Reynolds v. Ala. DOT

United States District Court for the Middle District of Alabama, Northern Division
June 19, 2008, Decided; June 19, 2008, Filed
CIVIL ACTION NUMBER 85-cv-665-MHT

Reporter: 2008 U.S. Dist. LEXIS 107721; 2008 WL 5666570 JOHNNY REYNOLDS, ET AL., Plaintiffs, v. ALABAMA DEPARTMENT OF TRANSPORTATION, ET AL., Defendants.

Subsequent History: Reconsideration granted by, Modified by Reynolds v. Ala. DOT, 2008 U.S. Dist. LEXIS 119169 (M.D. Ala., Sept. 10, 2008)

Prior History: Reynolds v. Ala. DOT, 2008 U.S. Dist. LEXIS 119150 (M.D. Ala., May 23, 2008)

Counsel: [*1] For Johnny Reynolds, individually on behalf of himself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated, Plaintiff: Ann K. Wiggins, Deborah Ann Mattison, Gregory O'Dell Wiggins, Henry Wallace Blizzard, III, Jon Craig Goldfarb, Rebecca Anthony, Richard Joe Ebbinghouse, Robert Fletcher Childs, Jr., Robert Lee Wiggins, Jr., Rocco Calamusa, Jr., Russell Wayne Adams, Steven Lee Atha, Susan Gale Donahue, LEAD ATTORNEYS, Wiggins Childs Quinn & Pantanzis, PC, Birmingham, AL; Julian Lenwood McPhillips, Jr., LEAD ATTORNEY, McPhillips Shinbaum L.L.P., Montgomery, AL; Richard Hamilton Gill, LEAD ATTORNEY, Copeland Franco Screws & Gill, Montgomery, AL; Stanley W. Logan, LEAD ATTORNEY, Baker Donelson Bearman Caldwell & Berkowitz PC, Birmingham, AL.

For Cecil Parker, - Robert Johnson, Frank Reed, Ouida Maxwell, Martha Ann Boleware, Peggy Vonsherie Allen, Intervenor Plaintiffs: Gregory O'Dell Wiggins, Jon Craig Goldfarb, Rebecca Anthony, Richard Joe Ebbinghouse, Robert Lee Wiggins, Jr., LEAD ATTORNEYS, Wiggins Childs Quinn & Pantanzis, PC, Birmingham, AL; Julian Lenwood McPhillips, Jr., LEAD ATTORNEY, McPhillips Shinbaum L.L.P., Montgomery, [*2] AL.

For Jeffery W. Brown, Intervenor Plaintiff: Gregory O'Dell Wiggins, Jon Craig Goldfarb, Rebecca Anthony, Richard Joe Ebbinghouse, Robert Lee Wiggins, Jr., Russell Wayne Adams, LEAD ATTORNEYS, Wiggins Childs Quinn & Pantanzis, PC, Birmingham, AL; Julian Lenwood McPhillips, Jr., LEAD ATTORNEY, McPhillips Shinbaum L.L.P., Montgomery, AL.

For William Adams, on behalf of himself and all similarly situated persons (Non-Class Employees), Cheryl Caine, on behalf of herself and all similarly situated persons (non-class employees), Tim Colquitt, on behalf of himself and all similarly situated persons (non-class employees), William Flowers, on behalf of himself and all similarly situated persons (non-class employees), Wilson Folmar, on behalf of himself and all similarly situated persons (non-class employees), George Kyser, on behalf of himself and all similarly situated persons (non-class employees), Becky Pollard, on behalf of herself and all similarly situated persons (non-class employees), Ronnie Pouncey, on behalf of himself and all similarly situated persons (non-class employees), Terry Robinson, on behalf of himself and all similarly situated persons (non-class employees), Tim Williams, [*3] on behalf of himself and all similarly situated persons (non-class employees), Intervenor Plaintiffs: Gary Lamar Brown, Raymond Paul Fitzpatrick, Jr., LEAD ATTORNEYS, Fitzpatrick & Brown LLP, Birmingham, AL.

For Michael Grant, John D'Arville, Andrew McCullough, Intervenor Plaintiffs: Raymond Paul Fitzpatrick, Jr., LEAD ATTORNEY, Fitzpatrick & Brown LLP, Birmingham, AL.

For Department of Transportation, State of Alabama, Defendant: Allen Robert Trippeer, Jr., LEAD ATTORNEY, Haskell Slaughter Young & Rediker LLC, Birmingham, AL; Christopher Marlowe Mitchell, LEAD ATTORNEY, Maynard Cooper & Gale, Birmingham, AL; Christopher William Weller, Henry Clay Barnett, Jr., Mai Lan Fogal Isler, LEAD ATTORNEYS, Capell Howard PC, Montgomery, AL; David R. Boyd, LEAD ATTORNEY, Balch & Bingham - MGM, Montgomery, AL; David Roy Mellon, LEAD ATTORNEY, Sirote & Permutt, Birmingham, AL; Ellen Ruth Leonard, William H. Pryor, Jr., LEAD ATTORNEYS, Office of the Attorney General, Montgomery, AL; Jimmie Robert Ippolito, Jr., LEAD ATTORNEY, Alabama Department of Transportation Legal Division, Montgomery, AL; Kenneth Lamar Thomas, LEAD ATTORNEY, Thomas Means Gillis & Seay PC, Montgomery, AL; Laszlo Daniel Morris, [*4] Jr., LEAD ATTORNEY, Alabama Department of Transportation, Montgomery, AL; Patrick Hanlon Sims, LEAD ATTORNEY, Cabaniss Johnston Gardner Dumas & O'Neal, Mobile, AL; Robert Richardson Baugh, LEAD ATTORNEY, Sirote & Permutt, P.C., Birmingham, AL; Robert A. Huffaker, LEAD ATTORNEY, Rushton Stakely Johnston & Garrett PC, Montgomery, AL; Tara Smelley Knee, Alabama State Personnel Department, Montgomery,

AL; Alice Ann Byrne, Alabama Department of Personnel Legal division, Montgomery, AL; Nathan Andrew Forrester, Bradley Arant Rose & White LLP, Birmingham, AL.

For Department of Personnel, State of Alabama, Defendant: Alice Ann Byrne, Alabama Department of Personnel Legal division, Montgomery, AL; Ellen Ruth Leonard, William H. Pryor, Jr., LEAD ATTORNEYS, Office of the Attorney General, Montgomery, AL; Tara Smelley Knee, Alabama State Personnel Department, Montgomery, AL; Christopher William Weller, LEAD ATTORNEY, Capell Howard PC, Montgomery, AL.

For Anne Regina Yuengert, Alabama Department of Transportation, Defendant: Christopher William Weller, LEAD ATTORNEY, Capell Howard PC, Montgomery, AL.

For The Lawyers' Committee for Civil Rights Under Law, Amicus: Barbara R. Arnwine, Richard T. Seymour, [*5] Teresa A. Ferrante, Thomas J. Henderson, LEAD ATTORNEYS, Lawyers' Committee for Civil Rights Under Law, Washington, DC.

For Jonathan H. Waller, Campbell, Waller & Poer, LLC, Movants: Brandy Murphy Lee, LEAD ATTORNEY, Campbell, Gidiere, Lee, sinclair & Williams, Birmingham, AL.

For Balch and Bingham LLP, Sirote & Permutt, P.C., Movants: David R. Boyd, LEAD ATTORNEY, Sirote & Permutt, Birmingham, AL.

For Capell and Howard PC, Movant: Christopher William Weller, Henry Clay Barnett, Jr., Mai Lan Fogal Isler, LEAD ATTORNEYS, Capell Howard PC, Montgomery, AL.

For Baker, Donelson, Bearman, Caldwell & Berkowitz, Movant: Lisa Wright Borden, LEAD ATTORNEY, Baker Donelson Bearman Caldwell & Berkowitz PC - Bham, Birmingham, AL.

For Haskell Slaughter Young & Rediker, LLC, Movant: Allen Robert Trippeer, Jr., LEAD ATTORNEY, Haskell Slaughter Young & Rediker LLC, Birmingham, AL.

For Rushton, Stakely, Johnston & Garrett, P.A., Movant: Robert A. Huffaker, LEAD ATTORNEY, Rushton Stakely Johnston & Garrett PC, Montgomery, AL.

For Thomas, Means, Gillis & Seay, P.C., Movant: Kenneth Lamar Thomas, LEAD ATTORNEY, Thomas Means Gillis & Seay PC, Montgomery, AL.

For Thomas G. Flowers, Interim Director of the State [*6] Personnel Department, Defendant: Christopher William Weller, LEAD ATTORNEY, Capell Howard PC, Montgomery, AL; William H. Pryor, Jr., LEAD ATTORNEY, Office of the Attorney General, Montgomery, AL.

Robert Camp, Movant, Pro se, Weogufka, AL.

John Robbins, Movant, Pro se, Equality, AL.

For Rosalyn Cook-Deyampert, Movant: Julian Lenwood McPhillips, Jr., Kenneth Jay Shinbaum, LEAD ATTORNEYS, McPhillips Shinbaum L.L.P., Montgomery, AL; Karen Sampson Rodgers, LEAD ATTORNEY, Karen Sampson Rodgers, LLC, Attorney at Law, Montgomery, AL; Robert Lee Wiggins, Jr., Russell Wayne Adams, LEAD ATTORNEYS, Wiggins Childs Quinn & Pantanzis, PC, Birmingham, AL.

For Carlos Gonzalez, Hon., Special Master: Carlos A. Gonzalez, LEAD ATTORNEY, Atlanta, GA.

For Robert Renfroe Riley, in his official capacity as Governor of the State of Alabama, Defendant: Christopher William Weller, LEAD ATTORNEY, Capell Howard PC, Montgomery, AL; David Roy Mellon, LEAD ATTORNEY, Sirote & Permutt, Birmingham, AL; Gaile Pugh Gratton, Robert Richardson Baugh, Robin Leigh Beardsley, Sandra Lois Vinik, LEAD ATTORNEYS, Sirote & Permutt, P.C., Birmingham, AL; Troy Robin King, LEAD ATTORNEY, Office of the Attorney General, Montgomery, AL; [*7] Robert Ryan Daugherty, Sirote & Permutt, PC -- B'ham, Birmingham, AL.

For Joseph McInnes, in his official capacity as Director of the Alabama Department of Transportation, Defendant: Christopher William Weller, LEAD ATTORNEY, Capell Howard PC, Montgomery, AL.

Elaine M. Coley, Shirley Mays, Calvin Lamar, Gloria Pugh, Movants, Pro se, Montgomery, AL.

Mary Lamar, Movant, Pro se, Prattville, AL.

For Lieutenant Dukes, Jr., Movant: Chuck Hunter, LEAD ATTORNEY, Law Office of Chuck Hunter, Birmingham, AL.

Judges: C. A. Gonzalez, SPECIAL MASTER.

Opinion by: C. A. Gonzalez

Opinion

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' INDIVIDUAL CONTEMPT CLAIMS

INTRODUCTION

This case is again before the Special Master on the Defendants' Motion for Partial Summary Judgment on Plaintiffs' Individual Contempt Claims. Docket No 8273. The Defendants have filed a brief in support of their motion, (Docket No 8274), the Plaintiffs have filed a response in opposition (Docket No 8306), and the Defendants have replied in support (Docket No 8307).

The Defendants frame the issues on which they seek summary judgment as follows:

> . **MONETARY RELIEF** -- Defendants are entitled to summary judgment on all pre-Fairness [*8] Hearing claims seeking monetary relief, including claims for back-pay, salary adjustment, or adjustment to retirement benefits.
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> . **CLAIMS OF DECEASED, RETIRED, OR RESIGNED CLAIMANTS** -- With respect to claimants who are deceased, or who have retired or resigned from ALDOT, Defendants are entitled to summary judgment on (1) all pre- and post-Fairness Hearing claims for non-monetary relief, and (2) all pre-Fairness Hearing claims for compensatory, monetary relief, including claims for adjustments to pension benefits.
>
> . **SALARY ADJUSTMENTS** -- Defendants are entitled to summary judgment on any post-Fairness Hearing claims for salary adjustments by Claimants occupying ALDOT-specific project classifications who received salary adjustments in February 2000 and for any post-Fairness Hearing claims seeking salary adjustments for periods covered by the two-year freeze on salaries of ALDOT merit system employees.
>
> . **MULTIPLE CLAIMANTS SEEKING SAME POSITION** -- Defendants are entitled to summary judgment on claims by multiple claimants seeking promotion or instatement to the same vacant position.
>
> . **DUPLICATE GRIEVANCE CLAIMS** -- Defendants are entitled to summary judgment on all duplicate claims seeking [*9] the same relief through separately filed Article XIX grievances.
>
> . **SETTLED INSTATEMENT CLAIMS** -- Defendants are entitled to summary judgment on Claimants' pre-Fairness Hearing instatement claims to the extent that they seek instatement relief for the same job classifications made the basis of the Promotions Class settlement.
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> . **OUT-OF-CLASSIFICATION DUTY ASSIGNMENTS** -- Defendants are entitled to summary judgment on Claimants' post-Fairness Hearing claims seeking individual contempt relief for out-of-classification duty assignments.
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> . **DISCRIMINATION CLAIMS** -- Defendants are entitled to summary judgment on all claims alleging racial discrimination or harassment.
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> . **LIMITATION CLAIMS** -- Defendants are entitled to summary judgment on any instatement claims asserted by Claimants beyond the job classifications identified in their original March 5, 2003 submissions.
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> . **ARTICLES 2 & 3 DELAYS** -- Defendants are entitled to summary judgment on claims for make-whole relief to the extent that the claims are attributable to implementation of the no-overlap provision of Articles 2 and 3.
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> . **ARTICLE 15 DELAYS** -- Defendants are entitled to summary judgment on all contempt claims arising from delays associated [*10] with implementation of Article 15.Docket No 8273 at 2-3.

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) authorizes summary judgment when all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. In short, everything in the record must demonstrate the absence of a genuine issue of material fact. Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1246 (11th Cir. 1999).

The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. Herzog, 193 F.3d at 1246 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)). The party requesting summary judgment "'always bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" Graham v.

State Farm Mut. Ins. Co., 193 F.3d 1274, 1281 (11th Cir. 1999) [*11] (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)) (internal quotation marks omitted). "The movant[] can meet this burden by presenting evidence showing that there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof." Id. at 1281-82. "There is no requirement, however, 'that the moving party support its motion with affidavits or other similar materials negating the opponent's claim.'" Id. at 1282 (quoting Celotex, 477 U.S. at 323).

INTRODUCTION

The ongoing controversy involving the Plaintiffs' individual contempt claims has its genesis in the Court's Order of Civil Contempt entered January 31, 2000. Docket No 4284, *reported at* Reynolds v. Ala. Dept. of Transp., 84 F. Supp. 2d 1339 (M.D. Ala. 2000)(hereinafter "Contempt Order"). The Contempt Order was entered based on the parties' agreement "that the defendants should be held in civil contempt of court for noncompliance with consent decree I . . . until such time as [the Defendants] have affirmatively demonstrated that they have achieved full compliance with [consent decree I] . . .." Id. at 7, 84 F. Supp. at 1342. [*12] In addition to finding the Defendants in contempt of their obligations under the Consent Decree, the Contempt Order left open issues "concerning what non-coercive remedies or compensation, if any, should be awarded to redress or undo the effects of the defendants' non-compliance and contempt." Id. at 21, 84 F. Supp. 2d at 1346. The Contempt Order specifically recites that it "does not in any way resolve or foreclose any employee's individual rights and remedies, if any, under federal or state law or under consent decree I . . .." Id. at 23, 84 F. Supp. 2d at 1346.

In discussions subsequent to the entry of the Contempt Order, the Plaintiffs and the Defendants were able to reach a Settlement Agreement that resolved the Plaintiffs' compensatory and monetary individual contempt claims through May 29, 2001--the date of the Settlement Agreement's Fairness Hearing. (hereinafter "Settlement Agreement" or "Agreement"). By its own terms the Agreement did not resolve the Plaintiffs' individual nonmonetary remedies for contempt including claims for instatement. Docket No 4700 at 24, 26. Nor did the Settlement Agreement restrict the right to seek instatement and monetary or compensatory relief for [*13] ongoing contempt after May 29, 2001.

MONETARY RELIEF FOR PRE-FAIRNESS HEARING CLAIMS

Defendants contend they are entitled to summary judgment on all pre-Fairness Hearing claims seeking monetary relief, including claims for back pay, salary adjustment, or adjustment to retirement benefits. The Plaintiffs have conceded that they are not seeking back pay or compensatory damages for contempt of the Consent Decree by the Defendants prior to the date of the Fairness Hearing. [1]

To the extent the Claimants can establish that they are actual victims of the Defendants' contumacious conduct, they can recover monetary damages for such contempt for the period after [*14] May 29, 2001. They cannot, however, recover compensatory and monetary damages for the Defendants' contempt before May 29, 2001--those claims having been settled by the January 2001 Settlement Agreement.

To the extent the Claimants are entitled to an adjustment to retirement benefits, that entitlement accrues for the period after May 29, 2001. The same is true for any Claimant seeking salary adjustment. Accordingly, to the extent a Claimant is entitled to receive a salary adjustment, such an adjustment should be calculated from May 29, 2001.

It is nevertheless true that the Plaintiffs retained the right to seek nonmonetary make-whole relief for their pre-Fairness Hearing claims of instatement. Such relief may include, under appropriate circumstances, a monetary component as set forth in City of Miami (see infra). This monetary component cannot include back pay or adjustments to salary or benefits arising before May 29, 2001.

The 2001 Settlement Agreement settled all of the Plaintiffs' claims for monetary relief for contempt arising prior to the close of business on the day of the Fairness Hearing. Docket No 4700 at 47-48 [2]. Adjustments to salaries and benefits accruing before the pre-Fairness [*15] Hearing are monetary in nature and were therefore settled and released in January 2001.

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[1] See Docket No 8306 at 5, ("As noted above, the plaintiffs are seeking instatement based on the date a plaintiff would have been promoted but for the defendants' prolonged contempt of the Consent Decree, but are only seeking back-pay for the period **following the date of the Fairness Hearing** (May 29, 2001). Similarly, the plaintiffs are seeking compensatory damages for the delay in appointment, but only those damages which are properly allocated to the date **following the date of the Fairness Hearing** (May 29, 2001)" (emphasis in original).

As previously noted, the decision that claims for salary and retirement adjustment pre-Fairness Hearing were settled does not affect the possible entitlement of a Claimant to an appropriate pay grade or retirement adjustment for the period after May 29, 2001. According to the Plaintiffs, "the vast majority of [persons] with individual contempt claims have unresolved claims for adjustment to their retirement benefits which accrue after the date of the Fairness Hearing [*16] (May 29, 2001) and are therefore not addressed or released by the settlement Agreement." Docket No 8306 at 6, see also id. at 7 ("The plaintiffs are entitled to make-whole relief and are therefore entitled to either an adjustment to their retirement in conjunction with RSA or, in the alternative, payment of damages by the defendants for all damages which accrued (or will accrue) after the date of the Fairness Hearing (May 29, 2001)."

The complexity of the Plaintiffs' argument on the point of salary adjustment and fringe benefit adjustments pre-Fairness Hearing obscures the simplicity of the Agreement they reached with the Defendants in January 2001. The fact is that the Plaintiffs released and settled all compensatory and monetary claims for contempt before the date of the Fairness Hearing. The Agreement did not resolve the right of Claimants to pursue pre-Fairness Hearing claims for instatement or other non-monetary relief.

The Defendants are entitled to a summary judgment on claims seeking monetary and compensatory damages for pre-Fairness Hearing contempt of the Consent Decree.
This includes claims for compensatory relief, claims for back pay, salary adjustment, adjustment to retirement [*17] benefits and fringe benefits. [3]

CLAIMS OF DECEASED, RETIRED, OR RESIGNED CLAIMANTS

The Defendants believe with respect to Claimants who are deceased, retired or have resigned from ALDOT, that they are "entitled to summary judgment on (1) all pre- and post-Fairness Hearing claims for non-monetary relief, and (2) all pre-Fairness Hearing claims for compensatory, monetary relief, including claims for back pay and adjustments to retirement benefits." Docket No 8274 at 10.

For obvious reasons, Claimants who are deceased, retired, or no longer working for ALDOT are ineligible for non-monetary, prospective relief in the form of promotions or instatement. Additionally, Claimants whose relationship with ALDOT was terminated before May 29, 2001, the dated of the Fairness Hearing, have received all monetary relief they may have been entitled to because of the Settlement Agreement between the Defendants and the Plaintiffs. Of course, those Claimants who retired or left ALDOT after May 29, 2001, may still have available claims for compensatory and monetary relief, such as back pay and retirement benefit adjustment through the date of their departure since such claims [*19] were not released by the Settlement Agreement.

ADJUSTMENT TO RETIREMENT BENEFITS

According to the Defendants, the authority to adjust retirement benefits rests solely with RSA ("Retirement

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3. The claims released by the contempt settlement are all individual claims of Class Members for monetary relief for contempt arising prior to the close of business on the day of the Fairness Hearing. . . . The contempt settlement does not resolve the following: (a) relief under Consent Decree I, other than individual monetary relief; . . . (f) coercive or non-coercive, non-monetary relief for contempt of Consent Decree I; . . . (l) individual non-monetary remedies for contempt; (m) individual or class-based monetary remedies for contempt arising after the close of business on the day of the Fairness Hearing. . . .Docket No 4700 at 47-48.

[3] In an attempt to clarify their position regarding the nature of the relief that a "generic plaintiff who prevails on his or her individual contempt claim" would be entitled to, the Plaintiffs noted the following:

> [The generic plaintiff] would indisputably be entitled to make-whole relief without limitation to the extent his or her claims were not settled by the Settlement Agreement. Appropriate make-whole relief would include (1) instatement to the plaintiff's rightful position retroactive to the date he or she should have been promoted; (2) a salary adjustment to the pay grade that individual should have received as of the date that individual should have been promoted (as well as any subsequent salary adjustments which would have followed from this salary adjustment); (3) back-pay from the date following the Fairness Hearing (May 29, 2001) to the present; (4) compensatory damages from the date following the Fairness Hearing (May 29, 2001); (5) adjustment to the individual's retirement benefits based on the date that individual should have been promoted; and (6) adjustment to fringe benefits from the date following the date of the Fairness Hearing (May **[*18]** 29, 2001).Docket No 8306 at 3-4 (emphasis and footnote deleted).

System of Alabama") and since RSA is not a party to the Reynolds case, and cannot now be added as a party, it would be improper to order adjustments to retirement benefits. Docket No 8274 at 10-11. The Defendants' argument would have merit if the Plaintiffs were suggesting that RSA miscalculated the payments due Claimants or otherwise misadministered the Claimants' benefits. No such allegation is made. To the extent the Plaintiffs can establish that a Claimant is entitled to an upward adjustment of retirement benefits due after May 29, 2001, then it will be the Defendants' responsibility to make the appropriate payment to RSA to enable RSA to adjust the Claimants account.

The case cited by the Defendants, Alexander v. Dothan City Bd. Ed., 891 So.2d 323 (Ala. Civ. App. 2004), stands for the proposition that RSA can only pay retirement benefits based on compensation actually received and not on what might have been received. Id. at 327. That is invariably a correct statement of the law. Nevertheless, [*20] in Alexander, the defendant school board refused to adjust the plaintiff's salary, and the plaintiff was unsuccessful in challenging the school board's decision, and since the RSA's benefit schedule is based on salary, the plaintiff had no claim against the RSA.

To the extent a claimant is successful in securing an upward adjustment to his or her retirement benefit for the period after May 29, 2001, it will be because they were also successful in securing an adjustment to their salary for the same period. Consequently, Alexander would be distinguishable on its facts.

With respect to Claimants who died after May 29, 2001, their monetary claims may be pursued to the extent a proper legal representative is or can be substituted according to the requirements of Alabama law. Without a properly substituted party, the individual contempt claims of deceased claimants are abated.

SALARY ADJUSTMENTS

Defendants argue they are entitled to summary judgment on any post-Fairness Hearing claims for salary adjustments by Claimants occupying ALDOT-specific project classifications who received salary adjustments in February and March 2000 pursuant to the requirements of Article XV of the Consent Decree. [*21] They also contend that summary judgment is appropriate for any post-Fairness Hearing claims seeking salary adjustments for periods covered by the two-year freeze on salaries of ALDOT merit systems employees. Docket No 8274 at 11-12.

The Defendants position is that Claimants who occupied ALDOT-specific project classifications and received salary adjustments in February or March 2000 "are not entitled to receive any additional salary adjustments for the same time period encompassed by the adjustments." Docket No 8307 at 6. Since the 2001 Settlement Agreement resolved all monetary claims, including claims for salary adjustment, up through May 29, 2001, the Defendants are correct. Of course, if a Claimant can establish that he or she suffered an injury entitling them to a salary adjustment for the period following May 2001, they can recovery such an adjustment despite the February and or March 2000 salary adjustments.

Because of budgetary pressures, the State of Alabama and ALDOT implemented a freeze on wages and salaries for a two-year period from April 1, 2003 through March 31, 2005. The Defendants' position is that any Claimants who can establish a right to relief are nevertheless not [*22] entitled to a salary adjustment for the two-year period covered by the Statewide wage freeze. Docket No 8274 at 12. The Plaintiffs position is that the Defendants' "motion is procedurally improper since their argument . . . goes to the amount of an appropriate damage award rather than the merits of the plaintiffs' claim." Docket No 8306 at 13 (footnote omitted).

The Defendants may very well be correct, nevertheless, as the Plaintiffs assert, it is an issue best taken up as an offset against any salary adjustment that might be awarded that covers the period of the freeze. The fact that there was a freeze and the fact that Claimants should not receive a salary adjustment for the period covered by the freeze goes to the amount of the salary adjustment, if any, that might be authorized, not to the appropriateness of the adjustment vel non.

MULTIPLE CLAIMANTS SEEKING SAME POSITION

The Defendants believe they are entitled to summary judgment on claims by multiple Claimants seeking promotion or instatement to the same position. Docket No 8274 at 13-14. With justification, the Defendants believe that the several hundred individual Claimants who are pursuing claims exceeds the limited number of [*23] vacancies in the job classifications to which individual Claimants may seek instatement. The Defendants correctly note that the Eleventh Circuit addressed this issue in U.S. v. City of Miami, 195 F.3d 1292 (11th Cir. 1999), cert. den.,*531 U.S. 815, 121 S. Ct. 51, 148 L. Ed. 2d 20 (2000)*, where the court held that the appropriate remedial relief for multiple contempt claimants pursuing the same promotion is an award of the pro-rata monetary value of the available promotions at issue. Id. at 1301-02.

According to the Defendants, the "Claimants . . . previously settled and released their pre-Fairness Hearing

claims for compensatory, monetary relief and, therefore, are not entitled to any additional monetary relief (pro-rata or otherwise) for pre-Fairness Hearing instatement claims." Docket No 8274 at 14. Consequently, an award of additional monetary relief for pre-Fairness Hearing instatement claims would constitute a double recovery for the same injury. Of course, the Plaintiffs expressly exempted all contempt instatement claims from the terms of the 2001 Settlement Agreement.

At the outset it is important to clearly recognize what the 2001 Settlement Agreement resolved and what it did not resolve. The Agreement contains [*24] the following relevant language related to the settlement of the Plaintiffs' then-pending claims for contempt relief including claims for instatement:

> 1. To settle all of the Plaintiffs' monetary contempt claims arising at any time from March 15, 1994 until the close of business on the day of the Fairness Hearing is held:
>
> > a. Defendants will pay Plaintiffs $ 4,600,000.
> >
> > . . .
> >
> > f. This Contempt part of the Agreement settles only the compensatory, monetary claims of Class Members and not their instatement claims or their claims for non-monetary claims for contempt. . . .Docket No 4700 at 24, 26.

The Agreement's exclusion of any settlement related to the instatement claims of class members is unequivocal. The Defendants' payment of monetary and compensatory damages for pre-Fairness Hearing contempt does not include the release of potential damages related to the claims retained. To find otherwise turns the parties' Agreement on its head. The Defendants' position would lead to the anomalous conclusion that the Plaintiffs retained the right to pursue contempt claims for instatement, but surrendered the right to seek make-whole relief related to their instatement claims for the period prior to May [*25] 29, 2001.

City of Miami was established law at the time the Settlement Agreement was reached. Therefore, both the Plaintiffs and Defendants were presumed to know that as an element of make-whole relief for contempt, the Court is authorized to award successful Claimants a proportional share of the monetary value of the promotion for which they were eligible. City of Miami, 195 F.3d at 1300-02. When, and if, multiple claimants establish that they were otherwise eligible for the promotion and did not receive it because of the Defendants' contempt, then they can all share equally, pro-rata, in the value of the denied promotion. In point of fact, the practical effect is that for those positions where large numbers of Claimants may be able to carry their burden of proof, the result could very well be an award *de minimus* damages.

The Claimants are entitled to pursue claims for instatement irrespective of the potentially large numbers seeking a limited number of positions. The Court is permitted to award make-whole relief for those Claimants who successfully establish their entitlement to instatement, including monetary relief as authorized by the City of Miami. Such make-whole relief would [*26] not, of course, include back pay, compensatory damages, or salary and benefit adjustments for the pre-Fairness Hearing period.

DUPLICATE ARTICLE XIX GRIEVANCE CLAIMS

Defendants contend they are entitled to summary judgment on all duplicate contempt claims seeking the same relief sought through separately filed Article XIX grievances. The Defendants explain their argument as follows: "[T]o the extent that any individual claimants assert the same contempt-based claims within an Article 19 grievance for which they now seek the same remedy as individual contempt claims, those claims are due to be dismissed because Plaintiffs cannot obtain a double recovery for the same wrong." Docket No 8307 at 11. In an earlier R&R, concern was expressed that Claimants not be permitted to recover twice for the same injury. Docket No 7041 at 8. That concern remains. Relying on Smith v. State of Alabama, 996 F. Supp. 1203, 1208-09 (M.D. Ala. 1998), the Plaintiffs argue that Claimants who avail themselves of the Article XIX grievance procedure can also seek relief directly from the Court for their claims of contempt that might have been earlier raised in grievance proceedings. Docket No 8306 at 19-20. While [*27] the Plaintiffs are correct with respect to a Claimant's ability to pursue relief in both a grievance forum and a judicial forum, it does not follow that they can receive a double recovery for the same act.

If a Claimant has received a settlement or payment pursuant to his or her grievance filing and then subsequently files an individual contempt claim seeking make-whole relief for the same actions, then the Defendant will be entitled to a setoff against any relief awarded in the contempt proceedings. Of course the nature of the available make-whole relief may be different from the relief awarded through a grievance proceeding. Until the facts of the individual cases are available, granting the

Defendants' motion summary judgment would be inappropriate. The crucial point is that double recovery will not be allowed. [4]

SETTLED INSTATEMENT CLAIMS

The Defendants believe that are entitled to summary judgment on Claimants' pre-Fairness Hearing contempt instatement [*28] claims to the extent that they seek instatement to the same job classifications made the basis of the Promotions Class [5] settlement. In the Defendants' own words:

> Claimants now seek instatement to various positions, contending that they would have been promoted to those positions but for Defendants' contumacious conduct. Defendants contend, however, that the positions made the bases of Claimants' instatement claims include claims for promotions that were settled pursuant to the Promotions Class settlement. In other words, some Claimants who settled their discrimination-based promotion/instatement claims are now seeking instatement to the same positions made the bases of the promotions claims settled and for which they were compensated as members of the Promotions Class.Docket No 8274 at 18.

According to the Plaintiffs, "[t]he defendants . . . confuse[] the compensatory, monetary relief the plaintiffs received pursuant to the Settlement Agreement with the non-compensatory, non-monetary relief to which the plaintiffs [*29] are entitled as a result of their individual contempt claims." Docket No 8306 at 22. The Plaintiffs go on to note that "there is no overlap between the plaintiffs' current individual contempt claims (which seek instatement and other make-whole relief not covered by the Settlement Agreement) and their pre-Fairness Hearing claims for back-pay and compensatory damages (which were addressed by the Settlement Agreement and for which they received monetary relief)." Id. at 23. Of course what the Plaintiffs do not point out is that the Settlement Agreement also released the Promotion Class's pre-Fairness Hearing noncontempt claims for instatement as well. [6]

The Settlement [*30] Agreement clearly retains the right to pursue instatement claims related to allegations of contempt. On the other hand the Defendants paid a very considerable sum to resolve all noncontempt instatement claims up through the date of the Fairness Hearing. Why the Defendants would have agreed to a settlement that left the Plaintiffs free to pursue instatement as a remedy for contempt into the very job position released by the Promotion Class Settlement is unclear. The equities are with the Defendants, but the language of the Agreement supports the Plaintiffs' position. The fact is that the Settlement Agreement distinguishes between the Promotion Class' pre-Fairness Hearing claims for discrimination, including claims for instatement related to alleged discrimination--which were all settled--and non-monetary claims for contempt relief, including instatement, which were not settled. The Defendants are not entitled to a grant of summary judgment on this issue.

POST FAIRNESS HEARING CLAIMS FOR OUT-OF-CLASSIFICATION DUTY ASSIGNMENTS

Defendants seek summary judgment on Claimants' post-Fairness Hearing claims seeking individual contempt relief for out-of-classification duty assignments based on [*31] the execution of waivers by affected ALDOT employees. This issue was previously analyzed by the Special Master in his Statement for the Record. Docket No 8251 at 15-18.

In October 2000, the Defendants implemented a policy requiring employees who agree to work on job duties outside their classification to sign a waiver to any claim for additional compensation for the performance of those duties. According to the Defendants any employee who was in fact working out of classification after the date of the Fairness Hearing, therefore waived any entitlement to further monetary relief, and all such claims should be dismissed.

The relevant part of the waiver reads as follows:

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[4] So this issue can be better sorted out, when selecting the first round of contempt claims to resolve, the parties will need to select a representative sample of Claimants who have previously filed and resolved or settled grievance claims.

[5] The term "Promotion Class" is defined by the Settlement Agreement as: "All African-Americans who were employed by ALDOT at any time since May 21, 1979." Docket No 4700 at 5.

[6] Under the terms of the Settlement Agreement, "'the claims released by the Promotion Class settlement are all individual non-contempt, non-grievance claims of Promotion Class members for race discrimination seeking monetary relief, including, but not limited to back pay, compensatory damages, and interest, and all individual non-contempt, non-grievance claims to instatement or other non-monetary relief for the period prior to the close of business on the day of the Fairness Hearing." Docket No 4700 at 41-42 (emphasis added).

> It has been explained and I understand that I am being requested to perform these tasks freely and voluntarily without change of status, classification, salary or benefits. It has also been explained and I understand that these duties, tasks, and assignment are being made temporarily.
>
> I freely and voluntarily accept this assignment of tasks and duties for my own personal reasons, but also to assist the Department in accomplishing its mission. By voluntarily accepting these tasks and duties, I agree that I will not initiate [*32] or have initiated on my behalf any legal, administrative or other action of any nature whatsoever involving my acceptance and/or performance of these duties, tasks and/or assignments.
>
> To the extent that I have previously been requested to perform new or additional duties, tasks, and/or assignments, or am currently performing additional duties, tasks and/or assignments, I hereby freely and voluntarily accept those assignments and will not initiate or have initiated on my behalf any legal, administrative or other action of any nature whatsoever involving my acceptance and/or performance of these duties, tasks and/or assignments. I understand that if I decline to voluntarily accept these duties, tasks and/or assignments by executing this document, appropriate work adjustments will be made to reassign those duties, tasks, and/or assignments.Docket No 8274, at Ex. B, attachment 2.

Nowhere in the waiver is any reference made to the Reynolds case or the Consent Decree or the waiver of potential claims related thereto, though the signed release was to be delivered to ALDOT's outside counsel, Lisa Borden, who at the time was responsible for the Reynolds litigation.

In their current briefing, the [*33] Defendants spend a considerable effort, including the filing of unrefuted affidavits, to establish that the waivers were knowingly and voluntarily executed. Accepting that ALDOT employees who signed the waivers did so voluntarily does not necessarily mean they did so knowingly, that is, that they understood they were relinquishing all legal rights to any additional compensation, including additional compensation that they may be entitled to under the Consent Decree.

To release a cause of action the release must be "'voluntary and knowing' based on the totality of the circumstances." Myricks v. Federal Reserve Bank of Atlanta, 480 F.3d 1036 (11th Cir. 2007) (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15, 94 S. Ct. 1011, 39 L. Ed. 2d 147, (1974). The Eleventh Circuit has stated that the review of the totality of the circumstances surrounding the signing of a release involves several objective and individualized factors:

> the plaintiff's education and business experience; the amount of time the plaintiff considered the agreement before signing it; the clarity of the agreement; the plaintiff's opportunity to consult with an attorney; the employer's encouragement or discouragement of consultation with an attorney; [*34] and the consideration given in exchange for the waiver when compared with the benefits to which the employee was already entitled.Myricks, 480 F.3d at 1040 (citing Puentes v. United Parcel Service, Inc., 86 F.3d 196, 198 (11th Cir. 1996).

The Defendants argue that ALDOT employees understood that "the phrase 'legal, administrative, or other action of any nature whatsoever' obviously encompasses all actions, including individual contempt claims filed within the Reynolds litigation." Docket No 8274 at 22. There is no evidence to support such a proposition. [7] Moreover, had ALDOT wanted to clearly waive any claims class members might have pursuant to the Consent Decree, they could have, and should have, specifically referenced the Reynolds case in the waiver language. They did not and they cannot now argue, without any evidence, that those who signed the waivers understood they were waiving any claims they might have under the Consent Decree. As the Defendants acknowledge, the waiver policy was implemented during the throes of the Reynolds litigation. As such, it should have been explicitly referenced; it was not and there is no evidence that the signers of the waivers

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[7] The affidavit submitted by the Defendants in support of their motion for summary judgement does not address whether the ALDOT employees who signed the waiver understood that they were relinquishing their rights under the Consent Decree. What the affidavit does establishes is that ALDOT did not coerce any employee to sign the waiver.

knew they were waiving [*35] their rights under the Consent Decree. [8]

DISCRIMINATION CLAIMS

Defendants are entitled to summary judgment on all claims alleging racial discrimination or harassment. This matter has previously been addressed by the Special Master in his Statement for the Record, (Docket No 8251 at 14-15) and in an October 2003 Order (Docket No 7041 at 16-17) and there is no reason to again address it here. The reasoning contained in Docket No 7041 and 8251 is incorporated. The Defendants should be granted summary judgment on the Claimants' racial discrimination claims, whether the claims are denominated as racial harassment [*36] claims or racial discrimination claims, there being no practical difference between them in this context and all such claims having been previously settled.

LIMITATION ON INSTATEMENT CLAIMS TO THOSE JOB CLASSIFICATIONS IDENTIFIED ON MARCH 5, 2003

Defendants request summary judgment on any instatement claims that arose before March 5, 2003, but were not listed in the Claimant's submission of that date. Docket No 8274 at 24. The Court addressed this issue on October 10, 2004 when it held that:

> plaintiff class members should be, and are, restricted to the instatements indicated in their March 2003 filing. Thus, if no instatement was sought in a March 2003 claim, then that claim may not be expanded to seek instatement; if one instatement was listed in a claim, then that claim is limited to the one instatement listed; if two or more alternative instatements were listed, then that claim is limited to the listed two or more alternative instatements. Because the March 2003 deadline was the product of a number of extensions, the plaintiffs had a generous, and perhaps too generous, period of time to put the class members' claims together and file them. Any claim or extension of a claim that came [*37] after that date is now too late.
>
> . . .
>
> This court is not holding that claims and instatement requests that arose or accrued after, on, or so near to the March 2003 deadline that it not be reasonable to expect the plaintiffs to have included them by the deadline are barred by the March 2003 date from being pursued in this litigationDocket No 7476 at 3-4, 5

Summary judgment should be granted to the Defendants to the extent Claimants assert instatement claims arising prior to March 5, 2003, but that they failed to identify in their March 5, 2003 submission.

ARTICLES II & III DELAYS

Defendants assert they are entitled to summary judgment on claims for make-whole relief to the extent that the claims are attributable to delays caused by the Defendants' failed efforts to implement the no-overlap provision of Articles II and III. Docket No 8274 at 24-25.

Article II of the Consent Decree governs the development and validation of minimum qualifications ("MQs") and authorizes their use as part of a job examination process. Minimum qualifications are those job-related qualifications deemed to be minimally necessary to perform the duties of a given job at the entry level position.

Article II, P 1 of the [*38] Consent Decree contains the "no-overlap provision." In general terms, the "no-overlap provision" relates to the requirement that the "knowledge, skills and abilities. ("KSAs") necessary to qualify an ALDOT job applicant to sit for an employment examination in the first instance cannot also be the same KSAs tested for in the job examination itself. The relevant portion of Article II reads,

ARTICLE TWO 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, knowledge or abilities necessary to the performance of the job at entry without a brief orientation, and such skills, knowledge and abilities are not addressed in the examination process.(Emphasis added to denote the "no-overlap provision.")

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[8] Of course, to the extent an ALDOT employee who signed the waiver acknowledges that he or she understood they were relinquishing all legal rights, including any rights under the Consent Decree, then the waiver would be enforceable against that person.

Stated otherwise, relevant KSAs could be measured by either the minimum job qualifications or the examination, but not both.

Article III requires, among other things, that only job selection criteria and procedures validated in accordance with the Uniform Guidelines can be used by the State [*39] Personnel Department to fill positions at ALDOT. The use of validated minimum qualifications, as required by Article II, is an essential component of establishing lawful job selection criteria and procedures that comply with the Consent Decree.

By order dated July 1, 2002, the Court modified the Consent Decree by eliminating the no-overlap provision, determining that it was infeasible in application. Docket No 5991. The modification was affirmed on appeal to the Eleventh Circuit. Reynolds v. McInnes, 338 F.3d 1221 (11th Cir. 2003). In affirming the modification, the Court of Appeals said of the no-overlap provision, that it "was not the most important part of Article II, . . . but is one of several means of accomplishing the purpose of the decree, and is, in fact, but one of several means of ensuring the development of non-discriminatory MQs" Id. at 1228.

In ruling on the Defendants' motion for a refund of Article II and Article III contempt fines, Judge Thompson echoed the sentiment of the Circuit Court when His Honor noted:

> The defendants did not comply with provisions of the Articles II and III that are independent of the no-overlap clause. To relieve the defendants of all contempt [*40] fines because the no-overlap provision was infeasible would effectively undermine this court's ability to enforce those provisions. The defendants' contention that these provisions are peripheral to the order and would not in themselves trigger fines is dispelled by a plain reading of the 2000 contempt order. That order does not require compliance with only certain portions of Articles II and III, but is an all or nothing proposition.Docket No 7845 at 6-7 (footnote omitted).

The [*41] fact that the Court found the no-overlap provision to be infeasible did not relieve the Defendants from the obligation to timely comply with those sections of Articles II and III that were unaffected by the no-overlap provision. Nevertheless, there were provisions of Articles II and III that were affected by the no-overlap provision that made it impossible for the Defendants to comply with those provisions. As such, the Defendants cannot be in contempt of a provision that was impossible to comply with. The Defendants are entitled to summary judgment on those claims seeking make-whole relief for contempt of Articles II and III to the extent such claims are based on delays attributable to the no-overlap provision.

ARTICLE 15 DELAYS

Defendants' are entitled to summary judgment on all contempt claims arising from delays associated with the implementation of Article XV for the 19-month period between May 27, 2003 and December 6, 2004.

On April 10, 2008, the Court adopted the Special Master's Report and Recommendation, (Docket No 8299), which dealt in part, with Defendants' compliance with the provisions of Article XV. It was recommended that the Defendants be found in compliance with Article [*42] XV for the period of May 27, 2003 (i.e., the filing of the motion to lift Article XV sanctions) through December 6, 2004 (the date the Court adopted the Special Master's compliance finding). It is on this basis that the Defendants are entitled to summary judgment for the 19-month period noted above. The Defendants were in compliance with Article XV as of May 27, 2003, and consequently, no claim for contempt of Article XV is sustainable after that date.

ACCORDINGLY, it is recommended that the Defendants' Partial Motion for Summary Judgment, Docket No 8273, be GRANTED IN PART and DENIED IN PART in conformity with this Report and Recommendation.

Objections to this Report and Recommendation must be filed with the Clerk of Court by July 11, 2008. Failure to file objections in a timely manner constitutes a waiver of the right to review by the District Court.

IT IS SO RECOMMENDED this 19th day of June 2008

/s/ C. A. Gonzalez

SPECIAL MASTER