No. 01-14262-II

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ENSLEY BRANCH, N.A.A.C.P., *et al.,*
Plaintiffs-Appellees
v.
GEORGE SEIBELS, *et al.,*
Defendants-Appellees.

JOHN W. MARTIN, *et al.,*
Plaintiffs-Appellees
v.
CITY OF BIRMINGHAM, *et al.,*
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiffs-Appellees,

ROBERT K. WILKS, *et al.,*
Plaintiffs-Intervenors-Appellants
v.
JEFFERSON COUNTY, *et al.*,
Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS APPELLEE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14262-II

BIRMINGHAM FIREFIGHTERS,
Plaintiff

v.

JEFFERSON COUNTY, *et al*.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES' BRIEF AS APPELLEE

CERTIFICATE OF INTERESTED PARTIES AND
CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for the United States certifies that the following persons and parties have an interest in the outcome of this case:

Jay Adelstein

Birmingham Fire Fighters Association, IAFF Local 117

Bradley, Arant, Rose & White, L.L.P.

Ralph F. Boyd, Jr., Assistant Attorney General

Farah S. Brelvi

Gary L. Brown

City of Birmingham, Alabama

Cravath, Swaine & Moore

Dennis J. Dimsey

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Gorham & Waldrep, P.C.

Jefferson County, Alabama

Albert L. Jordan

Bernard Kincaid, Mayor of the City of Birmingham, Alabama

Marybeth Martin

John W. Martin

V. Michelle Obradovic

Personnel Board of Jefferson County, Alabama

Andrea M. Picciotti-Bayer

Hon. Sam C. Pointer Jr., United States District Judge (Ret.)

Hon. C. Lynwood Smith, United States District Judge

Scott B. Smith

Edwin A. Strickland

Barbara E. Thawley

Rebecca K. Troth

United States Department of Justice

United States of America

John G. Veres, III

Charles S. Wagner

Charlie D. Waldrep

Wallace, Jordan, Ratliff & Brandt, L.L.C.

Robert K. Wilks

Rowan D. Wilson

Jim Woodward, Sheriff of Jefferson County, Alabama

All employees of the City of Birmingham, Alabama

_____

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Attorney

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14262-I
ENSLEY BRANCH, NAACP, *et al.,*
Plaintiffs-Appellees
v.
GEORGE SEIBELS, *et al.,*
Defendants-Appellees

JOHN W. MARTIN, *et al.,*
Plaintiffs-Appellees
v.
CITY OF BIRMINGHAM, *et al.,*
Defendants-Appellees

UNITED STATES OF AMERICA,
Plaintiffs-Appellees

ROBERT K. WILKS, *et al.,*
Plaintiffs-Intervenors-Appellants
v.
JEFFERSON COUNTY, *et al.*,
Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

The jurisdiction of the district court in this employment discrimination case is based upon 28 U.S.C. 1331. This Court does not have jurisdiction of this appeal. The district court's July 17, 2001, order, finding that the City of Birmingham had satisfied the requirements of Paragraph 8 of the 1995 Modified Consent Decree with respect to its selection procedures for several job classifications, does not

constitute an appealable interlocutory decision either dissolving or denying an injunction under 28 U.S.C. 1292. See pages 19-24, *infra*.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction of an appeal of the district court's July 17, 001, order.

2. Whether the district court improperly required the Wilks Class to prove that the City's selection procedures have adverse impact.

3. Whether the district court clearly erred in relying on statistical analyses of the City's selection data in concluding that there was no evidence of adverse impact based on race or gender.

STATEMENT OF THE CASE

A. Prior proceedings

This is a long-standing employment discrimination case involving suits filed in 1974 by the Ensley Branch of the NAACP and African American plaintiffs (the Martin plaintiffs) against the City of Birmingham and the Personnel Board of Jefferson County (Board). *Ensley Branch, NAACP* v. *Seibels*, 616 F.2d 812, 814 (5th Cir.), cert. denied *sub nom. Personnel Bd. of Jefferson County* v. *United States*, 449 U.S. 1061 (1980). The complaints alleged that the City and the Board had engaged in racially discriminatory employment practices in various public

service jobs in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. 1981 and 1983. In May 1975, the United States filed a similar complaint against the City and the Board (and other governmental units not involved in this appeal) alleging a pattern or practice of discriminatory employment practices against blacks and women. 616 F.2d at 814-815. Consent decrees resolving the cases were entered in 1981.

In 1990, a class of non-black current and future employees of the City, the Wilks Class (Appellants here), and a class of black and female current and future employees of the City, the Bryant Class, were allowed to intervene during negotiations aimed at modifying the decrees. In 1991, the district court ordered modification of the decrees and, in 1994, this Court affirmed the district court's order in part, vacated in part, and reversed in part. *Ensley Branch, NAACP* v. *Seibels*, 31 F.3d 1548, 1583-1584 (11th Cir. 1994). Finding that *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), altered the law on affirmative action, this Court held that modifications of the decrees were required under the standard of *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). *Ensley Branch*, 31 F.3d at 1563.

In December 1995, the district court entered an Order modifying the City Consent Decree, consistent with this Court's 1994 decision (R. 598) (see

Addendum 1).[1] The 1995 Modified Consent Decree provides:

> It shall be the City's responsibility to ensure that each selection procedure required or used by the City shall either: (1) have no adverse impact on the basis of race or sex as defined by the *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607 *et seq.* (1994), (hereinafter "the Uniform Guidelines"); or (2) be job related for the job classification(s) in question and consistent with business necessity, in accordance with Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.*, the *Uniform Guidelines* and other applicable Federal law * * *.

R. 598 at 3 (Paragraph 8 of 1995 Modified Consent Decree).

The 1995 Modified Consent Decree also sets forth timelines for the review of the City's selection procedures to determine whether implementation produced adverse impact based on race or gender. This process requires the City to submit general information regarding the operation of selection procedures (R. 598 at 3-4) (Paragraphs 9 and 10 of 1995 Modified Consent Decree) and, in response to a list developed by the other parties of up to 25 job classifications, identify whether any race- or gender-conscious goal was used by the City for any job classification and the extent to which each selection procedure had an adverse impact on the basis of race or sex (R. 598 at 4-5) (Paragraph 11 of 1995 Modified Consent Decree).

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[1] For the convenience of the Court, record items cited herein and not contained in the Wilks Class's Record Excerpts are reproduced as Addenda to this brief.

After receipt of such information, the parties are directed to identify any job classifications in the City's submission they contend have selection procedures that have adverse impact on the basis of race or sex (R. 598 at 5) (Paragraph 12). Finally, should the parties be unable to resolve any disagreements regarding whether a particular selection procedure has adverse impact, any party may submit the matter to the district court for resolution (R. 598 at 5) (Paragraph 14). The decree was set to expire in December 2000, subject to extension for good cause (R. 598 at 9) (Paragraph 36).

In accordance with the time lines in the 1995 Modified Consent Decree, the parties exchanged information and monitored compliance with the consent decrees. In 1996, the parties filed reports identifying jobs that they contended had selection procedures with adverse impact. In 1998, the Wilks Class moved for contempt and further relief, arguing that the City's promotional practices in the police department violated the decrees and that this Court's 1994 *Ensley Branch* decision required the City to validate all selection procedures (R. 13). The district court found that noncompliance had been proved with respect to only the Police Captain selection procedure (based on disparate impact) and ordered the City to validate

the selection procedures for that position (R. 17).[2]

In October 2000, the district court ordered the parties to submit recommendations on actions needed to bring the case to a close (R. 692). The Wilks Class filed a motion for additional relief, seeking to require the City to validate all employee selection procedures (R. 696). On December 4, 2000, the district court denied that motion (R. 704). On January 25, 2001, the Wilks Class filed a notice of appeal from the order denying its request that the City validate all selection procedures (R. 720). That appeal, No. 01-10544-II, is currently before this Court and has been consolidated with this appeal.

On December 18, 2000, the Modified Consent Decree was again modified and extended (R. 708) (December 18, 2000, order) (see Addendum 2). The district court specifically found that "neither the City of Birmingham nor the Jefferson County Personnel Board ha[s] achieved the long term goals of the consent decrees and modification orders" (R. 708 at 3). Further, the court noted that "[i]t is undisputed that efforts to develop and implement lawful selection procedures for many job classifications either have not been initiated or are incomplete" (R. 708 at 3). Further, the court noted that "(i)t is undisputed that efforts to develop and implement lawful selection procedures for

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[2] The Wilks Class filed a notice of appeal from that order, but moved to dismiss the appeal shortly thereafter (R. 642; Motion to Dismiss Appeal, No. 98-6512 (11th Cir. Aug. 11, 1998)). This Court granted the motion on August 28, 1998 (R. 645).

many job classifications either have not been initiated or are incomplete" (R. 708 at 3.

The district court's December 18, 2000, order sets forth reporting requirements for the City regarding its efforts to implement selection procedures that meet the requirements of the 1995 Modified Consent Decrees for 11 job classifications (R. 708 at 4-6).[3] Specifically, the December 18, 2000, order directs the City to provide all information required under Paragraph 11 of the 1995 Modified Consent Decree for the period of January 1, 1996, to the present, as well as: "(1) a description of the candidates and selectees (including race and gender) broken down by certification and by register;[4] (2) a description of the current

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[3] The 11 job classifications are: Police Captain, Fire Lieutenant, Fire Captain, Fire Battalion Chief, Fire Apparatus Operator, Public Safety Dispatcher II (Fire), Engineering Aide, Gardener, Heavy Equipment Operator, Police Officer, and Firefighter.

[4] The Special Master summarized the City's selection process as follows:

> Periodically, [the Jefferson County Personnel Board] tests applicants for a given job classification used by one or more of its 20 some participating agencies and jurisdictions. Successful applicants are placed on a *register* in rank order. Once a register for a job has been established, a participating jurisdiction (in this case, the City) may request a *certificate* of eligibles when vacancies occur in their organizations. A certificate contains the names of the highest ranked candidates on the register who have indicated that they desire to work for the City. The number of persons appearing on a certificate for consideration is a function of the number of vacancies to be filled.

(continued...)

selection procedure, including each sub-part, and the date the procedure went into place; (3) copies of certifications and affirmative action forms for each selection; and (4) a description of any back-up documentation regarding the selection procedure not previously provided to the parties" (R. 708 at 6-7). Additionally, the City "shall * * * identify each selection procedure that it believes meets the standards of the modification order, in that the procedure has no adverse impact on the basis of race or sex, and shall provide the calculations upon which the City relies for its adverse impact determination" (R. 708 at 7). The order also establishes a schedule for the review of the City's selection procedures for these job classifications "to permit the parties to determine whether the City's selection procedures have an adverse impact on the basis of race and/or sex" (R. 708 at 6-7). After receipt of this information from the City, the parties are required to identify for the Special Master the selection procedures, if any, that they believe have adverse impact (R. 708 at 8). If there is any disagreement among the parties, the Special Master shall review the information and provide a recommendation to

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[4](...continued)
The City selects one or more candidates for hire or promotion from the certificate. Candidates not selected from the certificate typically remain on the register and are referred on subsequent certificates when additional vacancies occur.

R. 782 at 14-15 (citing City Ex. 13 at 4).

the district court regarding whether he believes the selection procedure at issue does or does not have adverse impact (R. 708 at 8). Finally, "[a]ny party may submit any disagreement as to the adverse impact of any selection procedure for these eleven job classifications to the court for resolution" (R. 708 at 9).

B. Proceedings At Issue In This Appeal

In accordance with the December 18, 2000, order, the City provided information regarding the impact of the selection procedures for the 11 job classifications (R. 782 at 3-4) (District Court's July 17, 2001, Memorandum Opinion). The parties responded to this information, and the Special Master reviewed the data and provided an opinion regarding whether any of the selection procedures had adverse impact (R. 782 at 4). The Wilks Class asserted that there was evidence of adverse impact in the selection procedures for the Fire Apparatus Operator, Fire Captain, Fire Battalion Chief, Engineering Aide, Gardener, and Heavy Equipment Operator classifications and the post-job task screening portions of the selection procedure for the Firefighter classification (R. 782 at 5-6).[5] The City, the Martin/Bryant plaintiffs, and the United States disagreed with the Wilks

[5] The post-task screening component of the selection procedure for entry-level Firefighters includes any criteria the City uses to select from the pool of candidates after the physical abilities screening test.

Class's contentions. The City and the United States responded with requests for the district court to resolve the dispute (R. 745, 744).

The district court held an evidentiary hearing on May 31 and June 1, 2001 (R. 768) (hearing transcript). Four witnesses testified: Birmingham's Director of Personnel, Gordon Graham; the court-appointed expert and Special Master, Dr. John Veres III; the Wilks Class's expert, Dr. David Lasater; and the United States' expert, Dr. Leonard Cupingood. Admitted into evidence were the parties' extensive factual stipulations and copies of the expert reports.

The City provided evidence that since the 1995 Modified Consent Decree, its employment selection procedures no longer use race- or gender-conscious components. The most recent revision of selection procedures for Fire Apparatus Operator, Fire Captain, and Fire Battalion Chief occurred in 1998 (R. 782 at 14; City Ex. 2, tabs B, D, and E). In 1996, the City revised its selection procedures for Engineering Aide, Gardener, and Heavy Equipment Operator (R. 782 at 14; City Ex. 3, tabs F, G, and H). Finally, the City revised the selection procedure for Firefighter in 1996, 1998, and again in 2000 (R. 782 at 14; City Ex. 16, tab K).

Dr. Veres, the court's Special Master, reviewed the submissions of the City and the parties regarding the use of these selection procedures and produced two reports regarding the existence of adverse impact in the selection procedures (R.

782 at 19; City Exs. 13 and 14). Dr. Veres concluded that the evidence did not support a finding of adverse impact on the basis of race in the selection procedures for Engineering Aide, Gardener, and Heavy Equipment Operator (R. 782 at 19; City Ex. 14). He concluded, however, that there was support for a finding of adverse impact against males for the Heavy Equipment Operator and against females for the Public Safety Dispatcher II (Fire) classifications (R. 782 at 19-20).[6]

In arriving at these conclusions, Dr. Veres made "four-fifths rule" calculations on individual certificates.[7] He also performed statistical analyses, in the form of the Fisher's Exact Test[8] for individual certificates and the Multiple Events

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[6] The City subsequently conceded that the selection procedures for Public Safety Dispatcher II (Fire) had adverse impact on female applicants (R. 782 at 19 n. 28).

[7] The *Uniform Guidelines on Employee Selection Procedures* provides that "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact * * * ." 29 C.F.R. 1607.4D.

[8] The Fisher's Exact Test is a basic mathematical formula recognized in statistical textbooks and manuscripts. See, *e.g.*, Baldus & Cole, *Statistical Proof of Discrimination*, §§ 9A.11 & 9A.12 (McGraw-Hill 1980). In disparate impact employment cases, the test can be used to calculate the probability that the number of individuals of a particular race or gender selected for a certain job classification would the same as the number actually selected, if the selection was independent of

(continued...)

Exact Probability Test[9] (R. 768 at 95-96). Dr. Veres testified that he expressed a preference for the use of the statistical analyses, as "adjunct analyses" to complement the four-fifths computations, in assessing whether the selection procedures had adverse impact (R. 768 at 97).

Dr. Chester Palmer, Ph.D., analyzed the post-job task screening process for the Firefighter classification on behalf of the Special Master (R. 782 at 25). Dr. Palmer employed the same methodology used by Dr. Veres for evaluating the impact of these selection procedures (R. 782 at 25 n.36). Because the City's procedures changed in 2000, Dr. Palmer conducted separate assessments of the pre- and post-2000 selections. Dr. Palmer concluded that the four-fifths rule demonstrated adverse impact against black applicants, but that the disparity was not

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[8](...continued)
race or gender. A statistically significant finding of disparate impact is established if the probability of the occurrence is less than 0.05, or two standard deviations.

Courts have relied upon the Fisher's Exact Test to assess disparate impact with small sample sizes. See *Jones* v. *Pepsi-Cola Metro. Bottling Co.*, 871 F. Supp. 305, 311 (E.D. Mich. 1994); *Csicseri* v. *Bowsher*, 862 F. Supp. 547, 551 n.2 (D. D.C. 1994), aff'd, 67 F.3d 972 (D.C. Cir. 1995); *Bridgeport Guardians, Inc.* v. *City of Bridgeport*, 735 F. Supp. 1126, 1132 (D. Conn. 1990), aff'd, 933 F.2d 1140 (2d Cir.), cert. denied, 502 U.S. 924 (1991).

[9] The Multiple Events Exact Probability Test analyzes aggregated selection data for a given job classification. Statisticians use this method to increase the amount of data they have to work with and thereby, in theory, come up with a more accurate result. See *Csicseri*, 862 F. Supp. at 561 n.10.

statistically significant (R. 782 at 26). He also concluded that while there was disparity against males in pre-2000 selections, it was likely the result of chance and not statistically significant adverse impact (R. 782 at 26).

Dr. Cupingood, expert for the United States, produced two reports analyzing the selection data for each job classification by performing statistical analyses at the individual certificate and register levels (R. 782 at 26-27; U.S. Exs. 2, 3). At the certificate level, Dr. Cupingood used the Fisher's Exact Test to discern whether there was a statistically significant difference based on race or gender in selection rates (R. 782 at 27). He also aggregated the certificates, using the Mantel-Haenszel Test, a test similar to the Multiple Events Exact Probability Test used by Dr. Veres, to aggregate the individual certificates (R. 782 at 27). Dr. Cupingood also used a "unique person" analysis, counting only once each person who was placed on a certificate from a particular register (R. 782 at 27).

Dr. Cupingood found no evidence of adverse impact based on race in the selection rates after 1995, when the City stopped using race- and gender-conscious goals, for the job classifications of Fire Apparatus Operator, Fire Battalion Chief, Fire Captain, Engineering Aide, and Gardener (R. 782 at 28). He found that there was no statistically significant disparity based on race for the Heavy Equipment Operator classification, but found that there was a statistically significant disparity against males when individual certificates were aggregated (R. 782 at 29). Dr. Cupingood observed, however, that given the small size of the certificates and

selections, the disparity would not have been statistically significant if only one more male had been selected in place of a female (R. 782 at 29). Finally, Dr. Cupingood concluded that the post-job task screening selection procedures for Firefighter did not have adverse impact based on race (R. 782 at 29).

Dr. Lasater, offered as an expert by the Wilks Class, prepared four reports analyzing the City's data to determine whether the selection procedures for the job classifications at issue had adverse impact on the basis of race or gender (R. 782 at 17) (Wilks Exs. 1-4). Dr. Lasater reported only the results of four-fifths rule calculations for each job classification for each certificate and for some aggregated certificates (R. 782 at 17). He did not report results of any tests of statistical significance (R. 782 at 17). Dr. Lasater concluded that there was evidence of adverse impact on the basis of race in the selection results for Fire Apparatus Operator, Fire Battalion Chief, Engineering Aide, Gardener, and Heavy Equipment Operator job classifications and on the basis of gender for the Heavy Equipment Operator classification (R. 782 at 17-18).

In their testimony, Drs. Cupingood and Veres criticized Dr. Lasater's methodology and the reliability of his conclusions. Dr. Cupingood questioned why Dr. Lasater failed to conduct statistical analyses of aggregated selection data, analyses he said were not only "helpful" but "necessary" (R. 768 at 291). Dr.

Cupingood testified that Dr. Lasater's analysis – based exclusively on determining whether the four-fifths rule was violated – was inconsistent with professional standards in the field (R. 768 at 291). Dr. Veres agreed that aggregating the selection data across certificates and registers was the "sensible thing to do" (R. 768 at 319) and that Dr. Lasater's failure to report analyses of statistical significance was not "good professional practice" (R. 768 at 324).

On July 17, 2001, the district court issued a Memorandum Opinion and Order, finding that the City had satisfied the requirements of Paragraph 8 of the 1995 Modified Consent Decree with respect to its selection procedures for the seven job classifications at issue (R. 782, 783). As an initial matter, the district court recognized that "Title VII prohibits the use of facially non-discriminatory selection procedures that have disparate, or adverse, impact on the basis of race or gender, unless such procedures are demonstrated to be job-related and consistent with business necessity" (R. 782 at 8) (citing *Griggs* v. *Duke Power*, 401 U.S. 424, 428-429 (1971)). The court noted that "[a]lthough these proceedings in their present posture do not involve a plaintiff asserting claims of discrimination, but instead involve compliance with a consent decree, the legal standards relating to the disparate impact theory of discrimination are still applicable" (R. 782 at 8). Relying on this Court's decision in *EEOC* v. *Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1274-

1275 (11th Cir. 2000), the district court held that the Wilks Class, as the complaining party, had the burden of demonstrating that the selection procedures at issue, which are "facially race- and gender-neutral, nonetheless have adverse impact on the basis of those protected criteria" (R. 782 at 10).

The district court, pursuant to Paragraph 8, relied on the *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. Part 1607, ("*Uniform Guidelines*") and standards used by this Court in reviewing disparate impact claims under Title VII to evaluate whether the City's selection procedures have adverse impact (R. 782 at 11-14). Applying these standards, the district court concluded that the Wilks Class had failed to satisfy its burden to establish that the City's selection procedures had adverse impact based on race or gender. The court noted that all the parties agreed that because there was minimal data for the post-job task screening component for the Firefighter classification, the analysis was inconclusive (R. 782 at 39). The Wilks Class, therefore, failed to meet its burden of proving adverse impact for this component. The court also found that although there was a statistically significant disparity based on gender for the Heavy Equipment Operator classification, the disparity was not significant in "practical terms" since it would not exist if one fewer female had been appointed (R. 782 at 40). With regard to the remaining job classifications, the court relied on the expert opinions of Drs. Veres,

Palmer, and Cupingood that there was insufficient evidence to demonstrate that these facially-neutral selection procedures had adverse impact (R. 782 at 38).

STANDARD OF REVIEW

This Court has a duty to independently examine its jurisdiction and dismiss when its jurisdictional limits are exceeded. *Russell Corp.* v. *American Home Assurance Co.*, 264 F.3d 1040, 1043 (11th Cir. 2001). What a consent decree means, or whether it is ambiguous, is a question of law reviewed *de novo*. *Reynolds* v. *Roberts*, 202 F.3d 1303, 1312-1313 (11th Cir. 2000). If a provision of a consent decree is ambiguous and the district court looks to extrinsic evidence to determine the intent of the parties, the court's determination of what the parties intended is reviewed for clear error. *Id.* at 1313. A district court's use of statistical analyses to assess whether selection procedures have adverse impact is a finding of fact, reviewed under the clearly erroneous standard of review. See *Peightal* v. *Metropolitan Dade County*, 26 F.3d 1545, 1556-1557 (11th Cir. 1994); *Gay* v. *Waiter' and Dairy Lunchmen's Union*, 694 F.2d 531, 541-542 (9th Cir. 1982) (clearly erroneous standard applies to review of district court's "factual assessment" of statistical data).

SUMMARY OF ARGUMENT

This Court lacks appellate jurisdiction over the district court's July 17, 2001,

order. The district court's recognition that the City had complied with Paragraph 8 of the 1995 Modified Consent Decree, by developing lawful selection procedures for certain job classifications, did not dissolve any injunctive provisions of the 1995 Modified Consent Decree, nor did it qualify as a denial of injunctive relief. Further, even if the district court's order had the "practical effect" of denying injunctive relief, Appellants have failed to show that they might suffer "a serious consequence" should the order not be reviewed. *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981).

If this Court exercises appellate jurisdiction, the district court's July 17, 2001, order should be affirmed. The district court appropriately referred to the standards for establishing claims of disparate impact pursuant to Title VII, 42 U.S.C. 2000e, *et seq.*, as an "aid of construction" to evaluate the claims of the Wilks Class that the City had failed to comply with Paragraph 8 of the 1995 Modified Consent Decree by using selection procedures for certain job classifications that produced adverse impact based on race or gender. Furthermore, the court appropriately concluded that, in the absence of any statistically significant evidence of adverse impact, the City's facially-neutral selection procedures complied with the mandate of Paragraph 8.

ARGUMENT

I

THIS COURT LACKS JURISDICTION OVER THIS APPEAL

In support of their assertion that this Court has appellate jurisdiction to review the district court's July 17, 2001, order, Appellants contend that the order "denies further mandatory injunctive relief (effectively dissolving the prior injunctions) to require the City to reform its selection procedures for the jobs at issue" (Br. at vi). Appellants' characterization of the July 17, 2001, order is incorrect.

Title 28 U.S.C. 1292(a)(1) provides that the courts of appeals shall have jurisdiction over appeals from "[i]nterlocutory orders of the district courts * * * granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." The Supreme Court has noted that Section 1292(a) provides only a narrow exception to the final order rule incorporated in 28 U.S.C. 1291. See *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981); *Gardner* v. *Westinghouse Broad. Co.*, 437 U.S. 478, 481-482 (1978). Thus, courts approach Section 1292(a)(1) "somewhat gingerly lest a floodgate be opened that brings into the exception many [interlocutory] orders." *Gardner*, 437 U.S. at 481-482.

This Court has consistently held that the appealability of an order under 28 U.S.C. 1292 "depends not on terminology but on the substantive effect of the order." *Roberts* v. *St. Regis Paper Co.*, 653 F.2d 166, 169 (5th Cir. 1981).[10] So long as a district court's order does not change the legal relationship between the parties, appellate jurisdiction does not exist. *Combs* v. *Ryan's Coal Co., Inc.*, 785 F.2d 970, 977 (11th Cir.), reh'g denied, 791 F.2d 169 (11th Cir.), cert. denied, 479 U.S. 853 (1986); *Sizzler Family Steak Houses* v. *Western Sizzlin Steak House, Inc.*, 793 F.2d 1529, 1539 (11th Cir. 1986) (what matters is "the actual effect of the order on the obligations of the parties as set forth in the original judgment").

A. The July 17, 2001, Order Does Not Dissolve Any Injunctive Provisions Of The 1995 Modified Consent Decree

The July 17, 2001, order, finding that the City had developed lawful selection procedures for certain job classifications, did not dissolve any provisions of the 1995 Modified Consent Decree. Contrary to Appellants' assertion, the district court's July 17, 2001, order does not terminate Paragraph 8 of the 1995 Modified Consent Decree. A separate provision, not relied upon by the district court, is the

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[10] This Court, in *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), adopted as precedent decisions of the former Fifth Circuit handed down prior to October 1, 1981.

exclusive means for dissolving the decree prior to its termination date (R. 598 at 9) (Paragraph 36 of the 1995 Modified Consent Decree).[11]

So long as the district court retains jurisdiction over this matter, the City is obliged, under Paragraph 8 of the 1995 Modification Order, to use selection procedures that either (1) have no adverse impact or (2) are job-related and consistent with business necessity. Should the City adopt different selection procedures for the job classifications at issue here, the City is still obliged to ensure that such procedures comply with Paragraph 8's mandate. Furthermore, the City continues to be bound by Paragraph 8's requirement with regard to selection procedures for the four remaining job classifications covered by the decree. All the July 17, 2001, order does is recognize that, with respect to certain job

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[11] Paragraph 36 of the 1995 Modified Consent Decree provides, *inter alia*:

> The Court retains jurisdiction of this action for such further relief or other orders as may be appropriate. * * * This Order, as well as the 1981 City Consent Decree, shall expire five years from the date of the entry of this Order unless its term is extended by the Court. * * * In considering whether the City of Birmingham 1981 Consent Decree and this Order should be dissolved, the Court shall take into account whether and to what extent the purposes of this Order have been achieved and whether there is any continuing unlawful employment discrimination or vestiges of prior unlawful discrimination against blacks and/or women prohibited by Federal law.

classifications, the City had finally accomplished what this Court has identified as "the single most important race-neutral alternative contained in the decrees." *Ensley Branch, NAACP* v. *Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994).

Because the July 17, 2001, order does not alleviate the City of any of its obligations under the 1995 Modified Consent Decree, it does not "dissolve" any portion of the injunctive relief required thereunder. The July 17, 2001, order, therefore, does not qualify as an appealable interlocutory order pursuant to 28 U.S.C. 1292(a)(1) as an order "dissolving an injunction."

B. The July 17, 2001, Order Was Not A Denial Of An Injunction

As an alternative means of establishing this Court's jurisdiction to review the July 17, 2001, order, Appellants attempt to characterize their objections to the City's selection procedures during the district court's proceedings as requests for injunctive relief. Although Appellants in their post-trial brief urged the court to "retain jurisdiction" over the selection procedures at issue, see R. 774 at 24, such a request falls short of qualifying as a request for further injunctive relief. At no time in the proceedings did Appellants request the court to issue such an injunction.

In *Carson*, the Supreme Court held that an interlocutory order that does not specifically deny a request for injunctive relief may be appealable under Section 1292(a)(1) if it has the "practical effect" of denying an injunction. 450 U.S. at 83-

84. In such a case, an appellant must also show that the interlocutory order "might have a serious, perhaps irreparable, consequence, and that the order can be effectually challenged only by immediate appeal." *Id*. at 84 (internal quotation marks omitted). Appellants have failed to establish that the July 17, 2001, order satisfies the *Carson* criteria.

As mentioned above, the City continues to be bound by the requirements of Paragraph 8 and the district court maintains jurisdiction over this case to ensure that "any and all unlawful barriers to employment, assignment, and promotion that have existed for blacks and women are removed, that any present effects of past employment discrimination are fully remedied, and that equal employment opportunities with the City are available to all persons, regardless of race or sex * * *" (R. 598 at 2) (Paragraph 5). The court is thus continuing to do exactly what the Wilks Class requested it to do – require the City to develop lawful, non-discriminatory selection procedures.

Even if the July 17, 2001, order has the effect of denying some sort of more extensive court supervision over the use of the selection procedures at issue, Appellants have failed to show such a denial might cause them "serious or irreparable harm." As Appellants have failed to establish any harm would occur if this Court does not exercise appellate jurisdiction over the district court's finding

of compliance, there is no reason for this Court to exercise jurisdiction over the district court's ruling.

There is important work to be done before the City achieves substantial compliance with the provisions of the 1995 Modified Consent Decree. In recognition of this, the district court has established a strict schedule for the City in its compliance efforts. Rather than unduly prolonging this case with piecemeal interlocutory appeals every time the district court recognizes the City's compliance, the Wilks Class should be allowed to seek appellate review of such determinations only after the district court terminates the decree or any of its injunctive provisions.

II

THE DISTRICT COURT PROPERLY PLACED THE BURDEN ON THE WILKS CLASS, AS THE COMPLAINING PARTY, TO ESTABLISH ADVERSE IMPACT

In evaluating the Wilks Class's contention that the job selection procedures at issue fail to meet the requirements of Paragraph 8 of the 1995 Modified Consent Decree, the district court adopted the standards for evaluating claims of disparate impact under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.* (R. 768 at 8-9). Appellants argue that in so doing, the district court ignored the "plain language" of Paragraph 8 and inappropriately "modified" the 1995 Consent Decree (Br. at 19-20). Appellants are incorrect.

Paragraph 8 of the 1995 Modified Consent Decree provides:

> It shall be the City's responsibility to ensure that each selection device required or used by the City shall either (1) have no adverse impact on the basis of race or sex, as defined by the *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607 *et seq.* (1994), (hereinafter "the *Uniform Guidelines*"); or (2) be job related for the job classification(s) in question and consistent with business necessity, in accordance with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, the *Uniform Guidelines* and other applicable Federal law * * *.

R. 598 at 3. The fact that Paragraph 8 states that it is the City's "responsibility to ensure" such procedures are lawful is not the same as placing the burden on the City to prove before the district court that these procedures have no adverse impact. Instead, the 1995 Modified Consent Decree is silent with regard to how the district court should allocate the burden of proof in disputes regarding whether the City has complied with Paragraph 8.

This Court has recognized that where ambiguities exist in the language of a consent decree, "the [district] court may turn to other 'aids to construction,' such as other documents to which the consent decree refers, as well as legal materials setting the context for the use of particular terms." *Eaton* v. *Courtaulds of N. Am., Inc.*, 578 F.2d 87, 91 (5th Cir. 1978) (quoting *United States* v. *ITT Cont'l Baking*

Co., 420 U.S. 223, 238-243 (1975)).[12] Here, the court properly turned to case law involving claims of disparate impact under Title VII as an "aid of construction" to assess the Wilks Class's claims.

Paragraph 8 of the 1995 Modified Consent Decree requires the City to develop job selection procedures that either have no adverse impact based on race or gender, or are job-related and consistent with business necessity – a standard modeled after the legal standards for evaluating claims that employment practices cause disparate impact in violation of Title VII. See 42 U.S.C. 2000e-2(k). Further, Paragraph 8 specifically refers to the *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. Part 1607 – "a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with the requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin." 29 C.F.R. 1607.1B (Purpose of *Uniform Guidelines*). Because Paragraph 8 of the 1995 Modified Consent Decree tracks the language of Title VII and specifically provides that adverse impact is defined according to the standards set forth in the *Uniform Guidelines*, the district court

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[12] See note 10, *supra*.

reasonably used Title VII case law as an "aid of construction" in assessing whether the City's selection procedures have adverse impact.

Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). This Court has recognized that the "disparate impact" theory is, in essence, a "doctrinal surrogate for eliminating unprovable acts of intentional discrimination hidden innocuously behind facially-neutral policies or practices." *EEOC* v. *Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000). It is undisputed that the City developed race- and gender-neutral selection procedures for the job classifications at issue here (R. 782 at 2). The question before the district court, therefore, was whether the procedures cause a disparate impact based on the race or gender of an applicant.

The appropriate burdens of proof in a disparate impact case have been codified in 42 U.S.C. 2000e-2(k) and "a settled jurisprudence has arisen to implement the methodology." *In Re Employment Discrimination Litig.*, 198 F.3d 1305, 1311 (11th Cir. 1999). A plaintiff may establish a *prima facie* violation by demonstrating that a facially-neutral selection procedure exerts "a significantly discriminatory impact." *Connecticut* v. *Teal*, 457 U.S. 440, 446 (1982). If such an impact is demonstrated, whether by statistics or other evidence, the burden of

production then shifts to the defendant to "establish that the challenged employment practice serves a legitimate, non-discriminatory business objective." *Joe's Stone Crab*, 220 F.3d 1275. Even if the defendant satisfies this burden, however, a plaintiff may still prevail by proving that an alternative, non-discriminatory practice would have served the defendant's stated objective equally as well. *Ibid.*

This Court has set forth three elements that a complaining party must prove to establish a *prima facie* case of disparate impact: (1) a statistically significant disparity between the proportion of the group in the available pool and the number hired; (2) a specific, facially neutral employment practice that is the alleged cause of the disparity; and (3) a causal nexus between the specific employment practice identified and the statistical disparity shown. *Ibid.*; *In Re: Employment Discrimination Litig.*, 198 F.3d at 1311. Requiring the Wilks Class to present evidence of a statistically significant disparity in the selection rates of applicants to the job classifications at issue is consistent with Title VII's burdens of proof for disparate impact cases.

Appellants claim that despite the City's adherence to this Court's directive to the City in *Ensley Branch* "to strip away the past and adopt fresh, race [and gender]-neutral selection procedures," 31 F.3d at 1573, the district court should

presume that the City's selection procedures have adverse impact and require the City to prove that they do not (Br. at 36). The City's prior use of race- and gender-conscious employment practices, however, does not change the fact that the City is now using facially-neutral procedures. Thus, the court appropriately required any party complaining of adverse impact to prove it.

III

THE DISTRICT COURT DID NOT CLEARLY ERR IN RELYING ON STATISTICAL ANALYSES TO EVALUATE WHETHER THE CITY'S SELECTION PROCEDURES HAVE ADVERSE IMPACT

The district court found that the Wilks Class failed to establish that the selection procedures produced a statistically significant disparity based on either race or gender (R. 782 at 40-41). Appellants contend that the district court's conclusion was erroneous because the court improperly relied on statistical analyses of the City's selection data (Br. at 28-36). This is simply incorrect.

Here, in light of the small number of selections, the district court observed that adherence to the *Uniform Guidelines'* "four-fifths rule" – as an indicator of adverse impact – was inappropriate (R. 782 at 37-38).[13] Accordingly, the district

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[13] The *Uniform Guidelines* have adopted an enforcement rule under which adverse impact will not ordinarily be inferred unless the members of a particular

(continued...)

court discounted the Wilks Class expert's conclusion that "there was evidence of instances of adverse impact," because he "reported only rudimentary four-fifths rule calculations" (R. 782 at 37-38). Instead, the court found that "closer scrutiny of the data is warranted" (R. 782 at 35-36). This "closer scrutiny" took the form of statistical analyses of the selection data.

Courts have recognized the useful role of statistical analyses in proving disparate impact. See, e. g., *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 339 (1977). The party utilizing statistics to establish a *prima facie* case of disparate impact "must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson* v. *Fort Worth Bank & Trust,* 487 U.S. 977, 994 (1988). While there is no "rigid

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[13](...continued)
race, sex, or ethnic group are selected at a rate that is less than four-fifths of the rate at which the group with the highest rate is selected. 29 CFR 1607.4(D) (1987). This "four-fifths" rule, however, serves only as a "rule of thumb" to courts for evaluating claims of disparate impact. See *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988). For example, the interpretive guidance provided for the *Uniform Guidelines* cautions against reliance on the four-fifths rule where there are small selection rates. *Question 21 of the Uniform Employee Selection Guidelines Interpretation and Clarification, Equal Employment Opportunity Commission*, 44 Fed. Reg. 11,996, 11,999 (Mar. 2, 1979).

mathematical formula * * * statistical disparities must be sufficiently substantial that they raise such an inference of causation." *Id.* at 995.

Appellants argue that because there were few selections for the job classifications at issue, statistical analyses are unreliable (Br. 28-36). The cases Appellants cite in support of the argument against using statistical analyses in this case are inapposite. For example, in *Bryant* v. *Wainwright*, 686 F.2d 1373 (11th Cir.), reh'g denied, 691 F.2d 512 (11th Cir. 1982), cert. denied, 461 U.S. 932 (1983), this Court affirmed the denial of *habeus corpus* relief to a black woman alleging race discrimination in the selection of grand jury venires and race and gender discrimination in the selection of grand jury forepersons. *Id.* at 1375. The Court relied on the absence of a significant statistical racial disparity in grand jury and foreperson selections. *Id.* at 1377-1379. Despite the statistically significant gender disparity in foreperson selections, the Court held that the evidence was unreliable because the sample size of selections was not large enough. *Id.* at 1379. The Court refused "to draw an inflexible line" with regard to the number of selections and time that must pass before statistical evidence could yield reliable results and instead indicated that such an analysis should be done on a case-by-case basis. *Ibid.;* see also *Kadas* v. *MCI Systemhouse Corp.*, 255 F.3d 359, 363 (7th Cir. 2001) ("It is for the judge to say, on the basis of evidence of a trained

statistician, whether a particular significance level, in the context of a particular study, in a particular case, is too low to make the study worth the consideration of judge or jury"); *Waisome* v. *Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1376 (2nd Cir. 1991) (recommending a "case-by-case approach" in judging the significance or substantiality of statistical disparities).

Since the final quarter of 1998, when the City made its most recent revision to its selection procedures, there have been 10 appointments to Fire Battalion Chief from 3 certificates; 19 appointments to Fire Captain from 3 certificates; 27 appointments to Fire Apparatus Operator from 3 certificates; and 8 appointments to Engineering Aide from 3 certificates; and 108 appointments to Firefighter from 3 certificates (City Ex. 1, Stipulations of Fact). The district court observed that "[w]hile all of the experts noted the difficulties inherent in interpreting small numbers of selections, they found that there was sufficient information from which to draw reliable conclusions" (R. 782 at 39). Relying on these experts, the court found that "there is an adequate factual record, spanning several years of selections, to assess the adverse impact of the procedures" (R. 782 at 39). Further, the court found application of the Fisher's Exact Test was appropriate, noting that this test provides an adequate measure of reliability in cases involving

small selections (R. 782 at 36); see also Baldus, D. and Cole, J., *Statistical Proof of Discrimination*, § 9.12 (1987 Supp.). Such a finding is not clearly erroneous.[14]

In assessing whether the City's selection data showed adverse impact, the district court accepted a five percent (.05) level of significance, which is roughly equivalent to two standard deviations. This Court has similarly recognized this level of statistical significance as a benchmark for establishing disparity. See *Peightal* v. *Metropolitan Dade County*, 26 F.3d 1545, 1556 n.16 (11th Cir. 1994) ("Social scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance."). Appellants argue that because the City used race- and gender-conscious goals in the past to redress discriminatory employment practices, a lesser standard of statistical significance should be required as proof of adverse impact (Br. at 36). Appellants, however, provide no support for "tipping the scales" in favor of a

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[14] Appellants also contend that because the City's selection procedures "are exceedingly easy to manipulate," the district court erred by relying on statistical analyses of the selection data (Br. at 31-32). Appellants, however, must do more than trumpet conclusory averments concerning the validity of the statistical analyses. In this case, Appellants offer no evidence to support their assertion that the City's selection procedures are susceptible to manipulation or that the City is in fact engaging in such manipulation.

finding of adverse impact. Lowering the threshold for establishing adverse impact in this case would be at odds with generally accepted statistical principles and could improperly characterize disparity resulting from chance as being based on the race or gender of the applicant.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction. If this Court reaches the merits, the district court's finding that the City complied with Paragraph 8 of the 1995 Modified Consent Decree with respect to certain selection procedures should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains 7,779 words of proportionally spaced text. The type face is Times New Roman 14-point font.

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