Volume 24 | Issue 3 Article 8

1979

Civil Rights - Employment Discrimination - Section 1981 Cannot Invalidate Facially Neutral Seniority Systems Preserved by Title VII under Teamsters

John B. Wright II

CIVIL RIGHTS—EMPLOYMENT DISCRIMINATION—SECTION 1981 CANNOT INVALIDATE FACIALLY NEUTRAL SENIORITY SYSTEMS PRESERVED BY TITLE VII UNDER *TEAMSTERS*.

Johnson v. Ryder Truck Lines, Inc. (4th Cir. 1978)

Black employees, former employees, and applicants for employment instituted a class action[1] against the employer, the union, and its local, charging them with violations[2] of Title VII of the Civil Rights Act of 1964 (Title VII)[3] and section 1981.[4] Among the practices alleged to be discriminatory[5] were seniority provisions in collective bargaining agreements which required the forfeiture of departmental seniority upon interdepartmental transfer by any employee.[6] The United States Court of Appeals for the Fourth Circuit

1. Johnson v. Ryder Truck Lines, Inc., 12 Fair Empl. Prac. Cas. 895, 898 (W.D.N.C. 1975), *aff'd per curiam*, 555 F.2d 1181 (4th Cir. 1977), *modified*, 575 F.2d 471 (4th Cir. 1978), *cert. denied*, 99 S. Ct. 1785 (1979). The plaintiffs sought both injunctive relief as a class and specific redress for individual plaintiffs who suffered as a result of defendants' discriminatory practices. 12 Fair Empl. Prac. Cas. at 898.

2. 12 Fair Empl. Prac. Cas. at 898. The facility of the employer, Ryder Truck Lines, Inc. (Ryder), was divided into four departments: Longline (long distance hauling), City Cartage (short distance hauling), Shop, and Office. *Id.* at 899. The average gross wages paid to full-time longline drivers by Ryder were greater than the average gross wages paid to members of the City Cartage and Shop departments. *Id.* at 900. Yet until 1971, no blacks were hired into the ranks of the more than 100 longline drivers. *Id.* at 900-01. In the other departments, blacks were relegated to menial jobs, as in the City Cartage department where blacks were disproportionately assigned to jobs as dockworkers or stevedores, leaving to whites a disproportionate share of the higher paying positions as local drivers. *Id.* The district court found that this and other similar statistical evidence constituted a prima facie case of both past and continuing discrimination on the basis of race. *Id.* at 901.

3. 42 U.S.C. § 2000e (1976). The effective date of Title VII was July 2, 1965. Civil Rights Act of 1964, Pub. L. No. 88-352, § 716(a), 78 Stat. 266. Section 2000e-2(a) provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . .; 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 . . . .

42 U.S.C. § 2000e-2(a) (1976).

4. 12 Fair Empl. Prac. Cas. at 898. *See* 42 U.S.C. § 1981 (1976). Section 1981 provides in pertinent part:

> All persons . . . shall have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

5. Practices of the employer alleged to be discriminatory included, *e.g.*, failing to hire blacks for certain jobs, *see* 12 Fair Empl. Prac. Cas. at 901, refusing prior to 1971 to allow incumbent employees to transfer to longline driving jobs, *see id.*, and failing to promote blacks to supervisory jobs, *see id.* at 904-05.

6. 575 F.2d at 473. *See also* 12 Fair Empl. Prac. Cas. at 901. Departmental seniority was used to determine priority in job bidding and layoffs. *Id.* at 902.

One commentator has noted the role of seniority systems in the following terms: "In nearly all businesses of significant size whose employees are organized, a seniority system plays some

affirmed the district court's decision[7] that the seniority system, by perpetuating pre-Title VII discrimination, violated Title VII and section 1981.[8]

The Fourth Circuit subsequently granted a rehearing to consider the case in light of an intervening decision[9] of the Supreme Court in *International Brotherhood of Teamsters v. United States*.[10] Finding the seniority system "virtually identical" to the system upheld in *Teamsters*,[11] the court of appeals modified its opinion, *holding* that the seniority provisions were valid under Title VII and section 1981, and that section 1981 could not serve to invalidate such provisions once they are found valid under Title VII.[12]

---

role in determining the allocation of the work. Such systems are commonly accompanied by lines of progression or promotional ladders which establish an order of jobs through which employees normally are promoted." 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 (1969).

The seniority system in *Ryder* was of the type described as "competitive status seniority," *see* 12 Fair Empl. Prac. Cas. at 901-02, which is

> used to determine priorities among employees for promotion, job security, shift preference and other employment advantages. By contrast, "benefit seniority" is used, without regard to the status of other employees, to determine the eligibility of a given employee for certain benefits, such as participation in a group life insurance plan.

Cooper & Sobol, *supra*, at 1601 n.1.

Seniority may be measured by the length of: 1) employment with the employer—"employment," "mill," or "plant" seniority; 2) service in a department—"departmental" seniority; 3) service in a line of progression—"progression line" seniority; or 4) service in a job—"job" seniority. *Id.* at 1602.

At issue in the case *sub judice* was the departmental system of competitive status seniority. 575 F.2d at 474.

7. Johnson v. Ryder Truck Lines, Inc., 555 F.2d 1181 (4th Cir. 1977) (per curiam).

The district court granted injunctive relief and back pay awards against the employer. 12 Fair Empl. Prac. Cas. 895, 914-15. The judgment as issued by the district court is reprinted at Johnson v. Ryder Truck Lines, Inc., 11 Empl. Prac. Dec. ¶ 10,692, at 6898 (W.D.N.C. 1976). The court: 1) enjoined the defendant Ryder Truck Lines, Inc. from future discrimination against the individual plaintiffs and the represented class, *id.* at 6899; 2) ordered Ryder to offer certain individual plaintiffs jobs as longline drivers, with departmental and company seniority dating back to the date of the original discrimination in each case, *id.* at 6899-900; 3) ordered back pay to the successful individual plaintiffs, *id.* at 6900; 4) enjoined the company and its employees from discriminatory acts against the plaintiffs, *id.* at 6900-01; and 5) required the company to take certain affirmative steps to remedy the effects of past discrimination. *Id.* at 6901.

The district court also found that the defendant union and its local had violated Title VII by failing to "take steps to assist its black members who had been the victims of racial discrimination" and by "allowing perpetuation of discrimination in the applicable collective bargaining agreements." 12 Fair Empl. Prac. Cas. at 903. Noting, however, that the union made efforts to liberalize the seniority provisions in the various collective bargaining agreements, *id.* at 903-04, the court only imposed liability for monetary damages upon the employer. *Id.* at 914.

8. 12 Fair Empl. Prac. Cas. at 902, 914.

9. 575 F.2d at 473.

10. 431 U.S. 324 (1977).

11. 575 F.2d at 473. For a discussion of the provisions and effect of the seniority system in *Teamsters*, *see* note 36 and accompanying text *infra*.

12. 575 F.2d at 475. The Fourth Circuit accordingly withdrew its mandate and remanded to the district court for reconsideration of the claims made by those employees who were afforded relief on the basis of the invalidity of the seniority system upheld in *Teamsters*. *Id.* The court also directed the district court to permit the union to move for relief from the injunction issued against it, since "the union's conduct in agreeing to the seniority system violated neither Title VII nor § 1981." *Id.*

Johnson v. Ryder Truck Lines, Inc., 575 F.2d 471 (4th Cir. 1978), *cert. denied*, 99 S. Ct. 1785 (1979).

Facially neutral seniority systems which perpetuate past discrimination[13] were first held invalid under Title VII in *Quarles v. Philip Morris, Inc.*[14] and *Local 189, United Papermakers & Paperworkers v. United States.*[15] Upon examination of the legislative history of that title, these courts rejected the contention that section 703(h) of Title VII[16] was intended to validate facially neutral seniority systems.[17] Such a system was declared unlawful "if the inevitable effect of tying the system to the *past* . . . [were] to cut into the employees [sic] *present* right not to be discriminated against on the basis of race."[18]

The majority of subsequent cases have agreed with the interpretation of Title VII set forth in *Quarles* and *Paperworkers*.[19] Moreover, in response

---

13. Facially neutral seniority systems operate to perpetuate past discrimination by preventing newly hired or transferred black employees from achieving the level of job security and other advantages which they might have attained, had they not been discriminated against when originally hired. *See, e.g.*, Cooper & Sobol, *supra* note 6, at 1603-04; Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 How. L.J. 1, 8-9 (1967); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 Harv. L. Rev. 1260, 1263-66, 1268 (1967).

14. 279 F. Supp. 505 (E.D. Va. 1968). The court found that before 1966 the company had engaged in a discriminatory policy of hiring blacks into lower paying departments. *Id.* at 508. The company subsequently discontinued this practice and also replaced its no transfer policy with the departmental seniority system at issue in the case. *Id.* at 514. This system required that transferring workers forfeit their departmental seniority. *Id.* at 513.

15. 416 F.2d 980 (5th Cir. 1969). Until 1964, jobs in the company were organized into lines of progression, the white local union having jurisdiction over the more desirable lines. *Id.* at 983. Pools of new employees to fill vacancies on the progression lines were also segregated. *Id.* Subsequently the pools were merged and the employees allowed to transfer but only if they forfeited their progression line seniority. *Id.* at 983-84.

16. 42 U.S.C. § 2000e-2(h) (1976). This section 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 . . . .

Id.

17. 416 F.2d at 994-95; 279 F. Supp. at 515-18. For a brief discussion of the legislative history of Title VII, *see* note 39 *infra*.

18. 416 F.2d at 988 (emphasis in original). *See* 279 F. Supp. at 518-19.

19. *See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257, 265 (4th Cir. 1976) (progression line seniority invalid); Rodriguez v. East Tex. Motor Freight, 505 F.2d 40, 56 (5th Cir. 1974), *vacated on other grounds and remanded*, 431 U.S. 395 (1977) (departmental seniority invalid); United States v. N.L. Indus., Inc., 479 F.2d 354, 364 (8th Cir. 1973) (departmental seniority invalid); United States v. Bethlehem Steel Corp., 446 F.2d 652, 659 (2d Cir. 1971) (departmental seniority invalid); Robinson v. Lorillard Corp., 444 F.2d 791, 795-96 (4th Cir. 1971) (departmental seniority invalid); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970) (no transfer policy invalid). *But see* Chance v. Board of Examiners, 534 F.2d 993, 998 (2d Cir. 1976) (employment seniority valid); Watkins v. Steel Workers Local 2369, 516 F.2d 41, 44-45 (5th Cir. 1975) (employment seniority valid); Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687, 705 (3d Cir. 1975), *vacated on other grounds sub nom.* Equal Employment Opportunity Comm'n v. Jersey Cent. Power & Light Co., 425 U.S. 987 (1977) (plant seniority valid); Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1318 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976) (employment seniority valid).

to a Supreme Court decision which held that section 1982[20] was applicable to private acts of discrimination,[21] courts have also utilized section 1981 to invalidate facially neutral seniority systems which perpetuated prior racial discrimination.[22]

The Supreme Court appeared to approve the approach of the *Paperworkers* and *Quarles* courts in *Griggs v. Duke Power Co.*[23] In *Griggs*, an employee's transfer to a higher paying department depended upon his performance on certain tests which were unrelated to job performance.[24] Holding the tests invalid,[25] the Court stated that, under Title VII, "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."[26]

The use of section 1981 as a basis for relief from private acts of discrimination in employment has also been scrutinized by the Supreme Court in *Johnson v. Railway Express Agency, Inc.*[27] In addition to ratifying the

20. 42 U.S.C. § 1982 (1976). Sections 1981 and 1982 were both originally enacted as part of § 1 of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. Section 1981 was then reenacted in the Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968).

21. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968). In *Jones*, a married couple seeking to buy a house alleged that the developers had "refused to sell them a [certain] home . . . for the sole reason that petitioner . . . is a Negro." *Id.* at 412. The couple sought relief, contending that § 1982 prohibited private refusals to sell. *Id.* Both the district court and court of appeals concluded that § 1982 applied only to state action. *Id.* The Supreme Court reversed, holding "that § 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." *Id.* at 413 (emphasis in original).

Prior to *Jones*, the Court had indicated that the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, and the Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144 (reenacting the provision now codified as § 1981), applied only to discriminatory exercises of state power. Hurd v. Hodge, 334 U.S. 24, 31 (1948); Corrigan v. Buckley, 271 U.S. 323, 330 (1926); The Civil Rights Cases, 109 U.S. 3 *passim* (1883); United States v. Cruikshank, 92 U.S. 542, 554-55 (1875).

22. For cases holding a seniority system invalid under both Title VII and § 1981, *see, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257, 262, 265 (4th Cir. 1976); Rodriguez v. East Tex. Motor Freight, 505 F.2d 40, 59 (5th Cir. 1974), *vacated on other grounds and remanded*, 431 U.S. 395 (1977). For cases holding a seniority system valid under both Title VII and § 1981, *see, e.g.*, Chance v. Board of Examiners, 534 F.2d 993, 998 (2d Cir. 1976); Watkins v. Steel Workers Local 2369, 516 F.2d 41, 49-50 (5th Cir. 1975); Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1320 & n.4 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

23. 401 U.S. 424 (1971).

24. *Id.* at 427-28, 431. Prior to the effective date of Title VII, the Duke Power Company had restricted blacks to employment in the lowest paying department. *Id.* at 427. When the company abandoned its restrictive policy in 1965, it instituted a requirement for transfer to the other departments that the employee have completed high school and have registered satisfactory scores on two professionally prepared aptitude tests. *Id.* at 427-28. The Court found these requirements not to be job related. *Id.* at 428. Following guidelines on employee testing procedures promulgated by the Equal Employment Opportunity Commission, 29 C.F.R. § 1607 (1977), the Court held that employment tests, to be valid under Title VII, must be job related. 401 U.S. at 433-36.

25. 401 U.S. at 436.

26. *Id.* at 430.

27. 421 U.S. 454 (1975). In *Johnson*, an employee filed a timely charge with the Equal Employment Opportunity Commission (EEOC) alleging that the employer and the union had discriminated against black employees with respect to seniority rules and job assignments. *Id.* at 455. The EEOC investigated, but did not notify the employee of his right to bring a civil action

approach of the courts of appeals in holding section 1981 to be so applicable,[28] the Court held that the remedies available under Title VII and section 1981 are "separate, distinct, and independent,"[29] and noted several matters in which the two statutes are "not coextensive."[30]

In *International Brotherhood of Teamsters v. United States*,[31] however, the Supreme Court declined to follow the approach of *Paperworkers* and *Quarles*[32] and held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-[Title VII] . . . discrimination."[33] Before and after the effective date of Title VII, a trucking company[34] had restricted employment of blacks to the lower paying departments.[35] Victims of such discriminatory hiring practices prior to the effective date of Title VII were thereafter discouraged from transfer by the company's departmental seniority system, by which any employee who transferred would forfeit his departmental seniority.[36] Al-

---

against the respondents, as required by 42 U.S.C. 2000e-5(f) (1976), until two and a half years later. 421 U.S. at 455. The employee filed a complaint in district court, alleging violations of both Title VII and § 1981. *Id.* at 456. The district court held that the § 1981 claims were barred by the state's one year statute of limitations on actions brought under the federal civil rights statutes. *Id.* The Title VII claims were dismissed on other grounds. *Id.*

The Supreme Court granted certiorari to consider the limited question: "Whether the timely filing of a charge of employment discrimination with the [EEOC] . . . tolls the running of the period of limitation applicable to an action based on the same facts brought under . . . [§ 1981]?" Johnson v. Railway Express Agency, Inc., 417 U.S. 929 (1974). The Court affirmed the dismissal, stating that "Congress did not expect that a § 1981 court action usually would be resorted to only upon completion of Title VII procedures." 421 U.S. at 461.

28. 421 U.S. at 459-60. For decisions of the courts of appeals holding that § 1981 prohibits private acts of discrimination in employment, *see* cases cited note 22 *supra*.

29. 421 U.S. at 461. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974) (Title VII designed to supplement, not supplant, existing law).

30. 421 U.S. at 460. The Court noted the following differences in remedies: 1) under § 1981, a back pay award is not restricted to a period of two years preceding the filing of a charge of discrimination, as it is under Title VII; 2) Title VII is not applicable to certain employers, while the terms of § 1981 do not limit its applicability; and 3) Title VII "offers assistance" in investigation, conciliation, counsel, waiver of court costs, and attorneys' fees, which is not available in actions brought under § 1981. *Id.*

31. 431 U.S. 324 (1977).

32. For a discussion of *Paperworkers* and *Quarles*, *see* notes 13-18 and accompanying text *supra*.

33. 431 U.S. at 353-54.

34. *Id.* at 328. The defendants in *Teamsters* were T.I.M.E.-D.C., Inc., a nationwide trucking system, and the employee's union, the International Brotherhood of Teamsters. *Id.* at 328-29 & n.2.

35. *Id.* at 337-38. The employees were in three bargaining units: 1) line drivers who were "engage[d] in long-distance hauling between company terminals;" 2) city operations, which was composed of employees involved in the pick up and delivery of freight "within the immediate area of a particular terminal;" and 3) servicemen, "who service trucks, unhook tractors and trailers, and perform similar tasks." *Id.* at 329 n.3. Line drivers were better paid than either servicemen or employees in city operations. *Id.* at 338 n.18, 369 n.55. Although blacks represented 5% of the company's employees, only 0.4% of those employed as line drivers were blacks. *Id.* at 337.

36. *Id.* at 344. The seniority system, which originated in the company's collective bargaining agreement with the union, determined priority in layoffs, recall from layoffs, and job bidding. *Id.* at 343-44. For a discussion of departmental seniority systems, *see* note 6 *supra*.

though the Court acknowledged that the seniority system seemed invalid under the rationale of *Griggs*,[37] the Court nevertheless reasoned that the language of section 703(h) of Title VII[38] and the legislative history of Title VII demonstrated that Congress considered this effect of many seniority systems but "extended a measure of immunity to them."[39]

Against this background, the Fourth Circuit in *Ryder*[40] began its analysis by finding that the employees[41] were covered by seniority provisions[42] "virtually identical" to those found lawful under Title VII in *Teamsters*.[43] Following the Supreme Court's holding therein,[44] the *Ryder* court held that their prior affirmance of the district court's opinion[45] was invalid.[46]

The court then addressed the plaintiffs' contention that "§ 703(h) is expressly limited to Title VII and . . . should not be construed as a restriction on § 1981."[47] Noting that section 1981 and Title VII did furnish independent remedies,[48] the Court therefore framed the issue to be "whether the incumbent employees who were discriminatorily hired before . . . Title VII became effective have a cause of action under § 1981 because the bargaining contract's restriction of carryover seniority perpetuates the . . . [pre-Title

---

37. 431 U.S. at 349. For a discussion of *Griggs*, *see* notes 23-26 and accompanying text *supra*.

38. For the text of § 703(h) of Title VII, *see* note 16 *supra*.

39. 431 U.S. at 345, 349-50. In determining whether § 703(h) immunized facially neutral seniority systems, both the Supreme Court in *Teamsters* and the district court in *Quarles* relied upon: 1) remarks of Senator Humphrey, 110 CONG. REC. 6458, 6549 (1964) (Title VII not to destroy seniority rights); 2) remarks of Senator Kuchel, 110 CONG. REC. 6560, 6564 (1964) (seniority rights would not be affected); 3) Memorandum of the Department of Justice, presented by Senator Clark on April 8, 1964, 110 CONG. REC. 7206, 7207 (1964) (Title VII would have no effect on seniority rights existing at the time it takes effect); 4) Senator Clark's responses to Senator Dirksen's memorandum, 110 CONG. REC. 7216, 7217 (1964) (seniority rights are in no way affected; "last hired, first fired" principle may be used); 5) Interpretive Memorandum of Title VII of H.R. 7152 Submitted by Senator Clark and Senator Case, 110 CONG. REC. 7212, 7213 (1964) (no effect on seniority rights; effect is prospective and not retrospective; a business which once discriminated would not be obliged to give blacks special seniority rights at the expense of white workers hired earlier). 431 U.S. at 348-55; 279 F. Supp. at 515-18. *See generally* E.E.O.C., LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 (1968).

40. The case was heard by Judges Winter, Butzner, and Russell. The majority opinion was written by Judge Butzner, who had decided *Quarles*, the seminal case in the line of cases contradicted by *Teamsters*. For a discussion of *Quarles*, *see* notes 14-17 and accompanying text *supra*. Judge Winter wrote a concurring opinion.

41. 575 F.2d at 473. The employees had been discriminatorily hired before the effective date of Title VII. *Id. See also* 12 Fair Empl. Prac. Cas. 895, 899-901 (W.D.N.C. 1975).

42. 575 F.2d at 473. The provisions were contained in the company's collective bargaining agreements. *Id.* For a discussion of seniority systems, *see* note 6 *supra*.

43. 575 F.2d at 473. *Compare* International Bhd. of Teamsters v. United States, 431 U.S. 324, 329 n.3, 343-44 (1977) *with* Johnson v. Ryder Truck Lines, Inc., 12 Fair Empl. Prac. Cas. 895, 899, 901-02 (W.D.N.C. 1975).

44. 431 U.S. at 353-54.

45. 555 F.2d at 1181.

46. 575 F.2d at 473.

47. *Id.*

48. *Id.* at 473-74. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). For a discussion of *Johnson*, *see* notes 27-30 and accompanying text *supra*.

VII] hiring discrimination."[49] Explaining that the seniority provision was neutral, applying to both whites and blacks should they transfer to higher paying jobs as line drivers, the court reasoned that section 1981 did not afford the black employees relief, since that statute "confers on black persons only the same rights possessed by white persons."[50]

The majority stated further that the application of section 1988,[51] which requires the district courts to exercise and enforce the jurisdiction conferred upon them by section 1981 "in conformity with the laws of the United States,"[52] also failed to afford the plaintiffs relief.[53] The court declared that "[o]rdinarily, § 1988 enables a district court to utilize *Griggs'* interpretation of Title VII in a § 1981 employment suit,"[54] but reasoned that such a use of section 1988 is restricted by the limits placed upon the *Griggs* rationale in *Teamsters*.[55] As the *Ryder* court explained, "[a] ruling that a seniority system which is lawful under Title VII is nevertheless unlawful under § 1981 would disregard the precepts of § 1988."[56]

The court determined that such a result was consistent with decisions in other circuits that had held that section 1981 could not serve to invalidate facially neutral seniority systems excluded under section 703(h) of Title VII.[57] Moreover, the Fourth Circuit noted that the Supreme Court's opinion in *Johnson*, holding remedies under Title VII and section 1981 to be separate and independent,[58] gave no indication that Congress intended to create "conflicting and contradictory standards for determining what constitutes illegal discrimination."[59]

---

49. 575 F.2d at 474 (footnote omitted).

50. *Id.* The court acknowledged that each employee hired before the effective date of Title VII had possessed a cause of action under § 1981, but pointed out that such cause of action was barred by North Carolina's three year statute of limitations, N.C. GEN. STAT. § 1-52(1) (1969), which is made applicable to the § 1981 claim. 575 F.2d at 474, *citing* Johnson v. Railway Express Agency Inc., 421 U.S. 454, 462 (1975) (holding actions brought under § 1981 governed by applicable state statute of limitations).

51. 42 U.S.C. § 1988 (1976). Section 1988 provides in part: "The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this chapter . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect." *Id.*

52. *Id.*

53. 575 F.2d at 474.

54. *Id.*, *quoting* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). For a discussion of *Griggs*, *see* notes 23-26 and accompanying text *supra*.

55. 575 F.2d at 474.

56. *Id.* The court found support in Moor v. County of Alameda, 411 U.S. 693 (1973), which held that a state law that made municipal employers vicariously liable for the acts of their employees could not be used to enforce rights secured by § 1983 because it was inconsistent with the Supreme Court's holding in Monroe v. Pape, 365 U.S. 167, 187-91 (1961), excluding municipal corporations from liability under § 1983. 411 U.S. at 706. *But see* 575 F.2d at 477 (Winter, J., concurring). For a discussion of Judge Winter's position, *see* notes 63-65 and accompanying text *infra*.

57. 575 F.2d at 475, *citing* Chance v. Board of Examiners, 534 F.2d 993, 998 (2d Cir. 1976); Watkins v. Steel Workers Local 2369, 516 F.2d 41, 49-50 (5th Cir. 1975); Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1320 n.4 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

58. 575 F.2d at 475, *citing* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). For a discussion of *Johnson*, *see* notes 27-30 and accompanying text *supra*.

59. 575 F.2d at 475. The majority noted that the *Johnson* Court emphasized that the *procedures* required to invoke the sanctions of the statutes were independent. *Id.* The *Ryder* court

In a concurring opinion,[60] Judge Winter stated that "§ 1981 merely guarantees the black employee the same right to contract for his services 'as is enjoyed by white citizens.'"[61] Agreeing with the majority, the concurrence reasoned that there was no violation of section 1981 because the seniority provisions did not abridge "the right of blacks to contract . . . by reason of their race."[62]

Judge Winter disagreed with the majority's thesis "that § 1988 imports into § 1981 both Title VII and the judicial gloss which has been placed upon it."[63] Reviewing the language of section 1988,[64] he concluded that "the provisions of state and federal law which are imported into § 1981 do not relate to the substantive proscriptions of § 1981; they relate solely to how remedies for acts illegal under § 1981, standing alone, are to be redressed."[65]

The issue presented in *Ryder* raises for the first time the possibility that Title VII and section 1981 may be found in conflict regarding the validity of facially neutral seniority systems. The court has attempted to reconcile these statutes in two ways.[66] Under the first approach, facially neutral seniority systems cannot be invalidated if they meet the terms of section 1981, which, as interpreted, confers on black persons "merely" the same rights conferred on white persons.[67] Such an approach suffers the weakness of being con-

---

stated, however, that the Supreme Court's opinion did not suggest that "a practice held lawful under Title VII can be held unlawful under § 1981." *Id.*

60. Judge Winter concurred in the majority's decision that *Teamsters* invalidated the court's prior affirmance. *Id.* at 475 (Winter, J., concurring).

61. *Id.* at 475-76 (Winter, J., concurring), *quoting* 42 U.S.C. § 1981 (1976). Judge Winter agreed with the majority that the plaintiffs had had a cause of action under § 1981 for their original discriminatory hirings, but concluded that the claim was barred by the state's three year statute of limitations. 575 F.2d at 475-76 (Winter, J., concurring). For the applicable statute of limitations, *see* note 50 *supra*.

62. 575 F.2d at 476 (Winter, J., concurring).

63. *Id.* For the relevant text of § 1988, *see* note 51 *supra*.

64. 575 F.2d at 476-77 (Winter, J., concurring), *construing* 42 U.S.C. § 1988 (1976). Judge Winter noted that § 1988 speaks of the "exercise" of federal jurisdiction and the "enforcement" of the federal statutes, and concluded that these "refer to the *remedies* available and not to the threshold determination of whether . . . [§ 1981] has been violated." 575 F.2d at 477 (Winter, J.,concurring) (emphasis in original).

65. 575 F.2d at 477 (Winter, J., concurring). Judge Winter stated that § 1988 operates to import "into § 1981 many provisions of federal and state law to cover situations in which § 1981 is silent," and noted the use of states' statutes of limitations on § 1981 actions as an example. *Id.*

The concurring opinion drew support from Moor v. County of Alameda, 411 U.S. 693 (1973) (§ 1988 does not operate to import into federal law a state law holding municipalities vicariously liable for their employees' violations of citizens' federal civil rights), and Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) (federal court empowered by § 1988 to redress a violation of § 1982 through both state and federal rules on compensatory damages, whichever better serves the policy of the statute). 575 F.2d at 477 (Winter, J., concurring). Both cases were found to imply that "the sole effect of § 1988 is to provide a *remedy* for violation of the Civil Rights Acts." *Id.* (emphasis in original). The majority also cited *Moor* as support for its contrary position on this issue. *See* 575 F.2d at 475. *See* note 56 and accompanying text *supra*.

66. *See* 575 F.2d at 473-74.

67. *Id.* at 474. Since white employees as well as black employees must forfeit their departmental seniority rights upon transfer between departments, the *Ryder* seniority provisions accord both races the same rights and require the same penalties. *Id.*

trary to past holdings of courts of appeals.[68] Moreover, it is submitted that if section 1981 is interpreted as being inapplicable to any practices which literally accord blacks the same rights as whites, and no more, section 1981 may not be used to invalidate *any* facially neutral policies even though they may fall within the ambit of *Griggs*.[69]

The court also attempted to reconcile the two statutes by interpreting section 1988 as the mechanism by which courts have previously invalidated seniority systems through the absorption of the law of Title VII.[70] It is submitted that this second approach is, as the concurring opinion argued,[71] analytically unsound in light of the Supreme Court's opinions in *Moor v. County of Alameda*[72] and *Sullivan v. Little Hunting Park*,[73] which indicated that section 1988 cannot be employed to incorporate state and federal substantive civil rights law.[74]

As an alternative to such interpretations, it is suggested that a consistent result may be reached by applying norms of statutory construction. Although it has been clearly established that Title VII does not "impliedly repeal" section 1981,[75] Title VII can be read as controlling the interpretation of section 1981 in defining a discriminatory seniority system, in accordance with

---

68. *See* cases cited note 22 *supra*. Of the cases cited therein, only Watkins v. Steel Workers Local 2369, 516 F.2d 41 (5th Cir. 1975), which found the seniority system involved to be valid under both Title VII and § 1981, used this reasoning in analyzing systems challenged under § 1981. *Id.* at 50. None of the cases which held the seniority system invalid under § 1981 discussed this approach.

69. For a discussion of *Griggs*, *see* notes 23-26 and accompanying text *supra*.

70. 575 F.2d at 474-75.

71. *Id.* at 476-77 (Winter, J., concurring).

72. 411 U.S. 693 (1973). *See* note 65 *supra*. In *Moor*, two persons sought damages for alleged injuries suffered when a sheriff in a county's employ fired a shotgun during a civil disturbance. 411 U.S. at 695. While acknowledging that the Court had decided that a municipality is not a "person" within the meaning of 42 U.S.C. § 1983 (1976) and therefore may not be held directly liable under that section for breaches of an individual's civil rights, Monroe v. Pape, 365 U.S. 167, 187-91 (1961), the injured parties argued that a municipality could be held vicariously liable by using § 1988 to import into federal law a state statute making municipalities liable for their employees' breaches of federal civil rights statutes. 411 U.S. at 698-701. The *Moor* Court rejected this argument, reasoning that § 1988 was intended to "*complement* the various federal statutes which do create federal causes of action for the violation of federal civil rights," but "does not enjoy the independent stature of an 'Act of Congress for the protection of civil rights.' " *Id.* at 702 (emphasis added), *quoting* 28 U.S.C. § 1343(4) (1976) (conferring original jurisdiction on federal district courts over actions brought under the federal civil rights statutes). The *Moor* Court also stated: "[W]e do not believe that . . . [§ 1988], without more, was meant to authorize the wholesale importation into federal law of state causes of action—not even one purportedly designed for the protection of federal civil rights." 411 U.S. at 703-04.

It is submitted that such language makes Judge Winter's interpretation of § 1988 as a means to incorporate only federal and state *remedial* law the more compelling construction of the section. *See* 575 F.2d at 476-77 (Winter, J., concurring). *See* notes 63-65 and accompanying text *supra*.

73. 396 U.S. 229 (1969). In dicta in *Sullivan*, the Supreme Court stated that § 1988 could be used to apply favorable federal or state rules on compensatory *damages* to causes of action arising under § 1982. *Id.* at 240.

74. *See* notes 72 & 73 *supra*.

75. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459 (1975). *Cf.* United States v. United Continental Tuna Corp., 425 U.S. 164 (1976) (implied congressional repeal not favored). For a discussion of *Johnson*, *see* notes 27-30 and accompanying text *supra*.

the principle that "[w]here there is no clear intention otherwise, a specific statute will not be controlled *or nullified by* a general one, regardless of the priority of enactment."[76] It is submitted that this principle directs that section 703(h) of Title VII, a specific provision preserving facially neutral seniority systems, should control a determination of whether such systems violate the general statute, section 1981.[77] It is also suggested that to hold otherwise would be contrary to the Supreme Court's finding in *Teamsters* that Congress intended to preserve facially neutral seniority systems.[78] If Congress has in fact considered the effect of seniority systems in perpetuating prior discrimination and nevertheless "extended a measure of immunity to them,"[79] it would seem inappropriate to now hold such seniority systems invalid under the general language of the hundred-year-old section 1981.[80]

The Third and Fifth Circuits have already ruled on the issue presented in *Ryder*, and the Third Circuit has disagreed with the court's holding in the instant case.[81] Presently, therefore, the determination of whether

---

76. Morton v. Mancari, 417 U.S. 535, 550-51 (1974) (emphasis added). *See also* Townsend v. Little, 109 U.S. 504, 512 (1883) (territorial legislature's act for specific municipality controls over same legislature's contrary act for the entire territory). *See generally* 2A SUTHERLAND STATUTORY CONSTRUCTION §§ 51.01-.03 (4th ed. 1973).

77. Such an approach may appear to conflict with the holding in *Johnson* that Title VII and § 1981 are separate and independent remedies. *See* notes 27-30 and accompanying text *supra*. It is submitted that the suggested rationale does not conflict, since it merely suggests that, regardless of remedial matters, the two statutes should be construed as harmonious in regard to whether an act or practice, such as a seniority system, constitutes discrimination.

78. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 350-53 (1977). *See* notes 31-39 and accompanying text *supra*.

79. 431 U.S. at 353.

80. *See* note 20 *supra*.

81. Bolden v. Pennsylvania State Police, 578 F.2d 912, 920-21 (3d Cir. 1978) (conflicts with *Ryder*); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1191 n.37 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 1020 (1979) (agrees with *Ryder*).

In *Bolden*, the United States Court of Appeals for the Third Circuit was considering an appeal from, *inter alia*, the denial of a motion for a modification *pendente lite* of a judgment holding that the seniority rules governing promotions of state police officers violated § 1981. 578 F.2d at 914-15. The court rejected the argument that *Teamsters* preserved these seniority systems, asserting that "we would have to impute to the second session of the Eighty-eighth Congress the intention to circumscribe the remedial powers of the federal courts under §§ 1981, 1983, 1985, and 1988." *Id.* at 921. The Third Circuit stated that it could find no such direction in either Supreme Court decisions or the legislative history of Title VII. *Id.*

In *Pettway*, a case on its fourth appeal to the Fifth Circuit, the court considered an appeal from a judgment ordering back pay to appellant class members who alleged, *inter alia*, that the seniority provisions violated Title VII and § 1981. 576 F.2d at 1188. Reviewing its previous decision in light of *Teamsters*, the court modified its judgment, holding that class members who had been discriminatorily hired before the effective date of Title VII, and whose cause of action therefore depended upon the invalidity of the seniority system, were not entitled to relief under *Teamsters*. *Id.* at 1188-91. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 356-57 (1977). The Fifth Circuit, discussing Title VII, also noted that

> [a]ssuming, as we must, that Congress intended section 703(h) to accord absolute protection to pre-[Title VII] . . . seniority rights which accrued under bona fide seniority systems, Congress could not have intended such rights to remain subject to revision under section 1981. . . . We therefore agree with the Fourth Circuit's holding in *Johnson* [the instant case] that the protection accorded bona fide seniority systems by section 703(h) apply whether suit is brought under Title VII or section 1981.

576 F.2d at 1191 n.37.

employees will be accorded protection of their seniority rights depends upon the circuit within which their employer is located.

Ryder achieves harmony between Title VII and section 1981 by restricting the latter in accord with *Teamsters*, so as to preserve facially neutral seniority systems. The court employs two interpretations, both of which appear unsound.[82] It is suggested that the application of norms of statutory construction achieves the same result while preserving the integrity of section 1981 and avoids a convoluted and tenuously supported construction of section 1988.[83]

John B. Wright, II

---

82. For a discussion of the court's two interpretations, *see* notes 67-74 and accompanying text *supra*.

83. For a discussion of the suggested approach, *see* notes 75-80 and accompanying text *supra*.