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LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS v. CITY OF CLEVELAND: A CONSENT DECREE IS NOT AN ADJUDICATED ORDER FOR PURPOSES OF TITLE VII

Title VII of the Civil Rights Act of 1964,¹ which has been applied to municipalities,² was enacted by Congress to deal with discrimination in employment.³ The United States Supreme Court⁴ has interpreted the primary purpose of Title VII as legislation to “achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”⁵ Congress⁶ and the Equal Employment Opportunity Commission⁷ preferred voluntary compliance to achieve Title VII’s objectives.

The Supreme Court has held that this voluntary action by the parties may include some type of race-conscious relief.⁸ The Court has recently held that Section 706(g)⁹ of Title VII permits a court to order, in certain *limited* cir-

¹42 U.S.C. § 2000e (1978). For an in depth discussion of Title VII, see C. SULLIVAN, M. ZIMMER & R. RICHARDS, *FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION* (1980) [hereinafter referred to as *Sullivan*]. See also *Symposium 1964 Civil Rights Act, Title VII, Equal Employment Opportunity*, 7 B.C. INDUS. COM. L. REV. 413 (1986); Gould, *Employment Security Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 How. L.J. 1 (1967).

²Title VII was expanded to cover municipalities by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

³42 U.S.C. § 2000-2(a) (1978).

⁴*Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Court, in *Abemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975), stated that a second purpose is “to make persons whole for injuries suffered on account of unlawful employment discrimination.”

⁵*Griggs*, 401 U.S. at 429-30.

⁶See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (“Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation and persuasion . . . (c)operation and voluntary compliance were selected as the preferred means for achieving this goal”).

⁷According to the Equal Employment Opportunity Commission, “(v)oluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the congressional intent embodied in Title VII.” 29 C.F.R. § 1608.1(c) (1985). For a discussion of the Equal Employment Opportunity acts, see Hill, *The Equal Employment Opportunity Act of 1964 and 1972: A Critical Analysis*, 2 IND. REL. L.J. 1 (1977); Rodriguez, *A Look at Equal Employment Opportunity*, 33 LABOR L.J. 259 (1982).

⁸*United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979) (Title VII’s prohibition in §§ 703 (a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans).

⁹Section 706(g) of Title VII provides that: If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or per-

cumstances,¹⁰ affirmative race-conscious relief to unidentified victims as a remedy for past discrimination.¹¹ The problem that occurs is whether a court related remedy constitutes an "order" under Section 706(g) or a voluntary action by the parties. The distinction is important because voluntary actions seem to be subjected to less judicial scrutiny. This problem is compounded when the parties enter into a voluntary agreement and the court's approval of the agreement takes on the characteristics of an order. This is the very situation that occurred in *Local 93, International Association of Firefighters v. City of Cleveland*.¹² Here an affirmative action plan between the parties was incorporated into a consent decree.¹³

This note will examine the decision of the United States Supreme Court in *Local 93, International Association of Firefighters v. City of Cleveland*, and explore its potential implications in future Title VII actions. The issue the Supreme Court had to decide was whether a consent decree is a form of court ordered relief for purposes of Title VII litigation. The Supreme Court¹⁴ held that whether or not Title VII precludes a court from imposing certain forms of race-conscious relief for non-victims after a trial, it does not preclude relief awarded in a consent decree.¹⁵ The Court's analysis included discussions on:

- (1) whether consent decrees are among the "orders" referred to in Section 706(g) of Title VII;¹⁶
- (2) whether a federal court is barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial;¹⁷ and
- (3) whether the fact that the consent decree was entered into without the

sions discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704 (a) [42 USCS § 2000e-3(a)].

¹⁰Local 28 of the Sheet Metal Workers' Int'l Ass'n v. E.E.O.C., 106 S. Ct. 3019, 3036 (1986) ("(w)here an employer or union has engaged in particularly longstanding or egregious discrimination, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation.").

¹¹*Id.* at 3036-37.

¹²Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986).

¹³A consent decree is "an order of the court approving and embodying an agreement of litigation; the party's negotiated resolution of the dispute attains the status of judicial relief by virtue of the court's having approved the settlement and having ordered it to be enforced." Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. ILL. L. REV. 579 (1983). For a critical discussion of the uses of a consent decree, see Comment, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 HARV. L. REV. 1314 (1959).

¹⁴Brennan, J., delivered the opinion for the majority, in which Marshall, Blackmun, Powell, Stevens, and O'Connor, JJ, joined. White, J., filed a dissenting opinion. Rehnquist, J., filed a dissenting opinion in which Burger, C.J., joined.

¹⁵*Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3080.

¹⁶*Id.* at 3074-76.

petitioner's consent affected its validity.¹⁸

THE FACTS

On October 23, 1980, the *Vanguards of Cleveland (Vanguards)*¹⁹ filed a class action against the *City of Cleveland (City)*²⁰ alleging discrimination on the basis of race and national origin.²¹ The complaint stated that this discrimination occurred due to intentional practices by the City.²² The suit was filed on behalf of all present and future minorities.²³ This was not the first lawsuit in which the City was charged with discrimination,²⁴ and the City was very willing to try and reach some type of settlement.²⁵

On April 27, 1981, Local Number 93 of the International Association of Firefighters, AFL-CIO, C.L.C. (*Local*)²⁶ filed a motion²⁷ with the court to intervene as a party-plaintiff. The motion was granted and the Local filed a "complaint"²⁸ with the district court. The *Vanguards* and the City continued to negotiate, and filed a proposed consent decree with the district court²⁹ in

¹⁸*Id.* at 3079-80.

¹⁹The *Vanguards of Cleveland* are an organization of black and Hispanic firefighters employed by the City of Cleveland.

²⁰The class action was brought under the Thirteenth and Fourteenth Amendments to the Constitution, 42 U.S.C. §§ 1981 and 1983, and Title VII of the Civil Rights Act of 1964. *Id.* at 3066.

²¹The complaint alleged discrimination "in the hiring, assignment and promotion of firefighters within the City of Cleveland Fire Department." *Id.*

²²According to the *Vanguards*, these intentional practices included:

- (1) written examination that were allegedly discriminatory;
- (2) reinforcement of the effects of this test by the use of seniority points and the manipulation of retirement dates; and
- (3) the City limiting minority advancement by deliberately refusing to administer a new promotional exam after 1975.

Id. at 3067.

²³*Id.* at 3066.

²⁴*See Shield Club v. City of Cleveland*, 370 F. Supp. 251 (N.D. Ohio 1972) (district court enjoining certain hiring practices and establishing minority hiring goals for police department); and *Headen v. City of Cleveland*, No. C73-330 (N.D. Ohio, unreported, April 25, 1975) (court imposing hiring quotas on fire department).

²⁵As counsel for the City stated at oral argument:

"You don't have to beat us on the head. We finally learned what we have to do and what we have to try to do to comply with the law, and it was the intent of the City to comply with the law fully." Transcript of Oral Argument at 41-2.

²⁶Local 93 actually represents the majority of firefighters in the City of Cleveland.

²⁷The motion was made pursuant to Federal Rules of Civil Procedure Rule 24(a)(2). *Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3067.

²⁸Despite the document's title, the Supreme Court stated that the document "did not allege any causes of action or assert any claims against either the *Vanguards* or the City." *Id.* at 3067-68. The document also stated that "(p)romotions based upon any criterion other than competence, such as a racial quota system, would deny those most capable from their promotions and would deny the residents of the City of Cleveland from maintaining the best possible fire fighting force." *Id.* at 3068.

²⁹This proposed consent decree established a two-step procedure to remedy the City's past discriminatory policies. The first step provided that a fixed number of promotions (16 of 40 planned promotions to Lieutenant, 3 of 20 planned promotions to Captain, 2 of 10 planned promotions to Battalion Chief, and 1 of 3 planned promotions to Assistant Chief) were to be made to minority firefighters. The second step involved the

November, 1981.

The Local objected to this proposed consent decree,³⁰ and the district court held hearings on January 7 and 8, 1982, to consider those objections. The district court ruled that any discussions between the Vanguard and the City would have to include the Local³¹ and deferred approval of the consent decree. The district court also stated that the Local would have to make its objections to the proposed consent decree specific.³² At the second hearing, held on April 27, 1982, there was still no agreement between the parties, and the district court referred the matter to a United States magistrate.³³ The three parties negotiated under the magistrate's supervision³⁴ and came to a tentative agreement, subject to approval by the membership of the Local.³⁵ This proposed agreement was overwhelmingly rejected by the membership of the Local.³⁶

On January 11, 1983, the Vanguard and the City filed a second proposed consent decree³⁷ with the district court and moved for its approval.³⁸ The Local filed another objection, but this time the district court approved the consent decree.³⁹

The Local appealed the entering of the consent decree to the Sixth Circuit Court of Appeals.⁴⁰ After the Sixth Circuit had heard the oral arguments in the instant case, the Supreme Court decided *Firefighters Local Union No. 1784 v.*

establishment of promotion goals for minorities. This plan was to remain in effect for a maximum of fifteen years. Appellate Record at 32-4, 36.

³⁰The Local objected to the use of minority hiring requirement, the possible life of the plan, and the Local's exclusion from the negotiations between the City and the Vanguard. *Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3068.

³¹"I am going to at this time defer this proceeding until another day, and I am mandating the City and the Vanguard to engage the Firefighters in discussions." Transcript of first hearing at 151.

³²"I don't think the Firefighters are going to win their position on the basis that well, Judge, you know, there's something inherently wrong about quotas. You know, it's not fair. We need more than that." *Id.* at 153.

³³*Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3068.

³⁴Counsel for all three parties participated in forty hours of intensive negotiations. *Id.* at 3069.

³⁵The revised consent decree actually increased the number of supervisory positions available to nonminority firefighters. *Id.*

³⁶The vote was 660 to 89. *Id.*

³⁷This decree split the promotions between nonminorities and qualified minorities and restored the use of seniority points as a factor in ranking candidates for promotion. The life of the decree was also reduced to four years. Appendix to Petition for Certiorari at 29-38.

³⁸This proposal was based on the agreement worked out between all three parties under the magistrate's supervision. *Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3069.

³⁹The district court held that "(t)he documents, statistics, and testimony presented at the January and April 1982 hearings reveal a historical pattern of racial discrimination in the promotions in the City of Cleveland Fire Department." Appendix to Brief in Opposition of City of Cleveland at 43-4. The court also held that the second proposed consent decree was a "fair, reasonable, and adequate resolution of the claims raised in the action." *Id.* at A5.

⁴⁰*Vanguard of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985), *aff'd*, *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986).

Stotts,⁴¹ which also dealt with consent decrees, affirmative relief, and Title VII.⁴² The Sixth Circuit, concerned with the potential impact of *Stotts*, ordered the parties to submit supplemental briefs.⁴³ The Sixth Circuit then determined that the decision in *Stotts* did not affect the outcome of the instant case,⁴⁴ and affirmed the district court's decision.⁴⁵

The Local then petitioned⁴⁶ the Supreme Court for a writ of certiorari.⁴⁷ They argued that a "consent decree entered in Title VII litigation is invalid if it utilizes racial preferences that may benefit individuals who are not themselves actual victims of an employer's discrimination."⁴⁸ The Supreme Court granted the petition,⁴⁹ and affirmed the decision of the Sixth Circuit.⁵⁰ The Supreme Court held that "whether or not § 706(g) precludes a court from imposing certain forms of race-conscious relief after trial, that provision does not apply to

⁴¹*Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984).

⁴²In *Stotts*, the parties had already entered into a consent decree in a Title VII action against a city. When the city began to layoff minorities, in accordance with the city's "last hired — first fired" policy, the district court modified the decree and enjoined the city from laying off the minorities. The Sixth Circuit affirmed this decision, but the Supreme Court reversed it. The Supreme Court held that "the Court of Appeals imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed." *Id.* at 2588. The Court reasoned that § 706(g) of Title VII prohibits a court from ordering an employer to replace a non-minority with a minority. *Id.* at 2590.

⁴³*Vanguards of Cleveland*, 753 F.2d at 486.

⁴⁴"The fact that this case involves a consent decree and not an injunction makes the legal basis of the *Stotts* decision inapplicable." *Id.*

⁴⁵The Sixth Circuit, in affirming the district court's decision, concluded by stating that "(s)ince nothing in Title VII, as interpreted in *Stotts*, forbids this consent decree and since, as we have already determined, the decree is proper under the standards recognized in cases such as *Bratton*, the judgment of the district court is AFFIRMED." *Id.* at 489. In *Bratton v. City of Detroit*, 704 F.2d 878, 887 (6th Cir.), modified on rehearing, 712 F.2d 222 (6th Cir. 1983), cert. denied, 104 S. Ct. 703 (1984), the court defined the applicable standards for affirmative relief given by municipalities by stating that the consent decree must be fair, adequate, and reasonable. The court then stated that:

(o)nce the governmental interest in some remedial action is thus established, we must proceed to determine whether the remedial measures are reasonable. This includes an examination of whether any discrete group or individual is stigmatized by the program and whether racial classifications have been reasonably used in light of the program's objectives. If the affirmative action plan satisfies these criteria, it does not violate the equal protection clause of the Fourteenth Amendment. *Id.* at 887.

For further discussions of these criteria, see *Fullilove v. Klutznick*, 448 U.S. 448, 518-19 (1980); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 694 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981).

⁴⁶The Local was supported in its case by the United States, who filed as *amicus curae*, *Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3071, and supported all of the Local's contentions.

⁴⁷The petition actually raised two questions:

- (1) May a District Court adopt provisions in a consent decree purporting to remedy a Title VII violation that it would have had no authority to order as a remedy if the matter had gone to trial?
- (2) May a municipal employer voluntarily adopt an affirmative action promotional scheme over the objections of an intervenor union duly elected to represent all employees when said promotional scheme adversely affects the rights and interests of the employees and awards relief to minority employees regardless of whether they were actual victims of past racial discrimination?

Id. at 3071 n. 5. The Court felt it was only necessary to decide the first question, because the district court had retained jurisdiction for all other claims the Local might have had before that court. *Id.* See, Appendix to Petition for Certiorari, A38 (court retained jurisdiction for "all purposes of enforcement, modification, or amendment of the Decree upon application of any party").

⁴⁸*Id.* at 3071.

⁴⁹*Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 59 (1985).

relief awarded in a consent decree."⁵¹

ANALYSIS

Justice Brennan's Majority Opinion.

At the outset of the majority opinion,⁵² the Court stated that it has often recognized that "Congress did intend for voluntary compliance to be the preferred means of achieving the objectives of Title VII,"⁵³ and that "voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination."⁵⁴ The Court then held that there was no reason to distinguish between voluntary actions supported by consent decrees and voluntary actions without consent decrees.⁵⁵

The Court did not decide whether the City's actions would be acceptable under Section 703⁵⁶ of Title VII, or if state action was present.⁵⁷ The Court stated that the only issue before it was "whether, assuming *arguendo* that § 706(g) would bar a court from ordering such race conscious relief after trial in some of these instances, § 706(g) also bars a court from approving a consent decree entered into by the employers and providing for such relief."⁵⁸

⁵¹*Id.*

⁵²See *supra* note 14.

⁵³*Id.* For an in depth analysis of voluntary actions being the preferred means of achieving Title VII's objectives, see, *Albemarle Paper Co. v. Moody*, 422 U.S. at 417-18 (quoting *United States v. N.L. Industries, Inc.* 479 F.2d 354, 379 (8th Cir. 1973)) (Title VII sanctions cause employers "'to self-examine and self evaluation their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history'"). See also *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 228 (1982); *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum and Plastic Workers*, 461 U.S. 757, 770-71 (1983).

⁵⁴*Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3072.

⁵⁵*Id.* at 3073. The court cited *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) in support of its position. In *Carson*, the Supreme Court stated that a court's order denying entry of a consent decree is immediately appealable because the court's actions nullified Congress' strong preferences for encouraging voluntary settlement of employment discrimination claims. *Id.* at 88 n. 14.

⁵⁶Section 703 of Title VII provides that:

It shall be unlawful employment practice for an employer —

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

For an analysis of Section 703 of Title VII, see Note, *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

⁵⁷The fourteenth amendment provides that: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. For discussions on the relationship between municipalities, the Fourteenth Amendment, and discrimination, see Note, *The Due Process Rights of Public Employees*, 50 NYU L. REV. 310 (1975); Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 N.W.U.L. REV. 770 (1975).

⁵⁸*Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3073 N. 8.

The Local's main argument was that § 706(g)⁵⁹ established an independent limitation on what types of relief a court could order.⁶⁰ The Local argued that a consent decree should be considered an order because:

- (1) a consent decree looks like and is entered as a judgment;⁶¹
- (2) the court retains the power to modify a consent decree in certain circumstances⁶² over the objection of the signatory; and
- (3) noncompliance with a consent decree is enforceable by contempt proceedings.⁶³

The Court noted that consent decrees have attributes of both voluntary agreements and judicial decrees.⁶⁴ The court rejected the argument⁶⁵ that legislative history⁶⁶ intended to include consent decrees as "orders" within the meaning of § 706(g).⁶⁷ The court also reasoned that the voluntary nature⁶⁸ of consent

⁵⁹See *supra* note 9.

⁶⁰*Id.* at 3073.

⁶¹Anderson, *supra* note 13 at 585 and note 18. "A consent decree is a judicial act and should be treated as such because 'judgment' as used in the Federal Rules of Civil Procedure includes a decree."

⁶²See *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) ("A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need").

⁶³*United States v. City of Miami*, 664 F.2d 435, 440 and n. 8 (5th Cir. 1981) (The consent decree "may be enforced by judicial sanctions, including citation for contempt if it is violated.").

⁶⁴*Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. 3074. See, *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37, and n. 10 (1975) ("While they (consent decrees) are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the court").

⁶⁵*Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3076. The Court, in rejecting the Local's argument, stated that:

- (1) the fact that a consent decree looks like a judgment entered after a trial obviously does not implicate Congress' concern with limiting the federal courts unilaterally to require employers or unions to make certain kinds of employment decisions;
- (2) the mere existence of an unexercised power to modify the obligations contained in a consent decree does not alter the fact that those obligations were created by agreement of the parties;
- (3) there is no indication in the legislative history that the availability of judicial enforcement of an obligation, rather than the creation of the obligation itself, was the focus of congressional concern.

⁶⁶*Id.* at 3075. See H.R. REP. NO. 914, 88th Cong. 1st Sess., pt. 1, p. 11, 110 CONG. REC. 1518, 2567-71, 6549 (1964). That Court reasoned that since Section 706 of Title VII does not discuss limits to voluntary actions, only what a court cannot order, those voluntary actions may award affirmative race-conscious relief.

⁶⁷*United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). In *Weber*, the Supreme Court stated that the "natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action." *Id.* at 206. This case involved a white employee bringing an action against his employer and his union challenging the legality of a voluntary plan for on-the-job training providing for a one to one quota for minority workers. The Supreme Court held that this voluntary race-conscious affirmative action taken by the employer and the union did not violate "Title VII's prohibition in §§ 703(a) and (d) against racial discrimination." *Id.* at 208. For a discussion of the effect of *Weber* on voluntary action taken by an employer, see Allegritti, *Voluntary Racial Goals after Weber, How High is Too High?* 17 CREIGHTON L. REV. 773 (1983-84).

⁶⁸See *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) ("The parties waive their right to litigate the issues involved in the case," and "the agreement reached normally embodies a compromise"); *Ashley v. City of Jackson*, 104 S. Ct. 255, 257 (1983) (Rehnquist, J., dissenting from denial of certiorari) (A consent decree is "little more than a contract between the parties, formalized by the signature of a judge"). See also Comment, *supra* note 13, at 1317.

decrees was sufficient to conclude that "it is readily apparent that consent decrees are not included among the 'orders' referred to in § 706(g)."⁶⁹

Inherent in the Court's decision was the tension between voluntary and court ordered affirmative relief. The emphasis in Title VII litigation is on voluntary settlements and courts seem to encourage voluntary settlements without court interference. On the other hand, the consent decree is deliberately fashioned, and not just deduced from a legal harm suffered.⁷⁰ Without the voluntary agreement of the parties there could be no consent decree, but the enforcement nature of the decree prolongs the court's involvement, with the dispute.⁷¹ There is a tension between the hands-off approach of voluntary settlements and the limitations of court-ordered relief. Courts do not want to "order" relief. The instant case allows a court, by using a consent decree, to avoid those limitations. Early Supreme Court cases considered a consent decree to be a court ordered judicial act.⁷² The Supreme Court in the instant case, however, has held that a consent decree is a voluntary contractual-type undertaking by the parties.⁷³

As a second argument, the Local cited *Stotts*⁷⁴ and *System Federation No. 91, Railway Employees' Department v. Wright*.⁷⁵ In both of these cases, the Supreme Court held that a consent decree could not provide greater relief than a court could have awarded after a trial.⁷⁶ The Court distinguished these two cases from the instant case by concluding that in both cases the Court had found "conflicts between a judicial decree and the underlying statute."⁷⁷ The Court reiterated its statement that race-conscious consent decree relief did not violate the objectives of § 706(g). The court further held that because the par-

⁶⁹*Local 93, International Association of Firefighters*, 106 S. Ct. at 3075.

⁷⁰Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298 (1976).

⁷¹*Id.*

⁷²See, e.g., *United States v. Swift & Co.*, 286 U.S. at 115 (the Court rejected an argument by an intervening party that "a decree entered upon consent is to be treated as a contract and not as a judicial act").

⁷³For discussions as to whether a consent decree is a contract or a judicial act, see, *United States v. ITT Continental Baking Co.*, 420 U.S. at 236-37 n. 10; Anderson, *supra* note 13, at 584-86.

⁷⁴*Stotts*, 104 S. Ct. at 2576. For a discussion of *Stotts*, see notes 41 and 42. *Stotts* also relied on two other cases regarding consent decrees and Title VII: *Teamsters v. United States*, 431 U.S. 324 (1977), and *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). Both of these cases concerned the remedial powers of a court in a coercive action and did not consider the effect of voluntary action by the parties.

⁷⁵*System Fed'n No. 91, Employees' Dep't v. Wright*, 364 U.S. 642 (1961). *Wright* involved a union moving to modify a 1945 consent decree which had enjoined a railroad and a union from discriminating against non-union employees. The union wanted to modify the consent decree to permit, under certain circumstances, a contract requiring a union shop. The district court refused to modify the consent decree, and the Supreme Court held that this refusal was an abuse of discretion. *Id.* at 652. The Supreme Court stated that "a sound judicial discretion may call for the modification of terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." *Id.* at 647.

⁷⁶*Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3077.

⁷⁷*Id.* at 3078. The statute in conflict in *Stotts* was Title VII, and the statute in conflict in *Wright* was the Railway Labor Act, 45 U.S.C. § 151 *et. seq.*

ties' consent is the animating force,⁷⁸ "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial."⁷⁹

The Court reemphasized that the agreement by the parties can be subject to attack.⁸⁰ The Court stated that the "fact that the parties have consented to the relief contained in a decree does not render their action immune from attack on the grounds that it violates § 703 of Title VII or the Fourteenth Amendment."⁸¹

The Court summarized its rejection of the Local's second argument by stating:

[b]ecause § 706(g) is not concerned with voluntary agreements by employers or unions to provide race-conscious relief, there is no inconsistency between it and a consent decree providing such relief, although the court might be barred from ordering the same relief after a trial or, as in *Stotts*, in disputed proceedings to modify a decree entered upon consent.⁸²

With this part of the opinion, the Court appears to be limiting its opinion only to situations where there are no conflicts between the consent decree and some related statute. The Court's holding establishes a rule that a court may enter a consent decree that provides greater relief than that court could have otherwise awarded if the parties voluntarily agree, and if there is no conflict between that consent decree and an underlying statute.⁸³ This holding might put a court in the awkward position of examining a consent decree for conflicts with an underlying statute, and perhaps modifying that consent decree, even though the decree has already been voluntarily agreed to by the parties.

A court would have the power to change the decree to gain some result, even though it would not have that power to award that same remedy at trial.⁸⁴ This part of the Court's decision provides a great impetus for courts to urge opposing parties to voluntarily agree to some type of relief, because parties would have less restrictions as to what type of relief could be awarded in the decree.

The third and final argument of the Local was that the consent decree was invalid because it was entered into without the consent of the Local.⁸⁵ The Local claimed that because it was permitted to intervene as of right, the district

⁷⁸*Id.* at 3077.

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹*Id.* at 3077-78.

⁸²*Id.* at 3079.

⁸³*Id.*

⁸⁴42 U.S.C. § 2000-5(g) (Section 706 of Title VII) expressly limits what a court can order for relief after a trial. *See, supra*, note 9.

⁸⁵*Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3079.

court had to receive the Local's permission before approving the consent decree.⁸⁶

The Court also rejected this argument. The Court stated that "(i)t has never been supposed that one party — whether an original party, a party that was joined later, or an intervenor — could preclude other parties from settling their own disputes and thereby withdrawing from litigation."⁸⁷ The Court then stated that while an intervening party may present evidence at a hearing on whether to approve a consent decree, "it does not have the power to block the decree merely by withholding its consent."⁸⁸ The Court was also quick to emphasize that any settlement between the City and the Vanguard by consent decree did not affect the "legal duties and obligations of the Union [Local] at all."⁸⁹

In this part of the opinion, the Court seems to ignore the very real possibility that the affirmative relief awarded in the consent decree could affect the Local. Minorities were guaranteed a certain number of high-ranking positions by the plan,⁹⁰ and members of the Local would not be allowed to be promoted into those positions. As Justice Rehnquist and Chief Justice Burger argue in their dissenting opinion, the consent decree would very much bind the members of the Local in what they could do.⁹¹

The Court noted that if the intervening claims were properly raised, those claims would remain and the intervening party could still litigate them.⁹² The Local would still have its claims, however the Local, to overcome the limitations contained in the consent decree have to convince the court to modify the consent decree. If the district court refused, the Local would be very much bound by the consent decree.

The Court also noted that the Local might have a valid claim under Sec-

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ For further discussions as to the rights of an intervening party, see *Zipes v. Trans World Airlines, Inc.* 455 U.S. 385, 392 (1982) ("(t)he right to have its objection heard does not, of course, give the intervenor the right to block any settlement to which it objects"); *Kirkland v. New York State Dep't*, 711 F.2d 1117, 1126 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) ("although non-minority third parties allowed to intervene in cases which involve consent decrees or settlement agreements implementing race-conscious hiring or promotional remedies do have a sufficient interest to argue that the decree or agreement is unreasonable or unlawful, their interest in the expectation of appointment does not require their consent as a condition to any compromise of the litigation").

⁸⁹ *Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3080. The Court also recognized that parties may not enter into a consent decree "that imposes obligations on a party that did not consent to the decree." See 3B J. MOORE & J. KENNEDY, *MOORE'S FEDERAL PRACTICE* ¶ 24.16(6) (2d ed. 1985) [hereinafter cited as MOORE] ("the intervening parties may not stipulate away the rights of the intervenor"); *Ashley*, 104 S. Ct. at 257.

⁹⁰ The plan did guarantee that out of the sixty-six higher level promotions, one-half would go to minorities, *Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3069.

⁹¹ *Id.* at 3083.

⁹² See MOORE, *supra* note 89; *Wheeler v. American Home Products Corp.*, 563 F.2d 1233, 1237 (5th Cir. 1977) ("Once intervention has been allowed, the original parties may not stipulate away the rights of the intervenor").

tion 703 of Title VII or the Fourteenth Amendment,⁹³ but concluded that the only issue before the Court was whether Section 706(g) barred the district court from approving the consent decree.⁹⁴ The Court held that Section 706(g) did not prevent the district court from entering the consent decree and affirmed the decision of the Sixth Circuit.⁹⁵

Justice O'Connor's Concurring Opinion.

Justice O'Connor joined in the Court's holding but wrote a separate opinion to emphasize that the Court's holding was a narrow one.⁹⁶ The Court held that "the relief provided in a consent decree need not conform to the limits on court-ordered relief imposed by § 706(g)." The Court further stated that "a court should not approve a consent decree that on its face provides for racially preferential treatment that would clearly violate § 703 or the Fourteenth Amendment."⁹⁷ Justice O'Connor reasoned that the validity of race-conscious relief would still have to be assessed for consistency with the provisions of § 703, and, in the case of a public employer, for consistency with the fourteenth amendment. Therefore, the Local could still challenge the race-conscious relief as violative of its members' rights.⁹⁸ Also, Justice O'Connor reemphasized that the Court had refrained from deciding "what showing an employer would be required to make concerning prior discrimination on its part against minorities in order to defeat a challenge by non-minority employees based on § 703."⁹⁹

Finally, Justice O'Connor noted that the Court left open the question of whether the race conscious measures were permissible under § 703.¹⁰⁰ With all of these stated exclusions, Justice O'Connor's concurring opinion makes it clear that the only thing the Supreme Court did decide was that a consent decree is not an order for purposes of Section 706(g) of Title VII.

Justice White's Dissenting Opinion.

Justice White based his dissenting opinion¹⁰¹ on the idea that Title VII forbids discriminatory employment practices.¹⁰² He reasoned that the majority

⁹³See notes 56 and 57.

⁹⁴*Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3080.

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷*Id.*

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.* at 3081.

¹⁰²See SULLIVAN, *supra* note 1, at 2 ("Liberal interpretation of Title VII prohibits employers from perpetuating discriminatory attitudes toward certain groups in our society . . . Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed"). See also *Griggs*, 401 U.S. at 431 ("What is required by Congress is the removal of arbitrary, artificial, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications").

opinion would permit a court to enter a consent decree that would require conduct of the very nature that Title VII seeks to prohibit.¹⁰³

Justice White also alleged that the Court sought to avoid the issue of whether the consent decree in the instant case already violated Title VII.¹⁰⁴ Justice White then stated that because the consent decree in the instant case called for racial preferences for minorities in the form of promotion quotas,¹⁰⁵ the consent decree exceeded the limits of a permissible remedy.¹⁰⁶ Because the consent decree would "burden" nonminorities,¹⁰⁷ and could benefit persons who were not actual victims, Justice White concluded that the remedy provided for the consent decree was inequitable. Justice White believed that such a remedy "could not have been ordered after a trial,"¹⁰⁸ and was not valid even if it was agreed to by the City.¹⁰⁹

In writing his dissenting opinion, Justice White seems to completely ignore the Court's decision in *Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*,¹¹⁰ which was decided on the same day as the instant case.¹¹¹ In *Local 28*, the Supreme Court held that a court could award affirmative race-conscious relief as a remedy for past discrimination even if there was a benefit to non-victims. The consent decree in the instant case, even if it benefitted non-victims, did not, as a matter of law, exceed any remedy available under Title VII.

Justice Rehnquist's Dissenting Opinion.

Justice Rehnquist¹¹² began his dissenting opinion by stating that he fol-

¹⁰³*Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3081. "An employer may not, without violating Title VII, simply decide for itself or in agreement with its employees to have a racially balanced workforce . . . Title VII would forbid quota hiring or promotion such as reserving every third promotion or vacancy for a black, or a white for that matter."

¹⁰⁴*Id.*

¹⁰⁵The part of the consent decree that Justice White asserted was a racial preference for minorities consisted of the promotion plan whereby one minority and one non-minority would be promoted each time, with no regard for the ranking, seniority, or promotional exam results.

¹⁰⁶*Id.* at 3082.

¹⁰⁷This burden that Justice White refers to would appear to be the possibility that a senior and better qualified non-minority employee might not be promoted as fast as a less senior and less qualified minority employee.

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰*Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 106 S. Ct. 3019 (1986). In this case, the Court held that Section 706(g) does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief as a remedy for past discrimination. *Id.* at 3050. The Court first stated that affirmative relief should not be used merely to create a racially balanced workforce and then stated that affirmative relief should be used only in the most egregious situations. *Id.* Justice White appeared to be contending that the City's conduct was not egregious enough, and that the consent decree was being used to create a racially balanced workforce.

¹¹¹Both cases were decided on July 2, 1986.

¹¹²Justice Rehnquist was joined in this dissenting opinion by Chief Justice Burger.

lowed the holding in *Stotts*.¹¹³ There the court held that minority beneficiaries of a consent decree had to have been victims of previous discriminatory practices.¹¹⁴ Justice Rehnquist also maintained that the Court allowed the district court's entry of the consent decree to stand, even though the only difference between the instant case and *Stotts* was that *Stotts* involved the modification of a consent decree.¹¹⁵

Justice Rehnquist's dissenting opinion also failed to take into account the decision of the Court in *Local 28*.¹¹⁶ *Stotts* was decided before *Local 28*,¹¹⁷ and *Stotts* also involved a conflict with an underlying statute.¹¹⁸ The Supreme Court's decision in *Local 28* makes Justice Rehnquist's first argument moot because the Court held that race-conscious affirmative relief need not only benefit past victims.¹¹⁹

Justice Rehnquist then stated that the Court had to "implicitly repudiate language in the two of our cases most closely in point — *Stotts*, and *Railway Employees v. Wright*.¹²⁰ Justice Rehnquist is alluding to the fact that in both cases the district court modified an existing consent decree. The Supreme Court held that the district court's action was prohibited by § 706(g). The only difference in the instant case is that the district court entered the consent decree.¹²¹ This could be a major difference. The above cases involved the modification of consent decrees that the parties had agreed on and the modification imposed the court's will on the parties. A district court merely entering a consent decree, agreed to by the parties, would impose nothing on those parties.

What seemed to upset Justice Rehnquist was the fact that the consent decree did not require the Local to do or not do anything.¹²² Justice Rehnquist stated that "the decree does bind the City of Cleveland to give preferential promotions to minority firemen who have not been shown to be the victims of discrimination in such a way that nonminority union members (the Local) who would otherwise have received those promotions are obviously injured."¹²³

¹¹³*Stotts*, 467 U.S. at 561.

¹¹⁴*Id.* at 578-79. See also *Franks*, 424 U.S. at 747; *International Bhd. of Teamsters*, 431 U.S. at 324.

¹¹⁵*Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3083.

¹¹⁶*Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 106 S. Ct. at 3019.

¹¹⁷*Stotts* was decided in 1984, and *Local 28 of the Sheet Metal Workers' Int'l Ass'n* was decided in 1986.

¹¹⁸See note 77.

¹¹⁹*Id.* at 3050.

¹²⁰*Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3083.

¹²¹It should be noted, however, that there are many more differences between *Stotts*, *Wright*, and the instant case than just the entry or modification of an existing consent decree. *Stotts* and *Wright* both involved conflicts with an underlying statute, and both were decided before *Local 28 of the Sheet Metal Workers' Int'l Ass'n*, which held that affirmative race-conscious relief could be awarded in a consent decree.

¹²²*Id.*

Finally, Justice Rehnquist reasoned that a consent decree was an adjudication¹²⁴ under Section 706(g) by stating:

(S)ection 706(g) is the one section in the entire text of Title VII which deals with the sort of relief which a court may order in a Title VII case; it is simply incredible that the Court today virtually reads it out of existence. Surely an order of the Court entered by the consent of the parties does not become any less an order of the Court.¹²⁵

CONCLUDING NOTES

A consent decree entered in a Title VII case may now provide for affirmative race-conscious relief, and that relief would not be prohibited by Section 706(g). This holding by the Supreme Court has several implications. A district court now might possibly be put in the awkward position of enforcing some type of race-conscious relief that the court would not have been permitted to order following a trial.¹²⁶ A district court might also be more inclined to promote the idea of a consent decree, knowing that the consent decree can award a greater range of relief.

The Court's decision in the instant case does not read Section 706(g) out of existence. There are many possible types of orders a court can enter. The Supreme Court merely held that a consent decree is not one of them, at least for purposes of Title VII litigation. A consent decree is now considered a voluntary act by the parties, and is not considered any form of court-ordered relief.

The Supreme Court did not decide what would be considered acceptable race-conscious relief under Section 703 of Title VII or the fourteenth amendment.¹²⁷ The decision authorizes the use of consent decrees but does not define the possible limits of that decree. Until the Supreme Court decides the limits of

¹²⁴See 1B MOORE, *supra* note 89 at ¶.409(5) (2d ed. 1984) (when a court "has rendered a consent judgment, it has made an adjudication").

¹²⁵*Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3087.

¹²⁶As the Supreme Court noted in *Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 106 S. Ct. at 3050, "a court could consider whether affirmative action is necessary to remedy past discrimination in a particular case before imposing such measures, "and" (i) in the majority of Title VII cases, the court will not have to impose affirmative action as a remedy for past discrimination." While a court, in most cases, can not order affirmative relief, the holding of the court in the instant case makes it clear that affirmative relief can be awarded by means of a consent decree. The Court even stated that "a Federal Court is not necessarily barred from entering a consent decree merely because the decree provided broader relief than the court could have awarded after a trial." *Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. at 3077. See *Sansom Committee v. Lynn*, 735 F.2d 1535, 1538 (3d Cir.), *cert. denied*, 469 U.S. 1017 (1984) ("as long as the terms of a consent decree come 'within the general scope of the case made by the pleadings,' it will be within the district court's power to enter the decree"); *Turner v. Orr*, 759 F.2d 817, 825 (11th Cir. 1985) *cert denied* 106 S. Ct. 3332 (1980) (citing *Lynn*) ("consent decrees need not be limited to the relief that a court could provide on the merits").

¹²⁷*Local 93, Int'l Ass'n of Firefighters*, 106 S. Ct. 3080.

relief awarded in a consent decree¹²⁸ the crucial issue in any Title VII action will remain undecided. As the Supreme Court stated in the instant case, "there may be instances in which a public employer, consistent with both the Fourteenth Amendment as interpreted in *Wygant*¹²⁹ and § 703 as interpreted in *Weber*,¹³⁰ could voluntarily agree to take race-conscious measures in pursuance of a legitimate remedial purpose."¹³¹

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¹²⁸To gain some understanding of what standards a court would probably use to determine whether a consent decree would be acceptable under Section 703 of Title VII and the fourteenth amendment, see *McDonald v. Sante Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976) (Using section 703 of Title VII, courts have "consistently interpreted Title VII to proscribe racial discrimination in private employment against whites in the same terms as racial discrimination against non-whites"); *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842, 1848 (1986) ("public employers . . . also must act in accordance with a 'core purpose of the Fourteenth Amendment' which is to do away with all governmentally imposed distinctions based on race") (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

¹²⁹*Wygant*, 106 S. Ct. at 1842.

¹³⁰*Weber*, 443 U.S. at 208-10. For a discussion of *Weber*, see Note 67.

¹³¹*Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3073, n.8.

