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Constitutional Law: Quota versus Goal in Affirmative Action

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CONSTITUTIONAL LAW: QUOTA VERSUS GOAL IN AFFIRMATIVE ACTION—*Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*, 106A S. Ct. 3019 (interim ed. 1986).

I. INTRODUCTION

Since the passage of the Civil Rights Act of 1964,[1] the United States Supreme Court has continually attempted to define employment discrimination under Title VII.[2] For example, the Supreme Court has held that an employer's use of written tests and high school diploma criteria for hiring employees does not have discriminatory purpose but does have discriminatory impact which violates Title VII.[3] The Supreme Court has also held that preemployment tests are impermissible under Title VII unless job-related.[4] Further, the Supreme Court has interpreted section 703(h)[5] and section 706(g)[6] of Title VII; for example, the Court has held that section 703(h) does not bar relief to unnamed members of the class in question who would have had seniority status absent discriminatory hiring practices.[7] The Court has also held that section 706(g) allows an award of seniority retroactive to the date

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1. Civil Rights Act of 1964, 42 U.S.C. § 1981 (1982).

2. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (1982).

3. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

4. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Besides invalidating Albemarle's pre-employment tests, the Supreme Court determined that back pay for losses incurred in a discriminatory employment system should be denied only if the purposes of Title VII are frustrated. *Id.* at 424.

5. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(h), 78 Stat. 241, 257 (current version at 42 U.S.C. § 2000e-2(h)(1982)) states:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

Id.

6. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241, 261 (current version at 42 U.S.C. § 2000e-5(g) (1982)) states:

> If the court finds that the respondent has intentionally engaged 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 . . . or any other equitable relief as the court deems appropriate.

Id.

7. Franks v. Bowman Transp. Co., 424 U.S. 747, 750–51 (1976) (class action suit against employer and certain labor unions for violating Title VII where petitioner represented black nonemployee applicants denied over-the-road truck driver's positions).

of an individual's job application.[8] The Court's rationale for relief under section 706(g) is to award make-whole recovery to persons who suffered from employment discrimination.[9] Recently, the United States Supreme Court addressed the employment discrimination issue under Title VII. In *Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*,[10] the Court interpreted Title VII as allowing enforcement of court-ordered racial goals.[11] By enforcing court-ordered racial goals, the Court in *Local 28* in effect recognized court-ordered racial goals as an appropriate remedy for employment discrimination.

This article discusses the background of Title VII and examines United States Supreme Court holdings in previous employment discrimination cases. Further, the Court's holding in *Local 28* is analyzed in light of the Supreme Court's holdings in other employment discrimination cases. It is concluded that the *Local 28* decision marks a return to prior relief oriented Title VII decisions. Finally, the ramifications of the Supreme Court's holding in *Local 28* will be assessed.

II. FACTS AND HOLDING

In 1964, the New York State Commission for Human Rights brought suit in the New York Supreme Court against Local 28 of the Sheet Metal Workers' International Association (Local 28) and the Local 28 Joint Apprenticeship Committee (JAC)[12] under Title VII of the Civil Rights Act of 1964.[13] Local 28 is a union of sheet metal workers employed by New York contractors.[14] JAC operates a sheet metal apprentice program.[15] Having investigated Local 28 and JAC,[16] the State Commission for Human Rights introduced findings in court that Local 28 never had black members and that JAC had never ad-

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8. *Id.* at 763–67.

9. *Id.* at 763.

10. 106A. S. Ct. 3019 (interim ed. 1986).

11. *Id.* at 3035.

12. State Comm'n for Human Rights v. Farrell (Farrell I), 43 Misc. 2d 958, 959, 252 N.Y.S.2d 649, 651 (N.Y. Sup. Ct. 1964).

13. 42. U.S.C. § 1981 (1982).

14. Local 28 Sheet Metal Workers' Int'l Assoc. v. EEOC, 106A S. Ct. 3019, 3025 (interim ed. 1986).

15. *Id.*

16. The New York State Commission for Human Rights investigated the discriminatory practices pursuant to N.Y. EXECUTIVE LAW § 295 (McKinney 1982) which states:

> The division, by and through the commissioner or his duly authorized officer or employee, shall have the following functions, powers and duties:
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> (a) To receive, investigate and pass upon complaints alleging violations of this article.
>
> (b) Upon its own motion, to test and investigate and to make, sign and file complaints alleging violations of this article and to initiate investigations and studies to carry out the purposes of this article.

mitted blacks as apprentices.[17] The Commission ordered Local 28 and JAC to "cease and desist" their discriminatory practices.[18] The Supreme Court of New York upheld the Commission's findings and ordered both Local 28 and JAC to begin objective selection of apprentices.[19]

In response to the court order, Local 28 and JAC agreed to establish nondiscriminatory apprentice classes.[20] However, the second apprentice class was never selected; as a result, the Commission brought another state court action to order the selection of the second apprentice class.[21] The New York Supreme Court ordered the parties to follow the course of action previously agreed upon.[22] This order was affirmed by the New York Supreme Court Appellate Division.[23] Local 28 then requested that the number of apprentices for the second class be reduced from sixty-five to thirty; this request was denied.[24]

In 1966, Local 28 and JAC conducted an aptitude test for a third apprentice class.[25] After the test results were tabulated and examined, Local 28 and JAC required the apprentice class to retake the test.[26] According to Local 28 and JAC, the alleged "statistical improbability"

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17. *Farrell I*, 43 Misc. 2d at 959, 252 N.Y.S.2d at 652.

18. *Local 28*, 106A S. Ct. at 3025.

19. *Farrell I*, 43 Misc. 2d at 968–69, 252 N.Y.S.2d at 659–60.

20. State Comm'n for Human Rights v. Farrell (Farrell II), 47 Misc. 2d 244, 245, 262 N.Y.S.2d 526, 527 (N.Y. Sup. Ct. 1965), *aff'd*, 24 A.D.2d 128, 264 N.Y.S.2d 489 (1965). To enforce the court order, a plan for accepting and training apprentices was promulgated. The plan, "Standards for the Admission of Apprentices," listed requirements applicants must meet to be accepted in the program. *Farrell I* , 43 Misc. 2d at 970, 252 N.Y.S.2d at 661. Under the plan, applicants were required to meet age, physical, and educational requirements outlined in the plan, pass an aptitude test, and have successful personal interviews. *Id.* at 970–72, 252 N.Y.S.2d at 662–63.

21. *Local 28*, 106A S. Ct. at 3025; *see Farrell II*, 47 Misc. 2d at 245 262 N.Y.S.2d at 527. In September 1965, the State Commission sought to enforce a court order directing Local 28 and JAC to establish a second apprentice class by October 1965. Local 28 had not begun selection of the 65 apprentices for the class when this case went to trial. The union argued that the situation of the construction industry did not warrant expansion of the labor force. *Id.*

22. *Id.* at 3025, 47 Misc. 2d at 245.

23. State Comm'n for Human Rights v. Farrell, 24 A.D.2d 128, 132, 264 N.Y.S.2d 489, 494 (1965).

24. State Comm'n for Human Rights v. Farrell (Farrell III), 47 Misc. 2d 799, 801, 263 N.Y.S.2d 250, 253 (N.Y. Sup. Ct. 1965). Local 28 requested the 65 member apprenticeship class be reduced to 30 members, alleging some of the union's members were unemployed thus new members should not be admitted. *Id.* at 799, 263 N.Y.S.2d at 251. The court held that the union "unilaterally, [attempted] to halt or severely limit the process of its legally required integration on a claimed ground of unemployment in its racially homogeneous ranks." *Id.* at 800, 263 N.Y.S.2d at 252.

25. State Comm'n for Human Rights v. Farrell (Farrell IV), 52 Misc. 2d 936, 938, 277 N.Y.S.2d 287, 289, *aff'd*, 27 A.D.2d 327, 328, 278 N.Y.S.2d 982, 983, *aff'd*, 19 N.Y.2d 974, 228 N.E.2d 691 (N.Y. Sup. Ct. 1967).

26. *Farrell IV*, 52 Misc. 2d at 939, 277 N.Y.S.2d at 290.

of test results made a second test necessary.[27] The statistically improbable test results were as follows: of 147 examinees, 32 were black and 24 of the 32 black examinees passed the test.[28] Again, the State Commissioner applied to enforce a court order of nondiscriminatory selection process of apprentices which was granted[29] and affirmed on appeal.[30]

In 1971, the United States brought suit against Local 28 in the district court of New York pursuant to Title VII of the Civil Rights Act of 1964 and Executive Order 11,246.[31] The suit was brought by the Equal Employment Opportunity Commission[32] to enjoin Local 28 and JAC "from engaging in a pattern and practice of resistance to the full enjoyment by non-whites of rights secured to them by Title VII."[33] The district court found that Local 28 and JAC had violated Title VII.[34] The court enjoined Local 28 and JAC from further discriminatory practices and imposed a racial-based remedy stating: "[T]he imposition of a remedial racial goal in conjunction with an admission preference in favor of nonwhites is essential to place the defendants in a position of compliance with [Title VII]."[35] The remedial relief granted by the court was the imposition of a 29% nonwhite membership goal to be achieved by July 1, 1981.[36] The goal was to be reached by procedures agreed upon by the parties under the guidance of an administrator appointed by the court.[37]

The district court's findings and remedial orders were affirmed as modified by the Court of Appeals for the Second Circuit.[38] The Second Circuit modified the district court's order so as to forbid a white and

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27. *Farrell II*, 47 Misc. 2d at 246, 262 N.Y.S.2d at 529.

28. *Id.* at 938, 277 N.Y.S.2d at 289. The test supervisor found the test scores to be "statistically improbable" considering the applicants represented a culturally and educationally deprived segment of society. *Id.* at 938, 277 N.Y.S.2d at 290.

29. *Id.* at 943, 277 N.Y.S.2d at 288.

30. State Comm'n for Human Rights v. Farrell, 27 A.D.2d 327, 329, 278 N.Y.S.2d 982, 984, *aff'd*, 19 N.Y.2d 974, 977, 228 N.E.2d 691, 692 (1967).

31. Exec. Order No. 11,246, 3 C.F.R. 339 (1965).

32. EEOC v. Local 638 (Local 638 I), 401 F. Supp. 467, 470 (S.D.N.Y. 1975), *modified*, 532 F.2d 821, 831 (2d Cir. 1976).

33. *Local 638 I*, 401 F. Supp. at 471.

34. The findings of the district court are as follows: (1) Local 28 and JAC adopted discriminatory procedures and standards for admission into the apprenticeship program, *id.* at 476–77; (2) Local 28 restricted membership size to deny nonwhites membership, *id.* at 484; (3) Local 28 organized an affiliation with other unions that had few or no nonwhite employees, *id.*; and (4) Local 28 admitted only white transfer members. *Id.*

35. *Id.* at 488.

36. The district court decided on a 29% nonwhite membership goal since at that time 29% of the relevant labor force in New York City was nonwhite. *Id.* at 489.

37. *Id. See also* EEOC v. Local 638 (Local 638 II), 421 F. Supp. 603, 606 (S.D.N.Y. 1975).

38. EEOC v. Local 638, 532 F.2d 821, 824 (2d Cir. 1976).

nonwhite ratio when a valid, job-related entrance test existed.[39] The revised affirmative action program was affirmed by the Second Circuit.[40]

In April 1982, the State and City of New York moved for an order to hold Local 28 and JAC in contempt, alleging that the 29% nonwhite membership goal had not been reached.[41] The district court for the Southern District of New York held Local 28 and JAC in contempt for noncompliance with the revised affirmative action order and imposed a one hundred fifty thousand dollar fine.[42] In 1983, the City brought a second contempt proceeding, and the district court again found Local 28 and JAC in civil contempt.[43] The district court also entered an amended affirmative action order modifying the previous order to establish a 29.23% minority membership goal to be achieved by August 31, 1987.[44] Subsequently, the Second Circuit affirmed the district court's contempt findings and remedies.[45] Local 28 and JAC filed a petition for a writ of certioriari to the United States Supreme Court which was granted.[46]

The Supreme Court held that a district court may order preferential relief,[47] in appropriate circumstances, to individuals who are not actual victims of discrimination.[48] The Court stated that preferential relief is available as a remedy under Title VII for violations of Title

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39. *Id.* at 831. To enforce the district court's order, the parties and court-appointed administrator agreed to a white/minority applicant ratio. *Id.* The Court of Appeals for the Second Circuit held, citing Griggs v. Duke Power Co, 401 U.S. 424 (1971), that job-related tests are to be respected and held valid. *Local 638,* 532 F.2d at 831.

40. EEOC v. Local 638, 565 F.2d 31, 33 (2d Cir. 1977).

41. *Local 28,* 106A S. Ct. at 3028.

42. The court did not base its contempt finding on failure to meet the 29% membership goal but found contempt based on defendants' acts or omissions that impeded nonwhites' entry into Local 28. *Id.* at 3028–29. Local 28 had 10.8% nonwhite membership at the time of the pretrial hearing to the contempt proceeding. *Id.* at 3028. The $150,000 fine was to be "place in a fund designed to increase nonwhite membership in the apprenticeship program and the union. *Id.*

43. *Id.* at 3029. The City brought the comtempt proceeding before the court-appointed administrator who found JAC and Local 28 had submitted inaccurate data on apprentices' working hours and racial background and had failed to serve the affirmative action order on contractors employing Local 28 members. *Id.*

44. *Id.* at 3030. In 1981, Local 28, which represented sheet metal worker's in New York City, merged sheet metal worker's unions from certain counties in New York state and in New Jersey. EEOC v. Local 638, 753 F.2d 1172, 1175 (2d Cir. 1985). The increased nonwhite membership goal from 29% to 29.23% reflected the unions' merger. *Id.* at 1185.

45. 753 F.2d at 1189.

46. 106A S. Ct. 58 (interim ed. 1985).

47. "Preferential relief" can be described as remedial use of racial criteria. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 337 (1977) (Brennan, J., concurring).

48. *Local 28,* 106A S. Ct. at 3054. In *Local 28,* there were no identifiable victims of discrimination since no minorities had ever been apprentices or members of JAC or Local 28. *Id.* at 3025.

VII.[49] The Court also upheld the district court's contempt findings, agreeing that the fines and fund order were proper remedies for civil contempt.[50]

III. BACKGROUND

Title VII of the Civil Rights Act of 1964[51] is central to the United State Supreme Court's decision in *Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission.*[52] Title VII prohibits employment discrimination on account of race, color, religion, sex, or national origin.[53] "The central objective of Title VII was to improve minority employment by requiring employers to use colorblind [sic] standards in their hiring and promoting decisions."[54] Section 706(g) of Title VII allows judicial relief when the court finds "the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice."[55] The Equal Employment Opportunity Act of 1972 amended section 706(g) to allow courts to order affirmative action.[56] Under affirmative action, courts in most circuits have also approved hiring quotas and other remedial measures upon a finding of race discrimination.[57] By extending the EEOC's

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49. *Id.* at 3034.

50. *Id.* at 3054.

51. 42 U.S.C. § 1981 (1982).

52. 106A S. Ct. 3019 (interim ed. 1986).

53. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1982).

54. Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1116 (1971).

55. Civil Rights Act of 1964, Pub. L. No. 88-352, §706(g), 78 Stat. 241, 261 (current version at 42 U.S.C. § 2000e-5(g) (1982)).

56. Spiegelman, *Court Ordered Hiring Quotas After* Stotts: *A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine*, 20 HARV. C.R.-C.L. L. REV. 339, 402 (1985). The *Local 28* Court cites the language added to section 706(g) by the Equal Opportunity Act of 1972, Pub. L. No. 92-261, §4(a), 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e-5(a)–(g)): "[S]uch affirmative action as may be appropriate, which may include, *but is not limited to reinstatement or hiring of employees . . . or any other equitable relief as the court deems appropriate.*" *Local 28*, 106A S. Ct. at 3045.

57. Comment, *Title VII at Twenty—The Unsettled Dilemma of "Reverse" Discrimination*, 19 WAKE FOREST L. REV. 1073, 1080 (1983). *See* Chisholm v. United States Postal Serv. 665 F.2d 482, 499 (4th Cir. 1981) (long term promotional goal versus quota merely a matter of semantics to the court); Taylor v. Jones, 653 F.2d 1193, 1202 (8th Cir. 1981) (one black for every two white persons required to be hired until 16% of employees were black); Crockett v. Green, 534 F.2d 715, 718–19 (7th Cir. 1976) (50% hiring quota of blacks until the percentage of blacks in that job equalled the percentage of blacks in Milwaukee); Morgan v. Kerrigan, 530 F.2d 431, 432 (1st. Cir. 1976) (50% of new teachers hired required to be black until 20% of the permanent teachers employed are black); Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017, 1026 (1st Cir. 1974) (50% of firefighters hired must be black); Sim v. Sheet Metal Workers Int'l Ass'n, Local 65, 489 F.2d 1023 (6th Cir. 1973) (50% minority selection until 33% of apprentices were minorities); Pennsylvania v. O'Neill, 473 F.2d 1029, 1030 (3d Cir. 1973) (upheld district court order that black applicants be hired in proportion to black population); Local 53, Int'l Ass'n of

power to bring a civil action into federal court on behalf of the charging parties,[58] the 1972 amendment has also increased the jurisdiction and authority of the EEOC.

A. Affirmative Action Programs Under Title VII

Although courts are most often called upon to determine whether a Title VII discrimination claim exists, recently courts have also had to determine whether remedial actions (affirmative action programs) could be instituted before actual discrimination has been proven to exist. Two Supreme Court cases that have addressed this issue are *Regents of the University of California v. Bakke*[59] and *United Steelworkers of America v. Weber*.[60] In *Bakke*, the Court held that the University of California could not base acceptance of medical school applicants on race alone even in an attempt to remedy past societal discrimination.[61] Justice Powell's opinion for the Court held: "[F]ederal Courts of Appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference."[62] The opinion of four justices concurring in part and dissenting in part stated: "[O]ur cases under Title VII of the Civil Rights Act have held that . . . Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination."[63] Thus, these

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Heat & Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047, 1051 (5th Cir. 1969) (union ordered to alternate white and black referrals for work until objective membership criteria). These and other cases are cited in Spiegelman, *supra* note 56, at 345 n. 15.

58. The Equal Employment Opportunity Commission was created under Title VII. Civil Rights Act of 1964, 42 U.S.C. § 2000e-4 (1982). The EEOC is vested with the following powers under 42 U.S.C. § 2000e-4(g):

> (4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such other effectuation by conciliation or such remedial action as is provided by this subchapter;
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> (5) to make such technical studies as are appropriate to effectuate the purposes and policies of this sub-chapter and to make the results of such studies available to the public;
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> (6) to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved party against a respondent.

Id. The EEOC also has the power to file a charge alleging unlawful employment practices by an employer. *Id.* §2000e-5(b). To determine whether reasonable cause exists, "the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law." *Id.*

59. 438 U.S. 265 (1978) (holding that an affirmative action university admission process unlawful in limiting the number of white applicants who could be admitted).

60. 443 U.S. 193 (1979) (holding that a voluntary affirmative action plan was within the discretion of an employer and did not violate Title VII but followed the 'spirit' of the Act).

61. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

62. *Id.* at 301.

63. *Id.* at 366 (Brennan, White, Marshall, Blackmun, J.J., concurring in part, dissenting in part).

four justices argued that affirmative action programs can be enacted to correct past discrimination practices.

The *Weber* case was the first time that the Supreme Court addressed race-conscious programs[64] under Title VII. The Supreme Court held that "use of the word 'require' rather than the phrase 'require or permit' in section 703(j) fortifies the conclusion that Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action."[65] The Court upheld an employer's voluntarily implemented affirmative action plan,[66] relying heavily on the "legislative history of Title VII and the 'spirit' of the Act . . . in order to achieve an end more in line with what [the Court] deemed to be the legislative intent of the Act."[67]

Federal decisions since *Weber* have generally followed *Weber* in upholding formal voluntary affirmative action plans.[68] For example, in *Edmondson v. United States Steel Corp.*,[69] policies granting special benefits to blacks and women were held to be permissible under *Weber*.[70] The policy relating to blacks was adopted after a showing of past discrimination, and the policy relating to women was not based on judicial findings but was upheld nonetheless following the limited preferential policies of *Weber*.[71] In *Turner v. Orr*,[72] an affirmative action plan containing in a consent decree was upheld, again based on the *Weber* decision. These cases are examples indicating a more liberal approach to employment processes and management decisions that have followed *Weber*.[73]

B. *The* Stotts *Decision—A Literal Reading of Title VII*

After determining in *Weber* that a race-conscious program is permitted in some cases, the Supreme Court faced the question of whether a race-conscious affirmative action program overrides a seniority program in *Firefighters Local Union No. 1784 v. Stotts*.[74] In *Stotts*, a

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64. A race-conscious program as discussed in *Weber* is an affirmative action employment practice based on race. *See Weber*, 443 U.S. at 200.

65. *Id.* at 207.

66. *Id.* at 197.

67. Vaughn, *Employment Quotas—Discrimination or Affirmative Action?* 7 EMPLOYEE REL. L. J. 552, 557 (1982).

68. Comment, *supra* note 57, at 1085–86.

69. 20 FEP Cas. 1745 (N.D. Ala. 1979).

70. Special benefits to blacks and women were adopted through collective bargaining thus are permissible under *Weber*. *Id.* at 1747.

71. *Id.*

72. 759 F.2d 817, 826 (11th Cir. 1985) (affirming a finding of violation of a consent judgment and holding that the remedy did not violate sections 706(g) of Title VII).

73. Sape, *Use of Quotas After* Weber, 6 EMPLOYEE REL. L. J. 239, 248 (1980).

74. 104 S. Ct. 2576 (1984).

consent decree between the Memphis fire department and black firefighters was promulgated to remedy hiring practices with respect to blacks.[75] However, when the city experienced financial troubles, a layoff program based on "last hired, first fired" theory was implemented.[76] The consent decree had not addressed a layoff situation but the District Court for the Western District of Tennessee granted an injunction holding finding that the layoffs would have a racially discriminatory effect.[77] The Court of Appeals for the Sixth Circuit affirmed the district court.[78] The United States Supreme Court reversed.[79]

The Supreme Court based its decision to reverse the Sixth Circuit by analogizing section 703(h), which protects bona fide seniority systems absent intent to discriminate, with section 706(g).[80] In its analogy, the Court concluded that seniority as well as other types of preferences—hiring, promotion, and backpay—should not be awarded unless one is an actual victim of discriminatory practices.[81] The *Stotts* Court held that discriminatory effect did not give rise to remedial measures because there was no identifiable victim; thus, section 706(g) could not provide relief.[82]

The *Stotts* decision has been described as "a specter that has haunted civil rights groups" because it is limited to helping indentifiable victims of past discrimination.[83] Federal decisions since *Stotts*, however, have refused to apply its interpretation broadly; instead, courts have decided employment discrimination cases on a case by case basis.[84]

IV. ANALYSIS

As the course of defining employment discrimination developed, it was inevitable that the United States Supreme Court would address the

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75. *Id.* at 2581. Pursuant to the consent decree, the fire department agreed to promote 13 named individuals and award back pay to 81 fire department employees. The fire department also agreed to raise the percentage of minorities employed by the fire department to approximately the proportion of blacks in the labor force in Shelby County, Tennessee. *Id.*

76. *Id.*

77. *Id.* at 2582. The district court had also decided that the seniority system was not a bona fide system. *Id.* These conclusions were reached even after the district court had found that the layoff system was in accordance with the senoirity system. *Id.*

78. *Id.* at 2589. The Court of Appeals for the Sixth Circuit held the seniority system was bona fide but concluded the district court had acted properly. *Id.* at 2582.

79. *Id.* at 2590.

80. *Stotts*, 104 S. Ct. at 2587.

81. *Id.* at 2588–90.

82. *Id.* at 2588.

83. Marcus, *Fragmented Justices United*, Dayton Daily News, July 2, 1986 at 1, col. 1.

84. *See Local 28*, 106 S. Ct. 3050 n.47.

issue of hiring preferences and define the courts' roles in preferential hiring. The Court had already addressed employment discrimination cases concerning voluntary affirmative action employment practices,[85] the discriminatory impact of employment practices,[86] and the availability of relief to victims of discrimination.[87] The legality of court ordered racial goals for employment purposes, however, was an issue that the Supreme Court had not addressed until *Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission.*[88]

A. The Court's Analysis

The Court's analysis in *Local 28* focused on the remedies available under section 706(g) of the Civil Rights Act of 1964.[89] Petitioners relied on section 706(g), specifically the last sentence of section 706(g), to argue that district courts may provide relief only to actual victims of discrimination.[90] In rejecting this argument, the Supreme Court stated: "This reading twists the plain language of the statute."[91] The Court held section 706(g) did not prohibit the affirmative relief awarded by the district court since petitioners were not required by the membership goal to admit members who would not be admitted but for discrimination.[92]

The Court interpreted section 706(g) further to determine what remedies a district court may order. Looking to the legislative history of section 706(g) and Title VII, the Court discovered that remedial racial preferences were not addressed by Congress.[93] Thus, the Court concluded Congress did not intend to preclude district courts from ordering race-conscious relief when appropriate.[94] Congressional debates on Title VII stressed that quota usage in employment was not an ele-

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85. United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

86. Griggs v. Duke Power Co., 401 U.S. 421 (1971) (finding employment criteria—high school diploma or intelligence testing—violative of Title VII absent a showing of job relatedness).

87. Firefighters Local 1784 v. Stotts, 104 S. Ct. 2576 (1984) (holding across the board race preference relief is not available after literally interpreting Title VII's language and legislative history).

88. 106A S. Ct. 3019 (interim ed. 1986).

89. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241, 261 (current version at 42 U.S.C. § 2000e-5(g) (1982)).

90. 106A S. Ct. at 3034. The last sentence of section 706(g) provides: "No order of the court shall require the admission or reinstatement of an individual as an employee . . . if such individual was refused admission, suspended, or expelled . . . for any reason other than discrimination on account of race, color, religion, sex, or national origin . . . ." *Id.*

91. *Local 28*, 106A S. Ct. at 3035.

92. *Id.*

93. *Id.* at 3044.

94. *Id.*

ment of Title VII.[95] The Court noted Congress' strong opposition to quotas but proceeded to affirm the district court order for preferential hiring goals in *Local 28*. Since Congress had not specifically restricted types of remedies under section 706(g), a court could order any remedy including hiring goals[96]—a practice not unlike hiring quotas.

The Court also relied on the Equal Employment Opportunity Act of 1972[97] in interpreting section 706(g). The Act amended section 706(g) by adding language allowing courts broader remedial power in employment discrimination cases.[98] The Court cited a Conference Committee Report[99] which briefly discussed lower courts' power to order relief under section 706(g). As to the Act's effect on section 706(g), the Court did not rely on legislative history as much as the plain meaning of the statute to hold that district courts have broad remedial power under section 706(g).[100]

In its analysis of section 706(g), the Court found legitimate support for its interpretation. The plain meaning of section 706(g) indicates a court may order "affirmative action as may be appropriate."[101] Congress had not discussed remedies a court may order under section 706(g), so the Court interpreted section 706(g) on its face without analyzing the underlying implications of the language of section 706(g). The Court's interpretation did not address, however, the potential adverse effects that could result from a court's broad remedial power. It seems the Court was aiming at a specific, preordained holding for *Local 28* and did not want to raise any questions by expanding its interpretation beyond what would clearly support its decision.

B. Comparing Local 28 *and* Stotts

The Supreme Court distinguished *Local 28* from *Firefighters Local Union No. 1784 v. Stotts*. The Court noted that in *Stotts* it refused to modify a decree made between parties to a class and the city to

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95. 110 CONG. REC. 8500 (1964). Proponents of Title VII assured skeptics that "[i]t is not written in the bill that there must be a quota system." *Id.* at 8500. Senator Humphrey challenged, "If the Senator [from Virginia] can find in Title VII . . . any language which provides an employer will have to hire on the basis of percentage or quota . . . I will start eating the pages [of this bill]." 110 CONG. REC. 7417, 7420 (1964).

96. *Local 28*, 106A S. Ct. at 3044.

97. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 86 Stat. 103 (current version at scattered subsections of 42 U.S.C. § 2000e (1982)).

98. *See supra* note 6.

99. 118 CONG. REC. 7563 (1972). Regarding section 706(g), the Committee Report read: "The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible." *Id.* at 7565.

100. *See Local 28*, 106A S. Ct. at 3045.

101. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1982).

prevent a last hired, first fired layoff system.[102] The *Stotts* Court decided such employment practices were protected[103] under section 703(h).[104] In its *Local 28* holding, the Court recognized *Stotts* as authority which prohibited individual, race-conscious relief in the context of a seniority system absent proof of actual discrimination.[105] However, the Court distinguished *Local 28* from *Stotts* and allowed relief under section 706(g) to individuals who were not actual victims of employment discrimination.[106]

After the *Stotts* decision, the Supreme Court could easily have prevented relief under section 706(g) in *Local 28*. There were no actual, identifiable victims of discrimination in *Local 28*. According to *Stotts*, section 706(g) should have prohibited recovery in *Local 28*, since the policy of 706(g) was to provide "make-whole relief only to those who have been actual victims of illegal discrimination."[107] Nonetheless, the Court distinguishes the *Stotts* holding to affirm remedial relief in *Local 28*.

The Court distinguished *Stotts* on the basis of make-whole relief and affirmative action in general.[108] In *Stotts*, remedial relief was available for individual victims who could prove their layoffs were motivated by an intent to discriminate.[109] In *Local 28*, the Court awarded relief in the name of affirmative action to a class victimized by discrimination.[110] After *Stotts*, the *Local 28* analysis, was entitled to relief on the basis of suprisingly broad as to who was entitled to relief from discrimination. The differences in the holdings arguably disguises the Court's "change of heart" regarding relief to those who are not identifiable victims of discrimination. As mentioned previously, federal court decisions after *Stotts* refused to follow it as authority in employment discrimination cases.[111] Prior to *Stotts*, employment discrimination cases were more relief oriented, relying on the 'spirit' of Title VII to provide make-whole relief. When *Weber* was decided, "the commitment to equal achievement had long been part and parcel of employment dis-

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102. *Local 28*, 106A S. Ct. at 3048.

103. *Stotts*, 104 S. Ct. at 2587.

104. 42 U.S.C. § 2000e-2(h) (1982) (protecting bona fide seniority systems).

105. *Local 28*, 106A S.Ct. at 3048–49.

106. *Id.* at 3049.

107. *Stotts*, 104 S.Ct. at 2589.

108. *Local 28*, 106A S. Ct. at 3049.

109. *Stotts*, 104 S. Ct. at 2588. The Court awards relief, upon proof of intentional discrimination, to individuals according to seniority status. *Id.* at 2588.

110. The Court explained, "The purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future." *Local 28*, 106A S. Ct. at 3049.

111. *See supra* note 84.

crimination law."[112] In deciding *Local 28*, the Supreme Court must have considered both the legacy of employment discrimination case holdings and unresponsive lower court reactions to *Stotts* when deciding how to interpret Title VII. Thus, in *Local 28*, the Court had the opportunity to distinguish (perhaps even rationalize) *Stotts* regarding 706(g) remedial relief while at the same time reaffirm interpretations of Title VII that relied on the 'spirit' of the Act and provided make-whole relief.

C. *The Effects of* Local 28

There are positive ramifications of the *Local 28* decision for individuals and groups instituting employment discrimination actions. No longer must an individual be an actual victim of discrimination to be awarded remedial relief by a district court. However, a problem does exist for those claiming employment discrimination under *Local 28*: How much discrimination must be shown before remedial relief can be awarded? In *Local 28*, the Supreme Court held that when an employer has "engaged in longstanding or egregious discrimination," a court may order the employer to admit a certain number of minorities.[113] In future employment discrimination cases, plaintiffs are left to guess for themselves what qualifies as "longstanding or egregious discrimination." However, if a plaintiff succeeds in meeting the *Local 28* standard of discrimination, then the plaintiff will most likely receive relief.

The impact of the *Local 28* decision will be great on employers in future employment discrimination suits found to have engaged in "longstanding and egregious discrimination." Pursuant to a court order, the employer will have less control over who may and may not be hired to assure a certain number of minorities are hired. Though not discussed in *Local 28*, the court may even penalize the employer for not meeting the goal set by the court's order. Employers not charged with employment discrimination may also be effected by the *Local 28* decision. To avoid a discrimination suit, an employer may alter hiring practices and hire more minorities, perhaps to the detriment of white applicants. Thus, discrimination against whites may arise from employers' reaction to the *Local 28* decision. Granted, extreme paranoia will not overcome all employers following the *Local 28* decision, but such negative ramifications of the decision are possible.

District courts in future employment discrimination cases will also be effected by the *Local 28* decision. Now, district courts are assured remedial power under section 706(g) to eradicate employment discrimi-

112. Vaughn, *supra* note 67, at 558.

113. *Local 28*, 106A S. Ct. at 3036.

nation in certain circumstances. But, the courts are not given much guidance on what constitutes "longstanding and egregious discrimination." In *Local 28*, the employer had discriminated over a period of fifteen to twenty years and had not hired any blacks before the case was first litigated. Must lower courts base remedial relief on the extreme example of discrimination from *Local 28*? Probably not. Thus, courts are left to look to each case in deciding what qualifies as "longstanding and egregious discrimination" which may lead to some misuse of remedial power by the courts.

Another issue left to lower courts after *Local 28* is how to determine what recourse to take if an employer does not reach the hiring goal set by the court. Should the court hold the employer in contempt and, if so, at what point should the court hold the employer in contempt? It seems if a court reacts harshly to an unmet goal by holding the employer in contempt, the "hiring goal" begins to look like a "quota." The *Local 28* Court did not specifically address the legality of court imposed "quotas" but clearly discussed remedial relief in terms of imposing a "hiring goal."[114] In deciding what action to take against an uncooperative employer, a lower court should keep in mind the language of the *Local 28* Court (goals versus quotas) and not impose a severe punishment thus avoiding allegations that the court imposed a quota as remedial relief. Though the "goal" versus "quota" issue may be only a matter of semantics, *Local 28* was careful to make the distinction and so must lower courts.

District courts in employment discrimination suits are left to decide another vague issue from *Local 28*: When is an employer practicing reverse discrimination? As mentioned earlier, employers may react to *Local 28* by hiring more minorities to the detriment of white applicants who may then raise reverse discrimination claims. What will district courts use as a gauge to determine when "enough is enough" in terms of hiring minorities? If the court finds the employer was practicing reverse discrimination, can the district court provide remedial relief under 706(g) to those individuals affected by reverse discrimination? Future discrimination suits will give rise to these and other unanswered questions from *Local 28*. Overall, positive ramifications for district courts—power to order remedial relief—are balanced with potential problems—unanswered, complex questions—as a result of the *Local 28* holding.

IV. CONCLUSION

In *Local 28 of the Sheet Metal Workers' International Associa-*

114. *Id.* at 4990–91, 4998–99, 5000–01, 5003–05.

tion v. Equal Employment Opportunity Commission,[115] the United States Supreme Court affirmed court-ordered hiring goals as preferential relief for long, overt discrimination. The *Local 28* decision was a pleasant suprise after the Court's narrow interpretation of Title VII in *Firefighters Local Union No. 1784 v. Stotts*.[116] Lower court reaction to *Stotts* was less than warm after a litany of liberal, relief oriented interpretations of Title VII prior to *Stotts*. Recognizing lower court reactions, the number of liberal Title VII interpretations over the years, and courts of appeals' support for hiring quotas, the Supreme Court in *Local 28* advocated a liberal application of Title VII.

Explaining its rejection of the *Stotts* rationale, the Court carefully interpreted section 706(g) to allow courts to order hiring goals in certain instances of employment discrimination. However, the Court rejected court-ordered hiring goals except to relieve egregious discrimination. Thus, the Court in *Local 28* maintains a somewhat controlled demeanor as it turns from its conservative *Stotts* decision to the familiar relief oriented interpretation of Title VII.

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115. 106A St. Ct. 3019 (interim ed. 1986).
116. 104 S. Ct. 2758 (1984).