Statements of the United States Commission on Civil Rights

July 11, 1984

Firefighters v. *Stotts*

Hishon v. *King & Spalding*

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- Submit reports, findings, and recommendations to the President and the Congress.

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On July 11, 1984, the Commission adopted two statements. The statement on *Firefighters* v. *Stotts* was adopted by a 4-2 vote with Commissioners Pendleton, Abram, Bunzel and Destro in favor and Commissioners Berry and Ramirez opposed. *The Hishon* v. *King and Spalding* statement was adopted by a 4-0 vote with Commissioners Pendleton, Abram, Bunzel and Destro in favor. Commissioners Berry and Ramirez supported the Court's decision but declined to vote. Commissioners Guess and Buckley did not attend the meeting and did not vote.

The U.S. Commission on Civil Rights applauds the decision of the Supreme Court in *Firefighters* v. *Stotts* (June 12, 1984)—the Memphis layoff case. Contained in the Court's opinion on Section 706(g) of Title VII and on the legislative history of the 1964 Civil Rights Act is a reaffirmation of the principle that race and gender are not proper bases to reward or penalize any person. The decison retains the strong relief available for actual victims of an employer's illegal discrimination, including entire classes of such victims. Moreover, it leaves intact nondiscriminatory affirmative action methods favored by the Commission such as increased recruiting, training, counseling, and educational programs. It properly denies a court, however, the authority under Title VII to use discrimination in order to remedy discrimination.

In the decision, the Supreme Court held that, under Title VII, an employer may lawfully apply bona fide seniority rules to govern the sequence of employee layoffs rather than forego the use of such rules in order to preserve the percentage of racial minorities in the workforce when those minorities were not the actual victims of the employer's illegal discrimination.

In so holding, the Supreme Court also stated that a court can only order make-whole relief under Title VII for *actual* victims of an employer's illegal discrimination. The Court, then, not only preserved the validity of bona fide seniority systems but also vindicated the important, general principle that rights inhere in individuals, not in groups. The Court's pronouncement in *Stotts* is fully consistent with Commission policy that make-whole relief to actual victims and nondiscriminatory affirmative action are the

proper remedies under Title VII and that "preferring nonvictims of an employer's discrimination over innocent third parties solely on account of their race [or gender is inappropriate] in any affirmative action plan." (*Statement of the United States Commission on Civil Rights Concerning the Detroit Police Department's Racial Promotion Quota,* January 17, 1984.)

In *Stotts,* black firefighters sued the Memphis, Tennessee, Fire Department and other city officials under Title VII and other statutes alleging a pattern and practice of racial discrimination in the Fire Department's hiring and promotion decisions. The City agreed to a consent decree in 1980 providing, among other relief, hiring and promotional goals. The City did not admit that it had discriminated against anyone. Under an earlier, similar consent decree applicable city-wide, the percentage of black employees in the Fire Department increased from approximately 4 percent to 11½ percent in 1980.

In May 1981, a budget deficit led the City to seek to lay off some of its firefighters. The City sought to conduct the layoff according to its seniority rules which were also part of an agreement it had with the firefighters union.

The black plaintiffs obtained a court order enjoining the City's use of its seniority rules in a manner that would reduce the percentage of black firefighters presently employed in the Fire Department. Thereafter, the City laid off some white firefighters with greater seniority than some black firefighters who were retained in the workforce—in derogation of the City's seniority policy.

The U.S. Court of Appeals for the Sixth Circuit affirmed the lower court's entry of the injunction. The Supreme Court reversed the appellate court's decision.

In holding that the City may apply its seniority rules despite their adverse impact on less senior black firefighters, the Supreme Court relied, in part, on Section 703(h) of Title VII which specifically protects an employer's bona fide seniority system.[1] Under the Court's holding, an employer need not disregard its bona fide seniority policy and lay off, on the basis of race, more senior employees in order to preserve the jobs of less senior employees who were not actual victims of an employer's discrimination.

Indeed, as the Supreme Court's description of its earlier decision in *Teamsters* v. *United States* makes clear, a court may only provide competitive seniority to actual victims of an employer's illegal discrimination under Title VII, even where, as in *Teamsters,* layoffs were not at issue.

In determining that a court's remedial authority under Title VII extends only to actual victims of an

[1]Section 703(h) provides that "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 " 42 U.S.C. §2000e-2(h).

employer's illegal discrimination, the Court interpreted Section 706(g) of Title VII.[2] Section 706(g) governs a court's remedial authority generally under Title VII. The Court stated that the last sentence of this provision limited a court's remedial authority as reaching only actual victims of an employer's illegal discrimination.

In coming to this conclusion, the Court relied extensively on Title VII's 1964 legislative history and also relied on the legislative history of the 1972 amendments to Title VII. For example, the Supreme Court cited Senator Humphrey's 1964 remark that:

"No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted without relevant change as §706(g)]. . . . Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require. . . firing. . . of employees in order to meet a racial 'quota' or to achieve a certain racial balance.[3] That bugaboo has been brought up a dozen times; but is nonexistent." 110 Cong. Rec. 6549 (remarks of Sen. Humphrey).

The Court also cited other examples of Congressional intent:

An interpretative memorandum of the bill entered into the Congressional Record by Senators Clark and Case [who were the bipartisan floor captains of Title VII and whose memorandum we have previously recognized as authoritative] likewise made clear that a court was not authorized to give preferential treatment to non-victims. "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of [Title VII]. This is stated expressly in the last sentence of section [706(g)]. . ." *Id.* at 7214.

Similar assurances concerning the limits on a court's authority to award make-whole relief were provided by supporters of the bill throughout the legislative process. For example, following passage of the bill in the House, its Republican House sponsors published a memorandum describing the bill. Referring to the remedial

[2]Section 706(g) affects the remedies available in Title VII litigation, and provides: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in such 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. . . .
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We believe the cause of equal justice under law is well-served by the *Stotts* decision. While more needs to be achieved, we trust that the tide has begun to turn decisively against preferential treatment, such as quotas, on the basis of race, national origin, and gender, and in favor of evenhanded civil rights enforcement for *all* American citizens.

Statement of the United States Commission on Civil Rights Concerning *Hishon* v. *King & Spalding*

The U.S. Commission on Civil Rights notes its great satisfaction regarding the recent unanimous decision by the United States Supreme Court in which it held that Title VII of the Civil Rights Act of 1964 applies to a law firm's decision to deny partnership to a female attorney. The Court's opinion in *Hishon* v. *King & Spalding* makes clear that the partnership decisions of voluntary professional associations may not be made in a discriminatory fashion. The decision is a significant step toward securing equality of opportunity for women and minorities in a variety of professions.

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