

1990 WL 130005
United States District Court, S.D. Florida.

UNITED STATES of America, Plaintiff,
v.
CITY OF MIAMI, FLORIDA et al., Defendants.

No. 75-3096-CIV-KEHOE. | Jan. 9, 1990.

Opinion

KEHOE, District Judge.

*1 This Matter came before the Court on the motion of the Professional Firefighters of Miami, Local 587, International Association of Firefighters, AFL-CIO (Local 587) ("the Union"), to dissolve the Consent Decree, entered on March 29, 1977.

An evidentiary hearing on the motion was held on July 6, 1989 and July 7, 1989. The Union and the City of Miami ("the City") presented the testimony of witnesses and introduced exhibits at the hearing. Counsel for the United States and *amicus curiae*, the Lawyers' Committee for Civil Rights Under the Law, participated in the examination of witnesses and introduction of documents. The parties and *amicus* were given the opportunity to submit proposed findings of fact and conclusions of law on the issues raised by the motion.

Findings of Fact

A. The Scope of the Motion at Bar.

1. The Union has the right to engage in collective bargaining with the City concerning wages and working conditions of its members, who are firefighters in the classified ranks of Firefighter, Fire Lieutenant, Fire Captain, and Chief Fire Officer.
2. The Union does not engage in collective bargaining with the city over hiring in the Fire Department.
3. The scope of the motion at bar is limited to promotions within the classified civil service ranks of Fire Lieutenant, Fire Captain, and Chief Fire Officer within the City of Miami Fire Department.

B. Prior Proceedings.

4. On June 1, 1983, this Court entered an Order Containing Findings of Fact and Conclusions of Law on issues raised by Local 587 in its second Amended Cross-Complaint in Intervention.

5. In that Order, the Court made the following findings of fact in connection with Firefighters' Local 587:

7. On or about July 26, 1978, Firefighters Local 587, acting through its president and its attorney signed the Consent Decree in this matter, and thereby accepted the Consent Decree in resolution of the issues raised by the United States in this suit.

14. Ordinance 8977 has no effect upon which candidates pass a test, and those who fail are not considered further for promotion. Ordinance 8977 expands the list of eligible candidates from which the selecting official may make the promotions, in a manner which allows consideration of qualified black, Latin and female candidates, as well as white, Anglo and male candidates. In fact, *all of the persons on the eligible rosters are qualified for the promotion for which they are eligible.*

15. It is the policy of the City of Miami to hire and promote only those persons who are qualified for a particular position. Neither the consent Decree issued earlier in this cause nor Ordinance 8977 changed this policy.

Order Containing Findings of Fact and Conclusions of Law (June 1, 1983) (emphasis added).

6. In 1986, the Fraternal Order of Police, City of Miami Lodge 20, and its President filed a motion, similar in many respects to the instant one. On March 26, 1987, this Court denied that motion and issued its Findings of Fact and Conclusions of Law in connection with that ruling.

C. Goals Established by the Consent Decree.

*2 7. The Consent Decree sets forth a long-term goal to be pursued in terms of eliminating the effects of past discrimination in City employment. Specifically, Paragraph 5 of the Decree states that:

In order to eliminate the effects of past discriminatory practices against blacks, Latins and women, the City shall adopt and seek to achieve as its long term goal the participation at all levels throughout its work force of

blacks, Latins and women approximating their respective proportions in the city's labor force, as determined by the United States Bureau of the Census. The purpose of this goal is to eliminate the substantial underrepresentation and uneven distribution of blacks, Latins and women throughout the city's work force.

8. The Consent Decree also provides a mechanism for establishing annual short-term goals to be set for promotions within each department, absent achievement and maintenance of the long-term goal for at least one year. No specified promotional goals are required but rather the City is entrusted with establishing appropriate new goals each year. Paragraph 5(b) of the Consent Decree states, in pertinent part:

(b) *Promotion*: Subject to the availability of qualified applicants, promotional goals shall be established for minorities, on a department basis, with each department having as its yearly goal, until the long term goal has been met for a period of one year, either parity with the Miami city workforce population statistics or the percentage of minorities currently employed in the department, whichever is smaller.

D. Standards for Dissolving the Consent Decree.

9. Paragraph 13 of the Consent Decree, at pge 24, states:

13. The court retains jurisdiction of this action for such further orders as may be appropriate. At any time after five years subsequent to the date of the entry of this Consent Order, the City may move the court upon 45 days' notice to the plaintiff for dissolution of this decree, and in considering whether the decree should be dissolved, the Court will take into account whether the city has substantially complied with this decree and whether the basic objectives of the decree have been achieved.

10. As this Court found in 1987, the termination provisions contained in paragraph 13 of the Consent Decree, as set forth above, establish three tests for dissolution of the provisions of the Decree governing promotions, "all of which must be met." Findings of Fact and Conclusions of Law at 4 (March 26, 1987). These are: (1) the decree must have continued in operation for the minimum periods of time set forth in the decree; (2) the City must have "substantially complied" with the terms of the Decree, and (3) the City must have "achieved" the "basic objectives of the Decree."

11. The parties and *amicus* agree that, of the above three tests, the critical one for the Court's determination is whether the "basic objectives of the Decree" have been

achieved. The United States and *amicus* also have noted that questions have been raised in a separate lawsuit as to the second test, but consider this an issue that need not be reached in the context of the instant motion if the third test has not been met. This Court's 1987 ruling explained that, for the third test to be met,

*3 the City must have eliminated the substantial underrepresentation of blacks, Hispanics, and women caused by past discrimination through attainment of the long term goal of work force parity, as stated in Paragraph 5 of the Consent Decree. Full relief for past discrimination must have provided, according to the standard to which the parties agreed and which this Court adopted when it signed the Consent Decree and Consent Order.

Id., Findings of Fact at par. 6.

E. Census Bureau Figures to be Used in Determining Whether the Long Term Goals of the Consent Decree Have Been Met.

12. In its 1987 ruling, this Court found that the parties and *amici* had come up with marginally different figures from the 1980 Census reports as to the availability rates of Anglos, Blacks and Hispanics in the City of Miami's civilian labor force. This Court found that the parties and *amici* agreed that there was no substantial difference among these standard. 1987 Findings of Fact at par. 13.

13. For the purposes of the instant motion, the court adopts the labor force availability figures referred to in the 1987 ruling as the "City figures," namely 19.1% Anglo, 21.4% Black and 59.5% Hispanic. Similarly, the court adopts as the labor force availability of males and 45.9% for females. *See* 1976 Findings of Fact at par. 17. These figures reflect the labor force availability of the City itself in 1980, three years after the entry of the Consent Decree. The testimony of Dr. Hattie Daniels indicated that the City uses essentially these same figures when considering labor force availability.

F. Current Distribution of Personnel within the Fire Department.

14. According to City's Exhibit "A" (updated as stipulated by the parties), the ethnic and gender breakdown of the Fire Department according to rank, as of August 1, 1989, was as follows:

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Chart 1.

Department of Fire, Rescue & Inspection Services

Uniform Personnel

August 1989

Job Category	Males				Females				Totals
	A	B	H	O	A	B	H	O	
Fire Chief	1								1
	100%								
Deputy Chiefs	1	1							2
	50%	50%							
Division Chief	5	1	2						8
	63%	12%	25%						
Chief Fire	12								12
Officer	100%								
Fire Captain	38		10						48
	79%		21%						
Fire	74	10	20		1				105
Lieutenant	71%	10%	19%		0				
Fire Fighters	238	63	151	2	19	1	5		479
	50%	13%	32%	0		25 (5%)			
Totals	369	75	183	2	20	1	5		655 *
	56%	11.5%	28%	.4%		26 (4%)			

* Includes 12 Recruits in Training.

G. Progress Towards Goals.

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15. While progress has been made since 1977, none of the three groups mentioned in the decree—Blacks, Hispanics and women—is currently represented in numbers approximating their availability in the workforce. The following chart compares the representation of Anglos, Blacks, Hispanics and women in the Fire Department in **Chart 2.**

1977 and 1989, and contrasts them with the workforce availability standard based on the 1980 census.

Improvements in the Employment of Minorities and of Women—1977 through July 1989.

	1977	Data	1989	Data	Workforce
	Number	Percent	Number	Percent	Availability
Anglos	585	91.0%	389	59.4%	19.1%
Blacks	10	1.5%	76	11.6%	21.4%
Hispanics	48	7.5%	188	28.7%	59.5%
—Total	643		655		
—Men	643	100.0%	629	96.0%	54.1%
—Women	—	0.0%	26	4.0%	45.9%

*4 16. A comparison of the census data and the current representation of minorities and women in the Fire Department, as reflected in the foregoing charts, indicates that, despite progress to date, the Decree's long-term goal has not been achieved for any of the various groups, either in the Fire Department as a whole or in the promotional ranks. Specifically, these charts reveal the following:

Anglos (male and female) are currently represented within the Department at approximately three times their availability in the workforce (59.4% of uniform personnel compared to 19.1% of available labor force);

Blacks (male and female) are mainly underrepresented by a ratio of approximately two to one (21.6% [*sic*] of uniform personnel compared to 21.4% of labor force);

Hispanics (male and female) remain underrepresented by a ratio of approximately two to one (28.7% of uniform personnel compared to 59.5% of labor force); and

Women (Anglo, Black and Hispanic) remain underrepresented by a ratio of approximately nine to one (4% of uniform personnel compared to 45.9% of available labor force).

H. Promotions.

17. It is also evident from the City's Exhibit "A" that progress has been made in terms of promotions, but that the minorities and women are not represented among the promotional ranks of Fire Lieutenant, Fire Captain and Chief Fire Officer in numbers approximating their representation in the available workforce *or* within the uniform personnel ranks as a whole. Specifically,

Anglos (male and female) make up 75.7% of the officers in those three ranks but are 59.4% of the uniform personnel and 19.1% of the available work force;

Blacks (male and female) make up 6.1% of the officers in those three ranks but are 11.6% of the uniform personnel and 21.4% of the available work force;

Hispanics (male and female) make up 18.2% of the officers in those three ranks but are 28.7% of the uniform personnel and 59.5% of the available work force; and

Women (Anglo, Black and Hispanic) make up .6% of the officers in those three ranks but are 4% of the uniform personnel and 45.9% of the available work force.

18. The Union alternately seeks to modify the promotional goals of the consent Decree so that they “are based upon the number of qualified applicants within the City of Miami Fire Department as opposed to some general workforce statistics within the general population.” Motion to Dissolve Consent Decree and Alternative Motion to Modify Consent Decree at 8.

19. The Union also contends that the City is promoting minorities in the Fire Department at rates far in excess of their relative availability among the number of qualified applicants. *Id.*

20. Angela Bellamy, Assistant City Manager and Director of the Department of Personnel Management, testified that in order to be eligible for promotion to the various classified ranks in the Fire Department, a candidate must meet a time-in-grade requirement and pass a promotional examination. When vacancies occur, candidates are certified to the appointing official according to the “rule of eight.” Under that rule, the five highest ranking candidates and the next three highest ranking minorities and women are certified for the first vacancy, and thereafter, the next highest ranking candidate and the next highest ranking minority or woman are certified. Transcript of July 6, 1989 hearing at 17, 28–29.

*5 21. Dr. Hattie Daniels, Director of the Department of Internal Audits and Reviews, testified that yearly promotional goals in fact are set based on the percentage of minorities in the department rather than the percentage of minorities in the work force in general, and that a minority who has not met the minimum time-in-grade requirement to complete for a promotional position is not considered in setting the promotional goal. Transcript of July 6, 1989 hearing at 60–62.

22. Under the terms of the Decree and in practice,
Chart 2

promotional goals are not based on general population percentages if those percentages are larger than the percentages of minorities in the Fire Department. *See supra* at par. 8 (citing Consent Decree at par. 5(b)).

23. Under the terms of the Decree and in practice, promotional goals are not adhered to without considering the availability of qualified applicants.

24. On June 1, 1983, this Court, in its Order Containing Findings of Fact and Conclusions of Law, held as follows:

7. On or about July 26, 1978, Firefighters Local 587, acting through its attorney signed the Consent Decree in this matter, and thereby accepted the Consent Decree in resolution of the issue raised by the United States in this suit.

14. Ordinance 8977 [which includes the “rule of eight”] has no effect upon which candidates pass a test, and those who fail and [*sic*] are not considered further for promotion. Ordinance 8977 expands the list of eligible candidates from which the selecting official may make the promotions, in a manner which allows consideration of qualified black, Latin and female candidates, as well as white, Anglo and male candidates. In fact, all of the persons on the eligible rosters are qualified for the promotion for which they are eligible.

Findings of Fact at 6, 8.

4. [In adopting Ordinance No. 8977 and the “rule of eight”], it appears that the city is taking the appropriate steps to rectify the effects of past discrimination against minorities with the least adverse impact upon Anglo Whites. The net result of the “rule of eight” is to increase the flexibility of the City to promote *qualified* individuals while not excluding *any* particular group from the promotional process. The Court endorses this approach and finds that it falls well within the gambit of the Consent Decree.

Conclusions of Law at 10–11.

25. Chart 2 sets out promotion activity in the Fire Department for the indicated periods of time.

Anglos		Blacks		Hispanics		Men		Women	
#	%	#	%	#	%	#	%	#	%

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Lieutenant

Took Test	113	51.6	44	20.1	60	27.4	216 ¹	98.6	3 ₂	1.4
Passed Test	56	49.6	22	19.5	34	30.1	111 ³	98.2	2	1.8
Promoted ⁴	28	53.8	10	19.2	14	26.9	51	98.1	1	1.9

Captain

Took Test	71	79.8	3	3.4	15	16.9	89	100.0	0	0.0
Passed Test	33	75.0	0	0.0	11	25.0	44	100.0	0	0.0
Promoted	20	66.7	0	0.0	10	33.3	30	100.0	0	0.0

Chief Fire Officer

Took Test			29	90.6	1	3.1	2	6.3	32	100.0	0	0.0
Passed Test			28	93.3	1	3.3	1	3.3	30	100.0	0	0.0
Promoted			11	91.7	1	8.3	0	0.0	12	100.0	0	0.0

Overall

Took Test	213	62.6	48	14.1	77	22.6	337	99.1	3	0.9
Passed Test	117	62.6	23	12.3	46	24.6	185	98.9	2	1.1
Promoted	59	62.8	11	11.7	24	25.5	93	98.9	1	1.1

1 Figure includes two “other” male applicants.

3 Figure includes one “other” male applicant.

2 All three female applicants were anglos.

4 Promotional figures include promotions since March 29, 1985, for Lieutenant, since August 19, 1983 for Captain, and since December 17, 1982, for Chief fire

Officer.

Source: Defendant–Intervenor Ex. 1.

*6 26. Anglo, black, and hispanic candidates are being promoted to all ranks in proportion to the rate at which they are applying for promotion.

I. Evidence Presented by the Local 587.

27. The Union presented no evidence that unqualified individuals were or are being promoted. It presented no firefighters who complained of having been denied promotions because of the promotion of an unqualified individual. Indeed, Local 587 asserted that the City’s own Civil Service provisions are operating fairly, in support of its argument that Consent Decree is no longer necessary.

28. The Union did not raise questions as to the validity of the availability figure used with regard to women. However, the Court concludes that the City has not yet achieved the long-term goal set forth in the decree with regard to *any* of the three groups entitled to remedial relief under the decree.

29. The Union has not presented evidence to show that the long-term goal has been substantially met in any respect.

30. Any of the foregoing findings of fact which may represent conclusions of law are hereby adopted as conclusions of law.

Conclusions of Law

1. The Professional Firefighters of Miami, Local 587 has standing to seek an end to race-conscious, ethnic-conscious, and gender-conscious relief in promotions to the classified ranks of Fire Lieutenant, Fire Captain and Chief Fire Officer in the City of Miami Fire Department.

2. Paragraph 5 of the Consent Decree sets forth standards agreed to by the parties and binding upon them in the determination of when blacks, Hispanics, and women have received full relief from past discrimination. The instant motion must be resolved in accordance with those standards.

3. Despite progress since 1977, it is clear that the long-term goal of the Consent Decree has not been met

with regard to the Fire Department. The participation of Blacks, Hispanics, and women in the promotional ranks at the Fire Department does not approximate parity with their “respective proportions in the City’s labor force.” Consent Decree at par. 5. The substantial underrepresentation of these groups in the promotional ranks demonstrates that the “basic objectives” of the Consent Decree have not been achieved. Consent Decree at par. 13.

4. In implementing the Consent Decree, the City of Miami has been promoting only qualified individuals to the positions of Fire Lieutenant, Fire Captain and Chief Fire Officer.

5. This Court’s 1987 ruling on the similar motion filed by the Fraternal Order of Police is applicable to the instant motion, and the conclusions of law contained therein are incorporated by reference here. Among those conclusions were the Court’s statement that “[w]here discrimination has been shown or admitted, as here, ‘the Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past, as well as bar like discrimination in the future.’ *Louisiana v. United States*, 380 U.S. 145, 154 (1965).” 1987 Conclusions of Law at par. 4.

*7 6. The Union does not question the existence of an adequate predicate of discrimination at the time that the Consent Decree was entered in 1977. Rather, it argues that the discrimination has been eradicated and that the Consent Decree is no longer needed. However, the cases relied upon by the Union focus on the establishment of a *prima facie* case or on the existence of an adequate predicate for the remedy being imposed.

7. The opinion of the United States Supreme Court in *Wards Cove Packing Company, Inc. v. Atonio*, [50 EPD ¶ 39,021] 490 U.S. 642, 109 S.Ct. 2115 (1989), is inapplicable to the option to dissolve or modify the Consent Decree in the case at bar. The Supreme Court in *Wards Cove* focused on whether a *prima facie* statistical case of discrimination was proved in a disparate impact case brought by non-white cannery workers who had filed a Title VII action against the packing companies.

The initial establishment of a *prima facie* case in a disparate impact action filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, is relevant only to the shifting of the burdens of proof that must be met by the parties in such cases. Generally, a plaintiff in a disparate impact action establishes a *prima facie* case by showing, through statistics, that employment practices which are facially neutral in fact exclude minorities from employment opportunities. Once the *prima facie* showing is made, the defendant may rebut it by attacking the significance of plaintiff’s statistics or by justifying its practices as “business necessity.” *See Griggs v. Duke*

Power co., [3 EPD ¶ 8137] 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

The present motion does not raise or involve the issue of whether the United States carried its burden of establishing a *prima facie* case when the action was filed in 1975. This is because the Consent Decree is a contract, in which the parties have agreed upon and prescribed standards for eliminating the effects of discrimination existing in the past. See *United States v. City of Miami*, [27 EPD ¶ 32,328] 664 F.2d 435, 440 (5th Cir.1981) (*en banc*). Thus, *Wards Cove* has no application to either the dissolution or modification of the Consent Decree.

8. Likewise, the cases cited by the Union in support of its motion to dissolve or modify the Consent Decree are not applicable, since those cases involve either unilateral affirmative action plans or actions filed by nonparties or nonsignatories to a consent decree.

9. The case of *Johnson v. Transportation Agency*, [42 EPD ¶ 36,831] 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), lends no support to the Union's assertion that implementation of the Consent Decree "unduly infringes" upon its interests. Motion to Dissolve or Modify at par. 18. In *Johnson*, the Supreme Court, applying standards set forth in *United Steelworkers of America v. Weber*, [20 EPD ¶ 30,026] 443 U.S. 193, 208-09, 99 S.Ct. 2721, 2729-30, 61 L.Ed.2d 480 (1979), upheld against Title VII attack a *unilateral* affirmative action plan where the plan did not "unnecessarily trammel the interests of white employees;" did not impose "an absolute bar to the advancement of white employees" and was not designed to maintain racial balance, but, rather, to serve as a temporary measure to "eliminate a manifest racial balance." 480 U.S. at —, 107 S.Ct. at 1451 (citations omitted). In the case at bar, the Union has not demonstrated that the interests of its members have been "unnecessarily trammelled" upon. None of its members have been discharged or demoted in order to implement the Consent Decree. Neither has the Union shown that the minority promotional goals provided for in the Consent Decree create an absolute bar to the advancement of its members. Similarly, the Union has not demonstrated that the minority promotional goals are not temporary measures designed to eliminate a manifest racial imbalance.

*8 10. In *Williams v. City of New Orleans*, [34 EPD ¶ 34,311] 729 F.2d 1554 (5th Cir.1984), relied on also by the Union, the Fifth Circuit Court of Appeals upheld the district court's denial of a proposed race-conscious consent decree which provided for one-to-one promotional quotas for Black police officers to the exclusion of Hispanics, women, and non-Hispanic whites, essentially on the grounds that it was not properly tailored

to cure the effects of past discrimination.

11. Further, in *Genic v. Corporate City of South Bend*, 836 F.2d 1034 (7th Cir.1987), cited by the movant, a unilateral race-conscious affirmative action hiring plan was challenged by a non-minority applicant to the city's fire department. The plan was based solely upon a finding that a manifest racial imbalance existed in the fire and police departments because of a disparity between the percentage of minorities in the city's population and the percentage of minorities in the fire and police departments. The district court's ruling that the plan did not violate Title VII was reversed because the appropriate statistical comparison should have been between the percentage of minorities in the qualified labor force and that in the departments. The Court stressed that this was required because of the absence of any evidence establishing a predicate of past discrimination. *Id.* at 1039.

12. However, in the present case, the court finds no occasion for *de novo* review of the justification for the consent Decree and its remedial promotional provisions, in light of the contractual nature of the Decree and the fact that, both pursuant to the Decree's terms and in practice, promotional goals are tied to the availability of qualified applicants.

13. The Union has not presented an evidentiary or legal basis which would warrant, at this time, either dissolution of the consent Decree or modification of its provisions governing promotions to the classified ranks within the City of Miami Fire Department.

14. Any of the foregoing Conclusions of Law which may represent Findings of Facts are hereby adopted as Findings of Fact.

Order

In accordance with the above, the Motion of the Professional Firefighters of Miami to Dissolve Consent Decree and Alternative Motion to Modify Consent Decree are hereby Denied.

Parallel Citations

51 Fair Empl.Prac.Cas. (BNA) 1608, 52 Empl. Prac. Dec. P 39,625

