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DEBRA P. HACKETT, CLK
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FILED
JAN 28 2004
CLERK
U. S. DISTRICT COURT
MIDDLE DIST. OF ALA.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
TIMOTHY D. POPE,	)	
	)	
Intervenor-Plaintiff,	)	
	)	
JOHNNY REYNOLDS, et al.,	)	
	)	
Intervenor-Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION NO. CV-68-T-2709-N
	)	
TOMMY G. FLOWERS, et al.,	)	
	)	
Defendants.	)	

COMPLAINT AND MOTION TO MODIFY INJUNCTION OF PLAINTIFF-INTERVENOR TIMOTHY D. POPE

Timothy D. Pope, plaintiff-intervenor (hereinafter "Pope"), alleges as follows:

1. This complaint-in-intervention is filed by Timothy D. Pope, pursuant to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States; 42 U.S.C. § 1983; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., and its implementing regulations, which prohibit employers from discriminating on the basis of race in employment opportunities.

2. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1243, 1367, 2201 and 42 U.S.C. §§ 2000e, et seq.

3. Pope is a non-black employee of the Alabama Department of Corrections (ALDOC) and has been subjected to unlawful employment practices constituting discrimination on the basis of race.

4. The original parties to this action are plaintiff United States of America, acting through its Attorney General and the Alabama State Personnel Board (including individual members) and the State Departments of Personnel, Pensions and Security, Industrial Relations, Public Health, Education, Mental Health and Civil Defense, along with their respective department heads, as defendants. See *U.S. v. Frazer, infra* at 1081.

5. This action was initially brought by the United States to enforce the anti-discrimination provisions of certain federal funding statutes. The Court entered an injunction regarding the defendants' employment practices on July 28, 1970. *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970) ("the 1970 injunction"). The 1970 injunction prohibited, *inter alia*, the bypassing of a higher-ranking available black applicant in favor of a lower-ranking white applicant, as follows:

> 2. Negro applicants shall be appointed to positions other than custodial, domestic, laborer or laboratory aide, when said Negro applicants are listed on a Certification of Eligibles, unless higher-ranking white applicants on the certificate are appointed to fill the vacancy (or all the vacancies) in the listed position, or unless the defendants determine that the Negro applicant is not qualified to perform the duties of the position, or is otherwise not fit for the position.
>
> 3. Defendants shall not appoint or offer a position to a lower-ranking white applicant on a certificate in preference to a higher-ranking available Negro applicant, unless the defendants have first contacted and interviewed the higher-ranking Negro applicant and have determined that the Negro applicant cannot perform the functions of the position, is otherwise unfit for it, or is unavailable.

to Correctional Officer II and appointing an African-American to the position of Correctional Officer II. Race was the sole factor in the selection of the candidate that received the appointment and the decision not to appoint Pope.

9. On or about September 27, 2002, Pope met with ALDOC Personnel Director Dora Jackson for clarification of ALDOC's actions and to attempt to resolve the matter informally. Ms. Jackson confirmed that the plaintiff was selected by the interview panel as the most appropriate candidate for the position, but explained that the sole reason for the denial of Pope's appointment was that Pope (a non-black candidate) could not receive the appointment over a black female candidate. Pope then engaged in further discussions with Ms. Jackson and other ALDOC officials to resolve the issue by, *inter alia*, allowing him a lateral transfer (as a Correctional Officer I) to another ALDOC facility in the greater Birmingham area to alleviate the hardship and expense that he would endure in commuting to and from the Draper facility in Montgomery to his newly established residency in Birmingham. The plaintiff's request for accommodation was denied, and at the time of the filing of this complaint, the plaintiff continues to commute 160 miles per day (round trip) from his residence to the Draper Correctional Facility.

10. Pope sought further clarification of ALDOC's actions by contacting ALDOC's office of counsel. On December 4, 2002, ALDOC General Counsel Andrew W. Redd responded by letter to the plaintiff, stating "[W]arden Price selected you for the promotion and verbally advised you of her decision. The necessary paperwork for this promotion was submitted through Department of Corrections Personnel to State Personnel for approval and processing. State Personnel rejected this promotion because it was not in compliance with the provisions of *U.S. v. Frazer*, 317 F. Supp.1079 which does not permit the promotion of a lower ranking certified white candidate over a higher

ranking black candidate unless all higher ranking black candidates either decline or are ineligible to accept the promotion. A black candidate, who neither declined nor was ineligible was in Band 3. Thus you were precluded from selection, by State Personnel, and a black male in the same band as you was selected for the promotion." The defendants have admitted that Pope's appointment was rescinded solely due to his race. Moreover, it is clear that ALDOC did not appoint a higher ranking black candidate, but rather appointed a black candidate in the same band as Pope, after determining that Pope was the most qualified candidate.

11. On or about October 22, 2002, Pope filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging discrimination on the basis of race and gender. On or about December 4, 2002, Pope received a Right-to-Sue letter under Title VII. *See* Dismissal and Notice of Rights, dated December 4, 2002. The racial discrimination suffered by Pope was intentional, severe, pervasive, and objectively offensive. Pope has filed a separate discrimination action in this Court.

12. In light of this discriminatory treatment and the continuing impact of the *Frazer* no-bypass rule on plaintiffs' promotional opportunities, plaintiff-intervenor Pope seeks modification of the *Frazer* injunctions generally, and specifically elimination of the racially discriminatory *Frazer* no-bypass preference. The 1970 and 1976 *Frazer* injunctions have been in place now for over 30 and 25 years, respectively. Changes in both law and fact during the past three decades require modification of these injunctions, and particularly the *Frazer* no-bypass preference which is patently unconstitutional.[1]

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[1]Because the plaintiff-intervenor was not a party (and was not joined in this litigation) when these injunctions were entered, a showing of changed circumstances is not required, and modification can be based on the law and facts as they currently exist "irrespective of whether that

13. The United States Supreme Court has clarified its strict scrutiny of racial classifications and preferences in a series of decisions including *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."). The United States Court of Appeals for the Eleventh Circuit has applied those strict-scrutiny principles to institutional reform injunctions in cases including *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994). In fact, the Eleventh Circuit in its *Ensley Branch* decision has already held that *Croson* and its progeny have "sufficiently altered the legal landscape" so as to warrant *Rufo* modification of pre-1989 decrees. *See Ensley Branch*, 31 F.3d at 1564. These changes and developments in the law governing race-based remedies plainly show that these *Frazer* injunctions are unconstitutional and that modification is required. The *Frazer* injunction classifies candidates on the basis of race and, as has happened here, provides and denies hiring and promotional benefits on the basis of race. This racial classification (and preference) is not supported by a compelling governmental interest or by a strong evidentiary showing of ongoing discrimination. *See Ensley Branch*, 31 F.3d at 1564-68. It is not narrowly tailored to end any ongoing discrimination: the *Frazer* preference has continued now for over 25 years with no fixed duration; it ignores effective race-neutral alternatives (such as the development of valid, race-neutral selection procedures); it has no relationship whatsoever with the relevant labor market; and it has severe

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law has changed since the [injunction] was entered." *See Ensley Branch*, 31 F.3d at 1578-79. Even so, the changed circumstances, as set forth in the text, are apparent.

impact on the rights of innocent third parties (here, non-black candidates). *See id.* at 1569. Under Supreme Court and Eleventh Circuit precedent, the *Frazer* injunctions are plainly unconstitutional.

14. Additionally, the factual circumstances relating to these injunctions and the hiring practices at ALDOC have changed substantially over the past three decades. Most obviously, minority representation in the workforce at ALDOC has changed substantially. There is no longer any factual basis to support the race-based *Frazer* no-bypass preference under either the compelling-interest or narrow-tailoring prongs of strict-scrutiny analysis. The Alabama Department of Corrections is fully integrated, and the 1970 and 1976 injunctions no longer serve any remedial purpose. The injunctions, as written and as currently applied by the defendants, constitute an unlawful and unconstitutional race-based policy. The defendants' practices unconstitutionally discriminate against Pope and similarly situated non-black employees of the State. The injunction is plainly beyond the scope of permissible remedies under Title VII of the Civil Rights Act of 1964, the anti-discrimination provisions of the federal funding statutes at issue here, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

15. Application of the *Frazer/Ballard* no-bypass rule clearly has a continuing adverse effect on the employment interests of Pope, who must continue to compete for promotion subject to this racial preference. His legally protectable interests are not represented by any other party to this litigation. Nor has he been joined to this case pursuant to Section 108 of the Civil Rights Act of 1991 or the Federal Rules of Civil Procedure. Accordingly, Pope has sought intervention in this action for the purpose of challenging this unconstitutional, untailored, race-based application of the *Frazer/Ballard* injunction and to move for appropriate modification of those injunctive orders to ensure that they comply with the Constitution. *See Martin v. Wilks*, 490 U.S. 755 (1989) (holding

joinder of non-black employees appropriate); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1578-79 (11th Cir. 1994) (approving intervention of non-black employees to seek consent decree modification).

16. The requirements of the *Frazer* no-bypass rule fail to further the appropriate purpose of the injunction – that is, the elimination of the present effects of past illegal racial discrimination. In the context of a consent injunction, the Eleventh Circuit has noted that a "public employment consent decree's race-conscious provisions are only valid to the extent that they promote the compelling governmental interest, anchored in the Constitution, of ending discrimination." *Ensley Branch v. Seibels*, 31 F. 3d 1548, 1570 (11th Cir. 1994). The *Ensley Branch* court wrote that federal courts "must modify [injunctions] to prevent them from operating unconstitutionally in whole or in part." *Id.* Such a modification is required here.

17. Accordingly, the plaintiff-intervenor seeks modification of these injunctions and specifically the *Frazer* no-bypass preference, pursuant to Rule 60(b) and *Rufo v. Inmates of Suffolk Co. Jail*, 502 U.S. 367 (1992).[2] The changed circumstances set forth above (both legal and factual) require modification. As explained above, these race-conscious injunctions are unconstitutional, and their continuation is both inequitable and detrimental to the public interest. Under modification and strict-scrutiny precedent, modification is required.

18. This Court should modify and rewrite the injunction to reflect that its true "purpose is to remedy past and present discrimination, not to achieve workplace parity." *Ensley Branch*, 31 F.3d, 1570-71. "An end to racial discrimination demands the development of valid,

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[2]Alternatively, plaintiff-intervenor asks the Court to terminate the no-bypass provisions of these injunctions pursuant to the standards set forth in *United States v. City of Montgomery*, 948 F. Supp. 1553, 1563 (M.D. Ala. 1996).

nondiscriminatory selection procedures to replace race-conscious selection procedures." *Id.* at 1571. This Court should modify the injunction by vacating the no-bypass rule and other race-based requirements and/or alternatively ordering the defendants to implement lawful race-neutral selection procedures. *See id.* "The failure of the [injunction] to force the [defendants] to develop race-neutral selection procedures that are fair to blacks and whites has caused both to suffer the effects of discrimination." *Id.* at 1572.

19. The defendants' continued implementation of the *Frazer* no-bypass rule violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., and its implementing regulations.

20. Unless enjoined by this Court, the defendants will continue to violate the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964.

Wherefore, the proposed plaintiff-intervenor respectfully requests that this Court:

a. Declare that defendants have denied the plaintiff-intervenor and similarly situated persons the equal protection of the laws in violation of the Fourteenth Amendment;

b. Declare that defendants have discriminated on the basis of race by failing to address, prevent, and remedy racial discrimination, and in so doing failed to provide the benefits of race-neutral employment procedures to the plaintiff-intervenor, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., and its implementing regulations;

c. Permanently enjoin defendants, their officers, agents, employees, successors, assigns, and all persons in active concert or participation with them, from all unlawful discrimination against the plaintiff-intervenor on the basis of race;

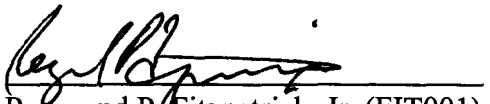
d. Vacate the race-conscious provisions of the 1970 and 1976 injunctions including the *Frazer* no-bypass rule and order the defendants to develop validated job-related race-neutral selection procedures forthwith;

e. Order defendants to provide such relief as is necessary to compensate the plaintiff-intervenor for the discrimination to which he was subjected;

f. Grant the plaintiff-intervenor an award of all costs and expenses including an award of reasonable attorney's fees, and;

g. Grant other such relief as may be appropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have on this 27th day of January 2004, served the above and foregoing pleading, by placing a copy of the same in the United States Mail, properly addressed and postage prepaid, upon the following counsel:

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