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## EEOC: Seniority Rights during Layoffs in Light of Title VII

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**EEOC: SENIORITY RIGHTS DURING LAYOFFS IN LIGHT OF TITLE VII—*Jersey Central Power and Light Co. v. Local 327, IBEW*, 508 F. 2d 687 (3d Cir. 1975).**

Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972,<sup>1</sup> has produced a variety of complex legal problems. Included, due to the recent recession, has been the conflict between the Act's interpretation and contractual seniority rights during layoffs.<sup>2</sup> Resolution of the issue of whether layoffs in reverse order of seniority violate Title VII influences not only contractual relations between unions and corporations, but also the strength of the Equal Employment Opportunity Commission,<sup>3</sup> and the effectiveness of Title VII. The Third Circuit decided in *Jersey Central Power and Light Co. v. Local 327, IBEW*<sup>4</sup> that collective bargaining agreement seniority provisions do not violate Section 703(h) of Title VII.<sup>5</sup> The court, in essence, directed Jersey Central to lay off in reverse order of seniority pursuant to a collective bargaining agreement, rather than according to a formula minority percentage plan incorporated in a conciliation agreement between the employer, unions, and the EEOC. This note will explore *Jersey Central* in the context of the judicial development of Title VII seniority policy, and of its weakening effect on Title VII, the EEOC, and public policies emphasizing the need for equal opportunity for women and minorities.

Jersey Central had entered into two agreements. The first was a standard union contract with local unions of the International Brotherhood of Electrical Workers effective from November 1, 1973, through October 31, 1975, providing for layoffs in reverse order of seniority.<sup>6</sup> The second was a conciliation agreement signed by Jersey

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1. 42 U.S.C. §§ 2000e to 2000e-15 (1970), as amended (Supp. II, 1972).

2. See generally Stacey, *Title VII Seniority Remedies in a Time of Economic Downturn*, 28 VAND. L. REV. 487 (1975) [hereinafter cited as Stacey]; Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB*, 123 U. PA. L. REV. 158, 162-8 (1974); Note, *Last Hired, First Fired, Layoffs and Title VII*, 88 HARV. L. REV. 1544 (1975); Heller, *The Survival of "Last Hired, First Fired" Under Title VII and Section 1981*, 6 LOYOLA U.L.J. 386 (1975).

3. Hereinafter referred to as EEOC.

4. 508 F.2d 687 (3d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3084 (U.S. Aug. 1, 1975)(No. 75-182).

5. 42 U.S.C. § 2000e-2(h) provides in part: ". . . 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 . . . ."

6. The collective bargaining provisions stated:

3.2(a) All lay-offs, or demotions occasioned because of falling off or curtailment of work, shall be discussed with the Union two (2) weeks in advance of the layoff and

Central, the union and the EEOC, effective from December 3, 1973, through December 3, 1977, providing for an increase in the percentages of minority and female employees within five years, and providing that Jersey Central use reasonable efforts to achieve such goals. Confronted with the economic necessity of a layoff, and recognizing that the provisions of the two agreements directly contradicted one another, Jersey Central eventually<sup>7</sup> brought an action in the District Court for the District of New Jersey seeking declaratory relief as to its rights and obligations under the two agreements. In an oral opinion,<sup>8</sup> the district court held that the collective bargaining agreement's seniority provision frustrated the purpose of the conciliation agreement, that the conciliation agreement should prevail over the seniority provision, and that Jersey Central should lay off according to minority percentages.<sup>9</sup>

On appeal, the Third Circuit Court of Appeals was given a single choice, but one involving a number of different and complicated considerations. The choice lay between upholding Title VII over contractually acquired seniority rights, or holding union seniority provisions paramount to the national anti-discrimination policy embodied in Title VII.<sup>10</sup> In accord with two other circuits,<sup>11</sup> the Third Circuit chose the latter.

Formulation of a position involved an evaluation of both basic contract theory and public policy considerations. By weighting the

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shall be made in order of seniority. No senior employee shall be laid off as long as any work which he can reasonably be expected to do is being performed by a junior in point of service.

3.3 Employees who have been laid off shall be reinstated to employment as need for their services arises, in the reverse order of their layoff.

3.4 Seniority is defined as length of continuous service with the Company . . . .

7. Jersey Central chose a preventive course of action instead of laying off according to one of the agreements and facing multiple suits for back pay. The company initiated the present action in the District Court for the District of New Jersey and sought an order to show cause. The order was denied, and Jersey Central held a meeting of all interested parties in an attempt to resolve the matter. As no resolution was reached, an expedited arbitration proceeding was held. On August 21, 1974, an arbitrator decided that Jersey Central should layoff according to reverse order of seniority. The company proceeded with the layoff. The district court then ordered Jersey Central to layoff according to a minority percentage plan, which the company complied with until the Third Circuit granted a stay of the district court order.

For a more complete statement of the history of this case, see Brief for Appellee at 4-14, *Jersey Central*, 508 F.2d 687 (3d Cir. 1975).

8. 8 F.E.P. Cas. 690 (D.N.J. 1974).

9. *Id.* at 692-3.

10. In *Jersey Central* this policy was represented by the conciliation agreement.

11. See *Waters v. Wisconsin Steel Workers*, 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 44 U.S.L.W. 3010 (U.S. Feb. 24, 1975)(No. 74-1064); *Watkins v. Steelworkers Local 2369*, 516 F.2d 41 (5th Cir. 1975).

decision of *Jersey Central* with elementary contract considerations, the court avoided larger public policy issues.

First, the court dealt with the question of whether or not the contracts conflicted.<sup>12</sup> Implicit in framing the issue in this way is the assumption that the conciliation agreement was a contract much like a private agreement. This, however, is an arguable proposition. A conciliation agreement is laden with the legislative authority of Title VII,<sup>13</sup> for the 1972 amendment to the Civil Rights Act of 1964 was designed to grant the EEOC effective enforcement powers.<sup>14</sup> When the EEOC enters into a conciliation agreement, the Commission and consenting parties are in effect prescribing public law on an individual basis. Thus, it is difficult to characterize a conciliation agreement as a private contract. It can also be argued that the conciliation agreement did not contain the requisite elements of a private contract. Though arguably the EEOC's agreement not to sue<sup>15</sup> formed the necessary consideration, that provision can more plausibly be compared to similar provisions in other more binding federal commission orders and decisions.

The court, however, chose to treat the agreement as a private contract. By reducing the EEOC to the status of a private contractual party, the Third Circuit has weakened the EEOC's bargaining power in future negotiations, and thereby diminished its ability to bargain effectively. The bargaining position of the EEOC is compromised if the other party has grounds for believing the agreement might not be judicially enforced. Given that the EEOC's effectiveness in policing and enforcing Title VII is largely dependent upon negotiation and conciliation,<sup>16</sup> this decision, by refusing to consider a conciliation agreement more binding than a private contractual arrangement, has added to the already heavy burden on the EEOC.

The court concluded that the two agreements were not contradictory. It based its holding on two grounds. First, since the conciliation agreement contained no explicit provision dealing with layoffs or seniority procedures, the two agreements could not be said to be in explicit conflict as to any material terms or provisions. Secondly, the court held the two agreements were not necessarily implicitly

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12. 508 F.2d at 700-04.

13. 42 U.S.C. § 2000e-5(b).

14. See generally THE BUREAU OF NATIONAL AFFAIRS, INC., THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (1973).

15. The conciliation agreement provided in Section I:

3. The Commission agrees not to sue the Respondents over matters contained in this Agreement subject to Respondent's compliance with the promises and representations contained herein.

16. 42 U.S.C. § 2000e-5(b).

inconsistent.<sup>17</sup> Again relying on the express provisions of the EEOC agreement, the court reasoned that since the agreement was silent as to seniority rights and layoffs, it could not be said that the intent of the parties was to substitute the conciliation agreement for the bargaining agreement. The court's reasoning was incomplete, however, for in considering whether or not an implicit inconsistency between the documents existed, the court looked only at the express silence.

A basic principle of contract law is that where there is a question of interpretation, the contract must be considered as a whole.<sup>18</sup> It is clear that the purpose of the conciliation agreement, as a whole, was to impose standards of affirmative action with regard to hiring, promotion, and generally with regard to employee relations on Jersey Central. Layoffs which follow a reverse order of seniority necessarily frustrate the intended goal of achieving a minority balanced employee group.<sup>19</sup> Again, reverse order layoffs frustrate the "reasonable efforts" clause in the conciliation agreement.<sup>20</sup> Though the court decision was supported by some authority, a more policy-oriented view of the law would seem to support the opposite conclusion: that is, the two agreements were necessarily contradictory.

Finally, the court dealt with the public policy argument,<sup>21</sup> phrasing the issue in terms of whether or not layoffs in reverse order of seniority were contrary to public policy. In deciding that they were not, the court used the test of whether or not terms of the contract were "invalid on the basis of clear and distinct legal principles."<sup>22</sup> The court looked to the language of 42 U.S.C. § 2000e-2(h)<sup>23</sup> and its legislative history<sup>24</sup> in finding no clear legislative policy contrary to the provisions of the collective bargaining agreement. It did not, however, conclude from its review of the legislative record,<sup>25</sup> that the result was one which necessarily followed from the terms of the statute as written.<sup>26</sup> Thus, it was open to the court to find that

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17. 508 F.2d at 702.

18. 3 A. CORBIN, CONTRACTS § 549 (1960).

19. The district court reached this conclusion. 8 F.E.P. Cas. at 692-3.

20. 508 F.2d at 702. The first part of Section V of the conciliation agreement provided that the company make reasonable efforts to "bring its minority and female workforce up to parity . . . ."

21. 508 F.2d at 704.

22. *Id.*

23. 42 U.S.C. § 2000e-2(h) quoted in note 5, *supra*.

24. 508 F.2d at 704-05; *but see* Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1607-14 (1969).

25. 508 F.2d at 704-05.

26. For discussion of the contention that Congress intended to leave to judicial interpre-

even though layoffs proportional to minority percentages were not required by Congress, neither were they incompatible with Congressional intentions. The court was not directed to either conclusion by the language or the legislative history of 42 U.S.C. § 2000e-2(h), and was free to choose the better result. Unfortunately, in a policy context, it declined to do so in *Jersey Central*, preferring to make the prudent, rather than the correct decision.

The court did not consider, however, other factors in depth that were at least arguably relevant. Applicable legal guidelines which could have constituted "clear and distinct legal principles," were embodied in the EEOC conciliation agreement. As previously discussed, the EEOC is a federal commission, authorized by statute to negotiate on an individual basis with alleged offenders of Title VII.<sup>27</sup> The Commission may also bring suit where negotiations fail.<sup>28</sup> Thus, it administers and enforces a particular area of the law, *i.e.*, Title VII. The typical form that regulation takes is a conciliation agreement, which may then be understood as incorporating the EEOC's views of correct application of Title VII law and policy in a given situation.<sup>29</sup> Thus, the court could have chosen to conform its ruling to EEOC mandates.

Moreover, there are grounds for reading prior cases as warranting the conclusion that seniority layoff provisions of the collective bargaining agreement violated Title VII. Litigation over seniority rights began with *Quarles v. Philip Morris, Inc.*,<sup>30</sup> which held that forfeiture of seniority rights upon entering a new department was a perpetuation of the effects of prior discrimination, where there was evidence of departmental racial segregation.<sup>31</sup> That decision gained wide acceptance,<sup>32</sup> as did *Dobbins v. Electrical Workers Local 212*,<sup>33</sup>

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tation the phrase "bona fide seniority system," see Note, *Last Hired, First Fired, Layoffs and Title VII*, 88 HARV. L. REV. 1544, 1549-52(1975); Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the N.L.R.B.*, 123 U. PA. L. REV. 158, 163 (1974).

27. 42 U.S.C. § 2000e-5(b).

28. *Id.*

29. The U.S. Supreme Court held that interpretations of Title VII by the EEOC are entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-4 (1971). See also Stacey at 516.

30. 279 F. Supp. 505 (E.D. Va. 1968).

31. "Section 703(h) expressly states the seniority system must be bona fide. The purpose of the act is to eliminate discrimination in covered employment. Obviously, one characteristic of a bona fide seniority system must be lack of discrimination." *Id.* at 517.

32. See *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1970), *petition for cert. dismissed*, 404 U.S. 1006 (1971); *Local 189, Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *Bowe v. Colgate Palmolive Co.*, 489 F.2d 896 (7th Cir. 1973); *United States v. N.L. Indus., Inc.*, 479 F.2d 354 (8th Cir. 1973).

33. 292 F. Supp. 413 (S.D. Ohio 1968). See *United States v. IBEW*, 2 F.E.P. Cas. 716

which held that previously all-white unions, which under Title VII began to admit minorities and women, perpetuated the effects of past discrimination by retaining a referral system based on length of prior experience. More recently in *Watkins v. United Steel Workers of America, Local 2369*,<sup>34</sup> the Federal District Court for the Eastern District of Louisiana held that a plant-wide seniority system violated Title VII where there was evidence of prior discrimination. As bona fide seniority systems are exempted from the reaches of Title VII,<sup>35</sup> these cases seem to hold that bona fide seniority systems were only those where there was no evidence of prior discrimination.

In *Jersey Central*, the court failed to inspect the discrimination record of the company, contending that no evidence had been admitted to prove discrimination.<sup>36</sup> However, the best evidence existed in the EEOC agreement,<sup>37</sup> for conciliation agreements are attempted by the commission only if it finds reasonable cause to believe a discrimination charge.<sup>38</sup> Thus, the court avoided consideration of the basic question posed by this line of decisions: whether or not the seniority system protected by the seniority clause was a bona fide one, *i.e.*, whether or not there was some evidence or some basis for inferring the presence of prior discrimination.<sup>39</sup>

The decision could perhaps be justified by arguing that changes in collective bargaining, protected by the National Labor Relations Act, should be introduced by Congress. But that is not the issue in this case. The question in *Jersey Central* simply came down to a

(6th Cir. 1970); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

34. 369 F. Supp. 1221 (E.D. La. 1974), *rev'd*, 516 F.2d 41 (5th Cir. 1975).

35. See 42 U.S.C. § 2000e-2(h) quoted in note 5, *supra*.

36. 508 F.2d at 710.

37. *But see* Section 1 of the conciliation agreement which states:

1. It is understood that this Agreement does not constitute an admission by Respondents of any violation of Title VII of the Civil Rights Act of 1964, as amended.

38. 42 U.S.C. § 2000e-5(b).

39. Prior cases had established that certain seniority systems which perpetuated the effects of past discrimination were not bona fide, and thus, violated Title VII. See note 32, *supra*. The Third Circuit, however, interpreted this standard of violation as lay-offs which have a disproportionate effect on female and minority workers. This interpretation is broader than the accepted phrase of "perpetuation of the effects of past discrimination," for it is conceivable that a lay-off may have a disproportionate effect without perpetuating the effects of past discrimination. The majority, having promulgated this broader scope of Title VII, then rejects it on the basis that its adoption would conflict with policies of the NLRA, *i.e.*, seniority rights. Thus, the court never fully dealt with the perpetuation of effects of past discrimination in the matter at bar. Secondly, it did not reach the conclusion, not having considered the accepted policy, that upon presentation of evidence of past discrimination, the seniority system could not be considered to violate Title VII. It should be noted, though, that Judge Van Dusen's concurring opinion analyzes the facts of *Jersey Central* in light of the accepted policy of Title VII. 508 F.2d at 710.

choice between an active anti-discrimination policy for corporations during hard-pressed financial times as well as good times, and a perpetuation of the plant-wide seniority system, which penalizes minorities and women for previous discrimination on the part of employers. The Third Circuit in *Jersey Central*, joined recently by the Fifth Circuit in *Watkins*,<sup>40</sup> chose to undo a portion of the progress of American society in anti-discrimination policies.

The decisions in *Jersey Central*, *Watkins*, and *Waters v. Wisconsin Steel Workers*<sup>41</sup> indicate a decided unwillingness on the part of the courts to implement Congressional policies during a recession.

*Nancy J. Wise*

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40. *Watkins v. Steelworkers Local 2369*, 516 F.2d 41 (5th Cir. 1975).

41. 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 44 U.S.L.W. 3010 (U.S. Feb. 24, 1975) (No. 74-1064).



