Shuford v. Alabama State Bd. of Educ., 846 F. Supp. 1511 (M.D. Ala. 1994)

Full Name: Shuford v. Alabama State Bd. of Educ.
Citation: 846 F. Supp. 1511
Docket Number: 89-T-1196-N
Court: Alabama

U.S. District Court for the Middle District of Alabama - 846 F. Supp. 1511 (M.D. Ala. 1994)
March 15, 1994

846 F. Supp. 1511 (1994)

Plaintiffs: Jerry L. SHUFORD et al.
Defendants: ALABAMA STATE BOARD OF EDUCATION, et al., Defendants.

Civil Action No. 89-T-1196-N.

United States District Court, M.D. Alabama, E.D.

March 15, 1994.

FOR Jerry L. Shuford, Jerry L. Stone, V.J. Mack Singleton, Anice J. Kelly, Kenneth Lamar Thomas, Thomas, Mason & Mills, P.C., Washington, D.C., for plaintiffs.

James U. Blacksher, John C. Sledmond, Leslie Ford, Jack W. Livingston, Birmingham, AL, Carolyn. **FOR** BRIEFS, Charles R. Kopsky and Elizabeth A. Whaley, Birmingham, AL, for Consolidated Plaintiffs.

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Vic Hill, Montgomery, AL, Frank Rice, Atlanta, GA, Kenneth Lamar Thomas, Thomas, Mason & Mills, P.C., Washington, D.C., for Kenneth A. Brackeen.

Thomas C. Gallikin, Deputy Attorney General, Sonya Jones & Gallion, Montgomery, AL, Beverly Pierce Walker, Richard J. Rhodes, Jr., Alabama State Bar, Montgomery, AL, for Alabama State Board of Education, Defendants.

J. Bevon Cook, Birmingham, AL, Edward M. Gropp, Dept. of Personnel Services, Birmingham, AL, John Greenwood, Birmingham, AL, Jerome Cochran, Birmingham, AL, Jack W. Livingston, Birmingham, AL, Jeffrey A. Sewell, Birmingham, AL, for Board Members Of Ellis, Fred Jones, John Dr. Sutton, L. Dedman Deals, Jr., Isabelle Thomasson, Ethel Hall, Willie Ruth Thomas, Jerry Ingram, Jerry Ingram, Jerry Ingram

****NOTE:** Per amended collective bargaining agreement, the Chancellor shall provide the Chairperson of the Committee on Personnel and Discipline with a written notification, and the reasons for such action, of any decision to place a tenure track faculty member on a probationary appointment, or to place a probationary faculty member on a probationary appointment for a second or third year, or to place a probationary faculty member on a probationary appointment for a second or third year with a reduction in salary, to the sound discretion of the Chancellor

on a temporary basis, the procedure shall be subject to the requirements of Section C.5.b.

6. The selection by the president from among the candidates recommended by the committee shall be supported by a contemporaneous written explanation of the reasons for the president's choice, which shall be made a part of the permanent record of the selection process.

E. Lateral Internal Transfers and Reorganization of Existing Positions

a. Notwithstanding the above procedures for filling vacant positions, in the event there shall be one or more employees at the respective college on permanent status in positions which are at least equivalent to a vacant position in terms of salary, responsibilities, and duties, the president may, after consulting with the faculty senate, and with the affected collective bargaining units, offer all such permanently positioned employees the opportunity to apply for a lateral transfer to said vacancy. If at least one equivalently positioned Black person applies for the vacancy and the president selects a person who is Black, the president's decision shall be supported by a written explanation of the reasons for such selection. Such lateral transfers shall be made on behalf of the president by appointment of the appropriate vice president.

b. Nothing in this section shall be construed to prohibit the reorganization of existing positions of permanent employees have been given the opportunity to apply for and to be considered for the lateral transfer without discrimination on the basis of race or color. To enable the president to make a better informed decision consistent with the goals of the decree, he has granted the authority to the president of each have obtained from the Chancellor the number of potential Black applicants for the position from the statewide bank of information to be established and maintained under this decree. Such reorganization of existing positions may be made only after the president has consulted with the faculty senate and any information obtained from the Chancellor. To make the lateral transfer or to open the application process and receive additional applications from all other interested, qualified applicants, **TS40** with such process to be governed by any applicable provisions of this decree.

c. Recognizing that there may occasionally be situations where, for legitimate reasons not related to race, a college may find it necessary and appropriate to operate or otherwise modify an existing position, the college may do so without the position, as modified, being considered a vacancy subject to the provisions of this decree. Examples of such circumstances include situations where the duties of a position are substantially changed, or where a number of employees in such the morning of a without employee, however, the number of employees in such position which involves a change of an existing employee's title, salary, placement, benefits, or level of supervisory responsibility shall be deemed a vacancy. In such instances, the college shall act expeditiously to fill the position on a permanent basis. In the event that a prior to implementation of the subject modification that the modification is not being made on the basis of race and that the modification is necessary and appropriate given the college's circumstances. No action under this paragraph shall be taken for the purpose of frustrating the intent of this consent decree. Failure of plaintiff's counsel to object to a proposed modification under this paragraph at the time notice is given shall not be deemed a waiver of the right to contest such modification or action.

F. Recruitment and Selection of Full-time Temporary Instructional, Administrative, or Professional Employees

a. In certain limited instances, a college may employ a full-time employee on a "temporary" (as distinguished from "probationary") basis. A "temporary" position generally would be one which is either intended to last for one year or less or has been established for a trial period of one year or less to determine the feasibility of making the position permanent.

b. A temporary position which, if permanent, would be a position covered by this decree may be filled by the president, without compliance with the selection, recruitment and selection criteria and procedures mandated by this consent decree, including but not limited to use of a recruitment and selection committee, only when one or more of the following conditions exists:

(1) The college is in need of filling such a position for a period of one year or less.

(2) The college is the recipient of a non-renewable contract or grant which is to be used for the purpose of employing a person to perform the duties of such a position, provided that the college is notifying the requirements of the contract or grant and will be eliminated upon the expiration of the contract or grant.

(3) The college is in need of immediately filling an unanticipated vacancy and is making a temporary appointment to the position while it is conducting a recruitment and selection process for filling the "probationary" appointment to the position. In such instances, the college shall act expeditiously to fill the position on a permanent basis. It is not contemplated that, except in extraordinary circumstances, a temporary employee hired under this provision would remain employed in that capacity beyond the commencement of the academic year next following his or her being hired on a temporary basis.

c. In no instance will a person be allowed to hold a position which would otherwise be a position covered by this decree on a "temporary" basis for longer than twelve months. After that twelve month period, the position shall be filled, if at all, in accordance with the provisions of this decree. Nothing in this section shall be construed to prohibit the reappointment by this decree. No position shall be left unfilled for the purpose of frustrating the goals and purposes of this decree.

10. Part-time Employees

Should a college determine that it is necessary to employ part-time employees, it shall hire and utilize such part-time employees in such a manner which, and not calculated to frustrate, the intent of this consent decree. A college shall not engage in the excessive use of part-time employees, and the totality of the circumstances will be considered relating to the college's action.

**TS41 D. Reduction in Force due to Merger or Consolidation*

1. It is currently the position of the Defendants that no merger or consolidation within the System of Postsecondary Education will be undertaken in the foreseeable future. If, however, a merger or consolidation is contemplated in connection with any merger or consolidation which may occur, the Defendants presently intend for all administrative employees at the affected colleges to retain all rights, privileges and benefits thereafter accruing to them, including, but not limited to, salary, schedule placement, continuing service status (tenure), accrued leave, and date of initial employment.

2. If, in the event of a merger, consolidation or other administrative restructuring involving one or more of the colleges, it is nevertheless determined that a reduction in force and/or demotions are necessary with respect to employees in positions covered by this decree, the affected employees will be given the opportunity to compete for positions in accordance with the rules of reorganization and minority employment goals embodied in this decree. For purposes of this provision, "demotion" shall mean (1) any material reduction in duties or responsibilities, or (2) any reduction in pay.

3. If it appears to Defendants that a reduction in force and/or demotions will be necessary as a result of a proposed merger, consolidation or other material restructuring, Defendants shall promptly advise counsel for the Plaintiff Class of this possibility. If a merger, consolidation or restructuring is in fact to be implemented which actually includes a reduction in force or demotions, Defendants shall give notice of such plan to counsel for the Plaintiff Class and the employees to be affected by such action. Such notice shall include a list of the positions to be affected, the number of employees expected to become effected, provided, however, that implementation of the plan shall not be delayed so long as Defendants give the required notice as timely as possible and in good faith.

4. In employing a person in good standing who is currently tenured in a position, full-time, of demotion as a result of a merger, consolidation or other material restructuring shall be provided information by the college, working through and with the appropriate Human Resources Department, of the minimum qualifications for the position, including the rank, if any, qualified, in the event such a vacancy is identified and the employee desires to apply for it. Defendants and the college shall facilitate submission and consideration of the application, and make their best efforts to afford an interview before the employee's retention decisions has been made to the employee's prior employment. Nothing in this paragraph shall require any college to actually employ an employee who is terminated, laid off or demoted as a result of a merger, consolidation or other material restructuring but any college may elect to employ such an employee.

5. The name of any Black employee in good standing who is terminated, laid off or demoted due to a merger, consolidation or other material restructuring shall be placed on a list of such employees to be maintained in accordance with the provisions of the preceding paragraph, shall be provided formally by the college to the Chancellor. The Chancellor shall maintain the name and relevant information regarding such employee in the statewide bank of information to be established and maintained pursuant to Section C.2.b. of this decree, and shall advise the colleges of the potential availability of such employee in connection with the inquiries regarding potential Black applicants which the colleges are required to make under Section C.5.b. of the decree. Notwithstanding the provisions of Section C.5.b. of the decree, the contact and advice each displaced Black employee of the availability of positions at the respective colleges for which the employee may be qualified, Notwithstanding any other provision of this consent decree, any displaced Black employee who meets the minimum qualifications for a vacant position at one of the colleges, shall, upon application for the position, be accorded an interview.

6. In identifying incumbent employees to be terminated, laid off, or demoted as the result of a merger, consolidation or other material restructuring, the following non-racial objective criteria (when applicable) shall be employed:

***TS42**. Area or field of teaching or other employment expertise;

b. Degree(s) earned;

c. Other education achieved; certifications or diplomas earned;

d. Teaching experience:

(i) at the college(s) involved in the restructuring;

(ii) in the instructional field;

(iii) in other college(s) within the System of Postsecondary Education;

(iv) in other higher education; and

(v) in other schools.

e. Employment experience:

(i) at the college(s) involved in the restructuring;

(ii) in other college(s) within the System of Postsecondary Education;

(iii) positions held;

(iv) duties performed;

(v) in other higher education;

(vi) in other schools; and

(vii) in other comparable or relevant employment.

7. Any employee who is terminated or laid off due to a merger, consolidation or other material restructuring shall be afforded the opportunity for reemployment at the college, or its successor institution, in the position which the employee is qualified become available, and if the employee otherwise meets all requirements for employment at the college. Any employee who is demoted as a result of a merger, consolidation or other material restructuring shall be afforded the opportunity to return to the employee's former rank or position, if and when the employee is qualified become available and if the employee is otherwise in good standing at the time.

8. To implement the provisions of the preceding paragraph, employees terminated, laid off or demoted shall be given priority for filling a vacancy for which they are qualified, and no such vacancy shall be filled until the displaced employee who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so within a reasonable period of time. An employee who fails to accept such an offer for a position which is equivalent or substantially equivalent to the position held prior to the employee's displacement shall no longer be entitled to the protections of this and the preceding paragraph.

9. The provisions of this Section D. shall apply only with respect to employees with a tenure, at the time of a decision to terminate, lay off or demote, except a position covered by this decree.

E. Reporting Requirements

The Chancellor shall file with the Court, or cause to be filed by the presidents of the colleges, on or about October 1, 1994 and annually thereafter on or about the same date for the duration of this consent decree, a report describing fully defendants' efforts to comply with the provisions of this decree, including without limitation the following information for each college and for the Postsecondary System as a whole:

1. The number and percentage of Black, Whites, and others employed in positions covered by this decree:

(a) as of September 30, 1993;

(b) as of the effective date of this decree; and

(c) as of September 30 of the year of the report.

Reports after the first report shall also include all the above information which was contained in the next preceding annual report.

2. The name, race and position filled of every person selected to fill a position covered by this decree during the period covered by the report, indicating whether such vacancy was filled permanently, by lateral transfer or on a "temporary" basis, and the reason therefor.

3. The name and race of every member of the recruiting and selection committee(s) who was appointed or served during the period covered by the report.

4. The name, race, and position held of any part-time employees during the period covered by the report.

F. Right of Inspection

Upon submission to the Chancellor and the affected college of written advance notice of not less than 10 working days, counsel for ***TS43** the plaintiff class shall have the right to visit a representative college and inspect and copy the records required by Section C.6. above to be maintained at the various colleges.

G. Individual Relief

1. Plaintiff Hunnicutt v. Stuthard shall be granted non-probationary status ("tenure") as Dean of Extended Services at Jefferson State Community College effective immediately upon the date this decree is entered. In addition, Defendant Alabama State Board of Education and Chancellor Fred Gainous shall cause to be paid by Jefferson State Community College (which includes the institution formerly known as Jefferson State Technical College) to Plaintiff Stuthard compensatory damages in the amount of forty-five thousand dollars ($45,000.00). Upon payment of this amount to Plaintiff Stuthard, Plaintiff Stuthard shall be deemed to have satisfied all claims against Defendants Jefferson State Community College (which includes the institution formerly known as Jefferson State Technical College) to Plaintiff Stuthard compensatory damages in the amount of forty-five thousand dollars ($45,000.00). Upon payment of this amount to Plaintiff Stuthard, Plaintiff Stuthard shall be deemed to have satisfied all claims against Defendants Jefferson State Community College (which includes the institution formerly known as Jefferson State Technical College) that shall be dismissed with prejudice.

2. Plaintiff Stuthard shall assume individual responsibility for any tax, social security, or Teachers Retirement System report or contribution which may accrue to or be required from him as a result of the award of compensatory damages.

H. Release from Claims

Plaintiff Hunnicutt v. Stuthard agrees that upon the entry of this decree he shall consider the relief stated herein to resolve absolutely and completely any and all claims which he has filed or could have filed in this action as of the effective date of this decree against any of the Defendants or against the State of Alabama, or any official or representative thereof, concerning his employment, or any failure of consideration of, or any action for consideration of, or any failure to consider for any position at Jefferson State Community College which is among those institutions controlled and administered by the State of Alabama Board of Education.

I. Attorney's Fees

Although Defendants do not in any manner admit liability under the Stuthard complaint, as amended, they acknowledge that, for purposes of an award of attorney's fees pursuant to 42 U.S.C. § 1988, Plaintiff Stuthard, individually and as class representative, is the prevailing party. If the parties are unable to agree upon the amount of attorney's fees and expenses to be paid plaintiff, plaintiff shall file his request for attorney's fees and expenses not later than thirty (30) days after final approval of this decree.

J. Terms of Decree and Dismissal of Parties and Claims

Jurisdiction of this action for such other and further relief or enforcement proceedings as may be appropriate consistent with this decree is hereby retained for a period of seven years (during the last two of such seven years the case will be moved to the Court's "inactive" docket) from the effective date of this decree, unless, upon the motion of one or more of the parties or upon the Court's own motion and for good cause shown, it is sooner modified, dissolved or extended by further order of the Court. This decree shall be binding upon the State of Alabama Board of Education and/or any of its successors, the Chancellor of the System of Postsecondary Education, the Chancellor of the System of Postsecondary Education, the Chancellor of the Alabama Community College System, and plaintiffs' claim under the Voting Rights Act, 42 U.S.C. § 1973, is hereby DISMISSED with prejudice.

NOTES

(1) Minors State has since merged with Jefferson State Community College.

(2) The parties to the proposed consent decree stipulated to the certification of this class.

(3) The testimony of the presidents of Bishop State and Almore State Community College suggests the contention that presidents have autonomy in employment decisions is the individual institutions. See Kennedy Deposition, at 84-85 ("the president has the right, the authority, the responsibility to select ..."); Michael Deposition, at 31-34 ("I make personnel decisions and have all the responsibility ...").

(4) The Lee v. Macon orders were dismissed in the Southern District of Alabama in 1982, but remain in effect in the Northern and Middle Districts. C.A. No. 5065-70-E (S.D.Ala. Jan. 20, 1982).

(5) On March 2, 1984, the court also permitted Kenneth A. Blackburn, an African-American male, to intervene in this action. Blackburn and Stewart claim that they received the same job discrimination in 1982.

(6) A proposed settlement was agreed upon in December 1992, but rejected by the Alabama State Board of Education in January 1993. Discovery resumed and the parties agreed to bifurcate the proceedings in September 1993.

(7) Two types of objections were received. First, several persons objected to the race-conscious provisions of the proposed decree. These objections are addressed below. Second, objections were received from several persons regarding the timing, but not the substance, of the relief embodied in the proposed decree, as explained below; these objections were received by agreement of the parties at the fairness hearing and are addressed in footnote 8 infra.

(8) Screening of applications is permitted where there are more than ten qualified applicants.

(9) A provision in the original version of the decree would have also given college presidents the unlimited authority to go outside the selection process at any time to employ an African-American. After the court expressed concern about this provision as one of the fairness hearings, the parties submitted a revised version on February 19, 1994, that does not include this provision, and it is this revised decree that is currently under the court's consideration.

(10) In Bonner, Pickard, 607 F.2d 1206, 1207-08 (5th Cir.1980) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the Fifteenth Fifth Circuit handed down prior to the close of business on September 30, 1981.

(11) Exhaustive documentation of compliance with the court's notice requirements was presented at the fairness hearing on December 16, 1993.

(12) Two of the 33 institutions Trenholm State Technical College and Alabama Southern Community College(named the defendants in the Lee v. Macon litigation) are not covered by the proposed decree. Trenholm State Technical College (Trenholm State TTC). A revised notice was sent to these institutions and sufficient time was allotted for objections to be filed. The supplemental fairness hearing was held to seek their views on February 19, 1994. Few objections were filed from these institutions and none raised of the substantial fairness issues.

(13) Its stated, notions were also sent to non-class member employees. The Civil Rights Act of 1991 precludes challenges by a consent judgment resulting employment discrimination claims from non-class members who had actual knowledge of the proposed decree and a reasonable opportunity to present objections. 42 U.S.C. § 2000e-2(n)(1)(B). The notices were sent to employees at the institutions named in the Lee v. Macon litigation. Employees at institutions not covered by the decree were also aware that the decree had adversely affect their interests and were invited to respond in writing and at the two fairness hearings. As discussed below, the court has carefully considered the opinions of those who made their views known to the court. Non-class member employees who did not make their views known, despite the notice of the lawsuit and the decree, do not have presented these objectors with notice of this suit or the decree.

(14) The parties agreed in the interim that, if positions covered by the partial decree are filled by promotion, new hires, or lateral transfers before the new class is established or and rules on the claims raised by the women, the position so employed will be notified in writing that their employment is subject to the condition that the court may at a later time require that the position be reopened if necessary to provide relief to the class of women and minorities. Without this hearing the evidence that such relief is necessary. Persons hired, transferred, or promoted will specifically be notified that their employment is subject to the condition that the court may at a later time require that the position be reopened "pursuant to the new position. Hicks v. Stuthard 90 Ala. 314 F. Supp. 1244 (M.D.Ala.1970)(Thornburg, J.,similar interim arrangement ordered by court). The defendants agreed to inform counsel for the women when covered positions are filled and who was considered for those positions. In agreeing to this arrangement, the parties have consented that the women would be able to make the necessary showing of likelihood of success on the merits as would be required for preliminary injunctive relief.

(15) Although the court must be sensitive to potential conflict between the class and its attorneys, Pelway 576 F.2d at 1295 n.4, the suggestion the presence of such conflict or potential conflict the inverse counsel's dedication to the Stuthard class.

(16) 2 Alpindale v. Ping, 760 F. Supp. 1195, 1197(M.D.Ala.1990) (majority of class members oppose the decree and "only the attorneys and a few class members really want the decree").

(17) These fair objections are in addition to the three objections by women already addressed by the court. The five objections were filed by George M. Terrell, Jr., Dwight S. Watts, Jerry D. Stone, Jodie Wells Ford, and John D. Wilcox.

(18) Two objections also objected to a provision of the original version of the decree which would have given college presidents unlimited authority to go outside the selection process at any time to employ an African-American. Because the parties have voluntarily agreed to remove this provision from the decree, the court will not consider the objections to this provision. See supra note 9.

(19) Although Crown involved the race-conscious provisions of a voluntarily adopted court plan, it seems clear that strict scrutiny also applies to race-conscious provisions in consent decrees. See In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1501-1505 (11th Cir.1987) (her reject any notion that the remediation of discrimination by employers with a history of discrimination is a compelling interest sufficient to justify race-conscious remedies against charges of illegal discrimination").

(20) 2 Deane v. Rees, ___ U.S.___, ___, 113 S. Ct. 2816, 2825, 125 L. Ed. 2d 911 (1993) ("the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest").

(21) In the dissenting opinion in Podrat, Judge Brown wrote that the evidence of past discrimination need only "jeopardize" a prima facie case. 947-2d at 1494, apparently relying on Justice O'Connor's statement in Croson that there was "nothing wrong with *[*1495]* *[*1496]* a State's decision to place itself in a position to remedy discrimination." 488 U.S. at 500, 109 S. Ct. at 706 (stated that the majority opinion authored by Justice O'Connor intended to establish "opportunity to prove a prima facie case", as the appropriate standard and is thus reluctant to apply that standard to a judge's opinion by the Stuthard class, in very cases, because the court finds that the evidence presented by the Stuthard class not only jeopardize a prima facie case, the court need not resolve this issue.

(22) Although the consent decree contains a disclaimer of liability by the defendants, the disclaimer does not preclude the court's consideration of evidence of past discrimination introduced in the action. Wood v. Mccurry, 874 F.2d 1085, 1087-1088 (5th Cir.1989); Jones v. Ford, 993 F.2d 1551, 1555 (11th Cir.1993), 114 L.Ed.2d 91 (1991) (Mem.) (per curiam).

(23) The court also takes judicial notice of relevant findings relating to the 1981 case v. Macon order and to the law number of African-American faculty employed at Bishop State Community College and Mobile State College made in Alabama. 787 F. Supp. 1030, 1105, 1185-85 (N.D.Ala.1991), aff'd in part, rev'd in part, vacated in part, 14 F.3d 1534 (11th Cir.1994) (dealing relevant Statistical determinations of district court judgment) (not reviewing the merits of such finding that Athens State had 1.5% African-American faculty in 1980, but only a 0.7% in 1985).

(24) The Supreme Court and Eleventh Circuit have recognized that a racial demographic contrast that the establishment of "racially neutral policies not amounted by a discriminatory purpose" is insufficient to eliminate the present effects of past discrimination. Wygant, 476 U.S. at 276, 106 S. Ct. 1842, 1846, 90 L.Ed.2d 260 (plurality opinion); Podrat, 947 F.2d at 1493 (1121, 1251, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1982) in this case, the defendants have not even adopted uniform and objective employment standards; they certainly have not dismantled "root and branch" the lingering effects of the past de jure system of segregation, which included the segregation of both faculty and administrative staff, id.

(25) Although, as discussed below, it is not possible to establish what were the specific qualifications for the covered positions, the evidence does show that the African-American applicants were qualified for the vacant positions. Moreover, on the basis of the evidence, the court assumes that the African-Americans who applied were, at the very least, qualified within the meaning of McDonnell Douglas.

(26) Defendant Macon jones, president of the college where Stuthard was employed and a signatory of the proposed decree, testified that he would not hire Stuthard for the job he held because Stuthard was not qualified for the position. The court finds jones's testimony to be without merit. As stated earlier, before approving the race-conscious provisions of the proposed decree, the court must determine if there is a strong basis in evidence to show past discrimination by the defendants, see supra note 22, and a portion of this evidence involves jones. The court, however, is not making a finding of liability against jones, but only concluding that the Stuthard class's allegations establish a prima facie case (jones's testimony is relevant to the court's consideration of the proposed decree because the court's consideration of the Stuthard class's allegations bears 100.

(27) After the Stuthard litigation was filed, McBride was appointed president of West State Technical College.

(28) In Croson, the trial court impermissibly found that the race-conscious set-aside was permissible because "minority businesses have been victims of racial discrimination in the construction industry generally." Croson, 109 S.Ct. at 706 U.S. at 499, 109 S.Ct. at 714.

(29) In Hoskewood School dist. v. Jewel Grove, 833 U.S. 295, 309 n. 13, 97 S.Ct. 2736, 2745 n. 13, 53 L. Ed. 2d 768 (1977), the Supreme Court stated that such direct statistics requested no special justifications because "the job data here revealed is one that many persons possess or can fairly readily acquire."

(30) The covered positions do not lend themselves to any other measure of minimum qualifications for example, a license, successful completion of a course or examination, prior membership in a union or professional association, or possession of certain equipment from which the Stuthard class could ascertain a qualified labor pool.

(31) In Color Corp. v. Hillsborough County, 908 F.2d 908, 915 (11th Cir. 1990) (footnote omitted), the court held that a race-conscious goal survived summary judgment and noted that, "While some of the factors relied on ... are identical to those rejected in Croson, other factors are markedly different.

(32) See 1989 Listing of A, B, C, and D Salaried Personnel at Alabama's Junior, Community and Technical Colleges, Exhibits 1 and 2 to Plaintiff's Brief in Support of Motion to Approve Partial Consent Decree.

(33) Stuthard does not challenge the race-conscious provisions of the proposed decree other than the employment goals have virtually no prejudicial effect on the rights of non-class members. That is, although race-conscious, these provisions cause no harm to non-class members and are of less concern to the court.

(34) Because the proposed decree seeks to remedy only discrimination against African-Americans, there is no over- or under-inclusiveness. The proposed decree is the same condemned by a plurality of the Supreme Court in Croson. 488 U.S. at 506, 109 S. Ct. at 728.

(35) Because each institution has only one president, there is no institutional level goal for presidents. Rather, presidents are included in the 25% system-wide goal.

(36) Because the court does not have statistics showing the qualified labor pool, however, it has no basis to conclude that the goals are under-inclusive.

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