MICHAEL MARTINEZ et al., Plaintiffs-Appellees v. CITY OF ST. LOUIS, Defendant-Appellant

Appeal Nos. 06-3554, 06-3558, 06-3561

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

2006 U.S. 8th Cir. Briefs 222596; 2007 U.S. 8th Cir. Briefs LEXIS 475

November 28, 2007

ON APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI. THE HONORABLE JOHN F. NANGLE.

Initial Brief: Appellant-Petitioner

COUNSEL: [*1] CITY OF ST. LOUIS LAW DEPT. PATRICIA A. HAGEMAN, City Counselor, JUDITH A. RONZIO, #7301, Associate City Counselor, NANCY R. KISTLER, #3599, Deputy City Counselor, SHARON STONE, MBE #59772, Assistant City Counselor, St. Louis, MO, Attorneys for Appellant.

TITLE: BRIEF OF APPELLANT

TEXT: SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This matter arose in 2001 when two unsuccessful Caucasian applicants for entry level positions as firefighters in the St. Louis Fire Department - Eric Deeken ("Deeken") and Michael Martinez ("Martinez"), - separately filed lawsuits claiming reverse discrimination and challenging the continuation of a 1976 consent decree. Pursuant to the consent decree, the City of St. Louis ("City") was obligated to hire firefighters on a "one-for-one basis", i.e. one African-American hire for every Caucasian hire, until such time as "parity" was reached in the ranks of the Fire Department.

Parity was defined as the point where the percentage of entry level African-American firefighter privates reflected the percentage of African-Americans in the relevant geographic labor area. According to the consent decree, the "relevant geographic labor area" was [*2] the City of St. Louis.

In the course of litigation, these two lawsuits were consolidated.

In 2003, the district court entered its order, decreeing that the consent decree should be dissolved because it no longer addressed a "compelling government purpose". In 2005, the court held "parity" had been reached "sometime in 1998". The court's determination that parity had been reached in 1998 was based on the court's contemporaneous determination that the relevant geographic labor area was no longer merely the City of St. Louis proper, but had shifted, in fact, to the entire St. Louis Standard Metropolitan Statistical Area ("SMSA"). The SMSA was, and is, a much larger geographic area than the City of St. Louis, with a considerably lower concentration of African-Americans.

Ultimately, the court imputed this knowledge, i.e. that the relevant geographic labor area had changed, to the City's civil service commission and held that the City should have moved to dissolve the consent decree in 1998 when, in the court's opinion, parity was reached. The court also directed that Deeken be hired as a firefighter -Martinez had already been hired at that point - and that both should be awarded damages, [*3] "backpay" and other equitable relief retroactive to March, 2000, the date the court believed they should have been employed as entry level firefighters.

The City has appealed and asserts that the court erred in: 1) holding that the City had an affirmative duty to move for dissolution of the consent decree; 2) unilaterally modifying the consent decree retroactively so that the relevant labor pool was changed from the City of St. Louis to the SMSA and determining that, therefore, racial parity within the meaning of the consent decree was reached in 1998, and 3) holding the City liable in damages for failing to seek dissolution of the consent decree.

Because of the lengthy history of the case and the multitude of procedural issues involved, Appellants request at least 20 minutes for oral argument.

JURISDICTIONAL STATEMENT

This is an appeal from decisions and orders of the Hon. John Nangle, United States District Court, Eastern District of Missouri, ret., entered in these two consolidated cases which allege, *inter alia*, reverse discrimination in the hiring of applicants for the entry level position of firefighter private in the City of St. Louis Fire Department.

The [*4] Court's decisions and orders as aforesaid had the effect of dissolving a 1976 hiring consent decree, unilaterally modifying the relevant geographic labor area set out in the decree and declaring that the goal of the consent decree had been achieved in 1998, holding that Defendant City of St. Louis was liable for failing to move to dissolve the consent decree prior to the filing of the instant cases and awarding both retroactive monetary and retroactive equitable relief to Plaintiffs.

The District Court had jurisdiction of this matter pursuant to *28 U.S.C. 1331* inasmuch as this action arose under the Constitution of the United States and Title VII of the Civil Rights Act of 1964, as amended *(42 U.S.C. 2000-e, et seq.*) This Court's appellate jurisdiction is premised upon *28 U.S.C. 1291* in that this is an appeal from a final order of a district court of the United States.

The Court's judgment in this matter became final on September 5, 2007, with the issuance of the Court's Order of that date. Notice of appeal was filed by Appellant City of St. Louis on September 1, 2006, and held in abeyance by the United States [*5] Court of Appeals for the Eighth Circuit pending resolution of outstanding issues. A briefing schedule was issued by the Eighth Circuit on October 5, 2007. This appeal is timely.

STATEMENT OF ISSUES

STANDARD OF REVIEW

McDonald v. Carnahan, 109 F.3d 1319 (8th Cir. 1997);

McDonald v. Armontrout, 908 F.2d 388 (8th Cir. 1990).

Cody v. Hillard, 139 F.3d 1197 (8th Cir. 1998).

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)

I. DID THE DISTRICT COURT ERR WHEN IT UNILATERALLY AND RETROACTIVELY CHANGED THE RELEVANT GEOGRAPHIC LABOR MARKET FOR DETERMINING RACIAL PARITY IN THE ST. LOUIS FIRE DEPARTMENT FROM THE CITY OF ST. LOUIS TO THE ST. LOUIS METROPOLITAN STATISTICAL AREA?

Rufo v. Inmates of Suffolk Jail, 502 U.S. 367 (1992).

In re Pearson, 990 F. 2d 653 (1st Cir. 1993).

Parton v. White, 203 F.3d 552 (8th Cir. 2000).

A. The district court modified the consent decree in the absence of a significant change in facts or law and in the absence of evidentiary support.

Rufo v. Inmates of Suffolk Jail, 502 U.S. 367 (1992). [*6]

United States v. City of Miami, 2 F.3d 1497 (11th Cir. 1993).

Wyatt v. King, 811 F.Supp. 1533 (M.D. AL 1993).

1. Permissible Modifications.

Booker v. Special School Dist. No. 1, 585 F.2d 347 (8th Cir. 1978).

Jenkins v. State of Missouri, 216 F.3d 720 (8th Cir. 2000).

2. Impermissible Modifications.

Rufo v. Inmates of Suffolk Jail, 502 U.S. 367 (1992).

Reynolds v. McInnes, 338 F.3d 1221 (11th Cir. 2003).

B. The district court erred in relying on In re Pearson as authority for modifying the consent decree *sua sponte.*

Jenkins v. State of Missouri, 216 F.3d 720 (8th Cir. 2000).

In re Pearson, 990 F.2d 653 (1st Cir. 1993).

C. The district court failed to adjust the St. Louis Standard Metropolitan Statistical Area for race-neutral factors.

EEOC v. Olson's Dairy Queens, Inc., 989 F.2d 165 (5th Cir. 1993).

EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991).

Bennett v. Roberts, 295 F.3d 687 (7th Cir. 2002). [*7]

II. DID THE DISTRICT COURT ERR BY IMPOSING UPON THE CITY AN AFFIRMATIVE DUTY TO MOVE FOR DISSOLUTION OF THE CONSENT DECREE WHEN THE LANGUAGE OF THE DECREE WAS PERMISSIVE, RATHER THAN EXPLICITYLY MANDATORY?

A. The language of the consent decree frames the duties of the consenting parties.

United States v. United Mine Workers, 330 U.S. 258 (1947).

Schempp v. Reniker, 809 F.2d 541 (8th Cir. 1987).

Donaghy v. City of Omaha, 933 F.2d 1448 (8th Cir. 1991).

B. The district court itself assumed control over the decree's duration and, therefore, it is the district court that is responsible if the decree continued beyond the point where parity was achieved.

Donaghy v.*City of Omaha, 933 F.2d 1448 (8th Cir. 1991).*

Deleo v. City of Boston, No. 03-12538-*PBS, 2004 U.S. Dist. LEXIS 24034* (D. Mass. Nov. 23, 2004).

In re Pearson, 990 F.2d 653 (1st Cir. 1993).

III. DID THE DISTRICT COURT ERR IN DETERMINING THAT THE CITY OF ST. LOUIS CAN BE LIABLE FOR DAMAGES ON A CLAIM FOR REVERSE DISCRIMINATION FOR FAILING TO SEEK DISSOLUTION OF THE CONSENT DECREE, [*8] **EVEN ASSUMING *ARGUENDO* THAT RACIAL PARITY WAS ACHIEVED?**

Quinn v. City of Boston, 325 F.3d 18 (1st Cir. 2003).

STATEMENT OF THE CASE

This matter arose in 2001 when Eric Deeken ("Deeken") and Michael Martinez ("Martinez"), both unsuccessful Caucasian applicants for entry level positions as firefighters in the St. Louis Fire Department, separately filed lawsuits claiming reverse discrimination in hiring and challenging the continuation of a 1976 consent decree. Under the consent decree, the City of St. Louis ("City") was obligated to hire firefighters on a "one-for-one basis" - i.e. one African-American firefighter for every Caucasian firefighter - until such time as "parity" was reached in the ranks of the Fire Department.

"Parity" was defined as the point where the percentage of entry level African-American firefighters reflected the percentage of African-Americans in the relevant geographic labor area. According to the consent decree, the "relevant geographic labor area" was the City of St. Louis.

In the course of litigation, these two lawsuits were consolidated.

In 2003, the district court entered its order, decreeing that the consent decree [*9] should be dissolved because it no longer addressed a "compelling government purpose". In 2005, the court held "parity" had been reached "sometime in 1998". The court's determination that parity had been reached in 1998 was based on the court's contemporaneous determination that the relevant geographic labor area was no longer merely the City of St. Louis proper, but had shifted, in fact, to the entire St. Louis Standard Metropolitan Statistical Area ("SMSA"). The SMSA was, and is, a much larger geographic area than the City of St. Louis, with a considerably lower concentration of African-Americans.

Ultimately, the court imputed this knowledge, i.e. that the relevant geographic labor area had changed, to the City's civil service commission and held that the City should have moved to dissolve the consent decree in 1998 when, in the

court's opinion, parity was reached. The Court also directed that Deeken be hired as a firefighter -Martinez had already been hired at that point - and that both should be awarded damages, "backpay" and other equitable relief retroactive to March, 2000, the date the Court believed they should have been employed as firefighter privates.

STATEMENT OF [*10] **FACTS**

This appeal is taken from the following orders and judgments entered in this case by the district court:

1. A Memorandum and Order dated November 5, 2003 (Addendum 1) (Joint Appendix "J.A." 528), dissolving the consent decree entered into in 1976 because it "...no longer addresses a compelling government purpose". (hereinafter "Memorandum and Order of 11/5/03").

2. A Memorandum and Order dated February 24, 2005 (Addendum 2) (J.A. 783), granting partial summary judgment to plaintiffs Michael Martinez and Eric Deeken, holding that "sometime in 1998" the consent decree's "relevant geographic labor area" changed from the City of St. Louis to the St. Louis Standard Metropolitan Statistical Area ("SMSA"), imputing knowledge of said change to the City's civil service commission and finding the City liable for reverse discrimination by failing to hire Martinez and Deeken as firefighters earlier (hereinafter, "Memorandum and Order of 2/24/05").

3. An Order dated April 20, 2005 (Addendum 3) (J.A. 804), requiring the City to "certify" n1 Deeken on the City's next list of firefighters (hereinafter, "Order of 4/20/05").

4. Two jury verdicts, rendered March 16, 2006, awarding [*11] damages to Plaintiff Martinez in the amount of $ 5,000 (Addendum 4) (J.A. 842) and to Plaintiff Deeken in the amount of $ 157,989 (Addendum 5) (J.A. 843) and the judgment / mandate entered on said verdicts by the district court (Addendum 6) (J.A. 844).

5. The Order entered May 26, 2006 (Addendum 7) in which the Court amended it judgment on the jury verdicts (Addendum 4, 5 and 6) to award an additional $ 40,061.09 to Plaintiff Martinez (hereinafter "Order of 5/26/06).

6. The Order entered September 5, 2007 (Addendum 8) (J.A. 858), in which the court changed its mind and amended its previous Order of August 4, 2006 (J.A. 858), denying retroactive seniority and other equitable relief sought by both plaintiffs (hereinafter "Order of 9/5/07"). The effect of the Order of 9/5/07, was to award plaintiffs retroactive seniority and various other types of equitable relief.

n1 Although the term "certify," as used in the City's Civil Service Rules, is not synonymous with "hire," a subsequent order issued by the district court clarified that the court intended the term to mean the City was being ordered to hire Deeken.

[*12]

I. Factual Background

In 1974, two separate lawsuits were brought in the United States District Court for the Eastern District of Missouri pertaining to claims of discrimination in the City Fire Department. In Firefighters Institute for Racial Equality, et al. v. City of St. Louis, et al. n2, an association of black firefighters ("F.I.R.E.") and ten individually named black firefighters, brought suit alleging, *inter alia*, that the City's testing procedures for hiring entry-level firefighters were not validated

for work performance and caused a disparate impact on black candidates for firefighter. In United States v. City of St. Louis, et al. n3, the Justice Department alleged that an underrepresentation of blacks in the Fire Department reflected a pattern and practice of unlawful discrimination by the City against blacks in the hiring, promoting and operating practices within the Fire Department. These two cases were consolidated in the district court.

n2 Cause No. 74-30C(4).
n3 Cause No. 74-200C(4).

[*13]

A. The 1976 Consent decree

According to the district court judge who presided over these cases, after extensive conferences, the parties to the cases jointly submitted a "partial consent decree" (hereinafter, "consent decree") which was intended to remedy the racial imbalance in the Fire Department. Memorandum and Order of 2/24/05 at 2 (Addendum 2) (J.A. 783). Under the terms of the consent decree, the City was enjoined from engaging in "any act or practice which has the purpose or effect of discriminating against any employee of, or applicant or potential applicant for, employment with the City of St. Louis Fire Department because of such individual's race or color." Consent decree, P 1. The consent decree targeted the entry-level firefighter position ("fire private" or "firefighter"). It provided in Paragraph 2 as follows:

> 2. The defendants shall, as a long range goal, seek to recruit and hire blacks in sufficient numbers so as to achieve a racial composition in the ranks of Firefighters with the City of St. Louis Fire Department that is more representative of the racial and ethnic composition of the City of St. Louis as a whole. The goal shall be to achieve a racial [*14] composition of Firefighters in the St. Louis Fire Department which is comparable to the civilian labor force for the City of St. Louis subject to the availability of qualified applicants. In order to fulfill this goal and subject to the availability of sufficient qualified black applicants, defendants shall adopt and seek to achieve a goal of hiring blacks for at least fifty per cent (50%) of the vacancies for the entry level of Firefighter personnel in the Fire Department for each year during the life of this decree. For purposes of compliance with this goal, only those blacks completing their probationary period shall be counted. In no case shall defendant be required to displace incumbent employees or to hire unneeded employees or unqualified employees in order to meet the goal.

The consent decree was set forth in its entirety at the time the district court made findings of fact and conclusions of law relative to other claimed aspects of discrimination, as an appendix. See *United States v. City of St. Louis, 410 F.Supp. 948, 960-962 (E.D. Mo. 1976).* It was amended and approved by the district court *nunc pro tunc* in a final order. *United States v. City of St. Louis, 418 F.Supp. 383, 384-386,* [*15] aff'd in part, rev'd in part on other grounds *sub nom. Firefighters Institute, etc. v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977).*

Another provision of the consent decree pertained to its duration and enforcement:

> 10. The Court retains jurisdiction of this action with respect to the issues raised by the plaintiffs with respect to promotion and terms and conditions of employment within the Fire Department and for such further relief or other orders as may be necessary or appropriate to enforce and insure rights to equal employment opportunity. At any time after five (5) years from the date of entry of this partial decree, defendants may move this Court on forty-five (45) days notice to plaintiffs for dissolution of this partial decree; and upon their showing that the goals of this decree in providing equal employment opportunities have been fully achieved, the decree may be dissolved.

B. The 1990 Motion to Modify the Consent Decree

In 1990, the United States filed a motion to modify the consent decree by dissolving the long-range hiring goal and compelling the City to utilize lawful selection procedures in filling entry-level positions. [*16] Memorandum and Order of 10/1/90. At that time, black representation in the entry-level positions had increased to 32 per cent and the Justice Department argued that this level of representation constituted "substantial compliance" with the goals of the consent decree. The United States contended that the relevant benchmark for determining compliance with the goals of the consent decree should have been the civilian labor force in the St. Louis Standard Metropolitan Statistical Area ("SMSA"), an area larger than the City of St. Louis. Based on the 1980 Census data, the St. Louis SMSA had black representation in the civilian labor force at a rate of only between 14.5 per cent and 15.7 per cent, compared to the City's percentage of approximately 41 per cent. The City and F.I.R.E. countered that the consent decree specifically stated that the relevant baseline for determining compliance was the civilian labor force in the City, and not in the SMSA.

In denying the United States' motion, the district court noted that it had the authority to modify the consent decree. However, the court acknowledged that the consent decree based its goals on black representation in the civilian labor force [*17] of the City of St. Louis, and not the larger metropolitan area. The court gave no indication that utilizing the City of St. Louis civilian labor force as the relevant standard was inappropriate. Based on this standard, the court held that it was "inclined to agree with F.I.R.E. and the City of St. Louis that a disparity of nearly 10% is not 'comparable,' in the parlance of the consent decree; the Court thus rejects the United States' 'substantial compliance' rationale."

II. Procedural History

In 2001, Michael Martinez and Eric Deeken filed separate suits against the City, each suit alleging that the City engaged in unlawful reverse discrimination by failing to hire the plaintiff as a firefighter. Michael Martinez v. City of St. Louis, Cause No. 4:01CV580; Eric Deeken v. City of St. Louis, Cause No. 4:01CV1770. Martinez and Deeken are both white. The City, which continued to operate under the terms of the consent decree, filed answers in both cases generally denying the allegations, pleading the existence of the consent decree, and suggesting that the case lacked necessary parties, namely, the United States Department of Justice and F.I.R.E., both having been [*18] parties to the consent decree. Martinez and Deeken then amended their complaints to add the parties to the consent decree n4 as defendants. Deeken's amended complaint prayed, *inter alia*, for injunctive relief, including:

> To permanently enjoin the City of St. Louis, its elected and appointed officials, officers, employees, agents and successors and assigns and all persons acting in concert or participating with the City of St. Louis from engaging in any employment practice which discriminates against persons because of their race, including Deeken.

and:

> To order the City of St. Louis and City employee defendants to immediately hire Deeken into the position of Probationary Fire Private, retroactive to September 1999.

Plaintiff's First Amended Complaint, Cause No. 4:01CV1770, *ad damna*, PP (b), (d) ("J.A.25-26). Upon motion, the cases were consolidated and then transferred to the district court judge who had entered the consent decree. Subsequently, additional individuals were granted leave to intervene n5 in the case.

n4 The parties to the consent decree, in addition to the City, included the United States, F.I.R.E. and a number of its members, and the members of the City's Civil Service Commission.
[*19]

n5 Intervenors Lawrence B. Arens, IV and Mark D. Rauss were white candidates who had successfully passed

the test for entry-level fire private and were on the hiring list.

Following consolidation, the district court ordered the parties to submit a joint comprehensive stipulation of facts (J.A. 85). The parties did submit a Joint Submission of Facts in Compliance with the Court's Order (J.A. 88); additionally, in the same document, several parties submitted statements as to certain portions of the Joint Submission to which they could not stipulate.

A. Motions to Dissolve or Modify the Consent decree

Martinez and Deeken each filed motions to dissolve the partial consent decree. The motions involved claims that the Decree was unconstitutional or that racial parity in the entry level position of the Fire Department, as the goal of the Decree, had substantially been achieved.

The motion to dissolve filed by Martinez (J.A. 115) relied on opinions supplied by an endorsed expert witness, Cecilia Hegamin-Younger, Ph.D. Dr. Younger's opinions utilized data from the Missouri Department [*20] of Economic Development (MDED), which, in turn, were based on the 1990 Census Report. According to the motion, the data showed that between December, 1991 and June, 2002, the percentage of blacks in the entry level position of the St. Louis Fire Department increased from 38 per cent to 45.3 per cent. Meanwhile, according to Martinez, the percentage of blacks in the civilian labor force in the City of St. Louis was 56.9 per cent according to the 1990 Census Report, and had decreased to 55.3 per cent according to the 2000 Census Report. According to Martinez, these statistics showed "that the percentage of black non-probationary firefighters in the City of St. Louis Fire Department is approximately equal to the civilian labor force in the City of St. Louis during the years 1995 to 2000." Martinez did not claim that the relevant geographic labor market should be changed from the civilian labor force of the City of St. Louis to the civilian labor force of the SMSA.

Deeken's a motion to dissolve the Consent decree sought to declare it unconstitutional and void n6 (J.A. 356). Deeken argued, using much of the same data utilized by Martinez, that the goals of the consent decree had been achieved, [*21] although Deeken contended that racial parity had actually been reached in December, 1993. According to Deeken, as of December, 1993, blacks constituted 41.1 per cent of the City's civilian labor force, while constituting 41.6 per cent of personnel in the fire private rank. Deeken also claimed that the consent decree was unconstitutional because its terms were not narrowly tailored to remedy the finding that the entry level examination had a disparate impact on blacks, as found by the Court when the consent decree was entered.

n6 Although not styled as a motion for summary judgment, Deeken's motion apparently was based on the premise that there was no genuine dispute as to any issues of material fact pertinent to his motion, and that he was entitled to judgment, at least on this issue, as a matter of law. (J.A. 356').

Within the same time frame, the United States also filed a motion to modify the consent decree (J.A. 189). The United States moved to dissolve the Consent decree's remedial goal of hiring blacks [*22] for 50 per cent of vacancies for the position of probationary fire private (consent decree P 2), and to require the City to implement a selection procedure that would comply with Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e, et seq.* The United States identified Bernard R. Siskin, Ph.D. as an expert witness. Dr. Siskin prepared two reports concerning the comparison of black representation in the position of probationary fire private in the St. Louis Fire Department with the black representation of the civilian labor force in the City of St. Louis (J.A. 209 and 232). Dr. Siskin reported that, while the percentage of blacks hired for the position of fire private had steadily climbed in the years between 1991 and 2002, it still remained slightly below the percentage of blacks in the civilian labor force. n7 Dr. Siskin was critical of Dr. Younger's methodology because it relied on the MDED data that was taken from the 1990 Census, which, as of

2003, was outdated in its breakdown of the civilian labor force. Specifically, Dr. Siskin found that, while the City of St. Louis suffered a net loss in both its black and white populations between 1991 [*23] and 2002, the net loss of its white population was significantly greater than the net loss of its black population. As a result, black representation in the civilian labor force in the interim period was comparatively increased. This phenomenon was not reflected in the MDED figures.

> n7 Specifically, Dr. Siskin found the percentage of blacks in the position of fire private had gone from 38 per cent in 1991, to 45.3 per cent in the first half of 2002, the most recent data available. During the same period, the percentage of blacks in the civilian labor force of the City of St. Louis went from 41 or 42 per cent in 1991, to between 44 and 46 per cent in the first half of 2002.

The City responded to the motions of Martinez, Deeken and the United States in a single pleading (J.A. 390). Relying on Dr. Siskin's opinions, the City argued that the percentage of blacks in the Fire Department still had not reached the percentage of blacks in the civilian labor force of the City as of 2002. The City also responded to [*24] Martinez's and Deeken's motions by citing the language of the consent decree that the City "may" move for dissolution of the decree, noting that the decree did not impose a specific obligation on the City to move for dissolution. The City also contended that the court, in entering the consent decree, had found that the entry level firefighter's test then being used had a disparate impact on blacks. The City also contended the Decree was narrowly tailored to meet its remedial purpose.

B. The Court Asks for Briefing on the Relevant Geographic Area

After these motions and the responses thereto had been filed, but before any ruling had been made on any of them, the district court issued an order which stated in part:

> The Court hereby orders all parties to brief the issue of what geographic area should be used for the purpose of determining the number of blacks and whites living and working therein. Such briefs shall be filed within fifteen days of the date of this Order.

(J.A. 406). The parties filed responses to the district court's order. (J.A. 409, 443, 458, 472, 497, 512 and 516).

C. The Court Dissolves the Consent decree

On November 5, 2003, the [*25] district court entered a Memorandum and Order (Addendum 1) (J.A. 528). This ruling essentially disposed of all of the above motions. The district court denied the United States' motion to modify the consent decree, instead determining that the decree should be dissolved "[b]ecause the consent decree's remedial plan no longer addresses a compelling governmental purpose." Memorandum and Order, at 15. (J.A. 542). However, the district court declined to grant Deeken's request to have the consent decree declared void *ab initio* or even void retroactive to 1993. The court also denied Martinez's motion as to the City's liability, noting that under the terms of the consent decree, "the City is not obligated to move to dissolve the consent decree." Memorandum and Order, at 18. (J.A. 545).

D. Motions for Summary Judgment as to the City's Liability

Following the entry of a *nunc pro tunc* scheduling order by the district court, Deeken and the City filed motions for summary judgment on the issue of the City's liability as to Martinez's and Deeken's claims. The City's motion (J.A. 548) averred that the City's hiring practices had been carried out pursuant to a valid consent decree, [*26] the terms of which did not obligate the City to move for its dissolution. Deeken filed a response and memorandum in opposition to the City's motion, which included a dispute as to certain material facts as well as a legal memorandum.

Deeken's motion for partial summary judgment (J.A. 551), was premised on two contentions: (1) that the consent decree was not narrowly tailored to achieve its remedial purpose because it used the City of St. Louis civilian labor force, rather than the SMSA labor force, as the benchmark for black representation in the position of fire private, and (2) that even if the consent decree were valid, the goal of racial parity had been achieved by 1998, the year Deeken took the fire private's exam and appeared on the hiring list. The City filed a response which included a dispute as to certain material facts and a legal memorandum.

Martinez filed a memorandum in support of Deeken's motion for partial summary judgment, as well as his own statement of uncontroverted material facts (J.A. 742) and supplemental statements of material facts in support (J.A. 754, 769, 773), but it was unclear whether it was meant to respond to the City's motion for summary judgment, [*27] or was filed for some other purpose. Martinez did not file a discrete motion for summary judgment. The City filed a response to Martinez's statement of uncontroverted material facts (J.A. 779), acknowledging that it was unsure to what purpose Martinez had filed it, but noting that it could not allow the statement to go unchallenged.

E. The Court Grants Summary Judgment in Favor of Plaintiffs and Against City

On February 24, 2005, the district court issued the Memorandum and Order of 2/24/05 (Addendum 2) (J.A. 783). The court recited the history of the litigation back to the 1974 cases and the 1976 consent decree. The court also noted the 1990 motion of the United States to dissolve the consent decree, which was based on the use of the St. Louis Standard Metropolitan Statistical Area in lieu of the civilian labor force of the City of St. Louis as the appropriate benchmark for black representation, which the court rejected. The Memorandum and Order of 2/24/05 then alluded to its Order of 11/5/03 (Addendum 1) (J.A. 528) dissolving the Consent decree before taking up the motions for summary judgment.

The Memorandum and Order of 2/24/05 noted that in 2003, the City received [*28] 1,056 applications for the position of fire private, with approximately 55 per cent of the applicants reporting they resided within the City of St. Louis and 45 per cent otherwise; it also noted that in 2001, the figures were 65 and 35 per cent, respectively. The Memorandum also noted that official data for 1998 was no longer available, having been destroyed after the 1998 eligible list expired (in October, 2000), but that Deeken claimed that of 1,541 persons who failed the written portion of the 1998 test, about 66 per cent reported residing in the City.

The Memorandum and Order of 2/24/05 also noted that a City Charter provision and City Civil Service Rules affected hiring practices. City Charter, Art. XVIII, § 3(e) provided in pertinent part that "vacancies in higher competitive positions, so far as practicable [be filled] by means of promotion on competitive examination. . . . Promotion on competitive examination shall be deemed to be practicable whenever there are qualified employees in positions of lower classes who are willing to compete." Civil Service Rules provided that, to be eligible for promotion, an employee must be a permanent employee, which is an employee who [*29] has successfully completed a working test period and whose permanent appointment has been recommended by that appointing authority and approved by the Director of Personnel. Civ. Serv. R. I, §§ 1(ii) and (gg). The Charter also provided that all City employees establish residency with the City within 120 days of their appointment.

The Memorandum and Order of 2/24/05 noted the statement of counsel for the City at a hearing that 75 per cent of the firefighter appointees under the 1998 test were from the promotional list, meaning that they were already City employees, and hence, already residing in the City, before being hired as firefighters. It also noted counsel's representation that 100 per cent of the firefighters appointed from the 2001 list were promotional, and thus had all resided in the City of St. Louis prior to their appointments.

The Memorandum and Order of 2/24/05 found that Deeken had taken and passed the written and physical components of the 1998 test, and was placed on the eligible list with a composite score of 94.864. Deeken was not a permanent City employee prior to his placement on the eligible list. He therefore was placed on the "open list," ranked first. The [*30] Memorandum then noted that, in September, 1999, the City appointed 15 black candidates with scores

lower than Deeken's from the open list. In December, 1999, in response to a request, lists of candidates for appointment to fire private were certified. A list of white candidates consisted of 28 names, all certified from the promotional list. A list of black candidates consisted of 41 names, 7 certified from the promotional list and 34 from the open list. No white candidates were certified from the open list. Not all of the certified candidates were hired, but all those hired came from these lists of candidates. In March, 2000, the City hired 17 blacks from the open list. In June, 2001, the City hired 5 blacks from the open list. In October/November, 2001, the City hired 9 blacks from the open list. Deeken was never hired.

Unlike Deeken, Martinez was already a permanent City employee at the time he took and passed the 1998 written and physical components of the firefighters test. He was placed on the eligible list with a composite score of 83.068; the City notified Martinez that he was ranked number 67 on the promotional list. In March, 1999, the City hired 8 black candidates from the [*31] promotional list with lower scores than Martinez. In 2000, the list of black candidates on the 1998 promotional list exhausted, Martinez was advanced on the list to second alternate. The first alternate was hired, but Martinez was not. n8

n8 However, during the course of this litigation, Martinez was hired as a fire private. See *infra*, at 26, n. 11.

After setting forth the pedigrees of Deeken and Martinez, the district court analyzed the relevant geographic area to be used to determine whether the City's failure to hire Deeken and Martinez constituted reverse discrimination. The Memorandum and Order of 2/24/05 acknowledged that in 1990 the district court expressly rejected the suggestion that the St. Louis SMSA be substituted as the relevant geographic market. However, the court then determined that "a geographic area encompassing the SMSA is the most appropriate geographical area for determining the relevant labor market." n9 Memorandum and Order, at 17. (J.A. 799). Hence, "the Court hereby reconsiders [*32] this aspect of the law of the case, however, holding that the City should have moved for the amendment or dissolution of the consent decree upon noticing the changing circumstances set out above." Memorandum and Order, at 19. (J.A. 801).

n9 The district court seemed to imply that changed circumstances were the reason for changing geographical area, noting that the City has lost substantial population and that "while this decline may have begun as 'white flight,'it long ago lost any possible racial overtones." Memorandum and Order of 2/24/05 at 18. (J.A. 800). According to the district court, the City's civil service commission and staff"must have been aware of these changing demographics. This awareness should cause any person on the Commission interested in securing the best possible firemen to realize that the continued use of the City of St. Louis proper as its relevant geographic area was outdated. In 1990 it was not, but many demographic changes have occurred since then." Memorandum and Order, at 18-19. (J.A. 800-801).

[*33]

The Memorandum and Order of 2/24/05 proceeded to state:

> This Court will ORDER that the SMSA shall serve as the relevant geographic area for hiring probationary firefighters, effective sometime in 1998. Consequently, the Court finds that racial parity was reached at that time.

Memorandum and Order, at 21. n10 (J.A. 803).

n10 The court left open for the parties to attempt to resolve by agreement certain issues: 1. When plaintiffs Deeken and Martinez should have been hired as probationary firefighters; 2. What other relief, if any, plaintiffs Deeken and Martinez should receive. Memorandum and Order, at 21. (J.A. 803).

F. The Court Orders the City to Hire Deeken

Subsequently, the district court issued its Order of 4/20/05, (Addendum 3) (J.A. 804), stating in pertinent part, the Court "...**HEREBY ORDERS** that Plaintiff Eric Deeken n11 be certified on the City's next list of probationary fire privates, currently tentatively scheduled for the end of May." However, a subsequent order from [*34] the district court, in ruling on the City's application for stay of its Order of 4/20/05 pending appeal, clarified that the court believed said order "mandated Plaintiff Deeken's inclusion in the City's next class of probationary firefighters" (J.A. 822).

n11 The order was made only as to Deeken. Prior to the issuance of this order, earlier in 2005, Martinez was certified from the promotional list and was hired as a fire private.

The City then filed its Notice of Appeal, but it was dismissed without prejudice when it became apparent that the appeal was premature (J.A. 826).

G. The Court Rules on Damages, Costs, Attorneys Fees and Equitable Relief

Thereafter, the Court scheduled a hearing for the purpose of receiving evidence and hearing oral argument with respect to pending applications for the plaintiffs' fees and expenses (J.A. 830). The Court further ordered that, prior to the hearing, the parties submit a joint statement stipulating, wherever possible, to the evidence that would be presented [*35] at hearing (J.A. 831). Ultimately, however, by Order dated September 27, 2005, the motion hearing was cancelled.

In lieu of the motion hearing, the court held a teleconference on the issue of attorneys fees and costs, as well as to determine a tentative date for a trial to determine damages. (J.A. 832). A jury trial was scheduled for March 15, 2006 (J.A. 833) and the Court further ordered that, at the conclusion of the trial on damages, it would hear the parties on the question of attorneys fees and costs (J.A. 839).

In the meantime, the City filed its "Motion to Clarify the Order of Court Relating to Trial Or, In The Alternative, Motion for Court To Enter Interlocutory Order As To Liability" (J.A. 836). The Court responded by an Order dated March 13, 2006 (J.A. 840), wherein it made clear that its Memorandum and Order of 2/24/05 included a finding of liability on the part of the City because the City should have moved for dissolution of the consent decree upon noticing the "changing circumstances", and should have hired both Martinez and Deeken as firefighters at an earlier date. The Order further stated that the issue remaining for trial was the issue of damages that should be [*36] awarded to Martinez and Deeken for the delay in their appointments as probationary firefighters.

A jury trial on the issue of damages was commenced on March 15, 2006 and concluded on March 16, 2006. The jury returned a verdict in favor of Martinez and against the City in the amount of $ 5,000 for, *inter alia*, emotional distress. The jury returned a verdict in favor of Deeken in the total amount of $ 157,989, representing lost wages, lost benefits and other damages. The court entered judgment on the verdicts on March 22, 2006 (J.A. 842, 843 and 844, respectively).

In response to Martinez's Motion to Alter Judgment (J.A. 849), the Court amended its judgment of March 22, 2006 so as to award Martinez an additional $ 40,061.09 for lost wages (J.A. 853).

Subsequently, the Court addressed the issue of costs and attorneys fees, establishing hourly rates for the attorneys and support staff and directing that the parties meet and jointly draft proposed awards for attorneys fees and costs. (J.A. 855).

On August 4, 2006, the Court entered its Order (J.A. 858) denying Martinez's Motion for Retroactive Seniority. By the same Order the Court granted, in part, Deeken's Post-Trial Motion for [*37] Equitable Relief by ordering that the City contribute $ 15,563 to the Firemen's Retirement System on Deeken's behalf and reducing Deeken's jury award by that amount.

The City again filed Notice of Appeal (J.A. 873) with respect to the Court's Order of August 4, 2006. Martinez and Deeken also filed Notices of Appeal (J.A. 879 and 880, respectively).

Although the Court had scheduled a hearing on the issue of attorneys fees (J.A. 878) for September 28, 2006, a later Order on October 13, 2006 (J.A. 886), directed that the Parties' Motions for Attorneys Fees should be stayed.

Finally, in response to motions by the Plaintiffs (J.A. 889 and 892), on September 5, 2007, the Court amended its previous Order and granted equitable relief in the form of retroactive seniority to both plaintiffs for the purpose of determining wages and retirement benefits. The Court directed that the plaintiffs be paid at the level they would have achieved in the normal course of employment, had they been appointed to the position of probationary firefighter on March 13, 2000, and that they each receive a lump sum payment to make up the difference. (Addendum 8) (J.A. 905). In the same Order, the Court declined [*38] to rule upon attorneys fees in light of the pending appeals.

SUMMARY OF THE ARGUMENT

Defendant maintains that the district court erred when, in its Order and Memorandum of 2/24/05 (Addendum 2) (J.A. 783), it retroactively changed the relevant geographic labor market for determining racial parity in the St. Louis Fire Department from the City of St. Louis to the St. Louis Metropolitan Statistical Area and then determined that, on the basis of the newly-defined relevant geographic labor market, racial parity in the department had been achieved as early as 1998.

Defendant additionally maintains that the district court erred when it held that the City of St. Louis alone had a legal duty to seek dissolution of the 1976 consent decree governing racial parity and firefighter hiring, despite the lack of express mandatory language to that effect in the consent decree and despite an earlier statement by the district court that the City had no such duty.

Finally, Defendant maintains that that the district court erred in holding that the City could be held liable to the individual plaintiffs in damages and for equitable relief on the grounds of reverse discrimination because of the [*39] City's failure to seek dissolution of the consent decree.

ARGUMENT

Standard of Review

The Court of Appeals reviews the district court's decision to terminate its supervision over a consent decree, or to modify a consent decree, for abuse of discretion. *McDonald v. Carnahan, 109 F.3d 1319, 1321 (8th Cir. 1997);* citing *Heath v. DeCourcy, 992 F.2d 631, 633 (6th Cir. 1993)* and *McDonald v. Armontrout, 908 F.2d 388, 390 (8th Cir. 1990).* Where a district court did not make sufficient findings in support of its decision to dissolve consent decree, the Court of Appeals could not make findings of fact or exercise discretion in the district court's stead. *Cody v. Hillard, 139 F.3d 1197, 1200 (8th Cir. 1998).* A reviewing court analyzes all racial classifications, imposed by whatever federal, state or local governmental actor, under strict scrutiny. Such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).*

I. THE DISTRICT COURT ERRED WHEN IT UNILATERALLY [*40] **AND RETROACTIVELY CHANGED THE RELEVANT GEOGRAPHIC LABOR MARKET FOR DETERMINING RACIAL PARITY IN THE ST. LOUIS FIRE DEPARTMENT FROM THE CITY OF ST. LOUIS TO THE ST. LOUIS STANDARD METROPOLITAN STATISTICAL AREA.**

Through negotiation, the parties to the 1976 consent decree agreed that the St. Louis Fire Department would aspire to obtain in its ranks a percentage of black firefighters substantially equivalent to the percentage of blacks in the City of St. Louis. Thus, the City of St. Louis was designated the "relevant geographic labor market" for purposes of the consent decree. Clearly, this geographic parameter was an essential element of the decree in that it was the official "measuring stick" by which the achievement of parity was to be judged.

When the district court held in its Memorandum and Order of February 24, 2005 (Addendum 2) (J.A. 783), that the SMSA, and not the City of St. Louis, was the appropriate relevant geographic labor market for determining parity, it unilaterally altered an essential term - perhaps the most essential term - of the consent decree. To use a sports analogy, the court changed the rules of the game in the midst of play. The court added insult to [*41] injury when it made the newly-designated labor market retroactive to 1998.

As an essential element of the consent decree, the provision setting out the relevant geographic labor market is not subject to unilateral modification by the district court - and especially not to retroactive unilateral modification.

A consent decree has qualities of both contracts and judicial decrees. *Rufo v. Inmates of Suffolk Jail, 502 U.S. 367, 378 (1992); Donaghy v. City of Omaha, 933 F.2d 1448, 1459 (8th Cir. 1991).* The terms of a consent decree are negotiated by the parties and arrived at by mutual agreement. *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986).* Consequently, consent decrees are to be construed as contracts and interpreted under contract law. *United States v. City of Ft. Smith, 760 F. 2d 231, 233-34 (8th Cir.1985).*

When a court interprets a consent decree, it should not do so in a vacuum. Rather, the original context and circumstances should be taken into account. *Pure Country, Inc. v. Sigma Chi Fraternity, 312 F.3d 952, 958, 959 (8th Cir. 2002); Quinn v. City of Boston, 325 F.3d 18, 37 (1st Cir. 2003).* [*42]

A consent decree, however, is more than a mere contract between two parties. *Navarro-Ayala v. Hernadez-Colon, 951 F. 2d 1325, 1337-38 (1st Cir. 1991).* The district court is also a significant player in the decree. As part of an issuing court's inherent power over decrees within its jurisdiction, the court retains "ongoing supervisory responsibilit[ies]" to enforce, modify or dissolve a consent decree. *In re Pearson, 990 F. 2d 653, 657-658* (1st Cir., 1993).

Specifically, issuing courts retain power to inquire into changed circumstances to ensure that a consent decree remains appropriately tailored to the wrongs that initially prompted it. *Id. at 658;* Jones 'El v. Schneiter, No. 00-*C-421-C, 2006 U.S. Dist. LEXIS 53213,* at * 12-13 (W.D. WI July 31, 2006).

It is both accurate and relevant to the instant case that a district court need not await a party's motion to amend a consent decree. When appropriate, a district court considering modification of a decree under its supervision may *sua sponte* move to evaluate the consent decree. *In re Pearson, supra, at 658-659. See also United States v. City of Miami, 2 F.3d 1497, 1503 and 1506 (11th Cir. 1993).* [*43]

A threshold requirement, however, is that any proposed modification to a consent decree must be warranted by a significant change in facts or law. *Rufo, 502 U.S. 367 at 393; Parton v. White, 203 F.3d 552, 555 (8th Cir. 2000).* Moreover, a proposed modification may not go so far as to alter an essential element of the consent decree. *Rufo, 502 U.S. at 398* (O'Connor, J., concurring).

A. The district court modified the consent decree in the absence of a significant change in facts or law and in the absence of evidentiary support.

Not only did the district court take it upon itself to modify an essential term of the consent decree, it did so without a showing that there had been a significant change in the facts or law and, moreover, without benefit of evidentiary support.

In the context of institutional reform litigation, the controlling U.S. Supreme Court case on the issue of consent decree modification is *Rufo v. Inmates of Suffolk Jail, 502 U.S. 367 (1992).* In Rufo, the Court reiterated its rejection of the strict Swift "grievous wrong" standard in favor of a more flexible approach in determining whether [*44] modification of a decree is permissible. *Rufo, 502 U.S. at 380-81, 393; City of Miami, 2 F.3d at 1503* (Rufo flexible standard replaces Swift standard). n12 A flexible approach is superior because the typical consent decree will be operable for an extended period of years and will face circumstantial changes that either are out of the parties' control or were not contemplated when the consent decree was entered. *Rufo, 502 U.S. at 380-381.* The principles of Rufo extend to employment discrimination actions. *City of Miami, 2 F.3d at 1505.*

n12 *United States v. Swift & Co., 286 U.S. 106, 119 (1932)* ("Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.").

Under Rufo, a party seeking modification needs to establish: (1) that a significant change in facts or law warrants revision [*45] and (2) that the proposed modification is suitably tailored to the changed circumstance. *Rufo, 502 U.S. at 393; City of Miami, 2 F. 3d at 1504;* and *Wyatt v. King, 811 F. Supp. 1533, 1538-39 (M.D. AL 1993).* Modifications follow the standard in Fed. R. Civ. P. 60(b)(5). *Rufo, 502 U.S. at 383; Parton, 203 F.3d at 555; Reynolds v. McInnes, 338 F.3d 1221, 1226 (11th Cir. 2003);* Jones '*El, 2006 U.S. Dist. LEXIS 53213*, at * 2, *6-7; *Wyatt v. King, 811 F. Supp. 1533, 1538 (M.D. Ala. 1993).* Not all modifications, however, are warranted. *Rufo, 502 U.S. at 383.*

1. Permissible Modifications.

Upon new or altered circumstances, a district court has discretion in the exercise of its equitable authority to modify a consent decree as long as notice and an opportunity to respond are provided to the parties prior to modification. *Booker, 585 F.2d at 352; Reynolds, 338 F.3d at 1227.* Modification is appropriate when: (1) changed factual conditions make compliance substantially more onerous; (2) the original [*46] consent decree becomes unworkable due to unforeseen obstacles; or (3) enforcement without modification is detrimental to the public interest. *Rufo, 502 U.S. at 384; Reynolds, 338 F.3d at 1226-27;* and Jones '*El, 2006 U.S. Dist. LEXIS 53213*, at *5, 6. *See e.g. Parton, 203 F.3d at 555.*

Any modification, however, regardless of how appropriate it might be, must be made pursuant to proper procedure and supported by an evidentiary record. *Jenkins v. State of Missouri, 216 F.3d 720, 726 (8th Cir. 2000); Dean v. City of Shreveport, 438 F.3d 448, 462 (5th Cir. 2006); U.S. v. Bd. of School Comm'rs, 128 F.3d 507, 512 (7th Cir. 1997).*

Proper procedure does not permit a court to rewrite a consent decree or to import its own terms. n13 *Rufo, 502 U.S. at 391; Holland v. New Jersey Dep't of Corr., 246 F.3d 267, 281 (3rd Cir. 2001).* In *EEOC v. New York Times Co., 196 F.3d 72, 78 (2nd Cir. 1999),* for instance, the appellate court observed that "[A] court may not replace the terms of a consent decree with its own, no matter how [*47] much an improvement it would make in effectuating the decree's goals".

n13 "A proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor. Once a court has determined that changed circumstances warrant a modification in a consent

> decree, the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances. A court should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires." *Rufo, 502 U.S. at 391.*

Moreover, the extensive knowledge a court may gain by virtue of its familiarity with long term litigation is not a substitute for an evidentiary record. *Jenkins, 216 F.3d at 726.* In Jenkins, the district court judge determined, without benefit of an evidentiary hearing, that the Kansas City, Missouri School District had achieved "unitary status" and then terminated the school reform litigation. *Jenkins, 216 F.3d at 724.* [*48] The Eighth Circuit Court of Appeals held this to be error and reversed. *Id. at 726.* The Seventh Circuit Court of Appeals, faced with a similar circumstance in a school reform consent decree, vacated a district court judge's unilateral modification of a busing order that was issued without a hearing or an evidentiary record. *U.S. v. Bd. of School Comm'rs, 128 F.3d 507, 512 (7th Cir. 1997).*

In the instant case, the district court exceeded the permissible range of modifications when it replaced the "City of St. Louis" with the "St. Louis SMSA" in defining the relevant geographic labor market. (See Memorandum and Order dated February 24, 2005, Addendum 2) (J.A. 783). First, the questionable shifting of demographics used to justify the switch does not rise to the level of a significant change in fact or law such as would meet the threshold requirement for a modification as set out in *Rufo, supra.*

Changed conditions warranting a modification or dissolution of a consent decree are those that result in a burden of "onerous" compliance, an "unworkable" decree, or a conflict with public interest. Here, there was no assertion that the City [*49] was unable to comply with its obligations under the consent decree to increase the participation of blacks within the fire department. In fact, the percentage of black fire fighters increased steadily under the decree. Further, there was no evidence offered to indicate whether the parties did or did not contemplate changing demographics when the geographical term of the consent decree was agreed upon. Consequently, whether migration patterns around the St. Louis area were "unforeseen" is debatable. Additionally, no public interest conflicts were argued by either party.

It is also important to note that any change in demographics that would support a modification must be validated by evidence. A casual observation of population redistribution patterns around the City does not qualify as factual support. No hearing was held on this issue. The only support offered in the Court's opinion for changing the relevant labor pool from the City proper to the St. Louis SMSA is a generalized discussion of migratory demographics, unaccompanied by concrete data. Memorandum and Order, dated February 24, 2005 (Addendum 2, 17-19) (J.A. 799-801). Again, it is not the judge's domain to rewrite a consent [*50] decree to his personal preferences. As a result, proper procedure was not observed.

Similarly, the district court's familiarity with St. Louis does not transform astute insight into a factual record. The district court took "judicial notice" of flight to the suburbs and westward expansion, and then imputed that knowledge to the Civil Service Commission. Memorandum and Order dated February 24, 2005 (Addendum 2, 18-19, fn.9) (J.A. 800-801). Judicial notice involving an essential element of the consent decree robbed the parties of their due process rights to present evidence. Again, proper procedure was not observed.

In summary, shifting demographics unsupported by statistical evidence do not qualify as a significant change in circumstances such as would justify a modification in the City's consent decree. Additionally, in the absence of an evidentiary record, any modification of a consent decree is procedurally infirm. Thus, the district court's unilateral modification of the relevant geographic labor market in this consent decree falls outside of the permissible range of modification.

2. Impermissible Modifications.

Not only does the district court's unilateral revision [*51] of the relevant geographic labor market not fall within the parameters of "permissible modifications", in many respects it actually constitutes an improper, impermissible

modification.

First, modification of a consent decree is improper when the revision defeats the basic purpose of the decree. *Rufo, 502 U.S. at 398* (O'Connor, J., concurring)); *Reynolds, 338 F.3d at 1226; City of Miami, 2 F. 3d at 1504-05;* and *Wyatt, 811 F. Supp. at 1539.* In the 1976 consent decree, the basic purpose of the consent decree was to equalize the ranks of firefighters in the St. Louis Fire Department with the racial composition of the civilian labor force within the City of St. Louis. n14 Altering the relevant labor market parameter, therefore, completely defeated the original purpose of the 1976 consent decree and is, for that reason, impermissible.

n14 "The defendants shall, as a *long range goal,* seek to recruit and hire blacks in sufficient numbers so as to achieve a racial composition...of Firefighters in the St. Louis Fire Department which is comparable to the civilian labor force for the City of St. Louis subject to the availability of qualified applicants. In order to fulfill this *goal*..." *U.S. v. City of St. Louis, 410 F. Supp. 948, 960 (E.D. Mo. 1976); 418 F. Supp. 383, 384 (E.D. Mo. 1976),* aff'd in part, rev'd in part on other grounds in *549 F.2d 506 (8th Cir. 1977)* (*emphasis added*).

[*52]

Modification of a consent decree is also disfavored when the alteration creates a constitutional violation. *Rufo, 502 U.S. at 391; Parton, 203 F.3d at 555.*

In general, an employment scheme that deliberately discriminates based on race is forbidden by the Constitution. *Regents of the Univ. of California v. Bakke, 438 U.S. 265, 307 (1978); The Brotherhood of Midwest Guardians, Inc. v. City of Omaha, 9 F.3d 677, 680 (8th Cir. 1993).* In this case, however, the City of St. Louis was "sheltered" from violating the constitution by discriminating because it adhered to an allowable race-conscious hiring plan under the 1976 consent decree.

In this case, the abrupt alteration of the relevant geographic labor market from the City proper to the greater St. Louis SMSA propelled the City from its safe haven into a position of illegal racial discrimination. As a result, the modification of the relevant geographic labor area was error.

Finally, a modification of a consent decree is impermissible and erroneous when an affected party relies on the circumstances of the consent decree. *Rufo, 502 U.S. at 384-85.*

In [*53] the instant case, for almost 30 years, the City of St. Louis was guided by, and relied on, the terms of the consent decree in establishing its policies and procedures for hiring firefighters.

The City was justified in doing so. When a city has a residency requirement, as does the City of St. Louis, the appropriate relevant geographic labor market is the city proper. n15 *Quirin v. City of Pittsburgh, 801 F. Supp. 1486, 1488-90 (W.D. Pa. 1992).* In this case, not only did the parties agree in the 1976 consent decree that the City of St. Louis was the relevant geographic labor market, but in 1990 the district court also entertained and rejected a motion by the United States Department of Justice to change the relevant geographic labor market to the St. Louis SMSA. Order of October 1, 1990.

n15 The City of St. Louis utilizes a residency requirement for its employees. *See* St. Louis City Charter, Article VIII City Officers and Employees, § 2 Residency Requirement. "In addition to other qualifications required by this charter ... all officers and employees (in non-temporary, full-time positions) must reside in the City of St. Louis ...."

[*54]

The City, faithfully following the terms of its consent decree, relied upon the City of St. Louis as the correct market by which to measure the success of the new hiring practices. Altering this essential term upon which the City relied was error.

B. The district court erred in relying on In re Pearson as authority for modifying the consent decree *sua sponte.*

Even if the modification at issue here were permissible, the district court's authority to oversee a consent decree within its jurisdiction does not allow a for a *sua sponte* modification.

Sua sponte modification of an essential element of a consent decree is improper, for example, when due process procedures are violated. In *Jenkins v. State of Missouri, 216 F.3d 720, 726 (8th Cir. 2000),* for instance, the Eighth Circuit held that the district court's *sua sponte* ruling that the school district had achieved unitary status was constitutional error in the absence of procedure. *See also U.S. v. Bd. of School Comm'rs, 128 F.3d 507, 511-12 (7th Cir. 1997).*

In contrast, when considering modification or dissolution of a decree, district courts do have the authority to [*55] *sua sponte* move for review of a consent decree to assess the current state of affairs. This was precisely what occurred in *In re Pearson, 990 F.2d 653, 658-59 (1st Cir. 1993).* In Pearson, the inmate petitioners sought a writ of mandamus to prevent the district court from appointing a special master to review the viability of their consent decree. *In re Pearson, 990 F.2d at 655.* The writ was denied. *Id. at 661-62.* The Court of Appeals held that the district court did not exceed its authority by simply investigating possible modifications to a consent decree affecting the operation of a state treatment center for sexual offenders. *Id. at 658.*

In the instant case, the district court has relied on Pearson as authority for modifying a consent decree. Memorandum and Order dated February 24, 2005 (Addendum 2, at 20 fn.11). (J.A. 802). However, a careful reading of the case reveals that the issue in Pearson was the appointment of a special master to "survey the legislative landscape," "investigate...the impact of changed circumstances," and "assess the current relevance of the decrees." *In re Pearson, 990 F.2d at 655, 660.* [*56] The district judge in Pearson did not attempt to modify the consent decree.

In fact, the First Circuit Court of Appeals specifically addressed the issue of *sua sponte* modification in Pearson and determined that the case did not present the issue of modification, but only the appointment of a master for "limited investigatory and advisory purposes." *In re Pearson, 990 F.2d at 659, n.7.*

Consequently, at best, the authority flowing from Pearson gives the district court in the instant case power to assess the current conditions influencing the consent decree, not the power to unilaterally change a term. n16

n16 *See also City of Miami, 2 F. 3d at 1503* (holding that the district court can *sua sponte* review a consent decree to determine the propriety of possible termination) and *Wyatt, 811 F. Supp. at 1536* (appointing expert to investigate compliance with the terms of the consent decree).

C. The district court failed to adjust [*57] **the St. Louis Standard Metropolitan Statistical Area for race-neutral factors.**

Even if the District Court was correct in ruling that as of 1998 the City of St. Louis was outdated as an unacceptably narrow region by which to measure the racial parity in the St. Louis Fire Department, adopting the entire St. Louis Standard Metropolitan Statistical Area was error. Memorandum and Order, dated February 24, 2005

(Addendum 2, at 21) (J.A. 803). Standard metropolitan statistical areas are often adjusted for non-discriminatory factors such as: applicant interest in the position, commuting time, language qualifications, and economic relationships between the geographic areas. *See EEOC v. Olson's Dairy Queens, Inc., 989 F.2d 165, 166 (5th Cir. 1993)* (refining the Houston SMSA to account for commute time); *EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 300-03, 305 (7th Cir. 1991)* (finding the metropolitan Chicago area too broad because applicant interest, commute time, and language fluency requirements should have been part of the calculus); and *EEOC v. O & G Spring and Wire, 790 F. Supp. 776, 778 (N.D. Ill. 1992)* (adjusting the relevant [*58] labor market to account for language requirements and applicant preference). In refining a relevant labor market the expert must identify persons who are not only qualified for the position at issue but also interested in applying. *Bennett v. Roberts, 295 F.3d 687, 697 (7th Cir. 2002).* n17

n17 *See also Ashton v. City of Memphis, 49 F. Supp. 2d 1051, 1070-71 (W.D. Tenn. 1999)* (finding expert's report insufficient with regards to the relevant labor market because his report failed to account for applicant interest, disqualifying criminal records, and age variables).

The district court's reliance on Bennett to support expanding the relevant labor market to encompass the entire statistical metropolitan area is misplaced. Memorandum and Order dated February 24, 2005 (Addendum 2, at 18 n.7 (J.A. 800). The Bennett court did note that the relevant labor market is a "key ingredient" of statistical evidence in employment discrimination cases. *Bennett, 295 F.3d at 697* [*59] (citing *EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 302 (7th Cir. 1991)).* The Bennett court did not, however, adopt the greater Chicago area because the expert's testimony was flawed for failure to account for non-discriminatory factors. Id. at 697.

As stipulated by the parties, the St. Louis SMSA includes the following cities and counties in Missouri and Illinois: Clinton County, Il., Jersey County, Il., Madison County, Il., Monroe County, Il., St. Clair County, Il., Crawford County, Mo. (part), Franklin County, Mo., Jefferson County, Mo., Lincoln County, Mo., St. Charles County, Mo., St. Louis County, Mo., Warren County, Mo., and St. Louis City, Mo. Memorandum and Order, dated February 24, 2005, (Addendum 2 at 6) (J.A. 788). Reliable experts could have refined the St. Louis SMSA to reflect the pool of realistic applicants for the St. Louis Fire Department. Since employees of the City are subject to a residency requirement, one race-neutral factor to consider is willingness of the applicant to relocate. No such evidence was presented by the parties nor considered by the court.

Using the broader St. Louis SMSA as the relevant geographical parameter [*60] produced a considerably different ratio than that arrived at under the terms of the original 1976 consent decree. In addition, a wide spectrum of percentages of the black civilian labor force could result depending on what areas represented in the St. Louis SMSA would have been reduced or eliminated due to applicable race-neutral factors.

Settling on an accurate geographic boundary for the relevant labor market is critical because it is determinative of whether the City of St. Louis remained obligated under the consent decree's hiring plan. Even if the St. Louis Standard Metropolitan Statistical Area is determined to be the correct geographical boundary for the relevant labor market, upon modification that statistical area should have been adjusted for race-neutral factors. Consequently, altering the relevant labor without accounting for relevant race-neutral factors was error.

D. THE DISTRICT COURT ERRED BY IMPOSING UPON THE CITY AN AFFIRMATIVE DUTY TO MOVE FOR DISSOLUTION OF THE CONSENT DECREE WHEN THE LANGUAGE OF THE DECREE WAS PERMISSIVE, RATHER THAN EXPLICITLY MANDATORY.

The City was not under an affirmative duty to move for amendment or dissolution of the consent decree. [*61] In the absence of specific direction in the decree's text for an exit plan, the district court retained the ultimate authority over the duration of the consent decree.

A. The language of the consent decree frames the duties of the consenting parties.

The 1976 consent decree under which the City operated did not expressly obligate the City to terminate the consent decree at an identifiable point nor did the decree expressly mandate that the City be the party to seek termination. The express language of the consent decree in this case states:

> "At any time after five (5) years from the date of entry of this partial decree, defendants *may* move this Court...for dissolution...upon their showing that the goals of this decree in providing equal opportunity have been *fully* achieved..." *U.S. v. City of St. Louis, 410 F. Supp. 948, 962 (E.D. Mo. 1976); 418 F. Supp. 383, 386 (E.D. Mo. 1976),* aff'd in part, rev'd in part on other grounds in *549 F.2d 506 (8th Cir. 1977)* (*emphasis added*).

Clearly, the language is open-ended with regards to dissolution. Compared to language in other consent decrees, the indeterminate language [*62] of this consent decree does not provide for a clear exit plan. *Cf. The Brotherhood of Midwest Guardians, Inc., 9 F.3d at 678* (decree expires when numerical target goals achieved and maintained for one year); and *Donaghy, 933 F.2d at 1451 - 52, 1461* (decree provided for specific interim hiring goals and had set duration of seven years).

Even the district court in this case held in 1990 that the City was not obligated to move for dissolution. Order of October 1, 1990, at p. 18.

As a result, the City in good faith continued to follow a valid court order. n18 Moreover, until such a valid court order is officially modified through proper procedure, a party to a judicial order is obligated to comply. *U.S. v. United Mine Workers, 330 U.S. 258, 293 (1947); Schempp v. Reniker, 809 F.2d 541, 543 (8th Cir. 1987); In re Novak, 932 F.2d 1397, 1400 (11th Cir. 1991); In re Providence Journal Co., 820 F.2d 1342, 1346 (1st Cir. 1986);* and *Picerno v. Mauer, 920 S.W. 2d 904, 912 (W.D. Mo. App. 1996).*

> n18 Good faith is part of the calculus the district court should consider in determining whether the goals of the decree have been met. *City of Miami, 2 F.3d at 1508; R.C. v. Walley, 390 F. Supp. 2d 1030, 1043, 1056* (M.D. Ala.) (finding good faith a relevant factor in determining whether a consent decree has served its purpose).

[*63]

In addition, reliance on a bona fide affirmative action plan is a defense against a reverse discrimination suit. *Donaghy, 933 F.2d at 1461; Warsocki v. City of Omaha, 726 F.2d 1358, 1359 (8th Cir. 1984).*

Therefore, based on the permissive language of the consent decree text, the general obligation to follow a court order, and the reliance on a valid affirmative action plan, the City did not have an obligation to seek dissolution of its decree.

B. The district court itself assumed control over the decree's duration and, therefore, it is the district court that is responsible if the decree continued beyond the point where parity was achieved.

The ultimate authority to ensure that a consent decree remains necessary rests with the district court because of its ongoing duty to monitor a consent decree issued in its jurisdiction. *Donaghy, 933 F.2d at 1459.* Oversight can encompass inquiries into whether the parties are in compliance with the decree's terms, whether goals are being achieved, and whether the means to achieve those goals have remained constitutional. *Donaghy, 933 F.2d at 1459;* Deleo v. City of Boston, [*64] No. 03-12538-*PBS, 2004 U.S. Dist. LEXIS 24034,* * 17, 18 (D. Mass. Nov. 23, 2004).

Demographic and statistical evidence can be provided to the court by the parties bound by a consent decree, but it is

the court that ultimately determines whether racial disparity still exists. *Dean, 438 F.3d at 458, 462.* A district court does not have to await a party's motion before involving itself in a consent decree. n19 *In re Pearson, 990 F.2d at 658; City of Miami, 2 F.3d at 1506.*

n19 "[T]he district court is not doomed to some Sisyphean fate, bound forever to enforce and interpret a preexisting decree without occasionally pausing to question whether changed circumstances have rendered the decree unnecessary, outmoded, or even harmful to the public interest...". *In re Pearson, 990 F.2d 653, 658 (1st Cir. 1993).*

For instance, upon motion by a group of white police applicants, the district court in Deleo exercised its equitable powers [*65] to re-examine the "Castro" decree under which the Boston Police Department ("BPD") operated. *Deleo, 2004 U.S. Dist. LEXIS 24034,* at * 10-12. The court reviewed statistics provided by the parties and determined that the department achieved its goal of "rough parity" and released the BPD from its obligations to affirmatively increase the representation of black and Spanish-surnamed officers in its ranks. *Deleo, 2004 U.S. Dist. LEXIS 24034,* at * 3, 29, 33. Similarly, in Pearson, the First Circuit Court of Appeals upheld the district court's power to appoint a special master to assess the "current relevance" of and the possibility of "decree-modifying changes" to the underlying decree. *In re Pearson, 990 F.2d at 658, 660.*

The authority for this power springs from the court's "inherent powers" regardless of whether the consent decree specifically provides for the power or not. *Id. at 657.*

In the instant case, the district court did exercise its inherent power to control the duration of the 1976 decree. Specifically, in 1990, the district court, upon a motion filed by the United States Department of Justice, reviewed [*66] the efficacy of the decree as a whole and the possibility of modification of the relevant geographic labor market from the City of St. Louis to the greater St. Louis SMSA. In its order, the district court denied either a modification or dissolution of the decree. Order dated October 1, 1990. Later, in an order dated March 20, 2003, the district court requested briefs from the parties regarding a modification in the relevant labor market. The district court however, dissolved the decree in November of 2003. Order dated November 5, 2003. (Addendum 1) (J.A. 528). That the district court assumed this ultimate authority is evidenced by its characterization of the text of the decree as merely an invitation to the City to seek dissolution, then upon such motion the decree "*may* be dissolved". n20 Memorandum and Order, dated February 24, 2005 (*emphasis added*). (Addendum 2, at 11) (J.A. 793).

n20 "The language of the consent decree invited the City to seek "dissolution of this partial decree" ...". Memorandum and Order, dated February 24, 2005 (Addendum 2, at 11) (J.A. 793).

[*67]

The court's decision that the decree "may" be dissolved, rather than "shall" be dissolved, implies that the court reserved the question of the duration of the consent decree for itself.

E. THE COURT ERRED IN DETERMINING THAT THE CITY OF ST. LOUIS CAN BE LIABLE FOR DAMAGES ON A CLAIM FOR REVERSE DISCRIMINATION FOR FAILING TO SEEK DISSOLUTION OF THE CONSENT DECREE, EVEN ASSUMING *ARGUENDO* THAT RACIAL PARITY WAS ACHIEVED.

The City is not liable for damages resulting from alleged reverse discrimination because it was actively monitoring the percentage of blacks in the Fire Department and comparing it to the percentage of blacks in the labor force in the

City of St. Louis as required by the 1976 consent decree.

The district court in its Memorandum and Order dated February 24, 2005, took judicial notice of the principle espoused in the First Circuit that a public employer has the duty of "continuous oversight" when it utilizes a race-conscious remedy to alleviate past employment discrimination. Memorandum and Order, dated February 24, 2005 (Addendum 2 at 19-20) (J.A. 801-802). *Quinn v. City of Boston, 325 F.3d 18 (1st Cir. 2003).* Under Quinn, a municipality [*68] using a racially discriminating hiring plan has an affirmative duty to monitor when parity has been achieved to determine the point at which it can no longer use its consent decree as a defense to a reverse discrimination claim. *Quinn, 325 F.3d at 37.* The First Circuit Court of Appeals, in its 2003 ruling, determined that as of 2000, parity in the Boston fire department was reached, and the City's reliance on its consent decree in 2000 was unconstitutional. *Id. at 37, 39.* Notwithstanding that only a single circuit court of appeals imposed an enhanced duty of oversight onto a municipality obligated under a consent decree, the district court in this case imposed a similar burden on the City of St. Louis.

Even so, Quinn is distinguishable from this case. Racial parity in Quinn was measured according to the original terms of the decree, i.e., the percentage of minority (black and Hispanic) firefighters against the percentage of those minorities in Boston's overall population. *Quinn, 325 F.3d at 35 - 37.* The judge in Quinn determined that parity was reached in the past, but the judge did not alter the original terms by which [*69] that parity was measured. Presumably, had the Boston fire department compared its percentage of minority firefighters to its goal, it would have realized that parity had in fact been achieved. Therefore, any authority flowing from the holding in Quinn grants a district court authority to hold that racial parity was retroactively achieved, but it does not extend to modification of a decree's original terms to determine that parity.

Here, the City was monitoring whether parity had been achieved yet, and determined that it had not been. Comparing the percentage of black fire fighters to percentage of black population in the city proper, the City determined that parity had not yet been achieved.

The City's goal, pursuant to the consent decree, was a fire department composed of 41% black firefighters. The City relied on this numerical goal to measure when parity achieved.

Even broadly accepting the premise in Quinn that a municipality has the duty to continually monitor its decree to determine when racial parity is met, it is clear that the City was doing just that.

CONCLUSION

For the foregoing reasons, the district court erred by modifying an essential term of [*70] the City's consent decree and then declaring that the City was liable for retroactively violating the Plaintiffs' constitutional rights by not moving for the dissolution of the consent decree earlier, even though the City was under no affirmative obligation to move for dissolution and the City was actively monitoring racial parity in the fire department. This court should overturn the district court's ruling and find that the City did not engage in reverse discrimination.

Respectfully submitted,

PATRICIA A. HAGEMAN, CITY COUNSELOR

/s/ Judith A. Ronzio, #7301
Associate City Counselor
/s/ Nancy R. Kistler, #3599
Deputy City Counselor
/s/ Sharon Stone, MBE #59772
Assistant City Counselor

Attorneys for Appellant
Room 314 City Hall
St. Louis, MO 63103
Tel: 622-3361 Fax: 622-4956

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,939 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements [*71] of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Judith A. Ronzio, #7301
Attorney for appellant City of St. Louis

Dated this 28th day of November, 2007.