Here's to You Mrs. Robinson -- Title VII and the Hangover Effect of Prior Racial Discrimination in Hiring

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IV. Conclusion

Rebuttable presumptions as to a student's domiciliary intent do not appear to be discriminatory in theory, because all persons are subject to a factual determination of domiciliary intent under a strict application of the law of domicil to voting residency laws. However, the burden of factual proof is greater for those whose presence in the community is for what are ordinarily conceived to be "temporary" purposes. Thus students, unlike persons in other occupational categories, are not able to vote in local elections after establishing that they dwell in the community and declaring their domiciliary intent. This discrimination is not strictly necessary to achieve any legitimate state purpose and cannot be sustained under the equal protection clause if the "compelling interest" standard is applicable. That standard should be invoked by the courts whenever any person is denied the vote, whether or not he be an admitted resident by state standards. A citizen's vote is the foundation of our representative democracy. Any state abridgement of access to the vote should be given the closest judicial scrutiny. The equal protection clause requires no less!

VANCE BARRON, JR.

Here's to You Mrs. Robinson—Title VII and the Hangover Effect of Prior Racial Discrimination in Hiring

Mrs. Dorothy Robinson applied for a job with the P. Lorillard Company at its Greensboro, North Carolina, plant following its opening there in 1956.¹ Mrs. Robinson was referred to the North Carolina Employment Service Office, an exclusively Black agency. All of Lorillard's Black job applicants were referred to that office. During this time, Lorillard practiced a policy of racial discrimination in its hiring policy. Mrs. Robinson was allowed to apply only for a position in one of the "Black" departments of the Company. She accepted a job in the "Black" service department and had worked for Lorillard from that time.²

Mrs. Robinson and her fellow employees, both Black and White,

¹During the course of the litigation discussed below, P. Lorillard Company changed its name to Lorillard Corporation.
were represented by the Tobacco Workers International Union in their dealings with the company. The Greensboro local was, in fact, the first integrated local in the entire tobacco industry. Included in the many facets of the union and management negotiations were the development and evolution of a seniority system for the workers at the Greensboro plant.

A system of seniority was included in the first bargaining agreement between the union and Lorillard in 1957. This agreement established seniority rights based upon a worker's tenure in his specific job in one of nine production and service departments and prohibited transfers between departments. Under this plan, Mrs. Robinson could aspire to no greater position than that of senior floor sweeper in the all-Black service department. In 1962, the Company negotiated a new contract which eliminated job seniority, but maintained departmental seniority. Under this plan, any worker in a department could "bid" for an opening based on his length of service in the department. Interdepartmental transfers were allowed, but a transferring employee was required to forfeit all his accumulated seniority rights and start in his new position at the lowest entry level. Each day that Mrs. Robinson worked in the service department she had more to lose in transferring. In 1962, the Company eliminated racial discrimination in its hiring practices. The seniority system continued as outlined above with minor amendments until Mrs. Robinson went to Federal court to challenge it as racially discriminatory.

In *Robinson v. Lorillard Corporation*, the Fourth Circuit Court of Appeals upheld an order of the North Carolina Middle District Court outlawing the seniority system as it existed, restructuring it with plant-wide seniority as the determining factor in job mobility and protection. Both the circuit court and the district court held that the seniority system established by Lorillard perpetuated the effects of the
company's prior policy of racial discrimination in hiring\textsuperscript{13} and was thus illegal under Title VII of the Civil Rights Act of 1964.\textsuperscript{14}

Title VII deals with racial discrimination in labor practices and is one of eleven sections of the Civil Rights Act, a comprehensive statute formulated to attack institutionalized racial discrimination on many fronts.\textsuperscript{15} Section 703 of Title VII states that an employer may not lawfully "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 or employment" because of his race, color, religion, sex or national origin, or to "limit, segregate, or classify his employees in any way which would . . . deprive any individual of employment opportunities or otherwise adversely affect his status as an employee."\textsuperscript{16} Labor organizations are similarly prohibited from acts of discrimination.\textsuperscript{17} Mrs. Robinson, as plaintiff, in her individual capacity and representative of the class of all persons hired into all-Black departments under the discriminatory policy, sued Lorillard Corporation under section 703 and alleged that the seniority system as it had evolved effectively kept them from advancement into higher paying departments. Transferring would have required that plaintiffs forfeit their accumulated seniority and, in many cases forced them to take an actual cut in pay. Plaintiffs argued that because they were Black and because they were hired into the lowest paying "Black" departments, they had had no chance of being anywhere else in the hierarchy of jobs.\textsuperscript{18} For example, if two workers, one Black and one White, went to work prior to 1962 on the same day, the White worker would begin in a department paying a higher wage and offering more responsibility. Even after all racial discrimination was eliminated in present employee selection procedures, the Black employee would never attain seniority on a parity with the White worker under a system of job or departmental seniority. This, Mrs. Robinson argued, was discriminatory under section 703. She

\textsuperscript{13}444 F.2d at 794-95; 319 F. Supp. at 842.
\textsuperscript{17}Id. § 703(d), 42 U.S.C. § 2000e-2(c) (1970).
pointed to evidence (not uncontradicted, but accepted by the court) that in spite of the transfer provision in the 1962 agreement, 85 per cent of the Blacks and 97 per cent of the Whites hired prior to 1962 had not transferred departments.\textsuperscript{10} Apparently the dual factors of sacrifice of seniority rights and the possibility of a cut in pay "operated as built-in headwinds"\textsuperscript{20} which offered resistance to the aspirations of Black workers.

Mrs. Robinson convinced the district court that the Lorillard seniority system was discriminatory. The court ordered the system restructured and granted the plaintiffs an award of back pay that has been calculated to be in excess of 500,000 dollars.\textsuperscript{21} However, the court denied attorneys' fees to the plaintiff.\textsuperscript{22}

On appeal Lorillard Corporation admitted a policy of racial discrimination prior to 1962, but argued that its seniority system did not retain the effects of that discrimination. Even if it did, the company argued, it was insulated from attack by provisions of Title VII that set certain exceptions and limitations to the inclusive wording of section 703.

Lorillard first argued that even if the system might show some effects of discrimination, it was not illegal unless "the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice."\textsuperscript{23} Intent, however, in the employment context has been interpreted to mean "only that the defendant meant to do what he did, that is, his employment practice was not accidental."\textsuperscript{24} A judicial interpretation of "intent" in regard to Title VII cases was formulated by the Supreme Court in \textit{Griggs v. Duke Power Co.}\textsuperscript{25} There the court said, "[C]ongress directed the thrust of the Act (Civil Rights Act of 1964) to the consequences of employment practices, not simply the motivation,"\textsuperscript{26} adding that "good intent or absence of discriminatory intent does not redeem employment procedures"\textsuperscript{27} otherwise found discriminatory.

\textsuperscript{10}Id. at 840.
\textsuperscript{21}Letter from C. Allen Foster, Attorney for Lorillard Corporation, to Lee A. Patterson, II, January 21, 1972.
\textsuperscript{22}319 F. Supp. at 843.
\textsuperscript{25}401 U.S. 424 (1971).
\textsuperscript{26}Id. at 432 (emphasis in the original).
\textsuperscript{27}Id.
Failing on the issue of intent, Lorillard next argued that its system of seniority was acceptable as “bona fide” under Section 703(h). This section states, “Notwithstanding any other provision of this subchapter, its shall not be . . . unlawful . . . 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 . . . .” Again arguing that there was no “intent” to discriminate, Lorillard submitted that this exception would render its seniority system acceptable under the law.

Rejecting this contention, the circuit court cited the first case of major impact regarding discriminatory effects of a seniority system: Quarles v. Phillip Morris, Inc. There the court said, “Obviously one characteristic of a bona fide seniority system must be lack of discrimination.” The court accepted the idea that Congress could not have intended “to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act.”

A federal district court sitting in Virginia in a case subsequent to Robinson summarized the law in the Fourth Circuit. “[T]he law in this circuit is that if an employee still suffers the effects of past discriminatory acts, even though the employer’s policy may have changed, he is entitled to relief.”

Failing in defenses arising from statutory interpretation, Lorillard argued that if its system was based on a business purpose and was organized so that it was “necessary to the safe and efficient operation of the business,” it could withstand attacks of discriminatory effect on some employees. The basis of this argument is that even in the enforcement of civil rights, the courts have not required changes in the structure of the defendant business or corporation so severe as to drive it out of business or seriously damage its safe and efficient operation.

This defense raised by Lorillard required the circuit court to formulate a test against which to measure the effects of reorganizing the
seniority system. This test was that of "business necessity." Before laying out the component parts of its own test, the court reviewed formulations from other courts and jurisdictions.

The cases set out two different lines of decision. One upholds seniority systems that are formally discriminatory on the basis of the need for efficiency and safety. In cases where one job qualifies a worker for the next along a line of progression, the need for ability and skill may outweigh the desire to root out the last vestiges of discrimination. The Fifth Circuit Court of Appeals commented that it would uphold a system of seniority on the need of employees "to perform the jobs satisfactorily and—more importantly—without danger of physical injury to themselves and their fellow employees." One district court commented, "The company is not required to forgo its legitimate interest in maintaining the skill and efficiency of its labor force."

The other line of decisions requires more than a mere showing of greater safety or efficiency in the old discriminatory system than in a proposed new one. Although no court as of yet has required an employer "to place an unqualified employee into a particular job qualification," some, following this second line of reasoning, have reflected the approach taken by the Second Circuit in United States v. Bethlehem Steel Corp., suggesting that qualification must be clearly proved essential before it will be considered necessary. "Necessity connotes an irresistible demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals." The Tenth Circuit rejected defense arguments that allowing transfer in violation of the existing discriminatory agreement would increase costs and create problems with the negotiating unions.

"Some have asserted that no amount of business purpose should be accepted as justification for a seniority system with a significant detri-

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3In Griggs, the Supreme Court set out a test of "business necessity" stating, "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431.


9446 F.2d 652 (2d Cir. 1971).

10Id. at 662.

mental impact on minorities."^43

Weighing the two lines of authority, the Robinson court accepted this second view, placing an extreme burden on the defendant company to clearly demonstrate the business necessity of its practice. It couched its test for business necessity in terms of "overriding legitimate business purpose . . . necessary to the safe and efficient operation of the business . . . sufficiently compelling to override any racial impact . . . [with] no acceptable alternative policies or practices."^44 In effect, this test is a judicial amalgamation of those offered by the Second and Tenth Circuits, extending the scope and coverage beyond either of those circuit's individual tests.^45

Against this formulation, the "business purposes" offered by the company had little chance for success. The arguments that extra administrative expenses would be involved in changing the system and that the same system was working in other places were summarily dismissed.^46 Evidence of pressure from the union to adopt the existing system was also rejected as insufficient for business necessity.^47 The assertion that an alteration of the system would adversely affect "efficiency, economy, and morale" was also found insufficient.^48 Finally, a stepping-stone theory of progressive job advancement, with one job serving as necessary training for the next, was rejected as unsupported by the facts. The district court in Robinson explained that higher level jobs in the company were simply not so difficult that they required a stepping-stone approach, pointing out that between 1956 and 1968 all employees who transferred between unrelated departments were successful at their new jobs.^49 It was equally damning that the seniority system granted as relief by the district court and appealed from by the company was precisely the same system offered by the company to and rejected by the union in collective bargaining three years earlier.^50

The argument that the new system would disappoint the expecta-

^43 Note, Employment Discrimination and Title VII of the Civil Rights Act of 1964, supra note 14, at 1163.
^44 444 F.2d at 798.
^45 See the Robinson court's discussion of these tests. 444 F.2d at 797.
^47 444 F.2d at 799.
^48 Id.
^50 444 F.2d at 799.
tions of the White workers was rejected as a necessary price to pay in the achievement of equality in opportunity. On this point, the Bethlehem Steel court stated, "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."\

Mrs. Robinson and her fellow plaintiffs won a total victory before the circuit court. The court not only upheld the restructuring of the seniority system and awarded back pay, but also reversed the lower court and granted attorneys' fees. These fees and out-of-pocket expenses were estimated to be in excess of 225,000 dollars.

In reversing the district court on attorneys' fees the circuit court quoted its own memorandum opinion, Lea v. Cone Mills, Inc., which granted attorneys' fees to a plaintiff in a Title VII suit on the authority of Newman v. Piggie Park Enterprises. There the Supreme Court required attorneys' fees awards in cases under Title II of the Civil Rights Act. Title II outlaws discrimination in public accommodations. The Supreme Court in Piggie Park commented that attorneys' fees should be required because plaintiffs under that section were acting in fact as "private attorneys-general," winning rights for all affected by violations of the public accommodations section. Under Title II as under Title VII, there is no allowance for monetary relief.

The dissent in Cone Mills pointed out the differences between possible relief under Titles II and VII, and added that under both titles the authority to grant attorneys' fees was in the discretion of the trial judge, so that in the absence of a ruling from the Supreme Court on Title VII

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446 F.2d at 663.
444 F.2d at 804.
Letter from C. Allen Foster, attorney for P. Lorillard Corporation, to Lee A. Patterson, January 21, 1972.
The court also upheld the district court order of the adoption by the company of a procedure of "red circling" which would allow a transferee to retain his former rate of pay in his new job, regardless of the level at which the new job started, until the transferee reached a level where the pay rate equalled or exceeded that of his former job. 444 F.2d at 799.
438 F.2d 86 (4th Cir. 1971) (per curiam).
Id. at 402; Act § 204(b), 42 U.S.C. § 2000a-3(b) (1970).
390 U.S. at 402.
analogous to *Piggie Park* on Title II (which converted the discretionary grant of attorney’s fees into a mandatory order) the lower court should not be reversed without a showing of abuse of discretion. The legislative history of Title VII would support the Lorillard court’s decision on the attorneys’ fees, but this was not mentioned. The court was apparently confident in resting its holding on the *Cone Mills* precedent.

*Robinson v. Lorillard* is a decision of great importance to employer and employees alike. Although it does not appear to completely resolve the problems of Title VII litigation, it clearly defines the terms in which such cases will be argued. The court’s formulation of its “business necessity test” puts any company defendant on notice that it faces significant obstacles in proving that its seniority system is essential to safe and efficient operation. Perhaps nothing will suffice short of a tightly structured seniority plan where one job trains a worker for the next and where experience is proven necessary for progression as well as the training.

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438 F.2d at 90-91. In *Newman*, the Supreme Court commented “[O]ne who succeeds under that Title (Title II) should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.” 391 U.S. at 402.


The plaintiffs also cite cases upholding the idea mentioned in *Newman* that a plaintiff in a discrimination case acts not only for himself, but also as a “private attorney general” to correct wrongs injuring the community at large. 390 U.S. at 402. They are Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 739-20 (7th Cir. 1969); Jenkins v. United Gas Corp., 400 F.2d 28, 32-33 (5th Cir. 1968); Oatis v. Crown Zellerback Corp., 398 F.2d 496, 499 (5th Cir. 1968). Brief for Appellee at 14, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971). Although these cases do give precedent for analogizing Title VII to Title II as interpreted by *Newman*, they do not speak to the point of overruling a district judge declining to grant attorneys’ fees.

44When the Civil Rights Act of 1964 first passed the House, it allowed any member of the Equal Employment Opportunities Commission to file a charge against an employer. 110 CONG. REC. 13693 (1964) (Remarks of Senator Humphrey). This procedure was changed in the Senate to require an aggrieved worker to bring suit or to allow the Attorney General to bring action against the employer. Act §§ 706(e), 707(a), 42 U.S.C. §§ 2000e-5(e), 2000e-5(a) (1970). Therefore there is some legislative history that suggests that there was intent to encourage workers injured by an employment practice made illegal by the title to bring suit without the inhibiting factor of possibly being saddled with the cost of attorney’s fees.
Robinson clearly places the burden of proof and persuasion on the defendant company to show that its seniority system is not discriminatory or that it is necessary. The plaintiff apparently needs only to prove that the company once practiced racial discrimination, and that there are workers presently with the company who were affected by it. This fact is brought home forcefully when one realizes that in Robinson the plaintiff won virtually every point. In demands for relief, procedural contests, and factual discrepancies, the court accepted the plaintiff's argument.62

Only time and subsequent litigation will tell how widely the sweep of the Robinson opinion will be in other situations and in other industries. The tobacco and textile industries of this state could be greatly affected. The expenses and attorneys' fees awarded to the plaintiffs approach 750,000 dollars. Such an award could seriously affect the profits and business lives of many of the marginal industries in the South.

Finally, this decision has a great impact on the working man, both Black and White. Any decision that alters seniority rights affects what is perhaps as important a right as has been developed in and been protected by the collective bargaining system.63 It is an unfortunate necessity that the inequities of years of racial discrimination may only be corrected by actions affecting the plans and aspirations of some White workers who may be personally blameless for the situation.

Lorillard Corporation filed a petition for certiorari in the Supreme Court on September 24, 1971. In the brief of that petition, the company requested a reversal of the order of back pay for the class of injured employees and a reversal of the court of appeals ruling allowing attorneys' fees. Lorillard based its first reason for appeal upon the argument that back pay should not be granted since they had operated their system of seniority in reliance on a letter from the Equal Employment Opportunity Commission, filed July 27, 1966, holding that there was no reasonable cause to believe that their system violated Title VII. Petitioner's Brief for Certiorari at 8-11, filed Sept. 4, 1971. The company also argued that the plaintiff had waived the claim for money damages in their brief and in pretrial negotiations. Id. at 18-19.

The company also questioned the court's reversal of the district court's denial of attorneys' fees, largely for the reasons expressed in the Cone Mills dissent. The company's brief on the petition for certiorari distinguishes Newman on the grounds that under Title II, the plaintiff would be acting as a "private attorney general," and if he were successful, he would attain an injunction against the offending party rather than any money recovery. Petitioner's Brief for Certiorari at 15-17.

Pursuant to a settlement agreement between the two parties approved by the district court, Lorillard Corporation withdrew its petition for certiorari. Letter from C. Allen Foster, Attorney for Lorillard Corporation, to Lee A. Patterson, II, March 8, 1972.

Robinson v. Lorillard demonstrates at least two important principles regarding the elimination of racial discrimination in employment. First, it shows the vigor with which the courts will attack the system that shows the signs of perpetuating discrimination. Secondly, it reveals that the costs of this necessary effort are very high.

Lee A. Patterson, II

Private Prosecution—The Entrenched Anomaly

Since the days of our Constitution's infancy, traditional judicial truisms have been superseded by the viable doctrines of "due process," "equal protection," and "judicial fairness." Notwithstanding this evolution, there remain seemingly impregnable citadels of judicial tradition. One such remnant of the past is the policy allowing private prosecution in criminal actions. Recently in State v. Best, the North Carolina Supreme Court reiterated its stand condoning the practice.

I. BACKGROUND AND STATE OF LAW

At common law criminal prosecution adhered to the pure form of the adversary system; each aggrieved party retained his own counsel to prosecute his private interest. The private prosecutor had the case laid before the grand jury and took charge of the trial before the petit jury. Despite statutory provisions requiring a public prosecutorial system and judicial repudiation of the procedure in some jurisdictions private prosecution remains well entrenched.

While adhering to the philosophy of the common law rule, the North Carolina courts have modified its application. Whereas the clas-