

2000 WL 33260712

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United States District Court, D. Arizona.

Jose G. PUENTE, Irene Canales Simonetti, and
Manuel Hernandez, on behalf of themselves and
all those similarly situated Plaintiffs,

v.

STATE of Arizona (Arizona Department of
Transportation), Larry Bonine and Mary Peters,
Defendants.

No. 97-CV-1734. | Dec. 19, 2000.

Attorneys and Law Firms

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Opinion

CONSENT DECREE

STRAND, District J.

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I. INTRODUCTION

A. This matter was instituted in 1997 by Plaintiffs, Irene Canales Simonetti, Manuel Hernandez, and Jose G. Puente, current or former employees of the Arizona Department of Transportation (“ADOT”), against the Defendants: the State of Arizona Department of Transportation, Larry Bonine, former Director of ADOT, and Mary Peters, current ADOT Director. Plaintiffs complained of violations of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981 and 1983, based on Defendants’ alleged intentional acts of discrimination and retaliation against current and former Hispanic employees of ADOT, and Defendants’ alleged use of employment practices which have a disparate impact on Hispanics.

B. On March 15, 1999, this Court granted Plaintiffs’ Motion for Class Certification pursuant to F.R.C.P. § 23(b). The class included all Hispanic applicants for an ADOT position and all Hispanic employees of ADOT; there are more than 1,200 current Hispanic employees at ADOT.

C. The Parties agree that this Court has jurisdiction over the subject matter of, and the Parties to, this lawsuit. The Parties advise this Court that they wish to avoid the expense, delay and uncertainties of further protracted litigation in this matter and, therefore, agree to settle this action by this Consent Decree (“Decree”).

D. The Parties agree that this Decree is voluntarily entered into, and that they have undertaken sufficient pretrial investigations and hearings to permit them to assess the desirability of this resolution.

THEREFORE, IT IS ORDERED AND DECREED as follows:

II. SCOPE AND DURATION

A. For purposes of this Consent Decree and the accompanying Notice, this class will be certified pursuant to F.R.C.P. § 23(b)(2). As seen below, the negotiated decree concerns prospective injunctive relief for the class

members, and not claims for past harms. As usual with such class settlements, a mechanism is included for the calculation of alleged damages only for the named Plaintiffs and individual class representatives; there are no presumptions concerning the amounts involved, if any.

B. This Decree is not, and shall not be construed as or deemed to be, an admission or concession by ADOT or the State of Arizona concerning (1) any alleged wrongdoing by ADOT, or any state official or employee, or (2) the truth of any fact alleged or the validity of any claim that Plaintiffs have asserted against any Defendant in this action. Likewise, this Decree is not and shall not be construed as or deemed to be an admission by Plaintiffs that no wrongdoing occurred.

As defined by the Court, the Plaintiff class includes only Hispanic employees. Therefore, certain provisions in the Decree necessarily refer to "Hispanics" or "Spanish." The inclusion of these references do not indicate or imply that Defendants are not providing the same services or opportunities to ADOT employees who are not members of the present class. Rather, inclusion of these references is intended to dispose of class claims raised in this litigation.

*2 C. Upon final approval and entry of this Decree, this Court shall dismiss all claims by the Plaintiffs in this action with prejudice. During the term of this Decree, this Court shall retain jurisdiction over the parties for purposes of compliance with the Decree, including issuing such orders as may be necessary to effectuate its purposes.

D. Absent further action by the Court, this Decree shall end two years after the date of entry. Prior to the completion of the two-year period, Plaintiffs may petition the Court for continuation of the Decree in some or all areas for an additional two years; Defendants will have an opportunity to respond. Plaintiffs' petition shall be granted if the Court finds that there has not been substantial compliance by Defendants in the areas covered by the Decree, or that there is substantial reason to believe that such compliance will not continue absent Court oversight; this Decree shall remain in effect pending the Court's determination.

III. HIRING AND PROMOTING

The parties understand the need to maximize the number of qualified applicants and to utilize a fair and reliable selection process, and to provide all ADOT employees an equal chance for advancement.

A. Covered Positions

1. Information about all vacant and new positions shall be disseminated in an effective and timely manner with the intended effect of reaching as large a number of ADOT employees and other potential applicants as practically possible. Information about a vacant or new position must be disseminated early enough to allow all qualified persons a reasonable opportunity to obtain information about the position and submit an application or other necessary paperwork in order to be considered.

2. In addition to other mechanisms, including computer generated lists, every vacant position and application process will permit self-nominations from interested persons. There shall be a minimum period of ten working days from the date of the dissemination of information about the open position as set out in paragraph 1, to the final date that self-nominations can be received. The qualifications of a self-nominating applicant shall receive the same consideration as those of every other applicant; the fact of self-nomination will not be a negative factor in the selection process for an available position, nor shall it have any bearing on an applicant's qualifications or consideration for an open or vacant position.

3. Within six months after entry of this decree, ADOT shall participate in an automated telephone information system accessible to potential applicants including all current ADOT employees; if this system is unavailable because of factors out of the control of Defendants, the Plaintiffs shall be immediately notified and the parties shall develop adequate alternatives. The automated telephone system will enable a caller to quickly ascertain information about temporary and permanent open positions at ADOT, and whether his or her name has been submitted for consideration as an eligible or qualified candidate for an open position (and for an identified past position). If the caller has not been submitted for a presently open position, he or she shall be entitled to take the steps necessary for self-nomination by the previously announced application deadline. The telephone information system shall provide information concerning how and where to make this self-nomination, and shall identify by name and/or telephone number where to find additional information and get questions answered about the above topics.

*3 4. ADOT or its agent shall, upon request, provide information, training and materials to current ADOT

employees about using the existing resume scanning/processing software system (currently "Resumix") to apply for transfers or promotions, as well as for any other systems utilized during the period of this Decree to identify or review applications for vacant positions; these materials will be provided to the decree monitor. These materials shall be available to employees and prospective employees in printed form and via the internet. ADOT employees who are interested in or use this system shall be provided training by experienced persons in the use of this software system. Within sixty days of the entry of this Decree, ADOT shall notify all ADOT employees where and how this training, and information concerning Resumix, may be obtained.

5. Upon advance request, the above basic training shall be provided by a Spanish speaking person. The informational materials and the computer and telephone information discussed in paragraph 4 above shall state that upon request they are available in Spanish. A person fluent in Spanish shall prepare Spanish language versions of this basic information.

6. Within six months after entry of this Decree, and at least once in every twelve month period thereafter, ADOT or its agent shall disseminate basic information about its hiring process, including where to find necessary information about open positions and how to apply, and about Resumix, to potential Hispanic applicants throughout Arizona. This will be done by forwarding this information, in English and Spanish, to print and electronic media specifically directed at or used by Hispanic communities, and to schools, organizations, and community groups with significant Hispanic participation. Plaintiffs shall provide up to twelve names, and facsimile or e-mail addresses for inclusion in this dissemination.

7. ADOT shall disseminate specific information about each vacant or new position on its web site, through the telephone system discussed in paragraph 3 above, by posting in a conspicuous and public area in each ADOT work location throughout Arizona, by publication in the "Arizona State Service Job Opportunities" listings available in the Phoenix and Tucson D.O.A. Human Resources offices, and by publishing in generally utilized print and electronic media throughout Arizona when ADOT deems appropriate. The information about an open position shall include the job title and grade, and a telephone number where additional information can be obtained. The applicant qualifications and criteria to be used in filling each position will be related to and required for performing this open position; all

applicants, including self-nominated, must have the knowledge, skills and ability required for the position. Prior to beginning the interview process, all applicants selected for interviews shall be provided written notice of the person(s) conducting the interview and responsible for the selection, and of the weight that will be given to each aspect of the applicants' performance (interview, prior experience, etc.).

*4 8. All applicants for an open position shall be judged on the same criteria and input. All questions utilized by the person(s) conducting the interviews must be preapproved in writing by ADOT or its agent. This review should seek to eliminate unacceptable and potentially discriminatory inquiries.

9. ADOT will take steps to reduce the possibility or appearance of a discriminatory selection decision. Within one year of entry of this Decree, all employees conducting and/or participating in the interviewing and selection process shall be trained by experienced and qualified persons. Non-employees participating in the selection process shall receive written instructions regarding the process. Steps shall be taken to recuse any person(s) because of bias (for or against a protected class or individual applicant) involving any applicant prior to the selection process. Copies of all written materials used by the ADOT in the training and selection of panel members and those employees participating in the interview and selection process shall be retained by ADOT for the period of the decree, and made available to the decree monitor upon reasonable notice.

10. Within three months of entry of this Decree, ADOT or its agent shall develop written policies and procedures for the review of all hiring and promotion decisions and to monitor supervisory personnel making these decisions in their adherence to equal opportunity policies; these written procedures shall be provided to class counsel for comment before implementation. Every hiring and promotion decision shall be reviewed, and a written determination made prior to finalizing the result. The reviewer(s) shall be provided the records necessary for this determination including, but not limited to, the basic job information and description, the names and resumes of each interviewed applicant, the race and ethnicity of each applicant if known because of records kept by ADOT or because of self-identification by the applicant, the weight given to each component of the hiring process, the person(s) involved in the interview and selection, the questions

asked of the applicants, and the performance of each applicant on each phase. The reviewer(s) may request follow-up information and/or interview the person(s) involved in the hiring decision, and will make a written record of all information considered, orally or in writing, in reviewing a particular hiring or promotion decision, and the reason(s) for the review result. All of the above written records submitted to and made by the reviewer shall be retained by ADOT, and made available for inspection by the decree monitor upon reasonable notice.

11. Any reductions-in-force at ADOT shall not be motivated by racial or ethnic factors. The decree monitor shall be provided notice of a proposed reduction-in-force of an Hispanic employee at least thirty days prior to the planned action.

B. Uncovered Positions

1. By statute and regulation, a limited number of positions at ADOT do not presently require compliance with many aspects of the usual application and selection requirements and corresponding State regulations. These "uncovered" positions are necessarily exempt from most of the specific steps set out in section III(A) above. However, these uncovered positions may not be filled in an unlawfully discriminatory manner.

*5 2. Within three months of entry of this Decree, Defendants shall provide the decree monitor with the grade, title and duration of all existing uncovered positions, and the name, and race and ethnicity if known, of the person in the position. The decree monitor shall be provided notice whenever ADOT seeks to uncover a position during the term of the decree, and notice of the designation, if successful, of such status for a position. The decree monitor shall be provided notice of the name, and race and ethnicity if known, of the person selected to fill a new, or open and existing, uncovered ADOT position at the time of the selection.

IV. CONDITIONS OF EMPLOYMENT

A. It shall continue to be the policy that Hispanic employees should not be subjected to a hostile work environment by ADOT or its agents. All actions, decisions and conditions that reflect animus on the basis of National Origin shall continue to be prohibited. These include, but are not limited to: racial or ethnic epithets and verbal abuse; a pattern of jokes reflecting racial or

ethnic animus; graffiti and objects reflecting such animus; treatment of Hispanic customers, contractors and other non-employees reflecting such animus; and any conditions or terms of employment of an Hispanic employee that reflect such animus. Examples of such conditions include, but are not limited to: requiring more than the usual restrictions placed on similarly situated non-Hispanic employees, on the freedom of movement or speech of the Hispanic employee or on the access of the Hispanic employee to otherwise available training, education or tuition assistance opportunities; regularly and unnecessarily assigning the Hispanic employee the least desirable tasks, equipment, and locations; selectively enforcing applicable disciplinary rules and sanctions against Hispanic employees; and unjustifiably paying Hispanic employees lower wages, merit-pay or benefits than similarly situated non-Hispanic employees.

B. It shall continue to be the policy of ADOT that all employee evaluations and appraisals should be done in a non-discriminatory manner. Implementation of this policy requires training of the reviewers (including in the diversity sessions), the use of well defined objective criteria, where possible, and avoidance of subjective and vague phrases such as "potential for promotion" and "interpersonal skills." Employees shall have the right to an effective and timely appeal (including claims of actual or apparent racial or ethnic bias by the reviewer). Within six months of entry of this Decree, ADOT shall utilize written materials in the training and education of supervisors in the area of employee evaluations and appraisals. Copies of such materials shall be retained by ADOT during the term of the Decree and made available to the decree monitor upon request.

C. ADOT shall provide all new employees written materials that either (a) discuss and/or chart the structure and organization of the various departments within ADOT and the type of jobs available at increasing grade levels, or (b) direct the new employee to where this information can be easily obtained within the ADOT. ADOT shall have an adequate number of qualified persons to assist employees interested in advancement and/or in applying for a vacant position; upon request this assistance shall be provided by a person fluent in Spanish. Defendants shall facilitate the advancement of employees by pairing an interested employee with an experienced mentor within ADOT, and by allowing attendance at outside schools subject to supervisory approval.

*6 D. A training program will be developed to insure that the provisions of this Decree are properly implemented. After approval by the Plaintiffs or the Court, Defendants shall hire an outside consultant to design the training in the areas covered by this Decree. The consultant and associates shall conduct the program for all ADOT

management and supervisory personnel for the first year after entry of this Decree, and train person(s) to lead them after this period. The program shall be no less than four hours long with at least one-half conducted by a "live" teacher/facilitator. Each ADOT supervisor and manager shall attend the full program during the first twelve months after entry of this Decree, and at least once in every three-year period thereafter; new supervisory employees shall attend during their first year. The attendance lists shall be retained by ADOT and made available to the decree monitor. During the training program, the ADOT Director or a representative shall speak to the employees about the discipline that can be taken if they commit or permit acts of discrimination or retaliation, the importance of maintaining an environment free of harassment, discrimination or retaliation, and ADOT's policies in regard to these areas including, but not limited to, encouraging every ADOT employee to report to management instances of harassment, discrimination or retaliation.

E. ADOT will institute a written procedure which evaluates supervisors, managers, and applicable human resources personnel on their performance in responding to employee complaints and in the above training sessions, and provide this to the decree monitor upon request. The failure of an employee to adequately enforce this Decree and ADOT non-discrimination policies can result in disciplinary action.

V. COMPLAINTS AND INVESTIGATIONS

Members of the protected class, and all ADOT employees, must be able to freely and effectively raise a complaint about unfair or discriminatory behaviors, including retaliation without fear of reprisal.

A. A complaint made by a member of the protected class must not be given less weight or consideration than those made by other ADOT employees. Defendants, and their agents, shall not retaliate in any manner against any person(s) making a complaint of discrimination within ADOT, or in an outside forum including the EEOC and the courts.

B. ADOT or its agent must make a written record of and investigate each complaint by or on behalf of any Hispanic employee about violations of this Decree or about discriminatory treatment because of his or her race or national origin promptly, reasonably and effectively by trained investigators; at least one of these persons shall be fluent in Spanish. If verified, adequate and timely corrective and disciplinary action will be taken by ADOT

to make the employee whole and eradicate all indications of the alleged wrongful behavior, and to punish the wrongdoer and deter others. ADOT shall not retain documents or materials related to the complaint or investigation in any of the Hispanic employee's personnel files or in any "supervisory" or similar file. ADOT shall keep records in such a manner that documented incidents of discrimination can be easily identified and the records examined.

*7 C. Within six months of entry of this Decree, ADOT shall utilize written policies and procedures concerning complaints about discriminatory treatment or decisions. These shall be submitted to class counsel for comment before final adoption, and after adoption shall be disseminated to all ADOT employees and posted in a conspicuous and public area in each work location throughout Arizona. These written practices and procedures will include but not be limited to: a clear explanation of prohibited conduct; assurance that employees who make complaints or provide information related to such complaints will be protected against retaliation; a clearly described complaint process that provides accessible avenues of complaint; these "avenues" must identify a person outside of the complainants immediate supervision and unit to initially receive a complaint, and shall state that upon request this person shall be fluent in Spanish; assurance that the confidentiality of the complainant will be protected to the extent possible; and assurance that timely corrective action will be taken if it is determined that the complaint is meritorious. These policies and procedures shall be reviewed annually to determine effectiveness and revised and updated as necessary given changes in circumstance or law.

D. Within six months of entry of this Decree, the ADOT persons and units responsible shall utilize written policies and guidelines for the investigation of complaints about discriminatory treatment or decisions, and for making a determination of the merits; these shall be submitted to the class counsel for comment before adoption. These guidelines should insure a timely, thorough and impartial investigation, short and definite timetables for all stages, recusal mechanisms when necessary, an effective appeal process, and notice to all complainants of other potential avenues of investigation such as the EEOC. Sufficient written materials shall be retained for each complaint and investigation to permit an effective after-the-fact review, including by the decree monitor; the retention period shall be for at least three years after the investigation and recommendation are final. These written materials include the names of the "parties" and witnesses, the concurrent notes of all interviews and investigations, and reasons for the decision and recommended actions, if any. Complete statistics regarding complaints and investigations will also

be maintained, including the type and number of complaints and resolutions each month at ADOT, and the location and unit involved, and made available to decree monitor upon request.

E. None of the above prevents ADOT from enforcing laws and regulations that prohibit knowingly filing a false complaint.

VI. DAMAGES

A. The parties agree that the three named Plaintiffs and the five class representatives, Valdo Carrola, Frances Ortiz, Henry Serrano, Theresa Vasquez, and Rose Vega, who testified at the Preliminary Injunction hearing, can present any claims for damages for alleged ADOT acts of discrimination or retaliation, or employment policies having an adverse impact, for the period January 1, 1994 to the entry date of this Decree. This does not constitute recognition by Defendants of the validity of any claims, nor that damages are required.

*8 B. Within ninety days of entry of the Decree, Plaintiffs will submit any damage claims for the eligible individual Plaintiffs, with accompanying reasons and documentation, to Defendants. A reduced time period for document requests shall be utilized; inspection or production shall presumptively occur within twelve business days of a request for an individual claim. The Parties will attempt in good faith to meet and confer regarding any such claims, in an attempt at informal resolution.

C. If the Parties are not successful at reaching agreement, they may at any point—but no later than ninety days after the initial receipt by Defendants—submit a disputed claim for a hearing before a United States Magistrate Judge.

VII. MONITORING

A. The parties agree that all disputes between them regarding any provision of this Decree shall first be raised informally between them, and that they shall attempt in good faith to meet and confer regarding such matters with the view to prompt and informal resolution. Absent other specific timetables set out above, if such matters are not resolved informally within sixty days, the parties shall then consider whether resort to mediation or the decree monitor is in the best interests of the parties. If the parties cannot agree to mediate, or if the mediation does not result in an agreement between them, then they may bring the dispute to the decree monitor and then to this Court

for resolution, provided that they set forth with specificity the efforts they have made to comply with the provisions of this paragraph. The parties agree that if counsel has a good faith belief that irreparable harm may occur absent immediate action, upon written notice to opposing counsel (including telefax), the attempt to resolve the dispute will be expedited.

B. For a period of six months after entry of this Decree, ADOT shall post a summary of this Decree, in English and Spanish, on its web site and in a conspicuous and public area in each work location throughout the state; the summary is appended to this agreement.

C. During the term of this Decree the decree monitor shall have the right to review compliance with this Decree at ADOT's facilities located within the State of Arizona. The compliance review may consist of, but not be limited to, inspecting and copying (and downloading if computer-based), at ADOT's expense, a reasonable number of relevant documents or data bases (or any portion thereof), and records and statistics mentioned in this Decree, including, but not limited to, ADOT policy statements, supervisory training and evaluation materials, hiring and application related data, employee orientation and other informational materials, policies and data from the units responsible for receipt or investigation of complaints of discrimination and the investigative files of such complaints.

D. During the term of this Decree, the decree monitor shall have the right to review compliance by visiting ADOT facilities and work locations throughout the state, and by interviewing ADOT personnel. ADOT shall designate a liaison with the decree monitor during the term of this Decree; this person will also coordinate the collection of necessary information about ADOT's compliance with the provisions of the Decree. At least three business days before an on-site compliance visit, the decree monitor shall contact this ADOT Decree "Coordinator," or a designated representative, to indicate the areas of planned review and to make necessary arrangements. Such visits shall occur during normal business hours, and follow any existing ADOT safety procedures. Any employee is entitled to have an attorney and an ADOT Human Resources representative present during the interview. Upon notice of at least three business days, ADOT shall facilitate any requested on-site meeting between class counsel and employees; such meetings shall not occur while an employee is engaged in his or her scheduled work unless approved by ADOT.

*9 E. The decree monitor shall give ADOT at least eight business days within which to copy documents during the term of this Decree. ADOT shall comply with all reasonable requests for such monitoring information,

including provision of statistical or personnel data previously described in this Decree, in a machine-readable or computerized format as agreed to by the parties. This monitoring information also includes records and data concerning discrimination and/or diversity areas required to be kept by existing federal or state agencies and regulations, including the C.F.R.

F. The decree monitor shall complete the first comprehensive compliance report ten-to-twelve months after entry of this Decree, and the second report three-to-four months before the end of two years. The reports shall be submitted to the parties and the Court. Reports on specific areas or concerns may be made at the discretion of the decree monitor. Either party may refer such matters to the decree monitor.

G. The monitoring information obtained by Plaintiffs and the decree monitor pursuant to this Decree includes some information that ADOT does not customarily release to the public, and shall not be disclosed to the public by them except as required by applicable law. Whenever a request is made for this information, Plaintiffs or the decree monitor shall notify ADOT and afford ADOT a timely opportunity to take whatever steps under applicable law deemed appropriate to oppose the disclosure of the information. ADOT shall designate all confidential and/or proprietary information subject to monitoring under this Decree to alert Plaintiffs and the decree monitor to the information's confidential and/or proprietary nature.

H. The State of Arizona or ADOT shall be responsible for the reasonable attorney fees and costs associated with the monitoring and implementation of this Decree on behalf of the class as a whole and on behalf of the claims or concerns of individual class members. Defendants may object to Plaintiffs' application for attorney fees and costs at the monitoring stage. Defendants may also object to the fees and costs by the decree monitor. Such disputes shall be submitted to the Court if the parties are unable to

resolve them within a reasonable time.

I. The State of Arizona or ADOT shall pay Plaintiffs' counsel the total amount of One Hundred Fifty Thousand Dollars (\$150,000.00) for all costs and attorneys' fees incurred by Plaintiffs and class counsel to the date of entry of this Decree. The total amount is due within five (5) working days after the Court's preliminary approval of the Consent Decree. If not paid by that date, interest shall accrue at ten percent (10%) per annum on any unpaid amounts.

VIII. CLASS NOTICE AND HEARING

A. Within twenty-one days of preliminary approval of this Decree by the Court, ADOT shall distribute notice of this proposed Decree, and of the hearing on whether the Court should grant final approval (the "final-approval hearing"), in the form approved by the Court (the "Court-approved notice") to class members who are ADOT employees, and place the notice on the ADOT web site. Within ten days of the date of such distribution, Defendants shall serve on class counsel and provide under seal with the Court an affidavit attesting to the distribution of the notices.

*10 B. The Court shall conduct the final-approval hearing on this Decree on December, 19, 2000, at 10:00 AM. The Parties may file a written response to any objections to the Decree at least ten days prior to this hearing.

C. If the Court disapproves any provision of this Decree, the parties will not be bound by any aspect of this Decree. In that event, this Decree and the underlying negotiations shall not be admissible for any purpose. The Parties shall be free to renegotiate and resubmit a settlement agreement, or proceed with discovery and trial.