No. 84-1340

In The

Supreme Court of the United States

October Term, 1984

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.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respectfully Submitted By:

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RESPONDENT DEFENDANT-APPELLEE'S COUNTER QUESTION OF LAW

I. THAT A NEGOTIATED LAYOFF PROVISION TO PROVIDE FOR MINORITY REPRESENTATION IN THE FACULTY IS NOT OFFENSIVE TO THE CONSTITUTION AND THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS AND THE TRIAL COURT SHOULD BE SUSTAINED AND THE WRIT DENIED.

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JURISDICTION

Jurisdiction is proper in the court in accordance with 28 U.S.C. § 1254(1) (1976).

STATEMENT OF THE CASE

The responding Defendant-Appellee accepts the Facts and Background as set forth in the Plaintiff-Appellant Petitioner's Brief at Pages 2 through 5, however, with the additions listed in the following paragraphs:

There is no dispute in the record that the clause which is the subject matter of this litigation arises through the collective bargaining process, and that all times pertinent the Jackson Education Association was and is the certified representative of teachers in the school district. Since the contract language in the 1972-73 labor agreement, which appears in the Appendix of the petitioning Plaintiff-Appellant at Page 1a, there have been at least three labor agreements, and the contract language which is the subject matter of this litigation remains intact.

At all times pertinent, white teachers made up a majority by 85% of the JEA, who voted for ratification of the labor agreement.

At no time since the inception of the language which is the subject matter of this lawsuit has the Union proposed its deletion from the labor agreement. Based upon the record, at Page 31a of the Appendix, Judge Joiner found that there was a substantial and chronic underrepresentation of minorities within the district. The trial court, as exhibited at Page 33a of the Appendix, found that since a majority of the employees ratifying the

labor agreement were white, that it could not be said that the Plaintiff's rights were invidiously trammeled.

It should be noted that the subject matter of language was not unilaterally imposed by the Employer, nor does it result from a court-ordered affirmative action plan, but rather, was collectively bargained by and between the Board of Education and the Plaintiff's bargaining representative, the JEA. The Plaintiffs have since the inception of this cause of action remained members of the labor organization.

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REASONS FOR DENYING THE PETITION

I. That A Negotiated Layoff Provision That Seeks To provide For Minority Representation In The Faculty Is Not Offensive To The Constitution And The Decision Of The Sixth Circuit Court Of Appeals And The Trial Court Should Be Sustained And The Writ Denied.

The findings of the trial court are significant, and it was noted that before 1953 there were no black teachers employed by the Jackson Public Schools, and that by 1969 black students constituted 15.2 percent of the total student population, while black teachers constituted 3.9 percent of the total teaching staff. *Wygant v. Jackson Board of Education,* 546 F. Supp. 1195 (E.D. Mich. 1982) and Appendix 20a-21a.

The trial court noted that the genesis of the language came following a solicitation of the views of all teachers on a district layoff policy. Appendix 22a.

In supporting the plan the court noted that minority teachers were substantially and chronically underrepresented in the district and that the language negotiated by the parties, which remains extant to date, was a reasonable plan. The language is designed to retain a sufficient number of minority teachers so that the racial composition of the Jackson School District faculty will approximate that of the student body, or if a ratio is not achieved, then at least to prevent a reduction in the minority to majority ratio. In this regard the court noted it was proper in accordance with *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 plan was substantially related to the objectives of remedying past discrimination and correcting substantial and chronic underrepresentation, and was therefore proper in accordance with the Sixth Circuit tests set forth in *Detroit Police Officers' 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).

Clearly, this court's decision in *United Steelworkers of America v. Weber,* 443 U.S. 193, 99 S.Ct. 2721, 61 L. Ed. 2d 480 (1979), made it clear 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., p. 209, 99 S.Ct., p. 2730. The facts in *Weber* made it clear that there was no judicial finding that the private employer, Kaiser Aluminum, had ever engaged in race discrimination. There were however gross disparities between the number of blacks employed by Kaiser and the number of blacks in the relevant labor market. In the *Young* case, the court found that discriminatory acts

which might not give rise to legal liability may nonetheless be sufficient to justify a voluntary remedial affirmative action plan. 608 F.2d, pp. 689-690. The requirement of court intervention was treated as self-defeating by this court in *Regents of the University of California v. Bakke,* 438 U.S. 265, 364, 98 S.Ct. 2733, 2785, 57 L. Ed. 2d 750 (1978).

This court's decision in *Firefighters Local Union No. 1784 v. Stotts,* — U.S. —, 104 S.Ct. 2576, 81 L. Ed. 2d 483 (1984) deals with a court-ordered affirmative action plan and not a plan negotiated by the representative of the Plaintiffs, who stand in the majority, and their Employer. This court's opinion in *Stotts* does not ban negotiated affirmative action layoff language, although heartily in all four cases, this court approved a set-aside requirement of at least 10 percent of public funds granted for local public works projects for purchase for minority-owned businesses, and found the same to not violate the equal protection clause in *Fullilove v. Klutznick,* 448 U.S. 448, 48 U.S.L.W. 4979 (1980), and recently, the Philadelphia School District's plan, which maintained a faculty ratio at each school of between 75 and 125 percent of system-wide promotions of white and black teachers, so that the racial composition of each school faculty reflects that of the overall teaching staff, was found to be constitutionally sound and not prohibited by Title VII, even in the light of *Firefighters v. Stotts, supra.* 51 U.S.L.W. 2441, 53 U.S.L.W. 2056. The Third Circuit in reaching this decision distinguished *Stotts,* in that in *Kromnick* the issue did not involve a court order forbidding race-conscious layoffs in controvention of seniority rights. Unlike *Stotts,* Petitioner would ask this Court to invalidate

the lay-off procedure negotiated by the Union and Employer.

It should be noted that Plaintiffs bring their case under the Fourteenth Amendment and not under Title VII, and that therefore the distinction between *Stotts* and the case at bar should be viewed in the light of the Sixth Circuit's recent decision in *NAACP v. Detroit Police Officers Ass'n,* 53 U.S.L.W. 2065. The trial court's finding of the language being a temporary measure is supported by the fact that it is part of a collective bargaining agreement which has an existence of no more than three years of duration. As a result, the test should meet the challenge of a temporary measure in accordance with *Tangren v. Wackenhut Servs.,* 658 F.2d 705 (9th Cir. 1981); *Valentine v. Smith, supra; United Steel Workers of America v. Weber, supra.* The Defendant-Appellee Respondent would suggest that the tests set forth in the plan itself comply with the tests suggested by Justices Brennan, White, Marshall, and Blackmun in *Bakke,* and particularly in the light of the fact that the measure is temporary and that laid-off teachers are not stigmatized by the layoff language at issue. Further, the layoff provision does not require the layoff of all white teachers. The provision was adopted by a white majority. The language is designed to protect against wiping out minority hiring gains. The language does not require the retention of unqualified teachers. In this sense the test set forth by Justice Powell, at 438 U.S., p. 305, 57 L. Ed. 2d, p. 781, would appear to be met. Justice Powell did not suggest that the only time an affirmative action plan could be adopted would be after a judicial finding, and in *Bakke* numerous suggestions were offered by Justice Powell to the contrary. 438 U.S., p. 302 n. 41; 57 L. Ed. 2d, p. 779, n. 41.

CONCLUSION

The Defendant-Appellee Respondent asks that this court deny the Petitioner's Writ of Certiorari. The lay-off plan negotiated by the Union and Employer does not violate the Fourteenth Amendment and is not repugnant to it, is for a limited duration, and was approved by a substantial majority of white teachers. The language which is the subject matter of this litigation has existed since 1972, having been ratified by the parties in successor agreements. As noted by the Court of Appeals when the matter was argued before it, but one white teacher, Plaintiff of the group of Plaintiffs, remained unemployed as a result of the use of the language, Appendix 3a. The issue, although not moot, comes close to it, and the language provided has worked to protect a minority balance without doing harm to the white majority. For these reasons the Defendant-Appellee would ask that the writ be denied.

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