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UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE CITY OF TORRANCE; THE CITY OF TORRANCE POLICE DEPARTMENT; POLICE CHIEF JOSEPH DELADURANTEY (in his official capacity); THE CITY OF TORRANCE FIRE DEPARTMENT, and FIRE CHIEF SCOTT ADAMS (in his official capacity),

Defendants.

Case No. CV 93-4142 MRP (RMCx)

**AMENDED**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: AWARD OF ATTORNEYS' FEES TO DEFENDANTS**



**Procedural Background**

The Attorney General (the "United States" or the "Government") brought this "pattern or practice" action in July 1993 against the City of Torrance, the City of Torrance Police Department, then-Police Chief Joseph DeLadurantey (in his official capacity), the City of Torrance Fire Department and then-Fire Chief Scott Adams (in his official capacity) (collectively "Defendants," "Torrance" or the "City") pursuant to her authority under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-6. Ultimately, the United States pursued four separate claims of discrimination. The principal claim challenged, under an adverse impact theory, two standardized, written literacy skills examinations used by the City to select entry-level police officers, and three such examinations used to select entry-level firefighters, between January 1, 1981 and August 31,

1994 ("adverse impact claim"). These examinations were alleged to discriminate against black, Hispanic and Asian job applicants. The United States also claimed that the Police Department's Field Training Officer ("FTO") Program had been maintained in a discriminatory manner. In addition, the Government alleged that the Police Department's pre-employment background investigations were used since 1981 as a vehicle for intentional discrimination. Finally, the United States alleged that the Police Department had tolerated a racially hostile environment.

On April 17, 1995, the Court entered summary judgment in favor of the City on the allegation directed at the FTO Program. The remaining claims were later trifurcated for the purpose of trial.

The adverse impact claim was tried to the Court between May 14 and May 25, 1996. On June 4, 1996, the Court issued a Memorandum of Decision relating primarily to the disputed issue of retroactivity of the Civil Rights Act of 1991, and later filed specific Findings of Fact and Conclusions of Law on September 18, 1996. Judgment in favor of Defendants on the adverse impact claim was entered on December 9, 1996.

The remaining two claims were dismissed pursuant to agreements between the parties after the conclusion of the trial on the adverse impact claim.

On December 31, 1996, Defendants filed a Motion for Award of Attorneys' Fees (the "Motion") pursuant to Fed. R. Civ. P. 11 and the attorneys' fees provision of Title VII, 42 U.S.C. Section 2000e-5(k), and filed a Memorandum of Costs. The Motion sought only the attorneys' fees incurred by the City in defending against the adverse impact claim. The United States opposed the Motion on January 13, 1997, and the City filed a Reply Memorandum on January 21, 1997.

The United States appealed from the underlying judgment on the adverse impact claim on February 6, 1997. The Court of Appeals heard argument on March 3, 1998, and affirmed this Court's decision in all respects on March 23, 1998.

On February 20, 1997, the Court entertained oral argument telephonically on Defendants' Motion; the parties appeared for subsequent argument on April 14, 1997 and again on April 13, 1998. At the hearing on April 13, 1998, the Court granted the Motion, and directed

Defendants to provide the United States with copies of all documentation supporting the specific amount of fees requested so that the United States would have a full opportunity to contest the amount claimed. That documentation had been filed by Defendants under seal on December 31, 1996, but was not provided to the Government pending the Court's ruling on the Motion.

Thereafter, the parties met and conferred as to the amount of costs and attorneys' fees to which the City was entitled. On June 23, 1998, the parties submitted a Stipulation and Proposed Order Re: Defendants' Costs and Attorneys' Fees, which set forth stipulated amounts of Defendants' costs and attorneys' fees relating solely to the adverse impact claim. The United States nonetheless reserved the right to appeal the Court's finding that the City was entitled to an award of attorneys' fees. The Court entered that order on June 24, 1998.

The Court now issues the following Findings of Fact and Conclusions of Law relating to the award of attorneys' fees to Defendants.

## FINDINGS OF FACT

**The United States' pleadings**

1. In May 1991, the Civil Rights Division of the United States Justice Department began an investigation into Defendants' hiring and employment practices. In November 1992, after concluding its investigation, the Government advised the City of its conclusion that there existed "reasonable cause" to believe that the City had engaged in a pattern or practice of discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq*. The Government subsequently proposed that the City enter into a consent decree, requiring, among other things, that the City cease using the written examinations it was using to select entry-level police officers and firefighters. The City rejected the proposed consent decree and the United States thereafter filed this action in July 1993.

2. The Complaint was virtually identical to those it had earlier filed against the cities of Alhambra, El Monte and Pomona, California, also alleging a "pattern or practice" of unspecified Title VII violations by their respective police and/or fire departments. The Complaint alleged, among other things, that Torrance had used unidentified "hiring procedures" that disproportionately excluded

minorities from employment in its police and fire departments, which procedures "have not been shown to be job-related and consistent with business necessity." Despite the Government's 18-month pre-litigation investigation into the City's hiring practices, however, the Complaint did not identify with any particularity any allegedly unlawful hiring procedure.

3. Defendants responded by moving for a more definite statement on the ground that the Complaint was "so vague and ambiguous that a responsive pleading cannot reasonably be framed." In opposition, the United States argued that the Complaint complied with Federal Rule of Civil Procedure 8(a), and asserted that "[f]urther evidence regarding the allegations contained in plaintiff United States' Complaint can be adduced during discovery." In defense of its pleading, the Government contended that, during its pre-filing investigation:

> [D]efendants did not provide several critical pieces of information requested by the Department of Justice, such as:
> (1) applicant flow, testing and adverse impact data with respect to the City's recruitment of firefighters prior to 1989;
> (2) applicant flow, testing and adverse impact data with respect to the City's recruitment of police officers prior to 1989; and (3) personnel files of incumbent police officers. Thus, the United States could not isolate all of the potentially discriminatory elements of the hiring processes used by the City's Police and Fire Departments.

The Government also argued that it had no obligation to identify the allegedly unlawful policies or practices, reasoning that: "until the United States has access to the personnel files of current employees as well as applicant flow, testing and adverse impact data, the United States cannot be expected to identify the full range of hiring procedures that are discriminatory." The Government did not explain, however, why it was unable or unwilling to identify any such procedures or practices. Moreover, by its own admission in its discovery responses, the United States did not possess any data relating to events prior to 1989 when it filed the Complaint.

4. The Court granted Defendants' motion, and the Government thereafter filed an Amended Complaint that added to its initial allegations the percentages of blacks, Hispanics, and Asians in the civilian labor force in the Los Angeles County labor market (Amended Complaint, ¶ 15), as well as data relating to the applicant pool for entry-level police officer and firefighter positions in Torrance between 1988 and 1991. (Id., ¶¶ 10, 13.) The Amended Complaint contrasted these numbers with the representation of those groups in the Torrance Police and Fire Departments. (Id. ¶¶ 9, 11, 12 and 14.) Instead of the term "hiring procedures," the Amended Complaint alleged that Torrance had used unlawful "selection devices and procedures, including but not limited to written examinations." (Id., ¶¶ 17(b), 18(b).). Although the amended allegations indicated that the City's use of written examinations was being challenged generally, it did not indicate which tests or during what period, or which of the remaining components of the City's multi-faceted selection process were also alleged to be unlawful.

**The United States' Discovery Responses**

5. The City propounded comprehensive written discovery aimed at clarifying the scope of and specific bases for the Government's adverse impact claim.

6. On February 25, 1994, the Government served its responses to Defendants' first request for production of documents. Those requests, among other things, sought "all documents which evidence, refer to, relate to or concern" the pertinent allegations in Paragraphs 9-20 of the United States' complaint. The Government's response to the first 19 such requests was identical:

> The United States objects to this request on the ground that it seeks materials that are protected from disclosure by the attorney work product doctrine. Without waiving this objection, the United States agrees to produce all non-privileged documents responsive to this request.

The few documents the Government produced related almost entirely to the proposed consent decree the Government had offered Defendants after it concluded its pre-litigation investigation. None of these documents identified a single selection procedure or device that was the apparent target of the Government's allegations, or a legitimate alternative.

7. On February 25, 1994, the Government also served its responses to Defendants' first set of interrogatories. Defendants' Interrogatory No. 2 requested that the United States "state the particular selection devices and selection procedures . . . which you contend have disproportionately excluded blacks, Hispanics and Asians from employment," including the dates any such devices were used. In response, the Government identified only two such examinations: the CPS Entry Level Law Enforcement Test Number 1020 ("and all written examinations derived therefrom"); and the CPS Entry Firefighter Test Number 2149 ("and all other written examinations derived therefrom"). Other than these two examinations (and the unidentified derivative "others"), the Government stated that "[a]t the present time, the United States cannot identify all other selection devices and selection procedures used by Torrance" that allegedly had an unlawful adverse impact on minority job applicants. Thus, according to the Government itself, as of February 1994, it possessed no evidence that any other examinations or other selection devices used by Torrance produced an unlawful adverse impact.

8. Defendants' Interrogatory No. 3 asked whether the United States contended that the "selection devices" it identified were not job-related, and if so, to explain its reasons therefor. The United States' verified response was as follows:

A. the information was protected by the attorney work-product doctrine;

B. it could not respond because Defendants had not yet furnished sufficient information in their discovery responses; and

C. it could not respond because it had not yet retained an expert.

Again, the Government's response suggests that it had no basis in February 1994 for alleging that any of the examinations used by Defendants were not job-related and, therefore, unlawful. Moreover, this particular response is directly contradicted by the Government's specific argument, made in opposition to the Motion, that it did have a good faith basis for bringing the adverse impact claim because it had retained an expert who rendered an opinion on this subject before the Government filed suit.

9. Defendants' Interrogatory No. 4 asked the United States to identify "what alternative selection device or selection procedure you contend should have been used by Torrance consistent with business necessity." The Government responded to Interrogatory No. 4 as follows:

> The United States contends that Torrance should have used alternative selection procedures or selection devices for entry-level [police officer and firefighter] which are job-related and consistent with business necessity in accordance with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, and the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1602 *et seq*.

The Government never supplemented this response.

10. In defending its February 1994 response to the City's Interrogatory No. 4 at the final pre-trial conference in March 1996, counsel for the Government argued:

> Mr. Flick posed the question what should the defendants have done. We recognize, and we understand that jurisdictions have police officers, firefighters. They have a continual need to hire such public safety officials, and if they ask what they should have done, *they could have picked up the phone and called us*.

This statement is negated by the fact that during almost five years of investigation and litigation, the United States failed to point to a single legally viable alternative, despite repeated formal and informal requests both by the City and by the Court that it do so.

11. On April 15, 1994, Defendants served a notice of deposition on the United States pursuant to Federal Rule of Civil Procedure 30(b)(6), seeking a knowledgeable, designated representative to testify regarding:

A. the Government's contention as to the relevant labor market;

B. the specific ways Defendants were alleged to have violated Title VII;

C. the particular selection devices that the United States contended disproportionately excluded minorities; and

D. any specific alternative selection devices that the United States contended should have been used.

In response, the Government refused to produce any witnesses for deposition, on the ground that no persons existed (other than Government attorneys themselves) who could testify as to those issues. The United States stated, however, that the information the City sought could be obtained through interrogatories. As is set forth above, Defendants had already sought -- and been denied -- this very information through interrogatories.

12. As a consequence of the Government's failure to provide meaningful discovery regarding its allegations or the bases of those allegations, the City was forced to defend itself without the benefit of the basic factual information to which the discovery rules entitled them. This unnecessarily and substantially increased the cost of defending the action. Although the City ultimately prevailed on the merits, the Government's conduct significantly increased the cost of achieving this result.

**The United States' Own Discovery Requests**

13. Throughout the litigation, the Government engaged in discovery which was exceedingly costly, but largely useless at trial. A series of depositions of so-called Subject Matter Experts ("SMEs") is an example. The SMEs were incumbent police officers and firefighters who participated in the professional validation studies relating to some of the challenged examinations, long before the United States filed suit. The Government examined 17 SMEs (and sought to depose 20 more) on subjects such as those reflected in the following excerpts from some of those depositions:

A. "When I say common sense, what does that mean to you?"

B. "Do you think that the ability to deal with people in tense situations is an important skill?"

C. "What are some of the names that people have called you?"

D. "Do you believe it's important for a police officer to -- in order to perform well in a position in Torrance, to appear confident?"

E. "Is it important to be a good listener?"

F. "Do you need to give oxygen to people as part of your job as a firefighter?"

G. "Do you think that you had common sense before you became a police officer in Torrance?"

H. "Would you describe that as a difficult task to endure, fearing for your life or the life of another officer?"

I. "Do you consider that the training that you received in learning how to write crime reports was useful?"

Following the first round of these depositions, Defendants moved *ex parte* for a protective order on the ground that the depositions were "illogical, pointless and were being used solely to harass the City." The Court granted Defendants' application and warned the Government that such discovery was not appropriate.

14. The Government requested a six-month extension of the discovery cut-off date for the stated purpose of completing discovery that it claimed it was unable to complete by the initial deadline (August 31, 1995). With some reservations and on the condition that the Government outline exactly what discovery it intended to complete during the extension period, the Court granted the United States' request. In response to the Court's instruction that the Government prepare a four-to-five page discovery plan, however, the United States instead submitted a brief explaining why "the United States is entitled to full discovery into areas reasonably calculated to lead to the discovery of admissible evidence." The United States' submission provided no explanation whatsoever why legitimate discovery could not have been accomplished before the original discovery deadline, and did not identify what discovery remained unfinished. When Defendants pointed out that the Government had failed to comply with the Court's instruction, the United States submitted a supplemental Discovery Plan that described in general terms what it intended to do during the six-month extension. On Defendants' motion, however, this plan was rejected by the Magistrate Judge as too vague. Finally, the Government submitted a 41-page memorandum outlining the reasons why it needed discovery into various, previously-unchallenged areas including the B-PAD test (a video-based, interactive police officer selection device) and the City's oral examinations. The United States' requests for discovery into these and other newly identified employment practices and procedures were ultimately rejected.

15. At the time the Government filed the Complaint, it presumably had (a) determined the appropriate labor market; (b) conducted an analysis to determine whether there was a statistically significant adverse impact resulting from the challenged tests; (c) identified the allegedly unlawful selection devices; (d) evaluated whether those tests (which are commonly used throughout California) were job-related; and (e) investigated whether there existed any legitimate alternative. The United States' discovery responses, however, and its overall conduct during discovery, demonstrate that it had not done any of these things. Rather, it appears that the United States filed suit against the City because it deemed the racial composition of the police and fire departments to be unsatisfactory, and then sought to discover whether the composition had resulted from a violation of Title VII.

**The United States' Inability to Articulate The Theory of its Case**

16. In several hearings during and after the 15-month discovery process, attorneys for the United States continued to be unwilling and/or unable to identify what specific selection devices were being challenged and how the Government intended to meet its burden of proof in challenging those selection devices. In hearings held in February 1995 (near the end of discovery) and August 1995 (one week before the parties' Rule 9 meeting), the Court sought unsuccessfully to elicit from the Government an articulation of its adverse impact theory. Indeed, until the beginning of trial, the Court repeatedly tried to focus the United States on its burden of proof and on how it intended to carry that burden.

17. Due to the Court's calendar, the original November 1995 trial date was vacated and the case was eventually reset for trial in May 1996. By the time the original date was vacated, discovery had already closed, and the parties had complied with the Local Rules relating to the pre-trial submissions. Nevertheless, the United States produced additional expert reports, to which the City was forced to respond. Then, at a status conference on February 12, 1996, while the parties were awaiting trial, the Government unveiled a previously undisclosed aspect of its adverse impact theory. Although the Government's claim had been based on its assertion that the written examinations themselves were not job-related, it indicated that it now intended to challenge the way the

examinations and applicants' scores were used by the City. No evidence was ever presented at the trial to support this challenge.

**The United States' Evidentiary Arguments**

18. The United States' motions in limine also reflected unexplained, last-minute changes in its theory of the case. For example, the United States moved to exclude any evidence relating to the relevant labor market -- an issue which the Government itself had introduced into the case. The Government had retained an expert (Dr. John Pencavel), who had submitted a Rule 26 report, and whom Defendants deposed. At significant expense, Defendants then retained an expert (Dr. Judith Stoikov) to rebut Dr. Pencavel's testimony, and the Government deposed her. (Defendants also retained a consultant, Dr. Peter Morrison, who advised the City with respect to labor market issues, but who did not testify at trial.) When asked to explain why it now sought to exclude labor market evidence altogether, the United States stated:

> As far as the Defendants' statements about the United States' labor market analysis being originally propounded, we did propound at the beginning of expert discovery a labor market report. We hired an economist from Stanford to do that. We found that it was not relevant to the case at that point but we were faced with a Hobson's choice at that time.

This explanation was at odds with the United States' earlier representations to the Court that disparities between the City's work force and the local labor market were the very basis for the filing of the adverse impact claim. The Government's motion was denied.

19. The United States also moved to exclude evidence that it had specifically permitted other cities in Southern California, in consent decrees, to use some of the very same examinations that it challenged as unlawful in this case. The Government contended, remarkably, that this evidence did not constitute an admission on its part that the examinations challenged in this case were, in fact, job-related for the positions in question. In particular, the Government objected to the introduction by the City of a consent decree in United States v. City of El Monte, which referred to the CPS Form 1027

examination (the primary police officer test at issue in this case) as a "job-related written examination." (*See* 9/18/98 Finding of Fact No. 68.) This motion was also denied.

20. The Government also sought to challenge at trial six examinations used by the police department, as well as one used by the fire department, with respect to which the Government had produced no evidence of adverse impact whatsoever. In response to the City's motion to preclude such challenges, the United States argued that, although there was no evidence that any minorities even took these examinations, it nonetheless could assert that Defendants violated Title VII by using them. The Government urged the Court to infer that a statistically significant number of minorities had actually taken the test, and then infer that a statistically significant adverse impact had resulted. However, the Government offered no evidence from which the Court could draw such an inference. Defendants' motion to preclude the challenge to these seven examinations -- as to which the Government had taken substantial discovery -- was granted.

**The Government's Attempt to Meet Its *Prima Facie* Burden**

21. In opposing Defendants' motion, the United States places significant reliance on the contention that it made out a *prima facie* case and that, therefore, an award of attorneys' fees is inappropriate. At trial, the Court saw no reason to argue the issue of whether the Government technically had made out a *prima facie* case. The Court did not wish to deny the Government an opportunity to put on its whole case in light of the large amounts of time and money spent in litigating the matter. Since this was not a jury trial, the Court thought it advisable to hear all of the evidence before resolving a matter involving such serious allegations. Nevertheless, the Court agrees with defense counsel that the Government failed to present a coherent theory of the case, and likewise failed to produce any evidence which could persuade a trier of fact to decide in their favor. The Court's Findings of Fact and Conclusions of Law reflect the abysmal lack of evidence produced to support the serious allegations made by the Government.

**The Government's Attack on the Examinations Themselves**

22. With the exception of one administration of one of the five examinations challenged at trial, all of the examinations at issue were administered before the Civil Rights Act of 1991 took

effect. As a consequence, the standards enunciated by the Supreme Court in Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977 (1988), and Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), applied in this case. The City, therefore, presented substantial evidence at trial of its legitimate business justification for the use of the challenged examinations, focusing primarily on the need for police officers and firefighters to possess strong reading and writing skills (and, in the case of firefighters, certain quantitative skills) in training and on the job. Although the United States bore the burden of disproving this evidence, it did not even attempt to do so. It ignored the City's justification evidence altogether.

23. The United States' challenge to the validity of the written examinations was limited to its assertion that "evidence of validity is lacking." By this, the Government apparently meant that, because the City could not prove that the challenged examinations were job-related, they were not. The Government did not specifically assert that the examinations were not job-related; it merely claimed that Torrance could not prove the contrary.

24. None of the United States' experts testified that the tests were not job-related; rather, they confined their efforts to criticizing Defendants' evidence regarding validity. These criticisms were based upon the Uniform Guidelines on Employee Selection Procedures, which have never been adopted as federal regulations, are not legally binding and are not professional standards recognized as state-of-the-art in the field of industrial organizational psychology.

25. The Government's attack on the City's evidence was also at odds with what it ultimately conceded at trial: Title VII defendants "are not required, even when defending standardized or objective tests, to introduce formal validation studies at all." *See* Watson, 487 U.S. at 998.

**The Government's Showing Regarding Alternative Selection Devices**

26. The Court's June 4, 1996 Memorandum of Decision and September 18, 1996 Findings of Fact and Conclusions of Law make clear that the Government failed to identify a single alternative selection device -- either a different selection device than the City had used, or an alternative use of a selection device currently in use -- during the investigation or discovery, or at trial. (*See* 9/18/96 Finding of Fact No. 76, finding that "[t]he United States continued to argue throughout the trial that

alternative selection devices or procedures existed and should be employed by Torrance. However, the United States never identified any such alternative selection devices or procedures;" *see also* 9/18/96 Conclusion of Law No. 39, concluding that "[t]he United States has offered no alternative selection device that would equally serve Torrance's legitimate hiring objectives.".) Indeed, the United States conceded this at trial.

27. The Court recognizes that attorneys' fees may not be awarded merely because a plaintiff fails to persuade a court as to the merits of its allegations. Such *post hoc* reasoning is inappropriate when considering attorneys' fees requests. In this case, however, it is the Government's total failure to produce any credible evidence of an alternative selection device, coupled with its repeated assurances that it intended to do so -- even during the final days of trial -- that provides a principal basis for an award of fees to Defendants. If, in response to the City's repeated requests, the Government had candidly acknowledged that it lacked any evidence of a legally viable alternative, the parties' efforts could have been focused elsewhere and scarce resources could have been conserved.

28. The Government did not at any time have sufficient evidence to support the claim it made with respect to the written examinations. The fact that the Court did not dismiss the Government's case or sanction the Government should not be taken as indicative of the strength of the Government's case. It is only indicative of the latitude extended the Government in view of the serious allegations it had made.

29. To the extent that they lend additional support to these findings, the Court's September 18, 1996 Findings of Fact and Conclusions of Law are incorporated herein by reference.

30. To the extent that any conclusion of law set forth below is deemed a finding of fact, it is incorporated herein by reference.

## CONCLUSIONS OF LAW

1. Defendants' request for reimbursement of the attorneys' fees incurred in defending against the United States' adverse impact claim is made pursuant to both the attorneys' fee provision in Title VII and Fed. R. Civ. P. 11. Based upon the findings of fact set forth above, and as is

discussed more fully below, the Court finds that an award of attorneys' fees to Defendants is appropriate under either or both sets of standards. Taking into account the totality of the circumstances, as well as the unique role the Civil Rights Division plays in the enforcement of Title VII and its concomitant obligations as the sovereign, as well as its substantial resources and corresponding power in the litigation process, the Court finds that the filing and prosecution of the adverse impact claim, and the Government's overall conduct throughout the litigation and at trial warrants an award of attorneys' fees in the amount already agreed upon by the parties.

**Title VII Attorneys' Fee Award**

2. Title VII provides that the Court, in its discretion, may allow the "prevailing party" a "reasonable attorney's fee (including expert fees) as part of the costs." Further, it provides that "the United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000e-5(k). When the prevailing party is the defendant, the Court may award fees where the plaintiff's case was "frivolous, unreasonable, or without foundation"; it need not find "subjective bad faith." Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

3. In considering Defendants' request for their attorneys' fees, the Court may consider the fact that the plaintiff in this case was the United States rather than a private plaintiff. Christiansburg, 434 U.S. at 422 n.19 (noting that "a district court may consider distinctions between the [EEOC] and private plaintiffs in determining the reasonableness of the Commission's litigation efforts"). *See* EEOC v. IPCO Hospital Supply Co., 565 F. Supp. 134 (S.D.N.Y. 1983) (in determining whether fee award is appropriate, "when the EEOC -- rather than a private person -- undertakes the burden of prosecution, somewhat different considerations then come into play.").

4. The record in this case provides compelling evidence that the Government had an insufficient factual basis for bringing the adverse impact claim and, perhaps more importantly, that the Government continued to pursue the claim, in as expansive a manner as possible, long after it became apparent that its case lacked merit. The conduct of the litigation by the Government also unquestionably increased its cost and length.

5. The United States' prosecution of its adverse impact claim in this case was paradigmatic of the conduct envisioned by Christiansburg and its progeny. Accordingly, the Court finds that Defendants are entitled to an award of its attorneys' fees pursuant to 42 U.S.C. Section 2000e-5(k).

**Rule 11 Sanctions**

6. Rule 11 imposes an affirmative duty on a lawyer to "inquire into the facts and law before filing a pleading. His inquiry must be reasonable under the circumstances." Coffey v. Healthtrust, Inc., 1 F.3d 1101, 1104 (10th Cir. 1993). By signing a pleading, an attorney certifies to the Court that she has made a reasonable inquiry into the facts, and that the pleading is "well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and . . . not interposed for any improper purpose." Id. Not only must an attorney make a reasonable investigation into the facts *before* filing the complaint, Coffey, 1 F.3d at 1104, the attorney must also act reasonably given the results of the investigation. White v. General Motors Corp., 908 F.2d 675, 682 (10th Cir. 1990); *see also* Navarro-Ayala v. Nunez, 968 F.2d 1421, 1426 (1st Cir. 1992); Collins v. Walden, 834 F.2d 961, 965-66 (11th Cir. 1987).

7. An attorney's duty under Rule 11 does not end once the complaint is filed, but continues throughout the entire course of the litigation. Southern Leasing Partners v. McMullan, 801 F.2d 783, 788 (5th Cir. 1986) (when a lawyer learns that an asserted position, even if originally supported, is no longer justifiable she must not persist in pressing the claim).

8. Based on, among other things, some of its own admissions, it is manifest that the United States lacked a sufficient factual basis for alleging in July 1993 that the written examinations used by the City to select entry-level police officers and firefighters violated Title VII. At a minimum, it conceded that it had no evidence relating to examinations used before 1988. It nevertheless pursued its allegations with respect to every examination used by the police and fire departments dating back to 1981. The pursuit of these allegations was accomplished through, among other things, the filing of numerous motions and other submissions subject to Rule 11. The broad adverse impact allegation in this case appears to have been used in litigation against other Southern California municipalities with some success by way of settlement, but the specific basis for it against

this defendant was never shown. Under these circumstances, the Court must conclude that the suit was initiated and the discovery process was used essentially to determine *whether* a violation could be established, not to prove one that existed.

9. The United States' assertion that it was prevented from providing any specifics in its Complaint or in responses to the City's discovery efforts because the City failed to turn over data to it during the pre-litigation investigation, and because the City did not provide adequate discovery responses, is meritless. The City provided substantial discovery in this case.

10. The Ninth Circuit has observed that when "the United States comes into court as a party in a civil suit, it is subject to the Federal Rules of Civil Procedure, as any other litigant." Mattingly v. United States, 939 F.2d 816, 818 (9th Cir. 1991). An attorney's duty to conduct a reasonable pre-filing investigation depends upon the time, knowledge and resources available to the attorney. The United States has virtually unlimited resources, and what is "reasonable" for a sole practitioner is not necessarily "reasonable" for the Justice Department. *See* also Gray Panthers v. Schweiker, 716 F.2d 23, 33 (D.C. Cir. 1983) ("There is, indeed, much to suggest that government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large.") (*citing* Model Code of Professional Responsibility EC 7-14 (1983)); United States v. Witmer, 835 F. Supp. 208 (M.D. Pa. 1993) *aff'd without op.*, United States v. Witmer, 30 F.3d 1489, 1994 U.S. App. LEXIS 19, 269 (3d Cir. 1994) ("the court recognizes that a government attorney must be held to a higher standard than a private attorney") (*citing* Freeport-McMoran Oil & Gas Co. v. F.E.R.C., 962 F.2d 45, 47 (D.C. Cir. 1992.)). The fact that the Attorney General has no subpoena power during the pre-suit investigation does not relieve the Government of its duty under Rule 11.

11. Courts assess a party's conduct in light of the following factors to determine whether an attorney has made a reasonable inquiry sufficient to satisfy Rule 11:

A. the time available to the signer for investigation;

B. the extent of the attorney's reliance upon his client for the factual support for the document;

C. the feasibility of pre-filing investigation;

D. whether the signing attorney accepted the case from another member of the bar or forwarding attorney;

E. the complexity of the factual and legal issues; and

F. the extent to which development of the factual circumstances underlying the claim requires discovery.

Childs, 29 F.3d at 1026 (*citing* Thomas v. Capital Security Services, Inc., 836 F.2d 866, 870 (5th Cir. 1988) (*en banc*)). As discussed below, consideration of each of these factors weighs heavily against the United States in this case.

12. **Time available for investigation**

As the Justice Department correctly argued early in this case, it is not hindered by any statute of limitations when it brings an action under 42 U.S.C. § 2000e-6. Accordingly, the "time available to the signer for investigation" was virtually unlimited here. Indeed, the United States commenced its pre-filing investigation in May 1991, and issued its Notice Letter in November 1992. Conciliation efforts followed, but were unsuccessful, and the United States filed this action in July 1993. Given the 18 months during which the City (and test developers) provided information and documents -- including evidence of the job-relatedness of the challenged examinations -- the United States cannot credibly contend that it was hampered in any way by time constraints on its pre-filing investigation.

13. **Extent of reliance upon the client for factual information**

This factor does not apply in this case. It bears noting, however, that the same attorneys who conducted the 18-month pre-litigation investigation signed the Complaint.

14. **Feasibility of pre-filing investigation**

The Justice Department is statutorily authorized to conduct pre-filing investigations, and has substantial resources with which to do so. Combined with the Government's unlimited time to investigate, the feasibility of conducting a pre-filing investigation in this case cannot be disputed.

15. **Whether the case was forwarded from another attorney**

This factor does not apply in this case.

16. **Complexity of the factual and legal issues**

The attorneys for the Civil Rights Division are clearly conversant with the factual and legal issues in a Title VII case. *See* Huettig & Schromm, Inc. v. Landscape Contractors Council of Northern California, 790 F.2d 1421, 1426 (9th Cir. 1986) (noting that sanctioned attorneys were experienced labor lawyers and thus should have known that their conduct was improper). Moreover, as Torrance is one of several Southern California municipalities the Civil Rights Division has sued since 1991 (asserting nearly identical allegations), it cannot credibly assert that the factual and legal issues pertaining to police and fire department hiring were too complicated to permit a reasonable pre-filing investigation. This plaintiff's expertise in this area is not in question.

17. **Extent to which underlying facts must be developed in discovery**

The essential facts relating to the adverse impact claim were primarily the tests themselves, the opinions of the parties' experts and the availability of alternative selection devices. The United States does not seem to have made an independent effort to determine the validity of the challenged examinations before it filed its Complaint. It surely could have done so with its unlimited time to investigate and its substantial resources. Although it now contends otherwise, the Government's verified discovery responses indicated that it did not retain an expert to determine the job-relatedness of the challenged examinations until some time after February 1994, seven months after filing suit. If formal discovery was necessary to develop further support for its claim, the Government does not appear to have used the discovery process for this purpose. At trial, its primary experts, Dr. Joel Lefkowitz and Dr. Kevin Murphy, merely opined that the City's substantial evidence of test validity did not satisfy the Uniform Guidelines. As the Court noted in its original findings, Dr. Lefkowitz "did not testify as to a single job analysis or validity study that he, himself, performed with regard to the examinations at issue," (*see* 9/18/96 Finding of Fact No. 81), and Dr. Murphy identified no alternative selection devices that would have had "less adverse impact yet equivalent utility to any of the challenged written examinations." (Id., Finding of Fact No. 83).

18. At the time the Government filed its original complaint, the 1993 amendments to Rule 11 had not yet become effective. At that time, an award of sanctions was *mandatory* once a violation

had been found. *See* Larez v. Holcomb, 16 F.3d 1513, 1522 (9th Cir. 1994) (under former Rule 11, court must impose sanctions if complaint is objectively frivolous, legally unreasonable, "or without factual foundation, or [ ] brought for an improper purpose"). Under the current version of Rule 11, such awards are discretionary.

19. The amount of a monetary sanction "should always reflect the primary purpose of Rule 11 -- deterrence of future litigation abuse." Brubaker v. Richmond, 943 F.2d 1363, 1374 (4th Cir. 1991). Rule 11 specifically provides that an award may include "an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation," where such an award is "warranted for effective deterrence." Fed. R. Civ. Proc. 11(c)(2). What should be deterred here is the filing of adverse impact claims against municipalities to realize the benefits of their coercive effect. These claims are very serious and very harmful, and should not be asserted unless there is a sound factual basis for them. That factual basis should exist at the time of filing the initial pleading.

20. When determining the amount of an award under Rule 11, "the ability of a party to pay is one factor a court should consider." Gaskell, 10 F.3d at 629. The United States does not contend that it lacks the resources to pay the City's defense fees.

21. In Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), the Court, reviewing a district court's award of attorneys' fees to a prevailing Title VII plaintiff, held that it is an abuse of discretion for a district court not to consider 12 factors in determining a total award. Those factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. In Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), this Circuit held that the amount of attorneys' fees to be awarded is within the trial court's discretion

and will not be disturbed absent an abuse of discretion, and adopted the Johnson factors. Then, in Patton v. County of Kings, 857 F.2d 1379 (9th Cir. 1988), the Ninth Circuit applied the Johnson/Kerr analysis in determining an appropriate award of attorneys' fees for a prevailing Title VII defendant.

22. This analysis is not necessary in this case, however, because the parties have stipulated that, if the City is entitled to an award of attorneys' fees -- which the Court finds it is -- the amount of those fees shall be $1,714,727.50. Accordingly, the United States shall pay the City attorneys' fees in this amount.

IT IS SO ORDERED, this 18 day of September 1998

Mariana R. Pfaelzer

Hon. Mariana R. Pfaelzer
Senior United States District Judge