Papermakers and Paperworkers, AFL-CIO v. United States, 416 Fed.2d 980 (5th Cir., 1969); Watkins v. United Steelworkers of America, Local 2369, 369 F.Supp. 1221 (E.D.La., 1974); Quarles v. Philip Morris Inc., 279 F.Supp. 505 (E.D.Va., 1968).

CASE:

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DECISION #75-037, 10 FEP 285.

DATE:

10/10/74.

ALLEGATION:

Charging parties, four white driver education instructors hired between 1966 and 1969, were laid off in August 1972 due to budgetary cutbacks and decreased student enrollment. They claimed that their employer violated Title VII by terminating them because of their race and without regard to their seniority and ability.

DECISION:

Two white and two Hispanic supervisors each were found to have made layoff recommendations to the white Executive Director, and most of their choices of persons to be retained were in agreement. They were shown to have made their recommendations on the basis of objective criteria: attendance, performance, employee conduct. The complainants were all found to have had poor performance and/or conduct records.

The EEOC held that there was no evidence, despite the retention of less senior Hispanics, that whites with superior conduct or performance records were released on the basis of their race.

REMEDY ORDERED:

None.

CASES CITED:

None.

CASE:

BALES v. GENERAL MOTORS CORP., 9 FEP 234.

COURT AND DATE:

U.S. District Court, Northern District of California, 1/27/75.

ALLEGATION:

Plaintiffs, female employees of defendant corporation, contended that defendant's proposed seniority based layoffs should be enjoined since defenant corporation's previous sex-based discrimination had caused plaintiffs to have so little seniority that they were to be laid off earlier than they would have been had defendant not previously discriminated against them. These plaintiffs asked that the collective bargaining agreement between defendant union and defendant corporation be amended to permit female employees to continue to work while more senior males would be laid off.

DECISION:

The court held that plaintiffs probably could not prevail on the merits, since defendant's seniority system was bona fide. Also, it was found that plaintiffs would not suffer irreparable injury if laid off, since their unemployment benefits under a collectively bargained plan would amount to 95% of their usual weekly take home pay.

REMEDY ORDERED:

Plaintiffs' request for preliminary injunction denied.

CASES CITED:

No case cited.

CASE:

JONES v. PACIFIC INTERMOUNTAIN EXPRESS, 10 FEP 913.

COURT AND DATE:

U.S. District Court, Northern District of California, 4/2/75.

ALLEGATION:

Plaintiffs, black truck drivers who were recently hired by defendant, who had previously not hired blacks, were laid off pursuant to a last-hired, first-fired provision ("LIFO") in the collective bargaining agreement between their union and their employer. The plaintiffs contended that the LIFO provision was itself illegal under Title VII of the 1964 Civil Rights Act, and asked that enforcement of the provision be enjoined and that the laid off drivers be reemployed under a plan in which all Pacific Intermountain Express drivers would share available work equally. Plaintiffs also argued that they should be awarded seniority retroactive to the dates when they would have applied for work at Pacific Intermountain Express except for its reputation for discrimination.

DECISION:

The reasoning of the court in Franks v. Bowman, which was decided after the case on which plaintiffs relied, Watkins, persuaded the court in this case. Hence, defendants' past discrimination was held not to invalidate an otherwise bona fide seniority system.

The retroactive seniority which plaintiffs sought was found inconsistent with the general requirement that one seeking to prove racial discrimination against him in hiring must show that he actually applied for the position in question, since plaintiffs here asked for seniority dating to a time at which they might not have actually applied for employment with defendant.

REMEDY:

Motion for preliminary injunction denied.

CASES CITED:

Watkins v. United Steelworkers of America, Local 2369, 369 F.Supp. 1221 (E.D.La., 1974); Waters v. Wisconsin Steel Works, (7th Cir., 1974); Jersey Central Power and Light v. Local Unions of the International Brotherhood of Electrical Workers, 508 Fed.2d 687 (3rd Cir., 1975).

CASE:

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DECISION #72-251.

COURT AND DATE:

EEOC, 5/8/75.

ALLEGATION:

Charging parties alleged that their employer engaged in unfair employment practices in violation of Title VII by maintaining a LIFO layoff system which had a disparate impact on blacks as a class because of past discriminatory hiring practices. Charging parties were laid off by respondent, an electric company, under the LIFO system.

DECISION:

The EEOC, relying on the district court's decision in Watkins, found the threshold question to be whether the practice here complained of had a disparate impact on a group protected by Title VII. Such disparate impact was demonstrated to exist through presentation of statistics which showed significant disparity between the percentage of blacks in the available workforce and on respondent's employment roster during the 1973-1974 period. The EEOC found that the statistical data raised an inference of hiring discrimination which was proved by respondent employer's failure to rebut. The Commission then presented statistics which it found to demonstrate that respondent's seniority system had a disproportionate adverse impact on blacks who had insufficient seniority to withstand layoffs due to respondent's prior discriminatory hiring practices.

While the EEOC recognized that the disparate impact of the LIFO system could be justified by proof of business necessity, it stated that this defense was not raised. Furthermore, relying on the district court's opinion in Watkins, the EEOC found that even if the defense had been raised, it could not have been sustained.

On the question of whether or not respondent's seniority system was bona fide, the Commission found, on the basis of the LIFO system's incorporation and perpetuation of earlier discriminatory employment decisions by the employer, that the system was not bona fide. Also noted was the fact that the seniority which was used as a basis for layoffs was a non-job related criterion. The finding of a non-bona fide seniority plan was limited to cases such as this one, in which the effects of past discrimination had not been eliminated; the EEOC stated that disproportionate impact on blacks would not indicate non-bona fideness when a LIFO system operated in a plant where there had been no discrimination.

Relying on its own Decision #71-1447 and the district court's opinion in Watkins, the EEOC found that the apparent legislative intent to support seniority systems was not relevant to the facts of this case.

The EEOC concluded that the respondent employer had engaged in an unlawful employment practice in violation of Title VII by utilizing a LIFO system which excluded a disproportionate number of black employees as a result of the employer's past hiring discrimination.

REMEDY ORDERED:

None.

CASES CITED:

Griggs v. Duke Power Co., 401 U.S. 424 (1971); Watkins v. United Steelworkers of America, Local 2369, 369 F.Supp. 1221 (E.D.La., 1974); Loy v. City of Cleveland, 8 FEP 614 & 617 (N.D. Ohio, 1974).

CASE:

SAVANNAH PRINTING SPECIALTIES AND PAPER PRODUCTS LOCAL UNION 604 v. UNION CAMP CORP., 350 F.SUPP. 632

COURT AND DATE:

U.S. District Court, Southern District of Georgia, 11/10/72.

ALLEGATION:

Plaintiffs claimed that defendant's refusal to arbitrate certain layoff and seniority related grievances violated a collective bargaining agreement between plaintiff's union and defendant. The grievances related to the seniority and layoff provisions of an OFCC Compliance Program, which stated that division (rather than the former job) seniority would be the only seniority factor involved in competition for higher echelon jobs by blacks who had been victims of pre-1970 discrimination. The grievances stated that plaintiffs had been laid off due to lack of business while certain employees with less "department" seniority, though greater "division" seniority, were retained. Plaintiffs, three of whom were black, were hired post-1970. Some of the retained employees were blacks who had been hired pre-1970 into different departments.

Defendant argued that plaintiffs stated no claim on which relief could be granted, since their grievances were not arbitrable. Rather, they asserted that the seniority standards for determining layoffs were mandated by the OFCC.

DECISION:

It was held that an employer was not required to arbitrate in a situation in which arbitration could eradicate the effects of affirmative action which was mandated by U.S. law and public policy. While it was recognized that compliance with Executive Order 11246 would not be required if defendant wished to cease contracting with the federal government, the court found that federal contracts were a mainstay of defendant's business, and that their elimination was not feasible. Furthermore, it was held that the affirmative action plan would be required of defendants under Title VII even if it made no government contracts, since defendant's previous job seniority system tended to perpetuate the effects of past discrimination.

RELIEF GRANTED:

Defendant properly refused to arbitrate; case dismissed for failure to state a claim on which relief could be granted.

CASES CITED:

Local 189, Papermakers and Paperworkers, AFL-CIO v. United States, 416 Fed.2d 980 (5th Cir., 1969); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D.Va., 1968).

CASE:

JERSEY CENTRAL POWER & LIGHT CO., v. LOCAL UNIONS OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS 508 Fed.2d 687.

COURT AND DATE:

U.S. Court of Appeals, Third Circuit, 2/14/75.

ALLEGATION:

This was originally a declaratory judgment action, brought to determine the rights of the company, the union, and the union-member-employees under a company-union collective bargaining agreement and a EEOC-company-union conciliation agreement, in the light of forthcoming economically induced layoffs. In the district court, it was held that the conciliation agreement, which would have maintained pre-layoff workforce composition with respect to race and sex throughout the layoffs, prevailed over the earlier collective bargaining agreement, which would have adhered strictly to LIFO under a plantwide seniority system.

The union appealed, alleging that the conciliation agreement sought to increase the proportion of female and minority workers through "hires" rather than "fires;" that once these persons were hired, the terms of their employment would be governed by the collective bargaining agreement, e.g. the LIFO provisions.

DECISION:

The Court of Appeals found for the union, stating that Title VII was not violated each time a minority group member was laid off under a LIFO plan. It further held that plantwide seniority systems which seemed to be neutral, but which actually had a disproportionately harsh impact on recently hired minority workers were bona fide seniority systems under Title VII; in addition the court held that a seniority system which carried forward the effect of past discrimination was valid under the 1964 Civil Rights Act.

REMEDY ORDERED:

Remanded: (1) to vacate the previous order which had dictated that Jersey Central was to maintain the same minority percentages in its post-layoff work force as in its pre-layoff work force; and (2) to implement the LIFO plan dictated by the collective bargaining agreement.

CASES CITED:

Griggs v. Duke Power Co., 401 U.S. 424 (1971); Local 189 Papermakers and Paperworkers, AFL-CIO v. United States, 416 Fed.2d 980 (5th Cir., 1969); Waters v. Wisconsin Steel Works, 502 Fed.2d 1309 (7th Cir., 1974).

CASE:

WILLIAMSON v. BETHLEHEM STEEL CORP., 468 F.2d, 1201.

COURT AND DATE:

U.S. Court of Appeals, Second Circuit, 11/3/75.

ALLEGATION:

Plaintiffs, six black employees of defendant, each of whom had at least 15 years' seniority, asked that the recall of laid off employees on a racially discriminatory basis be enjoined. Defendant's former job seniority system, which until 10/1/67, locked blacks into unattractive low paying jobs, was previously held a violation of Title VII of the 1964 Civil Rights Act.

DECISION:

The court found that the discriminatory impact of a departmental seniority recall system, where there had been multiple layoffs, was not foreseen by government counsel in the previous suit. Therefore, the present plaintiffs were permitted to seek an extension of the relief obtained in the earlier case.

It was held that recall privileges granted after an extended layoff, which operated to the residual disadvantage of black workers who had been discriminated against by a seniority system, could violate Title VII, and were subject to judicial modification.

The court noted that there were four questions which the district court would have to answer on remand:

(1) At what point in time does a "temporary" layoff become an "extended" layoff?

(2) To what class should relief extend? (e.g. should it extend only to black persons hired before defendant ceased its discriminatory hiring practices?)

(3) How does the seniority system affect pools? The previous court decree had organized recall as follows:

A) Laid off employees were recalled to or assigned into "pool jobs", usually entry level jobs, on the basis of plant service;

B) Employees were recalled from pool jobs to higher rated jobs in their seniority unit on the basis of unit service, except as to

C) Blacks who had transferred out of their traditionally black departments; for these reasons, total plant service of all employees competing for the job in question was used to determine order of recall.

(4) Should laid off white employees be treated as having plant-wide rather than unit seniority? If so, would this have the effect of recalling whites to positions held prior to layoff by blacks? If so, would Title VII be violated?

Finally, the court stated that defendant's compliance with Title VII might meet with criticism from majority group employees, but that this criticism was not to deter the effectuation of policies consistent with Title VII.

REMEDY ORDERED:

Remand to consider above questions (1) through (4).

CASES CITED:

Vogler v. McCarty, Inc., 451 Fed.2d 1236 (5th Cir., 1971); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D.Va., 1968); Local 189, Papermakers and Paperworkers, AFL-CIO v. United States, 416 Fed.2d 980 (5th Cir., 1969).

CASE:

LOY v. CITY OF CLEVELAND, 8 FEP 614.

COURT AND DATE:

U.S. District Court, Northern District Ohio, 3/29/74.

ALLEGATION:

Plaintiffs, female police officers who were notified of their termination, contended that their employer's (defendant's) layoff procedures violated Title VII of the 1964 Civil Rights Act and asked for a temporary restraining order. They alleged that they had been hired in 1973, but were to be laid off in order of increasing Police Entrance Examination scores because of budget cutbacks. It was stipulated that prior to 1973, the Police Department hired no female patrol officers, and was limited by ordinance to employ no more than 50 women in its Women's Bureau. While relevant ordinances were amended in 1972 to allow women to become patrol officers, the department continued to exhibit anti-female bias to an extent in 1973; e.g. 19% of all applicants who passed the entrance examination were female, yet only 8% of all of those passing applicants hired were women.

STATISTICAL DISPARITY:

The effect of the proposed layoff would have been to terminate 87% of the females appointed in 1973, but only 42.5% of the males appointed in 1973.

DECISION:

It was held that when a group had been prevented by discrimination from obtaining employment, and consequently from obtaining seniority in certain positions, that group should not be further penalized by the operation of a seniority system which rewarded those who were not the victims of discrimination. Also, the court found that it had authority to remedy the effects of past discrimination, once such past discrimination was established. The court decided that since plaintiffs would probably prevail on the merits, a temporary restraining order should be issued, limiting the percentage of women among persons laid off to equal the percentage of women among all patrol officers hired in 1973 (8%).

REMEDY ORDERED:

Temporary restraining order to prevent defendant from laying off plaintiffs.

CASES CITED:

Local 189, Papermakers and Paperworkers, AFL-CIO v. United States, 416 Fed.2d 980 (5th Cir., 1969); Quarles v. Philip Morris, Inc., 279 F. Supp. 503 (E.D. Va., 1968); Watkins v. United Steelworkers of America Local 2369, 369 F.Supp. 1221.

CASE:

LOY v. CITY OF CLEVELAND, 8 FEP 617.

COURT AND DATE:

U.S. District Court, Northern District of Ohio, 6/4/74.

ALLEGATION:

Defendants contended that the proposed discriminatory layoffs, complained of in plaintiff's previous motion for temporary restraining order, did not go into effect because of federal funds received, and that this case should be dismissed.

DECISION:

While voluntary cessation of allegedly illegal conduct was found not necessarily to render a case moot, the court held that plaintiff's claims, which were raised in the context of a threatened layoff, that never materialized, were moot. The court's rational was that while the past discrimination and seniority scheme which resulted therefrom were alleged to be unlawful, the layoffs which were previously planned and which precipitated the lawsuit were not alleged to be per se unlawful conduct.

REMEDY ORDERED:

No equitable remedy could be fashioned to insure non-prejudicial treatment of plaintiffs in the event of possible future layoffs. However, plaintiffs were granted leave to intervene in Harden v. City of Cleveland. In that case, claims of past discrimination and an unfair seniority system (similar to those in Loy) had been made, and were to be decided on the merits. Defendant's motion to dismiss was granted.

CASES CITED:

None relevant.

CASE:

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DECISION #74-106, 10 FEP 269.

DATE:

4/2/74.

ALLEGATION:

Complainants A and B contended that employer, a public educational institution, violated Title VII by failing to rehire them because they were white and by retaining in their places two less qualified black music instructors. Complainants stated that their dismissal was not based on their individual qualifications but on a policy, which complainants alleged was unlawful, of maintaining a fixed ratio of black teachers to black students.

DECISION:

Complainant A was found to have been laid off primarily because of his race. Seniority was not a consideration here since all parties in contention for the position which complainant claimed was rightfully his were on annual contracts.

Employer's contention, that black teachers were necessary to meet the needs of the black student community and to contribute to the school as a whole, was held of doubtful validity when evidence demonstrated that the music students as well as the general student body, including many blacks, felt that Complainant A contributed greatly to their educational experience. Furthermore, the EEOC found some of the criteria on which Complainant A's discharge was based to be overly subjective.

In a footnote, the EEOC cautioned that use of a strict ratio, such as a black faculty-black student ratio, as the chief criterion of an employment policy would come dangerously close to white abusive, black-preferential treatment forbidden by Title VII, and would perpetuate anti-1964 Civil Rights Act philosophies such as "only black teachers can relate to black students." However, the Commission was unable to find that respondent had utilized a strict quota. Rather, it found respondent's affirmative action policy in the layoff situation to have been inconsistently set forth on different occasions.

REMEDY ORDERED:

None.

CASES CITED:

Watkins v. United Steelworkers of America, Local 2369, 369 F.Supp. 1221 (E.D.La., 1974); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

CASE:

UNITED AFFIRMATIVE ACTION COMMITTEE v. GLEASON, 10 FEP 64.

COURT AND DATE:

U.S. District Court, Oregon, 7/24/74.

ALLEGATION:

Plaintiffs, minority group employees of a county government, challenged their proposed layoffs in reverse order of seniority, due to county fiscal problems, as racially discriminatory. They requested a preliminary injunction to stay the layoffs.

DECISION:

The use of the seniority system for determining which employees were to be laid off was seen as a usual and fair system, not based on racial discrimination, while the merit system suggested as an alternative to seniority by plaintiffs was denounced as unworkable and contrary to civil service and union rules.

The statistics which plaintiff had introduced in support of its contention that the county engaged in racial discrimination were found unconvincing.

While the use of the seniority list as a basis for layoffs was found to have a more harsh impact on racial minorities than on whites, since the minorities were for the most part hired more recently than whites, the court could not find this impact a sufficient reason to grant the prayed-for preliminary injunction.

REMEDY ORDERED:

Plaintiff's motion for a preliminary injunction to halt seniority-based layoffs was denied.

CASES CITED:

None relevant.

CASE:

LUM v. CIVIL SERVICE COMMISSION, 10 FEP 365.

COURT AND DATE:

U.S. District Court, Southern District of New York, 1/31/75.

ALLEGATION:

Plaintiff had originally complained that his employment application to the police force was denied because its minimum height requirement was designed to exclude persons of certain races or national origins. A Consent Order ended this alleged discrimination, and plaintiff went on to become a probationary officer, although he would have now completed the probationary period had he been hired when he originally applied.

The present allegation was that plaintiff would not now be affected by the budget crisis - motivated layoff of probationary police officers if it had not been for the police department's original discrimination against him, which postponed his admission to police training.

DECISION:

Plaintiff would have been beyond the probationary period and immune to the present layoffs had it not been for defendant's original discriminatory height requirement. Plaintiff made the requisite showing of probable success on the merits. Also, the court found that the city's burden of having one more person (plaintiff) on its payroll was much smaller than the burden which Lum would have to bear if he were laid off.

REMEDY ORDERED:

The police department was enjoined from laying off the plaintiff.

CASES CITED:

None relevant.

CASE:

CHANCE v. BOARD OF EXAMINERS, 10 FEP 1023.

COURT AND DATE:

U.S. District Court, Southern District of New York, 2/7/75.

ALLEGATION:

Plaintiffs, supervisory personnel who were appointed pursuant to orders of the Southern District Court, urged that continued implementation of the excessing regulations set forth in the agreement between their union and the defendant would have a discriminatory effect on plaintiffs which would be inconsistent with the court's prior decisions in Chance. Plaintiffs' previously proposed alternative approach to excessing procedures resulted in a court order on 11/22/74; defendant now sought modification of that order in the name of administrative expediency.

DECISION:

The judge first conceded his familiarity with the Title VII cases which dealt with minority layoffs through the unsympathetic "status quo" and/or "rightful place" approaches. He stated that the particular facts, as well as the different statutory bases of the present case might distinguish it from Waters and Jersey Central. Noting that the reasoning of these cases might be called "generally applicable," the judge stated, however, that he simply disagreed with them, and that he found support for his present order in the Watkins decision of Eastern District Court of Louisiana Court, especially since the Second Circuit's racial quota stance was more in agreement with the Fifth (in which the Eastern District of Louisiana lay) than with the Third and Seventh Circuits.

The court agreed to modify its previous order in this case.

REMEDY ORDERED:

The modified order stated, in essence:

1. Affected Persons

   a) Acting or regular supervisors shall be divided into Group A, black-American; Group B, Hispanic-American; and Group C, "All Others."

b) This order shall not affect:

1) Supervisors who were appointed within the last 5 months.

2) Supervisors who were not holders of valid supervisory licenses as of the date of their excessing.

3) Supervisors who were given the opportunity to take a licensing examination but who failed or neglected to take this examination.

II. Excessing

a) The total number of supervisors in each group. A, B and C, is to be calculated as of the date on which any supervisory position is to be terminated. Then the percentage of A and of B in the total (A+B+C) shall be calculated.

b) The percentage of A and of B in the total of supervisors to be excessed shall not exceed A/(A+B+C) and B/(A+B+C), respectively.

c) The numbers and percentages referred to in a) and b) above shall be calculated for individual districts for the purpose of intra-district excessing.

d) The numbers and percentages referred to in a) and b) above shall be calculated on the basis of the number of supervisors in New York City for the purpose of inter-district excessing.

e) Supervisors who are advised of their excessing rights and who elect to be transferred to similar positions of expected duration of at least one year, in the same or in a different district, are not to be considered excessed.

III. Reassignment

a) An A, B or C person who was excessed shall be reassigned to a supervisory position as follows:

1) (A+B)/(A+B+C) shall not decrease unless no A or B persons are available for reassignment.

2) A/(A+B+C) shall not decrease unless no A persons are available for reassignment, provided the ratio may decrease to A/(A+B+C+1) if the decrease results from reassignment of an excessed B person.

3) B/(A+B+C) shall not decrease unless no B persons are available for reassignment, provided the ratio may decrease to B/(A+B+C+1) if the decrease results from reassignment of an excessed A person.

IV. Duration

This order shall be effective 7/30/74 through 11/30/77, except that it shall not apply to pre-11/22/74 intra-district excessing.

V. Construction

This order shall be construed as consistent with relevant contracts, laws and policies. Defendant may create a preferred pool of excessed supervisors and/or reassign or appoint them to vacancies anywhere within the NYC Public School System. Excessed supervisors may return to vacancies in their home districts.

CASES CITED:

Waters v. Wisconsin Steel Works, Inc., 502 Fed.2d 1309 (7th Cir., 1974); Jersey Central Power and Light Co., v. Local Unions of the International Brotherhood of Electrical Workers, 508 Fed.2d 687 (3rd Cir., 1975); Watkins v. United Steelworkers of America Local 2369, 369 F.Supp. 1221 (E.D. La., 1974).

DECISION:

The court stated that the question before it was whether the LIFO layoff system dictated by the collectively bargained seniority scheme, while neutral on its face, violated Title VII of the 1964 Civil Rights Act, in that it tended to perpetuate the effects of past discrimination against females.

It was noted that departmental seniority systems which perpetuated the effects of past discrimination were generally found to violate Title VII. The court than analogized the previously typical situation, of discriminatory non-promotion within departmental seniority systems to the present situation, of discriminatory demotion on a quasi-departmental basis, e.g. demotion on the basis of time in rank rather than total length of service in the police department. The court concluded that the present seniority system was not bona fide, but was unlawful in light of Title VII, since: (1) females with greater total length of service, but less time in rank than similarly situated males, would be demoted while the males would be retained; (2) the police department's previous division of lines of progression on the basis of sex, in which females had substantially less chance for promotion than males, deprived females of time in rank, which upon merger of the lines would have allowed the females to withstand the planned demotions without feeling discriminatory impact.

After considering the precedents set forth by all relevant recent cases, the court found that the proposed layoffs and demotions of women, on the basis of their lack of seniority which was a result of previous discrimination, to violate Title VII, since defendants did not demonstrate business necessity.

REMEDY ORDERED:

The court explicitly stated that it wished to avoid injury to males which would result from preferential treatment to females; e.g. it did not wish to enter an order which would force layoff of senior males in exchange for retention of junior females. Hence, the court took notice that most of the females (and males) who had the least seniority had been hired under a certain federally funded program, and directed that no one hired under this program could be laid off. The seniority provisions of the collective bargaining agreement were to prevail, however, in the layoff of the 550 city funded police officers who were to become victims of budgetary cutbacks. The reasons stated for utilization of this remedy were that: (1) fewer total officers would be laid off (550 rather than the originally proposed 825); (2) a smaller percentage of women would be laid off; (3) no male or female officer not originally scheduled for layoff would be laid off. Recall under the new plan was also to be based on seniority.