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Race-Affirmative Action: Piscataway

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Piscataway

THE WHITE HOUSE

WASHINGTON

August 12, 1997

MEMORANDUM FOR THE PRESIDENT

FROM: **DAWN CHIRWA** Done
WILLIAM MARSHALL w/m/Done

SUBJECT: **BRIEFING ON THE CASE OF PISCATAWAY V. TAXMAN**

Tomorrow, August 13, 1997, you are scheduled to be briefed on the options available to the United States in the case of Piscataway Bd. of Education v. Taxman which the Supreme Court has agreed to review in its next term. To assist you in that briefing, we have attached a memorandum from the Solicitor General to the Attorney General setting forth a brief background of the case, recommendations as to whether the United States should file an amicus brief in the case and what arguments such a brief should make. At the briefing, we hope to explore the Solicitor General's recommendations, any alternatives that are available to us as well as the ramifications of these various options.

LIST OF ATTENDEES

Walter Dellinger
Chuck Ruff
John Podesta
Elena Kagan
Cheryl Mills
Dawn Chirwa
Bill Marshall
Seth Waxman

Attachment

U. S. Department of Justice

Office of the Solicitor General

The Solicitor General *Washington, D.C. 20530*

July 29, 1997

TO: THE ATTORNEY GENERAL

FR: WALTER DELLINGER

RE: No. 96-679, Piscataway Bd. of Education v. Taxman

BACKGROUND

The Piscataway Board of Education decided to eliminate a position in the Business Education Department of the Piscataway High School. The two teachers with the least seniority in that Department were Sharon Taxman, who is white, and Debra Williams, who is black. Having started the same year, they had equal seniority. Rather than breaking the seniority tie by random selection as it had done in the past, the Board, invoking its affirmative action policy, used race as the deciding factor and laid off Taxman and retained Williams.

The United States (under the Bush administration) filed suit against the Board, alleging that Taxman had been subjected to discrimination on account of race in violation of Title VII. Taxman intervened, asserting her own claim under Title VII. The Board sought to defend its decision by arguing that retaining Williams rather than Taxman furthered its interest in a diverse faculty. The district court found in favor of the United States and Taxman. By then, Taxman had been rehired, and the Board was in the process of eliminating its affirmative action policy. The district court awarded Taxman backpay and other monetary relief.

When the Board appealed that money judgment, the United States (under the Clinton Administration) attempted to file a brief supporting the Board. The Third Circuit rejected the brief, but allowed the United States to withdraw as a party. With only the Board and Taxman remaining in the case, the Third Circuit affirmed the judgment awarding Taxman monetary relief. The Third Circuit agreed with the district court that Title VII does not permit non-remedial affirmative action and that race may not be used in layoff decisions.

After the Board petitioned for certiorari, the Court invited the United States to express its views on whether certiorari should be granted. Although we urged the Court not to grant certiorari, certiorari was granted. The Board's brief is due on August 25, 1997, and Taxman's brief is due approximately 30 days thereafter.

DISCUSSION

The Attorney General has primary responsibility for enforcing Title VII against public employers, and the EEOC has primary responsibility for enforcing Title VII against private employers. Consistent with those responsibilities, we have participated in the Supreme Court either as a party or as amicus curiae in almost every (if not every) Title VII case. Given the government's role as primary enforcer of Title VII, our tradition of participation in the Supreme Court, and the importance of the Piscataway case, we have a responsibility to the Court and to the public to file a brief stating the views of the United States.

The question of what our brief should say is a sensitive one. After weighing several options and consulting with representatives of major civil rights litigation groups, I have concluded that we should file a brief arguing that the money judgment awarded to Taxman in this case should be affirmed on the narrow ground that the Board failed to offer or defend an adequate justification for this particular race-based layoff decision. The Court would then not have to reach the broad question whether Title VII always precludes non-remedial affirmative action. Several considerations have persuaded me of the wisdom of that course.

1. Most important, it is consistent with my understanding of the law. The use of race in layoffs generally imposes greater burdens than the use of race in hiring and promotion and therefore calls for a correspondingly greater justification. In this particular case, the Board clearly failed to satisfy that burden. Although the Board, in the course of litigation, asserted an interest in faculty diversity, it did not offer any evidence that such an interest could not be achieved through hiring and assignment policies, which are less burdensome than the use of layoffs. In fact, the record showed that the faculty at Piscataway High School was already diverse. The Board asserted an interest in diversity in the Business Department itself, which contains nine of the high school's 141 teachers. But no evidence was offered that diversity in the Business Department would promote any compelling educational objective that would not be served adequately by having a faculty that was generally diverse, as the faculty already was. What is worse, the Board did not even offer any evidence that it actually relied upon a "department diversity" rationale when it made the layoff decision. Thus, while the opinions of the courts below were incorrect in concluding that Title VII forbids all non-remedial affirmative action, the actual judgment awarding Taxman monetary relief should nonetheless be affirmed because of the Board's failure to offer any adequate justification for using layoffs to achieve diversity among this particular small subset of the faculty.

2. There is a strong likelihood that five Justices will be inclined to agree with the Third Circuit's broad opinion that Title VII never permits non-remedial affirmative action. Such a holding would be a disaster for civil rights in employment, rendering unlawful even the most carefully designed non-remedial affirmative action plans. Our best chance of avoiding that outcome is to persuade one or more of those five Justices that the case can be resolved against the Board on narrower grounds, and that the broader issue need not be reached. The Court is sometimes receptive to the argument that a case should be decided on the narrowest possible grounds. And at least one of the Justices inclined to construe Title VII to bar all non-remedial

affirmative action may be concerned about the consequences of such a broad holding and therefore willing to put off that issue.

Like our brief at the certiorari stage, the brief I propose would also argue our strongly held belief that Title VII does not preclude all non-remedial affirmative action. The Court may resolve that issue even if we urge it not to. We therefore need to address it. Equally important, unless the Court believes that there is a strong argument for non-remedial affirmative action in some circumstances, it will have no incentive to decide this case on narrower grounds.

I believe that the Court is virtually certain to rule against the school board in this case. Our best opportunity to avoid a broad and harmful ruling invalidating non-remedial affirmative action in employment is to persuade the Court that there is a clear basis for affirming the money judgment on narrow grounds.

3. The approach I propose demonstrates that we are serious in our commitment to mend (without ending) affirmative action. The Board's claim that it fired Taxman in order to further Business Department diversity, in a school that was itself already diverse in its teaching faculty, will be viewed by most members -- perhaps every member -- of the Court as indefensible. If we nonetheless attempt to support the Board, the Court is apt to conclude that we will support any use of race that is labelled affirmative action.

4. At a recent meeting in my office with representatives of civil rights litigating groups, I outlined the approach I am recommending here. No person at the meeting objected, and several offered encouragement. All agreed that the Board's decision is not defensible based on the record in this case. My strong perception is that, while the groups may take a somewhat different position in their own filing, they agree that it is important for the United States to take the position I am recommending.

5. While the position I am advocating with respect to the narrow issue of Taxman's layoff is at variance with the brief that the government attempted to file in the Third Circuit, that brief was written before the government reexamined its policies on affirmative action in the wake of the Supreme Court's decision in Adarand. As a result of that through reexamination, the Department of Justice issued a fully vetted memorandum that offered extensive guidance to federal agencies on the legal standards governing affirmative action. Thus, our revised position on the narrower question is fully consistent with the conclusions of the Adarand memorandum. More significantly, we will strongly reaffirm our previously stated views about the legitimacy of non-remedial affirmative action under appropriate circumstances.

6. Our brief at the certiorari stage has already paved the way for such a brief on the merits. In that brief, we stated that our present views on affirmative action are contained in the Department of Justice Adarand memorandum. Consistent with that memorandum, we argued that a school board has an obligation to justify any use of race and that the mere assertion that race-based personnel decisions promote diversity is insufficient, standing alone. We noted that the use of race in layoffs imposes a different burden from the use of race in hiring or promotion. And we pointed out that the Board in this case had failed to produce evidence that diversity in

the Business Department served any educational goal that was not already served by diversity in the school as a whole. The brief I propose would simply add to those points the logical conclusion that the Board violated Title VII.

7. The brief I am proposing would be called a Brief for the United States In Support of the Affirmance of the Judgment. While we could delay filing such a brief until Taxman's brief is due in late September, I propose that we file it when the Board's brief is due, on August 25. Because the brief I propose will attack the Third Circuit's reasoning while defending its judgment, it is appropriate to give both parties an opportunity to respond to it. Such a filing also eliminates unnecessary speculation that would arise with respect to the Government's position if the August 25 date for filing in support of the School Board passed without our participation. By filing on that date we can let a carefully crafted brief speak for itself, strongly defending affirmative action generally while finding that a proper justification was lacking for the particular use of race at issue in this case.