

1 UNITED STATES OF AMERICA  
 2 EASTERN DISTRICT OF MISSOURI  
 3 EASTERN DIVISION

3 MICHAEL MARTINEZ, ERIC DEEKEN, )  
 4 et al., )  
 5 Plaintiffs, )  
 6 vs. ) No. 4:01-CV-580 JFN  
 7 CITY OF ST. LOUIS, et al., )  
 8 Defendants. )

9 TRANSCRIPT OF MOTION HEARING

10 BEFORE THE HONORABLE JOHN F. NANGLE  
 11 UNITED STATES DISTRICT JUDGE

12 April 18, 2005

13 APPEARANCES:

14 For Plaintiff Mr. Clyde E. Craig  
 15 Martinez: CLYDE E. CRAIG, P.C.  
 16 400 Chesterfield Center  
 Suite 400  
 Chesterfield, MO 63017

17 For Plaintiff Mr. Charles W. Bobinette  
 18 Deeken: UTHOFF AND GRAEBER  
 906 Olive Street  
 Suite 300  
 19 St. Louis, MO 63101

20 For Intervenor: Mr. Jerome A. Diekemper  
 21 DIEKEMPER AND HAMMOND  
 7730 Carondelet  
 Suite 200  
 22 St. Louis, MO 63105

23 For Firefighters' Ms. Althea P. Johns  
 24 Institute for LAW OFFICES OF ALTHEA P. JOHNS, P.C.  
 Racial Equality: 225 S. Meramec Avenue  
 Suite 325  
 25 St. Louis, MO 63105

1 For Department of Mr. Benjamin Blustein  
Justice: U.S. DEPARTMENT OF JUSTICE  
2 Civil Right Division  
Tenth and Constitution Avenue, N.W.  
3 Fourth Floor, Patrick Henry Building  
Washington, DC 20530

4 For Defendants: Ms. Nancy R. Kistler  
5 Ms. Kathleen G. Tanner  
ST. LOUIS CITY COUNSELOR  
6 1200 Market Street  
314 City Hall  
7 St. Louis, MO 63103

8  
9 REPORTED BY: SUSAN R. MORAN, RMR  
Official Court Reporter  
10 111 South 10th Street  
St. Louis, MO 63102  
11 (314) 244-7983

12 Proceedings recorded by mechanical stenography, produced by  
13 computer-aided transcription.

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1           (The following proceedings were held in open court  
2 on April 18, 2005 at 12:10 p.m.):)

3           THE COURT: I apologize for the delay. They filed,  
4 as you folks are familiar with, the last minute motion in  
5 that other matter in addition to other matters that had been  
6 gathered. So we were, as you heard, debating.

7           Now, first, I well understand, Ms. Kistler and  
8 Ms. Tanner, that the City reserves any right to appeal and  
9 it's not waiving any rights by going on the assumption that  
10 my order was correct and valid. And I appreciate your  
11 cooperation in that regard.

12           I think as to the dates; Martinez, everybody seems  
13 to agree it's September '99; Deeken, March 2000. The City  
14 agrees only as to certification, not appointment. And,  
15 Nancy, let me -- those are my notes, so I'm not looking at  
16 the paper in chief. Am I right there?

17           MS. KISTLER: That's correct.

18           THE COURT: By saying agrees to attorneys' fees and  
19 argues no back wages, and, again, that's all premised, the  
20 City is not waiving any rights to appeal and object on  
21 appeal, et cetera.

22           And points out the duty to mitigate. Let's see, the  
23 plaintiff's back pay, benefits, et cetera. One of the things  
24 they want, dating back concerning benefits, back dating --  
25 what are the words? And finally before I go any further, I

1 want to enter the stipulation that has been filed and enter  
2 it officially as part of the record of our proceedings  
3 herein. And that stipulation, the recent one that the  
4 parties filed.

5 On the question of -- well, because I mentioned that  
6 jury question on the telephone the other day, let's see here,  
7 Ms. Johns raised the question of the fact that the -- they  
8 give an advantage to an employee, I mean, more than  
9 advantage, it's big time advantage to the employees. I don't  
10 think, Althea, that was raised early on in this case, and I  
11 don't think it's a part of this case.

12 MS. JOHNS: Yes, it is, Judge. And I think  
13 Mr. Diekemper, we had discussed it on the telephone back in I  
14 think August or September, and you ordered us to brief the  
15 issue by November 2nd. And we did so. And we sent -- we  
16 gave copies to you, Mr. Diekemper, of all the briefs.

17 MR. DIEKEMPER: Judge, that's what's in that rubber  
18 band.

19 THE COURT: And I thought this related to the state  
20 court cases solely.

21 MR. DIEKEMPER: That's what that is, Judge.

22 THE COURT: Well, what I'm saying is, let's see,  
23 Deeken is no on whether the state court proceedings impinged.  
24 Do you have a memo in here, Althea?

25 MS. JOHNS: Yes, page 3 of my memo of October 1.

1 THE COURT: Here we go.

2 MS. JOHNS: Second issue that has arisen.

3 THE COURT: What's that, Althea?

4 MS. JOHNS: The middle of page 3, the second  
5 issue --

6 THE COURT: What number?

7 MS. JOHNS: -- that has arisen.

8 THE COURT: Do I have the right page 3? It's  
9 No. 11, 12, 13, 14? No, that's not what you're talking  
10 about, I don't think. I have firefighter's compliance with  
11 the Court's order of October 1, 2004.

12 MS. JOHNS: That's correct.

13 THE COURT: Now I see the page 3. I was on whatever  
14 the next page is, the petition, okay. So on page 3, "The  
15 second issue that has arisen because the City seeks to hire,"  
16 that one?

17 MS. JOHNS: Yes.

18 THE COURT: I'll read that. Now, what I'm saying is  
19 that well may be an issue before the state judge. I don't  
20 know how that it can be an issue before me if my thinking is  
21 correct. And what I'm saying is, I may agree or disagree  
22 with it as a matter of law. Of course, it's whether I agree  
23 or disagree doesn't make any difference, but I don't know  
24 that there's been any allegation that it had an impact as to  
25 discrimination, any effect on this discrimination, that plan

1 that they follow where they just hire City employees. And  
2 I'll hear what Ms. Kistler says to that.

3 MS. JOHNS: As I understand how this works is that  
4 if the test that you give has an adverse impact on a  
5 protected class, then the test has to be validated. And the  
6 reason for the test not being validated before our test in  
7 2003 is because there was no adverse impact because there was  
8 50/50 hiring, so there was no adverse impact on any group.

9 So now with the 2003 test, there's no more consent  
10 decree, so the persons being hired for the probationary  
11 classes, if you go straight down the list there would be no  
12 adverse impact as the list that was given in 2003, December  
13 2003. However, if the promotional individuals are put at the  
14 top of the list then there would have been according to our  
15 calculations just I think five African Americans. But then  
16 the test was already validated. So the people of the  
17 validated part of the test, the African Americans, they have  
18 no cause of action because -- okay, Judge, the test as we  
19 said it predicts how a person would do in the test. There  
20 were reliability studies, and you saw all that.

21 THE COURT: Yes, ma'am.

22 MS. JOHNS: And according to the studies, if the  
23 people who would say were the first 30 persons who scored on  
24 the test, if they -- they would be the best candidates for  
25 the job. However, they were not going to be the first people

1 hired. As a matter of fact, the first 15 people were not  
2 even hired, people that did the best 15 on the test.

3 THE COURT: Because of the benefit.

4 MS. JOHNS: Right.

5 THE COURT: Because of being an employee of the City  
6 at the time.

7 MS. JOHNS: Going to the head of the list. So,  
8 Judge, that was our objection. And you already ruled on it.

9 THE COURT: Ma'am?

10 MS. JOHNS: And you already ruled on it, Judge.

11 THE COURT: I ruled on that point?

12 MR. DIEKEMPER: Yes, Your Honor.

13 THE COURT: What did I say about that?

14 MR. DIEKEMPER: This is your order from November --  
15 or, I'm sorry, December the 3rd, and it was on the --

16 THE COURT: Of what, 2004?

17 MR. DIEKEMPER: '04, Judge. And you said the Court  
18 found that the hearing of November 17, 2004 without  
19 expressing an opinion on the merits of the claim that fires  
20 concerns were outside the scope of this case, which is just  
21 the case question you asked earlier. You already ruled on  
22 that. There is no pleading before you alleging other than  
23 the --

24 THE COURT: So, Althea, you're satisfied with that  
25 then?

1 MS. JOHNS: I don't agree with it, but I'm saying  
2 you already ruled on it.

3 THE COURT: Because I know we had talked about it  
4 and all. So that's decided. Now, then you don't have to say  
5 anything Nancy.

6 I think that there's a way that I can word an order  
7 if given a little bit of time -- when do you appear in front  
8 of Judge Dowd, May --

9 MR. DIEKEMPER: 4th, I think it is.

10 MS. KISTLER: That's right.

11 THE COURT: That's fairly close. Which may  
12 delineate what I think is left for him to decide. I know  
13 that Mr. Blustein, and I'll hear from Ben in a minute, in a  
14 few minutes hear from you. I know that both you and  
15 Ms. Johns feel as if the state matters really belong to me or  
16 that they are impinging as they now stand on my rulings as a  
17 judge. And it's a close question because on one hand I think  
18 I probably somewhere in there I retained possession --

19 MR. DIEKEMPER: I think you've already dealt with  
20 this as well. You issued an order on November 7, 2003 on our  
21 motion, the intervenor's motion to clarify and amend your May  
22 5, 2003 order. And this came on the heels of your order of  
23 November 5 of 2003 in which you dissolved the consent decree.  
24 And you said in light of the Court's order of November 5,  
25 2003 dissolving the consent decree, the Court finds that the



1 appeals taken to the Civil Service Commission prior to  
2 December 3, 2003 deadline are not in danger of usurping  
3 issues presently before this court. Therefore intervenor's  
4 motion to --

5 THE COURT: I remember that now.

6 MR. DIEKEMPER: To clarify, paragraph 4 of the May 4  
7 order is granted in part. And this is in our memo, Judge,  
8 that we gave you.

9 THE COURT: I'm not totally -- I mean, my language  
10 may have been overbroad. And I think I can state an order  
11 because I was -- and I don't think that -- I think I can set  
12 out an order which would delineate precisely what I think is  
13 before Judge Dowd or should be before him, and that's mainly  
14 the area where the Civil Service Commission based upon  
15 whatever, and the practices that its agents follow concerning  
16 testing and more significantly the test for psychological  
17 personality matters, that's what you're questioning?

18 MR. DIEKEMPER: Yes, Judge.

19 THE COURT: By and large.

20 MR. DIEKEMPER: Yes. We have 16 individuals who  
21 didn't pass the noncognitive portion of the test. And that  
22 test was graded on two scales. It was graded on a customer  
23 service scale and it was graded on a performance scale. And  
24 12 out of the 16 plaintiffs that I represent passed one scale  
25 but not the other. And in one case the person missed it by

1 one point qualifying. And we're saying that --

2 THE COURT: You're saying that that's a state court  
3 matter.

4 MR. DIEKEMPER: Yes.

5 THE COURT: And Benjamin and Althea I think feel  
6 otherwise.

7 MR. DIEKEMPER: Nothing to do with any race issues  
8 or any of the issues before you.

9 THE COURT: And that was my hunch judgment. And I  
10 still can see a line, but, yeah, I see what they are getting  
11 at. Now, I don't know that I want to go out and get into  
12 that territory if it's not mine.

13 Let me first hear from Ms. Kistler. What are your  
14 thoughts? You're the City attorney and municipal authority  
15 here.

16 MS. KISTLER: Sure. Well, I know this is an issue  
17 that I've been wrestling with some time too because on one  
18 level it doesn't seem to have any impact on federal issues at  
19 this point. It potentially could, you know, so I don't know  
20 if it's premature at this time or, you know, if that's  
21 something we have to wait and see or that's something you  
22 could get involved in to prevent that happening, but, I mean,  
23 I can certainly see some parties here being, you know,  
24 adversely impacted, particularly if the state court is being  
25 asked to -- the City is being asked to redesign these testing

1 measures as to these particular plaintiffs.

2 Yeah, I mean, it really depends on where the state  
3 court judge sees his authority.

4 THE COURT: I'm just thinking out loud. And I think  
5 I should be able to, whether I can or not is a different  
6 thing, but I should be able to come up with an order  
7 forgetting about the other problems, you know, we have that  
8 are in dispute, which would rather precisely delineate what  
9 I -- you know, what I think is my territory and what I think  
10 is the state territory. Hopefully Judge Dowd, I don't know  
11 him as well, I've met David. I know his brothers much  
12 better. But I'm sure he's cut from the same cloth, he's a  
13 good, capable young man. I would think that he would have no  
14 problem with it.

15 But I'm trying to think of the wording of it. And  
16 we can get into that later. In fact, I might get all of you  
17 involved in that. But it seems to me that if they are just  
18 talking about what Jerry Diekemper said, if that's all Judge  
19 Dowd is going to rule on, whether those guys were the  
20 noncognitive part of it, it still, Jerry, the problem we  
21 have, it's still part of what they did under this court's  
22 order, right?

23 MR. DIEKEMPER: That's correct, Judge.

24 THE COURT: What the experts did and all that.

25 MR. DIEKEMPER: But I think when you issued your

1 order dissolving the decree --

2 THE COURT: Yes.

3 MR. DIEKEMPER: -- everything went away at that  
4 point. I mean, both fire and the government had asked you to  
5 not dissolve the decree until there was a valid testing  
6 place. And you in your order specifically dealt with that  
7 issue and said you didn't need to wait, and this decree is  
8 gone. Once that decree is gone, you're not in the testing  
9 business anymore unless somebody files a new complaint.  
10 That's our position.

11 MR. BLUSTEIN: Your Honor, I would disagree.

12 THE COURT: This is Mr. Blustein.

13 MR. BLUSTEIN: Yes, Benjamin Blustein for the United  
14 States. I think we're here today on this issue as a result  
15 of another order that the Court issued in April of 2003 when  
16 the Court granted the United States' motion for a TRO, I  
17 think that's an April 11th, 2003 order. And the Court  
18 directed the City to implement a written examination for the  
19 entry level fire fighter position that was valid. And the  
20 City complied with that order and selected a test development  
21 firm in Minneapolis. The City complied with the schedule for  
22 developing the test and administering the test. And the  
23 Court directed the City to develop a valid test.

24 And that's essentially the issue that is in front of  
25 the Court now. And the way we see it is that this 15

1 plaintiffs that Mr. Diekemper represents are seeking to that  
2 issue. In other words, is this a valid test. And they are  
3 asking the state court judge to decide that.

4 THE COURT: On this test, Ben, all of you, it seems  
5 to me that it has been tacitly validated in this court by our  
6 proceedings herein. Nobody has objected to it. In this case  
7 I have. I don't think anything --

8 MR. BLUSTEIN: I would agree with that, Your Honor,  
9 and the Court has given every opportunity to individuals to  
10 object to the validity. Mr. Bobinette represents Mr. Deeken.  
11 And Mr. Deeken is a plaintiff both in this case and in the  
12 state court action. And he on behalf of his client has not  
13 challenged the validity of the test.

14 It's my recollection that the Court has indicated to  
15 the parties several times that the Court would be open to  
16 bringing in the experts to air out this issue of the  
17 validity, bringing in -- I think Nancy has asked whether the  
18 City should bring in the people from Minneapolis. So if  
19 anybody wanted to challenge the validity of the test, the  
20 Court has provided a forum for them to do that. But nobody  
21 has. If we --

22 THE COURT: And that's over a period of time. I  
23 mean, that isn't something last week, Jerry, or last month.

24 MR. DIEKEMPER: Well, Judge, you issued that order  
25 on -- you issued the TRO on April the 3rd. On May the 5th of

1 '03 you ordered that the deadlines that were proposed -- on  
2 the 11th you issued a TRO and told us to develop time, a time  
3 line. On May the 5th you adopted that time line for the  
4 development of the test. And on October 31, '03 the  
5 intervenors filed a motion to clarify that order to see  
6 whether we could challenge that noncognitive portion of the  
7 test. And you entered your order of November 7, '03 after  
8 dissolving the decree on 11/5/03 saying that we could go  
9 forward and that you didn't see any problem.

10 So to say that nobody has challenged anything isn't  
11 correct. You gave us permission to challenge it in state  
12 court.

13 MR. BLUSTEIN: Your Honor, we had several  
14 conversations, I believe, about --

15 THE COURT: Let me say this. I think you're right,  
16 but I never did -- I don't know that that order was intended  
17 to say more than, you know, the test, and nobody has  
18 objected. And you still haven't objected. You were  
19 intervenors. You never objected to that test to my knowledge  
20 in any pleadings.

21 MR. DIEKEMPER: And that's because I don't think  
22 there's any basis for federal jurisdiction to bring a  
23 challenge to the test to you.

24 THE COURT: Let me tell you, you know me well enough  
25 to know I don't want any state court case or any state court

1 business. And my only concern is what Benjamin is talking  
2 about here, and is that obviously I issued an order to the  
3 City. We were all together. I issued it under the  
4 consultation with every lawyer in here or I think with every  
5 lawyer, Ms. Tanner, Ms. Kistler, Bobinette, Craig, Diekemper,  
6 Perkins was here, whatever, and Mr. Blustein. And we all  
7 over the period of time -- I mean, that was then.

8 Not having any -- the test was I'd say validated  
9 tacitly. I don't know that there was any formality.

10 Nancy, you sent to me this many papers, more than I  
11 needed, but anyway, at the top of it was a page explaining  
12 what they had done. And that has never been -- when we say  
13 validated, Nangle has never said, okay, and we've never held  
14 hearings on it if that's necessary.

15 MS. KISTLER: No, I believe one of the things we  
16 sent you, Your Honor, was a validation study performed by  
17 PDRI, that was the test consultant that gave the test.

18 THE COURT: And I don't know that anyone else got a  
19 copy of that.

20 MR. BLUSTEIN: We did, Your Honor.

21 MR. DIEKEMPER: The government did.

22 THE COURT: You didn't, Jerry?

23 MR. DIEKEMPER: I don't know. I can't remember.  
24 There was so much concern about secrecy. I don't remember  
25 whether -- I don't remember seeing it. Do you, Althea?

1 MS. JOHNS: I don't remember seeing it either.

2 THE COURT: I think you're right. It's possible --

3 MR. DIEKEMPER: There was an in camera review of a  
4 lot of stuff.

5 THE COURT: -- Nancy, that I had you just send it me  
6 because you were concerned. They are in my office in  
7 Savannah. And needless to say, no one else sees them. But  
8 there were applications, things I didn't look through half of  
9 them. I just thumbed through them.

10 MS. KISTLER: I think Your Honor had issued an  
11 order, and there were certain things that we were to give to  
12 the other parties and there were certain things that we were  
13 to submit to yourself in chambers and to the United States.  
14 And which things went to who I'm not quite sure, but I know  
15 we're following an order when we sent those to the different  
16 parties.

17 MR. BLUSTEIN: Your Honor, going back to this issue  
18 of how to delineate what's before Your Honor and what's  
19 before Judge Dowd, I remember conversations that we were a  
20 part of and the Court was a part of and Jerry was part of  
21 where -- and tell me if I'm wrong -- where Jerry framed the  
22 issue in state court as being one of procedural matters,  
23 whereas the issues before this court were more the substance  
24 of the and the validity of the test. And by procedural  
25 matters it was my understanding that we were talking about



1       whether --

2               THE COURT:   Timeliness.

3               MR. BLUSTEIN:   Of the Civil Service Commission.

4               THE COURT:   Whether to file the papers at the right  
5       time and all that stuff.

6               MR. BLUSTEIN:   And I don't know if that was the --  
7       that those conversations were the genesis of the November  
8       7th, 2003 order that Jerry referenced.

9               THE COURT:   Well, my memory is being jogged.   I  
10       can't recall.   I mean, I remember that idea.   Jerry, do you?  
11       That procedural is in my mind somewhere.

12              MR. DIEKEMPER:  Frankly, Judge, I can't tell you one  
13       way or the other on that.   I don't even know if I was at that  
14       conversation, whether Perkins was there.   I just don't  
15       remember.

16              THE COURT:   Nancy, do you?

17              MS. KISTLER:  Yes, and I think I can speak to that.  
18       When we talk about the procedural issues, the Civil Service  
19       Commission determined -- well, they limited their authority  
20       in this case to deciding whether the candidates had been  
21       ranked or whether they had been scored properly.   Under our  
22       Civil Service rules it is our contention that they just had  
23       the authority to determine whether the scores or whether the  
24       tests were scored properly, that they do not have the  
25       authority to go out and decide, well, is this the best test

1 that could have been given, was there a better test. Because  
2 that's why we hire testing consultants. So that was one  
3 procedural issue that I think is before the state court.

4 Now, the other procedural issue is that the Civil  
5 Service Commission --

6 THE COURT: How would you state that in one  
7 sentence? I mean, what you've said I think to me means a lot  
8 more than just procedure.

9 MS. KISTLER: It's --

10 THE COURT: As I think of the term.

11 MS. KISTLER: I believe it would be both the  
12 jurisdiction of the Civil Service Commission and I guess --

13 THE COURT: Well, the jurisdiction, that would be a  
14 state court matter just pure and simple, the jurisdiction of  
15 whatever the Civil Service Commission is not certainly  
16 something that I would judge on normally, let's put it that  
17 way. And -- but the darn test thing, it's a puzzle  
18 obviously. I don't think any one of us has a total grip on  
19 it, because there's no question I ordered the test, the new  
20 test be comprised and all that. And then after it was  
21 completed, when was that, in November of '03 when they  
22 submitted their report?

23 MS. KISTLER: December of 2003 was when we had the  
24 last --

25 THE COURT: Here's the development, validation, and

1 administration of the City of St. Louis Probationary Fire  
2 Private Selection Process. I suspect that this would not  
3 have been under seal. But you guys got a copy of that?  
4 Ms. Kistler? Ms. Kistler got a report of the defendant City  
5 of St. Louis, et cetera, in response to this order of  
6 April 11, 2003, and I think she attached something to that.

7           Anyway, it's a puzzle to me as well as -- well, I  
8 know you got copies of what I have in front of me. This  
9 is -- attached to is Report of City of St. Louis on the  
10 Implementation of a Validated Job Related Test for a  
11 Probationary Fire Private, and that's dated September 30,  
12 2003. And Ms. Kistler sets out in several single sentences  
13 the paragraphs exactly what took place procedurally.

14           MS. KISTLER: That's correct.

15           THE COURT: And it just seems to me that if there's  
16 anybody that had any complaint about that test with all that  
17 we have on the record here, it would have been brought before  
18 me.

19           Now, Jerry, when you say -- I don't know if that was  
20 in a -- the word procedural doesn't strike me, but I don't  
21 know if it was in a conversation we had in chambers, whether  
22 it was on the record in open court, but procedures is a lot  
23 different --

24           MR. DIEKEMPER: You had established, I think it was  
25 like a December 4th, 5th, 6th deadline for getting this test

1 done. And that's when we filed this motion in October, on  
2 Halloween apparently, to, you know, be able to go forward and  
3 make these challenges before the Civil Service Commission.  
4 For these 16 individuals we thought there was a better  
5 measure of their ability to get along well and to service  
6 people, function together based on their service rate.

7 And we put that issue with your permission before  
8 the Civil Service Commission, and they really declined to  
9 deal with it. Then we had to appeal it to the circuit court.  
10 I don't see, though as a practical matter just getting down  
11 to the practicalities of the situation, given your order  
12 recently saying that the standard metropolitan statistical  
13 area is the proper area for applicant flow data, that no  
14 matter what happens with these 16 individuals, that there  
15 would be an adverse impact on anybody based on where, you  
16 know, I think -- and Ben probably knows the statistics better  
17 than I do, but I think the minority population in the SMSA is  
18 about 14 or 15 percent, something like that.

19 So I don't think whatever Judge Dowd would order  
20 with respect to this portion of the test, and all we're  
21 asking is that the individuals who were eliminated as a  
22 result of a pass/fail portion of the examination be given the  
23 opportunity to finish the rest of the test. And then they  
24 may or may not -- it may all be moot. He may deny our  
25 appeal, first of all, or they may not get on the list. So,

1 you know, I think we may be putting the cart before the horse  
2 here talking about this.

3 THE COURT: Yeah, that's a little bit tangential to  
4 the nuts and bolts that I wanted to get down here today  
5 before -- and I wanted to find out. Now I have the status of  
6 that, I will have to tell you I do not have a satisfactory  
7 answer. I suspect I could prepare some kind of an order  
8 which would appropriately delineate authorities, et cetera,  
9 but I may not want to address it and depend upon Judge Dowd  
10 to follow his own judgment.

11 MR. DIEKEMPER: Judge, you ordered us to brief that  
12 issue on October 1, 2004 order. And we did brief it, and  
13 that's that package in the rubber band up there.

14 THE COURT: All right. Let's get to the simpler  
15 problem. You guys, Craig and Bobinette, I don't think I ever  
16 have suggested or requested that lawyers forget about jury  
17 trials, but can't you stipulate with the City on all the  
18 dollars and sense part of this? Where is the dispute of  
19 fact?

20 MS. JOHNS: Excuse me, Judge, before you move on, I  
21 have another engagement for which I have to leave, and this  
22 spot doesn't involve me at all. Is it okay for me to leave?

23 THE COURT: Yes, ma'am. Thanks, Althea. Good  
24 seeing you.

25 Go ahead.

1 MR. CRAIG: Your Honor, Clyde Craig for Plaintiff  
2 Martinez. Your Honor, I think on the calculation of lost  
3 wages and benefits, we most probably will be able to agree on  
4 those figures. We've been working towards that end and have  
5 made some progress. And we got a document from the City this  
6 morning, I haven't reviewed in detail, but I think we're  
7 moving along on that.

8 But Plaintiff Martinez is also requesting  
9 compensatory damages. And that, of course, cannot be  
10 calculated mathematically. It's something that we can  
11 discuss agreeing on in --

12 THE COURT: Why does he think he's entitled to it?

13 MR. CRAIG: Because the impact of the denial of  
14 employment severely affected him, it affected his life,  
15 affected his relationship in his marriage.

16 THE COURT: He should be affected favorably by  
17 Nangle's decision, and that should compensate and make up for  
18 his upset.

19 But, anyway, I would like -- what I'd like to have  
20 done here is for me after today to get a good -- in my mind  
21 at least a solid order, and then it will be up to whoever  
22 objects, Ms. Kistler whatnot, if they want to appeal, appeal.  
23 And if not -- but I'll be done with that phase of it. And  
24 that will require me -- I would agree with you, compensatory  
25 damages are something that a judge shouldn't decide. But I'm

1 not too inclined to think here under all the applicable facts  
2 and circumstances that he's entitled to compensatory damages  
3 in this case. This case is kind of a unique case. And  
4 that's why I tried to get you guys to agree to whatever you  
5 could because I'm not -- I didn't work for the Civil Service  
6 Commission and compute the value of benefits and all that  
7 sort of thing. And I really would like Martinez, if he  
8 mitigated his damages, forgetting about compensatory,  
9 out-of-pocket lost wages, what is he behind? You know,  
10 what he -- you and Ms. Kistler have agreed on that, huh?

11 MR. CRAIG: We haven't come to a final figure on the  
12 lost wages, but we're working on that. There is a  
13 differential between what he earned working in the Forestry  
14 Department for the City and what he would have earned working  
15 as a fire fighter. But that we can certainly calculate.

16 THE COURT: There's a figure that could be  
17 computed --

18 MR. CRAIG: That's correct, Your Honor.

19 THE COURT: -- without a jury. And as -- has  
20 Deeken's situation changed, Mr. Bobinette?

21 MR. BOBINETTE: Good morning, Your Honor, Charles  
22 Bobinette for Eric Deeken. Eric is still waiting for  
23 appointment. Mr. Martinez was enrolled in a fire academy  
24 class on the 21st of March, and despite our request, Deeken  
25 was not enrolled in that.

1 THE COURT: Is there a certain date, Nancy,  
2 Deeken -- Martinez was enrolled when?

3 MR. CRAIG: March 21st.

4 THE COURT: When is the next one of those, Nancy?

5 MS. KISTLER: And Martinez was actually on this list  
6 so he was appointed off of that, and that was the problem  
7 with Deeken. We've just found out that right now we have a  
8 class that -- our newest information is they are planning to  
9 start in May, the latter part of May, I believe May 27th.

10 MR. BOBINETTE: So we would ask the Court enter an  
11 order that the City enroll him in that academy the earliest  
12 opportunity or the next academy. With that then we could  
13 calculate his damages up to that point in time. In our brief  
14 to the Court in answer to the Court's question proposed, we  
15 attempted to detail, and these are rough numbers, but that  
16 Nancy has had a chance to look at, and I think we can refine  
17 these a little bit more. But basically on pages 8 and 9 of  
18 our memorandum we do a calculation.

19 THE COURT: Okay. Let me ask you this: Both of  
20 you, I mean, both Martinez and Deeken, request Defendant City  
21 of St. Louis is or be permanently restrained and joined from  
22 discriminating against applicants for the position of  
23 probationary fire private on the basis of race. I don't  
24 know, it's kind of an inane thing, I don't know if it's  
25 necessary. Aren't we able to assume, forgetting the past,



1       assume they are going to carry on in good faith and good  
2       fashion without having that. Nancy, is that burdensome in  
3       any way to you, or maybe you don't care about it?

4               MS. KISTLER: Well, I mean, we would prefer there  
5       not be an injunction entered, and I don't think it's  
6       appropriate in this case where I think everyone has agreed  
7       that the City's actions were taken pursuant to this long  
8       standing consent decree. There is no evidence that the City  
9       has or would continue to utilize a 50/50 hiring goal now that  
10      the decree has been dissolved. So I simply don't see any  
11      reason whatsoever for such an order.

12             THE COURT: What do you need that for, guys?

13             MR. CRAIG: It's not critical from our standpoint,  
14      Your Honor.

15             THE COURT: Yeah, I didn't think. Okay. Defendant  
16      has ordered plaintiff to hire Deeken, we're going to shift  
17      the date to May 27. I'm looking over Deeken's proposed  
18      order. Establishing seniority date as of March 13, 2000. I  
19      hate to get into these details, but what does that do, for  
20      example, on benefits? I'm just hesitant to make anything  
21      retroactive prior to the date of my order, Chuck, because, I  
22      mean, I don't know what could have happened in Deeken's life,  
23      maybe some big medical expense, maybe nothing but goodness  
24      and happiness, but I'm hesitant to date back.

25             MR. BOBINETTE: We would represent to the Court that

1 there would be no claims of, let's say, insurance or against  
2 the City.

3 THE COURT: What's the claim, that you have  
4 seniority?

5 MR. BOBINETTE: One of seniority as well as an  
6 accumulation of vacation and sick days going into the actual  
7 period of employment, to bring him into parity with where he  
8 should have been had he been hired in March of 2000.

9 THE COURT: Have you and Nancy Kistler talked about  
10 that?

11 MR. BOBINETTE: We have -- Nancy gave to me an  
12 agreed upon statement in terms of the number of hours he  
13 would accumulate, and we can calculate from that.

14 THE COURT: Yeah, I would urge you do it. If you  
15 can't come up with a figure and if Nancy can help you and  
16 kind of lean, and I'm kind of pushing Nancy on that, so I'm  
17 going to give you the benefit of the doubt if you guys don't  
18 agree, because it's not -- for me it's complicated, I don't  
19 get involved in that. Go ahead, Nancy.

20 MS. KISTLER: Well, the only thing that I want to  
21 address as far as seniority, I'm not sure everything that  
22 that would encompass. I think if you're talking about  
23 purposes of future promotions or assignments in a house such  
24 as who gets the lead position, I think you have safety issues  
25 here. I mean, certainly we can't say now you have, you know,

1 five years for purposes of, you know, and then tomorrow you  
2 can be a captain.

3 THE COURT: I want to tell you something, I'm sure  
4 some of these guys out there are firemen. And there's  
5 nobody -- I mean, I can say that. I have high respect for  
6 firemen. I know them. I was a city attorney at Brentwood  
7 for ten years. And my mentor and partner represented the  
8 Affton Fire District. I did work with them many years. And  
9 I know more about firemen than they know about themselves.  
10 Every time the police would get an extra \$3 for a uniform  
11 allowance, the firemen are rushing in to get that. I lived  
12 with this for ten years. I lived with Affton and -- or the  
13 firemen would get a little twist to the right, police are  
14 coming in, they want the same twist. That's just the way it  
15 goes. And so firemen, I've dealt with them and I love them.  
16 I've handled more -- probably the best clients I had were two  
17 firemen. They had bad accidents. I bought the first down  
18 payment on my house was representing a firemen. So I have a  
19 personal feeling over and above, you know, September 11 and  
20 all that. But I don't want to get down refining too much of  
21 this little stuff, that I think if you worked with  
22 Ms. Kistler as best you can and tell -- is Mr. Deeken out  
23 there?

24 MR. BOBINETTE: Yes, Mr. Deeken is in the back.  
25 Would you stand up.

1 THE COURT: I'm trying to get you a job, so shape up  
2 and agree with the City here so we don't have to get down all  
3 these details, two times two is four and all that stuff, will  
4 you?

5 MR. DEEKEN: Absolutely.

6 MR. BOBINETTE: We can figure out Nancy's concerns  
7 in terms of seniority for purposes of experience.

8 THE COURT: Clyde, is Mr. Martinez back there?

9 MR. CRAIG: No, he's in the academy and couldn't be  
10 here.

11 THE COURT: Thanks, Mr. Deeken.

12 MR. CRAIG: However, seniority is a very important  
13 issue.

14 THE COURT: I know that. But you see, what I didn't  
15 say, I also remember the best job I ever had was city  
16 attorney at Brentwood. I loved it. I was a lot younger. I  
17 lived two blocks from city hall and people could come by,  
18 firemen, police officers. I really mean it, I loved it. But  
19 the fire and police, I can remember so many stories because  
20 they used to have, what do they call them, Kelly hours? I  
21 never did understand. What do they call it, Kelly hours?

22 MR. BOBINETTE: O Days.

23 THE COURT: One off, one on. And, God, they'd drive  
24 me nuts trying to figure it out. And then I'd always get  
25 them together in a corner just like I'm trying with you guys,

1 work this out because Nangle, you know, I didn't go to law  
2 school to do multiplication and subtraction tables.

3 But one guy got to sleep in the upper bunk -- this  
4 is in Brentwood now -- and one guy in the lower bunk. And  
5 one of them had to clean the rails. I don't want to get in  
6 that Mickey Mouse stuff, and that's what seniority is. Here  
7 you got firemen, they are set in their ways and all of a  
8 sudden Deeken comes in and he's senior to these guys. And I  
9 don't know what preferences he gets. He knows better than I  
10 can tell us. Do you know what I'm talking about? Well,  
11 Craig knows because he's been in labor law longer.

12 MR. BOBINETTE: I appreciate what you're saying. I  
13 think we can work that out. I think we could.

14 THE COURT: Mr. Deeken will work that out with you.  
15 I'll get after him if he doesn't. I'm trying to get him  
16 squared away. In a serious fashion I think that he should  
17 have been hired obviously and wasn't, and we're going to get  
18 him and Mr. Martinez squared away. And the sooner the better  
19 if you guys can come up with some agreements. Forget about  
20 the blasted jury trial on this stuff.

21 MR. BOBINETTE: Could I bring to the Court's  
22 attention?

23 THE COURT: Yes, sir.

24 MR. BOBINETTE: One problem that I think we will  
25 have a little difficulty working out, and your direction on

1 this would be helpful. We certainly understand that under  
2 Title VII lawsuits there is a duty to mitigate. And we have  
3 provided to the City the gross numbers of earnings during the  
4 relevant period of time. Our point is this, that I'm sure  
5 the Court knows speaking of the Kelly days, that there's an  
6 opportunity for secondary employment as a firefighter.

7 And --

8 THE COURT: I'm not a big believer in that  
9 personally. I'm not talking as a lawyer. I'm talking just  
10 as a guy down the street. I know that because of taking  
11 those days off, but they should rest and be getting ready for  
12 putting out the next fire is what I've always thought. But I  
13 know what you are saying. And there are a lot of other  
14 people who do two jobs. What's Mr. Deeken, he's got a second  
15 job maybe or could have?

16 MR. BOBINETTE: Mr. Deeken has operated his own  
17 business with his wife, which is a carpet installer type of  
18 business where he does the sales and he does the  
19 installation. And this is the kind of thing that he does for  
20 owners of property that generally --

21 THE COURT: What are you telling me, and he makes  
22 money doing that?

23 MR. BOBINETTE: He makes money doing that. And in  
24 this unique circumstance is that it's the perfect kind of  
25 business that he would be doing secondary to being a fire

1 fighter. The argument being is although we have acknowledged  
2 his interim earnings, we do not think that it should be an  
3 offset against the gross earnings that he would have earned  
4 had he been a fire fighter.

5 THE COURT: Well, what kind of money you talking  
6 about, Chuck, roughly?

7 MR. BOBINETTE: Maybe a hundred thousand dollars  
8 over the course of --

9 THE COURT: Oh, Santa Maria, a hundred thousand  
10 dollars. I live next door to a guy that did carpets, he  
11 didn't make that kind of money. Deeken has got -- find out  
12 what kind of business he's got going and we better --

13 MR. BOBINETTE: Well, it would be about \$20,000 a  
14 year.

15 THE COURT: 20,000 a year.

16 MR. BOBINETTE: Right.

17 THE COURT: And Ms. Kistler reacted like I did.  
18 Let's be serious. I understand carpet laying because I'm  
19 familiar, I had a client that did it. I didn't know that  
20 kind of money came out of it. But that was then, this is  
21 now. How in the dickens -- if he's a firemen, he can't spend  
22 that much time. His wife -- he's doing that tacking in those  
23 corners, his wife doesn't do that, I bet. Does she? Is that  
24 his wife next to him? He doesn't make you do that, does he?

25 MRS. DEEKEN: No.

1 THE COURT: No.

2 MR. BOBINETTE: What my experience has been with  
3 this is that firemen have their own side businesses, lawn  
4 mowing, painting, house fix-up, all of those kinds of  
5 things.

6 THE COURT: But why shouldn't that mitigate?

7 MR. BOBINETTE: Well, because he would have been  
8 doing it anyway.

9 THE COURT: Would have been doing it anyway. Let me  
10 see what Ms. Kistler has to say.

11 MS. KISTLER: Well, I believe his argument has been  
12 he's been able to conduct this business in the evenings and  
13 during the nights. So for the past, I don't know, four or  
14 five years he's worked strictly evenings and nights. I mean,  
15 I just wonder what kind of money he could have been earning  
16 if he had a day job the last four years as well. I think  
17 that would be a real windfall to him if that were permitted.

18 THE COURT: Yeah, I think -- go ahead, Chuck. I  
19 don't know, I think Ms. Kistler is right in principle. It  
20 seems to me we're getting down to the -- it's not nickel and  
21 dime if you're talking about even \$20,000. Nancy, do you  
22 know if the fire department allows firemen to hold other  
23 jobs?

24 MS. KISTLER: Sure, yes, they do permit secondary  
25 employment. Now, how much other fire fighters make in their



1 secondary employment, I couldn't even tell you.

2 THE COURT: So that presumably, and I'm thinking out  
3 loud, knowing I sense I know what Mr. Deeken does, and he's  
4 got some people if he's a good carpet layer, he's in demand,  
5 he probably doesn't have to worry too much about unions or  
6 whatever, maybe he's a member of the carpet layers union, but  
7 in any event, his wife handles all the paperwork or should  
8 get the jobs, so all he's got to go out to do is do it and  
9 get the carpeting there. Is that about it? Buy it maybe and  
10 measure?

11 MR. BOBINETTE: Buy it, sure, order it, and size it.

12 THE COURT: So he could do that as a firemen.

13 MR. BOBINETTE: But that's his business and that's  
14 what he has relied upon on his earnings these past four  
15 years.

16 THE COURT: Why don't you guys give me alternative  
17 figures on the mitigation. And you use the ones that  
18 Mr. Deeken wants and what his income has been attributing to  
19 his other job and to his carpet laying.

20 MR. BOBINETTE: Okay. And just leave that legal  
21 question for you to resolve then.

22 THE COURT: Yes. But I'll give you some report.  
23 When I finish here I'll give you an order and then you can  
24 include that in your response to my order.

25 MR. BOBINETTE: Very good. Thank you.

1 THE COURT: So I'm going to take care of what I give  
2 the Martinez and Deeken matter first. And let's see if  
3 there's anything else any of you folks want to tell me with  
4 regard to that. I'm going to assume under these  
5 circumstances, Harry, Craig, and Chuck Bobinette that you're  
6 waiving a jury trial and the City agrees to that? Yes? If  
7 you don't, if there's compensatory damages, I'm going to rule  
8 against. You can appeal on it, I don't care.

9 MR. CRAIG: I think we can handle the rest of it by  
10 agreement, Your Honor.

11 THE COURT: What I come up with, remember, you can  
12 reserve your right, I have no problem with that. Just like  
13 Ms. Kistler is reserving the right to appeal from the whole  
14 thing. But I feel guilty. I want to get this out so you  
15 guys can -- everybody can get caught up.

16 Let's see, 2002 Personnel Decisions Research  
17 Institute, that's who did the 2003 study, Nancy?

18 MS. KISTLER: That's correct.

19 THE COURT: We talked about the permanent injunction  
20 thing. No evidence in this case.

21 Oh, okay. Now, Diekemper, get your pleading out.  
22 You find it faster. I had made a note to look at the  
23 wherefore clause in what you're asking the state court. And  
24 is this it?

25 MR. DIEKEMPER: It's attached to Althea's memo,

1 Judge.

2 THE COURT: Wait a minute. Decision. That's the  
3 civil service. Yeah, I took those papers apart. This is  
4 Bobinette here. Count I, Petition for Administrative Review.  
5 Now, that's Deeken.

6 MR. DIEKEMPER: That's Exhibit A.

7 THE COURT: And here's your memorandum.

8 MR. DIEKEMPER: Can I show you, Judge?

9 THE COURT: Yeah. I just want to see your wherefore  
10 clause in your petition for review. Don't let me take your  
11 file copy.

12 MR. DIEKEMPER: You've got it right here.

13 THE COURT: Okay. I'm on page --

14 MR. DIEKEMPER: Unfortunately it's not numbered.

15 THE COURT: But I'm on the page that's dark print,  
16 combined prayer for relief, therefore, the plaintiffs request  
17 the Court. And then I'm going to A, B -- make the plaintiffs  
18 whole for any injury or damages suffered, back pay. Well,  
19 part of it, plaintiffs be permitted to complete all stages  
20 and portions of the selection process for provisional fire  
21 private that they were not permitted to complete, and that  
22 plaintiffs be ranked and placed on the eligibility list.

23 Well, let me hear from -- although Althea is gone,  
24 I'm sure -- let me hear from Ben. Go ahead. Let me hear  
25 from Ben Blustein on this before I -- in that prayer,

1 Benjamin, we're right back where we were before I guess, huh?

2 MR. BLUSTEIN: Yes, Judge. Two things; one is  
3 although the prayer for relief doesn't specifically indicate  
4 this, I think Jerry has said very straightforwardly that the  
5 part of the challenge in the state court is a challenge to  
6 the validity of the noncognitive part of the test, and so our  
7 first concern is the inconsistent ruling by the state court  
8 as to the validity of the -- or the invalidity of the test.

9 The second problem is a practical problem of  
10 throwing a monkey wrench into the eligibility list. If the  
11 state court were to permit these 15 plaintiffs to complete  
12 the other portions of the exam and then place them on the  
13 eligibility list, we're not talking about an order affecting  
14 only those 15 plaintiffs, we're talking about an order  
15 affecting, first of all, everybody on that eligibility list  
16 who is going to be after them because --

17 THE COURT: Nancy, I'm sorry, did you hear what he  
18 is saying?

19 MS. KISTLER: I'm sorry?

20 THE COURT: He's talking about something on the --  
21 what would happen if the state court upheld Jerry Diekemper's  
22 request and what the effect would be on the eligibility list,  
23 placing them above the others.

24 MR. BLUSTEIN: You would be essentially moving these  
25 15 folks to the top of the list and bumping down people below

1       them. And there's also the problem of, well, the fact that  
2       we've already started hiring off this eligible list. We've  
3       got a class of 20 some odd people entered last month and then  
4       we've got a new class that's coming in. And then a sort of  
5       larger global problem is if the noncognitive portion of the  
6       test is invalid as to these 15 folks, well, then it's maybe  
7       invalid as to other people.

8               THE COURT: Is that right, Jerry, have you  
9       personalized it?

10              MR. DIEKEMPER: I don't necessarily agree with that.  
11       Anybody who was adversely affected by this test had an  
12       opportunity to challenge it. There were time limits for  
13       doing that. And I think the time limits are long gone. So,  
14       you know, I don't see that as being a real threat.

15              THE COURT: Go ahead.

16              MR. BLUSTEIN: I understand what Jerry is saying,  
17       but I guess my point is that the test did not single out  
18       these 15 people, the test applied to everybody as a whole.

19              THE COURT: If it's, let's say, dubious to them,  
20       question mark as to others, it may be I would suspect  
21       everybody would be guilty of laches at least, and I don't  
22       know about a statute of limitation. There are certainly --  
23       2003, they've had a year and a half to challenge it. And the  
24       only ones that have done it are the ones in the state court  
25       case.

1           MR. BLUSTEIN: So those would be my main concerns;  
2 one, the inconsistencies of rulings as to whether this test  
3 is valid.

4           THE COURT: Okay, well, here's what I think I'm  
5 going to do or I plan to do. You folks -- I'm going to give  
6 Bobinette, Craig, and Kistler and, of course, I don't know --  
7 I don't think you want to be involved in theirs, do you, Ben?  
8 A week to come up as much as you can with agreed upon  
9 figures. And where you don't agree, set it out just like you  
10 did in the last -- like on the point concerning Mr. Deeken's  
11 income, and what their salaries gross, et cetera, were. So  
12 my indications, my leanings are not to go back on that  
13 seniority because my personal experience probably shouldn't  
14 influence me, but I'm saying as a matter of record so anybody  
15 wants to appeal they can say it, my personal experience with  
16 firemen and policemen has been great. And I say the best ten  
17 years of my life was working with them in Brentwood. But the  
18 toughest thing to ever do, and Craig knows this better than  
19 any, than I do in labor matters is stick somebody else up in  
20 front of somebody else sort of arbitrarily, and if he doesn't  
21 know his dad -- your dad died?

22           MR. CRAIG: Yes, Your Honor.

23           THE COURT: But old man Craig and John Wiley would  
24 have turned in their graves if somebody did that to some of  
25 their clients, wouldn't they, Clyde?

1 MR. CRAIG: Well, I guess that depends on who you  
2 would be talking to on the list.

3 THE COURT: So anyway, my leaning is not on the  
4 seniority thing. The other -- what else -- and I'll get out  
5 an order. I'm not going to get into the question that Althea  
6 and Benjamin and Diekemper, Jerry Diekemper are involved in  
7 on this other one until after this first matter is disposed  
8 of because I want to get it in shape so the parties can  
9 appeal, exercise whatever rights they want and have that  
10 done, because I feel that I'm out of time. I'm late on this.

11 Now, let me see, there was something about interest.  
12 You had wanted some interest payments or something. Oh, I  
13 know, the attorneys' fees, the interest. What is this stuff?

14 MR. CRAIG: Prejudgment interest, Your Honor.

15 THE COURT: What's the rate, Nancy? Do you object  
16 to prejudgment interest, Nancy?

17 MS. KISTLER: Yes, we do, and we've got some Eighth  
18 Circuit cases that --

19 THE COURT: I'll tell you what, you submit that  
20 along with everything else, both sides. If there's any case  
21 law on that question, I'll take that. Then on attorneys'  
22 fees we know the right way to handle them would be -- well,  
23 if you can't stipulate, I don't know what the hourly rate is  
24 anymore in St. Louis, and I don't want Nancy to -- I don't  
25 expect her to give away the City's coffers, but the right way

1 is, of course, for me to come back and hold a hearing. I  
2 don't know that that's necessary. I'm not anxious to do it.

3 But another way is if you gentlemen submit your  
4 hours and your fee requests to Ms. Kistler and she can  
5 respond. That's the way -- as to whether she thinks it's an  
6 inordinate amount of time and high rates and all of that  
7 stuff. If that's enough. Now, I don't want to twist  
8 anybody's arm on that. Is that enough, Mr. Craig,  
9 Mr. Bobinette, Ms. Kistler?

10 MR. CRAIG: We have submitted to the City our hours  
11 at least up until several weeks ago. And we will update that  
12 and give them the figures. And the hourly rate we're  
13 requesting is \$250 an hour for attorneys' hours and 75 for  
14 paralegal hours, which I think is pretty standard.

15 THE COURT: I never had paralegals. I never needed  
16 those. But all the paperwork today you guys. You agree with  
17 that, Mr. Bobinette?

18 MR. BOBINETTE: Yes, Your Honor. I think --

19 THE COURT: I hate to put Nancy -- is that hourly  
20 rate, give me what's going on in the City today. What are  
21 the insurance defendants' lawyers charge an hour? They don't  
22 charge any 250.

23 MS. KISTLER: No, it's been awhile since I've been  
24 in private practice, so I'm probably not the best person to  
25 address that, and it's been awhile since I've had to address



1 that issue in court as far as the hourly attorneys' fees. It  
2 seems somewhat high, but I may need to look at other  
3 documents. I don't know if Kathleen has looked at that  
4 tissue.

5 MS. TANNER: I haven't had anything recently, Your  
6 Honor.

7 MR. BOBINETTE: Your Honor, our fee is 225 an hour,  
8 and that fee has been approved by Judge Jackson in civil  
9 rights cases two years, so that 250 to 225 range I believe is  
10 common, a little bit higher for certain classes of attorneys.  
11 Are you asking us to include the issue of attorneys' fees in  
12 this memo in a week's time?

13 THE COURT: Do you need more time on that?

14 MR. BOBINETTE: Well, I was just thinking that the  
15 time will be up to our stipulation and then maybe a week  
16 after that.

17 THE COURT: Yes, I'll give you a week after that for  
18 the attorneys' fee question because then I can prepare an  
19 order on the rest of it hopefully, and then just pick up the  
20 attorneys' fees a week later. But the main question is, is  
21 any one of you demanding a hearing? Because you're entitled  
22 to it. And Nancy, I guess, is the one that may want to --  
23 you don't know their final figures, Ms. Kistler?

24 MS. KISTLER: No, I don't.

25 THE COURT: Well, you get their figures and see, and

1 then if you let me know. And really I don't want you to  
2 worry about Nangle coming from Savannah, I want you to handle  
3 it like any other legal matter. If you object, why you can  
4 set out your objections. And if you want a hearing on it,  
5 Ms. Kistler, let me know.

6 MR. BOBINETTE: Then typically we would submit a  
7 bill of costs. But that would be after the Court enters its  
8 final order. I mean, that's been my experience.

9 THE COURT: Well, I prefer not. Why do you have to  
10 wait until after the Court's order?

11 MR. BOBINETTE: It's what the rule says. I mean,  
12 the rule provides that --

13 THE COURT: What rule?

14 MR. BOBINETTE: What the rule says is the submission  
15 of fees, attorneys' fees, expenses, and the bill of costs  
16 shall be entered, I believe it is within 20 days following  
17 the issue of the Court's final order.

18 THE COURT: It's a local rule that's been changed.  
19 I know it wasn't that way years ago. But I'm not up to -- I  
20 mean, you guys -- Dave will know more about that than I do.  
21 Because I always -- in fact, these cases I don't believe you  
22 have a final judgment unless attorneys' fees are included.

23 MR. BOBINETTE: No, actually it's a separate issue,  
24 and even if you waited and the Court has under consideration  
25 the attorneys' fees, your time for appeal is clicking on that

1 final order.

2 THE COURT: Is that right?

3 MR. BOBINETTE: So it's actually handled as a  
4 separate issue, and you have a separate right of appeal on  
5 the attorneys' fee issue.

6 THE COURT: If I had the time I'd check and see when  
7 the change took place. It doesn't make a difference. It was  
8 not that way 25 years ago, but God knows what happens.  
9 Anyway, I give you one week from today to get the best you  
10 can and get it in to me, the three of you; Mr. Craig,  
11 Mr. Bobinette, and Ms. Kistler representing your respective  
12 parties with regard to the -- all of the damages questions  
13 and the instatement question, et cetera. And I'm using the  
14 dates that I said before: Martinez, September '99; Deeken,  
15 March 2000. And separate those moneys about Mr. Deeken that  
16 I'm talking about.

17 MR. BOBINETTE: On mitigation?

18 THE COURT: Yes, sir. And maybe all the mitigation  
19 for both of them should be submitted, of course, to  
20 Ms. Kistler. You're doing all that now.

21 Did I say I'm not too much on relating back on  
22 insurance coverage and any back benefits? I'm even -- the  
23 interest I'm not talking about, but I'm dubious about that  
24 seniority thing. And just because of the havoc. I don't  
25 think it would be a wise move for getting along. I think it

1 might be a troublesome move. And I don't want to do anything  
2 to affect the morale of the fire department. I just think it  
3 would be based on experience. You guys can object in what  
4 you're giving me.

5 In a week what I should get from you is whatever you  
6 can stipulate to, No. 1. No. 2, if you take objection, any  
7 of the three of you, to anything in the stip or want to add  
8 to it, do so. Submit a private thing from Deeken and from  
9 Martinez and from the City and attach that, not too long, but  
10 I know you guys well enough you never, you've been well  
11 within limits of time and space and pages, so there's no  
12 problem there.

13 And then within one week from that you gentlemen  
14 will submit your -- I'd rather have the expenses along with  
15 the attorneys' fees and have done with it. I don't know why  
16 you can't do that.

17 MR. BOBINETTE: I can give it to you. Because I  
18 don't know -- Mr. Braun, will they accept my bill of costs  
19 before a final order?

20 THE CLERK: Yes, you can file it electronically. It  
21 won't be ruled on until the judge rules on it.

22 THE COURT: Don't they still do in St. Louis what  
23 the judge tells them to do since Nangle left? I can't figure  
24 it out. Maybe I better come back for a longer period of  
25 time. You got to get an okay --

1 MR. BOBINETTE: Point well taken.

2 THE COURT: Have the blasted cost and attorneys'  
3 fees in within one week and we'll worry about accepting it.

4 Now, most seriously, anything, Jerry or Ben, that  
5 you guys want to ask or point out to me? I've got your  
6 matter and Althea's matter under advisement. I don't know,  
7 just be sure to tell Judge Dowd, you know, that he's got a  
8 matter pending over here.

9 MR. DIEKEMPER: He's well aware of that. He's  
10 constantly postponed making a decision.

11 THE COURT: Okay. Ms. Kistler.

12 MS. KISTLER: Just one issue, Your Honor. Will we  
13 be receiving I guess fairly soon an order ordering the City  
14 to enroll Mr. Deeken in the next class?

15 THE COURT: I'll order that. What was that date  
16 again, May --

17 MS. KISTLER: That's tentative. I mean, I don't  
18 want to be bound by that date. I mean, I'm sure in the  
19 latter part of May or June, but it should be a class of 30,  
20 so the chief is going to need to interview enough people and  
21 send them to medical for medical exams, and so sometimes  
22 there's a delay in that.

23 THE COURT: I will order it orally to you now and  
24 instruct you to instate him, if that's the right word, in  
25 that process. And I will hope to get a written order out

1 before -- certainly before May the 25th, 6th or 7th. Is that  
2 clear enough?

3 MS. KISTLER: Is that all right for the personnel  
4 department?

5 THE COURT: Yeah, Ms. Tanner.

6 MS. TANNER: Judge, I think in connection with  
7 instating this individual into the class, we would  
8 respectfully request a written order ordering that as opposed  
9 to just a verbal communication.

10 THE COURT: Well, I thought Nancy wanted something  
11 now. But I want to give a little more thought to what I --  
12 in fact, I won't have a written order until after I receive  
13 the information from you folks in the next week or so.

14 MS. TANNER: And all I was going to say, Judge, is  
15 what I think Nancy is trying to convey too is that it's  
16 actually May 29th as opposed to the 27th. But that's a  
17 tentative date. That date very well may change to a latter  
18 date depending on interviewing and whether there is a need to  
19 get more individuals certified to be interviewed because they  
20 will want to start the class only when it's full.

21 THE COURT: Thanks.

22 MR. BOBINETTE: Your Honor, could I make this  
23 suggestion?

24 THE COURT: Yes, sir.

25 MR. BOBINETTE: The Court enter an order in

1 anticipation of receiving information about back pay that  
2 would instate Mr. Deeken to the next available class and  
3 leave it that way so we don't have to worry about these  
4 particular dates.

5 THE COURT: Is that helpful, Nancy?

6 MS. KISTLER: That would be very helpful.

7 THE COURT: We'll do that. We'll get that out.

8 MS. KISTLER: Thank you.

9 THE COURT: Okay. Anything else? Fine.

10 (Court in recess at 1:18 p.m.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

## C E R T I F I C A T E

1  
2 I, Susan R. Moran, Registered Merit Reporter, in  
3 and for the United States District Court for the Eastern  
4 District of Missouri, do hereby certify that I was present  
5 at and reported in machine shorthand the proceedings in the  
6 above-mentioned court; and that the foregoing transcript is  
7 a true, correct, and complete transcript of my stenographic  
8 notes.

9 I further certify that I am not attorney for, nor  
10 employed by, nor related to any of the parties or attorneys  
11 in this action, nor financially interested in the action.

12 I further certify that this transcript contains  
13 pages 1 - 47 and that this reporter takes no responsibility  
14 for missing or damaged pages of this transcript when same  
15 transcript is copied by any party other than this reporter.

16 IN WITNESS WHEREOF, I have hereunto set my hand  
17 at St. Louis, Missouri, this \_\_\_\_\_ day of  
18 \_\_\_\_\_, 2005.

19  
20 \_\_\_\_\_  
21 /s/ Susan R. Moran  
22 Registered Merit Reporter  
23  
24  
25