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IMPERMISSIBLE COLLATERAL ATTACK DOCTRINE AND COURT-APPROVED AFFIRMATIVE ACTION: NEW PERSPECTIVES AFTER *WILKS* AND THE CIVIL RIGHTS ACT OF 1991

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ABSTRACT

Contrary to reports, the United States Supreme Court's June 12, 1989 ruling in the case of *Martin v. Wilks* did not eliminate affirmative action plans. It did remove the "impermissible collateral attack doctrine" defense by employers as a means to avert reverse discrimination lawsuits, whereby federal courts would deny actions for reverse discrimination by employees who were not party to consent decrees. However, the *Wilks* decision affects *only* those parties not privy to the decree. If, for example, white employees or their representatives had participated in the consent agreement, they would still be subject to the doctrine. These points were incorporated into the Civil Rights Act of 1991. Essentially, *Wilks* requires employers to establish practical and viable affirmative action plans, while simultaneously precluding poorly planned, quick-fix programs that unnecessarily exclude whites. Employers should ensure that their current plans are based on justifiable utilization analysis and that the goals and timetables are reasonable in light of the *Wilks* decision.

INTRODUCTION

The *Wilks* decision was initially viewed as a "setback" in affirmative action for minorities and women in a year that had already brought forth three previous disappointing civil rights rulings [1]. Many commentators have argued the June 12, 1989 Supreme Court ruling in *Martin v. Wilks* [2], undermines court-approved

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affirmative action plans by allowing nonminority plaintiffs to more easily challenge such decrees in court.

The purpose of this article is to explain the *Wilks* decision and its impact on the construction of the consent decree provisions of the Civil Rights Act of 1991. Additionally, the impact that both the ruling and the statute are likely to have on the future of affirmative action in the United States is discussed. This article specifically addresses what the *Wilks* decision *does* and *does not* require of an employer's court-approved affirmative action plan. To enhance the understanding of the effects of both *Wilks* and the Civil Rights Act, this article includes a review of affirmative action plans under the law and the "impermissible collateral attack" doctrine as it relates to court-approved consent decrees. In doing so, it is also necessary to briefly explain the legal concept of "joinder" contained in the Federal Rules of Civil Procedure [3].

AFFIRMATIVE ACTION PLANS IN REVIEW

Voluntary Affirmative Action Plans

Although there are several sources of formal affirmative action plans [4], the most common are those adopted by contractors to qualify for federal contracts governed by Executive Order 11246 and its subsequent revisions [5]. This order, which applies only to prime contractors and subcontractors who hold federal contracts in excess of $10,000, states specifically that the contractor will take affirmative action to ensure that protected group members are recruited and employed [6]. Additionally, any prime contractor or subcontractor who holds nonconstruction contracts in excess of $50,000 or any institution that serves as a depository for federal funds is required by the Office of Federal Contract Compliance Programs' (OFCCP) Revised Order No. 4 to develop a "written affirmative action compliance program for each of its establishments" [6, § 60-2.1(a)].

Federal regulations require these formalized affirmative action plans to contain three basic components. First, the employer must conduct a "utilization analysis" to determine whether particular protected groups are presently underrepresented in its workforce. This is usually accomplished by comparing the percentage of protected group members in the employer's internal labor market to the percentage of *qualified* protected group members in the relevant external labor market [6, § 60-2.11]. The second component of an affirmative action plan is the portion referred to as "goals and timetables," which represent the desired level of protected group participation in the employer's workforce and the time frame in which the employer intends to achieve that level of participation [6, § 60-2.12]. Finally, a formalized affirmative action plan must contain an "action plan," which addresses the specific actions the employer intends to pursue to accomplish the goals and meet the time requirements [6, § 60-2.13].

Affected employers are required to provide a summary of the finalized programs to the director of the OFCCP. Formalized affirmative action plans under Revised Order No. 4 are to be updated annually on the anniversary of the plan's implementation [6, § 60-2.14]. It should be noted that these plans are "voluntary" in that the contractor has the choice of either establishing the affirmative action plan or being disqualified from contract consideration.

Another form of voluntary affirmative action occurs when employers elect to adopt formal affirmative action plans to achieve a social responsibility goal or to preclude potential unlawful discrimination charges. In such instances, employers may either attempt to remove the effects of historical discrimination or remove an imbalance in the workforce. Regardless of the employer's motives, to avoid charges of reverse discrimination plans must meet certain criteria [7]. Because the courts expect such plans to be predicated on some "manifest imbalance" in the employer's workforce, a thorough utilization analysis is highly recommended to substantiate this.

Involuntary Affirmative Action Plans

The source of involuntary affirmative action is Title VII of the Civil Rights Act of 1964 [8]. Under § 706(g) of the act, an employer found to be engaging in an unlawful employment practice (unlawful discrimination) may be enjoined by a federal court from continuing such practices and ordered to take "such affirmative action as may be appropriate" [8, § 2000e-5(g)]. This affirmative action may include, but is not limited to, hiring or reinstatement of affected employees, back pay awards, promotion, or "any other equitable relief as the court deems appropriate" [8, § 2000e-5(g)].

Court-ordered affirmative action plans have long been recognized as a means for the correction of past discriminatory practices. In this respect, affirmative action has been accepted as a remedial tool since the 1965 Supreme Court decision, *United States v. Louisiana* [9]. In that case, the Court ruled that a federal court "has not merely the power but also the duty to render a decree which will, so far as possible, eliminate the discriminatory effects of the past, as well as bar like discrimination in the future" [9, p. 154]. The permissible use of court-ordered affirmative action plans to correct past discrimination was recently reaffirmed by the Supreme Court's ruling in *United States v. Paradise* [10]. In *Paradise,* the Court upheld a court-mandated plan calling for a promotion quota for black state troopers on a one-to-one basis with white state troopers until blacks constituted 25 percent of the total labor force [10, p. 185].

Voluntary Court-Approved Affirmative Action Plans

Closely connected to court-ordered affirmative action plans are those that arise as a result of court-approved consent decrees. In these instances, employers attempt to reach an acceptable compromise or solution to the discrimination

problem with the plaintiffs (the group being discriminated against) before the court hearing the case renders a judgment. In essence, the employer develops an affirmative action plan acceptable to the aggrieved party, then seeks to adopt it in lieu of one that would unilaterally be imposed by the court.

Perhaps the best way to demonstrate how this mechanism works is to follow the actions of the City of Birmingham, Alabama (hereinafter referred to as the city), and the Personnel Board of Jefferson County, Alabama (hereinafter referred to as the board), which resulted in the consent decrees at the heart of the *Wilks* decision.

In 1974 both the city and the board had been sued by seven black individuals and the Ensley Branch of the National Association for the Advancement of Colored People (NAACP) for violating Title VII of the Civil Rights Act through racially discriminatory hiring and promotion practices in various public service jobs, including that of firefighters [11]. The cases were eventually consolidated and tried before the Federal District Court for the Northern District of Alabama. Prior to a final judgment from that court, the city and the board entered into proposed consent decrees with the plaintiffs. The proposed decrees, which contained extensive remedial goals and action plans for the long-term hiring and promotion of blacks, were subsequently approved by the district court [12]. There was nothing unusual about this arrangement, as court-approved consent decrees are far more common than court-ordered affirmative action plans [13].

THE IMPERMISSIBLE COLLATERAL ATTACK DOCTRINE

Court-approved consent decrees give rise to an interesting legal question when reverse discrimination is alleged—the issue of the "impermissible collateral attack" doctrine. Under this doctrine some, but not all, federal courts would deny actions for reverse discrimination suits by employees who were *not* parties to the consent decrees (nonprotected group employees) on the grounds that employment decisions mandated by the decrees were not subject to "collateral attack" [14]. In regard to consent decrees, impermissible collateral attack doctrine precludes any party to a decree from attacking that decree after it has been entered by a court. Once the parties have agreed to follow the decree, neither party can reopen the issue by initiating a new suit—such as a reverse discrimination suit [15].

Some federal courts have even applied "collateral attack" immunity to nonparties when consent decrees involve "voluntary" affirmative action [16]. The underlying rationale is the belief that allowing challenges to consent decrees would clearly violate the policy under Title VII to promote settlement [17]. Once entered, the only claim an affected party can make is that the other party is not complying with the decree—a party may request enforcement of the original decree, but cannot request a new independent action [18]. Thus, nonparties to the original decree were precluded from challenging the decree on the grounds of reverse discrimination.

There were two problems with the application of the "impermissible collateral attack" doctrine to court-approved consent decrees prior to *Wilks*. First, litigants who were not parties to the initial consent arrangement contended they could not be bound to an agreement by which their interests were *not* adequately, if at all, represented. In many instances, the terms of the consent decree were developed exclusively by the employer and the minority group alleging discriminatory employment practices. More often than not, nonminority employees were entirely excluded from the process. Not surprisingly, nonminority employees argued it was a violation of their due process rights for a judgment to be binding on them when they had had no opportunity to be heard [19].

The second problem confronting the application of the "impermissible collateral attack" doctrine to these decrees was its lack of universal acceptance [20]. For instance, some courts held that an employer's actions could be defended by merely showing that such actions are part of the court-approved consent decree. Thereafter, the court would impose the doctrine to deny further third-party litigation [2]. In other instances, however, an employer would attempt to remove a reverse discrimination complaint by asserting that the organization and the plaintiffs were bound by a consent decree, only to find that the court would ignore this defense entirely [21]. This is precisely what occurred in *Wilks* [2, p. 2188].

THE *MARTIN v. WILKS* DECISION

Martin v. Wilks involved consent decrees between two employers (the city and the board), a class of minority individuals, and the United States. The plaintiffs (black employees and applicants) alleged that the defendants (the city and the board) maintained racially biased hiring and promotion practices. These accusations were found to be valid in a trial [22]. Consequently, the defendants and plaintiffs entered into proposed consent decrees, under whose provisions specific annual hiring goals were established for blacks in specified job classifications. For example, there was to be a 50 percent annual hiring goal for black firefighters, a 50 percent annual goal for black fire lieutenants, and a 25 percent annual goal for blacks in engineering positions [23].

The federal district court provisionally approved the decrees in June 1981 [24]. In August 1981, the court convened a fairness hearing to hear objections submitted by the Birmingham Firefighters Association (BFA). The next day, the BFA moved to intervene on the grounds that the proposed consent decrees would have a substantial adverse impact upon nonblack firefighters. The court denied the BFA's motion as untimely and approved the consent decrees [24]. This action by the district court was upheld on appeal [24, p. 1519]. At this time, seven white firefighters filed a complaint requesting a preliminary injunction against the decrees because they illegally discriminated against whites on the basis of their race [24, p. 1519]. A request for a preliminary injunction was denied by the district court and later by the court of appeals. Because these courts held that legal

remedies would be adequate if they prevailed in their intervention, the white firefighters were not entitled to a preliminary injunction. This precluded the white firefighters from adequately demonstrating the "irreparable" harm necessary to secure a preliminary injunction [24, pp. 1519-1520].

Later, the firefighters, joined by other Birmingham city employees and the federal government, filed a complaint in district court alleging that the city and the board had denied them promotions in favor of less-qualified blacks and that such decisions were strictly racially motivated [25]. While both the city and the board admitted that the promotions were indeed made with consideration as to the candidate's race, both contended these decisions were predicated on the 1981 consent decrees. Since the decrees were binding on the employers and on all employees (white as well as black), the city and board argued the promotion practices were lawful [23, p. 1496].

The district court ruled in favor of the city and the board, holding that the plaintiffs (the white employees) were in fact under the doctrine of "impermissible collateral attack," and, therefore, bound by the consent decrees. Specifically, the district court viewed the primary issue in this case as enforcement of the city decree rather than as Title VII discrimination [23, p. 1497]. Since the court held that both the United States and the other plaintiffs were bound by the decrees, the city's selection procedures could not be challenged on the basis of criteria not part of those decrees [26].

Citing the *Firefighters Local No. 93 v. City of Cleveland* [21, p. 501], the Eleventh Circuit Court of Appeals reversed this part of the district court's decision, specifically rejecting the application of "impermissible collateral attack." According to the *Firefighters* decision, "[a] court's approval of a consent decree between some of the parties . . . cannot dispose of the valid claims of non-consenting [parties]; if properly raised, these claims remain and may be litigated by the [non-consenting parties]" [21].

The Supreme Court's Ruling

This portion of the Eleventh Circuit's ruling was affirmed by the Supreme Court on June 12, 1989 in a five-to-four decision. In his majority opinion, Chief Justice Rehnquist explicitly rejected the doctrine of "impermissible collateral attack" when applied to parties not privy to consent decrees. Relying heavily on Rule 19 and Rule 24 of the Federal Rules of Civil Procedure, the chief justice held that a decree among parties to a lawsuit resolves issues among them, but does not preclude the rights of strangers to those proceedings [2, pp. 2180-2185].

According to the majority, Rule 19 embodies factors a court must consider when deciding whether to allow an action to proceed in the absence of an interested party [2, pp. 2185-2186]. It encompasses the legal concept known as "joinder," under which a person is "joined" as a party in the action if s/he claims an interest relating to the subject of the action and the outcome of the action in that

person's absence may impede the person's ability to protect that interest [27]. Accordingly, the Supreme Court held that the *Wilks* respondents could not be bound by the provisions of consent decrees in which they had not been initially "joined." Additionally, the *Wilks* respondents could not be denied the right to challenge the employment decisions under the consent decrees, since they were not party to the 1981 decrees.

The Initial Impact of *Wilks* on Employers

Contrary to the many assertions in the popular press at that time, *Wilks* did not eliminate affirmative action plans. Nor did *Wilks* make affirmative action plans indefensible in reverse discrimination suits. Even after *Wilks*, a properly constructed affirmative action plan still affords employers a viable defense in such litigation, as will be discussed later.

What *Wilks* has done is remove the "impermissible collateral attack" defense from employers as a means to preclude reverse discrimination suits. However, the *Wilks* decision affects only those suits brought by employees who were *not* party to the consent decree. If, for example, white employees or their representatives (i.e., a labor union or professional association) had participated in the consent agreement, then the white employees *would be* subject to "impermissible collateral attack" doctrine. Having been party to the original decree, these employees would be bound by the arrangement. The determining factor here is not that a court-approved decree exists, but whether a potential litigant was party to the decree. Only when the party challenging the decree was a party to the decree does "impermissible collateral attack" doctrine apply.

WILKS AND THE CIVIL RIGHTS ACT OF 1991

To demonstrate the full impact of *Wilks,* one has only to examine its effect on subsequent cases and legislation involving reverse discrimination and consent decrees. Imposing a duty on a third party is at the heart of the *Wilks* decision, and this issue was given much consideration in the construction of the Civil Rights Act of 1991. Although the law was the direct consequence of Congress' dissatisfaction with several landmark decisions that emerged from the Supreme Court's 1989 term [28] and were felt by some legislators to have dramatically diminished the scope and effectiveness of many accepted civil rights protections, much of *Wilks* remains unaltered by the 1991 law.

The Civil Rights Act of 1991 contains no provision that would force nonparties to consent decrees to become automatically bound by the court-approved consent decree's provisions. However, the finality of consent decrees has been greatly strengthened by the legislation, which declared that "an employment practice that implements and is within a consent judgment or order resolving a claim of employment discrimination under the United States Constitution or federal civil

rights laws may not be challenged in a claim under the United States Constitution or federal civil laws" if certain criteria have first been met [29]. Among the disqualifying criteria are those persons who, prior to the entry of the consent decree, had notice of the pending arrangement and had a *reasonable opportunity* to voice their objections to its contents. Additionally, employees who were reasonably represented by another person or persons who challenged the judgment prior to its entry may not subsequently challenge it later. Finally, if the court which rendered the decree determines that "reasonable efforts were made to provide notice" to interested and affected parties, no party may challenge the judgment at a later date. In essence, the act mandates the inclusion of all affected parties or their representatives at the initial negotiations. By this requirement to ensure inclusion, the act's framers attempted to circumvent future challenges. The act further bars all after-the-decree challenges by adversely affected parties, provided that they had been afforded sufficient notification of the consent agreement and given an opportunity to intervene before it was adopted [29]. Whether they, or employees who were similarly affected by the decree's provisions, elect to intervene is immaterial. If all potentially affected groups were afforded the opportunity to be party to the initial consent agreement, the impermissible collateral attack doctrine can be legally exercised in the future.

IMPLICATIONS FOR EMPLOYERS

Employers who stand to suffer the most from the current legal environment are those who entered into court-approved affirmative action plans prior to *Wilks* and the passage of the Civil Rights Act of 1991. Since, in many instances, the nonminority employees were excluded from the originally court-approved plan, these employees may be perfectly free to challenge the provisions of these plans. This would be particularly disadvantageous to organizations that have poorly conceived affirmative action plans cloaked beneath a court-approved consent decree. Among the plans particularly susceptible to legal challenges are those providing for employment decisions predicated exclusively on race or sex, as these could very likely violate § 703 of the Civil Rights Act. If the challengers are permitted to file reverse discrimination suits, it is likely that the plans just described would invariably be indefensible.

Employers, therefore, would be well-advised to examine their existing affirmative action plans and policies to ensure they are properly framed and can withstand strict scrutiny in court. Some of the critical tests a good plan must pass were reiterated in the case of *Johnson v. Transportation Agency* [30]. In this Supreme Court decision relating to voluntary affirmative action, a defensible plan was one that met four criteria.

First, the affirmative action plan must be justified by either the employer's own prior discriminatory practices or a "conspicuous" imbalance in traditionally

segregated job categories. The latter can be demonstrated and supported by a properly conducted utilization analysis [31].

Second, the plan cannot authorize blind hiring—hiring based strictly on the applicant's race or sex. The employer *must* consider the applicant's qualifications in making a hiring decision. The minority applicant must possess necessary prerequisites to adequately perform the job in question. In other words, the employer may hire or promote only "qualified" protected group candidates [32]. Note that the criterion here is only "qualified," not "more qualified." An employer may hire a "qualified" minority applicant over a "more qualified" white applicant [32, p. 641, n. 17], In this way, race is considered to be *one factor among several other criteria* in making the selection decision, but not the only criterion.

Next, an affirmative action plan cannot unnecessarily trammel nonprotected group members' rights or create an absolute ban to their hiring or advancement. Any plan that completely excludes whites from consideration will be indefensible as a violation of Title VI [31, p. 209]. Additionally, such plans should not result in the termination of white employees or their replacement by minority employees.

Finally, the plan must be temporary in nature. That is to say, the plan must be designed to "attain," not "maintain," a balance [21, p. 529]. After all, the purpose of all affirmative action plans is to eliminate underrepresentation of minorities and women in the workplace. Once the plan achieves this goal, it lapses.

CONCLUDING REMARKS

The important point for employers to remember about the *Wilks* ruling is that the Supreme Court has not mandated any new requirements. In fact, the ruling upholds basic tenets of our legal system—individuals cannot be bound by agreements to which they were not party nor were they afforded the opportunity to become party [2, p. 2188]. As a result of the *Wilks* decision and the Civil Rights Act of 1991, employers must establish practical and viable affirmative action plans, while ensuring that *all* affected parties are given the opportunity to present their objections or views. Employers should, therefore, evaluate their current plans to ensure they are based on justifiable utilization analysis and that the proposed goals and objectives are reasonable.

Realistically, employers should expect an increase in the number of reverse discrimination suits. After all, a consent decree, in and of itself, is no longer sufficient to block such litigation. By removing the application of the "impermissible collateral attack" doctrine to nonparties, employers who have not developed viable action plans will find themselves with little to defend. As for employers who have taken the time and made the effort to create an acceptable plan, they will have little to fear from *Wilks* [33]. For in a reverse discrimination suit, or any instance when the employer has based an employment decision on race or gender, the burden of proof shifts to the employer to show that there is a

nondiscriminatory rationale for that decision. The existence of a well-developed affirmative action plan provides such a rationale [32, p. 626].

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ENDNOTES

1. Greenhouse, *Court, 5-4, Affirms a Right to Reopen Bias Settlements,* New York Times, June 13, 1989, at 1, col. 6.
2. 109 S.Ct. 2180 (1989).
3. Fed.R.Civ.P. 19 (1988).
4. The other federal sources of affirmative action are involuntary court-ordered plans and voluntary employer-initiated plans, J. Ledvinka and V. Scarpello, *Federal Regulation of Personnel and Human Resource Management,* PWS-Kent, Boston, pp. 166-167 (1991).
5. 29 U.S.C. §2.7 (1988).
6. 41 C.F.R. §60-2.1 (1990).
7. *Kaiser Aluminum and Chemical Company v. Weber,* 443 U.S. 193 (1979).
8. 42 U.S.C. §2000e (1988).
9. 380 U.S. 145 (1965).
10. 480 U.S. 149 (1987).
11. *United States v. Jefferson County,* 720 F.2d 1511, 1514 (11th Cir. 1983).
12. In *re Birmingham Reverse Discrimination Employment Litigation,* 833 F.2d 1492, 1494 (11th Cir. 1987).
13. D. Twomey, *Equal Employment Opportunity Law,* South-Western Publishing Co., Cincinnati, pp. 73-80 (1990).
14. *Striff v. Mason,* 849 F.2d 240, 245 (6th Cir. 1988); *Thaggard v. City of Jackson,* 687 F.2d 66, 68-69 (5th Cir. 1982), cert. den. sub nom. *Ashley v. City of Jackson,* 464 U.S. 900 (1983); *Dennison v. City of Los Angeles Department of Water and Power,* 658 F.2d 694, 696 (9th Cir. 1981); *EEOC v. McCall Printing Corp.,* 633 F.2d 1232, 1237-1238 (6th Cir. 1980); *United States v. Jefferson County,* 720 F.2d 1511, 1518.

15. A "collateral attack" is an indirect attempt to overturn a judgment rendered in a judicial proceeding that is made in a proceeding other than the original action. The underlying policy reason against collateral attack is that once the parties to the action have a final judicial decree, neither party should be permitted to initiate new litigation on the same issue, *The Guide to American Law, 3,* p. 39 (1983).
16. *Black and White Children of Pontiac School System v. School District of the City of Pontiac,* 464 F.2d 1030 (6th Cir. 1972); *Austin v. County of Dekalb, Department of Public Safety,* 572 F.Supp. 481 (N.D. Ga. 1983).
17. *Prate v. Freedman,* 430 F.Supp. 1373, 1375 (W.D. N.Y. 1977), aff'd without opinion, 573 F.2d 1294 (2d Cir. 1977), cert. den. 436 U.S. 922 (1978). *See also Marino v. Ortiz,* 806 F.2d 1144, 1146 (2d Cir. 1986), *aff'd by an equally divided court,* 484 U.S. 301 (1988).
18. *Thaggard v. City of Jackson,* 687 F.2d at 68 citing *Jackson v. Alabama Department of Public Safety,* 657 F.2d 694 (5th Cir. 1981).
19. *Birmingham Reverse Discrimination,* 833 F.2d at 1498.
20. *Firefighters Local No. 93 v. City of Cleveland,* 478 U.S. 501 (1986); *Dunn v. Carey,* 808 F.2d 555, 559-560 (7th Cir. 1986); *United States v. Jefferson County,* 720 F.2d 1511, 1517-1518 (11th Cir. 1983).
21. *Firefighters v. Cleveland,* 478 U.S. at 529 (1986).
22. *Ensley Branch of NAACP v. Seibels,* 616 F.2d 812, 822, *cert. den.,* 449 U.S. 1061 (1980).
23. See *Birmingham Reverse Discrimination,* 833 F.2d at 1494 n. 5.
24. *United States v. Jefferson County,* 720 F.2d at 1515.
25. The United States, as a signatory to the consent decrees, was named as the defendant in two of the earlier reverse discrimination suits. It then moved the lower court to intervene as a party plaintiff in the remaining cases. This motion was granted and the United States was even permitted to realign itself as a plaintiff in the two earlier suits in which it had been originally named as a defendant, *Birmingham Reverse Discrimination,* 883 F.2d 1492, 1496, n. 10.
26. The plaintiffs' case consisted of challenging the city's selection procedures by demonstrating that 1) the plaintiffs were demonstrably better qualified, 2) the job qualifications for making these comparisons were consistent with the language of the decrees, and 3) the city was aware of these criteria when it made the challenged promotions. Since the city did not use a job-related selection procedure, the court reasoned that the paragraph in question imposed no obligation on the city [23, p. 1497].
27. Fed.R.Civ.P. 19(a).
28. *Wards Cove Packing v. Antonio,* ___ U.S. ___ 109 S.Ct. 2115 (1989); *Price Waterhouse v. Hopkins,* ___ U.S. ___, 109 S.Ct. 1775 (1989); *Patterson v. McLean Credit Union,* ___ U .S. ___ 109 S.Ct. 2363 (1989); *Independent Federation of Flight Attendants v. Zipes,* ___ U.S. ___, 109 S.Ct. 2732 (1989); *Martin v. Wilks,* ___ U.S. ___, 109 S.Ct. 2180 (1989); *Lorance v. AT&T Technologies,* ___ U.S. ___, 109 S.Ct. 2261 (1989).
29. Civil Rights Act of 1991, Pub. L. No. 102-166, §108 (to be codified at 42 U.S.C. §2000e-2).
30. 480 U.S. 616 (1987).

31. *Steelworkers of America v. Weber,* 443 U.S. 193 (1979).
32. *Johnson v. Transportation Agency,* 480 U.S. at 638.
33. In a case involving firefighters in Gadsen, Alabama, a federal district court held that white firefighters were not precluded by the "impermissible collateral attack" doctrine from filing a reverse discrimination suit. However, that court also ruled that the challenged consent decree was justifiable and found for the defendant, *Henry v. City of Gadsen, Ala.,* 715 F.Supp. 1065, 1068-1069 (N.D. Ala. 1989).

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