Present Perpetuation of Past Discrimination: Employment Seniority Systems as a Continuing Violation under Title VII - Effect on Its Statute of Limitations

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PRESENT PERPETUATION OF PAST DISCRIMINATION:
EMPLOYMENT SENIORITY SYSTEMS AS A CONTINUING VIOLATION UNDER TITLE VII—EFFECT ON ITS STATUTE OF LIMITATIONS

Evans v. United Air Lines, Inc.,
534 F.2d 1247 (7th Cir.),
cert. granted, 97 S. Ct. 308 (1976) (No. 76-333)

Seniority systems have long been relied upon by employers and employees to determine allocation of the benefits, rights and compensation of employment. Seniority systems are especially favored by employees because the systems are capable of objective application: greater benefits and security of employment are accorded members with the longest time in service, while junior members enjoy fewer options on the job and run a greater risk of layoff.

Despite this presumed objectivity, seniority systems may nevertheless operate to discriminate against employees in violation of Title VII of the Civil Rights Act of 1964.2 Title VII outlaws job-related discrimination based on an employee's race, color, sex, religion, or national origin.3 Under Title VII, facially neutral employment practices4 have been found unlawful if their current operation perpetuates the effects of past discrimination.5 Aggrieved

3. Section 703(a) of the Act provides:
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, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
employees have consistently applied this theory of present perpetuation of past discrimination in challenging "departmental" seniority systems.6

A departmental seniority system regulates promotions, transfer, and seniority with reference to time served in a particular department rather than from date of hire.7 Such a system may, for example, permit transfer to another department only with forfeiture of seniority earned in the present department. The employee then starts re-earning seniority based only on the amount of time worked in the new position. Even where past discriminatory restrictions against transfer are removed, the system locks employees in particular departments which were, prior to Title VII, deliberately segregated by race, sex, or otherwise. Thus, the discriminatory status quo is maintained in two ways. First, the forfeiture of seniority upon transferring acts as a deterrent to transfer to the better jobs. Second, if minority employees do choose to transfer, they will never attain the status they would have reached in the new department had their transfer not been delayed by earlier discriminatory restrictions.8 The circuit courts of appeals have found that departmental seniority systems which operate in this manner, even though non-discriminatory on their face, perpetuate the effects of past discrimination and have held such systems violative of Title VII.9


A remedy courts have established for discrimination stemming from the operation of a departmental seniority system is that of imposing plant-wide, or employment, seniority. This remedy is designed to put the discriminatee in the place close to where he or she would have been were it not for the past unfair employment practice. Franks v. Bowman Transp. Co., 495 F.2d
Employees have also sought to apply this theory of "present perpetuation" to company-wide, or "employment," seniority systems. An employment seniority system measures seniority on a company-wide basis from the date of employment by taking into account the total time the employee has worked for the employer. Employees under an employment seniority system face different problems than those under departmental seniority systems. Present workers under an employment seniority system who were once discriminatorily denied employment have relatively lesser seniority than those who were properly hired. Because of their low seniority status, they are entitled to fewer benefits and are much more vulnerable to layoff than had they not been previously refused hire. Therefore, it is argued that the seniority system operates to perpetuate past discrimination by crediting such an employee with lesser seniority than had the individual not been previously discriminated against.

The perpetuation theory has not commonly been applied to challenges to employment seniority systems because of the belief by some courts that these neutral systems were bona fide and therefore protected from suit under Title VII. That belief is no longer valid. However, a separate consideration that remains viable and significant is that a suit based upon the operation of an employment seniority system may ineffectuate the Act's statute of limitations. This is possible in two ways. First, a suit based upon the operation of an employment seniority system focuses on that present system, rather than on the earlier discrimination which is allegedly perpetuated. A plaintiff thus may be permitted to circumvent the limitations period for bringing suit on the original discrimination. Second, a complaint which focuses on the present seniority system raises uncertainties about the proper application of the limitations period to that alleged violation.

In a recent case of first impression in the United States Court of Appeals for the Seventh Circuit, a challenge to the operation of an employment seniority system was sustained upon the theory of present perpetuation of past discrimination.
discrimination. In *Evans v. United Air Lines, Inc.*, 13 the Court of Appeals for the Seventh Circuit relied upon a recent United States Supreme Court decision14 and held that employment seniority systems are not protected from suit even though they may be neutral and presumably bona fide.15 *Evans* then applied the perpetuation theory and held that an employment seniority system could operate to continue past discrimination and thus violate Title VII.16

*Evans* involved an employee who was rehired several years after a 1968 discriminatory discharge. The employer’s employment seniority system credited only continuous time-in-service. Accordingly, the employee was not credited with time worked before the discriminatory discharge. Plaintiff based her complaint on the present operation of the employment seniority system rather than on the prior 1968 discriminatory termination, a claim which was time-barred under the Act.17 Therefore, although suit upon the discharge itself was time-barred, the plaintiff was given another opportunity to litigate her rights by challenging the present operation of the neutral employment seniority system. Thus, *Evans* has the potential for abrogating Title VII’s statute of limitations in many situations. It is this potential effect which has apparently caused the United States Supreme Court to grant defendant United Air Lines’ petition for certiorari.18

In anticipation of the Court’s review of the case, analysis of the Seventh Circuit’s reasoning in *Evans* is warranted. Before examining *Evans* itself, however, this note will review the prior circuit courts of appeals cases which considered the validity of challenges of employment seniority systems. The United States Supreme Court decision in *Franks v. Bowman Transportation Co.*19 will also be discussed since *Franks* implicitly considered the validity of such challenges and directly influenced the outcome of *Evans*. Finally, this analysis of *Evans* will examine the potential and practical implications of the decision.

**Title VII’s Effect Upon Employment Seniority Systems**

Employment seniority systems have in the past been perceived by

15. 534 F.2d at 1250-51.
16. *Id.* at 1250.
18. 96 S. Ct. 308 (1976) (No. 76-333).
several circuits\textsuperscript{20} to be exempt from the strictures of Title VII under section 703(h) of the Act.\textsuperscript{21} That provision seemingly authorized application of different standards and terms of employment through a bona fide seniority system. It was reasoned that a seniority system which measured all employees' seniority from their date of hire was neutral and non-discriminatory. Such a neutral system thereby qualified as bona fide and was thus within the terms of section 703(h) and insulated from suit.\textsuperscript{22}

A leading case holding that employment seniority systems were protected by section 703(h) was the Seventh Circuit's decision in \textit{Waters v. Wisconsin Steel Works}.\textsuperscript{23} In \textit{Waters}, the court was faced with the contention that defendant's "last hired, first fired" seniority system for bricklayers violated Title VII because it perpetuated past, pre-Act discriminatory hiring policies. The plaintiff,\textsuperscript{24} a black bricklayer, argued that blacks were laid off before, and recalled after, certain whites who might not otherwise have had seniority had Wisconsin Steel not discriminated in hiring. It was plaintiff's contention that the facially neutral seniority procedures perpetuated the effects of defendant's earlier discriminatory failure to hire blacks. The court agreed that Wisconsin Steel had previously discriminated in its hiring policies. Nevertheless, the court held that an employment seniority system which was racially neutral on its face was a bona fide seniority system within the contemplation of section 703(h) and therefore could not be violative of Title VII.\textsuperscript{25}

\textsuperscript{20} See note 12 \textit{supra}.
\textsuperscript{21} Section 703(h) of Title VII provides in pertinent part:
\begin{quote}
Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .
\end{quote}

Included in the scant legislative history of \textsection 703(h) are three interpretive memoranda introduced into the Congressional Record by Senators Clark of Pennsylvania and Case of New Jersey, the bipartisan managers of Title VII. The three memoranda are a Department of Justice interpretive memorandum obtained by Senator Clark, an interpretive memorandum submitted by the two senators, and Senator Clark's written response to a question of Senator Dirksen, one of the floor managers for the bill. The memoranda state that Title VII, because its effect is prospective and not retrospective, would not affect existing seniority rights. Thus, for example, a white worker would not be permitted to be fired in order to hire a black worker, nor would a black be allowed special seniority rights at the expense of an earlier hired white employee. A black, according to the memoranda, could be fired pursuant to a "last hired, first fired" system as long "as it is done because of his status as 'last hired' and not because of his race." 110 \textit{CONG. REC.} 7207, 7212-15, 7216-17 (1964). \textit{See generally Vass, Title VII: Legislative History, 7 B.C. INDUS. \& COM. L. REV.} 431 (1966).

\textsuperscript{22} See \textit{Waters v. Wisconsin Steel Works}, 502 F.2d 1309, 1318, 1320 (7th Cir. 1974), \textit{cert. denied}, 96 S. Ct. 2214 (1976).
\textsuperscript{23} 502 F.2d 1309 (7th Cir. 1974).
\textsuperscript{24} Although the discussion here concerns the plaintiff Waters, another plaintiff Samuels, alleged a discriminatory failure to hire. \textit{Id.} at 1312.
\textsuperscript{25} \textit{Id.} at 1318. Plaintiffs Waters and Samuels also challenged two amendatory agreements to their collective bargaining contract. The agreements reinstated the contractual seniority recall
The Fifth Circuit held similarly in Watkins v. United Steel Workers Local 2369. Class action plaintiffs in Watkins were black employees who were laid off under a last hired, first fired employment seniority system and placed on a recall list in reverse seniority order. The employer had discriminated in hiring prior to, but not after, the effective date of Title VII. Plaintiffs were hired under post-Act, non-discriminatory hiring practices. Nevertheless, as a result of the seniority system, all of the black employees hired after 1965, among others, were laid off and the first 138 persons on the recall list were white. Plaintiffs challenged the layoff and recall procedures of the employer which operated to exclude blacks from the work force.

The Fifth Circuit held that because plaintiffs themselves had not been personally subjected to prior employment discrimination, the use of the seniority system for layoff and recall was not violative of Title VII. The court added in dicta that even if the system could be found discriminatory, it would be exempt under section 703(h) from being declared an unlawful employment practice.

In contrast to Waters and Watkins, the Second Circuit in Acha v. Beame considered section 703(h) inapplicable to a challenge based on the rights of three white employees, after the white employees had received severance pay in lieu of the right of recall. Thus, the white employees were put back on the seniority list for recall ahead of plaintiffs. The court found the amendatory agreements discriminatory with respect to Waters. The court stated further that the prior discriminatory hiring practices and implementation of their present employment seniority system placed defendant at the brink of present discrimination. The amendatory agreements were not discriminatory as to Samuels, an inexperienced worker, the court agreeing with the policy of favoring recall of an experienced former worker before considering new applicants. Id. at 1320-21.

Accord, Jersey Central Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975), vacated and remanded sub nom. EEOC v. Jersey Central Power & Light Co., 96 S. Ct. 2196 (1976). In Jersey Central, the Third Circuit reviewed a declaratory judgment which determined for an employer which of two procedures should govern layoffs: a collective bargaining agreement requiring layoffs in reverse order of seniority or a conciliation agreement with the EEOC to retain more minority and female workers. The court held both agreements to be consistent, since the objective of the conciliation agreement, to increase the percentage of female and minority group persons among employees, was to be attained by the hiring of a greater percentage of those persons and not by readjustment of seniority or layoff procedures. Thus, as the court interpreted the agreements, once the females and minority group persons were hired according to the conciliation agreement, they would be subject to the conditions of employment, including seniority terms, as embodied in the collective bargaining agreement. 508 F.2d at 701-03. The court then considered whether reverse seniority layoffs which disproportionately affected minorities and females were contrary to public policy. Finding no statutory proscription of employment seniority systems, the court determined that §703(h) authorized the use of bona fide seniority systems, regardless of any perpetuating effect they might have. The court concluded also that because the neutral employment seniority system was exempt from suit, the court was not empowered to remedy the present effects of the prior discrimination. Id.

531 F.2d 648 (2d Cir. 1976).
operation of an employment seniority system which perpetuated prior discrimination. In *Acha*, the plaintiffs represented a class of female police officers in New York City who were laid off under a last hired, first fired policy. Females had previously been discriminated against in hiring and, when layoffs were made, many more females than males were affected since the women had been hired only recently. Plaintiffs contended the layoffs perpetuated the past discriminatory hiring policies of the police department and sought constructive seniority to the date they would have been hired but for the discrimination.\(^{32}\)

The Second Circuit held that the layoffs under the facially neutral seniority system were not insulated from attack under section 703(h).\(^{33}\) The court determined that the seniority system, because it perpetuated past discrimination as to plaintiffs, could not be bona fide and fell outside the terms of section 703(h). Moreover, the seniority system could not be considered bona fide until that past discrimination was remedied by granting the plaintiffs the seniority to which they were entitled.\(^{34}\)

The United States Supreme Court clarified the meaning of section 703(h) and its effect on employment seniority systems in *Franks v. Bowman Transportation Co.*\(^{35}\) However, *Franks* did not involve a challenge based upon such a seniority system but a remedies question under Title VII. The Court held that section 703(h) does not bar an award of retroactive seniority to employees who were previously discriminatorily refused employment.\(^{36}\)

The issue in *Franks* was presented in a suit by a class of black petitioners who were applicants of the defendant trucking company. Plaintiffs had been discriminatorily refused positions as over-the-road truck drivers and sought

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32. *Id.* at 650, 654.
33. *Id.* at 651-52. The Second Circuit had previously not allowed § 703(h) to insulate a departmental seniority system from alteration where the system was based on past discriminatory classifications in United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971). Thus, the court concluded in *Acha* that the section could not insulate the employment seniority system in *Acha* since there was no sufficient basis for distinguishing between facially neutral departmental and employment seniority systems. The court in *Acha* did point out that in an employment seniority case, unlike the departmental system in *Bethlehem Steel*, an award of constructive seniority would not invalidate or alter the seniority system, but merely would put plaintiffs in their proper place in it. 531 F.2d at 652, 655.
34. 531 F.2d at 655. The Second Circuit relied on its prior decision in Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), in its advocacy of retroactive seniority. In *Chance*, minority workers had been kept from their rightful place on the seniority list through inability to pass an allegedly discriminatory examination. The court stated that such a plaintiff "may in some instances be entitled to preferential treatment—not because he is black, but because, and only to the extent that, he has been discriminated against." A grant of constructive seniority, the court in *Chance* stated, would put minority employees in the approximate spot on the seniority list they would have occupied but for the discrimination. *Id.* at 999.
36. *Id.* at 761-62.
an award of constructive seniority from the date of the refusals.\textsuperscript{37} When the case was before the Fifth Circuit, that court held that the company’s neutral seniority system was bona fide and that the prior discrimination in hiring did not affect the bona fides of the system.\textsuperscript{38} The court prohibited the extension of constructive seniority as a remedy by reasoning that section 703(h) protected bona fide seniority systems from any interference or alteration.\textsuperscript{39}

The Court reversed the appellate court and pointed out that the legal wrong affecting the black applicants was not a racially discriminatory seniority system but a racially discriminatory hiring system.\textsuperscript{40} The petitioners did not seek alteration or elimination of the seniority system but simply an award of the seniority status they would have had were it not for the discriminatory refusal to hire. Thus, the Court determined the effect of section 703(h) upon that claim:

\begin{quote}
Whatever the exact meaning and scope of section 703(h), . . . the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act. There is no indication in the legislative materials that section 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved—as in the instant case, a discriminatory refusal to hire.\textsuperscript{41}
\end{quote}

\textsuperscript{37} Suit was brought under Title VII and under 42 U.S.C. § 1981 (1970). Plaintiff Franks had made an individual claim of discrimination but the district court dismissed it as barred by the limitations period. The Fifth Circuit reversed that portion of the decision, however, and remanded Franks’ claim for re-determination. 495 F.2d at 398, 406. In the meantime, plaintiff Lee intervened to press his individual claim against Bowman following his allegedly discriminatory discharge and to represent other classes of black Bowman employees and job applicants. Id. at 406-07.

\textsuperscript{38} 495 F.2d at 417. Another portion of the class were employees who were affected by the maintenance of defendant’s departmental seniority system. The court of appeals found that Bowman had, prior to 1968, consciously segregated its departments according to race by employing blacks only in the most menial and lowest paying jobs in one particular department. Interdepartmental transfers were flatly prohibited until 1967 when a collective bargaining agreement eliminated the no-transfer policy and allowed for nondiscriminatory hiring in all departments. The agreement, however, continued to recognize departmental seniority which, the court found, favored whites over blacks desiring transfer. Id. at 410-11. In addition, management blatantly discouraged transfer, job openings were often posted only in the departments where they occurred so that other employees remained ignorant of them, and the defendant continued to hire only whites in certain jobs. Id. at 411. The court asserted that to release employees from old racial patterns of the departmental seniority system, use of full company seniority was required for transfer purposes. Id. at 416.

\textsuperscript{39} Id. at 417. \textit{But cf.} Meadows v. Ford Motor Co., 570 F.2d 939 (6th Cir. 1975), cert. denied, 96 S. Ct. 2215 (1976) (no prohibition found in the Act of a remedy of retroactive seniority).

\textsuperscript{40} 424 U.S. at 758.

\textsuperscript{41} Id. at 761. The Court also discussed the appropriateness of an award of retroactive seniority under the § 706(g) remedial provision of Title VII. The Court asserted “that ordinarily such relief will be necessary to achieve the ‘make whole’ purposes of the Act.” Id. at 766. The Court stated that an award of seniority status is not requisite in every case, but, citing its decision in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), asserted:
The Court's precise holding makes clear that section 703(h) is not relevant in determining what relief is available when discrimination is found under the Act. It may be inferred from the Court's reasoning that the scope of section 703(h) is limited to seniority systems alleged to perpetuate pre-Act discrimination. Accordingly, section 703(h) does not serve as a general exemption of employment seniority systems from suit. As such, the reasonings of Waters and Watkins concerning exemptions of such systems from suit are weakened.

Recognizing the limited scope of section 703(h) is not conclusive in determining the validity of a challenge to the operation of an employment seniority system. It merely eliminates what once was considered an authorization of such systems. The Seventh Circuit in Evans, however, chose to go beyond this precise holding of Franks and rely upon the Court's general discussion of employment seniority systems and Title VII objectives to sustain a challenge to the operation of an employment seniority system. Because of the factual context in which the Seventh Circuit reached its conclusion, the decision manifests new uncertainties under Title VII. Particularly troubling is the decision's potential impact upon application of the Act's statute of limitations and its construction of a continuing violation under the Act.

**Evans v. United Air Lines, Inc.**

Plaintiff in Evans was a flight attendant for the defendant United Air Lines. She worked from 1966 to 1968 when, planning to marry, she involuntarily resigned pursuant to defendant's then-existing no-marriage rule for female flight attendants. In February 1972, after United's no-marriage policy was found discriminatory, plaintiff was rehired as a flight attendant. Plaintiff's seniority began accruing from the date of her rehire.

No less than with the denial of the remedy of backpay, the denial of seniority relief to victims of illegal racial discrimination in hiring is permissible 'only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'

424 U.S. at 771. In its determination of this aspect of the case, the Court analogized to the remedial section of the National Labor Relations Act, § 10(c), 29 U.S.C. § 160(c) (1970), the model for § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (1970). The NLRA allows, to those who have been discriminatorily refused employment, seniority retroactive to the date of the discriminatory refusal. This remedy would, of course, be just as appropriate for victims of discriminatory discharge. 424 U.S. at 768-69.

42. Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971). Defendant's no-marriage policy was held unlawfully discriminatory as to sex because female flight attendants were required to resign or transfer to a ground position upon marriage but male flight attendants were under no such restriction. Id. at 1198. Defendant discontinued its no-marriage policy on November 7, 1968. 534 F.2d 1247, 1247-48 (7th Cir. 1976).

43. By a letter of agreement with the flight attendants' collective bargaining agent in November 1968, defendant United agreed to reinstate those stewardesses who had been
according to defendant’s policy of crediting toward seniority only continuous
time-in-service. Plaintiff Evans sued United in February 1973, basing her
charges on defendant’s facially neutral seniority policy. She claimed the
policy discriminated against her by failing to credit her for prior time worked
for which she would have received credit but for the discriminatory dis-
charge. Plaintiff thus sought to apply to a neutral employment seniority
system the “present perpetuation” theory commonly applied to departmental
seniority systems.

Although Title VII provides a limitations period for filing discrimination
charges, plaintiff in Evans did not bring suit until five years after her
no-marriage termination and one year after her rehire. Plaintiff contended that
the present practice of crediting her with “improper” seniority was a
“continuing” violation because of the ongoing effect upon her and that she
was not barred by the then ninety-day limitations period because charges
could be filed at any time during the pendency of a continuing violation.

The Seventh Circuit ultimately agreed with plaintiff’s arguments, but
only after rehearing the case in light of Franks. Initially, the court of appeals
affirmed the district court’s dismissal of the complaint because of plaintiff’s
failure to timely file charges. The appellate court viewed defendant’s
terminated under the no-marriage rule and had filed charges with a governmental agency or
grievance under their collective bargaining agreement. Plaintiff had done neither and so did not
qualify for reinstatement. In October 1969, defendant agreed to reinstate those flight attendants
who had transferred to ground positions because of the no-marriage rule and who were then
employed by defendant. Again plaintiff did not qualify. 534 F.2d at 1247-48.

44. Though defendant’s policy of crediting only continuous time-in-service works to the
disadvantage of rehired employees, the court found it neutral as between male and female
employees. Id. at 1249.

45. Specifically, plaintiff’s theory was as follows: defendant’s present practice was to
credit her with less seniority than male flight attendants hired between 1966 and 1972 and males
with the same or less time in service. The present disparity in seniority was caused by prior sex
discrimination, her no-marriage termination. Consequently, defendant’s current practice with
respect to plaintiff’s deficient seniority presently and continuously discriminated against her.

46. See note 17 supra.

47. Where a party alleges the existence of an allegedly discriminatory employment practice
which is continuing in nature and effect, the time limit is inapplicable since obviously there is no
single date from which the period might begin to run. Bartmess v. Drewrys U.S.A., Inc., 444 F.2d
1186, 1188 (7th Cir.), cert. denied, 404 U.S. 939 (1971); see also Healen v. Eastern Airlines, Inc.,
failure to credit past work time).

48. Evans v. United Air Lines, Inc., 534 F.2d 1247 (7th Cir. 1976). The case was decided by
Circuit Judges Cummings and Sprecher and Judge Adams from the United States Court of
Appeals for the Third Circuit, sitting by designation.

49. 12 Fair Empl. Prac. Cas. 288 (7th Cir. 1976) [hereinafter referred to in the text as Evans
I].

opinion, granted defendant’s motion for dismissal. The motion was based on the ground that the
court was without jurisdiction under Title VII because plaintiff had failed to file charges with the
neutral employment seniority system as bona fide and therefore not unlawful under Title VII. The only remaining basis for suit, then, was plaintiff’s discriminatory, no-marriage termination in 1968. A charge brought in 1973 based on that act, the court concluded, was obviously time-barred since it was not filed within the then ninety-day time limit.\(^5\)

In *Evans I*, the court of appeals looked to both a Ninth Circuit decision and to the Seventh Circuit’s decision in *Waters* for support. The Ninth Circuit in *Collins v. United Air Lines, Inc.*\(^52\) disallowed a Title VII claim by a discriminatorily terminated flight attendant brought four years after her discharge. Plaintiff Collins was involuntarily terminated under defendant’s then-existing no-marriage rule and was subsequently refused rehire. Plaintiff claimed that defendant’s refusal to reinstate her deprived her of the benefits of employment and was thus a continuing violation and not barred by the Act’s time limit. The Ninth Circuit rejected this theory and concluded instead that plaintiff’s nonemployment was merely an effect of an unlawful practice.\(^53\) The court also concluded that defendant’s refusal to reinstate plaintiff was not a new act of discrimination; rather, plaintiff’s request for reinstatement was merely an attempt to remedy the discharge.\(^55\)

The Ninth Circuit labeled plaintiff’s nonemployment merely an “effect” of her no-marriage termination and not a continuing violation. The Seventh Circuit followed this approach in *Evans I* and characterized Evans’ present deprivation of benefits under the seniority system as merely an “effect” of the prior discriminatory discharge.\(^56\) In denying the challenge, EEOC within the proper time limit. The court found that Evans’ seniority was lost by reason of her February 1968 resignation and that she therefore should have filed charges within 90 days from that unlawful employment practice. See note 17 *supra*. Before the filing of this charge, plaintiff had not filed any prior charge of discrimination with the EEOC or any other governmental agency in challenge to defendant’s no-marriage rule or her discharge.

51. Most courts have found the timely filing of charges to be jurisdictional. *E.g.*, *East v. Romine*, 518 F.2d 332, 336 (5th Cir. 1975); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 359 (7th Cir. 1968).
52. 514 F.2d 594 (9th Cir. 1975).
53. Id. at 596.
54. Id.
55. Id. in *Evans I*, Judge Cummings noted that the plaintiff in *Collins* had failed to show that the “proximate cause” of defendant’s refusal to reinstate her was the prior discrimination. 12 Fair Empl. Prac. Cas. at 292. *Accord*, *Stroud v. Delta Airlines*, 392 F. Supp. 1184 (N.D. Ga. 1975), *aff’d*, 14 Fair Empl. Prac. Cas. 206 (5th Cir. 1977). Plaintiff in *Stroud* was terminated under a no-marriage rule and twice refused rehire. Upon her claim of a continuing violation, the court held that plaintiff must show that the refusals to reinstate were based on discriminatory animus flowing from prior policies or that the refusals were otherwise discriminatory in themselves. Id. at 1193.
56. 12 Fair Empl. Prac. Cas. at 290. Judge Cummings dissented in *Evans I*. He agreed with plaintiff’s assertion that the operation of defendant’s seniority system which failed to credit her with seniority, for time worked until her discriminatory termination, was a current and continuing act of discrimination. Id. at 292.
the court in *Evans I* did not explicitly state that defendant’s neutral employment seniority system was protected from suit under section 703(h). However, the court relied on *Waters* and thereby implicitly considered the seniority system to be protected under that provision.57

Evaluating plaintiff’s claim on rehearing, the Seventh Circuit looked to the United States Supreme Court’s decision in *Franks* decided after *Evans I*, to hold that an employment seniority system is not protected from suit by section 703(h).58 Following *Franks*, the court of appeals acknowledged that section 703(h) is a narrow exception to Title VII’s prohibition of all discriminatory employment practices and that the section is pertinent only where a pre-Act discrimination situation exists.59 The court was thus free to apply the theory that a neutral employment policy may be discriminatory if it gives present effect to past discrimination:

> United’s continuous time-in-service seniority program may put an employee who has been discharged and later rehired into an inferior seniority position. . . . If the prior discharge was itself a discriminatory one, then United’s seniority policy is an instrument that extends the impact of past discrimination, albeit unintentionally. Consequently, the present application of United’s seniority policy is deemed to be discriminatory.60

The Seventh Circuit concluded that “‘Evans’ complaint, having been filed during the pendency of the alleged discrimination, was not time-barred.”61 The court thereby construed the discriminatory operation of the seniority system as a *continuing* violation and found that plaintiff’s filing of charges one year after her rehire was not untimely.

*Evans* cited the Second Circuit decision in *Acha*62 as supportive of its holding. Although *Acha* is similar to *Evans* in principle, it has important factual distinctions. In *Acha* the initial discriminatory act was the refusal to hire female police officers. The alleged perpetuation of this earlier discriminatory act was the present layoff of the female officers who were at the bottom of the employment seniority system.63 The court found that if the individual plaintiffs could show that they were initially refused hire because of their sex, then their present layoff due to lack of sufficient seniority violated Title VII and section 703(h) would not bar suit.64 Thus, while *Acha* is persuasive authority for the *Evans* holding, it must be made clear that the layoffs in *Acha* involved a present affirmative act by the employer which

57. *Id.* at 291.
58. 534 F.2d at 1251.
59. *Id.*
60. *Id.* at 1247.
61. *Id.* at 1251.
62. See text accompanying notes 31, 34 supra.
63. 531 F.2d at 650.
64. *Id.* at 654.
perpetuated the prior discriminatory practice. *Evans*, on the other hand, involved an employer's failure to act; specifically, the failure to credit past seniority. This distinction may prove fateful for *Evans*.65

The Seventh Circuit also sought support in the often-cited 1971 United States Supreme Court decision in *Griggs v. Duke Power Co.*66 In *Griggs* the Court held that neutral employment testing procedures and diploma requirements may be violative of Title VII if they are not job-related and operate to maintain the status quo of prior discriminatory practices.67 Accordingly, *Griggs* affirmed the use of the perpetuation theory as then applied in departmental seniority system cases.68 By relying on *Griggs*, the Seventh Circuit adhered to established Title VII case law holding neutral practices unlawful if they perpetuate past discrimination. The novelty in *Evans* is the application of this principle to a neutral employment seniority system. To justify its extension of the principle, the court in *Evans* apparently regarded as significant certain language of the Court in *Franks* which went beyond the Court's section 703(h) resolution.

The Court, in considering the remedy of retroactive seniority in *Franks*, stated that one who is not granted proper seniority credit "will perpetually remain subordinate to persons who, but for the illegal discrimination would have been in respect to entitlements to these benefits his inferiors."69 The Court thereby premised its advocacy of a remedy of retroactive seniority upon the recognition that an employee without proper seniority may be in a perpetually subordinate position. In addition, the Court reiterated Title VII's "make whole" purpose and its intent to prohibit all practices which create inequality in employment opportunity.70 Despite its appreciation of the underlying issues, however, the Court did not actually determine whether a subordinate employee has a valid cause of action based upon inferior status within the seniority system. Nevertheless, considering the Court's dicta, it was not unreasonable for the Seventh Circuit in *Evans* to infer that an individual in a neutral seniority system may have a basis for suit if placed in an inferior position because of prior discrimination.

65. See text accompanying notes 84-93 infra.
67. The Court held:
   Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

   The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.

   *Id.* at 423, 430-31. The Court concluded that testing procedures and diploma requirements which operated to exclude blacks, and proven not to be job related, would be prohibited. *Id.* at 431.

69. 424 U.S. at 768.
70. *Id.* at 774.
In sum, the Seventh Circuit in *Evans* considered a claim of discrimination to be timely when filed during the operation of a seniority policy which carried forward some effects of a prior, time-barred act of discrimination. This decision found the limitations period inapplicable as to the original discrimination. Moreover, characterization of the present seniority practice as a continuing violation tolled the statute of limitations because charges can be filed at any time during which a continuing violation exists. Thus, the result in *Evans* poses significant potential consequences which deserve examination.

**Implications of *Evans***

**Title VII's Statute of Limitations**

According to *Evans*, an employment seniority system may perpetuate past discrimination, and do so in a continuing manner, by the failure to credit an employee with "proper" seniority.\(^7\) The discrimination in *Evans* that was presumably perpetuated was the plaintiff's no-marriage termination. However, charges based on that discriminatory discharge were long since time-barred when plaintiff brought her current suit. Despite the fact that the limitations period had run as to her no-marriage termination, plaintiff sought an additional opportunity to litigate her rights by challenging the present operation of the seniority system.

Considering, for a moment, only Evans' discriminatory termination, it is clear that charges had to have been brought within the then ninety-day time limit. Since termination is commonly considered a single act, all discrimination charges are required to be brought within the proper time limit from the date of the termination.\(^7\) The Ninth Circuit in *Collins* concluded as much by disallowing a claim brought four years after an unlawful, no-marriage termination.\(^7\) Similarly, in *Evans* there was a discriminatory discharge that was not challenged within the statutory limitations period. However, an anomaly is created between *Evans* and *Collins* because the plaintiff in *Evans* was rehired. Thus, the plaintiff in *Evans* was permitted to avoid the statute of limitations by asserting that her deficient seniority was a present violation. In short, the employee who is rehired may completely avoid the limitations

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\(^7\) 534 F.2d at 1250.

\(^7\) See, e.g., *Terry v. Bridgeport Brass Co.*, 519 F.2d 806, 808 (7th Cir. 1975). The Seventh Circuit noted that when an employee resigns or is terminated, all charges of discrimination must be filed in relation to the date of discharge. In *Terry*, however, after plaintiffs were terminated they had no subsequent employment contact with their former employer. Thus, the filing of charges eleven months after the terminations was held untimely. Id. at 808. See also *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir. 1975) (en banc) (termination of employment is not continuing violation even though the continuing discrimination theory may be available to present employees).

\(^7\) See text accompanying note 52 supra.
period as to the prior discriminatory discharge, while the employee who is not rehired must abide by it.

A New York district court addressed this point in a case similar to *Evans* but which reached a different result. In *Cates v. Trans World Airlines, Inc.*, the district court asserted that if a neutral seniority system were found to perpetuate some past discrimination, the Act's limitations period would be eradicated. Thus, the court stated:

Carried to its logical result, such an evasion of the statutory limitations of time would permit those whose only claim is they were hired later than they should have been, to bring their claims to the EEOC anytime they chose, while those who were refused hire altogether would still face the bar of the statutory cut-off date.

A California district court also recently addressed this anomaly in a case strikingly similar to *Evans*. In *Kennan v. Pan American World Airways, Inc.*, plaintiffs who became pregnant were terminated according to the defendant's policy. After the defendant eliminated the discriminatory rule, the plaintiffs were reinstated. Although suit based on the pregnancy discharges was time-barred, the employees brought suit based on the present operation of the neutral employment seniority system which denied them credit for service prior to the discharges. Considering the limitations period as to the earlier discriminatory discharges, the court asserted: “Because there is little or no visible prejudice to Pan Am by virtue of the lapse of time since its original act of discrimination, defendant's need for statute of limitations protection is minimized here.” The court concluded that for purposes of

75. *Id.* at 207.
76. *Id.* at 207-08. In *Cates*, three black plaintiffs alleged Title VII claims. Plaintiffs Cates and George charged they were repeatedly denied employment by defendant because of race from 1966 until each was finally hired in 1969. The following year both were furloughed. The third plaintiff, Whitehead, began working for defendant in 1967. He claimed he had been interested in working for TWA in 1957 but because he knew of defendant’s discriminatory policy toward blacks he did not apply. His main claim was that because of defendant's discriminatory policy which dissuaded him from applying earlier, he lost seniority benefits. *Id.* at 203. The district court held that as to the allegedly discriminatory layoffs of Cates and George, the time period for filing should commence running from the date of layoff for reasons of certainty and predictability. Plaintiffs did not meet this requirement and were therefore time-barred. *Id.* at 208. Whitehead's claim was also denied when the court declared that the monthly allocation of benefits pursuant to a facially neutral employment seniority system was not an unlawful practice which commenced the limitations period. The court cited *Collins* to hold that any detriments currently suffered were not of themselves fresh acts of discrimination but only derivative effects of the prior discrimination, namely, TWA’s alleged discriminatory hiring policies. A claim based on those policies should have been filed, the court concluded, within the statutory time limit from the effective date of Title VII. *Id.* at 209.
78. *Id.* at 1534.
determining the discriminatory operation of the seniority system, the plaintiffs' original terminations did not commence the limitations period. 79

Employers themselves may attempt to avoid the potential problem raised by Evans by simply refusing to hire or rehire individuals against whom they have previously discriminated, whether by discharge or failure to hire. The Seventh Circuit itself noted that the result reached in Evans would discourage the rehiring of employees. 80 The district court in Kennan agreed when it stated that although its decision might discourage the rehiring of employees, Title VII's make-whole objectives made the legal result worth the risk. 81

It is arguable that Evans would not discourage rehire because to refuse employment for reasons stemming from the prior discrimination because of fear of legal repercussions and economic effects could itself be discriminatory. 82 This argument leads to a dilemma for the employer. Faced with a job application from an employee previously discriminated against, the employer may either refuse employment and possibly face suit for that refusal or hire the individual and also face suit if the seniority system somehow carries forward the prior discrimination, as in Evans.

Kennan noted that the original discrimination was not the focus of the present lawsuit, but that the focus was the reinstatement without back seniority. 83 This assertion points out the desire of plaintiffs to prevent the arguments and defenses from centering around the earlier time-barred discrimination. In Evans this desire was satisfied. The court in Evans conceded that a charge based solely on the discriminatory discharge was untimely. However, by focusing instead on the present seniority practice, the court was able to find a current violation. Thus, the court held that the present effects of the prior discrimination were a continuing violation and therefore not time-barred. This characterization itself raises additional uncertainties.

The Concept of a Continuing Violation

In Evans, the deprivation of seniority and benefits was held to be a continuing violation because of the ongoing operation of the seniority system and its effect on the plaintiff. Plaintiff's lesser benefits under the system carried the past discrimination continuously, every day, into the present. The consequence of characterizing a violation as continuing is to toll the Act's statute of limitations and thus create an extraordinary opportunity to bring discrimination charges. 84

79. Id. at 1534-35.
81. 13 Fair Empl. Prac. Cas. at 1534.
82. See note 55 supra.
83. 13 Fair Empl. Prac. Cas. at 1534.
The concept of a continuing violation is well-recognized. But simply labeling an act or practice as "continuing" because its effects are continuously felt is not determinative. The proper role of the courts when faced with the parties' various characterizations of the claims is to interpret their propriety as they relate to the limitations period. The court in Evans has taken a broad view of the concept of a continuing violation. Thus, if an employee like the plaintiff in Evans may bring suit one year after her rehire because the seniority system gives effect to a prior discriminatory discharge, then she should be able to bring suit ten or twenty years after her rehire because her benefits will always and continuously be slightly less than they should be. Seeking to avoid this extreme result, other courts have taken a different view of the concept of a continuing violation.

In Cates, the black plaintiff claimed that the operation of a seniority system deprived him of benefits which would have been his but for the prior alleged discrimination in hiring. The court denied his claim by declaring that the monthly allocation of benefits pursuant to a facially neutral employment seniority system was not a present unlawful practice which commenced the limitations period or which was a continuing violation. The court held instead that any detriments currently suffered were not of themselves fresh acts of discrimination but only derivative effects of the prior alleged discrimination, namely, defendant's alleged discriminatory hiring policies.

A Texas district court also imposed restrictions when faced with a discrimination charge based on a refusal by an employer to restore plaintiff's seniority rights. The plaintiff in Kennedy v. Branniff Airways, Inc. was rehired after a no-marriage termination. The court stated that even if it accepted the refusal to restore plaintiff's seniority rights as discriminatory, plaintiff should have filed charges upon resumption of her flight position because she must have then been put on notice of defendant's seniority policies.

Similarly, the district court in Kennan was faced with claims of a continuing violation by the operation of an employment seniority system as to rehired employees. Although the court supported the broad concept of a continuing violation, it still sought to apply the statute of limitation, stating that "a 'statute of limitations' which never tolls [sic] would be a statute...
judicially overruled.\textsuperscript{92} The court cited both \textit{Cates} and \textit{Kennedy} but ultimately found the \textit{Cates} reasoning persuasive. The court stated that neither the date of rehire, nor the routine operation of a seniority system, should commence the limitations period, but that the occurrence of an event, such as transfer or layoff, must control the commencement of the limitations period.\textsuperscript{93}

The decisions of these three courts exemplify different approaches toward clarifying the continuing violation concept as applied to employment seniority systems. Obviously, the situation remains nebulous. The courts' views differ as to precisely when a continuing violation exists, how the concept pertains to the routine operation of an employment seniority system, and how the Act's statute of limitations applies.

Despite this general uncertainty, a definite consequence of the broad view of a continuing violation taken in \textit{Evans} is the ever-present potential for suit. Such a situation seems contrary to the purposes intended by the imposition of a time limit in which to bring suit. Implicit in limitations periods is the refusal to allow persons to "sleep on their rights."\textsuperscript{94} That implication is condemning for the plaintiff in \textit{Evans} because she did not bring suit either at the time of her discriminatory, no-marriage termination, or upon her rehiring when she received her new seniority date and was not credited with her prior time in service.

\textbf{Validity of the Perpetuation Theory as Applied in Evans}

In any view of \textit{Evans}, the underlying wrong from which all effects emanated was Evans’ 1968 no-marriage termination. The only means by

\textsuperscript{92} Id. at 12.

\textsuperscript{93} Id. at 12-13. A New Jersey district court recently supported this reasoning in Turnow v. Eastern Airlines, Inc., 13 Fair Empl. Prac. Cas. 1227 (D.N.J. Sept. 28, 1976). There, plaintiff was terminated by the airline because of pregnancy and rehired several years later. Shortly after her rehire, plaintiff was furloughed due to her lack of seniority. She was recalled ten months later. Two months thereafter she filed a discrimination complaint. Plaintiff contended that the neutral seniority system had the effect of carrying into the present defendant's past discrimination, and, further, the violation was a continuing one. The court held that the latest date from which the 180-day limitations period could begin to run was the date of her furlough. Thus, the claim was dismissed as time-barred. \textit{Id.} at 1229. The court relied on \textit{Collins} and \textit{Cates} and deliberately chose to disregard \textit{Evans}. \textit{Id.}

\textsuperscript{94} Culpepper v. Reynolds Metals Co., 421 F.2d 888, 892 (5th Cir. 1970) (citing Burnett v. New York Central R.R., 380 U.S. 424 (1965)). The Fifth Circuit in \textit{Culpepper}, a case involving a Title VII claim of discriminatory promotion, considered the United States Supreme Court's language in \textit{Burnett}, an FELA case, to have broad applicability:

Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. . . . Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights. This policy of repose, designed to protect defendants, is frequently outweighed however, where the interests of justice require vindication of the plaintiff's rights.

380 U.S. at 428.
which a present violation could be found to exist was by application of the theory that the seniority system perpetuated plaintiff’s past discrimination. This is the foundation of the “present perpetuation of past discrimination” theory;\(^95\) that is, an apparently neutral practice in some way gives present effect to past discrimination. However, the application of that theory to employment seniority systems may not have a firm, logical basis.

A discriminatory departmental seniority system operates to keep certain classes of employees in designated departments by interfering with transfers and promotions. Making transfer costly in terms of seniority locks employees in the designated departments and thus perpetuates an employer’s past segregation practices. But, it is crucial to note that regardless of any prior discrimination by the employer, the “locking in” of employees under a departmental seniority system creates a present disparity by denying job opportunities to the “locked in” employees.\(^96\) This disparity and denial of job opportunity create present actionable discrimination.\(^97\) In such a case, the perpetuation theory is superfluous to a finding of present discrimination. Generally, upon a finding of a discriminatory departmental seniority system, the system itself is dismantled and employment seniority is imposed.\(^98\)

On the other hand, a plaintiff like Evans who challenges the operation of an employment seniority system does not seek to eliminate the system. Rather, she seeks her “rightful” place within the seniority system and claims the system denies her that position because of prior discrimination. She can establish that she is presently not in her rightful place and that there is present disparity only by also establishing prior discrimination. Therefore, while an employment seniority system may operate to “recognize” prior discrimination, it does not in itself create a present, actionable disparity as does a departmental system. Instead, the only means by which an employment seniority system may operate discriminatorily is with reference to a prior act of discrimination.\(^99\)

\(^{95}\) See notes 6-9 and accompanying text supra.


\(^{98}\) See note 9 supra.

\(^{99}\) A Ninth Circuit decision, factually similar to Evans, also establishes this point. In Griffin v. Pacific Maritime Assn., 478 F.2d 1118 (9th Cir. 1973), plaintiffs’ union contract did not credit them for service prior to their discriminatory discharges which occurred before the enactment of Title VII. The court held that under Title VII plaintiffs had failed to exhaust proper state remedies and dismissed their Title VII claim. However, as to their 42 U.S.C. §§ 1981 and 1985 claims, the court asserted that because plaintiffs could establish their claim only with evidence as to what motivated their allegedly discriminatory discharges, the claims were barred by time. Id. at 1120.
CONCLUSION

Sustaining a challenge to the operation of a facially neutral employment seniority system, as Evans did, is not simply a matter of applying established Title VII case law. The theory that a neutral practice may give present effect to past discrimination, and therefore be violative of Title VII, is logical and acceptable only in certain situations. Evans is not a situation in which the theory logically applies. In addition, the potential legal and practical effects of the decision indicate that its significant consequences were not sufficiently considered by the Court of Appeals for the Seventh Circuit.

Several serious implications flow from Evans. First, and perhaps the most serious, is the abrogation of the Act’s statute of limitations. The limitations period may be avoided, according to Evans, when an employee once discriminatorily discharged is, upon rehire, affected by that prior discrimination through the operation of the employer’s seniority system. The rehired employee, by suing on the present practice, avoids the limitations period for the earlier discrimination. Such a result makes the availability of avoidance of the time limitation dependent upon being rehired. Thus, the employee who is discriminatorily discharged and fails to timely file a complaint has no remedy, while the employee so discharged who fails to timely file but who is rehired has a remedy. This anomaly created by Evans will certainly discourage voluntary conciliation and encourage an employer to avoid any further relationship with such an employee.

A second troubling implication of Evans is the court’s broadening of the concept of a “continuing” violation which similarly appears to ineffectuate the Act’s limitations period. Rather than center its deliberations on the time-barred discrimination, the Seventh Circuit in Evans focused on the present, challenged seniority system. The court characterized the operation of the seniority system as a “continuing” violation. Such a characterization tolled the statute of limitations and allowed the plaintiff in Evans to properly file suit at any time during which she was affected by the lesser seniority benefits. Such a conclusion, in all likelihood, leaves the courtroom doors open indefinitely.

Despite the consequences which may flow from Evans, the decision is not an unnatural step in an enlargement of opportunity for employees to gain relief under Title VII. Equal employment opportunity and elimination of all forms of employment discrimination, including neutral practices discriminatory in operation, are consistently expressed objectives of Title VII. Nevertheless, attaining these objectives through the acceptance of Evans
must be balanced against the decision's implications. The impending United States Supreme Court review of *Evans* indicates that the proper balance may not have been struck.

MARY JANE LYNK