84-1340

No. .....

In The

Supreme Court of the United States

October Term, 1984

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WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President and DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

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69 pp

QUESTION PRESENTED

Does the Constitution tolerate racial preferences for teacher layoffs adopted by a public employer in the absence of findings of past discrimination, based solely upon a disparity between the respective percentages of minority faculty and students?

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The opinion of which review is sought is reported as *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984), and is reproduced at pages 2-19a of the Appendix. The district court opinion is reported at 546 F. Supp. 1195 (E.D. Mich. 1982), and is included at pages 20-36a.

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JURISDICTION

The Sixth Circuit Court of Appeals decided this case and entered judgment on October 25, 1984. By order of this Court entered by Justice Sandra Day O'Connor on January 7, 1985, the time for filing this Petition was extended to and including February 22, 1985.

This Court's jurisdiction arises pursuant to 28 U.S.C. § 1254(1) (1976).

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action is based upon the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The principal statutory provision involved is 42 U.S.C. § 1983 (1978), which provides in pertinent part that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

> . . . causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

———o———

STATEMENT OF THE CASE

A. Facts and Background.

This case presents a constitutional challenge to racial preferences adopted by the Respondents and a teachers' union which resulted in the layoff of Petitioners from their jobs as public schoolteachers.

The racial preferences [set out at App. 1a] were first adopted in the 1972-73 collective bargaining agreement between Respondent Jackson Board of Education and the Jackson Education Association [App. 22a]. The preferences have been renewed essentially intact in successive agreements and presently continue in effect.

Specifically, Article XII.B.1 creates an exception to the otherwise applicable rule of seniority-based layoffs (last-hired, first-fired), to the effect that non-minority teachers with greater seniority shall be laid off when necessary to preserve the existing proportion of minority teachers. The racial preferences, as described by the district court, were designed to

> 1) retain a sufficient number of minority teachers so that the racial composition of the Jackson School District faculty will roughly approximate that of the student body, or 2) if that ratio has not yet been achieved,

> then at least to prevent a reduction in the minority to majority ratio.

[App. 32a.]

The racial preferences were adopted solely to eliminate a statistical disparity between the student and faculty minority populations. In 1969, blacks comprised 15.2% of the student body and 3.9% of the faculty. Thereupon, the school board endeavored to increase minority faculty representation. [App. 41-42a.] By 1971, the last year for which statistics are present in the record, minority representation in the student body remained relatively constant at 15.9%, while the proportion of minority schoolteachers had more than doubled to 8.3 - 8.5%. [App. 21a, 41a.] In spite of this noteworthy increase in minority faculty in only two years, the racial preferences were adopted the following year. The stated goal of the racial preferences is to achieve a racial balance, i.e., "to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools." [App. 22a.]

The racial preferences are not remedial in nature, and their benefits are not limited to identified victims of past discrimination. Neither Respondents nor any court has made specific findings of past discrimination. [App. 40a.] In fact, the teachers' union sued the school board in 1974 to compel it to enforce the preferential layoff provision, and attempted to prove that the board had engaged in past discrimination based upon the same statistical disparity upon which the racial preferences are premised. In *Jackson Education Association v. Board of Education of the Jackson Public Schools,* No. 4-72340 (E.D. Mich.

Dec. 15, 1976) [App. 36-45a], the court rejected the union's discrimination claims, holding that

> [t]he difficulty with plaintiffs' argument is that it assumes that the *de facto* imbalance disclosed by the statistical data in and of itself demonstrates a violation of the Fourteenth Amendment's equal protection clause. This simply is not so.

[App. 42-43a.] Consequently, *there are no findings of past discrimination in the record, and the only court to review the evidence declined to make such findings.*

Petitioners were laid off pursuant to the racial preferences contained in the contract. They filed their Complaint in federal district court in September 1981, invoking jurisdiction based on, *inter alia,* 42 U.S.C. § 1983. Although nine of the ten Petitioners have since been restored to teaching positions, all have outstanding claims for back pay and seniority, and the issues are ripe for resolution. [App. 3a.]

B. Decisions Below.

The district court decided the case on cross-motions for summary judgment. Applying *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), *reh'g denied,* 444 U.S. 889 (1980), the court determined at the outset that findings of past discrimination are unnecessary to sustain voluntarily adopted racial preferences. [App. 27a.] Eschewing a comparison between minority personnel and the relevant labor pool [App. 29a], the court instead compared the minority student and faculty populations. The court contended that this comparison was proper because "[t]eachers are role-models for their students." [*Id.*] Based on the statistical disparity between

these two groups, the court concluded that minority underrepresentation was substantial and chronic, thus justifying adoption of racial preferences. [App. 30a.] Finally, the court analyzed the racial preferences under a "reasonableness" standard [App. 31a], and pronounced them constitutional. [App. 34a.]

The Sixth Circuit affirmed, adopting both the result and reasoning of the district court. [App. 10a.] Judge Wellford concurred, but disagreed with the statistical comparison applied by the Sixth Circuit in sustaining the racial preferences. [App. 16a.] He noted that if relevant labor market statistics were in the record, the court "may well have been required to reverse," [App. 17a], and concluded that the district court's analysis on this point was "simply improper." [App. 19a.]

Petitioners request that this honorable Court review and reverse the opinion of the Sixth Circuit.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS HAVE CREATED A DIRECT, IRRECONCILABLE CONFLICT OVER WHETHER PUBLIC EMPLOYERS MAY ADOPT RACIAL PREFERENCES SOLELY ON THE BASIS OF STATISTICAL DISPARITIES AND WITHOUT FINDINGS OF PAST DISCRIMINATION.

A. Decisions Of The Sixth And Seventh Circuits Squarely Conflict.

The principal issue in this case is the power of municipal governments to voluntarily adopt racial preferences in

public employment. The recent statement of the United States Civil Rights Commission, which implored this Court to resolve this question, underscores its vital importance.[1]

This is the very issue explicitly left open by this Court in previous cases: "[T]he line of demarcation between permissible and impermissible affirmative action plans." *Weber,* 443 U.S. at 208; *see also Firefighters Local Union No. 1784 v. Stotts,* — U.S. —, 104 S. Ct. 2576, 2590 (1984).

In resolving this issue, the decision below squarely conflicts with the holding of *Janowiak v. City of South Bend,* 36 FEP Cases (BNA) 737 (7th Cir. 1984), *petition for reh'g en banc filed,* No. 84-1321 (Jan. 7, 1985). Specifically, the Sixth and Seventh Circuits reached opposite conclusions on whether a public employer may adopt racial preferences solely on the basis of statistical disparities and without findings of past discrimination.

The Sixth Circuit below sustained a race-preferential layoff scheme set out in the collective bargaining agreement between the school board and the teachers' union.

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[1]The Commission declared that,

> Such racial preferences merely constitute another form of unjustified discrimination, create a new class of victims, and . . . offend the Constitutional principle of equal protection of the law for all citizens.

Statement of the U.S. Commission on Civil Rights Concerning the Detroit Police Department's Racial Promotion Quota, January 17, 1984, pp. 3-4. Unbridled racial preferences inflict adverse consequences on numerous individuals. For instance, the Equal Employment Opportunity Commission, reports that in 1979-83 alone, white males filed 1,556 formal complaints alleging racial discrimination against public employers. EEOC, Freedom of Information Act request no. 83-8-FOIA-148.

The racial preference is not designed to provide relief to actual individual victims of past discrimination, but rather to achieve and maintain a racial balance so that the proportion of minority teachers mirrors the proportion of minorities in the student body. [App. 32a.]

There are no admissions or findings of past discrimination by the school board. [App. 40a.] The Sixth Circuit below upheld the racial preference based solely on a disparity between the respective ratios of minorities in the teaching staff and student body, which in the court's view demonstrates that underrepresentation of minority personnel is substantial and chronic. [App. 9a.] This statistical disparity is the only evidence of discrimination in the record, and was held insufficient to establish a constitutional violation in a related case. [App. 43a.]

The Sixth Circuit analysis relies on this Court's decision in *Weber,* although it concedes that this case involves a public employer and requires constitutional analysis.[2] [App. 4-5a.] The Court construed *Weber* to permit voluntary racial preferences even in the absence of prior judicial findings of past discrimination. [App. 4a.] Consequently, the Sixth Circuit held the racial preference constitutional. [App. 12a.]

The Seventh Circuit, facing the same issue, reached the opposite result in *Janowiak v. City of South Bend.* The preferential hiring program before the Seventh Cir-

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[2]Justice Rehnquist observes that this Court has never held that *Weber,* which was expressly limited to private employers and Title VII, applies equally to public employers and constitutional analysis. *Bushey v. New York State Civil Service Commission,* — U.S. —, 53 U.S.L.W. 3477, 3478 (Jan. 8, 1985) (*cert. denied*) (Rehnquist, J., dissenting).

cuit was adopted, as here, solely on the basis of statistical disparities and without findings of past discrimination. *Id.* at 738. While the Seventh Circuit also applied *Weber,* it construed it differently than the Sixth Circuit, concluding that the holding therein hinged upon findings of past intentional discrimination by the employer. *Id.* at 741.

In direct contrast to the decision of the Sixth Circuit, the Seventh Circuit held that the racial preference before it was invalid under both Title VII and the Fourteenth Amendment, declaring that

> the government must demonstrate that its remedial program responds to a finding of past discrimination .... Under the more exacting constitutional standard, this court now holds that *evidence of statistical disparity alone fails to prove past discrimination and cannot justify the adoption of a remedial plan that may discriminate against non-minorities.*

Id. at 742-43 (emphasis added). The reason for mandating such findings, in the view of the Seventh Circuit, is to ensure that the racial preferences are remedial in nature, and not simply " 'new forms of invidious discrimination approved in the guise of remedial affirmative action.' " *Id.* at 743 (quoting *Valentine v. Smith,* 654 F.2d 503, 508 (8th Cir. 1981), *cert. denied,* 454 U.S. 1124 (1981) (findings of past discrimination are necessary to justify an affirmative action plan)).

TABLE A

COMPARISON OF SIXTH AND SEVENTH CIRCUIT DECISIONS

POINT OF COMPARISON	*Wygant v. Jackson Board of Education*	*Janowiak v. City of South Bend*
1. Public or private employer?	public	public
2. Type of challenge	equal protection	equal protection and Title VII
3. Analysis applied	*United Steelworkers of America v. Weber*, 443 U.S. 193 (1979)	*United Steelworkers of America v. Weber*, 443 U.S. 193 (1979)
4. Source of racial preference	collective bargaining agreement	Board of Public Safety affirmative action plan
5. Job classification	teachers	police officers and fire fighters
6. Method of implementation at issue	preferential layoffs	preferential hiring
7. Goal of plan	to reflect minority composition of the student body	to reflect minority composition of the City
8. Findings of past discrimination?	NO	NO
9. Justification for plan	statistical disparities only	statistical disparities only
10. Additional evidence of past discrimination?	NO	NO
11. Tailored to relevant labor market?	NO	NO
12. Are beneficiaries actual victims of past discrimination?	NO	NO
HOLDING	**CONSTITUTIONAL**	**UNCONSTITUTIONAL AND VIOLATIVE OF TITLE VII**

The conflicting holdings of the Sixth and Seventh Circuits are irreconcilable.[3] The Sixth Circuit is satisfied to approve racial preferences in public employment that are not tailored to remedy identified past discrimination, based solely upon a statistical disparity between the racial composition of students and faculty. Conversely, the Seventh Circuit believes that racial preferences are tolerable only if they are truly remedial in nature, and holds that statistical disparities are an inadequate justification in the absence of specific findings of past discrimination.

These conflicts beg resolution of the issues previously left open by this Court.

B. This Court's Lack Of Guidance In Limiting Racial Preferences By Public Employers Has Produced Conflicts And Confusion In The Circuits.

At least five circuits have recently noted that this Court has not articulated standards by which the limits on racial preferences by public employees may be defined. *Williams v. City of New Orleans,* 729 F.2d 1554, 1567-68 (5th Cir. 1984) (*en banc*) (Higginbotham, J., specially concurring); *Bratton v. City of Detroit,* 704 F.2d 878, 885 (6th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 703 (1984), *reh'g denied,* 104 S.Ct. 1431 (1984); *Janowiak v. City of South Bend,* 36 FEP Cases at 742 (7th Cir.); *Valentine v. Smith,* 654 F.2d at 508 (8th Cir.); *Johnson v. Transportation Agency,* 36 FEP Cases (BNA) 725, 728 (9th Cir. 1984). Fifth Circuit Judge Higginbotham has expressed grave concern over attempting to interpret this

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[3]The facts and holdings of these decisions are summarized in Table A, *supra.*

Court's "sometimes inscrutable trilogy" of cases governing racial preferences.[4]

This uncertainty manifests itself in conflicting approaches among and within the circuits.[5] Such confusion pervades the Sixth Circuit itself. Its decision below that a school board may properly seek to balance its minority teacher and student populations is an explicit departure from its own rule set out in *Detroit Police Officers' Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), that racial preferences should be tailored to the relevant labor market.[6] [App. 9a.] Moreover, as Judge Wellford observed, such a balance was expressly rejected by the Sixth Circuit in *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757, 762 (6th Cir. 1983).[7] [App. 16-17a (Wellford, J., concurring).]

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[4]*Weber; Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

[5]The extraordinary divergence in views that invariably results from the absence of a definitive ruling by this Court is perhaps best illustrated by *Williams v. City of New Orleans*. In that case, the Fifth Circuit affirmed the trial court's refusal to approve a consent decree provision that imposed a racial quota for promotions on the ground that it was not tailored to the relevant labor market and that it inflicted an "inordinately harsh impact on non-black[s]." 729 F.2d at 1562-63. The *en banc* review produced four separate opinions. Three judges joined in the court's judgment upholding the district court's exercise of discretion, four judges concurred in the result on the ground that the quota was flatly unconstitutional, and six judges dissented.

[6]Comparisons between student and faculty populations have been explicitly rejected by the Fifth Circuit as a basis for identifying discrimination in teacher employment. *Fort Bend Independent School District v. City of Stafford*, 651 F.2d 1133, 1138 (5th Cir. 1981); *Castaneda v. Pickard*, 648 F.2d 989, 1002 (5th Cir. 1981).

[7]Judge Wellford noted that if relevant labor market statistics were before the court, it "may well have been required to reverse under the rationale of *Oliver*." [App. 17a.]

The Sixth Circuit's contradictory and revisionist interpretation of equal protection principles is a source of concern among district courts bound by it. In *Marsh v. Board of Education,* 581 F. Supp. 614, 627 (E.D. Mich. 1984), *appeal docketed,* No. 84-1240 (6th Cir. Apr. 4, 1984), Judge Newblatt upheld the demotion of a high school guidance counselor pursuant to a racial quota that was neither temporary nor the least burdensome alternative, since "[i]t is all too clear that the leeway given to affirmative action in the Sixth Circuit is wide enough to save the present [program]." Consequently, the court was "compelled . . . to place its imprimatur on an explicit act of racial discrimination visited on an American citizen." *Id.* at 628.

The multiple and inconsistent holdings of the various circuits inevitably produce intolerable conflicts, such as the instant conflict between the Sixth and Seventh Circuits. Clearly, the need for concrete direction by this Court is critical.

II. THE DECISION BELOW DEPARTS FROM ESTABLISHED CONSTITUTIONAL PRINCIPLES.

A. The Sixth Circuit Substitutes Traditional Strict Scrutiny With A "Reasonableness" Standard.

Just last term, this Court reaffirmed its well-established view that racial classifications "are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of [their] legitimate purpose . . . ." *Palmore v. Sidoti,* — U.S. —, 104 S.Ct. 1879, 1882 (1984). As in *Palmore,* this case "raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race." *Id.* at 1881.

In the area of "reverse discrimination," this Court has consistently invoked a heightened standard of constitutional review. In *Bakke,* Justice Powell declared that

> [t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color . . . . Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

438 U.S. at 289-91. Similarly, Chief Justice Burger confirmed in *Fullilove,* 448 U.S. at 491, that "preference[s] based on racial or ethnic criteria must necessarily receive a most searching examination . . .," and Justices Stewart, Rehnquist, and Stevens clearly articulated the traditional strict scrutiny standard in separate dissenting opinions. *Id.* at 526, 537.

Conversely, the Sixth Circuit has flatly rejected strict scrutiny, claiming that "the Supreme Court has failed to set out a binding standard," *Bratton v. City of Detroit,* 704 F.2d at 886 n.26, and disposing of *Fullilove* as "a plurality decision with little precedential value." *Id.* at 885. Consequently, the Sixth Circuit herein applied a nebulous "reasonableness" standard. [App. 10a.] Petitioners submit that this creative interpretation of the Fourteenth Amendment not only dictated the result in the instant case, but also creates an alarming precedent by discarding the vital principle that "[i]f both are not accorded the same protection, then it is not equal." *Bakke,* 438 U.S. at 290.

The relaxed standard of review adopted by the Sixth Circuit directly contradicts the holdings of this Court which sustain the principle of equal opportunity, and thus commends this case for review.

B. The Decision Below Conflicts With The Requirement That Racial Preferences Must Be Remedial In Nature.

The Sixth Circuit below approved governmentally adopted racial preferences in the absence of findings of past discrimination. In direct contrast, this Court has held that such a program "cannnot pass muster unless . . . it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing . . . remedial objectives." *Fullilove,* 448 U.S. at 487.

Thus, Justice Powell has observed that "this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations." *Id.* at 497 (Powell, J., concurring); *accord Bushey v. New York State Civil Service Commission,* 53 U.S.L.W. at 3478 (Rehnquist, J., dissenting). Such findings are necessary to ensure that racial preferences are truly remedial. Race-conscious remedies are "necessarily designed . . . to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley,* 418 U.S. 717, 746 (1974).

In contradiction, the Sixth Circuit below dispensed with this requirement. It justifies its sanction of the racial preferences by carving out an unprecedented exception in the context of teacher employment to allow such preferences to be sustained upon a mere showing of a statistical disparity between minority student and faculty populations. [App. 8a.] However, it was in the very context of teacher employment that this Court in *Hazelwood School District v. United States,* 433 U.S. 299, 308 n.13 (1977), cautioned that in identifying discrimination,

> When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.

Comparisons to the student body, as opposed to the general population, have *even less* probative value. *See, e.g., Fort Bend Independent School District v. City of Stafford,* 651 F.2d at 1138.[8]

Moreover, the Sixth Circuit requires no findings that the racial preferences are limited to providing relief to individual victims of past discrimination. Yet, it was precisely the exclusion of non-victims from the benefits of racial preferences that this Court deemed a critical feature in sustaining the minority set-aside in *Fullilove,* 448 U.S. at 486-87.[9] Instead, the racial preferences herein have the same effect as the one struck down in *Williams v. New Orleans,* 729 F.2d at 1569 (Higginbotham, J., specially concurring), in which the "quota made no effort to correlate prior victim status to future advantage; to be black *ipso facto* would be to benefit under this plan."

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[8]The Sixth Circuit's view that such a comparison is valid because teachers provide "role-models" for students [App. 8a] is inconsistent with its earlier holding in *Oliver,* 706 F.2d at 762, that minority students do not have a constitutional right to proportional representation among the faculty.

[9]Similarly, in *Stotts,* 104 S. Ct. at 2588, this Court held that "mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice has had an impact on him." The Sixth Circuit herein declined to apply *Stotts* to this case [App. 12a], although it did directly apply *Weber,* which is also a pure Title VII case. [App. 5a.] Petitioners question the Sixth Circuit's selective use of Title VII precedents in constitutional analysis, under which *Weber* is applied to uphold racial preferences while the limitations of *Stotts* are avoided.

The Sixth Circuit has clearly departed from this Court's mandate that racial preferences must be narrowly tailored to remedial objectives, and its decision consequently begs review. These issues will remain divisive and unsettled until addressed by this Court.

III. THE CASE IS RIPE FOR REVIEW.

This case presents constitutional issues in a context amenable to prompt resolution by this Court. It meets the ripeness standards presented in *Stotts,* 104 S.Ct. at 2583-85: (1) the layoff provision has continuing effect, (2) there is no assurance that Respondents will not enforce the provision in the future, and (3) there are unresolved back pay and seniority claims. Accordingly, the case is ripe for review.

CONCLUSION

The decision below squarely conflicts with decisions of other circuits as well as those of this Court. The issues herein are of vital concern, both to the nation as a whole as well as to individual victims of discrimination, including the Petitioners. For these reasons, Petitioners respectfully urge this Court to grant the Petition.

Respectfully submitted,

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APPENDIX

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1972-73 TEACHER CONTRACT
(Relevant Provisions)

ARTICLE VII.D.1. The Board and the Association, in recognition of the desirability of multi-ethnic representation on the teaching faculty, hereby declare a policy of actively seeking minority group personnel. For the purposes of this contract, minority group personnel will be defined as those employees who are Black, American Indian, Oriental, or of Spanish descendancy. *The goal of such policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools.* (Emphasis added).

ARTICLE VII.D.2. In order that this goal be expeditiously met, it is agreed that, for vacancies in school buildings in which this goal has not been met, the Board will actively seek, recruit, and hire qualified minority teachers for such vacancies. The Board will annually review each individual staff to ensure proper minority representation.

ARTICLE XII.B.1. In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, *except that at no time will be there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.* In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance. (Emphasis added).

No. 82-1746

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

On Appeal from the United States District Court
for the Eastern District of Michigan.

Wendy Wygant, Leonard Bluhm, Susan Lamm, John Krenkel, Florence Csage, Karen Smith, Susan Diebold, Deborah Brezezinski, Kathleen Crecine, Gordon Holton, Cheryl Zaski, Robert L. Staska, David P. Kiesel, Paula Janke, Martha Verhoeven, Perry Maynard, Mary O'Dell and Ruth Ann Anderson,

Plaintiffs-Appellants,

v.

Jackson Board of Education, Jackson, Michigan, and Richard Surbrook, President and Don Penson, Robert Moles, Melvin Harris, Cecelia Fiery, Sadie Barham, and Robert F. Cole,

Defendants-Appellees.

Decided and Filed October 25, 1984

Before: Edwards and Wellford, Circuit Judges; and Peck, Senior Circuit Judge.

Edwards, Circuit Judge, delivered the opinion of the Court in which Peck, Senior Circuit Judge, concurred. Wellford, Circuit Judge (pp. 14-17) delivered a separate concurring opinion.

George Clifton Edwards, Jr., Circuit Judge.

This is a school case tangentially involving segregation in public schools—this concerning a formula for layoff of

teachers of minority races during economically required reductions in staff. The disputed formula is contained in the collective bargaining contract executed between the Jackson Teachers Association and the Board of Education of the City of Jackson, Michigan. It reads as follows:

> ARTICLE XII.B.1. In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, *except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.* In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certified maintaining the above minority balance. (Emphasis added).

Appellants, who object to the Board's following this provision, contend that the quoted provision violates both federal and state statutory and constitutional provisions, including particularly the fourteenth amendment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981); 42 U.S.C. §§ 1981, 1983 and 1985 (1976 & Supp. V 1981).

While, at oral argument, this court was advised that due to somewhat improved economic conditions, only one teacher assignment is as a practical matter currently involved, the fundamental dispute over the validity of Art. XII.B.1. is still before us.

The District Judge who heard this case wrote a careful opinion upholding the validity of the layoff system adopted by the School Board and the Federation of Teach-

ers. We quote in part *Wygant v. Jackson Board of Education,* 546 F.Supp. 1195 (E.D.Mich.1982) as follows:

> "Plaintiffs argue first that they are entitled to summary judgment because an employer and a union cannot lawfully negotiate a voluntary affirmative action plan which gives preferential treatment to minorities, where there has been no judicial finding of past employer discrimination. Stated in other words, plaintiffs argue that societal discrimination, as opposed to identifiable employer discrimination, is not a lawful basis for the adoption of a voluntary affirmative action plan.

"*United Steelworkers of America v. Weber,* 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979) held that Title VII does not prohibit a private employer from voluntarily adopting an affirmative action plan 'to eliminate conspicuous racial imbalance in traditionally segregated job categories.' 443 U.S. at 209, 99 S.Ct. at 2730. In *Weber,* there was no judicial finding that the private employer, Kaiser Aluminum, had ever engaged in race discrimination. However, Kaiser's work force statistics for the years prior to the adoption of the affirmative action plan pointed up gross disparities between the number of blacks employed by Kaiser and the number of blacks in the relevant labor market. Thus, *Weber* stands for the proposition that Title VII does not require a judicial finding of employer discrimination before a private sector employer may adopt an affirmative action plan.

"*Detroit Police Officers' Association v. Young,* 608 F.2d 671 (6th Cir.1979), *cert. denied,* 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981), extended this particular holding of *Weber* to public sector employers *and* to alleged Constitutional violations.

"In *Young,* the Detroit Police Department, after an internal determination that blacks were underrepresented in the department, voluntarily adopted an affirmative action program which promoted black patrolmen to sergeant ahead of white patrolmen who were higher on the eligibility list. The white officers challenged the affirmative promotion plan on Title VII and Equal Protection grounds. The Sixth Circuit relied on *Weber* to hold that the internal determination of racial disparities justified the voluntary plan, even though there had been no prior judicial determination of race discrimination.

> "[D]iscriminatory acts which might not give rise to legal liability may nonetheless be sufficient to justify a voluntary remedial affirmative action plan. . . As Justice Blackmun noted in his concurring opinion in *Weber,* a preferential hiring plan which seeks to alleviate an imbalance caused by traditional practices of job segregation is a reasonable voluntary response 'whether or not a court, on these facts, could order the same step as a remedy' . . . Under *Weber,* the district court's holding that 'quota relief, when fashioned by the employer without the assistance and direction of the court, is not permitted . . .' . . . cannot stand as a matter of law. 608 F.2d at 689-90.

"Having thus held on the Title VII claim, the *Young* court applied the same principle to the Constitutional challenge.

> "It was also error to require that there be judicial determination of past discrimination for a state to undertake a race-conscious remedy, as stated by the district court. This requirement would be 'self-defeating' and would 'severely undermine' voluntary remedial efforts. [Citing *Regents of the University of California v. Bakke,* 438 U.S. 265, 364, 98 S.Ct. 2733, 2785, 57 L.Ed.2d 750 (1978)].

"[1] Thus, it appears that plaintiffs' contention that the affirmative action plan at issue here cannot stand because there has been no prior judicial determination that the defendants engaged in racial discrimination, is without merit. Plaintiffs' motion for summary judgment on this ground is denied.

"b. Constitutionality of
Affirmative Action Plan

"Having determined that a judicial finding that defendants engaged in race discrimination is not a prerequisite to adoption of the affirmative action at issue here, the court must still determine whether the plan is one permitted by the Constitution.

"As an initial matter, there must be some evidence that minority teachers have not enjoyed the same representation on the faculty of the Jackson Public Schools as have white teachers. Justice Brennan, for the majority

in *Weber,* adhered closely to the facts of that case and framed this requirement in terms of 'conspicuous racial imbalance in traditionally segregated job categories.' 443 U.S. at 209, 99 S.Ct. at 2730. Justice Blackmun, in concurrence in *Weber,* held out for an 'arguable violation' standard. In other words, employers and unions which had committed 'arguable violations' of Title VII would be free to adopt voluntary affirmative action plans without fear of Title VII liability to whites.

"For the purposes of the Equal Protection clause of the Constitution, the *Young* court stated this requirement as follows: 'whether "there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities . . ."' 608 F.2d at 694. The standard was adopted directly from the opinion of Justices Brennan, White, Marshall and Blackmun in *Bakke.*

> "The *Young* court expressly held that: [I]t was error to require proof that the persons receiving the preferential treatment had been individually subjected to discrimination, for "it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination.' 608 F.2d at 694.

"The reason for this requirement is to permit the court to determine that the purpose of the affirmative action plan is legitimate. *Valentine v. Smith,* 654 F.2d 503, 508 (8th Cir.), *cert. denied,* 454 U.S. 1124, 102 S.Ct. 972, 71 L.Ed.2d 111 (1981).

"The requirement of some showing of previous underrepresentation of minorities must, of course, be adapted

to the facts and circumstances of the particular case. In both *Weber* and *Young* it was appropriate, when searching for evidence of past discrimination, to compare the percentage of blacks in the employer's work force with the percentage of blacks in the relevant labor pool. For example, prior to the adoption of the affirmative action plan challenged in *Weber,* 1.83 percent of Kaiser-Aluminum's skilled workers were black while the relevant work force was 39 percent black. 433 U.S. at 198-99, 99 S.Ct. at 2724.

"However, in the setting of this case, it is appropriate to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than with the percentage of minorities in the relevant labor market. It is appropriate because teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models. *See, Oliver v. Kalamazoo Board of Education,* 498 F.Supp. 732, 748 (W.D.Mich. 1980) ('faculty ought to begin to approximate the percentage of minority students in the district').

"[2] Because of this one vitally important aspect of the teaching profession, the court holds that in applying the *Young* 'substantial underrepresentation' standard, it may compare the percentage of minority faculty with the percentage of minorities in the student body, rather than the Jackson School Board and the Jackson Education Association to voluntarily adopt, through collective bar-

with the percentage of minorities in the relevant labor pool.[1]

"Applying this standard, it is clear that minority teachers were "substantially" and "chronically" underrepresented on the Jackson School District faculty in the years preceding the adoption of the affirmative action plan. In 1953, there were no black teachers and by 1961, only 1.8 percent of the faculty was black. The court has not been provided with figures establishing the percentage of black students in the Jackson School District during these years.

"[3] However, by the school year 1968-69, black students made up 15.2 percent of the total student population, while black faculty members constituted only 3.9 percent of the total teaching staff. While the percentage of minority students remained relatively constant (15.9 percent in 1971), the percentage of minority faculty members increased, but only to 5.5 percent in 1970-71 and 8.3-8.8 percent in 1971-72.[3] These findings were made by the school board and the court holds that the school board was competent to make such findings. *Regents of University of California v. Bakke, supra,* 438 U.S. at 363-64, 98 S.Ct. at 2785; *see also, McDaniel v. Barresi,* 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

"[4] The court finds that this is 'substantial' and 'chronic' underrepresentation within the meaning of *Young.* Thus, the Fourteenth Amendment would permit

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[1]We agree with the concurring opinion insofar as it asserts substantial underrepresentation was established by plaintiffs. We find it unnecessary, however, to reach the question of whether the District Court properly utilized a minority student ratio. No such issue was presented.

the Jackson School Board and the Jackson Education Association to voluntarily adopt, through collective bargaining negotiations, an affirmative action plan to protect minority teachers from the effects of layoffs.

"The objective of this affirmative action plan to remedy past 'substantial' and 'chronic' underrepresentation of minority teachers on the Jackson School District faculty is plainly constitutional. *Valentine v. Smith, supra,* at 509. Therefore, the only remaining question is whether the means adopted by the Jackson School Board to achieve its objective are constitutional.

"[5] The test is one of reasonableness. *Detroit Police Officers' Association v. Young, supra,* at 694, 696. The reasonableness test asks whether the affirmative action plan is 'substantially related' to the objectives of remedying past discrimination and correcting 'substantial' and 'chronic' underrepresentation. *Id.* at 696; *Valentine v. Smith, supra,* at 510; *U.S. v. City of Miami,* 614 F.2d 1322, 1338-40 (5th Cir. 1980). *See also, Regents of the University of California v. Bakke, supra,* 438 U.S. at 359, 98 S.Ct. at 2783, *Fullilove v. Klutznick,* 448 U.S. 448, 482-92, 100 S.Ct. 2758, 2776-2782, 65 L.Ed.2d 902 (1980)."

546 F. Supp. at 1199-1202.

We agree with and adopt Judge Joiner's conclusions as stated above.

Appellants contend, among other things, that this court's opinion in *Oliver v. Kalamazoo Board of Education,* 706 F.2d 757 (6th Cir. 1983) (*Oliver II*) (decided

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[3]The 8.3 percent figure appears in the affidavit of Susan Diebold, one of the plaintiffs. The other figures appear in the affivadit of Jane I. Phelps, custodian of employment and student records and coordinator of personnel operations for the Jackson Public Schools.

after Judge Joiner's opinion in this case), requires our reversal of the District Court's opinion.

We do not believe that *Oliver II* controls this case. The school board (and the bargaining representative of the teachers) have a legitimate interest in curing the past racial isolation of black teachers in the school system concerned. No undue stigma attaches in the instant case. We recognize that on the record before us, at least one white school teacher, presumably entirely innocent of any racial discrimination, has suffered by being displaced by the plan which plaintiffs attack here. The Supreme Court has, however, previously recognized that "[w]hen effectuating a limited and properly-tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Fullilove v. Klutznick,* 448 U.S. 448, 484, 100 S.Ct. 2758, 2778, 65 L.Ed.2d 902 (1980) (opinion of Burger, C.J.).

This court's recent opinion in *Bratton v. City of Detroit,* 704 F.2d 878 (6th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984), reaffirming our earlier decision in *Detroit Police Officers' Association v. Young,* 608 F.2d 671 (6th Cir. 1979), *cert. denied,* 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981), supports and strengthens the result reached by Judge Joiner.

As was true in the two cases cited above, in our instant case the Board of Education and its bargaining agent had a legitimate interest in the remedial plan which was jointly adopted. Here the school board's interests in eliminating historic discrimination, promoting racial harmony in the community and providing role models for minority students are among the justifications available to support the layoff provisions.

Finally, the district judge appropriately held that there was no basis for the exercise of pendent jurisdiction over appellants' state claims upon dismissal of the federal cause of action. *United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

In this case a local school board and its teacher bargaining representative have adopted a protective collective bargaining contract containing a provision as to teachers in racial minority status. They have done so voluntarily to cure faculty racial imbalance and as a matter of educational policy. We believe that it is within the power and authority of the parties to this agreement so to do, and that their action is in no respect in violation of the United States Constitution or federal law.

The Supreme Court of the United States has just decided *Firefighters Local Union No. 1784 v. Stotts,* — U.S. —, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984), and we have considered the possible impact of this decision upon our instant appeal. We conclude that *Stotts* does not require any revision or change of result in the opinion above. The affirmative action plan involved in our instant case was not the product of any court order. It resulted from voluntary decisions in the collective bargaining process between the school board and the bargaining agent for the teachers. We do not read *Stotts* as barring this form of affirmative action.

The majority opinion in *Stotts* specifically declined to decide the issue with which we are confronted. It said:

> Finally, the Court of Appeals was of the view that the District Court ordered no more than that which the City unilaterally could have done by way of adopting an affirmative action program. Whether the City, a public employer, could have taken this course without violating the law is an issue we need not decide.

> The fact is that in this case the City took no such action and that the modification of the decree was imposed over its objection.

— U.S. at —, 104 S.Ct. at 2590. (footnote omitted).

Nor does the *Stotts* case overrule *United Steelworkers v. Weber,* 443 U.S. 193 (1979). This prior Supreme Court decision was relied upon by the District Court in this case. In *United Steelworkers v. Weber,* the Supreme Court declined to "condemn all private, voluntary, race-conscious affirmative action plans." 443 U.S. at 208, 99 S.Ct. at 2729.

It may be appropriate to point out in this context that the collective bargaining contract containing the disputed layoff provision was adopted in 1972. The full provisions which bear on our present discussion are as follows:

> ARTICLE VII.D.1. The Board and the Association, in recognition of the desirability of multi-ethnic representation on the teaching faculty, hereby declare a policy of actively seeking minority group personnel. For the purposes of this contract, minority group personnel will be defined as those employees who are Black, American Indian, Oriental, or of Spanish descendancy. *The goal of such policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools.*
>
> ARTICLE VII.D.2. In order that this goal be expeditiously met, it is agreed that, for vacancies in school buildings in which this goal has not been met, the Board will actively seek, recruit, and hire qualified minority teachers for such vacancies. The Board will annually review each individual staff to ensure proper minority representation.
>
> ARTICLE XII.B.1. In the event that it becomes necessary to reduce the number of teachers through

> layoff from employment by the Board, teachers with the most seniority in the district shall be retained, *except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.* In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certified maintaining the above minority balance.

The contract containing these provisions, is "a voluntary, race-conscious affirmative action plan." It was adopted by a majority vote of the Jackson Teachers Association as well as by the Jackson Board of Education.

Judge Wellford's concurring opinion concludes "I would AFFIRM the decision that this voluntary affirmative action layoff system, subjected to collective bargaining safeguards, was sufficient to meet the challenge presented by plaintiffs." This is a good summary of this majority opinion's rationale as well as that of Judge Wellford's concurrence. The majority opinion is not, however intended, as Judge Wellford seems to imply, to overrule *Oliver v. Kalamazoo Board of Education,* 706 F.2d 757 (6th Cir. 1983), either directly or sub silentio. The agreement which the School Board and the Jackson Teachers Association (set out in full on pages 7 and 8 of this opinion) was *voluntarily* entered into by the Jackson Board of Education and the Jackson Teachers' union. Neither Judge Joiner nor this court has held that its adoption was constitutionally mandated. This opinion does imply that that agreement is constitutionally permissible. It is also a collective bargaining contract enforceable as a voluntary affirmative action plan designed to remedy past obvious race discrim-

ination and to meet the practical problems posed by racial tensions engendered by that history.

What this court ruled in the *Kalamazoo* case was that the District Court did not have the constitutional authority to design and order the remedy of a 20% hiring quota for black teachers disregarding the contractual and legal seniority and tenure rights of white teachers who would be displaced. In this regard, it seems to have anticipated the opinion of the majority of the Supreme Court in *Firefighters Local Union No. 1784 v. Stotts,* — U.S. —, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984).

The principle involved in both cases seems to be that voluntary affirmative action plans contracted between the parties are easier to defend in the courts than those mandated ab initio by federal trial courts.

The judgment of the District Court is affirmed.

Wellford, Circuit Judge, concurring.

I concur in the result reached in this case, but I write separately in an effort to address an issue which the majority expressly refuses to answer. *See supra* note 1.

Judge Edwards has cited at length from the decision of the trial judge, and has agreed with and adopted Judge Joiner's conclusions. My problem with this determination is that Judge Joiner expressly relied upon *Oliver v. Kalamazoo Board of Education,* 498 F.Supp. 732 (W.D. Mich. 1980), in stating a proposition essential to his decision:

> [I]n the setting of this case, it is appropriate to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than with the percentage of minorities in the relevant labor market. It is appropriate because

> teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models. *See, Oliver v. Kalamazoo Board of Education,* 498 F.Supp. 732, 748 (W.D.Mich. 1980) ("faculty ought to begin to approximate the percentage of minority students in the district").

Wygant v. Jackson Board of Education, 546 F. Supp. 1195, 1201 (E.D. Mich. 1982).

This court, however, reversed the trial court in *Oliver.* In doing so it was made clear that comparing the percentage of minority teachers to the percentage of minority students and then requiring a minority quota of teachers based on the latter proportion was not only *not* constitutionally mandated, it was inappropriate under the circumstances because the court had ignored the practicalities of the situation in the school district. *Oliver v. Kalamazoo Board of Education,* 706 F.2d 757, 762 (6th Cir. 1983). *See also International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 375, 97 S.Ct. 1843, 1874, 52 L.Ed.2d 396 (1977) (court should take practicalities into account in devising remedies under Title VII and in any equitable decree.)

This court, moreover, in reversing the trial court in the *Oliver* case, stated:

> In most school desegregation cases, as in this one, *see* 498 F.Supp. at 746, 751, the constitutional rights to be vindicated are those of the students, not of the teachers or potential teachers. *The students, however, do not have a constitutional right to attend a school with a teaching staff of any particular racial composition. See Fort Bend Independent School District v. City of Stafford,* 651 F.2d 1133 (5th Cir. 1981) (hold-

> ing that the percentage of minority faculty need not approximate the percentage of minority students). Rather, with respect to the teaching staff, all that the students are entitled to is the "sustained good faith effort to recruit minority faculty members so as to remedy the effects of any past discriminatory practices." *Id.* at 1140.

706 F.2d at 762 (footnote omitted) (emphasis added).

This court, then, in citing with approval *Fort Bend Independent School District v. City of Stafford,* 651 F.2d 1133, (5th Cir. 1981), a case decided after the district court decision in *Oliver,* held that there is no constitutional right to attend a school with a minority teacher ratio the same as the minority ratio of students. So long as the school district, over a period of years, had voluntarily hired minority teachers without evidence of discrimination, it was erroneous to impose a quota system utilizing the minority student ratio as the minimum quota for minority teachers. *Oliver,* 706 F.2d at 763. The court, rather, advised:

> But, generally, the wiser approach is a more flexible affirmative action program rather than a hiring quota. *Cf. University of California v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (affirmative action admission programs of educational institutions may take race into account, but racial quotas are prohibited).

Id. at 763.

Had the plaintiffs in this case presented data as to the percentage of qualified minority teachers in the relevant labor market to show that defendant Board's hiring of black teachers over a number of years had equaled that figure, I believe this court may well have been required to reverse under the rationale of *Oliver.* For example,

had defendant shown that from 1969 to 1972 the qualified minority teacher ratio in the relevant market was 10% and that 16% of its teachers hired were a minority, the rationale of *Oliver* would have brought the contract provision at issue into very serious question. *See United Steelworkers v. Weber,* 443 U.S. 193, 209, 99 S.Ct. 2721, 2730, 61 L.Ed.2d 480 (1979), (Court indicated that a showing of "conspicuous racial imbalance" was required). It is a close case, moreover, as to whether the data which was presented was sufficient under *Oliver* standards.[1]

The case relied upon by the trial judge and the panel majority, *Detroit Police Ass'n v. Young,* 608 F.2d 671 (6th Cir. 1979), *cert. denied,* 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981), based its decision upon a comparison of hiring of minorities and the Detroit SMSA labor market ratio of eligible minorities in the Detroit Police Force. Thus, *Young* utilized an available, reasonable labor base of eligible minority workers, not the general population of the city served by the police force. The metropolitan labor market should be the "proper comparison." *See Young,* 608 F.2d at 688, and *Hazelwood School District v. United States,* 433 U.S. 299, 308, 97 S.Ct. 2736, 2743, 53 L.Ed.2d 768 (1977).

> There can be no doubt, in light of the *Teamsters* case, that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Ap-

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[1]Judge Joiner conceded that from 1968-1969 to 1971-1972 the ratio of black minority teaching staff rose from 3.9% to between 8.3% and 8.8% in the Jackson School District. In *Oliver,* the minority ratio, of teachers in the Kalamazoo School District rose from 6.5% to 11.5% between 1970-1971 and March, 1979.

> peals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market. *See Teamsters, supra,* [431 U.S.] at 337-338, and n.17 [97 S.Ct. at 1855-1856 and n.17]. The percentage of Negroes on Hazelwood's teaching staff in 1972-1973 was 1.4% [431 U.S.] and in 1973-1974 it was 1.8%. By contrast, the percentage of qualified Negro teachers in the area was, according to the 1970 census, at least 5.7%.

Hazelwood School District, 433 U.S. at 308, 97 S.Ct. at 2741-42 (footnotes omitted). Underrepresentation, then, of minority teachers as found by Judge Joiner based on a student minority ratio was simply improper under *Oliver* and *Hazelwood; Bratton v. City of Detroit,* 704 F.2d 878 (6th Cir.), *vacated in part on reh'g,* 712 F.2d 222 (1983), *cert. denied,* — U.S. —, 104 S.Ct. 703, 79 L.Ed.2d 168, *reh'g denied,* — U.S. —, 104 S.Ct. 1431, 79 L.Ed.2d 754 (1984), was decided prior to our decision in *Oliver* and cannot override *Hazelwood* on this issue.

I would AFFIRM the decision that this voluntary affirmative action layoff system, subjected to collective bargaining safeguards, was sufficient to meet the challenge presented by plaintiffs.

I concur with the majority that there was no basis for the exercise of pendent jurisdiction under *United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

Wendy WYGANT, et al., Plaintiffs,

v.

JACKSON BOARD OF EDUCATION,
et al., Defendants.

Civ. A. No. 81-60156.

United States District Court,
E. D. Michigan, S. D.

Sept. 7, 1982.

MEMORANDUM OPINION AND ORDER

JOINER, District Judge.

This action is brought by nineteen (19) non-minority school teachers employed by the Jackson Board of Education. Plaintiffs assert various constitutional and statutory claims against the defendants, the Jackson Board of Education and its individual members. The case is now before the court on cross-motions for summary judgment. For the reasons given below, defendants' motion is granted and plaintiffs' motion is denied.

FACTS

The roots of this case reach nearly thirty (30) years into the past. It will be helpful, in coming to grips with the problems posed by this case, to review that past. The following statement of facts is adapted from defendants' brief and is not disputed by the plaintiffs.

Before 1953, no black teachers were employed by the Jackson Public Schools. In that year, the first black school teacher was hired. She was one of sixty-one (61) new hires for the 1953-54 school year. By 1961, ten (10) teach-

ers on the staff of 515 were minorities for a minority to majority ratio of 1.8 percent.

By 1969, black students constituted 15.2 percent of the total student population, while black teachers constituted on 3.9 percent of the total teaching staff. It appears that only in 1969 did the Jackson School District seriously turn its attention to the problem of underrepresentation of minorities on the faculty.

In October, 1969, the Superintendent's Professional Staff Ad Hoc Committee recommended that each of Jackson's 22 elementary schools include at least two minority faculty members within one year. The Executive Secretary of the Jackson Education Association (JEA) was a member of that committee.[1] Since only three of the 22 elementary schools then had at least two minority faculty members, implementation of the Committee's recommendation would have required the School Board to hire 40 new minority teachers within one year. The Committee's recommendation was rejected.

Over the next two years, a Citizens School's Advisory Committee, and a Professional Council made up of school administrators and representatives of JEA, studied the problem. By November, 1971, 15.9 percent of the student body was minority, while only 8.3-8.5 percent of the faculty was minority. At that time, the collective bargaining agreement between JEA and the Board of Education mandated that layoffs be imposed on a straight seniority basis. That is, the last hired were the first to be fired.

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1. JEA has served as the collective bargaining representative for all Jackson school teachers since 1966.

In January, 1972, the Minority Affairs Office of the Jackson Public Schools solicited the views of all teachers on the district's layoff policy. Ninety-six (96) percent of the teachers expressed a preference for the straight seniority system and opposed a system that would freeze minority layoffs. In this atmosphere, contract negotiations were commenced in the spring, 1972.

In retrospect, 1972 appears to have been a critical year for the Jackson School District. In February, race tensions boiled over and violence broke out at the Jackson High School. In the spring, a tentative agreement was reached by JEA and the Board of Education on a new contract, a contract which included increased protection from layoffs for newly hired minority teachers. In September, the teachers returned to work, even though the collective bargaining agreement had not yet been ratified. In the late fall, the teachers struck for a short period of time. Finally, in late fall, the contract for the 1972-73 school year was ratified.

The relevant provisions of that contract have been continued through to the contract challenged in this action and read as follows:

> ARTICLE VII.D.1. The Board and the Association, in recognition of the desirability of multi-ethnic representation on the teaching faculty, hereby declare a policy of actively seeking minority group personnel. For the purposes of this contract, minority group personnel will be defined as those employees who are Black, American Indian, Oriental, or of Spanish descendancy. *The goal of such policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools.* (Emphasis added).

ARTICLE VII.D.2. In order that this goal be expeditiously met, it is agreed that, for vacancies in school buildings in which this goal has not been met, the Board will actively seek, recruit, and hire qualified minority teachers for such vacancies. The Board will annually review each individual staff to ensure proper minority representation.

ARTICLE XII.B.1. In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, *except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.* In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance. (Emphasis added).

In spring, 1973, layoffs were required and the contract language was followed. However, in spring, 1974, the School Board ignored the language of the contract in imposing layoffs. It retained tenured teachers and failed to maintain the percentage of minority personnel which existed at the time of the layoff. As a result, a group of minority teachers sued in federal district court. Judge DeMascio of the Eastern District of Michigan retained the civil rights claims but remanded the breach of contract claims to Jackson County Circuit Court.

In *Jackson Education Association v. Board of Education of Jackson Public Schools,* No. 77-0011484 CZ (Jackson County Cir. Ct., 1979), Judge Britten found that Art. XII.B.1. of the contract did not violate Title VII of the Civil Rights Act of 1964 or the Fourteenth Amendment.

Chastened, the Board apparently adhered to the letter of the contract when layoffs were next required. That course of action led to this lawsuit.

One group of plaintiffs—Wygant, Lamm, Krenkel, Osage, Smith, Diebold, Brzezinski, Crecine, Holton and Zaski—allege that on April 7, 1981, they were notified that they would be terminated for the 1981-82 school year and possibly indefinitely. They allege that they have been displaced by minority teachers or by the effects of the minority retention provisions of the collective bargaining agreement.

A second group of plaintiffs—Bluhm, Burnette, Staska, Kiesel, Janke, Verhoeven, Maynard and Odell—challenge layoffs which occurred much earlier. They allege that they were displaced by minority teachers with less seniority for various periods of time during the 1976-77 school year.

The plaintiff Ruth Ann Anderson is named in the caption to the complaint, but is not again mentioned. Presumably she belongs to one of the two groups described above, and she will be so treated.

Plaintiffs have challenged their layoffs on a variety of statutory and constitutional theories:

1. Equal Protection, U.S.Const. amend. XIV, § 1.
2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*
3. 42 U.S.C. § 1981.
4. 42 U.S.C. § 1983.
5. 42 U.S.C. § 1985.

6. Equal Protection, Mich.Const. art. I, § 2.

7. Elliott-Larsen Civil Rights Act, M.C.L.A. § 37.2101 *et seq.*

8. Teachers' Tenure Act, M.C.L.A. § 38.71 *et seq.*

9. Fair Employment Practices Act, M.C.L.A. § 423.-301 *et seq.*[2]

The defendants have moved for summary judgment on or dismissal of all these claims on various grounds. Plaintiffs have countered with their own summary judgment motion. The parties are agreed that the relevant facts are not in dispute. Therefore, the various motions and countermotions will be addressed and ruled on point by point.

DISCUSSION

1. Equal Protection, U.S.Const. amend. XIV, § 1.

a. Prior Judicial Finding of Past Employer Discrimination as Prerequisite to Adoption of Affirmative Action Plan

Plaintiffs argue first that they are entitled to summary judgment because an employer and a union cannot lawfully negotiate a voluntary affirmative action plan which gives preferential treatment to minorities, where there has been no judicial finding of past employer discrimination. Stated in other words, plaintiffs argue that societal discrimination, as opposed to identifiable em-

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2. The Fair Employment Practices Act was repealed by Mich. P.A.1976, No. 453, § 804 (Eff. March 31, 1977). It has largely been replaced by the Elliott Larsen Civil Rights Act, M.C.L.A. § 37.2101 *et seq.* It is not a proper basis for this lawsuit and will not be considered further in this opinion.

ployer discrimination, is not a lawful basis for the adoption of a voluntary affirmative action plan.

United Steelworkers of America v. Weber, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979) held that Title VII does not prohibit a private employer from voluntarily adopting an affirmative action plan "to eliminate conspicuous racial imbalance in traditionally segregated job categories." 443 U.S. at 209, 99 S.Ct. at 2730. In *Weber,* there was no judicial finding that the private employer, Kaiser Aluminum, had ever engaged in race discrimination. However, Kaiser's work force statistics for the years prior to the adoption of the affirmative action plan pointed up gross disparities between the number of blacks employed by Kaiser and the number of blacks in the relevant labor market. Thus, *Weber* stands for the proposition that Title VII does not require a judicial finding of employer discrimination before a private sector employer may adopt an affirmative action plan.

Detroit Police Officers' Association v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied,* 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981), extended this particular holding of *Weber* to public sector employers *and* to alleged Constitutional violations.

In *Young,* the Detroit Police Department, after an internal determination that blacks were underrepresented in the department, voluntarily adopted an affirmative action program which promoted black patrolmen to sergeant ahead of white patrolmen who were higher on the eligibility list. The white officers challenged the affirmative promotion plan on Title VII and Equal Protection grounds. The Sixth Circuit relied on *Weber* to hold that the internal

determination of racial disparities justified the voluntary plan, even though there had been no prior judicial determination of race discrimination.

> [D]iscriminatory acts which might not give rise to legal liability may nonetheless be sufficient to justify a voluntary remedial affirmative action plan. . . As Justice Blackmun noted in his concurring opinion in *Weber,* a preferential hiring plan which seeks to alleviate an imbalance caused by traditional practices of job segregation is a reasonable voluntary response "whether or not a court, on these facts, could order the same step as a remedy" . . . Under *Weber,* the district court's holding that "quota relief, when fashioned by the employer without the assistance and direction of the court, is not permitted . . ." . . . cannot stand as a matter of law. 608 F.2d at 689-90.

Having thus held on the Title VII claim, the *Young* court applied the same principle to the Constitutional challenge.

> It was also error to require that there be judicial determination of past discrimination for a state to undertake a race-conscious remedy, as stated by the district court. This requirement would be "self-defeating" and would "severely undermine" voluntary remedial efforts. [Citing *Regents of the University of California v. Bakke,* 438 U.S. 265, 364, 98 S.Ct. 2733, 2785, 57 L.Ed.2d 750 (1978)].

[1] Thus, it appears that plaintiffs' contention that the affirmative action plan at issue here cannot stand because there has been no prior judicial determination that the defendants engaged in racial discrimination, is without merit. Plaintiffs' motion for summary judgment on this ground is denied.

b. Constitutionality of Affirmative Action Plan

Having determined that a judicial finding that defendants engaged in race discrimination is not a prerequisite to adoption of the affirmative action at issue here, the court must still determine whether the plan is one permitted by the Constitution.

As an initial matter, there must be some evidence that minority teachers have not enjoyed the same representation on the faculty of the Jackson Public Schools as have white teachers. Justice Brennan, for the majority in *Weber,* adhered closely to the facts of that case and framed this requirement in terms of "conspicuous racial imbalance in traditionally segregated job categories." 443 U.S. at 209, 99 S.Ct. at 2730. Justice Blackmun, in concurrence in *Weber,* held out for an "arguable violation" standard. In other words, employers and unions which had committed "arguable violations" of Title VII would be free to adopt voluntary affirmative action plans without fear of Title VII liability to whites.

For purposes of the Equal Protection clause of the Constitution, the *Young* court stated this requirement as follows: "whether 'there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities. . .'" 608 F.2d at 694. The standard was adopted directly from the opinion of Justices Brennan, White, Marshall and Blackmun in *Bakke.*

The *Young* court expressly held that:

> [I]t was error to require proof that the persons receiving the preferential treatment had been individ-

ually subjected to discrimination, for "it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination." 608 F.2d at 694.

The reason for this requirement is to permit the court to determine that the purpose of the affirmative action plan is legitimate. *Valentine v. Smith,* 654 F.2d 503, 508 (8th Cir.), *cert. denied,* — U.S. —, 102 S.Ct. 972, 71 L.Ed. 2d 111 (1981).

The requirement of some showing of previous underrepresentation of minorities must, of course, be adopted to the facts and circumstances of the particular case. In both *Weber* and *Young* it was appropriate, when searching for evidence of past discrimination, to compare the percentage of blacks in the employer's work force with the percentage of blacks in the relevant labor pool. For example, prior to the adoption of the affirmative action plan challenged in *Weber,* 1.83 percent of Kaiser-Aluminum's skilled workers were black while the relevant work force was 39 percent black. 443 U.S. at 198-99, 99 S.Ct. at 2724.

However, in the setting of this case, it is appropriate to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than with the percentage of minorities in the relevant labor market. It is appropriate because teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models. *See, Oliver v. Kalamazoo Board of Education,* 498 F.Supp. 732, 748 (W.D.Mich.1980) ("fac-

ulty ought to begin to approximate the percentage of minority students in the district").

[2] Because of this one vitally important aspect of the teaching profession, the court holds that in applying the *Young* "substantial underrepresentation" standard, it may compare the percentage of minority faculty with the percentage of minorities in the student body, rather than with the percentage of minorities in the relevant labor pool.

Applying this standard, it is clear that minority teachers were "substantially" and "chronically" underrepresented on the Jackson School District faculty in the years preceding the adoption of the affirmative action plan. In 1953, there were no black teachers and by 1961, only 1.8 percent of the faculty was black. The court has not been provided with figures establishing the percentage of black students in the Jackson School District during these years.

[3] However, by the school year 1968-69, black students made up 15.2 percent of the total student population, while black faculty members constituted only 3.9 percent of the total teaching staff. While the percentage of minority students remained relatively constant (15.9 percent in 1971), the percentage of minority faculty members increased, but only to 5.5 percent in 1970-71 and 8.3-8.8 percent in 1971-72.[3] These findings were made by the school board and the court holds that the school board was competent to make such findings. *Regents of Univer-*

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3. The 8.3 percent figure appears in the affidavit of Susan Diebold, one of the plaintiffs. The other figures appear in the affidavit of Jane I. Phelps, custodian of employment and student records and coordinator of personnel operations for the Jackson Public Schools.

sity of California v. Bakke, supra, 438 U.S. at 363-64, 98 S.Ct. at 2785; *see also, McDaniel v. Barresi,* 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

[4] The court finds that this is "substantial" and "chronic" underrepresentation within the meaning of *Young.* Thus, the Fourteenth Amendment would permit the Jackson School Board and the Jackson Education Association to voluntarily adopt, through collective bargaining negotiations, an affirmative action plan to protect minority teachers from the effects of layoffs.

The objective of this affirmative action plan to remedy past "substantial" and "chronic" underrepresentation of minority teachers on the Jackson School District faculty is plainly constitutional. *Valentine v. Smith, supra,* at 509. Therefore, the only remaining question is whether the means adopted by the Jackson School Board to achieve its objective are constitutional.

[5] The test is one of reasonableness. *Detroit Police Officers' Association v. Young, supra,* at 694, 696. The reasonableness test asks whether the affirmative action plan is "substantially related" to the objectives of remedying past discrimination and correcting "substantial" and "chronic" underrepresentation. *Id.* at 696; *Valentine v. Smith, supra,* at 510; *U.S. v. City of Miami,* 614 F.2d 1322, 1338-40 (5th Cir. 1980). *See also, Regents of the University of California v. Bakke, supra,* 438 U.S. at 359, 98 S.Ct. at 2783, *Fullilove v. Klutznick,* 448 U.S. 448, 482-92, 100 S.Ct. 2758, 2776-2782, 65 L.Ed.2d 902 (1980).

[6] The court finds that the affirmative action layoff provisions of the collectively-bargained contract be-

tween the defendants and JEA are substantially related to constitutional objectives. Therefore, the plan is constitutional.

First, the plan is designed to either 1) retain a sufficient number of minority teachers so that the racial composition of the Jackson School District faculty will roughly approximate that of the student body, or 2) if that ratio has not yet been achieved, then at least to prevent a reduction in the minority to majority ratio. *See, Valentine v. Smith, supra,* at 510-11; *United Steelworkers v. Weber, supra,* at 208, 99 S.Ct. at 2729; *Detroit Police Officers' Association v. Young, supra,* at 696. In practice, the affirmative action layoff provision prevents the loss of minority hiring gains, which is an express policy and goal of the contract. Art. VII.D.2. Clearly, the Board could and did act to increase the number of minority teachers. The layoff provision simply operates to implement that policy. The layoff provision does not *require* that the percentage of minority teachers retained equal or approximate the percentage of minorities in the student body. Rather, it seeks only to prevent the loss in minority hiring gains achieved through operation of the Board's affirmative hiring policy.

Second there is no suggestion that the affirmative action layoff provision is anything more than a temporary measure. *United Steelworkers v. Weber, supra,* at 208, 99 S.Ct. at 2729; *Valentine v. Smith, supra,* at 510-11. In fact, the layoff provisions are part of a collectively-bargained contract of limited duration. These provisions, presumably like all other provisions in the contract, are subject to change whenever the contract is renegotiated.

Third, the layoff provisions do not require the retention of unqualified teachers. *Valentine v. Smith, supra,* at 510-11. A layoff provision, by definition, applies only to those previously hired and, presumably, previously found qualified.

Fourth, the layoff provision does not require the layoff of all white teachers or otherwise unnecessarily or invidiously trammel their interests. *Valentine v. Smith, supra,* at 510-11; *United Steelworkers v. Weber, supra,* at 208, 99 S.Ct. at 2729. Clearly, an affirmative action plan is not invalid merely because some innocent persons bear the brunt of the racial preference. *Fullilove v. Klutznick, supra,* at 484, 100 S.Ct. at 2777; *Valentine v. Smith, supra* at 511. Here, no white teacher is stigmatized by operation of the layoff provision. Layoffs are usually required either because a school district is financially strapped, or because student enrollment has declined. Layoffs of the sort contemplated by Art. XII.B.1. of the contract are not related to merit.

Furthermore, Art. XII.B.1. does not oust white teachers and replace them with new minority hires, nor does it absolutely bar laid off white teachers from ever again working for the Jackson School District. *See United Steelworkers v. Weber, supra,* at 208, 99 S.Ct. at 2729.

Finally, it is undeniable that the contract, and thus the challenged layoff provision, was collectively bargained. It is difficult for the court to conceive how a plan which has been voluntarily adopted by the membership of the JEA can invidiously trammel the interests of white teachers, a majority of the JEA.

In light of all these considerations, the court concludes that Art. XII.B.1. is substantially related to admittedly proper objectives and that, therefore, the affirmative action layoff provision is constitutional.

2. Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

Defendants contend that plaintiffs' Title VII claims should be dismissed because plaintiffs have not complied with administrative prerequisites. Specifically, defendants argue that plaintiffs have not produced the required notice of right-to-sue from the Equal Employment Opportunity Commission (EEOC).

[7] A Title VII action may not be filed in the district court unless the plaintiff has first filed an administrative charge with the EEOC. 42 U.S.C. § 2000e-5(f)(1). Ordinarily, a plaintiff demonstrates compliance with this requirement by securing and producing a notice of right-to-sue from the EEOC. This requirement is jurisdictional and may not be waived. *Foreman v. General Motors Corp.*, 473 F.Supp. 166 (E.D.Mich.1979).

[8] Since the plaintiffs have neither produced a notice of right-to-sue from the EEOC, nor otherwise alleged that the administrative prerequisites of Title VII have been fulfilled, all Title VII claims must be dismissed for lack of jurisdiction. Fed.R.Civ.P. 12(b)(1).

3. § 1981, § 1983, § 1985

It follows from the court's holding as to plaintiffs' Equal Protection claims, that the defendants must also be granted summary judgment on plaintiffs' § 1981, § 1983 and § 1985 claims.

[9] Section 1981 forbids with some specificity, what the Constitution forbids generally. *Detroit Police Officers' Association v. Young, supra,* at 692. It also permits what the Constitution permits. *Id.* at 692. Therefore, an affirmative action plan of a governmental employer that passes constitutional muster does not violate § 1981. *Id.; Valentine v. Smith, supra,* at 512. Since the court has already determined that the affirmative action plan did not violate the Equal Protection clause of the Constitution, plaintiffs' § 1981 claims must be dismissed.

[10] The same is true of plaintiffs' § 1983 claims. Section 1983 provides a remedy for any person deprived under color of law of "any rights, privileges, or immunities secured by the Constitution and laws." The only conceivable right, privilege or immunity that plaintiffs could have been deprived of was their Constitutional right to equal protection of the laws. However, the court has held that the affirmative action plan at issue did not deprive them of that right. Therefore, defendants are entitled to summary judgment on plaintiffs' § 1983 claims.

[11] Plaintiffs have not specified which subsection of § 1985 they are suing under. However, the court assumes the plaintiffs are suing under § 1985(3) which provides a remedy for conspiracies to deprive a person or class of persons "of the equal protection of the laws, or of equal privileges and immunities under the laws." Since the court has already held that plaintiffs have not been denied their rights to equal protection, it follows that defendants cannot be liable under § 1985(3). Defendants are entitled to summary judgment on the § 1985 claims.

[12] Furthermore, even if defendants were not entitled to summary judgment, plaintiffs' § 1985(3) claims would have to be dismissed because plaintiffs have failed to state a claim. Fed.R.Civ.P. 12(b)(6). A "conspiracy" is an essential element of a § 1985 claim. *Griffin v. Breckinridge,* 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971). Plaintiffs have not alleged that defendants engaged in a conspiracy.

4. State Constitutional and Statutory Claims

[13] As all plaintiffs' federal claims have been dismissed, there is no basis for the court to assert jurisdiction over plaintiffs' state law claims. Therefore, plaintiffs' claims under the Michigan Constitution, the Elliott-Larsen Civil Rights Act, and the Teachers' Tenure Act, must be dismissed. *United Mineworkers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966).

So ordered.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 4-72340

THE JACKSON EDUCATION ASSOCIATION, INC., a non-profit Michigan corporation, LINDA BENSON, and VIRGINIA DAVIS,

Plaintiffs,

v.

BOARD OF EDUCATION OF THE JACKSON PUBLIC SCHOOLS,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Jackson Education Association, Inc. (Association), plaintiff herein, filed this suit on August 30, 1974 for itself and on behalf of Linda Benson and Virginia Davis, two black school teachers employed by defendant, the Board of Education of the Jackson Public Schools (Board). The Association is a labor organization within the meaning of Michigan's Public Employment Relations Act, M.C.L.A. § 423.201, *et seq.*, and is the exclusive bargaining agent, *see* M.C.L.A. § 423.211, for the teachers employed by the Board. The first count in the complaint filed by the Association alleges that, on September 7, 1973, the Association and the Board entered into a collective bargaining agreement effective as of September 1, 1973; that the employment practices of the Board, prior to the execution of the collective bargaining agreement, had, *inter alia,* the effect of discriminating against the employment of minority groups; and that, as a consequence of the alleged discriminatory employment practices, the parties agreed to include the following provision in the collective bargaining agreement:

> The Board and the Association, in recognition of the desirability of multi-ethnic representation on the teaching faculty, hereby declare a policy of actively seeking minority group personnel. For the purposes of this contract, minority group personnel will be defined as those employees who are black, American Indian, Oriental, or of Spanish descendency. The goal of such policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools. (Article VII, ¶E.)

Count I also alleges that the parties agreed to the following provision as part of the proper layoff procedure:

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance. (Article XII, ¶B, subparagraph 1.)

Count I further alleges that, on or about April 8, 1974, the Board took formal action to lay off seventy-five teachers (pursuant to its estimate that that many teaching positions had to be eliminated), including plaintiffs Davis and Benson; that nineteen of the seventy-five teachers originally laid off were "minority group personnel" within the meaning of the collective bargaining agreement; that the Board failed to maintain the proper percentage of minority group personnel (the proper percentage pursuant to Article XII, paragraph E, was 9.4%, the 'percentage of minority group personnel employed at the time of the layoff") because of its decision to retain eleven non-minority teachers that had achieved tenure status under the Michigan Teacher Tenure Act, M.C.L.A. § 38.71, *et seq.* (the Act), and to lay off eleven minority group teachers that had not yet achieved tenure under the Act (these eleven were on probationary status).

The second count of the complaint alleges only that the Board, in laying off plaintiffs Davis and Benson, vio-

lated Article XII, paragraph B of the collective bargaining agreement, and that as a direct result of this breach, plaintiffs suffered damages, including the loss of pay. Plaintiffs' prayer for relief seeks only that the court find that the Board breached Article XII, paragraph B of the collective bargaining agreement by failing to maintain the proper percentage of minority group personnel because of the layoff of plaintiffs Benson and Davis; that the court declare Article XII, paragraph B of the collective bargaining agreement to be not contrary to the provisions of the Teacher Tenure Act; that the court enjoin the Board from further violating the provisions of Article XII, paragraph B, *i.e.*, that the court restrain the Board from laying off a greater percentage of minority group personnel than the percentage of minority group personnel employed at the time of any future layoff; and that plaintiffs Davis and Benson[1] be awarded damages (for expenses incurred as a result of defendant's alleged breach of contract), back pay, reinstatement to their jobs, and "such other relief as may be just and equitable in the eyes of this Court."[2]

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[1]All of the minority group personnel originally laid off in 1974 have been recalled with the exception of plaintiff Benson, who remains on the Systems Layoff Recall List although she has found alternative employment for the 1974-76 school years. Defendant contends that plaintiff Benson resigned her position to obtain full-time employment elsewhere and that plaintiff Davis taught in a program that had been abolished.

[2]The collective bargaining agreement under which this dispute arose was replaced by a successor agreement on September 1, 1975. The same language relating to layoff procedures was retained in the successor agreement. See Exhibit 13, Article XII, paragraph B, and affirmative action language was added to the existing contract. In the Spring of 1975, the Board laid off eighteen teachers but, in doing so, the language of the contract was followed.

The Board admits all of the averments in the complaint except the allegation that, prior to the making of the collective bargaining agreement in September 1973, it had engaged in employment practices discriminatory to minority groups, and that such alleged discriminatory employment practices caused the alleged relative underemployment of minority group personnel. Defendant asserts, moreover, that its actions in laying off a greater percentage of minority group personnel than the total percentage of minority group personnel employed at the time of the layoff were compelled by the provisions of the Teacher Tenure Act, so that it could not adhere to the contract language which it views as contrary to, and subordinate to, the laws of the State of Michigan.

The trial of this cause was ordered bifurcated, and on March 31, 1976, the court held a bench trial on the liability issue. Just prior to trial, plaintiff filed an amendment to paragraph A of Count I of the complaint.[3] At trial, plaintiffs offered the testimony of the Executive Director of the Association and fifteen exhibits were admitted into evidence together with certain deposition testimony. At

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[3]Although the proposed amendment was filed on the first day of trial without leave of the court, we treat it as properly filed. The amendment seeks to include an allegation that the court properly has jurisdiction over the action pursuant to Title VII. As amended, paragraph A of Count I reads:

> A. This Court has original jurisdiction of the action here brought under the provisions of the United States Code, Title 28, 1343(3) and 1343(4) and under United States Code, Title 28, 1331, based upon violations of rights secured by and arising out of statutes (e.g., United States Code, Title 42, Section 2000d and 2000e-2(a) (1) and (2)) and the Constitution of the United States. The amount in controversy exceeds the sum or value of ten thousand ($10,000.00) dollars, exclusive of interest and costs.

the conclusion of the trial, the cause was taken under advisement for preparation of the court's findings of fact and conclusions of law. When the court examined the evidence, it questioned its jurisdiction over this cause on its own motion.[4] The parties were requested to submit briefs on that issue and they did so; after much consideration the court has concluded that it lacks jurisdiction over the subject matter of this action.[5]

In support of their allegations that defendant engaged in employment practices, prior to the making of the 1972 collective bargaining contract, that resulted in hiring policies discriminatory to minority personnel, *see* Complaint, Count I, paragraph F, plaintiffs submitted Exhibits 14 and 15. Exhibit 14, supplied by the Board, merely sets forth the student racial mix and the number of minority teachers contained in the total teaching faculty.[6] The evidence further demonstrated that the first black teacher in the City of Jackson was not hired until 1953. Following the 1968-69 academic year, the Board attempted to increase the percentage of minority teachers, causing the minority staff ratio to increase from 3.9% to 8.8% over

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[4]The Board did not raise the jurisdictional issue prior to or during the trial. It addressed itself to the jurisdictional issue only after the court raised it *sua sponte*.

[5]Plaintiffs once again have sought to amend their complaint in an attempt to confer jurisdiction upon the court. To their brief on the jurisdictional issue, plaintiffs attached a motion for leave to amend their complaint to allege a violation of 42 U.S.C. § 1981.

[6]Exhibit 15 represents an extension of the data contained in Exhibit 14. For example, Exhibit 14 sets forth the percentage of minority students contained in the total student enrollment together with the percentage of minority teachers employed by the Board.

the next three years. The Board did not begin to maintain student minority ratio statistics until the 1968-69 academic year. In 1972, Dr. Lawrence Read, then the superintendent of schools, reported the recommendations of the desegregation subcommittee to the members of the Board. One of these recommendations suggested that:

> . . . the Board of Education direct the school administration to work towards a teaching staff, in the elementary schools, that also achieves a racial balance as close as possible to that of the students with a minimum of two black teachers in every school.

It is interesting to note that the evidence also demonstrated that there were not enough black teachers in the school system at that time to implement this recommendation.

Plaintiffs argue that the statistical data submitted in exhibit form sufficiently establish that the Board engaged in discriminatory hiring practices;[7] that these allegations of racial discrimination in violation of the fourteenth amendment are sufficient to confer jurisdiction over this cause upon the court; that, once having established that this court has jurisdiction pursuant to the fourteenth amendment, the court has pendent jurisdiction to resolve their claims that the Board breached the collective bargaining agreement, the sole claims set forth by the complaint. The difficulty with plaintiffs' argument is that it assumes that the *de facto* imbalance disclosed by the

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[7]Plaintiffs admit that when Dr. Lawrence Read became superintendent, the Board began a real effort to end the racial imbalance in the student enrollment at each school and in the teaching staff. Plaintiffs argue, however, that, notwithstanding the valiant efforts of Dr. Read, the racial imbalance situation has not been rectified.

statistical data in and of itself demonstrates a violation of the fourteenth amendment's equal protection clause. This simply is not so. *Washington v. Davis,* 44 U.S.L.W. 4789 (U.S. June 7, 1976). It is true, however, that statistical evidence may demonstrate that hiring and promotion practices of an employer have a racially differential impact sufficient to make out a *prima facie* case under Title VII. *See, e.g., Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971); *Robinson v. City of Dallas,* 514 F.2d 1271, 1272-73 (5th Cir. 1975).[8] The plaintiffs, however, have not demonstrated that they fulfilled the jurisdictional prerequisites for a Title VII suit—they did not allege or demonstrate that discrimination charges were filed with the Equal Employment Opportunity Commission (EEOC), that they received a right-to-sue letter from EEOC, or that they timely acted upon a right-to-sue letter. 42 U.S.C. §2000e-5. *See, e.g., Alexander v. Gardner-Denver Corp.,* 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 798 (1973).

The proofs presented at trial were not directed at establishing violations of the fourteenth amendment, Title VII, or any other statute forbidding racial discrimination. Nor did plaintiffs ever make averments sufficient to establish such violations. The complaint, as well as the proofs offered at trial, demonstrated that this dispute

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[8]This is not to say, however, that statistical evidence tending to demonstrate a racially differential impact cannot be utilized in a non-Title VII racial discrimination case. In *Washington v. Davis, supra,* the Court, in speaking of such cases, stated that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." 44 U.S.L.W. at 4793.

centers about a conflict between the provisions of the collective bargaining agreement and state law as interpreted by defendant. Plaintiffs' contractual claim arises under state law and the parties have not shown, nor could they, that the court has jurisdiction over it. The parties are not of diverse citizenship and the contractual claim can in no way be considered pendent to any federal claim since it does not arise out of a common nucleus of operative fact. Any federal claim advanced by plaintiffs was advanced to set forth a pretextual jurisdictional basis so that the court could decide the real dispute between the parties—the contractual claim. The contract dispute is, however, a state law matter and the state courts are fully able to resolve any real or apparent conflict between the Michigan Teacher Tenure Act and the collective bargaining agreement's provisions. The court does not have jurisdiction over plaintiffs' asserted Title VII claim because of plaintiffs' total failure to comply with the jurisdictional prerequisites to a Title VII action. The complaint was amended to allege 42 U.S.C. §2000d as a jurisdictional basis, but plaintiffs made no attempt to include averments in their complaint or to introduce any evidence at trial to support such a claim.[9]

Accordingly, we conclude that the jurisdictional averments contained in the complaint are insufficient to vest

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[9]42 U.S.C. § 2000d, et seq., prohibits discrimination on the basis of race, color or national origin against any person or by anyone in a program or activity receiving federal financial assistance. Here, however, plaintiffs' claim of discrimination revolves about the contractual dispute and there has been no showing whatsoever that defendant's allegedly discriminatory actions were motivated by a racial animus.

this court with jurisdiction over the Title VII cause of action asserted by plaintiff and that the non-Title VII causes of action, advanced by amendments to the complaint, are unsupported by the evidence.

/s/ Robert E. DeMascio
United States District Judge

Dated: December 15, 1976