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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, RICHARD SURBROOK, President, DON PENSON, ROBERT

MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and

ROBERT F. COLE, Respondents.

No. 84-1340

SUPREME COURT OF THE UNITED STATES

1984 U.S. Briefs 1340; 1985 U.S. S. Ct. Briefs LEXIS 1133

October Term, 1984

August 23, 1985

[\*1]

   ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF

APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF

COLORED PEOPLE, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

COUNSEL: AUDREY B. LITTLE, CHARLES F. SANDERS, Assistant General Counsel

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   NAACP Special Contribution Fund, 186 Remsen Street, Brooklyn, New York 11201,

(718) 858-0800, Attorneys for the National Association for the Advancement of

Colored People As Amicus Curiae

INTERESTS: The National Association for the Advancement of Colored People

("NAACP") is a New York non-profit membership corporation. Its principal aims

and objectives may best be understood by reference to its Articles of

Incorporation:

The Interest of the National Association for the Advancement of Colored People

   . . . voluntarily to promote equality of rights and eradicate caste or race

prejudice among the citizens of the United States; to secure for them impartial

suffrage; and to increase their opportunities for securing justice in the

courts, education for their children, employment according to their ability, and

complete equality before the law.

   To ascertain and publish all facts bearing upon these subjects and to take

any lawful action thereon; together with any and all things which may lawfully

be done by a membership corporation . . .

   The NAACP has a long-standing history of participating in the United States

Supreme Court, both as a party and as amicus curiae, in cases presenting

constitutional and statutory claims of racial discrimination.

   The NAACP is vitally concerned with the issues raised in this appeal. The

resolution of these issues will have a direct bearing on whether municipalities,

state governments, public boards of education, as the Jackson (Michigan) Board

of Education, teachers, and teacher unions, as the Jackson Education

Association, may voluntarily adopt policies and programs which simultaneously

seek to remedy the ill results of past and existing racial discrimination and

segregation in public education and employment. What is involved here is

whether a public school authority and a teachers' union may voluntarily include

provisions in a collective bargaining agreement which promote equal educational

and employment opportunities for black, white, and Hispanic students and

teachers respectively within the principles of the United States Constitution

and all laws promulgated thereto.

   It is because of the overriding public consequences of the decision in this

case that the NAACP is filing this brief as amicus curiae.

   Consent of the Parties

   Petitioners and Respondents have consented to the filing of this brief and

their letters of consent have been filed with the Clerk of the Court.

   Statement of the Case

   This case concerns the policies adopted by the Jackson Board of Education in

response to its mandate to provide quality and equal educational opportunities

for black, Hispanic and white students attending the public schools in Jackson,

Michigan. For the past twelve years, the Jackson Board of Education has adhered

to procedures designed to establish and maintain multi-ethnic representation on

the faculties and staffs for the respective [\*4] institutions within its

educational system. Only the constitutionality of the procedure followed in

effecting teacher layoffs, incorporated in the collective bargaining agreement

between the representative of the teachers, the Jackson Education Association,

and the Jackson Board of Education is challenged herein.

   Article XII of the Professional Negotiations Agreement ("Article XII"), in

pertinent part, provides:

   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 layoff . . .

Following the announcement of the proposed layoffs for the 1982-83 school year,

several white teachers brought this action in the United States District Court

for the Eastern District of Michigan to enjoin the Jackson Board of Education

from effectuating layoffs in accordance with the provisions of Article XII. The

Complaint alleged that the layoff provision violated Title VII of the Civil

Rights Act of 1964, [\*5] as amended, 42 U.S.C. Sections 1981, 1983 and 1985,

the Equal Protection Clause of the Fourteenth Amendment to the U.S.

Constitution, and the constitution and laws of the State of Michigan. Wygant v.

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

   The action proceeded before the District Court on crossmotions for summary

judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and on the

Jackson Board of Education's motion to dismiss the Complaint for failure to

state a claim upon which relief can be granted, under Rule 12(b)(6) of the

Federal Rules of Civil Procedure. In deciding the motions, the District Court

considered the facts set forth in the Complaint, Affidavits submitted by the

plaintiffs, briefs and oral arguments of counsel, which were not controverted by

either party.

   According to allegations set forth in the Complaint, the affirmative action

clauses in the collective bargaining agreement were designed to remedy "only

general societal discrimination," and not past employer discrimination. On

their motion for summary judgment, plaintiffs argued that in the absence of

judicial findings of past [\*6] discrimination in the employment of teachers,

the affirmative action clauses in the collective bargaining agreement lacked

legitimacy of purpose and were therefore, violative of the Equal Protection

Clause of the Fourteenth Amendment. The District Court, relying upon United

Steelworkers of America v. Weber, 443 U.S. 193 (1979) and Detroit Police

Officers Association v. Young, 608 F.2d 671 (6th Cir. 1979), cert. den., 452

U.S. 938 (1981) found that plaintiffs' contention, that only judicial findings

of past employer discrimination would support the voluntary adoption of an

affirmative action plan by a public employer and union, was without merit. 546

F. Supp. at 1200.

   In the District Court's view, the Jackson Board of Education had satisfied

the constitutional requirements set forth in Weber and Young by the adoption and

implementation of Article XII. Evidence of substantial and chronic

underrepresentation of minority group teachers was disclosed by the comparison

of the percentage of minority group teachers (8.3-8.8 percent) with the

percentage of minority group students (15.3 percent) existing at [\*7] the time

the plan was conceived. The District Court observed that while the inquiry as

to whether there is minority underrepresentation in a job classification

typically focuses on a comparison of the employer's labor force with the

relevant labor market, such a comparison was not appropriate when the inquiry

concerned the underrepresentation of minorities on a public school faculty.

According to the District Court, "teaching is more than just a job. Teachers

are role-models for their students." 546 F. Supp. at 1201.

   The District Court concluded that Article XII was substantially related to

the objective of remedying the substantial and chronic underrepresentation of

minority teachers. Article XII was designed to prevent a reduction in the

minority to majority faculty ratio and to prevent a loss in minority hiring

gains achieved through the operation of the Jackson Board of Education's

affirmative hiring policy. The constitutionality of Article XII was premised

also on the District Court's findings that it did not (1) impose quotas, (2)

require the retention of unqualified teachers, (3) unnecessarily trammel the

interests of white teachers, (4) stigmatize white [\*8] teachers affected by a

layoff, or (5) oust white teachers in order to replace them with minorities.

Because the provision was subject to the collective bargaining process, and

thereby renegotiated periodically, it was necessarily a temporary measure. 546

F. Supp. at 1202.

   The Title VII claims asserted in the Complaint were dismissed for lack of

jurisdiction. The District Court's decision upholding the constitutionality of

Article XII required the dismissal of plaintiffs' claims under 42 U.S.C.

Sections 1981, 1983 and 1985.

   In its affirmance of the District Court's decision granting summary judgment

in favor of the Jackson Board of Education, the Sixth Circuit characterized the

controversy as 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." Wygant v. Jackson Board of

Education, 746 F.2d 1152, 1134 (6th Cir. 1984). The evidence presented to the

District Court and reviewed by the Sixth Circuit was sufficient to establish

that the initial adoption of the affirmative action provisions in [\*9] the

collective bargaining agreement coincided with the examination and revision of

educational policies to redress problems of racial segregation and isolation in

the Jackson Public Schools.

   In their Brief, Respondents have presented a detailed statement of the facts

and circumstances preceding the adoption of the challenged provision and,

accordingly, a restatement of those facts will not be presented herein. The

District Court determined that the problem of minority underrepresentation on

the faculty was not seriously considered by the Jackson Board of Education until

1969. One of the most significant influences on the timing of the deliberations

over faculty desegregation and integration was not mentioned in the District

Court's opinion. It is therefore important to note, that in April 1969, the

Jackson Branch of the NAACP filed charges against the Jackson Board of Education

with the Michigan Civil Rights Commission. The NAACP Complaint alleged, inter

alia, that black students were being denied guaranteed rights to equal

educational opportunity as a result of discriminatory acts in the areas of

discipline, assignment and training, curriculum and counselling. Significantly,

[\*10] the NAACP alleged also that the low percentage of black professionals in

the school district was indicative of the Jackson Board of Education's

discriminatory hiring policies.

   The Michigan Civil Rights Commission's investigation of the Complaint

uncovered evidence which substantiated the NAACP's charges. Following the

investigation, the Commission recommended, and the Jackson Board of Education

agreed, that the following affirmative steps be taken to implement its policy of

equal opportunity in all areas of education: (1) establish an in-service course

on Intergroup Relations; (2) adopt a multi-cultural curriculum; (3) implement

new discipline procedures; (4) recruit, hire and promote minority group teachers

as positions become available; (5) review teacher assignments so that good

balance is reflected in all schools from a standpoint of race, age, sex,

background and experience; and (6) discontinue its practice of "tracking" in

certain subjects.

   Petitioners and various amici curiae insist that only judicial or

administrative findings that an employer previously engaged in racially

discriminatory employment practices, can justify the use of race in employment

decisions. Further, [\*11] it is argued that considerations of race can never

override considerations of seniority in layoff decisions, where it would result

in the retention of a less senior minority who has not been judicially

determined to be an actual victim of the employer's past discrimination. In the

absence of such findings, they argue that the courts below erred as a matter of

law, in upholding the constitutionality of race-conscious procedures followed by

the Jackson Board of Education in effecting teacher layoffs.

   It is clear from the Statement of the Case presented by the Respondents that

the arguments advanced by the Petitioners distort the history of racial

segregation in the Jackson Public Schools. More importantly, Petitioners'

contentions ignore the permissible objectives of the educational policy pursued

by the Jackson Board of Education and misinterpret this Court's decisions which

authorize, if not encourage, the means adopted by the Board to attain its lawful

goals.

TITLE: BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

   Summary of Argument

   The Equal Protection Clause of the Fourteenth Amendment permits a

governmental body, in furtherance of legitimate objectives, to make employment

decisions based partly on considerations of race, [\*12] where, as in the case

before the Court, race is not the sole determinant. Given the history of

segregation in the Jackson Public Schools, and the constitutional obligation to

voluntarily take the necessary steps to establish a school system free of racial

segregation, the remedial purpose of the provisions in the collective bargaining

agreement relating to the creation and maintenance of multi-ethnic

representation on the faculty cannot be disputed. Further, the broad discretion

accorded to local school authorities to formulate educational policy allows race

and ethnicity to be considered along with a teacher's professional experience,

expertise and seniority in employment decisions, including layoffs of teachers

for reasons of economy. No violation of the Fourteenth Amendment arises from

policies and practices designed to provide equal educational and employment

opportunities for black, Hispanic and white students and teachers in an academic

setting established and maintained to reflect the multi-ethnic diversity of this

society.

   ARGUMENT

   I.

   A School Board May Voluntarily Adopt and Implement Policies to Establish and

Maintain a Completely Integrated School System.

A. [\*13] A School Board May Proceed With the Implementation of a

Faculty-Integration Plan Without Judicial Findings of Past Discrimination

Against Minority Students and Minority Teachers.

   Prior to the initial adoption of Article XII, the Jackson Board of Education

operated a school system which denied black students their constitutional rights

to equal educational opportunities. While no court was asked to make such a

finding, the Jackson Board of Education, the Michigan Civil Rights Commission,

the NAACP, the Ad Hoc Committee of teachers and administrators and the Citizens'

School Advisory Committee accepted the reality of a racially segregated Jackson

public school system. Once the problem of segregated student bodies was

addressed by these entities, it became apparent that the segregationist policies

of the Jackson Board of Education extended also to the employment and assignment

of teachers within the district.

   In the 1970-71 school year, there were no black teachers in 13 of Jackson's

22 elementary schools. In each of these schools, the percentage of white

students ranged from 64 percent to 100 percent. Not surprisingly, 8 of the 16

black teachers in elementary education were [\*14] assigned to two elementary

schools. The percentages of black students in these two schools were 86 percent

and 64 percent respectively. n1 The practice of assigning black students and

administrators only to schools wherein black students comprised the majority, is

clearly symptomatic of a system-wide policy of segregation.

   n1 Department of Health, Education and Welfare, Office of Civil Rights,

Elementary and Secondary Public School Survey, Fall 1970.

   Primary responsibility for disestablishing the system of segregated schools

rests with local school authorities. United States v. Montgomery County Board

of Education, 395 U.S. 225, 226 (1969). In McDaniel v. Barrisi, 402 U.S. 39

(1971), the Court acknowledged the competence of school boards to assess whether

its schools were unlawfully segregated and their constitutional obligation to

take voluntary affirmative steps to convert to a unitary system. Further, in

Montgomery County, supra at 232, the court recognized the essentiality of

faculty desegregation to the establishment of a public school system free from

racial discrimination. The goal to be attained is a ratio [\*15] of minority to

non-minority faculty members in each school that approximates the ratio of

minority to non-minority faculty members in the entire school district. Id.

   The Jackson Board of Education's desegregation plan contemplated that no

school in the district would be identifiable by the racial composition of its

teaching staff and that each school would have a multi-ethnic faculty. It

immediately realized that a reassignment of the black teachers, then employed,

would still leave the faculties of the majority of the schools without the

desired multi-ethnic representation. The affirmative action plan for hiring

additional minority teachers, conceived and implemented by the Jackson Board of

Education, is the appropriate remedy for a problem not uncommon to school

desegregation cases.

   In United States v. Texas Education Agency, 467 F.2d 848, 873 (5th Cir.

1972), the Fifth Circuit required the school district to take similar

affirmative action to increase the number of Mexican-American teachers in order

to fulfill the mandate of Montgomery County. It is significant that the Fifth

Circuit, as did the courts below in this case, compared the percentages [\*16]

of Mexican-American teachers to the percentage of Mexican-American students in

the school district, in deciding that affirmative action was required to achieve

an equitable ratio of minority to non-minority faculty members. In Fort Bend

Independent School District v. City of Stafford, 651 F.2d 1133 (5th Cir. 1981),

the Fifth Circuit clarified its holding in Texas Education Agency regarding

faculty integration, when it considered the question of whether a school

district has effectively carried out the mandate of Brown v. Board of Education,

349 U.S. 294 (1955), and thereby attained unitary status. According to the

Fifth Circuit in Fort Bend, supra at 1137, a showing of a good faith effort to

find sufficient qualified minority teachers to achieve an equitable ratio will

rebut any inference of continuing discrimination against minority school

children. The establishment and maintenance of a faculty with a percentage of

minority teachers equal to that of the percentage of minority students in the

school district, however, was held not to be a prerequisite to the attainment of

unitary status. The Sixth Circuit, in Oliver v. Kalamazo Board of Education,

706 F.2d 757 (6th Cir. 1983), [\*17] adopted the Fifth Circuit's interpretation

of the goal to be attained by faculty-integration plans.

   The courts in Oliver and Fort Bend did not hold, as Petitioners' contend,

that the racial composition of the student population may never be considered

when the inquiry is whether there is adequate minority representation on a

teaching staff. Rather, Oliver and Fort Bend instruct that the disparity

between the percentages of minority students and minority teachers does not

justify the imposition of racial quotas under an affirmative plan, to achieve a

percentage of minority teachers that matches the percentage of minority students

in a school district. The Jackson Board of Education's affirmative action plan

does not, by design or effect, contravene the principles set forth in Oliver and

Fort Bend.

   When the layoff provision in the collective bargaining agreement is viewed,

as it must be, as but one component of a voluntary plan to desegregate and

integrate the Jackson public school system, the legitimacy of the governmental

purposes served thereby, cannot be disputed. Sound and enlightened educational

policy and the obligation to correct the effects of [\*18] practices which have

limited the educational and employment opportunities of minority students and

teachers, provide the justification for faculty-integration plans contained in

the collective bargaining agreement.

   The plenary power of school boards to formulate and implement educational

policy which prescribes the complete integration of the school system, was

recognized by the Court in Swann v. Charlotte-Mecklenburg, 402 U.S. 1, 16

(1971). The federal courts have "consistently supported a school system's

affirmative duty and discretion to take steps to remedy racial imbalance, a view

that perforce applies to a policy of faculty integration." Kromnick v. School

District of Philadelphia, 739 F.2d 894, 907 (3rd Cir. 1984), cert. den., 53

U.S.L.W. 3483 (Jan. 8, 1985). Thus, the argument that voluntarily adopted

race-conscious faculty integration plans violate the Equal Protection Clause of

the Fourteenth Amendment has been considered and rejected by the courts in the

Second, Third and Ninth Circuits. See Porcelli v. Titus, 431 F.2d 1257 (3rd

Cir. 1970), cert. den., 402 U.S. 944 (1971), [\*19] Zaslawsky v. Bd. of Ed. of

Los Angeles, 610 F.2d 661 (9th Cir. 1979), Caulfield v. Board of Education of

the City of New York, 632 F.2d 999 (2d Cir. 1980) and Kromnick v. School

District of Philadelphia, supra. The race-conscious teacher layoff provision

here is substantially similar, in both its purpose and operative effects, to the

faculty integration plans before the courts in Porcelli, Zaslawsky, Caufield and

Kromnick. Adherence to the analysis and reasoning of the Third Circuit in

Kromnick, compels a similar conclusion as to the constitutionality of the

teacher layoff plan before this Court.

   In Kromnick, the Third Circuit considered whether the Fourteenth Amendment

and Title VII were violated by the implementation of a faculty-integration plan

requiring the mandatory reassignment of teachers to maintain a ratio of black

and white teachers in each school, reflective of the racial composition of the

overall teaching staff. Teacher transfers under the reassignment plan adopted

by the Philadelphia school board, were made on the basis of seniority, with the

least senior teachers being reassigned to fill [\*20] vacancies within the

district. If adherence to strict seniority would result in racial imbalance,

then teachers of the overrepresented race were to be reassigned, notwithstanding

their seniority. Decisions on requests for voluntary transfers were also

conditioned upon the maintenance of racial balance. As in the case before the

Court, the faculty reassignment plan was incorporated in the collective

bargaining agreement between the school district and the teachers' union.

   The appellees in Kromnick, argued, as do the Petitioners, that the mandatory

reassignment plan served no legitimate purpose because it was designed to

preserve the status quo and not to remedy past discrimination. But the Third

Circuit, 739 F.2d at 905, concluded that the plan to integrate faculties was

remedial and a necessary part of the desegregation effort as the Philadelphia

school district was still obligated to eliminate racially identifiable schools.

Judge Sloviter observed:

   . . . [B]ecause our society has not yet achieved full integration among its

component races, in important areas of public life, including housing,

employment, and public education, a reasonable plan designed [\*21] to foster

racial balance of public school teachers must be considered as directed toward

remedying still existent racism, even without an applicable court order or

pending administrative proceeding. Id.

   The court in Kromnick relied, in part, upon the wide discretion granted to

school boards to formulate educational policies, in deciding that the school

board had the authority to implement a race-conscious teacher assignment policy

to further educational goals. Additional support for concluding that local and

state governmental authorities possessed the competence to adopt race-conscious

policies was found in Detroit Police Officers Assn. v. Young, supra, wherein the

Sixth Circuit determined that the Board of Police Commissioners had the

authority to voluntarily adopt an affirmative action plan.

   The Third Circuit's analysis under the Fourteenth Amendment considered

whether the plan adopted by the Philadelphia Board was narrowly tailored to

achieve its objective, so as to limit the burden suffered by others. The

inquiry, thus, focused on whether the operation of the race-conscious teacher

assignment plan gave rise to the evils associated with unconstitutional [\*22]

racial classifications. The court determined that because the plan required the

transfer of both black teachers and white teachers, it could not be deemed

"racially preferential." No evidence was presented to indicate that the plan:

(1) disproportionately impacted upon one race; (2) stigmatized or stereotyped

racial groups or (3) imposed racial quotas. As the plan was subject to periodic

renegotiation through the collective bargaining process, it was deemed

"temporary." The Court, therefore, concluded that the race-conscious teacher

reassignment plan was constitutional. 739 F.2d at 907-908.

   Neither does the race-conscious layoff provision in the collective bargaining

agreement before this Court, operate as an unconstitutional racial

classification. Layoffs under the plan affect both white teachers and black

teachers and in a proportionate manner. No stigma attaches to any teacher

because of economically required layoffs. The plan is flexible in its numerical

requirements because the percentages are based on the racial composition of the

faculty which changes from year to year. Because it is subject to periodic

renegotiation under the collective bargaining process, [\*23] the plan must be

viewed as temporary. Finally, it violates no contractual or statutory rights of

the Jackson school teachers.

   That the Jackson Board of Education has taken steps to insure that its

educational policy, to establish and maintain multi-ethnic diversity in the

curriculum, student bodies, and teaching staffs, is not frustrated by fiscal

constraints, is really the gist of the controversy before this Court. When

reductions in the teaching staff are required for reasons of economy, experience

demonstrates that layoff decisions, based solely on seniority, do not result in

multi-ethnic teaching staffs. Yet, considerations of race, professional

experience, expertise, along with seniority, do preserve the ethnic diversity on

the faculty deemed essential to the quality of education provided in the Jackson

Public Schools.

   In Regents of the University of California v. Bakke, 438 U.S. 265, 314

(1978), the plurality of the court recognized that because ethnic diversity

contributes substantially to the educational process, race, along with other

factors, may be considered in the selection of students for admission to

institutions of higher education. Certainly, [\*24] the principles set forth

in Justice Powell's opinion in Bakke, would allow a school board to consider

race, along with other factors, in its employment decisions, where the goal is

to attain ethnic diversity.

   The criticality of racial and ethnic diversity on the public school faculty

is reflected in the view, expressed by the courts below, that "teaching is more

than a job." As the Third Circuit observed in Kromnick, supra, at 906.

   Schools are great instruments in teaching social policy, for students learn

not only from books, but from the images and experiences that surround them.

One such lesson is of a spirit of tolerance and mutual benefit, a lesson that is

more difficult to absorb when schools attended by black students are taught by

black teachers while schools attended by white students are taught by white

teachers.

   Given the legitimacy of each of the objectives of the educational policies

adopted by the Jackson Board of Education and the reasonableness of the

procedures it has implemented in furtherance of those objectives, the courts

below were correct in upholding the constitutionality of the teacher layoff

provision.

B. A School Board [\*25] and Teachers Union May Negotiate Modifications to a

Bona Fide Seniority Plan.

   The collective bargaining agreement between the Jackson Board of Education

and Jackson Education Association incorporates and continues the basic seniority

system for the teachers in the Jackson public school system. The Jackson Board

of Education did not violate the seniority system when the race-conscious

provisions concerning the hiring and retention of minority teachers were

instituted within the contract since the two contested provisions were only one

of several which pertained equally to the recruitment, hiring and retention of

teachers in the system. All teachers are directly subject to its terms, and

thereby no third-party relationships exist between the teachers and the Jackson

Board of Education. The collective-bargaining agreement which has been signed

by the teachers, the Jackson Board of Education, and the Jackson Education

Association continuously since 1973, which includes the contested race-conscious

language, is a voluntary agreement bargained for on an equal basis by the

respective parties.

   Petitioners' contentions seek to equate seniority rights with the fundamental

rights [\*26] guaranteed by the Constitution. Yet, seniority rights owe their

existence to the collective bargaining process and, as such, are contractual by

nature. And while the Jackson Education Association owes a duty of loyalty to

all of its members, the law recognizes that a union cannot always satisfy the

competing interests of all in its collective bargaining negotiations. In Ford

Motor Co. v. Huffman, 345 U.S. 330, 338 (1953), this Court observed:

   Inevitably differences arise in the manner and the degree to which the terms

of any negotiated agreement affect individual employees and classes of

employees. The mere existence of such differences does not make them invalid.

The complete satisfaction of all who are represented is hardly to be expected.

A wide range of reasonableness must be allowed a statutory bargaining

representative in serving the unit it represents, subject always to complete

good faith and honesty of purpose in the exercise of its discretion.

The discretion granted to bargaining representatives permits the Jackson

Education Association to agree that seniority principles may be subordinated in

layoff decisions, if necessary, to preserve [\*27] ethnic diversity.

   The aforementioned factual elements directly distinguish this action from

Firefighters Local Union No. 1784 v. Stotts, 164 S.Ct. 2576 (1984) and recent

federal circuit court decisions support this distinction. Turner v. Orr, 759

F.2d 817, 824 (11th Cir. 1985); Equal Employment Opportunity Commission v. Local

638, 753 F.2d 1172 (2d Cir. 1985); Vanguards v. City of Cleveland, 753 F.2d 479

(6th Cir. 1985), reh. den., 36 CCH EPDP 35190 (6th Cir. 1985). Stotts involved

circumstances where a union and white employees were questioning the

constitutional validity of a consent decree which was entered in a federal

district court in a suit where they were not named parties but the decree

affected their rights under a long established seniority system. Here, a

voluntary agreement, not a consent decree, exists between the parties,

negotiated by the Petitioners' bargaining representative (the Jackson Education

Association), and ratified by the teachers, obviating any correlation between

this action and Stotts.

   Further, the agreement has a life of three (3) years, which provides [\*28]

the teachers with an opportunity to revise any part or provision of the contract

deemed unsatisfactory. The race-conscious provisions in the agreement are not

permanent and the policy underlying the provision is periodically reappraised at

the expiration of the contract. As noted in a similar context in Kromnick when

the Third Circuit allowed a race-conscious provision in a collective bargaining

agreement between the Philadelphia Board of Education and its teachers involving

the reassignment of school teachers within the school system by race, the

"[policy] is a formal part of the District's collective bargaining agreement,

which is subject to biennial renegotiation, and the plan operates in annual

cycles, allowing for reevaluation of its continued necessity." 739 F.2d at 912.

Such provisions are contractual in nature, and are aimed solely at creating and

maintaining integrated public school systems in Jackson and Philadelphia for

both students and teachers, and therefore allowed under the U.S. Constitution.

   II.

   A Race-Conscious Policy or Program in a State Context Is Permissible Under

the United States Constitution If It Serves Important Governmental Objectives

[\*29] and Is Substantially Related to Achievement of Those Objectives.

   The Court has previously concluded that "racial classifications are not per

se invalid under the Fourteenth Amendment." Regents of the University of

California v. Bakke, 438 U.S. 265, 356. As stated in a recent federal circuit

opinion, "[r]acism . . . has not been eliminated, but the Thirteenth, Fourteenth

and Fifteenth Amendments to the Constitution have been restored to their

intended race-conscious and remedial function." Kromnick v. School District of

Philadelphia, 739 F.2d 894, 900. A voluntary race-conscious policy or

affirmative action program that employs racial classification which is adopted

by a governmental entity for remedial purposes is permissible "if the racial

classifications designed to further remedial purposes serve important

governmental objectives and is substantially related to achievement of the

objectives." Regents of the University of California v. Bakke, 438 U.S. 265,

359. This standard has been followed in a number of federal circuit court

decisions involving race-conscious policies and programs pursuant to voluntary

agreements [\*30] and consent decrees. n2

   n2 Kromnick v. School District of Philadelphia, supra; Bratton v. City of

Detroit, 704 F.2d 878 (6th Cir. 1983); Valentine v. Smith, 654 F.2d 503 (8th

Cir. 1981); Zaslawsky v. Board of Education of the Los Angeles City Unified

School District, supra.

   When analyzing a race-conscious policy or program, relevant factors as "(1)

the importance and validity of the remedial aim, (2) the competence of the

agency to choose such a remedy, and (3) the tailoring of the remedy so as to

limit the burden suffered by others," Kromnick v. School District of

Philadelphia, 739 F.2d 894, 904, are important in determining whether such a

plan "is permissible or entails unconstitutional racial discrimination." Id. If

the race-conscious program adopted and incorporated in the collective bargaining

agreement by the Respondent Jackson Board of Education and the Jackson Education

Association were analyzed under the aforementioned framework, a constitutionally

permissible plan would be evident.

   Hereinbefore, we have sufficiently established the competency of the Jackson

Board [\*31] of Education to choose a remedy to eliminate segregation and

promote integration within its school system. The integration of the faculty at

all the elementary, junior high, and high schools was deemed necessary by both

the Jackson Board of Education and the Jackson Education Association to allow

the students in the Jackson, Michigan public school system the best quality,

multi-diverse, and enriching educational opportunities possible. The Jackson

Board of Education and the Jackson Education Association properly executed a

program which allowed integration of the faculty simultaneous to the integration

of the student population within the respective schools of the said academic

system. This Court has noted in another context the importance of a

multi-diverse faculty and the importance in which teachers are held in our

educational institutions by stating:

   "(t)eachers have direct, day-to-day contact with students, exercise

unsupervised direction over them, act as role models and influence their

students about the government and the political process." Kromnick v. School

District of Philadelphia, 739 F.2d 894, 904 (quoting Bernal v. Fainter, 81 L.Ed.

2d 175, 180, 104 S.Ct. 2312, 2316-17 (1984). [\*32]

   The Court further recognized in Bakke that discrimination still existed

within school systems across the nation and the need to have race-conscious

remedies to eliminate such entrenched practices by stating:

   [i]n 1968 and again in 1971, for example, we were forced to remind school

boards of their obligation to eliminate racial discrimination root and branch.

And a glance at our docket and at dockets of lower courts will show that even

today officially sanctioned discrimination is not a thing of the past.

   Against this background, claims that law must be "colorblind" or that the

datum of race is no longer relevant to public policy must be seen as aspiration

rather than as description of reality. Id., at 327.

   The race-conscious program incorporated within the collective bargaining

agreement between the Jackson Board of Education and the Jackson Education

Association definitely limits the burden suffered by any faculty member. There

is no mandatory number or percentage of minority teachers which the Jackson

Board of Education must hire by a date certain stated within the agreement, only

an expressed goal. Concerning layoffs, minorities as well as whites are subject

to [\*33] layoffs within the same proportion, thereby treating each faculty

member equally.

   Therefore, the race-conscious program adopted in the agreement satisfies and

meets the standard of review as deliberated in Bakke and stated hereinabove.

   Concerning the issue as to how much past discrimination must the Jackson

Board of Education prove before this Court so as to substantiate its

race-conscious programs, in view of the Petitioners' rights under the Fourteenth

Amendment, this Court has previously stated that:

   . . . the presence or absence of past discrimination by universities or

employers is largely irrelevant to resolving respondent's constitutional claims.

The claims of those burdened by the race-conscious actions of a university or

employer who has never been adjudged in violation of an anti-discrimination law

are not any more or less entitled to deference than the claims of the burdened

non-minority workers in Franks v. Bowman Transportation Co., Inc., 424 U.S. 747,

47 L.Ed. 2d 444, 96 S.Ct. 1251 (1976), in which the employer had violated Title

VII, for in each case the employees are innocent of past discrimination.

Regents of the University of California v. Bakke, 438 U.S. 265, 365. [\*34]

The same analysis is appropriate in this action in reference to the claims of

the Petitioners though there is evidence in the record which indicates past

discrimination existed in the Jackson Board of Education School System.

   Petitioners contend that their fundamental rights under the Fourteenth

Amendment have been infringed upon by means of the race-conscious provisions in

the collective bargaining agreement which the Petitioners claim caused their

layoffs from their teaching positions with the Jackson Board of Education.

However, there are no fundamental rights involved here as with the respondent in

Bakke. 438 U.S. 265, 357. Further, the Court in Bakke stated:

   Nor do whites as a class have any of the "traditional indicia of suspectness:

the class is not saddled with such disabilities, or subjected to such a history

of purposeful unequal treatment, or relegated to such a position of political

powerlessness as to command extraordinary protection from the majoritarian

political process. San Antonio Independent School District v. Rodriguez, 411

U.S. 128, 36 L.Ed. 2d 16, 40, 93 S.Ct. 1278, 1294 (1973); see United States v.

Carolene Products Co., 304 U.S. 144, 152 n 4, 82 L.Ed. 1234, 1241, 58 S.Ct. 778,

783 (1938). [\*35]

   Nor has anyone suggested that the University's purposes contravene the

cardinal principle that racial classifications that stigmatize -- because they

are drawn on the presumption that one race is inferior to another or because

they put the weight of government behind racial hatred and separatism -- are

invalid without more. Id., at 357.

Therefore, the Jackson Board of Education need not prove that the race-conscious

provision in the collective bargaining agreement furthers a compelling

governmental purpose and that no less restrictive alternatives are available

since the provision did not affect the fundamental rights of the Petitioners

either as individuals or as a class, and such a standard is inappropriate in

these circumstances.

   Further, race is but one of the factors that the Jackson Board of Education

considers when laying off teachers. The Jackson Board of Education considers

other factors as subject area, special programs in which the teachers are

involved, seniority, and the number of teachers in a particular department and

school when laying off teachers. Minority teachers are laid off proportionately

to that of the white majority teachers. As the Third Circuit [\*36] stated in

Kromnick v. School District of Philadelphia: "No case has suggested that the

mere utilization of race as a factor, together with seniority, school need, and

subject qualification, is prohibited." Id., at 903, a statement which still

holds here in this action.

   III.

   No Title VII Claims Are Before This Court Due to Lack of Jurisdiction.

   No claims under Title VII, 42 U.S.C. Sections 2000e et seq., are before this

Court due to Petitioners' failure to properly file any charges, or complaints,

or initiate any proceedings with either the Equal Employment Opportunity

Commission ("EEOC") within one hundred and eighty (180) days after the alleged

discriminatory act(s) by Respondents were committed. 42 U.S.C. Section

2000e-5(e). Prior U.S. Supreme Court decisions have held that the

jurisdictional and substantive requirements of Title VII are applicable to

plaintiffs and defendants when one of the parties is a municipal or state

governmental entity or employer. Connecticut v. Teal, 457 U.S. 440, 449 (1982);

Dothard v. Rawlinson, 433 U.S. 321, 331 (1977). A claim(s) based on [\*37] an

alleged discriminatory act(s) is barred if the charge is not timely filed with

the EEOC, and a Right to Sue letter is not issued, since such prerequisites are

necessary to file a Title VII action. United Air Lines, Inc. v. Evans, 431 U.S.

553, 555 (1977); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974);

Electrical Workers v. Robbins & Meyers, Inc., 429 U.S. 229, 239-240 (1976).

Therefore, the Respondents were entitled to continue their treatment of the

Agreement as lawful since the Petitioners failed to file a complaint or charge

within 180 days after the alleged discriminatory act. Id.

   Further, Petitioners' failure to timely file their charges with the EEOC was

raised as a defense by the Respondents in the District Court action and upheld

by Judge Joiner, 546 F.Supp. 1195, 1203. Since the Respondents raised the

affirmative defense that the Petitioners failed to timely file their charges or

complaints and a Letter to Sue was not issued, no waiver was committed by the

Respondents. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 392-393 (1982).

   CONCLUSION

   The case [\*38] before the Court does not present a situation where a

governmental body is using race as a criteria for the purpose of favoring

minority group members at the expense and to the detriment of the rights and

expectations of Petitioners, members of the majority group. Rather, the Jackson

Board of Education's policy and procedures for teacher layoffs, which considers

a myriad of factors, including race, is designed to create and maintain a public

school system wherein ethnic diversity is reflected in what is taught, who will

teach and who will learn.

   For the reasons hereinabove stated, it is submitted that this Court should

affirm the decision of the Court below dismissing the Complaint in this action.

   Respectfully submitted,

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