In The

United States Court of Appeals

For the Eighth Circuit

No. 71-1181

GERALD CARTER, ET AL.,
Plaintiffs-Appellees,

and

MINNEAPOLIS COMMISSION ON HUMAN RELATIONS,
Plaintiff-Intervenor-Appellee,

vs.

HUGH GALLAGHER, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court,
District of Minnesota, Fourth Division

BRIEF FOR PLAINTIFFS-APPELLEES GERALD CARTER, ET AL.

MARINO, BECKER & GRANQUIST

By Luther A. Granquist and
Bernard Becker
Legal Aid Society, Inc.
501 Park Avenue
Minneapolis, Minnesota 55415
(612) 332-8984

Attorneys for Plaintiffs-Appellees
Gerald Carter, et al.

On the Brief:
Kirk A. Gustafson

Legal Aid Society of Minneapolis

1971—People's Press, 2000 - 4th Ave. S., Mpls., 55404 332-1812

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

Miscellaneous:

Jones v. Lee Way Motor Freight, 431 F. 2d 245 (10th Cir. 1970) cert. denied, 91 S. Ct. 972 (1971).

Marquez v. Ford Motor Co., F. 2d 3 CCH Employ. Prac. Dec. ¶8156 (8th Cir. 1970).

Parham v. Southwestern Beil Telephone Co., 433 F. 2d 421 (8th Cir. 1970)

Preston v. Mandeville, 428 F. 2d 1392 (5th Cir. 1970).

Turner v. Fouche, 396 U.S. 346 (1970).

United States v. Hayes Int. Corp., 415 F. 2d 1038 (4th Cir. 1969).

United States v. Sheet Metal Workers, 416 F. 2d 123 (8th Cir. 1969).

Fiss, A Theory of Fair Employment Laws, 38 Chi. L. Rev. 235 (1971).

2) Was Substantial Evidence Presented to Support the District Court's Finding of Other Discriminatory Hiring Practices?

Arrington v. Massachusets Bay Transportation Authority, 306 F. Supp. 1355 (D. Mass. 1969).

Clark v. Board of Education, 426 F. 2d 1035 (8th Cir. 1970).

Clements Auto Co. v. Service Bureau Corp., F. 2d , (8th Cir. 19, 783, Apr. 27, 1971).

Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Calif. 1970).

Griggs v. Duke Power Co., 91 S. Ct. 849 (1971).

Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 (E.D. La. 1970).

Jackson v. Marvell School District No. 22, 416 F. 2d 380 (8th Cir. 1969).

Loving v. Virginia, 388 U.S. 1 (1967).

Meredith v. Fair, 298 F. 2d 696 (5th Cir. 1962), cert. denied, 371 U.S. 828 (1962).

McLaughlin v. Florida, 379 U.S. 184 (1964).

Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421 (8th Cir. 1970).

Roman v. Reybolds Metals Co., 3 CCH Employ. Prac. Dec. ¶8072 (S.D. Tex. Nov. 18, 1970).

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).
Spangler v. Pasadena City Board of Education, 311 F. Supp. 501 (C.D. Calif. 1970).
State ex. rel. Ryan v. Civil Service Commission, 278 Minn. 296, 154 N.W. 2d 192 (1967).
United States v. Gypsum Co., 333 U.S. 364 (1948).
United States v. Jefferson County Board of Education, 380 F. 2d 385 (5th Cir. 1967), cert. denied sub nom. Caddo Parish School Board v. United States, 389 U.S. 840 (1967).
United States v. Sheet Metal Workers, 416 F. 2d 123 (8th Cir. 1969).
Yick Wo v. Hopkins, 118 U.S. 356 (1886).

United States Constitution, Amdt. XIV
Title VII, Civil Rights Act of 1964
42 U.S.C. §1981.
Rule 52(a), Federal Rules of Civil Procedure
M.S.A. §197.45

Comment, Arrest Records as a Racially Discriminatory Employment Criterion, 6 Harv. Civ. Rights & Civ. Liberties L. Rev. 165 (1970).
Cooper and Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (1969).
EEOC Dec. No. 71-339, Oct. 13, 1970, CCH Employ. Prac. Dec. ¶6166.
Note, Discrimination on the Basis of Arrest Records, 56 Cornell L. Rev. 470 (1971).
Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 Colum. L. Rev. 691 (1968).
3) Was Proof of Specific Intent to Discriminate Required to Support a Finding of Past Racial Discrimination?
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
Griggs v. Duke Power Co., 91 S. Ct. 849 (1971).
Hawkins v. Town of Shaw, 437 F. 2d 1286 (5th Cir. 1971).

Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), aff'd. sub nom. Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969).

Monroe v. Pape, 365 U.S. 167 (1961).

Norwalk CORE v. Norwalk Development Agency, 395 F. 2d 920 (2nd Cir. 1968).

Smith v. Texas, 311 U.S. 128 (1940).

42 U.S.C. §1981

42 U.S.C. §1983

B) Was the Minority Preference Ordered by the District Court a Proper Excercise of that Court's Power to Frame Appropriate Equitable Relief?

1) Did the District Court have the Duty to Exercise its Broad Equitable Power in Order to Remedy Past Discrimination?

Brown v. Board of Education, 349 U.S. 294 (1955) (Brown II).

Green v. County School Board, 391 U.S. 430 (1967).

Haney v. County Board of Education, 429 F. 2d 364 (8th Cir. 1970).

Hodgson v. American Can Co., F. 2d , 3 CCH Employ. Prac. Dec. ¶8171 (8th Cir., Apr. 7, 1971).

Jackson v. Marvell School District No. 22, 416 F. 2d 380 (8th Cir. 1969).

Louisiana v. United States, 380 U.S. 145 (1965).

Swann v. Charlotte-Mecklenburg Board of Education, 91 S. Ct. 1267 (1971).

United States v. Jefferson County Board of Education, 372 F. 2d 836 (5th Cir. 1966) (Jefferson I).

United States v. Montgomery County Board of Education, 395 U.S. 225 (1969).

United States v. West Peachtree Tenth Corp., 437 F. 2d 221 (5th Cir. 1971).

2) Did the District Court have Authority Under 42 U.S.C. §1981 to Establish the Minority Preference?

Buchanan v. Warley, 245 U.S. 60 (1917).

Cook v. Advertiser Co., 323 F. Supp. 1212 (M.D. Ala 1971).
Culpepper v. Reynolds Metal Co., 421 F. 2d 888 (5th Cir. 1970).
Hurd v. Hodge, 334 U.S. 24 (1948).
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
McLaughlin v. Florida, 379 U.S. 184 (1964).
Sanders v. Dobbs House, Inc., 431 F. 2d 1097 (5th Cir. 1970), cert. denied, 91 S. Ct. 935 (1971).
Stauder v. West Virginia, 100 U.S. 303 (1880).
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).
Swift & Co. v. Wickham, 382 U.S. 111 (1965).
Virginia v. Rives, 100 U.S. 313 (1880).
Waters v. Wisconsin Steel Works of International Harvester Co., 427 F. 2d 476 (7th Cir. 1970), cert. denied sub nom. United Order of Bricklayers, Local 21 v. Waters, 91 S. Ct. 137 (1970) and International Harvester Co. v. Waters, 91 S. Ct. 137 (1970).
Yick Wo v. Hopkins, 118 U.S. 356 (1886).
Young v. International Tel. & Tel., 438 F. 2d 757 (3rd Cir. 1971).

United States Const., Amdt. XIII.
United States Const., Amdt. XIV.
Civil Rights Act of 1866, 14 Stat. 27
Civil Rights Act of 1870, 16 Stat. 144
Rev. Stat. §1977
42 U.S.C. §1981.
42 U.S.C. §1982.
42 U.S.C. §1983.

Note, Racial Discrimination in Employment Under the Civil Rights Act of 1866, 36 U. Chi. L. Rev. 615 (1969).

C) Does the Remedial Minority Preference in Employment Granted by the District Court Violate Applicable Constitutional Standards?
Bolling v. Sharpe, 347 U.S. 497 (1954).
Kemp v. Beasley, 398 F. 2d 178(8th Cir. 1968).

Korematsu v. United States, 323 U.S. 214 (1944).

Local 53, Asbestos Workers v. Vogler, 407 F. 2d 1047 (5th Cir. 1969), affirming Vogler v. McCarty, 294 F. Supp. 368 (E.D. La. 1967).

Louisiana v. United States, 380 U.S. 145 (1965).

Loving v. Virginia, 388 U.S. 1 (1967).

North Carolina State Board of Education v. Swann, 91 S. Ct. 1284 (1971).

Norwalk CORE v. Norwalk Development Agency, 395 F. 2d 931 (2nd Cir. 1968).

Porcelli v. Titus, 431 F. 2d 1254 (3rd Cir. 1970), cert. denied, 39 U.S.L.W. 3486 (May 3, 1971).

Potts v. Flax, 313 F. 2d 284 (5th Cir. 1963).

Robinson v. Lorillard Corp., 319 F. Supp. 835 (M.D.N.C. 1970).

Shelly v. Kramer, 334 U.S. 1 (1948).

United Papermakers and Paperworkers, Local 189 v. United States, 416 F. 2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

United States v. Central Motor Lines, Inc., 3 CCH Employ. Prac. Dec. ¶8095 (W.D.N.C., Oct. 15, 1970).

United States v. Frazer, 317 F. Supp. 1079 (M.D. Ala. 1970)

United States v. Jefferson County Board of Education, 372 F. 2d 876 (5th Cir. 1966).

United States v. Montgomery County Board of Education, 395 U.S. 236 (1969).

Vogler v. McCarty, 62 CCH L.C. ¶9411 (E.D. La., Feb. 19, 1970).

Hellerstein, The Benign Quota, Equal Protection and "The Rule in Shelley's Case", 17 Rutgers L. Rev. 531 (1963).

Vieira, Racial Imbalance, Black Separatism, and Permissible Classification by Race, 67 Mich. L. Rev. 1553 (1969).

III.

DID THE OTHER EQUITABLE RELIEF GRANTED BY THE DISTRICT COURT INCORPORATE APPROPRIATE AFFIRMATIVE RELIEF BASED UPON A FINDING OF PAST RACIAL DISCRIMINATION?

Bruns v. Pomerleau, 319 F. Supp. 58 (D. Md. 1970).
Deveau v. Braistad, 363 U.S. 144 (1960).
Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970).
Griggs v. Duke Power Co., 91 S. Ct. 849 (1971).
Hawker v. New York, 170 U.S. 189 (1898).
McConnell v. Anderson, 316 F. Supp. 809 (D. Minn. 1970)
Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421 (8th Cir. 1970).
Upshaw v. McNamara, 435 F. 2d 1188 (1st Cir. 1970).
United States v. Electrical Workers (IBEW) Local 38, 428 F. 2d 144 (6th Cir. 1970), cert. denied, 91 S. Ct. 245 (1970).
United States v. Sheet Metal Workers, 416 F. 2d 123 (8th Cir. 1969).
M.S.A. §418.20
M.S.A. §609.165
Advisory Committee Comments on M.S.A. §609.165

STATEMENT OF THE CASE

Since 1962, the Minneapolis Fire Department has been all-white. Since 1945, there has been only one minority fire fighter in that department. During that period, Minneapolis had an ever increasing minority population. This statistical evidence of racial discrimination provided the basis for the District Court's preliminary injunction issued on November 5, 1970, which delayed examining and hiring of fire fighters until this case could be heard on the merits in the hearing commencing March 1, 1970.

On the basis of the evidence presented at that hearing, Judge Earl Larson made extensive findings of fact and conclusions of law, and issued an injunction in accord with those findings. The District Court's findings fall into three basic categories. First, that Court found that the statistical evidence constituted prima facie evidence of past racial discrimination (A. 348-50, ¶¶18-27) and that this prima facie case was supported by other evidence of hiring practices which had been discriminatory (A. 350, ¶28). Specifically, the District Court found that a racially discriminatory effect was created, whether by design

or not, by a combination fo the written examinations used (A. 350-52, ¶¶29-35), the stated arrest record requirement (A. 352-54, ¶¶36-45), conviction record requirements (A.354-56, ¶¶46-52), educational requirements (A. 361-63, ¶¶67-71), oral examinations (A. 359-61, ¶¶59-66), recruitment practices (A. 356-58, ¶¶53-57), the durational residence requirement to qualify for a veterans preference (A, 363-64, ¶¶72-77), and the bad reputation of the fire department for fair hiring practices (A. 358-59, ¶58). Secondly, the District Court found that changes in the employment practices with respect to fire fighters which had been implemented in the past few years (A. 365-78, ¶¶78-138), would not effectively remedy the effects of past racial discrimination (A. 378-79, ¶¶139-40). Third, the Court found that what was needed to effectively correct the past discriminatory practices was the immediate certification at the present time of at least twenty minority fire fighters, (A. 379, ¶140), and that certain other hiring practices and procedures had a racially discriminatory effect and were not necessary to serve any compelling state interest (A. 372-77, ¶¶108-135).

The District Court entered Conclusions of Law to the effect that the past hiring practices involved discrimination by race in violation of 42 U.S.C. §§1981 and 1983 and the Equal Protection Clause of the Fourteenth Amendment. (A. 380-81, ¶¶2-3). The Court concluded that a limited minority preference must be granted on the authority of 42 U.S.C. §1981 (A. 381, ¶¶5-6), and that other current hiring practices involved violations of sections 1981 and 1983 and the Fourteenth Amendment (A. 381-382, ¶¶7-9). The appellants suggestion that the injunctive relief granted is based on Title VII of the Civil Rights Act of 1964 (Brief, p. 31) is utterly unfounded.

The Decree issued on March 9, 1971, requires the certification of twenty qualified minority applecants for fire fighter (A. 383-85, ¶¶1-3). That Decree also requires certain changes in fire fighter qualifications and hiring practices with regard to education requirements, arrest and conviction requirements, entry level age requirements, test validation, and affirmative re-

cruitment programs. Paragraph 11 of the Decree (and apragraphs 141-46 of the Findings) relate to the constitutionality of the durational residency requirements of Minnesota's Veterans Preference Act and are not at issue before this court.

In the detailed statement of facts which follows, the evidence supporting the findings made and the relief given are set forth in detail.

Evidence supporting the finding of past discrimination.

Statistical evidence. For the past twenty-five years, the Minneapolis Fire Department has been, for all practical purposes, all-white. There are now 535 men in the department. (Hall Dep. 48) There are no Blacks, American-Indians, or Mexican-Americans. (Hall Dep. 41; A. 154-56 [Hall]) Minority employee censuses taken of all Minneapolis city employees in 1965 and 1970 showed no minority employees in that department. (Ex. 47-49) One Negro was employed who retired in 1962, but he was relatively light-complected and apparently able to pass as a white man. (Hall Dep. 42; A. 157 [Hall]; A. 107 [Glover]) The only other Black man employed in the recent past, insofar as Chief Hall could recall, was hired and fired in 1944, allegedly for refusing to wear the right color shirt. (Hall Dep. 42; A. 157-60 [Hall]) Chief Hall testified that there was one other Black man on the department when he joined it in 1935, and some others earlier. (Hall Dep. 41-42; A. 157-58) In short, with the exception of one light complected Black man, the Minneapolis Fire Department has been all-white since 1944.

Minneapolis has had an ever increasing minority population in the years from 1940 to the present day. The total minority population in the city was 1.07% in 1940. It increased to 1.62% in 1950. 3.23% in 1960, and 6.44% in 1970. During these same years the Black population in Minneapolis increased from 0.94% to 4.37%. (A.55, Stip. ¶65, Tab. III)

Past discriminatory practices. The District Court found that the present all-white Minneapolis Fire Department was a "result of hiring practices and procedures which, whether by design or not, discriminated against minority applicants..." (A. 350, Findings ¶28) The evidence in support of that conclusion must be set forth in some detail.

1. Written examinations.

In the years from 1948 through 1968 a total of 2,404 persons took written examinations to qualify for the fire fighter position. Of these persons, 1,308 passed, or 54.41% of the total. (A. 41 Stip. ¶20) A total of 24 of the persons who applied for the fire fighter position from 1950 through 1968 could be identified as minority applicants, all of whom were Black. (A. 44, Stip. ¶30) Of these 24 minority persons, 22 took the written examinations and six, or 27.27%, passed. (A. 41-42, Stip. ¶21) Thus the percentage of minority persons passing the examination was half the percentage of all examinees who passed.

Four of the written examinations used in past fire fighter examinations were introduced in evidence. (Ex. 32-35) These examinations were used in the years from 1957 through 1968. (White Dep. 75-77) Approximately the first thirty questions on each of these examinations constituted a vocabulary quiz on the meaning of such terms as "incipient", "volatile", "temporize", "indemnity", "entail", "meticulous", and "per diem". (Ex. 33, pages 1-6) Applicants were questioned regarding the formula for finding the volume of a cubical tank (*Ibid*, p. 8), the number of cubic inches in a liquid gallon (*Ibid*, p. 11), and the relative range of a carbon dioxide fire extinguisher (*Ibid*, p. 16). To the extent that the questions related to technical aspects of fire fighting, the examinations required knowledge of material which the fire department did not expect rookie fire fighters to know at the time they were hired, which was incorporated in the program of the fire department training school, and which was the subject of constant retraining for all fire fighters. (A. 161-71, [Hall]; Hall Dep. 13-38) Many of the same questions (78 of them) appeared on all four of the available past fire fighter examinations; most of these questions (117) appeared on three of the examinations. (A. 40-41, Stip. ¶¶17-19) Thus, to a great extent, the past examinations were used in identical form again and again.

No study was ever made by the Civil Service Commision or staff to determine whether these examinations incorporated any "cultural bias" which would screen out minority applicants

or whether the results on the examinations would be predicative of performance on the job. (White Dep. 78; A. 226-27 [Herndon])

The testimony at the trial supported the inference, which can be drawn from the pass ratios mentioned above, that the written examinations would have had a discriminatory effect against minority applicants. Dr. Frank Wood, an associate professor of educational psychology at the University of Minnesota, testified at length regarding the uses and misuses of employment selection examinations. (A. 78-102) He testified that tests which are constructed by white middle-class professionals may tend to discriminate against persons from other cultural backgrounds. (A. 83-85) He noted that the language utilized in the 1961 examination (Ex. 33), which he had examined, was a "kind of formal English", the "language used by college professors when they write books..." (A. 86) While Dr. Wood acknowledged that he could not say definitely whether these examinations were culturally biased (A. 86-88), he did indicate that they were "probably" so biased (A. 87). On analogy to his experience with other tests, Dr. Wood concluded "that a highly verbal test like this does tend to underestimate the potential for training of minority group applicants." (A. 88) With respect to the use of certain words in Exhibit 34, such as "incipient", "infalliable", "contentious", and other similar terms, Dr. Wood testified that such an examination "without any question" would have a racial and cultural bias built into it against Chicanos, Blacks, and American Indians. (A. 94)

Dr. Wood could not render a definite opinion whether these examinations were validated in the sense that they were related to job performance. (A. 101) He did suggest that the type of fire fighter examination which has been used in the past was not the type which was particularly helpful in selection of employees in a situation in which an extensive training program was utilized after hiring. (A. 82-83, 86, 101)

Dr. Wood's opinion as to the past fire fighter examinations was not seriously disputed by Stephen Mussio, the Minneapolis Civil Service Commission's Personnel Research Analyst. (A. 309-310) He did not disagree with Dr. Wood's conclusion that the

past fire fighter examinations were within the category of examinations which would have a cultural bias. (A. 315) The defendent Elisabeth White, Supervisor of Personnel Selection for the Civil Service Commission, acknowledged that "these types of examinations may very well be culturally biased." (A. 273) Other witnesses testified that she had made similar statements to the effect that "she felt strongly" that the examinations were culturally biased (A. 240 [Herndon]) and that the past examination "wasn't fair" to minority group persons (A. 253 [Staten]).

There is no suggestion in the record that these examinations were intentionally biased against minorities. The grading was done by numbers, without identification of the person whose test was being scored. (A. 40, Stip.¶15) Dr. Wood testified that test constructors very seldom deliberately construct a biased test (A. 83) and that he had no evidence as to the intent of the constructors of the fire fighter test to discriminate (A. 92), but he noted that "all of us tend to be insensitive to a bias that is in our favor" (A. 83) and that discrimination has "obviously... been the effect" of many such tests. (A. 92) Mrs White testified that these examinations were "in the long time tradition of Civil Service Examinations" (A. 272-73), and Dr. Wood's testimony does not contradict that fact (A. 90-91). Mrs. White went on to acknowledge that although they now realize that there were things wrong with those examinations, at the time they were used they did not know this fact (A. 274).

2. Arrest record. Since 1945, the percentage of persons arrested by the Minneapolis Police Department who are non-white has been substantially higher than the percentage of non-white persons in the population of the city. In 1950, there were only 1.62% non-whites in the city, but non-white persons constituted 13.37% of those arrested. In 1960, the figures were 3.23% and 20.53% respectively, and in 1970 6.44% and 26.94% (1969 data). (A. 46, 55, Stip.¶¶36, 65, (Tab. III)

In the years from 1950 to the present time, Civil Service announcements of the fire fighter position have consistently referred, in one form or another, to the applicant's "arrest" record. (A. 44-46, Stip.¶¶31-35) The term is also used on other

Civil Service literature used in regard to the fire fighter examination. (White, Dep. 8, 14-15, 25) While the term "arrest" was used, in each instance "conviction" was meant and no applicant was denied employment based on an arrest record alone. (Ibid.) The confusion between what was said ("arrest") and what was meant ("conviction") was evident in the testimony of Commissioner Glover (A. 123) and Commissioner Gallagher (A. 324-25). To the extent that a potential applicant for the fire fighter position with an arrest record would be deterred by a misleading use of the term "arrest", the effect would be felt most by non-whites who were arrested in disproportionate numbers. There is no evidence in the record to suggest that an arrest record was or would be a compelling employment requirement. The testimony of Commissioner Gallagher, indeed, was to the contrary. (A. 325)

3) Conviction record. The disproportionate number of non-white arrests referred to above is reflected as well in the available statistics regarding the relative number of non-white persons convicted of crimes in Hennepin County (which includes Minneapolis) and throughout Minnesota. (A. 46-48, Stip. ¶¶37-44) For instance, in 1969, 12.19% of felony convictions referred to the Hennepin County Department of Court Services involved male Black persons (A. 46-47, Stip. ¶¶37-38), while the 1970 census data shows that in Minneapolis alone only 4.70% of male persons were Black (A.55, Stip. ¶65, Tab. IV). From 1950 through 1968 conviction of a felony was an absolute bar to employment as a fire fighter. (A. 44-45, Stip. ¶¶31, 34; White Dep. 24; A. 137 [Glover]; A. 318-319 [Gallagher]). The current examination plan for the fire fighter position simply requires a "satisfactory arrest record" (Ex. 1; A. 46, Stip. ¶35) by which is meant a satisfactory conviction record (White Dep. 14). The Civil Service Commission recently adopted a point scale for judging the effect of convictions (Ex. 67), which was being changed at the time of trial (A. 326-27 [Gallagher]). The Commissioners who testified stated that individual consideration of convictions was advisable, with no automatic disqualification. (A. 126-28 [Glover]; 327 [Gallagher]).

4) Educational Requirements. Data prepared by the Minne-

apolis Public Schools demonstrate that in each year from 1963 through 1970 the percentage of Black and American-Indian students in senior high schools in Minneapolis was significantly smaller than the percentage of such students in junior high schools, and substantially smaller than the percentage in elementary schools. (Ex. 78-80) Commissioner Glover's testimony supports the inference from these statistics that there is a significantly higher drop-out rate for non-whites--especially Blacks and American-Indians--in the city's schools (A. 118) Commissioner Gallagher also recognized this fact. (A. 330) No data was presented to the Court regarding earlier years.

From 1950 through 1964 all applicants for fire fighters were required to be high school graduates, except that veterans could qualify with a G.E.D. certificate or its equivalent. In 1967 and 1968 all applicants were permitted to present the optional G.E.D. certificate. (Ex. 2-10) For the present examination, this requirement was relaxed to permit applicants to present a diploma or G.E.D. certificate at the time of hiring rather than at the time of application as in earlier years. (Ex. 1)

The relevancy of the high school or G.E.D. requirement was questioned by a subcommittee sponsored by Mobilization of Economic Resources (MOER), the former Hennepin County anti-poverty agency. (A. 221-22, 228-29 [Herndon]) The recommendation of that subcommittee was that an educational requirement should be imposed for promotions but not at the entry level. (Ex. 68) That recommendation was supported by all members of the subcommittee including the defendant Mrs. White, the president of the fire fighters union, and other firemen. (A. 239 [Herndon]) There is no suggestion in the record that any study was ever made by the Civil Service Commission or the Fire Department to determine whether a high school education was a necessary qualification for the entry-level fire fighter position. (A. 116-20 [Glover]; 174-76 [Hall]; 330-32 [Gallagher]) Rather the testimony was to the effect that "a person should have to the best of his ability the best educational background that he can bring into a job," (A. 330 [Gallagher]), or "the better educated the man is, from what I have seen of them, they turn out to be better fire fighters as a general rule, not in all cases" (A. 175 [Hall]). Commissioner Glover testified

that the educational requirement "was something that had just been going on and no one ever questioned it, and our commission never thought twice about it except during this period of time" and that "it had been a traditional kind of thing." (A. 117-118)

5) Oral Examination. Oral examinations comprised a part of the fire fighter examination during the years from 1950 to 1955. A total of 326 persons took these examinations. Only one person failed, a Black man named W. Matthew Little, who took the examination in 1950. (A. 42-43, Stip. ¶¶22-28) Mr. Little's case was the subject of an investigation by the Minneapolis Fair Employment Practice Commission. (Ex. 76-77). The FEPC concluded that the failing grade given to Mr. Little was based upon race. (Ex. 76, minutes of Nov. 6, 1950)

6) Recruitment. Prior to 1965 recruiting of fire fighters involved advertising in the two main daily newspapers in Minneapolis, advertising in the official newspaper, *Finance and Commerce,* and posting of announcements in the City Hall and at fire stations. There was no significant attempt made, in any affirmative manner, to recruit minority fire fighters. (White Dep. 72-74, A. 275-76 [White]) In 1970, in cooperation with the MOER Subcommittee, an affirmative recruitment program was established. (White Dep. 73-75; A. 278-80 [White]) That effort was the only extensive minority recruitment program aimed at obtaining minority applicants for fire fighter. (A. 286-87) During the 1970 recruitment efforts the position was advertised in the three weekly newspapers with a wide circulation in the Black community in Minneapolis. (Ex. 62; A; 194-95 [Davis]) One fire fighter advertisement had appeared earlier in the *Minneapolis Spokesman* (a Black weekly) on August 3, 1967 (Ex. 97), but fire fighter applications were received only through July 31st that year (Ex. 4). With the exception of the 1970 period, that was the only fire fighter advertisement in that paper, although other positions were advertised in the *Spokesman* commencing in 1966. (A. 262-66 [Doyle]; 275-81 [White]; Ex. 97, 101) Mrs. White testified that fire fighter advertisements were placed in the other weeklys, the *Observer* and the *Courier,* between 1965 and 1970, but available data

from Civil Service records was not produced. (White Dep. 72-74; A. 276, 282 [White])

7) Bad reputation for fair hiring practices. The Minneapolis Fire Department has had a bad reputation for employment of minorities in the minority community in Minneapolis for years. During the summer of 1970, the MOER Subcommittee found that a vast majority of the minority persons contacted felt there was no chance of employment as a fire fighter. (A. 250-51 [Staten]) The plaintiff McHie refused to apply for that reason. (A. 102-03) At the trial, all of the Black witnesses, including Commissioner Glover, agreed on the bad reputation of the fire department insofar as equal employment opportunity was concerned. These witnesses included middle-aged men, such as Cozelle Breedlove, a community center director (A. 67-68, 69-70, 74-76); Harry Davis, the president of the Urban Coalition and active participant in community affairs (A. 186, 196); and Matthew Little, a former member of the Minneapolis Commission on Human Relations. (A. 201-04) Commissioner Glover, who is also the Director of the Minneapolis Urban League (A. 104), reflected a similar feeling in his statement to the Court that "it's hard to tell a black youngster that he can become chief of the fire department if he doesn't see any black firemen." (A. 148) The younger Black men who had actively participated in the MOER Subcommittee also testified that the fire department had a bad reputation for hiring minority applicants. Fred Herndon and Randy Staten, both employed with MOER and both of whom had served as chairman of the MOER Subcommittee, testified to this effect. (A. 217, 220-21 [Herndon]; 248, 249-51, 255-56 [Staten]) Wilford Leland, a white man who had served as Executive Director of the Minneapolis Fair Employment Practice Commission from 1948 to 1955, likewise testified that the reputation of the Minneapolis Fire Department for fair hiring practices was bad during those years. (A. 181-84) The defendant Mrs. White acknowledged that there was such a reputation in the community. (A. 292-93)

8) Veterans preference. Fire fighter applicants who are honorably discharged veterans are entitled to an absolute preference in employment if they meet minimal education qualifications and either enlisted from Minnesota or have lived in the state and in Minneapolis for five years preceding the application. (Ex. 56; M.S.A. §197.45) Approximately 60% of the

present fire fighters claimed such a preference. (A. 49-51, Stip. ¶¶46-64) This preference permits veterans with lower scores to be hired before higher scoring non-veterans or veterans who cannot claim a preference because of the durational residency requirement. (A. 50, Stip. ¶¶55-58)

United States Census Bureau data indicates that non-white persons are considerably more mobile than white persons (A. 61, Stip. ¶65, Tab. IX) and would thus be more often affected by the five-year durational residency requirement than white persons. It is common knowledge that the past decades have seen vast migration of non-whites into the northern cities. In the current group of fire fighter applicants, approximately 13 are residents of Minneapolis who are unable to claim the veterans preference because they do not satisfy the five-year requirement. Five of them (approximately 38%) were minority applicants. (A. 38, Stip. ¶11, Group I-B)

Evidence regarding present minority recruitment efforts.

Within the past two years, the Civil Service Commission and its staff have taken some steps to correct past policies which had the effect of creating and maintaining an all-white fire department. Most of these changes followed the submission of a report to the Commission in 1969 by a Black Urban Corps intern, Jerome Newson, which criticized minority hiring practices. (Ex. 50) As a result of this report the Commission adopted a Policy Statement on Employment which directed the the staff, inter alia, to eliminate examination questions which were slanted toward middle-class values and vocabulary and to review employment requirements to determine whether the requirements were necessary for the job. (Ex. 51-52, White Dep. 68-69)

One of the changes implemented was the decision to obtain consultants to assist in creation of a test validation program (Ex. 55) and the hiring of a personnel research analyst. (A. 274 [White]) Nevertheless, the fire fighter examination was originally scheduled to be given without validation (A. 333 [Gallagher]), although both Commissioner Gallagher (A. 333) and Mrs. White (A. 283-84) emphasized that the Commission did not now plan to give the fire fighter examination until it was validated.

Other efforts to increase minority employment centered about the efforts of the MOER Fireman Employment Subcommittee, a group composed of persons from the anti-poverty a-

gency, other civic groups such as the Urban Coalition and the Urban League, Mrs. White and other Civil Service staff personnel, and four fire fighters including Gordon Norheim and Wayne Turnquist, both officers in the fire fighters union. (A. 221-24 [Herndon]; White Dep. 41-43; Ex. 58) That group, in cooperation with the Civil Service Commission staff, engaged in extensive recruitment efforts aimed at seeking minority applicants. (Ex. 58-64; A. 250-51 [Staten]; 278-79 [White]) The result was that at least 26 minority applicants out of a total of 494 persons sought employment as fire fighters. (A. 36-37, Stip. ¶¶4, 8-9)

The MOER Subcommittee sought changes in various requirements for the fire fighter position including the education requirement, the height requirement, the minimum age, and the requirement of a "satisfactory employment, arrest and driving record." (Ex. 68) The whole Subcommittee, including the fire fighters and Mrs. White, concurred. (A. 239-40 [Herndon]) On June 8, 1970, after hearing the position of the MOER Subcommittee, the Commission, with Commissioner Glover dissenting, voted to proceed with the fire fighter examination plan in accordance with the qualifications originally set on April 23, 1970. (Ex. 69; A. 115-16 [Glover]; 324 [Gallagher]) That examination plan (Ex. 1) had incorporated only the following changes: 1) the time at which to present a high school diploma or G.E.D. certificate was postponed to the time of employment, not application; 2) the minimum height requirement was lowered; 3) the eye sight requirement was liberalized; 4) the automatic felony conviction requirement was eliminated; and 5) a requirement was added regarding a drivers license. (Ex. 69, minutes of June 8, 1970; Ex. 2)

The efforts of the MOER Subcommittee to implement a successful recruitment program and to effect changes in fire fighter qualifications were seriously impaired by a memorandum of Chief Hall dated May 15, 1970, sent to all fire department personnel which referred to a movement in the city to "lower standards." (Ex. 69) Commissioner Glover stated before the Civil Service Commission on May 28, 1970, that this memorandum "through misstatement of fact, distortion and innuendo, sets the climate for discouraging qualified minority persons from applying for the forthcoming Fire Fighter Examination." (Ex.69; A. 113 [Glover]). He testified that the MOER Subcommittee for the first time had succeeded in getting minority groups, the Civil Service Staff and representatives of the fire fighters local

to sit down to attempt to work out a minority employment program (A. 133), and "then the letter comes out of Chief Hall's office and everything is blown up. The commissioners began to change a bit in their feelings because they had only been representing segments of the community too." (A. 133) Mr. Procter and Mrs. White, both ranking members of the Civil Service staff, agreed that Chief Hall's attitude signified an unwillingness on his part to make the fire department representative of the population. (Ex. 71; A. 289 [White]). Mrs. White further testified that the reaction by the MOER Subcommittee and the fire fighter personnel to this letter made it difficult to continue their minority recruitment efforts. (A. 294). In fact, participation by fire fighter personnel in the Subcommittee's program significantly decreased after the memorandum was issued. (A. 114 [Glover]; 223-24 [Herndon]; 294 [White].

The MOER Subcommittee, in cooperation with other civic groups, specifically the Urban Coalition, requested the Commission to "freeze" or "set aside" jobs for qualified minority applicants in city departments, such as the fire department, with few or no non-white employees. (Ex. 69--letter dated July 13, 1970; A. 240 [Herndon]). This request was discussed at length at a special meeting of the Commission held on August 20, 1970. (Ex. 69) Subsequently that request was placed before the Commission on September 10, 1970, in the form of a motion by Commissioner Glover to set aside 24 such positions. This motion was rejected, with Commissioner Glover dissenting. (Ex. 69)

Statement of Facts Relative to the Scope of Relief Granted by the District Court

The Minority Preference. The District Court found that there had been discriminatiory practices utilized in the hiring of fire fighters in the past and ordered the Civil Service Commissioners and staff to grant preference to twenty qualified minority applicants. Despite the fact that some changes had been made in the fire fighter qualifications, and despite the recruitment efforts made by the Civil Service staff and the MOER Subcommittee, no significant change would have been made in the racial makeup of the Minneapolis Fire Deparment, absent such an order by the Court. The order in which fire fighter applicants would be hired is set by law and by Civil Service practice. Persons who could claim a veterans preference and who have been residents of Minneapolis for one year would be hired first.

(Ex. 56-57, A. 37-38, Stip. ¶11) Of the present group of applicants, approximately 113 fall in that category. (A. 37-38, Stip. ¶11, Group I). That group may be increased by eight other applicants included in Stipulation ¶11, GroupI-A. If the durational residency requirement to claim a veterans preference is invalidated by the three-judge court, that group would be increased by 13 more applicants (A. 38, Stip. ¶11, Group I-B) Thus a total of as many as 134 applicants, of whom 13 are minority applicants, are first in line. (A. 37-38, Stip. ¶11) (These figures are subject to a possible ten percent margin of error) (White Dep. 96-99). Those applicants second in line are 130 persons including nine minority applicants who have been Minneapolis residents for a period of one year and who cannot claim a veterans preference.(A. 38, Stip. ¶12)

Simple arithmetic indicates that the probability of many minority applicants being hired is very small. Mrs. White, who has had extensive experience as a member of the Civil Service staff (White Dep. 2-4; A. 271-72 [White]), was asked to estimate how many of those applicants would likely be certified. Her answer confirms the mathematical probabilities: "The odds are that one or two will be certified." (A. 288) Commissioner Glover agreed. (A. 128-29)

The testimony presented in the District Court indicates that the certification of one or two minority applicants will not remedy one of the basic and continuing causes of an all-white fire department, which is quite simply that minority fire fighters are not visible on fire trucks throughout the city. Cozelle Breedlove, a Black man who serves as program director at a community center (A. 68), testified that his efforts are in part directed toward counseling minority youth regarding employment. (A. 69) He stated:

> "We have received no encouragement from the Fire Department, and since there are no black or minority firemen in the department we have no image in which to project to these youngsters." (A. 70)

Later he added:

> "Within our community we do not see any firemen. I socially or professionally do not know any firemen. I know several youngsters I went to school with that have become

firemen that moved out of our community. I can honestly say that within my community we do not see any firemen living in our community, we do not know them. They are an invisible force." (A. 73)

Commissioner Glover noted that one of the difficulties in encouraging Blacks to seek employment was that

"There was that believability gap in what was said and what was actually going on. In other words, comments were out that 'We tried to get them, but they never were available.' But in terms of believing this, you didn't have the models and you didn't have anyone to which you could really point to." (A. 108)

He emphasized at length that something "drastic" had to be done to remedy the situation in the fire department and "the traditional way of doing it, you just couldn't do it..." (A. 109-10) Later Commissioner Glover stated, with respect to the activity of the MOER Subcommittee, that

"You see, the object of the committee was to recruit minorities for fire fighters, but at the end of the rainbow there has to be some jobs. You know, when you work with the Urban League, you know, we see day after day, year after year, promises being made by people to get publicity and nothing comes out of it." (A. 132-33).

Commissioner Glover, in effect, acknowledged that the Commission was unable to effectively correct the present lack of minority persons in the Fire Department:

"You see a problem that has to be solved and you are the agency that is supposed to solve that problem, but you are in a bind because within your own framework you can't do anything about it." (A. 144-45)

He qualified his statement by retracting the "not anything" (Ibid.) But he returned again to the need for a number of minority firemen in his final statement to the Court. He spoke again in terms of the "believability gap" (A. 148). He added:

"And I think not only the fact of putting the 20 or so mi-

nority people we are talking about in the Fire Department having effect on just this generation, but we are talking about the effect it would have on white kids too. We are talking about the effect it has on the black kid who would aspire to be a fire fighter. The aspiration isn't there because of the absence of. That's the concern I have. The legal terminology and how you do it I leave up to the Court and to the Judge, but it's a simple thing to me that equality has to be brought about if it isn't coming through in the traditional way of doing things." (A. 148-49)

Harry Davis, the president of the Urban Coalition, saw the same need for non-traditional action:

"You don't eliminate a reputation unless you make some intensive moves to eliminate a reputation that's been there. You have got to do something progressive and agressive to help people come in when they have been denied for quite a while." (A. 197)

W. Matthew Little also emphasized the fact that "for the last 22 years, of which we are speaking of, there has been no black fireman" (A. 205) when he was explaining the basis for his conclusion that the Minneapolis Fire Department shows the effect of racial discrimination.

While Mrs. White testified that she would not favor the minority preference (A. 297), she did testify that she said to the MOER Subcommittee,

"We have tried everything we can think of and we still don't get more than five or six [minority] applicants for fire fighter examinations. What do you suggest that we can do?" (A. 279)

She also acknowledged that some relatively dramatic action would be necessary to overcome the image of the fire department in the minority community. (A. 303) As is set forth above, Mrs. White, her staff, and the MOER Subcommittee, after extensive recruitment, got only 26 minority applicants. The net result, absent the intervention of the Court, was likely to be one or two minority persons certified. (A. 288)

Change ordered in education requirement. As has already been stated, the requirement of presenting a high school diplo-

ma or G.E.D. certificate would have a greater effect on non-white applicants than on white applicants because of the disproportionately higher dropout ratio for non-whites. Neither Commissioner Glover (A. 118-19), nor Chief Hall (A. 175-76, 179), nor Commissioner Gallagher (A. 330-32) were able to point to any demonstrable relation between the stated educational requirement and performance as a fire fighter. Although that requirement was discussed at length by the MOER Subcommittee, at no time did Mrs. White suggest to that group that there were any facts available to support the educational requirement. (A. 228-29 [Herndon])

Minimum age. Both the statistical evidence and the testimony presented at the trial disclosed that minority youth have grave problems obtaining employment. Unemployment statistics establish the unemployment rate for male non-whites aged 16-21 was 24.5% as of December, 1970, as opposed to 15.8% for male white persons of the same age. (Ex. 95) These figures were reflected in the testimony of Cozelle Breedlove, who stated that at the Phyllis Wheatley Community Center, located in an area of high minority population, "the number one problem with our youth is employment." (A. 70) Fred Herndon, the MOER Subcommittee chairman, testified that lowering the minimum age to 18 would "definitely" enhance minority recruitment. (A. 230)

Again, there is no suggestion in the record that in order to adequately perform as a fire fighter an applicant must be 20 rather than 18 years old. Commissioner Glover acknowledged that "I can say I don't think we had any facts for or against it." (A. 121)

Elsewhere he stated that there was "nothing wrong with 18." (A. 120) Chief Hall admitted that he really did not know whether or not an eighteen year old would or would not make a good fire fighter (A. 177) and that he had had no experience in such an area (Hall Dep. 49). With respect to a change in the minimum age to 18, he said, "I don't favor it, but I don't know as I would put up very much opposition to it either..." (Hall Dep. 49) Commissioner Gallagher found a basis for the 20 year old figure in what he testified was the recommendation of the International Association of Fire Fighters (A. 329), but he admitted that he knew of no studies to determine whether an 18

year old could adequately perform as a fire fighter other than the Galles report, which found the minimum age to be a barrier to recruitment. (A. 328-29) He also testified that an 18 year old could, if he has the mental attitude, qualify as a fire fighter. (A. 329)

Other relief granted. It has already been noted that the city officials testified that they intend to validate the fire fighter examination before it is given. (A. 283-84 [White]; 333 [Gallagher]) The reference to arrests in fire fighter literature is, and always has been, a mistake. (White Dep. 8, 14-15, 25) Affirmative recruitment programs are already a part of Civil Service policy (Ex. 51-52), but there has been little assistance, in fact opposition, to such efforts by Chief Hall and other high ranking fire department officials. (A. 77 [Breedlove]; 111-15, 133, 140-41 [Glover]; 200 [Davis]; 223-24 [Herndon]; 289,294 [White]; Ex. 70-71)

The District Court's order required specific changes in the consideration of a fire fighter applicant's conviction record. This departure from the previous absolute felony bar was in keeping with changes already made by the Commission. (Ex. 67) The point system incorporated in Exhibit 67 made some distinction between felonies on the basis of the time when the conviction occurred. But no distinction was made between types of crimes. (White Dep. 19) Commissioner Glover testified that the nature of any felony involved, the length of time a person has been out, and the chance of giving a person employment with the city should be considered. (A. 126-28, 138-39) He also stated, in response to a question by the Court, that individual consideration of applicants affected by the conviction record requirement was possible. (A. 149)

ARGUMENT

I.

THE DISTRICT COURT HAD JURISDICTION UNDER 28 U.S.C. § 1343 (3) AND (4) TO HEAR AND DETERMINE THE PLAINTIFFS' CLAIMS FOR RELIEF ASSERTED UNDER 42 U.S.C. § § 1981 AND 1983.

The appellant city officials claim that the federal courts lack jurisdiction of this action for equitable relief brought against them. The court below concluded that jurisdiction was established "over this action and these defendants under 28 U.S.C. §1343(3) and (4)." (A. 380, ¶1) This conclusion is firmly supported by decisions of this court, the Supreme Court, and other federal courts throughout the country. See *Monroe v. Pape*, 365 U.S. 167, 183, (1961); *Board of Trustees of Arkansas A & M College v. Davis*, 396 F. 2d 730, 734 (8th Cir. 1968), cert. denied, 393 U.S. 962 (1968); *Smith v. Board of Education*, 365 F. 2d 770 (8th Cir. 1966); *Harkless v. Sweeny Independent School District*, 427 F. 2d 319, 323 (5th Cir. 1970), cert. denied, 91 S. Ct. 451 (1971). Many of the arguments made by the City officials were rejected in two very similar employment discrimination cases. See *Morrow v. Crisler*, 3 CCH Employ. Prac. Dec. ¶8119, S.D. Miss., (Feb. 12, 1971); *Penn v. Stumpf*, 308 F. Supp. 1238 (N.D. Calif. 1970). While this lawsuit was brought against the city officials in their individual and official capacities, they seek to characterize it as a suit against the City of Minneapolis and suggest that the city is not a "person" within the meaning of section 1983. Even if that were the nature of the case, which it is not, equitable relief has been held to be available against municipalities in this type of action. *Kennedy Park Homes Association v. City of Lackawanna*, 436 F. 2d 108 (2nd Cir. 1970), cert. denied 91 S. Ct. 1256 (1971); *Harkless v. Sweeny Independent School District, supra*, 427 F. 2d at 321-23. Of course there is no requirement that the minority persons bringing this action exhaust or defer to state administrative or judicial remedies. *Houghton v. Shafer*, 392 U.S. 639 (1968); *Monroe v. Pape*, 365 U.S. 167, 183 (1961); cf. *Wisconsin v. Constantineau*, 91 S. Ct. 507 (1971).

II.

THE DISTRICT COURT APPROPRIATELY EXERCISED ITS EQUITABLE POWER BY ORDERING THAT PREFERENCE SHOULD BE GRANTED IN THE HIRING OF FIRE FIGHTERS TO TWENTY QUALIFIED MINORITY APPLICANTS BASED UPON FINDINGS THAT AN ALL-WHITE FIRE DE-

PARTMENT WAS A PRODUCT OF PAST RACIAL DISCRIMINATION AND A FINDING THAT SUCH RELIEF WAS NECESSARY TO REMEDY THE PRESENT AND CONTINUING EFFECTS OF SUCH DISCRIMINATION.

The District Court has ordered that the city officials give an absolute preference in certification of fire fighters to twenty qualified Black, American-Indian, or Spanish-surnamed-American applicants for that position. (A. 383, ¶1) The procedure to be followed is detailed in Paragraph 2(a)-(c) of the Decree. (A. 384) To the extent that these orders conflict with provisions of state law and the city charter, the city officials were enjoined from enforcing those provisions. (A. 385, ¶3) The city officials argue that there is insufficient basis in fact and in law for this order. That position disregards both the substantial record made below and the applicable standards of federal statutory and constitutional law.

It is well to emphasize what is *not* required by these orders. The Decree does not require that unqualified persons be hired. To be eligible for the preference, a minority applicant must meet the *same* qualifications met by all other applicants--he muat pass the examinations and meet all qualifications stated in the fire fighter examination plan as amended by order of the Court. The minority preference is thus similar to Minnesota's established veteran's preference, which was found constitutional by the Minnesota Supreme Court for the very reason that it did not establish one set of qualifications for nonveterans and another set for veterans. *State ex. rel. Kangas v. McDonald* 188 Minn. 157, 161, 246 N.W. 900 (1933). Furthermore, the Decree does not require that minority applicants be hired in direct numerical ratio to the percentage of minority persons in the city. Given the present minority population of 6.44% and a fire department of 575 persons (the present 535 persons plus 40 new fire fighters), a true racial balance would require 37 minority fire fighters. Nor does the decree require that continuing racial balance be established in the Minneapolis Fire Department. Rather, on a short-term basis, the city officials are required to give a remedial preference to minority applicants. No

permanent quota or preference is established. Finally, these portions of the Decree do not impose a unique or complex administrative burden upon the Commissioners and their staff. Paragraph 2(a)-(c) of the decree parallels the procedures already followed in administering the veterans preference. (Ex. 56-67). In short, the minority preference is necessary but limited relief disegned to remedy what the District Court found to be the continuing effects of past racial discrimination. As will be pointed out in more detail below, the District Court had not only the power but the duty to grant such relief on the basis of the evidence presented.

A. The District Court correctly found that the present all-white Minneapolis Fire Department was created by racially discriminatory hiring practices and procedures.

1. Prima facie statistical case. One fact is central to the determination of this appeal–there are no minority fire fighters in the Minneapolis Fire Department and, for all practical purposes, have been none in the last 25 years. Given the minority population in Minneapolis and the fact that 5.29% of the city employees as a whole are members of minority groups, the District Court ruled that this statistical evidence alone established a prima facie case of racial discrimination.

That ruling is well founded. In racial discrimination cases the federal courts have recognized that raw data–statistics presented to the Court–cut through a general denial of non-discrimination and reflect reality. Judge Brown of the Fifth Circuit succinctly acknowledged that fact in his oft-quoted statement that "In the problem of racial discrimination, statistics often tell much, *and Courts listen.*" *Alabama v. United States* 304 F. 2d 583, at 586 (5th Cir.) (voter registration case) (emphasis added), aff'd, 371 U.S. 37 (1962) (per curiam). The Supreme Court recognized the revealing quality of statistical evidence by holding that a prima facie case of jury discrimination was established once a disparity was shown between the percentage of Black residents in a county as a whole and the percentage of Black persons on the county jury. *Turner v. Fouche,* 396 U.S. 346, 360 (1970). See also *Preston v. Mandeville,* 428 F. 2d 1392, 1395 (5th Cir. 1970) (jury discrimination); *Hawkins v. Town of Shaw,* 437 F. 2d 1286, 1288 (5th Cir. 1971) (alloca-

tion of municipal services).

The same principle applies in employment discrimination cases. In *United States v. Sheet Metal Workers,* 416 F. 2d 123, 127 n. 7 (8th Cir. 1969), this Court noted that Title VII of the Civil Rights Act of 1964 "permits the use of statistical probability to infer the existence of a pattern or practice of discrimination." More recently and in even stronger language, this Court held that statistical evidence of the disparity between the small percentage of Black employees of an Arkansas firm in comparison with the percentage of Blacks in the population as a whole sufficed to establish discriminatory hiring practices. *Parham v. Southwestern Bell Telephone Co.*, 433 F. 2d 421, 426 (8th Cir. 1970). In his opinion for the court, Judge Bright emphasized the importance of the statistical evidence presented:

> "We hold as a matter of law that these statistics, which revealed an extraordinarily small number of black employees, except for the most part as menial laborers, established a violation of Title VII of the Civil Rights Act of 1964. 433 F. 2d at 426

See also *Marquez v. Ford Motor Co.,* F. 2d , 3 CCH Employ. Prac. Dec. ¶8156 (8th Cir. 1970); *Jones v. Lee Way Motor Freight,* 431 F. 2d 245 (10th Cir. 1970), cert. denied, 91 S. Ct. 972 (1971); *United States v. Hayes Int. Corp.*, 415 F. 2d 1038, 1043 (4th Cir. 1969). All of these employment cases arose under Title VII of the Civil Rights Act, but that principle, originally established in voting and jury discrimination cases, must necessarily apply in employment discrimination cases against municipal employers as well.

The statistical evidence presented below, establishing as it does a prima facie case of employment discrimination, shifted to the city officials the burden of establishing that racial discrimination was not the reason for the existence of an all-white department. *Turner* v. *Fouche*, *supra*, 396 U.S. at 360; *Preston* v. *Mandeville*, *supra*, 428 F. 2d at 1395; see also, Fiss, *A Theory of Fair Employment Laws*, 38 Chi. L. Rev. 235, 268-73 (1971).

The city officials cannot rebut the prima facie case established by statistics with a general denial of discrimination.

The Tenth Circuit so ruled in *Jones v. Lee Way Motor Freight, supra,* where the Court emphasized that, "the company's conclusory claims that it has never discriminated against Negroes in hiring line drivers do not overcome this prima facie [statistical] case. " 431 F. 2d at 247. Thus, it was incumbent upon the city officials in this action to prove, if they could, that an all-white fire department existed apart from patterns and practices of racial discrimination. This they failed to do.

2. Other substantial evidence of discrimination. The evidence presented to the District Court, which has been summarized at length above, rather than rebutting the inference of racial discrimination, provides support at every turn for that inference. No one factor, in itself, would necessarily establish that the all-white department was a product of discriminatory practices. But when each of the factors analyzed, such as the examinations used and the education requirements imposed, supports, rather than rebuts, the inference of discrimination, Judge Larson's finding that the all-white Minneapolis Fire Department was a "result of hiring practices and procedures which, whether by design or not, discriminated against minority applicants..." (A. 350, Findings ¶28) must be sustained on appeal. See *United States v. Gypsum Co.,* 333 U.S. 364, 395 (1948); *Clements Auto Co. v. Service Bureau Corp.,* F. 2d , (8th Cir. Apr. 27, 1971) (slip opinion, p. 2, n. 1); Fed. Rule Civ. P. 52 (a).

In the following discussion of the evidence of various discriminatory practices which created an all-white fire department, two well-established principles are applicable. First, a requirement which is neutral on its face but discriminatory in effect is no more permissible under the Equal Protection Clause and 42 U.S.C. § 1981 than a requirement explicitly designed to discriminate on the basis of race. *Yick Wo v. Hopkins,* 118 U.S. 356, 359 , 373-74 (1886); *Meredith v. Fair,* 298 F. 2d 696, 701 (5th Cir. 1962), cert. denied, 371 U.S. 828 (1962). Secondly, an employment classification which, on its face or in its effect, discriminates on the basis of race cannot be sustained in the absence of a showing

that it is necessary to the furtherance of some compelling state interest. *Loving v. Virginia,* 388 U.S. 1, 9 (1967); *McLaughlin v. Florida,* 379 U.S. 184, 192-93, 196 (1964); *Arrington v. Massachusets Bay Transportation Authority,* 306 F. Supp. 1355, 1358 (D. Mass. 1969).

a. Written examinations. The evidence presented to the Court below established that the past fire fighter examinations were culturally biased and had never been validated to determine whether they were related in any way to performance on the job. Such a showing adequately justifies the finding of the District Court that they served to eliminate or to deter minority applicants without any proven or compelling employment selection purpose. (A. 350-52, ¶¶29-35).

This conclusion is not surprising. It is by now well-recognized that a written examination which incorporates white middle-class values and vocabulary can discriminate against minority persons. See *Arrington, supra,* 306 F. Supp. 1355; *Hicks v. Crown Zellerbach Corp.,* 319 F. Supp. 314 (E.D. La. 1970); Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 Harv. L. Rev. 1598 (1969); *Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education,* 68 Colum. L. Rev. 691 (1968). The United States Supreme Court recognized this fact in *Griggs v. Duke Power Co.,* 91 S. Ct. 849 (1971). In *Griggs,* as in this case, a written examination was used which had a proven discriminatory effect and which was not shown to "bear a demonstrable relationship to successful performance of the jobs for which it was used." 91 S. Ct. at 853. While *Griggs* arose under Title VII of the Civil Rights Act of 1964, it is inconceivable that municipal officials, who have been subject to 42 U.S.C. §1981 and the Fourteenth Amendment for one hundred years, should be subject to less stringent standards regarding employment discrimination than private employers.

b. Arrest records. The statistical evidence summarized above establishes that the stated arrest record requirement would have a discriminatory effect in the recruitment and

hiring of minority applicants. That discriminatory effect cannot be justified, for the simple reason that consideration of arrests, as opposed to convictions, was never really intended in the first place. Apart from that fact, the use of an arrest record alone cannot be justified. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 241 (1957); *Gregory v. Litton Systems, Inc.* 316 F. Supp. 401 (C.D. Calif. 1970); *Comment, Arrest Records as a Racially Discriminatory Employment Criterion,* 6 Harv. Civ. Rights & Civ. Liberties L. Rev. 165 (1970); *Note, Discrimination on the Basis of Arrest Records,* 56 Cornell L. Rev. 470 (1971).

c. Conviction records. The statistical evidence likewise establishes that the absolute felony bar actually implemented as an employment requirement in the past fire fighter hiring had a discriminatory effect. Again, this requirement was not necessary to serve a compelling governmental interest. Both Commissioner Glover and Commissioner Gallagher emphasized that this absolute bar needed to be changed. The Commission as a whole recognized this fact by implementing and then deciding to change a somewhat more flexible point scale to determine the effect of a conviction record.

We must emphasize that the absolute felony bar previously imposed is not being considered on its face, but in regard to the proven discrimination *on the basis of race* which that otherwise neutral qualification imposed. Thus strict scrutiny of that requirement is appropriate in determining whether it was justified. Nor is there any suggestion that *all* consideration of convictions was improper. The portions of the District Court's Decree which deal with the present conviction record requirement explicitly permit consideration of a conviction record which bears a reasonable relationship to adequate performance as a fire fighter. The validity of that portion of the Decree is discussed below. It suffices at this point simply to state that the record below permitted the trial court to conclude that there was no compelling employment interest served by an absolute felony bar which did not allow consideration of the type of crime and the time elapsed since commission of that crime and which had a disproportionate deterring effect on minority applicants.

d. Education requirements. It was established below that the high school diploma requirement adversely affected a higher proportion of potential minority applicants for the fire fighter position. Again there was no showing that this requirement had (or has) actually been determined to be job related. The testimony was that this requirement was simply the traditional kind of requirement implemented solely because education was generally thought to be a good thing to incorporate in job qualifications. The Supreme Court dealt with such contentions in *Griggs,* which parallels this action closely in this respect. We submit that this Court could, mutatis mutandi, adopt the following conclusion of the Supreme Court:

> On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgement that they generally would improve the overall quality of the work force.
>
> 91 S. Ct. at 853.

The testimony of Commissioner Glover and Chief Hall is in the same vein as the testimony of the company vice president in *Griggs.* See also EEOC Dec. No. 71-339, Oct. 13, 1970, CCH Employ. Prac. ¶6166; *Roman v. Reynolds Metals Co.,* 3 CCH Employ. Prac. Dec. ¶8072 (S.D. Tex., Nov. 18, 1970).

e. Oral examinations. Oral examinations also played a part in creating an all-white fire department. The District Court found that racial discrimination was involved in Matt Little's failure of the oral examination in 1950. Without regard to the fact that the use of oral examinations had been shown to be susceptible to racial discrimination, they were used in two subsequent examinations (Ex. 18-19) and incorporated in the examination plan in a third (Ex. 8). The District Court certainly

was justified in concluding that the continued use of oral examinations reflected an indifference to hiring practices which had proven susceptible to racial discrimination. (A. 361,¶66).

f. Recruitment. Despite the fact that minority employment in the Minneapolis Fire Department has been grossly disproportionate to minority employment in other city positions and to the minority population of the city as a whole for years, the Commission did not launch an aggressive affirmative recruitment program until 1970. However laudable those efforts, they were years late. The school desegregation cases decided by this Court and other Courts clearly stand for the proposition that state created discrimination must be met by affirmative efforts by the state to wipe out that discrimination. See, e.g., *Clark v. Board of Education*, 426 F. 2d 1035, 1040 (8th Cir. 1970) (*Clark II*), petition for cert. pending, 39 L.W. 3079; *Jackson v. Marvell School District No. 22*, 416 F. 2d 380 (8th Cir. 1969); *United States v. Jefferson County Board of Education*, 380 F. 2d 385 (5th Cir. 1967) (*Jefferson II*), cert. denied sub nom. *Caddo Parish School Board v. United States*, 389 U.S. 840 (1967). *Sheet Metal Workers, supra,* and other employment discrimination cases also require affirmative action to remedy discrimination. Yet year after year nothing was done to attempt by affirmative recruitment efforts to change the all-white fire department. The past recruitment program for fire fighters was passive–limited to official announcements, newspaper advertisements in the leading daily but not the minority newspapers, and requests for fire fighters to obtain recruits. Obviously white firemen would tend to recruit white applicants. Cf. *Parham, supra,* 433 F. 2d at 426-27. The passive nature of the past recruitment together with a failure to take affirmative recruitment efforts was another important factor in the creation of an all-white fire department. This failure to act was, as the cases cited above indicate, a failure by past Civil Service administrations to meet their constitutionally imposed obligation to take effective measures to eliminate the effects of racial discrimination.

The appellant city officials suggest that they have done no wrong in that they were appointed in 1969 and cannot be held

responsible for the existence of an all-white Fire Department. (Brief, p. 13) But the relief granted in this case is premised on the failure of the present Commissioners to take appropriate affirmative action to remedy the effects of past discrimination. (A. 381, Conclusions of Law, ¶3) (They are sued in their individual and official capacities, for the Commission itself is not a suable entity under Minnesota Law. See *State ex rel. Ryan v. Civil Service Commission,* 278 Minn. 296, 154 N.W. 2d 192, 194 (1967).) As the cases cited above indicate, once it is established that discriminatory practices were followed, it is incumbent upon the present employer or administrator to take the action necessary to remedy those practices.

g. The durational residency requirement of the Veterans Preference Act. The evidence also shows that the five-year durational residency requirement incorporated in the definition of "veteran" in Minnesota's Veterans Preference Act, M.S.A. §197.45, Subd. (1), while neutral on its face, had the effect of eliminating a higher proportion of potential minority applicants.

h. Reputation. None of the preceding discriminatory hiring practices in itself was the sole cause of an all-white fire department. Operating together, however, they corroborate the prima facie case of discrimination based on statistics alone. They also explain why the Minneapolis Fire Department had the reputation in the minority community as an institution which did not welcome and would not hire minority applicants, as the uncontroverted testimony below established. Such a reputation is a factor which can be considered by the Courts in employment discrimination cases. See *Spangler v. Pasadena City Board of Education,* 311 F. Supp. 501, 515 (C. D. Calif. 1970).

3. Proof of intent to discriminate is not required. The city officials suggest that the finding by the District Court of past discrimination is legally and factually deficient because there is no explicit finding of intent to discriminate. The District Court's findings do not rely on any intent to discriminate in the past hiring practices. The Court specifically noted that the *effect* of these practices was discrimination, "whether by design or not." (A. 350, ¶28). It is worthy of note, however, that Judge Larson stated from the Bench, upon the completion of oral argument, that "I think I might suggest at this time that

there may have been no intentional or purposeful discrimination, *although I am not entirely satisfied on that score.*" (Tr. 455) In any case, to the extent that the city officials argue the District Court must find that there is evidence of a specific intent to discriminate in order to conclude that past hiring practices have been discriminatory, their contention runs contrary to established law.

The District Court concluded that the past hiring practices involved discrimination in hiring in violation of 42 U.S.C. §§1981 and 1983 and the Fourteenth Amendment. The Supreme Court has explicitly held that there is no need to prove specific intent to deprive a person of a federal right under section 1983. *Monroe v. Pape, supra,* 365 U.S. at 187. That decision squares with other Supreme Court cases which do not require proof of intentional discrimination but rather look to the effect of the actions taken. See *Smith v. Texas,* 311 U.S. 128, 132 (1940). As Justice Clark stated in *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 725 (1961), "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." In the recent case of *Hawkins v. Town of Shaw,* 437 F. 2d 1286 (5th Cir. 1971), which is similar in many respects to the present action, Judge Tuttle noted that there was no direct evidence of bad faith or evil motive, but held that actual intent or motive need not be directly proved. His conclusion parallels the conclusion stated by the District Court:

> Having determined that no compelling state interests can possible justify the discriminatory *results* of Shaw's administration of municipal services, we conclude that a violation of equal protection has occurred.
>
> 437 F. 2d at 1292 (emphasis by the Court)

The present action demonstrates "the arbitrary quality of thoughtlessness [which] can be as disasterous and unfair to private rights and the public interest as the perversity of a wilful scheme." *Hobson v. Hansen,* 269 F. Supp. 401, 497 (D.D.C. 1971), aff'd sub nom. *Smuck v. Hobson,* 408 F. 2d 175 (D.C. Cir. 1969). Adopting Judge Wright's viewpoint in *Hobson*, the Second Circuit has emphasized that equal protection of the laws "means more than the absence of governmental action designed

to discriminate." *Norwalk CORE v. Norwalk Development Agency,* 395 F. 2d 920, 931 (2nd Cir. 1968).

Although there is, to our knowledge, no explicit statement by the Supreme Court with respect to actions arising under section 1981, that section, like section 1983, incorporates no requirement of wilfulness or intent. Considering that fact, section 1981, like section 1983, should not be read to incorporate any requirement of specific intent. See *Monroe v. Pape, supra,* 365 U.S. at 187. Such an interpretation would be consistent with Chief Justice Burger's interpretation of Title VII of the Civil Rights Act of 1964 in his opinion for the Court in *Griggs:*

> . . .[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.
>
> 91 S. Ct. at 854

B. The Minority Preference Ordered by the District Court Was a Proper Exercise of that Court's Powers to Frame Appropriate Equitable Relief.

1. The District Court had the duty to exercise its broad equitable power in order to remedy past discrimination. After making a finding of past discrimination, the District Court had "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). In granting equitable relief, the federal district courts have vast power to shape an effective remedy. This power was emphasized in the recent school busing cases. In his opinion for the Court, the Chief Justice stated as follows:

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> *Swann v. Charlotte-Mecklenburg Board of Education,* 91 S. Ct. 1267, 1276 (1971)

This Court has recognized the necessity of granting affirmative injunctive relief in discrimination cases. See *Haney* v. *County Board of Education*, 429 F. 2d 364, 368-69 (8th Cir. 1970). See also *United States* v. *West Peachtree Tenth Corp.*, 437 F. 2d 221, 228 (5th Cir. 1971). This Court has also acknowledged that a District Court Judge has a wide range of discretion in granting or denying injunctive relief and in framing the terms of the injunction:

> Where all relevant circumstances have properly been evaluated, the action of the trial Court, whether granting or denying an injunction, ordinarily will be sustained.

Hodgson v. *American Can Co.*, 000 F. 2d 000, 3 CCH Employ. Prac. Dec. ¶8171, at 6533 (8th Cir. Apr. 7, 1971).

We submit that the District Court did consider all the relevant circumstances and has framed relief in accord with Louisi*ana v. United States, supra.* The Court initially made extensive findings to the effect that there had been discrimination in the past. The Court recognized that some efforts had been made in the past year or two to remedy discriminatory practices. But the Court concluded, based on statistical studies and the testimony of Mrs. White, that no more than one or two minority fire fighters would be hired. (A. 377-78, ¶¶136-139) In this context, the Court found as a fact that the addition of such a small number of minority persons would not dispell the continuing effects of years of discriminatory practices. (A. 379, ¶140) It was the finding of the trial court, based upon the entire record, including the testimony of the leaders of the minority community in Minneapolis, that "what is needed now to correct the effects of the past twenty-five years is the immediate certification of at least twenty minority fire fighters." (A. 379, ¶ 140)

The Court's order promises to provide effective and timely relief to dispell the continuing effects of past discrimination. Indeed it must, for such relief is required by *Louisiana v. United States, supra.* The history of almost two decades of school desegregation cases shows why relief which is effective at once must be given in racial discrimination cases. For years, the

Courts and the school districts proceeded at "all deliberate speed" in accordance with *Brown II,* 349 U.S. 294 (1955). Finally, the lower federal courts and the Supreme Court in cases such as *Green v. County School Board,* 391 U.S. 430 (1967); *United States v. Montgomery County Board of Education,* 395 U.S. 225 (1969); and *Jackson v. Marvell School District No. 22, supra,* 416 F. 2d 380, declared the demise of the all-deliberate-speed doctrine and mandated affirmative steps effectively to end segregation. The change is epitomized by Judge Wisdom's statement that *"the only school desegregation plan that meets constitutional standards is one that works." United States v. Jefferson County Board of Education,* 372 F. 2d 836, 847 (5th Cir. 1966) *(Jefferson I)* (emphasis by the Court).

The plans undertaken by the city officials were simply not going to work effectively to dispell the effects of twenty-five years of discriminatory practices. Minneapolis would be left with an all-white or practically all-white fire department for the next two years and beyond. At such a deliberate pace, it would be years before the "anti-minority" and "all-white" image of the Minneapolis Fire Department would be eliminated. The District Court's order eschews proceeding with all deliberate speed. The lesson of the school cases has been learned.

2. The District Court properly established the minority preference on the authority of 42 U.S.C. §1981.

The District Court concluded that the past and present actions by the Commission were violations of 42 U.S.C. §§1981 and 1983 and the Equal Protection Clause, but proceeded to grant the minority preference solely on the basis of section 1981. That section was originally enacted as section 1 of the Civil Rights Act of 1866, Act of Apr. 9, 1866, c. 31, §1, 14 Stat. 27, pursuant to the recently ratified Thirteenth Amendment. *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 437-38 (1968). Because, at least in part, of doubts as to the Congressional power to enact this provision under the Thirteenth Amendment, Congress re-enacted it in 1870, after the passage of the Fourteenth Amendment. Act of May 31, 1870, c. 114, §18, 16 Stat. 144. See Note, *Racial Discrimination in Employment Under the Civil Rights Act of 1866,* 36 U. Chi. L. Rev. 615, 617-21 (1969). For purposes of this case, in which there is no lack

of state action, it is certainly permissible to view section 1981 as derived from both the 1866 and the 1870 Acts.

Section 1981 is still in full force and effect. The Supreme Court recognized that the language in that section relating to the right "to make and enforce contracts" prohibits racial discrimination in employment in *Jones v. Alfred H. Mayer Co.*, supra, 392 U.S. at 441 n. 78. In the past year, that section has been applied in various cases of racial discrimination in employment in the private sector. See, e.g. *Waters v. Wisconsin Steel Works of International Harvester Co.*, 427 F. 2d 476 (7th Cir. 1970), cert. denied sub nom. *United Order of American Bricklayers, Local 21 v. Waters*, 91 S. Ct. 137 (1970) and *International Harvester Co. v. Waters*, 91 S. Ct. 137 (1970); *Sanders v. Dobbs House, Inc.*, 431 F. 2d 1097 (5th Cir. 1970), cert. denied, 91 S. Ct. 935 (1971); *Young v. International Tel. & Tel.*, 438 F. 2d 757 (3rd Cir. 1971). Section 1981 applies in the public sector as well, as is obvious from the discussion in these cases and from *Jones v. Alfred H. Mayer Co., supra,* in which the crucial question was whether section 1982 applies to private action as well as state action. See also, *Cook v. Advertiser Co.*, 323 F. Supp. 1212 (M.D. Ala. 1971).

For the past 90 years the Supreme Court has recognized that the Congress intended section 1981 to have as broad a scope as the Fourteenth Amendment where state action is involved. In *Strauder v. West Virginia*, 100 U.S. 303 (1880), the Court stated with respect to Rev. Stat. 1977 (now section 1981) that "this Act puts in the form of a statute what had been substantially ordained by the Constitutional amendment." 100 U.S. at 312. In context the Court is referring to the Fourteenth Amendment. On the same day, in *Virginia v. Rives*, 100 U.S. 313, 317-18 (1880), the Court treated the Civil Rights Act and the Fourteenth Amendment as coextensive in substance. The close relationship between the Civil Rights Act of 1866 and the Fourteenth Amendment has been consistently emphasized by the Court. See *Yick Wo v. Hopkins, supra,* 118 U.S. at 368-69; *Buchanan v. Warley*, 245 U.S. 60, 77-79 (1917). In *Hurd v. Hodge*, 334 U.S. 24 (1948), the Court noted that "Indeed, as the legislative debates reveal, one of the primary purposes of many members in supporting the adoption of the Fourteenth

Amendment was to incorporate the guarantees of the Civil Rights Act of 1866 in the organic law of the land. " 334 U.S. at 32. See also, *McLaughlin v. Florida, supra,* 379 U.S. 184 at 192; *Jones v. Alfred H. Mayer Co., supra,* 392 U.S. at 422-36. In short, section 1981 incorporates in statutory form the standards of the Thirteenth and Fourteenth Amendments. Racial discrimination cases decided on a constitutional basis are therefore applicable in determining the scope of section 1981 as well.

Section 1981 does not specify the judicial relief available in an action alleging violation of its provisions. But this fact does not limit this Court in framing appropriate relief. Its counterpart, section 1982, is likewise framed in declaratory terms, but the Supreme Court held that a federal court was not thereby prevented "from fashioning an effective equitable remedy," *Jones v. Alfred H. Mayer Co., supra,* 392 U.S. at 414 n. 13, or even from awarding damages, *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229, 239 (1969). See also *Culpepper v. Reynolds Metal Co.,* 421 F. 2d 888 (5th Cir. 1970); *Spotted Eagle v. Blackfeet Tribe,* 301 F. Supp. 85, 89 (D. Mont. 1969). Insofar as the District Court's Decree can properly be characterized as an injunction against the enforcement of Minnesota's Veteran's Preference Act, no three-judge court is required when such an injunction is issued on the authority of section 1981. *Swift & Co. v. Wickham,* 382 U.S. 111 (1965).

C. The Minority Preference Does Not Violate Applicable Constitutional Standards...

The District Court found that the minority preference was a necessary and essential step to implementation of equal employment opportunity in the Minneapolis Fire Department now and in the future. The evidentiary support for that conclusion has been detailed already. Again, we must emphasize that the *factual* finding which serves as the basis for the Court's order was that "what is needed now to correct the effects of the past twenty-five years is the immediate certification of at least twenty minority fire fighters." (A. 379, ¶140) The legal question posed is whether the classification by race incorporated in that order is Constitutionally permissible in circumstances in which such action has been found necessary for effective implementation of equal employment opportunity. We argue that estab-

lished law requires an affirmative answer to this question.

Initially, we assume the obvious—that the District Court could not order the city officials to take any action which would itself be unconstitutional. We also make the obvious assumption that any conflict between the Court's order and any state or local law must necessarily give way to measures which are essential to implementation of federal law. As the Supreme Court stated in *North Carolina State Board of Education v. Swann,* 91 S. Ct. 1284, 1286 (1971), "state policy must give way when it operates to hinder vindication of federal constitutional guarantees" Cf. *Haney v. County Board of Education, supra,* 429 F. 2d at 368-69. Commissioner Glover aptly summarized this fact in his comment that "there's also another principle I believe in that is greater than [the principles of] Civil Service and that is the equality of mankind." (A. 134)

As has already been stated, state classifications by race are suspect classifications unless they are necessary to serve some compelling state interest. See, e.g., *Loving v. Virginia, supra,* 388 U.S. at 9, 11. But the Supreme Court has not ruled that *any* classification by race is ipso facto unconstitutional. The rubric referred to above on its face would permit classification by race in a situation where that classification *was* necessary to serve a compelling interest. In fact, the Supreme Court upheld a racial classification in *Korematsu v. United States,* 323 U.S. 214 (1944).

In this action, the racial classification is one which the District Court found was needed *now* in order to dispell the continuing effects of past racial discrimination. Although the District Court found that certain remedial steps had been taken by the city officials and although the Court ordered other remedial steps to be taken, that Court nevertheless determined that no significant change would occur in implementing the federal mandate of equal employment opportunity unless twenty minority fire fighters were hired. The overriding importance of actually implementing the fundamental law of this land provides the necessary justification for this classification by race.

The District Court's order is remedial. It is not premised on achieving racial balance, so there is no issue regarding the le-

Page 43 and 44 are removed from original document

to admit specified Blacks as mechanic members. The Court also ordered the union to admit as improver members (an entry level position) a total of 55 whites and 55 Blacks. The Court's order did not limit the relief to Blacks who had worked or attempted to work with the union, although it did give priority to them. The Court also ordered the union's work referral register to "be divided by race, and all referrals shall be made in order of registration on a one-for-one basis, one white mechanic and one Negro mechanic and one white improver and one Negro improver, except to the extent that persons in one race or the other are not available in the city involved." 62 L.C. ¶9411, at p. 6615. This order in *Vogler* is of particular importance because it is similar to the preliminary injunction issued earlier, see *Vogler v. McCarty, Inc.*, 294 F. Supp. 368 (E. D. La. 1967), which was approved in all respects by the Fifth Circuit in *Local 53, Asbestos Workers v. Vogler*, 407 F. 2d 1047 (5th Cir. 1969). The Fifth Circuit specifically approved the alternative referral system, on the basis of the authorization in 42 U.S.C. §2000e-5(g) "to order such affirmative action as may be appropriate." 407 F. 2d at 1055.

These latter cases arise under Title VII of the Civil Rights Act of 1964, but they are not distinguishable for that reason. The substantive finding of discrimination arises under Title VII in those cases and section 1981 in the present action, but the relief granted is a matter of the scope of the equitable powers of the federal courts. In terms of framing relief, the Title VII cases are directly applicable to this case. Furthermore, the federal courts are bound by the Due Process Clause of the Fifth Amendment to avoid impermissible classification by race just as state officials are. Cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Shelly v. Kraemer*, 334 U.S. 1 (1948). Thus *Vogler* and *Central Motor Lines* are authority for the proposition that remedial relief which incorporates a classification by race is constitutionally permissible when it is the relief necessary to implement racial equality in employment.

In short, the constitutional question is answered in the same terms used to analyze the necessity of granting effective equitable relief in the preceding subsection of this brief. Absent the order granted by the District Court, it is probable that the

Minneapolis Fire Department will have only one or two minority employees out of a total of over 550. It will still be a fire department which reflects years of discriminatory practices. Refusal by the District Court and by this Court to implement the minority preference would be inconsistent with the dictates of the Supreme Court in *Louisiana v. United States, supra,* which require that equitable relief be fashioned to eliminate so far as possible the present effects of past discrimination. 380 U.S. at 154. Failure of the District Court and of this Court to order the necessary relief to eliminate these continuing effects of past discrimination would, in effect, constitute federal sanctioning of the continuing denial of federal rights. See *Jenkins v. United Gas Corp.,* 400 F. 2d 28, 34 (5th Cir. 1968); *Potts v. Flax,* 313 F. 2d 284, 289 (5th Cir. 1963).

III.

OTHER EQUITABLE RELIEF GRANTED BY THE DISTRICT COURT INCORPORATED APPROPRIATE AFFIRMATIVE RELIEF BASED UPON A FINDING OF PAST RACIAL DISCRIMINATION.

In addition to ordering the minority preference, the District Court issued other injunctive relief relating to fire fighter hiring practices and procedures. Some of this relief, such as requiring an affirmative recruitment program and validation of the written examination, simply required the city officials to do what they state they had already planned to do or to continue with efforts already initiated. (See Appellants' Brief, pp. 25-26). Indeed, the affirmative recruitment program is virtually standard relief in employment discrimination cases, see e.g. *Sheet Metal Workers, supra,* 416 F. 2d at 139-40; *United States v. Electrical Workers (IBEW) Local 38,* 428 F. 2d 144, 151 (6th Cir. 1970), cert. denied, 91 S. Ct. 245 (1970); and after *Griggs, supra,* the need for validation cannot seriously be disputed. Deletion of any reference to "arrests" comports not only with the stated intention of the city officials but also with the *Litton Systems* case, *supra,* 316 F. Supp. 401. *Parham, supra,*

433 F. 2d at 429; *Electrical Workers, Local 38, supra,* 428 F. 2d at 151; and *Sheet Metal Workers, supra,* 416 F. 2d at 140, clearly support the Court's decision to maintain jurisdiction. The change ordered in the education requirement likewise finds ample support in *Griggs, supra,* especially in light of the inability of the city officials to demonstrate that this requirement had any relation to performance as a fire fighter.

The changes ordered in the minimum and maximum ages for entry as a fire fighter likewise have ample support in the record. The testimony summarized above indicates that lowering the entry level age requirement to 18 would be of considerable assistance in an affirmative recruitment program designed to obtain minority fire fighters. The city officials advanced no facts to support a contention that 18 year olds could not perform capably as fire fighters. In fact, the testimony indicates no firmly stated opposition to such a change. The Court's increase in the maximum age until twenty minority applicants are hired obviously is a compensatory action designed to reopen the fire fighter position to minorities subjected in the past to discriminatory practices. No contention can be made that this action is unreasonable, for the present examination plan permits veterans to apply up to age 35 (Ex. 1), in accorddance with M.S.A. §418.20 (Supp. 1971).

The changes ordered in the consideration of conviction of felonies and misdemeanors demand more detailed analysis. These changes are based upon the District Court's findings and conclusions that this facially neutral requirement has a discriminatory effect and thus must be shown by the city officials to be necessary to serve some compelling state interest. Apart from references to "light fingered people" (A. 177[Hall]), to "a habitual crook" (A. 122[Glover]), and to "habitual criminal" (A. 324[Gallagher]), the record is devoid of evidence of any attempt at reasoned analysis by the city officials as to what types of convictions can reasonably be said to bar a man from effective service as a fire fighter.

The District Court's order does not prohibit the Civil Service Commission from considering recent felony convictions and more recent misdemeanor convictions in hiring fire fighters. It simply requires the Commission to give an applicant a chance

to show that he has rehabilitated himself and to come to a reasoned conclusion whether that person's record provides a valid basis for excluding him. The testimony of Commissioner Glover and Commissioner Gallagher is not at odds with such approach.

We cannot cite to this Court a case which is directly on point regarding this issue. Cases which approve the denial of employment on the grounds of a conviction record such as *Deveau v. Braistad,* 363 U.S. 144 (1960); *Hawker v. New York,* 170 U.S. 189 (1898); and *Upshaw v. McNamara,* 435 F. 2d 1188 (1st Cir. 1970) are not applicable here because they do not involve a situation in which the employment requirement had been shown to have a racially discriminatory effect and thus demand strict scrutiny in judicial review. The analysis required here is the type of analysis made in *Bruns v. Pomerleau,* 319 F. Supp. 58 (D. Md. 1970) in which employment criteria which impinged on the exercise of the right of association were subjected to the compelling state interest test and found lacking. See also *McConnell v. Anderson,* 316 F. Supp. 809 (D. Minn. 1970).

The District Court's order is consistent with Minnesota policy regarding restoration of civil rights. M.S.A. § 609.165. See also Advisory Committee Comments following M.S.A. § 609.165. That order is likewise consistent with the expression of concern for rehabilitation of convicted persons currently a matter of discussion by high ranking members of the judiciary and the bar throughout the nation. It is indeed ironic that state and local governments will spend millions of dollars to lock persons up and then place arbitrary roadblocks in their way when they attempt to rejoin society.

CONCLUSION

The District Court's order should be affirmed in all respects.

Respectfully submitted,

MARINO, BECKER & GRANQUIST

By Luther A. Granquist and
Bernard Becker
Legal Aid Society, Inc.
501 Park Avenue
Minneapolis, Minnesota 55415
(612) 332-8984

Attorneys for Appellees Gerald Carter, et. al.

On the Brief:

Kirk A. Gustafson

ADDENDUM

On June 3, 1971, after the appellees Brief had been sent to the printer, attorneys for the plaintiffs-appellees received a manuscript draft of the Brief to be submitted by the Amici Curiae. Since that Brief does not appear even to purport to analyze in depth the legal and factual issues properly before this Court, we do not intend to respond to it in detail. The appellees' case is set forth in the body of this memorandum, and we rest with the analysis made here.

The Amicus Brief is replete with suggestions that the District Court's findings were unfounded. But no attempt is made to discuss the evidence presented to the Court. The repeated and improper use of the term "sic" in quotations from the Court's findings may be an effective device in discussion of this case in some other forum, but it is no substitute for reasoned analysis of the evidence and the law in a Brief submitted to a federal appellate court.

Two of the suggestions made in the Brief of the Amicus Curiae demand at least a cursory response. Strong exception is taken therein to the District Court's order revising the conviction record requirement. The spectre of a thieving fireman is raised, but without consideration of the fact that the Decree precludes consideration of convictions only in circumstances where a convicted felon has been out of jail and going straight for a five year period and a convicted misdemeanor for two years. In other respects the Court's Decree simply requires a finding by the Commission that it reasonably can be inferred that the applicant cannot adequately fulfill fire fighter duties. (A. 388). How this order conceivably can be found actually detrimental to the interests of sleeping firemen escapes us.

Secondly, the amici curiae brief refers to the "fact" that a fire fighter needs a high school education to perform sophisticated and complex duties. If that were so, it would seem that evidence could have been introduced to establish that fact. But the record made below, as is discussed in detail above, provided no evidence to show that there was any reasoned or factual basis to the education requirement.