

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
TIMOTHY D. POPE,)	
)	
Intervenor-Plaintiff,)	CIVIL ACTION NO. CV-68-T-2709-N
)	
JOHNNY REYNOLDS, et al.,)	Judge Thompson
)	
Intervenor-Plaintiffs,)	
)	
v.)	
)	
TOMMY G. FLOWERS, et al.,)	
)	
Defendants.)	

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON
JOINT MOTION TO TERMINATE NO-BYPASS
PROVISIONS OF INJUNCTIVE ORDERS (DOC. NO. 634).**

COME NOW Defendants in the above-styled case, and pursuant to Federal Rule of Civil Procedure 56, move this court for summary judgment on the Joint Motion to Terminate No-Bypass Provisions of Injunctive Orders (Doc. no. 634) (hereinafter, the "Joint Motion to Terminate").¹ As grounds for this motion, Defendants state that there is no genuine issue of material fact and that they are entitled to summary judgment as a matter of law.

¹ After granting the Joint Motion to Terminate under a preliminary injunction standard, this Court set the Joint Motion for final submission and summary disposition pursuant to Rule 56 of the Federal Rules of Civil Procedure in its April 29, 2005 Order. (Doc. no. 724) at 4. Consequently, Defendants submit this Motion for Summary Judgment in tandem with its original Joint Motion to Terminate as directed by the Court.

This motion is based on the following:

- Defendants Memorandum of Law in Support of Their Motion for Summary Judgment on Defendants' Joint Motion to Terminate No-Bypass Provisions of Injunctive Orders (Doc. no. 634), filed contemporaneously herewith;
- The pleadings filed to date;
- The reports submitted by Defendants' experts Drs. Joan Haworth and Janet Thornton (Doc. nos. 634, 675, 697);
- The deposition testimony of Defendants' experts Joan G. Haworth, Ph.D. and Janet R. Thornton, Ph.D.;
- The Affidavit of Janet R. Thornton, Ph.D.; and
- The deposition testimony of the *Reynolds/Crum* Intervenor's expert Edwin Bradley, Ph.D.

In further support of this motion, Defendants state as follows:

1. The no-bypass provision of the *Frazer* injunctions classifies candidates for State employment and promotion on the basis of race. The rule mandates that a higher ranked African-American candidate cannot be bypassed to select a lower ranked non-African-American candidate, unless the African-American candidate refuses the position, is unavailable, or is found to be unqualified for the position. This race-conscious, indeterminate, across-the-board rule has operated continually absent any court review or reauthorization for over 35 years.

2. Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, Defendants have asked the Court to modify the *Frazer* injunctions by eliminating the no-bypass rule based on a significant change in circumstances (both factual and legal) that justifies modification under *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) and *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994). With respect to the significant change in legal circumstances, following implementation of the no-bypass rule in the 1970s, the Supreme Court, followed by the Eleventh

Circuit Court of Appeals, adopted a strict scrutiny standard requiring that all race-conscious remedies be narrowly tailored and serve a compelling governmental interest. In the instant case, the no-bypass rule cannot survive strict scrutiny because it no longer promotes a compelling governmental interest. Today, there is no evidence of the pervasive, systematic, and obstinate discriminatory conduct that characterized the State Defendants' employment practices in the 1960s and 70s. To the contrary, as this Court has found, there has been a "substantial positive change in the racial makeup of the government of the State of Alabama after the uninterrupted implementation of the no-bypass rule for 35 years." *See* 04/29/05 Order (Doc. no. 723) at 7-8. In fact, the Court preliminarily enjoined continued application of the no-bypass rule based, in part, on its conclusion that "continued implementation of the no-bypass rule would cause irreparable injury to all state employees and applicants for state jobs, and thus would be against the public interest. ..." *Id.* at 8. Furthermore, the same undisputed facts that demonstrate a lack of a compelling governmental interest also support modification under the changed factual circumstances prong of *Rufo*.

3. The lack of any compelling governmental interest is further demonstrated by the fact that the discriminatory selection practices that justified implementation of the *Frazer* no-bypass rule have ceased, and the effects of such practices have been eliminated. Specifically, with respect to selections made from the certificates of eligibles ("COE"), i.e., the *only* step in the selection process to which the no-bypass rule applies, the evidence establishes that the State has demonstrated its good faith in implementing an exemplary selection process substantially free of discrimination and that the State Defendants consistently have selected African-Americans from the COEs at rates consistent with or greater than their representation on the COEs. More tellingly, even when selections are not subject to the no-bypass rule, e.g., when the COE consists of a single band of candidates, all of whom have the same score and rank, the State Defendants have selected African-

Americans at rates consistent with or greater than their representation on the COEs. In sum, there is no evidence supporting a compelling governmental interest justifying continued application of the no-bypass rule.

4. Additionally, even if the Court determines that a compelling governmental interest exists, the no-bypass rule remains facially unconstitutional because it is not sufficiently narrowly tailored in that it lacks any durational limit or provision for court review or reauthorization; it is inflexible in its application; and it has an intolerable impact on innocent third parties.

5. Defendants' request for the complete elimination of the no-bypass rule is also suitably tailored and not overbroad because any remedy short of total elimination would perpetuate an existing constitutional violation.

6. Finally, Defendants are not required to establish perfect compliance or elimination of all discrimination with respect to implementation of the no-bypass rule. As long as human beings are making selections in employment, perfect compliance, although ideal, is unrealistic, particularly when dealing with thousands of selections made by multiple decision-makers in many agencies and departments geographically dispersed throughout the 67 counties of the State of Alabama. To the extent that there remain isolated and anecdotal examples of discrimination and attempts to circumvent or otherwise violate the no-bypass rule, such violations are best addressed through traditional federal remedies such as Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 1981a, 2000e through 2000e-17, and the Civil Rights Act of 1866, 42 U.S.C.A. § 1981.

WHEREFORE, PREMISES CONSIDERED, Defendants are entitled to summary judgment pursuant to FED. R. CIV. P. 56 on their Joint Motion to Terminate No-Bypass Provisions of Injunctive Orders (Doc. no. 634).

Respectfully submitted this 9th day of September, 2005.

s/Christopher W. Weller
Christopher W. Weller (WEL030)
Deputy Attorney General and
Liaison Counsel for the Office of the
Attorney General of the State of Alabama

OF COUNSEL

CAPELL & HOWARD, P. C.
P.O. Box. 2069
Montgomery, Alabama 36102-2069
(334) 241-8000
Fax: (334) 328-8888
cww@chlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Robert L. Wiggins, Jr. Kell A. Simon WIGGINS, CHILDS, QUINN & PANTAZIS, P.C. 301 19 th Street North Birmingham, Alabama 35203-3204	Taylor Abbott Raymond P. Fitzpatrick, Jr. R. Scott Clark FITZPATRICK, COOPER & CLARK, LLP Farley Building, Suite 600 1929 Third Avenue North Birmingham, Alabama 35203
Hon. Troy King Attorney General of the State of Alabama State Capitol 600 Dexter Avenue Montgomery, Alabama 36130	Alice Ann Byrne, Esq. ALABAMA DEPARTMENT OF PERSONNEL 64 N. Union Street Montgomery, Alabama 36130
Hon. Alex Acosta U.S. ASSISTANT ATTORNEY GENERAL Civil Rights Division Employment Litigation Section – PHB 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530	Mr. Jay D. Adelstein EMPLOYMENT LITIGATION SECTION Attn: 4026PHB Civil Rights Division U.S. Department of Justice 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530
David R. Boyd J. Dorman Walker BALCH & BINGHAM, LLP P.O. Box 78 Montgomery, Alabama 36101-0078	

s/Christopher W. Weller

OF COUNSEL