

ROUTING AND TRANSMITTAL SLIP

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11/5/85

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1. Jim Turner		
2. Dave Rose		
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REMARKS

Attached is an outline reflecting Dennis Dimsey's and my tentative approach to the Local 638 brief. Your early reaction would greatly facilitate our ability to finalize a draft.

If you have no objections I would also like to seek Sam Alito's reaction to the outline.

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Outline of position in EEOC v. Local 638

I. Validity of the 29.23% Membership "Goal" and the Fund Order

A. Membership Goal

1. Properly before the Court -- no law of the case bar.
2. Goal is actually a quota
 - a. Changed interpretation?
 - b. District court said if not met by 1987, union would be wiped out by fines.
 - c. Court of appeals relied on failure to meet the goal as proof of contempt.
 - d. Court of appeals acknowledged that rights of whites would be affected by the decree.
3. Improper as Title VII remedy, since Section 706(g), as interpreted in Stotts, prohibits affirmative relief to non-victims. Summarize the argument we make in Vanguards and serve our Vanguards brief on parties here. Respond to the three reasons given by the court of appeals for distinguishing Stotts.
4. Also improper as contempt sanction. If quotas are unlawful under Title VII, it follows that they can't be used as contempt sanctions for violations of Title VII decrees. (Possible problem: 42 U.S.C. 2000h, which states that "nothing herein" deprives courts of their broad civil contempt powers to enforce decrees entered under the 1964 Civil Rights Act.) In any event, facts of this

case do not justify imposition of quota as contempt sanction; e.g., petitioners have voluntarily indentured 45% nonwhites in apprenticeship classes since January 1981. Non-discriminatory sanctions are adequate to enforce decree.

5. Quota also violates equal protection. Summarize our arguments in Wygant and Turner and serve those briefs on parties here. Ignore petitioners' "corruption of blood" argument.

B. Validity of Fund Order

1. Benefits non-whites only.
2. Imposed as a contempt sanction, not a Title VII remedy.
3. Violates policy behind 706(g) -- i.e., no affirmative equitable relief to non-victims. (Section 706(g) literally inapplicable.)
4. Since not a proper Title VII remedy, not a proper contempt sanction.
5. Also violates equal protection.

II. Contempt findings properly entered

A. Proper procedures were followed.

1. Sanctions are coercive, not punitive. (Problem: \$150,000 fine imposed after first contempt finding may be punitive.) There is a question whether the sanctions are "compensatory," since the beneficiaries are not victims of discrimination.

2. Thus, regardless of their validity, sanctions were not imposed in violation of criminal contempt procedures.

B. Findings support contempt

1. 1982 contempt finding
 - a) statistical evidence misunderstood by district court.
 - b) other unchallenged, concurrent findings support contempt.
2. 1983 contempt finding not contested on the merits in petition.
3. 1975 finding of a Title VII violation
 - a) not properly before the Court: time barred and not raised below.
 - b) in any event, finding amply supported by the evidence.

III. Administrator

- A. Petitioners argued in court of appeals that Administrator's authority should be limited to adjudicating disputes under AAAP0, not that the office should be abolished.
- B. In any event, Courts below followed general rule that where less intrusive means promised to work, the intrusive remedy employed here may not be ordered.
- C. No ground for reversing the lower courts' application of that rule.