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Neal Devins

William & Mary Law School, nedeви@wm.edu

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The Possible Final Word on Employment Discrimination Relief

by Neal Devins

**Local No. 93, International Assoc. of Firefighters,
AFL-CIO**

v.

City of Cleveland and Vanguard of Cleveland
(Docket No. 84-1999)

Argued February 25, 1986

ISSUES

The Reagan administration's often contested claim that courts can only make-whole the actual victim of discrimination in statutory employment discrimination cases may be resolved in *Local No. 93 v. Vanguard of Cleveland*.

The administration, in response to the Supreme Court's 1984 holding in *Firefighters Local Union No. 1784 v. Stotts* (104 S. Ct. 2576 (1984); *Preview*, 1983-84 term, pp. 239-40, (limiting the ability of courts to order affirmative action relief that interferes with seniority rights)), has sought to displace numerous court orders based in Title VII of the 1964 Civil Rights Act. In its view, Title VII remedies cannot extend relief to nonvictims of discrimination.

Every federal court which has considered the issue has rejected the administration's position. This blanket rejection, aside from frustrating the call for victim-specific relief in employment cases, has been a political embarrassment. Yet, if the Supreme Court validates the administration's position in *Vanguard* (and the related *Local 28 v. EEOC*, also analyzed in this issue of *Preview*), administration can save face. Furthermore, pointing to such a legal victory, the administration might claim that it has been improperly victimized both by its civil rights critics and the lower federal courts. On the other hand, if the Supreme Court rejects the position, strong ammunition will be provided to critics of the administration's civil rights policies.

FACTS

In October, 1980, Vanguard (an association of Black and Hispanic firefighters) filed suit against the Cleveland Fire Department. Its complaint noted that, although 46.9 percent of Cleveland's population was

Neal Devins is an attorney specializing in civil rights law, 1121 Vermont Avenue, NW, Washington, DC 20425; telephone (202) 376-8372.

minority, only 4.5 percent of firefighters ranked as lieutenant or above were minority. Pointing to this gross statistical disparity, Vanguard claimed that the city's promotion policy was discriminatory, violating the Thirteenth and Fourteenth Amendments, sections 1981 and 1983 of the Civil Rights Act and Title VII.

In June of 1981, the firefighters' union (Local 93) was allowed to intervene in the lawsuit. In November, 1982, a tentative agreement was reached among Vanguard, Local 93 and the city. Members of Local 93 ultimately rejected this agreement, however. An agreement was then worked out between Vanguard and the city. In January, 1983, the Northern District of Ohio district court adopted—over Local 93's objections—the proposed consent decree.

The consent decree provided, in part, that promotions take place in two stages. During the first stage (immediately after entry of the decree), minority and nonminority candidates were to be promoted to sixty-six lieutenant positions on an alternating basis, with separate eligibility lists based on a 1981 examination. During the second stage (until December, 1987), the decree set a goal of 25 percent minority promotions to the lieutenant position based on an examination yet to be administered. This goal would be accomplished, if necessary, through out-of-turn promotions.

The Sixth United States Circuit Court of Appeals, in January, 1985, held that the district court did not abuse its discretion in finding that the decree was fair, reasonable and adequate (753 F. 2d 479 (6th Cir. 1985)). Central to the appellate court's reasoning was its belief that a consent decree is a voluntary agreement and thus may provide for relief beyond that which a court could otherwise order. In so ruling, the appellate court concluded that Vanguard was like the Supreme Court's 1979 *Steelworkers v. Weber* decision (443 U.S. 193 (1979)), which held that a private employer may voluntarily adopt a race-conscious plan to increase minority employment. The appellate court further concluded that *Firefighters v. Stotts*, although involving a consent decree, was inapplicable since *Stotts* centered on the district court's extension of a race-conscious hiring plan to the layoff context over the objections of the city of Memphis. In contrast, the city and Vanguard both supported the affirmative action plan.

Viewing the Vanguard consent decree as a voluntary affirmative action plan, the appellate court utilized the

following standard in assessing its validity: "whether the affirmative action plan is reasonably related to the objective of remedying prior discrimination and whether the plan is fair and reasonable to nonminorities who may be affected by it" (753 F. 2d at 484). Pointing to gross statistical disparities in the promotion of minorities and nonminorities, the city's admission of past discrimination, the plan's insistence that minorities be qualified and the temporary (four year) duration of the plan, the appellate court held that the plan satisfied the above criteria.

Circuit judge Cornelia Kennedy dissented from this holding. Judge Kennedy argued that a consent decree is a judicial order and consequently cannot provide for relief broader than that recognized by the Supreme Court. Claiming that the *Firefighters v. Stotts* decision limited court relief to the actual victims of discrimination, Judge Kennedy concluded that the *Vanguards* consent decree was proscribed by Title VII.

On appeal, Local 93 (as well as the United States as *amicus curiae*) and the city of Cleveland and *Vanguards* present markedly different pictures of both the law and the nature of the consent decree. The union adopts Judge Kennedy's rationale claiming that the decree is a judicial order grounded in Title VII and thus subject to the limitations set out in *Firefighters v. Stotts*. The city and *Vanguards* mimicking the Sixth Circuit majority, disagree with these assertions, arguing that: a) the decree is a *Weber*-like voluntary arrangement and thus exempt from Title VII, b) regardless of how one characterizes the decree, consent decrees may provide for relief greater than that which a court may unilaterally order, and c) *Firefighters v. Stotts* is limited to seniority rights. The city and *Vanguards* further assert that the *Vanguards* decree is rooted in both the Constitution and Title VII and thus should not be judged solely on Title VII grounds. Finally, they claim that firefighters who benefit from the decree probably were subject to prior discrimination, obviating the need for resolution of the issue of whether *Stotts* mandates that Title VII relief can only make-whole the actual victims of discrimination.

BACKGROUND AND SIGNIFICANCE

This case, almost certainly, will resolve the debate concerning the meaning of section 706(g) of Title VII. This section provides, in part, that no court order shall extend relief to an individual "if such individual was refused admission, suspended, or expelled [etc.] ... for any reason other than discrimination on account of race, color, religion, sex, or national origin" In *Firefighters v. Stotts*, the Court commented that "the policy behind section 706(g) ... is to provide make-whole relief only to those who have been actual victims of illegal discriminations."

The administration, pointing to this language, argues that court-ordered relief in employment discrimi-

nation cases cannot extend to nonvictims of discrimination. Civil rights groups such as the NAACP and Lawyers' Committee which have entered the case as *amici* on the other hand, claim that the administration misreads both section 706(g) and *Stotts*. According to these groups, the section 706(g) limitation merely ensures the employer the right to select among qualified members of the affected class and *Stotts* only extends to seniority issues.

It is possible that the Court will base its decision on other grounds, namely, that the decree is unaffected by Title VII limitations since it is: 1) a voluntary *Weber*-like agreement, or 2) grounded in the Constitution. It is unlikely, however, that the Court will choose either of these facts. First, unlike *Weber*, the *Vanguards* decree is based on the Constitution, the judicial practice of avoiding constitutional issues when a case can be decided on statutory grounds suggests that the Court will address the section 706(g) issue.

ARGUMENTS

For Local 93 (Counsel of Record, William L. Summers, 1818 Standard Building, Cleveland, OH 44113; telephone (216) 696-0727)

1. The *Vanguards* consent decree is a judicial order and thus cannot provide for relief broader than that permitted under the statute.
2. Title VII, section 706(g) prohibits courts from granting affirmative action relief to nonvictims of actual discrimination. The *Vanguards* decree provides for such relief and thus is illegal.
3. The decree violates the rights of innocent nonminority firefighters since court-ordered Title VII relief which is improperly extended to those who were not discrimination victims adversely affects the rights of nonminorities to obtain a promotion.

For the *Vanguards* of Cleveland (Counsel of Record, Edward R. Stege, Jr., 1800 Standard Building, Cleveland, OH 44113; telephone (216) 861-0360); and **City of Cleveland** (Counsel of Record, John D. Maddox, 1100 Huntington Building, Cleveland, OH 44115; telephone (216) 696-1100)

1. The *Vanguards* decree is, in part, based in the Constitution and thus is not subject to section 706 limitations. The decree, in accordance with well accepted remedial principles, is designed to create a supervisory force that resembles the force that would have existed in the absence of discrimination. Alternatively, the decree should be viewed as a *Weber*-like voluntary agreement and thus not subject to Title VII limitations.
2. Section 706(g) does not limit courts to victim-specific relief. Furthermore, consent decrees may provide for relief broader than that permitted under the statute.
3. The decree represents a reasonable compromise on a method of identifying actual victims of discrimination.

4. The decree, contrary to the assertions of *amicus* Department of Justice, does not abrogate a *bona fide* seniority system.

AMICUS BRIEFS

In Support of Cleveland and the Vanguard

National Conference of Black Mayors, Atlanta, Ga., Detroit, Mich., California and other states, International Association of Black Professional Firefighters, Affirma-

tive Action Coordinating Center, Lawyers Committee for Civil Rights Under Law, National League of Cities, NAACP Legal Defense & Educational Fund and NOW Legal Defense Fund

In Support of Local 93

The United States, the Pacific Legal Foundation, Washington Legal Foundation, Anti-Defamation League and the International Association of Firefighters

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