

Although the Supreme Court identified diversity as a “compelling governmental interest,” courts have generally not extended this holding from the context of higher education to public employment.³⁰ In *Lomack v. City of Newark*, a public employer’s diversity rationale falls far short of the mark.

Lomack v. City of Newark 463 F.3d 303 (3d Cir. 2006)

OPINION BY CIRCUIT JUDGE BARRY:

On July 1, 2002, Sharpe James, newly re-elected as Mayor of Newark, New Jersey, issued a “mandate” in his inaugural speech that, “to improve morale,” all single-race fire companies in the Newark Fire Department would be eliminated. The racial composition of each of the 108 fire companies was thereafter examined, and dozens of firefighters were involuntarily transferred to different companies solely on the basis of their race. * * *

It is important at the outset to note what this case is not about. This case is not about whether diverse workplaces are desirable. It is not disputed that they are. Neither is this case about a remedy for unlawful past discrimination because, again, it is not disputed that there was no unlawful discrimination in the past. And this case is not about whether the numbers of minority firefighters being hired are satisfying long-range hiring goals. Rather, this case is about whether the City of Newark may employ a race-based transfer and assignment policy when any racial imbalance in the 108 fire companies is not the result of past intentional discrimination by the City. We hold that it may not and, accordingly, will reverse the District Court’s entry of judgment for the defendants.

In 1977, the United States filed a complaint against the State of New Jersey, several New Jersey officials, the City of Newark, and eleven other New Jersey cities alleging “a pattern or practice of discrimination” in the hiring and promotion of minority firefighters. A Consent Decree resolving the United States’ claims was approved and entered by the District Court in 1980. * * * Fifteen years passed, and in 1995, the Newark City Council hired Samuel Rosenfarb, a certified public accountant, to “determine [statistical] compliance

with [the 1980] consent decree.” Rosenfarb reported his findings to the Council in a December 1995 report, which indicated that 68.8% of the Fire Department’s uniformed employees were white, 24% were black, and 6.9% were Hispanic. He also reported that of 195 promotions granted between 1980 and 1994, 168 were given to white employees, twenty-four to black employees and three to Hispanic employees. In conducting his analysis, Rosenfarb noticed that “the [companies] were significantly homogenous either black or white.” His report noted that 81 of the 108 companies “had a majority of white personnel with 30 being comprised entirely of white personnel. Fifteen of the [companies] were predominantly black. . . . Only one . . . had a majority of Hispanics. The remaining eleven [companies] did not contain a majority of any one group.”

The City took no action with respect to the existence of single-race fire companies for another seven years. Then, in July 2002, Mayor James, apparently out of the blue, ordered that all fire houses, i.e., companies, in the Newark Fire Department be integrated “to improve morale” and “to honor a court order to make our Fire Department the mirror of the City of Newark. . . .” * * * [After an initial attempt that was rejected because it did not meet the mayor’s goal] Wallace [the fire chief] proposed an alternative transfer list that would achieve 100% diversity. * * * Thirty-four firefighters who were involuntarily transferred or denied requests to transfer due to the new policy, together with the Newark Firefighters Union and the Newark Fire Officers Union, brought this action . . . challenging the constitutionality of the policy under the *Equal Protection Clause*; Title VII of the Civil Rights Act of 1964, and the New Jersey Civil Rights Act. Following a bench trial, the District

³⁰ A notable exception is *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003), cert. denied, 541 U.S. 1074 (2004).

Court dismissed their claims and entered judgment for defendants. This timely appeal followed.

*** Because the diversity policy is a race-based classification, it must pass strict scrutiny: it must be narrowly tailored to achieve a compelling state interest. **
* The City argues that it has three somewhat interwoven compelling interests in implementing the diversity policy. First, it argues that it has a compelling interest in eliminating *de facto* segregation in the Fire Department. Second, it contends that there is a compelling interest in securing the “educational, sociological and job performance” benefits of diverse fire companies. Finally, it argues that the policy is required by the 1980 Consent Decree, compliance with which constitutes a compelling interest. As we have already suggested, we are not persuaded by these arguments. We will address each in turn.

1. REMEDYING PAST DISCRIMINATION

It is well settled that a government has a compelling interest in remedying its own past discrimination. Accordingly, it may employ racial classifications to cure racial imbalances—but only if it can prove that it engaged in prior intentional discrimination or was a “passive participant” in a third party’s discrimination. “[R]ace-based preferences cannot be justified by reference to past ‘societal’ discrimination in which the municipality played no material role.” *** The City does not even suggest that it participated, directly or passively, in any form of discrimination; indeed, it concedes that it neither intentionally discriminated against minority firefighters with respect to assignments or transfers, nor intentionally segregated firefighters into racially homogeneous companies. Moreover, the City concedes that single race fire companies resulted, not from “Fire Department management,” but from the “tendency on the part of management to allow people to work where they choose to work,” and to accommodate their desire to work in the neighborhoods where they live. Accordingly, the remedial justification for the use of racial classifications is wholly inapplicable here, and the District Court’s finding to the contrary is clearly erroneous.***

2. EDUCATIONAL AND SOCIOLOGICAL BENEFITS OF DIVERSE FIRE COMPANIES

In *Grutter v. Bollinger* [the University of Michigan law school case], the Supreme Court clarified that

nonremedial goals may also justify race-based classifications in certain circumstances. Specifically, the *Grutter* Court held—quite narrowly—that the “educational benefits” of a diverse student body are a sufficiently compelling interest to justify race-based enhancements of minority students’ applications to law school. The City argues that it has a compelling interest in integrating its fire companies because “integration in the workplace is no less important than in an educational setting.” Specifically, it contends that “integration in fire companies leads to greater camaraderie between coworkers, acceptance and consideration for people of varying backgrounds, sharing of information and study support. It also promotes tolerance and mutual respect among colleagues.” The District Court agreed, as do we, but went on to find that the “educational, sociological, and job-performance enhancements” supported, if not by themselves compelled, the diversity policy. With that, we disagree.

Initially we note that the under-inclusiveness of the diversity policy, specifically its failure to consider gender, other ethnic groups, age, or socioeconomic class, seems to belie Newark’s claim that “educational benefits” were its actual purpose. It bears mention, as well, that neither Mayor James nor the Fire Department officials called upon to implement the diversity policy referred to “educational benefits” or anything akin thereto as a reason for the policy. By accepting educational benefits as an interest compelling the policy, however, the District Court, at least implicitly, found that that was the City’s “actual purpose,” or at least one of its purposes.

We need not resolve whether or not the District Court’s finding was clearly erroneous, because even if the alleged “educational benefits” were an “actual purpose,” they do not constitute a compelling interest in the circumstances presented by this case. While *Grutter* established that educational benefits are compelling *in a law school context*, we do not find its holding applicable in the firefighting context. The “relevant difference” between a law school and a fire department is their respective missions. The mission of a school is to educate students, “prepar[e] students for work and citizenship,” and cultivate future leaders. The *Grutter* Court found, based on extensive testimony and other evidence, that a “critical mass” of diverse students was necessary for the University of Michigan Law School to effectively achieve this mission. But *Grutter* does not stand for the proposition that the educational

benefits of diversity are *always* a compelling interest, regardless of the context. Rather, it stands for the narrow premise that the educational benefits of diversity can be a compelling interest to an institution whose mission is to educate.

The Fire Department's mission is not to educate. Its mission is "the control, fighting and extinguishment of any conflagration which occurs within the city limits." Accordingly, *Grutter's* holding regarding a compelling interest in the educational benefits of diversity is unavailing here. And, we note, the City does not argue that diversity within individual fire companies is in any other way necessary, or even beneficial, to the Fire Department's mission of fighting fires, *i.e.*, that the Department has an operational need for diverse fire companies, and we do not read the City's assertions of increased "camaraderie," "acceptance," and "tolerance" as making such an argument. * * * In sum, we conclude that the benefits of diversity, as set forth by the City, are not a compelling interest that justifies its diversity policy.

3. COMPLIANCE WITH THE 1980 CONSENT DECREE

The City also argues that compliance with the 1980 Consent Decree constitutes a compelling interest. This, too, is unavailing. Compliance with a consent decree may certainly be a compelling interest, but only if the decree *mandates* the race-based policy at issue. . . . The Consent Decree says nothing about the diversity policy at issue here, much less does it *require* the City to engage in that policy. The Decree establishes policies and benchmarks for the hiring and promotion of minority firefighters, with the only language even arguably relevant here found in one paragraph of the twelve-page

Decree where the defendants were prohibited from making unlawfully discriminatory assignments. Reading a complete diversity requirement into that prohibition, however, . . . would stretch that language beyond its logical or intended limits. * * *

We conclude this opinion as we began, by reiterating what this case is not about. It is not about remedying intentional discrimination in the Newark Fire Department. It is not about improving the Department's ability to extinguish fires. It is not about whether diverse work places are good for employees or for society or whether long-range hiring goals are being met. This case is about whether Newark can "create[] a rainbow" in each of the 108 companies solely by means of a racial classification. We hold that it cannot. Racial balancing, and that is what this is, simply cannot be achieved by means of a racial classification without running afoul of the *Equal Protection Clause of the Constitution*. Accordingly, we will reverse the order of the District Court, and remand for further proceedings consistent with this opinion.

CASE QUESTIONS

1. What was the legal issue in this case? What did the court decide?
2. Why was a compelling governmental interest lacking in this case?
3. If this case had been argued solely under Title VII rather than the Constitution, would the analysis and outcome have been any different? Why or why not?
4. Should the Supreme Court's holding that a diverse student body is a compelling governmental interest for universities be extended to public employment? Why or why not?
5. Do you agree with the court's decision in this case? Why or why not?

Legal battles over affirmative action have most often involved public employers and their practices for hiring and promoting persons to highly sought-after civil service jobs, particularly positions in police and fire departments. Blatant discrimination against women and people of color by these entities led to numerous lawsuits in the 1960s and 1970s. These lawsuits, in turn, produced court orders and consent decrees, requiring strong affirmative action to undo the legacy of discrimination. Challenges to the continuation of these affirmative action plans have also been numerous. *Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland* is one such case. The excerpt that follows combines an appeals court decision in this case, with a subsequent district court decision on remand.