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SENIORITY SYSTEMS AS A POTENTIAL THREAT TO EQUAL EMPLOYMENT OPPORTUNITY— *HARRIS V. BEKINS VAN LINES*

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I. INTRODUCTION

In *Harris v. Bekins Van Lines*,[1] the United States District Court for the District of Kansas upheld an employer's use of a seniority system embodied in the collective bargaining agreement.[2] This agreement governed the relationship between the employer and the union representing the employees.[3] The seniority system used two components to measure the respective seniority rights of workers in layoff situations: (1) date-of-service seniority, and (2) possession of a chauffeur's license.[4] The employer then used the seniority calculation to identify the employees to be laid off.[5] As the white employee, unlike the minority worker, possessed a chauffeur's license, he was retained, although employed with the company for a shorter period of time.[6] The court concluded that the employer's seniority determination did not violate § 2000e-2(a) of the Civil Rights Act of 1964.[7] In reaching this conclusion, the district court relied upon the

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1. No. 95-2384-GTV, 1996 WL 570194 (D. Kan. Sept. 27, 1996).
2. *Id.* at *2.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at *2–*3.
7. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).

special protection granted to seniority systems under Title VII.[8] Specifically, in analyzing an adverse impact claim under Title VII, a plaintiff must prove that the employer adopted the seniority system with the intent to discriminate against the plaintiff.[9] In adverse impact cases not involving a seniority system, proof of discriminatory intent is not required to establish liability.[10]

This Note shows that the court's holding in *Harris* utilizes a rationale that presents a significant threat to the goals of equal employment. The *Harris* analysis demonstrates that seniority systems may present a viable vehicle for discrimination in the workplace. Selection criteria that typically would result in employer liability under the equal employment provision of Title VII may be safeguarded from liability by embedding these criteria in a seniority system. Moreover, seniority systems that incorporate discriminatory selection criteria would be more difficult to challenge given the prevailing judicial policy that imports immunity to seniority systems absent evidence that their original adoption was motivated by discriminatory intentions. Finally, this Note maintains that the use of selection criteria to measure seniority is fundamentally flawed because: (1) it is in conflict with limitations that the Supreme Court has established for determining a bona fide seniority system; and (2) it is in conflict with commonly accepted industrial relations principles defining seniority. Therefore, selection criteria do not merit the immunity typically granted by the courts to bona fide seniority systems.

II. BACKGROUND

Section 2000e-2(a) of the Civil Rights Act of 1964 states:

> Employer Practice
> 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.[11]

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8. *See* 42 U.S.C. § 2000e-2(h) (2000).
9. Lorance v. AT & T Techs., Inc., 490 U.S. 900, 905 (1989).
10. *See infra* Part II-A.
11. 42 U.S.C. § 2000e-2(a) (2000).

The equal employment provision of Title VII of the Civil Rights Act of 1964 ("Title VII") was enacted with the goal of assuring equality of employment opportunities through the termination of "practices and devices that discriminate on the basis of race, color, religion, sex, or national origin, in an effort to open employment opportunities for African Americans in occupations which had been traditionally closed to them."[12] Prior to the enactment of Title VII, many African Americans were employed in unskilled jobs.[13] Technological advances decreased the number of unskilled jobs in these industries.[14] In the years leading up to the enactment of Title VII, African Americans experienced increased difficulties in the labor market.[15] "[I]n 1947 the nonwhite unemployment rate was only 64% higher than the white rate, while in 1962 it was 124% higher."[16] Through enactment of Title VII, Congress aimed to create new job opportunities for African Americans in industries from which they previously were excluded.[17] Congress believed this was necessary to achieve the primary goal of the Civil Rights Act—"the integration of African Americans into the mainstream of American society."[18]

A. *General Analytical Framework of Adverse Impact Cases*—Griggs v. Duke Power Co.

In the seminal adverse impact case, *Griggs v. Duke Power Co.*,[19] the Supreme Court recognized the adverse impact theory of liability under Title VII. Prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, Duke Power Company adhered to a discriminatory hiring policy at its Dan River plant.[20] The plant was broken down into five operating departments.[21] Of the plant's five operating departments (Labor, Coal Handling, Operations, Maintenance, and Laboratory and Test), African Americans were hired only for the Labor Department.[22] The highest paying jobs in the Labor Department paid less than the lowest paying jobs in any of the other four departments.[23] In 1955, a requirement of a high school

12. Ann K. Wooster, Annotation, *Title VII Race or National Origin Discrimination in Employment—Supreme Court Cases*, 182 A.L.R. FED. 61 (2002).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
20. *Id.* at 426–27.
21. *Id.* at 427.
22. *Id.*
23. *Id.*

education became mandatory for initial assignment to all departments, excluding Labor, and for transfer from Coal Handling to Operations, Maintenance, or Laboratory.[24] After the Civil Rights Act of 1964 became effective, Duke Power required minimum scores on two professionally prepared aptitude tests, in addition to a high school education, in order to obtain placement in any department, excluding the Labor Department.[25]

The Court found that these criteria had an adverse effect on the employment opportunities of minorities.[26] This adverse effect was, in part, the result of differing graduation rates between white males and minorities at this time in North Carolina. Census data shows that while thirty-four percent of all white males had a high school diploma, only twelve percent of minorities graduated high school.[27] Further evidence of adverse impact is found in EEOC records. These records indicate that "while [fifty-eight] percent of whites passed these tests, only six percent of minorities did."[28] The Court went on to find that "[n]either [test] was directed or intended to measure the ability to learn to perform a particular job or category of jobs."[29]

Justice Brennan, writing for the Court, addressed the issue of

> [W]hether an employer is prohibited by . . . Title VII[] from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question have formerly been filled only by white employees as part of a longstanding practice of giving preference to whites.[30]

Griggs states that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[31] The Court reemphasized this point in commenting, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' . . . Congress directed the thrust of the Act to the *consequences*

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24. *Id.*
25. *Id.* at 427–28.
26. *Id.* at 430. *See also* BENJAMIN WOLKINSON & RICHARD BLOCK, EMPLOYMENT LAW: THE WORKPLACE RIGHTS OF EMPLOYEES AND EMPLOYERS 28 (1996).
27. *Id.*
28. *Id.* at 29.
29. *Griggs*, 401 U.S. at 428.
30. *Id.* at 425–26.
31. *Id.* at 430.

of employment practices, not simply the motivation."[32] Note that, in adverse impact cases, discriminatory intent is not required for the establishment of liability.

Griggs, coupled with *Albermarle Paper Co. v. Moody*,[33] and § 2000e-2(k)[34] work to establish a three-step process for analyzing liability in adverse impact cases.[35] Step one in this analytical framework requires that the plaintiff prove a prima facie case of adverse impact.[36] In proving a prima facie case, the plaintiff bears the burden of proving that the employment practice causes a significantly disproportionate exclusionary impact.[37] Secondly, assuming a prima facie case is established, the employer may defend on the grounds that "the challenged practice is job related for the position in question and consistent with business necessity."[38] The business necessity defense requires a balancing of interests. The interests being balanced are the employer's need for the rule in question and the societal harm inflicted by the disparate impact created by the rule.[39] Finally, "[e]ven if the employer demonstrates a selection device to be job related and consistent with business necessity, a plaintiff may prove unlawful discrimination simply by showing the existence of 'an alternative employment practice [with a lesser adverse impact that the employer] refuses to adopt.'"[40]

This three-step analysis is the generic process used to evaluate a claim of adverse impact under Title VII. As Wolkinson and Block articulate, four primary principles emerge from *Griggs*. First, Title VII does not require "an employer to employ individuals who lack the requisite qualifications to fill a job."[41] Secondly, "[t]ests could be used and raise no Title VII issue as long as they had no disparate impact upon protected class workers."[42] Third, "[t]ests which have a disparate impact are subject to challenge, but might be used if they were proven to be job related."[43] Finally, "[t]o prove disparate impact, charging parties need not demonstrate

32. *Id.* at 432.
33. 422 U.S. 405 (1975).
34. *See* 42 U.S.C. § 2000e-2(k) (2000).
35. BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 86–113 (3d ed. 1996).
36. *See id.* at 88–94.
37. *Id.* at 89.
38. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2002).
39. STEPHEN N. SHULMAN & CHARLES F. ABERNATHY, THE LAW OF EQUAL EMPLOYMENT OPPORTUNITY ¶ 2.05[1] (1990).
40. LINDEMANN & GROSSMAN, *supra* note 35, at 111 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2002) (alteration in original)).
41. WOLKINSON & BLOCK, *supra* note 26, at 29.
42. *Id.*
43. *Id.*

that the employer was motivated by the intent to discriminate."[44] By focusing on the consequences of employer practices, the evidentiary burden required to prove discrimination was reduced, thus allowing employees to more easily challenge and overturn employer selection policies.[45] As a result, *Griggs* acts to restrain the use of discriminatory selection criteria by employers.

B. *Framework For Analyzing Title VII Claims Implicating Seniority Systems*

Seniority systems have a long history in the United States and many rights within the workplace are often determined by seniority.[46] A sampling of such rights includes vacation time, pension benefits, promotion, and firing.[47] Due to the importance and far-reaching influence of seniority rights, Congress sought to ensure that "the passage of Title VII would not unduly impinge upon those rights."[48]

This congressional concern becomes clear upon reviewing the legislative history of § 2000e-2(h). In *International Brotherhood of Teamsters v. United States*,[49] the Supreme Court examined the legislative history of § 2000e-2(h).[50] Prior to the enactment of the Civil Rights Act of 1964, critics voiced concern that its adoption would be destructive of existing seniority rights.[51] In response to these concerns, supporters of Title VII and the Justice Department asserted that even in those instances where the employer has previously engaged in discrimination prior to the passage of Title VII, those established seniority rights would not be impacted.[52] The Court in *Teamsters* wrote:

> [T]he unmistakable purpose of § 703(h) [§ 2000e-2(h)] was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. . . . [T]his was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority than Negroes. . . . To be sure, § 703(h) [§ 2000e-2(h)] does not immunize all seniority systems. It refers only to "bona fide" systems, and a proviso requires that any differences in treatment not be "the

44. *Id.*
45. *Id.*
46. *See* LINDEMANN & GROSSMAN, *supra* note 35, at 51.
47. *Id.*
48. *Id.* at 52.
49. 431 U.S. 324 (1977).
50. *Id.* at 350–53.
51. *Id.* at 350.
52. *Id.*

result of an intention to discriminate because of race . . . ."[53]

In order to guard against these concerns, seniority systems are granted special protection under Title VII, § 2000e-2(h).[54] Therefore, seniority systems are not analyzed under the *Griggs* framework. A significant distinction between the *Griggs* analysis and the analytical framework used when seniority systems are at issue is the requirement of discriminatory intent. As previously stated, the *Griggs* analysis does not require discriminatory intent in order to find liability in adverse impact cases.[55] Comparatively, in *Teamsters,* the Court articulated the bona fide seniority system defense. "The Supreme Court held that, absent a showing of specific discriminatory intent, § 703(h) provides a defense even where adverse impact results."[56] In *Lorance v. AT & T Technologies, Inc.,* the Supreme Court said, "'absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful practice even if the system has some discriminatory consequences.'"[57]

Two questions emerge from these court decisions. First, what constitutes a seniority system? Second, if a seniority system is deemed to exist, how does one determine if it is a bona fide seniority system, thus entitling it to the increased protection provided by § 2000e-2(h)?

"Seniority system" is not a defined term in Title VII.[58] In *California Brewers Ass'n v. Bryant,*[59] the Supreme Court said that

> [a] "seniority system" is a scheme that, alone or in tandem with non-"seniority" criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase. . . . [T]he principal feature of any and every "seniority system" is that preferential treatment is dispensed on the basis of some measure of time served in

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53. *Id.* at 352–53.

54. 42 U.S.C. § 2000e-2(h) (2002) provides:

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

Id.

55. *See supra* Part II-A.

56. LINDEMANN & GROSSMAN, *supra* note 35, at 54 (citing Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324 (1977)).

57. *Lorance*, 490 U.S. at 904 (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 82 (1977)).

58. *See* 42 U.S.C. § 2000e (2002).

59. California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980).

employment.[60]

The fact that no bright line test exists for determining whether a certain scheme may be properly labeled a seniority system was not lost on the Supreme Court. In *California Brewers Ass'n*, the Court acknowledged that "[s]eniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes."[61] The Court then proceeded to state:

> In order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment . . . . Rules that serve these necessary purposes do not fall outside § 703(h) [42 U.S.C. § 2000e-2(h)] simply because they do not, in and of themselves, operate on the basis of some factor involving the passage of time.[62]

The breadth of the Court's statement demonstrates the broad immunity that is granted to seniority systems under Title VII.

If an employment scheme is deemed to be a seniority system under the Court's ambiguous definition, it does not automatically ensure that the scheme will be granted the protection provided by § 2000e-2(h). In order to receive such protection, the seniority system must be bona fide—"it must not be adopted or operated with a discriminatory intent."[63] The plaintiff bears the burden of proving that a seniority system is not bona fide.[64] The Supreme Court in *Teamsters* provided that a determination of discriminatory intent requires evaluation of the "totality of the circumstances."[65] Though it is not an all-inclusive list of factors to be evaluated in making such a determination of discriminatory intent, in *James v. Stockham Valves & Fitting Co.*,[66] the Fifth Circuit established a four-factor test to guide the analysis. These factors include:

> 1. whether the seniority system operates to discourage all employees equally . . . ;
> 2. whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
> 3. whether the seniority system had its genesis in racial discrimination; and

60. *Id.* at 605–06.
61. *Id.* at 608.
62. *Id.* at 607.
63. LINDEMANN & GROSSMAN, *supra* note 35, at 60.
64. *Id.* at 61.
65. *Teamsters*, 431 U.S. at 352.
66. 559 F.2d 310 (1977).

4. whether the system was negotiated and has been maintained free from any illegal purpose.[67]

Only if the seniority system is determined to be bona fide will it qualify for the protections granted by § 2000e-2(h).[68]

C. *Selection Procedures*

Employers often rely upon selection procedures in managing their workforce. The Uniform Guidelines on Employee Selection Procedures ("Uniform Guidelines") adopted by the Equal Employment Opportunity Commission ("EEOC") define the term "selection procedure" as "[a]ny measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include . . . assessment techniques from traditional pencil and paper tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms."[69] The Uniform Guidelines define "employment decisions" to include, but not be limited to, "hiring, promotion, demotion, membership . . . referral, retention, and licensing and certification . . . . Other selection decisions . . . may also be considered employment decisions if they lead to any of the decisions listed [in the definition of selection procedure]."[70]

Assuming a selection procedure is facially neutral and applied in a constant manner across classes covered by Title VII, it should be analyzed under the process articulated in *Griggs* (described above).[71] The EEOC guidelines and Supreme Court doctrine make it apparent that factors used by employers to measure a worker's ability and fitness are considered selection criteria. Hence, *Griggs* should be applied to such factors. Significantly, courts have applied this same judicial approach to licensing requirements. The results in cases challenging license requirements have been mixed.[72] As is often the case under the *Griggs* analysis, the results turn on whether the license requirement was inherently job related.

EEOC v. Local 14, International Union of Operating Engineers[73] is an example of a court finding a licensing requirement to be in violation of

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67. *Id.* at 352.

68. *See* LINDEMANN & GROSSMAN, *supra* note 35, at 62–65 (discussing implementation of these four factors).

69. 29 C.F.R. § 1607.16(Q) (2005).

70. 29 C.F.R. § 1607.2(B) (2005).

71. *See supra* Part II-A (presenting the *Griggs* framework for analyzing an adverse impact claim under Title VII).

72. *See* LINDEMANN & GROSSMAN, *supra* note 35, at 184–85.

73. 553 F.2d 251 (2nd Cir. 1977).

Title VII. Local 14 and ten contractors associations with which the local negotiated collective bargaining agreements were charged with discriminating against non-whites and Spanish surnamed workers.[74] Local 14's members operated machinery in building and construction work.[75] The membership of Local 14 was historically white, and as of 1974, only 2.8% of its members were minorities.[76] The district court found that the "labor pool for operating engineers in New York City consisted primarily of males living in the City who have a high school education or less; that the black percentage of this pool was 20.76% and the percentage for Spanish surnamed males was 15.63%," totaling 36.39% for the group.[77] Local 14 argued that this disparity was the result of job related membership admission requirements that included: a New York City Hoist Operator's license, the ability to operate more than one piece of equipment, and 200 days' worth of experience.[78] The appeals court held that such requirements were not justifiable on the basis of business necessity.[79] This determination was based upon the finding that a city license was not required for a worker to earn a living as an operating engineer.[80] That the licensing requirement was not a business necessity was demonstrated by the fact that many union members allowed their licenses to lapse.[81] The license requirement worked to disproportionately exclude minorities from Local 14 because few minority members of the labor pool possessed such licenses.[82] For this reason, the license requirement was found to be in violation of Title VII.

III. DISCUSSION—*HARRIS V. BEKINS VAN LINES*

A. Facts

Harris v. Bekins Van Lines involved an allegation that Bekins Van Lines ("Bekins"), a company engaged in interstate movement and storage, violated 42 U.S.C. § 2000e-2(a).[83] Bekins had six drivers, packers, and helpers working at its Kansas City facility who were represented by the Teamsters Union.[84] The collective bargaining agreement ("CBA") in place during the time period at issue provided that seniority determined the order

74. *Id.* at 253.
75. *Id.*
76. *Id.* at 254.
77. *Id.*
78. *Id.* at 256.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. No. 95-2384-GTV, 1996 WL 570194 at *1 (D. Kan. Sept. 27, 1996).
84. *Id.* at *2.

in which employees would be laid off.[85] As a result of economic decline, Bekins reduced the number of drivers, packers, and helpers at the Kansas City facility by laying off all but three of its drivers, packers, and helpers.[86]

As required by the CBA, Bekins used two criteria to calculate each employee's seniority: (1) actual date-of-service seniority; and (2) possession of a chauffeur's license.[87] This calculation resulted in Harris, a black male, being ranked fourth in seniority among the employees, although he had greater date-of-service seniority than the white employee who was ranked third.[88] The white employee was hired three months after Harris but was ranked higher than Harris because he, but not Harris, possessed a chauffeur's license.[89] Following the layoff, Harris filed a Title VII claim contending that he was discriminated against on the basis of race.

B. The Harris *Court's Analysis*

The parties agreed that Bekins used a nondiscriminatory, bona fide seniority system in determining which employees to lay off.[90] Based on this finding, the court held that Bekins was entitled to summary judgment.[91] The court applied *Griggs v. Duke Power Co.*[92] in reaching this conclusion.[93] The court acknowledged that pursuant to *Griggs*, Title VII prohibits "practices that are fair in form, but discriminatory in operation."[94] However, the court ruled that the fact pattern presented in *Harris* fell outside of the *Griggs* analysis because it involved a bona fide seniority system which is granted special protection under 42 U.S.C. § 2000e-2(h).[95] The court also cited *Lorance v. AT & T Technologies, Inc.*,[96] noting that "[f]or liability to inure to defendant, plaintiff must prove that defendant adopted the seniority system with the intent to discriminate against plaintiff."[97]

Once the court presented this legal framework, it quickly disposed of Harris' claim.[98] Harris never asserted that the seniority system in place at

85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at *3.
91. *Id.*
92. 401 U.S. 424 (1971).
93. *Harris*, 1996 WL 570194, at *2.
94. *Id.* (quoting *Griggs*, 401 U.S. at 431).
95. *Id.*
96. 490 U.S. 900 (1989).
97. *Harris*, 1996 WL 570194, at *2 (quoting *Lorance*, 490 U.S. at 905).
98. *Id.* at *3.

the time of the layoff failed to meet the requirements of a bona fide system or that the seniority system's implementation was motivated by a discriminatory purpose.[99] The court determined that Bekins properly followed the established bona fide seniority system in determining employee layoffs.[100] Thus, Bekins properly laid off Harris because his lack of a chauffeur's license resulted in his possession of less seniority than the white employee who was retained. The court noted that under these circumstances, laying off the white employee with less service time than Harris would have violated the CBA and put the bona fide character of the CBA in jeopardy.[101] Based upon this analysis, the court granted Bekins' motion for summary judgment.[102]

IV. THE APPLICATION OF SENIORITY IN INDUSTRIAL RELATIONS

The *Harris* court's analysis of Bekins' seniority system merits rejection because it is inconsistent with industrial relations approaches to seniority. In the employment realm, "seniority" refers to length of service.[103] One of the functions served by seniority is that it limits management discretion in employment decisions.[104] Employers typically oppose seniority provisions in order to exercise maximum flexibility in employment decisions.[105] Conversely, unions support seniority clauses to prevent employee favoritism and to protect the job security of workers with the most years of service in the organization.[106] Most CBAs attempt to balance these management and union concerns by requiring that the employer consider both seniority and employee qualifications when making employment decisions.[107] These provisions are commonly called modified seniority clauses and can be broken down into three categories:

> 1. "relative ability" clauses, which state that the senior employee will be given preference if he possesses qualifications equal to that of junior employees;
> 2. "sufficient ability" clauses, wherein preference is given to the senior employee provided he is qualified for the job; and
> 3. "hybrid" clauses, which require only that the employer give consideration to both seniority and qualifications, without

99. *Id.* at *3.
100. *Id.*
101. *Id.*
102. *Id.*
103. LAURA J. COOPER ET AL., ADR IN THE WORKPLACE 338 (2000).
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 351.

indicating the relative weight to be accorded these factors.[108]

The importance of seniority in employment can be understood by examining promotion clauses in CBAs. In seventy-two percent of contracts, seniority is given a role in determining promotions.[109] Seniority acts as the sole factor in promotions in five percent of contracts.[110] In forty percent of CBAs seniority is the determining factor assuming the job applicant meets the minimum qualifications.[111] Seniority is a secondary factor in twenty-four percent of such contracts.[112] In such contracts the employer can bypass the more senior employee if the worker selected by management possesses less seniority but is more qualified. Finally, seniority is granted equal consideration with other factors in determining promotion in two percent of contracts.[113]

These CBAs demonstrate that seniority and measurements of ability are two distinct phenomena. Ability measurements are not considered part of seniority. Both the courts and the parties negotiating seniority clauses routinely treat seniority and qualification measurements as distinct notions. By treating a qualification measurement, such as a chauffeur's license, as part of the seniority clause, the *Harris* court misapplied industry practices regarding seniority. In addition to being unreasonable, the *Harris* court's approach in analyzing such a hybrid contract clause is dangerous because, as will be examined below, it would allow employers to circumvent *Griggs* through the adoption of seniority clauses that contain selection criteria that may restrict minority employment opportunities.

V. THE THREAT TO EQUAL EMPLOYMENT OPPORTUNITY POSED BY THE *HARRIS* DECISION

Due to the special protection granted to seniority systems under Title VII, seniority systems present a possible vehicle through which employers may implement discriminatory mechanisms negatively impacting minority employment. This threat arises from the fact that non-validated selection criteria having a disparate impact, when embedded within a seniority system, would no longer be subject to scrutiny under the *Griggs* framework. Furthermore, when implemented through a seniority system, such discriminatory selection criteria could only be proven unlawful if the plaintiff were able to demonstrate a discriminatory intent. Such a showing

108. *Id.*
109. THE BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 75 (10th ed. 1983).
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*

is very unlikely given the difficulty of establishing direct evidence of employment discrimination. Yet, such evidence would be necessary in view of the prevailing judicial policy that seniority systems are lawful absent evidence of a hostile discriminatory intent.

This threat to equal employment opportunity was explicitly recognized by the Supreme Court in *California Brewers Ass'n v. Bryant.*[114] In *California Brewers Ass'n*, the Court indicated that employers are not to evade Title VII by embedding discriminatory selection criteria in a seniority system.

> What has been said does not mean that § 703(h) [42 U.S.C. § 2000e-2(h)] is to be given a scope that risks swallowing up Title VII's otherwise broad prohibition of "practices, procedures, or tests" that disproportionately affect members of those groups that the Act protects. Significant freedom must be afforded employers and unions to create differing seniority systems. But that freedom must not be allowed to sweep within the ambit of § 703(h) [42 U.S.C. § 2000e-2(h)] employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system, simply because those rules are dubbed "seniority" provisions or have some nexus to an arrangement that concededly operates on the basis of seniority.[115]

The threat warned of in *California Brewers Ass'n* is precisely the negative outcome that occurred in *Harris*. In *Harris*, Bekins incorporated a licensing requirement into the seniority provision and then proceeded to use it to measure seniority.[116] Note, the employer could have substituted any other selection criteria in the place of the license requirement. For example, a pencil-and-paper test, an interview, or possession of a college degree could be embedded into a seniority clause and used to deprive minority workers of job opportunities. Such an outcome would eviscerate *Griggs*, which was designed to outlaw selection criteria having a disproportionately adverse effect, unless such selection criteria were proven to be job related.

Furthermore, were the *Harris* decision to be approved of by higher level courts, it would be extremely difficult to overturn seniority systems which have disparate impact given the Supreme Court ruling that seniority systems are immune from challenge absent evidence that they were implemented with the intent to discriminate against minorities.[117] Appellate courts have recognized the inherent difficulty in proving an employer's discriminatory intent. While discussing the difficulty of

114. 444 U.S. 598 (1980).
115. *Id.* at 608.
116. *Harris*, 1996 WL 570194, at *2.
117. Lorance v. AT & T Techs., Inc., 490 U.S. 900 (1989).

proving an employer's discriminatory intent, the Sixth Circuit in *Radue v. Kimberley-Clark Corp.*[118] wrote, "[d]irect evidence essentially requires an admission by the decision-maker [employer] that his actions were based on the prohibited animus."[119] At the same time, the *Radue* court recognized that "most employers are careful not to openly discriminate and certainly not to publicly admit it."[120] The Supreme Court has also acknowledged that the employer will typically have better access to the proof of discrimination than will the plaintiff.[121] Similarly, in *La Montagne v. American Convenience Products, Inc.*,[122] the Seventh Circuit acknowledged the difficulty in proving an employer's discriminatory intent, because "an employer who knowingly discriminates . . . may leave no written records revealing the forbidden motive and may [not] communicate it . . . . When evidence is in existence, it is likely to be under the control of the employer, and the plaintiff may not succeed in turning it up."[123] It is clear that charging parties confront extreme difficulty in proving that a seniority system was deliberately implemented with the purpose of discriminating.

VI. RECOMMENDATION—HOW *HARRIS* SHOULD HAVE BEEN DECIDED

The *Harris* court was faced with a distinct seniority clause. As opposed to treating date-of-service seniority and possession of a chauffeur's license as comprising a single seniority clause, the court should have separated these two aspects of the provision and analyzed each separately.

The requirement of a chauffeur's license is a qualification clause and not part of seniority. As such, the license qualification should not be granted the special protection provided to a seniority system under 42 U.S.C. § 2000e-2(h). Rather, it should be analyzed under the *Griggs* framework.

Within the *Griggs* framework, Harris is first required to prove a prima facie case of adverse impact. Harris bore the burden of proving that the requirement of a chauffeur's license caused a significantly disproportionate exclusionary impact. Harris failed to establish such a prima facie case. Harris only alleged that Bekins laid him off while retaining a white employee with less time of service.[124] This allegation in no way demonstrated that the requirement of a chauffeur's license caused a

118. 219 F.3d 612 (6th Cir. 2000).
119. *Id.* at 616.
120. *Id.*
121. *See* Int'l Bhd. Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977).
122. 750 F.2d 1405 (7th Cir. 1984).
123. *Id.* at 1410.
124. *Harris*, 1996 WL 570194, at *3.

significantly disproportionate exclusionary impact. This is not to say that making such a showing was not possible. For example, Harris could have attempted to demonstrate a disproportionately exclusionary impact by introducing evidence that fewer African Americans than others possessed a chauffeur's license at the time of Harris' layoff. Nonetheless, no such evidence was presented.

Because Harris failed to establish a prima facie claim of disproportionate exclusionary impact, the court should have determined that there was no Title VII violation, and as a result, that Bekins was entitled to summary judgment. Thus, under both the proposed analytical framework and the framework utilized by the *Harris* court, a granting of summary judgment in favor of Bekins is the final result. However, the means by which this result is achieved is drastically different. By treating the license requirement as part of the seniority provision, the *Harris* court incorrectly applied Supreme Court doctrine and ignored industry practices regarding seniority. The *Harris* court's framework in analyzing such a hybrid contract clause is dangerous because its adoption would allow employers to circumvent *Griggs* through the use of seniority clauses incorporating selection criteria. In comparison, the proposed analytical framework does not present such a danger and protects the disparate impact doctrine endorsed by the Supreme Court in *Griggs*.

VII. CONCLUSION

The decision in *Harris* is a district court case, and hence, may be of limited precedential value. However, highly authoritative commentators, such as Larson, have cited the decision as an example of a seniority system that withstood legal challenge. Note, when Larson cited *Harris*, no critical commentary was provided.[125] As such, other courts may mistakenly adopt *Harris*. Discerning jurists should understand that the court's approach in *Harris* represents a misguided application of Supreme Court decisions on both seniority systems and selection criteria which, if adopted, would undermine equal employment opportunity goals.

125. LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 30.02D[2] n.7 (2d ed. 2005).