No. 84-1999

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERES, AFL-CIO, C.L.C., PETITIONER

v.

CITY OF CLEVELAND, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a judgment entered with consent of a defendant public employer in an action brought under Title VII of the Civil Rights Act of 1964 may award racial preferences in promotions to persons who are not the actual victims of the employer's discrimination.

2. Whether a consent judgment may be entered over the objection of an intervenor of right whose interests are adversely affected by the terms of the consent judgment.

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INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., prohibits, inter alia, racial discrimination in employment. The Attorney General is responsible for enforcement of Title VII where, as here, the employer is a government, governmental agency, or political subdivision. 42 U.S.C. 2000e-5(f)(1). This Court's resolution of the issues presented in this case will have a substantial effect on the Attorney General's enforcement responsibilities. The federal government, which is the nation's largest employer, also is subject to the requirements of Title VII its capacity as an employer. 42 U.S.C. 2000e-16.

STATEMENT

In 1980, the Vanguards of Cleveland ("Vanguards"), an association of black and Hispanic firefighters employed by the City of Cleveland, brought a class action in the United States District Court for the Northern District of Ohio. The Vanguards alleged that the Cleveland Fire Department had discriminated in promotions in violation of the Thirteenth and Fourteenth Amendments, 42 U.S.C. 1981 and 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. The complaint charged the City with using unfair written tests and seniority points, manipulating retirement dates with respect to the dates on which promotion eligibility lists expired, and failing to hold promotional examinations since April 1975 (Pet. App. A2). The complaint also alleged that blacks and Hispanics were under-represented in the ranks of lieutenant and above (ibid.). The Vanguards sought a declaratory judgment, an injunction prohibiting the continuation of discriminatory practices, and the institution of a hiring and promotion program for blacks and Hispanics (Pet. App. A2-A3).

Shortly after the complaint was filed, the parties began negotiations. In 1981, petitioner (Local Number 93, International Association of Firefighters, the collective bargaining representative of all of the Cleveland firefighters) successfully moved for intervention of right under Fed. R. Civ. P. 24(a)(2). Petitioner alleged that "[p]romotions based upon any criteria other than competence, such as a racial quota system," would be discriminatory (Pet. App. A3).

In November 1982, the parties reached a tentative settlement, but this agreement was rejected by a vote of 88% of petitioner's membership. The Vanguards and the City then negotiated a new agreement. Petitioner strongly objected to the proposed settlement. The civil service rules provided for promotions to be made primarily on the basis of test scores, with

extra points granted for seniority. Under the new agreement, however, a preference was given to any "minority" (i.e., black or Hispanic) firefighter who passed the promotional exams, regardless of whether he or she was the actual victim of discrimination. During the first stage of the decree, approximately 50% of all promotions were to go to minority candidates. The city was ordered to certify lists of those eligible for promotion based on the last exam and to make a large number of promotions no later than February 10, 1983 (Pet. App. A33-A34). In making these promotions, the city was required to pair the highest ranking minority and non-minority candidates on the lists (id. at A34). _/ The second stage was to begin after certification of the eligible lists based on the next exam and was to continue until December 1987. The settlement set statistical "goals" to be achieved during this period for each rank and required that minority candidates be promoted "out of eligible list rank" if necessary to achieve these goals (Pet. App. A36). _/

The district court entered this agreement as a "consent" judgment while expressly acknowledging that petitioner did not consent (Pet. App. A31). The court purported to retain exclusive jurisdiction over any attempt by petitioner or any other party to enforce, modify, amend, or terminate the decree (id. at A38). The court also provided that the decree was to supersede any conflicting provisions of state or local law (id. at A37).

_/ If there were not enough eligible minority firefighters to fill the 33 lieutenant slots reserved for minority candidates, the unfilled slots were to be given to non-minorities. In that event, all future appointments to the rank of lieutenant from the next eligible list were to go to minority firefighters until the "shortfall" was made up (Pet. App. A34).

_/ For the period following the 1984 exam, the goals were as follows: 20% for assistant chief; 10% for battalion chief; 10% for captain; 23% for lieutenant (Pet. App. A35). For the period after the 1985 exam, the following goals were imposed: 20% for ranks above lieutenant and 25% for the rank of lieutenant (Pet. App. A35-A36).

Petitioner appealed, but a divided panel of the Sixth Circuit affirmed (Pet. App. A1-A28). The majority held that "the district court did not abuse its discretion in finding that the consent decree was fair, reasonable and adequate" (id. at A10). In support of this conclusion, the court of appeals first noted that it had been conceded that there had been past discrimination by the fire department and that minorities were statistically underrepresented in the department's higher ranks (ibid.). The court also emphasized that non-minority firefighters would not be fired and were not absolutely barred from promotion (id. at A11). Finally, the court observed (ibid.) that the city was not required to promote unqualified minority firefighters, that the percentage "goals" were subject to modification under certain circumstances, and that the plan was scheduled to remain in effect for a limited period.

The court of appeals held (Pet. App. A12) that Firefighters Local Union No. 1784 v. Stotts, No. 82-206 (June 12, 1984), had "no effect" on this case for two reasons: first, because here the decree did not totally abrogate the seniority system (Pet. App. A13) and, second, because the decree was a "consent" judgment rather than a judgment entered after adjudication of the suit (id. at A13-A20). The court likened this "consent" decree to a voluntary affirmative action plan such as that in United Steelworkers v. Weber, 443 U.S. 193 (1979) (Pet. App. A16-A17); see also id. at A9-A12).

Judge Kennedy dissented "because the language and reasoning of * * * Stotts indicate that the consent decree in the present case should be governed by the principles applicable to court-ordered relief rather than those applicable to purely voluntary actions" (Pet. App. A20-A21). She first explained (id. at A21) that under Stotts "if the present case had gone to trial and the plaintiffs had proven a pattern or practice of discrimination in promotions in violation of Title VII, the District Court could

not have ordered relief equivalent to the provisions of the consent decree." Stotts, she wrote (Pet. App. A20), interpreted Section 706(g) of Title VII to mean that "when fashioning relief for a violation of Title VII a court [is] limited to making whole those found to have been victims of past discrimination." _/

Because the quota relief could not have been awarded had the case gone to trial, Judge Kennedy, relying on Stotts v. System Federation No. 91 v. Wright, 364 U.S. 642 (1961), concluded that this relief could not be awarded in a consent decree. She noted that a consent decree is a court order and consequently has a legal statute far exceeding a mere contract (Pet. App. A26). She wrote (id. at A28):

> Under the Supreme Court's decision in Stotts, a court may not enter relief of the type embodied in the consent decree in this case. Since the power to enter a consent decree purporting to enforce a statute is drawn from that statute, it is incongruous to approve a consent decree that goes far beyond the scope of relief permissible under the statute.

_/ Judge Kennedy also disputed (Pet. App. A21-A22) the panel majority's view that the presented case does not involve an abrogation of seniority rights. She concluded that here, as in Stotts, "[t]he consent decree * * * in effect gives minority firefighters superseniority over all non-minority firefighters."

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the legality under Section 706(g) of Title VII of the Civil Rights Act of 1964__/ of a so-called "consent" decree that provided preferences in promotions in the Cleveland Fire Department to individuals not shown to be the actual victims of discrimination.__/ This decree was entered

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__/ The Vanguards asserted in their Brief in Opposition (at 14-17) that the "consent" decree in this case rests upon Title VII but also upon the Fourteenth Amendment as well as Title VII. The court of appeals, however, did not rely upon the Fourteenth Amendment in affirming the decree, and thus the constitutional issue need not be reached by this Court. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 163-164 (1975); Ramsey v. Mine Workers, 401 U.S. 302, 312 (1971); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). Moreover, the Vanguards' argument ignores the principle (see pages , infra) that equitable remedies must be tailored to fit the scope of the constitutional violation they are imposed to correct. Indeed, as we have argued this Term in our brief in Wygant v. Jackson Board of Education, No. 84-1340, the Fourteenth Amendment does not permit a public employer to award racial or ethnic preferences to non-victims. We are serving a copy of our brief in Wygant upon the parties in this case.

__/ In their Brief in Opposition (at 19-20), the Vanguards asserted that all of the individuals given preference under the "consent" decree were in fact the actual victims of past discrimination by the fire department. This contention has no substance. Although the "consent" decree (which was entered on January 31, 1983), stipulated that there had been past discrimination by the fire department (see Pet. App. A29-A30), neither the decree nor the district court's opinion (see appendix to Br. in opp. of Cleveland) specified the nature, extent, or duration of the discriminatory practices. The decree provided for racial and ethnic preferences in promotions beginning in February 1983 and continuing until December 1987. The Vanguards' argument is that every minority employee who has received or will receive such a preference is an actual victim of discrimination because he or she is likely to have been a member of the fire department prior to the entry of the consent decree. In other words, the Vanguards seem to argue that all such employees would have received a promotion at an earlier date but for discrimination. This argument has no factual support. Without knowing the nature, extent, and duration of the discriminatory practices, as well as the employment history of the individuals given preference, it is unjustified to assume that all such individuals are the actual victims of past discrimination. To take the most extreme example, minority employees who joined the department in 1984--after the decree was adopted--will have completed the minimum three years needed for promotion to lieutenant by 1987 and will be eligible for the racial and ethnic preferences awarded by the decree.

The invalidity of the Vanguards' found argument is illustrated by the course of this litigation in the lower (continued)

with the consent of the employer and the minority employees who initiated the suit but over the strenuous objection of the union, which intervened of right to protect the interests of its members. This decree is unlawful.

Section 706(g)--the sole provision of Title VII governing judicial remedies--authorizes a wide range of affirmative equitable relief to make whole those individuals subjected to employment discrimination. But the final sentence of Section 706(g) states in language that could hardly be clearer that "[n]o order of the court" shall grant such relief to an individual who "was refused employment or advancement or was suspended or discharged for any reason other that discrimination." The plain meaning of this provision is that a court may not enter an order imposing a quota, because a quota awards benefits solely on the basis of race or ethnicity rather than the individual's status as a victim of discrimination.

The legislative history of Section 706(g) unmistakably shows that it was intended to preclude the imposition of quotas by Title VII courts. Both in the House and the Senate, the chief proponents and supporters of the 1964 Civil Rights Act made this point repeatedly in terms that can leave no doubt in the mind of any fair minded person who reads the debates. Section 706(g) was slightly amended in 1972, but it is quite clear that this amendment was not intended to authorize the imposition of quotas.

This Court's prior decisions construing Section 706(g)--most notably, Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); Teamsters v. United States, 431 U.S. 324 (1977); and