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# No Retrenchment in Affirmative Action: The Tension between Civil Rights Laws and Layoffs

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# NO RETRENCHMENT IN AFFIRMATIVE ACTION: THE TENSION BETWEEN CIVIL RIGHTS LAWS AND LAYOFFS

*Firefighters Local Union No. 1784 v. Stotts*[1]

In 1937, the United States Supreme Court upheld the constitutionality of the National Labor Relations Act.[2] The decision affirmed the right of employees to organize into unions which would provide them the opportunity to deal more equally with their employers.[3] In 1954, the Supreme Court rejected the doctrine of separate but equal treatment for blacks.[4] The decision implicitly recognized that blacks would remain second-class citizens unless blacks and whites were integrated into a single society.[5] These watershed cases marked the beginnings of the Court's increased concern for the rights of laborers and the rights of blacks. In 1984, these twin concerns of the Court collided.

In *Firefighters Local Union No. 1784 v. Stotts*,[6] the Supreme Court decided whether, to maintain a particular proportion of minority[7] workers in the labor force, the burden of job layoffs may fall upon senior[8] nonminority em-

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1. 104 S. Ct. 2576 (1984).
2. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
3. *Id.* at 33.
4. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).
5. *See id.* at 494.
6. 104 S. Ct. 2576 (1984).
7. For convenience, the term "minority" will be applied generally to include minority and female workers.
8. Basically, seniority is measured from the date on which an employee began working with an employer. Elkiss, *Modifying Seniority Systems Which Perpetuate Past Discrimination*, 31 LAB. L.J. 37, 37 (1980). Layoffs in a company following a seniority system are conducted under a last-hired, first-fired rule, i.e., employees are laid off in reverse order of seniority. Craft, *Equal Opportunity and Seniority: Trends and Manpower Implications*, 26 LAB. L.J. 750, 752 (1975).

Seniority provides two types of benefits to an employee. Benefit seniority provides employees with benefits which do not deprive other employees of similar benefits. Benefit seniority determines conditions of employment such as length of vacation, size of pension, and rate of pay. By contrast, competitive seniority provides employees with benefits which, when exercised, disadvantage other employees. For instance, competitive seniority gives an employee the right to retain her job while less senior employees are laid off, the right to bump a less senior employee out of his position, and the right to be recalled before a less senior employee. Ziskind, *Affirmative Action v. Seniority, Retroactive Seniority: A Remedy for Hiring Discrimination*, 27 LAB. L.J. 480, 484-85 (1976).

The size of the unit in which seniority may be exercised is also important. In a

ployees rather than less senior minority employees who have been hired under court approved affirmative action plans.[9] The Court held that since Title VII of the Civil Rights Act of 1964[10] protects bona fide seniority systems,[11] it is inappropriate for courts to interfere with such systems to prevent the layoff of recently hired minority employees in order to maintain the gains of an affirmative action plan.[12] Those minority employees who prove they have been actual victims of discrimination may be awarded retroactive seniority and thus be afforded so much relief from the layoffs as their constructive position on the seniority roster gives them. However, members of a disadvantaged class, absent proof of discrimination against themselves individually, may not avail

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plant-wide seniority system an employee's seniority provides him benefits with respect to all other employees of the plant. In a departmental seniority system the employee's seniority provides benefits only with respect to her particular department in the plant. When an employee transfers to another department she loses all seniority earned in the department from which she transferred. Craft, *supra*, at 750-51. Departmental seniority systems often work to the disadvantage of minority workers because they had often been segregated into "black" or "Hispanic" or "female" departments before the effective date of equal employment opportunity legislation. Once given the opportunity to transfer to the more desirable "white" or "male" departments, minorities would still be disadvantaged because they would lose seniority earned in their old departments. *Id.* Prior to *Stotts*, departmental seniority systems which had this effect on minorities had been found to be unlawful. *See, e.g.*, Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969) (departmental seniority system enjoined and replaced with plant-wide seniority system), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968) (departmental seniority system enjoined and replaced with plant-wide seniority system).

9. The Supreme Court addressed this issue for the first time in the *Stotts* decision.

10. Section 703(h) of Title VII provides:

> [I]t 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. . . .

42 U.S.C. § 2000e-2(h) (1982).

A bona fide seniority system is difficult to define. Determination of what seniority systems are bona fide is made on a case-by-case basis. James v. Stockham Valves & Fittings Co., 559 F.2d 310, 352 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). But several general characteristics indicate the nature of a bona fide seniority system. A bona fide seniority system is one adopted without intent to discriminate. *Stotts*, 104 S. Ct. at 2587. A bona fide seniority system applies equally to all races and ethnic groups. International Bhd. of Teamsters v. United States, 431 U.S. 324, 355 (1977). A bona fide seniority system does not lose its bona fide status simply because it may perpetuate past discrimination. *See id.* at 353-54. A union has argued that its seniority system was bona fide "when judged in light of its history, intent, application and all of the circumstances under which it was created and is maintained." *Id.* at 345. *See id.* at 355-56 for the Supreme Court's analysis of whether a particular seniority system was bona fide.

11. 104 S. Ct. at 2586.

12. *Id.* at 2588.

themselves of retroactive seniority.[13]

Some observers of this decision claim that it marks the beginning of a turn away from race-conscious remedies and thus away from affirmative action.[14] However, a more likely correct interpretation of the opinion is not that the Court in *Stotts* turned away from affirmative action, but that it merely followed the results of numerous lower court decisions by placing a boundary upon the extent of affirmative action application.

In 1977, Stotts, a black firefighter in the Memphis Fire Department, filed a class action in the United States District Court for the Western District of Tennessee. Stotts charged that the fire department violated Title VII of the Civil Rights Act of 1964 by discriminating against black employees in its hiring and promotion practices.[15] Following discovery and settlement negotiations, the district court approved and entered a consent decree in 1980. Under the terms of the decree, the city agreed to pursue a long-term goal of increasing black representation in the fire department to a proportion approximately equal to that of blacks in the labor force of Shelby County.[16] The city admitted to no violations of the law in agreeing to the decree.[17]

The plaintiffs, on their part, agreed to seek no further relief other than to enforce the decree. The employment goals outlined in this decree were consistent with the goals provided for in a 1974 consent decree to which the city had agreed to resolve a suit brought against it by the United States. The 1974 decree provided that, for purposes of promotion, transfer, and assignment, seniority would be determined by each employee's total time with the city. Neither decree dealt with the possibility of layoffs or reductions in rank.[18]

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13. *Id.*

14. For example, William Bradford Reynolds, chief of the Civil Rights Division of the Department of Justice once stated that "civil rights was at a crossroads; that we would either take the path of race conscious remedies . . . or the high road of race neutrality." *Seniority Determines Layoffs, Justices Rule*, MONTHLY LAB. REV., August 1984, at 39. After the *Stotts* decision he said, "The court has moved us off the crossroads and propelled us down the road we have been urging." *Id.*; *see also Campaign Against Existing Consent Decrees*, 118 LAB. REL. REP. (BNA) 182, 183 (1985); Powers, *'Stotts' Douses Courts' Affirmative Action Clout*, Legal Times, July 30, 1984, at 34, col. 2.

15. 104 S. Ct. at 2581. Section 703(a)(1) of Title VII provides: "It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race." 42 U.S.C. § 2000e-2(a)(1) (1982).

16. 104 S. Ct. at 2581. The city also agreed to promote immediately thirteen fire department employees and to provide back pay to eighty-one fire department employees. *Id.*

17. *Id.*

18. *Id.* Both the 1974 and the 1980 decrees provided that 50% of all job vacancies per year in the fire department would be filled with qualified black applicants. This practice was to continue until the proportion of black employees in the fire department required by the long-term goal of the decree was met. The 1980 decree further provided that the fire department would attempt to provide that 20% of promotions in each job classification would go to blacks. *Id.*

In 1981, in response to anticipated budget deficits, the city announced layoffs of non-essential city employees. A last-hired, first-fired rule would be used to determine which employees would be laid off.[19] Subsequent to the announcement, the plaintiff class sought and received a temporary restraining order forbidding the city to lay off any black employee. The firefighters union was then permitted to intervene in the suit. Following a hearing, the district court found that the proposed layoff method had not been adopted with any intent to discriminate.[20] However, the court also found that the proposed layoffs would have a discriminatory effect and that the city's seniority system was not bona fide.[21] The district court then entered an injunction to prevent the fire department from applying its seniority system to the layoffs insofar as that would decrease the percentage of blacks currently employed.[22] The city presented a modified layoff plan aimed at protecting black employees which the district court subsequently approved. Layoffs carried out pursuant to the modified plan resulted in some nonminority employees being laid off or demoted before minority employees with less seniority.[23]

The United States Court of Appeals for the Sixth Circuit affirmed.[24] Despite concluding that the city's seniority system was bona fide,[25] the court of appeals decided that the district court's rulings were proper. It held that the injunction was a modification of the 1980 consent decree that was permissible to prevent the city from breaching its contract to increase substantially minority employment in supervisory positions. Alternatively, the court held that the injunction properly modified the decree to prevent hardship, created by new and unforeseen circumstances, to one of the parties to the decree.[26] Finally, the court of appeals held that a court could issue orders overriding employee rights in a bona fide seniority system.[27] The city and union appealed this decision to the Supreme Court.[28]

On the merits, the Court first found that the injunction was not justifiable on the ground that the consent decree, as written, required the issuance of an

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19. *See supra* note 8.

20. 104 S. Ct. at 2582.

21. *Id.* The city's seniority system determined each employee's seniority by his or her length of continuous service from the most recent date of permanent employment. *Id.* at 2581.

22. *Id.* at 2582.

23. *Id.* Due to the district court's injunction, three white employees who would not otherwise have been laid off were laid off. It was unclear from the record how many white employees were demoted as a result of the order. *Id.* at 2582 n.2.

24. *See* Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982), *rev'd sub nom.* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984).

25. *Id.* at 551 n.6.

26. *Id.* at 561-63.

27. *Id.* at 564.

28. Justice O'Connor concurred with the majority opinion, 104 S. Ct. at 2590, and Justice Stevens concurred in the judgment. *Id.* at 2594. Justice Blackmun, joined by Justices Brennan and Marshall, dissented. *Id.* at 2595.

injunction overriding seniority.[29] No provisions of the 1980 consent decree dealt with layoffs or demotions. No suggestion of an intent to depart from the city's existing seniority system could be intimated from a reading of the decree. The decree did state that it was not intended to conflict with the terms of the 1974 consent decree and that decree "expressly anticipated that the city would recognize seniority."[30] For these reasons, the Court said it could not be argued that the decree explicitly contemplated the issuance of an injunction overriding the existing seniority system, much less mandated it.[31]

The Court likewise concluded that the district court's injunction could not be justified because it was necessary to carry out the purposes of the 1980 decree.[32] The purpose of the decree was "to remedy the past hiring and promotion practices" of the fire department.[33] The Court asserted that neither this purpose nor the remedies adopted by the decree included the layoff of white employees before less senior black employees. The Court added that it was reasonable to believe that the remedy adopted by the decree would not go beyond the limits of remedies available under Title VII, which protects bona fide seniority systems. Therefore, the Court found it likely that the city believed its seniority system continued to be valid under the 1980 decree and that it never intended to depart from that system.[34]

The Court then added that it was unlikely that the city would claim to bargain away its seniority system since the union and nonminority employees protected by that system were not parties to the decree. Thus, the Court concluded that the injunction was not required to enforce the express terms or purposes of the 1980 consent decree.[35]

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29. *Id.* at 2583.

30. *Id.* Justice Stevens agreed with the majority that the case was not moot because of the precedential effect of the injunction. *Id.* at 2594 (Stevens, J., concurring). Justice Blackmun disagreed with Justice White's first two reasons because the injunction itself and any rulings on which it was based could both be eliminated by vacating the judgment of the court of appeals and remanding with instructions to dismiss. *Id.* at 2596-97 (Blackmun, J., dissenting).

31. *Id.* at 2584. Justice O'Connor found the mootness claim unwarranted based on this third reason. *Id.* at 2591 (O'Connor, J., concurring). Justice Blackmun disagreed with Justice White's final reason. Backpay and retroactive seniority could only be awarded by the city. Since both the city and union were petitioners, rather than adversaries in this suit, it involved the wrong adverse parties for the adjudication of backpay and seniority claims by union members against the city. *Id.* at 2598 (Blackmun, J., dissenting).

32. *Id.* at 2586.

33. *Stotts*, 679 F.2d at 575-76.

34. 104 S. Ct. at 2586.

35. *Id.* Justice Stevens also found that the express provisions and purposes of the 1980 consent decree did not justify the injunction. However, he arrived at this position on the grounds that the district court neither indicated that it was interpreting the decree nor pointed out any portion of the decree which supported the issuance of the injunction. *Id.* at 2595 (Stevens, J., concurring). Justice O'Connor agreed with both the Court's and Justice Stevens's reasoning. *Id.* at 2592-93 (O'Connor, J., concurring).

Justice Blackmun disagreed and concluded that the injunction was justifiable

After concluding that the city's seniority system was bona fide,[36] the Court again turned its attention to the district court's injunction. The Court discussed whether the injunction was permissible as a modification of the consent decree because of changed circumstances which, without the injunction, would have undermined the gains in black employment under the decree and subjected respondent plaintiff class to undue hardship.[37] The court of appeals had held that the injunction was a permissible modification of the consent decree, even though it conflicted with a bona fide seniority system.[38] The Supreme Court examined in turn each of the three alternative rationales offered by the court of appeals to support its holding.

The majority opinion first considered a settlement theory. Under this theory, a consent decree which encroaches on a bona fide seniority system is permitted because of the strong public policy in favor of voluntary settlements in Title VII suits.[39] The Court rejected this theory as inapplicable because the decree did not contain any voluntary agreement by the city to depart from the seniority system.[40]

The Court also rejected the rationale that the district court's injunction was permissible because it required the city to do no more than that which it could have done by establishing an affirmative action program of its own. This rationale was found to be irrelevant because the modification of this decree

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under a reasonable construction of the consent decree. First, the decree required "good faith efforts on the part of the City" to meet the goals of increasing black representation in the fire department. *Stotts*, 679 F.2d at 576. Had respondent plaintiff class been able to prove its charges at trial, a court could reasonably have concluded that the proposed seniority based layoffs were a violation of that provision. 104 S. Ct. at 2603 (Blackmun, J., dissenting). Second, the decree gave the district court authority to issue "further orders as may be necessary or appropriate to effectuate the purposes of this decree." *Stotts*, 679 F.2d at 578. It was the obligation of the courts to give meaning to this provision and it was reasonable for the district court to fulfill this obligation and to carry out the broad terms of the decree by issuing the injunction. 104 S. Ct. at 2603-04 (Blackmun, J., dissenting).

36. The Court based its conclusion that the seniority system was bona fide on Title VII and case law. Section 703(h) of Title VII provides that use of a bona fide seniority system by an employer shall not be an unlawful employment practice. *See supra* note 9 for the text of section 703(h). In International Bhd. of Teamsters v. United States, 431 U.S. 324, 352 (1977), the Supreme Court held that routine application of a seniority system is permitted by section 703(h) absent proof of an intention to discriminate. Since the district court itself concluded that the city adopted its seniority based layoff plan without any intention to discriminate and since the city admitted no intentional discrimination in its employment practices when it agreed to the consent decree, Justice White concluded that any finding that the seniority based layoff plan was not a bona fide application of the seniority system was improper. 104 S. Ct. at 2587.

37. *See* 104 S. Ct. at 2586-90.

38. *Stotts*, 679 F.2d at 551 n.6, 564.

39. *Id.* at 564-66.

40. 104 S. Ct. at 2587-88.

was ordered over the city's objection.[41]

The Court examined the third rationale at greater length. Under this theory, it was said that had this suit gone to trial and respondent proven its allegations, the district court, under authority of Title VII, could properly have ordered an injunction overriding the fire department's seniority system. Since an injunction overriding seniority would have been proper after a trial, the district court also had authority to issue such an injunction to effectuate the purpose of the consent decree.[42] The Court found this third rationale incorrect. The Court concluded that two earlier decisions required it to hold that Title VII does not empower a district court to issue orders overriding bona fide seniority systems to protect the jobs of minority employees in the face of proposed layoffs.[43]

In *Franks v. Bowman Transportation Co.*,[44] the Supreme Court held that if an individual can prove that he was an actual victim of a discriminatory employment practice, he may be awarded retroactive seniority from the date that he would have been hired but for the discrimination.[45] In *International Brotherhood of Teamsters v. United States*,[46] the Supreme Court refined the *Franks* decision by holding that *only* those individuals who prove that they have been actual victims of discrimination may take advantage of the retroactive seniority remedy.[47] In other words, merely being a member of a disadvantaged class is not sufficient to justify an award of retroactive seniority.

In *Stotts*, the district court made no finding that any individual in the respondent plaintiff class was an actual victim of discrimination.[48] Therefore,

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41. *Id.* at 2590. The Court reserved decision on whether a public employer can unilaterally decide to disregard its seniority system when conducting layoffs in order to preserve a particular racial balance. *Id.* at 2590.

42. *Id.* at 2588.

43. *Id.* at 2588. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). Neither of these earlier cases dealt with the problem of layoffs presented in *Stotts*, but both provided general rules on the availability of retroactive seniority as a remedy in employment discrimination suits. *See Teamsters*, 431 U.S. at 371; *Franks*, 424 U.S. at 767-70. The general rules on the availability of retroactive seniority are relevant because the Supreme Court apparently interpreted the district court's injunction as a generalized grant of retroactive seniority to black firefighters as a class. If this type of retroactive seniority did not comply with the guidelines on the use of that remedy laid down by the Supreme Court, that Court would then be required to find that the district court lacked the authority to grant such relief.

44. 424 U.S. 747 (1976).

45. *Id.* at 767-70. The retroactive seniority is both of the competitive and benefit types. *Id.* at 766-69.

46. 431 U.S. 324 (1977).

47. *Id.* at 371.

48. 104 S. Ct. at 2588. Justice Blackmun questioned the relevance of the district court's failure to find that any firefighter was an actual victim of discrimination. He pointed out that this suit never did go to trial, and any findings the district court may have made subsequent to a trial on the merits were unknown. *Id.* at 2606 (Blackmun, J., dissenting).

under the authority of *Franks* and *Teamsters*, the district court could not properly have ordered protection of any black firefighter's job at the expense of the job of a more senior white firefighter even if the suit had gone to trial.[49]

Justice White buttressed this conclusion with a discussion of the legislative history of section 706(g) of Title VII. Section 706(g) establishes the remedies a court may order in an employment discrimination case.[50] The legislative history excerpted by Justice White indicated that Title VII was never intended to authorize individual relief to anyone who was not an actual victim of discrimination.[51]

Since the district court's injunction would not have been a permissible Title VII remedy had the *Stotts* case gone to trial, the Supreme Court majority held that neither could it properly be ordered under the district court's inherent power to modify a consent decree in order to prevent undue hardship to one of the parties.[52] Thus, the Supreme Court reversed the court of appeals, rejecting each alternative rationale that court used to justify its affirmance of the district court.[53]

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49. *Id.* at 2588.

50. Section 706(g) of Title VII provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of 704(a) [2000e-3(a)] of this title.

42 U.S.C. § 2000e-5(g) (1982).

51. *See* 104 S. Ct. at 2588-90. Typical of the excerpts is one from the remarks made by Senator Humphrey about the effect of Title VII:

> No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section [706 (g)] . . . . [T]here is nothing in [Title VII] that will give any power to the Commission or to any court to require . . . firing . . . of employees in order to meet a racial "quota" or to achieve a certain racial balance.

*Id.* at 2589 (quoting 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey)).

52. *Id.* at 2590.

53. *Id.* The Court, in a footnote, also concluded that the injunction was not justified under 42 U.S.C. §§ 1981 and 1983 because the requirement for relief under these sections of either proof or admission of intention to discriminate was not satisfied. *Id.* at n.16.

One court has distinguished *Stotts* on the basis of this footnote. *See* NAACP v.

Justice O'Connor agreed with the majority opinion that the district court's injunction was improper, either as an interpretation of the consent decree's express terms[54] or as a valid modification of the decree.[55] She emphasized that respondent plaintiff class could have chosen to establish that particular class members were victims of discrimination either by going to trial or in the negotiations leading to the consent decree. The consent decree, however, identified no individual victims of discrimination. By agreeing to this decree, respondents waived any further relief other than enforcement of the decree.[56] Justice O'Connor stated that granting respondents relief properly available only to actual victims of discrimination after waiver of any further right to establish individual victims would discourage voluntary settlement of employment discrimination suits.[57]

Although he agreed in large part with the Court, Justice Stevens found the Court's discussion of Title VII irrelevant. In his opinion, the only issue in the case was whether the consent decree justified the district court's injunction. If the decree did justify the injunction it should have been upheld because the parties had agreed to the decree and were thereby bound. The question of whether a court could order a similar injunction at the conclusion of a Title VII suit was thus irrelevant.[58] Using this analysis, Justice Stevens agreed with the Court that the injunction was improper as a construction of the decree itself.[59]

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Detroit Police Officers Ass'n, 591 F. Supp. 1194 (E.D. Mich. 1984). In this case, plaintiffs charged that the city of Detroit violated affirmative duties imposed by prior findings of constitutional violations by conducting layoffs of police officers which undermined recent gains in black employment made under an affirmative action program. *Id.* at 1197. The court held that the layoffs were a breach of the city's constitutional duties because a court had found previously that the city had engaged in intentional discrimination. *Id.* at 1197, 1202-04; *see also* EEOC v. Local 638, 36 Fair Empl. Prac. Cas. (BNA) 1466 (2d Cir. 1985) (*Stotts* distinguished in suit alleging only Title VII violations on ground that there had been a finding of intentional discrimination).

54. *Id.* at 2592-93 (O'Connor, J., concurring); *see supra* note 35 and accompanying text.

55. *Id.* at 2593-94 (O'Connor, J., concurring).

56. *See Stotts*, 679 F.2d at 574.

57. 104 S. Ct. at 2593 (O'Connor, J., concurring). Justice O'Connor also addressed Justice Blackmun's criticism that the majority opinion incorrectly treated the injunction as permanent rather than preliminary and thus applied the wrong standard of review. *See infra* note 62. She stated that the Court properly disapproved the preliminary injunction issued in *Stotts* as an abuse of discretion because respondents had no chance of succeeding on the merits since they had waived any right to establish individual victims of discrimination. 104 S. Ct. at 2594 (O'Connor, J., concurring).

58. 104 S. Ct. at 2594-95 (Stevens, J., concurring). Justice White defended his Title VII analysis by stating that the court of appeals had relied on a Title VII analysis and the Supreme Court had granted certiorari on that basis. Also, under System Fed'n No. 91 v. Wright, 364 U.S. 642, 651 (1961), a "District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not by the consent of the parties to the decree. 104 S. Ct. at 2587 n.9.

59. *Id.* at 2595 (Stevens, J., concurring); *see supra* note 38.

Justice Stevens also found the injunction to be an improper modification of the decree because the proposed layoffs were not a changed circumstance. It was clear at the time the parties agreed to the 1980 consent decree that layoffs would adversely affect black representation on the fire department. Thus, Justice Stevens determined that the district court had insufficient reason to invoke its power to modify the consent decree.[60]

Justice Blackmun, joined by Justices Brennan and Marshall, dissented from the majority's views. Although Justice Blackmun thought the case should have been dismissed as moot,[61] he noted what he considered to be errors in the majority's reasoning.[62]

The thrust of the dissent was that the Court ignored a substantial portion of the body of employment discrimination law—that portion dealing with race-conscious relief. Section 706(g) of Title VII allows a court to order "any . . . equitable relief as the court deems appropriate" in employment discrimination suits.[63] While individual relief[64] and race-conscious relief to a class[65]

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60. *Id.* at 2595 (Stevens, J., concurring). Like the dissent, Justice Stevens considered the injunction a preliminary one. *See infra* note 62. However, since he found that the district court was not justified in issuing the injunction either as a reasonable construction of the consent decree or as a proper modification of the decree, he concluded that the district court had abused its discretion in entering the preliminary injunction. *Id.* a 2595 (Stevens, J., concurring).

61. *Id.* at 2596-2600 (Blackmun, J., dissenting); *see supra* note 28.

62. *See id.* at 2600 (Blackmun, J., dissenting). One such error asserted by Justice Blackmun was that the Court incorrectly treated the district court's injunction as a permanent one. As the injunction was truly a preliminary injunction, according to Justice Blackmun, the Court, by determining the injunction's propriety, used the wrong standard of review. The proper standard for review of a preliminary injunction is whether the district court abused its discretion in entering the injunction. *Id.* at 2600-02 (Blackmun, J., dissenting). Justice White asserted that he did apply the correct standard of review because the district court did not apply the standards for determining whether a preliminary injunction should issue, but rather proceeded immediately to determine whether it should modify the decree. *Id.* at 2585 n.8.

Justice Blackmun also asserted that the Court erred in defining the issue in the suit as whether the district court had the power to order an injunction requiring the layoff of white employees. The injunction, in reality, only prohibited layoffs which would decrease the proportion of black employees in the fire department. Even if the injunction did result in the layoff of white employees in violation of the seniority provision of the union contract, the existence of the injunction would not prevent the city from being liable to those employees. *Id.* at 2602 (Blackmun, J., dissenting).

63. *See supra* note 50 for the text of section 706(g) of Title VII.

64. Individual relief is relief awarded to an individual because she has proven she was an actual victim of discrimination. Awards to individuals of back pay, retroactive seniority, and promotions are examples of individual relief. *Id.* at 2605-06 (Blackmun, J., dissenting).

65. Justice Blackmun described race-conscious relief as follows:

> The purpose of such relief is not to make whole any particular individual, but rather to remedy the present class-wide effects of past discrimination or to prevent similar discrimination in the future . . . . The distinguishing feature of race-conscious relief is that no individual member of the disadvantaged class has a claim to it, and individual beneficiaries of the relief need not show

have been distinguished by courts, both types of relief have been deemed appropriate remedies under section 706(g) in certain circumstances.[66] The majority opinion, by discussing only individual relief, failed to consider the propriety of the district court's injunction as an application of race-conscious relief.[67] Justice Blackmun found that the injunction was a proper exercise of the district court's power to order race-conscious relief because it protected blacks as a class, not as individuals. The city was not prevented from laying off any individual black employee as long as the proportion of black employees in the fire department did not decline.[68] Justice Blackmun concluded that, because the Court failed to acknowledge the existence of race-conscious relief, it seemed clear that the Court's holding meant "that the race-conscious relief ordered in these cases was broader than necessary, not that race-conscious relief is never appropriate under Title VII."[69]

The dissent in *Stotts* voiced concern that the Court had departed from precedent first, in not finding the case moot,[70] and second, in not recognizing the existence of the availability of race-conscious relief under Title VII when it did address the merits. The concern was justified on the mootness point. In the previous term, the Court had considered a case substantially similar to

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that they were themselves victims of the discrimination for which the relief was granted.

*Id.* at 2606 (Blackmun, J., dissenting).

66. *Id.* at 2605-06 (Blackmun, J., dissenting). The courts of appeal are in unanimous agreement that race-conscious relief can be an appropriate remedy. 104 S. Ct. at 2606 (Blackmun, J., dissenting) (citing Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1027-28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 629 (2d Cir. 1974); EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 174-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); Chisholm v. United States Postal Serv., 665 F.2d 482, 499 (4th Cir. 1981); United States v. City of Alexandria, 614 F.2d 1358, 1363-66 (5th Cir. 1980); United States v. IBEW, Local No. 38, 428 F.2d 144, 149-50 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); United States v. City of Chicago, 663 F.2d 1354, 1364 (7th Cir. 1981) (en banc); Firefighters Inst. v. City of St. Louis, 616 F.2d 350, 364 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); United States v. Ironworkers Local 86, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. Lee Way Motor Freight, 625 F.2d 918, 944 (10th Cir. 1979); Thompson v. Sawyer, 678 F.2d 257, 294 (D.C. Cir. 1982)).

Justice Blackmun also found tacit approval of the use of race-conscious relief by courts in the legislative history of section 706(g). *See* 104 S. Ct. at 2608-10 (Blackmun, J., dissenting). Justice White challenged the dissent's interpretation of this legislative history. *See id.* at 2590 n.15.

67. Justice Blackmun found the Court's reliance on *Teamsters* irrelevant because that case involved only the problems and nature of appropriate individual relief. The Court in *Teamsters* did not consider race-conscious relief because all class-wide claims were settled before the Court heard the case. 104 S. Ct. at 2608 (Blackmun, J., dissenting).

68. *Id.* at 2606 (Blackmun, J., dissenting).

69. *Id.* at 2610 (Blackmun, J., dissenting). Although Justice Blackmun dissented, he did not think the district court's injunction necessarily was proper. *Id.*

70. *See supra* note 28.

*Stotts* which it vacated and remanded for consideration of mootness.[71] The Court should have faced its reversal from this position squarely,[72] but instead it ignored the earlier decision entirely.[73]

The dissent was concerned also over the failure of the Court to recognize the existence of race-conscious relief. Justice Blackmun apparently suspected that the Court was signaling an eventual decision that race-conscious relief is not proper as a Title VII remedy regardless of whether there is a conflicting seniority system.[74] One commentator has stated explicitly that the *Stotts* decision evidences a move by the Court toward this position.[75] His reasoning is that the Court's opinion in *Stotts*,

> is based in significant part on the conclusion that Congress did not intend for

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71. *See* Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, 103 S. Ct. 2076 (1983). The District Court for the District of Massachusetts enjoined the city of Boston from laying off police officers and firefighters in any manner which would reduce the proportion of minorities in those occupations. This injunction interfered with the operation of Massachusetts's statutory last hired, first fired system for public employee layoffs. The court of appeals affirmed. Subsequently, the state enacted legislation which provided Boston with revenue and required the rehire of all laid off police officers and firefighters. The legislation also prohibitted future layoffs of police officers and firefighters for fiscal reasons and required minimum staffing levels to be maintained in the police and fire departments through June 30, 1983. The Supreme Court vacated the court of appeals' decision and remanded for consideration of mootness. *Id.* at 2076.

In both *Stotts* and *Boston Firefighters* the city rehired the laid off employees before the case reached the Supreme Court. Apparently the Boston employees had more protection from future layoffs than did the Memphis firefighters since Massachusetts enacted legislation protecting against future layoffs. However, the legislation required the minimum staffing levels only until June 30, 1983, and secured employees against layoffs only for fiscal reasons. *See id.* Moreover, it was not inconceivable that Boston's fiscal woes would continue, that the state would tire of pumping funds into Boston to secure the jobs, and that the legislation would be repealed. Therefore, the chance that the injunction would control future layoffs was just as existent in *Boston Firefighters* as in *Stotts*. Even if the existence of the legislation in *Boston Firefighters* could be found to be a distinguishing factor, the Boston employees, no less than the Memphis firefighters had claims against the city for back pay and lost seniority. *See* 104 S. Ct. at 2584.

72. The Court could have justified its change in position under a "capable of repetition, yet evading review theory." For a discussion of this theory, see Roe v. Wade, 410 U.S. 113, 124-25 (1973). Such a theory could be invoked on three grounds: injunctions preventing the operation of seniority systems in determining layoff order would likely occur again; review of the injunctions would be nearly impossible because the rehire of those laid off would moot the cases; and such rehire was likely before the case could reach the Supreme Court. To support its assertions of the likelihood of injunctions suspending operation of seniority systems and of the rapid rehire of those laid off, the Court could point out that two such cases had arrived at the Court in the past two years. *See Stotts*, 104 S. Ct. 2576 (1984); *Boston Firefighters*, 103 S. Ct. 2076 (1983).

73. Curiously, the dissent did not cite the earlier decision either.

74. *See* 104 S. Ct. at 2609-10 (Blackmun, J., dissenting).

75. Powers, *supra* note 14, at 34, col. 2; *see also Campaign Against Existing Consent Decrees*, 118 LAB. REL. REP. (BNA) 182, 183 (1985).

> § 706(g) [of Title VII] to empower courts to order race-conscious action for those not identified as victims of discrimination. Since § 706(g) applies to situations not involving seniority as well as those that do, the five justices who joined in the opinion probably will give similarly broad application to this conclusion.[76]

Race-conscious relief cannot be written off this quickly. There is a broad statement in the Court's opinion that the policy behind section 706(g) "is to provide make-whole relief only to those who have been actual victims of illegal discrimination."[77] This statement apparently means that courts may not rely on Title VII to award relief to anyone who has not shown she was an actual victim of discrimination. Under this interpretation, race-conscious relief would be impermissible. However, the Court's statement is susceptible to another interpretation. The dissent states that the purpose of race-conscious relief "is not to make whole any particular individual."[78] This indicates that race-conscious relief and make-whole relief are not the same and that one is not a sub-class of the other. Thus, the Court's statement about the availability of make-whole relief under Title VII has little to do with the availability of race-conscious relief. The majority opinion of the Court did not even discuss race-conscious relief. The failure of the Court to recognize the existence of race-conscious relief could mean that the Court found race-conscious relief impermissible in all instances. But since it did not explicitly reject the propriety of race-conscious relief, the Court's non-recognition of such relief could just as easily mean that the Court merely found it inapplicable in this case.

Also, one court, in a decision subsequent to *Stotts*, distinguished between make-whole and prospective relief.[79] Since court-ordered affirmative action programs favoring minorities with respect to new hires and promotions are examples of prospective relief, the *Stotts* majority's statement about the availability of make-whole relief is inapplicable to race-conscious relief that favors minorities for hiring and promotion.[80] Thus, the door remains open for a majority of the Supreme Court to recognize the validity of race-conscious relief in contexts other than the one presented by *Stotts*.

In addition, the Court's opinion speaks of balancing the equities in cases of employment discrimination.[81] There is a strong policy consideration against applying race-conscious relief in layoff cases like *Stotts* in that innocent nonminority employees would lose their jobs if such relief is applied.[82] No similar policy consideration exists in other potential applications of race-conscious

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76. Powers, *supra* note 14, at 34, col. 2.
77. 104 S. Ct. at 2589.
78. *Id.* at 2606 (Blackmun, J., dissenting).
79. *See* EEOC v. Local 538, 36 Fair Empl. Prac. Cas. (BNA) 1466, 1477 (2d Cir. 1985).
80. *Id.* at 1477.
81. *See Stotts*, 104 S. Ct. at 2588.
82. *See, e.g., id.* at 2586; Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1320 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

relief.[83] If the weight of harm to innocent employees is removed from the scale, the Court could find the equities tilting the balance toward the application of race-conscious relief.[84]

Moreover, a Supreme Court holding that race-conscious relief is not proper would be contrary to the strong current of decisions of the courts of appeal. Each of the courts of appeal has found that race-conscious relief can

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83. *See* Vanguards v. City of Cleveland, 36 Fair Empl. Prac. Cas. (BNA) 1431, 1435 (6th Cir. 1985); Hammon v. Barry, 606 F. Supp. 1082, 1093-94 (D.D.C. 1985). In the case of new hires, a non-minority applicant has no more right to be hired than an equally qualified minority applicant since neither obtains a legitimate interest in the job until hired. *See Vanguards*, 36 Fair Empl. Prac. Cas. (BNA) at 1435; *Hammon*, 606 F. Supp. at 1092-93. Courts have ordered race-conscious remedies which favored the hiring of miniorities. *See, e.g.*, Chisholm v. United States Postal Serv., 665 F.2d 482, 498-99 (4th Cir. 1981); Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1026-28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). Similarly, courts have upheld race-conscious remedies which favored minorities for union membership. *See, e.g.*, Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 632-33 (2d Cir. 1974).

Race-conscious promotion plans occupy a middle ground between plans for new hires and layoffs. In favoring minorities for promotion, the non-minorities are in no danger of losing their existing jobs, and therefore their livelihood. But, even though a minority and a non-minority have no legitimate interest in the higher job until actually promoted, *see Vanguards*, 36 Fair Empl. Prac. Cas. (BNA) at 1435, a non-minority with ten years seniority does have a justifiable expectation to be promoted before a minority with five years seniority, *see Hammon*, 606 F. Supp. at 1098. Courts have upheld race-conscious remedies which favored minorities for promotion. *See, e.g.*, Firefighters Inst. v. City of St. Louis, 616 F.2d 350, 364 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 174-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). In *EEOC v. American Tel. & Tel. Co.*, the court refused to distinguish between race-conscious remedies applied to new hires and those remedies applied to promotions. 556 F.2d at 177. In *Stotts*, however, the Supreme Court stated that it was "inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy" in employment discrimination suits. 104 S. Ct. at 2586. This statement indicates race-conscious remedies applied to new hires are more likely to pass muster than race-conscious remedies applied to promotions since promotions are often based, at least in part, on seniority. *See also* Hammon v. Barry, 606 F. Supp. 1082 (D.D.C. 1985) (court upheld hiring provisions of employer's voluntary affirmative action plan, but rejected promotion aspects of the plan).

84. In Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), Justice Powell stated that application of retroactive seniority as a remedy in employment discrimination cases would disadvantage innocent employees. *Id.* at 788-89 (Powell, J., concurring and dissenting). Yet the majority found retroactive seniority to be a permissible remedy. *Id.* at 767-70. The Court could as easily find that disadvantages to non-minority applicants inherent in a race-conscious hiring plan are an unfortunate but necessary side effect of a permissible judicial attempt to redress past discrimination. *See* Vanguards v. City of Cleveland, 36 Fair Empl. Prac. Cas. (BNA) 1431 (6th Cir. 1985) (affirmative action plan upheld; *Stotts* distinguished because plan did not interfere with existing seniority system); EEOC v. Local 638, 36 Fair Empl. Prac. Cas. (BNA) 1466 (2d Cir. 1985) (affirmative action plan upheld; *Stotts* distinguished because plan did not conflict with any seniority rights).

be an appropriate remedy under section 706(g).[85] The Supreme Court should not treat this unanimity lightly.

Further, as the dissent noted,[86] the author of the *Stotts* opinion, Justice White, has himself joined in an opinion which stated: "Executive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race."[87]

Finally, whether the Supreme Court in *Stotts* is signaling a rejection of court-ordered, race-conscious relief, the Court's decision in *United Steelworkers v. Weber*[88] is unaffected by *Stotts*. In *Weber*, the Court held that race-conscious affirmative action plans voluntarily implemented by private parties are permissible under Title VII.[89] Thus, the *Stotts* decision leaves unblocked a huge avenue for race-conscious affirmative action plans.[90]

Whatever the long-term implications of the *Stotts* decision, the *Stotts* result complies with the bulk of previous decisions addressing the question of circumventing seniority to realign the burdens of a layoff between minorities and nonminorities. While the Supreme Court had never addressed the merits

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85. 104 S. Ct. at 2606 (Blackmun, J., dissenting); *see supra* note 67.

86. *See* 104 S. Ct. at 2610 (Blackmun, J., dissenting).

87. *See* University of Cal. Regents v. Bakke, 438 U.S. 265, 353 n.28 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

88. 443 U.S. 193 (1979).

89. *Id.* at 207-08. Also, the Court in *Stotts* specifically left open the question of whether a public employer can unilaterally adopt an affirmative action program which modified the operation of a seniority system. 104 S. Ct. at 2590.

90. At least five courts have already distinguished *Stotts* on this ground. *See Vanguards*, 36 Fair Empl. Prac. Cas. (BNA) 1431 (6th Cir. 1985) (city's affirmative action promotion plan valid under *Weber* in that it was voluntarily adopted; *Stotts* distinguished because the plan did not interfere with the existing seniority system and because the city had voluntarily agreed to the plan); Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (6th Cir. 1984) (provision in collective bargaining agreement between teachers union and board of education which provided that in the event of layoffs there would be no reduction in proportion of minority teachers upheld under *Weber*; *Stotts* distinguished because it was said not to apply to court-imposed affirmative action plans), *cert. granted*, 105 S.Ct. 2015 (1985); Kromnick v. School Dist., 739 F.2d 894 (3d Cir. 1984) (provision in collective bargaining agreement between teachers union and school district which required maintaining a faculty ratio at each school of between 75% and 125% of the system-wide proportions of black and white teachers valid under *Weber*; *Stotts* distinguished because the union and school district voluntarily agreed to the provision); Hammon v. Barry, 606 F. Supp. 1082 (D. D.C. 1985) (hiring provisions of city's voluntarily adopted affirmative action plan upheld under *Weber*; *Stotts* distinguished because job applicants were not deprived of any vested seniority rights; promotion aspects of plan rejected because interests of non-minorities were unnecessarily trammeled in that employees have legitimate expectations of equal opportunity to advance); Britton v. South Bend Community School Corp., 593 F. Supp. 1223 (N.D. Ind. 1984) (provision in collective bargaining agreement between teachers union and school board which provided that in the event of layoffs there would be no reduction in proportion of minority teachers upheld under *Weber*; *Stotts* distinguished because it was said to apply only to court imposed affirmative action plans).

of this question before *Stotts*,[91] several lower courts have had the opportunity to consider it.

Most courts of appeal have reached the same result that the Supreme Court reached in *Stotts*, i.e., that it is generally improper for a court to issue orders which result in nonminority employees being laid off before less senior minority employees in order to maintain a particular proportion of minority employees.[92] Several courts of appeal tempered this general holding, just as the Supreme Court tempered its general holding in *Stotts*, by stating that those minorities who could prove that they were actual victims of discrimination would be provided with retroactive seniority.[93] The district courts that have addressed the issue have, more often than not, found that orders which result in layoffs of nonminority employees before less senior minority employees can be an appropriate remedy, even where no actual victims of discrimination have been determined.[94] The district courts, though, have often been

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91. On the two occasions in which cases hinging on this question reached the Court, the lower court decisions were vacated and remanded. *See* Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, 103 S. Ct. 2076 (1983) (lower court told to consider mootness issue); EEOC v. Jersey Cent. Power & Light Co., 425 U.S. 987 (1976) (lower court told to reevaluate decision in light of *Franks*).

92. *See* Oliver v. Kalamazoo Bd. of Educ., 706 F.2d 757, 764-65 (6th Cir. 1983); Youngblood v. Dalzell, 568 F.2d 506, 508 (6th Cir. 1978); Southbridge Plastics Div., W.R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers, 565 F.2d 913, 916-17 (5th Cir. 1978); Schaefer v. Tannian, 538 F.2d 1234, 1236 (6th Cir. 1976); Acha v. Beame, 531 F.2d 648, 654 (2d Cir. 1976); Chance v. Board of Examiners, 534 F.2d 993, 998 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); Watkins v. United Steel Workers, Local No. 2369, 516 F.2d 41, 44-45 (5th Cir. 1975); Jersey Cent. Power & Light Co. v. Local Union 327, IBEW, 508 F.2d 687, 703 (3d Cir. 1975), *vacated sub nom.* EEOC v. Jersey Cent. Power & Light Co., 425 U.S. 987, *on remand sub nom.* Jersey Cent. Power & Light Co. v. Local Union 327, IBEW, 542 F.2d 8, 10 (3d Cir. 1976) (court readopted its original opinion nearly in its entirety on remand); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1320 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976). *Contra* Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 973 (1st Cir. 1982), *vacated sub nom.* Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, 103 S. Ct. 2076 (1983); Brown v. Neeb, 644 F.2d 551, 558-59 (6th Cir. 1981).

93. *See Youngblood*, 568 F.2d at 508; *Southbridge*, 565 F.2d at 916-17; *Jersey*, 542 F.2d at 11; *Schaefer*, 538 F.2d at 1236; *Chance*, 534 F.2d at 1007; *Acha*, 531 F.2d at 654, 656. The *Waters* and *Watkins* decisions did not make an exception to their general holding for those who could prove they were actual victims of discrimination, but they were decided prior to *Franks*.

94. *See* Oliver v. Kalamazoo Bd. of Educ., 526 F. Supp. 131, 135 (W.D. Mich. 1981), *vacated*, 706 F.2d 757 (6th Cir. 1983); Castro v. Beecher, 522 F. Supp. 873, 877 (D. Mass. 1981), *aff'd sub nom.* Boston Chapter, NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), *vacated sub nom.* Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, 103 S. Ct. 2076 (1983); Brown v. Neeb, 523 F. Supp. 1, 6 (N.D. Ohio 1980), *aff'd*, 644 F.2d 551 (6th Cir. 1981); Chance v. Board of Examiners, 10 Fair Empl. Prac. Cas. (BNA) 1023, 1025-26 (S.D.N.Y. 1975), *rev'd*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); Schaefer v. Tannian, 394 F. Supp. 1136, 1150 (E.D. Mich. 1975), *modified*, 538 F.2d 1234 (6th Cir. 1976) (remanded for further consideration in light of *Franks*); EEOC v. International Union of Elevator Con-

reversed.[95]

The factual situations in many of these layoff cases are very similar. Typically, females or minorities are suing their employer or union or both on the ground that seniority based layoffs provided for in the collective bargaining agreement between the employer and union or by statute for public employees violate either Title VII or the Reconstruction Era civil rights statutes or both, in that they perpetuate past discrimination.[96] Although there may be no discrimination in present hiring practices, plaintiffs argue, past discriminatory hiring practices have assured that women or minorities do not have sufficient seniority to withstand layoffs.[97]

This type of situation provides a less compelling reason for courts to enjoin the operation of the seniority system than existed in *Stotts* because in *Stotts* there was the added factor that the consent decree arguably overrode the existing seniority system. The district courts are split in their decisions of these cases; some have rejected plaintiffs' claims[98] while others have accepted

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structors, Local Union No. 5, 398 F. Supp. 1237, 1258 (E.D. Pa. 1975), *aff'd sub nom.* United States v. International Union of Elevator Constructors, Local Union No. 5, 538 F.2d 1012 (3d Cir. 1976); Southbridge Plastics Div., W.R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers, 403 F. Supp. 1183, 1188 (N.D. Miss. 1975), *rev'd*, 565 F.2d 913 (5th Cir. 1978); Jersey Cent. Power & Light Co. v. Local Union 327, IBEW, 8 Fair Empl. Prac. Cas. (BNA) 690, 693 (D.N.J. 1974) (oral opinion), *vacated*, 508 F.2d 687 (3d Cir. 1975), *vacated sub nom.* EEOC v. Jersey Cent. Power & Light Co., 425 U.S. 987, *on remand sub nom.* Jersey Cent. Power & Light Co. v. Local Union 327, IBEW, 542 F.2d 8 (3d Cir. 1976) (court substantially readopted original opinion on remand); Loy v. City of Cleveland, 8 Fair Empl. Prac. Cas. (BNA) 614, 616 (N.D. Ohio 1974); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 8 Fair Empl. Prac. Cas. (BNA) 234, 236 (N.D. Ill. 1973), *modified*, 502 F.2d 1309 (7th Cir. 1974) (reversed portion of decision overriding seniority system), *cert. denied*, 425 U.S. 997 (1976). *Contra* Robinson v. Polaroid Corp., 567 F. Supp. 192, 195 (D. Mass. 1983), *aff'd*, 732 F.2d 1010 (1st Cir. 1984); Croker v. Boeing Co., 437 F. Supp. 1138, 1188 (E.D. Pa. 1977), *modified*, 662 F.2d 975 (3d Cir. 1981) (district court's decision to enforce seniority system affirmed); Youngblood v. Dalzell, 14 Fair Empl. Prac. Cas. (BNA) 145, 148 (S.D. Ohio 1976), *aff'd*, 568 F.2d 506 (6th Cir. 1978); Payne v. Travenol Laboratories, 416 F. Supp. 248, 264-65 (N.D. Miss. 1976), *modified*, 565 F.2d 895 (5th Cir.) (district court's decision to enforce seniority system affirmed), *cert. denied*, 439 U.S. 835 (1978); Hinton v. Lee Way Motor Freight, 412 F. Supp. 625, 629 (W.D. Okla. 1975); Acha v. Beame, 401 F. Supp. 816, 817 (S.D.N.Y. 1975), *rev'd*, 531 F.2d 648 (2d Cir. 1976) (district court reversed because it had not allowed individuals to show that they had been actual victims of discrimination); Jones v. Pacific Intermountain Express, 10 Fair Empl. Prac. Cas. (BNA) 913, 914 (N.D. Cal. 1975), *aff'd*, 536 F.2d 817 (9th Cir.), *cert. denied*, 429 U.S. 979 (1976).

95. *See supra* note 94.

96. *See Hinton*, 412 F. Supp. at 626; *Acha*, 401 F. Supp. at 816-17; *Schaefer*, 394 F. Supp. at 1137-38; *Jones*, 10 Fair Empl. Prac. Cas. (BNA) at 913; *Loy*, 8 Fair Empl. Prac. Cas. (BNA) at 615-16; *Waters*, 8 Fair Empl. Prac. Cas. (BNA) at 235-36.

97. *See* cases cited *supra* note 96.

98. *See Hinton*, 412 F. Supp. at 629; *Acha*, 401 F. Supp. at 817; *Jones*, 10 Fair Empl. Prac. Cas. (BNA) at 914.

plaintiffs' arguments and ordered that the seniority system at least partially be disregarded for purposes of layoffs.[99] Those district court decisions which have held that the seniority system must be overridden usually have been either remanded for further consideration or reversed.[100] The courts of appeal have predominantly upheld the seniority systems, rejecting plaintiffs' claims in these cases, usually on the ground that Title VII authorizes relief only for actual victims of discrimination.[101]

Not all the decisions dealing with the layoff problem conform with this basic fact pattern. One case involved a variation in the legal basis for the challenge of the collective bargaining agreement's seniority based lay-off system.[102] Instead of a charge that seniority based lay-offs would violate Title VII or the Reconstruction Era Civil Rights Statutes, it was argued in this case that the lay-off of any black teacher in the public school district should be enjoined because that would conflict with previous court orders to the school to achieve a particular ratio of black teachers. Those previous orders were made in a desegregation suit and were based on the equal protection clause of the fourteenth amendment.[103] The district court ordered that all tenured black teachers who had been laid off be reinstated and that no tenured black teacher be laid off until the district achieved its goal of a twenty percent black teaching staff.[104] The court of appeals, in vacating the district court's decision, held that seniority rights may not be nullified unless necessary to vindicate constitutional rights, and that plaintiffs had failed to show the necessity of prohibiting the layoff of black teachers.[105]

In a second variation of the basic fact pattern, the district court affirmatively orders that minority employees be rehired (thus possibly displacing existing nonminority employees) or that nonminority employees be laid off before less senior minority employees. In the more typical case, the court orders that layoffs are not to reduce the proportion of minority employees.[106] As

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99. *See Schaefer*, 394 F. Supp. at 1150; *Loy*, 8 Fair Empl. Prac. Cas. (BNA) at 617; *Waters*, 8 Fair Empl. Prac. Cas. (BNA) at 236.

100. *See supra* note 94.

101. *See Schaefer*, 538 F.2d at 1236; *Acha*, 531 F.2d at 654, 656; *Waters*, 502 F.2d at 1320. In light of the *Franks* decision, the *Schaefer* court remanded for determinations of actual victims of discrimination, who would then receive retroactive seniority. Those who received retroactive seniority would thereby receive as much insulation from layoffs as this constructive seniority provided. *See* 538 F.2d at 1236. The *Acha* court did the same thing before the *Franks* decision. *See* 531 F.2d at 654, 656.

102. *See Oliver*, 526 F. Supp. 131 (W.D. Mich. 1981), *vacated*, 706 F.2d 757 (6th Cir. 1983).

103. *Oliver*, 706 F.2d at 785.

104. *Oliver*, 526 F. Supp. at 135.

105. *Oliver*, 706 F.2d at 764-65.

106. *See Chance*, 10 Fair Empl. Prac. Cas. (BNA) at 1026 (district court ordered layoffs to be conducted in accordance with a formula imposing racial quotas); Watkins v. United Steel Workers, Local No. 2369, 8 Fair Empl. Prac. Cas. (BNA) 729, 730-31 (E.D. La. 1974) (district court ordered rehire of a sufficient number of blacks to achieve black-white ratio that existed before layoffs), *rev'd*, 516 F.2d 41 (5th

would be expected, the affirmative orders are more often reversed by the courts of appeal than the typical "no reduction of proportion" order.[107]

In a third variation, the employees are covered by no guarantee that layoffs will be conducted in reverse order of seniority. In *Stotts*, the seniority system implied from the 1974 consent decree was a major factor strengthening the Supreme Court's ruling that the order to disregard seniority in the Memphis layoffs was improper.[108] Where no formal seniority system exists, the situation is more favorable for those desiring to prevent seniority based layoffs. This is because no concrete contractual right which ensures seniority based layoffs can be set against the plaintiffs' claim of discrimination, and because the protection section 703(h) of Title VII applies to bona fide seniority systems and is probably less likely to be found applicable where there is no formal seniority system.[109] Therefore, in cases where no formal seniority system exists, there is less to impede a court that wants to remedy a situation that is discriminatory in effect. However, in these circumstances the courts generally have allowed employers to conduct layoffs in accordance with informal seniority policies.[110] One district court, in an analogous situation, upheld an affirma-

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Cir. 1975). In *Watkins*, the district court also ordered that no white employee be laid off to make places for the rehired black employees. 8 Fair Empl. Prac. Cas. (BNA) at 731. Intuitively, an order to rehire many employees combined with an order to lay off no one to make room for the returning employees would seem to be a certain recipe for driving a company into bankruptcy by overburdening the payroll. However, two commentators have made a convincing argument that, in many cases, companies conduct layoffs to maximize profits rather than to avoid bankruptcy. Thus, this combination of orders often would not push a company beyond the brink, but rather would merely decrease profits. Such orders would therefore be no more difficult to bear than an ordinary money judgment against the company. Burke & Chase, *Resolving the Seniority/Minority Layoffs Conflict: An Employer-Targeted Approach*, 13 HARV. C.R.-C.L. L. REV. 81, 100-06 (1978).

107. *See* Watkins v. United Steel Workers, Local No. 2369, 516 F.2d 41 (5th Cir. 1975). The *Watkins* court stated:

> [R]egardless of an earlier history of employment discrimination, when present hiring practices are nondiscriminatory and have been for over ten years, an employer's use of a long established seniority system for determining who will be laid-off . . . , adopted without intent to discriminate, is not a violation of Title VII or § 1981, even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination.

*Id.* at 44-45; *see also* Chance v. Board of Examiners, 534 F.2d 993, 998 (2d Cir. 1976) (order requiring layoffs based on quotas determined to be a form of reverse discrimination because it was not designed to benefit actual victims of discrimination), *cert. denied*, 431 U.S. 965 (1977).

108. *See* 104 S. Ct. at 2586.

109. *See supra* note 10 for the text of § 703(h) of Title VII.

110. *See* Robinson v. Polaroid Corp., 567 F. Supp. 192, 195 (D. Mass. 1983) (seniority based layoff executed without racial bias even though blacks were more heavily affected than whites), *aff'd*, 732 F.2d 1010 (1st Cir. 1984); Croker v. Boeing

tive action program adopted as part of the collective bargaining union agreement which modified the pre-existing seniority system.[111] The court of appeals affirmed, stating that seniority is an economic right which unions may elect to bargain away.[112]

The final variation occurs where either a conciliation agreement between the EEOC and an employer or a consent decree between minority employees and an employer contradicts, or arguably contradicts, the seniority based lay-off requirement of the collective bargaining agreement or a state statute. The *Stotts* case involved a situation similar to this in that the 1980 consent decree arguably contradicted the 1974 consent decree which recognized the seniority system. At least five cases have involved whether a conciliation agreement or a consent decree takes precedence over a seniority based lay-off system required by a collective bargaining agreement or a state statute in the event of contradictory provisions.[113]

In four of these cases the consent decree or conciliation agreement called

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Co., 437 F. Supp. 1138, 1188 (E.D. Pa. 1977) (seniority based layoffs, both of those employees covered by a formal seniority system and those not so covered, not violative of Title VII), *modified*, 662 F.2d 975 (3d Cir. 1981) (district court's holding on seniority system affirmed); Payne v. Travenol Laboratories, 416 F. Supp. 248, 264-65 (N.D. Miss. 1976) (seniority based layoffs approved, but actual victims of company's past discriminatory hiring practices entitled to some degree of relief from layoffs), *modified*, 565 F.2d 895 (5th Cir.) (district court's decision to enforce seniority system affirmed), *cert. denied*, 439 U.S. 835 (1978). *Contra* EEOC v. International Union of Elevator Constructors, Local Union No. 5, 398 F. Supp. 1237, 1258 (E.D. Pa. 1975) (union enjoined from exhorting employers to favor senior members when making layoff decisions and from enforcing provision in standard agreement requiring that probationary workers be laid off before non-probationary workers belonging to other union locals), *aff'd sub nom.* United States v. International Union of Elevator Constructors, Local Union No. 5, 538 F.2d 1012 (3d Cir. 1976).

111. *See* Tangren v. Wackenhut Servs., 480 F. Supp. 539, 550 (D. Nev. 1979), *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982).

112. 658 F.2d at 707. The *Tangren* court relied substantially upon United Steelworkers v. Weber, 443 U.S. 193 (1979). In a footnote the court also stated that a racially preferential affirmative action program imposed unilaterally by the employer would not violate the law, provided the plan does not conflict with a collective bargaining agreement.

113. *See* Castro v. Beecher, 522 F. Supp. 873 (D. Mass. 1981), *aff'd sub nom.* Boston Chapter, NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), *vacated sub nom.* Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, 103 S. Ct. 2076 (1983); Brown v. Neeb, 523 F. Supp. 1 (N.D. Ohio 1980), *aff'd*, 644 F.2d 551 (6th Cir. 1981); Youngblood v. Dalzell, 14 Fair Empl. Prac. Cas. (BNA) 145 (S.D. Ohio 1976), *aff'd*, 568 F.2d 506 (6th Cir. 1978); Southbridge Plastics Div., W.R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers, 403 F. Supp. 1183, 1188 (N.D. Miss. 1975), *rev'd*, 565 F.2d 913 (5th Cir. 1978); Jersey Cent. Power & Light Co. v. Local Union 327, IBEW, 8 Fair Empl. Prac. Cas. (BNA) 690, 693 (D.N.J. 1974) (oral opinion), *vacated*, 508 F.2d 687 (3d Cir. 1975), *vacated sub nom.* EEOC v. Jersey Cent. Power & Light Co., 425 U.S. 987, *on remand sum nom.* Jersey Cent. Power & Light Co. v. Local Union 327, IBEW, 542 F.2d 8 (3d Cir. 1976) (court readopted its original opinion nearly in its entirety on remand).

for the employer to increase the percentage of minority employees, but contained no provisions dealing with the order of lay-offs.[114] The district court in *Youngblood v. Dalzell* held that the consent decree could not be construed to foreclose the city from conducting seniority based layoffs.[115] The court of appeals, after pointing out that the city had specifically denied committing any employment discrimination in the consent decree and that no contentions were presented that the layoffs were intentionally discriminatory, affirmed the district court's decision because the consent decree did not commit the city to any policy with respect to layoffs.[116]

In two of the other cases, the district court held that the consent decrees gave the district court the power to order the city not to conduct layoffs which would reduce the percentage of minority employees.[117] In both cases the court of appeals affirmed, in *NAACP v. Beecher* on the ground that new and unforeseeable circumstances allowed such a modification of the consent decree[118] and in *Brown v. Neeb* on the ground that the consent decree required affirmative action, not negative aciton, and that the decree specifically allowed the entry of orders to effectuate its provisions.[119] Both courts of appeal distinguished the previous case on several grounds. First, in the previous case, the city denied prior discrimination in the consent decree. In these two cases, there was no such exculpatory language in the consent decrees.[120] Second, there had been no finding of prior discrimination in the previous case, while in these cases the decrees were entered upon "capitulation to judicial findings of past discrimination."[121] Third, language was used in the consent decrees of these two cases which justified the conclusion that the cities were placed under an affirmative duty to achieve a proportion of minority employees approximately equal to the proportion of minorities in the general population. The language of the consent decree in the previous case placed no such affirmative duty on the city.[122]

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114. *See Beecher*, 679 F.2d at 966; *Brown*, 644 F.2d at 553; *Youngblood*, 568 F.2d at 506-07; *Jersey Cent.*, 542 F.2d at 10 (remanded for determination of actual victims of discrimination who would then be entitled to retroactive seniority).

115. *Youngblood*, 14 Fair Empl. Prac. Cas. (BNA) at 148.

116. *Id.* at 508.

117. *Beecher*, 522 F. Supp. at 877; *Brown*, 522 F. Supp. at 6.

118. *Beecher*, 679 F.2d at 973.

119. *Brown*, 644 F.2d at 558.

120. *Beecher*, 679 F.2d at 973; *Brown*, 644 F.2d at 561.

121. *Beecher*, 679 F.2d at 973; *Brown*, 644 F.2d at 561-62.

122. *Beecher*, 679 F.2d at 973; *Brown*, 644 F.2d at 561. Under these three distinctions, *Stotts* falls closer to the previous case, *Youngblood*, which allowed seniority based layoffs than to the later two cases, *Beecher* and *Brown*, which did not. In the *Stotts* consent decrees, the city refused to admit any prior discrimination. *See* 679 F.2d at 574, 570. Moreover, there was no judicial finding of prior discrimination in *Stotts*. *See* 679 F.2d at 574. The provision in the *Stotts* 1974 consent decree which states that the "purpose of this consent decree is to insure . . . that any disadvantage to blacks and women which may have resulted from past discrimination is remedied," 679 F.2d at 571, could be construed as placing the city under an affirmative duty to bring the proportion of minority employees into line with the proportion of minorities in the gen-

In *Jersey Central Power & Light Co. v. IBEW*, the district court held that the conciliation decree superseded the seniority system and that layoffs had to be conducted so as not to reduce the percentage of minority employees.[123] The court of appeals vacated the judgment because it found that the conciliation agreement and the collective bargaining agreement did not conflict. The court determined that lay-offs in reverse order of seniority would not contravene the provision of the conciliation agreement which called for increasing the percentage of minority employees through new hires.[124]

A different situation was involved in *Southbridge Plastics Division v. International Union of Rubber Workers*. In this case the conciliation agreement specifically provided for quota-based layoffs to prevent any reduction in the percentage of women employees,[125] while the collective bargaining agreement provided for seniority based layoffs.[126] The district court held that the conciliation agreement took precedence over the collective bargaining agreement.[127] The court of appeals, in reversing the district court, determined that layoffs should be conducted under the seniority system established by the collective bargaining agreement. The court held that agreements between management and labor can be overturned on a Title VII challenge only to the extent required to comply with that statute. Citing *International Brotherhood of Teamsters v. United States*,[128] the court stated that, absent a showing of discriminatory purpose, section 703(h) of Title VII protects a seniority system from Title VII attack. Since there was no showing of discriminatory purpose in this seniority system, its destruction, as authorized by the conciliation agreement, could not be permitted.[129]

From the foregoing, it is clear that the Supreme Court's holding in *Stotts* is not a departure from precedent or from the trend in lower federal courts. Rather, the *Stotts* decision is more a culmination of a visible trend in the

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eral population. However, this provision does not seem to place as strong an affirmative duty on the city to end the disproportionately low minority representation among employees as the provision in *Brown* in which the city committed itself "to erase any vestige of past employment discrimination." *Brown*, 644 F.2d at 554.

123. *Jersey Cent.*, 8 Fair Empl. Prac. Cas. (BNA) at 693.

124. 542 F.2d at 10 n.2 (remanded for determination of actual victims to discrimination who would then be entitled to retroactive seniority).

125. *Southbridge*, 565 F.2d at 915.

126. *Id.*

127. *Id.*

128. 433 U.S. 324 (1977).

129. *Southbridge*, 565 F.2d at 915-17 (court further held that if individual employees could prove that they were actual victims of discrimination they would be entitled to retroactive seniority). The parties in *Southbridge* were later involved in a suit concerning whether the company was liable for backpay to employees laid off pursuant to the consent decree who would not have been laid off under the terms of the collective bargaining agreement. *See* W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers, 103 S. Ct. 2177 (1983). The Supreme Court held that the company's conflicting obligations were a dilemma of its own making and upheld awards of backpay to the employees. *Id.* at 2184.

lower courts. This trend is not toward the erosion of race-conscious relief, and thus of affirmative action. *Stotts* and the other cases discussed above dealt only with the question of layoffs. There are real distinctions between the application of race-conscious relief in the layoff situation and in other situations in which affirmative action plans have been ordered. For example, affirmative action programs dealing with hiring practices do not suffer from the inequities inherent in requiring layoffs to be conducted under a race- or sex-conscious plan. One job applicant has no more right to be hired than another equally qualified applicant since neither obtains an interest in the job until hired.[130] On the other hand, although courts have stated that seniority rights are not vested property rights,[131] they are viewed by the courts as very important.[132] Certainly no one will deny that seniority rights give rise to an expectancy in the employee that she will not be laid off before a less senior employee. Further, the nonminority employees are, themselves, innocent of any employment discrimination. The employer is the one who made the hiring decisions.[133] Therefore, for a court to nullify a seniority system by requiring that any layoffs be conducted so that the percentage of minorities or women does not decline "would be tantamount to shackling [innocent nonminority] employees with a burden of a past discrimination created not by them but by their employer."[134] Even worse, resentment and antagonism will be bred between minority and nonminority employees.[135]

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130. *See* Vanguards v. City of Cleveland, 36 Fair Empl. Prac. Cas. (BNA) 1431, 1435 (6th Cir. 1985); Hammon v. Barry, 605 F. Supp. 1082, 1092-93 (D.D.C. 1985).

131. *See, e.g.*, Tangren v. Wackenhut Servs., 658 F.2d 705, 707 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982). *But see* International Bhd. of Teamsters v. United States, 431 U.S. 324, 353-54 (1977) (speaks of vested seniority rights); Hammon v. Barry, 606 F. Supp. 1082, 1094 (D.D.C. 1985) (same).

132. *See, e.g.*, *Stotts*, 104 S. Ct. at 2583-84 n.4.

133. *See* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1320 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

134. *Id.* Since non-minority employees are innocent of employment discrimination and the minority employees have been historically discriminated against, why should either be laid off? The employer who maintained discriminatory employment practices should bear the burden of its past discrimination. Two commentators have made a strong case for requiring the employer to keep both the minority and the nonminority employees on its payroll. Burke & Chase, *Resolving the Seniority/Minority Layoffs Conflict: An Employer-Targeted Approach*, 13 HARV. C.R.-C.L. L. REV. 81 (1978). The district court in Watkins v. United Steel Workers, Local No. 2369, 8 Fair Empl. Prac. Cas. (BNA) 729, 730-31 (E.D. La. 1974), *rev'd*, 516 F.2d 41 (5th Cir. 1975), did place the burden on the employer when it both ordered the recall of laid off black employees and enjoined the employer from laying off white employees to make room for the returning blacks. The court of appeals, however, reversed. *See* 516 F.2d at 44-45.

135. *See* Burke & Chase, *supra* note 134, at 93-95; Wines, *Seniority, Recession, and Affirmative Action: The Challenge for Collective Bargaining*, 20 AM. BUS. L.J. 37, 43 (1982). One could argue equally vigorously that unencumbered operation of a seniority system would cause antagonism and resentment as minority employees see nonminority employees retaining their jobs even though hired after the minority employees sought jobs and were rejected because of the employer's former discriminatory hiring

The *Stotts* Court apparently recognizes the distinctions between the application of race-conscious relief to layoffs and to new hires given its acceptance of a balancing of equities approach.[136] The *Stotts* decision made clear the Supreme Court's position that the equities in the layoff cases do not justify race-conscious relief. On the other hand, the existing equities in the new hires case do seem to justify race-conscious relief from the courts. It is evident that these two positions can co-exist from the decisions of the courts of appeal which refuse to modify seniority systems in the layoff cases, even though all the circuits accept the appropriateness of race-conscious relief in some circumstances. Thus, the *Stotts* decision placed a boundary only upon the reach of race-conscious remedies. It is a boundary that has seldom before been crossed by affirmative action plans anyway. In areas other than layoff cases, race-conscious relief should remain valid.

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practices. But in this case the minority worker has a solution. Under *Franks*, she may be awarded retroactive seniority upon a showing that she was an actual victim of discrimination. *See* 424 U.S. at 767-70. Given that the burden of proof is set at a level to make this remedy an effective one for minorities, antagonism between minorities and non-minorities caused by a freely operating seniority system will be minimized.

136. *See* 104 S. Ct. at 2588.