

1986

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Repository Citation

Devins, Neal, "Righting Past Wrongs: When Affirmative Action May Be Reverse Discrimination" (1986). *Faculty Publications*. 403.
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Righting Past Wrongs: When Affirmative Action May Be Reverse Discrimination

by Neal Devins

Wendy Wygant
v.
Jackson Board of Education
(Docket No. 84-1340)

Argued November 6, 1985

ISSUE

Wygant v. Jackson Board of Education may well prove to be one of this term's most controversial Supreme Court decisions. In it, the Justices will confront the vexing issue of whether—absent a finding of intentional discrimination—a government entity may voluntarily bestow special preferences to minority group members. Specifically, *Wygant* concerns the constitutionality of the Jackson Board of Education's practice of laying off senior white employees ahead of black employees to ensure that there is no decrease in the percentage of minority teachers.

FACTS

In a 1973 collective bargaining agreement entered between the Jackson Board of Education and the Jackson Education Association, an exception was created to a last-hired first-fired layoff provision. Under this exception, non-minority teachers would be laid off out-of-turn when necessary to preserve the existing percentage of minority teachers. When the school board laid off senior white employees in April 1981, Wendy Wygant and other affected non-minority teachers filed this lawsuit.

The United States District Court for the Eastern District of Michigan, in September of 1982, upheld the layoff provision (546 F.Supp. 1195 (E.D. Mich. 1982)). In October, 1984, the United States Court of Appeals affirmed this decision (746 F.2d 1152 (6th Cir. 1984)).

The Sixth Circuit flatly rejected Wygant's argument that, before preferential treatment can be accorded to minorities, there must be a judicial determination of past unlawful discrimination. Instead, the court maintained that a public sector employer may adopt "an affirmative action plan to eliminate conspicuous racial imbalance in traditionally segregated job categories." By

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comparing the percentage of minority teachers to the percentage of minority students, the appellate court determined that minority teachers were substantially underrepresented.

The appellate court then ruled that the Jackson program would be upheld if it passed a "reasonableness" test. The reasonableness test asks whether the affirmative action plan is "substantially related to the objectives of remedying past discrimination and correcting substantial and chronic underrepresentation." The appellate court concluded that the school board's layoff policy satisfied this requirement; for it addressed historic discrimination, promoted racial harmony and provided role models for minority students.

On appeal, Wygant argues against both the "reasonableness" standard and the lower court's determination of minority underrepresentation. For Wygant and the other teachers, race-based practices can be justified only if they respond directly to appropriate findings of discrimination. Specifically, they claim that, rather than a "reasonableness" standard, the school board should be forced to demonstrate that its layoff procedure is the least restrictive means available to satisfy the state's compelling interest in eradicating identified discrimination.

Related to this, Wygant argues that mere differences between the percentages of minority students and teachers does not support remedial school board action. Moreover, she claims that—in the absence of a constitutional violation of student rights that requires such a remedy—minority teacher underrepresentation should be judged by comparisons of the percentage of minority teachers to the relevant labor market. Under this formulation, Wygant asserts that the layoff plan cannot pass muster under either a compelling interest test or a reasonableness test, for there is no minority teacher underrepresentation in Jackson schools.

The Jackson Board of Education, for the most part, supports the lower court's analysis. The board, however, also asserts that the layoff policy responded to specific segregative school board policies, not societal discrimination. Through this factual assertion (apparently made for the first time in its Supreme Court brief), the board claims that the layoff policy would satisfy the compelling interest standard advanced by Wygant.

BACKGROUND AND SIGNIFICANCE

Wygant will prove significant both as a legal precedent and as a matter of social policy. As a precedent, this

decision will fill an important hole in Supreme Court jurisprudence on the so-called "reverse discrimination" issue. Prior to this case, the Court has been mute on the manner in which municipal and state governments may address past societal discrimination. In the *Bakke* case (438 U.S. 265 (1978)), the Court—in invalidating a state medical school's preferential admissions policy—suggested that race may be a factor, but not a determinative factor, in certain types of government decisionmaking. In *Fullilove v. Klutznick* (448 U.S. 448 (1980)), the Court ruled that Congress, through a minority business set-aside provision in a Public Works Act, may seek to remedy the effects of past racial discrimination.

The precedential value of *Bakke* and *Fullilove* is subject to debate, however. In both cases, no single opinion concerning the constitutionality of "reverse discrimination" commanded a majority of the Justices' votes. Consequently, *Wygant*, aside from covering another dimension of the "reverse discrimination" controversy, may also prove to be the Court's first full opinion on this issue. (The Court, however, has spoken with some clarity on the legality of reverse discrimination under the employment section (Title VII) of the 1964 Civil Rights Act. In *United States Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Court ruled that Title VII does not prohibit a private employer from voluntarily engaging in certain kinds of affirmative action. And, in *Firefighters v. Stotts*, 104 S.Ct. 2576 (1984), *Preview* 1983-84 term, pp. 229-30, the Court invalidated a lower court order that disrupted seniority-based layoffs to ensure adequate minority representation in the workforce.)

In many respects, *Wygant* holds the key to future state and local efforts to address racial disparities through numerically-based affirmative action. If the Supreme Court views the Jackson program—in which senior white employees were laid off solely because of their race—as a permissible attempt by a municipality to address past societal discrimination, the court would effectively place a seal of approval on affirmative action. If, however, the Court holds that government-sponsored race-based classifications must narrowly respond to identifiable purposeful discrimination, race conscious action would be limited to those instances where the government—through judicial action—could be compelled to adopt such a race-based classification.

Although it seems almost certain that *Wygant* will speak broadly about the scope of permissible affirmative action, there are two ways in which the Court can limit its holding. First, if the school board's layoff policy is viewed as a narrowly-focused response to past illegal discrimination, *Wygant* will be limited to the issue of whether a school board can voluntarily remedy a situation that it otherwise could be forced to remedy in the context of a school desegregation lawsuit. Second, the Court could adhere to the school board's education policy argument; namely, that deference should be

accorded the Jackson School Board in its efforts to promote racial understanding.

ARGUMENTS

For the Jackson Board of Education (Counsel of Record, Jerome A. Suskind, 2300 Spring Arbor Road, Jackson, MI 49203; telephone (517) 787-5340)

1. A local school board has authority to evaluate the effects of its past conduct and, in this case, the layoff provision was an appropriate response to prior discrimination.
2. Regardless of prior discrimination, a local school board can seek to advance educational and social objectives through a race-conscious layoff plan.
3. The Jackson layoff plan, by distributing layoff burdens equitably, does not disrupt the legitimate expectations of third parties.

For Wendy Wygant (Counsel of Record, K. Preston Gade, Jr., 1717 Washington Avenue, Golden, CO 80401; telephone (303) 278-3300)

1. Race-based layoffs, to be justified, must be the least restrictive means available to serve some compelling state interest. Since the school board action did not violate the Constitution, there is no state interest sufficiently compelling to justify the layoff provision.
2. Differences between the respective percentages of minority teachers and minority students do not support a finding of actionable discrimination. Moreover, the use of proportional representation goals to eradicate such disparities does not constitute a compelling educational objective.
3. The layoff plan singles out a few non-minority teachers to bear the burden for district goals of racial equality.

AMICUS BRIEFS

In Support of the Jackson Board of Education

The city of Detroit; Lawyers' Committee for Civil Rights Under Law; Mexican American Legal Defense and Educational Funds; the NAACP Legal Defense and Educational Fund; the NAACP; the National School Boards Association; the National Lawyers Guild; the NOW Legal Defense and Education Fund; the Women's Legal Defense Fund; the National Education Association; the Jackson Education Association; the Michigan Department of Civil Rights; and the states of Minnesota, California, Louisiana, Nebraska, New Mexico and Wisconsin.

In Support of Wendy Wygant

The American Federation of Teachers, the United States, the Pacific Legal Foundation, the Mid-America Legal Foundation and the Anti-Defamation League of B'nai B'rith.