

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -

COMMONWEALTH OF PENNSYLVANIA, et al.	:	CIVIL ACTION
	:	74-CV-258-1
	:	
Plaintiffs	:	
	:	
vs.	:	Philadelphia, Pennsylvania
	:	July 12, 2010
JOSEPH R. RIZZO, et al.	:	
	:	
	:	HEARING RE:
Defendants	:	MOTION TO DISSOLVE
- - - - -	:	CONSENT DEGREE

- - -

BEFORE THE HONORABLE THOMAS N. O'NEILL, JR.
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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1 (At 10:09 a.m. in Courtroom 4-A.)

2 MR. SULLIVAN: ...as in this case, it has expired.

3 When I filed the initial motion to dissolve the degree
4 in this case, it was November of 2009, the list was active.

5 In other words, like the abortion cases, we face a
6 situation that's capable of repetition yet evading review and I
7 would invoke that exception to the standing doctrine in this
8 context, if your Honor looks unfavorably on our claim for
9 standing.

10 THE COURT: Okay. Okay.

11 I'm going to reserve judgment on that.

12 Now, where is my --

13 (Pause at 10:10 a.m.)

14 THE COURT: Now, Counsel, this case is so -- and it
15 wasn't my case, as you well know -- and it's so old, the Court
16 is -- we're not sure we have the entire file.

17 In particular, we don't have -- what it is in the
18 '84 --

19 DEPUTY CLERK: The transcript of the 1984 hearing.

20 THE COURT: We don't have a transcript of the 1984
21 hearing, do counsel have that?

22 MS. LEHENY: Your Honor, I have looked in my file and
23 I have not found any transcript of the 1984 hearing.

24 MR. MILDENBERG: No, your Honor.

25 And just so you know, we also did a search of the

1 federal archives and they came back not having the information
2 as well when we first got involved.

3 (Laughter at 10:10 a.m.)

4 THE COURT: All right.

5 Well, now, Mr. Mildenberg, let me read to you from
6 Judge Bechtle's findings:

7 The Court finds --

8 This is in '75, right?

9 -- the Court finds pursuant to the evidence
10 submitted that the question of treatment of minorities,
11 firemen and all -- and all firemen --

12 Firemen and all firemen? That's what it appears to
13 say.

14 -- has been and continues to be a major concern
15 to the present administration of the City of Philadelphia.
16 The Court finds that the current administration of the
17 City of Philadelphia has made reasonable efforts to
18 eliminate any historical vestige or appearance of
19 racial discrimination which may have arisen out of
20 any past unintentional practices.

21 Now, in view of that finding, I -- I cannot understand
22 how you are contenting that Judge Bechtle found intentional
23 discrimination?

24 MR. MILDENBERG: Yes, your Honor.

25 All -- all the Court said there is that any

1 unintentional discriminatory practices were potentially towards
2 remedy by virtue of the good faith of the City of Philadelphia,
3 but as cited throughout my brief, in other findings of his
4 Honor, especially, when he speaks about the subjective use and
5 the -- of the Rule of Two -- and I have the quote.

6 In -- in his very brief, his Honor stated -- I'm sorry
7 in his findings -- his Honor stated quote, the Rule of 2 quote:

8 Provides opportunity for discriminatory selection.

9 And the Court can -- continued, that's the opinion of
10 July 26th, 1974 at Lines 9 to 13.

11 THE COURT: Well, following -- providing opportunity
12 for intentional discrimination, it's not a finding that there
13 was, in fact, intentional discrimination.

14 MR. MILDENBERG: Well, the Court actually continued
15 and then said:

16 There is a considerable degree -- quote -- of quote,
17 subjective factors that --

18 And the Court found that discriminatory selection
19 which was subjective had occurred. Discriminatory use of the
20 Rule of Two.

21 Now, I will say, is a minor finding, I'll be the first
22 one to admit it, but the reason is, the -- the Court choose
23 legally to use the disparate-impact analysis.

24 So, the Court under the disparate-impact analysis, the
25 intentional discrimination analysis is irrelevant once -- and

1 the Court says:

2 Since we're under the disparate-impact analysis,
3 we don't need to go any further to see about the
4 intentional discrimination.

5 Now, the point is that doesn't mean there wasn't any,
6 it just means for that legal argument, the Court chose, we don't
7 need to go there. We don't need to determine if it was
8 intentional, because we're using disparate impact, which is
9 exactly what --

10 THE COURT: Well, what is clear -- even from what you
11 now say -- what it's clear is, there has been no finding of
12 intentional dis -- discrimination.

13 MR. MILDENBERG: I'm not certain, I -- I -- with
14 respect, your Honor, the only thing I have to go on would be the
15 -- that line there, nine to thirteen --

16 THE COURT: Yeah.

17 MR. MILDENBERG: -- and he says:

18 There is a considerable decree of -- quote --
19 subjective factors that lead to -- quote --
20 discriminatory selection.

21 THE COURT: Counsel, you have just told me that the
22 Judge said, we don't need to decide whether there was
23 intentional discrimination.

24 MR. MILDENBERG: He does -- that is correct. He --
25 well, he -- he said, we don't need to decide it, but he also

1 made this -- like I said, minor finding.

2 THE COURT: So, having said, we don't need to decide
3 it, he decided it, that's what your contention is?

4 MR. MILDENBERG: I'm calling it a minor finding.

5 THE COURT: Frank -- frankly, I just don't buy that
6 argument.

7 MR. MILDENBERG: It's --

8 THE COURT: Now, I --

9 MR. MILDENBERG: -- it's in the document.

10 THE COURT: -- I'd like to hear from counsel on the
11 disparate-impact point.

12 MS. LEHENY: I -- I'm sorry, your Honor, you mean on
13 the -- the -- what do you mean on the disparate on the -- on the
14 issue of whether there's been an intentional finding -- a
15 finding of fact -- as to intentional discrimination?

16 THE COURT: Yes.

17 Well, if they -- I want you to respond to his argument
18 on that point.

19 MS. LEHENY: I'm happy to do so, thank you, your
20 Honor.

21 First of all, actually, the Court specifically found
22 that there was no intentional discrimination and I would refer
23 the Court to the oral findings of fact, which you were just
24 quoting a few moments ago.

25 THE COURT: Well, I'm -- we're past that point, I am,

1 at least.

2 MS. LEHENY: But -- well, but it's the same oral
3 findings of fact, but a different section, Page 9-16, the Court
4 said and I quote:

5 The Court is not suggesting that the under-
6 representation of minorities in the fire department is
7 in any way comparable to the blatant intentional and
8 pervasive discrimination found in the Olan (ph) and Morrow
9 v. Chrysler cases.

10 So, already we have a court specifically setting out
11 that he has not found any intentional discrimination.

12 Now, when you turn to the written findings of facts
13 and conclusions of law from 1975 and you look at Paragraph B-7,
14 it says:

15 This court finds as a matter of fact that the
16 current administration of the City of Philadelphia
17 does not intentionally discriminate against any
18 firefighter.

19 THE COURT: Right.

20 MS. LEHENY: So, now I grant you, you're --

21 THE COURT: You're preaching to the converted on this
22 point.

23 MS. LEHENY: All right.

24 THE COURT: What I'd really like to hear is your
25 response to his alternative argument.

1 MS. LEHENY: I'm -- the alternative argument being --

2 THE COURT: Say it again?

3 MS. LEHENY: -- I'm sorry.

4 MR. MILDENBERG: Disparate treatment does not require
5 intentional discrimination, so that the finding there -- it
6 wasn't a finding of no discrimination, it was merely a finding
7 that you don't need to examine the point under a disparate-
8 impact analysis.

9 MS. LEHENY: Well, your Honor, I would make two
10 points --

11 THE COURT: Where does it say that?

12 MR. MILDENBERG: Pardon me?

13 THE COURT: Cite me to where that -- it says that.

14 MR. MILDENBERG: Yes, your Honor, I will do so. We do
15 have it right. Okay.

16 The court actually said --

17 THE COURT: What page -- cite me, so I can --

18 MR. MILDENBERG: Findings of fact and conclusions of
19 law at Section II -- Roman Numeral II -- Paragraph B, but this
20 is January 7th, 1975.

21 THE COURT: Wait a minute.

22 MR. MILDENBERG: And the quote is --

23 THE COURT: Hold on a minute.

24 MR. MILDENBERG: Yes, your Honor.

25 (Pause at 10:17 a.m.)

1 THE COURT: Okay, January 7th, '75, okay.

2 MR. MILDENBERG: Roman Numeral II, large -- large B,
3 Paragraph 2.

4 THE COURT: I don't find any Roman numerals in what I
5 have.

6 MS. LEHENY: Your Honor, may I be of assistance -- may
7 I be of assistance?

8 If you're referring to Exhibit Q, which is the last
9 exhibit in the -- in the City's motion to dissolve, it is the
10 -- the second to the last page of the -- of the exhibit.

11 THE COURT: I'm looking at Exhibit Q which is --

12 MS. LEHENY: If you look at the --

13 THE COURT: -- which is January 7th, '75, findings of
14 fact and conclusions of law.

15 MS. LEHENY: Right.

16 And if you look at the -- you know -- where the -- you
17 know, where the electronic -- the ECF systems stamps.

18 THE COURT: Oh, I see the Roman II, okay.

19 MS. LEHENY: Yeah, Page 64.

20 THE COURT: Okay.

21 MR. MILDENBERG: So, it's 2B, Paragraph 2, your Honor.

22 THE COURT: 2 --

23 MR. MILDENBERG: 2, large B --

24 THE COURT: Right.

25 MR. MILDENBERG: -- Paragraph 2.

1 And the quote is, quote:

2 The intent or motive -- or motive by the employer
3 to discriminate is legally irrelevant.

4 And that's right after he notes that he's using a
5 disparate-impact analysis.

6 The court stated that the disparate impact alone made
7 out a *prima facie* case and, therefore, we need not go any
8 further to determine intentionality.

9 And he actually calls it -- quote/unquote --
10 irrelevant.

11 THE COURT: I'm reading what you've cited me to.

12 (Long pause at 10:19 a.m.)

13 THE COURT: Okay. I have your argument.

14 MS. LEHENY: Thank you, your Honor.

15 THE COURT: Response?

16 MS. LEHENY: Yes, thank you, your Honor.

17 Your Honor, when you look at -- you cannot look at
18 that -- that one sentence in isolation from both the oral
19 findings of fact and the rest of the written findings of fact
20 and conclusions of law, that's merely a statement of the law.

21 If you can show -- if you can meet your burden of a
22 *prima facie* case of disparate impact, then you don't have to
23 prove intent, that's just a statement of the law.

24 When you couple that single statement of the law with
25 the fact that the court expressly found that there had been no

1 intentional discrimination, the court is merely recognizing that
2 even without a finding of intentional discrimination, the
3 plaintiffs still carried their burden on disparate impact.

4 THE COURT: Well, the --

5 MR. MILDENBERG: If I may, your Honor?

6 THE COURT: -- the -- Paragraph 3 says after the
7 recitation in Paragraph 2 of the legal standard, Paragraph 3
8 says that:

9 The defendants have not met their burden of proving
10 that the written promotion examinations are valid and
11 job related.

12 And 4:

13 The written promotion examinations of the Philadelphia
14 Fire Department have violated the legal requirements
15 of Title 8, et cetera, et cetera, et cetera.

16 The next paragraph it's sort of confusing to me
17 because it says:

18 Upon a finding of discrimination --

19 Which it would seem to me he's wrong, he's elsewhere
20 said, he doesn't find it.

21 MR. MILDENBERG: That's why I'm calling it a minor
22 finding, but it was a finding.

23 And then, he also uses a quote where he quotes, he
24 says:

25 There was a -- quote -- history of discrimination.

1 That's also in Section 2B, Paragraph 2, it says:

2 It's a result of a history.

3 Now, one thing I want to say, the administration --

4 THE COURT: Well, wait a minute.

5 MR. MILDENBERG: -- in 1975 --

6 THE COURT: Wait a minute -- wait, wait, wait.

7 MR. MILDENBERG: Yes, your Honor.

8 THE COURT: I'm trying to look, you're going too fast.

9 MR. MILDENBERG: Sorry.

10 THE COURT: Give me the cite again.

11 MR. MILDENBERG: Yes.

12 It says, quote, history of discrimination and --

13 THE COURT: You'll have to give me the cite.

14 MR. MILDENBERG: that's at -- sorry.

15 THE COURT: No, give me -- give --

16 MR. MILDENBERG: Paragraph 2, the same one, sorry,
17 your Honor.

18 THE COURT: Paragraph B2?

19 MR. MILDENBERG: Yes, B2, your Honor.

20 MS. LEHENY: That's not right.

21 THE COURT: Yeah, I -- okay, that sets forth the --
22 the legal standard --

23 MR. MILDENBERG: History of discrimination.

24 THE COURT: -- yeah. Okay.

25 MR. MILDENBERG: The thing -- the thing about this is

1 that he only found that the 1975 administration wasn't engaged
2 in any intentional discrimination, but that didn't go back all
3 the way to the 1800s, to the 1700s.

4 No one can truly sit here and say that there was no
5 discrimination for African-Americans in the fire department,
6 they weren't allowed to be hired until relatively recent times.
7 I mean, no one can really say that there's no history -- long-
8 term history -- of discrimination, it was --

9 THE COURT: Well, I don't --

10 MR. MILDENBERG: -- just that the particular --

11 THE COURT: -- I don't find -- are there findings that
12 Judge Bechtle made on that subject?

13 MR. MILDENBERG: No, he didn't --

14 THE COURT: Well, then --

15 MR. MILDENBERG: -- he said --

16 THE COURT: -- then --

17 MR. MILDENBERG: -- it's irrelevant.

18 THE COURT: -- then, I don't know how I can consider
19 it. All right.

20 Let me tell you what I really would like you to do.

21 I'd like to take up Mr. Mildenberg's suggestion that
22 the City sit down with him.

23 And it seems to me there's no reason why Mr. Sullivan
24 can't be part of that discussion, because what we're talking
25 about is the possible solution -- is a modification of this

1 agreement.

2 Now, if you can't agree, fine. Then, I'm going to go
3 ahead and decide it. But I'd like you to make that effort.

4 MS. LEHENY: Your -- your Honor, ah, I -- the City
5 will not take a position at this stage that it would not
6 consider that, but there is no -- but the modification -- the
7 mod -- we're -- a modification has to work with the substantive
8 terms of the decree.

9 And the substantive terms of the decree are that there
10 is a quota -- there's a quote hiring.

11 Now, the City by no means agrees that that -- that
12 there is any finding of intentional discrimination or that the
13 mere repetition of the standard for disparate impact creates
14 such a finding, but --

15 THE COURT: Well --

16 MS. LEHENY: -- that --

17 THE COURT: -- there was more than the repetition of
18 the standard. I mean, you're just ignoring -- it seems to me --
19 the -- the findings in 3, 4 and 5.

20 MS. LEHENY: No, your Honor, if I may, I'm not.

21 That's part of a disparate-impact finding

22 Courts have held, repeatedly, that tests that are
23 valid and job related are not discriminatory under a disparate-
24 impact theory even if one racial group or another performs
25 markedly worse on the test, that's the Ricchi (ph) case.

1 So, there's -- there's a whole host of cases about
2 that.

3 What the -- what Judge Bechtel said in this case was,
4 you can prevail on an disparate-impact case in this case,
5 because I'm looking now at the test, which is not on its face
6 discriminatory showing intentional discrimination and there is
7 no other evidence of an intentional discrimination, but I'm
8 looking at this test and I don't see that's valid and job
9 related. That's still an element of disparate impact, it's not
10 intentional discrimination, your Honor.

11 So, the fact that the court --

12 THE COURT: I'm not -- I'm not suggesting it is
13 intentional discrimination but he does -- doesn't he find
14 there's a disparate impact which resulted in the defendants
15 having proved -- carried their burden of proving -- that the
16 examinations are valid and job related and, therefore, the
17 written promotion examinations violated the requirements of
18 Title VII?

19 MS. LEHENY: Absolutely, your Honor.

20 But that's -- but that is a finding of discrimination
21 that is unintentional, it is not a finding of intentional
22 discrimination and that -- that under Lomax -- intentional
23 discrimination is -- is when the -- when this -- when the City
24 can take into account a racial classification, not in -- not
25 when there's been a finding of unintentional discrimination.

1 THE COURT: Well, what's your -- what's your -- but
2 what -- what is the authority for that statement --

3 MS. LEHENY: That --

4 THE COURT: -- please?

5 MS. LEHENY: -- that's Lomax, your Honor, Lomax versus
6 City of Newark --

7 THE COURT: Yeah.

8 MS. LEHENY: -- the Third Circuit case in which the --
9 in which the City of Newark was operating under a consent decree
10 and then, sort of in addition to that consent decree,
11 transferred firefighters by race, because it wanted to -- the --
12 the -- the administration wanted to create a sort of more
13 harmonious and racially-balanced environment.

14 MR. MILDENBERG: No --

15 MS. LEHENY: And -- and --

16 MR. MILDENBERG: -- that was a statute.

17 And that was the problem, it wasn't enacted for any
18 proper purpose, so that was the one we talked about, it was
19 enacted to create a rainbow.

20 MS. LEHENY: May I -- may I --

21 MR. MILDENBERG: And that ordinance was found to be
22 unconstitutional --

23 THE COURT: Counsel --

24 MR. MILDENBERG: -- and that was not a consent decree.

25 THE COURT: -- you really shouldn't interrupt opposing

1 counsel's --

2 MR. MILDENBERG: Sorry, your Honor. I apologize --

3 THE COURT: -- argument.

4 MR. MILDENBERG: I withdraw that.

5 MS. LEHENY: Thank you, your Honor.

6 Your Honor, again, in that case, the Third Circuit
7 said that -- a compelling governmental interest exists when a
8 government is remediating its own discrimination, but it then
9 specifically said, that the government had to, either -- either
10 had to have intentionally discriminated in the past or had to
11 have been a passive participant in a third party's
12 discrimination.

13 Now, that second piece, passive participant doesn't
14 apply here, because the City back in 1975 and still today,
15 administers its own exams. So, there is no third party creating
16 a list.

17 THE COURT: What's the cite to that case?

18 MS. LEHENY: To that Lomax, your Honor, bear with me
19 one moment, please.

20 MR. MILDENBERG: If I may, your Honor.

21 MS. LEHENY: Thank you.

22 (Pause at 10:27 a.m.)

23 MS. LEHENY: Your Honor, it's 463 F. 3rd, 303, it's a
24 2006 case.

25 THE COURT: Let me just take a minute to read it here.

1 MS. LEHENY: Sure.

2 (Pause at 10:28 a.m.)

3 (Resumed in open court at 10:29 a.m.)

4 THE COURT: Now, what portion of this were you
5 referring to?

6 MS. LEHENY: Your Honor, if you'd turn to Page 307 of
7 the decision.

8 THE COURT: Yes, this is a printout --

9 MS. LEHENY: Under --

10 THE COURT: -- I can't find the page numbers, is this
11 the heading remedying past discrimination?

12 MS. LEHENY: Yes, your Honor.

13 And that's in that very first sentence it says that:

14 It's well settled that a government has a compelling
15 interest in remedying its own past discrimination.

16 But it further goes on to explain in the next sentence
17 that:

18 It may employ racial classifications to cure racial
19 imbalances but only if it can prove that it engaged in
20 prior intentional discrimination or was a passive
21 participant in a third party's discrimination.

22 THE COURT: Right.

23 MS. LEHENY: And by the way, your Honor, to address
24 Mr. Mildenberg's point, the first next sentence clears up his
25 argument that you should look back at the history going back to

1 1700, 1800, even the beginning of this -- of the last century,
2 because it says that race-based preferences cannot be justified
3 by reference to past societal discrimination in which the
4 municipality played no material role.

5 MR. MILDENBERG: But they did play a material role,
6 they -- there were laws that disallowed -- laws passed by the
7 City -- that disallowed African-Americans from even being
8 firemen. So, the City did play a role in that one and that's
9 why we can and must look back and will, probably, in this case.

10 So, that particular sentence is not supportive of the
11 City's position.

12 But your Honor --

13 THE COURT: Well, I'm still looking for the sentence.
14 I really think that you have to learn not to interrupt your
15 opponent's argument.

16 MR. MILDENBERG: Yes, your Honor.

17 THE COURT: We will come back to you --

18 MR. MILDENBERG: Yes, your Honor.

19 THE COURT: -- and allow you the opportunity to argue.

20 MR. MILDENBERG: Yes, your Honor.

21 THE COURT: Now where is the sentence you were
22 referring me to?

23 MS. LEHENY: Ah, which -- which sentence -- I'm sorry,
24 your Honor, I -- which one, the race-based -- the societal
25 discrimination or the --

1 THE COURT: Well, I have the -- I have the first part
2 of what you had submitted. The second part of it -- that
3 past --

4 MS. LEHENY: The intentional -- prior intentional
5 discrimination?

6 That's the preceding sentence, your Honor, it starts
7 with accordingly, it may employ racial -- the sentence
8 immediately preceding the citation from Richmond v. J. Carlson.

9 THE COURT: I have that sentence, I believe I do. Oh,
10 here it is -- after the -- the Richmond cite, okay.

11 MS. LEHENY: Hm-hmm.

12 THE COURT: All right. All right.

13 Now, your --

14 MR. MILDENBERG: My point on that one sentence, your
15 Honor -- it's the whole point here -- the only finding of Judge
16 Bechtle is that the 1975 -- that current administration -- had
17 engaged in good-faith efforts and it, itself, was not attempting
18 to intentionally discriminate.

19 If you go back in the history -- and we cite it in our
20 brief -- there were laws on the books passed by the Government,
21 African-Americans could not even be firemen employed by the City
22 of Philadelphia.

23 She read the sentence:

24 To remedy its own past discrimination.

25 That doesn't stop in 1975 -- that word, past.

1 The reason we're here, it's not because of what
2 happened in '75 -- 1975 -- it's what happened in 1800 -- in the
3 1800s. There's a history --

4 THE COURT: Did Judge Bechtle make any findings on
5 that?

6 MR. MILDENBERG: But he didn't need to, he said, I
7 don't need to do that, 'cause I'm going to use this for an
8 impact and then, he even said, it's -- quote/unquote -- legally
9 irrelevant under this disparate-impact analysis.

10 Now, one other thing --

11 THE COURT: You seem to be going back and forth, I --
12 I --

13 MR. MILDENBERG: Well, it's not really --

14 THE COURT: -- I don't know how I can consider -- I
15 don't have any record about hundreds of years --

16 MR. MILDENBERG: Right.

17 THE COURT: -- of discrimination.

18 Now, you're telling me, it doesn't matter that he
19 said, it's not intentional because of the disparate impact, now
20 that -- that's the theory I'm trying to understand.

21 MR. MILDENBERG: Right.

22 I -- I see what's -- see what's happening, your Honor,
23 under -- in other words, Judge Bechtle could have used one or
24 two both choices of law, disparate impact or intentional
25 discrimination analysis.

1 Since he was able to use disparate impact, he found
2 it's legally irrelevant to determine the intentional-
3 discrimination analysis.

4 Now, what I'm saying here years later in 2010 is, we
5 still can -- and should in my opinion -- if that wasn't found
6 yet, if Judge Bechtle never did that analysis and now we're in a
7 position where the decree could be dissolved if that analysis
8 isn't done and intentional discrimination is determined by the
9 Court. We'd still have to go back to that.

10 Back then, he just didn't need to, he said, it's
11 legally irrelevant, because I have disparate impact.

12 And now, the City is saying, well, based on the
13 changed circumstances in 2010, there's no more disparate impact,
14 so the whole thing should be dissolved.

15 And I'm saying, you can't dissolve it without going
16 back now and doing what wasn't done in 1974, that's all I'm
17 saying.

18 THE COURT: Well, it's clear to me -- and I think
19 counsel will agree on this, first of all, despite my -- after
20 counsel educated me -- I must make findings of fact, if I'm
21 going to modify or dissolve this.

22 MR. MILDENBERG: Right.

23 THE COURT: Findings of fact requires --

24 MR. MILDENBERG: Right.

25 THE COURT: -- an evidentiary hearing and any party,

1 who wishes to have discovery in advance of that evidentiary
2 hearing is entitled to have it.

3 The other thing I -- I was hoping to see whether there
4 was room to -- to reach some agreement on a modification, but
5 I'm a little dubious about it, because it seems -- if -- if
6 there is any quota -- if it can be modified in other ways with
7 no quota, that's one thing.

8 But if there is any quota that -- the question is
9 still there -- whether the quota is valid or not.

10 MR. MILDENBERG: I --

11 THE COURT: So, I don't know whether you have any
12 suggestions -- I'm not -- I don't want to make you spin wheels
13 and do useless things, if you are going to have some suggestions
14 that you can make to the City about modification --

15 MR. MILDENBERG: Yes.

16 THE COURT: -- without a quota, then I think that's
17 worth exploring.

18 MR. MILDENBERG: I think we can explore that point,
19 but also, your Honor, it may -- if it pleases the Court to
20 indulge me for one moment on this topic of whether a quota is
21 unconstitutional, *per se*, which has been said multiple times by
22 the City.

23 The most recent Supreme Court case, the Chicago case
24 that was a quota case. The Supreme Court affirmed -- well, that
25 -- that whole scheme is a quota scheme.

1 Quotas are not illegal, *per se*, there are
2 circumstances where they can be used. One is, where there is
3 intentional discrimination which hasn't been found yet in this
4 case. If there is an evidentiary hearing, it may be something
5 the Court looks back and finds and then, the Court may use a
6 quota.

7 The other one is to remedy disparate impact.

8 So, it's still -- they -- they were hoping on the
9 Ricchi case out of New Haven, that that would somehow change the
10 law and say, you can't impose -- that's a misreading of Ricchi
11 and the Supreme Court came back in the Chicago case -- just
12 recently.

13 If the Supreme Court *per se* made quotas
14 unconstitutional, they would have kicked that whole Chicago
15 Firemen case out of the court, but they didn't and in fact, the
16 Chicago Firemen prevailed in a case that has quotas.

17 And the fact that people keep saying that somehow
18 there's a change in the law, it's just not true.

19 MS. LEHENY: May I address that point, your Honor?

20 THE COURT: Yes.

21 MS. LEHENY: First of all, I'm not sure exactly what
22 case counsel is referring to, because the Chicago Firefighter
23 case that was before the court was a disparate-impact case and
24 the question before the court was whether the statute of
25 limitations had run, what -- what act was necessary to trigger

1 the statute of limitations.

2 The issue was that a -- that a test had been given, a
3 list had been created that black applicants had fallen -- that
4 -- and I'm not sure -- I don't remember whether statistically
5 they had shown that a disproportionate number of black
6 applicants had -- had not scored highly on the test, I think
7 they did.

8 And the City of Chicago, essentially, did these
9 cutoffs in -- in -- on the list and said, you know, from say No.
10 1 to No. 300, you're in the well-qualified range and the -- you
11 know -- 301 to 500, you're in the qualified and whatever -- and
12 then, they sent out a letter to everyone.

13 And they said, essentially -- they told them where
14 they were -- and they said, if you're in the qualified range --
15 if you're in the well-qualified range -- you have a good chance
16 of being hired. If you're in the qualified range, probably not,
17 because we're not -- we're probably not going to reach that far
18 down on the list. That's essentially what the letter said.

19 And what happened was -- is that the firefighters who
20 were in the qualified range, who did not get hired, waited --
21 there was -- there was no hiring for a while off of that list.

22 And then, eventually, the -- the city did hire -- the
23 list expired -- they had never reached down into the qualified
24 group. And at that point, those black -- those black applicants
25 brought a disparate-impact claim.

1 And the city said, no, no, no, you're past the three
2 hundred days under Title VII, the three hundred days started
3 running from the date that we announced the list and, hey, we
4 sent you a letter telling you, you probably wouldn't get hired.

5 And the -- the plaintiff's position was that, no, that
6 each new act of -- each new act -- each new hiring off that list
7 was a -- quote -- fresh act of discrimination that triggered the
8 Title VII statute of limitations and the Supreme Court agreed.

9 There's no quota in that case, I'm not -- I have no
10 idea what counsel is referring to. That is the case that the
11 Supreme Court just decided, that's the Chicago Firefighter case.

12 Ricchi also involved disparate impact, it had nothing
13 to do with intentional discrimination.

14 So -- so -- and if I may finish, your Honor.

15 We are relying on Grudder v. Bollinger (ph). In
16 Grudder v. Bollinger from 2003, that case -- and the citation is
17 539 U.S. 306 and I'm referring, your Honor, to -- I just want to
18 get the right quote, your Honor.

19 (Pause at 10:40 a.m.)

20 MS. LEHENY: Two -- Page 239 30, this is on the -- in
21 the decision. The court said there that -- and in this case
22 they were talking about a law school, an educational
23 environment. But they said:

24 To assure that within -- that within this institution
25 -- quote -- some specified percentage of a particular

1 group merely because of its race or ethnic origin
2 amounts to outright racial balancing which is patently
3 unconstitutional.

4 And it further went on to say that:

5 In this case the law school of Michigan could
6 not -- and I quote -- insulate each category of
7 applicants with certain desired qualifications from
8 competition with all other applicants.

9 That is exactly what a quota does.

10 And, in fact, in Dietz v. Baker (ph), the district
11 court in Delaware recognized that the quota are what -- are that
12 Grudder was talking about and recognized that they are patently
13 unconstitutional. They are not unconstitutional sometimes, they
14 are patently unconstitutional.

15 And the Supreme Court has not wavered from that
16 position and I defy counsel for Valiants to point to anything in
17 that Chicago decision that said that quotas were constitutional,
18 because they're not.

19 MR. MILDENBERG: Your Honor --

20 THE COURT: I don't quite understand your argument,
21 because I thought you just said they're unconstitutional except
22 in some limited circumstances.

23 MS. LEHENY: No, your Honor, what I was saying is they
24 are not -- they are unconstitutional in all circumstances.

25 There is no set of circumstances in which they are

1 constitutional.

2 THE COURT: Not even to render -- remedy -- past
3 discrimination?

4 MS. LEHENY: No, your Honor, not even to remedy past
5 discrimination.

6 A racial classification may be used, but a racial
7 classification is not the same thing as a quota. It -- and the
8 Bollinger case is a good example -- the Grudder is a good
9 example, because in that case, the law school at Michigan --
10 Michigan law school --

11 THE COURT: Excuse me.

12 MS. LEHENY: I'm sorry.

13 THE COURT: Let me make sure I understand --

14 MS. LEHENY: Hm-hmm.

15 THE COURT: -- a racial classification --

16 MS. LEHENY: Yes, your Honor.

17 Because that's what Lomax -- when Lomax talks about
18 the use of racial classifications, it says that racial -- in
19 Lomax it says that:

20 Racial classifications may be used only -- to remedy
21 intentional past discrimination or if the governmental actor was
22 a passive participant in a third party's intentional
23 discrimination and that doesn't apply here at all, because there
24 was no third -- third party involved.

25 THE COURT: Excuse me --

1 MS. LEHENY: So, but that deals with the compelling
2 governmental interest piece.

3 The quota piece goes to the narrowly-tailored remedy
4 and that's the one -- and that's the standard under Grudder,
5 narrowly-tailored.

6 Now, in Grudder, the education -- the compelling
7 interest was -- was diversity in an educational institution, the
8 Supreme Court said that in an educational institution, diversity
9 is a compelling governmental interest.

10 And for the record, in Lomax the court rejected that
11 diversity -- for educational purposes -- is a compelling
12 interest in a fire department, but leaving that aside -- going
13 back to Grudder.

14 In that case, the University of Michigan was using the
15 applicants' race as what was considered a plus factor in its
16 application process.

17 It was not saying, we want to have X percentage of
18 black students, X percentage of Asian students, X percentage of
19 white students and so on.

20 It was saying, when we're looking at our applicant
21 pool and we are giving consideration to the various factors
22 including things like, extracurriculars or other factors, one
23 thing we will consider as a plus factor is race.

24 THE COURT: Well --

25 MS. LEHENY: And the Supreme Court said that in that

1 case, that was okay, because it was not a quote.

2 THE COURT: But way -- it occurs to me that possibly,
3 the Michigan -- the University of Michigan case might be the
4 basis for a modification of this decree that both parties could
5 agree to.

6 In other words, it would eliminate the quota, but it
7 would bring to bear on the selection, the factors that the
8 University of Michigan was allowed to bring in that case.

9 MS. LEHENY: Well, your Honor --

10 MR. MILDENBERG: Your Honor, could I just --

11 THE COURT: I'll be with you in a minute.

12 MR. MILDENBERG: She's still -- yes, your Honor.

13 MS. LEHENY: Your Honor, the troubling thing about
14 that is that in -- in the Michigan case -- the compelling
15 governmental interest was diversity in an educational setting.

16 And in Lomax, the Third Circuit said that a firefight
17 -- that a fire department -- does not have a compelling interest
18 in diversity for educational purposes.

19 In fact, currently in the Third Circuit, the law is --
20 is only that -- it's only, either, past discrimination or
21 education -- I'm sorry -- diversity in an educational setting.

22 I know counsel for Valiants has pointed to an
23 operational-needs argument, but I have to point out that that
24 operational-needs argument which has been adopted in other
25 circuits in the law-enforcement and correctional context -- and

1 I can talk about that -- the -- the distinction more -- but let
2 me first point out that that operational-needs argument as a
3 compelling governmental interest has not, in fact, been adopted
4 by the Third Circuit. The Third Circuit merely recognized that
5 -- that the City of Newark did not --

6 THE COURT: Be that as it may, I don't know that that
7 precludes you from discussing a modification of -- of the decree
8 along the lines that I suggested.

9 MS. LEHENY: Well, your Honor, obviously, nothing
10 precludes us from discussing anything.

11 But --

12 THE COURT: No, but --

13 MS. LEHENY: -- our ability -- I'm sorry, your Honor,
14 I didn't mean to cut you off.

15 THE COURT: Yeah, but are we going to -- there's no
16 use sending you to discussion just to talk, if -- if nothing is
17 going to come of it.

18 MS. LEHENY: Well, your -- your Honor, the City -- the
19 problem that the City faces is that it cannot engage in any kind
20 of racial classification, unless there is a compelling
21 governmental interest, it cannot -- or otherwise, it runs afoul
22 of the Constitution and it can be sued successfully by any
23 disappointed applicant, who does not belong to whatever the
24 favored racial classification is.

25 And the stumbling point -- block -- we have is that

1 there is no compelling governmental interest, there is nothing
2 in the record to support one.

3 THE COURT: That's what you cite Lomax for, right?

4 MS. LEHENY: Pardon me?

5 THE COURT: You cite Lomax for that?

6 MS. LEHENY: I cite Lomax for that, but I also refer
7 you to the findings of fact and the conclusions of law, both the
8 oral ones and the written ones.

9 Not only does the -- Valiants argument is that the
10 Court didn't find certain things and, therefore, we should read
11 from that silence that it could have found certain things.

12 Your Honor, if --

13 THE COURT: I was speaking that you cite Lomax for the
14 proposition that there's no compelling interest to have
15 diversity in firefighters --

16 MS. LEHENY: Yes, your Honor.

17 THE COURT: -- and educational function?

18 MS. LEHENY: Correct, your Honor.

19 THE COURT: That's what you're citing Lomax for -- one
20 of the things --

21 MS. LEHENY: Yes.

22 THE COURT: -- you're citing Lomax for?

23 MS. LEHENY: Yes.

24 THE COURT: Okay. All right.

25 MR. MILDENBERG: Thanks, your Honor.

1 I'd just -- I think that we just had an example of the
2 problem with the thinking and analysis and logic that the City
3 is employing.

4 Ms. Leheny said, the Third Circuit hasn't adopted the
5 operational-needs test, other circuits have adopted it.

6 Well, we all know that just because your circuit
7 hasn't adopted something, there's -- they haven't rejected it.
8 They're taking something where someone hasn't done something and
9 trying to tell you that it means something and it doesn't.

10 And, in fact, the Third Circuit specifically cited the
11 operational-needs test in the Lomax/Newark case and it says --
12 it criticizes the party:

13 You should have raised this, but since you didn't
14 raise this, we're not going to let you use a racial
15 classification.

16 It actually cites the operational-needs test from
17 other circuits, it says:

18 You could have used this, but you didn't, instead
19 you're using this educational factor, I'm gonna throw
20 that one out. Had you brought in operational needs, we
21 could have discussed that, you didn't do so, so we're
22 not going to address it here.

23 So, Ms. Leheny takes that to tell you that we can't
24 use that in the Third Circuit? It's kind of like when she says,
25 quotas are unconstitutional always. It's the same exact leap of

1 logic.

2 And the Court should be blinded by that and I don't
3 think it will be.

4 THE COURT: Well, that -- that's a different --

5 MR. MILDENBERG: Well, it's -- but --

6 THE COURT: -- but what you're saying --

7 MR. MILDENBERG: -- it's the same, it's the lack of
8 something and then, you look at something that's not there to
9 try to convince the judge that --

10 THE COURT: Well --

11 MR. MILDENBERG: -- because it's not there, that means
12 they've said it can't be there --

13 THE COURT: And that's --

14 MR. MILDENBERG: -- and that's just not true.

15 THE COURT: That -- I understand that argument.

16 MR. MILDENBERG: Yes, it's not true.

17 THE COURT: You're simply saying that the fact that
18 the Third Circuit hasn't decided the question doesn't mean that
19 the Third Circuit has to --

20 MR. MILDENBERG: Yes --

21 THE COURT: -- decided the --

22 MR. MILDENBERG: -- right, exactly.

23 And it's the same thing with quotas, we have the
24 Paradise case --

25 THE COURT: All right.

1 MR. MILDENBERG: -- which we've cited.

2 THE COURT: Well now, let me ask you both, is there
3 any -- given what you've said and -- and if this is your
4 position, fine. I mean, because I understand -- I think -- the
5 problems you face.

6 Is there any sense in the parties sitting down and
7 discussing this or not? I'm not anxious to waste your time.

8 MS. LEHENY: I appreciate that, your Honor.

9 Your Honor, may I have a moment to consult -- my chief
10 deputy is here --

11 THE COURT: Sure.

12 MS. LEHENY: -- and I don't have the authority to make
13 this decision.

14 THE COURT: Why don't we take a five-minute recess.

15 MS. LEHENY: Thank you.

16 THE COURT: And then -- if you need more time than
17 that, please tell me, just let me know when you're ready.

18 MS. LEHENY: I certainly will. Thank you, your Honor.

19 MR. MILDENBERG: Thank you, your Honor.

20 (Brief recess is held at 10:50 a.m.)

21 (Resumed in open court at 11:14 a.m.)

22 THE COURT: Counsel.

23 MS. LEHENY: Thank you, your Honor.

24 After discussion, the City would agree to a settlement
25 conference but it would want the settlement conference to be

1 held quickly within a month, to be back in front of this Court
2 within two weeks after that, either, with an agreement with
3 opposing counsel or for a final disposition on the
4 constitutional question.

5 And it would also be with the understanding that the
6 City will not agree to -- to a quota, any sort of form of quota.

7 THE COURT: Well, the one thing I can't do -- well, I
8 didn't hear you yet --

9 MR. MILDENBERG: Yes, your Honor.

10 In general, we're more than happy to sit down with the
11 City. We won't -- will not -- agree to any talks with
12 preconditions.

13 So, if she's really trying to put a precondition on
14 the --

15 THE COURT: Well --

16 MR. MILDENBERG: -- talk --

17 THE COURT: You can't argue --

18 MR. MILDENBERG: -- we just won't --

19 THE COURT: -- with the condition that the settlement
20 conference ought to take place as quickly as possible?

21 MR. MILDENBERG: Oh, the -- the time in that is fine,
22 I mean, any substantive -- if there were some substantive
23 preconditions, I won't agree --

24 THE COURT: Well, I can't -- I didn't hear any sub --
25 well, I -- I think there's one -- they're not going to agree to

1 a quota.

2 Now, if -- if a quota is necessary to you, then

3 there's no use having the --

4 MR. MILDENBERG: It's --

5 THE COURT: -- discussion. But --

6 MR. MILDENBERG: -- it's not necessary, but the point
7 is, your Honor, when we get down there to the talk -- when we
8 start talking -- there's leverage, there's discussions, there's
9 settlement negotiations.

10 We will not enter that room with respect -- it doesn't
11 make sense for a party to enter a negotiation having already
12 given up on a major point. We will talk about everything in
13 good faith and we may be able to reach a resolution, that
14 doesn't involve a quota.

15 But we will not sit down in a talk that involves a
16 necessity for us to agree prior to the talk --

17 THE COURT: Well --

18 MR. MILDENBERG: -- that she's going to get what --
19 what she wants.

20 THE COURT: -- I don't think she's asking that.

21 She's simply telling you, you should know they're not
22 going to agree to a quota.

23 MR. MILDENBERG: If that's it, then that's fine --

24 THE COURT: That's the --

25 MR. MILDENBERG: -- but that's not -- she has a -- she

1 -- she said, it's a condition that we don't --

2 THE COURT: Well, I -- I --

3 MR. MILDENBERG: -- the talks are conditional.

4 THE COURT: -- and I think -- if I may respectfully
5 suggest -- that you might have put a different label on that.

6 It's your position -- and I understand that -- that
7 you're not going to agree to a quota, you know that. You're not
8 surrendering anything. You're -- that's your position. But
9 there is room for you to talk.

10 Now, what I would like you to do -- and I think it
11 ought to be done quickly.

12 MR. MILDENBERG: Sure.

13 THE COURT: I cannot guarantee you the trial date
14 you're asking for because of my own schedule.

15 MS. LEHENY: Hm-hmm.

16 THE COURT: But obviously, as I expect counsel to move
17 quickly on this, I will do my best to -- consistent with my
18 schedule -- to move quickly on it as well.

19 Now, I would like to offer you, too, the assistance of
20 a magistrate judge, if anywhere along the way -- I don't want
21 to, obviously, get into it, myself -- where I'm going to have to
22 decide the question if it comes to that.

23 MS. LEHENY: Hm-hmm.

24 THE COURT: But we have very capable magistrate
25 judges, I would offer you my -- my own magistrate judge, Judge

1 Restrepo, but frankly, he is loaded up above his head.

2 And in the past, Judge Rice has -- in whom I have
3 confidence -- has offered to help me, if -- if I need it because
4 of Judge Restrepo's schedule.

5 So, you don't have to start with him, obviously, but
6 that avenue is available to you and all you have to do is call
7 Mr. Ervin and I'll talk to Judge Rice.

8 MR. MILDENBERG: We would -- we would be most
9 appreciative to have a magistrate assigned to our -- to all
10 parts of our discussions.

11 THE COURT: Okay.

12 MR. MILDENBERG: Yes.

13 MS. LEHENY: We'll -- we would agree to that --

14 THE COURT: Okay.

15 MS. LEHENY: -- your Honor.

16 THE COURT: Well, then I'll -- I'll --

17 MR. MILDENBERG: Judge Rice, we have no objection to,
18 your Honor.

19 THE COURT: Okay.

20 MS. LEHENY: Neither do we.

21 THE COURT: Fine. I think you'll like him.

22 All right. I'm going to go call him and just make
23 sure that he's willing to do it.

24 MS. LEHENY: Thank you.

25 MR. MILDENBERG: Thanks, your Honor.

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(Adjourned in this matter at 11:18 a.m.)

* * *

C E R T I F I C A T E

_____I do hereby certify that the foregoing is a correct transcript of the electronic-sound recording of the proceeding in the above-entitled matter.

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Date: August 1, 2010