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WENDY WYGANT, et al., Petitioners, vs. JACKSON BOARD OF

EDUCATION, et al., Respondents.

No. 84-1340

SUPREME COURT OF THE UNITED STATES

1984 U.S. Briefs 1340; 1985 U.S. S. Ct. Briefs LEXIS 1126

October Term, 1984

August 23, 1985

[\*1]

   On Writ of Certiorari to the United States Court of

Appeals for the Sixth Circuit

BRIEF OF MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL

FUND, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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CURIAE.

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   QUESTIONS PRESENTED

   1. Is a collectively bargained layoff provision which does not immunize

minority employees from layoff but rather corrects the disparate impact of

strict seniority a racial preference?

   2. Does the Fourteenth Amendment require public employers to adhere to a

last-hired, first-fired system for selecting employees for layoff?

   3. Does the Fourteenth Amendment permit a union and public employer

voluntarily to adopt a collective bargaining agreement which requires racially

proportional layoffs where, absent such a provision, layoffs could be expected

to have a substantial disparate impact on [\*2] minority employees?

INTERESTS: The Mexican American Legal Defense and Educational Fund, Inc.

("MALDEF") is a national civil rights organization established in 1967. Its

principal objective is to secure the civil rights of Hispanics living in the

United States, through litigation and education. MALDEF believes that the

Fourteenth Amendment should and must apply with equal force to members of all

racial and ethnic groups. MALDEF also believes, however, that public and

private employers are permitted under the Fourteenth Amendment to take

reasonable voluntary measures to correct historical underrepresentation of

racial and ethnic minorities in the workforce. In support of these principles

and goals, MALDEF has participated as amicus curiae and as counsel of record in

numerous cases before the Court. Firefighters Local Union No. 1784 v. Stotts,

    U.S.    , 104 S.Ct. 2576 (1984); Fullilove v. Klutznick, 448 U.S. 448

(1980); Bryant v. California Brewers Ass'n., 444 U.S. 598 (1980); United

Steelworkers of America v. Weber, 443 U.S. 193 (1969); Chicano Police Officers

Ass'n. v. Stover, 426 U.S. 944 (1976), 624 F.2d 127 (10th Cir. 1980); Rodriguez

v. East Texas Motor Freight Sys., Inc., 431 U.S. 395 (1977).

INTEREST OF AMICUS CURIAE

[\*4]

   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

   Although MALDEF generally concurs in the Statement of the Case in

Respondents' Brief, MALDEF believes that its emphasis on this case as a school

desegregation case is somewhat misplaced. This case involves a more general

problem experienced by many public and private employers. Whether as a result

of efforts to correct past discrimination in the workplace, or as a result of

changes over time in the racial and ethnic makeup of the employer's workforce or

the available labor market, many public and private employers find that their

minority employees on the whole have significantly less seniority than their

non-minority employees. When such an employer faces a layoff, application of a

strict last-hired, first-fired seniority system for selecting employees for

layoff often has a significant disparate impact on minority employees and

substantially reduces the percentage of minorities in the employer's workforce.

   The fundamental issue presented by this case is whether, when a public

employer [\*5] is involved, the Fourteenth Amendment permits the employer and

union to take voluntary steps to correct the disparate impact of a layoff on

minority employees.

   The Jackson School District is a good example of this problem. From 1950 to

1980, the minority population of Jackson County approximately doubled from 4.7

percent to 9.2 percent. n1 The percentage of minority teachers in the Jackson

School District also grew. In 1953 there were no black teachers. By 1961, 1.8

percent of the faculty was minority. By 1968-69, minority faculty constituted

3.9 percent of the total teaching staff. By 1971-72, the period when Article

XII was added to the collective bargaining agreement, minority faculty members

had increased to approximately 8 percent. n2 By 1981, the time of the layoffs

giving rise to the present action, minority teachers represented 13.1 percent of

the faculty. n3

   n1 United States Department of Commerce, Census of Population: 1950, Vol. II,

Characteristics of the Population, Part 22 Michigan, p. 22-46 (Table 12)

(showing 4.7% non-white population); id. 1980 Census of Population, Michigan STF

3A (showing 9.212% minority population). This Court may take judicial notice of

census figures. Rose v. Mitchell, 443 U.S. 547, 571 n.11 (1979); Castaneda v.

Partida, 430 U.S. 482, 486 n.6 (1977); Hernandez v. Texas, 347 U.S. 475, 480

n.12 (1954).

   n2 Pet. App. 30a.

   n3 J.A. 57-100 (68 of 518 teachers on 1981 seniority list are minority).

[\*6]

   The record also indicates that minorities were historically underrepresented

as teachers in the Jackson School District and that this underrepresentation was

the result of discriminatory employment practices. In 1970-71, for example,

minority teachers represented only 6.1 percent of the teachers in the Jackson

School District, n4 even though neighboring Wayne County had 21.6 percent

minority teachers n5 and the Ann-Arbor/Detroit Combined Standard Metropolitan

Statistical Area from which teachers could easily have been recruited had 12.5

percent minority teachers. n6 Discriminatory practices included the assignment

of black teachers to virtually all-black schools. n7

   n4 Pet. Lodging, 56-62; Michigan Department of Education, Racial Ethnic

Census for 1970-1971, Jackson Public Schools.

   n5 Department of Commerce, Census of Population: 1970, Characteristics of the

Population for Michigan ("1970 Census"), Tables 122, 127 & 132, at pp. 564, 587

& 602.

   n6 1970 Census, note 5 supra, Tables 86, 93 & 99, at pp. 331, 387 & 435.

   n7 The preliminary investigatory report dated June 16, 1969, prepared by the

Michigan Civil Rights Commission in response to Complaint No. 6585 of the NAACP

revealed that eight of the nine all-white schools had all-white facilities,

while half of the black teachers were concentrated in just two schools which

were 81% and 91% black.

[\*7]

   Because minorities were historically underrepresented as teachers in the

Jackson School District, and most minority teachers were recent hires, minority

teachers on the whole had significantly less seniority than non-minority

teachers. An analysis of the 1981 seniority list -- the only seniority list in

the record -- shows a striking disparity in minority and non-minority seniority.

   Of the 518 teachers on the 1981 seniority list, 68 (13.1%) are indicated as

minority employees and 450 (86.9%) are indicated as non-minority. The median

seniority date for non-minority teachers is July 19, 1967. In other words, half

of the non-minority teachers on the seniority list were hired before July 19,

1967 and half were hired after that date. The median seniority date for the

minority teachers is August 29, 1972. Simply put, minority teachers on the

average had approximately five years less seniority than non-minority teachers.

This is a significant disparity, particularly in light of the fact that, had the

layoff in 1981 of 70 teachers been based strictly on seniority, it would have

resulted in the layoff of teachers with approximately five years or less of

seniority. n8

   n8 Pet. Lodging, 1-2; Pet. Brief p. 31 n.27; J.A. 94-100 (employee 70th from

end of March 1, 1981 seniority list had seniority date of January 13, 1976).

[\*8]

   Other methods of statistical analysis reveal a significant disparity between

the seniority of minority and non-minority teachers. Of the most senior third

of the teachers on the seniority list, for example, only six out of 173 (3.5%)

are minority. Of the least senior third of the teachers on the seniority list,

48 out of 173 (27.7%) are minority. n9

   n9 J.A. 57-100.

   Had the Jackson School Board laid off the fifty least senior teachers in

1981, sixteen (32%) would have been minority. In other words, the percentage of

minorities in the group of employees laid off would have been more than double

the percentage of minorities in the teacher population as a whole (13%). The

minority percentage of the workforce would have declined from 13.1 percent

before the layoff to 11.1 percent after the layoff. n10

   n10 J.A. 95-100. Respondents correctly point out that the collective

bargaining agreement did not require application of strict seniority, even apart

from Article XII.

   The attention by petitioners on the actual layoff which occurred in 1981-1982

obscures the fact that, when the School Board and the union first agreed to

Article XII in 1972, they did not know when layoffs [\*9] would occur, how

severe they would be, and what the rate of minority employment would be up to

the date of layoff. What is relevant is not simply the actual layoff which

occurred in 1981-82, but the layoffs which could reasonably have been

anticipated in 1971-72 when the School Board and union negotiated and ultimately

agreed on Article XII. The record indicates that the potential for a layoff

with a severely disparate impact on minority employees was quite substantial in

1972. Thus, had the School Board on September 1, 1972 laid off the twenty-five

least senior teachers, thirteen of the twenty-five (52%) would have been

minorities. n11

   n11 J.A. 86-88. Because the record does not contain a 1972 seniority list,

the preceding calculation is based on the 1981 seniority list which, of course,

does not reflect teachers who left the employ of the School Board between 1972

and 1981.

TITLE: BRIEF OF MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AMICUS

CURIAE, IN SUPPORT OF RESPONDENTS

   SUMMARY OF ARGUMENT

   The Fourteenth Amendment does not require employers and unions to adopt a

strict last-hired, first-fired seniority system for layoff. An employer could

constitutionally decide to lay teachers off by lot.

   Article XII, although race conscious, does not create a preference [\*10]

based on race. It achieves the same result in racial terms as selecting

employees for layoff by lot. It does not immunize minorities from layoff, nor

does it require that minority teachers be laid off slower than non-minority

teachers.

   Article XII is a constitutional means of correcting the disparate impact of a

layoff on the School District's minority employees. The record establishes that

minority teachers in the Jackson School District have significantly less

seniority than non-minority teachers. A layoff based strictly on seniority

would have a severe disparate impact on minority teachers. The means adopted to

correct that disparate impact are constitutional. Because seniority is not a

measure of individual worth, adjustments to a seniority system to ameliorate a

layoff's disparate impact on minorities does not suggest that minority teachers

lack the ability to succeed on their own.

   One of the fundamental purposes of Title VII of the Civil Rights Act of 1964

is to correct employment practices which have a disparate impact on minorities

but cannot be justified by business necessity. Article XII achieves this

purpose. The immunity in Section 703(h) of Title VII for bona [\*11] fide

seniority systems does not prevent a union and employer from voluntarily

agreeing through collective bargaining to modify a seniority system to correct

its disparate impact on minorities. The rationale behind Section 703(h) -- to

accord deference to the results of collective bargaining -- and the underlying

policy of Title VII to eliminate employment practices with disparate impacts on

minorities are both served by allowing implementation of Article XII.

   ARGUMENT

I. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE EMPLOYERS AND UNIONS TO ADOPT A

STRICT LAST-HIRED, FIRST-FIRED SENIORITY SYSTEM TO SELECT EMPLOYEES FOR LAYOFF.

   Petitioners appear to suggest in their brief that the Constitution somehow

forces the School Board and the union to adopt a last-hired, first-fired

seniority system to select employees for layoff. After assuming that a

last-hired, first-fired seniority system is a constitutional given, petitioners

then treat any race conscious alteration of such a system as a racial

preference, thereby invoking the Fourteenth Amendment. Both steps in

petitioners' argument are flawed.

   We start with the obvious premise that the Constitution does not require

public or [\*12] private employers to have any kind of seniority system to

select employees for layoff. An employer and union could agree, for example,

that an employer could select employees for layoff based on the employer's

subjective evaluation of which employees are best able to perform the remaining

work. Alternatively, the employer and union could agree that the employer would

administer validated, job-related competency tests and select those employees

with the lowest scores for layoff. The employer and union could also agree to

select employees to be laid off by lot -- for example, by pulling names out of a

hat.

   This Court's precedents also make it clear that, if an employer and union

agree on a particular contractual provision governing selection of employees for

layoff, they nevertheless remain free to revise or eliminate that provision in

subsequent contracts. Franks v. Bowman Transportation Co., 424 U.S. 747, 778-79

(1976); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Aeronautical Industrial

District Lodge 727 v. Campbell, 337 U.S. 521 (1949). The employee has no vested

property interest in a particular seniority system. As one [\*13] leading labor

law commentator has stated:

   "Thus, seniority rights provided for in a collective bargaining agreement may

be modified or eliminated by agreement of the union and the employer so long as

they act in good faith, and this change may be effected without the consent -

indeed, against the wishes - of the individual employee." n12

   n12 B. Aaron, Reflections on the Legal Nature and Enforceability of Seniority

Rights, 75 Harv.L.Rev. 1532, 1533-34 (1962). See also Ford Motor Co. v. Huffman,

345 U.S. 330, 338 (1953); Franks v. Bowman Transportation Co., 424 U.S. 747, 778

(1976); Whitfield v. United Steelworkers of America, 263 F.2d 546 (5th Cir.),

cert. denied, 360 U.S. 902 (1959).

   While seniority systems are widespread in our economy, it is important to

bear in mind that they are frequently inequitable in their application. Under a

standard last-hired, first-fired system, for example, a worker with twenty

years' experience who was hired by a particular employer a year ago would be

laid off before an employee who was hired by the employer two years ago, with no

previous experience. [\*14] In the school context, a highly gifted teacher

employed for four years would be laid off before a less competent teacher

employed for six years. Seniority not only does not necessarily equate to

merit; seniority does not even necessarily equate to experience. And yet, the

mechanical nature of seniority is one of its chief advantages. A merit system

for selecting employees for layoff would involve inherently subjective

evaluations of employees' relative ability. A simple last-hired, first-fired

seniority system, by contrast, allows employees to be selected for layoff from a

list by reference to one arbitrarily selected criteria -- date of hire.

   In our complex industrial society, seniority and layoff provisions assume an

almost infinite variety. Seniority preference may be determined on a

geographical or district basis, or on a plant, departmental or craft basis. The

employees who are laid off from a particular job may have complex rights to bump

back to other, low-paying jobs, thereby forcing the layoff of other employees.

n13 It has never been seriously suggested that the Constitution forces public or

private employers and unions to adopt any particular form of seniority or [\*15]

layoff provisions in their collective bargaining agreements, or indeed to have

any such provisions at all.

   n13 See generally B. Aaron, note 12 supra, at 1534-35.

II. WHILE ARTICLE XII IS RACE CONSCIOUS, IT DOES NOT CREATE A PREFERENCE BASED

ON RACE.

   Article XII does not impose a preference based on race. True, it is race

conscious in that it ameliorates the disparate impact on minority employees of

strict seniority by requiring that employees be selected for layoff in the same

proportion as their percentages in the employer's current workforce. That

result, however, creates no preference for any racial group. Article XII

achieves the very same result in terms of racial makeup of employees selected

for layoff as would be achieved by selecting employees for layoff by lot, a

procedure which the School Board and union clearly have the constitutional power

to adopt in order to avoid the disparate impact on minorities of a strict

seniority layoff system. Thus, if the School Board selected employees for

layoff by lot, the laws of probability would dictate that the employees selected

for layoff would have approximately the same racial makeup as the then-current

teacher [\*16] workforce. Selecting employees for layoff by lot would eliminate

the disparity resulting from the fact that minorities are not evenly distributed

in terms of hire date. In terms of racial impact, Article XII achieves the same

result as would be achieved by a purely colorblind, neutral system of selecting

employees for layoff by lot. As such, it does not create any racial preference.

   Viewed in this light, Article XII can best be characterized as an amalgam of

two racially neutral methods of selecting employees for layoff -- strict

seniority and random selection. It avoids the disparate impact of strict

seniority by achieving the same racial distribution as would be achieved by a

random selection method. It then uses seniority to determine which individual

employees will be laid off to achieve that result. It does not create a

preference for any racial group. Employees are selected for layoff from all

racial groups in direct proportion to their percentage representation in the

current workforce. No immunity from layoff is granted to members of any racial

or ethnic classification.

   While petitioners are unquestionably correct in asserting that each

individual employee has the [\*17] right to assert the protections of the

Fourteenth Amendment, petitioners are wrong in suggesting that the union and

School Board violated the rights of petitioners simply because petitioners were

selected for layoff under Article XII and would not have been selected for

layoff had strict seniority been the only layoff criteria. As noted earlier,

the union and School Board, consistent with the Fourteenth Amendment, could have

rejected seniority altogether and agreed to select employees for layoff by lot

in order to avoid the disparate impact on minorities of a pure seniority system.

Had they done so, the employees so selected would clearly have no basis for

contending that their rights under the Fourteenth Amendment had been violated.

Two different facially neutral methods of selecting employees for layoff (random

selection and seniority) will result in the selection of different individual

employees in a given instance. Yet each method would be constitutional, and the

changeover from one method to another would also be constitutional.

III. THE FOURTEENTH AMENDMENT PERMITS THE VOLUNTARY ADOPTION OF A COLLECTIVE

BARGAINING AGREEMENT WHICH REQUIRES RACIALLY PROPORTIONAL LAYOFFS [\*18] WHERE,

ABSENT SUCH A PROVISION, LAYOFFS COULD BE EXPECTED TO HAVE A SUBSTANTIAL

DISPARATE IMPACT ON MINORITY EMPLOYEES.

   A. Article XII Is a Constitutional Means of Correcting the Disparate Impact

of a Layoff On The School District's Minority Employees.

   Whatever its other weaknesses, the record in this case clearly demonstrates

that application of a strict seniority method to select employees for layoff

would have a substantial disparate impact on minority employees. As noted

earlier, had the school district laid off the twenty-five least senior teachers

at the start of the 1972 school year (when Article XII was adopted), thirteen or

52 percent of the laid off teachers would have been minorities, even though

minorities represented only approximately 8 percent of the teachers at the time.

Had the fifty least senior teachers been laid off in 1981, sixteen (32%) would

have been minorities even though only 13 percent of the total teacher population

was then minority. n14 The School Board and union adopted a constitutional means

for ameliorating this adverse impact.

   n14 See pp. 10-13, supra.

   To begin with, Article XII does not simply purport to seek racial balance

[\*19] for the sake of racial balance or in order to remedy perceived societal

discrimination against minorities. See Regents of University of California v.

Bakke ("Bakke"), 438 U.S. 265, 290 (1978); United Steelworkers of America v.

Weber, 443 U.S. 193, 238-39 (1979) (Rehnquist, J., dissenting). As Respondents'

Brief makes clear, Article XII is part of a broader voluntary effort, including

affirmative action in hiring, to correct a history of underrepresentation of

black teachers in the school district. The hiring aspect of the affirmative

action program was not challenged below and is not at issue here. Moreover, the

record does not allow the Court to evaluate the constitutionality of the hiring

aspect of the affirmative action program. There is no record, for example, as

to what methods were used by the School Board to meet its goal of increased

minority hiring, and there is nothing in the record to suggest that the School

Board used a quota system which gave preference to a black applicant over an

equally qualified or more qualified white applicant based solely on race.

   The purpose and operation of Article XII is, in contrast, clear from the

[\*20] record. Article XII was not designed to rectify past societal

discrimination. Rather, it was rooted in the fact that a strict seniority

layoff would have a substantial present or future disparate impact on minorities

given this employer's seniority list.

   Second, the means adopted by Article XII are far different from the racial

quota held unconstitutional by a majority of the Court in Bakke. The special

admissions procedure attacked in Bakke created an arbitrary preferential quota

for minority students and resulted in a more qualified non-minority applicant

being rejected in favor of a less qualified minority applicant. n15

   n15 In Bakke, 16 out of 100 spaces in the entering class were reserved for

applicants to the special admissions program. The only applicants to the

special admissions program selected for one of the 16 slots were minorities.

For the 1974 entering class, 3,737 applicants were submitted for 100 seats, of

which only 84 were available to whites. Thus, a white applicant's chance of

admission was 84/3,737 or 2.2%. In 1974, 456 minorities vied for the 16 spaces

in the special admissions program so that 3.5% of all minority applicants were

accepted under the special admissions program -- in addition to minorities

accepted through the regular admissions program. Bakke, 438 U.S. at 273 n.2 and

275 n.5.

[\*21]

   Here, in contrast, Article XII does not create any preferential immunity from

layoffs for minority employees. Minority and non-minority teachers are laid off

in direct proportion to their percentage in the current teacher workforce.

Furthermore, neither the pure seniority system advocated by petitioners nor the

modified seniority system adopted by respondents results in the retention of

less qualified teachers at the expense of more qualified teachers. All current

teachers are qualified. Individualized evaluations of relative merit and

qualifications are ignored by both systems in favor of mechanical means of

selecting teachers for layoff.

   Indeed, the same considerations which underlay Justice Powell's approval in

Bakke of the Harvard College Admissions Program should lead to approval of

Article XII here. Harvard College's Admission Program rejected the use of a

single criterion of scholarly excellence to select from the pool of qualified

candidates, based on the conclusion that "diversity adds an essential ingredient

to the education process." 438 U.S. at 321-322. In the present case, the union

and School Board have rejected the use of a single criterion [\*22] -- seniority

-- to select from the pool of qualified teachers those who will be retained.

Instead, they have added a second criterion -- preservation of ethnic and racial

diversity. The nature of the layoff selection process is necessarily very

different from the process of selecting from a pool of college applicants, and

is different from the process of selecting from a pool of teacher job

applicants. The individualized consideration in the Harvard College Admissions

Program which the Court lauded in Bakke cannot realistically be applied in the

layoff context. Yet there is a fundamental shared premise of both Article XII

and the Harvard College Admissions Program -- that racial and ethnic diversity

can legitimately be added as a criterion in the selection process.

   The mechanism adopted by Article XII is a reasonable means to achieve the

goal of racial and ethnic diversity in a layoff context where individualized

consideration of individual merit is not feasible, yet the record demonstrates

that a pure seniority system will have a severe disparate impact on current

levels of minority employment. Fullilove v. Klutznick, 448 U.S. 448 (1980).

   The race conscious [\*23] adjustment of a seniority system does not bring

into play many of the concerns expressed over race conscious adjustments to

employer decisions which are normally based solely on merit. In Bakke, for

example, Justice Powell expressed the concern that preferential programs for

members of racial or ethnic groups

   "may only reinforce common stereotypes holding that certain groups are unable

to achieve success without special protection based on a factor having no

relationship to individual worth." Bakke, 438 U.S. at 298.

See also DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J.,

dissenting).

   These concerns are unwarranted here. A last-hired, first-fired seniority

system does not select employees for layoff based on factors having a direct

relationship to individual worth. As noted earlier, seniority does not measure

ability or worth, nor is it even a direct measure of experience. Adjusting a

seniority system to ameliorate the disparate impact of a layoff based strictly

on seniority does not in any way suggest that minority employees lack the

ability, talent or drive to "make it" on their own.

   The fact that there was [\*24] no formal administrative or judicial

determination that the Jackson School District discriminated against minority

teachers should not change the result. Under the Court's judgment in Bakke,

Harvard College can administer its admittedly race conscious admissions program

even though no court or administrative body has ever found that the college

discriminates against minority applicants. Race conscious remedies have been

approved where no judicial findings of discrimination have been made. McDaniel

v. Barresi, 402 U.S. 39 (1971); United Jewish Organizations, Inc. v. Carey, 430

U.S. 144 (1977). See Califano v. Webster, 430 U.S. 313 (1977); Schlesinger v.

Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974). See also

Katzenbach v. Morgan, 384 U.S. 641 (1966).

   B. One of the Fundamental Purposes of the Civil Rights Act of 1964 Is To

Correct Employment Practices Which Have a Disparate Impact On Minorities But

Cannot Be Justified By Business Necessity.

   In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court unanimously held

that Title [\*25] VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et

seq., must be interpreted not only to reach intentional discrimination, but also

to prohibit facially neutral employment practices which have a disparate impact

on minorities.

   "Congress directed the thrust of the Act to the consequences of employment

practices, not simply the motivation." Griggs v. Duke Power Co., 401 U.S. at

432. (Emphasis in original.)

See also Albermarle Paper Co. v. Moody, 422 U.S. 405, 422-23 (1975).

   In Griggs, the Court held that Title VII forbids the use of any employment or

promotion criterion which is discriminatory in effect, unless the employer meets

"the burden of showing that any given requirement [has] . . . a manifest

relationship to the employment in question." Griggs v. Duke Power Co., 401 U.S.

at 432.

   A showing by an employer that an employment or promotion criterion is job

related is not sufficient, however. The employer must also show that the

criterion is justified by business necessity -- that is, the employer must show

that there are no other selection devices, without a similarly [\*26]

undesirable racial effect, which would serve the employer's legitimate interest

in an efficient, competent workforce. McDonnell Douglas Corp. v. Green, 411

U.S. 792, 801-02 (1973); Albermarle Paper Co. v. Moody, 422 U.S. at 425.

   As the Court has summarized in International Brotherhood of Teamsters v.

United States ("Teamsters"), 431 U.S. 324 (1977), under a disparate impact

theory, Title VII generally prohibits "employment practices that are facially

neutral in their treatment of different groups but that in fact fall more

harshly on one group than another and cannot be justified by business

necessity." Teamsters, 431 U.S. at 335 n.15. Thus, there is a strong public

policy, reflected in Title VII, that employers correct those employment

practices which, though neutral on their face, have a significant disparate

impact on minority employees and cannot be justified by business necessity.

   C. The Immunity Provided In Section 703(h) of Title VII Does Not Prevent

Employers and Unions From Voluntarily Agreeing To Correct the Disparate Impact

of a Layoff.

   In Teamsters, the Court recognized that seniority systems [\*27] appeared to

be one kind of practice which could be attacked under Title VII as "fair in

form, but discriminatory in operation." Teamsters, 431 U.S. at 349. Seniority

systems, moreover, cannot satisfy the "business necessity" test as there are

other selection methods which would serve the employer's legitimate interest in

reducing the workforce without the undesirable disparate racial impact. The

Court concluded, however, that Section 703(h) of Title VII, 42 U.S.C. §

2000e-2(h), was intended by Congress to immunize bona fide seniority systems

from judicial attack under Title VII even though they have a disparate impact on

minority employees, may tend to perpetuate into the present the effects of past

discrimination, and cannot satisfy the "business necessity" test. Nowhere in

Teamsters, however, does the Court suggest that employers and unions are forced

to accept the disparate impact of strict seniority systems on minority

employees. Nowhere in the legislative history relied upon in Teamsters did

Congress indicate that employers and unions were forced to accept that disparate

impact. n16 Section 703(h) of Title VII may [\*28] well have immunized strict

seniority from judicial attack if adopted in good faith by an employer and

union. But Section 703(h) does not require the collective bargaining agreement

to follow strict seniority, nor does it prohibit a collective bargaining

agreement from mitigating the disparate impact on minorities of a seniority

system.

   n16 In dissent in United Steelworkers of America v. Weber, 443 U.S. 193

(1979), the Chief Justice has argued that the legislative history does indicate

that Congress intended to prohibit voluntary race conscious adjustment of

seniority systems. 443 U.S. at 240 (Burger, C.J., dissenting). The Chief

Justice relied on remarks in an interpretative memorandum by Senators Clark and

Case which stated that, even if an employer discriminated in the past

   "'He would not be obliged -- or indeed permitted -- to fire whites in order

to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are

hired, to give them special seniority rights at the expense of the white workers

hired earlier.' Ibid. (emphasis added)." Ibid.

   We respectfully suggest that the comments of Senators Clark and Case could

also be read in a more limited manner to mean only that an employer unilaterally

could not rely on Title VII to give special seniority rights to blacks contrary

to a collective bargaining agreement. The Senators' remarks do not go so far as

to suggest that an employer and union cannot revise a seniority system to

ameliorate its disparate impact on minorities. See also United Steelworkers of

America v. Weber, 443 U.S. at 207 n.7 (construing remarks of Senators Clark and

Case in light of subsequent adoption of Section 703(j), 42 U.S.C. § 2000e-2(j)).

[\*29]

   In American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), the Court again

acknowledged that collectively bargained seniority systems would seem to fall

under the Griggs rationale prohibiting policies and practices which are neutral

on their face but nevertheless discriminate in effect against a particular

group. The Court reaffirmed, however, that Section 703(h) was designed to

immunize a collectively bargained seniority system from a judicial finding of

liability under Title VII. The Court's rationale did not go so far as to

prohibit an employer and union from agreeing to modify the seniority system to

ameliorate its disparate impact. To the contrary, the Court reasoned in

American Tobacco that, when Congress enacted Section 703(h), it struck a balance

between two conflicting policies -- the policy to eliminate discrimination in

employment and "the policy favoring minimal supervision by courts and other

governmental agencies over the substantive terms of collective-bargaining

agreements." American Tobacco Co. v. Patterson, supra, 456 U.S. at 76-77. See

also California Brewers Ass'n v. Bryant, 444 U.S. 598, 608 (1980). [\*30]

   In the present case, neither Congress nor the courts need choose between

conflicting policies. Here, the parties have voluntarily modified their

collective bargaining agreement themselves to serve one of the principal

purposes of Title VII -- prohibiting practices that, while neutral on their face

and intent, have a disparate impact on particular racial or ethnic groups and

cannot be justified by business necessity. The policies of Title VII and the

policy of minimal supervision by the courts over the substantive terms of

collective bargaining are both served by allowing Article XII to operate

pursuant to its terms. n17

   n17 Thus, affirming the judgment of the Court of Appeals is fully consistent

with this Court's decision in Firefighters Local Union No. 1784 v. Stotts,

U.S.    , 104 S. Ct. 2576 (1984). There, the Court held that a district court

may not modify a consent decree "to disregard a seniority system" simply because

proposed layoffs would have an adverse effect on minority employees. The Court

did not reach the issue of whether the City, as a public employer, could have

disregarded the seniority system.     U.S. at    , 104 S.Ct. at 2590. See also

id.,     U.S. at    , 104 S.Ct. at 2592-93 (O'Connor, J., concurring)

(emphasizing that the union did not participate in the negotiation of the

consent decree). See also Vanguards of Cleveland v. City of Cleveland, 753 F.2d

479, 486-489 (6th Cir. 1985) (distinguishing voluntarily adopted provisions from

the court-ordered abandonment of seniority at issue in Stotts).

[\*31]

   In United Steelworkers of America v. Weber, 443 U.S. 193 (1979), the Court

held that an employer and union may voluntarily agree to a raceconscious

affirmative action plan which modified seniority rights to favor minorities for

places in a training program. Minorities were historically underrepresented in

the various crafts at issue. The contract provision involved in Weber was

preferential to blacks in a very real sense. It reserved 50 percent of the

openings for black applicants, even though the local workforce was only 39

percent black. The Court's opinion in Weber established that employers and

unions may take voluntary action to correct practices which have had or will

have disparate impacts on minority employees, regardless of whether a court

could invalidate the practice:

   "Further since 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." 443 U.S. at 200.

   Weber, of course, was a Title VII case, and the Court noted that it was not

deciding whether the plan would have been constitutional under the Fourteenth

[\*32] Amendment if adopted by a public employer. 443 U.S. at 200. In the

present case as well, this Court need not reach the thorny issue of whether the

Fourteenth Amendment prohibits a public employer from negotiating a collective

bargaining agreement which grants preferential treatment to minority employees.

Article XII does not prefer blacks over whites like the plans at issue in Weber

or Bakke. It does not immunize blacks from layoff. It does not provide that

blacks will be laid off at a slower rate than whites. It simply provides that

minority employees can be laid off in no greater percentages than their

percentage in the workforce. It is a race-conscious remedy which is

race-neutral in impact.

   The Court should be particularly solicitous of voluntary measures by

employers and unions to deal in their collective bargaining agreements with

possible layoffs. While it is easy in hindsight to calculate the effect of

alternative layoff provisions on a given layoff, the union and School Board did

not have the benefit of a crystal ball when they negotiated Article XII. They

could not know when layoffs would occur how many teachers would be laid off,

which particular [\*33] schools would experience the most severe declines in

enrollment, and what the precise racial mix would be on the date of layoff.

They did know, however, that blacks on the average had significantly less

seniority than whites and that a strict seniority system would have a

significant disparate effect on black teachers. The seniorty gap between whites

and minorities persisted after the initial adoption of Article XII, and

continues to this day, warranting continuation of Article XII in subsequent

contracts.

   Article XII is well designed to deal with the potential disparate impact of

an uncertain future layoff on black employees. It does not require that layoffs

be disproportional in favor of blacks or otherwise set quotas for white and

black layoffs. It does not require even that the racial makeup of individual

schools be frozen. Article XII simply requires generally that a layoff not have

a district-wide disparate impact on any minority group.

   Here, the employer and union had a legitimate concern not simply to correct

past underrepresentation of blacks, but also not to engage in future practices

which would have a substantial disparate impact on blacks. This Court has [\*34]

never held or suggested that public or private employers are powerless to modify

employment practices which have severe disparate impacts on minority employees.

It should not do so now.

   CONCLUSION

   For the foregoing reasons, amicus curiae respectfully requests that this

Honorable Court affirm the judgment of the Court of Appeals.

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