No. 01-10544-II

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ENSLEY BRANCH, NAACP, *et al.,*
Plaintiffs-Appellees

v.

GEORGE SEIBELS, *et al.,*
Defendants-Appellees.

JOHN W. MARTIN, *et al.,*
Plaintiffs-Appellees

v.

CITY OF BIRMINGHAM, *et al.,*
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiffs-Appellees,

ROBERT K. WILKS, *et al.,*
Plaintiffs-Intervenors-Appellants

v.

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

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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Ensley Branch, NAACP v. *Seibels, et al.*
01-10544-II
CERTIFICATE OF INTERESTED PARTIES AND
CORPORATE DISCLOSURE STATEMENT

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

Jay Adelstein

Birmingham Fire Fighters Association, IAFF Local 117

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

Farah S. Brelvi

Gary L. Brown

City of Birmingham, Alabama

Cravath, Swaine & Moore

Dennis J. Dimsey

Fitzpatrick, Cooper & Clark, L.L.P.

Raymond P. Fitzpatrick, Jr.

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Jefferson County, Alabama

Albert L. Jordan

Bernard Kincaid, Mayor of the City of Birmingham, Alabama

Marybeth Martin

John W. Martin

V. Michelle Obradovic

Personnel Board of Jefferson County, Alabama

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

Hon. C. Lynwood Smith, United States District Judge

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Jim Woodward, Sheriff of Jefferson County, Alabama

William R. Yeomans, Acting Assistant Attorney General

All employees of the City of Birmingham, Alabama

_____

REBECCA K. TROTH
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STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe that oral argument is necessary for the Court to resolve this appeal.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

STATUTES:

RULES:

MISCELLANEOUS:

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BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

This Court does not have jurisdiction of this appeal. A party may appeal an interlocutory order in an ongoing injunctive proceeding under 28 U.S.C. 1292(a)(1),

and in a case in which the United States is a party, the notice of appeal ordinarily must be filed within 60 days of entry of the order under Fed. R. App. P. 4(a)(1). Here, the district court entered the order denying modification of the decree on December 19, 1995 (R.E. 598).[1] Because no notice of appeal was filed within 60 days of that date, this Court lacks jurisdiction.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction of an appeal of an order that was entered in 1995.

2. Whether the district court abused its discretion in refusing to modify the consent decree to require the City to validate employee selection procedures where the procedures are race neutral and there is no evidence of disparate impact or discriminatory intent.

STATEMENT OF THE CASE

A. *Proceedings Below*

This is a long-standing employment discrimination case that the Ensley Branch of the NAACP and African American plaintiffs filed in 1974 against the City

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[1] "Doc.__" refers to the entries on the docket sheet. "Wilks Br. at _" refers to the Brief of Appellants Robert K. Wilks, *et al.* "R.E. __" refers to entries in appellants' Record Excerpts. Because the docket sheet in appellants' record excerpts is incomplete, the version the parties used to designate the record is included as an addendum hereto.

of Birmingham and the Personnel Board of Jefferson County (Board). See generally, *Ensley Branch, NAACP* v. *Seibels,* 31 F.3d 1548, 1553-1563 (11th Cir. 1994). The United States filed suit in 1975, and the cases were consolidated. After two trials addressing the legality of selection procedures for certain City positions, consent decrees resolving all claims were entered in 1981.

In 1990, a class of white employees of the City of Birmingham, the Wilks plaintiffs-intervenors (appellants here), was allowed to intervene in the suit for the purpose of negotiations aimed at modifying the decrees. In 1991, the district court ordered modification of the City's and Board's decrees and in 1994, this Court affirmed the district court's order in part, vacated in part, and reversed in part. *Ensley Branch*, 31 F.3d at 1583-1584. On remand, rejecting the motion of the Wilks plaintiffs-intervenors to modify the decrees to require the City to validate all employee selection procedures, the district court entered modified consent decrees in December 1995 that were to terminate in five years unless extended for good cause (R.E. 597, 598).

In October 2000, the district court ordered the parties to submit recommendations on actions needed to bring the case to a close (R.E. 692). The Wilks plaintiffs-intervenors filed a motion for additional relief, again seeking to require the City to validate all employee selection procedures (R.E. 696). The

district court denied that motion on December 4, 2000 (R.E. 704). All parties agreed to extension of the decrees, which the court ordered on December 18, 2000 (R.E. 708, Order Extending 1981 Consent Decrees and 1995 Modification Orders, at 2). The Wilks plaintiffs-intervenors filed a notice of appeal from the December 4, 2000, order on January 25, 2001 (Doc. 720).

B. *Statement of Facts*

1. Entry Of The Decrees

In January 1974, the Ensley Branch of the NAACP and seven black individuals (the Martin plaintiffs) filed separate class action complaints against the City of Birmingham and the Personnel Board of Jefferson County (Board). See *Ensley Branch, NAACP* v. *Seibels,* 616 F.2d 812, 814 (5th Cir.), cert. denied *sub nom. Personnel Bd. of Jefferson County* v. *United States,* 449 U.S. 1061 (1980). The complaints alleged that the City and the Board had engaged in racially discriminatory employment practices in various public service jobs in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*., and 42 U.S.C. 1981 and 1983. In May 1975, the United States filed a similar complaint against the City and Board (and other governmental units not involved in this appeal) alleging a pattern or practice of discriminatory employment practices against blacks and women. 616 F.2d at 814-815.

The district court consolidated the cases and held a bench trial in December 1976 addressing the validity of the Board's entry-level written examinations for police officers and fire fighters. In January 1977, the court found that these written examinations adversely affected black applicants and were not sufficiently job-related, and thus held that use of the tests violated Title VII. *Ensley Branch, NAACP* v. *Seibels*, 31 F.3d 1548, 1554-1555 (11th Cir. 1994).

In August 1979, the district court held a second trial addressing the validity of some of the Board's other testing and screening devices. *Ensley Branch,* 31 F.3d at 1556. Before the court issued its decision, the plaintiffs and the United States entered into consent decrees with the City and the Board. Both decrees provided race conscious remedies, including interim and long-term hiring and promotion goals for blacks and women. 31 F.3d at 1556. The Board was directed to review its selection procedures periodically and to "make a good faith effort" to determine whether there are alternative measures that would have less adverse impact and would continue to provide a sufficient pool of qualified applicants. *Ensley Branch*, 31 F.3d at 1557. Both consent decrees provided that any party could move for termination six years after entry of the decrees.

2. The Reverse Discrimination Litigation

The Wilks plaintiffs-intervenors (appellants) are non-black employees of and

applicants for employment with the City of Birmingham. After their motions to intervene in this litigation to challenge the consent decrees were initially unsuccessful, the Wilks plaintiffs-intervenors filed complaints that were consolidated under the heading *In re Birmingham Reverse Discrimination Employment Litigation* in 1984. The complaints alleged that the City made race-conscious employment decisions pursuant to the consent decree, thus violating Title VII and the Equal Protection Clause.

The district court tried the reverse discrimination claims of 15 of the white employees in 1985. After trial, the district court held that the City decree was an absolute defense to the white employees' claims of reverse discrimination. *Ensley Branch,* 31 F.3d at 1559. The Wilks plaintiffs-intervenors appealed, and this Court reversed, holding that they were not barred from collaterally attacking the decree. *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492 (11th Cir. 1987). The Supreme Court affirmed. *Martin* v. *Wilks*, 490 U.S. 755 (1989).

After the Supreme Court's decision, the district court allowed the Wilks plaintiffs-intervenors to intervene in this case "for the limited purpose of participating in any litigation regarding potential modification of the consent decrees." *Ensley Branch*, 31 F.3d at 1560. The district court certified a class of

"all present and future black and female employees * * * [and] applicants for employment with the City" (Bryant class) and a class of "all present and future male, non-black employees * * * [and] applicants for employment with the City" (the Wilks plaintiffs-intervenors). *Ibid.*

3. The Motions To Modify

The parties were unable to agree on modifications to the decrees. On May 2, 1990, the United States moved to modify the consent decrees to reflect the emerging case law and changing circumstances. The motion asked the court:
(1) to replace the existing long-term goals with the long-term goal of developing lawful selection procedures; (2) to replace the current interim goals with interim goals based upon applicant flow data; (3) to require the Board to develop nondiscriminatory selection procedures in a timely manner for jobs for which it certifies candidates; (4) to require the City to cooperate with the Board in developing nondiscriminatory selection procedures and to demonstrate that any selection procedures it has implemented are lawful; and (5) to strengthen recruitment mechanisms. The United States proposed a three-year deadline for the development of lawful tests. *Ensley Branch,* 31 F.3d at 1560. The Wilks plaintiffs-intervenors also moved to modify both decrees to eliminate all of the goals. The remaining parties supported at least some modifications of the decrees.

On May 21, 1991, the district court ordered modification of the decrees. The court held that the City could not use annual goals if the long-term goal of parity with the civilian labor force has been met, or if the Board has developed lawful screening procedures for the position. Second, it ordered the City to "stop using annual goals for any promotional position once the long-term goal is met for the position from which the promotional candidates are normally chosen, except that the City should continue to promote blacks and women to high-level police and fire positions in proportion to those groups' representation in the position from which promotions are normally made until the long-term goal is reached with respect to the high-level positions." *Ensley Branch*, 31 F.3d at 1561. The court agreed to reconsider the appropriateness of the decree in 1996. 31 F.3d at 1562.

The court refused, however, to replace the long-term goals with a requirement that defendants develop lawful selection procedures. *Ensley Branch,* 31 F.3d at 1562. The court also refused to order a timetable requiring the City and the Board to develop lawful selection procedures that could be used to replace the numerical goals. 31 F.3d at 1562.

4. This Court's 1994 Order On The Motion To Modify

This Court affirmed in part, reversed in part, vacated in part, and remanded for modification of the decrees. *Ensley Branch*, 31 F.3d at 1548. Finding that

City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989), altered the law on affirmative action, this Court held that modifications in the decrees were required under the standard of *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). *Ensley Branch,* 31 F.3d at 1563. In applying strict scrutiny to the decrees, this Court found that the City had a strong basis for believing there had been discrimination in the police and fire departments, but that a remand was necessary to determine whether the City had a compelling interest in affirmative action in other departments. 31 F.3d at 1568.

Considering the second prong of strict scrutiny, the Court held that the long-term goals were not narrowly tailored because neither the City nor the Board had diligently pursued the most important race-neutral alternative -- the development and implementation of "non-discriminatory selection procedures." *Ensley Branch*, 31 F.3d at 1571. As this Court explained, "[t]he Board was quite properly ordered to implement selection procedures that *either* had no disparate impact on blacks and women, *or* that, despite having disparate impact, were 'job-related' as that term is used in Title VII." 31 F.3d at 1571 (emphasis in original). The Court repeatedly emphasized its concern that the City and the Board continued to rely on the results of discriminatory testing, and that the City's goal should be to use race-neutral selection devices. The Court acknowledged that if tests could not be devised that

had no unjustified disparate impact, "the Board could be ordered to use time-of-application, a lottery, or some other race-neutral device to select from among those who are qualified. * * * At least then the racially discriminatory hiring would end." 31 F.3d at 1574 n.12. The Court also made clear that it was not "condemn[ing] subjective screening tools," but that they, too, must be non-discriminatory. 31 F.3d at 1575 n.13.

The Court also found that the decrees' annual goals were not narrowly-tailored. The Court ordered the district court to re-write the decrees "to make clear that the annual goals cannot last indefinitely." *Ensley Branch,* 31 F.3d at 1577. After a valid selection procedure is in place, race-conscious goals could no longer be used "absent proof of ongoing racial discrimination, or of the lingering effects of past racial discrimination, with respect to that position." *Ibid.* The Court also required the district court to "re-write the decrees to relate the annual goals to the proportion of blacks in the relevant, objectively-qualified labor pool, calculated with reasonably available data." *Ibid.*

5. Post-1994 Decree Modification Proceedings

After this Court ordered modification of the decrees, the parties engaged in protracted negotiations. Relevant to this appeal are the arguments the Wilks plaintiffs-intervenors raised concerning implementation of valid selection

procedures. They argued that this Court's 1994 order required the City to undertake job validation studies for all employee selection procedures, even for those positions for which no adverse impact has been found (Doc. 594, Report of the Wilks Class Concerning Modification of the 1981 Decrees (Nov. 14, 1995)). In essence, they argued that no selection procedure was "valid" unless it was objective and had been the subject of a job validation study (see Wilks Br. at 9-10).

The district court rejected that argument, agreeing with the United States that job validation studies are not needed absent evidence that the selection procedures had a disparate impact based on race or sex (see Wilks Br. at 10). The court entered orders modifying the two consent decrees on December 20, 1995 (R.E. 597, 598). The City's order required it to ensure that selection procedures "either: (1) have no adverse impact on the basis of race or sex, * * * or (2) be job-related for the job classification(s) in question and consistent with business necessity, in accordance with Title VII" (R.E. 598, ¶ 8). It established as a new long term objective: "that any and all unlawful barriers to employment assignment, and promotion that have existed for blacks and women are removed, that any present effects of past employment discrimination are fully remedied, and that equal employment opportunities with the City are available to all persons, regardless of race or sex, as required by Title VII of the Civil Rights Act of 1964, as amended"

(R.E. 598, ¶ 5). The modification order also required the City to establish an interim plan to counteract identified adverse impact. That plan may include annual interim appointment goals only if: (1) the goals are temporary and narrowly tailored; (2) there is no feasible race or gender blind remedy to counteract the identified adverse impact; and (3) the plan is filed with and approved by the district court (R.E. 598, ¶16). The modification orders also established timetables for the parties to exchange information on adverse impact and selection procedure validation. Both decrees were set to expire in December 2000 subject to extension for good cause (R.E. 597, 598).

During the next five years, the parties exchanged information and monitored compliance with the consent decrees. At no time after 1995 did the City propose or implement any plans with race or sex conscious goals (see Doc. 694, Tr. at 10-11 (Oct. 30, 2000)). In 1996, the parties filed reports identifying jobs that they contended had selection procedures with adverse impact based on sex and/or race. In 1998, the Wilks plaintiffs-intervenors moved for contempt and further relief, arguing that the City's promotional practices in the police department violated the decrees and that this Court's 1994 order required the City to validate selection procedures for all positions (see R.E. 696 at 3; Wilks Br. at 12-13, 31-32). The district court found that noncompliance had been proved with respect to only the

police captain selection procedure (for which disparate impact had been demonstrated) and ordered the City to validate the selection procedures for that position but no other (see R.E. 696 at 4; Wilks Br. at 12-13, 31-32). The Wilks plaintiffs-intervenors filed a notice of appeal from that order on July 9, 1998, but moved to dismiss the appeal shortly thereafter (Doc. 642; Motion to Dismiss Appeal, No. 98-6512 (11th Cir. Aug. 11, 1998)).

6. Proceedings At Issue In This Appeal

In October 2000, the new district court judge assigned to the case ordered the parties to submit recommendations on actions needed to bring the case to a close (R.E. 692). In response, all parties agreed that extension of the decrees was warranted because the City and the Board had yet "to develop and implement lawful, non-discriminatory selection procedures for hiring and promotion" (R.E. 708, Order Extending 1981 Consent Decrees and 1995 Modification Orders, at 2). The Wilks plaintiffs-intervenors filed a motion for additional relief, seeking for a third time to convince the district court that this Court's 1994 order required the City to validate selection procedures for all positions, not just those that had been identified as having disparate impact (R.E. 696). The Wilks plaintiffs-intervenors presented no evidence that the selection procedures in those job categories for which no disparate impact had been found were anything other than race-neutral.

In their view, "[s]imply requiring the avoidance of adverse impact is tantamount to an order to continue a program of racial balancing" (R.E. 696 at 5). The Wilks plaintiffs-intervenors also contended that the experience of the last five years, in which the City had made little progress in validating procedures where disparate impact was demonstrated, proved that in 1995, the district court should have required validation of *all* procedures, not just those for which adverse impact is demonstrated (R.E. 696 at 5).

The United States and the Martin plaintiffs opposed that motion, noting that the district court rejected the same argument in 1995 (see R.E. 705 at 6, 13; Doc. 695, November 17, 2000 Status Report on Compliance with the 1995 Modification Orders, at 5-6). The district court held a non-evidentiary hearing considering the motion on November 30, 2000 (R.E. 707), and denied the motion of the Wilks plaintiffs-intervenors for additional relief on December 4, 2000 (R.E. 704). On December 18, 2000, the district court extended the consent decrees until June 30, 2002, to allow the implementation and development of lawful selection procedures for the remaining job classifications (R.E. 708).

C. *Standard Of Review*

The jurisdictional issue is a question of law that this Court reviews *de novo*. *Randolph* v. *Green Tree Financial Corp.*, 178 F.3d 1149 (11th Cir. 1999), aff'd in

part, rev'd in part, 531 U.S. 79 (2000). The district court's refusal to modify the consent decree is reviewable for an abuse of discretion. *Jacksonville Branch, NAACP* v. *Duval County Sch. Bd.*, 978 F.2d 1574, 1578 (11th Cir. 1992); see also *Hodge* v. *Department of Housing and Urban Development,* 862 F.2d 859, 864 (11th Cir. 1989) (district court "must exercise judicious discretion" that is wide, but not unbounded, in considering a motion to modify a consent decree).

SUMMARY OF ARGUMENT

Under Fed. R. App. P. 4(a)(1), the time for filing an appeal from the December 19, 1995, interlocutory order denying the motion of the Wilks plaintiffs-intervenors to modify the decree was 60 days after entry of the order (see R.E. 598). The Wilks plaintiffs-intervenors, the losing party, did not file a notice of appeal with 60 days of the 1995 order, but filed two successive repetitive motions, in 1998 and 2000. A losing party, however, may not file successive motions requesting the same relief (absent changed circumstances, new evidence, or a change in the law) "simply to revisit the original injunction decision or resurrect an expired time for appeal." 16 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice and Procedure* § 3924.2 (2d ed. 1996) (citing *Stiller* v. *Squeez-A-Purse Corp.*, 251 F.2d 561, 563 (6th Cir. 1958)). As in *Winfield* v. *St. Joe Paper Co.*, 663 F.2d 1031, 1032 (11th Cir. 1981), to allow appellants here to

pursue their appeal of repetitive orders "would circumvent the policy behind Rule 4 of the Federal Rules of Appellate Procedure," which requires the appeal to be filed within 30 or 60 days of the first order.

If the Court addresses the merits, the district court's judgment should be affirmed because there was no abuse of discretion. In *Ensley Branch, NAACP* v. *Seibels*, 31 F.3d 1548 (1994), this Court ordered the City to adopt race-neutral selection procedures that did not have a disparate racial impact and to cease its reliance on race-conscious remedies. Thus, the City could "implement selection procedures that *either* had no disparate impact on blacks and women *or* that, despite having disparate impact, were job related as that term in used in Title VII." 31 F.3d at 1571 (emphasis in original). The Court did not, as the Wilks plaintiffs-intervenors argue, require the City to use only objective selection devices that could be proven to be job-related. This Court has expressly approved the use of subjective selection devices in a similar context, recognizing that "subjective evaluations of a job candidate are often critical to the decision-making process." *Denney* v. *City of Albany*, 247 F.3d 1172, 1185 (2001) (quoting *Chapman* v. *AI Transp.*, 229 F.3d 1012, 1033 (11th Cir. 2000)). As long as the City is using race-neutral selection devices in a non-discriminatory manner, it is complying with this Court's order and Title VII, and no job-validation studies are required.

The Wilks plaintiffs-intervenors would have this Court draw an inference of discriminatory intent from the *absence* of disparate impact in certain positions -- that the only way the City was able to avoid disparate impact is by using race-conscious selection procedures (see Wilks Br. at 34). But this is only an assertion unsupported either by direct or indirect evidence that any applicant received a racial preference. And to suggest that such an inference should be drawn from *lack* of disparate impact is completely contrary to the principles governing claims of discrimination, under which courts may find discrimination based on an unjustified racial disparity in an employer's work force. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977).

ARGUMENT

I

THIS COURT HAS NO JURISDICTION BECAUSE THE NOTICE OF APPEAL IS UNTIMELY

This Court lacks jurisdiction over this appeal because the notice of appeal is more than five years out of time. The Wilks plaintiffs-intervenors seek to appeal from the latest order denying their motion to modify the consent decree to require the City of Birmingham to perform job validation studies for all employee selection procedures, rather than for just those having adverse impact based on race or sex

(R.E. 696). This is the precise motion the Wilks plaintiffs-intervenors made and which the district court denied in 1995 and in 1998 (R.E. 598; see R.E. 696 at 2, 4; Wilks Br. at 12-13, 32). On all three occasions (see R.E. 696, and R.E. 696 at 2, 4; Wilks Br. at 32-33), the Wilks plaintiffs-intervenors argued that unless the consent decree required all selection devices to be validated, the consent decree does not comply with this Court's 1994 order in *Ensley Branch, NAACP* v. *Seibels*, 31 F.3d 1548 (11th Cir. 1994).

An interlocutory order denying a motion to modify an injunction normally is appealable under 28 U.S.C. 1292(a)(1). The time for filing such an appeal is 60 days if one of the parties is the United States. Fed. R. App. P. 4(a)(1). If that time passes and no appeal is filed, the losing party may not file a successive motion requesting the same relief (absent changed circumstances, new evidence, or a change in the law) "simply to revisit the original injunction decision or resurrect an expired time for appeal." 16 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice and Procedure* § 3924.2 (2d ed. 1996) (citing *Stiller* v. *Squeez-A-Purse Corp.*, 251 F.2d 561, 563 (6th Cir. 1958)).

This Court recognized this limitation on appeal of a subsequent, repetitive order absent changed circumstances in *Winfield* v. *St. Joe Paper Co.*, 663 F.2d 1031 (11th Cir. 1981). The Court dismissed the appeal of a denial of a motion for

preliminary injunction, finding that while normally such an interlocutory order is appealable under 28 U.S.C. 1292(a)(1), in that case "[i]t was simply a refiling of a motion which had been denied two years earlier." 663 F.2d at 1032. To allow appellants to pursue their appeal "would circumvent the policy behind Rule 4 of the Federal Rules of Appellate Procedure," *ibid.,* which requires the appeal to be filed within 30 or 60 days of the order. Other courts of appeals (in addition to the Sixth Circuit, noted above) have agreed with this limit on interlocutory appeals from orders denying subsequent, repetitive motions where there has been no change in circumstances. *Gill* v. *Monroe County Dep't of Soc. Servs.*, 873 F.2d 647 (2d Cir. 1989) (citing *Winfield*); *Squillacote* v. *Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 750 (7th Cir. 1976). See also *Sierra On-Line, Inc.* v. *Phoenix Software, Inc.*, 739 F.2d 1415, 1419 n.4 (9th Cir. 1984) (distinguishing *Winfield* because a motion for reconsideration was filed within ten days under Fed. R. Civ. P. 59(e), tolling the time for appealing the original injunction).

In this case, the Wilks plaintiffs-intervenors did not appeal either the 1995 order or the 1998 order denying their motion to require job validation studies for all employee selection procedures. And it is clear from the brief that the Wilks plaintiffs-intervenors filed on appeal here that they recognize the same motion was denied in 1995 and 1998 (Wilks Br. at 8-10, 31-33, 37). The Wilks plaintiffs-

intervenors knew at that time that jobs for which disparate impact cannot be demonstrated would not be subject to job validation studies, and there are no changed circumstances or changes in law since then that render this last motion anything other than repetitive of the first. Certainly the fact that the City has been slow to produce job validation studies for the positions for which disparate impact has been alleged (see Wilks Brief at 15-17, 21) is not a change in circumstances that would justify requiring the City to perform job validation studies for all City positions. The basis for their argument, that this Court's 1994 order required across-the-board validation, has not changed since they first asserted it in 1995. Because the Wilks plaintiffs-intervenors did not appeal within 60 days of entry of the order in 1995, this Court has no jurisdiction of this untimely appeal.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO MODIFY THE CONSENT DECREE TO REQUIRE THE CITY TO VALIDATE JOB SELECTION DEVICES THAT WERE NOT DISCRIMINATORY IN EITHER PURPOSE OR EFFECT

A. *This Court's 1994 Order Does Not Require Across-The-Board Validation Studies Absent Evidence Of Disparate Impact*

In 1994, this Court ordered the modification of the consent decrees to require the City to adopt "non-discriminatory selection procedures." *Ensley Branch, NAACP* v. *Seibels* 31 F.3d 1548, 1571 (11th Cir.). The Court's decision

focused on tests and evinced concern that the decrees, as written, allowed the City and the Board to continue to administer tests that had a disparate impact and were not job-related, and then compensate for the disparity by making race-conscious hiring decisions. 31 F.3d at 1572. The Court noted that the ultimate goal is non-discrimination, and ordered modification of the decrees to replace race-conscious remedies with "race-neutral alternatives." 31 F.3d at 1571. Nothing in the Court's decision, however, requires the City to rely on tests or any other particular form of selection. Rather, the Court made clear that the decrees could require use of any number of selection procedures, including a lottery or "subjective screening tools," as long as they mandated a "race-neutral device to select from among those who are qualified." 31 F.3d at 1574 n.12, 1575 n.13.

The Wilks plaintiffs-intervenors assume that no employee selection procedure is "valid" until a job validation study has been performed, and "some kind of reliable objective procedures are in place" (Wilks Br. at 17). But neither this Court nor Title VII requires the use of "objective" procedures. See *Denney* v. *City of Albany*, 247 F.3d 1172, 1185-1186 (11th Cir. 2001). Subjective employment criteria are subject to the same two types of analysis under Title VII -- disparate treatment and disparate impact -- as other procedures. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-991 (1988). As the Supreme Court

recognized in *Watson*, subjective factors such as "common sense, good judgment, originality, ambition, loyalty and tact" often must be assessed primarily in a subjective fashion. 487 U.S. at 991 (plurality opinion). Subjective procedures are "valid" as long as they are lawful, and they are lawful if there is no discriminatory intent or effect. If there is disparate impact, there *may* be illegal discrimination if the selection procedure is not job-related, or there are alternatives with less disparate impact that serve the employer's legitimate needs equally well. *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1275 (11th Cir. 2000). But a court need not analyze job-relatedness unless there is disparate impact. The procedures this Court suggested as alternatives in footnote 12 of its 1994 opinion, *Ensley Branch*, 31 F.3d at 1574, could not be validated because they are not "objective," but they are nonetheless "valid" because they are race neutral.

The contrary view, that all selection devices must be validated and "objective," cannot be reconciled with this Court's opinion, which found that "[t]he Board was quite properly ordered to implement selection procedures that *either* had no disparate impact on blacks and women *or* that, despite having disparate impact, were 'job related' as that term is used in Title VII." 31 F.3d at 1571 (emphasis in original). This Court recognized that the Board or the City should be put to the test of proving a procedure is job-related only if disparate impact has

been established.

This position is not, as the Wilks plaintiffs-intervenors suggest (Wilks Br. at 34-35), a variation on the position the Supreme Court rejected in *Connecticut* v. *Teal*, 457 U.S. 440 (1982). In *Teal*, the Court held that overall racial balance in an employer's work force did not justify use of a job selection device that had an adverse impact on black applicants. 457 U.S. at 455. All applicants had the right to fair procedures during the selection process. 457 U.S. at 456-457. Here, the Wilks plaintiffs-intervenors were required to identify some aspect of the selection process that had an adverse impact on white or black applicants. To require job validation studies for all positions absent any evidence of discriminatory effect at any stage of the selection process would be a great waste of public resources.

B. *The Wilks Plaintiffs-Intervenors Did Not Prove That The City's Selection Procedures Are Discriminatory*

The Wilks plaintiffs-intervenors argue that while the procedures the City has implemented may not have not had a disparate impact, they are nevertheless discriminatory. The Wilks plaintiffs-intervenors are thus left with the burden of proving disparate treatment. A disparate treatment claim is a claim that "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." *International Bhd. of Teamsters* v.

United States, 431 U.S. 324, 335 n.15 (1977). Critical to claims under a disparate treatment theory is an allegation of facts sufficient to establish that the employer acted with the intent to discriminate. *Ibid.*; see also *EEOC* v. *Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1286 (11th Cir. 2000).

It is certainly true that if, as the Wilks plaintiffs-intervenors allege, the City were engaged in a "new form of racial balancing" (Wilks Br. at 36) and were choosing employees based on their race, it would be contrary to the decrees and Title VII. But while the Wilks plaintiffs-intervenors have alluded to intentional discrimination, there is no direct or indirect evidence of intentional discrimination after the 1995 modifications. All the Wilks plaintiffs-intervenors have demonstrated is that the City abandoned certain selection procedures that had a disparate impact and adopted alternative procedures, including structured interviews, in their place. The upshot of their argument appears to be that use of race-neutral selection procedures would naturally have a disparate impact, and that the way the City avoided disparate impact was by conscious racial balancing (Wilks Br. at 34). The Wilks plaintiffs-intervenors would thus have this Court draw an inference of discrimination from the *absence* of disparate impact, an inference unsupported by Title VII or the cases interpreting it. See, *e.g., Teamsters*, 431 U.S. at 335 n.15.

The Wilks plaintiffs-intervenors do not demonstrate that African American

applicants were given a preference of any kind, that they were given a different test than other applicants, that they were treated differently in interviews, that they were scored differently from other applicants, or that different qualifications were required of African American applicants than other applicants. There is no direct or indirect evidence that the applicant's race entered into any hiring decisions. And this Court recently and clearly rejected the claim that a promotion process "dependent upon 'unreviewable' subjective factors, rather than objective data, itself constitutes proof of an intent to discriminate." *Denney*, 247 F.3d at 1185. This Court found instead that "[c]ertainly nothing in our precedent establishes that an employer's reliance upon legitimate, job-related subjective considerations suggests in its own right an intent to facilitate discrimination." 257 F.3d at 1186.

Here, the City adopted race-neutral procedures designed to secure equal treatment to all applicants regardless of their race. While the Wilks plaintiffs-intervenors may prefer the City to use selection criteria that have no subjective element, neither this Court nor Title VII has imposed such a requirement. Rather, this Court required the City to adopt "non-discriminatory selection procedures." *Ensley Branch*, 31 F.3d at 1571. Absent any evidence that the City has treated applicants or employees differently based on race or sex, the district court did not abuse its discretion in denying the motion to modify the consent decrees.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction. If the Court reaches the merits, the district court's order should be affirmed.

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains 5638 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

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