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

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
(954) 981-1222

CERTIFICATE OF INTERESTED PERSONS AND

CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for the United States, in compliance with Fed.R.App. P. 26.1 and 11th Cir. R. 26.1-1, certifies that the following listed persons and parties have an interest in the outcome of this case. These representatives are made so that the Judges of this Court may evaluate possible disqualification or recusal pursuant to the local rules of the Court.

Deborah J. Arnold, Counsel for City of Hialeah

Jose J. Arrojo, counsel for Dade County Police Benevolent Association

Katherine A. Baldwin, counsel for the United States

Brenda Berlin, counsel for the United States

Michael Braverman, counsel for Dade County Police Benevolent Association

Dade County Police Benevolent Association

Dennis J. Dimsey, counsel for the United States

Dan Greenfield, Personnel Director of the City of Hialeah

Veronica Harrell-James, Assistant United States Attorney

City of Hialeah, Florida, defendant

Hialeah Personnel Board

The Honorable Shelby Highsmith, United States District Judge

Stuart A. Kaufman, counsel for Raul Suau

Robert D. Klausner, counsel for Raul Suau

Klausner & Cohen, P.A., counsel for Raul Suau

Marybeth Martin, counsel for the United States

Raul L. Martinez, Mayor of the City of Hialeah

Deval L. Patrick, Assistant Attorney General, United States Department of Justice

Stephen Scott, counsel for the City of Hialeah

Leslie A. Simon, counsel for the United States

Donald Slesnick, counsel for Dade County Police Benevolent Association

Raul Suau, defendant-intervenor

Robert A. Sugarman, counsel for Hialeah Association of Firefighters

Sugarman & Susskind, P.A., counsel for Hialeah Association of Firefighters

Alejandro Vilarello, City Attorney, City of Hialeah

Noah Warman, counsel for Hialeah Association of Firefighters

Richard Weiner, counsel for Hialeah Association of Firefighters

STATEMENT REGARDING ORAL ARGUMENT

Appellees/Cross-Appellants Raul Suau, et al. believe that oral argument may be helpful to the Court in understanding the legal issues raised in this case. Appellees/Cross-Appellants Raul Suau, et al. therefore request oral argument.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is composed in 12 point Courier New.

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STATEMENT OF JURISDICTION

The United States filed this case pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. The district court had subject matter jurisdiction of the case

pursuant to 42 U.S.C. §2000e-6. On August 16, 1994, the district court entered an order denying approval of a consent decree (2-23). The United States filed a notice of appeal on October 13, 1994 pursuant to 28 U.S.C. §1292(a)(1). The Intervenors filed a Notice of Appeal on October 24, 1994 pursuant to 28 U.S.C. §1292(a)(1). It is the position of the Intervenors that this Court does not have jurisdiction over the main appeal. The Intervenors' position regarding this Court's jurisdiction over both the main appeal and the cross-appeal is more fully set forth in the "Argument" portion of this brief.[1]

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[1]By letter from the Clerk of this Court dated November 16, 1994, the parties were requested to advise the Court in writing as to their positions regarding jurisdiction over this appeal. The parties submitted memoranda to this Court briefing the jurisdictional issue. By Order of this Court filed April 18, 1995, the Court ruled that the jurisdictional issue would be "carried with the case." The Order further provided that the parties could further address the jurisdictional issue in their briefs.

STATEMENT OF THE ISSUES

MAIN APPEAL

1. Whether the district court abused its discretion in denying approval of a consent decree containing relief in the form of retroactive competitive seniority where third parties objected to the relief and the district court determined that the relief would create an unusual adverse impact and it was not fair.

CROSS-APPEAL

2. Whether the district court erred its discretion in holding that there was a showing of a prima facie case of discrimination without allowing the Intervenors the opportunity to present evidence to the contrary.

STATEMENT OF THE CASE

A. Background and Procedure History

The Intervenors accept the United States' statement of background and procedural history.

B. Facts

The Intervenors accept the United States' statement of facts as amended by the following. Additionally, it should be noted that the United States' allegation that the City had engaged in discriminatory hiring practices was based on statistical data presented in the affidavit of Marian Thompson, Ph.D., a statistician for the Department of Justice. (R. 2-23 at 8,9). Dr. Thompson did not testify at the fairness hearing on August 11, 1994 as to how she reached the conclusions contained in her affidavit. Dr. Thompson was not subject to cross-examination. The Intervenors did not have the opportunity to conduct discovery or present evidence regarding the appropriateness of the relevant labor market pool used by Dr. Thompson as the Intervenors did not become a party to this case until the fairness hearing on August 11, 1994. (R. 2-23 at 6). The Intervenors had no opportunity to question Dr. Thompson's credentials as a purported expert.

C. The District Court's Opinion

The Intervenors are satisfied with the United States' statement of the District Court's opinion.

D. Standard of Review

3. Main Appeal

In Title VII consent decree cases, a district court's approval or refusal of a proposed settlement agreement is reviewed under the abuse of discretion standard. Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984). This Court has held that "the district court is entitled to a substantial measure of discretion in dealing with consent decrees, and that as a result, on appeal, our duty is to ascertain whether or not the trial judge clearly abused his discretion. Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977). See also, United States v. Allegheny-Ludlam Industries, 517 F.2d 826, 850 (5th Cir.), cert. denied, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1975)." Williams, Id., at 1558. The district court was cognizant of the facts and circumstances of this case and the exception to the general rule of "abuse of discretion" review providing for de novo review as set forth in United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980), should not be applied as the exceptional circumstances set forth in that case are not present herein. See, Williams, supra at 1558, 1559. The district court was familiar with the lawsuit and reached its determination after review of the written submissions of the parties and oral arguments of the parties at the fairness hearing. In Alexandria, supra, both

the plaintiff and defendant agreed to the relief set forth in the consent decree. No third parties appeared in the case to contest the approval of the decree and no one raised any arguments in support of the district court's refusal to sign the proposed decree. Id. The Fifth Circuit was aware that this was not an ordinary consent decree case: "We thus face this case in a highly unusual posture ..." Id., at 1360. These circumstances are not present in this case.

CROSS-APPEAL

The district court erred as a matter of law in finding a prima facie case of discrimination without first providing the Intervenors due process; a chance to conduct discovery or examine the United States' expert witness. Review by this Court is therefore de novo. Donovan v. Robbins, 752 F.2d 1170 (7th Cir. 1985); White v. State of Alabama, 74 F.3d 1058 (11th Cir. 1996).

SUMMARY OF ARGUMENT

MAIN APPEAL

The district court determined that the consent decree entered into between the United States and the City of Hialeah should not be approved. The consent decree contained relief in the form of remedial retroactive competitive seniority. This form of relief was objected to by the Dade County Police Benevolent Association, the International Association of Firefighters Local 1102 and the Suau Intervenors. The third parties argued that approval of a decree containing this relief would diminish bargained for contractual rights of current police officers and firefighters.

The district court, in its discretion, held that approval of the decree would create an unusual adverse impact on both the police and fire departments in the City of Hialeah. Furthermore, the Court held that the decree was not fair as written as it would affect the vested contractual rights of members of the unions and the Intervenors. This decision was a correct application of the law and within the sound discretion of the district court.

CROSS-APPEAL

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

THIS COURT HAS NO JURISDICTION TO ENTERTAIN THE UNITED STATES' APPEAL

A. THE ORDER APPEALED FROM IS AN INTERLOCUTORY ORDER NOT APPEALABLE PURSUANT TO 28 U.S.C. §1292(A)(1)

The United States contends that the Order appealed from is appealable pursuant to 28 U.S.C. §1292(a)(1), which provides:

> (a) The courts of appeal shall have jurisdiction of appeals from:
>
> (1) interlocutory orders of the district courts of the United States, ... or of the judges thereof, granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court ...

This section allows an interlocutory appeal as of right when the District Court refuses to grant an injunction. The United States may argue that although the Order did not on its face refuse to grant injunctive relief, the Order had the practical effect of doing so.

In Carson v. American Brands, Inc., 101 S.Ct. 993, 450 U.S. 79, 67 L.Ed.2d 59 (1981), the Supreme Court set forth the test to be employed when considering whether an interlocutory order is

appealable pursuant to 28 U.S.C. §1292(a)(1). In that case, the court held that although the District Court's order declining to enter the proposed consent decree did not in specific terms refuse an injunction, it nonetheless had the practical effect of refusing injunctive relief. However, a party must show more than that the order has a practical effect of refusing an injunction. In Carson, the court stated:

> "For an interlocutory order to be immediately appealable under §1292(a)(1), however, a litigant must show more than that the order has the practical effect of refusing an injunction. Because §1292(a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly to ensure that appeal as of right under §1292(a)(1) will be available only in circumstances where an appeal will further the statutory purpose of "permitting litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence. Baltimore Contractors, Inc. v. Odinger, supra. At 181. 75 S.Ct., at 252. Unless a litigant can show that an interlocutory order of the District Court might have a 'serious, perhaps irreparable, consequence' and that the order can be 'effectually challenged only by immediate appeal,' the general congressional policy against piecemeal review will preclude interlocutory appeal."

In the Carson case, the Supreme Court held that the petitioners would have been irreparably injured if they were not entitled to an immediate appeal under §1292(a)(1). In footnote 12 to the Carson decision, the Supreme Court stated:

> "By refusing to enter the proposed consent decree, the district court made clear that it would not enter any decree containing remedial

> relief provisions that did not rest solidly on evidence of discrimination and that were not expressly limited to actual victims of discrimination." 446 F.Supp. At 788-790.
>
> "In ruling so broadly, the court did more than postpone consideration of the merits of petitioners' injunctive claim. It effectively foreclosed such consideration. Having stated that it could perceive no 'vestiges of racial discrimination' on the facts presented, Id., at 790, and that even if it could, no relief could be granted to future employees and others who are not 'actual victims' of discrimination, Id., at 789, the court made clear that nothing short of an admission of discrimination by respondents plus a complete restructuring of the class relief would induce it to approve remedial injunctive provisions."

In the present case, the District Court Order did not "effectively foreclose" consideration of a revised Settlement Agreement. The District Court noted:

> ". . . that all parties to this action, and all objectors, either agree with or do not dispute the majority of the provisions in the agreement.... the main contention seems to arise solely with regard to the remedial retroactive seniority provision."

(R. 2-23 at 11, 12) The District Court Order also stated that the court could not "approve the proposed Settlement Agreement at this juncture" (R. 2-23 at 18) It was abundantly clear to all parties that the District Court would entertain a revised agreement that was equitable. Since that Order was entered, all parties have reached a subsequent agreement that is both fair and agreeable to all parties. If the United States felt that it was irreparably injured as a result of the August 16, 1994 Order, it would not have

entered into this revised Settlement Agreement.

In a case which closely mirrors the present case, the Second Circuit has held that a district court order disapproving a proposed settlement did not fall within the recognized exception to the so-called final judgment rule, and the state cannot appeal from the disapproval of the settlement. State of New York v. Dairy Lea Co-Op, Inc., 698 F.2d 567 (2d Cir. 1983). The court took the Carson decision into consideration before reaching a decision that the order was not appealable. The court stated:

> "As set forth in Carson, the rationale for permitting appeals from denials of settlement agreements which have the practical effect of denying an injunction is to allow appellate review only of orders which might result in serious, irreparable harm to the party to whom injunctive relief is denied. NY and Dairy Lea have failed to make such a showing. The parties remain free to return to the bargaining table to devise a settlement which would respond to Judge Owen's objections. Indeed, the district court opinion explicitly expresses a willingness to consider further proposals." Dairy Lea, 698 F.2d at 570.

In the present case, the parties remained free and did in fact return to the bargaining table to devise a settlement which would respond to the District Court Judge's objections. In light of this agreement, the United States has failed to show that it would be irreparably injured if not granted appellate review.

This Court has followed Carson holding that an appeal as of right under §1292(a)(1) is available only if the appellant can show that the interlocutory order might have serious, perhaps

irreparable, consequences that the order may be effectually challenged only by immediate appeal. Administrative Management Services, Ltd., Inc. v. Royal Amer. Managers, 854 F.2d (11th Cir. 1988); Roberts v. St. Regis Paper Co., 653 F.2d 166 (5th Cir. 1981).[2] (The Roberts case is factually distinguishable from the present case in that in Roberts, the appeal was from an order refusing to dissolve a consent decree and both parties would have been irreparably injured by the district court's requirement that the parties abide by the terms of the consent decree even after it expired.) In Administrative Management, supra, at 1278, this Court held that a denial of a motion to compel arbitration which was reviewable after a final judgment was not appealable under 28 U.S.C.A. §1292(a)(1), because the parties did not suffer irreparable harm.

In Utah State Department of Health v. Kennecott Corp., 14 F.3d 1489 (10th Cir. 1994), the Tenth Circuit, applying the Carson test, held that the denial of a consent decree in a Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") action was not appealable as an interlocutory order that granted or

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[2]The Eleventh Circuit recognizes all Fifth Circuit decisions rendered prior to close of business on September 30, 1981, as binding precedent. *Virgo v. Riviera Beach Associates, Ltd., 30 F.3d 1350, 1357 (11th Cir. 1994).* The *Roberts* decision was decided on August 10, 1981, and is therefore binding precedent.

denied injunctive relief. The court held that no equitable or prospective relief was contained in the consent decree in that case. Id. at 1496. The court did not have the opportunity to address the questions of whether refusal to hear the appeal would cause irreparable harm or whether the order could only be effectually challenged by immediate appeal.

The parties in this case have agreed to a revised settlement which was approved by the district court judge. (R. 37). As the United States has not shown any irreparable consequences stemming from the denial of the original Agreement, this Court should dismiss the United States' appeal for lack of jurisdiction.

B. 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)

If the Court determines that they have jurisdiction over the initial appeal because the District Court Order effectively denied injunctive relief, the Court must also hold that they have jurisdiction over the cross-appeal filed by the Appellees/Cross-Appellants Raul Suau, et al. ("Suau") pursuant to 28 U.S.C. §1292(A)(1). The parties to a settlement agreement have to first make a showing of prima facie discrimination in order to get permanent or any injunctive relief. The Court must find that there

is a prima facie case of discrimination before it can reach the issue of whether to grant or deny approval of a settlement agreement. No race conscious relief can be granted by a district court without a valid finding of discrimination. Ensley Branch, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994).

In order to show a prima facie case of discrimination, the burden was on the United States to show that a gross statistical disparity existed between the number of minorities in the relevant labor pool and the number of minorities employed by the City of Hialeah. See, Maryland Troopers Association v. Evans, 993 F.2d 1072, 1077-78 (4th Cir. 1993). The United States offered the affidavit of Marian Thompson, Ph.D., employee of the Department of Justice, to establish their prima facie case. A numerical disparity alone is not proof of discrimination. U.S. v. City of Miami, 2 F.2d 1497 (11th Cir. 1993). Race conscious relief is only available if the statistical disparity is caused by unlawful conduct. City of Richmond v. I.A. Croson, Co., 488 U.S. 469, 507, 109 S.Ct. 706, 729 (1989). No such finding was made in the case sub judice.

As a district court's finding that there is a prima facie case of discrimination is required before the question of whether to grant approval or denial of the consent decree can be reached, this Court has the same jurisdiction over the cross-appeal as they have over the main appeal.

II

THE DISTRICT COURT'S DECISION DENYING APPROVAL OF THE CONSENT DECREE WAS PROPER

A. THE DISTRICT COURT MAY NOT APPROVE A SETTLEMENT THAT INCLUDES PROVISIONS AFFECTING THE RIGHTS OF A THIRD PARTY WITHOUT THAT PARTY'S CONSENT

At the fairness hearing, the unions and Intervenors objected to approval of the proposed settlement agreement. The unions and Intervenors did not object to the majority of the provisions contained in the agreement. What was objected to was a provision containing a the remedial retroactive competitive seniority provision. The district court held that approval of the decree in the face of the objections made by the unions and intervenors would not be appropriate as the court cannot bind non-consenting parties to a consent decree, relying on United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981). In addition, the district court rejected the proposed settlement agreement based on the affect the remedial retroactive seniority provisions would have upon the legal rights of incumbent employees. The court determined that the proposed settlement agreement created an unusual adverse impact and was not fair. In City of Miami, Id. at page 442, the court examined the circumstances under which a court may enter a consent decree in a multi-party suit when not all parties agree to the decree and parts

of the decree affect the rights of a non-consenting party. The court clearly held that that part of a consent decree affecting a third party not consenting to the relief contained in the decree cannot properly be included in the consent decree. Id. at page 442.

The United States relies heavily on Local No. 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501, 106 S.Ct. 3063 (1986). In Local 93, the plaintiffs, an association of black and hispanic firefighters, alleged they had been discriminated against on the basis of race and national origin in the hiring, assigning, and promotion of firefighters. The plaintiffs and the city defendant entered into a settlement agreement providing prospective relief to unknown persons who had not suffered any discrimination. The union intervened objecting to the proposed settlement. The union contended that Title VII of the Civil Rights Act of 1964, as amended, barred the district court from granting relief that benefitted individuals who were not actual victims of the alleged discrimination. The sole issue decided in Local 93 was whether a consent decree awarding relief under Title VII that may benefit individuals who were not the actual victims of the employer's discrimination is an impermissible remedy under Section 706(g) of Title VII. Section 706(g) provides, inter alia, that "no order of the court shall require the hiring, reinstatement, or promotion of an individual as an employee, if

such individual was refused employment or advancement for any reason other than discrimination on account of race, color, religion, sex, or national origin." The union intervenor argued that this provision precludes a district court from awarding relief under Title VII that would benefit persons not actual victims of discrimination. In essence, the intervenors argued that since the relief contained in the consent decree would not be an available remedy for the court to award after trial, the remedy could not be contained in the consent decree. The Supreme Court held that the district court was not barred from entering the consent decree because the decree provided broader relief than the court could have awarded after trial. Id., 462 U.S. at 526, 106 S.Ct. at 3077. The Supreme Court's holding was extremely narrow: "The only issue before us is whether Section 706(g) barred the district court from approving this consent decree. We hold that it did not." Id., 462 U.S. at 530, 106 S.Ct. at 3079.

Local 93 actually supports the position of the intervenors and can be easily reconciled with the holding in City of Miami. A "court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of non-consenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." (Citations omitted) Local 93, supra, 478 U.S. at 530, 106 S.Ct. at 3079. In this case, the district court clearly found that there was a valid dispute raised by the

unions and intervenors, concerning the remedy of retroactive seniority. In Local 93, the union never claimed that the terms of the proposed decree violated Title VII, the Constitution, or contractual rights of its members. Despite several requests from the Court that the union make a legal claim, the union failed to do more than protest that the consent decree was unreasonable because a less drastic remedy might suffice. Had the union raised a valid claim, the Court would have blocked entry of the decree. Id., 478 U.S. at 530, 106 S.Ct. at 3079. In this case, granting remedial retroactive competitive seniority would have clearly diminished legal and contractual rights of the unions and intervenors.

The district court was fully aware that it could give partial approval of the agreement regarding those provisions not in dispute. (R. 2-23 at 14, Footnote 12). In this case the proposed agreement provided for the remedy of retroactive seniority without any explicit reservation of this issue for the court's judicial determination. "All that the United States and the City have asked the court to do is pass on the fairness of the agreement as a whole." (R. 2-23 at 15). Simply put, the unions and the intervenors raised a valid claim; these claims remain and may be litigated by the unions and the intervenors. The district court correctly chose not to dispose of the valid claims of the non-consenting parties by denying approval of the agreement as a whole.

This court recently held that a decree that provides a remedy

agreed to by some, but not all, of the parties cannot affect the rights of the dissenting party. White v. State of Alabama, 74 F.3d 1058 (11th Cir. 1996), citing United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981). This court in White, supra, specifically addressed the holding in Local 93, reasoning that the Supreme Court in that case rejected the union's arguments that the consent decree was invalid because it was entered without the union's consent, because the union had presented no claim for relief to the district court. White, at 1075, Footnote 53. The union had no cause of action in its own right and its sole reason for intervening was to protest the settlement. Id. at page 1075, footnote 53. "Had the settlement affected the union's rights, the decree could not have been entered without its consent." Id. at page 1075, footnote 53.

In White, Judge Black, specially concurring, held that a consent decree that resolves the claims of intervenors without their consent is not valid. White, supra, at 1076. The court held that the intervenors were entitled to fully litigate their claims and that because they did not receive this opportunity the consent decree was not valid as it had been entered without their consent.

In the present case, "... the proposed agreement provides for the remedy of retroactive seniority without any explicit reservation of this issue for the court's judicial determination." (R. 2-23 at 15). The district court properly held that the unions and intervenors raised a valid claim and the consent decree could

not be entered absent a full opportunity to litigate those claims. The fact that the unions and intervenors raised a valid claim cannot be disputed by the United States. The unions and intervenors argue that the seniority relief contained in the proposed settlement would diminish the existing seniority rights of incumbent employees under their collective bargaining agreements. (See, United States brief, page 16.) The United States conceded at the fairness hearing that if the decree was approved with the retroactive seniority contained within it, that the consent decree could operate to deprive a vested interest of someone presently employed (R. 26 at 53-54).

The district court, in this case, also cited to Martin v. Wilks, 490 U.S. 755, 109 S.Ct. 2180, decided after Local 93, in which the Supreme Court held that "a voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly settle, voluntary or otherwise, the conflicting claims of another group of employees who do not join in the agreement. Martin, 490 U.S. at 768, 109 S.Ct. at 2188. The unions and intervenors have raised a valid claim and the district court's decision to deny approval of the agreement was proper.

B. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE RETROACTIVE COMPETITIVE SENIORITY PROVISIONS OF THE PROPOSED SETTLEMENT AGREEMENT WAS VIOLATIVE OF THE CONTRACTUAL RIGHTS OF THE UNIONS AND INTERVENORS

The United States argues that the District Court conducted no analysis and made no findings concerning the specific contractual rights of the unions and intervenors under their respective collective bargaining agreements. (See, United States brief, page 17). This argument is incorrect. All intervenors were members of the bargaining unit of the Dade County Police Benevolent Association (PBA). The PBA and the City of Hialeah are parties to a collective bargaining agreement containing a seniority provision. Article 28 of the collective bargaining agreement provided that seniority and rank be given preference with respect to days off and vacation time. Seniority was also to be considered in the event of a vacancy in any unit within the police department. If two officers sought a transfer to a vacancy in another unit, seniority would be considered by the City in determining which officer would fill the vacancy. These vested contractual rights would have clearly been diminished if a consent decree containing remedial competitive seniority was approved. The unions argued this at the fairness hearing. (R. 26 at 37-45). Though not specifically citing the seniority provisions contained in the collective bargaining

agreement, the District Court clearly considered the contractual rights of the members of the unions and the intervenors before reaching their decision. The Court held:

> "That the objections raised in the case sub judice stemmed not so much from the fact that the incumbent employees are unhappy with the proposed settlement because their expectations will not be realized, but more from the fact that their **vested, contractual rights** will be diminished. This is not merely a case in which disappointed incumbent employees are being asked to share the burden in curing the City's alleged discrimination, but in which the relief sought disrupts settled rights and expectations." (Citation omitted).

(R. 2-23 at 16, 17).

The United States now argues in its brief that the proposed individual relief did not violate the contractual rights of the unions or intervenors. However, the record clearly establishes that the United States "conceded at the hearing the existence of a present potential for the denial of or interference with these vested rights." (R. 2-23 at 17; R. 26 at 53, 54). Nothing in the United States' brief demonstrates an abuse of judicial discretion in this finding.

The intervenors possess specific contractual rights under the PBA's collective bargaining agreement with the City which would have been impaired by the settlement agreement. (R. 2-23 at 5-6). This position is entirely consistent with the union's position in City of Miami, supra. In City of Miami, the district court

concluded that the consent decree affected the contractual relationship between the City and the Fraternal Order of Police. The court made this determination based on a "prevailing benefits" provision contained in the collective bargaining agreement between the City and the Fraternal Order of Police. City of Miami, supra, at 446. A similar provision appears in the collective bargaining agreement between the PBA and the City of Hialeah. Section 2 of Article 29 of the agreement provides

> "the City and the Association will meet at the written request of either party to negotiate any proposed changes in those rights and benefits not specifically covered by this agreement. Current job benefits may be changed at the written request of either party; provided, however, no change shall be made except by mutual consent. This section shall not be subject to the impasse procedure provided for in this agreement."

The plain language of this section is that no job benefits may be changed by the City without the consent of the PBA. Benefits of Hialeah police officers, such as preference in days off, vacation and assignment are clearly determined by seniority. The Intervenors have vested, contractual rights in these seniority privileges, and the existence of these rights properly prevented the approval of a consent decree without the unions' and intervenors' concurrence. See, City of Miami, at 446.

This case is distinguishable from Kirkland v. New York State Department of Correctional Services, 711 F.2d 1117, (2d Cir. 1983),

relied upon by the United States. (See, United States brief, page 18). In Kirkland, the court determined that the intervenors did not have a specific contractual right in the preservation of their positions on a promotional eligibility list. Id., at 1128. The intervenors in this case have a vested contractual right which based upon the law and admissions by the United States the district court correctly found would be diminished by the proposed settlement agreement.

Howard v. McLucas, 871 F.2d 1000 (11th Cir. 1989), is similarly distinguishable from the present case. In Howard, Id., the intervenors were previously denied standing by the district court to contest the existence of past discrimination, the backpay award, or to contest veto remedial measures contained in the consent decree therein. See Howard v. McLucas, 782 F.2d 956, 960-61 (11th Cir. 1986). The intervenors in that case had failed to prove that the consent decree had any adverse impact on them.

The City of Hialeah entered into a collective bargaining agreement with the police union containing seniority provisions. The City then entered into a separate agreement with the United States in order to avoid liability under Title VII which would have the effect of altering the rights in the first contract. In W.R. Grace & Co. V. Local Union 759, 461 U.S. 757, 103 S.Ct. 2177 (1983) the United States Supreme Court recognized that an employer may not seek to enforce the provisions of a Title VII consent decree at the

expense of an earlier voluntary labor contract containing a bona fide seniority clause. The enforcement of the proposed consent decree in this case as urged by the United States would have the effect of abrogating the earlier collective bargaining agreement. The Supreme Court refused to do that in W.R. Grace and the district court properly refused to do the same thing in this case.

III.

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE RETROACTIVE COMPETITIVE SENIORITY PROVISIONS OF THE PROPOSED SETTLEMENT AGREEMENT CREATED AN UNUSUAL ADVERSE IMPACT AND WERE NOT FAIR

The effect a remedy will have on an innocent third party must be taken into account when formulating the remedy. Doll v. Brown, 75 F.3d 1200 (7th Cir. 1996). When third parties are involved, the court must carefully scrutinize the decree and determine that the effect of the decree on third parties is "neither unreasonable nor proscribed." Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984).

The District Court held that the proposed agreement should not be approved because it was not fair as to the unions, intervenors, and other objectors. (R. 2-23 at 17). The Court noted that almost half of the combined work force of the City police officers and firefighters filed objections to the remedial retroactive seniority provision contained in the proposed settlement agreement. The

District Court held: "A strong likelihood exists that an atmosphere of hostility and animosity will arise between the incumbent employees and the incoming victim class." (R. 2-23 at 18). The District Court did not abuse its discretion in determining that the retroactive seniority provisions created an unusual adverse impact and were not fair.

The decision not to grant the requested retroactive competitive seniority is within the sound discretion of the District Court. "There may be cases calling for one remedy but not another, and - owing to the structure of the Federal Judiciary - these choices are, of course, left in the first instance to the district courts." Franks v. Bowman Transportation Company, Inc., 424 U.S. 747, 96 S.Ct. 1251 (1976), citing Albemarle Paper Company v. Moody, 422 U.S. 405, 95 S.Ct. 2362 (1975). The district courts are not stripped of their equity power in this case by the Franks decision to determine what relief is proper. (See Franks, 424 U.S. at 779, 96 S.Ct. at 1271.) The Supreme Court realized in Franks, that an award of full, retroactive seniority may not be appropriate in every case. See Romasanta v. United Airlines, Inc., 717 F.2d 1140, 1148 (7th Cir. 1983).

The district courts, in determining what relief should be awarded, "should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be

denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases." Franks, 424 U.S. at 779, 96 S.Ct. at 1271. Several courts have interpreted this "unusual adverse impact" standard.

In Romasanta v. United Airlines, Inc., 717 F.2d 1140 (7th Cir. 1983), the court reasoned that "there is no basis in either law or logic for concluding that unusual adverse impact must reflect factors unrelated to the impact of the remedy upon incumbent employees." Id. at 1148. This is so because the Supreme Court in Franks was aware that the burden of granting retroactive seniority in most cases falls on innocent incumbent employees. Franks, 424 U.S. at 779, 96 S.Ct. at 1271.

The United States argues that retroactive competitive seniority may only be denied on the basis of unusual adverse impact arising from facts not generally found in Title VII cases. This is an improper reading of Franks. Franks is properly read "that full retroactive seniority should not be routinely denied discrimination victims merely because such relief will have some impact, as it always will, on incumbents." Romasanta, supra, at 1148. It should be noted that in Franks, neither the Supreme Court or the lower courts had relied on the competing rights of incumbent employees as a ground for denying seniority relief. This is why the adverse

impact upon the interests of the incumbent employees in Franks was found to be abstract and not arising from facts and circumstances generally not found in Title VII cases. In this case, the district court specifically relied upon the adverse impact the decree would have on vested, contractual rights of third parties in reaching its decision to deny approval of the consent decree.

In International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843 (1977), the Supreme Court held that the basic principles of equity should determine how to fashion a seniority remedy. An equitable balance should be struck between the contractual rights of innocent, incumbent employees and the statutory rights of victims. Id., 431 U.S. at 375, 97 S.Ct. At 1875. The district court in this case correctly placed great emphasis on the Supreme Court's holding in Teamsters that: "especially when immediate implementation of inequitable remedy threatens to impinge upon the expectations of innocent parties, the courts must look to the practical realities and necessities inescapably involved in reconciling competing interests, in order to determine the special blend of what is necessary, what is fair, and what is workable." Teamsters, Id., 431 U.S. at 375, 97 S.Ct. at 1875 (citations omitted).

The district court properly relied on both Franks and Teamsters, in deciding that the proposed agreement created the "unusual adverse impact," contemplated by Franks, and was not

"fair," as contemplated by Teamsters. (R. 2-23 at 17). The district court's decision met the unusual adverse impact test set forth in Franks, as the district court determined that an atmosphere of "hostility and animosity" would likely arise between the incumbent employees and the incoming victim class. The court further determined that granting the agreement would transcend the harm caused to incumbent employees; "it will pervade these obviously closely knit departments." (R. 2-23 at 18). This represents the sound exercise of judicial discretion which is entitled to deference.

The district court finding that the agreement was not "fair" under the Teamsters standard is supported by the record. The unions and intervenors agreed to all relief contained in the settlement agreement other than remedial competitive seniority which diminished and extinguished their own rights. The unions and intervenors agreed that granting the alleged discrimination victims "benefit seniority" was appropriate. The intervenors agreed that the alleged victims should receive appropriate backpay, an appropriate pension, an appropriate level of compensation, and accrual of vacation and sick leave. The intervenors objected to the granting of bidding rights for promotions, transfers, shift assignments, days off, and vacation days which could only be granted by taking the rights away from innocent employees. Rather than trying to negotiate a settlement fair to all involved, the

United States took an "all or nothing approach" in the fairness hearing. The district court judge was asked to determine what was fair and he did. The United States simply doesn't like the result. That does not, however, constitute an abuse of discretion.

The district court correctly denied approval of the proposed settlement agreement where the agreement was not fair and created an unusual adverse impact. The decision of the district court should be affirmed.

IV

CROSS-APPEAL[3]

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

The Suau Intervenors appeal that portion of the order in which Judge Highsmith held that a gross statistical disparity between the number of minorities in the available labor pool and the number of minorities employed by the City proved a prima facie case of discrimination. The court departed from the law in that there was a complete absence of any opportunity to offer evidence to rebut that conclusion.

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[3]The argument set forth in this Cross-Appeal is also responsive to the argument contained in Section IC of the Argument portion of the United States' brief.

In order to grant any race conscious relief, the parties to a settlement agreement must first demonstrate a valid basis for the race conscious relief sought in the agreement. The requisite evidentiary basis for race conscious relief exists if there is sufficient evidence to establish a prima facie case of discrimination in violation of Title VII. Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989). In order to establish a prima facie case of discrimination, a plaintiff must show that a gross statistical disparity exists between the number of minorities in the available labor pool and the number of minorities employed by that particular employer. Maryland Troopers Association v. Evans, 993 F.2d 1072, 1077-78 (4th Cir. 1993). In the present case, the court found that the parties to the Agreement established their prima facie case based on the statistical evidence proffered to the court, through the affidavit of Marion Thompson, Ph.D. This affidavit was dated and served on the parties on July 28, 1994, approximately two weeks before the fairness hearing.[4]

A numerical disparity alone is not proof of discrimination. U.S. v. City of Miami, 2 F.3d 1497 (11th Cir. 1993). Only if the disparity is caused by unlawful conduct is it a basis for race

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[4]It should be noted that the Intervenors were not granted party status until August 11, 1994 at the fairness hearing (R. 2-23 at 6) and therefore had no opportunity for discovery even though they requested the same. (R. 26 at 26-27).

conscious relief. Id. At 1507-1509. See also, City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 507, 109 S.Ct. 706-729 (1989). In the present case, only Dr. Thompson's affidavit was offered. Dr. Thompson did not testify and was not subject to cross-examination. The Intervenors requested an opportunity to conduct discovery concerning possible causes of the numerical disparity but were denied that opportunity. (R. 26 at 26, 27). Statistics, unless placed in context, have little probative value in employment discrimination cases. See, e.g., Teamsters, supra, 431 U.S. at 340, 97 S.Ct. at 1856, 1857 (remarking that, in a Title VII case, the usefulness of statistics "depends on all of the surrounding facts and circumstances"); Nash v. Consolidated City of Jacksonville, 895 F.Supp. 1536, 1542 (M.D. Fla. 1995)(noting that "statistics are inherently slippery in nature" and observing that statistical findings "can be challenged on various grounds," including "small or incomplete data sets and inadequate statistical technique") aff'd, 85 F.2d 643 (1996). The proof offered by the United States is hearsay and the Intervenors were denied any due process to challenge the conclusion reached by the District Court. Without a valid finding of discrimination, no race conscious relief is appropriate. See, Ensley Branch, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994).

In Williams v. City of New Orleans, supra, the district court considered the testimony of an expert witness in determining what

constitutes a "relevant labor market." The district court in that case decided that the statistics offered overstated the percentages of minorities in the relevant labor market. Id., at 1562. This decision was reached after hearing the conflicting expert testimony of the Intervenors. Additionally, the district court felt that the expert's statistical analysis was flawed in its choice of what constituted the relevant labor market. Id., at 1562. In the present case, the Intervenors had no opportunity to present testimony regarding the statistics offered by the United States. Furthermore, no evidence was presented as to what the relevant labor market should be in this case. Dr. Thompson is not an expert in labor economics and she lacks the ability to offer an opinion as to what the relevant labor market should be. Opinions of experts are valued only when they are based upon facts which are accepted and when the opinion itself is based on sound reason and judgment. Hossie v. United States, 682 F.Supp. 23 (N.D. Pa. 1987). Dr. Thompson is a statistician not qualified to offer an expert opinion as to the relevant labor market.

In United States v. McHenry County, No. 94-C-50086, slip. Op. at 3 (N.D. Ill. Sept. 6, 1996)(appeal pending)[5], the Fraternal Order of Police (FOP) filed a motion to intervene in a consent decree case four days before the fairness hearing. On the day of

[5]A copy of this decision is included as an addendum to the United States' brief.

the fairness hearing, the Magistrate granted the FOP's motion to intervene. The FOP was given a discovery deadline and the fairness hearing was continued for approximately one and one-half months. The Suau Intervenors filed their motion to intervene on July 11, 1994, one month before the fairness hearing. The motion was not granted until the fairness hearing on August 11, 1994. Additionally, in the McHenry County case, the United States specifically retained a labor economist to testify as to the relevant labor market pool. Id., at p. 72. A labor economist was not retained in this case.

The Intervenors in this case were not given a discovery deadline and the fairness hearing was not continued at their request. As the Intervenors were denied due process, the finding of a prima facie case of discrimination by the district court was improper as a matter of law.

CONCLUSION

MAIN APPEAL

The district court's order denying approval of the proposed Settlement Agreement should be affirmed.

CROSS-APPEAL

If this Court determines that the district court's denial of the proposed Settlement Agreement was improper, this case should be remanded to the district court for further proceedings with instructions to permit the Intervenors a meaningful opportunity to challenge the evidence on the issue of prima facie discrimination.

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 February 10, 1997, two copies of the foregoing Brief for the Intervenors as Appellees/Cross-Appellants were served by first-class 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

ROBERT D. KLAUSNER