St. Mary's Law Journal

Volume 14 | Number 1 Article 5

1-1-1982

Bona Fide Seniority Systems Adopted before and After Civil Rights Act of 1964 Are Immune from Attack Unless Result of Intention to Discriminate.

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CIVIL RIGHTS—Seniority Systems—Bona Fide Seniority Systems Adopted Before And After Civil Rights Act Of 1964 Are Immune From Attack Unless Result Of Intention To Discriminate.

American Tobacco Co. v. Patterson,
___ U.S. ___ , 102 S. Ct. 1534, 71 L. Ed. 2d 748 (1982).

In 1968, American Tobacco Co. discontinued its previous racially discriminatory employment practices in its two plants,[1] in response to the mandates of title VII of the Civil Rights Act of 1964.[2] A new plan for employment and promotion practices was developed with the creation of nine lines of progression, each line having at least two jobs.[3] Patterson, a black employee, brought suit against American Tobacco, under the Civil Rights Act of 1964, alleging discriminatory employment practices.[4] The

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1. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1536, 71 L. Ed. 2d 748, 753 (1982). Each of the two plants had separate prefabrication and fabrication departments. The prefabrication department, in direct contrast to the fabrication department, had the lowest paying jobs and the least desirable working conditions. It is conceded that prior to 1963, American Tobacco openly segregated and discriminated against black employees by assigning them to the prefabrication departments while assigning white employees to the fabrication departments. Each department maintained its own seniority list, along with a policy of forfeiture of accrued seniority in the event of transfer between departments. In 1963, the company changed these employment policies. A plant-wide seniority list replaced the separate departmental lists, and seniority was lost in the event of transfer between plants. The promotion policy was changed to grant promotions based not only on seniority, but also on particular subjective qualifications. This discretionary promotion policy, however, resulted in continued discriminatory employment practices. *See id.* at ___, 102 S. Ct. at 1536, 71 L. Ed. 2d at 753.

2. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980). 42 U.S.C. § 2000e-2 is designated section 703 in title VII of the Civil Rights Act of 1964, and will be hereinafter referred to as section 703. Section 703 generally prohibits employers and unions from engaging in discriminatory employment practices or procedures on the basis of an individual's race, color, sex, religion, or national origin. *See id.* § 2000e-2(a) (1976) (employer's practices) and § 2000e-2(c) (1976) (union's practices).

3. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1536, 71 L. Ed. 2d 748, 753-54 (1982). Four of the nine lines of progression consisted of the top jobs from the traditionally white fabrication department matched with the lowest jobs from the same department. Two of the nine lines had jobs from the highest level in the traditionally black prefabrication department matched with the lowest level jobs from the same department. Upward mobility to the top job in each line depended upon prior experience in the lower job. Automatic forfeiture of accrued seniority resulted if an employee transferred between plants. *See id.* at ___, 102 S. Ct. at 1536, 71 L. Ed. 2d at 753-54.

4. *See id* at ___, 102 S. Ct. at 1536, 71 L. Ed. 2d at 754; Patterson v. American Tobacco

district court found six of the nine lines of progression violative of title VII because they perpetuated past discrimination, and American Tobacco was enjoined from further use of those six lines.[5] The Court of Appeals for the Fourth Circuit affirmed in part, modified in part, and remanded.[6] On remand, American Tobacco claimed the lines of progression were part of a bona fide seniority system and consequently protected from title VII attack, even if they did perpetuate past discrimination, so long as their inception was not the result of an intent to discriminate.[7] The district court found the seniority system was not bona fide because it had its genesis in racial discrimination.[8] American Tobacco's motion to vacate the injunction order was denied.[9] The court of appeals affirmed the district court, but reasoned that the lines of progression were not part of a seniority system.[10] An en banc rehearing of the court of appeals focused on the immunity afforded bona fide seniority systems and declared that title VII, section 703(h) only extended immunity to those seniority systems in existence at the time title VII became effective.[11] A petition for certiorari was granted.[12] Held—*Reversed and remanded.* Bona fide seniority systems adopted before and after the effective date of title VII are immune

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Co., 535 F.2d 257, 262 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976). In 1973, more than 80 percent of the employees in the Virginia branch and 92 percent in the Richmond branch prefabrication departments were black. In comparision, 14 percent in the Virginia branch and 38 percent in the Richmond branch fabrication departments were black. The wages earned by most employees in the Richmond branch were considerably less than those earned at the Virginia plant. *See* Patterson v. American Tobacco Co., 535 F.2d 257, 263 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976).

5. *See* Patterson v. American Tobacco Co., 535 F.2d 257, 264-65 (4th. Cir.), *cert. denied*, 429 U.S. 920 (1976). Job advancement along lines of progression required the employee to work in the lower paying job before rising to the higher paying job. Since the employees had previously been segregated and blacks essentially excluded from the white fabrication departments, blacks held few jobs in the lower levels of the progression lines; therefore, blacks could not advance and in this manner employment discrimination was perpetuated. *See id.* at 264.

6. *See id.* at 276.

7. *See* Patterson v. American Tobacco Co., 586 F.2d 300, 303 (4th Cir. 1978). American Tobacco claimed section 703(h) of title VII provided their seniority system with immunity from attack under title VII. *See id.* at 303. Section 703(h) of title VII provides an exception for seniority systems from the general terms of title VII. *See* 42 U.S.C. § 2000e-2(h) (1976).

8. *See* Patterson v. American Tobacco Co., 586 F.2d 300, 303 (4th Cir. 1978).

9. *See id.* at 301.

10. *See id.* at 303. The court interpreted section 703(h) as protecting only the seniority aspects of a promotional system and not as insulating an entire promotional system. *See id.* at 303.

11. *See* Patterson v. American Tobacco Co., 634 F.2d 744, 748-49 (4th Cir. 1980) (en banc), *vacated and remanded*, ___ U.S. ___, 102 S. Ct. 1534, 71 L. Ed. 2d 748 (1982).

12. American Tobacco Co. v. Patterson, 452 U.S. 937 (1981).

from attack unless they are the result of an intent to discriminate.[13]

Title VII of the Civil Rights Act of 1964 specifically prohibits discriminatory employment practices by employers or unions on the basis of race, color, sex, religion, or national origin.[14] The purpose of title VII is to guarantee equal employment opportunities and to eliminate prior employment procedures or devices[15] which have been used to effectuate employers' and unions' discriminatory motives.[16] In *Griggs v. Duke Power Co.*,[17] the Supreme Court found this prohibition extending not only to notorious acts of discrimination, but also to those acts neutral on their face whose effect is discriminatory.[18] Discriminatory employment practices are not subject to the prohibition if they can be justified as necessa-

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13. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1541, 71 L. Ed. 2d 748, 760 (1982).

14. *See* 42 U.S.C. §§ 2000e-2(a) to 2(c) (1976). Section 2(a) provides that it is unlawful for an employer to discharge, segregate, or fail to hire employees, or to limit or withhold any privileges of employment on the basis of the statutorily proscribed classifications. *See id.* at § 2(a). Section 2(c) provides that it is an unlawful union practice to refuse to admit to membership or discharge from membership, to segregate members, to limit members' opportunities for advancement, or to aid an employer in discriminatory practices based on an individual's race, color, sex, religion, or national origin. *See id.* at § 2(b).

15. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (high school diploma or passing mark on intelligence test as requirement for employment unlawful when neither standard linked to job performance); Contreras v. City of Los Angeles, 656 F.2d 1267, 1280 (9th Cir. 1981) (pre-employment discriminatory tests unlawful unless test score predictive of work qualities essential to employment position); Durant v. Owens-Illinois Glass Co., 517 F. Supp. 710, 721 (E.D. La. 1980) (waiver of skills tests for experienced employees lawful), *aff'd*, 656 F.2d 89 (5th Cir. 1981).

16. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (title VII to assure equal employment and destroy existing discriminatory barriers); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (congressional intent was equal job opportunity and elimination of discriminatory devices); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (objective of title VII was equal opportunities and removal of employment barriers to non-white employees); *see also* Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (secondary purpose of title VII to make persons whole for damages suffered due to discriminatory employment practices).

17. 401 U.S. 424, 430 (1971).

18. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) (neutral height and weight requirement for prison guard invalid where effect was disproportionate exclusion of females); General Elec. Co. v. Gilbert, 429 U.S. 125, 137 (1976) (title VII clearly violated when effect of neutral action is discriminatory); Mitchell v. Mid-Continent Spring Co., 583 F.2d 275, 280-81 (6th Cir. 1978) (title VII violated when employer arbitrarily refused to assign women to positions requiring lifting strength), *cert. denied*, 441 U.S. 922 (1979). Employment practices which preserve past discrimination are the type of "in effect" discrimination proscribed by title VII under the *Griggs* analysis. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 349 (1977) (employment practice which perpetuates past discrimination has effect of discrimination); *see also* Local 53, Int'l Ass'n of Heat and Frost Insulators v. Vogler, 407 F.2d 1047, 1054 (5th Cir. 1969) (nepotism policy of all-white union, while fair on face, still unlawful because in practice excluded virtually all non-whites).

rily related to job performance.[19]

A seniority system is a scheme devised to allocate preferential treatment, employment benefits, and rights to employees based on length of service.[20] Seniority systems have been recognized as valuable tools to assure job security, equal and fair employment advancement,[21] and are frequently included in collective bargaining agreements between employer and employee.[22] Seniority systems, by definition, grant fewer advantages to new employees; therefore, minorities who are now seeking jobs from which they were excluded in the past will, in effect, be denied equal access to better jobs because of the difference in the incumbent worker's accrued seniority.[23]

The original draft of title VII of the Civil Rights Act of 1964, did not

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19. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 249-50 (1976) (verbal skill test lawful when justified as business necessity); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (business necessity justified by valid relationship to job performance); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.) (efficiency and economy may be justifiable business necessities), *cert. dismissed*, 404 U.S. 1006 (1971); *cf.* Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970) (showing of mere rationality not adequate to justify business necessity), *cert. denied*, 401 U.S. 954 (1971). *See generally* Note, *Defining the Proper Scope of the Business Necessity Defense in Title VII Litigation*, 30 CATH. U.L. REV. 653 (1981) (analysis of application of business necessity defense).

20. *See* California Brewers Ass'n v. Bryant, 444 U.S. 598, 606 (1980) (employees rights and benefits increase with length of employment). *See generally*, Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1534 (1962) (general discussion of nature of seniority systems).

21. *See* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1602-04 (1969). Objectivity is the seniority system's mainstay. When there has been no discrimination in attaining seniority, the system has no discriminatory features and in fact minority workers are insulated from discretionary employer practices. A seniority system provides employees protection from arbitrary or discriminatory employment practices of management. *See id.* at 1604; *see also* Zimmer, *Title VII: Treatment of Seniority Systems*, 64 MARQ. L. REV. 79, 80 (1980) (employer limited in use of arbitrary or discriminatory treatment if seniority system present).

22. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 79 (1977). Seniority systems have long been championed as the chief weapon against employment discrimination. *See id.* at 79; *see also* Humphrey v. Moore, 375 U.S. 335, 346 (1964) (seniority provisions important ingredient in collective bargaining agreements). There is a recognized reluctance by the courts and Congress to interefere in labor areas governed by the terms of collective bargaining agreements. *See* H. K. Porter Co. v. NLRB, 397 U.S. 99, 103 (1970). *See generally* Fischer, *Seniority is Healthy*, 27 LAB. L.J. 497 (1976) (discussion of seniority system attributes).

23. *See* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1603 (1969). *See generally* Comment, *Last Hired, First Fired Seniority, Layoffs, and Title VII: Questions of Liability and Remedy*, 11 COLUM. J.L. & SOC. PROBS. 343 (1975) (examination of practical aspect of last hired, first fired phenomenon).

contain a specific provision pertaining to seniority systems, rather, it generally prohibited discriminatory employment practices.[24] The bill passed in the House of Representatives,[25] despite strong objections that title VII would destroy existing seniority rights.[26] Thereafter, the bill was presented in the Senate,[27] where once again the inquiry focused on the bill's potential impact on seniority rights.[28] This second attack prompted supporters of the House version of the bill to introduce three documents evidencing legislative intent in the Congressional Record in an attempt to alleviate fears that title VII would destroy existing seniority rights.[29] Ad-

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24. *See* H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2391; *see also* Franks v. Bowman Transp. Co., 424 U.S. 747, 759 (1976) (section 703(h) not in original House bill). A defeated amendment to title VII provided, in pertinent part, "[t]he provisions of this title shall not be applicable to any employer whose hiring and employment practices are pursuant to, 1) a seniority system . . . ." *See* 110 Cong. Rec. 2727-28 (1964).

25. *See id.* at 2804.

26. *See id.* at 2726. Title VII, without provisions addressing seniority systems, would require employers, who had previously refused to employ black persons, to disassemble and devise new seniority systems. *See id.* at 2726 (statements by Representative Dowdy).

27. *See id.* at 2882; *see also* Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 443-44 (1966) (title VII bypassing senate committee lacks legislative history).

28. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 759 (1976) (Senate debated potential adverse impact of title VII on seniority systems).

29. 110 Cong. Rec. 7207 (1964). The first document was a Justice Department memorandum and provided in pertinent part:

> First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect . . . . 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.

Id. at 7207.

The second document was an interpretative memorandum prepared by Senators Clark and Case and provided in pertinent part:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis . . . .

Id. at 7213.

The third document was a set of questions between Senator Clark and Senator Dirksen. (Senator Clark answers).

> . . .
>
> Question: If an employer is directed to abolish his employment list because of discrimination what happens to seniority?
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> Answer: The bill is not retroactive, and it will not require an employer to change existing seniority lists . . . .

Id. at 7217.

ditionally, the attack induced a bipartisan group of Senators to meet and prepare a substitute bill.[30] The substitute bill passed in the Senate and the House without further debate on the seniority issue.[31] This successful draft contained an exception provision, section 703(h), exempting employment practices that applied different standards of compensation or privileges of employment pursuant to a bona fide seniority system, so long as the differences were not the result of an intention to discriminate.[32]

Quarles v. Phillip Morris, Inc.,[33] was the landmark case which addressed the immunity granted in section 703(h) to seniority systems.[34] Prior to 1964, Phillip Morris maintained four racially segregated departments; each department had a separate seniority list and interdepartmen-

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30. *See* 110 Cong. Rec. 11,935-36 (1964). Senator Humphrey, a proponent of the substitute bill remarked, "section 703(b) [later to be 703(h)], pertaining to seniority systems was added to clarify congressional intent and the effect of title VII." *See id.* at 12,723; *see also* Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 445 (1966) (Senators Dirksen, Mansfield, Humphrey, and Kuchel lead bipartisan group to formulate amendments to bill to assure passage in Senate).

31. *See* 110 Cong. Rec. 14,511 (1964) (Senate); *see id.* at 15,897 (House of Representatives). Representative McCulloch remarked before the final vote, "the bill does not permit the Federal Government to destroy the job seniority rights of either union or non-union employees." *See id.* at 15,893. The Act was signed into law by President Johnson on July 2, 1964. *See id.* at 17,783. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1972) (title VII became effective July 2, 1965, one year after enactment); 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980).

32. *See* 42 U.S.C. § 2000e-2(h) (1976). Section 703(h) provides in pertinent part,

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

Id.

33. 279 F. Supp. 505 (E.D. Va. 1968).

34. *See id.* at 517-18. *Quarles* undertook a statutory construction of section 703(h). *See id.* at 517-18. A general rule of statutory construction is to first look to the face of the statute. *See* United States v. Anderson, 626 F.2d 1358, 1365 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). Congress is presumed to have written what it meant and, therefore, statutory language is the best indication of legislative intent. *See* Matala v. Consolidation Coal Co., 647 F.2d 427, 429 (4th Cir. 1981). Courts need not search the legislative history in order to interpret the meaning of an easily understood statutory provision. *See* Heppner v. Alyeska Pipeline Serv. Co., 665 F.2d 868, 871 (9th Cir. 1981). Review of the legislative history is permitted, however, to clarify ambiguous language. *See* United States v. Tex-Tow, Inc., 589 F.2d 1310, 1313 (7th Cir. 1978). Reliance on remarks made by a single representative are not controlling in the determination of legislative intent. *See* Alabama *ex rel* Graddick v. Tennessee Valley Auth., 636 F.2d 1061, 1066 n.8 (5th Cir. 1981); *see also* Consumer Product Safety Comm'n v. G.T.E. Sylvania Inc., 447 U.S. 102, 118 (1980) (reliance on individual legislator's remarks, even sponsor of bill, not recommended).

tal transfers were virtually prohibited.[35] After the effective date of title VII, very restrictive transfers between departments were allowed, however, most employees lost their earned departmental seniority and entered the new department with seniority dating from the day of transfer.[36] Quarles wanted to transfer and apply for a position available to an applicant with the most departmental seniority.[37] After transferring, however, he would be unable to use his accrued seniority from the other department.[38] Quarles sought injunctive relief, claiming the transfer system operated to discriminate.[39] The *Quarles* court rejected Phillip Morris' contention that "the present consequences of past discrimination are outside the coverage of title VII."[40] The court found that section 703(h) did not protect the facially neutral seniority system, reasoning that the requirement of bona fide was lacking because the system had its genesis in past discrimination.[41] This reasoning was extended in *Local 189, United Papermakers & Paperworkers v. United States*,[42] where a facially neutral seniority system was not considered bona fide because it perpetuated the effects of past discrimination.[43] These two cases together became the standard of review for lower courts.[44] Congressional approval of these

35. *See* Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 511-12 (E.D. Va. 1968).

36. *See id.* at 512-13.

37. *See id.* at 513-14.

38. *See id.* at 513-14. Quarles, a black employee, sought to transfer to a previously all-white department. *See id.* at 513-14.

39. *See id.* at 514. Quarles and other incumbent black employees were essentially forced to remain in their original jobs because the transfer to another department, with the accompanied loss of earned seniority, constituted too great a sacrifice. *See id.* at 514.

40. *See id.* at 515. In an often quoted passage, the court declared, "[i]t is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." *See id.* at 516.

41. *See id.* at 517. *See generally* Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications*, 47 TEX. L. REV. 1039 (1969) (early examination of *Quarles*).

42. 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). Before 1964, lines of progression for promotion purposes in the paper mill were segregated according to race. The lowest jobs in the white line paid more than most of the highest jobs in the black line. Promotion in either line depended upon experience and length of service in the position immediately below the vacant slot. The lines of progression were completely integrated in 1966, but blacks were placed below whites in each rung of the new single line. Moreover, the company did not recognize previously earned seniority of black employees, but did calculate the accrued seniority of white employees before the lines merged. *See id.* at 984.

43. *See id.* at 988. The seniority system would also be denied protection by section 703(h) because the intent to discriminate was present. This intent was easily found. *See id.* at 996.

44. *See, e.g.*, Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973) (seniority system with limited transfer policy in previously racially segregated department violates title VII as perpetuating effects of past discrimination); United States v. Jackson-

developments was implicit in the Equal Employment Opportunity Act of 1972, which amended the Civil Rights Act of 1964.[45] Finally, two Supreme Court decisions gave tacit approval of the lower courts' theory that perpetuation of past discrimination negated the quality of bona fide.[46]

In 1977, the Supreme Court radically altered this development of the statutory interpretation of section 703(h) by its decision in *International Brotherhood of Teamsters v. United States.*[47] The Court was presented

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ville Terminal Co., 451 F.2d 418, 438 (5th Cir. 1971) (reviewing claim that railroad seniority system discriminatory where practices which perpetuate past discrimination violate title VII), *cert. denied*, 406 U.S. 906 (1972); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 248 (10th Cir. 1970) (policy prohibiting transfer between truck routes unlawful since perpetuated past discrimination), *cert. denied*, 401 U.S. 954 (1971); *see also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 378 (1977) (Marshall, J., dissenting) (cites 32 cases following perpetuation of past discrimination doctrine). The Equal Employment Opportunity Commission supported these decisions. *See, e.g.*, EEOC Decision ¶ 6365 (1973) (seniority system perpetuating past discrimination violative of title VII); EEOC Decision ¶ 6355 (1973) (seniority policy with provision for loss of accrued seniority in event of transfer violative of title VII because perpetuates past discrimination); EEOC Decision ¶ 6334 (1973) (policy resulting in loss of accrued seniority in event of job transfer violative of title VII).

45. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV. 1980)). The House Committee report acknowledged that discrimination was a far more complex phenomenon than first contemplated. The Committee report specifically mentioned the development of thought concerning seniority systems and the perpetuation of pre-Act discriminatory practices. *See* H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in*, 1972 U.S. CODE CONG. & AD. NEWS 2137, 2144. The report cited *Quarles* and *Local 189* in a footnote. *See id.* at 2144 n.2. More impressive, Congress referred to the unchanged portions of the Civil Rights Act of 1964 which included unchanged section 703(h), and remarked, "[i]n any area where the new law does not address itself . . . it is assumed that the present case law, as developed by the courts would continue to govern the applicability and construction of title VII." *See* 118 Cong. Rec. 7564 (1972); 118 Cong. Rec. 7166 (1972).

46. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 761 (1976); Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). In *Griggs*, the Supreme Court invalidated an employment practice which required a high school diploma or passing grade on an intelligence test as a prerequisite to hiring or transferring jobs, because, "[u]nder 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." *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). In *Franks*, the Supreme Court found the retroactive grant of seniority an available remedy to a post-Act discriminiatee, as section 703(h), "is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act." *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 761 (1976).

47. 431 U.S. 324 (1977). In *Teamsters*, the employer was a nationwide common carrier who had practiced discriminatory hiring procedures before and after the effective date of the Act. *See id.* at 341. Blacks and Spanish surnamed persons were frequently denied employment opportunities in the most desirable truck driving routes, and instead were routinely hired as servicemen in the lowest paying positions. *See id.* at 329. Separate lines of progression existed and transfer between departments resulted in automatic forfeiture of

with the issue of whether a seniority system that perpetuated pre-Act discrimination could still be considered bona fide and thus protected by section 703(h).[48] The Court held in the affirmative,[49] reasoning that Congress had added section 703(h) to exempt seniority systems[50] from the general provisions of the Civil Rights Act and to grant them a measure of immunity from an otherwise successful attack using the "effects" standard of *Griggs*.[51] In *United Air Lines, Inc. v. Evans*,[52] the Court further ruled that the operation of a neutral seniority system, which had not been the subject of a timely charge,[53] would not be deemed unlawful simply because it perpetuated the effects of past post-Act discrimination.[54] Taken together, *Teamsters* and *Evans* halted the long trend of seniority system invalidation under the perpetuation of past discrimination analysis.[55] A discriminatee now had to show more than the "effects" standard developed in *Griggs*.[56] Rather, the seniority system was to be attacked on the grounds that it was not bona fide,[57] or that the differences in treatment

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accrued seniority. *See id.* at 344. The discriminatees claimed that pre-and post-Act discriminatory hiring practices, together with the seniority system forfeiture policy operated to perpetuate the effects of past discrimination. *See id.* at 344-45.

48. *See id.* at 348. The issue was limited to the perpetuation of pre-Act discriminatory practices, as the court resolved any difficulty concerning the perpetuation of post-Act discrimination by referring to its earlier holding in *Franks*. *See id.* at 347.

49. *See id.* at 353.

50. *See id.* at 350. The *Teamsters* Court did not inquire as to when the seniority system was adopted, hence this issue was undecided until specifically presented in *American Tobacco*. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___ n.16, 102 S. Ct. 1534, 1541 n.16, 71 L. Ed. 2d 748, 760 n.16 (1982).

51. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 350 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

52. 431 U.S. 553 (1977). In *Evans*, the female respondent was fired from her job in 1968, pursuant to the employer's no-marriage policy for female flight attendants. *See id.* at 554. Evans did not file timely charges at the time she was forced to resign. *See id.* at 554-55. Subsequently, the no-marriage policy was found violative of title VII, and Evans returned to work for the same employer. *See id.* at 555. The seniority policy did not recognize any rehired employee's previously earned seniority. *See id.* at 557.

53. *See* 42 U.S.C. § 2000e-5(e) (1976) (time limit to file charges is 180 days). A timely filed charge is a prerequisite to maintain a title VII action. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

54. *See* United Air Lines Inc. v. Evans, 431 U.S. 553, 558 (1977). The Court reasoned that any discriminatory employment practice that had not been the basis of a timely charge was the legal equivalent of a discriminatory act which occurred before the effective date of the Act. *See id.* at 558.

55. *See* Zimmer, *Title VII: Treatment of Seniority Systems*, 64 MARQ. L. REV. 79, 88 (1980). *Teamsters* and *Evans* were decided on the same day, May 31, 1977. *See* United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

56. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 349-50 (1977).

57. *See id.* at 353. The *Teamsters* Court did not specifically define bona fide, but it did

pursuant to the seniority system were the result of an intention to discriminate.[58]

There has been a variety of responses in the lower courts to these Supreme Court rulings.[59] For example, since section 703(h) exempted only bona fide seniority systems, some courts focused on the characteristics of bona fide, as described in *Teamsters*, in order to determine which systems were initially eligible for the provision's protection.[60] Other courts drew fine distinctions between employment practices that could be considered as part of a seniority system and those practices that were independent and therefore not protected by section 703(h).[61] Another reaction

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enumerate those qualities in the seniority system under analysis that caused it to be bona fide. *See id.* at 355-56.

58. *See id.* at 353; Sledge v. J. P. Stevens & Co., 585 F.2d 625, 636 (4th Cir. 1978) (challenge to seniority system requires showing discriminatory intent or purpose, which is exception to regular showing of *Griggs* "effects" standard in other title VII disputes), *cert. denied*, 440 U.S. 981 (1979); *see generally* Note, *Teamsters and Seniority System Violations Under Title VII: A Requirement of Discriminatory Intent*, 42 ALB. L. REV. 279 (1978) (discussion on intent required to attack seniority systems).

59. *See, e.g.*, Patterson v. American Tobacco Co., 634 F.2d 744, 749 (4th Cir. 1980) (en banc) (section 703(h) only protects those seniority systems in existence at time title VII enacted), *rev'd and remanded*, ___ U.S. ___, 102 S. Ct. 1534, 71 L. Ed. 2d 748 (1982); Bryant v. California Brewers Ass'n, 585 F.2d 421, 426 (9th Cir. 1978) (disqualified certain employment practices from being part of seniority system, therefore rendering section 703(h) unavailable for protection), *vacated and remanded*, 444 U.S. 598 (1980); James v. Stockham Valves & Fittings, Inc., 559 F.2d 310, 352 (5th Cir. 1977) (defines characteristics of bona fide to limit section 703(h) protection), *cert. denied*, 434 U.S. 1034 (1978).

60. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 355-56 (1977). The Fifth Circuit generalized these characteristics to develop four distinct factors determinative of bona fide. *See* James v. Stockham Valves & Fittings, Inc., 559 F.2d 310, 352 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). They are as follows:

> 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
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> 2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
>
> 3) whether seniority system had its genesis in racial discrimination;
>
> 4) whether the system was negotiated and has been maintained free from any illegal purpose.

See id. at 352.

This formula for judicial review of seniority systems and the nature of bona fide has been widely accepted. *See* Taylor v. Mueller Co., 660 F.2d 1116, 1122 (6th Cir. 1981) (utilized four factors as mentioned in *James* to determine whether seniority system is bona fide); *see also* Swint v. Pullman-Standard, 624 F.2d 525, 530 (5th Cir. 1980) (court focuses on four factors of *James* to determine the bona fides of the seniority system) *rev'd and remanded*, ___ U.S. ___, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982).

61. *See* Bryant v. California Brewers Ass'n, 585 F.2d 421 (9th Cir. 1978) (provision in collective bargaining agreement pertaining to definition of permanent employee not component of seniority system), *vacated and remanded*, 444 U.S. 598 (1980); *cf.* Alexander v. Aero Lodge No. 735, Int'l Ass'n Machinists & Aerospace Workers, 565 F.2d 1364, 1378 (6th Cir.

was to consider which party had the burden of proving the seniority system's bona fide nature.[62] An alternative response, developed because the *Teamsters* opinion did not indicate when that seniority system had been adopted, was to declare that section 703(h) protected only those bona fide seniority systems that had been developed prior the effective date of the Civil Rights Act of 1964.[63]

In *American Tobacco Co. v. Patterson*,[64] the Supreme Court premised its findings on an adherence to certain general rules of statutory construction.[65] In particular, the Court noted that normally, legislative intent is assumed to have been expressed in the plain meaning of the chosen words[66] and that the statutory language, without any clear indication to the contrary, must be regarded as conclusive.[67] In light of these two general rules, the Court examined section 703(h) and found it was neither a grandfather clause, nor did it contain any words limiting its application.[68]

1977) (provision for job placement of experienced employees embodied in collective bargaining agreement not independent from overall seniority system), *cert. denied*, 436 U.S. 946 (1978).

62. *Compare* Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 396, 637 F.2d 506, 516 (8th Cir. 1980) (discriminatee must prove seniority system had discriminatory motive) *and* Southbridge Plastics Division, W.R. Grace and Co. v. Local 759, Int'l Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, 565 F.2d 913, 917 (5th Cir. 1978) (those seeking title VII remedies must prove title VII violations) *with* Griffin v. Copperweld Steel Co., 22 Empl. Prac. Dec. (CCH) ¶ 30,637 (N.D. Ohio Sept. 28, 1979) (employer established affirmative defense that seniority system bona fide).

63. *See* Patterson v. American Tobacco Co., 634 F.2d 744, 749 (4th Cir. 1980); Evans v. United Air Lines, Inc., 534 F.2d 1247, 1251 (7th Cir. 1976) (section 703(h) applicable only to those bona fide seniority system rights vested before effective date of title VII), *rev'd*, 431 U.S. 553 (1977).

64. ___ U.S. ___, 102 S. Ct. 1534, 71 L. Ed. 2d 748 (1982).

65. *See id.* at ___, 102 S. Ct. at 1537, 71 L. Ed. 2d at 755.

66. *See id.* at ___, 102 S. Ct. at 1537, 71 L. Ed. 2d at 755; *see also* Richards v. United States, 369 U.S. 1, 9 (1962) (initial determination of statutory construction premised on assumption legislative purpose expressed by clear meaning of statutory language).

67. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1537, 71 L. Ed. 2d 748, 755 (1982); *See, e.g.*, Consumer Product Safety Comm'n v. G.T.E. Sylvania, Inc. 447 U.S. 102, 108 (1980) (statutory language controls absent clear indication favoring another interpretation); United States v. Apfelbaum, 445 U.S. 115, 121 (1980) (statutory construction controlled by plain language of statute unless contrary intention shown); Smith v. Pena, 621 F.2d 873, 876 (7th Cir. 1980) (statutory language controlled by common meaning unless contrary congressional intent shown).

68. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1537-38, 71 L. Ed. 2d 748, 755 (1982). The Court reasoned that to limit the protection offered by section 703(h) to only those seniority systems in existence before title VII would be an unreasonable interpretation of the statutory language. *See id.* at ___, 102 S. Ct. at 1538, 71 L. Ed. 2d at 757; *see also* Commissioner v. Brown, 380 U.S. 563, 571 (1965) (statutory interpretation favors that alternative which offers most reasonable result).

Turning to the legislative history, the Court found no evidence to warrant finding a distinction between seniority systems adopted before or after the effective date of title VII.[69] The remainder of the opinion focused on two other areas, prior case law and the legislative and judicial policy favoring minimal interference with terms of labor agreements.[70]

Justice Brennan, writing the first dissent, agreed the case was one of statutory construction.[71] He focused on specific language found in the Act[72] and reasoned that section 703(h) was designed to protect only those seniority systems in existence in 1965 and did not extend protection to seniority systems adopted after the effective date of title VII.[73] He found the words "to apply" to be self-limiting, that is, anything to be applied had to first be in existence.[74] Justice Stevens, in a separate dissent, found section 703(h) to be an affirmative defense, available to any employer when a seniority system is alleged to have discriminatory results, but limited the defense with a requirement that the seniority system be bona fide.[75] Furthermore, Justice Stevens found that Congress added the "in-

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69. *Compare* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1540, 71 L. Ed. 2d 748, 758 (1982) (Court refused to accept interpretation of words "existing" or "established" found in legislative materials as limiting protection afforded seniority system under section 703(h)) *with* 110 Cong. Rec. 7217 (1964) (title VII would not demand existing seniority lists be altered) *and* 110 Cong. Rec. 7213 (1964) (title VII will not affect established seniority rights) *and* 110 Cong. Rec. 7207 (1964) (title VII would not undermine existing rights of seniority).

70. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1541, 71 L. Ed. 2d 748, 759-60 (1982).

71. *See id.* at ___, 102 S. Ct. 1543, 71 L. Ed. 2d 762 (1982) (Brennan, J., dissenting).

72. *See* 42 U.S.C. § 2000e-2(h) (1976). This section provides in pertinent part, "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, . . . pursuant to a bona fide seniority or merit system. . . . " *See id.*

73. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1543, 71 L. Ed. 2d 748, 762 (1982) (Brennan, J., dissenting) (scope of section 703(h) governed by words "to apply").

74. *See id.* at ___, 102 S. Ct. at 1543, 71 L. Ed. 2d at 762-63 (Brennan, J., dissenting) (the words "to apply" found in statutory language not meant to include action of "adoption"; application of seniority system is act of putting into effect already adopted seniority system).

75. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1548, 71 L. Ed. 2d 748, 768 (1982) (Stevens, J., dissenting) (affirmative defense developed from business necessity justification found in *Griggs*). A seniority system's classification as bona fide depended on when it was adopted. *See id.* at ___, 102 S. Ct. at 1548, 71 L. Ed. 2d at 768 (Stevens, J., dissenting) (affirmative defense only available after bona fide nature of seniority system established). A seniority system adopted after title VII must be lawful to be considered bona fide, lawfulness meaning that it was not adopted in violation of title VII. *See id.* at ___, 102 S. Ct. at 1547, 71 L. Ed. 2d at 767 (Stevens, J., dissenting). Section 703(h) does not contain exact references to lawfulness. The adoption of a seniority system is likened to other employment practices subject to title VII attack; therefore, the seniority system must withstand the *Griggs* standard to be lawful. *See id.* at ___, 102 S. Ct. at 1547-48,

tent" proviso of section 703(h)[76] in order to limit the protection afforded pre-Act seniority systems.[77] Justice Stevens concluded that the lines of progression, adopted post-Act by American Tobacco, were violative of title VII and thereby not eligible as an affirmative defense because they were not bona fide.[78]

The majority identified three grounds to support its decision: the language and legislative history of section 703(h), prior case law, and the nation's traditional labor policy of minimal interference with those specialized areas embodied in collective bargaining agreements.[79] In its approach to the statutory construction, the Court had ample support in first looking to the specific language of section 703(h),[80] and the assumption that legislative intent is expressed in the plain meaning of the chosen statutory language.[81] The Court's conclusion that the plain language of

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71 L. Ed. 2d at 767-68 (Stevens, J., dissenting). Seniority systems adopted before title VII are presumed lawful and hence bona fide. *See id.* at ___, 102 S. Ct. at 1548, 71 L. Ed. 2d at 768 (Stevens, J., dissenting).

76. *See* 42 U.S.C. § 2000e-2(h) (1976). Section 703(h) provides "it shall not be an unlawful employment practice for an employer to apply different standards of compensation . . . 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, religion, sex, or national origin. . . . " *Id.*

77. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1548, 71 L. Ed. 2d 748, 768 (1982) (Stevens, J., dissenting) ("specific intent" proviso limitation on scope of affirmative defense available to pre-Act adopted seniority systems). Justice Stevens reasoned that Congress wanted to protect the accrued seniority of employees but did not want to extend protection to seniority systems that were created with the intent to discriminate. *See id.* at ___, 102 S. Ct. at 1548, 71 L. Ed. 2d at 768 (Stevens, J., dissenting).

78. *See id.* at ___, 102 S. Ct. at 1549, 71 L. Ed. 2d at 769 (Stevens, J., dissenting). The lines of progression had a disparate impact on minority employees and thus clearly violated the "effects" standard of *Griggs*. *See id.* at ___, 102 S. Ct. at 1548, 71 L. Ed. 2d at 769 (Stevens, J., dissenting). Seniority systems adopted after title VII that violate the *Griggs* standards are considered unlawful and hence not bona fide. *See id.* at ___, 102 S. Ct. at 1548-49, 71 L. Ed. 2d at 769 (Stevens, J., dissenting).

79. *See id.* at ___, 102 S. Ct. at 1542, 71 L. Ed. 2d at 760 (1982).

80. *See id.* at ___, 102 S. Ct. at 1537, 71 L. Ed. 2d at 755. Statutory construction begins with textual examination of statute's langauge. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979) (statutory construction begins with statutory language); Caminetti v. United States, 242 U.S. 470, 485 (1917) (meaning of statute begins with examination of language); Chicago Transit Auth. v. Adams, 607 F.2d 1284, 1289 (7th Cir. 1979) (terms of statute first focus for statutory construction), *cert. denied*, 446 U.S. 946 (1980).

81. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1537, 71 L. Ed. 2d 748, 755 (1982). Congress is presumed to have intended the plain meaning of the statutory language to effect legislative intent. *See, e.g.*, Matala v. Consol. Coal Co., 647 F.2d 427, 429 (4th Cir. 1981) (Congress presumed to have written what it intended to say); United States v. Yeatts, 639 F.2d 1186, 1189 (5th Cir.) (Congress presumed to use plain meaning of words in statute to express intention), *cert. denied*, 452 U.S. 964 (1981); United States v. Porter, 591 F.2d 1048, 1053 (5th Cir. 1979) (words written in statute presumed to

section 703(h) did not limit its protection to seniority systems adopted before title VII is reinforced by other instances wherein the legislature did include limiting phrases in other sections of the same Act.[82] The legislative history, by the Court's own admission, is ambiguous and hence unreliable,[83] yet, the Court extracted particularly favorable portions of the legislative materials to mold its decision.[84] The Court relied on *Teamsters* and *Evans* to support the conclusion that all bona fide seniority systems, whether adopted before or after title VII, were protected from an attack under the usual *Griggs* standard.[85] In addition, the Court reviewed the traditional reluctance of the legislature and judiciary to interfere in areas such as seniority, that are included in collective bargaining agreements between management and labor.[86] In order to balance the policy goals of equal employment opportunities and minimal interference with the terms of collective bargaining agreements, Congress exempted all seniority systems from the general terms of title VII by including section 703(h).[87]

Justice Brennan's conclusion that section 703(h) extends protection to only those seniority systems in existence at the time title VII was enacted, was based solely on his view of the statutory language and legislative history.[88] Justice Brennan's narrow interpretation of the words "to

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be what Congress intended them to mean).

82. *Compare* 42 U.S.C. § 2000e-2(h) (1976) (no grandfather clause) *with* 42 U.S.C. § 2000e(b) (1976) (grandfather clause).

83. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1539, 71 L. Ed. 2d 748, 757 (1982) (Court declined to place great weight on legislative materials in view of convoluted legislative history and lack of usual legislative history materials).

84. *See id.* at ___, 102 S. Ct. at 1539-40, 71 L. Ed. 2d at 758 (quoting Justice Department interpretive memorandum, Court negates sentence explaining future effect of title VII).

85. *See id.* at ___, 102 S. Ct. at 1541, 71 L. Ed. 2d at 759. The Court emphasized that *Teamsters* and *Evans* did not distinguish between pre- or post-Act perpetuation of discrimination. *See id.* at ___, 102 S. Ct. at 1541, 71 L. Ed. 2d at 759-60; United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977) (Court does not inquire date seniority system established); International Bhd. of Teamsters v. United States, 431 U.S. 324, 348 n.30 (1977) (no distinction between pre- and post-Act perpetuation of discrimination).

86. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1541, 71 L. Ed. 2d 748, 760 (1982). Congress enacted title VII, mandating equal employment opportunities, realizing these measures would collide with the traditional policy of minimal interference with terms of collective bargaining agreements between management and labor. *See* California Brewers Ass'n v. Bryant, 444 U.S. 598, 608 (1980). The Court has recognized congressional reluctance to interfere with terms of collective bargaining agreements. *See* United Steelworkers of America v. Weber, 443 U.S. 193, 207 (1979).

87. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1541, 71 L. Ed. 2d 748, 760 (1982); *see also* H. K. Porter Co. v. NLRB, 397 U.S. 99, 103 (1970) (purpose of National Labor Relations Act was mutual management-employee development of favorable employment conditions eliminating delegation to government).

88. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1546, 71

apply," used to exclude from section 703(h) protection those seniority systems adopted after title VII, may be contrary to the practice that statutory language be given its common meaning.[89] Conversely, Justice Brennan's reliance on the legislative history to support his decision could be erroneous.[90] Understandably, it is difficult to ignore the frequency with which the words "existing," "established," and "vested" appear in the legislative materials,[91] but Justice Brennan's dependence on these admittedly inconclusive legislative materials[92] is inappropriate.[93] Analyzing these words out of context results in an attenuated vision of section 703(h)[94] and its unique relation to other generally proscribed employment

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L. Ed. 2d 748, 766 (1982) (Brennan, J., dissenting) (labels case as one of statutory construction).

89. *See* Perrin v. United States, 444 U.S. 37, 42 (1979) (in absence of specific definitions, statutory language will be defined as ordinarily and commonly understood).

90. *See, e.g.*, Heppner v. Alyeska Pipeline Serv. Co., 665 F.2d 868, 871 (9th Cir. 1981) (unnecessary to explore legislative history when statutory language plain); Dow Chemical Co. v. United States EPA, 635 F.2d 559, 561 (6th Cir. 1980) (courts need not delve into legislative history to interpret clear and plain statutory language); United States v. Jones, 607 F.2d 269, 272 n.4 (9th Cir. 1979) (courts hesitant to look beyond clear language of statute when words unambiguous). In a prior opinion, Justice Brennan joined Justice Marshall in questioning the Court's use of the three documents in the Congressional Record for interpreting the meaning of section 703(h). The Justices found the documents, written many weeks before the final draft, were not dispostive of legislative intent. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 382-83 (1977) (Marshall, J., dissenting, joined by Brennan, J.). *See generally* Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 U.C.L.A. L. REV. 177, 187 (1975) (legislative history surrounding section 703(h) inconclusive).

91. *See, e.g.*, 110 Cong. Rec. 7217 (1964) (remarks by Senator Clark, "the bill is not retroactive and will not require an employer to change existing seniority lists"); 110 Cong. Rec. 7213 (1964) (interpretive memorandum stated "[t]itle VII would have no effect on established seniority rights"); 110 Cong. Rec. 7207 (1964) (Justice Department memorandum provided, "it has been asserted title VII would undermine vested rights of seniority. This is not correct.").

92. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1545, 71 L. Ed. 2d 748, 765 (1982) (Brennan, J., dissenting) (legislative materials do not contain any exact statements limiting protection afforded by section 703(h) to seniority systems adopted before title VII).

93. *See* United States v. Wilson, 591 F.2d 546, 547 (9th Cir. 1979) (inappropriate to interpret inconclusive legislative materials in order to apply different meaning to otherwise clear statutory language). *See generally* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, 155-57 (1975). "The greatest weakness in most legislative history is its unreliability." *Id.* at 155.

94. *See, e.g.*, Richards v. United States, 369 U.S. 1, 11 (1962) (single provision should not be read in isolation from terms of entire act); Duke v. University of Texas at El Paso, 663 F.2d 522, 525 (5th Cir. 1981) (particular sections of Act should not be viewed in isolation); Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n, 659 F.2d 903, 926 (9th Cir. 1981) (in determining meaning of specific provision court should not be guided by single sentence, rather should look to entire act in terms of policies and objec-

practices in title VII.[95]

Justice Stevens' construction of section 703(h) as an affirmative defense is extrapolated from the business necessity justification developed in *Griggs v. Duke Power Co.*[96] This business necessity justification was made available to those employees claiming disparate impact, which required only a showing of discriminatory effect, and not to those employees claiming disparate treatment, which requires a showing of discriminatory intent.[97] Heeding other decisions mandating that challengers to seniority systems prove discriminatory intent, Justice Stevens inaccurately extended the defense delineated in *Griggs*, in which a challenger need only show a discriminatory effect.[98]

The Court's decision, immunizing all seniority systems from attack by

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tives). *But see* Piedmont & N. Ry. v. ICC, 286 U.S. 299, 312 (1932) (exemptions from broad remedial statute construed narrowly and only to extent to achieve purpose for which included).

95. *Compare* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1543, 71 L. Ed. 2d 748, 762 (1982) (Brennan, J., dissenting) (section 703(h) protects only seniority systems in existence at time title VII enacted) *with* Pullman-Standard v. Swint, ___ U.S ___, ___, 102 S. Ct. 1781, 1784, 72 L. Ed. 2d 66, 72-73 (1982) (title VII carves special exception for seniority systems from general provisions of prohibited employment practices) *and* 110 Cong. Rec. 14,331 (1964) (Senator Williams described second bill, which included section 703(h), as providing protections for seniority systems not in prior House draft of title VII) *and* 110 Cong. Rec. 6549 (1964) (remarks by Senator Humphrey that seniority rights would not be jeopordized as thrust of title VII was to eliminate discriminatory employment practices).

96. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1548, 71 L. Ed. 2d 748, 768 (1982) (Stevens, J., dissenting) (Justice Stevens admitted that *Griggs* did not define business necessity justification as affirmative defense); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (where employment practices neutral on face but discriminatory in operation violate title VII, unlawful unless justified as business necessity).

97. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *see also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977). Disparate impact involves employment practices that operate to affect some people more harshly than others, even though the practice may be neutral on its face or in its terms. Proof of disparate impact only requires a showing of discriminatory effects. *See id.* at 336 n.15. Disparate treatment is the actual discriminatory treatment; some persons are simply treated differently than others. Proof of disparate treatment requires a showing of discriminatory intent. *See id.* at 335 n.15.

98. *See, e.g.*, Pullman-Standard v. Swint, ___ U.S. ___, ___, 102 S. Ct. 1781, 1784, 72 L. Ed. 2d 66, 73 (1982) (challenge to seniority system requires showing of discriminatory intent); Trans World Air Lines, Inc. v. Hardison, 432 U.S. 63, 82 (1977) (seniority system which operates to perpetuate past discrimination not unlawful unless accompanied by showing of discriminatory purpose); International Bhd. of Teamsters v. United States, 431 U.S. 324, 349-50 (1977) (congressional extension of immunity to seniority systems rendered showing of disparate impact insufficient to attack seniority system); *see also* Hillman, *Teamsters, California Brewers, and Beyond: Seniority Systems and Allocation of the Burden of Proving Bona Fides*, 54 ST. JOHN'S L. REV. 706, 723 (1980) (section 703(h) not intended as affirmative defense, but as explanation of what particularly violates general terms of title VII).

the less stringent *Griggs* standard, could have relied on three other grounds for support.[99] The Court alludes to seniority systems as integral components of collective bargaining agreements,[100] but fails to expound on the intrinsic protections seniority systems have traditionally afforded employees against discriminatory employment practices.[101] Once employees have been guaranteed equal access to seniority systems by title VII,[102] the seniority system itself operates to prevent any further employment discrimination.[103] Alternatively, to soften the seemingly harsh ruling, the Court could have emphasized the continuous encouragement and guidance it has given in previous cases to those attacking seniority systems.[104] Finally, the Court might have also explained that a bona fide seniority system does not necessarily shield an employer from attacks of

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99. *See, e.g.*, California Brewers Ass'n v. Bryant, 444 U.S. 598, 606 (1980) (seniority systems have intrinsically anti-discriminatory operation granting preferential treatment based on objective criteria, not subjective methods); International Bhd. of Teamsters v. United States, 431 U.S. 324, 353 (1977) (section 703(h) permits challenge to seniority system for lack of bona fides or intent to discriminate); Fisher v. Proctor & Gamble Mfg. Co., 613 F.2d 527, 542-44 (5th Cir. 1980) (other discriminatory employment practices still actionable under title VII despite bona fide character of controlling seniority system), *cert. denied*, 449 U.S. 1115 (1981).

100. *See* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1541, 71 L. Ed. 2d 748, 760 (1982) (Court acknowledged seniority systems are of "overriding importance" in collective bargaining agreements).

101. *See* California Brewers Ass'n v. Bryant, 444 U.S. 598, 606 (1980) (seniority systems use objective standard, length of service, rather than subjective criteria to allot preferential treatment); *see also* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1534 (1962) (employers may discriminately hire, promote or discharge employees where no established seniority system to guide employment practices).

102. *See* 42 U.S.C. § 2000e-2(a) (1976) (employers prohibited from engaging in discriminatory employment practices, such as hiring, discharge, or promotion); 42 U.S.C. § 2000e-2(c) (1976) (union prohibited from engaging in discriminatory employment practices with regard to employees).

103. *See* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1602-03 (1969) (where no discrimination in attaining seniority and system has no discriminatory features, seniority system guarantees employees protection from arbitrary or discriminatory employment practices).

104. *See* United Air Lines, Inc. v. Evans, 431 U.S. 553, 560 (1977) (failure to allege seniority system not bona fide or discriminatory intent caused differences in operation of seniority system, narrows claim and possible remedy); International Bhd. of Teamsters v. United States, 431 U.S. 324, 353 (1977) (section 703(h) does not grant blind protection to all seniority systems, challenger may still attack on grounds that system is not bona fide or that differences in system created with intent to discriminate). The Court has literally instructed unsuccessful challengers of seniority systems to attack the bona fide nature or to allege the differences were a result from an intent to discriminate. *See* California Brewers Ass'n v. Bryant, 444 U.S. 598, 610-11 (1980) (on remand challengers still free to show seniority system not bona fide or differences in employment conditions result of intention to discriminate).

other discriminatory employment practices.[105] Title VII generally prohibits discriminatory employment practices, therefore, if an offensive act, such as a discriminatory promotion policy is alleged, a cause of action may still be maintained, despite the bona fide nature of the controlling seniority system.[106]

The decision in *American Tobacco* defines the scope of protection afforded by section 703(h) to seniority systems from attack under the general terms of title VII. Section 703(h) permits an employer to apply different standards of compensation or privileges of employment pursuant to a bona fide seniority system, as long as the differences were not the result of an intent to discriminate. A challenge to a seniority system must establish more than the usual "effects" standard of *Griggs* to show discrimination; a successful challenge must prove the seniority system is not bona fide or was created with the intent to discriminate. The Court correctly decided that the immunity offered by section 703(h) would be available to any seniority system, whether adopted before or after the effective date of title VII.

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105. *See* Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1189 (5th Cir. 1978) (grants of retroactive seniority available to remedy other illegal acts, despite bona fide nature of seniority system), *cert. denied*, 439 U.S. 1115 (1979); James v. Stockham Valves & Fittings, Inc., 559 F.2d 310, 355 (5th Cir. 1977) (remedy for past discrimination in promotions includes retroactive seniority grant even if seniority system itself found bona fide), *cert. denied*, 434 U.S. 1034 (1978).

106. *See* Fisher v. Proctor & Gamble Mfg. Co., 613 F.2d 527, 542-43 (5th Cir. 1980) (discriminatory promotion policies independently actionable under title VII despite bona fide nature of controlling seniority system), *cert. denied*, 449 U.S. 1115 (1981).