Reynolds v. Alabama DOT

United States District Court for the Middle District of Alabama, Northern Division
May 29, 1998, Decided ; May 29, 1998, Filed
CIVIL ACTION NO. 85-T-665-N

Reporter: 1998 U.S. Dist. LEXIS 10711
JOHNNY REYNOLDS, et al., Plaintiffs, v. ALABAMA DEPARTMENT OF TRANSPORTATION, et al., Defendants.

Disposition: [*1] Alabama State Personnel Department's motion for clarification or, in the alternative, for modification, filed August 7, 1997 (Doc. no. 2015), denied.

Counsel: Robert L. Wiggins, Jr., Ann K. Wiggins, Russell W. Adams, Abigail P. van Alstyne, Kimberly C. Page, Scott Gilliland, and Kell A. Simon, Gordon, Silberman, Wiggins & Childs, Birmingham, AL, for Johnny Reynolds, plaintiff, and Cecil Parker, Frank Reed, Ouida Maxwell, Martha Ann Boleware, Florence Belser, Peggy Vonsherie Allen, and Jeffrey W. Brown, intervenor-plaintiffs.

Claudia H. Pearson, Nakamura & Quinn, Birmingham, AL, for Robert Johnson, intervenor-plaintiff.

Raymond P. Fitzpatrick, Jr., R. Scott Clark, J. Michael Cooper, Fitzpatrick, Cooper & Clark, Birmingham, AL, for William Adams, Cheryl Caine, Tim Colquitt, William Flowers, Wilson Folmar, George Kyser, Becky Pollard, Ronnie Pouncey, Terry Robinson, Tim Williams, Michael Grant, John D'Arville, and Andrew McCullough, intervenors.

Thomas R. Elliott, Jr., Allen R. Trippeer, Jr., Lisa W. Borden, C. Dennis Hughes, London & Yancey, Birmingham, AL, for Alabama Department of Transportation, Alabama State Personnel Department, Jimmy Butts, Halycon Vance Ballard, and Fob [*2] James, defendants.

William H. Pryor, Jr., Attorney General for the State of Alabama, Montgomery, AL, for Alabama Department of Transportation, Alabama State Personnel Department, Jimmy Butts, Halycon Vance Ballard, and Fob James, defendants.

William P. Gray, Jr., Gray & Jauregui, Montgomery, AL, for Fob James, defendant.

Elaine R. Jones, Norman J. Chachkin, NAACP Legal Defense Fund, New York, NY, for NAACP Legal Defense and Educational Fund, Inc., amicus.

Barbara R. Arnwine, Thomas J. Henderson, Richard T. Seymour, Teresa A. Ferrante, Lawyers' Committee for Civil Rights Under Law, Washington, DC, for The Lawyers' Committee for Civil Rights under Law, amicus.

Judges: Myron H. Thompson, UNITED STATES DISTRICT JUDGE.

Opinion by: Myron H. Thompson

Opinion

ORDER

This 13-year-old lawsuit, brought by African-American plaintiffs against the defendants, the Alabama Transportation Department, [1] the Alabama State Personnel Department, and various state officials, charging them with racial discrimination in employment, is now before the court on the Personnel Department's motion for clarification or modification of its obligations to perform certain 'personnel projects' under the consent [*3] decree entered in this case. [2] Specifically, the Personnel Department agreed to validate minimum qualifications and examinations and to perform a multigrade job study for classifications used by the Transportation Department. The Personnel Department argues, however, that it agreed to perform the personnel projects for only those classifications that are exclusively used by, or largely specific to, the Transportation Department. The Personnel Department further asserts that it is not, nor should it be, required to do these projects for classifications that are widely or predominantly used by other state departments. For the reasons that follow, the court rejects the Personnel Department's arguments, and concludes that it must

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[1] At the outset, to avoid any confusion, the court notes that throughout this order it refers to the Alabama Department of Transportation as both the 'Transportation Department' and the 'Highway Department.' These names are used interchangeably and the choice of one over the other in a particular context is without significance.

[2] *See* Alabama State Personnel Department's motion for clarification or, in the alternative, for modification, filed August 7, 1997 (Doc. no. 2015).

perform the validations and multigrade job study for every classification used by the Transportation Department. [*4]

I. BACKGROUND

May 21, 1985: Johnny Reynolds filed this lawsuit, and over the next seven years, Ouida Maxwell, Martha Ann Boleware, Florence Belser, Peggy Vonsherie Allen, Jeffrey Brown, Robert Johnson, Cecil Parker, and Frank Reed were allowed to intervene. Together, they charged the defendants with widespread and long-standing racial discrimination, and advanced claims based on theories of 'disparate treatment' and 'disparate impact.' The plaintiffs based this lawsuit on the following: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 1981a, *2000e through 2000e-17*; the fourteenth amendment to the United States Constitution, as enforced by *42 U.S.C.A. § 1983*; and *42 U.S.C.A. § 1981*. The jurisdiction of the court has been invoked pursuant to 28 U.S.C.A. § 1343 and *42 U.S.C.A. § 2000e-5(f)(3)*.

October 8, 1986: The court entered an order certifying a plaintiff class, and divided it into three groups. The three groups [*5] were described as follows: "(1) all black merit system employees of the highway department employed since May 21, 1979; (2) all black non-merit system employees of the department who have unsuccessfully sought employment as merit system employees since May 21, 1979; and (3) all black non-employees who have unsuccessfully applied for merit system employment since May 21, 1979." [3] In this order, the court discussed employees who had worked in or applied for positions in the following classifications: graduate civil engineer, engineering assistant, clerical aide, clerk, and laborer. [4]

October 7, 1991: The court entered its third of four pretrial orders. [5] The pretrial order discussed the following classifications: graduate civil engineer, engineering assistant, clerk typist, public health/engineer, and clerical aide. [6] [*6]

1992: Over a six-month period, the court conducted a partial trial of this cause. During this trial, hundreds of exhibits were admitted, among them significant statistical analysis showing the 'disparate racial impact' of the Transportation Department's personnel practices and policies. One exhibit, in particular, went through most, if not all, of the classifications used at the Transportation Department and analyzed those classifications for disparate impact. [7] Significant disparate impact was shown in a substantial majority of the non-SPD project classifications that are widely or predominantly used by other state departments. [8]

[*7] *March 16, 1994*: After the partial trial in 1992, the parties reached a partial settlement, subsequently embodied in three consent decrees. One of the consent decrees, commonly referred to as 'consent decree I,' was approved on this date. [9] The consent decree and the order adopting it contain many provisions that are relevant to the current inquiry.

In its order adopting consent decree I, the court set forth a description of the plaintiff class:

> "The case has been certified and maintained as a class action on behalf of … all black merit system [*8] employees employed by the Alabama Highway Department at any time since May 21, 1979, … all black non-merit system employees of the Alabama Highway Department and all black non-employees who have unsuccessfully sought employment as merit system employees with the Alabama Highway Department at any time since May

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[3] Order, entered October 8, 1986 (Doc. no. 82), at 2.

[4] *See id*. at 2-3.

[5] *See* order, entered October 7, 1991 (Doc. no. 339).

[6] *See id*., appendix A, at PP 2.b, 2.c, 2.d, 2.e, 2.g.

[7] *See* plaintiffs' exhibit 30, 1992 trial.

[8] *See id*.; plaintiffs' submission regarding trial of selection procedures for interdepartmental job classifications in 1992, filed August 20, 1997 (Doc. no. 2051), at 12-23 (identifying specific portions of plaintiffs' exhibit 30).

[9] *See Reynolds v. Alabama Dep't of Transp*., 1994 U.S. Dist. LEXIS 20921, 1994 WL 899259 (M.D. Ala. Mar. 16, 1994) (Doc. no. 553). On January 23, 1998, the court entered an order adopting P 4 of article XIII, which was part of consent decree II. *See Reynolds v. Alabama Dep't of Transp*., 996 F. Supp. 1118, 1998 WL 32182 (M.D. Ala. 1998) (Doc. no. 2413). The remainder of consent decree II and all of consent decree III are still under submission with the court.

21, 1979…." [10]In its introductory order, the court also set forth the scope of the relief in the decree:

> "A recess in the trial of the case for the purpose of settlement negotiations has resulted in the Consent Decree which follows. The following terms and provisions of this Consent Decree are accordingly agreed to in final and complete resolution of all class issues which have been asserted in the case…." [11]

In P 19 of article I, which relates to recruitment, the decree defines a group of "merit system job classes at the Highway Department":

> "Jobs [*9] covered by the program: The expanded recruitment program will apply to the following merit system job classes at the Highway Department:
>
> (a) The PCET, GCE, and GRE classes.
>
> (b) The Professional Civil Engineer and Civil Engineer classes.
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> (c) The Accountant and Auditor job classes, the Project Cost Auditor job classes, the Right-of-Way job classes, the Engineering Assistant job classes, Highway Maintenance Superintendent, Chemist I, Community Planner I, Electrical Engineer, Geologist I, Highway Office Manager, Programmer I, Programmer-Analyst I, Transportation Planner I, and such other job classes for which an open competitive job announcement is utilized and the percentage of black persons on the Register for such job is more than 5% lower than the availability of persons in the Alabama labor force for such job or job family, provided, however, that if the Highway Department does not anticipate an opening in the coming 12 months in such a job, such expanded recruitment programs will not apply with respect to such job. In the event the Highway Department determines that it does not anticipate such an opening in the coming 12 months, it will notify the plaintiffs' counsel [*10] of such determination and the job or jobs in which it does not anticipate such an opening." [12]

Article II sets forth the requirements that minimum qualifications shall be validated and that the plaintiffs have a right to challenge the defendants' choice of the minimum qualifications:

> "1. Limitation on the use of minimum qualifications: Minimum qualifications will not be utilized on examination announcements or to preclude an applicant from examination unless the minimum qualification bears a manifest relationship to skills, knowledges, or abilities necessary to the performance of the job at entry without a brief orientation period and such skills, knowledges or abilities are not addressed in the examination process.
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> "2. Consultation:
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> (a) Subject to Article Four on Implementation of Personnel Projects, Personnel will forthwith utilize a content validation procedure to determine the appropriate minimum qualifications for the Highway Department job classes. Such determination [*11] and the SPD validation procedure will be subject to challenge by plaintiffs and no new minimum qualifications will be implemented without approval by the plaintiffs or the Court." [13]

Article III sets forth the requirements that selection procedures (or examinations) shall be validated and that the defendants provide the plaintiffs with information to verify their work. This article also sets up a time schedule in P 4, which language is at issue in the present dispute:

> "3. Plan to monitor adverse impact:
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> (a) Personnel will maintain adequate means for measuring and monitoring the adverse impact of screening and selection criteria used in eligibility for examinations, ranking, scoring and forming Registers or COE's and will submit such means to the plaintiffs' attorney for review and comment.
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> …

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[10] *Reynolds v. Alabama Dep't of Transp.*, 1994 U.S. Dist. LEXIS 20921, 1994 WL 899259 (M.D. Ala. Mar. 16, 1994) (Doc. no. 553), at *2.

[11] *Id*.

[12] *Id*. at *7.

[13] *Id*.

"4. Validation of criteria:

(a) Personnel will develop and thereafter use only selection criteria and procedures that have been validated in accordance with the Uniform Guidelines [*12] on Employee Selection Procedures. For the SPD Project job classes, such validation will be completed within two years of the effective date of this Decree; for all other Highway Department jobs they will be completed within a reasonable period after the effective date of the Decree, subject to the right to seek further relief set forth in Paragraph 4 of Article Four on Implementation of Personnel Projects.

…

"10. Documentation: Defendants will make available to plaintiffs' attorney sufficient information and documentation to show that the development and implementation of the selection procedures conform to the Uniform Guidelines. All validation efforts shall be documented in writing and make available to plaintiffs' counsel for review at least 30 days before an Examination Announcement or other use of the examination which is the subject of such validation effort." [14]

Article IV identifies the personnel projects that the Personnel Department will perform, defines the "SPD [*13] project classes," [15] and gives the SPD project classes priority in treatment over the other classifications within the scope of the personnel projects:

"1. This Decree establishes a number of duties for Personnel, including four projects that will involve substantial studies: (a) Validation of minimum qualifications (Article Two); (b) Examination validation (Article Three); (c) Study of multi-grade job (Article Fifteen); and (d) Analysis of individual reclassification requests (Article Fifteen).

"2. Projects (a) and (b) set forth in Paragraph 1 above will focus on the following principal Highway Department classifications: Highway Maintenance Technician, Engineering Assistant, Professional Civil Engineer Trainee, Graduate Civil Engineer, Graduate Registered Engineer, Civil Engineer, Professional Civil Engineer, Right-of-Way Specialist, Project Cost Auditor, and Highway Office Manager. The classifications listed in the preceding sentence are referred to in this Decree as the 'SPD Project Classes.' The precise sequencing is to be determined by Personnel, provided that the goal is to complete all four projects within two years of the effective date." [16] [*14]

Article XV sets forth the reclassification and multigrade job study requirements. The language is P 3(a) is at issue in the present dispute, but the language of P 1(a) is also relevant:

"1. Reclassification program: Following the effective date of this Decree, the following steps will be taken:

(a) All employees then working for the Highway Department in the classified service will be provided with a Form 40 on which they may list the job duties which they are performing and the percentage of time spent on each such job duty. Such filled-out Form 40's will be subject to review and approval or revision by such employee's supervisor or supervisors. Any disagreement will be resolved by a job study analysis by the Personnel Department, subject to challenge by plaintiffs' counsel.

…

"3. Multi-Grade Jobs: The following steps will be taken by the defendants:

(a) A job classification study will be conducted by the State Personnel Department encompassing the job classifications [*15] at Highway in a multi-grade series. Such study will commence with the following multi-grade

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[14] *Id*. at *8-*9.

[15] As indicated, the 'SPD project classes' are defined in P 2 of article IV, and are given priority, as a group, in treatment with respect to the personnel projects. Every other classification used by the Transportation Department is identified as a 'non-SPD project class,' some of which are used only by the Transportation Department, *see* notice of filing, filed August 18, 1997 (Doc. no. 2048), while others are used by multiple state agencies. *See* notice of filing, filed August 19, 1998 (Doc. no. 2049).

[16] *Reynolds v. Alabama Dep't of Transp.*, 1994 U.S. Dist. LEXIS 20921, 1994 WL 899259 (M.D. Ala. Mar. 16, 1994) (Doc. no. 553), at *10.

> jobs: Engineering Assistants Civil Engineers Professional Civil Engineers Highway Maintenance Technicians and Highway Maintenance Superintendent Right-of-Way Specialists Project Cost Auditors." [17]

Paragraph 6(d) of article XIX expresses the intent and purpose of the consent decree:

> "It is the intent and purpose of this Decree to undo the effects of the past practices which have been the subject of this case and Decree and to prevent further practices which may perpetuate such effects or otherwise discriminate against the plaintiffs or the class they represent. To the extent that this Decree fails to achieve the intent and purpose for which it has been entered, the parties may seek further relief from the Court." [18]

[*16] And P 9 of article XIX sets forth the requirement that the defendants document their validation projects, make this information available to the plaintiffs, and consult with the plaintiffs' counsel on certain matters:

> "9. In developing validation efforts directed to minimum qualifications or examinations, and in developing revised examination announcements, Personnel will (a) document its efforts in writing, (b) consult with the attorney for the plaintiff class regarding the selection of its psychologists and (c) consult with the attorney for the plaintiff class and any psychologist or other expert designated by such attorney for such purposes. Prior to implementing the results of such efforts, Personnel will make the documentation of its projects available for review and comment by plaintiffs' attorney and consultants." [19]

August 2, 1995: In anticipation of the resumption of trial pursuant to article XX of consent decree I, which provides for further proceedings to resolve the [*17] individual claims of the members of the plaintiff class, the Transportation Department filed seven Rule 52 motions against plaintiff class members Patricia Mason, [20] Nina Steele, [21] Scott Miller, [22] Reyla Mallory, [23] Alisha Kelly, [24] Tamara Jenkins, [25] and Darlene Davis. [26] In these motions, the Transportation Department argued that the seven plaintiffs had not demonstrated that they had the requisite experience for the classifications for which they applied. The classifications at issue were: accountant, auditor, engineering assistant, clerk typist, clerk, clerical aide, computer operator, programmer, and data entry operator. The defendants never took issue with the appropriateness of relief in these classifications, but only with the amount of evidence the individual plaintiffs had presented. These motions were later denied. [27]

[*18] *September 30, 1996*: The parties filed their joint omnibus report. [28] The purpose of this report is to provide the court with the respective positions of the defendants and the plaintiffs on compliance with each provision of consent decree I. With respect to P 10 of article III, which requires that the defendants make available to the plaintiffs sufficient information to show that their development and implementation of selection procedures conform to the Uniform Guidelines on Employee Selection Procedures, the defendants indicated that they had provided the plaintiffs with job analysis summary reports for a number of classifications they described as "ALDOT specific

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[17] *Id*. at *21-*22.

[18] *Id*. at *25.

[19] *Id*.

[20] Doc. no. 688.

[21] Doc. no. 689.

[22] Doc. no. 690.

[23] Doc. no. 691.

[24] Doc. no. 692.

[25] Doc. no. 693.

[26] Doc. no. 694.

[27] *See* order, entered September 26, 1995 (Doc. no. 773).

[28] *See* joint omnibus report on compliance with consent decree I, filed September 30, 1996 (Doc. no. 1251).

classes only." [29] The classifications were: cultural resources coordinator II, architectural history option, accounting technician II, equipment maintenance superintendent, environmental planning specialist II, structural steel fabrication inspection supervisor, equal employment officer, cartographic planning specialist I, asphalt polymer specialist, employee assistance program coordinator, archaeologist II, personnel assistant II, information specialist II, chief auditor, clerk messenger, and underwater bridge inspector. [*19] [30] In response, the plaintiffs indicated, among other things, that "The defendants are violating the Decree if they are only 'submitting information pertaining to ALDOT specific classes only.' The Decree requires documentation and submission of validation studies and job announcements for all classifications used at ALDOT even if such classification[s] are also used by other state agencies or departments." [31] At oral argument on this motion, the plaintiffs' counsel stated that a majority of these classifications are not specific to the Transportation Department. [32]

II. DISCUSSION

In its motion for clarification or, in the alternative, for modification, defendant Alabama State Personnel Department is seeking to clarify, [*20] or modify, two provisions of consent decree I: P 4 of article III, relating to validation of criteria, and P 3 of article XV, relating to the multigrade job study. The Personnel Department asserts that, "Based upon the agreements and course of negotiations among the parties, [the Personnel Department] understands these provisions to apply *only* to classifications that are either exclusively used by [the Transportation Department] or are largely specific to [the Transportation Department]. [The Personnel Department] further understands that these provisions do not apply to classifications that are widely used in agencies outside of [the Transportation Department], such as clerical workers, accountants, attorneys, and the like." [33] The Personnel Department then asks the court either to clarify the consent decree by adopting its interpretation or modify the consent decree to conform to its interpretation. Each of these requests will be discussed below.

[*21] Before turning to these requests, however, the court must address two preliminary issues: uncertainty about which classifications are at issue in the Personnel Department's motion, and the gross untimeliness of the motion. On the issue of what classifications are at issue, the language of the motion leads the court to some confusion. The consent decree divides the classifications at the Transportation Department into two groups--'SPD project classifications' and 'non-SPD project classifications.' The SPD project classifications are specifically identified in P 2 of article IV, and all of the other classifications are considered non-SPD project classifications. As best the court can tell, within both of these groups are classifications that are exclusively used by, or largely specific to, the Transportation Department ('Highway specific'), and some that are widely or predominantly used by other state departments ('non-Highway specific'). This creates four categories of classifications: (1) Highway specific, SPD project classes, (2) non-Highway specific, SPD project classes, (3) Highway specific, non-SPD project classes, and (4) non-Highway specific, non-SPD project classes.

The court's [*22] confusion derives from the fact that when the motion speaks of the Personnel Department not having to perform the personnel projects for any non-Highway specific classifications, it does not draw any distinction between those that are SPD project classes and those that are non-SPD project classes. This led the court to think that the Personnel Department was asserting that it did not agree to perform the personnel projects for any non-Highway specific classification, no matter whether it was an SPD project class or a non-SPD project class. When presented with this area of confusion, defense counsel clarified that the Personnel Department was not advancing this seemingly untenable position, and stated that, because the SPD project classes are specifically identified in the consent decree, it is the Personnel Department's position that those classifications are not disputed and not at issue here. [34] Accordingly, the court notes that the only classifications that are at issue in the Personnel Department's motion are those that are non-Highway specific, non-SPD project classes.

[*23] On the issue of the untimeliness of the Personnel Department's motion, this litigation has already proceeded over four years and two months past the date on which the court adopted consent decree I, and this time has been

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[29] *Id*. at 64-65.

[30] *See id*. at 65.

[31] *Id*. at 66.

[32] *See* transcript of hearing on motion to set aside, etc., held August 15, 1997, at 119.

[33] Alabama State Personnel Department's motion for clarification or, in the alternative, for modification, filed August 7, 1997 (Doc. no. 2015), at 2.

[34] *See* transcript of in-chambers status conference, held May 22, 1998, at 10-11.

marked by substantial delay in almost every possible way. In light of the decades-long history of rampant discrimination in almost every aspect of the Transportation Department, the court would have expected, particularly in light of the State's voluntary agreement to settle these seemingly intractable issues, a more conscientious and expeditious effort to implement the remedies chosen. Instead, it has gotten delay, after excuse, after failure to comply, and this motion is just another part of this well-established trend. [35] Filed approximately three and one half year after the adoption of the consent decree, the motion seeks to remake substantially a vital portion of the relief that would be provided to the members of the plaintiff class. Although the court believes, and so holds, that the motion is without merit, the court also believes that this issue should have been brought to the court long ago.

[*24] As the September 1996 joint omnibus report indicates, the plaintiffs expected the Personnel Department to perform the personnel projects at issue on every classification in which there is an incumbent at the Transportation Department. This statement put the Personnel Department on notice of any dispute at least one year before it brought the dispute to the court's attention. And the court is quite confident that the Personnel Department was aware of this issue long before that. Presenting this issue now causes the court to go back and reexamine the foundation of the relief for the plaintiffs, which should have been established long ago, instead of building on that foundation. That this could not help but be another form of delay has not escaped the court's notice.

A. CLARIFICATION

1.

A consent decree or judgment has the attributes of a contract and thus, as with a contract, its meaning "must be discerned within its four corners." *United States v. Armour & Co.*, 402 U.S. 673, 682, 91 S. Ct. 1752, 1757, 29 L. Ed. 2d 256 (1971). In some cases, however, this cannot be done because a term is ambiguous. "A contract term is ambiguous if [it is] 'reasonably susceptible to more than [*25] one interpretation….'" *Orkin Exterminating Co., Inc. v. F.T.C.*, 849 F.2d 1354, 1360 (11th Cir. 1988) (quoting *Fabrica Italiana Lavorazione Materie Organiche, S.A.S. v. Kaiser Aluminum & Chemical Corp.*, 684 F.2d 776, 780 (11th Cir. 1982)). To determine whether a writing is ambiguous, the court must first assess the plain meaning of the language of the writing and determine whether there are two possible reasonable interpretations. *Dahl-Eimers v. Mutual of Omaha Life Ins. Co.*, 986 F.2d 1379, 1382 (11th Cir. 1993). If the court determines that the contract is ambiguous, it must then engage in what is essentially a fact-finding mission and "endeavor to ascertain the true intent of the parties[,] … and then, so far as it is possible so to do consistently with legal principles, give effect to that intention." *Pickren v. United States*, 378 F.2d 595, 599 (5th Cir. 1967). When faced with an ambiguous term and the task of determining the intention of the parties, the court may rely "upon certain aids to construction…. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any [*26] other documents expressly incorporated in the decree." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238, 95 S. Ct. 926, 935, 43 L. Ed. 2d 148 (1975). In other words, "Assuming that a consent decree is to be interpreted as a contract, it would seem to follow that evidence of events surrounding its negotiation and tending to explain ambiguous terms would be admissible in evidence." *Id.* at 238 n.11, 95 S. Ct. at 935 n.11 (quoting *Twenty-fourth Annual Antitrust Review*, 72 Col. L. Rev. 1, 23 n.148 (1972)).

One particularly instructive means of determining the meaning the parties intended for a consent decree is how they themselves have performed under the decree. *See, e.g., Air Transp. Ass'n of Am. v. Lenkin*, 283 U.S. App. D.C. 280, 899 F.2d 1265, 1267 (D.C. Cir. 1990) ("The parties' 13-year history of performing according to

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[35] Last year, on this very issue, the court wrote the following:

> "It is now three years since entry of the 1994 consent decree, and the Transportation and Personnel Departments still have not created and implemented the required new hiring-and-promotion system. In other words, African-Americans are still not only without open and fair procedures in which they may compete for positions based on their merit and without regard to race, they are being denied hiring and promotion opportunities altogether. The effect of the Departments' delay has been, for the most part, to shut down permanent hiring and promotions altogether, and thereby essentially punish the plaintiffs for vindicating their statutory and constitutional rights." And to make matters worse, the Departments have, and are continuing, to assign supervisory duties and responsibilities to employees, with the assignment often made outside the important strictures set up by the consent decree. While admittedly these assignments are without actual promotions, there is the possibility that those receiving the assignments will in future competition for jobs enjoy the credit and experience conferred on them by the assignments."*Reynolds v. Alabama Dep't of Transp.*, 972 F. Supp. 566, 568-69 (M.D. Ala. 1997) (Doc. no. 1085).

Lenkin's base-year computation method is strong evidence of the parties' intent…."); *Tymshare, Inc. v. Covell*, 234 U.S. App. D.C. 46, 727 F.2d 1145, 1150 (D.C. Cir. 1984) ("The historical interpretation given to a contract by the parties is strong evidence of its meaning"); Restatement (Second) of Contracts § 202(4) (1979) ("Where [*27] an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement."); Restatement § 202(5) ("Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with … any relevant course of performance…."). [36]

2.

The first inquiry the court must [*28] make is whether the provisions of the consent decree at issue are ambiguous. In its motion, the Personnel Department raises a question about P 4 of article III and P 3 of article XV. Paragraph 4(a) of article III provides:

> "Personnel will develop and thereafter use only selection criteria and procedures that have been validated in accordance with the Uniform Guidelines on Employee Selection Procedures. For the SPD Project job classes, such validation will be completed within two years of the effective date of this Decree; *for all other Highway Department jobs* they will be completed within a reasonable period after the effective date of the Decree…."Paragraph 3(a) of article XV provides:
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> "A job classification study will be conducted by the State Personnel Department *encompassing the job classifications at Highway* in a multi-grade series. Such study will commence with the following multi-grade
> jobs: Engineering Assistants Civil Engineers Professional Civil Engineers Highway Maintenance Technicians and Highway Maintenance Superintendent Right-of-Way Specialists Project Cost Auditors."

The distinctive feature of the language identified as ambiguous [*29] by the Personnel Department is that it makes a point of identifying "Highway department jobs" and "job classifications at Highway" in discussing the jobs or classifications that are to be included in the scope of the personnel projects. The Personnel Department argues that this special identification carries with it a substantial limit on what classifications should be covered under the projects. The court disagrees, however, that the language necessarily carries such a meaning.

First, the act of identifying the specific location of the jobs seems sensible to the court in light of the facts that the decree encompasses both the Personnel Department and the Transportation Department, and, in the two provisions at issue, the decree specifically discusses things that relate to both departments, thus requiring some distinction. The specific reference to the Transportation Department, therefore, does not necessarily raise any ambiguity.

Second, the specification of the "Highway Department" is used freely throughout the decree in similar circumstances, [37] and if it was intended to have some specific meaning--particularly one that would substantially reduce the number of employees of the [*30] Transportation Department who would be covered by vital relief provisions of the consent decree--the court would expect to find it defined somewhere within the decree. There is no such definition anywhere in the decree--not one indication that it should have a restricted meaning. In fact, the only attempt to define the meaning of a similar phrase--"The expanded recruitment program will apply to the following merit system job classes at the Highway Department"--appears in P 19 of article I, which deals with the recruitment program the Transportation Department is to undertake. The definition that appears there is far more broad than the Personnel Department now suggests, and it specifically identifies classifications that are

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[36] Comment (g) of § 202 further elucidates what the drafters of the Restatement meant by conforming the interpretation of an agreement to the parties' 'course of performance':

> "The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning. But such 'practical construction' is not conclusive of meaning. Conduct must be weighed in light of the terms of the agreement and their possible meanings."

[37] *See* PP 13 and 19 of article I, P 2(a) of article II, P 2(b) of article III, PP 1 and 1(d) of article VII, PP 1, 2, and 3(a) of article X, P 11 of article XI, P 1(a) of article XV, and PP 1 and 2(b) of article XVI.

predominantly used by other state agencies--like auditor and accountant--and then provides a very broad general definition, which includes:

> "such other job classes for which an open competitive job announcement is utilized and the percentage of black persons on the Register for such job is more than 5% lower than the availability of persons in the Alabama labor force for such job or job family, provided, however, that if the Highway Department does not [*31] anticipate an opening in the coming 12 months in such a job, such expanded recruitment programs will not apply with respect to such job."The plaintiffs indicate that this definition encompasses the vast majority, if not all, the classifications now at issue. [38]

Third, in the opening paragraphs of the order adopting the consent decree, the court defined the persons who make up the plaintiff classes, and described them as "All black merit system employees employed by the Alabama Highway Department," "All black non-merit system employees of the Alabama Highway Department," and "all black non-employees who have unsuccessfully sought [*32] employment as merit system employees with the Alabama Highway Department." The words chosen here seem clear, and the defendants do not challenge the idea that, generally, relief under the decree was to go to every employee of the Transportation Department, no matter what classification he or she held. These definitions do not admit any suggestion that "employees of the Alabama Highway Department" could mean anything but everyone, and it would seem odd to have a crucial part of the decree's relief restricted with no special indication that it should be so.

Finally, there is one language issue that may or may not support the Personnel Department's contentions. The personnel projects that the Personnel Department is contesting are identified in P 1 of article IV, and, in addition to including validations of minimum qualifications, examination validation, and a study of multigrade jobs, this paragraph includes an analysis of individual reclassification request. Like the multigrade job study, the reclassification requests are governed by article XV. Interestingly, the language of P 1(a) of article XV, which serves the same purpose as the language the Personnel Department is now contesting [*33] with respect to the other personnel projects, states the following:

> "*All employees then working for the Highway Department in the classified service* will be provided with a Form 40 on which they may list the job duties which they are performing and the percentage of time spent on each such job duty."This language makes a point of identifying "All employees then working for the Highway Department," which, arguably, sets it apart from the language used in P 4 of article III and P 3 of article XV, which identify "Highway department jobs" and "job classifications at Highway." This seeming change in language could reflect a difference in meaning in that when the drafters of the decree wanted to include every incumbent at the Transportation Department they used words like "all employees." In light of the rest of the decree, however, the court finds this reading implausible. The change in language could just as easily reflect the different circumstances in which the respective language arises--in the validation and multigrade job study provisions, they are only discussing classifications, whereas in the reclassification provision, it is discussing individual employees--or [*34] reflect nothing at all. [39]

[*35] Considering the language of the consent decree as a whole, the court does not believe that there is any

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[38] *See* plaintiffs' opposition to SPD's motion for clarification, or in the alternative, for modification, filed August 12, 1997 (Doc. no. 2032), at 4.

[39] At this juncture, the court must note that it finds it curious that the issue of reclassification never came up in any of the parties' briefing on this issue, and only came up in oral argument when the court brought it up. *See* transcript of hearing on motion to set aside, etc., held August 15, 1997, at 111-14, 116-18. In the Personnel Department's motion, it draws a line, whether intentionally or not, between three of the personnel projects identified in article IV--validation of minimum qualifications, examination validation, and the multigrade job study--and the fourth--reclassification, and suggests that the three be treated differently from the fourth. Specifically, the Personnel Department asks that a number of classifications be excluded from the validations and the multigrade job study, but not from the reclassification. Little explanation has been offered as to why the projects--all identified in article IV--should be treated differently. Suggesting different treatment presents a contradiction within the Personnel Department's own motion. Defense counsel stated that the Transportation Department is seeking reclassification for some people in the classifications that are disputed here. *See id.* at 111-12. This incongruity in treatment of provisions that are grouped together in the consent decree is troubling to the court, and is an important factor militating against treating them differently.

ambiguity about using "Highway Department" to identify the jobs or classifications discussed in the decree. There is nothing to suggest an exclusive meaning is to be implied by this designation, so the court is of the opinion that the Personnel Department's interpretation is without basis. Nonetheless, the court will continue its examination of other aids to interpretation to eliminate any doubt about the meaning of the provisions at issue.

3.

The main evidence, beyond the language of the consent decree, upon which the Personnel Department rests its argument is composed of parts of the exchange between counsel for the parties during negotiation of the consent decree. This evidence is composed of some letters and changes to a draft of the proposed consent decree. From this, the Personnel Department argues that "The course of negotiations of Consent Decree I demonstrates that [the Personnel Department] never agreed to such a sweeping interpretation of these provisions, and that it was always clearly understood that the jobs at issue were to be those that were entirely or mostly [*36] [Transportation Department]-specific." The court cannot agree with this assertion by the Personnel Department.

The first part of the exchange presented to the court by the Personnel Department is a letter to the plaintiffs' counsel dated June 6, 1993, in which the Transportation Department's attorney stated the following:

> "It should also be said that Personnel's ability and willingness to commit to some of the provisions in the draft depends on the extent of the list of 'subject jobs.' This draft is premised on that list being limited to the classes that are in large measure Highway-specific."This statement is of limited assistance to the court in considering the matter before it, however, because it speaks of "the list of 'subject jobs,'" which is a concept that is not defined for the court. The court does not know if this is referring to all classes that are covered by the consent decree, or a subcategory like the SPD project classes, which only identified some of the classifications that were to get preference in treatment over the others. Furthermore, this letter was dated more than nine months before the consent decree was entered in this case, so the court [*37] has no sense of what transpired in those many intervening months, leaving this statement with little weight.

The next portion of the exchange to which the Personnel Department points is the drafts of the consent decree; the Personnel Department argues that the draft decree "contained drafts of the aforementioned provisions, but those draft provisions did not make any attempt to specify which job classifications were at issue. … These draft provisions gave no indication that the classifications to which they referred were intended to be those used outside [the Transportation Department]." [40] The Personnel Department neglects to recognize, however, that its point that the "draft provisions did not make any attempt to specify which job classifications were at issue" also implies that the provisions gave no indication that the classifications to which they referred *were not* intended to be those used outside the Transportation Department. The Personnel Department's argument is without meaning because the lack a definition implies nothing one way or the other; there is no presumption that one or the other should apply in the absence of a definition.

[*38] The Personnel Department next argues that on August 30, 1993, its counsel received a letter from the plaintiffs' counsel indicating that the "subject jobs" would include: professional civil engineer trainee, graduate civil engineer, graduate registered engineer, civil engineer I through VII, professional civil engineer I through IV, right of way specialist I through IV, and project cost auditor I through III. [41] As mentioned earlier, the court has no idea to what "subject jobs" refers, and the list looks suspiciously like what later came to be known as the 'SPD project classes.' If they are one and the same, the list was not meant to limit the classifications to which the decree would apply, but identify which group of classifications would receive preference in treatment over the others. And even if they are not the same, the court still has no evidence before it to give the concept of "subject jobs" meaning.

The Personnel Department then points to a number of letters and changes in consent [*39] decree drafts between the plaintiffs' and defendants' counsel. The exchange began with a September 16, 1993, letter from the plaintiffs' counsel in which the plaintiffs' counsel wrote:

> "I am willing to accept your position on timing of implementation and to change our role in picking the experts to one of merely being 'consulted,' so long as the *concepts* in the rest

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[40] Alabama State Personnel Department's motion for clarification or, in the alternative, for modification, filed August 7, 1997 (Doc. no. 2015), at 3-4.

[41] *See id*. at 4.

of P 2 of the Minimum Qualification section and P 4 of the Scoring and Ranking section of the June 23rd draft are retained. Even as to the latter concepts, I have proposed additional compromise in the attached redraft of your new section on Implementation. I am unwilling, however to limit P 2 to the jobs listed in Section B-1 of the Recruitment section.

…

"I have accepted your new language proposed for P 4 of the Article on Scoring and Ranking, except for the restriction to the jobs in P B-1 of the Recruitment section. This is a new concept and is objectionable if it is meant to suggest that only those jobs will be subject to the validation requirements of the Scoring and Ranking section. I read it otherwise. It appears to be only a definition of the jobs to be validated in one year. If that reading [*40] is correct, I don't object to it so long as all other validations will be completed in 18 months from the effective date and so long as our right to monitor the validation process is spelled out. I have added the needed changes to your draft of P 4 of the Article on Scoring and Ranking in the attached redraft."The attached redraft then reflected that the language restricting validation to P B.1 was taken out of P 2 and in its place, identifying the classifications to which a process for content validation would apply, the language "the Highway Department job classes" was added. With respect to P 4, language was added to indicate that the list of classifications in P B.1 was to be the group of classifications that would be validated in a year, and then the following language was added: "for all other Highway Department jobs [validated selection criteria and procedures] will be completed within 18 months of the effective date of the Decree."

On September 17, 1993, the defendants' counsel responded:

"The proposed expansion of the one year validation program to all newly listed B.1 jobs, and the provisional appointment provisions with respect to such jobs will, I know, [*41] be completely unacceptable at Personnel.

"We have always considered the focus of this settlement to be the major Highway-specific job classes, particularly the engineer classes. Personnel has arranged for financing and employees sufficient to complete the studies within one year for those classes. The expansion to the newly listed jobs in paragraph B.1 and to all jobs within the Highway Department would make that task impossible. Many of those jobs have very, very few Highway incumbents….

"Finally, restricting the 'covered jobs' to the major highway-specific and engineering classes makes it possible to focus Personnel's attention on Highway. Broadening the scope to classes shared significantly with other departments would create very substantial administrative problems relating to different rules applying to registers, [certificates of eligibles], etc., for the same class in different departments…."The final part of the exchange identified by the Personnel Department ended with the following statement by the defendants' counsel: "Including accountants and auditors, most of which are located outside the Highway Department, would unreasonably complicate the multigrade [*42] job study."

The court agrees with the Personnel Department that this exchange demonstrates a disagreement between the parties about what classifications should be covered by the decree and about timing of projects under the decree, but for a number of reasons, the court does not find the exchange instructive on the question of the ultimate meaning of the provisions of the consent decree. While it is true that this exchange highlights a disagreement about what classifications are to fall within the "one year validation program," and about other issues, it is plucked out of the middle of the negotiations of the consent decree, and occurred approximately six months before the adoption of the decree. The court, therefore, has no indication of what transpired after this exchange during the most critical months of the negotiations. Even though each of the parties had set forth a position on the areas of disagreement at this time, it is doubtful they never changed their positions in the ensuing months, and this exchange alone certainly cannot support the Personnel Department's sweeping assertion that "Based on the foregoing, it is evident that [the Personnel Department] did not ever agree [*43] to an expansion of its obligations to perform the multigrade job study or new validation studies to include

any jobs other than those that are entirely or largely Highway-specific." [42]

Additionally, the exchange in no way sheds light on the ultimate decision to designate the jobs as "Highway Department jobs," and gives the court no idea if the designation had any particular significance. Furthermore, when the court looks at the final product that was adopted as consent decree I, and considers it in light of this exchange, it appears as if the exchange was a precursor of the 'SPD project classifications,' and the new deadlines that gave the Personnel Department two years to perform its personnel projects on these classifications, and a reasonable time thereafter to do the rest of the classifications at the Highway Department. But it does not appear to have been the precursor to any limitation on the classifications covered by the consent decree--at least that made its way into the final decree [*44] adopted as consent decree I.

Overall, the Personnel Department's evidence that it did not agree to perform the personnel projects on all the classifications used by the Transportation Department is unavailing. It does not show that the Personnel Department refused to agree to anything, nor explain how the language that ended up in the consent decree was chosen. It does not, therefore, dissuade the court from its view that the consent decree was intended to cover every classification used by the Transportation Department.

4.

If there is still any doubt about the scope of the language in consent decree I, this doubt is cleared up by examining the history of this litigation. The evidence is overwhelmingly against the Personnel Department's position. From the very beginning, this litigation has been about pervasive racial discrimination that has infected practically every aspect of the Transportation Department. The discrimination was in no way limited to those jobs that were used solely by the Transportation Department, and, in fact, evidence was presented concerning discrimination in practically every classification used by the Transportation Department.

There simply cannot be any [*45] doubt that this litigation has been aimed at seeking relief for all of the employees at the Transportation Department. When Johnny Reynolds and the eight plaintiff-intervenors filed their complaints in this case, their allegations covered a wide range of classifications at the Transportation Department. As reflected in the October 1991 pretrial order, these classifications included graduate civil engineer, engineering assistant, clerk typist, public health/engineer, and clerical aide.

When the court entered its order certifying a plaintiff class in this case, it spoke in unequivocal terms about who was to be considered part of the class. The groups the court described were *all* black merit system employees, *all* black non-merit system employees of the Transportation Department who have unsuccessfully sought employment as merit system employees, and *all* black non-employees who have unsuccessfully applied for merit system employment. These descriptions do not admit of the idea that there are any limits as to who would be entitled to relief. Furthermore, in that same order, the court discussed employees who had worked in or applied for positions in the graduate civil engineer, [*46] engineering assistant, clerical aide, clerk, and laborer classifications, giving some sense of the variety of positions that was intended to be covered.

When the 1992 trial was held in this case, dozens of witnesses gave anecdotal testimony about the discrimination they faced in a wide array of classifications throughout the Transportation Department. In addition, the plaintiffs offered extensive statistical evidence that analyzed the disparate racial impact of the Transportation Department's personnel policies and practices. The statistical evidence covered most, if not all, of the classifications now at issue. This evidence showed not only that all the classifications at the Transportation Department were at issue, but that relief was needed in practically every job, and that the discrimination faced by African-American employees was not limited to jobs that were only used by the Transportation Department.

When the court approved the consent decree in this case, it affirmed once again the description the court used to describe the plaintiff class, specifically that it covered *all* black merit system employees, *all* black non-merit system employees of the Transportation Department [*47] who have unsuccessfully sought employment as merit system employees, and *all* black non-employees who have unsuccessfully applied for merit system employment. In addition, in the order adopting the consent decree, the court indicated that "The following terms and provisions of this Consent Decree are accordingly agreed to in final and complete resolution of *all* class issues which have been asserted in the case." Once again, the court's language does not admit of a reading that the relief contained in the consent decree is in any way limited.

Furthermore, in its orders, the court has emphasized that "A 1994 consent decree, commonly referred to as 'consent decree I,' set up an *open and competitive* system in which persons, regardless of race, could pursue and be considered for promotions, both provisional and

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[42] *Id*. at 6.

permanent, on the basis of merit." [43] This statement about the consent decree does not indicate that the decree was providing an open and competitive system for some persons working at the Transportation Department, or that the process would be open and competitive for some promotions. The vision of the relief in this litigation has been that the personnel policies at [*48] the Transportation Department are in need of a substantial overhaul, and they will have to get it for the relief for the plaintiffs to be complete and effective.

In addition, there have been signs of performance by defendants under the consent decree, and, consequently, reliance by the plaintiffs, that is contrary to the argument the Personnel Department is advancing now. Article III, which sets forth the provisions relating to validation of exams, also has a provision, P 10, that contains a requirement that the defendants document all of their validation efforts, and provide the plaintiffs' counsel with such documentation for review. In the September 1996 joint omnibus report, asserting their compliance with this provision, the defendants listed information they had provided to the plaintiffs on a number of classifications. These classifications were cultural resources coordinator II, architectural history option, accounting technician II, equipment maintenance [*49] superintendent, environmental planning specialist II, structural steel fabrication inspection supervisor, equal employment officer, cartographic planning specialist I, asphalt polymer specialist, employee assistance program coordinator, archaeologist II, personnel assistant II, information specialist II, chief auditor, clerk messenger, and underwater bridge inspector. As the plaintiffs' counsel pointed out, these classifications are far from being specific to the Transportation Department, and gave some indication of what the Personnel Department saw as its obligation to perform validation studies.

Finally, and perhaps most tellingly, even if the court were to grant the Personnel Department's motion, the department is unable to articulate a reasonable and workable standard as to what classifications should be covered by the consent decree. At the in-chambers status conference held May 22, 1998, the Personnel Department's counsel agreed that the standard could not be limited to those classifications or jobs used *exclusively* by the Transportation Department, because even the SPD project classifications, which the Personnel Department agrees are subject to multigrade-job-study and [*50] validation requirements, are not used *exclusively* by the Transportation Department. [44] The Personnel Department still contends, however, that these requirements are limited to classifications that are largely specific to the Transportation Department. The problem is that the Personnel Department cannot articulate a standard by which the court can measure whether a classification or job is largely specific to the Transportation Department. At the May 22 status conference, the Personnel Department's counsel could not say whether this measure means more than 50%--that is, 51%--specific to the Transportation Department, 90% specific to the Transportation Department, or 95% specific to the Transportation Department. [45] Indeed, at the time of the status conference, the Personnel Department's counsel had not even done a study to see what jobs would meet these differing percentages. [46] The reason that the Personnel Department cannot articulate a standard is that the consent decree simply did not contemplate the approach the Personnel Department is advancing. But more importantly, such arbitrary cut-offs are just that--arbitrary--and they bear no relationship to the discriminatory claims [*51] at issue in this litigation. For example, although clerical positions in the Transportation Department may account for only a small percentage of the state-wide clerical jobs, the number of clerical jobs in the Transportation Department is still over 400 and these jobs were among those at the center of the charges made during the 1992 and 1997-98 trials of longstanding and pervasive racial discrimination. [47]

In light of this evidence, the Personnel Department would have a heavy burden to carry to show that a crucial portion of the relief contained in the consent decree was not intended to cover a substantial portion of the plaintiff class. The Personnel Department has not even approached meeting this burden, and its request for clarification must therefore be denied.

B. MODIFICATION

[*52] 1.

Modification of a consent decree, like modification of any judgment or order, is formally governed by *Rule 60(b) of the Federal Rules of Civil Procedure*. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378, 380, 112 S. Ct.

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[43] Order, entered March 3, 1998 (Doc. no. 2475), at 1.

[44] *See* transcript of in-chambers status conference, held May 22, 1998, at 12-14.

[45] *See id*. at 11-17.

[46] *See id*. at 15-17.

[47] *See* defendants' notice of filing, filed May 28, 1998 (Doc. no. 2722), at 1-4.

748, 757, 116 L. Ed. 2d 867 (1992). *Rule 60(b)* authorizes a court to modify a final judgment or court order at any time if it finds that "the judgment has been satisfied, … or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or [for] any other reason justifying relief from the operation of the judgment." *Fed. R. Civ. P. 60(b)(5)-(6)*.

Traditionally, courts had required parties seeking modification of a consent decree under *Rule 60(b)* to demonstrate that continued application of the decree would result in "grievous wrong" on account of new and unforeseen conditions. *United States v. Swift & Co.*, 286 U.S. 106, 119, 52 S. Ct. 460, 464, 76 L. Ed. 999 (1932). In recent years, however, the Swift standard has been rejected as too rigid for "institutional reform litigation." *See, e.g., Hodge v. H.U.D.*, 862 F.2d 859 (11th Cir. 1989) [*53] (per curiam); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956 (2d Cir. 1983); *Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114 (3d Cir. 1979). The Supreme Court's decision in *Rufo* established a two-part standard for determining when modification of such decrees is appropriate. 502 U.S. at 383-384, 112 S. Ct. at 760.

First, the party seeking modification of the decree "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Rufo*, 502 U.S. at 383, 112 S. Ct. at 760. The party may satisfy this initial burden "by showing either a significant change in factual conditions or in law." *Id*. at 384, 112 S. Ct. at 760. The Court identified several situations in which a significant change in factual conditions could warrant modification of a decree. Modification could be appropriate where a change in conditions has made compliance with the decree "substantially more onerous." *Id*. Modification could also be appropriate "when a decree proves unworkable because of unforeseen obstacles," or, lastly, "when enforcement of the decree without modification would be detrimental to the public interest." [*54] *Id*. In addition, modification of the decree may be appropriate where there has been an intervening change in the governing law, such that one or more of the obligations the decree imposes upon the parties has been made impermissible under federal law or, conversely, the law has changed to make legal what the decree was designed to prevent. *Id*. at 388, 112 S. Ct. at 762.

Second, if the moving party meets this standard, the court then considers "whether the proposed modification is suitably tailored to the changed circumstance." *Id*. at 383, 112 S. Ct. at 760. "A proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor," *id*. at 391, 112 S. Ct. at 764; rather, any modification to the decree must be directly responsive to the problem created by the changed circumstances. The *Rufo* Court recognized that, in applying this two-part standard, a court must take into consideration the effect of the proposed modifications on the underlying purpose of the consent decree. Where the defendant requests a modification that is clearly designed to further the goals of the decree, for example, the court may be more flexible [*55] in its application of the two-part test. *Id*. at 381 n.6, 112 S. Ct. at 758 n.6. Similarly, if the proposed modification concerns only minor details of the decree and does not affect the decree's purpose, the court may forgo application of the *Rufo* standard altogether. *Id*. at 383 n.7, 112 S. Ct. at 760 n.7. On the other hand, if the modification would in any manner frustrate or undermine the decree's purpose, the court must proceed with extreme caution in reviewing the justification for the proposed changes. *Id*. at 387, 112 S. Ct. at 762.

2.

In seeking modification of P 4 of article III and P 3 of article XV of consent decree I, the Personnel Department advances three main arguments. First, the Personnel Department asserts that it did not agree to perform the validations and multigrade job study for every classification used by the Transportation Department. Second, the Personnel Department asserts that if it was to be required to perform these personnel projects for all the classifications at issue, this would represent an unreasonable and undue burden on the Personnel Department that would add years and substantial expense to the projects. Finally, the Personnel [*56] Department asserts that including all of the classifications at issue within the department's obligation would represent an unreasonable expansion of this litigation, and would defeat the ability of the defendant agencies in *In re Employment Discrimination Litigation Against the State of Alabama (Crum v. State of Alabama)*, civil action no. 94-T-356-N (M.D. Ala.) (Thompson, J.) (commonly known as the '*Crum* litigation'), to protect their rights with respect to classifications they use much more extensively.

In the context of modification of consent decree I, the arguments advanced by the Personnel Department are without force. As set out above, the burden to establish the need for modification is on the movant, and the showing necessary requires that there be "a significant change in factual conditions or in law." *Rufo*, 502 U.S. at 384, 112 S. Ct. at 760. The Personnel Department has not shown any change in factual condition or in the law, much less a significant one. As the court has already held, consent decree I contemplated full relief for every plaintiff class member. There is no basis on which to conclude that any part of the language of the decree should be read to [*57]

allow otherwise. Consequently, the Personnel Department agreed to perform validations and a multigrade job study for each and every classification used by the Transportation Department. This was the meaning of the consent decree when it was adopted, and remains the meaning today. Despite the Personnel Department's protestations to the contrary, the requirement that the Personnel Department perform the personnel projects for every classification is not new, and cannot support a modification of the consent decree.

Looking at the specific arguments raised by the Personnel Department, there is no basis to support the department's argument that it did not agree to perform the validations and multigrade job study for every classification used by the Transportation Department. As already held by the court, full relief for every plaintiff class member was the objective of the decree, and there is no reason for the court to believe that the Personnel Department agreed to provide otherwise.

As to the Personnel Department's argument that requiring it to perform the personnel projects for all the classifications at issue would represent an unreasonable and undue burden on the department, and [*58] that it would add years and substantial expense to the projects, the court does not doubt that this will be a substantial undertaking for the Personnel Department and that it will involve considerable time and expense. On the issue of the reasonableness of this burden, however, the court must disagree with the Personnel Department. It is perfectly reasonable to expect that the Personnel Department, which was specifically named as a defendant in this litigation, would have a serious role to play in remedying the racial discrimination that has pervaded the Transportation Department for decades. The discrimination did not involve only the officials at the Transportation Department, but infected all of the Transportation Department's personnel policies and practices, thus closely connecting the Personnel Department. Placing a substantial portion of the burden on the Personnel Department, therefore, is the only way to correct many of the offending policies. As for the addition of years to the projects, the Personnel Department need look no further than itself to find the source of this problem. Had the Personnel Department started these projects when the consent decree was adopted--March [*59] 16, 1994--it would be substantially, if not totally, finished today. And to come forward now and argue that the additional time required is a reason for relieving the Personnel Department of its obligations is an argument the court will not even entertain. "The court will not allow [the Personnel Department] to bootstrap [its] failure to act in a timely manner into a further court-approved failure to meet [consent decree I's] requirement[s]." [48]

[*60] One other point that must be made, and that really underlies the court's entire discussion in this matter, is that the Personnel Department's obligations here cannot be considered without taking account of the department's obligations under the 1976 injunction entered in *United States v. Frazer*, a case that was consolidated with this one. [49] In *Frazer*, where the Highway Department and the Personnel Department were defendants, the court forbade the defendants from using selection criteria and examinations that were not validated. [50] This prohibition was put in place in 1976 and remains in force today. Consequently, the notion that requiring validation of any particular classification would expand this litigation is nonsense, and if the Personnel Department has been keeping up with its obligations under the *Frazer* injunction, the reaffirmation of the requirement of validation in consent decree I presents no additional burden on the Personnel Department at all. [51] [*61]

[*62] Finally, as to the Personnel Department's argument that including all of the classifications at issue within the

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[48] *See* order, entered May 6, 1998 (Doc. no. 2652), at 4-5. The court recently reached the same conclusion with respect to the defendants' attempt to avoid compliance with another provision of consent decree I. *Id.* ("Time constraints will not justify relaxation of this requirement, however. The defendants have had since March 16, 1994--the date of the entry of consent decree I--to comply with this requirement, and the court will not allow them to bootstrap their failure to act in a timely manner into a further court-approved failure to meet P 2's requirement.").

[49] *See* United States v. Frazer, 1976 U.S. Dist. LEXIS 11573, Civil action no. 2709- N, 1976 WL 729 (M.D. Ala. Aug. 20, 1976).

[50] *See id.* at *7 ("No written test shall be used as a ranking device, unless and until it has been validated in accordance with the Guidelines on Employee Selection Procedure promulgated by the Equal Employment Opportunity Commission, 29 C.F.R. 1607, et seq., and approved by this Court. Defendants shall validate all written tests used by them as screening devices in accordance with the EEOC Guidelines.").

[51] At oral argument on this motion, defense counsel conceded that the Personnel Department remains under a continuing obligation to validate all selection criteria and examinations under the *Frazer* injunction, and attempted to reframe the issue in the current motion. *See* transcript of hearing on motion to set aside, etc., held August 15, 1997, at 112-13, 115. The issue changed from whether the Personnel Department had to perform validations at all to whether the Personnel Department had to perform

Personnel Department's obligation represents an unreasonable expansion of this litigation, and defeats the ability of the defendant agencies in the *Crum* litigation to protect their rights with respect to classifications they use much more extensively, the court disagrees with both parts of the Personnel Department's assertion. First, it is simply no defense to a valid Title VII disparate-impact claim brought by a single state employee that a job or classification is used state-wide rather than in just one state agency. If an agency's job qualifications must be validated, then they must be validated regardless of whether the qualifications are agency-specific or state-wide, and this principle is no less sound whether only one employee has a valid entitlement to have a job's qualifications validated or hundreds of employees do. Second, with an expectation that the entire plaintiff class would receive relief for the discrimination it has faced at the Transportation Department, and with the Personnel Department as a party to this litigation from its inception, it does not [*63] represent an expansion of this litigation to require the Personnel Department to provide the relief no matter whether it touches other state departments or not. There has never been any hint in this litigation that the relief the employees of the Transportation Department could get was in any way limited by how widely used their job classification was beyond the Transportation Department. And to suggest now that requiring the Personnel Department to perform the personnel projects on all the classifications at issue is an expansion of the litigation is ridiculous. With respect to the *Crum* litigation, even if the relief in this case does have an impact on *Crum*, the court is at a loss to understand how validating and studying any of the classifications within the State could be considered as having a negative impact on the *Crum* litigation. Completion of these projects will only bring a benefit to anyone it affects. Furthermore, the Personnel Department remains under a continuing obligation to validate selection criteria under the 1976 *Frazer* injunction, so the Personnel Department's having to validate selection criteria anyway, irrespective of any other litigation that [*64] follows after *Frazer*, makes its argument even less compelling. In light of the Personnel Department's failure to show a substantial change in fact or in the law, its motion for modification is due to be denied.

III. CONCLUSION

In conclusion, the foundational issue in this litigation has never had anything to do with whether a classification is exclusively or largely Transportation Department-specific; the plaintiffs never framed nor limited their lawsuit to such classifications. Instead, the issue has always been, and still remains, whether the Transportation Department and the Personnel Department filled a classification in a manner prohibited by Title VII and the orders in *Frazer*, regardless of whether the classification was specific to the Transportation Department. Consent decree I, which resolved all class-wide issues, similarly drew no line based on whether a classification at the Transportation Department was specific to the department. Consequently, the suggestion that the court should now limit the relief for the plaintiffs in such a way has no place in this litigation.

In any event, the court notes that it posed the following question to the plaintiffs' counsel [*65] at the hearing held on the Personnel Department's motion: "What if there are one or two jobs in the Highway Department that fall within a particular classification and … the people really are in large measure in other departments of the State?" [52] The plaintiffs' counsel responded "If [the defendants] want to point out jobs that are principally belonging to other departments and they just happen to have one or two or three [employees at the Transportation Department], I'm willing to discuss that." [53] The court took the plaintiffs' counsel's response to mean that they are willing to negotiate the extent to which the Personnel Department must perform validations and the multigrade job study for classifications with only a few incumbents *and* where the classifications were not the subject of discrimination claims in this litigation. In light of the court's findings above, and its holding, the court recommends that the

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validations under the supervision of the *Reynolds* plaintiffs. This concession and defense counsel's attempt to re-frame the issue in the motion further undermine every argument the Personnel Department makes here.

It is perfectly clear that the Personnel Department has been under an obligation to validate for over 20 years, and this was equally true at the time of the adoption of the consent decree as it is today. But without even a pause, nor a previous mention of how long-standing obligation fits into its argument, the Personnel Department changed its argument to accommodate this fact when it came to light. It strains believability to the breaking point for the court to be asked now to believe that the personnel Department's new argument was what was really in the contemplation of the parties at the time of the drafting of the consent decree, or that there was some change in fact or law that makes the Personnel Department's long-standing obligation presently unworkable.

The court would normally pay no attention to plaintiffs' argument in this matter that they believed that the Personnel Department thought this argument up recently and started advancing the argument as a means of avoiding its obligations. In light of the course of the proceedings on this motion, however, the court must admit that this argument has a compelling plausibility.

[52] Transcript of hearing on motion to set aside, etc., held August 15, 1997, at 126-27.

[53] *Id.* at 127.

Personnel Department take advantage of the plaintiffs' counsel's willingness to negotiate as a means of addressing its concerns about the scope of this project. [*66]

For the foregoing reasons, it is ORDERED that the Alabama State Personnel Department's motion for clarification or, in the alternative, for modification, filed August 7, 1997 (Doc. no. 2015), is denied.

DONE, this the 29th day of May, 1998.

Myron H. Thompson

UNITED STATES DISTRICT JUDGE