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## Enforcement Against State and Local Governments

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EMPLOYMENT DISCRIMINATION:  
45 YEARS OF ENFORCEMENT OF TITLE VII OF THE  
CIVIL RIGHTS ACT OF 1964  
ENFORCEMENT AGAINST STATE  
AND LOCAL GOVERNMENTS

BEGIN TRANSCRIPT

**RICHARD UGELOW:** Let me introduce Terry Connors who's leading the next panel, and he too will introduce the distinguished panelists. Terry and I share something in common; we started in the [ELS] on the same day. The only problem was that Terry came from Air Force JAG, which is an inferior branch of the military, and I came from the Army JAG and it was [superior.] Terry had a really distinguished career at the [ELS]. He prosecuted cases against . . . Maryland, Michigan, and [the] New Jersey State Police for race and sex discrimination; and worked on the *AT&T* case.<sup>1</sup> After he left the Section in 1976, he went into private practice in Florida. He's now co-head of a labor and employment practice, the Miami office of Hunton & Williams. He's worked extensively in employment throughout his professional career and he's written extensively on employment discrimination and [he] participates in many professional organizations dealing with employment discrimination issues. Terry?

**TERRY CONNORS:** Thank you, Richard. The truth is that the reason I was invited was because on my first day at the Civil Rights Division I reported late for work to Mr. Rose, as I knew him at the time, and he wanted to know why. I'd just settled on my first house purchase, so I didn't need to get fired, but he said "well, we don't—we haven't hired many people before that have already tried cases, so here's a file involving the City of Albuquerque, and why don't you take a look at it and why don't you go out and handle it?" So having nothing to say, I said, "well, what happens if I lose?" and he said, "we don't." But I did. Actually, I think Brian Landsberg lost it, because he touched it last.

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1. *EEOC v. AT&T*, 556 F.2d 167 (3d 1977).

But in any event, that was the religious discrimination case, and—and I think maybe the only one ever brought [there].<sup>2</sup>

On the State Police, and building on the very good work you heard described this morning, by the time [I] got [to] the State Police agencies, the heavy lifting had largely been done on the *Griggs*<sup>3</sup> issues and so forth; and I recall that I discovered something that we didn't have in [the] Judge Advocate's court, which is request to admit. And so I prepared this extensive request to admit that essentially meant that we won the case. And to my great surprise, Michigan signed it.

So I didn't know quite what to do next, except I went out and November 11th happens to be Veteran's Day and that year my wife's 30th birthday. And we got to a point in the discussions—Gerald Ford was newly in the White House—where the Attorney General of Michigan and the Chief of the State Police yelled at me across the room that “Jerry Ford would never require us to do what you're asking us to do in this settlement, and we're just not going to discuss it with you; we're going to talk to him.” So it was November 10th, and I was supposed to be taking somebody to dinner in Washington the next night, but I said, “well, I actually don't know the President, but why don't we do this: let's adjourn for today and you call Jerry and . . . one of two things will happen. Either I will go home and have birthday dinner with my wife, or we'll be back here tomorrow morning talking about this, depending on what he says.” And we came back and talked about it the next day, so we did resolve the case, so thank you for the heavy lifting everybody.

Our group is—I want to introduce them all at once because I think we'll bounce back and forth a little bit . . . and I'll start to my immediate right: Marybeth Martin, who has held Section responsibilities, having started in 1970 as a research analyst—and worked on numerous cases—then moved on [to] another career, became a lawyer later, returned as a lawyer in the Section and prosecuted numerous cases before she retired there in . . .

**MARYBETH MARTIN:** 2003.

**TERRY CONNORS:** Next to her, Jerry George, [who was with the Civil Rights Division of the DOJ from] 1969 through . . .

**JERRY GEORGE:** 1988.

**TERRY CONNORS:** 1988, and then [he went] to the Environmental and Natural Resources Division and off to private practice in San Francisco after that, handling many cases involving police and fire departments in Los Angeles, San Francisco, St. Louis, and others. Vivian Toler, next to Jerry, was a research analyst and worked through the entirety of her career I think until [her] retirement . . .

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2. United States v. City of Albuquerque, 423 F. Supp. 591 (D.N.M. 1975), *aff'd*, 545 F.2d 110 (10th Cir. 1976).

3. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

**VIVIAN TOLER:** [in] 2007.

**TERRY CONNORS:** In 2007, when at the end of her career she was responsible for all the research assistants—by then called paralegals—working on many cases including the gaming industry, the film industry, and putting together the analysis models for the various remedial relief programs that the [ELS] sought. And to her right, Mike Middleton, [who was] in the [ELS] from 1971 to [19]78, currently on [the] faculty at the University of Missouri, and we'll focus, among his many accomplishments, on the *City of Jackson*<sup>4</sup> case, if you will. And if I may, Mike, could you start off to talk about that one?

**MIKE MIDDLETON:** Sure. Thanks, Terry. I'm really happy to be here. I was at a gathering of the Civil Rights Division a few years ago in Washington and I was impressed with that gathering and I'm equally impressed with this one and I am very grateful for the experience. What people have said about Dave Rose and the folks who taught us all what we were doing; it's hard to express how influential they were on us and as I look around the room and see all my former colleagues and see all the success they've had—I think all can be attributed to Dave. His work ethic. His nurturing attitude towards folks. And his deep, deep intelligence. And deep, deep commitment to these issues.

Like Terry said, by the time we started working, most of the heavy lifting was done. The law had been pretty much established, the seniority systems had been—at least the framework for analyzing [the] seniority systems—had been worked out. Adverse impact theory had been worked out.<sup>5</sup> And it was simply a matter of finding the right targets and going after them. I had some experience in several different areas, and I'll briefly describe some of those cases. But what I think I really want to say is the pictures that were on the screen at the beginning of this session the white/colored bathrooms, the colored only movie theater. You may think that that was long, long ago, but the fact of the matter is the cases that I worked on, the discrimination was so clear and so in-your-face, that it made the cases not only easy to do, but a lot of fun to really challenge that kind of stuff.

My first trial I tried with Bob Gallegher and Dave Allen; and Kathy Green was our research analyst on that case. It was in Detroit, *Detroit Edison*.<sup>6</sup> [This is from when] we began going to the public utility companies. Detroit Edison was a major electricity provider in the Detroit area. We also did the *Philadelphia Electric Company*,<sup>7</sup> [which was the] same kind of case. The fundamental issue there was [that] obviously the good jobs went to whites and the menial jobs, if [any] at all, went to blacks. I will never forget the *Detroit-Edison* trial. We managed to find a star witness, a gentleman named Leroy Bell. And by the

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4. United States v. City of Jackson, 519 F.2d 1147 (5th Cir. 1975).

5. See, e.g., *Griggs*, 401 U.S. at 424.

6. *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973), *rev'd sub nom.* *EEOC v. Detroit Edison Co.*, 515 F.2d 310 (6th Cir. 1975), *vacated*, 431 U.S. 951 (1977) (remanding for further consideration in light of Supreme Court's decision in *International Brotherhood of Teamsters v. United States* (citation omitted)).

7. United States v. Phila. Electric Co., 351 F. Supp. 1394 (E.D. La. 1972).

way, the way we found witnesses, I think someone mentioned. You had to develop a really good relationship with the local NAACP and some of the local organizations because they knew where the people were.

So whenever you would go into a city, you would contact the NAACP or [Congress of Racial Equality] or some community organization that was involved in civil rights, explain what you were doing, [and] explain what you were looking for. [We would] try to develop a trusting relationship with those groups because we were the federal government, and of course we're here to help you. They didn't always buy that. But, they put us in touch with a gentleman named Leroy Bell [in Detroit].

Leroy Bell had been in World War I; he was trained as an electrician in the war. He came out of the war and went to his home[town] of Detroit, and applied for a job at the electric company. He was told [that] he was black. He was told that there was one job at the Detroit Edison Company that a black man could have. But they already had a shoeshine boy. And if he were to wait around; if this gentleman ever left, they would consider him for the job. Well obviously he was our star witness, I mean. But that's how simple the case was. Their policy was you didn't get to be a lineman if you were black, no matter what your qualifications. The other interesting thing about that case was [that] Damon Keith was our judge. A very distinguished African-American judge, and when I saw him I immediately got very relaxed. But somewhere during Mr. Bell's testimony, the question was raised, well, how about black women? And he mentioned well, black women could work there, but the job[s] for black women [were as] elevator operator[s]. And they had two elevators in the building, and there were women in those jobs. Well the defense counsel was trying to challenge him and ask [confusing questions]. Judge Keith interrupted. And he said, "Well I know something about that; my sister was an elevator operator at Detroit Edison." So it was a good case, and it was a lot of fun. Needless to say we won that case.

Some of the other things—someone mentioned the airline cases. I worked on three airline cases: *TWA*,<sup>8</sup> *Delta*,<sup>9</sup> and *United*,<sup>10</sup> with Susan Reeves, and eventually Doug Huron . . . got on those cases. I don't want to tell the story of how I was second chair on *United* and Susan left. Dave Rose turned to Doug, who had just completed some major case and asked Doug to take first chair. I was of course quite outraged, because I thought I was ready for that. And I went in and talked to Dave about it, and I was railing about how he was mistreating me. It turned out that he was absolutely right. Doug was eminently more qualified to do that than I was. The only advice Dave gave me as we were arguing in his office was, "Mike, don't do anything precipitous." I had to go back to my office and find out what he was trying to tell me. I didn't do anything precipitous, and it all worked out. [B]ut Doug, I have always admired you and appreciate the leadership you gave on that case, and I confess even today that you were eminently more qualified than I to take the lead on that.

But the airline cases are pretty easy too. [B]asically blacks were redcaps or

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8. *Zipes v. Trans World Airlines Inc.*, 455 U.S. 385 (1982).

9. *Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781 (E.D. Pa. 1967).

10. *Lansdale v. United Airlines*, 437 F.2d 454 (5th Cir. 1971).

baggage handlers, and the big jobs were ramp servicemen. [Ramp servicemen were] much more highly paid [and the jobs were] much more attractive. But the policies were that, you know, African-Americans simply need not apply for those jobs. And there was that inexorable zero in terms of black participation in those jobs.

The other aspect of the [airline] case[s] we were beginning to get into enforcing was the gender discrimination portions of Title VII. Women were always . . . stewardesses—not flight attendants, stewardesses. They had stewards and stewardesses and reservations agents. And again, the patterns were clear. Women were not in any jobs other than those two. Those were the lowest paying jobs. And there were some side issues about appearance, height, and weight requirements for stewardesses that were not related to one’s ability to get down the aisle and serve passengers but more related to the physical attractiveness of the woman. There were age, height, and weight requirements for the flight attendants. It was fun challenging those because there was really no justification other than discriminatory attitude on the parts of people. And we—I think—settled all those cases. The other thing about what we did at the Division was we really prepared our cases well. And once you had the evidence together, a defendant really had to be crazy to go to trial. Because it was quite clear what the outcome would be if the judge was going to analyze the case properly.

And I’ve got to give credit to Marybeth and Vivian and other research analysts that we had in the Division then, because they did all that legwork to put the statistical cases together and kept the cases organized. But the case[s] I had [the] most fun with [were] the police cases. I think I had one of the first local government police cases in the City of Jackson, Mississippi, which was my hometown, so I knew something about it. I had two friends, Frank Parker, who was the head of the lawyer’s committee in Jackson. He had sued the police department, and Mel Leventhal, who was the counsel for the NAACP Legal Defense Fund, had sued the fire department.<sup>11</sup> [Both were] race discrimination cases. I wanted to go home and do something in my hometown. Dave authorized me to go down and investigate but he told me that if I were able to do it by myself with, I think, one research analyst, I could try it.

So I went to Jackson and, on my way to the city attorney’s office to introduce myself, I went by the employment office on a whim. I had a big afro and I was about twenty-five years old, maybe. And I asked the lady, I said “I’d like to apply for a job with the City of Jackson. May I have an application, please?” She said, “Boy, that’s not the way you get jobs in Jackson. If you want a job, you have to go stand under the viaduct on Highway Forty-Nine before seven o’clock on any morning, and there’s a truck that’ll come by. And if there’s work, you hop on the truck. And if there’s not, you come back the next day.” I dutifully took my notes, and said “Okay.” I then went over to the City Attorney’s Office and announced myself and told him what we were doing. Ultimately we settled that case. We focused on the fire and police departments, because there were two private suits in existence at the time. And

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11. *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982); *Corley v. Jackson Police Dep’t*, 755 F.2d 1207 (5th Cir. Unit A Mar. 1981); *United States v. City of Jackson*, 519 F.2d 1147 (5th Cir. 1975).

it's amusing, we talk about quotas and goals and timetables; we pretty quickly got an agreement out of the City of Jackson to hire—all future hires in the police department had to be on a one for one basis—Black/White. And in the fire department, two for one—two blacks for every white. We got that signed. Fortunately we didn't have Judge Cox [on] that. I don't know if any of you know Judge Cox, but I had some dealings with him several years later where I had to move to recuse him from some cases because of his racism. And finally [we] won that [case] in the Fifth Circuit.

But those were the days. The discrimination was obvious. The legal theories had been pretty much ironed out by our predecessors on the prior panel and others, and it was a great deal of fun to do those cases. Another little anecdote, I think I talked about the NAACP, and the research analysts. I have to tell you, the FBI was very, very, very helpful during those days. You can imagine a young black attorney running around Jackson, Mississippi or Birmingham, Alabama and Mobile, Alabama; trying to interview witnesses can be difficult. It was always very nice to be able to write a memo to J. Edgar Hoover and ask him to have his people go do the interviews. And the FBI did a very, very good job of following the script and getting vital information from basically anyone who was involved in any of these cases. White policemen, black applicants, black deterred applicants . . . the FBI had a way of walking around a community and getting people to talk, so their expertise was extremely useful.

Someone mentioned that we should talk about expert witnesses. I don't know that I have much to say about that except that it was often very difficult to find experts who could do what needed to be done. But I think it was more difficult for the defendants. In the Philadelphia Police Department case<sup>12</sup>—which was a sex discrimination case—[they] had about eight women on the police force. They were all assigned to the juvenile unit and they were all denied the ability to be patrolmen. The juvenile unit obviously paid less. To show you how blatant it was, on the way up to Philadelphia, when we got there in fact, Mayor Rizzo was on television saying that women would patrol the streets of Philadelphia over his dead body. That kind of motivated us on that one, too. But the point is that the City of Philadelphia hired an expert who did a study that pretty much confirmed the stereotype on some trumped-up psychological basis that women just were not cut out for police work. And that was their expert witness, and that was amazing to me that they thought that they could convince anybody with that kind of testimony. And indeed, they didn't. I didn't stay on there—Richard Ugelow, you took that case on when I left, didn't you? We won it, didn't we? Alright. Alright.

So those are some of the stories, and I will leave it at that and hopefully if there are questions, I will try to help answer them. Thank you.

**TERRY CONNORS:** I think that's a perfect segue to Vivian, and I wonder if you, Vivian, could explain to this group how you became the expert for the City of Cincinnati.<sup>13</sup>

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12. *United States v. City of Philadelphia*, 573 F.2d 802 (3d Cir. 1978).

13. *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992).

**VIVIAN TOLER:** I'm not sure how that happened myself.

**TERRY CONNORS:** But perhaps beyond that, [could you] talk about the work of your team over the years, which was obviously extremely critical to this effort?

**VIVIAN TOLER:** Yes. Paralegal specialists or research analysts—there are numerous things in preparation for trial for the attorneys. A lot of our work involved xerox. That was a majority of it in the beginning. We xeroxed our hearts out, going to various cities, going through personnel files and applicant folders. Trying to identify—this was before people were identified by race and sex—people by looking at their high school or their college, to see if they went to a predominantly black school, and then we would make the identification that way. And [then compared] their qualifications with the white majority.

Paralegals summarize[d] depositions and went out and searched for witnesses; I guess that was after the FBI stopped doing it for us. We used to go out there to find witnesses for . . . particular cases. We had one case against the Florida Department of Corrections, [w]e had about [sex discrimination] and we had paralegals, research analysts [a]t that time, going all over the state to the different correction facilities trying to locate witnesses, and we'd do the preliminary interview and come back to the attorneys with people we thought would make good witnesses and give them that information.

We've had a paralegal . . . go out to a fire department and take the agility test to see how difficult that was. A female had to go out and take that test. We had one in which a male paralegal had to go into the shower at a Department of Corrections, because they said they weren't letting women be correctional officers because it would interfere with the privacy of the male prisoners. So he had to go out there to show that the guards wouldn't see the males' private parts while they were taking showers, and it was just a variety of different things.

And in the Chicago police case, I—along with other paralegals in the Section—had to go through the disciplinary actions to compare the discipline given to white officers compared to that given to black officers, and that was also before we had everything on computer, so we had to go through by hand and compare information and jot down our findings. And testifying at trial when necessary—I had to testify at that trial in Chicago.<sup>14</sup> I think I spent almost a year off and on in Chicago and I believe the entire summer of 1975 I was in Chicago. And I think that about covers it for right now. I think I worked on the Cincinnati case with Marybeth, so she knows[.]

**MARYBETH MARTIN:** Right. I know the strain.

**TERRY CONNORS:** Then go ahead.

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14. United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977).



**MARYBETH MARTIN:** Oh, I'll do it. Vivian Toler was the paralegal assigned by the [DOJ] to work on the case. She never was an employee of the City of Cincinnati. However, the concentration that we wanted to enter there was something that the City had agreed that they needed to do some work on and that was basically hiring—hiring black females and Hispanic police officers. So what we needed to do—and this was even before . . . *Adarand*<sup>15</sup> and other decisions that talked about having the factual predicate or the findings—[was] we put together findings that would show how badly the City needed to have goals and timetables; so this was entered into the record. The City took about four years to hire anybody. They went into a layoff status. It was not for purposes of avoiding the decree as other places had done, but this was simply because they were in an economic downturn. So when the City started hiring again, that brought on a rush of reverse discrimination cases. One of them was the *Vogel* case.<sup>16</sup> We wanted to intervene, but Mr. Turner had some reason that we weren't allowed to intervene. I can't remember the specifics.

So this was a private case against the City, [and they were] saying these goals and timetables needed to be off the books. Vivian's affidavit was all of her standard deviation analysis. This was the bread and butter of a paralegal or research analyst's day, [which] was to sit and do—without a computer, remember, this is another time that we did not have computers. So she did her analysis, put it into an affidavit, and the Court of Appeals decision came out and lo and behold there was Vivian Toler, expert witness for the City of Cincinnati.

So Jim Turner was the first to read this, I believe, and came to my office or called me up and said, "We've got to object to this. Vivian Toler is an employee of the [ELS]." So I called the Court of Appeals clerk's office, and said, "There's a mistake on this opinion that just came out." And they said, "Are you a party?" And we were—[but] I couldn't convince the City to say that they didn't hire you as an expert witness. And she had made the case. Her affidavit had helped bolster our argument that these goals and timetables were indeed needed, so.

**TERRY CONNORS:** How much did you charge for that, Vivian?

**MARYBETH MARTIN:** I want to know if Vivian is going to get any referrals. Have you gotten any calls to serve as an expert witness? Because it was an excellent example. Now Vivian is the quintessential research analyst, I will say that. She worked—when she did the City of Chicago facts, she was up all night. The judge I believe commented—Bob Moore can confirm this—on what excellent work she had done, and ever so quickly. Now my point is that there's a theme underlying all of the discussions this morning and up to right now; thank you, Mike, for acknowledging us, and, Doug, you also.

Paralegals were also on the scene. Secretaries were on the scene. We had a big support staff in the Section and nobody knew exactly what research analysts did. I think I had an interview with an administrative officer in the

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15. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

16. *City of Cincinnati*, 959 F.2d 594.

Division, and the only question I can remember when I was being hired was: are you available to travel? Well, little did I know how job related that was. I think I was kind of a hazy figure to people around the Section, because I spent most of my three and a half years as a research analyst in Birmingham, Alabama. Or Inslie, Fairfield, or Pratt City. One of those towns in which the U.S. Steel's Fairfield worked. Nine mills were located [there]. And I had to learn the difference between all the nine mills and the lines of progression in each of the mills. They had all been totally segregated up until the time at which . . . U.S. Steel thought it would solve its problems by creating a pool down at the bottom. So you lost your line of promotion seniority so that you'd have the opportunity to hopefully get into another line. Well there weren't any jobs. Or not enough jobs for this to happen smoothly. So that's one reason we got involved.

Now another thing I will say, because we had paralegals and research analysts, and I understand the word just—the title—changed. I'm not sure there was any use of something called a research analyst before it was used in our Section. I keep hearing that we were the innovators there in the Section, and I hope that's the case, because I think that it was a wonderful job category to do anything that was needed to get ready for a case.

Now what this meant was, yes, we did a lot of interviews. We did the interviews that the FBI basically didn't want to do or the lawyers didn't want the FBI to do for some reason. We also went . . . without our government suits on—because at that time all the research analysts were female and we would be a little bit less intimidating sometimes than some of the lawyers. So we had some of our interviewees tell us that they preferred talking to us. And [this] worked out well when we got ready for trial. We also had a number of records to look at almost every case. This goes to the factual development of the case that we've talked about being so important, and it was critical; it really was critical. [W]ell Kate Green, for instance, in the late [19]70s, I believe had a responsibility in a case [called] *United States vs. County of Fairfax*<sup>17</sup>—one of the wealthiest counties in the nation. The records for applications I believe were stored in shoeboxes that were pushed under a table in the personnel office, and they were in no order. That's what we had to deal with.

A lot of records were in any number of different places; they had different codes. Charlotte and Logan, I believe in *Detroit Edison*,<sup>18</sup> found a dot curiously behind certain names and learned that oh, that means this is the internal code for “that's a black applicant.” I had to deal with a case in which I was seeing the word peachy written by some names. That was a little bit more evident, I suppose. But anyway we had to learn these records inside out. [Let's go] back to *U.S. Steel*,<sup>19</sup> where I spent a lot of my time.

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17. 629 F.2d 932 (4th Cir. 1980).

18. *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973), *rev'd sub nom.* *EEOC v. Detroit Edison Co.*, 515 F.2d 310 (6th Cir. 1975), *vacated*, 431 U.S. 951 (1977) (remanding for further consideration in light of Supreme Court's decision in *International Brotherhood of Teamsters v. United States* (citation omitted)).

19. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

We had not only interviewed all the black steel workers; we knew all the lines of promotion, who was where, and we had a curious delay in the trial. There were fifty-five trial days over—Lou and Bob could tell me precisely—[t]wo years, I believe. Well, there was a delay for the defendants after we'd put on our case; they were working on some big project over at the law firm, and it turns out that they brought in an expert witness. We didn't have any experts up until that time on this case. The expert witness had something called a regression analysis. We had never heard of a regression analysis at this point, so we were curious to see this. Well it was a big printout and it showed that while we were saying race made the difference—ah-ha—you need to look further. There are other factors at work. One of those factors was education. Now it wouldn't surprise anybody to know that black steelworkers typically did not have the same level of education as white steel workers, but these are steel working jobs. And education is not necessarily something that is translatable into most of the work in the steel mills.

But we had interviewed—the paralegals had interviewed—all of the black steelworkers. We knew when we looked at this closely, their education levels aren't even right. Some were too high, some were too low—they [were] just [in]correct. What did we do? We brought in about fifty steelworkers to testify to the inaccuracy of the data they were using for their regression analysis, and the judge, who was very much attuned to mathematical analysis, Judge Pointer, tossed out the exhibit. That was their major work, I'd have to say—I don't think they put up any resistance after that, but it was just a good example for me of how facts are important.

**TERRY CONNORS:** The Department actually paid you for all that time in Alabama?

**MARYBETH MARTIN:** No. I got per diem; it was twenty-five dollars a day.

**TERRY CONNORS:** Actually—

**MARYBETH MARTIN:** And overtime.

**MIKE MIDDLETON:** [You received] overtime?

**TERRY CONNORS:** In 19—

**MARYBETH MARTIN:** We did get overtime.

**MIKE MIDDLETON:** We didn't.

**JERRY GEORGE:** We didn't.

**TERRY CONNORS:** [That's a] good point, because someone brought us up to 1974, I believe, in the initial phase, and there was a group of us that went over to the EEOC on detail, when the transfer occurred, and were asked to put cases together in ninety days in the style we had done at the Justice

Department and I recall going to tak[e] a team to Cincinnati to investigate a major consumer products company that will remain unnamed. And my plan was that we would go on Tuesday and we would return when we were finished. And, of course, that we would be finding people at home at night and over the weekend and so on and so forth, and the team said “wait a minute.” The point of this is young lawyers and law students, when you are dedicated [to] something like this, [will] work as much as it takes to get this done and I think this is the theme throughout all of our lives at the [ELS]. And Jerry, tell us about fire departments and police departments and your experience.

**JERRY GEORGE:** Well, police and fire departments, they’re sort of like construction unions; they’re kind of my people. I’m from Indiana; I was working class. [I went] to Catholic schools. As I say, the guys in the police and fire departments were my people; I knew them. Before I get into that, one of the themes I think that’s coming out of this is that in the [ELS], I think in the Civil Rights Division generally, [it] wasn’t lawyers; it was a team. It was lawyers; it was research analysts and secretaries. We traveled together; we worked together; we partied together. We made very effective teams, and it’s because we didn’t have any artificial barriers between job classifications. This wasn’t even a consideration. People did. Everybody worked on everything. And Dave Rose was key to that. And he always had our back. I always felt he had my back and I got one story on that which I would like to tell.

In the mid [19]80s, when I was suing—and had been suing for several years, off and on—the San Francisco Police Department,<sup>20</sup> there was [a] promotional exam coming up and it was no different than the promotional exam that I had stopped two years earlier, and [so I] informed the Chief Deputy City Attorney and I said, you know, under our consent decree, you guys [can’t] go—I’m objecting; I’m writing you a letter telling you to stop the exam. Unfortunately there [was] some turmoil in the City Attorney’s office at the time and that the person I had spoken with departed without ever telling anybody he was supposed to stop the examination. And we came up around in 1986, Thanksgiving week. I sent off my letter; I stopped the examination and the then mayor, now a Senator, called a friend of hers, George Bush, who was Vice President, at his home in Kennebunkport for the holidays; who then called Ed Meese; who then called Brad Reynolds. Who then called Dave Rose. And then the day after Thanksgiving, when I was at my mother’s house, he called me; asked me what was going on, [and] I explained what had happened, and you know, nothing ever happened out of that. I understand that the mayor spoke to Brad, and Brad—she started yelling at Brad, Brad started yelling at her, they hung up on each other and nothing further happened. But I never had to worry about political interference as long as Dave was my Section chief, and it made a huge difference given the particular dealing[s] with police and fire litigation, which [were] extremely politically sensitive.

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20. See, e.g., *United States v. City of San Francisco*, Nos. C-84-7089-MHP & C-84-7694-MHP, 1986 WL 68546, at \*1 (N.D. Cal. Feb. 12, 1986).

Police and fire—why did we do so many police and fire cases? Well, police and fire departments in this country historically were all white and all male. There were in some cities [where] you might have had a few blacks, a few Hispanics, but often they would have segregated assignments, segregated facilities. And these are really well paid jobs that have low entry requirements. They hire eighteen year-old kids and they train them to be firefighters; they train them to be police officers. You don't need to be an electrician; you don't need to be a sheet metal worker. You start out with no skills at all; they train you and it's a very good living.

Now, if you're also wondering why the fire department [i]n New York might have a lot fewer minorities than the police department. Firefighters in most big cities work eight days a month. They're twenty-four hour shifts, but they're sleeping in the firehouse during most of those shifts. I often thought I missed my calling; I went into the wrong profession. It is a fabulous job, and most of these guys have two jobs. And they'll work through their firefighting career and then retire and go to their second job full-time. But they'll have two full-time jobs. They can easily work two full-time jobs depending on what kind of job it was. There were firefighters in Chicago; there'd be four of them that would have a union—they would have a union job, a construction job, [which] they would work among the four of them. Whoever had a day off would work that day—they are terrific jobs. They have terrific . . . salaries, good benefits, and very good retirement.

Another element that made these this kind of litigation a little different than dealing with the industrial and union cases that I dealt with [was] the fact that you have the civil service “merit” system. (I would put quotes around merit.) It's a different kind of process. At a company you can go in any time and apply for the job. When you're talking about police and fire entry level jobs, they all accept applications maybe—they might be doing it once every five years. They'll go out, they'll rig, they'll run a selection process, and they accept applications, [and] they go take the multiple choice test, the physical agility test, they'll interview, create an eligibility list, that eligibility list will rank maybe 500 people, and that will be in place for several years. And they either run out of people on the list, [or] it expires. And then they go through the process again. So you have to be motivated to get those jobs. And they are politically sensitive. I mean, these are the people that are responsible for the protection of the community: your homes, your families, [and] your businesses. So people are very concerned about the quality of their fire and police departments. But it's also very important that those fire and police departments be representative of the communities they're serving, and that they be perceived as actually serving that community and not [be]—as many police departments were, and maybe still are—occupying forces.

They also were politically sensitive because they have extremely strong unions that are very politically savvy. They have a lot of time, they have a lot of money, and they have a lot at stake in preserving the status quo. So when we filed these cases, we're dealing with the cities—and maybe the politics in the city might be to resolve this matter, but the politicians in the city had to take into account the political threat from the police and fire unions. So that made them a little harder to deal with.

Now I talk about the myth of “merit” selection. You know, [a] lot of these departments were just historically all white. If they had any blacks, they just [would]—even [in] some of the northern and western cities [they] would have a few blacks, Hispanics—[have] segregated assignments. The city of Los Angeles—[the] liberal left coast—had two black fire houses. And the area of all the other fire houses were whites; all of these departments would have male only policies. They would not—just would not—even allow a woman to apply for a firefighter job or a police officer’s job. On police officers—police departments—there were no street cops. You might have a policewoman category or a matron category to deal with prisoners; maybe to serve undercover on vice squad or something, but they were not considered police officers.

A story I heard [a]bout the Philadelphia Police Department was that when the Director was deposed, he was explaining that there were two badges for the Philadelphia Police Department. You had the badge for the police officers, and then the badge for the dogs, horses, and policewomen. In the L.A. Police Department, at a dinner for the policewoman’s organization, there were about a hundred policewomen I think at the time on the L.A.P.D. The police chief at the time said he thought there was room for about twenty policewomen. And I don’t know why he thought that was a good audience to say that to, but that was the situation that existed at the time we got authority to start suing these employers.

In addition to these policies there [was] a lot of what you would call “institutional head-winks.” The standard they were all using—standards unrelat[ed] to job performance—[such as] multiple choice tests [that] would consistently have adverse impact on blacks and Hispanics. Blacks and Hispanics would always score, or not always, well—always—pretty much, one standard deviation below the white mean. If you’re using it as pass/fail, that’s bad enough, but if you’re using the written test as a ranking device, forget it. You’re not going to be hiring any blacks or Hispanics. Physical strength and agility tests—they would use those to screen out female candidates once formal sex requirements were eliminated. There were minimum height requirements, usually in the five-foot-six to five-foot-nine range, which would eliminate at least ninety percent of the women, and eliminate Asians and Hispanics at twice the rate of white males. And then [there were] background checks; use of factors, such as arrest records without convictions that had disproportionate impact on minorities, and often they were just subjectively applied. If your dad’s a cop they may not even bother to check your background, particularly, you know, if he had a bad patch when he was a teenager but he’s fine now. If you were a minority and you had an arrest record, you’re out of there.

And then the last thing was just the process itself. Like I said, they might have an eligibility list that would exist for five years, [so] then you wouldn’t know if you missed that start date; you’re just going to have to wait around. And who waits around—unless you’re really motivated to be a police officer or a firefighter? In addition you have this multiple step process where you first apply, then they’ll send you a notice of the written test. Come in and take the written test. [We’ll] send you the results of the written test. Then later they’ll schedule the physical agility test. They’ll send you another notice. You come in for the physical agility test. Then, after that, same thing for the oral

interview. And then maybe, then they'll have the eligibility list, and then if you've got 500 names on it, they probably won't run the background [checks until] they're getting ready to hire somebody, so they're going to hire twenty people, maybe they'll take [the] first sixty names on the list and send them a notice to come in and fill out the forms for the background check. So if you're in the second sixty names, you might not hear anything for two years after you've got yourself on the list.

So none of this is a problem if your dad's a police officer [and] your six cousins are all [in] the department. You know, when things are ready to happen, they'll let you know. You need to move, you change your address, you know; they make sure civil service knows about it. But if you're not in that game, then it can be a real problem. And people move; they forget to tell somebody about the change of address, they don't get notice, and they're off the list. Or it's been three, four years, they forgot they even applied for the job. So if you wonder why, if you have a merit system, you still end up with situations where the bulk of the people on the police or the fire department are all related to each other, that's how it happens. It's a merit system. It's a transparent system, but it's set up in such a way that unless you've got a comparable organizational effort for the minority communities, they're going to fall to the wayside. In terms of litigating stuff, what we really did [wasn't]—most of what we actually actively litigated—the height requirements and that sort of thing [because those] just went. You know, people understood they couldn't defend them. I only had one that ever got litigated.<sup>21</sup> They brought in an expert to talk about why the North Carolina Highway Patrol [used that type of requirement], and we had a case that only went two days, because the judge had gone to the University of North Carolina and he wanted to go to the basketball game that night. He let the trial go over to the next day. It took a couple more hours of testimony, and then [he] ruled from the bench. But they put their expert on the stand, and the most amazingly bad thing about it was that this guy gets on with his report talking about why this five-foot nine-inch height requirement was absolutely required to be a good, successful State Trooper. And you know, I knew that five years earlier, he had a one page report, and I had in my hands this transcript from the case five years earlier in California where he had testified for a plaintiff against a height requirement, and had gone on at great length about just how you could never defend a minimum height requirement for a trooper position.

So it was fun, I [have] got to admit. But it was not difficult. In terms of challenging written tests—and I think this is still an issue, because we're still doing it, and they're still giving the same kinds of exams. As I said, they'll always have adverse impact. The evidence of job relation in those early days often was not much more than well, of course, it's a good test; I mean it says this is a test for a police officer. That's what it says on the first page. So that's what it does; it tests for a police officer. And it didn't get a lot more sophisticated than that. [I]f they did try to validate test performance against job performance, they would typically use training academy performance because they had no good measures of actual job performance. Everybody was satisfactory. And if

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21. *United States v. North Carolina*, No. 75-0328-CIV-5, 1981 WL 232 (E.D.N.C. Feb. 17, 1981).

you're correlating against a written test against another written test, you would expect probably to get about a point three correlation; and that was about the best any of the cases I saw ever did, was to get about a point three correlation between written test performance and academy performance.

On promotional exams, they didn't even have that, because they didn't have any job performance data at all. So they would say that they built these tests using a "doing a good job" analysis and the content of the test matched the content of the job. [That's what's] called content validation. And our response to these was to first tear apart their job analyses, because these are typically very superficial job analyses done by inexperienced analysts; nobody had ever questioned them before in terms of their ability to do these jobs, and if you cross-examined them, you could trip them up fairly easily.

**TERRY CONNORS:** Jerry, isn't that true in the *Ricci* case,<sup>22</sup> as well, but it never got to the record, I think?

**JERRY GEORGE:** I suspect it's true. I doubt that the test was any better than any of the stuff I saw. And test [content], typically would be irrelevant to job content, even on the promotional exams. I mean they looked like they were relevant, but if you started asking people about [it]—"So what would you do with this information on the job?"—[they] typically had no idea. It made no difference. And these are highly physical jobs—in terms of firefighter[s and] even police officer[s]—and on the promotion[s], the difference between the guys who were successfully performing at the entry level and their officers is leadership potential and there's nothing on those written tests that's going to measure any of those leadership traits.

**TERRY CONNORS:** Jerry, in the interest of time, [would you] run down the results on the San Francisco [and] L.A. cases?<sup>23</sup>

**JERRY CONNORS:** Well, all right. Well, L.A., as I said, had historically segregated firehouses [until] 1956. Then the department—the fire chief—said the watchword within the department was integrate and eliminate. And so they had internal segregation within those firehouses. What all of us had some experience with [was] the black bed. If you're at a fire house, you've got four, five people on the crew [that] live in [the] fire house. [I]f there was a black on the crew, there was a bed he was supposed to sleep in, and then when the next crew came in, the black on that crew would have to sleep in that same bed. They were not allowed to eat in the supper clubs. They all fixed meals together and [would] eat together in the fire houses, but the blacks were not allowed to eat with the whites [and] were not allowed to socialize with the whites. They could only [be] with the whites at the

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22. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

23. *United States v. City of Los Angeles*, 595 F.2d 1386 (9th Cir. 1979); *United States v. City of San Francisco*, Nos. C-84-7089-MHP & C-84-7694-MHP, 1986 WL 68546, at \*1 (N.D. Cal. Feb. 12, 1986); *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 473 F. Supp. 801 (N.D. Cal. 1979).



fire scene. And the whites were told that they could not talk to the black firefighters, because, the Chief said, “If people talk, they’ll argue. People argue, they’ll fight, and I’m not going to have any interracial fights.”

**TERRY CONNORS:** And that’s the last word.

**JERRY GEORGE:** And the witness who was going to say all this was a black firefighter who went to law school while he was on the fire department, and by the time we were ready to go to trial his chief was the head of the Los Angeles Civil Service Commission.

**TERRY CONNORS:** [J]ust as a wrap, because I want to do it publicly, I endorse completely what a great thing it was, what a great example Dave Rose was to all of us and what a great man and a great lawyer he is.

**RICHARD UGELOW:** Before we take a break for the next panel, you’ve heard a lot about Dave Rose today and the culture he created and established in the [ELS], and I say in the entire Civil Rights Division, particularly in the [ELS]. We were trained by Dave. [Since] Dave left, our successors have continued that—that same work ethic and culture [w]ill carry on. And as you’ve heard Tom Perez say, [the] Civil Rights Division is open for business again, and I’m sure the [ELS] is open for business, but hopefully, in the same tradition that Dave created, and that will carry on in [the] future, we have as a token of our appreciation to you. And I want to give credit to Lorna Grenevere who, as you know, was always the heart and soul of the set.

**END TRANSCRIPT**