IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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WALTER HOLLAND; OVESTON COX; TERRY JACOBS; BRIAN TAYLOR; WALTER WILLIAMS; MILDEO RAGHU; JAMES ROBERSON; LUTHER GREGG; WHILHELMINA SHERROD; LILLI SMITHERMAN, as Administratrix of the Estate of
Richard Smitherman, on behalf of themelves and all other persons similarly situated

Plaintiffs-Appellees /Cross-Appellants

v.

NEW JERSEY DEPARTMENT OF CORRECTIONS, THE; *JACK TERHUNE; WILLIAM PLANTIER; SCOTT FAUNCE; GEORGE BLASKEWICZ; JOHN SWAL; JAMES WILLIAMS; FRANK BUDD; DAVID WIANECKI; LOUIS HELMKIN; ARTHUR FINGERMAN; WAYNE SCHULTZ; RONALD ENSANA; THOMAS MORAN; MICHAEL VIGGIANO; PAUL SCHUSTER; GREGORY DAUKSHAUS; LAWRENCE CARPENTER; PATRICK ARVONIO; AL ORTIZ; JOSEPH BUTLER;
ROBERT MILLER; HERBERT BOWLBY; MICHAEL DEVINE; DOMINICK CONTE; BARRY PARKS; RAYMOND CONOVER; DAVID TILBURY; ANTHONY PORTO; ROBERT STEPHENS; JAMES LUTZ; FREDERICK VALUSEK; CAROLYN ABBOA-OFFEI; LYDELL SHEERER; CHRISTOPHER NORELLI; GEORGE KENNYBROOK; individually and in
their capacities as employees and agents of the New Jersey Department of Corrections; STATE LAW ENFORCEMENT CONFERENCE OF THE NEW JERSEY STATE POLICEMEN'S BENEVOLENT ASSOCIATION; NEW JERSEY LAW ENFORCEMENT SUPERVISIORS ASSOCIATION, PRIMARY LEVEL SUPERVISORY LAW ENFORCEMENT UNIT; NEW
JERSEY SUPERIOR OFFICER'S LAW ENFORCEMENT ASSOCIATION, SUPERIOR OFFICERS LAW ENFORCEMENT UNIT; NEW JERSEY SUPERIOR OFFICERS'S LAW ENFORCEMENT ASSOCIATION, CAPTIONS UNIT; INTERNAL AFFAIRS INVESTIGATORS ASSOCIATION, INTERNAL AFFAIRS INVESTIGATORS UNIT, as necessary parties pursuant to
Fed. R. Civ. Pro. 19 (a)

(D.C. No. 93-cv-01683)

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JAMES LUTZ

v.

LUTHER GREGG

(D.C. No. 94-cv-02391)

(For continuation of caption, see back of page)

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BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant

LILLI SMITHERMAN, in her Capacity as Executrix of the Estate of RICHARD SMITHERMAN; WALTER HOLLAND; OVESTON COX; BRIAN TAYLOR; TERRY JACOBS; WALTER WILLIAMS,

Plaintiffs-Intervenor-Appellees/Cross-Appellants

v.

STATE OF NEW JERSEY; NEW JERSEY DEPARTMENT OF CORRECTIONS; *JACK TERHUNE, in his Official Capacity as Commissioner of the New Jersey Department of Corrections; STATE LAW ENFORCEMENT CONFERENCE OF THE NEW JERSEY STATE POLICEMEN'S BENEVOLENT ASSOCIATION; NEW JERSEY LAW ENFORCEMENT SUPERVISORS ASSOCIATION, PRIMARY LEVEL SUPERVISORY LAW ENFORCEMENT UNIT; NEW JERSEY SUPERIOR OFFICERS LAW ENFORCEMENT ASSOCIATION, SUPERIOR OFFICERS LAW ENFORCEMENT UNIT; NEW JERSEY SUPERIOR OFFICERS LAW ENFORCEMENT ASSOCIATION, CAPTAIN UNIT; INTERNAL AFFAIRS INVESTIGATORS ASSOCIATION, INTERNAL AFFAIRS INVESTIGATORS UNIT

(D.C. No. 94-cv-03087)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant

LENA HASKINS, on behalf of herself and all other persons similarly situated,

Plaintiffs-Intervenor-Appellees/Cross-Appellants

v.

NEW JERSEY DEPARTMENT OF CORRECTIONS, THE; *JACK TERHUNE; JOSEPH GLOVER, individually and in their capacity as employees of the New Jersey Department of Corrections,

(D.C. No. 94-cv-04724)

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*substituted pursuant to rule 43(c)(2)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-1801, 00-2356, 00-2357

WALTER HOLLAND, et al.

Plaintiffs-Appellees/
Cross-appellants

v.

NEW JERSEY DEPARTMENT OF CORRECTIONS, et al.

Defendants-Appellants/
Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

STATEMENT OF JURISDICTION

The United States filed two complaints in the United States District Court for the District of New Jersey, alleging that the New Jersey Department of Corrections violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. The district court had jurisdiction over the actions pursuant to 28 U.S.C. 1331 and 1345 and 42 U.S.C. 2000e-5(f)(3) and 2000e-6(b).

Defendants' appeal is from an order issued May 10, 2000, modifying a consent decree to extend its injunctive provisions for an additional 10 months, an order over which this Court has jurisdiction pursuant to 28 U.S.C. 1292(a)(1) (not, as defendants contend, 28 U.S.C. 1291).

The United States' cross-appeal is from that order and the district court's July 25, 2000, order denying the United States' renewed motion to amend the Decree to extend it for an additional two years, over which this Court also has jurisdiction under 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court had the authority, pursuant to the terms of the Consent Decree or its inherent equitable authority, to modify the termination date of the Decree previously entered by the court.

2. Whether the district court abused its discretion in modifying the Consent Decree to extend the termination date for injunctive provisions of the Decree.

3. (Cross-appeal) Whether the district court abused its discretion in refusing to modify the termination date of a consent decree that was intended to be in effect for four years for an additional two years after finding that defendants were "not in substantial compliance with the consent decree" for the first three years and ten months of the Decree's existence.

The two-year extension was pressed by the United States in the district court (App. 121-123, 349-378), objected to by defendants (App. 243-253, 383-387), and resolved by the court's orders of May 10, 2000, and July 25, 2000 (App. 103-105; S.App. 7-11).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously. The United States is not aware of any related cases or proceedings pending in this or any other court.

STATEMENT OF THE CASE

In June 1991, the Equal Employment Opportunity Commission (EEOC) received a charge from Richard Smitherman alleging that white officers, supervisors, and managers at the New Jersey Department of Corrections (NJDOC) had subjected him and other black employees to constant racial remarks and slurs. Pursuant to Title VII of the Civil Rights Act of 1964, the EEOC investigated the charge, found reasonable cause to believe that the allegations of racial harassment were true and, after attempting unsuccessfully to achieve a voluntary resolution of these matters, referred the charge to the Department of Justice. On December 2, 1993, the Department informed New Jersey that it had concluded that the NJDOC had engaged in a pattern or practice of discrimination against black employees, and outlined in some detail the flagrant use of racial insults directed against black employees (*e.g.*, "nigger," "stupid nigger," "niggers go back to Africa," "blackie"), and the white employees who supported them (*e.g*, "nigger lover," "traitors to the

purity of the white race"), as well as other acts of discriminatory conduct, and the the failure of NJDOC to respond to the problem (S.App. 489-494).[1] On June 28, 1994, after further unsuccessful attempts to achieve voluntary compliance, the United States filed a complaint in the District Court of New Jersey (*United States* v. *New Jersey*, No. 94-cv-3087), alleging a pattern or practice of race discrimination and harassment by the New Jersey Department of Corrections and its officials (S.App. 465-473).[2]

In September 1994, on motion of the United States (and with the consent of all the parties), the action was consolidated for all purposes with a private action that raised similar allegations (*Smitherman* v. *New Jersey Department of Corrections*, No. 93-cv-1683, also known as *Holland* v. *New Jersey Department of Corrections*, after the death of Smitherman in February 1994) (S.App. 18-19). In

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[1] "S.App." refers to the Supplemental Appendix filed on behalf of the United States and private plaintiffs as appellees/cross-appellants. "App." refers to the Appendix filed on behalf of defendants-appellants/cross-appellees. "Br." refers to the opening Brief on Behalf of Defendants/Appellants.

[2] With the consent of the parties, this case, along with all the related cases, was referred to Magistrate Judge Joel A. Pisano, who retained jurisdiction over the proceedings even after being appointed to the District Court. For convenience, we will refer to his orders as those of "the district court."

addition, the district court permitted the plaintiffs in *Smitherman* to intervene in the United States' action (App. 4). Also in September 1994, the United States filed a separate complaint alleging that the NJDOC had sexually harassed a female employee (*United States* v. *New Jersey Department of Corrections*, No. 94-cv-4724). The employee was permitted to intervene in that action on behalf of herself and a class of female NJDOC employees who complained of sex discrimination and harassment (App. 5).

With the assistance of a court-appointed mediator, the parties in all these actions drafted a consent decree to resolve the complaints (S.App. 23). On May 10, 1996, the district court approved the settlement and entered it as a decree of the court (S.App. 40-65).

By its terms, the court retained jurisdiction over the Decree for four years and most of the injunctive relief was to terminate at that time (App. 53-54 ¶ 63). Over the next four years (as detailed below), the district court issued orders to enforce the Decree and modify its terms. In September 1999, the United States and private plaintiffs formally requested the district court to modify the Decree to extend the injunctive relief for an additional two years (App. 121-123). On May 10, 2000, the district court entered an order modifying the Decree to extend the

injunctive relief for almost 10 months, until March 1, 2001 (App. 104).

On June 9, 2000, defendants filed a notice of appeal from this order (App. 106-107). On July 7, 2000, pursuant to Fed. R. App. P. 4(a)(5), the district court extended the time for the United States and private plaintiffs to file notices of appeal for 30 days (S.App. 4-5). The district court denied the United States and private plaintiffs' motion to further extend the Decree on July 25, 2000 (S.App. 7). The United States and private plaintiffs' notices of appeal were timely filed on August 8, 2000 (S.App 12-14, 15-17).

STATEMENT OF THE FACTS

1. After "substantial discovery * * * in the course of the fifteen months" and extensive mediation efforts, the parties proposed an agreement that "alter[ed] the manner in which [the New Jersey Department of Corrections] handles issue[s] of race and sexual discrimination and harassment" (S.App. 51, 45).

In addition to over $5 million in monetary damages to be paid to the individual plaintiffs and members of the class (S.App. 46), the settlement provided for extensive prospective relief. In entering the settlement as an order of the court, the district court explained that "the injunctive relief provisions of the Decree attempt to completely overhaul the NJDOC's current practices in handling

complaints of racial and sexual discrimination and any resultant retaliation; to ensure that supervisors and employees who discriminate, harass, or retaliate against complainants receive appropriate discipline; and to alleviate the hostile work environment that is alleged to pervade the NJDOC by providing extensive training for all supervisors and employees" (S.App. 45).

Although defendants did not acknowledge liability as part of the settlement (App. 6), in entering the Decree, the court made its own assessment of the evidence. It found that "the plaintiffs' risk of establishing liability in this case does not appear to be great" (S.App. 55). It explained that "[t]hroughout the negotiations, the defendant State of New Jersey has recognized the *pervasive pattern of discrimination* that has characterized the NJDOC during the relevant class period," and that "the State of New Jersey supports the Consent Decree as the best way to eradicate the Department of Corrections' *chronic history of discrimination*" (S.App. 56, 57) (emphases added). It concluded that the "Consent Decree permits the [United States] Department of Justice to achieve [its goal of enforcing civil rights laws in governmental workplaces] * * * by providing concrete relief that will remedy both the claims of the plaintiff class and *the discriminatory practices historically in place at the NJDOC*" (S.App. 57)

(emphasis added).

2. Over the next four years, after exhausting the dispute resolution procedure outlined in the Decree, the United States and private plaintiffs petitioned the court on a number of occasions to find defendants in non-compliance and issue appropriate remedial orders. The bulk of these concerns were resolved informally between the parties. In other instances, the court declined to make a finding on the merits of the complaint because of defendants' representations that the challenged practice had changed. Nonetheless, over the course of the Decree's existence, the district court made a number of findings of non-compliance by defendants and, in other instances, defendants themselves admitted non-compliance.[3]

Year 1: Non-compliance with even the least complicated provisions of the Decree was a problem from the beginning. For example, Paragraph 65 of the Decree provided that "[w]ithin ten (10) days after the entry of this Decree," defendants "shall *post* a copy of Paragraphs 1-36 and 42-65 of this Decree and all Appendices in a prominent and conspicuous location used for posting notices at each NJDOC facility" and "[i]n addition * * * provide a copy of this Decree and

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[3] We have elected not to rely on numerous other instances when the United States and/or private plaintiffs repeatedly brought an alleged violation to defendants' attention and they remained silent.

Appendices, at no cost, to any NJDOC employee who so requests, and such copies shall be available at each NJDOC facility" (App. 54 (emphasis added)). However, defendants did not post the Decree at certain facilities, arguing that the thickness of the Decree made it more practical to simply make the Decree available to employees (thus negating the separate posting requirement) (S.App. 596). Defendants did not "post" the Decree until the court instructed them to do so in September 1996, four months late (S.App. 596-597), thus depriving employees of the knowledge of their rights under the Decree and the proper procedures for invoking those rights.

A subsequent hearing to resolve issues concerning defendants' compliance with the Decree was held on February 26, 1997. The United States and private plaintiffs contended that ten months after the effective date of the Decree, defendants were still not in compliance with Paragraph 15 of the Decree, which required them to "complete investigations and issue findings on complaints * * * within forty-five (45) days of receipt of complaints" (App. 21). Defendants acknowledged non-compliance ("we're not meeting the 45-day requirements"), but explained that after the new investigator they hired in November 1996 began to eliminate the backlog, "we don't expect any more problems" and they did not "see

that 45-day issue as a big issue anymore" (S.App. 133). Based on these representations, the district court permitted them an additional two months to come into compliance (S.App. 134).

In addition, the United States and private plaintiffs contended that defendants were not in compliance with the Paragraph 25 of the Decree, which required "no later than (6) months after the date of entry of this Decree," *i.e.*, November 10, 1996, defendants to initiate a training program for existing and newly hired supervisors and employees, instructing "what acts may constitute racial or sexual discrimination [and harassment], and what acts may constitute retaliation, and the procedures for reporting and investigating claims of employment discrimination and retaliation" (App. 28). At the hearing, defendants explained that although they had not yet initiated the program, they had a "pilot program" that had been shown to "certain individuals to watch it and make critiques of that program, and now the program will be developed" for use in March 1997, five months late (S.App. 138).

Year 2: In May 1997, the United States and private plaintiffs once again raised with the district court defendants' non-compliance with the 45-day requirement of Paragraph 15 (S.App. 547-569). Defendants responded that they did "not disagree with this assessment" (S.App. 570), and asked that the

requirement be modified to extend the time to resolve complaints (S.App. 573). Similarly, in response to assertions by the United States and private plaintiffs that defendants had violated various requirements involving the investigation of complaints of discrimination, defendants agreed that "mistakes were made," but asserted that "small violations of the decree * * * could and should have been expected" (S.App. 576, 577).

Later that year, the court issued an opinion finding that defendants had failed to comply with the Decree's obligation to resolve complaints of discrimination accurately (S.App. 67-68). The court found that defendants' "investigation of [an employee's] complaints was insufficient for its lack of thoroughness," in violation of the purposes of the Decree (S.App. 74). It found that defendants had failed to investigate relevant facts and failed to make credibility findings necessary to resolve issues of discriminatory intent and pretext, instead relying on the supervisors or co-workers' "bare denials" (S.App. 75, 77). The court concluded that after a complainant made out a prima facie case of discrimination, defendants had not satisfied the standard of investigating and punishing discrimination set forth in the Decree, "by basing [their] * * * decision merely upon the denials of [the accused supervisor] and by subsequently failing to develop a fuller factual

record to determine whether [his] explanations were pretextual" (S.App. 78-79).

Another hearing was convened in April 1998 to address further non-compliance by defendants. Although the parties had agreed that the requirements of Paragraph 15 could be modified to extend from 45 to 60 days the time defendants had to investigate and resolve allegations of discrimination, defendants were out of compliance with even the more lenient requirement. As defendants stated in January 1998, "some determinations are still not provided within the 60 days agreed to by the parties" (S.App. 647). The court found that the delays were "far beyond what * * * anybody would consider reasonable" and had "been troublesome from the beginning" (S.App 165, 164). "[T]he fact of the matter is," the court found, plaintiffs are "not being hyper-technical, they are not being hysterical, they've been telling us that this is a problem since day one and they're right" (S.App. 197). In its written order, the court found that there were "44 outstanding complaints that are currently overdue" (App. 484).

In addition, although the Decree required defendants to "develop a training program to ensure that supervisors and employees of the NJDOC are instructed on what acts may constitute racial or sexual discrimination, and what acts may constitute retaliation" (App. 27-28 ¶ 25), the training defendants provided

contained no such instructions, a defect they proposed to remedy by "hand[ing] [them] out" to supervisors during future programs (S.App. 640 & n.*). Similarly, although the Decree required that defendants' Equal Employment Division be staffed by "investigators with training in equal employment opportunity issues" (App. 14 ¶ 7), defendants conceded at the hearing that the training for such investigators "has been late" (S.App. 189).

Finally, the court found a violation in the manner in which two complaints had been investigated in terms of the identity of the investigator and the time it took to refer the matter to the Equal Employment Division, issues specifically addressed by the Decree (App. 14-15 ¶ 8, 20-21 ¶ 14). It concluded that in one instance defendants had "violated the Consent Decree: (1) in the manner in which it investigated that incident, (2) by failing to give prompt notice of the investigation to Class Counsel and the United States, and (3) in delaying unduly in reaching a determination" (App. 485; see also S.App. 209). In the other instance, regarding a racially offensive cartoon at Northern State Prison, the court found "a technical violation of the decree in the manner in that NJDOC investigated the complaint" (App. 486), but excused "the slip sho[d] manner in which this incident was investigated" for a number of fact-specific reasons (S.App. 223; see also S.App.

225 ("the investigation that was conducted, such as it was, was inappropriate")). The court concluded, however, that the latter incident "is just symptomatic of all the problems and lack of performance that has been demonstrated to date by the Department" (S.App. 224).

Year 3: In an October 1998 hearing, two and a half years after the effective date of the Decree, defendants explained that they were still preparing a training program (S.App. 241). Because they had not been in communication with the United States or private plaintiffs, the court deferred consideration of the issue (S.App. 242). The court did modify the Decree to impose a limit on the time from a finding of probable cause of discrimination until a final resolution of the complaint was issued. The court explained that "as much as we would like to impose a standard – a simple standard of reasonableness * * * on the department, * * * we've learned through experience that that can't be done" (S.App. 253). A number of additional allegations of violations could not be resolved because defendants' counsel was not prepared to address them (S.App. 234).

In preparation for the December 1998 hearings, defendants filed an affidavit in which they admitted that "determinations have been issued beyond the 60 day time limit" in violation of Paragraph 15, including one instance in which a file was

simply "misplaced," and that "[i]n some cases, class counsel and United States were not provided copies of determinations" in violation of Paragraphs 16, 17, and 19 (S.App. 749, 753). At the hearings, the court found that two of defendants' determinations had apparently applied the wrong legal standard or admitted irrelevant evidence regarding the complainant's character (S.App. 301, 311). It again found that defendants had failed to timely investigate and resolve the claims "in violation of [the court's] order" (S.App. 332-333).

Year 4: In a hearing before the court on August 5, 1999, addressing further allegations of non-compliance, the court lamented that "[i]t seems like we've done this over and over" (S.App. 341). The court noted its previous "findings" regarding the failings of defendants' adjudication of discrimination complaints and that it had declined to issue an order at that time "in the spirit of cooperation that I think I have contributed to in the years that I've been presiding over this matter" (S.App. 343, 347). But it found that defendants, having previously agreed to enter a memorandum of understanding that embodied the court's findings relating to the adjudication of such complaints and other disputes, subsequently repudiated the agreement (S.App. 349, 371). It thus entered the agreement as an order of the court (S.App. 114-118).

Also at that hearing, defendants conceded "there is still a backlog" of complaints that were not processed within the period required by Paragraph 15, and that "there are some files where extension letters have not been sent out in order to advise complainants * * * that their complaint has not been forgotten or lost through the cracks" (S.App. 359). But defendants represented that "tremendous strides have been made over the last year to get that backlog down to something that can be reasonably handled over the next couple of months" and that they "[were] in the process of bringing those files [of persons who had not been notified about the status of their case] up to date as well" (S.App. 359-360).

In December 1999, the court held a hearing to consider addressing the contempt motion filed by the United States and private plaintiffs. When asked by the court whether there are "complaints pending for more than sixty days that are unresolved," defendants answered "Yes, there are" (S.App. 389). In fact, defendants revealed that there were complaints that had exceeded the sixty-day requirement in September 1999 that were still not resolved (S.App. 390). The court explained that "what troubles me * * * is, first of all, the fact that there continues to be, even by the state's numbers * * * difficulty in meeting the dates that you agreed to and * * * which I included in an order" (S.App. 395). But

because of representations from defendants that they had a plan to eliminate the backlog (*e.g.*, hiring more employees and having people work overtime and on weekends) by March 15, 2000 (S.App. 414, 417-418), the court deferred addressing the contempt issue. On March 17, 2000, three years and ten months after the effective date of the Decree, defendants submitted an affidavit that they were finally in compliance with the 60-day requirement of the Decree (App. 458).

The United States and private plaintiffs had raised a number of other allegations of non-compliance with the court and asked for a finding of contempt on those grounds. The primary focus of the hearing was on allegations of discriminatory patterns of discipline between black and white officers.[4] The statistical reports generated by *defendants* found that in 1999, even though minorities constituted only 39% of employees, they constituted 65% of disciplined employees, and these disparities were "statistically significant" (defined by defendants as two or more standard deviations) at various facilities (S.App. 1024). The statistical measures actually understated the problem because, defendants

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[4] Defendants suggest (Br. 8) that concerns of systemic discrimination in discipline were raised for the first time in January 2000. That is incorrect. The United States and private plaintiffs raised the issue previously with defendants, consistent with the dispute resolution mechanism of the Decree, on a number of occasions, including June 1998 (S.App. 731), and April 1999 (S.App. 1074-1077).

acknowledged, "there was an error in one of the factors that was being used" in computing the deviations (S.App. 457) until the United States brought the fact to defendants' notice (App. 341; see also App. 412 (recalculating disparities with proper formula)). While defendants articulated a number of possible explanations for the disparity (App. 384-385), they provided no *evidence* that these explanations would in fact diminish the significant racial disparities they reported. The United States subsequently submitted an affidavit from a statistician that rebutted most of defendants' explanations and stated that the others were without support because no regression analysis had been done (App. 395-400). The district court found that "under the case law, *Hazelwood [School District* v. *United States*, 433 U.S. 299 (1977)] and other cases, I think the State has to, first of all, has an obligation to come forward with some response" (S.App. 463) in addition to one they had already made, which the court viewed as inadequate. See App. 472 (defendants need to "prepare an appropriate response").[5]

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[5] In *Hazelwood*, the Supreme Court held that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of [intentional] discrimination," and that "'if the difference between the expected value and the observed number is greater than two or three standard deviations,' then the hypothesis that [employees were treated] without regard to race would be suspect." 433 U.S. at 307, 309 n.14.

3. Beginning in April 1998, plaintiffs suggested to the district court that an extension of the Decree for an additional two years would be suitable means of curing the past violations and fulfilling the purposes of the Decree (S.App 172; see also S.App. 320 (making same point in December 1998)). In September 1999, the United States and private plaintiffs formally requested such an order (App. 121-123), and, after settlement talks encouraged by the district court failed (App. 337), renewed our request in January 2000 (App. 349-378).

After a hearing, the district court entered an oral order (App. 470-475), later put in writing (App. 103-105). The court found that "until approximately the first quarter of 2000 the State was not in substantial compliance with the consent decree, principally in connection with its obligation to issue timely decisions regarding discrimination complaints" and further "that class counsel have raised a claim of discriminatory discipline" (App. 103). While declining to hold defendants in contempt, the court extended the Decree in all material respects through March 1, 2001 (App. 104-105). It also ordered that in February 2001, the United States and private plaintiffs could appear to "SHOW CAUSE why the consent decree should not expire" (App. 105).

In a subsequent hearing involving defendants' motion for a stay and the United States and private plaintiffs' motion for reargument, the court explained that its order was based on the "history, and matters that are of public record in connection with this case" (App. 494). Based on its experience and after surveying its findings over the past four years, it explained that "I found there to be enough problems with other parts of the Decree than paragraph 15, to justify extending [it] in its entirety" (App. 496; see also App. 495 (there was "enough of a record made on issues other than the timing of the * * * decisions, which justify the Court in seeing to it that all parts of the Consent Decree remain in force for a period of time")). The court noted, "there are enough admissions in[] these transcripts that the State was in violation of the Consent Decree" that it could have "easily" found defendants in contempt "a long time ago," but had restrained itself because of the "respect the Court has for the difficult mission of the Department of Corrections" (App. 490).

SUMMARY OF ARGUMENT

The district court's findings of fact, unchallenged on appeal, demonstrate defendants' pattern of substantial non-compliance over the four years of the Decree. The district court had the authority, and indeed the duty, to modify the

Decree to respond to this serious, chronic non-compliance by postponing the Decree's termination date. The Decree itself granted the district court that authority. The judge who approved and entered the Decree and has supervised its implementation for four years so found, and this finding is consistent with the language and structure of the Decree itself. In any event, the district court's order was also well within the scope of its inherent equitable authority to modify the terms of the Decree in order to fulfill its objectives.

Nor did the district court abuse its discretion in extending all the prospective relief embodied in the Decree, rather than acting in a piecemeal fashion. The Decree itself was intended to act as an integrated whole to replace the "discriminatory practices historically in place at the NJDOC" with a culture of equal opportunity. Substantial non-compliance with any of these provisions, especially those involving training of employees and internal investigation and discipline of discrimination complaints, undermined the very sea-change in attitudes and work environment that the parties intended. The court's findings – that defendants violated a wide swath of the Decree's provisions and that significant unexplained disparities exist in defendants' treatment of their African-American employees – are evidence of the intertwined nature of the violations.

However, the district court did not go far enough. The injury suffered by the United States and private plaintiffs was not cured by defendants' last-minute compliance or the court's short-term extension. In order truly to change the behavior of discriminatory employees working for defendants, a reasonable period of consistent enforcement of the terms of the Decree is necessary. At a minimum, an additional two years is required for this to occur.

ARGUMENT

I

THE DISTRICT COURT HAD THE AUTHORITY TO MODIFY THE TERMINATION DATE OF THE CONSENT DECREE

A consent decree is a hybrid of a contract and an injunction. See *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992). Like a contract, it embodies an agreement between two parties. Like an injunction, it is entered by the district court pursuant to its equitable power and remains subject to its jurisdiction. Viewed as a matter of interpretation of the Decree or as an exercise of its inherent equitable power, the district court properly determined it had the authority to modify the termination date of the Decree in this case.

A. *The District Court Did Not Err In Interpreting The Consent Decree To Give It The Authority To Modify The Termination Date Of The Decree*

1. The district court found (App. 493) that it was authorized by the Decree itself to issue an order modifying the Decree's termination date. Defendants contend (Br. 12) that this holding is subject to *de novo* review. That is not a complete description of the law. Reconciling the general rule that meaning of unambiguous contracts is to be determined *de novo* with the district court's important role in approving and enforcing a consent decree, courts have granted a degree of deference to the district court's interpretation of a decree. This Court has held that while interpretation of a consent decree "is a matter of law over which we exercise plenary review," a district court's interpretation of a consent decree is entitled to "some deference" "in light of the district court's extensive experience with this case and the [decree]." *Halderman* v. *Pennhurst*, 901 F.2d 311, 319 n.11, 320 (3d Cir.), cert. denied, 498 U.S. 850 (1990). The Seventh Circuit case relied on by defendants (Br. 12) makes the same point. See *United States* v. *Board of Educ.*, 717 F.2d 378, 382 (1983) ("[T]he interpretation of consent decree provisions * * * is a matter of law and subject to plenary review * * * The district court's views on interpretation, however, are entitled to deference.") (citations omitted); accord *Officers for Justice* v. *Civil Serv. Comm'n*, 934 F.2d 1092, 1094

(9th Cir. 1991); *Langton* v. *Johnston*, 928 F.2d 1206, 1221 (1st Cir. 1991).

The Sixth Circuit has described this level of review as "deferential de novo," explaining that this hybrid standard was appropriate because "[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it." *Sault Ste. Marie Tribe of Chippewa Indians* v. *Engler*, 146 F.3d 367, 371-372 (1998). The Seventh Circuit has suggested that this "deference" merits a standard of review closer to an "abuse of discretion" standard. See *Goluba* v. *School Dist.*, 45 F.3d 1035, 1038 n.5 (1995).

2. Regardless of the degree of review that this Court applies to the district court's holding, the result in this appeal is the same. Defendants contend (Br. 18-19, 26) that the Decree left the court no power to modify the termination date in the Decree. But the text and structure of the Consent Decree reveal that the parties granted the district court the power to take whatever actions were necessary to effectuate the purposes of the Decree, including modifying the terms of the Decree itself. Paragraph 63 of the Consent Decree provides that the district court "shall retain jurisdiction of the matters covered by this Decree for a period of four (4) years from the date of entry of this Decree for such action as may be necessary or appropriate to effectuate the purposes of this Decree" (App. 53-54). Paragraph 64

provides that "[a]ny party may seek to modify the procedures enumerated in this Decree, provided that the proposed modifications effectuate the purposes of this Decree. Requests to modify shall be subject to the dispute resolution mechanism set forth in Paragraphs 59-62 of this Decree" (App. 54). Paragraph 60 of the Decree, in turn, provides that when the parties were unable to resolve issues among themselves, "such issues may be brought to the attention of Judge Pisano, and any remedy ordered shall be prospective" (App. 53).

By its clear terms, the Decree granted the court "jurisdiction" over the Decree for four years from May 10, 1996 (App. 53 ¶ 63). The district court's May 5 and May 10, 2000, orders were entered within this four-year window.[6] This jurisdiction was granted for the court to take "such action as may be necessary or appropriate to effectuate the purposes of this Decree" (App. 53 ¶ 63). Similar language ("such other and further relief as may be appropriate consistent with this Order") has been interpreted "as granting to the court during the [four]-year period the power to modify the decree and to grant additional relief not embodied in the decree." *Roberts* v. *St. Regis Paper Co.*, 653 F.2d 166, 172 (5th Cir. 1981).

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[6] Compare *EEOC* v. *Local 40*, 76 F.3d 76, 80-81 (2d Cir. 1996) (holding district court exceeded authority in attempting to retroactively extend decree 12 years after it had expired).

The Decree also authorized the court to "modify the procedures enumerated in this Decree, provided that the proposed modifications effectuate the purposes of this Decree" (App. 54 ¶ 64). The district court's order in essence modified the second sentence of Paragraph 63, which had stated that the Decree "shall be in effect for a period of four (4) years from the date of entry of this Decree, at which time all obligations under this Decree shall end" (App. 54 ¶ 63), so that it reads that the Decree "shall be in effect for a period of four (4) years *and ten (10) months* from the date of entry of this Decree." This modification did not affect the substance of defendants' duties under the Decree, but simply the amount of time they were obligated to comply with them. Indeed, four of the previous modifications of the Decree (one requested by defendants with the consent of United States and private plaintiffs, one requested by private plaintiffs with the consent of defendants and the United States, and two requested by the United States with no opposition from the other parties) involved extending the amount of time to comply with various provisions of the Decree.[7] And, consistent with

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[7] The court's approval of the parties' agreement in late 1997 to defendants'request to extend period they had to investigate and resolve discrimination complaints is reflected at App. 484. For the other orders modifying the time limits of the Decree, see S.App. 65-66 (granting modification of time limits in Paragraph 48 of the Decree (App. 46-47), regarding United States and private plaintiffs'

(continued...)

Paragraph 60, the remedy ordered in this case was prospective. Thus, the district court properly determined that the Decree itself vested it with the authority to modify the termination date of the Decree.[8]

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[7](...continued)
recommendations concerning individual monetary relief), 67-68 (granting further extension), 106-107 (granting motion to modify time limit in Paragraph 40b of the Decree (App. 39-40) regarding attorneys fees application).

[8] We agree with defendants (Br. 26) that the Consent Decree is unambiguous and that recourse to extrinsic evidence is thus not appropriate. See *United States* v. *New Jersey*, 194 F.3d 426, 433 (3d Cir. 1999) ("a court can consult extrinsic evidence in interpreting a consent decree only when the language of the decree is ambiguous"). However, if this Court found to the contrary, the case would have to be remanded to the district court for factual findings. For the meaning of an ambiguous contract is a question of fact that is subject to clear error review on appeal, see *In re Nelson Co.*, 959 F.2d 1260, 1263-1264 (3d Cir. 1992), and the district court made no factual findings on this point. While defendants assert (Br. 26-27) that earlier drafts of Paragraph 63 of the Decree contained a sentence authorizing the district court to extend the decree "for good cause," it does not inevitably follow that the absence of this language in the final Decree is conclusive evidence that the parties intended for the Decree not to be extended in any circumstances. To the contrary, the district court on remand could find the parties dropped the provision because they understood the district court had inherent equitable authority to modify the Decree, and thus the provision would be redundant. Or the court could find that the parties dropped that provision because they believed the standards for permitting an extension were already articulated in the previous sentence authorizing "such action as may be necessary or appropriate to effectuate the purposes of this Decree." These possibilities must be addressed by the district court in the first instance, for courts of appeals are not permitted to make factual findings. See *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986).

B. *The District Court Did Not Err In Concluding That It Had Inherent Authority To Modify The Termination Date Of The Decree*

1. The district court also stated (App. 494) that it was exercising its inherent equitable authority to modify the termination date of the Decree. Defendants suggest a number of limitations on the scope of this authority. The scope of a district court's inherent authority is a legal question reviewed *de novo*. See *In re Tutu Wells Contamination Litig.*, 120 F.3d 368, 383 (3d Cir. 1997). As we discuss in Part II, *infra*, the application of that authority to a given situation is reviewed for an abuse of discretion.

2. Because a consent decree is, in part, an injunction, the parties cannot bargain away the district court's inherent authority to adjust its prospective orders to ensure that they are in fact serving the purposes of the Decree and the underlying statute. "The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction. In a case like this the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce. * * * The parties could not become the conscience of the equity court and decide for it once and for all what was equitable and what was not, because the court was not acting to enforce a promise but to enforce a statute." *System Fed'n No. 91* v. *Wright*, 364 U.S. 642, 651, 652-653 (1961).

In the Supreme Court's first extended discussion of consent decrees, the Court stated that it was "not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent." *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932). The Court explained that even "[i]f the reservation [to modify a decree] had been omitted [from the decree itself], power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *Ibid.*; see also *Wright*, 364 U.S. at 647 ("The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief.").

This Court has consistently adhered to this position. In *Lasky* v. *Continental Products Corp.*, 804 F.2d 250 (1986), this Court emphatically held:

> The power of a court to enter a consent decree emanates from its authority to adjudicate the rights of the parties in the first instance. The authority thereafter to modify the consent decree similarly derives directly from the court's initial exercise of jurisdiction over the dispute. Put otherwise, a court has inherent power to modify a consent decree that it initially had the power to approve.

* * * * *

> We reiterate here that the district court's proper exercise of power over its consent order is not dependent upon an express retention of jurisdiction within that order. Rather, jurisdiction to modify the order is inherent in its power properly to issue the order.

Id. at 254, 256 n.11; see also *Sansom Comm.* v. *Lynn*, 735 F.2d 1535, 1538 n.3 (3d Cir. 1984) (*Sansom I*) ("A court possesses inherent power to modify its consent decree."); *Fox* v. *HUD*, 680 F.2d 315, 322 (3d Cir. 1982) ("Courts exercising their equitable jurisdiction are not powerless to alter the terms of a prospectively operating consent decree.").

Nor is there anything special about deadlines or termination dates embodied in a decree that would make them immune from this modification power. Cf. *Sansom Comm.* v. *Lynn*, 735 F.2d 1552 (3d Cir. 1984) (*Sansom II*) (district court had power to issue preliminary injunction to extend deadline provided in consent decree until it could decide merits of motion to modify decree); *Pennsylvania* v. *Local Union 542*, 807 F.2d 330 (3d Cir. 1986) (district court did not abuse discretion in extending six-year injunction an additional two years). Indeed, the Supreme Court has made clear that no term of a consent decree is immune from modification. See *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 387 (1992) ("If modification of one term of a consent decree defeats the purpose of the decree,

obviously modification would be all but impossible. That cannot be the rule.").

The Supreme Court has affirmed the authority of a district court to extend a termination date for certain prohibitions embodied in a consent decree, even absent the consent of the defendant. In *Chrysler Corp.* v. *United States*, 316 U.S. 556 (1942), the defendant entered into a settlement agreement in 1938 to resolve allegations by the United States that it had conspired with its affiliated finance company to violate the antitrust laws. The decree required Chrysler to disaffiliate itself from its finance company, but provided that "[i]t is an express condition of this decree that * * * *if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1941*, requiring General Motors [to disaffiliate itself from its finance company], then and in that event, nothing in this decree shall preclude [Chrysler from affiliating with any finance company]." *Id.* at 558. The district court subsequently granted the United States' motion to modify this provision to extend the time Chrysler would have to remain disaffiliated, without a similar order entered against General Motors, for an additional year. On review, the Supreme Court explained that "[t]he question is whether the change in date * * * amounted to an abuse of this power to modify. We think that the test to be applied in answering this question is whether the

change served to effectuate or to thwart the basic purpose of the original consent decree." *Id*. at 562. Concluding that the district court had not erred in determining the extension served the "purpose" of the decree and that the extension did not impose "a serious burden" on Chrysler, the Court affirmed. *Id*. at 563-564.

More recent court of appeals cases have likewise held that modifying a consent decree by extending a decree's obligations after the termination date embodied in the decree is within the court's equitable authority. In *EEOC* v. *Local 580*, 925 F.2d 588 (1991), the Second Circuit approved a district court order that "ordered implementation of extensive remedial measures" in response to non-compliance with an existing Consent Decree. *Id*. at 591. The defendants argued that the consent decree had expired after five years and thus the district court did not have the authority to issue its orders. *Id*. at 592. The court of appeals disagreed. First, it found that the decree had not expired of its own force. *Id*. at 593. In the alternative, it held that

> the court has inherent power to enforce consent judgments, beyond the remedial "contractual" terms agreed upon by the parties. Unlike a private agreement, a consent judgment contemplates judicial interests apart from those of the litigants. Until parties to such an instrument have fulfilled their express obligations, the court has continuing authority and discretion–pursuant to its independent, juridical interests–to ensure compliance.

Ibid.

The Sixth Circuit in *Vanguards* v. *City of Cleveland*, 23 F.3d 1013 (1994), likewise approved a district court's extension of a consent decree beyond the termination date. It held that "[t]he district court's decision to approve the proposed extension of the consent decree was an appropriate exercise of the court's discretion under both the express terms of the consent decree and the court's inherent power to modify a consent decree to effectuate the purposes of the decree." *Id*. at 1022; see also *Akers* v. *Ohio Dep't of Liquor Control*, 902 F.2d 477 (6th Cir. 1990) (district court abused discretion in failing to extend consent decree past termination date); *South* v. *Rowe*, 759 F.2d 610, 613 (7th Cir. 1985) (dictum) ("Of course, the parties could not agree to restrict the court's equitable powers to modify its judgment enforcing the consent decree, including the two-year limitation period, in light of 'changed circumstances.'").[9]

3. Defendants do not appear to dispute any of the contentions discussed above. Cf. S.App. 572 (defendants ask district court to apply a "flexible approach

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[9] The court of appeals in *Rowe* reversed a district court's order modifying the termination of a decree because it held that changed circumstances identified by plaintiff (*i.e.*, violations of the decree) were not "unforeseeable, extraordinary, and imposed such a heavy burden as to constitute a 'grievous wrong,'" a standard for modification drawn from *Swift*. *Id*. at 613-614. That standard was interred in *Rufo*, 502 U.S. at 378-380, and thus the ultimate result in *Rowe* should not be considered persuasive.

in determining whether [this] consent decree should be modified" to give them more time to process complaints, citing *Rufo*). Instead, they urge this Court to impose arbitrary limits on the court's power to modify a termination date. First, they contend (Br. 17) that "in the absence of a finding of non-compliance, a court has no power to modify the clear agreement of the parties to a consent decree." Even if defendants were correct that this was the legal standard, they do not dispute (Br. 12) that there was such a finding here, or challenge that finding as clearly erroneous. Instead, they argue (Br. 21) that modifying the termination date for the entire decree was a "disproportionate" response to the non-compliance in which they were engaged. But that is not a question of legal authority to modify the decree, but of whether the district court abused its discretion in exercising that authority, an issue we address in Part II, *infra*.

In any event, that is not the law. "The hornbook rule regarding plaintiff's requests for modification of injunctive relief is that 'modification is proper if the original purposes of the injunction are not being fulfilled in any material respect.'" *United States* v. *Local 560*, 974 F.2d 315, 331 (3d Cir. 1992). In *Local 560*, this Court explained that the proper test when plaintiffs seek a modification is derived

from *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968).[10] *United Shoe* involved a government request to modify an injunction ten years after the initial injunction had been entered, because the initial injunction had not been wholly effective. The district court denied the motion, holding that it was powerless to modify the injunction because there had been no showing of a "grievous wrong evoked by new and unforeseen conditions." *Id.* at 247. The Supreme Court reversed, holding that the district court had the power "to prescribe other, and if necessary more definitive, means to achieve the result" the decree was "specifically designed to achieve." *Id.* at 252, 249.

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[10] In *Rufo*, 502 U.S. at 383, 384, the Supreme Court held that a modification of a consent decree was appropriate when a party established that a "significant change in circumstances warrants revision of the decree," which included "unforeseen obstacles" to compliance. This Court has subsequently held that the more flexible *United Shoe* standard continues to apply when a *plaintiff* seeks to modify a consent decree. See *Local 560*, 974 F.2d at 331 n.9 (distinguishing between the situation "where a plaintiff seeks to modify the injunction based on the inadequacy of the initial decree" with "the obverse situation, where a defendant requests modification of an injunctive decree entered against him or her"); see also *Building & Constr. Trades Council* v. *NLRB*, 64 F.3d 880, 885 (3d Cir. 1995) ("Different considerations apply when the party seeking to modify the consent decree wishes to strengthen its prohibition because the purpose for which the decree had been framed has not been fully achieved." (citing *United Shoe*)). In any event, the district court's order meets the *Rufo* standard, for it was not a foreseeable event that defendants would remain substantially out of compliance with the Decree for bulk of its anticipated duration.

As this Court summarized the holding of *United Shoe*, "[t]he appropriate test for whether a new injunction was justified was whether 'time and experience have demonstrated' that 'the decree has failed to accomplish' its objectives. The Court further noted that each consideration of the request for modification 'must be based upon the specific facts and circumstances that are presented.'" *Local 560*, 974 F.2d at 332 (quoting *United Shoe*, 391 U.S. at 249).[11] Thus, defendants' substantial non-compliance was not a prerequisite for the exercise of the district court's authority.

4. Defendants also assert a distinct limitation on the district court's equitable authority. Relying on their understanding of contempt law, defendants argue (Br. 19-21) that a district court cannot modify the termination date of a decree even as a response to non-compliance because such a modification neither coerces current compliance nor remedies past violations. This is wrong for three reasons.

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[11] *United Shoe* and *Local 560* involved court-ordered injunctions after findings of liability. Defendants may argue that the standard relied on in these cases should not apply when there was no litigated violation. But this Court has instructed that the standard for modification should be the same for all court orders, litigated or not, because "the application of different standards to litigated decrees, consent decrees, decrees dealing with institutional reform, etc. could generate an undesirable complexity and uncertainty about the standard that an appellate court should apply in reviewing an order to grant or deny modification of an equitable decree." *Favia* v. *Indiana Univ.*, 7 F.3d 332, 341 n.16 (3d Cir. 1993); see also *Wright*, 364 U.S. at 650-651 (standard for modification same for injunction and consent decree).

First, there is no basis for equating a court's contempt power with its power to modify a decree. In fact, the single case defendants proffer for this proposition (Br. 20 n.*), *Vanguards* v. *City of Cleveland*, 23 F.3d 1013 (6th Cir. 1994), holds precisely the opposite. *Vanguards* clearly viewed contempt and modification as distinct when it explained that the "injunctive quality of a consent decree compels the approving court to: (1) retain jurisdiction over the decree during the term of its existence, (2) protect the integrity of the decree with its contempt powers, *and* (3) modify the decree if 'changed circumstances' subvert its intended purpose." *Id*. at 1018 (emphasis added). This is the only sentence in the opinion that mentions contempt. The rest of the opinion reviews and approves the district court's order extending a consent decree for an additional two years under standards governing modification of a consent decree. Indeed, such a modification could not have been based on contempt because the parties had not violated the terms of the decree, but instead "changed circumstances" had "prevented the core objectives of the consent decree from being met." *Id*. at 1019; see also *id*. at 1022 (district court did not abuse discretion in extending consent decree "without determining whether or not the City was engaged in ongoing discrimination").

While not directly addressing defendants' contention, this Court has made clear that modification of a decree and contempt are subject to different procedural rules. While contempt must be proven by clear and convincing evidence, see *Harris* v. *City of Philadelphia*, 47 F.3d 1311, 1321 (3d Cir. 1995), a plaintiff seeking a modification is "only required to show by a preponderance of the evidence that [defendants'] activities were frustrating the purposes of the [initial] injunction." *Local 560*, 974 F.2d at 336. There would be no basis for different standards of proof if the authority involved were identical.

Second, even assuming *arguendo* that the power to modify is coextensive with the contempt power, expanding prospective duties of a defendant is an appropriate response to a finding of non-compliance. As this Court explained in *In re Arthur Treacher's Franchise Litigation*, 689 F.2d 1150, 1159 (3d Cir. 1982), "[i]n exercising remedial powers in civil contempt proceedings, courts may require the contemnor to perform various affirmative acts, even though these actions were not mandated by the underlying decree." The Court discussed with approval the decision in *NLRB* v. *J.P. Stevens & Co.*, 563 F.2d 8 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978), which held that a company's non-compliance with an order prohibiting mistreatment of employees justified a more detailed order that

"required the company to formulate rules for employee conduct in manufacturing plants and to establish a continuing educational program for supervisory personnel in the area of the rights of union organizers." 689 F.2d at 1159; see also *EEOC* v. *Local 580*, 925 F.2d 588, 592-593 (2d Cir. 1991) (as remedy for contempt, court may employ "equitable remedies which exceed the confines of the consent judgment" so long as they are "reasonably imposed in order to secure compliance of the parties").

Third, even accepting for the sake of argument the narrow view of when a court may exercise its contempt authority pressed by defendants (Br. 20-21), modifying the Decree to extend its termination date is "remedial." "With respect to the 'compensatory' purpose of civil contempt, the [Supreme] Court reaffirmed [in *International Union* v. *Bagwell*, 512 U.S. 821 (1994),] the 'longstanding authority' of judges 'to enter broad compensatory awards for all contempts through civil proceedings.'" *Harris*, 47 F.3d at 1328 n.16.[12] The United States brought its actions (consolidated below with private plaintiffs' suit) not simply to vindicate the interests of individuals subjected to discrimination, but to vindicate our

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[12] Because we rely on the remedial prong of contempt, the limits of coercive contempt discussed in *Harris* and *Spallone* v. *United States*, 493 U.S. 265 (1990), and relied on by defendants (Br. 20, 22), are inapplicable.

sovereign interest in preventing employment discrimination and to achieve compliance with civil rights laws. See *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 326 (1980). Failure to abide by the Decree's provisions, which were intended as a means to these ends, directly injures the United States. And the best "remedy" for these violations is what the court did here – modifying the Decree to extend its substantive and procedural requirements to give defendants more time to come into and stay in compliance. Under defendants' theory, by contrast, they could disregard every requirement of the Consent Decree for the entire four-year period, and the district court would lack the authority to extend the Decree for any period of time. Such a result is not only contrary to well-established case law, but is also patently unreasonable.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN MODIFYING THE TERMINATION DATE FOR ALL THE INJUNCTIVE PROVISIONS OF THE CONSENT DECREE

Although not denominated a separate issue, defendants repeatedly assert (Br. 15-16, 22-26) that the district court's order modifying the termination date to extend all the prospective provisions of the Decree is not suited to the violations identified by the district court. In doing so, they ignore the purposes of the Decree,

understate their past non-compliance, and overstate the onus of the Decree.

1. The modification of a consent decree is reviewed for an abuse of discretion. See *Delaware Valley Citizens' Council* v. *Pennsylvania*, 674 F.2d 976, 978 (3d Cir.1982) ("Our scope of review on this appeal is narrow: whether, in its orders modifying and refusing to modify the consent decree, the district court abused its discretion."). This is because a "court of equity cannot rely on a simple formula but must evaluate a number of potentially competing considerations to determine whether to modify or vacate an injunction entered by consent or otherwise." *Building & Constr. Trades Council* v. *NLRB*, 64 F.3d 880, 888 (3d Cir. 1995). "Under the abuse of discretion standard, we may reverse the lower court only if the extended decree is arbitrary, capricious, or irrational, or it employs improper standards, criteria, or procedures." *Pennsylvania* v. *Local Union 542*, 807 F.2d 330, 334 (3d Cir. 1986).

2. Whether viewed as an exercise of the power granted it under the Decree or its inherent authority, the question facing the district court was the same: was the modification of the termination date suited to effectuating the purposes of the Decree and Title VII. "A consent decree, like a permanent injunction, seeks to remedy a particular harm. * * * Therefore, we think any modification * * * must

be undertaken with the injunction's purpose in mind." *Favia* v. *Indiana Univ.*, 7 F.3d 332, 341 n.14 (3d Cir. 1993).

The purpose of this Decree is, as defendants themselves described it, "to compel the elimination of any racial/gender discrimination within the NJDOC" (App. 244). The Decree accomplishes this in three ways: by establishing a comprehensive internal program to investigate claims of discrimination and discipline discriminators; by requiring defendants to inform employees and supervisors about their rights and responsibility; and by prohibiting discrimination that violates Title VII. See S.App. 45 (district court, in approving Decree, likewise describing Decree's major purposes). To ensure that these elements were abided by, the Decree also permits the United States' and private plaintiffs' counsel to monitor defendants actions for compliance and, if disputes arose, to try and reach an accommodation before bringing the issue to court.

Before addressing the findings regarding each of these elements, we must address defendants rather myopic view of the district court's findings. On appeal, defendants claim (Br. 12) to accept the district court's finding "of past non-compliance with a single paragraph of the Decree." But, contrary to the tenor of

defendants' brief,[13] that was not the extent of the court's finding. In its May 10, 2000, order, it found that "until approximately the first quarter of 2000 the State was not in substantial compliance with the consent decree, principally in connection with its obligation to issue timely decisions regarding discrimination complaints" (App. 103). That is, the court made a general finding that defendants had "not [been] in substantial compliance with the consent decree," and then a subsidiary finding that one of the principal areas of non-compliance involved the failure to issue timely decisions. Contrary to defendants' assertions, the court did not find that the failure to issue timely decisions was the *exclusive* violation, just a *principal* one.

The district court's oral findings, completely ignored by defendants, make this clear. See Fed. R. Civ. P. 52(a) (noting that it is "sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court"). The court stated that "I found there to be enough problems with other parts of the Decree than paragraph 15, to justify extending [it] in its entirety" (App. 496) and that there was "enough of a record made on issues other than the timing of the

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[13] See Br. 15 ("non-compliance with a single requirement of the decree"), 16 ("finding only a past failure to comply with regard to one paragraph"), 17 ("no finding of any other failure by defendants"), 25 ("finding of past non-compliance with a single paragraph of the Decree").

* * * decisions, which justify the Court in seeing to it that all parts of the Consent Decree remain in force for a period of time" (App. 495). As the party bearing the burden to show that the district court's ultimate finding of fact was "clearly erroneous," Fed. R. Civ. P. 52(a), defendants' silence on this point is dispositive, for they have forfeited any right to challenge this finding of global violation.[14] In any event, the history of the case shows the district court's finding was amply supported in each of the three substantive areas addressed by the Decree that were extended by the court.[15]

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[14] Although defendants ignored this finding in their opening brief, they may contend that this finding should not be given its due because the district court did not identify all the portions of the record that justified its conclusion. But courts are required to make findings of fact, not to cite evidence. See *Amadeo* v. *Zant*, 486 U.S. 214, 228 (1988); *Bowles* v. *Cudahy Packing Co.*, 154 F.2d 891, 894 (3d Cir. 1945) (factual findings sufficient so long as court makes ultimate finding necessary for remedy imposed). It is the obligation of the party challenging a finding to identify the evidence on which it relies to show clear error and, as we note in the text, defendants have proffered none in response to these findings.

[15] It is an overstatement to claim (Br. 13) that "all 68-paragraphs of the Consent Decree" were extended. Many of the Decree's provisions involved issues relevant only at the inception of the Decree: the first two paragraphs (App. 7-8 ¶¶ 1-2) dealt with approval of the decree, another (App. 51 ¶ 55) with the defense of the Decree if subject to challenge, another (App. 33 ¶ 30) involved the change of a job title, and another 21 paragraphs (App. 36-51, 54-57 ¶¶ 37-54, 66-68) dealt with awarding monetary and injunctive relief to identified victims of discrimination.

Investigation and resolution of complaints of discrimination: Defendants concede multiple violations of Paragraph 15 of the Decree, but apparently argue (Br. 22) that the district court erred in not extending only that single provision requiring investigation and resolution within 60 days. In doing so, defendants ignore the court's findings of other violations with regard to the investigation and disposition of complaints. See pp. 12, 14-15, 16, *supra*.

But even assuming that the district court had found only violations of Paragraph 15, we cannot conceive what the order proposed by defendants would look like. Paragraph 15's requirement that the EED (Equal Employment Division) process "complaints" within 60 days of their receipt is intertwined inextricably with other requirements. Most basic, the duty to act on a complaint cannot be understood apart from Paragraph 6's (App. 13) definition of what constitutes a "complaint." In addition, the Decree requires the EED (an entity created by Paragraph 7 of the Decree (App. 13-14)) be staffed by "investigators with training in equal employment opportunity issues" (App. 14 ¶ 7), prohibits entities other than the EED or its designees from investigating employment discrimination complaints under most circumstances (App. 15-17, 17-18, 20-21 ¶¶ 8, 10, 14), requires that the EED review interim remedial action taken by the complainant's institution during

the pendency of the investigation (App. 17 ¶ 9) and keep the complainant informed throughout the process (App. 18-19, 21-24 ¶¶ 10, 11, 15, 16, 17, 18, 19), and provides that decisions as to violations and appropriate remedies be made by the Commissioner or designated Deputy Commissioner (App. 21-23 ¶¶ 16-18), consistent with a set of sanctions (App. 27 ¶ 24) that are distributed to all employees, and will be permanently posted (App. 9-10 ¶ 5).

These provisions were never intended to be implemented as anything other than an integrated whole. In other words, defendants promised that within 60 days of receiving the "complaint," trained investigators would investigate complaints of employment discrimination that the Commissioner or his designee ultimately would resolve, and that during this 60 days the EED would make sure the complainant was provided an interim remedy and was kept informed. It is this promise that defendants breached, and this breach justified the extension of all of the provisions concerning the availability of an effective internal discrimination investigation and redress system. The district court thus did not abuse its discretion in this regard.

Training of employees: The Decree required defendants to "develop a training program to ensure that supervisors and employees of the NJDOC"

understand what constituted discrimination "and the procedures for reporting and investigating claims of employment discrimination and retaliation" (App. 27-28 ¶ 25). In addition to posting the Decree so long as the Decree is in effect (App. 54 ¶ 65), defendants must distribute a "statement of policy" against discrimination to all new employees along with a schedule of penalties for violations, and show them a videotape of the Commissioner expressing his personal commitment to combating discrimination (App. 9-10 ¶ 5).[16] Defendants admitted at several points during the initial four years of the Decree that they were not in compliance with its training requirements. See pp. 9-10, 11, 13-14, *supra*. Similarly, the court found problems with employees not understanding the proper investigation procedures for employment discrimination complaints. See p. 14, *supra*.

In their litany of objections to the provisions of the Decree (Br. 23-24), defendants did not object to these provisions, nor identify any burden they bore by continuing to train employees on these matters and to distribute the policy. Indeed, on this latter point, the Decree itself provided that the "statement of policy and schedule of penalties" had to be posted as well as distributed, and the posting

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[16] A number of other requirements in Paragraph 5 involved obligations incurred during the first weeks and months of the Decree (such as reading the policy at line-ups and distributing the policy to current employees) and are no longer applicable.

requirement "shall survive the expiration of this Decree" (App. 10 ¶ 5). So it was clearly envisioned that both the policy and schedule of penalties would continue in effect even after the four-year period. Moreover, informed employees were needed to comply with the investigation procedures (which as we explain above were properly extended) and to reduce the risk of future discrimination (see the discussion below). The district court did not abuse its discretion in extending these provisions as well.

Discrimination: The Decree prohibits defendants from discriminating on the basis of race or sex (and retaliating for filing a complaint) "consistent with their obligations under current law" (App. 8 ¶¶ 3-4), and then applies that general prescription to the areas of assignments and discipline (App. 29-30 ¶¶ 26-27).

These cases were brought to remedy discrimination. The district court found in 1996 that a "pervasive pattern of discrimination * * * has characterized the NJDOC" in the past (S.App. 56) . The purpose of the Decree's provisions regarding the internal investigation and discipline system were to detect, deter, and punish such discrimination. Those provisions having been properly extended, the extension of the prohibition on discrimination likewise was appropriate.

In addition, the issue of discriminatory discipline has yet to be resolved. While defendants correctly note (Br. 10) that the district court did not make a finding that they had engaged in discriminatory practices in this regard, the court relied on more than an "unlitigated allegation" (Br. 29). The district court's order required defendants to "conduct a thorough investigation into the allegations that have been made as to discriminatory discipline" (App. 104). Read in light of the court's statements at the hearings (App. 471-472; S.App. 463), the order is best construed as reserving judgment on the ultimate question of fact (whether the statistics, combined with the anecdotal evidence and past history of discrimination, were sufficient to show intentional discrimination or, in the alternative, that they demonstrated an unjustified disparate impact), but finding that the evidence was sufficient to make out a prima facie case that required defendants to provide evidence, not just arguments. See *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 307-308 (1977) (plaintiff can meet prima facie burden by showing statistics, shifting burden of production to defendants); 42 U.S.C. 2000e-2(k)(1) (outlining burden shifting for disparate impact cases); cf. S.App. 443 (defendants argue that statistics cannot prove discrimination "but at most, under a prima facie case summary judgment standard to shift the burden to us"). It is certainly appropriate

for a district court to retain jurisdiction over an entity when serious questions of continuing illegal discrimination have been documented. Cf. *Williams* v. *Edwards*, 87 F.3d 126, 131-132 (5th Cir. 1996) (district court did not abuse discretion in expanding scope of consent decree to include areas that "raised the specter" of violations so that "a more detailed examination * * * could be accomplished"); cf. also S.App. 458 (director of EED states that "I'm not saying that there is not a valid area to look at, although I'm not sure exactly how we would check such data to find a negative based on the supposition [*i.e.*, whites committing the same infractions are not being disciplined] that's been suggested here by class counsel").[17]

It is important to keep the court's findings on these points in context. The Decree's goal was to uproot "the discriminatory practices historically in place at the NJDOC" (S.App. 57). One of the basic requirements agreed to by the parties

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[17] Defendants suggest (Br. 29), perhaps only for rhetorical flourish, that the district court "unconstitutionally" relied on this ground for extending the Decree because it imposes burdens on them without a finding of liability. Although not identifying the constitutional right at issue, they elsewhere (Br. 17) invoke the Due Process Clause. We assume defendants are not asking this Court to overrule the Supreme Court's holding that States are not protected by the Due Process Clause because "[t]he word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union." *South Carolina* v. *Katzenbach*, 383 U.S.301, 323 (1966).

was that defendants would investigate and resolve complaints by their employees within 45 (later modified to 60) days. In addition to serving an important function in deterring employees from discrimination through the threat of detection and discipline, this provision also served as a good bellwether for defendants' compliance with the Decree as a whole. Compliance with that provision did not hold defendants responsible for the discriminatory actions of their agents; it simply required that one office under their complete administrative supervision, the Equal Employment Division, be operated so that timely and accurate dispositions could occur. Second, the provision set a clear standard that was easily tracked by the parties and the court. And yet defendants consistently failed to comply with this provision.

Finally, defendants do not identify any *substantive* objection to these non-discrimination obligations. Nor could they, since these provisions provide that they are "consistent with their obligations under current law" (App. 8 ¶¶ 3-4, App. 29-30 ¶¶ 26-27), that is Title VII of the Civil Rights Act. Cf. *Building & Constr. Trades Council* v. *NLRB*, 64 F.3d 880, 888 (3d Cir. 1995) ("the fact that the party is now subject to a contempt sanction for violation of the decree in addition to the statutory punishment is not generally a factor to be considered" in deciding whether

to modify an injunction that incorporates statutory prohibitions). Thus, the district court did not abuse its discretion in extending these obligations for an additional period of time.

3. Defendants' primary complaint (Br. 23-26) appears not to be with extending the Decree's substantive obligations vis-a-vis their employees, but the requirement that they provide information to the United States and private plaintiffs and respond to inquiries about their activities. The parties agreed that defendants would give the United States and private plaintiffs notice of certain events, would provide the United States and private plaintiffs with certain documents, and would retain other records and make them available upon request (App. 18, 20, 21, 23, 25-26, 32, 33-36, 52 ¶¶ 10, 13, 15-17, 19, 21-22, 29, 32-36, 56). And the parties established a dispute resolution procedure to address those instances when the United States or private plaintiffs believed defendants were not complying with the Decree or, in dealing with the adjudication of individual complaints, when the United States and private plaintiff "disagree[d]" or were "dissatisfied" with the decision in light of the Decree's obligations (App. 21-22, 24-25 ¶¶ 16-17, 20). These provisions were to assure that violations of the Decree were detected and disputes regarding compliance brought to the court if agreement among the parties

could not be reached. Indeed, the court found that "without the continuing monitoring that we've already argued over, I dare say that performance under the consent decree would be even slower than it has been" (S.App. 289).

Defendants contend (Br. 25-26) that "there is no evidence and no finding that defendants have not fully complied with the above requirements for the entire life of the Decree." That is simply not true. See S.App. 174 ("class counsel are being frustrated [by defendants] in their efforts to adequately monitor the performance here"), 225 (defendants violated Decree by failing to provide information to United States and private plaintiffs); see also S.App. 753 (defendants' affidavit stating that in "some cases, class counsel and the United States were not provided copies of determinations").

Defendants also contend (Br. 25) that "Class Counsel" abused these provisions. They make no such claim as to the United States, so the result pressed by defendants (end the Decree) is not justified by their objection. But more importantly, defendants' assertions, which lack the citations to the record required by Local Appellate Rule 28.3(c), are contrary to the consistent findings of the

district court on this issue.[18] As the district court stated in denying defendants' motion for a stay, "I reject the concept that class counsel's conduct is somehow visiting a hardship upon the State" (App. 496).

Finally, the district court took steps to reduce any burden on defendants. "[I]n response to some complaints that have been made by the State that there simply has been an inordinate amount of work generated by the continued demand

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[18] See App. 486 ("all matters raised by Class Counsel and the United States in their December 8, 1997, letter-motion, and the manner in which they were raised by Class Counsel and the United States represent legitimate and necessary post-decree monitoring"); S.App. 102 ("[t]hrough these efforts [in monitoring the Decree], the plaintiffs have protected the rights they gained when the Decree was entered" and "[s]uch activities have promoted the dissemination of information, * * * ensured the continued education of employees and facilitated the internal review of complaints"), 169 ("I do not think that you are taking an improper role in attempting to micro manage the Department of Corrections through this process. I understand that you have a bona fide and legitimate role in this."), 179 ("the fact of the matter is that they're not being hyper-technical, they are not being hysterical, they've been telling us that this is a problem since day one and they're right"), 293 ("you are doing terrific work"), 348 (defendants' request to sanction plaintiffs' counsel "an inappropriate, extraordinary display of cheek"), 373 ("I think it's a fair conclusion for me to make, that notwithstanding all of the extensions of time, the hearings, the denial of motions, the review of countless letters, transcripts, and other materials, that it is not class counsel which is creating all of this work. It is not being created by an improper, nitpicking spirit, to simply continually complain where complaints are unjustified."), 374 (request for sanctions against plaintiffs "utterly inappropriate"); cf. also S.App. 444-445 (director of the EED states that "to the extent that I look closer at what [the United States and private plaintiffs] have said, I find some merit to [it], I'm certainly going to take advantage of that comment").

for information" (App. 474), when the court extended the termination date of the Decree, it also provided that while "class counsel and the United States may continue to make inquiries into the performance of the State's obligations," such inquiries are "to be made at a frequency agreed upon by the parties" (App. 104). (The United States and private plaintiffs have proposed making inquiries once a month, but as yet defendants have neither agreed, made a counter-proposal, nor even responded.) This modification shows that the court was cognizant of and responsive to defendants' concerns regarding the burden of the Decree. Its measured response in this regard was not an abuse of discretion. Cf. *Building & Constr. Trades Council* v. *NLRB*, 64 F.3d 880, 891 (3d Cir. 1995) (rejecting claim that burdensome nature of procedural requirements intended to assure compliance with court order "warrant[ed] wholesale dissolution of the injunction").

For these reasons, the district court did not abuse its discretion in modifying the termination date to extend all the prospective provisions of the Decree.

III

THE DISTRICT COURT ABUSED ITS DISCRETION IN NOT EXTENDING THE TERMINATION DATE FOR AN ADDITIONAL TWO YEARS

1. As noted in Part II, *supra*, the modification of a consent decree is reviewed for an abuse of discretion. See *Delaware Valley Citizens' Council* v. *Pennsylvania*, 674 F.2d 976, 978 (3d Cir. 1982).

2. The question of what length of time is appropriate for an extension requires an exercise of discretion. However, a court's equitable power in granting a remedy must be measured against the appropriate legal standard. For "such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975). Here, the relevant principle, whether viewed as a matter of general remedial law or the specific law governing consent decree modification, is whether the violations of the Decree and the underlying statute (here, Title VII) have been cured, see *id*. at 418, and the "original purposes" of the Decree are "fulfilled" in all "material respect[s]." *United States* v. *Local 560*, 974 F.2d 315, 331 (3d Cir. 1992).

The Department of Corrections had, as of 1999, over 9,500 employees spread out at over a dozen institutions throughout the State (S.App. 1024). The

purpose of the Decree's provisions was to create mechanisms within the Department to root out what the district court found was a "chronic history" and "pervasive pattern of discrimination" (S.App. 57, 56) against African Americans and women that violated Title VII of the Civil Rights Act. At the time we agreed to the Decree, we believed that four years of compliance with the internal enforcement procedures and training provided in the Decree would assure that the ethos of nondiscrimination could take root and that employees would come to believe that the Department had dedicated itself to prompt and effective actions sufficient to deter future violations of Title VII. Cf. *Andrews* v. *City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990). However, in spite of the close monitoring by us and private plaintiffs' counsel, defendants were often out of compliance with many of these critical provisions of the Decree. Every day of non-compliance was itself a violation of the Decree, which required immediate compliance as a remedy. Defendants finally met that objective three years and ten months after the effective date of the Decree (App. 103), at least as to the internal investigation procedures.

But equally important, every day of non-compliance delayed the creation of an environment in which victims could receive timely redress and discriminators

were deterred from harassment and other adverse actions. This latter harm was not cured by defendants' ultimate compliance with a given provision. Instead, the appropriate remedy is an additional period of compliance commensurate with the period of non-compliance. We do not claim that there is a mathematical formula that can be applied to such situations. Reasonable judges viewing these facts could reach different results about precisely how much time was required to remedy the violation. But the district court's order exceeds the bounds of that discretion.

The court's order, in effect, offers only one year of compliance (the two months before May 2000 plus the ten-month extension). We would never have agreed to a decree requiring only one year of compliance. As defendants themselves note (Br. 27), *they* had initially proposed that the Decree last for two years. The district court did not explain why two additional years was inappropriate or give any reason why 10 months (a period of time advocated by none of the parties) was equally or more appropriate. Nor did it acknowledge that the duration of the Decree, even with our proposed two-year extension, is relatively short for this kind of litigation. Cf. *Vanguards* v. *City of Cleveland*, 23 F.3d 1013, 1020 (6th Cir. 1994) (describing an approximately two-year extension of a five-year decree as "a relatively short period of time"); *Balark* v. *City of Chicago*, 81

F.3d 658, 663 (7th Cir.) ("Sometimes [consent] decrees are rather short in duration, such as the 6 ½ year consent decree entered in *United States v. Microsoft*, while in other cases they can last for decades." (citation omitted)), cert. denied, 519 U.S. 1006 (1996).

Given the pervasive nature of the discrimination that preceded the Decree, the large and decentralized nature of the employment setting, and the length and severity of the non-compliance with the Decree, the court in our view failed to order a modification of the termination date sufficient to remedy the violation and "achieve the purposes of the provisions of the decree." *United States* v. *United Shoe Mach. Corp.*, 391 U.S. 244, 249 (1968). In other words, we have been deprived of the "benefit" of our bargain, *i.e.*, an extended period of substantial compliance with the terms of the Decree. Cf. *Akers* v. *Ohio Dep't of Liquor Control*, 902 F.2d 477 (6th Cir. 1990) (district court abused discretion in not extending scope of decree after plaintiffs were deprived of full period of monitoring).

CONCLUSION

The district court's order should be reversed in part and remanded with instructions to modify the termination date of the Consent Decree to May 10, 2002. In all other respects, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation set out in Fed. R. App. P. 32(a)(7)(B) and Local Appellate Rule 28.5. The brief was prepared using WordPerfect 9, and contains 13,652 words.

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2000, two copies of the foregoing Brief for the United States as Appellee/Cross-Appellant and one copy of the Supplemental Appendix were served, first-class mail, on the following counsel:

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