No. 94-5083

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant/Cross-Appellee

v.

CITY OF HIALEAH, et al.,

Defendants-Appellees

v.

DADE COUNTY POLICE BENEVOLENT ASSOCIATION, INC.,
AND HIALEAH ASSOCIATION OF FIREFIGHTERS,
LOCAL 1102 OF THE IAFF, AFL-CIO,

Defendants-Appellees

and

RAUL SUAU, et al.,

Defendants-Intervenors-Appellees/
Cross-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

REPLY BRIEF FOR RAUL SUAU, et al., as Appellees/Cross-Appellants

ROBERT D. KLAUSNER, ESQUIRE
KLAUSNER & COHEN, P.A.
Attorneys for Raul Suau, et al.
6565 Taft Street
Suite 200
Hollywood, Florida 33024
Telephone: (954) 981-1222

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SUMMARY OF ARGUMENT

The Intervenors were granted party status at the fairness hearing held on August 11, 1994. At the hearing, the Intervenors requested an opportunity to conduct discovery regarding the statistical data offered by the United States to prove a prima facie case of discrimination. The district court denied the request of the Intervenors. The district court determined that the United States had made a showing of a prima facie case of discrimination relying solely on the affidavit of Dr. Marian Thompson. The district court erred as a matter of law in not allowing the Intervenors the opportunity to rebut the statistical data offered by the United States.

Furthermore, the United States failed to present any evidence of the relevant labor pool used by Dr. Thompson. Dr. Thompson, a statistician, is not a labor economist who has expertise in this area.

ARGUMENT

I.

IF THE COURT DETERMINES THAT THEY HAVE JURISDICTION OVER THE UNITED STATES' APPEAL PURSUANT TO 28 U.S.C. §1292(A)(1), THE COURT HAS JURISDICTION OVER THE INTERVENORS' CROSS-APPEAL PURSUANT TO 28 U.S.C. §1292(A)(1)

The United States has applied the wrong standard in arguing that Suau is not properly before this Court on the cross-appeal.

In Swint v. Chambers County Commission, 115 S.Ct. 1203 (1995), the Supreme Court addressed when it may be proper for a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are themselves not independently appealable. Id. at 1212. The Supreme Court determined that if the rulings are "inextricably intertwined," then review of the rulings together is appropriate. Id. at 1212.

The Swint standard was applied by the Court of Appeals for the Ninth Circuit in Paige v. State of California, 102 F.3d 1035 (9th Cir. 1996). In Paige, the Court of Appeals reviewed the entry of an interim injunction in a public employee Title VII class action. At the same time, a request was made to review the class certification order. The court determined that the class certification order was "inextricably bound up" with the grant of the interim injunction. The reasoning was simple; the injunction

provided classwide relief and it could not be upheld without upholding the class certification.

In this case, the Government urges review of an order relating to race conscious relief to a class of persons. No race conscious relief can be granted by a district court without a valid finding of discrimination. Ensley Branch NAACP v. Seibles, 31 F.3d 1548 (11th Cir. 1994). As a necessary predicate for race conscious relief, a prima facie case of discrimination must be established by more than mere statistical disparity. United States v. City of Miami, 2 F.3d 1497 (11th Cir. 1993).

Simply stated, the Court cannot get to the Government's question of whether the scope of the approved decree was too narrow without getting to Suau's question of whether race conscious relief is appropriate at all.

Accordingly, should this Court determine that it has jurisdiction to consider the United States' appeal (which Suau continues to dispute), then it also has jurisdiction to review the cross-appeal on the basis that they are inextricably intertwined.

II.

THE DISTRICT COURT'S FINDING THAT THERE WAS A PRIMA FACIE CASE OF DISCRIMINATION WAS IMPROPER AS IT DENIED THE UNIONS AND THE INTERVENORS DUE PROCESS

The gravamen of the Government's argument is that the Settlement Agreement is not "race conscious relief." This simply is contrary to the plain facts. The United States urges that the strict scrutiny standard in City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989), is not appropriate. The Government does not say, however, what standard is appropriate.

In this case, the United States has decided that the City of Hialeah discriminated against a class of applicants on the basis of race. It has urged a settlement which would include giving these applicants seniority rights which would displace incumbent employees. The sole justification for this relief is the allegation that the City's personnel practices discriminated on the basis of race. It would otherwise not be jurisdiction under Title VII.

The "voluntary Settlement Agreement" is not voluntary as far as Suau is concerned. If the agreement had been entered as requested by the Government, Suau and 200 other police officers would be displaced from opportunities for assignment, promotion, protection from layoff, and a variety of other seniority related

job benefits.

To this point in the proceedings, the Government has shown nothing but a statistical disparity with the general population. There has been no evidence as to the appropriate market area or as to whether the populations being considered are, in fact, qualified and interested applicants. Pure numerical disparity has been specifically rejected by this Court as inadequate for proof of discrimination necessary to set a predicate for race conscious relief. United States v. City of Miami, supra. More recently, in Middleton v. City of Flint, 92 F.3d 396 (6th Cir. 1996), that court held that a disparity between the percentage of "protected class" employees and the raw percentage of class members in the regional labor pool, standing alone, did not provide a "strong basis in evidence" sufficient to justify race conscious hiring and promotion policies. A key in the court's determination was the inadequacy of the relevant market analysis. Id. at 406.

There is no evidence in this record of a pattern of intentional discrimination on the part of the City of Hialeah which would justify the displacement of innocent employees such as Suau. See, e.g., United States v. Paradise, 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987). The denial of opportunity for a promotion, protection from layoff, and other job opportunities which Suau would face under the Government's proposal, constitutes a "very significant and legally cognizable, adverse impact on the rights of

third parties." Given Suau's absence of any opportunity to test the underlying basis of race conscious relief, approving the affirmative action plan urged by the United States without meeting the strict scrutiny requirement would be improper. The finding of prima facie discrimination by the district court in the present case is legal error and should not be sustained.

CONCLUSION

If this Court determines that the district court's denial of the proposed Settlement Agreement which would displace Suau with competitive seniority was improper, this case should be remanded to the district court for further proceedings with instructions to permit the Suau Intervenors a meaningful opportunity to challenge the evidence on the issue of prima facie discrimination. Determination of this issue will not be necessary, however, should the Court determine that there is no jurisdiction for the United States appeal or, in the alternative, that denial of the proposed Settlement Agreement was proper.

RESPECTFULLY SUBMITTED,

ROBERT D. KLAUSNER
KLAUSNER & COHEN, P.A.
Counsel for Appellees/
Cross-Appellants
6565 Taft Street
Suite 200
Hollywood, Florida 33024
Tele: (954) 981-1222
Dade: (305) 620-6565
Fax: (954) 981-0088

By:_____
ROBERT D. KLAUSNER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May ____, 1997, two copies of the foregoing Reply Brief for the Intervenors as Appellees/Cross-Appellants were served by first-class U.S. mail, postage prepaid, on the following counsel of record:

Alejandro Vilarello, Esquire
City Attorney
City of Hialeah
501 Palm Avenue
Hialeah, Florida 33011

Robert A. Sugarman, Esquire
Sugarman & Susskind, P.A.
5959 Blue Lagoon Drive
Suite 150
Miami, Florida 33126

Donald D. Slesnick, Esquire
10680 N.W. 25th Street
Suite 202
Miami, Florida 33172

Leslie A. Simon
U.S. Department of Justice
Post Office Box 66078
Washington, D.C. 20035-6078

Veronica Harrell-James
Asst. U.S. Attorney
United States Attorney's Office
Southern District of Florida
99 N.E. 4th Street, 3rd Floor
Miami, FL 33132-2111

ROBERT D. KLAUSNER