10-1985

Local 28 of the Sheetmetal Workers' International Association v. Equal Employment Opportunity Commission (EEOC)

Lewis F. Powell Jr.

City of Cleveland, 84-1999 is pending on Cert. & also presents quota issue in a different setting. This may be the better case, tho SG prefers Cleveland

Grant. 9 & 2 also grant Cleveland & set back to back.

A case that squarely presents the Q whether court imposed quotas ("rigid" goals) because of the Union's past discrimination vs. non-whites is valid when the quotas cannot be justified by past discrimination.

Wygant v Jackson Bd of Education, 84-1340, also presents a type of quota system - but it was result of a CBA - not court ordered

PRELIMINARY MEMORANDUM

September, 30, 1985 Conference
List 11, Sheet 1

No. 84-1656

LOCAL 28, SHEET METAL WORKERS' INT'L ASSN, et al. OR
v.
EEOC, et al. OR

Cert to CA2 (Pratt, Mansfield; Winter--dissent)

Fed./Civ. Timely

1. SUMMARY: Petrs contend that the district court exceeded its Title VII remedial powers by imposing an affirmative action plan on them containing "rigid goals or quotas" that cannot be justified as a legitimate remedy for their past violations of Title VII.

GRANT - Bill

OVER →

2. FACTS AND PROCEEDINGS BELOW: Petrs include a union of sheet metal workers in the New York metropolitan area and its committee responsible for its apprenticeship program. A majority of the union's members have traditionally come up through the apprenticeship program, a four-year course designed to teach sheet metal skills. A student entering the program is indentured, and upon graduation becomes a journeyman.

This case began in 1971 when the United States filed a Title VII suit against petrs to enjoin their pattern and practice of discriminating against nonwhites in union membership. The district court found that petrs had purposefully denied nonwhites membership in the union in violation of Title VII. Petrs had accomplished this goal primarily by blocking the entry of nonwhites into the apprenticeship program through the use of invalid entrance exams, a requirement that applicants possess a high school diploma, and inquiries into applicants' arrest records. The district court entered judgment and created an affirmative action program (AAP) as a remedy. The petrs were ordered to achieve a nonwhite membership "goal" of 29% by July 1, 1981, with interim percentage goals also set. The court appointed a special master called an "administrator" to supervise compliance with the AAP.

The CA2 initially affirmed the finding of a Title VII violation, but reversed part of the relief granted. On remand, the district court entered a revised affirmative action program (RAAP) that, inter alia, retained the elements previously

mentioned. A divided CA2 affirmed.

In April 1982, the city and state of New York moved to have petrs held in contempt for failing to reach the RAAP's 29% goal. The district court granted the motion, but rather than base its contempt order directly on failure to meet the goal, it based the order on (1) underutilization of the apprenticeship program, (2) refusal to conduct an adequate publicity campaign, (3) adoption of a job protection plan that favored older, and hence white, members, (4) issuance of unauthorized work permits to whites from sister unions, and (5) failure to maintain and submit records and reports. The court determined that these violations of the RAAP thwarted the achievement of the goal. The court imposed a fine of $150,000 to be placed in a training fund to increase nonwhite membership in the union's apprenticeship program and ordered the administrator to develop a plan for use of the fund.

In April 1983, New York City again instituted contempt proceedings against petrs, this time before the RAAP's administrator. The administrator concluded that petrs were in contempt of outstanding court orders requiring them to provide records of the race and national origin of all applicants for union membership. As a remedy, the administrator suggested that petrs pay for computerized record keeping and make further payments to the training fund that the administrator was developing. The district court adopted the administrator's recommendations, but deferred setting an amount for the training fund contribution until the administrator submitted

his proposal outlining a plan for the fund. In September 1983, the administrator submitted his proposed plan, stating that the fund would be used to encourage nonwhite membership in the union and be financed by the previous fines and a $.02 per hour labor tax on union members. The district court issued a contempt order adopting the administrator's proposal.

The district court issued still another contempt order in September 1983, this time adopting an amended affirmative action program (AAAP) that (1) increased the nonwhite membership goal from 29% to 29.23% to be reached by July 31, 1987, (2) established an apprentice to journeyman ratio of 1:4, (3) created a three-member apprentice selection board, (4) imposed a nonwhite to white ratio of 1:1 for admittance into the apprenticeship program, (5) permitted work on new selection procedures to be used after the goal was reached, and (6) incorporated the order requiring petrs to pay the costs of an advisor to monitor the computerization of the records.

The program at issue

A divided CA2 affirmed all the contempt orders and penalties, and sustained the AAAP with minor modifications. The CA2 upheld the district court's initial order holding petrs in contempt for failure to meet the RAAP's 29% goal because four of the five violations of the RAAP that the district court found were correct and this provided sufficient basis for the order. In particular, the CA2 concluded that, although the district court had based its important finding relating to underutilization of the apprenticeship program on a misunderstanding of the statistics, the finding was supported

by other sufficient evidence. The CA2 reversed the district court's finding that the job protection plan constituted contumacious conduct on the ground that the provision had never been implemented, but concluded that reversal of this one finding did not make the order invalid.

The CA2 also affirmed the district court's contempt order issued for petrs' lack of recordkeeping, concluding that the order was supported by clear and convincing evidence showing that petrs had not been reasonably diligent in attempting to comply with the particular orders of the court and the administrator. The CA2 rejected petrs' contention that the contempt remedies were punitive and therefore could not be imposed except after a criminal proceeding. The court found that the fund order was compensatory because its purpose was to improve the route of nonwhites to union membership and that it was coercive because it would remain in effect until the new 29.23% goal was achieved.

The CA2 likewise rejected most of petrs' objections to the AAAP established by the September order, holding that the AAAP did not violate Title VII or the Constitution. It rejected petrs' argument that Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984), prohibits race-conscious relief for Title VII violations "except that [which] benefit[s] specifically identified victims of past discrimination." Instead, it read Stotts as limiting the scope of race-conscious relief only when such relief conflicts with a bona fide seniority plan, when "make whole" rather than prospective

relief is involved, and when there has been no finding of intentional discrimination. Here, none of these factors was present. The appeals court then upheld various changes made by the AAAP in petrs' affirmative action obligation. In particular, it CA2 ruled that the 29.23% nonwhite membership objective was not a permanent "quota," but only a temporary and permissible "goal." The court stated that the goal was a remedy for past discrimination and added that it "will not unnecessarily trammel the rights of any readily ascertainable group of nonminority individuals." Nevertheless, the court struck down that portion of the AAAP that required the selection of one nonwhite for every white who enters the apprenticeship program. It reasoned that because 45% of petrs' indentures in the past had been nonwhite and a selection board would oversee the future selection process, the one-for-one quota was unnecessary.

Judge Winter dissented from the court's affirmance of the order holding petrs in contempt for failing to meet the RAAP's 29% goal largely because of the majority's failure "to address the fact that Local 28 had the approval of the administrator for every act it took that affected the number of minority workers entering the sheet metal industry." The RAAP granted the administrator broad discretion to balance the goal of increased nonwhite membership with economic constraints. Thus, petrs fully complied with the heart of the program. By nevertheless imposing sanctions on petrs for failing to meet the 29% nonwhite membership goal, the district court

transformed the "goal" into an inflexible "quota" in violation of Title VII and probably the Constitution. Judge Winter explained that statistics in the record refuted the district court's central finding that the apprenticeship program had been underutilized. Because the economics of the sheet metal industry had been depressed during the relevant period, the "reactive finger pointing at Local 28 is a faintly camouflaged holding that journeymen should have been replaced by minority apprentices on a strictly racial basis." He argued that such a requirement "is at odds with [Stotts], which rejected such a use of racial preference as a remedy under Title VII." Judge Winter also dissented from the order establishing a training fund on the ground that factual findings establishing a need for such a fund had not been made.

3. CONTENTIONS: Petrs first contend that imposition of the RAAP and AAAP exceeded the district court's remedial powers granted by Title VII because the programs either did or do impose a race-conscious quota broader than is necessary to remedy the effects of past discrimination to actual victims. They argue that the CA2's reading of Stotts was unfairly narrow, but that, if not, the Court should grant cert to determine the permissible breadth of coercive race-conscious remedies for Title VII violations. Petrs also contend that the district court's order adopting the AAAP violated the equal protection component of the Fifth Amendment by requiring petrs to enroll nonwhites in the apprenticeship program who are not identifiable victims of the union's past discrimination.

Furthermore, the CA2's construction of Title VII as allowing the district court to impose the AAAP on petrs transforms Title VII into an unconstitutional bill of attainder on the heirs of the persons attainted in violation of the constitutional provision prohibiting the practice of "corruption of blood." See U.S. Const. art. I, §9, cl. 3. Petrs cite County of Oneida v. Oneida Indian Nation, 105 S. Ct. 1245, 1275 (1985)(Stevens, J., dissenting)("The Framers recognized that no one ought to be condemned for his forefathers misdeeds."), as an example of the Court's repeated objection to such discriminatory legislation.

Petrs also argue that the contempt sanctions violate due process because they are punitive rather than compensatory or designed to compel compliance with prior court orders. Due process allows such sanctions only in the context of criminal proceedings. Furthermore, petrs argue that the CA2 should have reversed the district court simply because it erroneously interpreted the statistical study of the apprenticeship program as implying that the program had been underutilized while the RAAP was in effect. Finally, they argue that the use of a special master to administer the affirmative action program violates the union's right to self-governance, which is protected by §401(a) of the LMRA.

Resps, city and state of New York, argue that petrs' appeal should be dismissed as an untimely challenge to the initial 1971 determination of a Title VII violation and imposition of the RAAP. They also argue that the contempt orders were appropriately compensatory and coercive rather than

punitive. They further argue that the CA2's distinction of Stotts is correct, the imposition of a race-conscious program is an appropriate remedy, and there is no split in the circuits that needs to be resolved. Finally, they contend that the AAAP and funding order are narrowly tailored to serve the compelling goal of eradicating proven systematic discrimination.

On behalf of resp EEOC, the SG argues that petrs' only issue meriting review is the one "relating to the failure to abide by racial quotas contained in [the RAAP] as a proper basis for a finding of contempt, as well as the imposition of such quotas as part of the remedial scheme of the [AAAP]." The other issues are highly fact-bound and therefore inappropriate for review. The SG argues that even the meritorious issues in this case are not optimal candidates for cert because they are inextricably interwoven with the other fact-bound issues and because the issue is presented in a far clearer form in Local No. 93, International Association of Firefighters v. City of Cleveland, cert. pending, No. 84-1999, in which the United States, as amicus curiae, has urged the Court to grant cert. The SG admits that the AAAP's 29.23% "goal" is really a "quota" because "fines that will threaten [petrs'] very existence" have been threatened if it is not met. But the question is unnecessarily complicated because it is unclear the extent to which the quota was imposed to remedy prior Title VII violations or instead as an exercise of the district court's contempt power. In addition, the Court will likely consider the validity of racial quotas under the Fourteenth Amendment

SG

Yes

when it decides Wygant v. Jackson Board of Education, cert. granted, No. 84-1340. Thus, the SG requests that cert be granted in the City of Cleveland case, and that this case be held pending its disposition and that of Wygant.

In a reply to the SG, petrs argue that neither the City of Cleveland case nor Wygant will resolve the issue presented here because both involve "voluntary" consent decrees instead of court-imposed remedies, and Wygant involves the Fourteenth Amendment instead of Title VII.

4. DISCUSSION: In United Steelworkers v. Weber, 443 U.S. 193 (1979), the Court held that Title VII leaves private employers and unions free to take voluntary race-conscious steps to eliminate "manifest racial imbalances in traditionally segregated job categories." But Weber began its analysis by stating:

> We emphasize at the outset the narrowness of our inquiry. . . . [S]ince the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act.

Id., at 200. This case squarely presents the issue left open in Weber.

The CA2 concluded that Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984), did not decide the issue presented in this case. Indeed, Stotts touched upon, but did not fully address, the limits of Title VII's grant of remedial powers. In Stotts, the Court struck down an order enjoining a public employer, which was subject to an affirmative action

plan adopted pursuant to a consent decree, from following its seniority system in determining lay-offs. The Court held that the injunction could not be justified as an effort to enforce the consent decree because neither the decree's express terms nor its purpose envisioned overriding the seniority system. The Court also rejected the argument that the injunction was a valid modification of the consent decree, reasoning that neither Title VII's voluntary settlement policy nor its potential remedial power could justify such a theory. The Court reasoned that the potential power argument was not consistent with cases requiring a close nexus between the remedy of competitive seniority and actual victimization from past discrimination, nor with Title VII's policy of providing "make-whole relief only to those who have been actual victims of illegal discrimination."

Rather than explore the limits on Title VII's remedial power as suggested by Stotts, the CA2 chose to confine Stotts to a rather small category of cases and to affirm the case based on its prior decision in EEOC v. Local 638, 532 F.2d 821, 828 (CA2 1976)(race-conscious goals permissible to remedy past discrimination if reverse discrimination effect is concentrated on relatively small group of nonminorities), cert. denied, 429 U.S. 823 (1976). Each circuit that has addressed a Title VII challenge to affirmative action programs since Stotts has read Stotts equally narrowly. See, e.g., Deveraux v. Geary, No. 83-1345, slip op., at 17-18 (CA1 June 24, 1985); Turner v. Orr, 759 F.2d 817, 823-26 (CA11 1985)(distinguishing Stotts and

extending Weber to consent decree programs); City of Cleveland, 753 F.2d, at 485-93 (CA6), cert. pending. The acceptability and permissible scope of court-imposed affirmative action remedies under Title VII is a question of great public importance and one whose answer need not await an intercircuit split. The question has already been extensively debated in the public fora, and thus the benefit of further percolation will be negligible. Moreover, this case involves the imposition of rigid goals or quotas, and this Court has indicated that quotas are unacceptable remedies for Title VII violations. Stotts, 104 S. Ct., at 2589. See also University of California v. Bakke, 438 U.S. 265, 288-89 (racial quotas violate Fourteenth Amendment whether labeled "quotas" or "goals").

Although the Court should seriously consider the SG's suggestion of granting cert in the City of Cleveland case and holding this case for it, the SG presents no sufficient reason for refusing to grant cert in this case if cert is denied in the City of Cleveland case. The City of Cleveland case does present its Title VII issue more cleanly than this case does. But the Title VII issues in each case are not identical because City of Cleveland involves whether a public employer may adopt racial quotas pursuant to a consent decree. It is unclear whether Title VII imposes the same limitations, if any, on quasi-voluntary affirmative action by public employers as it does on court-imposed affirmative action by private unions. Furthermore, the fact that the case is complicated by a

possible difference between Title VII remedial powers in the first instance and contempt powers to enforce an existing affirmative action plan or to impose a new plan does not make the case uncertworthy. Numerous cases involving existing affirmative action plans may arise under these circumstances. Finally, the case can be made far less complicated by limiting review to the Title VII issue rather than extending it to the unpersuasive equal protection and due process issues or the other issues involved in the case below, which are overly fact-bound.

5. RECOMMENDATION: I recommend grant.

There are two responses and a reply.

August 22, 1985 Guynn Opn in ptn

or (2) the DC's contempt power justifies ~~the requirement of explicitly~~ an order compelling an explicitly race-conscious hiring scheme, even though ~~Stotts doesn't resolve this issue but least according to CA3~~ (apparently) ~~the beneficiaries were not~~ themselves victims of discrimination. (There is no suggestion in the opinions below that relief was confined to actual victims of discrimination.)

This issue is obviously important, and is not resolved by Stotts, Weber, or Bakke. This case may be a good one in which to address the issue. If the Court decides that (as Stotts suggests, 104 S.Ct. at 2588-2590, as the SG would argue) Title VII authorizes race-conscious relief only for actual victims, ~~it could~~ the Court could go on to address the limits on ~~the~~ the contempt power in this area.

I agree with the memo writer that the other, fact-specific issues ~~can~~ need not be addressed in order to reach the central issue. The SG's position is therefore curious. I wonder whether the SG simply doesn't want to defend the EEOC. Cf. the Bob Jones University case.

~~Finally, I think this case would be a good case to take than~~

Finally, I think this is a much better case to take than City of Cleveland, cert pending No. 84-1999. In that case, the affirmative action goals were "consensual", not imposed by the DC as here and as in Stotts.

September 30, 1985

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 84-1656

Submitted ....., *19*... *Announced* ....., *19*... (page 6)

LOCAL 28 ETC.

vs.

EEOC

9

On a vote after we ~~the~~ City of Cleveland 84-1999 we voted to Grant this also.

Discuss ~~Held~~ ~~for~~ with. City of Cleveland 84-1999 & then decided whether to take one or both. I inclined to take both.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.	~~✓~~	✓		~~for 84-1340 & 84-1999~~									
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.	✓	for Wygant		84-1340									
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.	✓		for Wygant.										
O'Connor, J.	✓		"		"		&	84-1999					