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; 2008 U.S. 8th Cir. Briefs LEXIS 543

February 12, 2008

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

Reply 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, St. Louis, MO, Attorneys for Appellant.

TITLE: REPLY BRIEF OF APPELLANT

TEXT: STATEMENT OF FACTS

The City of St. Louis would dispute the accuracy of Deeken's Statement of Facts. Said statement contains numerous inaccuracies as well as fails to cite to any portions of the Joint Appendix before this Court. Furthermore, after careful review, the City has determined that many of the cited portions are not in said Joint Appendix. Therefore the City would urge this court to disregard Deeken's Statement of Facts. To the extent said "facts" are considered by this Court, the City would state that the assertions at page three regarding the demographics of applicants for the 2003 and 2000 examinations are not only unsupported by the record, but are irrelevant to any of the issues on appeal.

Further, the alleged facts at page three regarding the demographics of applicants for the 1998 examination are inaccurate in that the exhibit referenced by Deeken, which is not a part of the record, lists just those applicants who [*2] failed to appear for the examination or failed the examination, not all applicants. (S.A.A. 1097). If Deeken would have included said exhibit, it would be evident that a large number of applicants living outside the City of St. Louis did not appear for the examination. Defendant City's Opposition to Plaintiff Deeken's Motion for Partial Summary Judgment at 1, fn. 1 and 6 (S.A.A. 1097, 1002). It can only be assumed that such applicants were not truly interested in the

probationary fire private position.

Also, it should be noted that the MDED statistics cited by Deeken at page five are based on the 1990 Census (Joint Stip. P 51 (J.A. 100) and do not, therefore, account for demographic changes in the City between 1990 and 2000.

Additionally, Deeken does not accurately cite the language of the consent decree. On page two Deeken states that "under the terms of the consent decree, the City was not prohibited from hiring applicants who lived outside the City of St. Louis [consent decree *P 9,410 F. Supp. at 961)*". A review of paragraph 9, which is at 962, does not reflect language to that effect. *United States v. City of St. Louis, 410 F. Supp. 948, 961 (E.D. Mo. 1976)* [*3]

ARGUMENT

I. THE DISTRICT COURT ERRED IN CHANGING THE RELEVANT GEOGRAPHIC LABOR AREA IN THAT IT DID NOT AFFORD THE CITY DUE PROCESS OF LAW PRIOR TO CHANGING IT AND IN THAT IT MADE THE CHANGE IN THE GEOGRAPHIC LABOR AREA RETROACTIVE.

A. THE DISTRICT COURT ERRED IN CHANGING THE RELEVANT GEOGRAPHIC LABOR AREA IN THAT IT DID NOT AFFORD THE CITY DUE PROCESS OF LAW PRIOR TO CHANGING IT.

At page 15 of his Brief, Martinez maintains that, although the issue of changing the relevant geographic labor area was raised by the district court *sua sponte*, "it was by no means unilateral in the sense that there was no input from the parties." At page 23 of his Brief, Deeken denies that the issue was raised *sua sponte* by the Court but instead suggests that the court's order was in response to Deeken's motion for summary judgment. Deeken further alleges that the court did not modify the consent decree but, rather, determined it was unconstitutional to the extent that it used the City of St. Louis as the relevant labor market for determining racial parity in 1998. Deeken's Brief, at 23-24.

The City disagrees with both assessments of what occurred. The district court did [*4] solicit input from the parties with respect to what area should be used as the relevant geographic labor area for determining when parity had occurred. The district court did not, however, hold a hearing or solicit input on the underlying issue of whether the consent decree should be changed by substituting a new relevant geographic labor area.

The court's order at issue here stated:

> 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. 407).

That order was issued on March 20, 2003. It is clear that this order was not in response to Deeken's motion for summary judgment in that said motion was not filed until May 10, 2004. (J.A. 551). Clearly, the order was in fact entered *sua sponte* and the change was made unilaterally.

Further, a suggestion by Martinez at page 16 of his brief that the fact that the City stipulated that it had actively recruited probationary firefighters from outside the City limits proper (July 2, 2004 Joint Stip. PP 63-68, Add. B [*5] to Martinez's Brief) somehow constituted "evidence" on which the district court could rely in changing the relevant geographic labor area, is untenable. Deeken, in his Statement of Facts at 3, also mentions these recruiting efforts. First, the portion of the joint stipulation identified by Martinez does not reflect any change. It merely describes recruiting efforts employed by the City between 1998 and November 2003. Furthermore, the City routinely advertises for positions outside of the City limits. It has little option but to do so when the mass media such as the Post-Dispatch, the St. Louis American and various radio stations have circulation and broadcast areas that extend well beyond the City's boundaries.

In any event, recruiting beyond the City limits cannot change the fact that any individual hired by the City was, and is, by law required to move into the City and to maintain residence there throughout his or her employment tenure. Appellant's Brief, at 39, n. 15.

Furthermore, historically, a large number of permanent City employees, like Martinez, have been promotional candidates for the position of probationary fire private. Because, the City Charter n1 required that "vacancies [*6] in higher competitive positions, so far as practicable," be filled "by means of promotion on competitive examination...", these promotional candidates were certified for appointment before non-promotional candidates. Declaration of Linda Thomas, P7, Attachment 3 to Joint Stip. (Supplemental Appendix of Appellant [hereinafter "S.A.A."], 928). As a result, the majority of the probationary fire private positions have been filled with promotional candidates. One hundred twenty-two (122) out of 168 appointees from the 1998 eligible list were promotional candidates and all of the twenty-one (21) appointees from the 2002 eligible list were promotional candidates. Defendant City's Opposition to Plaintiff Deeken's Motion for Partial Summary Judgment at p. 5 (S.A.A., 1101); Defendant's Response to Deeken's First Set of Interrogatories, Number 10, Attachment 17 to Joint Stip. (S.A.A. 1089). These candidates, because they were permanent city employees n2, were all residents of the City of St. Louis. Martinez also suggests, without citation to any authority, that the City cannot complain of the court's failure to hold a hearing when the City never requested a hearing. However, the City had no [*7] notice that the court was going to retroactively change the relevant geographic labor area without a hearing on the matter.

n1 Article XVIII, § 3(e) of the City's Charter required that "vacancies in higher competitive positions, so far as practicable," be filled "by means of promotion on competitive examination except where vacancies are filled, in the interests of the service, by demotion, transfer, reinstatement, or reemployment, in the order of preference here indicated, where applicable. 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." (S.A.A. 1008).

n2 See City's Opposition to Plaintiff Deeken's Motion for Partial Summary Judgment at p. 5 (J.A. 1101); City of St. Louis Civil Service Rule I, § 1(ff) and (ii), Exhibit G attached to City's Opposition to Plaintiff Deeken's Motion for Partial Summary Judgment (S.A.A. 1161).

Martinez further argues that the district court's [*8] decision to change the relevant geographic labor area was within its broad discretion to modify the terms of a consent decree upon a substantial change in circumstances. Yet Martinez fails to describe the substantial change in circumstances. As the City pointed out in its brief, the only change in circumstances identified by the district court was the change in demographics. Memorandum and Order dated February 24, 2005 at p. 18-19, n.9. Add. 2 to Appellant's Brief (J.A. 800-801). These "demographic changes" were unsupported by the record.

B. THE COURT ERRED IN MAKING THE CHANGE IN THE GEOGRAPHIC AREA RETROACTIVE

The City addresses the issue of retroactivity at length in its Appellant's Brief and will not repeat its arguments here, except to note that not even *Quinn v. City of Boston, 325 F.3d 18 (1st Cir. 2003)*, which the district court relied on heavily for support, involved a retroactive alteration of a relevant geographic labor area. The issue of retroactivity is raised here for the purpose of pointing out that Martinez submits no theory by which such a radical retroactive alteration can be justified and that neither Martinez, nor Deeken, cite to any authority [*9] which supports such action.

Martinez cites Quinn in asserting that measures of parity must remain flexible. The City does not argue with this assertion. However, this holding does not suggest that a measure of parity contained in a consent decree can be changed retroactively and a party found liable for not previously adhering to the changed measure.

In Quinn, the court, in determining whether parity had been achieved, was defining the two variables set out in the underlying consent decree, which were utilized to measure parity. In regard to the first variable (minority firefighters in the Boston Fire Department), because it was somewhat ambiguous and had never previously been defined by the court, the First Circuit held that the original intent of the parties should have been ascertained by the district court. The court did not change the variable.

In regard to the second variable used to measure parity (minorities within the community), the court of appeals held that the district court was correctly guided by the principle of *stare decisis* when it defined this variable based on the unambiguous language of the consent decree and prior court decisions addressing this [*10] variable. If the court in the case at bar had been similarly guided, the relevant geographic labor market would have remained the City of St. Louis and the City would not be liable to plaintiffs for any damages.

II. THE DISTRICT COURT ERRED IN FINDING THAT THE CITY WAS LIABLE FOR RACE DISCRIMINATION IN THAT THE CITY HAD NO AFFIRMATIVE DUTY TO MOVE TO DISSOLVE OR MODIFY THE CONSENT DECREEE AND THE CITY WAS OBLIGATED TO FOLLOW THE ORIGINAL TERMS OF THE CONSENT DECREE UNTIL IT WAS DISSOLVED OR MODIFIED.

In Point IV of his Brief, Martinez argues that the City was guilty of race discrimination because it failed in its "responsibility to protect all of its citizens from race discrimination." Martinez fails to provide a citation to the source of that alleged "responsibility". Furthermore, Martinez's argument seems to be based on the fact that the language of the consent decree does not "limit the City's responsibility to seek to discontinue the race-based hiring system once racial parity was achieved in the Fire Department". Martinez's Brief, at 19 (emphasis added). Deeken also argues that the City has an affirmative duty to move to modify or dissolve the consent decree once racial [*11] parity was achieved. Deeken's Brief, at 15.

Deeken argues that "all of the obligations under the consent decree were placed on the City and its agents, including the burden to move to dissolve the decree..." and that "[u]nder the consent decree, only the City was permitted to move to dissolve the decree". Deeken's Brief, at 15. However, that is not the case. The decree did not require the Appellant to move to dissolve the decree, instead noting that it "may" move to dissolve the decree. Neither did the language of the decree foreclose other parties or individuals from moving to dissolve the decree. This is evidenced by the fact that in 1990 the United States Department of Justice did, in fact, file a motion to dissolve the decree. At that time the Department of Justice argued that the 50 percent hiring goal was no longer warranted because African-Americans represented approximately 32 percent of non-probationary fire privates, while the 1980 census for the St. Louis Standard Metropolitan Statistical Area (SMSA) showed that African-Americans represented 14.5 percent of the total labor force and 15.7 percent of the civilian labor force between the ages of 20 and 29. (J.A. 91 - 92). [*12] The court denied the motion to dissolve the consent decree, not on the basis that the United States could not move to dissolve the decree, but on the ground that the long-term goal of the consent decree had not been achieved and that the City of St. Louis civilian labor force, as opposed to the broader SMSA, was the appropriate benchmark for determining whether this goal had been achieved. (J.A. 91-92). The court held that the City of St. Louis remained the appropriate benchmark even though the residency requirement initially in effect when the consent decree was entered into had changed and applicants were no longer required to be residents at the time of application. St. Louis City Charter, Article VIII, § 2 (S.A.A. 1174)

Clearly, the City was obligated to follow the terms of the consent decree while it was in effect. "[A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *United States v. United Mine Workers, 330 U.S. 258, 293 (1947).* "Even if the order is later declared improper or unconstitutional, it must be followed until vacated or modified. [*13] .." *In re Providence Journal Co., 820 F.2d 1342, 1346 (1st Cir. 1986),* modified on reh'g en banc, *820 F.2d 1354 (1st Cir. 1987),* cert. dismissed sub nom. *United States v. Providence Journal Co., 485 U.S. 693 (1988)* (citing *Walker v. Birmingham, 388 U.S. 307 (1967).*

Assuming, *arguendo,* that, as Deeken and Martinez contend, the City had an obligation to move to dissolve the decree when the goals were met, it remains unclear when they suggest that obligation arose. Point III of Deeken's brief suggests that racial parity was achieved "in or before 1998" while Point III(A) states that parity was achieved in 1993. Deeken's Brief, at 16, 17. Martinez does not explicitly commit to a date, but appears to adopt the 1998 date as to when parity was reached. Martinez's Brief, at 20. When did that obligation arise - 1993? - 1998? How was the City to determine that fact? Should it have relied on the civilian labor force in the City or the civilian labor force in the SMSA in making that determination? Was it required to speculate that the district court would change the relevant labor market despite the fact that in 1990, as well [*14] as when Deeken and Martinez filed their lawsuits, it no longer required applicants to live in the City at the time of application? That fact did not sway the district court to change the relevant labor force benchmark in 1990. Had the City moved to modify or dissolve the consent decree, there is no certainty that it would have prevailed in such a motion and, if it in fact did not prevail, the taxpayers could very well have been liable for attorney's fees. See *42 U.S.C. 1988*(b). The City presumes that the Firefighters Institute for Racial Equality would have opposed said modification or dissolution, as it did in 1990 and as it did in the current cause.

In his brief, Deeken argues that, under the unaltered terms of the consent decree, parity was reached in 1993. Deeken's Brief, at 17-18. His argument relies upon data from the Missouri Department of Economic Development that reflects the percentage of African-Americans in the City of St. Louis civilian labor force from 1993 through 2001. The statistics for each of these years, however, were based upon the demographics for the City of St. Louis as reflected in the 1990 Census. Joint Stip. P 51 (J.A. 100); Declaration [*15] of William Niblack, P 8, Attachment 10 to Joint Stip. (S.A.A. 1020). They were based upon the assumption that the demographics did not change during this time period. In fact, the parties stipulated to the opposite - that the demographics shifted, resulting in a higher percentage of African-Americans participating in the City of St. Louis labor market. Joint Stip. PP 38 - 46 (J.A. 98 - 99).

Deeken further argues that the analysis of the United States' and the City's expert, was flawed in that it assumed that the change in demographics between 1990 and 2000 occurred in a straight line. However, the analysis of Deeken's expert ignored the change altogether.

Under the original terms of the consent decree, contrary to Deeken's assertion, racial parity had not been achieved in 1993. In arguing that the ratio of African-American firefighters in the St. Louis Fire Department reached parity with the ratio of African-Americans in the City of St. Louis labor force in 1993, Deeken is asking this Court to make factual findings that the district court declined to make. Memorandum and Order dated November 5, 2003 (Brief of Appellant, Add. 1; J.A. 544-545). Making such findings in the district [*16] court's stead, however, would be inappropriate. *Cody v. Hillard, 139 F.3d 1197, 2000 (8th Cir. 1998).*

The district court also did not find that parity under the original terms of the consent decree was reached in 1998, because the City presented evidence that parity had not been reached by this time. Memorandum and Order dated November 5, 2003, at 9, 17-18, Add. 1 to Brief of Appellant (J.A. 536, 544-545). Again, assuming the City had an obligation to move to dissolve or modify the consent decree once parity was achieved, a position disputed by the City, such obligation never arose because parity was not reached under the terms of the original consent decree - not by 1993 or by 1998.

In arguing that the City failed to monitor parity (Martinez's Brief, at 21 - 22), it appears the measure that Martinez believes should have been monitored is the percentage of African-Americans in the SMSA. Deeken's argument that the City failed to monitor and take affirmative action to dissolve the decree when it had outlived its ethicacy (Deeken's Brief, at 24) also assumes the appropriate measure of parity to be the SMSA. Martinez notes that the City was aware the United States had [*17] filed a motion in 1990 seeking to modify the consent decree based on the position that racial parity had been achieved if measured by the SMSA. The City was also well aware, however, that the district court rejected the argument of the United States that the relevant geographic market area should be changed from the City of St. Louis to the SMSA. Given the court's ruling at the time, to the extent the City had an obligation to monitor the measurements of parity, the obligation was to monitor the percentage of African-Americans in the Fire Department as compared to the percentage of African-Americans in the City of St. Louis, not in the SMSA. As argued above, utilizing

these measures, parity was not achieved in 1998.

It was only when the district court arbitrarily substituted the SMSA for the "City of St. Louis" - i.e., when the district court moved the goalpost - that the long-term hiring goals were met. Because it was still aiming at the original goalpost, the City was not in a position in 1998 to claim that the goal had been met and to move for dissolution of the consent decree.

III. THE CONSENT DECREE WAS CONSTITUTIONAL, AS WRITTEN AND APPLIED TO DEEKEN, BECAUSE IT WAS NARROWLY [*18] **TAILORED TO SATISFY THE REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.**

Contrary to Deeken's assertion, the consent decree was constitutional as written and as applied to him. The validity of a consent decree's affirmative action plan is a question of law. *Donaghy v. City of Omaha, 933 F.2d 1448, 1458 (8th Cir. 1991).* To demonstrate that a remedial affirmative action plan in a consent decree is bona fide, the employer must show it is in fact remedial. Id. The employer must have identified "a conspicuous racial imbalance in its work force..." Id., Also the employer "must show that the plan which seeks to remedy effects of past discrimination is narrowly tailored to meet that goal". Id.

It is clear that when the consent decree herein was entered into there was a conspicuous racial imbalance in the St. Louis Fire Department. As the district court noted when the consent decree was entered, "[a]s of November 30, 1974, there were approximately 1,000 uniformed personnel employed in the St. Louis Fire Department, of whom approximately 110 (11%) were black." *United States v. City of St. Louis, 410 F. Supp. 948, 951 (E.D. Mo. 1976).* [*19] Further, the district court found that of the 734 individuals who took the written test for the entry level firefighter position 267 (36.4 percent) were black and that 51 percent of those individuals, compared to 25 percent of the white individuals who took the test, were eliminated. *Id. at 952.* The district court found that statistical evidence established that the entry-level examination used as part of the process for hiring firefighters had an adverse impact upon black applicants and that the exam had not been shown to be related to job performance. *United States v. City of St. Louis, 418 F. Supp. 383, 384 (E.D. Mo. 1976),* aff'd in part, rev'd in part on other grounds in *Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977).* It is also clear that the consent decree was narrowly tailored. Initially, it should be noted that it did not use quotas. The decree set a goal "of hiring blacks for at least fifty percent (50%) of the vacancies for the entry level of Firefighter personnel in the Fire Department for each year during the life of this decree." The City was not required to hire unqualified [*20] or unneeded employees in order to meet this goal. Id. at 385. Further, it did not foreclose the hiring of non African-Americans. See *United States v. Paradise, 480 U.S. 149, 177-178 (1987)* (plurality) (plan was narrowly tailored where plan did not require gratuitous promotions or promotion of unqualified candidates and did not foreclose hiring of non-minority candidates) It is clear that the consent decree was narrowly tailored and was constitutional. The tailoring requirement is to be interpreted both carefully and flexibly and is left, within constitutional or statutory limits, to the sound discretion of the trial court. *Donaghy, supra, at 1461.* "While the entry of an affirmative action consent decree does not guarantee that the decree serves a remedial purpose or is narrowly tailored, the heightened judicial oversight inherent in a properly entered decree helps attain that end." *Id. at 1459.* It is clear from the record that there was heightened judicial oversight in the entry of this consent decree and that the consent decree was narrowly tailored.

This fact is not altered by the failure of the City to "admit" any liability [*21] or past acts of discrimination. That does not preclude the entry of a consent decree to remedy said discrimination. In Donaghy, this Court gave little weight to a formal disclaimer of liability in a consent decree wherein the City of Omaha expressly denied that it was or had been guilty of any wrongdoing and that the decree did not constitute an admission by it. *Id. at 1460.*

CONCLUSION

For the foregoing reasons and for the reasons set forth in the City's principal brief, this Court should reverse the district court's ruling that in 1998 the relevant geographic labor force shifted from the City of St. Louis to the SMSA

and that the City is liable for engaging in racial discrimination.

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
314 City Hall
St. Louis, MO 63103
314/622-3361

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,316 words, [*22] 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 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 for Windows in 14-point Times New Roman.

/s/ Nancy R. Kistler, #3599
Attorney for Defendant City of St. Louis

Dated this 12th day of February, 2008.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was mailed by first class U.S. Mail, postage prepaid, on February 12, 2008 to: Charles W. Bobinette, Attorney for Deeken, 906 Olive Street, Suite 300, St. Louis, MO 63101 and Clyde Craig Attorney for Martinez, 744 Wedge Drive #8, Naples, FL 34103.