MICHAEL MARTINIEZ, et al., Plaintiffs-Appellees, vs. CITY OF ST. LOUIS, Defendant-Appellant.

APPEAL NO. 06-3554

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

2006 U.S. 8th Cir. Briefs 474429; 2008 U.S. 8th Cir. Briefs LEXIS 544

January 15, 2008

On Appeal from Orders and Judgment of the United States District Court for the Eastern District of Missouri. The Honorable John F. Nangle.

Initial Brief: Appellee-Respondent

COUNSEL: [*1] UTHOFF, GRAEBER, BOBINETTE & BLANKE, Charles W. Bobinette, #9806, Attorneys for Plaintiff-Appellee, Eric Deeken, St. Louis, Missouri.

TITLE: BRIEF OF APPELLEE ERIC DEEKEN

TEXT: SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiff/Appellee, Eric Deeken ("Deeken"), brought this civil rights action against the City of St. Louis and other defendants ("City"), claiming that he was discriminated against on the basis of his race when he was not hired as a probationary fire private, in violation of Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.* ("Title VII") and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and *42 U.S.C. §§ 1981* and *2*. The City defended its decision not to hire Deeken based upon a 1976 consent decree requiring the City to engage in race-based hiring of probationary fire privates to remedy past discrimination until racial parity was achieved.

On November 5, 2003, the district court dissolved the consent decree because racial parity was achieved under its terms. On February 24, 2005, the court ruled on the consent decree as written was [*2] unconstitutional, finding that the St. Louis Standard Metropolitan Statistical Area was the appropriate geographic area for determining whether racial parity had been achieved under the consent decree at the time that this case arose in 1998. Additionally, the district court found that the City was guilty of race discrimination and awarded Deeken legal and equitable relief.

The orders and judgment of the district court should be affirmed on appeal for the reasons set forth in the court's accompanying memoranda and because the summary judgment record established that the racial parity under the consent decree was reached in the mid 1990's when the estimated percentages of blacks in the St. Louis civilian labor force were virtually the same as the percentage of blacks in the rank of fire private and the consent decree, as written and as applied to Deeken, was not narrowly tailored to survive strict scrutiny under the Fourteenth Amendment.

Oral argument is necessary for a complete exposition of the issues and facts and to permit the Court an opportunity to question counsel. Because this case is fact intensive and procedurally complicated, Deeken requests 20 minutes for oral argument. [*3]

STATEMENT OF FACTS

I. The Consent Decree.

Approximately a year after the United States filed its complaint alleging that the City had engaged in a pattern and practice of discrimination in the hiring of blacks for the position of probationary fire private, the City entered into a partial consent decree. ***U.S. v. City of St. Louis, et al.,*** *410 F.Supp. 948, 952, 960-962 (E.D. Mo. 1976)* [App. 89; J.S. P5]. The parties stipulated the consent decree did not constitute findings on the merits of the case and was not an admission by the City that it violated Title VII or the Fourteenth Amendment. ***Id.*** *at 960.*

On April 19, 1976, the district court adopted the terms of the consent decree. ***Id.*** On June 28, 1976, the district court found that the entry level examination used by the City to hire probationary fire privates had a disparate impact on black candidates and that the City failed to show that the examination was related to job performance. ***U.S. v. City of St. Louis, et al.,*** *418 F.Supp. 383 (E.D. Mo. 1976).* To remedy the effects of this employment discrimination, the court entered a *nunc pro* [*4] *tunc* order, adopting the terms of the consent decree. ***Id.*** *at 384* [App. 90; J.S. P6].

The long-range goal of the consent decree required the City to recruit and hire blacks in sufficient numbers to achieve racial composition of the ranks of firefighters within the City of St. Louis Fire Department ("Fire Department") that was more representative of the racial and ethnic composition of the City of St. Louis as a whole [App. 91; J.S. P12]. The racial composition of the fire private rank was to be used in measuring whether the City had achieved racial composition that approximated the racial composition of the City of St. Louis. ***U.S. v. City of St. Louis, et al.,*** *410 F.Supp. at 959-960* [Id. J.S. P15]. The consent decree "required that the City attempt to achieve a 50% hiring rate for blacks for firefighter positions over the [first] five years." ***Firefighters Institute for Racial Equality v. City of St. Louis,*** *588 F.2d 235, 237 (8th Cir. 1978).* The long-range hiring goal of the consent decree did not expire automatically, but rather required action by the parties and the district court. The consent decree stated [*5] that, "upon [a] showing that the goals of this decree in providing equal employment opportunities have been fully achieved, the decree may be dissolved" [Id. J.S. P17].

II. Hiring Demographics.

Prior to the consent decree being adopted, applicants for the entry level position of probationary fire private were required to be residents of the City on the date of their application. ***U.S. v. City of St. Louis,*** *et al., 410 F.Supp. at 951* [Finding P7]. Thereafter, under the terms of the consent decree, the City was not prohibited from hiring applicants who lived outside the City of St. Louis [consent decree P9; ***Id.*** *410 F.Supp. at 961].*

Between 1998 and November 2003, the City of St. Louis successfully recruited applicants living outside the City [McCurley Depo., p.p. 7:9-10:6]. The placing of newspaper classified ads has proven to be effective in recruiting applicants [Id., p. 22:12-16]. The City received a big response from ads placed in the St. Louis Post Dispatch and the St. Louis American to a lesser degree. The St. Louis Post Dispatch is distributed throughout the entire SMSA [Id., p. 15:8-20]. In 2003, the City received [*6] 1,056 applicants for the position of fire private. Of those applicants, 581 reported residing in the City (55%) [Ex. (Depo. Ex. 2); p.p. 12:17-13:4]. In 2001, the City of St. Louis received 931 applications for the position of probationary fire private. Of those applicants, 607 reported residing in the City (65%) [Ex. 4 (Depo. Ex. 2); Ex. 5 (Depo. Ex. 1); Id., p.p. 11:16-13:4). Further, based upon available data, in 1998, approximately 66% of the applicants for the position of probationary fire private reported residing in the City [Ex. 6 (Depo. Ex. 4); p.p. 29:10-30:23]. For each of the last three (3) testing periods for the position of probationary fire private, over one-third (1/3) of the applicants reported living outside of the City of St. Louis with the majority of them living in St. Louis County or the larger SMSA (Doc. 130).

III. Racial Parity Under the Consent Decree.

A. Black Representation in the Civilian Labor Force for the City of St. Louis between 1990 and 2002.

William C. Niblack was the Research Manager for the Missouri Economic Research & Information Center, a division of the Missouri Department of Economic Development ("MDED") [Niblack Declaration [*7] P1, App. 99 & 119, J.S. P48, Attachment 10 (Doc. 63)]. Mr. Niblack was personally involved in the creation of the report format used in the "Labor Market Information for Affirmative Action Programs" published by MDED [Id. P2].

The reports were produced to provide information for employers to use in preparing affirmative action plans. Data was provided for various race and ethnic groups as reported by the U.S. Census Bureau [Id., P3]. Table 1 contained data for the entire population of the area covered by the report [Id., P4]. Table 2 contained annual estimates of the civilian labor force for the area covered by the report for race and ethnic groups as described in the report [Id., P5]. Each year, Table 2 was updated to incorporate new annual average labor force data for the previous year. These labor force data were produced by the MDED in cooperation with the U.S. Department of Labor, Bureau of Labor Statistics ("BLS"). The civilian labor force included all of the residents of the area, age 16 or older who are not in the military or in institutions such as correctional facilities or mental hospitals and who were either employed or unemployed. These concepts used definitions [*8] published by BLS [Id. P6]. The methodology prescribed by BLS was used to produce these data. These procedures were uniformly used by all states, for published geographic areas, so that the data were compatible for all areas in the United States [Id. P7].

The percentages shown on Table 2 were calculated from 1990 U.S. census data. The information used was the best available information since there are not alternative official data to use [Id. P9]. MDED estimated the percentage of blacks in the City's civil labor force was 41.1% in 1993 and 40.7% in 2001 [App. 99-100, J.S. P50].

At the request of the United States, Dr. Bernard Siskin produced 2 reports which, in pertinent part, analyzed the black representation in the civilian labor force for the City of St. Louis between 1990 and the reporting period ending June 2002. Dr. Siskin concluded that the MDED figures for the civilian labor force were inappropriate because they were based on 1990 population figures and did not reflect the differential population changes by race, which occurred since 1990 [App. 234]. Based upon information released by the U.S. Census made available after his original report in December 2002, Dr. [*9] Siskin issued his rebuttal report dated January 15, 2003. Dr. Siskin computed 2 revised estimates of black representation in the St. Louis civilian labor force using the additional information. Dr. Siskin estimated that the percentage of blacks in the civilian labor force for the City of St. Louis ranged between 42.16% and 41.9% as of the reporting period ending December 1990 and for the reporting period from January to June 2002 was between 46.06% and 44.06% [App. 216 & 217, Tables 1A and 1B, respectively].

B. Black Representation in the Civilian Labor Force for the Combined Area of the City of St. Louis and St. Louis County and SMSA between 1990 and 2000.

Using the 1990 Census Data, the percentages of blacks in the civilian labor force was 20.8% for St. Louis City and County combined and 14.18% on the SMSA. Using the Census 2000 EEO Data Tables, "Purportion of Blacks in the Civilian Labor Force" was 23.7% for St. Louis City and County combined and 15.4% for the SMSA [App. 726].

C. Comparison of the Racial Composition of the Rank of Fire Private and the Civilian Labor Force for the City, the City and County Combined and SMSA.

As of December 1993, blacks comprised 41.6% [*10] in the rank of fire private [App. 97, J.S. P37(e)]. Using the 1990 census data, the estimated percentage of blacks in the City of St. Louis civilian labor force was 41.1% in 1993 [App. 99, J.S. P50]. On the other hand, Dr. Siskin estimated that the estimated percentage of blacks in the City labor force, was between 42.30% (Table 1B) and 42.90% (Table 1A) for the same period [App. 216-217].

IV. Denial of Deeken's Application for Fire Private.

In late October 1998, the City notified Deeken he ranked No. 1 of all applicants and was placed in the "open" eligible list for appointment. He was not placed on the promotional list because he was not a City employee [App. 375].

Between March 1, 1999 and March 21, 2000, the City hired 118 probationary fire privates. On March 1, 1999, the City hired 40 probationary fire privates from the promotional list. On September 13, 1999, the City began appointing black candidates from the open list with lower composite scores than Deeken [App. 375]. But for one-for-one hiring of blacks, under the consent decree, the City would have exhausted the promotional list and Deeken would have been hired on March 13, 2000 (Doc. 130).

A. Deeken's [*11] Lawsuit.

Deeken filed suit against the City on November 8, 2001 alleging that the City discriminated against him on the basis of his race by denying him employment as a probationary fire private and hiring less qualified and lower ranking black candidates. Deeken asserted claims under Title VII, *42 U.S.C. §§ 1981* and *1983* (for alleged violations of the Fourteenth Amendment) [App. 90, J.S. P8].

The City answered that its actions were taken pursuant to the consent decree. Thereafter, on June 3, 2002, Deeken filed his amended complaint [App. 1-23], seeking to dissolve the consent decree [Id., P9].

On February 14, 2003, based upon the uncontroverted facts, Deeken moved to dissolve the consent decree and declare it void because: (1) the goal of the consent decree was achieved on or before December 31, 1993; and (2) the consent decree was not narrowly tailored to satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment [App. 356-358] (Doc. 72).

On November 5, 2003, the district court dissolved the consent decree, finding that the long-term goal of the Decree had been achieved and that the decree was no longer constitutional [*12] (Doc. 118). The court, however, declined to declare the consent decree void *ab initio* and denied Deeken's motion to retroactively dissolve the consent decree because there was a material issue of fact as to whether racial parity was achieved prior to 2002 [App. 544-545].

On May 10, 2004, Deeken filed his second motion for partial summary judgment, alleging, in pertinent part, that: (1) since the entry of the consent decree, the City's Charter was amended so that applicants for the position of probationary fire private were no longer required to be residents of the city at the time of application; (2) in 1998, the City successfully recruited applicants living in and beyond the SMSA; (3) on or before December 1997, the long-term goal of the consent decree was achieved when the percentage of blacks in the fire private rank exceeded the percentage of blacks in the SMSA civilian labor force; and (4) the consent decree, as written and as applied to Deeken, violated the Equal Protection Clause of the Fourteenth Amendment because it was not narrowly tailored to meet its remedial purpose in that, the consent decree provided that the City of St. Louis civilian labor force, rather than [*13] the larger metropolitan area, was the appropriate benchmark for determining whether the City had achieved the long-range goal of the consent decree [App. 553-555] (Doc. 130).

On October 24, 2005, the district court granted Deeken's summary judgment on the issue of the City's liability, finding that the geographic area encompassing the SMSA was the most appropriate geographical area for determining the relevant labor market and held that the City should have moved to amend or dissolve the consent decree upon noticing the changes in the way it recruited and accepted applications for the position of probationary fire private from those living outside the city. Consequently, the court found that racial parity was reached in 1998 [App. 783-803] (Doc. 178).

On April 20, 2005, the court ordered that Deeken be certified on the City's next list of probationary fire privates [App. 804] (Doc. 185). Per the court's order, Deeken was appointed a probationary fire private on August 22, 2005 [J.S. P66] (Doc. 66, J.S. P67, filed 3/10/06, case: 4:01-cv-01770).

The district court set for trial the question of the amount of damages that should be awarded to Deeken for the delay

in his appointment [*14] as a probationary fire private. On March 16, 2006, the jury returned a verdict in favor of Deeken, awarding him a total of $ 157,989.00 in lost wages, lost benefits to the date of verdict and $ 1,000.00 in other damages [App. 843] (Doc. 254). On March 22, 2006, the court entered judgment on the verdict [App. 844-845] (Doc. 255).

Deeken moved for a new trial on his damage claim and sought post-trial equitable relief (Docs. 261 & 263). On August 4, 2006, the court denied his motion for new trial, but granted, in part, his motion for equitable relief (Doc. 276). On September 5, 2007, the court amended its order, granting Deeken additional equitable relief. In pertinent part, the court awarded Deeken retroactive seniority for the purposes of determining his wages and retirement benefits, from the date he would have been hired (3/13/00) but for the discrimination. Finally, the district court stayed Deeken's motion for attorney's fees and costs [App. 905-914] (Doc. 317).

B. City's Appeal.

On July 1, 2006, the City filed its notice of appeal from the judgment entered by the district court on August 4, 2006 [App. 873]. For the reasons argued below, the orders and judgment of [*15] the district court should be affirmed.

SUMMARY OF THE ARGUMENT

The City owed an affirmative duty to non-minority applicants to move to dissolve the consent decree when it became reasonably apparent that its goal was met. The City intentionally violated the rights of non-minority applicants, including Deeken, when it continued to follow the terms of the consent decree after it knew or should have known that its goal had been met.

Viewed in a light most favorable to the City, the summary judgment record supports the district court's finding that the long-term goal of the consent decree was achieved in 1998 and that the City's decision to deny Deeken's appointment to the position of probationary fire private in March 2000 violated his rights under Title VII and the Equal Protection Clause of the Fourteenth Amendment. Consequently, the court properly ruled that Deeken was entitled to compensatory damages and equitable relief.

In addition to the reasons given by the district court in its memoranda, the judgment of the district court may be affirmed because the summary judgment record established racial parity was met in the mid 1990's when the percentage of blacks employed [*16] in the rank of fire private was virtually the same as the percentage of blacks in the St. Louis civilian labor force and because the consent decree, as written and as applied to Deeken, was not narrowly tailored to satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

I. STANDARD OF REVIEW.

Summary judgment is appropriate where there are no genuine issue of material fact on all or any part of a claim and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c).* One of the purposes of summary judgment is to dispose of factually unsupported claims or defenses. ***Celotex Corp. v. Catrett,*** *477 U.S. 317, 323 (1986).*

The threshold question presented in this case is whether the City may lawfully defend its decision to discriminate against Deeken under the consent decree. The interpretation of a consent decree is a question of law to be decided by the courts. ***Brotherhood of Midwest Guardians, Inc. v. City of Omaha,*** *9 F.3d 677, 678 (8th Cir. 1993).* The validity of a consent decree's affirmative action plan is also a question of law, which the Court reviews *de novo.* [*17] ***Donaghy v. City of Omaha,*** *933 F.2d 1448, 1458 (8th Cir. 1991).*

On appeal, the Court may affirm the judgment on any ground supported by the record regardless of whether it was argued below or considered by the district court. ***O'Hagan v. U.S.,*** *86 F.3d 776, 779, fn 2 (8th Cir. 1996).*

II. THE DISTRICT COURT PROPERLY FOUND THAT THE CITY HAD AN AFFIRMATIVE DUTY TO SEEK TO MODIFY OR DISSOLVE THE CONSENT DECREE WHEN ITS REMEDIAL GOAL WAS MET.

The district court had the power to interpret vague and confusing language to implement the purpose of a consent decree. See ***Pasadena City Bd. of Ed. v. Spangler,*** *427 U.S. 424, 438 (1976).* For purposes of enforcement, consent decrees are to be construed as contracts. Reliance upon certain aids to construction are, therefore, proper as in any other contract dispute. ***U.S. v. ITT Continental Baking Co.,*** *420 U.S. 223, 238 (1975).*

The parties to a contract are conclusively presumed to know the law as it existed at the time and place of the making of the contract. Such laws become a part of the contract as if they were expressly referred to or incorporated in [*18] its terms. ***Marx v. U.S.,*** *86 F.2d 245, 248 (8th Cir. 1936);* ***Sharp v. Interstate Motor Freight System,*** *442 S.W.2d 939, 945 (Mo.banc. 1969).* Affirmative action consent decrees are not favored unless they are "temporary and will terminate when the manifest [racial] imbalances have been eliminated." ***Brotherhood of Midwest Guardians, Inc. v. City of Omaha,*** *9 F.3d 677, 680 (8th Cir. 1993),* citing ***Paradise v. Prescott,*** *767 F.2d 1514, 1531 (11th Cir. 1985),* quoting ***U.S. v. City of Alexandria,*** *614 F.2d 1358, 1365 (5th Cir. 1980);* ***U.S. v. Paradise,*** *480 U.S. 149, 171 (1987).* This principal is a useful constructional aid in this case.

The City contends that because it was not obligated to move to dissolve the consent decree, it should not be held liable to Deeken for following the terms of the consent decree while it was in effect. Essentially, the City argues that it had a right to discriminate against Deeken on the basis of his race by hiring lower ranking black applicants for the position of probationary fire private even if the remedial purpose of the [*19] consent decree had been achieved at the time of the hiring decision. The City's argument overlooks its constitutional duty to treat all applicants equally regardless of their race, and not to "unnecessarily trammel the rights of non-minorities" under the guise of an affirmative action consent decree. ***Johnson v. Transportation Agency,*** *480 U.S. 616, 637 (1987).*

"It is axiomatic that if a contract is subject to two interpretations, one lawful and one unlawful, the courts will enforce the lawful interpretation. The wisdom of that ancient rule is well illustrated by this case." ***Sunray DX Oil Co. v. Vickers Refining Co.,*** *285 F.Supp. 403, 407 (Mo. W.D. 1968).* If this Court were to accept the City's interpretation that it is permitted to continue to discriminate against "innocent" non-minority applicants for the position of probationary fire private, despite the fact that the goal of the consent decree had been accomplished, it would be unconstitutional. see, ***Brotherhood of Midwest Guardians, Inc. v. City of Omaha,*** *9 F.3d 677 (8th Cir. 1993);* see also, ***Detroit Police Officers Ass'n v. Young,*** *989 F.2d 225 (6th Cir. 1993),* [*20] holding because the goal of promoting blacks to 50% of the vacant sergeant positions had been "virtually attained" and the existence of the plan for 19 years was excessive, the consent decree was no longer narrowly tailored. *Id. at 228.*

The circumstances surrounding the formation of the consent decree are also relevant in construing the decree. ***U.S. v. ITT Continental Baking Co.,*** *420 U.S. 223, 238 (1975).* Here, all of the obligations under the consent decree were placed on the City and its agents, including the burden to move to dissolve the decree. The consent decree, as written, contemplated the City would act in the public's interest and the interests of non-minority applicants by moving to dissolve the consent decree at the earliest opportunity. ***Quinn v. City of Boston,*** *325 F.3d 18 (1st Cir. 2003);* see also, Memorandum and Order, *sub judice,* 2/25/05 [App. 802-802].

The City argues the word "may," as used in the consent decree, suggests that it was not obligated to move to dissolve the decree. Under the consent decree, only the City was permitted to move to dissolve the decree. In this context, the word "may" [*21] was used to authorize the City to move to dissolve the consent decree after the passage of 5 years, as opposed to permit the City to take no action when the long term goal of the consent decree had been satisfied.

III. THE DISTRICT COURT PROPERLY DISSOLVED THE CONSENT DECREE BECAUSE RACIAL PARITY WAS ACHIEVED IN OR BEFORE 1998.

Since the entry of the consent decree, the Supreme Court has made clear that racial classification plans reviewable under the Equal Protection Clause of the Fourteenth Amendment must be strictly scrutinized. ***Adarand Constructors, Inc. v. Pena,*** *515 U.S. 200, 224-27 (1995)* (plurality opinion; ***Id.*** *at 239* (Scalia, J., concurring opinion)). ***U.S. v. Paradise,*** *480 U.S. 149 (1987)* (plurality opinion).

The first prong of the strict scrutiny analysis requires a determination of whether the state has a compelling interest. ***Wygant v. Jackson Bd. of Educ.,*** *476 U.S. 267, 274 (1986).* The government has a compelling interest in remedying proven past or present discrimination by a state act or actor. ***Id.*** *at 274.* The second prong requires a determination [*22] as to whether the affirmative action plan is tailored narrowly to accomplish its purpose. ***Id.*** *at 274.* Courts are to consider several factors in determining whether the plan is narrowly tailored including: (1) whether or not the relief is necessary and the efficacy of alternatives; (2) the flexibility and duration of the relief; (3) the relationship of the numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of third parties. ***Paradise,*** *480 U.S. at 171;* ***Setser v. Novack, Inc. Co.,*** *657 F.2d 962, 968 (8th Cir. 1981)* (en banc), (a private sector affirmative action "program is narrowly tailored if its" goals and time tables . . . [are] reasonably related to such considerations as racial imbalance of the work force, the availability of qualified applicants and the number of employment opportunities available; "[a] plan should be used no longer than reasonably necessary to eliminate a conspicuous racial imbalance." *657 F.2d at 969.* ***Id.*** citing ***United Steelworkers of America, AFL-CIO-CLC v. Weber,*** *443 U.S. 193, 208 (1979).*

A. Racial [*23] Parity Was Achieved in 1993 When the Percentages of Black Fire Privates and the Percentage of Blacks in the City Civilian Labor Force Were Virtually the Same.

The goal of the Decree was the recruitment in hiring of "blacks in sufficient numbers to as to achieve racial composition in the ranks of Firefighters within the City of St. Louis Fire Department that is more representative of the racial and ethnic composition of the City as a whole. The goal shall be achieved by racial composition of the Firefighters in the St. Louis Fire Department which is comparable to the civilian labor force for the City of St. Louis, subject to the availability of qualified applicants." ***City of St. Louis,*** *418 F.Supp. 384* [J.S. 12]. The language of the decree, "most representative" and "comparable" indicates that the objective was substantial compliance with the stated goal, not an unyielding numerical calculation. This construction of the consent decree is also compatible with the principal that affirmative action consent decrees must be temporary. ***Brotherhood of Midwest Guardians, Inc. v. City of Omaha,*** *9 F.3d 677, 680 (8th Cir. 1993).*

After nearly 2 [*24] decades, racial parity was achieved in December 1993. According to the City's records, as of December 1993, blacks comprised 41.6% of the fire private rank [J.S. P37(e)]. In comparison, according to the census data available in 1993, the estimated percentage of blacks in the St. Louis civilian labor force was 41.1% [J.S. P50]. The City, however, failed to move to dissolve the consent decree when the best available data showed the goal was met.

Almost 10 years later, the United States and the City agreed that the consent decree should be modified prospectively to eliminate the one-for-one hiring provision. In support of their position, they relied on Dr. Siskin's analysis. Dr. Siskin rejected the use of the 1990 census data for determining the racial composition of the St. Louis civilian labor force in the early 1990's through December 2000. Rather, based upon demographic changes in the racial composition of the City of St. Louis between 1990 and 2000, he performed a retrospective analysis and calculation of the percentage of blacks in the St. Louis civilian labor force. Part of his analysis is based upon the assumption that the change in demographics between 1990 and 2000 occurred [*25] in a straight line. Thus, for each bi-annual reporting period, he increased the percentage of blacks by a fixed percentage [App. 216 & 217]. There is, however, nothing in the record to support the assumption that significant demographic changes occurred between 1990 and 1993.

Even if the Court were to accept Dr. Siskin's analysis, for summary judgment purposes, his calculations demonstrate that racial parity was substantially met in December 1993. At that time, the percentage of black fire privates was 41.6% and, by Dr. Siskin's estimate, the percentage of blacks in the St. Louis civilian labor force ranged between 42.3% and 42.9% [Siskin's Rebuttal Report dated 1/03, Tables IA and IB]. In December 1993, the difference between the percentage of blacks in the labor force and among fire privates ranged between .7% and 1.3%. In addition,

for the reporting period ending June 1994, the difference ranged between .5% and 1.19%. This statistical disparity did not create a material fact dispute to defeat Deeken's motion for summary judgment.

Regardless of which estimate offered by Dr. Siskin is used, the long-term goal of the decree was substantially met by late 1993 or mid 1994. see, [*26] ***Detroit Police Officers Ass'n. v. Young,*** *989 F.2d 225, 226-228 (6th Cir. 1993)* (50% goal for African-American representation at the rank of Police Sergeant was met where 309 black Sergeants, 312 white Sergeants, 4 hispanic Sergeants and 4 oriental Sergeants were appointed). n1 The representation of blacks at the entry level positions in the City of St. Louis was comparable to the representation of blacks in the civilian labor force in the City of St. Louis and is more representative of the racial and ethnic composition of the City of St. Louis as a whole. Because the racial composition for the rank of fire private was "comparable" to the St. Louis civilian labor force in 1993 and 1994, the goal of the decree was met long before Deeken applied to become a probationary fire private in 1998.

n1 The District Court, in dissolving the consent decree in 2003, agreed that a difference of one percent met the consent decree's racial parity goal [App. 535-536].

Considering the length of time the [*27] consent decree had been in effect and the City's proof that the goal of the consent decree had been met, as written, it should have moved to dissolve the consent decree in the mid 1990's.

B. The Long-term Goal of the Consent Decree Was Met When the Percentage of Black Fire Privates Exceeded the Percentage of Blacks in the SMSA Civilian Labor Force.

In determining whether a plan is narrowly tailored, one of several factors courts must consider is the relationship of the numerical goals of the program to the relevant labor market. ***Paradise*** *at 480 U.S. at 171.* In affirmative action employment cases, minority representation must be measured against the specific adult population that comprises the qualified labor pool. ***Id; City of Richmond v. J.A. Croson Co.,*** *488 U.S. 469, 501-02 (1989);* ***Local 28 of Sheet Metal Workers' Intern. Ass'n v. E.E.O.C.,*** *478 U.S. 421, 479 (1986).*

The labor pool's geographic boundaries must coincide with the geographic area from which the Fire Department draws its applicants. To properly define the labor market, not only must those individuals who are qualified for the position be identified, [*28] but also those who are potentially interested in it. ***Bennett v. Roberts,*** *295 F.3d 687, 697 (7th Cir. 2002).* When an employer's current work force is derived primarily from a small geographic area in close proximity to the workplace, but applications are received from a larger geographic area, the relevant labor pool area is the larger one. ***E.E.O.C. v. Olson's Dairy Queens, Inc.,*** *989 F.2d 165, 168-9 (5th Cir. 1993).*

In 1975, the parties agreed that the long-term goal of the consent decree would be to achieve when racial composition of fire privates in the Fire Department was comparable to the civilian labor force for the City. ***U.S. v. City of St. Louis, et al.,*** *410 F.Supp. 948, 960 (E.D. Mo. 1976).* In April 1976, the district court adopted the consent decree. In pertinent part, the court found that applicants for the entry level position of probationary fire privates were required to be residents of the City on their date of application. ***Id.*** *at 951* [Finding 7].

The logic of designating the City of St. Louis as the relevant geographical labor market was manifest, based upon the then current [*29] hiring restrictions. Thereafter, however, under the terms of the consent decree, the City was not prohibited from hiring applicants who lived outside its borders. ***Id.*** *410 F.Supp. at 961.* Moreover, just months after the entry of the consent decree, the City no longer required applicants to be residents of the City. On August 3, 1976, Article VIII, § 2 of the City's Charter was amended to require employees to establish residency in the City within 120 days after appointment. On August 4, 1998, Article VIII, § 2 was further amended to require employees to establish City residency within 120 days after the end of an initial working test period, not to exceed one (1) year.

Long before the 1998 hiring process began, the City knew or should have realized that the City of St. Louis was no longer the appropriate geographic labor market for determining parity - rendering an essential term of the consent

decree unconstitutional. Yet, the City did nothing. Indeed, in 1990, it opposed the United States' motion to redefine the relevant labor market to the SMSA, knowing that it was soliciting applications and hiring persons who lived outside the City. n2 The City did not [*30] simply fail to act; rather, it took affirmative action to resist the modification of the consent decree, knowing that the relevant area was the St. Louis metropolitan area.

n2 In support of the City's motion for summary judgment, it attached the United States' memorandum filed in support of the 1990 motion to modify or dissolve the consent decree [City's Ex. H (Doc. 137)]. According to Miguel Rodriguez, Attorney for the U.S. Department of Justice, on January 24, 1990, Kathleen Gormley n/k/a Tanner, Attorney for the City, informed him that ". . . (3) the relevant entry level firefighter hiring area for defendants is the City of St. Louis metropolitan area" (pp. 5-6). The United States' memorandum references the attached affidavit of Mr. Rodriguez. The City, however, did not include the attachment. Deeken requests the Court to take judicial notice of the memorandum, including all attachments.

Based upon the change in the City's residency requirement for applicants and the City's successful solicitation of applicants [*31] for the position of probationary fire private outside the City between 1998 and November 2003, the district court properly found that it was appropriate to measure the representation of blacks holding the rank of fire private against the civilian labor force for the SMSA and determined racial parity was achieved prior to the City making appointments from the 1998 eligible list [App. 803].

The City argues that the district court erred when it unilaterally changed the relevant geographic labor market for determining racial parity under the consent decree. It further argues that the court abused its discretion in modifying the consent decree retroactively and without conducting an evidentiary hearing [Respondents' Brief, pp. 30-41]. The City misperceives the procedures leading to the court's order and its rationale.

None of the parties sought relief under *Rule 60(b)(f), Fed.R.Civ.P.* Neither the City nor Deeken moved to modify the consent decree based upon a significant change in circumstances. Rather, the court's order was in response to Deeken's motion for summary judgment. Based upon the undisputed facts, the court agreed with Deeken that the consent decree, as written and as [*32] applied to him, violated the Equal Protection Clause of the Fourteenth Amendment because it was not narrowly tailored to meet its remedial purpose. The court did not modify the consent decree, but rather determined it was unconstitutional to the extent that it used the City of St. Louis as the relevant geographic labor market for determining racial parity in 1998 [App. 797-801].

Additionally, for the first time on appeal, the City argues that the district court erred in failing to adjust the SMSA for race neutral factors [Respondent's Brief, pp. 42-44]. The City's argument is are without merit. First, the City did not raise the issue in response to Deeken's motion for summary judgment. Second, the City offered no reliable expert reports which refined the SMSA to reflect the pool of realistic applicants for the Fire Department. Finally, the City offered no evidence in response to Deeken's motion, demonstrating that such reports would alter the conclusion that racial parity was reached in or before 1998.

The City further argues that, in good faith, it continued to follow a valid court order. The problem with the City's argument is, as found by the district court, it failed to monitor [*33] and take affirmative action to dissolve the consent decree when it knew or should have known that after 20 years the consent decree had out lived its ethicacy [App. 801-803].

IV. THE CONSENT DECREE WAS UNCONSTITUTIONAL, AS WRITTEN AND APPLIED TO DEEKEN, BECAUSE IT WAS NOT NARROWLY TAILORED TO SATISFY THE REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The employer has the burden of producing evidence that it implemented its plan in adherence to a court order which was responsive to a conspicuous racial imbalance in its work force and that the plan is sufficiently narrowly

tailored to its remedial purpose. ***Donaghy v. City of Omaha,*** *933 F.2d 1448, 1459 (8th Cir. 1991).* "As with any equity case, the nature of the violation determines the scope of the remedy." ***Swann v. Charlotte-Mecklenburg Bd. of Ed.,*** *402 U.S. 1, 16 (1971).* "The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." ***Id.*** "[F]ederal courts may not order or approve remedies that exceed the scope of a constitutional violation . . . "***Fullilove v. Klutznick,*** *448 U.S. 448, 508 (1980),* [*34] *overruled on other grounds,* ***Adarand Constructors, Inc. v. Pena,*** *515 U.S. 200 (1995).*

The use of ratios in fashioning a remedy has been permitted by the Supreme Court in only the most egregious cases, typified by repeated and persistent violations of the law. see, e.g., ***U.S. v. Paradise,*** *480 U.S. 149 (1987).* "The creation of racial preferences by courts, even in the more limited form of goals rather than quotas, must be done sparingly and only where manifestly necessary." ***Local 28 of Sheet Metal Workers v. EEOC,*** *478 U.S. 421, 496-497 (1986).* compare, ***City of Richmond v. J.A. Croson, Co.,*** *488 U.S. 469, 498 (1989)* (plurality) (finding quotas were unconstitutional because no remedial purpose was proven); ***Wygant v. Jackson Bd. of Educ.,*** *476 U.S. 267 (1986)* (plurality) (finding racial preferences in protecting some minorities from layoffs violated of the Fourteenth Amendment).

In ***U.S. v. Paradise,*** *480 U.S. 149 (1987),* the district court held that the Alabama Department of Public Safety ("Department") had systematically excluded blacks from employment [*35] in violation of the Fourteenth Amendment. "Some 11 years later, confronted with the Department's failure to develop promotional procedures that did not have an adverse impact on blacks, the district court ordered the promotion of one black trooper for each white trooper elevated in rank, as long as qualified black candidates were available, until the Department implemented an acceptable promotion procedure." ***Id.*** *153.* In upholding the district court's order, the Supreme Court found that the Department's prior employment practices and dilatory and recalcitrant conduct during the litigation had a direct bearing in finding the remedy constitutional. ***Id.*** *at 154.* In comparison, here, the City entered into the consent agreement without admitting any liability or past acts of discrimination in the hiring of probationary fire privates. ***U.S. v. City of St. Louis, et al.,*** *410 F.Supp. 948, 960 (E.D. Mo. 1976).* Additionally, the settlement came approximately a year after the suit was filed [App. 89, J.S. PP1 & 4].

The district court held that the imposition of racial quotas was justified in 1974 because "a conspicuous racial [*36] imbalance in the City's Fire Department existed" - although never proven or admitted by the City to be due to its past acts of race discrimination. The district court relied on its finding that blacks constituted only 11 % of the uniformed personnel employed in the St. Louis Fire Department. ***U.S. v. City of St. Louis,*** *410 F.Supp. 948, 951 (E.D. Mo. 1976).* This figure, however, lacks probative value without comparison to labor force statistics or other pertinent data. n3 Instead, the record shows the consent decree was based on the finding that the entry-level firefighter test had a disparate impact on blacks and had not been validated. ***U.S. v. City of St. Louis,*** *418 F.Supp. 383, 384 (E.D. Mo. 1976).*

n3 The parties only stipulated that the population of the City was approximately 40% back. ***Firefighters Institute for Racial Equality v. City of St. Louis,*** *588 F.2d 235, 237 (8th Cir. 1978).* The Court of Appeals did not address the constitutionality of the consent decree.

[*37]

Additionally, the means chosen by the parties to the consent decree were not narrowly tailored to remedy the finding that the entry level examination had a disparate impact on blacks. For example, the City was not enjoined from using the test results from the 1974 entry level examination. To the contrary, the City was specifically permitted to use the test to rank applicants for hiring. Further, the City was not required in the future to use written examinations for qualifying or ranking applicants for the position of probationary fire privates which are shown to be job related or validated.

In the consent decree, the parties did not discuss or evaluate the range of remedies to address the alleged

discrimination. Nor does it appear that the parties called upon the district court to engage in a balancing process to determine the appropriate equitable remedies. Moreover, there was not a sufficiently compelling reason for the imposition of quotas because other racially neutral alternatives were available, including: (1) the alteration of the permissible hiring area; (2) the elimination of hiring preferences for permanent civil service employees; and (3) the use of validated written [*38] examinations.

The district court found, in part, the consent decree was constitutional because it was not intended to be a permanent remedy. The City, however, permitted the consent decree to become permanent in its application. Except for the United States' 1990 request to dissolve the quota remedy, which the City opposed, none of the original parties returned to court for supplemental relief until Deeken (and Martinez) challenged the consent decree [App. 92, J.S. PP20 & 21].

In ***Paradise,*** the district court imposed the 50% promotional quota, "but only *if* there were qualified candidates, *if* their rank was less than 25% black, and *if* the Department had not developed and implemented a promotion plan without adverse impact to the relevant rank." *480 U.S. at 164* (emphasis in original). When the district court ordered the promotion of 8 black and 8 white troopers to the rank of corporal, the court stated it intended to use the quotas as a one-time occurrence. ***Id.*** *at 165.* Four months later, after the Department submitted to the court its proposed procedures for the promotion to the rank of corporal and the district court suspended [*39] application of the hiring quota. ***Id.*** The Supreme Court found that the district court's order was "flexible, waivable and temporary" in application (***Id.*** *at 178)* and "sought to achieve (its) goal while interfering as little as possible with the rights on non-minority troopers." ***Id.*** *at 174, n.22.*

Unlike the decree in ***Paradise,*** here the parties agreed that the one-for-one requirement would remain in effect for at least 5 years. The requirement did not automatically dissolve when the goal was reached. When it was reached, according to the City, it was not "obligated" to move to dissolve the decree [Respondent's Brief, pp. 45-47]. Because the one-for-one hiring requirement did not automatically dissolve when the hiring goal was achieved, the City was unlawfully permitted to thereafter continue the practice to the prejudice of Deeken.

CONCLUSION

Based upon the foregoing facts and authorities cited, Eric Deeken prays this Honorable Court to affirm the orders and judgment of the district court, together with his attorneys fee and costs incurred on appeal and for such other and further relief deemed just and proper [*40] in the premises.

Respectfully submitted,

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APPELLANT'S CERTIFICATION

The undersigned hereby certifies that on the 15th day of January, 2008, two copies of the foregoing Brief and one copy on floppy disk were delivered, by first-class U.S. Mail, postage prepaid, to: Judith A. Ronzio, Attorney for

Appellant, Room 314 City Hall, St. Louis, Missouri 63103 and Clyde Craig, Attorney for Michael Martinez, 744 Wedge Drive, #8, Naples, Florida 34103.

2. This brief complies with the limitations contained in *F.R.A.P. 32(a)(7)(B)* because this brief contains 6970 words, excluding the parts of the brief exempted by *F.R.A.P. 32(1)(7)(B)(iii)*.

3. This brief complies with the typeface requirements of *F.R.A.P. 32(a)(5)* and the type style requirements of *F.R.A.P. 32(a)(6)* because this brief has been prepared in a proportionally spaced typeface using WordPerfect 9 in 14-point Times New Roman.

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