

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
2004 MAR 12 10 3 25

FILED

MAR 12 2004

CLERK
U. S. DISTRICT COURT
MIDDLE DIST. OF ALA.

UNITED STATES OF AMERICA,)
Plaintiffs,)
TIMOTHY D. POPE,)
Intervenor-Plaintiff,)
JOHNNY REYNOLDS, et al.,)
Intervenor-Plaintiffs,)
EUGENE CRUM, et al.,)
Intervenor-Plaintiffs,)
v.)
THOMAS G. FLOWERS, et al.,)
Defendants.)
ALABAMA STATE CONFERENCE OF NAACP)
BRANCHES,)
Amicus Curiae)

CIV. ACTION NO. 68-T-2709-N
JUDGE MYRON H. THOMPSON

COMPLAINT-IN-INTERVENTION OF EUGENE CRUM, ET AL.

Pursuant to the Order entered in this action February 26, 2004 granting intervention to *Eugene Crum, et al.* [Doc nos. 638, 661], the following complaint-in-intervention is filed on behalf of: Eugene Crum, Sylvia S. Adams, Charles E. Archie, Jr., Carolyn Ball, Carol Banks, David Barley, John Bradford, Milton Burton, Pauline Burton, Dorothy C. Carson, Lynn Carter, Clyde Chatman, Charles Chinakwe, Presley W. Coleman, Geneice Smith Crayton, Betty Crum, Grant DeWayne

Culliver, Jerome Dangerfield, Velma Easterling, Venus Edwards, Mable Elliott, Cornell Ellis, Glenda Elston, Cecil Fagg, Audrey D. Finch, Samuel Foster, Terry D. Goodson, Katherine Gray-Armster, Brenda Dianne Green, Ricky Grider, Romanza Hamilton, Vivian Handy, Willie Harris, Roy Hightower, Michael Hopkins, Rodney Huntley, Brenda J. Irby, Jacquelyn Jackson-Kelly, Yvonne Jennings, Gladys D. Jones, Theodore Jones, Willie N. Kelly, Deborah Lumpkin, Eddie McCoy, Franklin McMillion, Sr., Kathy Mathews, Roosevelt Mays, Alva Moore, Annie Moore, Wilson Morgan, Benny Newton, Herman Powell, Samuel Price, Laneeta Roberts, Shelia Russell, Layan Said, Annie F. Smith, Robert L. Smith, Lee M. Taylor, Robert Taylor III, Earl Vaughn, Carrie Warren, Marie Wilson, Tamblyn Witherspoon, Darrell B. Wright, Earnest Wright, and the class they represent defined in their motion to intervene, this complaint-in-intervention and in *In Re Employment Discrimination Litigation Against State Of Alabama*, CV#94-T-356-N. [“Crum” or “plaintiff-intervenors” hereafter].

1. This complaint-in-intervention is filed pursuant to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States; 42 U.S.C. §§ 1981 and 1983; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), *et seq.*, and its implementing regulations, which prohibit employers from discriminating on the basis of race in employment opportunities; and the injunctions and decrees heretofore entered in this action which found defendants to have engaged in a pattern and practice of racial discrimination against African-Americans and enjoined acts or omissions having the purpose or effect of perpetuating such discrimination. The plaintiff-intervenors are African-American applicants, potential applicants and/or employees of the defendants who are among the African-American employees and applicants that the decrees and injunctions entered in this case were meant to protect.

2. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1243, 1367, 2201 and 42 U.S.C. §§ 2000(e), *et seq.*

3. Sylvia S. Adams is an African American employee of the Alabama Department of Finance and has been employed by the State of Alabama since 1993. She is a Security Systems Operator.

4. Charles E. Archie, Jr. is African American. He was an employee of the Alabama State Port Authority (Docks) from 1990 to 1999 at which time he was laid off. He was a Buyer II at the time of his lay off.

5. Carolyn Ball is an African American employee of the Alabama Department of Tourism and Travel where she holds the position of Tourist Promotion Representative I. She has been employed by the State of Alabama since 1979.

6. Carol Banks is an African American employee of the Alabama Medicaid Services Administration. She has been employed by the State of Alabama since 1978, initially as a temporary claims clerk at the Department of Industrial Relations. On November 26, 1980, she was hired on a permanent basis by the Department of Industrial Relations. In June 1991, Banks transferred back to Medicaid where she holds the position of Employee Services Representative.

7. David Barley is an African American employee of the Department of Economic and Community Affairs. He has been employed with the State of Alabama since 1977. He currently holds the position of Planning and Economic Development Specialist IV.

8. Johnny L. Bradford is an African American employee of the Alabama Department of Human Resources and has been employed with the State of Alabama since 1977. He currently holds the position of Public Information Specialist II.

9. Milton Burton is an African American employee of the Alabama Department of Corrections where he holds the position of Correctional Officer I. He has been employed by the State of Alabama since 1988.

10. Pauline Burton is African American. She was an employee of the Alabama Department of Corrections where she held the position of Correctional Officer I at the time of her termination in 1992. She began working for the State of Alabama in 1986.

11. Dorothy C. Carson is an African American employee of the Alabama Department of Human Resources. Carson was initially employed by the Alabama Department of Mental Health in 1976 and began working at the Department of Human Resources in 1977. She currently holds the position of Welfare Administrator IV.

12. Lynn Carter is an African American male who has been employed by the Alabama Department of Corrections from 1991 to the present. He was laid off in April 1992 and was rehired in October 1992. He currently holds the position of Correctional Officer I.

13. Clyde Chatman is African American. He was employed by the State of Alabama in the Department of Economic and Community Affairs and the Department of Conservation from April 1976 until his retirement in April 2002. At his retirement, he held the position of Planning and Economic Development Specialist III.

14. Charles Chinakwe is an African American employee of the Alabama Department of Agriculture and has been employed with the State of Alabama since 1989. He currently holds the position of Chemist II.

15. Presley W. Coleman is an African American. He was employed by the Alabama Department of Corrections from 1987 to 1994 when he resigned. At the time of his resignation, he

held the position of Correctional Officer I.

16. Geneice Smith Crayton is an African American employee of the Alabama Department of Corrections. She began working for the State of Alabama in 1991. She was laid off in April 1992 and was rehired in October 1992. She currently holds the position of Correctional Officer I.

17. Betty Crum is an African American employee of the Alabama Department of Economic and Community Affairs. She has been employed with the State of Alabama since 1977 and currently holds the position of Accountant III.

18. Eugene Crum is an African American. He was employed by the Alabama Department of Mental Health and the Alabama Development Office from February 6, 1984, until his termination in July 2000. At the time of his termination, he held the position of Economic Development Division Director.

19. Grant DeWayne Culliver is an African American employee of the Alabama Department of Corrections. He began working for the State of Alabama in 1981. He currently holds the position of Correctional Warden III.

20. Jerome Dangerfield is an African American employee of the Alabama Department of Revenue and has been employed with the State of Alabama since 1983. He currently holds the position of Revenue Special Agent II.

21. Velma Easterling is an African American employee of the Alabama Crime Victims Compensation Commission where she holds the position of Crime Victims Compensation Specialist. She began working for the State of Alabama in 1972 for the Alabama Public Library Service. In 1990, she began working for the Crime Victims Compensation Commission.

22. Venus Edwards is an African American. She was an employee of the Alabama

Department of Mental Health and Retardation where she held the position of Habilitation Treatment Specialist I at the time of her retirement in 2000. She began working for the State of Alabama in 1990.

23. Mable Elliott is an African American employee of the Alabama Department of Revenue where she has worked since 2001. She began working for the State of Alabama in 1978 in the Alabama Medicaid Services Administration. She resigned in March 1989 and was rehired in December 1990. She currently holds the position of Administrative Support Assistant II.

24. Cornell Ellis is an African American. In 1990, he applied for the following positions with the State of Alabama, but was not hired: County Welfare Director II, Vocational Education Specialist I, Revenue Research Analyst, Welfare Administrator II, Public Information Manager, Human Services Program Specialist Supervisor, Social Worker I, Welfare Supervisor I.

25. Glenda Elston is an African American. She was employed by the Alabama Department of Human Resources at the time of her retirement in 2000. She began working for the State of Alabama in 1997 and held the position of Human Resources Service Supervisor when she retired.

26. Cecil Fagg is an African American employee of the Alabama Department of Industrial Relations. He began working for the Alabama Department of Finance in 1978 and worked there until 1988 when he transferred to the Department of Industrial Relations. He currently holds the position of Department Procurement Officer II.

27. Audrey D. Finch is an African American. She was employed by the Alabama Department of Mental Health and Retardation from 1986 until her layoff in 1996. From 1986 until 1991, she held the position of Mental Health Worker. From 1991 until her layoff, Ms. Finch held

the position of Habilitation Treatment Specialist I.

28. Samuel Foster is an African American employee of the Alabama Department of Corrections where he holds the position of Correctional Officer I. He began working for the State of Alabama in 1984.

29. Terry D. Goodson is an African American. In 1993 he applied for the following positions with the State of Alabama but was not hired: Laboratory Technician I, Engineering Assistant III, Engineering Assistant I, Programmer I, Programmer Analyst I. In 1994 he applied for the following positions with the State of Alabama but was not hired: Box and Carton Manufacturing Plant Manager, General Services Supervisor.

30. Katherine Gray-Armster is an African American who was employed by the Alabama Department of Education from March 24, 1993 to September 9, 1993. She was a Clerk Typist I at the time of her termination.

31. Brenda Dianne Green is an African American employee of the Alabama Department of Human Resources and has been employed with the State of Alabama since 1977. She currently holds the position of Human Resources Program Supervisor.

32. Ricky Grider is an African American. He was employed by the Alabama Department of Corrections from 1984 until his termination in 1994. At the time of his termination, he held the position of Correctional Officer I.

33. Romanza Hamilton is an African American. She was employed by the Alabama Department of Revenue as a clerical aide in 1990 when she was terminated because her temporary appointment ended. She began working for the Alabama Department of Corrections in 1982 where she worked until 1984 when she transferred to the Department of Revenue.

34. Vivian Handy is an African American employee of the Alabama Department of Transportation. She began working for the State of Alabama in 1985 in the Department of Human Resources. She transferred to the State Personnel Department in 1995 and to the Department of Transportation in 1997. She currently holds the position of Department Personnel Manager I.

35. Willie C. Harris is an African American employee of the Alabama Department of Corrections. He began working for the State of Alabama in 1998 and currently holds the position of Correctional Officer I.

36. Roy Hightower is an African American employee of the Alabama Department of Corrections. He began working for the State of Alabama in 1973 and currently holds the positions of Correctional Institutional Co-ordinator.

37. Michael Hopkins is an African American employee of the Alabama Department of Corrections. He began working for the State of Alabama in 1983 in the Department of Mental Health and transferred to the Department of Corrections in 1985. He resigned in 1998 at which time he held the position of Correctional Officer II.

38. Rodney Huntley is an African American employee of the State of Alabama Department of Corrections and has been employed with the State of Alabama since 1983. He holds the position Correctional Warden II.

39. Brenda J. Irby is an African American. She began working for the State of Alabama in 1976 and worked for the Department of Public Health when she retired in 2001. At the time of her retirement she held the position of Administrative Support Assistant II. During her employment with the State of Alabama, she also worked for the Department of Education, the Department of Human Resources and the Department of Industrial Relations.

40. Jacquelyn Jackson-Kelly an African American. She was initially employed by the State of Alabama in 1970 when she was hired as a Steno I with the Department of Pensions and Security which is now the Department of Human Resources. She held this same job classification with the Rehabilitation and Crippled Children's Service and the Medicaid Agency during the 1970's. She later worked for the Revenue Department, the Securities Commission, and the Insurance Department, where she last worked in 1997.

41. Yvonne Jennings is an African American. She was employed by the State of Alabama beginning in 1983 and worked in the Department of Education, the Department of Revenue, the Department of Transportation and the Department of Corrections. She resigned in 2002 at which time she held the position of Administrative Support Assistant I.

42. Gladys D. Jones is an African American. She was employed by the Alabama Department of Education from 1976 to 1997 when she retired. At the time of her retirement, she held the position of clerk.

43. Theodore Jones is an African American employee of the Alabama Department of Economic and Community Affairs. He began working for the State of Alabama in 1969 and currently holds the position of Planning and Economic Development Specialist I/II.

44. Willie N. Kelly is an African American. He was employed by the Alabama Department of Corrections from 1984 to 1993 when he was terminated. At the time of his termination, he held the position of Correctional Officer Superintendent I.

45. Deborah Lumpkin is an African American. She was employed by the Alabama Department of Revenue from 1985 to 1996 when she resigned. At the time of her resignation, she was a Correctional Officer Supervisor I.

46. Eddie McCoy is an African American employee of the Alabama Department of Revenue and has been employed with the State of Alabama since 1984. He currently holds the position of Revenue Compliance Officer.

47. Franklin McMillion, Sr. is an African American employee of the Alabama Department of Revenue and has been employed with the State of Alabama since 1985. He currently holds the position of Revenue Compliance Officer.

48. Kathy Matthews is an African American employee of the Alabama Department of Economic and Community Affairs and has been employed with the State of Alabama since 1986.

49. Roosevelt Mays is an African American employee of the Alabama Department of Revenue and has been with the State of Alabama since 1977. He currently holds the position of clerk.

50. Alva Moore is an African American employee of the Alabama Department of Industrial Relations. He began working for the State of Alabama in 1978 and currently holds the position of Employment Security Representative.

51. Annie N. Moore is an African American. In 1993 she applied for the following positions with the State of Alabama but was not hired: Mental Health Worker I, Correctional Officer Trainee .

52. Wilson Morgan is an African American employee of the Alabama Department of Human Resources and has been employed with the State of Alabama since 1974. He currently holds the position of Senior Social Work Supervisor.

53. Benny Newton is an African American employee of the Alabama Department of Conservation. He began working for the State of Alabama in 1989 and currently holds the position

of Senior IT Systems Specialist.

54. Herman Powell is an African American employee of the Alabama Department of Economic and Community Affairs. He began working for the State of Alabama in 1979. He currently holds the position of Warehouse Superintendent.

55. Samuel Price is an African American employee of the Alabama Alcohol Beverage Control Board. He began working for the State of Alabama in 1981 and currently holds the position of District Supervisor for Enforcement.

56. Laneeta Roberts is an African American employee of the Alabama Public Service Commission. She began working for the State of Alabama in 1981 and currently holds the position of Public Utilities Analyst.

57. Shelia Russell is an African American employee of the Alabama Department of Mental Health. She began working for the State of Alabama in 1980 and currently holds the position of Administrative Support Assistant I.

58. Layan Said is an African American. He was an employee of the Alabama Department of Agriculture and Industries. He began working for the State of Alabama in 1983 and resigned in 1995. At the time of his resignation he held the position of Pesticide Administrator.

59. Annie F. Smith is an African American employee of the Alabama Department of Rehabilitation Services. She began working for the State of Alabama in 1983 and currently holds the position of Accountant I. She has also worked for the Department of Revenue and the Department of Economics and Community Affairs.

60. Robert L. Smith is an African American employee of the Alabama Department of Conservation. He began working for the State of Alabama in 1987 and currently holds the position

of Administrative Analyst I.

61. Lee M. Taylor is an African American. He was an employee of the Alabama Department of Public Health. He worked for the State of Alabama from 1973 until he retired in 1998. At the time of his retirement, he held the position of Public Health Senior Environmentalist.

62. Robert Taylor III is an African American employee of the Alabama Public Service Commission. He began working for the State of Alabama in 1986 and currently holds the position of Public Utilities Analyst

63. Earl Vaughn is a African American. He is a former employee of the Alabama Department of Agriculture. He was employed with the Department of Agriculture from 1987 until he retired in 1998. At the time of his retirement, he held the position of electrician.

64. Carrie Warren is an African American employee of the Alabama Public Health Department and has been employed with the State of Alabama since 1989. She currently holds the position of Public Health Senior Environmentalist.

65. Marie Wilson is an African American. She was an employee of the State of Alabama from 1989 to 2002 when she resigned. During her employment she worked in the Department of Mental Health, the Alcohol Beverage Control Board, the Department of Public Health and the Department of Industrial Relations. At the time of her resignation, she held the position of Employment Security Representative.

66. Tamblyn Witherspoon is an African American. She worked from the Alabama Department of Corrections from 1988 until her termination in 1993. At the time of her termination, she held the position of Correctional Officer I.

67. Darrell B. Wright is an African American employee of the Alabama Department of

Mental Health. He began his employment with the State of Alabama in 1982. He currently holds the position of Mental Health Worker I.

68. Earnest Wright is an African American employee of the Department of Corrections. He worked for the State of Alabama from 1986 until his termination in 1994. At the time of his termination, he held the position of Correctional Officer I.

69. Each of the foregoing plaintiff-intervenors incorporate their prior facts and allegations set forth in *In Re Employment Discrimination Litigation Against The State of Alabama*, CV#94-T-356-N, as part of the current complaint-in-intervention.

70. The plaintiff-intervenors bring this complaint-in-intervention on their own behalf and on behalf of the class incorporated in the motion to intervene granted by the Court on February 26, 2004. *Flowers* Docs. 638, 661. Such class consists of all African-Americans who: (1) applied for employment opportunities covered by the prior decrees and injunctions in this case; or (2) would have applied for such opportunities in the absence of the wrongs found and enjoined in this action and/or alleged in this complaint-in-intervention; or (3) are employed by the defendants, or were formerly employed by them during the period since the decrees and injunctions in this case were entered.

71. The prior decrees in this case found and enjoined a pervasive pattern and practice of racial discrimination in hiring, training, promotions, and other employment opportunities by the State Personnel Department and the various departments and agencies of the State of Alabama. *Flowers* Doc. 65 (reported at 317 F. Supp. at 1079); *Flowers* Docs. 141, 142 (reported at 1976 WL 729). The Court found that racial discrimination “has so permeated the employment practices of the defendants that it [is] necessary to enter a detailed and specific decree which will not only prohibit

discrimination in the future but which will also *prescribe procedures* designed to prevent discrimination in the future and to correct the effects of past discrimination.” *Flowers* Doc. 65 (reported at 317 F. Supp. 1079 (M.D. Ala. 1970)) (emphasis added). Such decree required, among other things: (1) that black eligibles not be passed over by *lower ranked* white eligibles “unless the defendants have first contacted and interviewed the higher-ranking Negro applicant” and have “documentary evidence” that such applicant “cannot perform the functions of the position, is otherwise unfit for it, or is unavailable” [hereinafter “no bypass injunction”]; (2) that Certificates of Eligibles “shall not be canceled or returned with vacancies unfilled unless each Negro applicant is appointed or is found to be unavailable or unqualified”; (3) that “[d]ocumentary evidence shall be maintained . . . that will sustain the finding of unavailability or lack of qualifications”; (4) that black applicants be notified of which position they were considered for and the action taken on their application; (5) that “defendants shall assign employees on the basis of their training and ability” and “shall not be assigned to serve . . . predominantly Negro clientele”; and (6) that defendants “shall . . . implement a program of recruitment and advertising which will fully advise the Negro citizens of . . . Alabama of the employment opportunities available to them with the State . . . agencies.” *Frazer*, 317 F. Supp. at 1090-1093.

72. This Court “permanently enjoined the defendants from the foregoing practices and “from encouraging in any employment practices, including recruitment, examination, appointment, training, promotion, retention, or any other personnel action, for the purpose or with the effect of discriminating against any employee, or actual or potential applicant, on the ground of race or color.” *Frazer*, 317 F.Supp. at 1090 (*Flowers* doc. 65).

Pursuant to the findings of fact and conclusions of law made and

entered in this case this date, it is the order, judgment and decree of this Court:

I. That the defendants, . . . their agents, officers, successors in office, employees and all persons acting in concert or participation with them, be and they are hereby permanently enjoined from engaging in any employment practices, including recruitment, examination, appointment, training, promotion, retention, or any other personnel action, for the purpose or with the effect of discriminating against any employee, or actual or potential applicant for employment, on the ground of race or color.

Frazer, 317 F. Supp. at 1090 (*Flowers* Doc. 65). Such pattern and practice has never been found to have been remedied and the resulting injunction remains in force today. The current plaintiff-intervenors are the African-American employees, applicants and potential applicants: (1) who such injunction was entered to benefit and protect; and (2) who seek to compete for such employment opportunities on the basis of the terms laid down in this Court's prior decrees and injunctions. Such persons include the class of persons covered by the motion to intervene granted in this action (*Frazer* docs. 638, 661), to-wit: all African-Americans who are or were employed by the defendants, or who applied, would have applied, or were otherwise injured by the practices found or enjoined in the prior decrees and injunctions in this case.

73. Defendants have not complied with the foregoing injunctive requirements, have not eliminated the vestiges of the prior racial discrimination found and enjoined in this case, and have continued to discriminate on the basis of race in the various ways that such injunction was intended to prohibit.

74. Two of the principal means of undoing the vestiges of defendants' past racial discrimination and preventing further discrimination were: (1) the no-bypass injunction previously entered in this case; and (2) the injunction against examinations and other selection procedures that

have not been shown to be valid pursuant to the guidelines of the United States Department of Justice and other federal agencies charged with enforcing Title VII of the Civil Rights Act of 1964. The pattern and practice of racial discrimination already found by this Court included “the State’s use of written tests which have an adverse racial impact” and cause black applicants to be “clustered at the bottom of the employment registers.” *Frazer*, 1976 WL 729 at *3. Defendants were enjoined not to use examinations for ranking purposes unless they were shown to be valid under the federal guidelines requiring such examinations to “differentiate among levels of job performance” and demonstrate that “a higher score . . . is likely to result in better job performance.” 29 C.F.R. § 14C(9); *see also Frazer*, 1976 WL 729 at *7, ¶10 (“No written test shall be used as a ranking device, unless and until it has been validated in accordance with the Guidelines On Employee Selection Procedures . . . 29 C.F.R. § 1607 *et seq.* . . .”). The ranking provision of the Uniform Guidelines on Employee Selection Procedures reads as follows:

(9) *Ranking based on content validity studies.* If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

29 C.F.R. §1607.14C(9). The prior decrees and injunctions in this case require both that examination scores be shown to distinguish better performance and qualifications and that such better performers not be bypassed by persons with lower scores. Defendants have not complied with such requirements of the decrees and injunctions entered in this case and have disproportionately refused to include qualified African-American eligibles on certificates of eligibles based on invalid examination rankings that do not differentiate between applicants on the basis of performance or

merit. Compliance with the examination provisions of the Court's prior decrees and injunctions in this case would have provided defendants a valid basis for selecting from certificates of eligibles on the basis of merit-based rankings consistent with the no-bypass injunction, rather than subjective opinions of relative qualifications or merit. The no-bypass injunction is based on the requirement that defendants develop valid examinations having scores that distinguish between applicants who are likely to be better performers on the job. The no-bypass paragraph of that injunction is an integral part of the remedies necessary to eliminate the vestiges of defendants' past racial discrimination and to prevent further discrimination. Rather than terminating the no-bypass injunction, it should be enforced by requiring the defendants to comply with the validation requirements of the prior decrees and injunctions in this action.

75. The no-bypass injunction also reduces the discriminatory effect of the overall selection process which is an important part of the Uniform Guidelines incorporated in the *Frazer* injunction. 29 C.F.R. § 1607.3B (requiring use of alternative "which has as little adverse impact as possible"). Examination scores continue to be severely discriminatory in eliminating African-Americans who passed the test from certificates-of-eligibles, but such effect is mitigated to some degree by the no-bypass injunction by requiring that examination scores be respected in making appointments in the same way as in forming certificates of eligibles.

76. Defendants have also continued the following practices which were declared discriminatory and enjoined in the prior decrees of this case: (1) "[e]xamination for many classified positions are conducted on a non-continuous basis, i.e., a register is established at a given time, and no one is added to the register until it is depleted and another examination is given" so that "[o]ften registers will remain 'closed' in this fashion for over two years;" (2) "avoid[ing] compliance with

the decrees in this case by examining job registers” and “requesting certificates of eligibility only at times when no blacks were available for certification;” and (3) administering written tests and other selection criteria which “screen[] out disproportionate numbers of black applicants” and that “cluster[] [them] at the bottom of the employment registers where they were less likely to be selected” without any showing that such criteria is “significantly related to job performance.” *Frazer*, 12976 WL 729. The Court declared that “[i]t is evident from the findings hereinabove made that the . . . defendants are engaged in a pattern and practice of racial discrimination in employment.” *Frazer*, 1976 WL 729 at *6.

77. The district court “permanently enjoined” the defendants from the foregoing practices and “from engaging in any employment practices . . . for the purpose or with the effect of discriminating . . . on the ground of race or color.” *Frazer*, 1976 WL 729 at *6. Such injunction was extended to the class of defendant departments and agencies in a second decree that is still in full force and effect:

Pursuant to the findings of fact and conclusions of law made and entered in this case and incorporated in the memorandum opinion of the Court filed this date, it is the ORDER, JUDGMENT and DECREE of this Court that:

1. Defendants, including the class of defendants represented by Bass, Boswell, Gray and Locke, their officers, agents, successors in office, employees, and all persons in active concert and participation with them are hereby permanently enjoined from engaging in any employment practice, including but not limited to any practice relating to recruitment, appointment, training, promotion or retention, which has the purpose or the effect of discriminating against any employee or actual or potential applicant for employment on the basis of race.

Frazer, 1976 WL 729 at *6. Such injunction was entered for the benefit of qualified African-

Americans who seek to compete for employment opportunities on the basis of the terms laid down in that injunction, including, but not limited to, the current plaintiff-intervenors and the class they represent. Since the entry of such decrees and injunctions in this case, defendants have continued to engage in the same racially discriminatory practices in recruitment, examinations, hiring, assignment, training, pay, promotions, and retention already found to be racially discriminatory and enjoined in this action.

78. Defendants have continued to discriminate on the basis of race in recruitment in the same way as already found in the prior decrees in this case. They have also failed and/or refused to comply with the permanent injunction which required that “[a]ll defendants shall engage in intensive recruiting efforts, including media advertising and individual contact with black leaders in communities throughout the state, to secure qualified black applicants and black employees.” *Frazer*, 1976 WL 729 at *7. Defendants have continued the following practices previously found to be racially discriminatory and enjoined:

The defendants’ methods of advertising employment opportunities do not reach substantial portions of the Negro population of Alabama. The advertising and recruiting practices of the defendants tend to perpetuate the existing racial patterns of employment. These practices have resulted in discrimination against Negro citizens on the ground of their race or color.

* * *

The defendants shall adopt and implement a program of recruitment and advertising which will fully advise the Negro citizens of the State of Alabama of the employment opportunities available to them with the State of Alabama agencies

The defendants shall institute regular recruitment visits to predominantly Negro high schools, business and vocational schools, and colleges and universities throughout the State of Alabama, such visits to be made in person by appropriate officials of defendant

agencies from both local and central offices.

The defendants have continued the foregoing discriminatory recruitment practices and have not fully engaged in the recruitment methods ordered in this case. As a result, many of the best qualified African-Americans never knew about or were not able to apply for classifications that are historically and disproportionately occupied by non-black employees. The result has been a continuing pattern and practice of racial discrimination that injures the plaintiff-intervenors and the class they represent

79. Defendants have violated the decrees and injunctions in this case by continuing to utilize closed registers which freeze-out African-American eligibles for prolonged periods and perpetuate past racial discrimination. Because African-Americans have only been able to gain entrance to the historically white lines of progression in recent years, the use of "closed" registers and "promotional" registers perpetuates the discriminatory effect of the past by precluding application even after the discriminatory exam eligibility criteria begin to be overcome by some African-Americans. Continuous open-competitive announcements and examinations would have allowed class members to apply as soon as they satisfy the exam eligibility criteria, which is usually a discriminatory "prior experience" requirement.

80. Defendants have continued to administer examinations and apply exam eligibility criteria which perpetuate the historical pattern of racial discrimination and are independently discriminatory. Defendants structure the examinations and exam eligibility criteria so as to favor those who have had experience in the historically white job classifications and positions within classifications through training and out-of-classification assignments and to disadvantage black applicants who have not been able to gain such experience or training to the same degree. By

depressing scores and ranks of black eligibles so that they continue to be clustered at the bottom of registers, the defendants are able to avoid the certification of black eligibles and the remedial effect of the decrees in this case. When the few black eligibles who have been able to survive the backlog of discriminatory selection procedures begin to be reachable on the register in significant numbers, defendants announce the formation of new registers so that a new influx of white eligibles can retake the upper levels of the register and keep the black eligibles at the bottom.

81. The few black eligibles who occasionally break through this battery of discriminatory practices are avoided through various manipulative devices already described in the certificate-forming phase of the selection procedure and in the appointment phase once certificates of eligibles are issued. Defendants have continued to manipulate the racial composition of certificates of eligibles by: (1) previewing upcoming eligibles before the certificate is issued ; (2) timing the issuance of certificates in a way that advantages white eligibles and/or disadvantages black eligibles, either by choosing between multiple registers (open competitive vs. promotional), delaying or canceling the formation of the certificate until the racial composition changes through ingress or egress of eligibles on the register, or using alternative means of filling positions which avoid or delay the issuance of the certificate of eligibles, such as out-of-classifications assignment, transfers, use of contract employees, reallocations, etc. This Court has already found such practices to be racially discriminatory and that the defendant state agencies "have generally avoided compliance with the decrees in this case by examining job registers maintained by the Personnel Department and by requesting certificates of eligibles only at times when no blacks were available for certification." *Flowers*, 1976 WL 729 at *6. These practices were enjoined, not only by the direct prohibition of "deferring requests for certification until blacks are unavailable" and the

injunction against practices having a discriminatory “effect,” but by continuing “in full force and effect” the 1970 injunction which required as follows:

- IV. It is further ORDERED that each of the defendants be and is hereby enjoined from failing to certify Negro applicants whose rank and geographical availability entitle them to certification. If a Negro applicant is removed from any certification, he shall have a right to the next available position in that classification in the geographical area, subject only to a finding of lack of qualification or fitness.

82. In those instances where African-Americans overcame the discriminatory recruitment, examination and certification process, the final phase of the appointment process after the issuance of a certificate of eligibles has remained a formidable discriminatory obstacle. Defendants still do not require that certified black eligibles be interviewed or that their candidacy be assessed through objective, race-neutral criteria. Defendants select anyone on the certificate of eligibles regardless of rank, except in the increasingly rare instance that a black eligible is available and higher ranked.

83. All of the foregoing practices are either expressly condemned in the prior decrees and injunctions in this case or have the effect of perpetuating past discrimination. The prior findings and decrees in this case condemned defendants’ refusal to interview certified black eligibles and required that they be given fair consideration according to non-discriminatory selection procedures and criteria, including the requirement that “[d]ocumentary evidence shall be maintained by the State Personnel Department that will sustain the finding of unavailability or lack of qualifications of the Negro applicants when they are not appointed.” *Frazer*, 371 F.Supp. at 1091-93, 1086-87.

84. The State Personnel Department, which is the agent of all of the State agencies enjoined in *Frazer*, has repeatedly been found in contempt of a consent decree in *Reynolds* which

has many of the same requirements as the *Frazer* injunction, such as the development and use of valid selection procedures. The State Personnel Department was found in non-compliance with such requirements in 1996-1997, found in contempt in June and July, 1998, found in contempt again in September 1998 and January 2000, and found in contempt a fourth time in July 2002 ---- less than a year ago. *Reynolds* Doc. 4147 (Defendants' stipulation of non-compliance); *Reynolds*, Doc. 1131 (Order and Injunction); *Reynolds* Doc. 1132 (Writ of Injunction); *Reynolds* Doc. 2890 (Civil Contempt Order) at pages 34-35; *Reynolds* Doc. 2954 (Supplemental Civil Contempt Order) at pages 6-7 ("Therefore, in light of the defendants' past contumacious conduct and in light of their evident reluctance to participate in fruitful efforts to move this litigation forward as quickly as possible toward the creation and implementation of open and competitive race-neutral promotion procedures for both provisional and permanent appointments, the court concludes that significant and substantial monetary sanctions are not only appropriate, they are desperately needed."); *Reynolds*, Doc. 3163 (Order) at pages 1-2; *Reynolds* Doc. 4284 (Order of Civil Contempt Against The Alabama Department Of Transportation And The Alabama State Personnel Department (finding of noncompliance and further sanctions); *Reynolds* Doc. 6026. Coercive fines are still being paid on the Articles of the *Reynolds* Decree that are most like the *Frazer* injunction's requirement to develop and use valid selection procedures — Articles Two, Three, and Eight of the *Reynolds* Decree. These are the Articles for which the State Personnel Department has principal responsibility. In addition, coercive fines are still being paid for contempt of Article Nineteen of the *Reynolds* Decree which incorporates the *Frazer* injunction itself and makes it enforceable in *Reynolds*. See Article Nineteen, ¶1 and ¶6(c) (*Reynolds* Doc. 553). Article Nineteen of the *Reynolds* Decree provides as follows:

1. Frazer/Ballard: Defendants remain bound by the injunctive

and declaratory relief entered in U.S. v. Frazer (now Ballard).

* * *

6(c). The parties will have the right to seek to enforce the provisions of this Decree by filing motions with the Court. The provisions of this Decree, and the issues challenged in the case, have been premised upon the existence of the prior remedies ordered in the Frazer/Ballard case and, to the extent that any future acts or omissions violate the remedies ordered in Frazer/ Ballard, the plaintiffs will be entitled to enforce such remedies in this case in the same way that they are entitled to enforce the remedies of any other provision of this Decree.

85. The United States and the defendants in this action have jointly moved to terminate the part of the permanent injunction in this case known as the “no-bypass rule.” Disposition of the joint motion to terminate will, as a practical matter, impair or impede the movants’ ability to protect their interests in the decrees and injunctions entered in this action, as well as the prohibition against racial discrimination guaranteed by Title VII of the Civil Rights Act of 1964, the Constitution of the United States and 42 U.S.C. §§ 1981 and 1983. The current plaintiff-intervenors have a direct interest in the decrees and injunctions entered in this case. Disposition of the joint motion to terminate may impair or impede the plaintiff-intervenors’ claim that the vestiges of past discrimination continue into the present and that current practices perpetuate that discrimination. In deciding the joint motion to terminate, the Court “must determine whether the decree’s basic purpose of eliminating the effects of past discrimination has been achieved.” *United States v. City of Miami*, 2 F.3d 1497, 1508 (11th Cir. 1993) “In making this determination, the district court must certainly consider the . . . Department’s progress, or lack thereof, toward the long term goal of work force parity,” even though this is “not the determining factor.” *Id.* at 1507. The Court must also consider “whether the City has ‘complied in good faith’ with the decree and whether the vestiges of

past discrimination have ‘been eliminated to the extent practicable,’” including the defendants’ “record of compliance with the decree, as well as . . . other affirmative action undertakings” and “whether the current under representation of favored groups in the promotion ranks of the . . . Department is a vestige of past discrimination, or the result of other neutral causes.” *Id.* “In sum, termination . . . would be appropriate if the district court finds that the decree is clearly no longer necessary either to prevent discrimination in the future or to remedy the effects of past discrimination.” *Id.*

Wherefore, the plaintiff-intervenors respectfully request that this Court:

a. Declare that the defendants have denied African-Americans equal protection of the laws in violation of the Fourteenth Amendment; 42 U.S.C. §§ 1981 and 1983; Title VII of the Civil Rights Act of 1964 and the prior decrees and injunctions in this case;

b. Hold defendants in civil contempt of court for non-compliance with the prior decrees and injunctions in this case; award sufficient coercive fines to achieve prompt compliance prospectively; and undo the effects of past non-compliance retrospectively through both monetary and non-monetary compensatory relief, including, but not limited to, backpay, damages, reinstatement, and other retrospective relief necessary to make the plaintiff-intervenors whole;

c. Permanently enjoin defendants, their officers, agents, employees, successors, assigns, and all persons in active concert or participation with them, from all unlawful discrimination against the plaintiff-intervenors on the basis of race;

d. Deny all requests to vacate or modify the prior decrees and injunctions entered in this case so that such decrees and injunctions, including the no by-pass injunction, remain in effect until no vestiges of the defendants’ past discrimination in employment practices remain;

e. Order defendants to provide such relief as is necessary to compensate the plaintiff-intervenors for the racial discrimination they have suffered and to restore them to their rightful place;

f. Grant the plaintiff-intervenors an award of all costs and expenses including an award of reasonable attorney's fees, and;

g. Grant other such relief as may be appropriate.

Respectfully submitted,

Robert F. Childs, Jr., ASB-2223-6-60R
Ann K. Wiggins, ASB-7006-I-61A
Rocco Calamusa, Jr. ASB-5324-A-61R

By: Robert F. Childs, Jr.

Counsel for *Crum* Plaintiffs and the Class

OF COUNSEL:
WIGGINS, CHILDS, QUINN & PANTAZIS, P.C.
1400 SouthTrust Tower
Birmingham, Alabama 35203
(205) 328-0640

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served, either by hand delivery, facsimile transmittal, or by placing same in the United States Mail, properly addressed and first class postage prepaid, on this the 12th day of March, 2004, on the following:

Henry C. Barnett
Christopher W. Weller
Capell, Howard, Knabe & Cobbs, P.A.
P.O. Box 2069
Montgomery, AL 36102-2069

William F. Gardner
Joe Musso
Cabaniss, Johnston, Gardner,
Dumas & O'neal
700 Park Place Tower
Birmingham, Alabama 35203

Lisa W. Borden
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
1600 SouthTrust Tower
Birmingham, Alabama 35203

John J. Park
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130

Alice Ann Byrne
Alabama Department of Personnel
64 N. Union Street, Room 300
Montgomery, Alabama 36130

Mr. Jay D. Adelstein
Employment Litigation Section
Attn. 4026 PHB
Civil Rights Division
U. S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Raymond P. Fitzpatrick, Jr.
R. Scott Clark
Fitzpatrick, Cooper & Clark
Suite 600 - Farley Building
1929 Third Avenue North
Birmingham, Alabama 35203


OF COUNSEL