IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-432, 78-435, 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, et al., *Petitioners*,

v.

BRIAN F. WEBER, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICI CURIAE

For:

American Federation of State, County and Municipal Employees, AFL-CIO
International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC
International Union of Oil, Chemical and Atomic Workers, AFL-CIO
International Union, United Automobile, Aerospace and Agricultural Implement Workers (UAW)
International Woodworkers of America, AFL-CIO, CLC
National Education Association
United Farm Workers of America, AFL-CIO
United Mine Workers of America
Coalition of Black Trade Unionists
Coalition of Labor Union Women

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Dated: January 25, 1979

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INTEREST OF AMICI

Amici are ten international and national labor organizations committed to the elimination of employment dis-

crimination against minorities and women and to the eradication of its continuing effects. *Amici* believe that remedial plans such as that challenged by respondent in this case are necessary, appropriate and lawful action towards these ends.

The American Federation of State, County and Municipal Employees is the largest labor organization in the AFL-CIO, with a membership of more than one million persons, most of whom are employed by state and local governments throughout the nation. Of this total membership, substantial numbers are minorities and/or women. AFSCME is committed to the principle of affirmative action as a means of achieving equal opportunity in employment, and has therefore participated in previous briefs *amici curiae* in this Court in cases raising related issues.

The International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC (IUE) has over 285,000 members throughout the Nation, 100,000 of whom are women, and many of whom are members of disadvantaged minority groups. The IUE is a leader among unions in championing the civil rights of its members. It has instituted numerous suits under federal and state fair employment laws, and has filed many charges of discrimination with administrative agencies. The IUE believes that affirmative action is an indispensable tool toward the elimination of the legacy of discrimination.

The International Union of Oil, Chemical and Atomic Workers, AFL-CIO (OCAW) represents more than 180,000 employees in the oil, chemical, atomic and related industries. Its membership includes both sexes and all races and it has a strong commitment to the principle of equal employment opportunity. Because OCAW believes that affirmative action is essential to the achievement of this goal, it joins in this *amicus* brief.

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) represents some 1,500,000 active workers, and their families, in the automobile, aerospace, agricultural implement and related industries. Including spouses and children, UAW represents more than 4-1/2 million persons throughout the United States and Canada. The UAW is deeply committed to equal employment opportunity and anti-discrimination. The UAW, like the Steelworkers and other industrial unions, has long been desirous of remedying the near-total absence of minorities in the skilled trades, and of creating access to these elite jobs for incumbent, unskilled workers of all races. The UAW has negotiated major national collective bargaining agreements with provisions that expressly provide apprenticeship program admissions advantages to minorities. See *Barnett* v. *International Harvester*, 12 FEP Cases 786 (W.D. Tenn. 1976). UAW believes that the decision of the court of appeals in this case, unless reversed, will cast a pall over all voluntarily adopted affirmative action programs.

The International Woodworkers of America, AFL-CIO, CLC is a labor organization representing approximately 125,000 members. Since October, 1972 it has engaged in an extensive affirmative action program, especially in areas of concentration of black employees in the industry, as in the southern United States.

The National Education Association, founded in 1857 and chartered by a special act of Congress in 1906, is the largest organization of public employees in the nation. NEA presently has a membership of nearly 1,700,000. Many of its affiliates are labor organizations engaged in collective bargaining on behalf of teachers with school employers. NEA believes that teaching staffs and faculties

should reflect the ethnic diversity in our society and accordingly that collective bargaining contracts containing affirmative action provisions assuring such diversity should not be discouraged.

The United Farm Workers of America, AFL-CIO (UFW) is an unincorporated association which functions as a trade union on behalf of agricultural laborers. Minorities comprise a large percentage of the membership of the UFW. UFW is vitally interested in the social betterment of its members and in eliminating discrimination in job opportunities.

The United Mine Workers of America (UMWA) is a labor organization representing coal miners throughout the United States. The UMWA, by its constitution, contracts, and actions, has been in the forefront of the nation's struggle to establish equal opportunity in employment for minorities and women, and it is dedicated to securing equal opportunity in every walk of American life.

The Coalition of Black Trade Unionists (CBTU) is a national membership organization of black men and women who are members of labor unions. CBTU supports the concept of affirmative action and numerical goals to rectify discrimination in employment.

The Coalition of Labor Union Women (CLUW) is a national membership organization of women and men who are members of labor unions. CLUW has thirty active chapters throughout the United States with members from more than 65 International Unions. CLUW is dedicated to the participation of women within their unions and to removing all forms of discrimination in the workplace.

CONSENT OF THE PARTIES

This brief *amici curiae* in support of petitioners is filed with the consent of all parties.

QUESTION PRESENTED

In a community with a 46% black population, in which an employer has only 5 blacks among its 290 craftsmen, does Title VII of the Civil Rights Act of 1964, as amended, invalidate a collective bargaining agreement calling for the creation of a craft training program and allocation to blacks of one half of these new opportunities for training?

STATEMENT OF THE CASE

Kaiser Aluminum & Chemical Company's Gramercy plant is located in a rural Louisiana community, with a population that is 54% white and 46% black. A. 60. Although the vast majority of the jobs in the plant do not require any specialized skills or experience, A. 78, in 1974, black employees comprised only 15% of Kaiser's work force. A. 87. A disproportionate number of these black employees were low seniority employees who had been hired in the preceding five years. A. 71, 78, 87.

The best jobs in the plant are the craft jobs. In 1974, only 5 of 290 craft jobs were filled by blacks. R. 62. Until that date, Kaiser applied requirements of up to five years of prior industrial craft experience as a condition of entry to these jobs. A. 70. At trial, company officials attributed the virtual absence of blacks among its craftsmen to the inability of blacks to acquire the prerequisite experience due to racial discrimination in the building trades. A. 63, 90. The prior industrial experience requirements had not been subjected to any validation study.[1]

The United Steelworkers of America, AFL-CIO-CLC, is

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[1] The record is silent on the issue of validation, but OFCC documents lodged with the Clerk by the Solicitor General make clear that the experience requirement had not been validated. See File Memorandum, January 31, 1973.

the collective bargaining representative of the production and maintenance employees at the Gramercy plant. For some years prior to 1974, the Steelworkers had unsuccessfully sought the institution of a craft training program, by which incumbent production employees, few of whom could meet the experience requirements, could learn the necessary skills and promote to craft jobs. A. 73.[2] The company had consistently declined to adopt such a program, because of its high cost and the availability of persons with the necessary skills outside the incumbent work force. A. 67-68.

In 1974, Kaiser and the Steelworkers resolved to take positive action to end the virtual exclusion of blacks from craft jobs. They entered into agreements which called for the establishment of craft training programs for incumbent employees, and agreed to fill the places in this program half with minorities and half with whites.[3] The company and the union agreed that the selections, within each racial group, were to be made on the basis of total employment seniority. At the time of trial, seven blacks and six whites had been admitted to the training program. A. 66. The record makes clear that the training program would not have been established by Kaiser, other than in connection with its decision to take steps that would assure the entry of blacks into craft jobs.[4]

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[2] Prior to the establishment of the 1974 training program, Kaiser had done some training of employees who had some substantial prior craft experience, but not enough to meet the established experience requirements. Two out of the 28 employees trained under these programs were black. A. 125-26.

[3] Five percent out of the "minority" fifty percent goal was allocated to women. None of the four women in the Gramercy plant workforce had bid for entry to the training program at the time of trial A. 66-67.

[4] The training program in Gramercy was only adopted after Kaiser and the Steelworkers nationally had agreed to establish temporary

Respondent Weber, a white employee at the Gramercy plant who was denied admission to the training program, brought suit claiming that the admission of black employees with less employment seniority than whites who were not admitted violated rights secured to the white workers under Title VII of the Civil Rights Act of 1964. Weber's position was sustained by the district court and by a divided court of appeals.

ARGUMENT

I. Title VII Does Not Prohibit an Employer and a Union from Adopting Reasonable Race Conscious Measures to Overcome the Absence of Minorities from Skilled Jobs.

The decision of this case depends on the interpretation of Sections 703(a), (c) and (d) of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. § 2000e-2(a), (c), (d), which prohibit racial and sexual discrimination in employment by employers and by labor organizations, specifically in regard to apprenticeship training. This Court has held that Title VII of the Civil Rights Act of 1964, unlike Title VI, does not embody the same standards as the Fifth or Fourteenth Amendment prohibitions against discrimination by governmental agencies, see *Washington* v. *Davis*, 426 U.S. 229 (1977), and, accordingly, no constitutional question is presented in this case. Compare *Regents of the University of California* v. *Bakke*, 98 S.Ct. 2733, (opinion of Mr. Justice Powell); 2766 (opinion of Mr. Justice Brennan) (1978). We think it clear that in the enactment of Title VII, the Congress did not intend to pro-

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goals of fifty percent minority entries into craft jobs. The goal was to continue in each plant until such time as minority craftsmen equalled the minority proportion of the work force. The training program in Gramercy was established because it would not be possible to meet this goal without it. A. 137, 144-46.

hibit reasonable voluntary action, such as that embodied in the Kaiser-Steelworkers craft training program.

Title VII of the Civil Rights Act of 1964 was enacted in response to long standing discrimination in employment against minorities and women. Its purpose was to prohibit practices that exclude these individuals from employment opportunities, on grounds of race or sex. See generally *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

In its consideration of Title VII in 1964, Congress did not address the issue of the "reverse discrimination" that arguably results when an employer takes special affirmative steps to provide new opportunities to members of minority groups.

> There simply was no reason for Congress to consider the validity of hypothetical preferences that might be afforded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment.

Regents of the University of California v. *Bakke, supra,* 97 S.Ct. at 2746 (Powell, J.).[5]

This issue was, however, forcefully brought to the attention of the Congress in connection with its consideration of farreaching amendments to Title VII in 1971 and 1972, and, at that time, Congress made clear that Title VII was not intended to prohibit reasonable race conscious affirmative action designed to overcome the relative absence of minorities or women from any segment of the workforce.

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[5] Section 703(j), which provides that the Act shall not be interpreted to require preferential treatment or racial balancing, reflects Congress' intention with respect to the *requirements* of the legislation, but does not address the issue of voluntary race conscious action.

In 1969, the Department of Labor issued the Philadelphia Plan, in implementation of Executive Order 11246. The Plan, for the first time, required government contractors to agree to numerical goals for the entry of minorities into skilled craft classifications in which they were underutilized. Underutilization was to be determined by a comparison of the employer's work force with data showing the "availability" of qualified minorities in the relevant geographic area. The Plan made clear that the numerical requirements were dependent only on underutilization and not on a finding of illegal discrimination by the contractor.[6] In fact, because of craft union referral systems, the contractors had no direct responsibility for the relative absence of blacks from their construction projects.

The validity of the Philadelphia Plan was tested in *Contractors Association* v. *Schultz*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). The contractors argued, *inter alia*, that the Plan required them to discriminate against white craftsmen in violation of Section 703(a), by classifying employees by race and by preferring black craftsmen in order to meet the established goals.

The Third Circuit rejected this argument.

> To read Section 703(a) in the manner suggested by plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention from the language of the statute or from its legislative history. . . . We reject the contention that Title VII prevents the President acting through the Executive

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[6] These concepts are embodied in the current Office of Federal Contract Compliance Programs regulations, 41 C.F.R. §§ 60-2.10 through 2.13.

> Order program from attempting to remedy the absence from the Philadelphia construction labor of minority tradesmen in key trades."

442 F.2d at 173.[7]

When Congress began consideration of amendments to Title VII in 1971, the Philadelphia Plan and the decision of the Third Circuit in *Contractors Association* were very much in the forefront of the debate. See generally Comment, "The Philadelphia Plan: A Study in the Dynamics of Executive Power," 39 U. Chi. L. Rev. 723, 751 ff. (1972). Both Houses of Congress voted on and rejected amendments which would have forbidden the imposition of numerical goals under the Executive Order. In the Senate, Senator Ervin proposed to amend Section 703(j) to forbid the imposition of numerical requirements under the Executive Order, as well as under Title VII.[8] This amend-

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[7] The contractors also made constitutional arguments that were rejected by the Court. 442 F.2d at 166, 176. See note 11, *infra.*

Subsequently, the same conclusions were reached in similar litigation in the First and Seventh Circuits. *Associated General Contractors of Massachusetts* v. *Altschuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); *Southern Illinois Builders Ass'n* v. *Ogilvie,* 471 F.2d 680 (7th Cir. 1972).

[8] The Ervin proposal would have amended Section 703(j) to read:

> Nothing contained in this title or in Executive Order No. 11246, or in any other law or Executive Order, shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title or to any other law or Executive Order to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed . . . in comparison with the total or percentage of persons of such race,

ment was debated explicitly in the context of the Third Circuit decision upholding the Philadelphia Plan. Indeed, in the course of his argument opposing a related amendment, Senator Javits caused the opinion of the Third Circuit in *Contractors Association* to be reprinted in the Congressional Record, 118 Con. Rec. 1665, and opposed the amendment precisely because it would interfere with the type of numerical goals upheld by the Court of Appeals. *Id.* at 1664-65. See also 118 Cong. Rec. 1385 (1972) (remarks of Senator Saxbe). The Ervin amendment was defeated by a two to one margin.[9] A similar amendment, proposed by Congressman Dent, was rejected in the House.[10]

Of course, Congress' rejection of the Ervin and Dent amendments does not resolve the constitutional questions that exist concerning the imposition of numerical goals

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> color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

118 Cong. Rec. 4917 (1972).

[9] 118 Cong. Rec. 4918 (1972).

[10] Congressman Dent's amendment to the bill to amend Title VII would have prohibited the imposition of numerical goals in the enforcement of the Executive Order. 117 Cong. Rec. 31784 (1971). After it was proposed, a substitute bill was introduced by Congressman Erlenborn, which would not have so limited Executive Order enforcement. Opposing the Erlenborn substitute, Congressman Dent stated:

> You are giving quotas and preferential treatment the blessing of your vote if you vote for the Erlenborn amendment.

Id. at 32090. Shortly thereafter, the Erlenborn amendment was adopted, thereby deciding the matter, and Congressman Dent did not thereafter bring his amendment up for a vote. Id. at 32111.

under the Executive Order.[11] But it does represent a definitive expression of Congress' intention that *Title VII* does not prohibit the imposition of numerical goals under the Executive Order. See *Albermarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 414, n. 8.[12] And if the imposition of

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[11] See e.g., *Regents of the University of California* v. *Bakke*, 98 S.Ct. 2733, 2754 & n. 40 (Powell, J.); *United States* v. *NOPSI*, 553 F.2d 459 (5th Cir. 1977), vacated, 98 S.Ct. 2841 (1978); *Contractors Association* v. *Schultz*, *supra*, 442 F.2d at 166, 176. As the plan under attack in this case was voluntarily adopted by Kaiser and the Steelworkers, and not proposed or imposed by the Government, the constitutional validity of the imposition of numerical goals by the Department of Labor under the Executive Order is not an issue in this case.

Moreover, this case does not involve the conflict that may exist between the Department of Labor's interpretation of the requirements of the Executive Order as it affects seniority, and the interpretation of Section 703(h) by this Court in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 352 (1977). See *United States* v. *East Texas Motor Freight, Inc.* 564 F.2d 179 (5th Cir. 1977).

[12] *Moody* was a Title VII case involving the issue of the entitlement to back pay of class members who had not filed their own charge of discrimination with the Equal Employment Opportunity Commission. In connection with its consideration of the 1972 amendments to Title VII, Congress rejected an amendment that would have overruled lower federal court decisions allowing the award of backpay to class members who had not filed a charge. In *Moody*, this Court held that, in rejecting the proposed amendment, the Congress had "ratified" these interpretations and settled the issue. 442 U.S. at 414, n. 8. The identical analysis applies in this case.

Moreover, under decisions of this Court, Congress has acquiesced in the affirmative action requirements imposed under the Executive Order by annually appropriating funds for the Office of Federal Contract Compliance in the Department of Labor with full knowledge that affirmative action requirements are at the heart of OFCCP's enforcement efforts. See *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 293-4 (1958); *Service* v. *Dulles*, 354 U.S. 363, 380 (1957); *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111,

numerical goals under the Executive Order does not violate Title VII, there is no principled way in which the voluntary adoption of numerical goals by private parties, in similar circumstances, can be held to violate the statute.

The decision of the court of appeals accepted voluntary race conscious action, but only when the employer's past conduct is later found to be unlawful under Title VII.[13] This standard effectively precludes voluntary race conscious action. Title VII law is sufficiently cloudy, and so dependent on factual findings involving issues of credibility, that it is usually difficult to predict whether or not discrimination would be found. Moreover, the employer would, by taking voluntary action, put itself in a no-win situation in a suit such as this. Either its past conduct will be determined to be unlawful, thereby inviting litigation by discriminatees, or the remedial action will be found unlawful, and liability to white employees will exist.

This standard is not only wrong as a matter of policy, it is unworkable in practice. In a suit by a white employee

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116, 119 (1947); *Brooks* v. *Dewar,* 313 U.S. 354, 360-361 (1940); *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139, 147 (1937). See also *In Re Subpoena of Persico,* 522 F.2d 41, 65 (2d Cir. 1975). In fact, on one occasion, Congress rejected an effort to forbid the expenditure of funds to enforce numerical goals as part of the OFCCP's program. See Comment, "The Philadelphia Plan: A Study of the Dynamics of Executive Power," 39 U. Chi. L. Rev. 723, 747-750 (1972).

[13] The court of appeals reached this conclusion because of its view that race conscious remedial measures could be adopted by private parties only in circumstances in which they would be ordered by a district court after a finding of a violation of Title VII. 563 F.2d at 224. For the reasons stated in text, *amici* believe that Congress' intention to the contrary is clear, and that, therefore, this case does not require a decision on the issue of whether courts may impose numerical quotas in fashioning remedies under Section 706(g). Compare *County of Los Angeles* v. *Davis,* 566 F.2d 1334 (9th Cir. 1977), *cert. granted,* 46 U.S. L. W. 3780 (1978).

to enjoin affirmative action by the employer, there may be no party in court with the motivation to establish past discrimination. The result, as the record of this case demonstrates, is that the evidence and arguments on which a finding of discrimination could be based may not be submitted to the trial court.[14] As Judge Wisdom points out in dissent, the decision of the court of appeals bases the outcome of the litigation on the determination of a fact, as to which all litigants can be expected to take the same position. 563 F.2d at 231. This is not a suitable rule of law.

The court of appeals has misconstrued Title VII. In accordance with the expressed intent of the Congress, voluntary remedial action should be sustained under Title VII, if it is a reasonable response to the absence or relative absence of minorities or women from the workforce, or a significant segment thereof. On this standard, the agreement between Kaiser and the Steelworkers plainly passes muster.

II. The Kaiser-Steelworker Training Agreement is Lawful Under Title VII

A. The Record Establishes a Basis for Remedial Action

The record shows that in 1974, only 5 of 290 craftsmen were black, and that many crafts at the Gramercy plant included no blacks. A. 64-65. Blacks comprised 39% of the available workforce, A. 60-61 and according to Census Data, 21% of the available craftsmen.[15] This evidence is

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[14] See pp. 15-16, n. 16, *infra.*

[15] Gramercy is located on the border of St. James and St. John the Baptist Parishes, halfway between New Orleans and Baton Rouge. In 1970, blacks constituted 21% of the available "craftsmen and kindred workers" in these parishes. Bureau of the Census, Charac-

more than sufficient to justify reasonable efforts by Kaiser and the Steelworkers to correct the absence of blacks from craft jobs.[16]

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teristics of the Population, Vol. I, part 20, Tables 122 and 127 (1970).

The crafts in which persons are employed at Kaiser's Gramercy plant are painter, electrician, carpenter, machinist and repairman. A. 64-65. There are no Parish figures broken down for these crafts, but statewide, New Orleans and Baton Rouge figures are available. The percentages of blacks, computed by counsel from Census Data, are as follows:

	Statewide	Baton Rouge SMSA	New Orleans SMSA
Construction carpenters	21%	34%	27%
Construction electricians	3%	2%	4%
Construction & maintenance painters	28%	28%	36%
Mechanics & repairmen	15%	9%	14%
Machinists (and job and die setters)	10%	16%	5%
All crafts & kindred workers	16%	18%	19%

Id. at Table 172.

[16] There is, in fact, a substantial question as to whether Kaiser was guilty of racial discrimination in filling craft jobs in Gramercy. The findings of the courts below to the contrary are entitled to little weight because the issue was not contested. See pp. 13-14, *supra*. Apart from the statistical disparity between the 2% black craftsmen at Kaiser and 21% black craftsmen in the area, compare *Hazelwood School District* v. *United States*, 97 S.Ct. 2736, 2743, n. 17 (1977). the record shows that the company had applied an entry requirement of five years of industrial experience in the crafts—prior to employment in Gramercy. This requirement effectively excluded blacks from craft jobs on account of racial discrimination in the building trades in southeastern Louisiana. See p. 5, *supra*. There is no evidence that the prior industrial experience requirement was ever validated by Kaiser. To the contrary, OFCC documents lodged with the Clerk in this case by the Solicitor General include 1973 findings that Kaiser had not validated its prior industrial experience requirement.

(Footnote cont.)

B. The Training Program was a Reasonable Response to the Absence of Blacks in Craft Jobs.

A number of factors make clear that the Kaiser-Steelworkers plan was a reasonable response to the absence of blacks in craft jobs.

First, neither respondent Weber nor any other employee lost any employment opportunity, or any expectation of employment opportunities, as a result of the institution of the training program. No seniority rights for entry into craft training previously existed. Prior to the institution of the program, there was no way in which an employee who did not already have the skills could acquire them and promote to a craft job while at the Gramercy plant. The train-

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This evidence establishes a *prima facie* violation of Title VII by Kaiser in craft entry. In *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978), a Title VII case involving Kaiser's plant in nearby Chalmette, Louisiana, the court of appeals held that a *prima facie* case of discrimination in craft entry had been established on the basis of statistical evidence strikingly similar to that in this Record, and on the basis of a prior industrial experience requirement—for which no validation had been shown—that was apparently the same as that imposed by Kaiser in Gramercy.

Moreover, major issues concerning Kaiser's craft entry practices were not explored at trial. For example, if the prior industrial experience requirement had not been consistently applied to whites, but had been applied to exclude blacks from craft jobs, there would be an obvious violation of the Act. Material lodged with the Clerk in this case by the Solicitor General shows that, in 1973, the OFCC found that Kaiser in Gramercy had waived the experience requirement in the case of whites. And in *Parson* v. *Kaiser Aluminum & Chemical Corp., supra,* there was evidence in the record that Kaiser had not consistently applied its prior industrial experience requirement to whites at its nearby Chalmette Plant. See 575 F.2d at 1381.

Similarly, at Chalmette, Kaiser imposed unvalidated written tests and formal education requirements for entry to craft jobs. *Id.* There is no indication in this record as to whether similar requirements were applied in Gramercy.

ing program did not constitute a *diversion* of employment opportunities, in response to the absence of blacks in craft jobs, but the *creation* of additional opportunities.

Second, the program adopted by Kaiser and the Steelworkers provided additional opportunities for both black and white employees.

Third, allocation of 50% of the training vacancies to blacks constituted a reasonable division of the new opportunities, considering the 46% black population in the area. Because less than half of the new craft vacancies were to be filled from the training program, and because of the relatively low turnover in these attractive jobs, the allocation of 50% of training vacancies to blacks would result only in a very gradual increase in black representation in the crafts. A. 68-69.

Fourth, given the decision to allocate the training opportunities half to blacks and half to whites, the system of selecting the senior bidder within each racial group *itself* has no racial implications. Indeed, this system, agreed to by the company and the union, was the best available procedure for achieving the 50-50 allocation, and at the same time recognizing the equity of prefering incumbents in order of their length of service.

Other methods were available for the selection of trainees that would have achieved substantial representation of blacks, without establishing any overt racial classification. Specifically, training vacancies could have been awarded to the *youngest* [17] applicants in the work force (half of whom

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[17] Apprenticeship training programs are exempted from the strictures of the Age Discrimination in Employment Act. See 29 C.F.R. § 860.106.

are black) or to new hires—not unreasonable standards from the employer's point of view, considering the expense and length of craft training. Either selection standard would have resulted in substantial black participation, approximating the result under challenge here. But these methods would have needlessly sacrificed the seniority interests of the incumbent workers.

Fifth, selection of trainees without regard to race on the basis of employment seniority, as demanded by respondent, would be totally at odds with the purpose of the company and the union in establishing the training program. If selections were made on the basis of employment seniority, it would be many years before any significant numbers of blacks would be admitted. A. 113.

Moreover, selection on the basis of seniority would have perpetuated Kaiser's apparent past discrimination in non-craft hiring. The evidence shows that from 1958 through 1969 only 10% of the non-craft employees hired by Kaiser were black, although the available labor force was 39% black, and that other than craft jobs, the entry positions at the Gramercy plant do not require any special skills or prior experience. A. 123. Disparities of this dimension in filling unskilled jobs establish a *prima facie* case of hiring discrimination under Title VII. *Dothard* v. *Rawlinson*, 97 S.Ct. 2720, 2726 (1977).

In *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), this Court explicitly recognized that, where there has been past exclusion of blacks from a seniority unit, the use of seniority to allocate future opportunities perpetuates the effects of the past discrimination. The Court stated that such a system would violate Title VII, under the standards articulated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971), except for the immunizing

effect of Section 703(h) of the Act. 431 U.S. at 349. While *Teamsters* holds that, because of Section 703(h), it is not unlawful to allocate employment opportunities on the basis of a preexisting seniority system, it is quite another matter to conclude that, when an employer and a union are negotiating a system of selection for a new training program, particularly one adopted in response to the absence of blacks in the crafts, Title VII *requires* the adoption of a system that perpetuates past discrimination and results in the continued exclusion of blacks from the crafts. Compare *Gates* v. *Georgia Pacific Corp.*, 492 F.2d 292 (9th Cir. 1974).

Sixth, the selection system challenged by respondent was negotiated and agreed to by the union that is the exclusive bargaining representative of all the production and maintenance employees in the Gramercy plant. We have pointed out that no seniority rights and no seniority expectations of the respondent were abridged by the 1974 Training Agreement. But even if that were not the case the collective bargaining agent, acting in good faith and in order to promote national policy and what it perceives to be the best interests of all of the employees in the bargaining unit, is free to enter into agreements calling for seniority modifications.

> This Court has . . . held that a collective bargaining agreement may . . . enhance[d] the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). And the ability of the union and the employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objec-

> tive of the "highest priority," is certainly no less than in other areas of public policy interests.

Franks v. *Bowman Transp. Co., Inc.*, 424 U.S. 747, 770, (1976). See also *Steele* v. *Louisville & N. Ry.*, 323 U.S. 192 (1944); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

> An affirmative action plan should be less suspect when negotiated between employer and union. The union's duty to represent white workers, who may often be, as here, a majority of the bargaining unit, serves as a check on the fairness of the plan.

Weber, 563 F.2d at 233 (Wisdom, J., dissenting).

Here, acting pursuant to its affirmative duty to root out discrimination, see *Emporium-Capwell* v. *WACO*, 420 U.S. 251 (1975), the Steelworkers determined that the 1974 Training Program was in the best interests of all of the members of the bargaining unit, because it created new training opportunities for all employees, it did not deprive any employee of any rights or expectations, and it would operate to correct the traditional exclusion of blacks from craft jobs. Title VII does not afford respondent any rights to overturn that judgment.

CONCLUSION

The decision of the court below should be reversed and the respondent's complaint should be dismissed.

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