

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-5083

D.C. Docket No. 94-1140-CV-SH

UNITED STATES OF AMERICA,

Plaintiff-Appellant,
Cross-Appellee,

versus

CITY OF HIALEAH, RAUL L. MARTINEZ, Mayor
(in his official capacity), HIALEAH
PERSONNEL BOARD, et al.,

Defendants-Appellees,

RAFAEL SUAUA,

Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(May 7, 1998)

Before CARNES, Circuit Judge, KRAVITCH and REAVLEY*, Senior Circuit
Judges:

CARNES, Circuit Judge:

The United States appeals the district court's refusal to
approve part of a consent decree it negotiated with the City of

*Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for
the Fifth Circuit, sitting by designation.

Hialeah, Florida. The underlying lawsuit claims that the City discriminated against blacks in hiring firefighters and police officers in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Other parts of the consent decree have been approved and entered, and they are not in question. One such part requires the City to hire as police officers and firefighters thirty blacks from a pool of prior applicants who were qualified but had been denied employment. The part of the decree the district court refused to enter would have granted retroactive competitive seniority to those thirty new black employees.

The district court, while finding that the United States had established a prima facie case of discrimination, refused to approve the retroactive seniority remedy part of the proposed decree because of objections from the police and fire unions, and from a group of individual police officers including Rafael Suau (the "Suau objectors"). The court found that the retroactive seniority provision in the decree would violate contractual seniority rights of the incumbent employees, rights guaranteed to them in the unions' collective bargaining agreements with the City. It therefore refused to enter that part of the proposed consent decree over the objections of those whose legally enforceable seniority rights would be adversely affected.

The United States contends that the district court erred in refusing to enter the part of the decree granting the new black employees retroactive seniority rights. The Suau objectors' cross-appeal, contends that the district court erred in finding that the

United States had made out a prima facie case of discrimination. We agree with the district court that the retroactive seniority part of the proposed consent decree would have diminished the seniority rights of incumbent employees, which are legally enforceable rights guaranteed to them by their collective bargaining agreements. Accordingly, we hold that the district court properly refused to approve that part of the proposed decree absent either the consent of the unions and the individual objectors, or a finding that the provision was necessary and appropriate to remedy discrimination proven during a trial at which all affected parties had an opportunity to participate. In light of that holding, we also conclude that the cross-appeal is moot.

I. FACTUAL AND PROCEDURAL HISTORY

In February 1992, the Department of Justice began an investigation into the hiring practices of the police and fire departments of the City of Hialeah, Florida. As of August 1992, the Hialeah workforce was approximately 17% black, but only 2% of Hialeah police officers and 1% of Hialeah firefighters were black. Only 25.2% of black applicants passed the entry-level police examination, while whites had a 61.9% passing rate. Furthermore, only 67.2% of black applicants passed the entry-level exam for the fire department, while 95.9% of white applicants passed that examination.

In May 1993, the Department of Justice told the City that its hiring practices violated Title VII. Specifically, the Department claimed that the number of blacks in the police and fire

departments did not adequately reflect their presence in the workforce. The Department also contended that the City's entry-level examinations for these positions had an adverse impact on blacks and were not consistent with business necessity.

Between May 1993 and June 1994, the City and the Department of Justice negotiated a settlement agreement. No representatives of either the police or fire unions were included in any part of these negotiations. Under the terms of the settlement agreement, the City, while not admitting to any Title VII violations, agreed to: (1) establish a recruitment program aimed at increasing the number of black police and firefighters; (2) develop written entry-level examinations that are consistent with business necessity or that do not adversely impact blacks; and (3) provide individual relief to black applicants who had been denied positions in the past solely because of their test scores.

That individual relief was to be composed of three components: (1) a monetary settlement of \$450,000 to be distributed among eligible claimants as back pay; (2) a commitment to provide priority employment in each department to fifteen blacks who had been denied employment solely because of test scores, meaning that each department would hire its next fifteen employees from the class of eligible claimants; and (3) each claimant hired under the priority employment provision would receive remedial retroactive seniority dating from six months after his or her original application for employment. The settlement agreement terms were incorporated into a proposed consent decree.

After the Department of Justice and the City completed their settlement discussions, the Department filed, on behalf of the United States, a Title VII complaint against the City on June 7, 1994. On the same day, the City and the Department filed a joint motion requesting that the district court approve the proposed settlement agreement and enter the consent decree.

On June 29, 1994, the district court granted a motion by the United States to join as defendants the Dade County Police Benevolent Association (PBA) and the Hialeah Association of Firefighters, Local 1102 of the International Association of Firefighters, AFL-CIO (Local 1102). Those unions are the authorized collective bargaining units for Hialeah police officers and firefighters. The Department of Justice contended that the joinder of those two unions was necessary to insure that the relief provisions of the settlement agreement could be fully implemented. Neither union, however, had been allowed to participate in the formulation of the settlement agreement that the parties asked the district court to impose. Attorneys for Local 1102 had expressed interest in taking part in the negotiations two weeks before the Department of Justice filed its complaint; the Department, however, never invited either union to participate.

On August 11, 1994, the district court held a fairness hearing, at which time it allowed Raul Suau and approximately 200 other individual police officers to intervene. At the fairness hearing, the district court did not allow the Suau objectors to develop evidence that they claimed would contradict the statistical

evidence that the Department of Justice used to build its prima facie case. Nor did the district court allow the Suau objectors to cross-examine the government's statistical expert. However, the district court did allow the unions and the Suau objectors to present nonevidentiary objections to the provision granting retroactive competitive seniority to blacks hired pursuant to the settlement agreement. "Competitive seniority" determines the allocation of benefits for which employees must compete with one another, such as shift assignments, promotions, and transfers. In contrast, "benefit seniority" determines benefits such as vacation time, compensation levels, and pension benefits that depend solely on that employee's longevity. The unions and the Suau objectors had no quarrel with the benefit seniority provisions, which did not adversely affect them. They did object, however, to granting the new hires retroactive competitive seniority, which they contend violates the rights of incumbent police and firefighters under their collective bargaining agreements with the City.

In an order dated August 16, 1994, the district court found that the United States had established a prima facie case of discrimination in the City's hiring practices for the police and fire departments. The court also concluded that the proposed decree was narrowly tailored to remedy that past discrimination. Notwithstanding those findings, the court refused to approve the consent decree. The court explained that affording competitive seniority benefits to those hired under the settlement agreement would violate the contractual rights of firefighters and police

already working for the City, and it would have an "unfair, adverse impact" on current police and fire department employees. The district court urged all of the parties to negotiate a workable substitute remedy that avoided the problems of the proposed agreement while allowing for immediate relief. The United States filed a notice of interlocutory appeal on October 13, 1994, and the Suau objectors filed a notice of cross-appeal shortly thereafter.

On December 9, 1994, the district court approved a partial settlement agreement and consent decree that resulted from the negotiations of all of the parties involved in this case. That decree, which is not being appealed, is materially identical to the proposed consent decree that the district court refused to approve earlier, in all but one respect: it leaves for litigation the question of whether retroactive competitive seniority should be imposed. Thus, the sole issue which remains for this appeal is whether the district court erred in concluding that it should refuse to enter without a trial the retroactive competitive seniority provisions of the proposed consent decree, over the objections of parties who would be adversely affected by those provisions.

II. STANDARD OF REVIEW

Subject matter jurisdiction over this appeal is a legal issue which we address in the first instance. See Stovall v. City of Cocoa, 117 F.3d 1238, 1240 (11th Cir. 1997).

Our review of a district court's refusal to approve a proposed settlement agreement and enter a consent decree depends upon the basis of the refusal. See id. The district court has the responsibility to insure that a consent decree is not "unlawful, unreasonable, or inequitable." United States v. City of Alexandria, 614 F.2d 1358, 1361 (5th Cir. 1980). To the extent that the district court's refusal to approve the settlement agreement was based on its conclusion that the proposed agreement would violate the contractual rights of incumbent employees, this appeal presents a question of law that we review de novo. See Stovall, 117 F.3d at 1240; United States v. City of Miami, 664 F.2d 435, 451 n.7 (Former 5th Cir. 1981) (en banc)(Gee, J., concurring in part and dissenting in part) ("It is difficult to envision an issue more purely legal than that of whether one written agreement, the consent decree, conflicts with another written compact, the existing collective bargaining agreement.").

III. DISCUSSION

A. SUBJECT MATTER JURISDICTION OVER THE APPEAL

The unions and the Suau objectors contend that no jurisdictional basis exists for this interlocutory appeal. Normally, only final judgments are appealable. See 28 U.S.C. § 1291. One exception to this rule is 28 U.S.C. § 1292(a)(1), which permits this Court to review "[i]nterlocutory orders of the district courts . . . refusing . . . injunctions." The United States contends that this appeal falls within that exception.

Congress did not intend for the injunction exception to open the floodgates to piecemeal appeals. The Supreme Court has repeatedly cautioned that the "exception is a narrow one and is keyed to the 'need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.'" Gardner v. Westinghouse Broadcast Co., 437 U.S. 478, 480, 98 S. Ct. 2451, 2453 (1978) (quoting Baltimore Contractors v. Bodinger, 348 U.S. 176, 181, 75 S. Ct. 249, 252 (1955)).

In Carson v. American Brands, 450 U.S. 79, 84, 101 S. Ct. 993, 996 (1981), the Supreme Court held that an interlocutory order must meet two requirements to be appealable under 28 U.S.C. § 1292(a)(1). First, if the relief sought is not actually an injunction, then it must have the practical effect of an injunction. See Carson, 450 U.S. at 83-84, 101 S. Ct. at 996. Second, for an appeal to be proper under 28 U.S.C. § 1292(a)(1), the appellant must show that the 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." Id. at 84, 101 S. Ct. at 997 (internal quotation marks omitted); see also Roberts v. St. Regis Paper Co., 653 F.2d 166, 170 (5th Cir. Unit B Aug. 1981) (noting that order is appealable under § 1292(a)(1) only if denial of appealability would result in irreparable harm).

The United States contends that notwithstanding Carson's explicit mention of two prerequisites for jurisdiction, it effectively establishes a uniform rule that all orders refusing to

enter consent decrees in Title VII cases are automatically appealable under § 1292(a)(1). A close examination of the two Carson prerequisites and their application to Title VII cases leads us to conclude that the United States is correct about that. Whenever a district court refuses to enter a Title VII consent decree, the plaintiffs can immediately appeal that order under 28 U.S.C. § 1292 (a)(1) instead of waiting until after the district court has entered a final judgment in the case.

Several considerations convince us of this conclusion. For example, the Supreme Court has subsequently made a statement indicating that Carson makes all orders refusing to enter a consent decree in Title VII cases interlocutorily reviewable. In Local No. 93 v. City of Cleveland, 478 U.S. 501, 517, 106 S. Ct. 3063, 3073 (1986), the Court stated that it had held in Carson that "a District Court's order denying entry of a consent decree is appealable under 28 U.S.C. § 1292(a)(1)." Accord City of Miami, 664 F.2d at 442 (Rubin, J., concurring) ("[T]he Supreme Court recently noted that a court's refusal to approve a consent decree in a Title VII case is an appealable order. . . ."). Even though that statement by the Supreme Court in Local 93 was dictum, it is of considerable persuasive value, especially because it interprets the Court's own precedent. See, e.g., Peterson v. BMI Refractories, 124 F.3d 1386, 1392 n.4 (11th Cir. 1997)("[D]icta from the Supreme Court is not something to be lightly cast aside.").

Another reason for our holding flows directly from analysis of the two jurisdictional requirements that Carson announced. Every refusal to enter a Title VII consent decree will satisfy both Carson requirements for interlocutory jurisdiction. First, such a denial will always have “the practical effect of refusing an injunction.” Carson, 450 U.S. at 84, 101 S. Ct. at 996. A consent decree will always contain injunctive relief because, by definition, a consent decree obligates the defendant to “stop alleged illegal activity.” Black's Law Dictionary 410 (6th ed. 1991). For example, the proposed consent decree in this case would have the effect of an injunction, because it would obligate the City to hire a total of thirty black police and firefighters and would prevent the City from using its current written entry-level exams to fill future openings. An order refusing to enter a consent decree in a Title VII case, therefore, satisfies the first requirement for interlocutory jurisdiction under Carson.

Second, a district court’s refusal to enter a Title VII consent decree can be “‘effectually challenged’ only by immediate appeal” because it “might have a ‘serious, perhaps irreparable, consequence.’” Id. at 84, 101 S. Ct. at 997. Title VII embodies a strong preference for voluntary settlement of employment discrimination cases. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 44, 94 S. Ct. 1011, 1017 (1974) (“Cooperation and voluntary compliance were selected as the preferred means for achieving [the goals of Title VII.]”). The Carson Court noted that because litigation might cause an essential party to withdraw its

assent to the decree, denying interlocutory review might destroy the conditions that permitted compromise in the first place, which would be in contravention of the strong public policy favoring voluntary settlement of Title VII cases. See Carson, 450 U.S. at 87-88 & n.13, 101 S. Ct. 998 & n.13.

That the City is not the party most affected by the competitive seniority provision of the proposed decree complicates the question of whether the possibility that the City might later withdraw its consent creates an irreparable injury for the purposes of Carson. However, we need not decide whether the possibility that the City might withdraw its consent alone creates an irreparable injury in this case. The Supreme Court's opinion in Carson identifies an additional source of irreparable injury which, when considered in conjunction with the strong policy in favor of settlement of Title VII cases, renders an order refusing to enter a Title VII consent decree interlocutorily appealable. The opinion indicates that postjudgment review of a refusal to enter a consent decree raises serious problems even when the parties to the agreement continue to support the decree. See Carson, 450 U.S. at 88 n.14, 101 S. Ct. at 998 n.14. One such problem is that the court reviewing a final judgment may be forced to choose between the relief upon which the parties had agreed and the relief ordered by the trial court. See id.

The Supreme Court explained in Carson that making that choice correctly would be difficult, because "delaying appellate review until after final judgment would adversely affect the court of

appeals' ability fairly to evaluate the propriety of the district court's order." Id. If the trial court ultimately ordered relief that differed from that originally agreed to by the parties, the reviewing court might be less likely to view the provisions of the original proposal as favorably as it might otherwise have. Deferring review of an order refusing to enter a consent decree in a Title VII case will always create a risk of irreparable harm because, even when no risk exists that the parties' willingness to compromise will be disrupted, having to go through litigation poses a risk to the settlement of cases and to a fair evaluation of the original proposal in any post-trial appeal.

An order refusing to enter a Title VII consent decree, therefore, will always pose a risk of irreparable harm as Carson envisioned it. Consequently, whenever a district court refuses to enter a consent decree in a Title VII case, that order is immediately appealable under 28 U.S.C. § 1292(a)(1). We therefore have jurisdiction over the government's appeal in this case.¹

B. REFUSAL OF THE DISTRICT COURT TO APPROVE THE CONSENT DECREE

1. A Consent Decree Requires the Consent of All Parties Whose Legal Rights Will Be Affected By the Decree

¹As indicated, our holding in this case is compelled by the reasoning and language in Carson, another Title VII case the decision of which was based in part upon the strong, congressionally indicated preference in favor of settling Title VII cases. See Carson, 450 U.S. at 88 n.14, 101 S. Ct. at 998 n.14 ("In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims."); see also Alexander, 415 U.S. at 44, 94 S. Ct. at 1017 (1974). The question of whether a district court's order rejecting a proposed settlement agreement in a non-Title VII case is interlocutorily appealable is not before us, and we express no view on it.

We turn now to the merits of the appeal. The United States contends that the objection of the unions and the Suau objectors to the remedial seniority part of the proposed decree is insufficient to prevent its entry. It is true that opposition to a proposed consent decree will not always operate as a bar to it. While a party "is entitled to present evidence and have its objections heard at the [fairness] hearings . . . , it does not have the power to block [the] decree merely by withholding its consent." See Local No. 93 v. City of Cleveland, 478 U.S. 501, 529, 106 S. Ct. 3063, 3079 (1986). However, the objection of a party whose rights or claims would be adversely affected does bar a proposed consent decree. See id. ("parties who choose to resolve litigation through settlement may not dispose of the claims of a third party"). Our holdings in United States v. City of Miami, 664 F.2d 435 (Former 5th Cir. 1981) (en banc), and White v. Alabama, 74 F.3d 1058 (11th Cir. 1996), make it clear that a consent decree requires the consent of all parties whose legal rights would be adversely affected by the decree.

a. The City of Miami Decision

Although the en banc decision of the former Fifth Circuit in City of Miami was released after the circuit split, it is part of the law that is binding upon subsequent panels in this circuit. See White, 74 F.3d at 1074 n.50. In the City of Miami case, the en banc court vacated in relevant part a district court order approving a consent decree. The decree had provided that when a minority employee had the greatest seniority in a particular

position and was qualified for a promotional opportunity, the city was required to promote that minority employee unless another applicant had demonstrably superior qualifications. See City of Miami, 664 F.2d at 446 (Rubin, J., concurring). That provision of the decree conflicted with the police officers' collective bargaining agreement, which guaranteed that promotions would be made on the basis of civil service examination scores. The police union (the FOP) objected to that part of the decree, arguing among other things, "the impropriety of enforcing the decree against the FOP without a trial between the City and the Attorney General." Id.

Accepting that argument, the en banc Court held: "A party potentially prejudiced by a decree has a right to a judicial determination of the merits of its objections." Id. at 447.² It explained that a "party is prejudiced if the decree would alter its contractual rights and depart from the governmental neutrality to racial and sexual differences that is the fundament of the

²Even though Judge Rubin's concurring opinion in City of Miami was joined by only five of the twenty-four judges who participated in that decision, we quote from and cite it as the opinion of the Court. The reason we do so is, as the introductory per curiam opinion in that case explains, while there is no majority opinion, Judge Rubin's opinion is the narrowest basis for the Court's appellate judgment, and serves as its mandate. See 664 F.2d at 436 (per curiam).

Another opinion, authored by Judge Gee, and joined by a total of 11 judges would have granted even more relief to the objecting police officers and ordered a broader remand on their behalf. See id. Thus, a total of 16 of the 24 judges participating in City of Miami agreed that a trial cannot be dispensed with by a consent decree which would affect the contractual rights of an objecting party.

Fourteenth Amendment in order to redress past discrimination." Id. The rule is that "[t]hose who seek affirmative remedial goals that would adversely affect other parties must demonstrate the propriety of such relief." Id. Such a demonstration requires a trial on the merits (or a valid summary judgment, which was not even sought in this case), and it cannot be accomplished in a consent decree proceeding if the rights of a nonconsenting third party are affected. As the City of Miami opinion explained: "parts of the decree do affect the third party who did not consent to it, and these parts cannot properly be included in a valid consent decree." Id. at 442.

Those holdings from City of Miami would seem to dispose of the matter. However, the United States contends that the requisite "demonstration" of intentional discrimination need not be made in a trial of the merits to final judgment, and it is enough if a court finds that a prima facie case has been established. Even if we adopted that position we would not apply it in this case, because the district court did not give the Suau objectors a full opportunity to contest the existence of a prima facie case. The Suau objectors were not given permission to intervene until the date of the fairness hearing. As soon as the court granted their motion to intervene, they asked for the opportunity to develop and present evidence of their own, but that request was denied. They also asked to cross-examine the statistician whose affidavit the United States proffered to show a prima facie case. The Suau objectors stated that:

if given an opportunity to question Dr. Thompson, then we would be able to establish that her area of expertise is not labor economics and that her, and that she lacks the ability as an expert to offer an opinion as to what the relevant labor market should be for determining that there is an under-representation within the relevant labor market.

The district court denied that request. The requirements of due process dictate that if the issue of whether a prima facie case exists is to be decisive, each party should be afforded a full and fair opportunity to present evidence relevant to that issue and to contest evidence proffered by any other party. That did not happen in this case.

In any event, the facts of City of Miami, as well as the explicit holding of that decision, preclude any holding that a prima facie case is enough to justify dispensing with an objecting party's right to a full adjudication of its position on the merits in a trial. As to the facts in City of Miami, the United States and the City entered a stipulation which showed "gross statistical disparities presented in the workforce" concerning the number of blacks, Latins, and women compared to white males, and also a "striking disparity in earnings." United States v. City of Miami, 614 F.2d 1322, 1332, 1339 (5th Cir. 1980). The panel opinion in that case noted that the FOP, the party objecting to entry of the consent decree, did not challenge those statistics. See id. at 1339. Likewise, the en banc opinion observed that while urging the district court to conduct a "full-blown trial," the FOP had "proffered no evidence and did not attempt to controvert in any way

the stipulation between the United States and the City." 664 F.2d at 438-39. Furthermore, in that case the City admitted the requisite past discrimination. See id. at 443-44.

As the en banc opinion in City of Miami summarized it: "The United States and the City stipulated data that supported the inference of past discrimination, and they agreed to a statement in the text of the decree that the City had discriminated against blacks, Latins, and women." Id. at 444. The panel opinion in that case explicitly found that the stipulated statistics alone "present an overwhelming prima facie case of discriminatory employment practices." 614 F.2d at 1339. The en banc opinion did not disagree with that finding. Therefore, there was a prima facie showing of discrimination in City of Miami. If the existence of a prima facie case were enough to justify abrogating an objecting party's rights via a so-called "consent decree," City of Miami would have been decided differently. Because it was not, we are bound to reject the United States' position.

Another insurmountable hurdle to the United States' attempt to surmount the en banc holding in City of Miami is the explicit language of that decision itself. In complex cases good opinions often state their holdings with careful specificity near the beginning and again at the end of the opinion. Judge Rubin's opinion in the City of Miami case does that. The first paragraph of his opinion for the en banc court consists of these three sentences:

This case requires us to examine the circumstances under which, and the procedure

by which, a court may enter a consent decree in a multiparty suit when some, but not all, of the litigants agree to the decree and parts, but not all, of the decree affect the rights of a nonconsenting party. We conclude that a decree disposing of some of the issues between some of the parties may be based on the consent of the parties who are affected by it but that, to the extent the decree affects other parties or other issues, its validity must be tested by the same standards that are applicable in any other adversary proceeding. Most parts of the decree entered by the trial court in this Title VII case pass the requisite muster, and we affirm them; however, because a part of the decree, entered without a trial, affects the rights of an objecting party, we limit its effect as to that party and remand for trial of the complaint insofar as a remedy is sought against that party.

664 F.2d at 436 (emphasis added).

The first sentence of that first paragraph of the City of Miami opinion states the issue in that case, which is identical to the issue in this case. The second sentence states the conclusion of the Court: to the extent a proposed consent decree affects the rights of nonconsenting parties, "its validity must be tested by the same standards that are applicable in any other adversary proceeding." In "any other adversary proceeding" a nonconsenting party's rights cannot be abrogated merely upon a showing of a prima facie case; that can be done only in a judgment entered following trial (or summary judgment). In order to remove any doubt, the third and last sentence of the opening paragraph unambiguously states that as to the objecting party, the case is "remand[ed] for trial of the complaint insofar as a remedy is sought against that party." The opinion says "for trial," not for any proceeding short

of trial. It certainly does not say that the remand was for the purpose of determining whether a prima facie case could be established. One already had been. More than a prima facie case is required by the City of Miami decision. The more that is required is a trial. The very first paragraph of the opinion could not have been clearer about that.

Likewise, the concluding three sentences of the City of Miami opinion, in a section labeled "Mandate," state:

The case is remanded, in addition, for further proceedings, consistent with this opinion, to determine whether the United States has the right to claim any relief concerning police promotion. If, at trial, the United States can prove that the City has discriminated against black, Spanish-surnamed, or female police officers, or that the City has so discriminated in its employment policy as to prejudice their opportunities for promotion, and that affirmative action in favor of the affected class is appropriate remedial action, the United States may seek such relief, including reimposition of the contents of paragraph 5(c). The FOP shall, of course, be afforded the opportunity either to contend that discrimination, the necessary predicate for relief, has not been proved, or to show that the type of relief embodied in paragraph 5(c) is, in this instance, unnecessary, inadvisable, or unconstitutional.

Id. at 448 (emphasis added). The first sentence remands for further proceedings consistent with the opinion, and the second sentence explicitly states that those proceedings are to occur "at trial." Both the second and third sentences speak of what the United States is required to prove at that trial, not what it may simply suggest with a prima facie case. Thus, the explicit language of the concluding paragraph, as well as that of the

opening paragraph, in the City of Miami opinion precludes interpreting that decision as permitting an objecting party's rights to be dispensed with upon nothing more than a prima facie showing of discrimination. Proof at trial is required.

b. The White Decision

This Court recently applied and followed the City of Miami rule in White v. Alabama, 74 F.3d 1058 (11th Cir. 1996), a decision which vacated a district court's judgment approving and incorporating a settlement agreement that would have altered the manner in which Alabama state judges were selected. The district court, finding that the original plaintiffs had established a prima facie case that the Voting Rights Act had been violated, entered what purported to be a "consent decree." That decree was consented to by the original plaintiffs, by the State Attorney General, and by the Department of Justice. See id. at 1073. But two intervening plaintiffs and an intervening defendant did not consent to entry of the decree; they objected to it. See id. at 1064-67, 1072-74. Nonetheless, the district court entered the decree without a trial, treating it as a consent decree. See id. at 1073 n.48.

We were unequivocal in explaining why there could be no consent decree absent consent of all the parties whose rights would be affected:

First, the district court's final judgment is not a consent decree. It is a final judgment, because it disposes of all of the claims and defenses of all of the parties in the case. See 28 U.S.C. § 1291; Andrews v. United States, 373 U.S. 334, 83 S.Ct. 1236, 10

L.Ed.2d 383 (1963). But it is not a final consent decree, because not all of the parties consented to its entry. White, the Attorney General, the Department of Justice, and the district court refer to the final judgment as a "consent decree." That, however, does not make it one.

Id. at 1073 (emphasis added). To ensure no one missed the point, in the very next paragraph we reiterated that: "In this circuit, a decree that provides a remedy agreed to some, but not all, of the parties cannot affect the rights of a dissenting party." Id. Of course, we cited for that proposition the City of Miami en banc decision. See id.

The dissenting opinion in this case attempts to perform reconstructive surgery on White by suggesting that it really does not mean, as it plainly said, that a consent decree requires the consent of all the parties whose rights are affected. Instead, the dissenting opinion contends, a decree entered by consent of some parties can modify or affect the rights of a dissenting party, so long as the party getting shafted has not formally pleaded any claims, i.e., is not a plaintiff or third-party plaintiff.

Neither White, nor City of Miami which it cites, imply that parties who have pleaded claims are the only ones whose consent is necessary and whose legal rights matter. Indeed, in White one of the parties whose objection prevented entry of a consent decree was an intervening defendant who had not pleaded any claim; he just wanted to maintain the status quo. See 74 F.3d at 1075 n.51. Nor does the dissenting opinion explain why a nonconsenting plaintiff's rights should be given more protection than a nonconsenting

defendant's rights, or any other party's rights that were asserted in an objection instead of in a claim.

The dissenting opinion points to footnote 53 of the White opinion, which discussed Local No. 93 v. City of Cleveland, 478 U.S. 501, 106 S.Ct. 3063 (1986). That discussion does not detract from the clear holding in White or support the position of the dissenting opinion. Instead, the discussion clearly recognizes that in Local No. 93 the Supreme Court acknowledged that "had the settlement affected the union's rights, the decree could not have been entered without its consent." 74 F.3d at 1075 n.53. The City of Miami decision also puts the focus on whether the rights of objecting parties would be affected by the decree. See City of Miami, 664 F.2d at 447 ("[t]hose who seek affirmative remedial goals that would adversely affect other parties must demonstrate the propriety of such relief") (emphasis added); id. at 436 ("to the extent the decree affects other parties"); id. ("because a part of the decree, entered without a trial, affects the rights of an objecting party, we...remand for trial....") (emphasis added). We follow the explicit holdings of White and City of Miami. Those holdings bind this Court as well as the district court, and they forbid entry of a "consent decree" insofar as it adversely affects the legal rights of an objecting party, whether that party is a plaintiff or defendant.

c. The Local No. 93 and Franks Decisions

As a subsequent panel, we are bound by the White panel's interpretation of the Supreme Court's Local No. 93 decision. See,

e.g., United States v. Hutchinson, 75 F.3d 626, 627 (11th Cir. 1996). That interpretation, which holds that to the degree a consent decree diminishes a party's legal rights, it cannot be entered over that party's objections, see White, 74 F.3d at 1075 n.53, is inconsistent with the dissenting opinion's reading of Local No. 93. However, even if we were writing on a clean slate we would interpret Local No. 93 the same way White did.

The express language of Local No. 93 refutes the dissenting opinion's contention that, under the Supremacy Clause, contractual rights guaranteed by Florida law cannot prevent entry of a consent decree. That decision explicitly recognizes that a consent decree cannot dispose of the contractual rights of objecting parties. The Local No. 93 Court affirmed entry of the consent decree in that case because "the consent decree does not purport to resolve any claims the Union might have ... as a matter of contract." 478 U.S. at 530, 106 S. Ct. 3079. The union intervenor in Local No. 93, unlike the intervenors in this case, did not assert any legal rights that would be impinged by the consent decree. See 478 U.S. at 508-11, 106 S. Ct. at 3067-69. Apparently, no established collective bargaining rights were affected by the decree, because the union did not contend that any were.³

³The dissenting opinion contends that the Local No. 93 union asserted that the decree "would affect the contractual expectations of its members." The language of Local No. 93, however, does not support that contention. The most that Local No. 93 seems to have alleged is that "promotions should be made on the basis of demonstrated competency." Local No. 93, 478 U.S. at 507, 106 S. Ct. at 3067. Expectations aside, nothing in the opinion suggests that the union ever asserted that the decree would violate contractual rights. In fact, the Court commented that the union

As the Supreme Court pointed out in Local No. 93, the district court provided the objecting union with several opportunities to advance specific objections and to develop evidence to substantiate those objections; the court even informed the union that vague appeals to fairness could not prevent entry of the decree. See id. at 528-29, 106 S. Ct. at 3079. Instead of detailing specific claims as to how the decree would impair the rights of its members, the union merely protested that "there must be a more equitable, fair and just way to correct the problems caused by the [City]," and that it was totally opposed "to the use of racial quotas which must by their very nature cause serious racial polarization." Id. at 511, 106 S. Ct. at 3069. As the Supreme Court characterized it, the union simply "express[ed] its opinion as to the wisdom and necessity of the proposed consent decree." Id. That is entirely unlike City of Miami and this case, where the intervenors have objected based upon their specific legal rights under Florida law, rights that the decree would abrogate. See pp. 30-32, below.

Finally, the rule the dissenting opinion would read into Local No. 93 not only cannot be found in the opinion in that case, it cannot withstand scrutiny either. According to the dissenting opinion, an objecting party's existing legal rights can be sacrificed to the interests of the other parties, without a trial, so long as the intrusion on those rights does not obligate that party "to do or not to do anything." That would mean, for example,

"failed to raise any substantive claims." Id. at 530, 106 S. Ct. at 3079.

that the other parties could agree to use a "consent decree" to cut the wages of the objecting union members, in violation of their contractual rights, if the other parties deemed it necessary and appropriate to do so in order to fund aspects of the remedy put into place by the decree. Under the rule advocated by the dissenting opinion, the union members whose wages were being cut over their vehement objection would not be entitled to bar the settlement or to insist upon a trial. What would matter is that they were not being ordered to do anything by the decree. The City could take care of the paperwork and other affirmative acts necessary to actually reduce their compensation. Such are the implications of the dissenting opinion's interpretation of Local No. 93, which is an interpretation we are confident never occurred to the Supreme Court, and is also an interpretation foreclosed by White.

The dissenting opinion also relies heavily upon Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S. Ct. 1251 (1976), which it says "stands for the proposition that a third party cannot block approval of a consent decree merely because the party will be 'affected' by the decree." See dissenting op. at 11 - 12. The reason Franks does not and cannot stand for that proposition is that Franks only involved remedy issues arising after a full blown trial at which the plaintiffs went further than merely showing a prima facie case and actually proved that the defendant corporation had engaged in a pattern of racially discriminatory practices. The word "consent" is not mentioned, not even once in the Franks

opinion, because that decision had nothing at all to do with consent decrees. Nowhere does the dissenting opinion explain how Franks, which concerned the propriety of make-whole relief following a finding of discrimination in violation of Title VII, could possibly apply to this case, where the government conceded before the district court that no finding of discrimination had been made.

The dissenting opinion attempts to make more of Local No. 93 and Franks than either will support by combining language from the Court's opinions in the two cases as though it were all from the same decision. See dissenting op. at 13. That is like trying to produce a unicorn by crossing a mule with a rhinoceros. Local No. 93 is not a consent decree case in which the objecting party articulated a specific contractual right that the decree would contravene. Neither is Franks. Those two decisions cannot be combined to produce what they are not. The issue before us is not whether or when a third party's legal rights must give way in order to remedy a federal constitutional or statutory violation established in a trial. Instead, the issue is whether based upon the agreement of some other parties in the lawsuit a court can abrogate, violate, or impinge upon the legal rights of an objecting third party where the necessity or propriety of doing so has not been established in a trial or by summary judgment.

Our difference with the dissenting opinion on this important issue is evident in terminology. In the dissenting opinion, the original class of potential claimants is referred to as the

"discriminatees" or the "actual victims of discrimination." That terminology assumes that a trial would reach that conclusion. However, at the fairness hearing, the government indicated that it was seeking only to establish a prima facie case of discrimination, and that it had no intention of proving its case at that time. The attorney for the government took the position that: "the district court does not need to find discrimination. This is not a litigated judgment." The district court then indicated that it would not make a finding of discrimination: "I agree with that." The court later added: "the trial judge ought not to try the case in the settlement hearings." Nothing in the record supports the dissenting opinion's assumption that the potential class of plaintiffs have been demonstrated to be "discriminatees" or "actual victims of discrimination." Of course, if the desired conclusion is assumed, it is a simple matter to reach that conclusion. For the same reasons we would not do so in other cases where summary judgment has not even been sought, we decline to assume there is no point in having a trial in this case.

We concede that the dissenting opinion's position, if taken to its logical conclusion, might be a promising way to ease judicial workloads. If we can dispense with the consent of the unions and the intervening employees and resolve this case over their objections, why should we not dispense with the consent of the City as well? Why not let the Department of Justice, once it has demonstrated a prima facie case, enter into a settlement agreement with itself (and perhaps with the original plaintiff class as

well), and have the court enter a "consent" decree to that effect even if the City objects? If the consent of the intervenors is not required before their legal rights can be settled away, why should the consent of the original defendant be required? Fortunately, the holdings of the City of Miami and White decisions save us from such possibilities, because those decisions compel the conclusion that a proposed consent decree is due to be rejected if it would affect the legal rights of the objecting parties. We turn now to that question in this case.

2. The Proposed Consent Decree Would Adversely Affect Legal Rights of the Intervenors

In this case, the police and firefighters' collective bargaining agreements confer legal rights that the proposed consent decree would affect adversely. The dissenting opinion concludes that the decree at issue in this case is like the one that the Court approved in Local No. 93 because both would affect future promotions. However, that is where any similarity ends. Unlike Local No. 93, the decree at issue in this case affects a wide range of contractual rights that existing collective bargaining agreements clearly guarantee incumbent employees. Examination of those rights dispels any superficial similarity that may result from a first glance comparison of Local No. 93 and the present case.

Several of the rights that the Hialeah collective bargaining agreements detail accrue strictly according to seniority. For example, the City retains no authority to decide which firefighters to call back for mandatory overtime. Article 52, Section 2 of the

Local 1102 agreement states that when additional firefighters are needed on duty and the positions cannot be filled with voluntary replacements, they "shall be filled via mandatory overtime by the most junior available employee[s] of the appropriate rank."

The collective bargaining agreement also confers seniority rights involving some positions in the Fire Department, such as those on the hazardous materials team. Article 51, Section 1 of the agreement provides, "As positions open up on the hazardous materials team, they shall be filled from among personnel who have expressed an interest based on seniority in grade." Because allocation of such benefits is strictly according to seniority in rank, a grant of retroactive seniority to some individuals infringes other employees' accrued seniority rights.

Similarly, the Police Benevolent Association (PBA) bargaining agreement provides seniority rights relating to promotions. Article 1 of the PBA agreement defines seniority as "[t]hose rights which accrue to an employee based on longevity in the department. . . ." Subsequent provisions describe the rights that seniority confers upon the police officers. Article 24 of the PBA agreement specifies that: "Eligible applicants for the promotional examination for Sergeant shall be entitled to one-fourth (1/4) of a point for each full year of service as a Hialeah Police Officer." The settlement agreement's grant of retroactive seniority to new hires would curtail the promotional rights of some incumbent officers, because it would effectively grant the new hires

additional points on the promotional exam that they would not otherwise receive.

In addition, the settlement agreement impinges on other benefits which, although not determined purely according to seniority, are worded in such a way that seniority will have a substantial and often decisive impact. For example, Article 28 of the PBA agreement, entitled "Seniority Privileges," states that once operational needs have been met, "seniority in rank will be given preference with respect to days off and vacation time." [R1-9-At. 3 at 41] The firefighters' agreement contains a similar provision. Both collective bargaining agreements contain provisions that allocate other benefits such as shift preference and transfer requests according to seniority once operational needs have been met. Those provisions confer rights and benefits upon union members that the proposed consent decree would undermine or diminish.

The United States does not dispute that the proposed agreement would harm the interests of current police and firefighters to some extent. Counsel for the United States conceded at the fairness hearings that incumbent employees "may even be slightly diminished in their rights" by the proposed consent decree, which is akin to saying that the rights of a pedestrian in a crosswalk may be slightly diminished by a runaway truck. Notwithstanding its concession, the United States contends that infringement of incumbent employee rights does not allow those employees to block approval of the settlement, because it is "speculative" whether the

proposed agreement's grant of retroactive seniority will cause any incumbent employees to lose a shift or vacation preference or be called back for mandatory overtime.

That contention cannot survive examination against existing decisional law. In City of Miami, the Court invalidated parts of a consent decree altering the City's procedure for promoting police officers even though it was impossible to determine in advance which -- or even that -- officers would be affected by the change; the mere threat of injury to contractual rights was held to be sufficient. See City of Miami, 664 F.2d at 446 (Rubin, J., concurring).⁴ As a result, under the law of this Circuit, the retroactive seniority provision's threat to the objectors' competitive seniority benefits prevented entry of the consent decree. The objectors were not required to prove with certainty that particular employees would lose contractual benefits. In any event, it is obvious that the decree in this case would have adversely affected at least some of the incumbent employees.

The United States also argues that the proposed grant of retroactive seniority cannot be said to impinge upon the rights of incumbent employees, because the City retains some discretion in allocating many of the benefits in the collective bargaining agreements. There are two major problems with that argument. First, as discussed above, some of the competitive seniority rights are not subject to the City's discretion at all. The opportunity for firefighters to receive hazardous materials training, and the

⁴See supra note 2.

right of police officers to receive the benefit of extra points on their competitive sergeant's exam for years of service are contractual rights that accrue with seniority, and the City has reserved no authority under the collective bargaining agreements to infringe those rights. That alone is enough to defeat the United States' discretion argument.

Second, the discretion argument misses the point anyway. Seniority rights subject to the City's exercise of some discretion in certain circumstances are neither the same as no seniority rights at all, nor are they the same as seniority rights subject to additional exceptions. Nothing in either collective bargaining agreement authorized the City to modify seniority rights across the board. Cf. People Who Care v. Rockford Bd. of Educ., 961 F.2d 1335, 1337 (7th Cir. 1992) ("When the parties to a decree seek to enlarge their legal entitlements -- to grant themselves rights and powers that they could not achieve outside of court -- their agreement is not enough.").

Florida law supports the conclusion that the proposed consent decree would contravene the contractual rights of Hialeah police and firefighters, because Florida statutory and constitutional law give public employees a right to bargain collectively. See, e.g., Hillsborough County Governmental Employees Ass'n, Inc. v. Hillsborough County Aviation Auth., 522 So.2d 358, 363 (Fla. 1988). Collective bargaining is required by Florida law for important terms of employment such as shift assignments, promotions, vacation time, and mandatory overtime. See, e.g., City of Miami, 664 F.2d

at 446 ("Under Florida law promotion is a subject for collective bargaining for public employees."); City of Miami v. F.O.P. Miami Lodge 20, 571 So.2d 1309, 1312-13 (Fla. Dist. Ct. App. 1989) (holding that public sector employers are obligated to engage in collective bargaining process over broad range of issues, including "wages, hours, and terms and conditions of employment" as well as any changes in those terms or conditions), approved, 609 So.2d 31 (Fla. 1992). Altering collectively bargained benefits through non-collective bargaining mechanisms is contrary to Florida law.

Furthermore, public policy dictates that parties to a labor agreement either live up to the terms of that agreement or pay for the opportunity to alter those terms. "[P]arties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored." W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 771, 103 S. Ct. 2177, 2186 (1983). One party to a collective bargaining agreement cannot use the device of a nonconsensual consent decree to avoid its obligations, which the other party negotiated and bargained to obtain. As we have previously observed in these circumstances: "The Florida cases hold that, when a subject is encompassed within the terms of an existing contract, a public employer may not foreclose bargaining on the subject or unilaterally alter the terms and conditions of employment." City of Miami, 664 F.2d at 447.

Because a grant of retroactive seniority would alter the rights and benefits of incumbent employees under the collective bargaining agreements, approval of that part of the proposed

decree over the unions' objections would violate the police and firefighters' collective bargaining rights under Florida law. If the City wants to alter the manner in which competitive benefits are allocated, it must do so at a bargaining table at which the unions are present. Or, that must be done pursuant to a decree entered after a trial at which all affected parties have had the opportunity to participate.

3. If a Title VII Violation is Established at Trial, the District Court Can Consider the Remedy Set Out in the Proposed Decree

If a Title VII violation is found after a trial at which the affected parties are represented, modification of otherwise legally enforceable seniority rights may be part of a necessary and appropriate remedy. See United States v. City of Chicago, 978 F.2d 325, 332 (7th Cir. 1992) ("[U]nder some circumstances, federal courts may require an innocent third party to participate in remedies for illegal discrimination."). To the extent necessary and proper, Florida law will have to yield in that situation. But modifying seniority rights to remedy a Title VII violation found after a trial is entirely different from modifying them without a trial based upon a "consent decree" to which adversely affected parties have objected. The important point is that an objecting party is entitled to an adjudication of its rights on the merits before those rights are infringed or modified by court decree. The district court was correct in concluding that it lacked the

authority to deprive the objecting parties of that entitlement in this case.⁵

4. Summary

What happened in this case is that the Department of Justice and the City of Hialeah crafted a settlement agreement without the consent or input of the unions or individual police and firefighters whose contractual rights, recognized and protected under Florida law, would be affected by the agreement. The Department refused to permit the police and firefighters to participate in the negotiations. The resulting settlement agreement and proposed consent decree would impair important rights guaranteed to the police officers and firefighters in their collective bargaining agreements.

At several points in its briefs, the United States cites the policy favoring negotiation and settlement of Title VII claims in support of its argument that the district court should have approved the agreement and decree. The United States also argues that a consent decree that it negotiates carries a considerable presumption of validity because the Department of Justice represents the interests of all citizens. See Williams v. City of New Orleans, 729 F.2d 1554, 1560 (5th Cir. 1984). These arguments are heavy with irony, given that the Department of Justice

⁵Because we conclude that the district court lacked the authority to approve the settlement agreement, we need not consider the government's contention that the district court erred in finding that the retroactive seniority provision should not be approved because it would have an unusual, unfair adverse impact on current employees. See Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 96 S. Ct. 1251 (1976).

restricted its "negotiations" to the City, a party with no interest adverse to the Department's competitive seniority proposals. If the Department had been concerned about the interests of all citizens and had been interested in "negotiation" and "settlement" in the non-Orwellian sense, it would have attempted to reach an agreement with all of those whose rights were at stake. Instead, the Department disregarded the interests and rights of some parties based upon their races, and it asked a United States district court to do the same. The district court correctly rejected the Department of Justice's request to ram the proposed settlement agreement down the throats of the unions and individual objectors without affording them a fair adjudication of their rights.

As Judge Gee recognized in City of Miami, for the district court to enter a proposed decree in such a situation would contravene basic principles of fairness:

An appellant is before us complaining that it has had no day in court -- has never been set for trial or had notice of a setting -- but has been judged away. This error is so large and palpable that, like an elephant standing three inches from the viewer's eye, it is at first hard to recognize. The major dissent is reduced to arguing that it is all right to enter a permanent injunction without a trial against one who is unable, in advance of such a trial, to show the court how his rights will be infringed by the order. Here is new law indeed, law that we cannot accept.

City of Miami, 664 F.2d at 651 (Gee, J., concurring in part and dissenting in part). Just as the en banc court did in City of Miami, we see the elephant. We will not close our eyes to its existence. We will not hold that a party's legally enforceable

contractual rights can be discarded without affording that party the right to litigate the case on the merits.

C. JURISDICTION OVER THE SUAUA OBJECTORS' CROSS-APPEAL

In their cross-appeal, the Suau objectors contend that the district court erred in concluding that the United States had demonstrated a prima facie case of discrimination. Because we affirm the district court's refusal to enter the consent decree, the Suau cross-appeal is moot. See, e.g., Pacific Ins. Co. v. General Development Corp., 28 F.3d 1093, 1096 (11th Cir. 1994) (per curiam) (appeal is moot when it fails to present a controversy with respect to which the court can provide meaningful relief). Accordingly, their cross-appeal is due to be dismissed. However, as we have pointed out, the Suau objectors, at least, were refused a full and fair opportunity to present their own evidence and to meaningfully test the statistics upon which the effort to establish a prima facie case was based. Our dismissal of the cross-appeal on jurisdictional grounds should not be read to imply that the question of whether a prima facie case exists has been settled.

IV. CONCLUSION

A district court may not enter parts of a proposed consent decree that operate to diminish the legal rights of a party who objects to the decree on that basis. The part of the decree at issue in this case would diminish the contractual seniority rights of incumbent Hialeah police officers and firefighters, who objected

to it for that reason. Therefore, the district court's refusal to enter that part of the decree was proper.

We AFFIRM the district court's judgment. The Suau objectors' cross-appeal is DISMISSED AS MOOT.