# United States v. City of Warren

United States District Court for the Eastern District of Michigan, Southern Division

August 12, 1992, Decided ; August 12, 1992, Filed

CASE NO.: 86-CV-75435-DT

**Reporter:** 1992 U.S. Dist. LEXIS 21702; 61 Empl. Prac. Dec. (CCH) P42,269

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF WARREN, MICHIGAN, CITY OF WARREN POLICE and FIREFIGHTER CIVIL SERVICE COMMISSION, Rule 19(a) Party, Defendants.

**Judges:** [*1] DUGGAN

**Opinion by:** PATRICK J. DUGGAN

**Opinion**

***OPINION***

***I. Introduction***

This is a Title VII action instituted in 1986 by plaintiff, United States of America ("Government"), against defendant, City of Warren ("Warren" or "City"). [1] Beginning January 23, 1992, and ending February 8, 1992, trial was had in this Court on the claims asserted by the Government against Warren relating to the City's alleged violations of Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*[2] As developed prior to the trial, the alleged Title VII violations at issue are as follows:

(A) That Warren violated Title VII in its recruitment practices:

(1) by utilizing, prior to October 1986, recruitment practices which had a disparate impact on blacks;

(2) by refusing to advertise in black-oriented media after October 1986;

(3) by treating black job applicants in a discriminatory manner; and

(4) by the timing of its 1990/1991 police recruitment in such a way
as to disparately impact black applicants.

(B) That Warren violated Title VII in its hiring practices by disparately treating William Spicer (by failing to hire him as a City purchasing [*2] agent) and Kenneth Bailey (by failing to hire him as Assistant to the Director of the Department of Public Service).

(C) That Warren violated Title VII by allowing racial harassment of black employees at several of its departments, i.e., its Water Division, Parks and Recreation Department, and Treasury Department.

(D) That Warren has failed to eliminate the effects of its pre-1986 discrimination against blacks with regard to recruitment to City jobs.

(E) That Warren violated Title VII by removing the Commissioners of the Warren Police and Firefighter Civil Service Commission in retaliation for their participation in the instant action. [*3]

***II. Findings of Fact and Conclusions of Law***

*A. Recruitment*

*1. Pre-October 1986 Recruitment Practices*

The Government contends that prior to October 1986, Warren's recruitment practices for municipal positions violated Title VII by having a disparate adverse impact on blacks. This Court agrees with such contention, but only insofar as it relates to the City's pre-October 1986 recruitment for police and firefighter positions.

The plaintiff in a disparate impact case must first establish a prima facie case of discrimination. *Albemarle Paper Co.*

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[1] The Court recognizes that the Government is also suing Warren for violation of the State and Local Fiscal Assistance Act of 1972, *as amended.*31 U.S.C. § 6716 ("Revenue Sharing Act"). *(See* Government's Complaint at 1) However, at trial, violations of such act were not presented as issues distinct from the alleged Title VII violations. Accordingly, in this Opinion, the Court will not discuss the claims as they relate to any violations of the Revenue Sharing Act.

[2] By Opinion and Order issued December 20, 1991, this Court bifurcated the trial in the instant matter into two stages -- the first stage concerning issues of liability and general injunctive relief and the second stage concerning, if necessary, issues of individual relief.

*v. Moody,* 422 U.S. 405, 425, 95 S. Ct. 2362, 2375, 45 L. Ed. 2d 280 (1975). Such a prima facie case will be established if the plaintiff shows that a facially neutral employment standard is discriminatory [*4] in effect in that it selects applicants for hire in a discriminatory pattern. *Dothard v. Rawlinson,* 433 U.S. 321, 329, 97 S. Ct. 2720, 2726-27, 53 L. Ed. 2d 786 (1977). A plaintiff can make this showing by using statistical proof to make a comparison, in a case where race discrimination is alleged, "between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs . . . ." *Wards Cove Packing Co., Inc. v. Atonio,* 490 U.S. 642, 109 S. Ct. 2115, 2121, 104 L. Ed. 2d 733 (1989). Also, "in cases where such labor market statistics will be difficult if not impossible to ascertain . . . certain other statistics -- such as measures indicating the racial composition of 'otherwise-qualified applicants' for at-issue jobs -- are equally probative for this purpose." *Id.*

Further, where a plaintiff is proceeding under a disparate impact theory, he/she must show by a preponderance of the evidence that the practice at issue "was the [employer's] standard operating procedure -- the regular rather than the unusual practice." *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 336, 97 S. Ct. 1843, 1855, 52 L. Ed. 2d 396 (1977). [*5] Additionally,

> [A] Title VII plaintiff does not make out a case of disparate impact simply by showing that, "at the bottom line," there is racial *imbalance* in the work force. As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII.*Wards Cove,* 109 S. Ct. at 2124-25 (emphasis in original). In other words, the plaintiff must show the challenged practice caused the alleged disparate impact on a protected group. *Id.,* 109 S. Ct. at 2124.

After the plaintiff has established a prima facie case of disparate impact, the burden will shift to the employer who must come forth with a "justification" for the challenged practice. *Id.,* 109 S. Ct. at 2125. "In this phase, the employer carries the burden of producing evidence of a business justification for his employment practice." [*6] *Id.,* 109 S. Ct. at 2126. However, "the burden of persuasion . . . remains with the . . . plaintiff." *Id.*

The "touchstone" of the business justification inquiry will consist of:

> [A] reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification . . . will not suffice . . . . At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster; this degree of scrutiny would be almost impossible for most employers to meet . . . .*Id.*

If the employer meets its burden of production as to a business justification, the plaintiff may still prevail on his/her disparate impact claim if he/she "persuades the factfinder that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interests . . . .'". *Id.* By demonstrating this, the plaintiff would, in effect, prove that the employer was using the challenged practice "'merely as a 'pretext' for discrimination.'" *Id.* (quoting *Albemarle Paper Co.,* 422 U.S. at 425, 95 S. Ct. at 2375)). [*7]

Where a plaintiff sets forth such "alternative practices," they must be "equally effective" as the employer's chosen practice. *Id.,* 109 S. Ct. at 2127. Further, the costs or "other burdens" of the alternative practices are relevant factors in "determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals." *Id.* (internal quotation marks omitted) (quoting *Watson v. Forth Worth Bank & Trust Co.,* 487 U.S. 977, 998, 108 S. Ct. 2777, 2790, 101 L. Ed. 2d 827 (1988)).

Warren is located in Macomb County, Michigan and its southern border abuts the City of Detroit. According to the 1980 census, Warren had a resident civilian labor force of 80,992 people, of whom approximately 181 (or 0.2%) were black. (Ex. # 568A) According to the 1980 census, the remainder of Macomb County had a resident civilian labor force of 257,752 people, of whom approximately 3,422 (or 1.3%) were black. *(Id.)* According to the 1980 census, the civilian labor force residing in the City of Detroit consisted of 484,203 people, [*8] of whom 289,027 (or 59.7%) were black. *(Id.)*

Prior to October 1986, Warren's regular recruitment practice was to advertise in the *Macomb Daily,* the *Warren Weekly,* and the *Community News,* as well as to post notices of municipal job opportunities in municipal buildings. These three newspapers primarily circulate in Macomb County. Prior to October 1986, Warren's general recruitment practice for municipal jobs was not to place advertisements in the *Detroit News* or *Free Press.* The *Detroit News* and *Free Press* are newspapers of general circulation in the Detroit metropolitan area.

At trial, the Government offered evidence as to Warren's recruitment for police and firefighter positions.

Warren recruited for firefighters in March/April 1985 and for police officers in January/February 1986. For the firefighter recruitment, the City placed advertisements in the *Macomb Daily, Warren Weekly* and *Community News,* and also sent notices to Wayne State University, Macomb Community College (South and Center campuses), Oakland University, and the Macomb County Fire Training Institute. Warren did not place advertisements in the *Detroit News* or *Free Press.* [*9] For the police recruitment, the City placed advertisements in the *Macomb Daily, Warren Weekly* and *Community News,* and also sent notices to the Macomb Criminal Justice Center, Michigan Technical Institute, the Federal Building in Detroit, Wayne State University, Macomb Community College, and Oakland University.

Of the 182 persons who submitted applications for the firefighter recruitment's eligibility list, created in August 1985, not one was black and no blacks were on the ultimate firefighter eligibility list. (Ex. #'s 124A & 124B at Request # 24; Rule 30(b)(6) Dep. of Joan Gower at 33-34) Of the approximately 400 persons who submitted applications for the police recruitment's eligibility list, one was black.

After October 1986, Warren broadened the scope of its recruitment practices to include advertising outside of Macomb County. In 1987, Warren recruited for police and firefighter positions. Included in the recruitment advertising was the *Detroit News* or *Detroit Free Press.*

The 1987 recruitments for police and firefighter positions attracted 50 black applicants (6.2% of the total). As stated by Dr. Mark Killingsworth, plaintiff's expert witness on statistical analysis, [*10] the difference between the percentage of black applicants to Warren for police and firefighter positions in 1985 and 1986 and the percentage of black applicants to Warren for such positions in 1987 results in a standard deviation of more than six, based upon a chi-squared method of analysis. (Tr. Vol. 6-A at 40; Ex. # 139)

This Court concludes that the Government has made out a prima facie case of discrimination by Warren with regard to the pre-October 1986 recruitment practices for police and firefighter positions -- advertising only in Macomb County papers of general circulation. Simply put, Dr. Killingsworth's statistical comparison of the 1985/86 police and firefighter recruitments -- which were advertised only in the *Macomb Daily, Warren Weekly,* and *Community News* -- with the 1987 police and firefighter recruitments -- wherein the City additionally advertised in the *Detroit News* or *Detroit Free Press* -- has revealed a standard deviation of more than six with regard to the number of black applicants for such positions in 1985/86 (one) and in 1987 (fifty). As a general rule, a statistical disparity of more than two to three standard deviations may properly be used [*11] to support an inference of discrimination. *See* *Hazelwood School Dist. v. United States,* 433 U.S. 299, 311 n. 17, 97 S. Ct. 2736, 2743 n. 17, 53 L. Ed. 2d 768 (1977). This Court is further persuaded that the statistical evidence offered by the Government demonstrates a causal connection between the challenged practice and the disparate impact here on blacks.

Warren has offered no substantive evidence as to a business justification for its pre-October 1986 use of exclusively Macomb County-based advertising for police and firefighter positions. This Court finds unpersuasive Warren's arguments that equitable doctrines such as laches and estoppel bar the Government from making any Title VII claim against it for its pre-October 1986 recruitment practices [3] and/or that any person, black or white, Macomb County or non-Macomb County resident, was free to purchase a copy of the *Macomb Daily, Warren Weekly,* or

[3] This Court previously rejected such equitable defenses in this action with regard to the Government's disparate impact claim relating to Warren's pre-1986 use of durational pre-application residency requirements for municipal positions. *See United States v. City of Warren,* 759 F. Supp. 355, 361 (E.D. Mich. 1991). This Court's rejection of such claims in that Opinion are of equal application here:

> The Supreme Court has clearly stated: "'As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest.'" *United States Immigration and Naturalization Service v. Hibi,* 414 U.S. 5, 8, 94 S. Ct. 19, 21, 38 L. Ed. 2d 7 (1973) (per curiam) (quoting *Utah Power & Light Co. v. United States,* 243 U.S. 389, 409, 37 S. Ct. 387, 391, 61 L. Ed. 791 (1917)). (footnote omitted) Indeed, if Warren's argument were accepted as true, many employers, public and private, using employment practices having a disparate impact on Title VII-protected groups, could escape liability when sued by the Government for Title VII violations simply because the Government should have informed them, when they adopted the challenged practice, that it violated Title VII. Such an outcome is untenable.*Id.* Further, Warren's proffered equitable estoppel argument cannot possibly succeed as there is no evidence of affirmative misconduct on the part of the Government with regard to the challenged practice. *Cf. United States v. Lair,* 854 F.2d 233,

*Community News.* Warren has not met its burden of production as to a substantial justification for its pre-October 1986 use of Macomb County-oriented media for advertising police and firefighter positions.

[*12] In sum, this Court concludes that Warren's pre-October 1986 recruiting practice of advertising for police and firefighter positions in media -- i.e., the *Macomb Daily, Warren Weekly,* and *Community News,* which primarily circulated in Macomb County -- violated Title VII.

This Court further concludes, however, that the Government has failed to prove its disparate impact claim as to Warren's pre-October 1986 recruitment via Macomb County-oriented media for other municipal positions. The Government has not submitted evidence and corresponding statistical analysis as to the alleged adverse disparate impact Warren's Macomb County-oriented recruitment methods had against prospective black job applicants for municipal positions other than police and firefighter positions. [4]

[*13]

*2. Refusal to Advertise in Black-Oriented Media After October 1986*

*a. Intentional Discrimination*

The Government contends that Warren, via its mayor, Ronald Bonkowski, intentionally discriminated against blacks with regard to recruitment for jobs by refusing to advertise in black-oriented media such as the *Michigan Chronicle* prior to 1990. This Court finds such contention unpersuasive.

The *Michigan Chronicle* is the only black-oriented newspaper in the Detroit metropolitan area, a fact of which Mayor Bonkowski was aware.

Between October 1986 and July 1990, Warren did not advertise in the *Michigan Chronicle.* At the time of the 1987 police recruitment, Mayor Bonkowski refused to sign a purchase order which would have authorized payment for advertising the police recruitment in the *Michigan Chronicle.*

In August 1989, Michael Smith, Personnel Director for the City, informed Deborah Frazier, secretary of the Warren Police and Firefighter Civil Service Commission, that Mayor Bonkowski would not approve advertising in the *Michigan Chronicle* even if it were free.

Mayor Bonkowski offered reasons such as cost, effectiveness, and the absence of a legal obligation [*14] to advertise as some of the reasons for his decision not to advertise in the *Michigan Chronicle.*

As of September 1990, the cost of a four column inch classified advertisement in the *Michigan Chronicle* was $ 64.52. Recruitment advertisements in the *Macomb Daily* cost between $ 150 and $ 800.

Prior to 1990, Warren did not advertise for municipal positions on black-oriented radio. The possibility of placing such advertisements on black-oriented radio stations was discussed at a meeting of the Warren Police and Firefighter Civil Service Commission in June 1987. In November 1988, such advertisements were suggested by a member of the Commission as a means of attracting black firefighter applicants.

A member of the Warren Police and Firefighter Civil Service Commission, Ronald Peplinski, testified that Mayor Bonkowski said "We may have to hire blacks, but there is no reason that we have to force them . . . to live next door to us." (Sept. 1990 Tr. Vol. 1 at 91-92) Mayor Bonkowski denied making such a remark. Mayor Bonkowski did, however, acknowledge that he rejected efforts by employee unions to rescind the City's post-hire residency requirement.

Mayor Bonkowski made the following [*15] statement during the course of a newspaper interview, "We've kept

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237-38 (7th Cir. 1988) (estoppel applicable to government's actions only if traditional requirements of estoppel are met and government's actions constituted "affirmative misconduct").

[4] In its post-trial briefs, the Government argues that it should be relieved of its burden of specifically proving its disparate impact claim as to the City's pre-October 1986 recruitment for municipal positions other than police and firefighter positions. The Government contends that, since the City had a durational pre-hire residency requirement for such positions until 1986, a comparison of recruitment results for such positions pre- and post-1986 would not isolate the cause for alleged disparate impact, i.e., whether the Macomb County-oriented recruitment or the residency requirement was the cause of any disparate impact. (Government's Post-Trial Brief at 4 n. 7; Government's Post-Trial Reply Brief at 13 n. 18)

This Court finds such argument unpersuasive. The burden of proving Title VII discrimination is on the plaintiff, *see* Wards Cove, 109 S. Ct. at 2126, and the Government has plainly not met this burden.

The Court notes, however, that this finding does not affect this Court's previous conclusion that Warren's pre-1986 use of durational pre-application residency requirements violated Title VII having a disparate adverse impact on blacks. *See* United States v. City of Warren, 759 F. Supp. 355 (E.D. Mich. 1991).

them away, but there is more to be done." (Ex. # 118A) He testified, however, that such statement referred to the Government.

In the context of commenting upon the City's hiring its first black police officer candidate, Mayor Bonkowski made the following statement: "The law of averages said it was going to happen." (Ex. # 135) He testified that such statement was made under the following circumstances:

> It's one sentence out of an entire interview of a reporter. The best of my recollection, the recruitment techniques that the City had employed were generating -- generating a larger number of blacks than have ever applied for jobs in the City before. What I meant by that, that we hire the best qualified applicants given the testing procedures that we have.(Tr. Vol. 7-A at 108) This Court does not conclude that, by making such statement, Mayor Bonkowski was necessarily expressing an underlying intent on his part to discriminate against blacks.

Actions of the City, taken during Mayor Bonkowski's tenure, just prior to the outset of this litigation and continuing on through such litigation, lend support to the City's [*16] contention that it did not intentionally discriminate against blacks with regard to post-1986 recruitment for municipal jobs. Since 1986, the City has advertised all job openings in either the *Detroit News* or the *Detroit Free Press.(See, e.g.,* Ex. # 724) Also, since 1986, the City has sent notices of job openings to the Wayne County offices of the Michigan Employment Security Commission, where 85% of the registered job applicants on a typical day are black. (Ex. # 724) Further, the City has sent recruitment materials regarding job openings to such organizations as Focus Hope, Greater Opportunity Industrial Center, the Detroit and Highland Park branches of the YMCA, and the Vocational Technical Center. In 1989, the City began sending similar materials to the NAACP and the Urban League.

Such expanded recruitment efforts were implemented, in part, with the aid and advice of Ellen Shong Bergman, a former Director of the Office of Federal Contract Compliance Programs. The City first retained Bergman in 1986, just prior to the onset of the instant litigation. She assisted the City in preparing recruitment programs which would better reach prospective black job applicants, recommending [*17] many of the recruitment activities described above. She also reviewed the applicant flow data generated from Warren's expanded recruitment efforts and advised the City they were adequate. [5]

With this evidence in view, this Court finds that the Government has not shown by a preponderance of the evidence that Warren did, in fact, intentionally discriminate against blacks in recruitment for municipal positions after 1986.

Additionally, although the City, via Mayor Bonkowski, did not advertise for municipal positions in black-oriented media, such as the *Michigan Chronicle* or a black-oriented radio station, the Court finds that the Government has not shown by a preponderance of the evidence that by not advertising in such media, the City discriminated against blacks with regard to recruitment for municipal positions. Indeed, this Court finds that the City's expanded recruitment efforts, adopted in part with the [*18] aid and advice of an outside expert, Ellen Shong Bergman, evidence actions by the City that are contrary to any racial animus or putative intent to discriminate that may be attributed to Mayor Bonkowski.

In sum, the City's recruitment efforts do not demonstrate that Warren, in fact, *acted* upon any putative intent, by Mayor Bonkowski, to discriminate against prospective black job applicants when recruiting for municipal positions post-1986. Without such discriminatory action (treatment) on the part of the City, this Court finds unpersuasive the Government's discriminatory treatment claim. [6]*Cf. International Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n. 15, 97 S. Ct. 1843, 1854 n. 15, 52 L. Ed. 2d 396 (1977) (disparate treatment occurs where an employer treats some people less favorably than others on account of their race, color, religion, sex, or national origin).

[*19]

*b. Disparate Impact Claim as to Pre-1990 Recruitment*

The Government argues that Warren's pre-1990 recruitment practices, up to its use of black-oriented media in 1990 for recruitment advertising, discriminated against blacks because such efforts had a disparate (negative) impact on blacks.

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[5] This Court admitted Bergman's testimony only insofar as it related to the City's intent and actions.

[6] While some of the statements attributed to Mayor Bonkowski may be interpreted as evidencing a negative attitude toward blacks, such "attitude" alone is not sufficient to establish disparate treatment. The test, as indicated above, is whether or not Warren disparately treated blacks, i.e., whether or not the City's actions in the recruitment and treatment of municipal employees were in fact discriminatory.

In support of its disparate impact claim as to such recruitment practices, the Government introduced extensive statistical analysis by its expert, Dr. Mark Killingsworth, concerning the City's pre-1990 recruiting practices. In opposition to the Government's claim, Warren introduced extensive statistical analysis by its expert, Dr. David Peterson. Both sides used their experts to criticize the other's statistical results.

In seeking to prove a disparate impact claim under Title VII, a plaintiff may use statistical evidence, and the model employed to characterize the evidence need not address all possible variables. *See* *Bazemore v. Friday,* 478 U.S. 385, 400, 106 S. Ct. 3000, 3008, 92 L. Ed. 2d 315 (1982).

Dr. Killingsworth conducted an analysis of Warren's labor market for police, firefighter, blue collar (laborer), and pink collar [*20] (clerical) municipal jobs. (Ex. #'s 31A, 31B, 31C) In his analysis, Dr. Killingsworth used 1980 census data, data on travel time to Warren compiled by the Southeast Michigan Council on Governments ("SEMCOG"), and data about actual job applicants to Warren since June 1987 for full-time permanent municipal jobs. (Id.)

Dr. Killingsworth's analysis constructed a model which estimated the expected percentage of black applicants to Warren for certain types of jobs. *(Id.)* Dr. Killingsworth used the following factors and data about such factors taken from the actual white applicants for municipal jobs in Warren after June 1987: age, sex, education level, occupation, and travel time to Warren. *(Id.;* Tr. Vol. 6-A at 58) Using "Poisson regression" analysis, Dr. Killingsworth developed data predicting the expected percentage of black job applicants for municipal jobs in Warren based upon the distribution of the black labor force by age, sex, education level, occupation, and travel time to Warren. (Ex. # 31A at 12-17) Dr. Killingsworth's analysis obtained the following figures, representative of his overall findings:

- For firefighter recruitment in 1987 and 1989, the percentage of [*21] expected black applicants was 19.4% (Ex. # 31A at Table 4.1)

- For police recruitment in 1987, the percentage of expected black applicants was 32.0% (Ex. # 31A at Table 4.1)

- For blue collar recruitment from 1987 to July 1990, the percentage of expected black applicants was 10.1% (Ex. # 31C at Table 3.1)

- For pink collar recruitment from 1987 to July 1990, the percentage of expected black applicants was 15.7% (Ex. # 31C at Table 3.1)

Dr. Killingsworth further opined that the percentages for expected black applicants should be increased by 20% to 30% for police and firefighter positions and by 10% to 20% for blue collar and pink collar positions to account for demographic changes subsequent to the 1980 census. (Ex. #'s 31A at 2, 31C at 2)

Dr. Killingsworth's data also included the actual percentage of black applicants for recruitment between 1987 and 1991:

- For firefighter recruitment in 1987 and 1989, the percentage of actual black applicants was 5.8% (Ex. # 31A at Table 4.1)

- For police recruitment in 1987, the percentage of actual black applicants was 4.1% (Ex. # 31A at Table 4.1)

- For blue collar recruitment from 1987 to July 1990, the percentage of actual [*22] black applicants was 9.8% (Ex. # 31C at Table 3.1)

- For pink collar recruitment from 1987 to July 1990, the percentage of actual black applicants was 3.4% (Ex. # 31C at Table 3.1)

Dr. Killingsworth next calculated the number of standard deviations from his analyses between the actual and the expected percentages of black applicants for municipal positions in Warren between 1987 and 1991, obtaining the following results:

- For firefighter recruitment in 1987 and 1989, the standard deviation was 6.193 (Ex. # 31A at Table 4.2)

- For police recruitment in 1987, the standard deviation was 3.711 (Ex. # 31A at Table 4.2)

- For blue collar recruitment from 1987 to July 1990, the standard deviation was 0.170 (Ex. # 31C at Table 3.2)

- For pink collar recruitment from 1987 to July 1990, the standard deviation was 5.397 (Ex. # 31C at Table 3.2)

Warren's statistical analysis expert, Dr. David Peterson, testified at trial and offered several evidentiary exhibits containing his methods, and results, of analyzing Warren's pre-1990 recruitment for municipal positions.

Dr. Peterson also offered criticisms of the Government's analysis. (Ex. # 586A at Tab IV) Dr. Peterson criticized [*23] Dr. Killingsworth's analysis method finding the following faults: (1) that Dr. Killingsworth should not have used Poisson regression analysis and should have,

instead, used "behavioral" and "allocation" modelling in deriving estimates of black applicant rates; (2) that Dr. Killingsworth should have used commuting data instead of applicant flow data in weighting geographic areas (while preserving use of age, gender, education, occupation, and geography); (3) that Dr. Killingsworth should have also taken into account the effect of Warren's move-in requirement in deriving estimates of black application rates -- i.e., by modifying, in part, the analysis to include a factor for the propensity of blacks and nonblacks to move out of the City of Detroit; and, (4) that Dr. Killingsworth should have compared his estimates and data to the results achieved by the various communities in the Detroit metropolitan area who have entered into consent decrees with the Government with regard to recruitment and hiring practices for municipal positions. (Ex. # 586A at Tab IV; Tr. Vol. 11 at 111-114)

Dr. Peterson next offered analyses taking into account his criticisms of Dr. Killingsworth's analysis. Dr. [*24] Peterson arrived at estimates of black application rates for police and firefighter positions ("availability estimates") significantly lower than those presented by Dr. Killingsworth. (Ex. # 586A at Tab IV at "Revisions of DOJ's Availability Estimates," "Availability Estimates Ignoring Move in Requirement," "Availability Estimates Taking Account of Move in Requirement," "Availability Estimates Taking Account of Move in Requirement Revision for Population Changes from 1980 to 1990"; Tr. Vol. 11 at 114-118)

This Court is unpersuaded by the Government's statistical analysis. In reaching this conclusion, this Court finds two of Warren's proffered criticisms persuasive: that the Government's analysis was flawed because it did not taken into account the effect Warren's post-hire residency requirement might have on potential applicants for municipal positions; and, that the Government's analysis was flawed because it did not taken into account the recruiting statistics of the Detroit metropolitan area communities that had entered into consent decrees with the Government as to minority recruitment.

The Government's statistical analysis of Warren's pre-1990 recruitment results did not include [*25] as a factor the City's post-hire residency requirement. Warren's statistical expert, Dr. Peterson, opined that such a factor should have been included in the Government's analysis. (*See, e.g.,* Tr. Vol. 11 66-71) This Court believes that such a factor should necessarily have been included in any analysis of the pre-1990 recruitment results. Warren is a predominantly white community [7] and this Court believes it is reasonable to assume that a post-hire residency requirement might alter expected and actual numbers of black job applicants for municipal position as opposed to white job applicants.

Further, this Court believes the Government's proffered analysis is weakened by the recruitment result data for the consent decree cities. At trial, Dr. Peterson testified that overall [*26] 1986-1990 black applicant flow for municipal positions in the consent decree cities located in Macomb County was 10.35% and that Warren's overall black applicant flow was 10.2%. [8] This data presents persuasive evidence to this Court that the Government should have factored in, or at least addressed, the recruitment rates of the consent decrees cities during the relevant time period in attempting to prove its disparate impact claim against Warren.

Additionally, Dr. Killingsworth's testimony left this Court unconvinced that his conclusions should be accepted by the Court. For example, in 1990, Dr. Killingsworth prepared a report which showed significantly lower percentages of "available" black employees (Ex. # 715) than the later report (Ex. 31A) which he used to support his 1992 trial testimony. Exhibit 715 estimated availability for black firefighter applicants in the range of 5.32% to [*27] 13.83%. (Ex. 715 at Models B-E) These estimates are significantly lower than the figures contained in Exhibit 31A which estimates the number of expected black firefighter applicants in the range of 19.4% to 25.2%. (Ex. 31A at 2) While Dr. Killingsworth attempted to explain that the earlier report was not intended to reflect that which it purports to reflect, i.e., that it was "not an availability estimate" (Tr. Vol. 6A at 100), he acknowledged that "somebody might use it as an availability estimate." (Id.) Such testimony, however, contradicted Dr. Killingsworth's own earlier testimony: "It's an availability figure, in other words. Computed in this fashion, you would get an availability figure that would imply that 5.3% of applicants would be black." (Tr. Vol. 6A at 99)

Simply said, this Court was not impressed with Dr. Killingsworth's testimony and evidence offered with regard to Warren's 1986-1990 recruitment practices. His testimony was not sufficiently persuasive to convince this Court that there is reliable statistical data to support a conclusion that the 1986-1990 recruitment practices of the

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[7] According to the 1980 census, Warren had a resident civilian labor force of 80,992 people, of whom approximately 181 (or 0.2%) were black. (Ex. 568A at "Estimate of 1990 Representation of Blacks Among Persons Working in the City of Warren")

[8] *See* Ex. # 741; Ex. # 586A at Tab II at "All Applicants Reported by 17 Consent Decree Towns Summary" & accompanying charts.

City had a disparate (negative) impact on prospective black applicants who might have [*28] applied for employment with Warren during such period.

Further, while this Court finds Dr. Peterson's testimony not totally convincing, the Court is persuaded that his criticisms of Dr. Killingsworth's statistical analysis have sufficient merit to support this Court's rejection of Dr. Killingsworth's conclusions as to the City's 1986-1990 recruitment practices.

This Court is not persuaded that the claimed employment device, recruitment for police and firefighter positions without advertising in black-oriented media, was responsible for the disparate impact suggested in the Government's proffered statistical analysis. Accordingly, the Government has failed to meet its initial burden of proving a prima facie case of discrimination, via disparate impact, on the part of Warren with regard to its pre-1990 recruitment for police and firefighter positions. *See* *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 656, 109 S. Ct. 2115, 2124, 104 L. Ed. 2d 733 (1988) (in a disparate impact case, the plaintiff is responsible for identifying the employment practice allegedly responsible for any observed statistical disparities).

For similar [*29] reasons, the Government's disparate impact claim as to pre-1990 recruitment by Warren for pink collar (clerical) jobs must fail. Indeed, the evidence proffered by the Government indicates that any failure on the part of Warren to advertise in black-oriented media did not have a significant negative effect as to black applicant rates. The Government's statistical evidence as to black application rates for pink collar municipal positions shows very inconsistent applicant rate results. For example, for pre-July 1990 pink collar recruitment, Dr. Killingsworth came up with the following data: from 1987 to July 1990 the percentage of actual black applicants was 3.4% versus an expected percentage of 15.7% (with a standard deviation of 5.397). (Ex. # 31C at Tables 3.1 & 3.2) However, for recruitment from July 1990 to December 1990, the percentage of actual black applicants was 15.8% versus and expected percentage of 11.7% (with a standard deviation of 1.195). *(Id.)* Since there is no evidence in the record indicating that Warren advertised for pink collar positions in black-oriented media with regard to the July-December 1990 recruitment, this Court finds no basis in the record to support [*30] the Government's contention that Warren's recruitment for pink collar municipal positions up to July 1990 had a disparate impact on blacks.

*3. Treatment of Black Job Applicants*

The Government argues that Warren violated Title VII in its recruitment for municipal positions in that it engaged in pattern or practice discrimination against black job applicants by treating them in a disparate (negative) manner from white applicants. As support for this argument the Government brought forth several witnesses at trial who gave testimony about their experiences in applying for municipal positions in Warren. Warren brought forth several of their own witnesses to testify as to this issue.

In a disparate treatment pattern or practice case, the plaintiff must prove "more than the mere occurrence of isolated or accidental' or sporadic discriminatory acts" -- the plaintiff must show that discrimination was the "standard operating procedure -- the regular rather than the unusual practice." *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 336, 97 S. Ct. 1843, 1855, 52 L. Ed. 2d 396 (1977).

At trial, Gregory Hattaway, [*31] a black male who applied for a police officer position in Warren's police department, testified as to his treatment during the application process. Hattaway first went to the Warren Personnel Department in March 1987. He testified that he was informed by a worker that the City was not accepting applications for police officer positions, that he was treated by the worker in an abrupt, impolite manner, and that the worker acted as if she did not want to be bothered. Later, in August 1987, he returned to Warren and applied for a police officer position. He testified that the person in the Personnel Department who waited on him was not particularly polite.

Hattaway applied for a police officer job in January 1991. He testified he had no complaints about his treatment in relation to such application. He also testified that he did not see any whites being treated differently from the manner he experienced.

Hattaway was hired as a police officer for the City in 1991. However, in May 1991, Hattaway was discharged from this position because he failed the police academy. The City originally offered to send Hattaway through the police academy a second time, but subsequently rescinded such offer. [*32] Mayor Bonkowski, who made these decisions, testified that the offer was rescinded because of concerns about liability to other police applicants on the eligibility list behind Hattaway and because of an unwillingness on the part of the Government to agree not to challenge Hattaway's failure to pass the academy if he were given a second chance.

Derick Mathis, a black male who is a police officer for the City of Detroit, applied to the City for a police officer position in January 1991. Mathis testified that the employee in the Personnel Department who waited on him spoke to him in a sharp tone of voice.

Alfred Nwokedi, a black male, is a police officer for the City of Inkster. In July 1987, Nwokedi went to the Warren Personnel Department to inquire as to whether the City of Warren was hiring for the position of police officer. He filled out an interest card with the understanding that he would be contacted if there was an opening. He was never contacted by the City. However, he was treated well, in a courteous manner, and without delay. Nwokedi also applied for a position with the police department in late 1990 or early 1991 and took a written examination for the job, although it was [*33] around this time that he took his present job as a police officer for the City of Inkster.

Walter Davis, a black male, is an officer for the Michigan State Police. In January 1991, Davis applied for a police officer position with the City of Warren. Davis testified that at the Warren Personnel Department he was not given an application right away, but was, instead, informed of the requirements he would have to fulfill before he could be hired. He testified that the personnel employee who spoke to him was rude and sarcastic and that he felt as if the employees at the Personnel Department were trying to discourage him from applying. Davis testified that when he showed a personnel employee his State Police badge, the employee's facial expression turned to a look of disgust.

Lori Ewell, a black female, applied for a position as a laboratory technician in October 1989. Ewell testified that she was initially ignored by employees at the Personnel Department and was then directed to look at job postings on the Department's bulletin board. She also testified that when a white applicant entered the office, he was immediately helped. Nothing was said to her that she found offensive and she took [*34] the lab technician test.

Donetta Hayes, a black female, applied for a tax account specialist position in July, 1989. Hayes testified that she was asked by an employee of the Personnel Department to provide identification, such as a drivers' license, social security card, or a utility bill; however two white applicants were not asked to produce a utility bill. Hayes testified that she was interviewed for the job and that the interviewer, City Treasurer Lilian Klimecki Dannis, told her that, if hired, some of the employees in the office might not like her. Hayes was later offered a job with the City. She testified that she spoke with the City's Personnel Director, Michael Smith, who told her that she would have to come to the City to pick up a pre-employment physical form. However, she made no effort to pick-up the form, or arrange for an alternate means of receiving it.

Felicia Thomas, a black female, applied for a temporary position as a clerical worker in July 1987. She testified that she was ignored initially by Personnel Department workers and had to ask twice for assistance in obtaining an application. She asked where she could fill out the application and was told to go to the [*35] lobby even though there were empty chairs in the Personnel Department. When she returned the application, she asked about the date of the test for the position. The Personnel Department employee responded to such question in an unpleasant manner. Thomas also testified that she remained interested in taking the typing test but did not do so because her car broke down.

Imogene Tate, a black female, applied for a temporary clerical position with the City in August, 1989. [9] Tate testified that employees in the Personnel Department were evasive and were unwilling to tell her what positions were available. However, an employee called the man in charge of temporary hiring to come out and speak with Tate. Tate was also given an application to fill out and was later contacted by the City as to her continued interest in a job with the City.

Quinton Swift, a black male, applied for a firefighter position with the City in October, 1990. He testified [*36] that an employee of the Personnel Department spent more time explaining the job application to two white applicants than to him. He was not told about the requirement to submit an EMT certificate with the application and only later found out about such requirement when he overheard another applicant talking about it. Swift testified that he then went back into the Personnel Department to ask about this requirement and the personnel employee "briskly" pointed out to him a notice on a checklist stating such requirement.

Gwendolyn Cook, a black female, applied for the job of tax account specialist in Warren in the fall of 1988. She took the test for the position, passed it, and was hired by the City. When she applied for the job she was waited on immediately, was given all the information she needed, and was not treated in an offensive manner.

Sam Nance, a black male, applied for a temporary laborer position at the end of 1987. He testified that he had to wait several minutes for an interview with an employee of the Personnel Department and that a female employee of the Personnel Department was not friendly, just nonchalant.

Dwight McGee, a black male, applied for a laborer position [*37] in December 1986. He testified that he had no complaints about his treatment at the Personnel Department -- that no one was impolite or rude to him.

Derrick Cato, a black male, applied for a firefighter position with the City in October 1990. He testified that

[9] Imogene Tate's deposition testimony was introduced into evidence at the trial.

the employees in the Personnel Department who waited on him were helpful and that he had no complaints.

Stephen Harris, a black male, applied for a temporary laborer position in March, 1991. He testified that he was offered a job on the spot and that he was treated with dignity and respect.

Terrell Williams, a black male, applied for a temporary laborer position in August 1987. He testified that he was treated properly by the Personnel Department staff.

Leonard Miree, a black male, applied for a firefighter position with the City in 1989 and is currently a firefighter for Warren. He testified that he had no complaints about how he was treated during the application process.

Alvin Dunlap, a black male, is currently employed by the City's Sanitation Division. He testified that he had no complaints about how he was treated during the application process for his job.

Considering the testimony presented at trial and in the depositions [*38] admitted at trial, the Government has failed to persuade this Court by a preponderance of the evidence that Warren engaged in a pattern or practice of discrimination against blacks with regard to their treatment during the job application process. At most, the testimony indicates that some black individuals who applied for municipal jobs with the City in the past several years may have been treated rudely or that they were not immediately helped. However, there is also much testimony that many black individual who applied for municipal positions were treated with civility and care.

Additionally, this Court finds unpersuasive the Government's argument that the City's rescinding of its offer to send Hattaway through the police academy a second time is evidence of Warren's disparate treatment of black job applicants.

In sum, this Court finds that the Government has not met its burden of proving that Warren disparately treated black job applicants because of their race in such a way as to be considered a "standard operating procedure" of the City. At most, the Government has shown some sporadic instances of, arguably, disparate treatment of black job applicants. Such a showing cannot [*39] support a claim of pattern or practice discrimination on the basis of disparate treatment. *See Teamsters,* 431 U.S. at 336, 97 S. Ct. at 1855.

*4. Timing of the 1990/1991 Police Recruitment*

The Government claims that Warren's 1990/1991 recruitment for police officer positions with the City violated Title VII in that such recruitment was timed so as to disparately impact black applicants. The Government bases its claim on the fact that more black applicants than white applicants were disqualified from the recruitment because they did not submit the required Michigan Law Enforcement Officers Training Course ("MLEOTC") certification by the deadline date. [10]

Warren began the challenged recruitment on December 21, 1990. Advertisements for the recruitment ran in the *Detroit News* and *Detroit Free Press* [*40] on December 21, 22 and 23, 1990. *(Id.)* Advertisements for the recruitment ran in the *Michigan Chronicle* on December 26, 1990, January 2 and 9, 1991. Advertisements for the recruitment ran on WJLB radio on December 26-28, 1990, January 2 and 3, 1991. The radio advertisements were prepared by WJLB and did not make reference to the MLEOTC requirement.

Both black and white applicants called the City and said they could not get their MLEOTC certifications by the deadline date. The City arranged for these applicants' MLEOTC scores to be sent directly to the City via facsimile or telephone. However, the City did not inform all applicants for the recruitment about having MLEOTC scores expedited.

The Government presented evidence that 38.1% of the black applicants for the police recruitment were disqualified for failure to timely submit MLEOTC certification; whereas 14.4% of the white applicants were disqualified for such reason. The Government presented statistical analysis that the number of disqualified, black applicants compared to white applicants, was 5.2 standard deviations.

This Court finds the Government's proffered disparate impact claim as to the timing of the 1990/1991 [*41] police recruitment unpersuasive. In a nutshell, the Government asks this Court to speculate as to the cause behind the failure of a higher number of black applicants than white applicants to timely submit their MLEOTC certifications. The Government's statistical analysis containing the high standard deviation factor for disqualification rates is unpersuasive. It does not eliminate other possible reasons for a higher black applicant disqualification rate -- such as the possibility that a lower number of black applicants as compared to white applicants may have contacted the City for expedited

[10] Under the terms of the police recruitment, an applicant had to possess MLEOTC certification in order to be eligible to take the written examination.

MLEOTC scores. [11] Dr. Killingsworth's analysis also did not take into account the number of black applicants compared to white applicants who had MLEOTC certification at the time of application for the 1990/1991 police recruitment.

[*42]

*B. Hiring*

The Government contends that Warren violated title VII by hiring two white males instead of two black males to municipal positions. The Government's claim with regard to such hiring is based on a disparate treatment theory.

The Supreme Court has characterized an appropriate framework for analyzing claims of individual disparate treatment as follows:

> In *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. [footnote omitted] First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.,* at 802, 93 S. Ct. at 1824. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance [*43] of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.,* at 804, 93 S. Ct. at 1825.*Texas, Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207 (1981). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.,* 450 U.S. at 253, 101 S. Ct. at 1089. Also, the defendant's burden as to articulating a legitimate, nondiscriminatory reason for its action is one of production, not persuasion -- the defendant need only introduce enough evidence to create a "genuine issue of fact as to whether it discriminated against the plaintiff." *Id.,* 450 U.S. at 254-55, 101 S. Ct. at 1094.

In establishing a prima facie case of race discrimination in hiring under this framework, the plaintiff must establish: (1) that he/she belongs [*44] to a racial group; (2) that he/she was qualified for the position; (3) that he/she was rejected for the position; and, (4) that there are circumstances that give rise to an inference of racial discrimination. *See Harris v. Adams,* 873 F.2d 929 (6th Cir. 1989).

1. Failure to Hire William Spicer

The Government contends that Warren violated Title VII by disparately treating William Spicer, a black male, because of his race by failing to hire him for the position of Purchasing Agent for the City.

In June 1987, the City accepted applications for the position of Purchasing Agent. (Ex. # 82) The requirements for the position included: a bachelor's degree in business administration or public administration and five years of purchasing experience, with preferably two years governmental experience. (Ex. # 82) Initial interviews of eleven applicants who met the minimum qualifications for the position were conducted by Martin Wicker and Marcel Sucaet, assistants to Richard Fox, the Controller for the City. Wicker and Sucaet ranked as the top three candidates: William Spicer, Dennis Costello, a white male, and Joseph Kaplan, a white male.

Fox then interviewed [*45] the three top candidates for the position and made the hiring decision. After the interviews, Fox ranked the candidates an follows: Costello, Spicer, and Kaplan. For each candidate, Fox asked the same set of ten questions, and scored each candidate's response to the questions. Fox hired Costello, into the Purchasing Agent position.

At the time he was hired, Costello had no previous government purchasing experience. He did have five and one-half years purchasing experience with two private companies, Macauley's Inc. and United Stationers Supply Company, and he had experience in formulating purchasing specifications, formulating bids, visiting vendors, buying supplies, working with computers, and making recommendations as to purchases of goods and services. Costello also held a bachelor of science degree in business administration. (Ex. # 84A)

While in the Army, Spicer had been involved in purchasing duties in France, Puerto Rico, Panama, and

[11] The Court also notes that while the Government points to the fact that the City arranged to have some MLEOTC scores expedited by being sent directly to the City, the Government did not produce any evidence at trial that the City did so only for white applicants while refusing such action for black applicants.

Nicaragua between 1962 and 1969. (Ex. # 712) Between 1972 and 1976, Spicer administered defense contracts for the Army. (*Id.*) Between 1977 and June 1978, Spicer worked for Chevrolet as a mechanical engineer. Between July 1978 and June 1982, [*46] he worked as an assistant to the department of procurement for the Argonne National Laboratory, but did not work directly in the Laboratory's purchasing department. Between June 1982 and November 1983, Spicer worked as a program manager for Cadillac Gage but did not work in the company's purchasing department. Between November 1983 and August 1985, he worked as Acting Purchasing Agent for the City of Chicago. In such job, he was not involved in the day-to-day function of purchasing. During the interview with Spicer, Fox testified that Spicer spent little time discussing his experience in the Army with purchasing.

This Court concludes that the Government has made out a prima facie case of discrimination as to Warren's decision not to hire Spicer as Purchasing Agent. Warren, however, has met its burden of production as to a legitimate, nondiscriminatory reason for its decision to hire Costello instead of Spicer. To wit, Warren introduced evidence that its Controller, Fox, hired Costello based upon his interview-derived impression of Spicer and Costello. He determined that Costello had more "hands-on" procurement experience such as actually preparing and engaging in procurement auctions [*47] and bids, whereas Spicer's procurement experience was more of a managerial nature.

Fox also reviewed his decision to hire Costello with the City's Personnel Director, Michael Smith. Smith wanted to make sure the decision was proper due to the Government's scrutiny of Warren's hiring practices.

This Court concludes that the Government has not shown by a preponderance of the evidence that Warren's proffered reasons for hiring Costello instead of Spicer are pretext. For example, the Government contends that Spicer's Army procurement experience, such as his activities in Nicaragua, made him much more qualified than Costello. However, Fox testified at trial that during the interview, Spicer did not discuss his Army experiences much at all. The Government also contends that, at the interview, Fox did not ask Spicer about any hands-on procurement experience and, further, that before the interviews, Wicker and Sucaet, Fox's assistants, had ranked Spicer higher than Costello. However, at the interview, Fox asked Spicer the same questions he asked Costello, letting each candidate answer the question as they saw fit. Fox testified that he was impressed with Costello's answers:

> After I went [*48] through and interviewed all three candidates, I went and jotted down some
> information that I feel the reasoning [sic] why I hired Mr. Costello. And they were that he was very forceful in his answers. He was well poised during the interview. All questions were very detailed, always related a hands on approach to work, not strictly a division head. Followed through to determine his role in office. Asked what I expected from him in his performance. Very goal orientated, very motivated and driven for new procedures and new ideas for better operation.(Tr. Vol. 4-A at 64)
> Fox then testified about his post-interview impressions of Spicer as compared to Costello:
>
> I felt Mr. Spicer was, through the interview, that he was more of a supervisor, had personnel performing the tasks for him and in the position that I had to hire someone, I felt that I needed someone that was going to perform, do many of the functions, be involved in the day-to-day operations and actually possibly do typing through the, actually doing the formal bids. And Mr. Costello fit the criteria more that I needed for the Purchasing Agent for the City of Warren.(Tr. Vol. 4-A at 64-65)

Further, Fox had Personnel [*49] Director Smith review his decision to hire Costello -- an act that indicates to this Court that Fox did not have the intent to discriminate against Spicer on account of race.

In sum, this Court concludes that the Government has not met its burden of proving by a preponderance of the evidence that the City, via Fox, failed to hire Spicer to the purchasing agent job on account of his race.

*2. Failure to Hire Kenneth Bailey*

The Government also contends that Warren violated Title VII by disparately treating Kenneth Bailey because of his race by failing to hire him for the position of Assistant to the Director for the City's Department of Public Services.

The City's Department of Public Service has several divisions which report to the Department's Director, such as: Waste Water Treatment; Water and Sewer; Building and Safety; Service; Engineering; Maintenance; Public Works; Garage; and, Sanitation.

In June 1989, the City accepted applications for the position of Assistant to the Director, Department of Public

Service. The job notice for the position stated as preliminary requirements the following: a bachelor's degree in civil engineering or business administration and four years [*50] of administrative experience in a related management field. (Ex. # 85) The Assistant Director position entails broad administrative duties and staff work germane to the Department of Public Services operations. (Ex. # 85)

Kenneth Bailey, a black male, and Paul D'Luge, a white male, were interviewed and considered for the position. D'Luge was hired.

At the time he applied for the Assistant Director position, Bailey held a bachelor of science degree in criminal justice and was working towards a master's degree. He had almost four years experience as Deputy Superintendent of Public Service for the City of Highland Park, Michigan. His job in Highland Park was in a department charged with general maintenance and included the following: administrative duties as to budget hearings, state reports, labor relations and disciplinary hearings; and, answering and addressing grievances and dispensing disciplinary action.

At the time of his application, D'Luge was working on his bachelor's degree and had taken courses in engineering and water distribution. (Ex. # 664D) D'Luge had worked fourteen years for the City of Mount Clemens, Michigan, and had gained experience there handling citizen complaints, [*51] operating heavy equipment, and had worked in the City's sanitation, water, and sewer departments.

Robert George, then Director of the Department of Public Service, interviewed both Bailey and D'Luge. George had been through EEO training both in Warren and at his previous job at Detroit Edison. While working for Detroit Edison, George had been selected to give EEO training for 60 to 80 supervisors and had been responsible for a company affirmative action program for the recruitment and hiring of minorities into field positions with the company.

Based on his interviews of the candidates, George scored D'Luge higher than Bailey. George rated as D'Luge's strengths the following: experience in the field in water and sewer operations; his year of experience working as a supervisor in Warren; his ability to articulate his thoughts; his manner and professionalism; his follow-up to customer complaints; his knowledge of the functions of the City's departments. As a weakness in D'Luge, George noted that D'Luge had failed to correctly answer a contracts question. (Ex. # 664C)

George rated as Bailey's strengths the following: his previous experience as Deputy Superintendent in Highland Park; the [*52] fact that he possessed a bachelors degree; his good communication skills; and his handling of grievances.

As a result of the interview and application process, George placed D'Luge first on the eligibility list for the Assistant Director position and placed Bailey in second position. George also reviewed his decision placing D'Luge ahead of Bailey with Michael Smith, the City's Personnel Director.

This Court concludes that the Government has made out a prima facie case of discrimination as to Warren's decision not to hire Bailey to the Assistant Director position. However, this Court finds that Warren has come forward with a legitimate, nondiscriminatory reason for hiring D'Luge to the Assistant Director position instead of Bailey. Warren introduced evidence at trial that George considered D'Luge's prior experience more relevant to the job than Bailey's -- one such example being D'Luge's experience with sanitation, water and sewer operations. George testified that he considered the Water and Sewer Division one of the Department of Public Services' most important divisions. D'Luge also possessed S-1 and S-2 licenses, qualifications relevant to the Department's operation of the Water [*53] Division.

This Court concludes that the Government has not met its burden of persuasion as to whether Warren's proffered reasons for hiring D'Luge instead of Bailey are pretext. The Government focuses only on the aspects of D'Luge's background which least relate to the duties for the Assistant Director position. For example, the Government points to the nature of D'Luge's hands-on experience in Mount Clemens and Warren as being primarily non-administrative and that Bailey had hands-on experience from his job in Highland Park. However, such evidence ignores George's testimony that he considered experience in water and sewer work to be important, experience that D'Luge had. Bailey, however, had no experience with water and sewer work.

The Government also contends that George treated D'Luge and Bailey differently in the interview process. Bailey testified that during the interview, George answered the telephone and walked in and out of the office. Bailey later testified that he had no complaint as to how he was treated by George. Along similar lines, the Government contends that George contacted D'Luge's superior in Warren for a recommendation, but failed to likewise contact Bailey's [*54] superior in Highland Park. However, George did not testify that he contacted D'Luge's superior. He only testified that during the time D'Luge had been working for Warren, he had received comments from D'Luge's superior about his job performance.

In sum, this Court concludes that the Government has not met its ultimate burden of proving by a preponderance of the evidence that the City, via George, failed to hire Bailey to the Assistant Director position because of his race.

*C. Maintenance of a Hostile Work Environment*

The Government next argues that in three of the City's divisions or departments, the Water Division, the Parks and Recreation Department and the Treasury Department, there was a racially hostile work environment after 1986 so pervasive as to violate Title VII. The Government claims that Warren knew of the hostile work environment and failed to remedy it.

The elements of prima facie proof for a plaintiff claiming a racially hostile work environment violative of Title VII are straightforward. The plaintiff must assert and prove that: (1) he/she was a member of a protected class (race); (2) he/she was subjected to slurs or other harassment; (3) the slurs or harassment [*55] were based upon the plaintiff's race; (4) the charged slurs or harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive work environment that affected seriously the psychological well-being of the plaintiff; and, (5) the existence of respondeat superior liability of the employer. *See Risinger v. Ohio Bureau of Workers' Compensation,* 883 F.2d 475, 484-485 (6th Cir. 1989) (holding that such factors are proper for establishing racially hostile work environment claim). As to the latter element, proving respondeat superior liability of the employer, the plaintiff will have the burden of proving that "the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to implement prompt and appropriate corrective action." *Bell v. Chesapeake & Ohio Ry. Co.,* 929 F.2d 220, 224 (6th Cir. 1991) (involving analogous state-law racially hostile work environment claim and utilizing federal law).

*1. The City's Water Division*

Several former employees of the City's Water Division testified at trial.

[*56] Arthur Mainor, a black male, worked as a temporary laborer in the Water Division between November 1988 and October 1989. He testified as to four incidents of alleged racial harassment:

> (1) That while working in the Division's garage building he encountered a noose hanging in the hallway near the supervisor's office. The noose was removed approximately three hours later.
>
> (2) That in approximately May 1989, he was in a supervisor's office along with two white supervisors, Paul Ballard and Gene Wakker, and some other, white, coworkers. Mainor testified that Dick Gantz, a City worker from the Department of Public Services stated to Tony Ventimiglio, a coworker of Mainor's, "hang around [the] temporary [Mainor] and you'll become a white nigger." (Tr. Vol. 2-B at 13) Mainor testified that neither of the two white supervisors present did anything about the remark.
>
> (3) That he had a conversation with a coworker, Ventimiglio, concerning a recent Sugar Ray Leonard boxing match. Mainor testified that Ventimiglio, in response to being asked if he had seen the fight, stated to Mainor, "Let me tell you something, Art. I can't stand that black nigger." (Tr. Vol. 2-B at 22)
>
> (4) That in approximately [*57] March 1989, Mainor was assigned to gas up a Division truck at the City's fire and police station on Nine Mile Road. He waited in a line of vehicles at the station, all driven by whites, and when he reached the gas pump he was challenged by a City police officer who said, "What the fuck are you doing here?" (Tr. Vol. 2-B at 25, 33) Mainor testified that the white employees who had previously used the gas pump had not been challenged.

Besides these four alleged incidents of harassment, Mainor testified that while working as a temporary laborer he was never assigned to a job requiring that he go to a resident's home and that he was not assigned to work on a Division sewer truck that would go to residents' homes. Mainor further testified that he was assigned to shovel snow several times even though it was the job of the janitor. However, the City introduced the testimony of Joseph Rezak, a superintendent at the Water Division in charge of assigning work who testified that he assigned a white employee, Mr. Meyerhoff, to do janitorial work, as well as Mainor. Rezak also testified that, in assigning work to temporary employees, he did not consider the work preferences of such employees.

[*58] Mainor also testified that when he started work, he was not informed of the City's EEO or anti-discrimination policies, including the procedures for reporting incidents to superiors. He never reported any of these incidents to his superiors. Mainor applied for three jobs with the City after the incidents occurred.

Dwight McGee, a black male, worked as a temporary laborer for the Water Division over several periods from

January 1987 through October 1988. (Ex. # 105) McGee testified that a white coworker would introduce him and add a comment such as: "He's not Da-white. We're Da-white" (Tr. Vol. 3-B at 86) McGee testified that such comments were made in front of supervisors who did nothing to halt such practice. McGee further testified that he did not pay any attention to such comments because they were made in a joking manner. He also testified that a crew chief at the Division told him that Albert Logan, another black temporary employee, "was like a ghetto nigger" and that to McGee he said: "McGee you're not like that, you're better." (Tr. Vol. 3-B at 91) McGee testified that he regularly witnessed white employees at the Division laughing at and heckling Logan. He further testified [*59] that such comments were made at the Division garage when they had time off and were just "fooling around." These comments were not made by Division supervisors.

McGee testified that on one occasion someone in the Division placed a cartoon depicting a black genie coming out of Aladdin's Lamp on a bulletin board, but that Leonard Solecki, the superintendent of the Division, immediately took the cartoon down.

McGee testified that he was never provided any information regarding the City's EEO or anti-discrimination policies, including the procedures for reporting incidents to superiors. McGee never informed any of his superiors about the above-described incidents. McGee also testified that he had no complaints about how he was treated by his supervisors at the Division.

Stephen Harris, a black male, worked as a temporary laborer in the Water Division between March 1991 and June 1991. Harris testified about several incidents with the Division. He testified that while using a shower in the City's warehouse, two white employees walked into the locker room and one commented that "these two niggers" had broken into his house or car. (Tr. Vol. 7-A at 25-26) Harris testified that he confronted [*60] the employee who made the comment and told him, "You shouldn't say stuff like that here." (Tr. Vol. 7-A at 26-27) The employee apologized to Harris. Harris did not report this incident to his supervisors.

Harris also testified that while painting the Division's garage, he encountered racially derogatory graffiti in the bathrooms located across the hall from the supervisor's office.

Harris testified that in April 1991, he was walking with another black employee and two white employees passed them near the Division's water building, with one of the white employees saying, "Where's those two diggers at?" (Tr. Vol. 7-A at 23-24) Harris confronted the employee who had made the comment and asked him if he had said "digger" or "nigger." (Tr. Vol. 7-A at 24.) He never reported this incident to his superiors. Harris testified that he was treated fairly by his supervisors at the Division such as Leonard Solecki.

*2. The City's Parks and Recreation Department*

Several former employees of the City's Parks and Recreation Department ("Parks Department") testified at the trial.

Sam Nance, a black male, worked as a temporary laborer in the Parks Department from January 1988 to July 1988. Nance [*61] testified that a white City employee called a black coworker of his a "nigger" in his presence, and that the coworker was upset by the comment. Nance never complained to his superiors about the incident.

Nance also testified that a white employee at the Parks Department would always refer to him as "brother," and that this upset him. He told the white employee to stop using the term; however, the white employee continued to use the term. The same white employee made racially derogatory comments to a black coworker of Nance's. Nance never complained to his supervisors about these comments.

Nance testified that he was never provided any information regarding the City's EEO or anti-discrimination policies, including the procedures for reporting incidents to superiors.

Kaira Gandy, a black female, worked as a public relations intern for the Parks Department for several months. She testified that Paula Artman was her supervisor, that her work was closely scrutinized by Artman and that Artman required constant reports as to what she was doing. Gandy testified that she left the internship in order to avoid an "explosive or confrontational" situation with Artman. Gandy also testified that [*62] Artman treated many employees, including white employees, in a tough, sometimes abusive manner -- yelling, even swearing, at such employees.

Gandy further testified that the intern position with the Parks Department was a high profile position, involving a high degree of contact with the community. She testified that she experienced no racial harassment while on the job, and that she never made any complaints to her superiors about how she was treated on the job. She also testified that she was never provided any information regarding the City's EEO or anti-discrimination policies, including the

procedures for reporting incidents to superiors. However, she testified that she would have gone directly to the Mayor if any racially derogatory comment were made to her.

*3. The City's Treasury Department*

Gwendolyn Cook, a black female, worked as a tax account specialist for the City for three weeks beginning in July 1989. She was the only black employee in the Treasury Department, and she testified that she felt isolated because her coworkers interacted less with her than with other, white, coworkers. She testified that she would not receive assistance from her supervisors as fast [*63] as white coworkers did. She voluntarily resigned from her job in order to accept another, higher paying job elsewhere. Cook testified that nothing she experienced on the job made her resign.

*4. Conclusion as to Hostile Work Environment Claim*

This Court concludes that the Government has not shown that black employees in the City's Water Division, Parks and Recreation Department, and Treasury Department were subject to a racially hostile work environment violative of Title VII.

Specifically, this Court finds that the Government has failed to prove a prima facie case of its claim of a racially hostile work environment at these three City departments. The Court's finding is compelled by the fact that the Government presented little or no evidence of respondeat superior liability on the part of the City. To wit, not one of the Government's witnesses, whose testimony is detailed above, testified that he or she reported any of the alleged incidents of racial slurs or harassment to his or her supervisor.

Only in a few of the alleged incidents can it be argued that some City employee in a supervisory role had direct notice of the incident. This Court remains unconvinced, on the evidence [*64] presented by the Government, that such incidents were more than isolated, albeit regrettable, incidents within the three City departments challenged by the Government. Indeed, there is contrary evidence in the record indicating that when confronted with a racial incident, a department supervisor would act to remedy or stop such incident. For example, Dwight McGee testified that on the occasion when someone in the Division placed a cartoon depicting a black genie coming out of Aladdin's Lamp on a bulletin board, Leonard Solecki, the superintendent of the Division, immediately took the cartoon down.

This Court also finds that the Government has not met its burden of proving that the claimed incidents of racial harassment in the three departments had the effect of unreasonably interfering with any of the witness' work performance and creating an intimidating, hostile, or offensive work environment that affected seriously the psychological well-being of any employee. Some of the witnesses testified that they had applied for additional jobs with the City or that they would be inclined to do so in the future. This hardly supports any claim that the incidents they testified to at trial had [*65] the effect of unreasonably interfering with their work or seriously affecting their psychological well-being.

In sum, this Court finds that the Government has not established a prima facie case of a hostile work environment violative of Title VII at the three City departments.

*D. Failure to Eliminate Effects of Pre-1986 Discrimination*

The Government also contends that Warren has failed to eliminate the effects of its pre-October 1986 discrimination as to the hiring of blacks into the City's municipal workforce. This Court agrees.

Previously, this Court has held that Warren's pre-1986 use of a durational preapplication residency requirement for municipal jobs violated Title VII by disparately impacting prospective black job applicants -- resulting in no permanent black municipal employees in the City. *United States v. City of Warren,* 759 F. Supp. 355 (E.D. Mich. 1991). In Part II-A-1 of this Opinion, this Court has concluded that Warren's pre-October 1986 practice of advertising for police and firefighter positions only in newspapers which generally circulated in Macomb County disparately impacted against prospective black job applicants in violation [*66] of Title VII.

It is now approximately six years since Warren eliminated the last of its durational preapplication residency requirements and began to advertise municipal job openings in newspapers with general circulation throughout the entire Detroit metropolitan area. In these six years, the representation of blacks in Warren's permanent municipal workforce has barely increased. It is undisputed that in 1986, there were no permanent black employees in Warren's municipal workforce. The Government has presented evidence, which Warren does not dispute, that, as of March 27, 1991, blacks constituted only 1% of Warren's permanent municipal workforce. (Ex. # 35) Further, at trial, the Government's statistical expert, Dr. Killingsworth testified that, even when using Warren's proffered labor market estimates, as presented by Warren's expert, Dr. Peterson, it could be expected that there would be three times as many black municipal employees for the

City. Warren offered little rebuttal to Dr. Killingsworth's findings, and instead argues that such "snapshot" statistics are meaningless. This Court is satisfied from the evidence presented that the number of permanent black employees in Warren [*67] should be significantly greater than one percent; and that such "deficiency" is, in part, the result of the disparate impact caused by the durational preapplication residency requirement and the "limited" police and firefighter recruitment before October 1986. [12]

This Court therefore finds that Warren's post-1986 recruitment efforts, even though greatly widened in scope and, recently, expressly and powerfully directed at blacks (via advertisement in black-oriented media), have, as yet failed to eradicate the effects of the City's pre-October [*68] 1986 discrimination as to prospective black job applicants for municipal positions. Accordingly, this Court concludes that, even though the City has eliminated the two practices that, pre-October 1986, violated title VII, the durational preapplication residency requirement and the use of Macomb County only newspaper advertisements, injunctive relief is still appropriate. Such relief may properly be directed at City minority recruitment efforts for municipal positions. *See* NAACP v. Town of Harrison, 940 F.2d 792, 805-08 (3d Cir. 1991) (upholding district court's imposition of injunction against city regulating municipal recruitment after finding that city's use of a residency requirement had violated Title VII by disparately impacting prospective black job applicants and after city had eliminated residency requirement).

*E. Retaliation Claim*

The Government also contends that Warren violated Title VII by removing the three members of the Warren Police and Firefighter Civil Service Commission ("Commission") on August 28, 1990. The Government argues that the three Commissioners, Ronald Peplinski, Harvey Dean and Paul Piatt, were removed in retaliation [*69] for their participation with the Government in the instant lawsuit and/or their requests to the City for advertising of police and firefighter positions in black-oriented media, thus violating *42 U.S.C. § 2000e-3(a)*.

On August 30, 1990, the Government filed an application for a temporary restraining order and a motion for a preliminary injunction, seeking to enjoin the City's removal of the Commissioners. This Court held an evidentiary hearing on the matter from September 24 through September 27, 1990. At the conclusion of such hearing, this Court denied the Government's request for injunctive relief. (Sept. 1990 Tr. Vol. 4 at 33)

At the trial in the instant matter, this Court instructed the parties to brief the retaliation claim after completion of such trial. Accordingly, post-trial, the parties have briefed the issues relating to the retaliation claim. In its present brief, the Government argues that the Commissioners are "employees" of the City within the meaning of Title VII and that it has direct evidence that the Commissioners were fired in retaliation for their speaking with the Government with regard to the instant action. Warren offers [*70] a plethora of arguments in opposition to the Government's retaliation claim, i.e., that the Commissioners were not "employees" of the City under Title VII, that the Government's retaliation claim is precluded by res judicata and/or collateral estoppel as a result of a state court decision finding the discharge of Peplinski proper under Michigan law, that any claim against Piatt and Dean is foreclosed by releases they signed with the City, and, that the Government has not and cannot prove a claim of retaliation by the City with regard to the removal of the Commissioners from their position on the Commission.

This Court concludes that the Government's retaliation claim may most easily be disposed of on its merits.

In order to prove a prima facie case of retaliation violative of *42 U.S.C. § 2000e-3(a)* a plaintiff must establish the following: "(1) that he engaged in an activity protected by Title VII; (2) that he was the subject of adverse employment action; and (3) that there exists a causal link between his protected activity and the adverse action of his employer." *Jackson v. RKO Bottlers of Toledo, Inc.,* 743 F.2d 370, 375 (6th Cir. 1984), [*71] *cert. denied sub nom., Jackson v. Pepsi-Cola Bottlers, Inc.,* 478 U.S. 1006, 106 S. Ct. 3298, 92 L. Ed. 2d 712 (1986). *See also Irvin v. Airco Carbide,* 837 F.2d 724, 727 (6th Cir. 1988) (same). Once a plaintiff establishes a retaliation claim, the employer may articulate a legitimate, nondiscriminatory reason, and this in turn may be shown to be pretext by the plaintiff. *Irvin,* 837 F.2d at 727 (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)).

The Government argues that it need not follow the *McDonnell Douglas* shifting burdens method as to its retaliation claim because it has "direct" evidence that the Commissioners were discharged in retaliation for their meeting with the Government in the instant action. In

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[12] In reaching this conclusion, the Court notes that it is not concluding that Warren's post-1986 recruiting efforts themselves violated Title VII. In other words, while the recruiting efforts between 1986 and 1990 may not have *caused* a disparate impact, such efforts did nothing to correct the disparate impact caused by the City's durational preapplication residency requirement and its failure to properly recruit for police and firefighter positions before October 1986.

cases where there is "direct" evidence of discrimination, *McDonnell Douglas'* methodology should not be employed. *See* *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121-22, 105 S. Ct. 613, 621-22, 83 L. Ed. 2d 523 (1985); [*72] *Blalock v. Metals Trades, Inc.,* 775 F.2d 703, 707 (6th Cir. 1985), *cert. denied,490 U.S. 1064, 109 S. Ct. 2062, 104 L. Ed. 2d 627 (1989)*.

This Court finds that the Government has not and cannot prove its claim of retaliation as to the City's removal of the Commissioners.

It is undisputed that in June 1990, the City entered into a collective bargaining agreement with its firefighters which provided that new firefighters could be hired without going through the Commission.

In August, 1990, the Commission sued the City and the firefighters' union ("Union") in Macomb County Circuit Court. Such suit sought to enjoin the City and Union from enforcing the portion of the new collective bargaining agreement allowing for hiring of firefighters without going through the Commission. On August 28, 1990, Judge Michael Schwartz, following a hearing, ruled against the Commission and in favor the City and Union.

Also on August 28, 1990, the City, via Mayor Bonkowski, sent a letter to the Commissioners removing them from their positions on the Commission. *(See* Ex. # 25 [13] (letters from Mayor Bonkowski to [*73] each of the Commissioners removing them from their Commission positions and specifying the reasons for such removal))

The Government contends that, at a deposition, Mayor Bonkowski gave the real reason for his decision to remove the Commissioners from the Commission -- their participation in the instant lawsuit.

At his deposition, Mayor Bonkowski testified that on August 28, 1990 he learned that the Commissioners were planning to appeal Judge Schwartz's decision denying the Commission's request for an injunction against the City and Union as to hiring of new firefighters. He became angry and upset at learning of the Commissioners' plans and decided to remove the Commissioners from their positions. (Bonkowski Dep. at 271-72)

As its "direct" evidence of retaliation, the Government asserts that the Mayor considered the state court lawsuit filed by the Commission to be a part of the instant action by the Government (Bonkowski Dep. [*74] at 282), and that he was upset at some of the testimony Peplinski had given to the Government in a deposition in the instant Case. (Bonkowski Dep. at 169-71)

This Court finds unpersuasive the Government's proffered evidence in support of its retaliation claim. Mayor Bonkowski's statements at his deposition simply do not support the Government's claim that there was a causal link between the City's removal of the Commissioners and their participation in the instant lawsuit. In other words, the Government's evidence of retaliation does not meet the third requirement for their prima facie case -- that there exists a causal link between the Commissioners' protected activity and the adverse action of the City. *Jackson,* 743 F.2d at 375.

In his deposition, Mayor Bonkowski testified that he was angry at the Commissioners because they had decided to appeal Judge Schwartz' decision, a decision he believed was clear and correct, and that an appeal would cost the City additional legal fees. (Bonkowski Dep. at 282-83) He further testified that the Commissioners' participation with the Government in the instant lawsuit did not cause him to remove them from their positions. [*75] (Bonkowski Dep. at 272) The Court is not persuaded that the removal of the Commissioners was in retaliation for their engaging in protected activities as alleged by the Government.

In sum, this Court concludes that Government has not and cannot make out a prima facie case via direct or circumstantial evidence of retaliation by the City against the Commissioners for their Participation in the instant action. [14]

### *III. Conclusion and Relief*

#### *A. Conclusion*

This Court concludes that Warren's pre-October 1986 recruitment practice of advertising for police and firefighter positions in media which primarily [*76] circulated in Macomb County, i.e., the *Macomb Daily, Warren Weekly,* and *Community News,* had an adverse disparate impact on blacks and thus, violated Title VII. Previously, this Court has ruled that Warren's pre-1986 use of durational pre-application residency requirement violated Title VII by having an adverse disparate impact on blacks. *United States v. City of Warren,* 759 F. Supp.

[13] This exhibit number refers to Exhibit # 25 admitted at the trial in the instant action.

[14] The Government asks this Court to reopen the record on the retaliation issue if its proffered direct evidence is rejected. The Court has already conducted a lengthy evidentiary hearing on this matter in September 1990 where the Government called numerous witnesses, obtained extensive testimony, and introduced relevant exhibits. Any reopening of the record would, in this Court's opinion, be futile.

355 (E.D. Mich. 1991). This Court also finds that Warren has failed to eliminate the effects of its pre-October 1986 discrimination.

*B. Relief*

The Government asserts that the appropriate relief for Warren's pre-October 1986 recruitment practices should include the opportunity for it to identify any actual victims of such discrimination and the right to seek compensation for any such victims. The Government also asserts that the Court should issue appropriate injunctive relief against the City in order to eliminate the effects of the pre-October 1986 discrimination.

*1. Individual Victim Relief*

This Court believes that it would be difficult, if not impossible, to identify any actual victims of the pre-October 1986 discrimination. While the Court recognizes [*77] that the law provides that victims of discrimination, or, in the present matter the Government on behalf of such victims, be allowed the opportunity to seek relief for the injury they have suffered as a result of such discrimination, *see International Bhd. of Teamsters v. United States,* 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977), the Court believes that the practical difficulties in attempting to establish such claims in the case at bar may justify the Court denying the Government the right to proceed further with respect to the identification and trial of individual victims. Further efforts at identification and proof would, obviously, require the Government to locate individuals who would be able to come forward with evidence that, more than six years ago, but for the discriminatory practices of the City, they would have been employed by Warren. This Court believes that it may be very difficult, if not impossible, for the Government to meet such burdens. Also, this Court has concerns as to whether or not the time, effort and expense that would be involved in any attempt to identify and prove the discrimination [*78] claims of individual victims is warranted -- or, whether some alternative remedy would better serve the ends of justice.

However, the Court recognizes that the Government has interviewed many individuals in conjunction with the case at bar. If such investigation, to date, has produced information that indicates that there is a reasonable likelihood that there exists identifiable individual victims that are entitled to relief as a result of Warren's pre-October 1986 discrimination, the Government should present such information to the Court. [15]

[*79] Therefore, the Government shall have 30 days from the date of this opinion to present evidence to this Court that there is a reasonable likelihood that it can prove that there are identifiable victims of Warren's pre-October 1986 discrimination. If the Government believes that it should pursue relief on behalf of individual victims, it shall submit to the Court, within 30 days of this opinion, a brief setting forth the reasons for and the evidence in support of such relief. Warren shall have 20 days from receipt of the Government's brief to respond. The Court shall thereafter make a determination as to whether or not further proceedings should be conducted with respect to relief as to individual victims.

*2. Injunctive Relief*

As this Court has found that Warren has failed to eliminate the effects of its pre-October 1986 discrimination, injunctive relief pertaining to City recruitment for municipal positions, with the goal of remedying the effects of such discrimination, is appropriate. *NAACP v. Town of Harrison,* 940 F.2d 792, 805-08 (3d Cir. 1991).) As such, the parties shall forthwith submit to the Court a proposed injunction consistent with [*80] this opinion.

August 12, 1992

PATRICK J. DUGGAN

UNITED STATES DISTRICT JUDGE

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[15] The Government contends that it should, at present, be entitled to proceed to the individual relief phase of this litigation and present evidence to establish the claims of individual victims and, in its post-trial brief, points to the testimony of Mr. Mainor and others during the trial of the liability phase of this litigation. The testimony referred to by the Government does not persuade this Court that there is a likelihood that proofs can be introduced which will persuade this Court that individual victim relief can be awarded. The testimony presented thus far, and referred to by the Government in its post-trial brief, would not allow this Court to make a finding, by a preponderance of the evidence, entitling individuals to relief. In this Court's opinion, it would be pure speculation, based on the limited evidence presently available, for this Court to conclude that any individuals are actual victims and are entitled to make whole relief.