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**THE LAW OFFICE OF J. BRYAN WOOD**

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April 29, 2008

Via E-Mail & U.S. Mail

Mr. Grant K. Dugdale  
Assistant Attorney General  
Hoover State Office Building, 2<sup>nd</sup> Floor  
1305 E. Walnut Street  
Des Moines, IA 50319

Re: Phippen et al. v. The State of Iowa et al.  
Iowa District Court, Polk Co., Case No. CL 107038

Dear Grant,

Thank you for helping finalize the scheduling order. We wanted to follow up with you regarding some of the issues we discussed shortly after Court.

**A. Discovery Logistics**

We appreciate your agreement to consider informal discovery requests as a means of expediting formal discovery. We have identified some initial categories and types of information we hope the State can produce quickly - perhaps more quickly than the discovery rules require. Below we also provide some of the information you requested after Court. We have taken care to ensure the accuracy of information we provide in this letter, but hope you recognize it does not constitute formal discovery responses. If there are other areas of information we can provide informally, do not hesitate to ask.

We appreciate your agreement not to limit Plaintiffs to the number of discovery requests permitted under the Iowa rules. Given the nature of this action, that seems appropriate. We have every interest in limiting discovery to only that we think necessary to demonstrate the appropriateness of class certification, and will work towards that goal. If there are discovery requests you think relate solely to "merits" or "damages" issues instead of class certification issues, please let us know.

As we discussed, we will be serving sets of discovery requests on the State, the Department of Administrative Service ("DAS"), and each individual department Plaintiffs contend is covered by the lawsuit. We understand that



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THE LAW OFFICE OF J. BRYAN WOOD

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Mr. Grant Dugdale  
April 29, 2008  
Page 2 of 8

will make your investigation, collection and production of responsive materials more efficient.

As we agreed, please identify the source of the materials produced by each department. Bates-numbering the documents by department (e.g., DASDocXXXXXX, DOTDocXXXXXX) and providing a table of the departments should help make the production process more efficient. Additionally, if possible, please identify the producing individual on a production table. We will endeavor to do the same when producing documents from Plaintiffs.

We also understand you will be producing as much information as possible electronically instead of hard copy, even for materials that are maintained hard copy. If materials exist electronically in a format compatible with commonly used software forms (e.g., Microsoft Office software – including for e-mail – or other word processing or spreadsheet software, etc.), please produce them electronically in that format.

We anticipate requesting a significant amount of data from the State and/or DAS's databases. We should probably confer soon about what types of data exist, what can be exported into manageable formats (e.g., Microsoft Access, Microsoft Excel, etc.) and how we will be able to access that data if it cannot be exported into manageable formats. Providing the initial information we request below should help us evaluate issues connected with this and streamline that process.

Lastly, we assume this goes without saying, but please preserve all information regarding organizational structure, the creation, maintenance and utilization of the centralized hiring and promotion system, prior job postings, applicant information, hiring files, workforce data, affirmative action reports (departmental or statewide), and other related information (regardless of whether it relates solely to class certification issues). This is a substantial undertaking, but necessary. If you have questions or issues about the type of information that should be retained or issues with respect to the burden of preserving it, please do not hesitate to ask.

Mr. Grant Dugdale  
April 29, 2008  
Page 3 of 8

### **B. Initial Information Requested By The State**

As we discussed, Plaintiffs contend that all departments (including subdivisions or entities within each department) that use the State's centralized hiring and promotion system provided through the Department of Administrative Services ("DAS") are subject to the lawsuit. As we understand, those departments include all departments listed on Exhibit A, attached.

Presently, putative class counsel represents the individuals listed on Exhibit B. For ease of reference, we have also identified whether each individual currently has a case pending in Court or at the Iowa Civil Rights Commission, along with the case number. Based on communications with many other individuals, we expect that this number will grow. We will identify other individuals once we have their permission. We simply have not been able to interview everyone at this point.

We are still in the process of identifying each of the departments with positions to which Plaintiffs or other individuals that putative class counsel represents. We feel the best way to identify that information is by accessing a list of jobs each individual sought. As we understand, this is called a "referral list." We understand Joe Ellis with DAS can provide these types of lists for specific individuals. Please let us know if you can provide that information for the individuals listed on Exhibit B.

### **C. Tolling For Administrative Complaints**

Based on our understanding of the State's current position with respect to the application of tolling pursuant to Rule 1.277, we will continue to advise individuals who contact us of their need to file complaints with the Iowa Civil Rights Commission.

We ask, however, that the State clarify its position in writing as soon as possible on whether the tolling provision obviates the need for each class member to file an administrative complaint under Title VII and/or the Iowa Civil Rights Act. Please consider the following authority in reaching your decision on a position about this issue:

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THE LAW OFFICE OF J. BRYAN WOOD

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Mr. Grant Dugdale  
April 29, 2008  
Page 4 of 8

- *American Pipe & Construction et al. v. Utah, et al.*, 414 U.S. 538, 551-54 (1974), which holds:
  - “We are convinced the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.”
  
- *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54 (1983), which holds:
  - “the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. [internal quotation and citation omitted] Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action.”
  
- *Romasanta v. United Airlines, Inc.*, 537 F.2d 915, 918-19 (7<sup>th</sup> Cir. 1976), which holds that tolling commences upon the filing of representative administrative charges:
  - “Because of the statutory reliance on private enforcement, the courts have suspended the requirement that each victim of discrimination file a complaint with the EEOC once one member of the class has filed the protest. *Dodge v. Giant Food, Inc.*, 160 U.S. App. D.C. 9, 488 F.2d 1333 (1973); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7<sup>th</sup> Cir. 1969)]; *Oatis v. Crown Zellerbach Corp.*, [398 F.2d 496, 498 (5<sup>th</sup> Cir. 1968)]. That logic also compels the conclusion

Mr. Grant Dugdale  
April 29, 2008  
Page 5 of 8

here that in court, as well as before the agency, the members may rely on the champion of the class until he or she abdicates.”

Given that similar public policies underpin the administrative compliant requirements and tolling doctrines under both Iowa and federal law, we do not see why the Iowa tolling provision should be interpreted differently. Thus, we ask that the State stipulate that each individual class member and/or Plaintiff need not file new or additional administrative complaints regarding alleged discriminatory actions covered by the lawsuit while Plaintiffs are pursuing the lawsuit on a class basis.

Depending on the State’s position, we may need to raise the issue for resolution with the Court and/or seek leave to notify putative class members of their obligations (to avoid any confusion). Again, please let us know the State’s position as soon as possible.

#### **D. Initial Discovery Requested By Plaintiffs**

As we discussed, we hope the State or DAS can quickly produce the categories of information identified below. We anticipate each of these categories will be reduced to a formal request soon (regrettably, with a different request number). But we wanted to identify these materials in case you could produce them earlier informally.

Providing the materials described in bold (or even providing information about whether those materials exist and how difficult it will be to collect and produce them) may help expedite discovery and/or limit our need to submit broader requests. Thus, we would appreciate very much it if the State can focus its efforts on producing those materials as soon as possible. If you have questions about what types of materials we are requesting, please do not hesitate to ask.

- 1) The Project Report dated April 30, 2007 regarding the Review of State Hiring Practices (submitted by CPS Human Resource Services) (“the CPS report”).**

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THE LAW OFFICE OF J. BRYAN WOOD

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Mr. Grant Dugdale  
April 29, 2008  
Page 6 of 8

- 2) All information submitted to or received from CPS Human Resource Services in connection with preparation of the CPS Report, including:
  - a. Completed departmental hiring process review questionnaires for each department;
  - b. Zoomerang Hiring Process Applicant survey responses;
  - c. Mailed Hiring Process Applicant survey responses;
  - d. Workforce data submitted CPS Human Resource Services (i.e., data in the same form it was submitted to CPS Human Resource Services);
  - e. Workforce data analyses received from CPS Human Resource Services.
- 3) Any workforce data or workforce data analyses of the type provided to CPS Services that exists for years 2001-2004.
- 4) A copy of the following specific documents:
  - a. The Applicant Screening Manual available online available through DAS's website.
  - b. The Class Descriptions for jobs available online through DAS's website.
  - c. The Competency Guide available online through DAS's website.
  - d. The Selective Lists available online through DAS's website.
  - e. The Written Hiring Practices Summary for each department that was due to be provided to DAS by February 1, 2008.
  - f. The completed Hiring Practices Evaluation Form from DAS evaluating each department's hiring practices.
- 5) The following categories of documents:
  - a. The State Affirmative Action plan (including all exhibits or attachments) for the years 2001 to the present.
  - b. Any departmental Affirmative Action plans (including all exhibits or attachments) for 2001 to the present.
  - c. Documents regarding use of or explaining applicant status codes.

Mr. Grant Dugdale  
April 29, 2008  
Page 7 of 8

- d. Documents describing the role of DAS in monitoring, overseeing, auditing, enforcing or overseeing any aspect of the State's centralized hiring and promotion system.
  - e. Documents regarding use of or explaining pay grades, salary classifications or class codes for jobs (e.g., the matrix or matrices explaining the criteria for a particular job being assigned a particular salary grade).
- 6) Any complaints of race discrimination against the State of Iowa regarding hiring and promotion since 2001 and any documents regarding those complaints.

As discussed above, we would prefer electronic production. Producing the data used for the CPS report in native format (or an agreed format) will be key to allowing both sides to review the same evidence in the same format.

#### **E. Creating A Forum To Discuss Resolution**

As you know, the State already is taking steps to address some of the problems raised by the lawsuit through enforcement of the Governor's Executive Order No. Four. Allowing those harmed by the system to provide input into what types of changes should be made seems prudent. Likewise, providing relief to those harmed by the system the State is seeking to reform seems to go hand-in-hand with moving beyond the well-documented problems of the past.

Thus, we think engaging in a dialogue about a potential class resolution can benefit all parties and - importantly - the citizens of the State of Iowa. The State certainly has an interest in defining the scope and size of any certified class, the claims covered by the class claims, and the nature of any relief awarded. From our perspective, the State also has interests in conserving the people's resources by resolving this matter without protracted litigation of numerous individual claims and, instead, proceeding with one trial to determine liability (and, if warranted) damages for the class as a whole.

We would like the opportunity to meet with you, the Solicitor and - if you deem it appropriate - the Attorney General and/or Governor or a representative

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THE LAW OFFICE OF J. BRYAN WOOD

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Mr. Grant Dugdale  
April 29, 2008  
Page 8 of 8

of their staffs to discuss the potential benefits of establishing a process by which the parties can explore potential resolution.

We look forward to hearing from you soon with respect to these issues. If you have any questions or concerns, please do not hesitate to call me, Tom Newkirk or Mike Carroll.

Best regards,



J. Bryan Wood

cc: Thomas A. Newkirk (via e-mail only)  
Michael J. Carroll (via e-mail only)

DEPT NUMBER	DEPT AARU	DEPARTMENT/DIVISION
005	005	Administrative Services
009	010	Agriculture
126	030	Auditor
131	035	Blind
167	050	Civil Rights
284	105	College Student Aid
217	065	Commerce-Professional Licensing
212	061	Commerce-Alcoholic Beverage
213	062	Commerce-Banking
214	063	Commerce-Credit Union
216	064	Commerce-Insurance
219	067	Commerce-Utilities
238	07A	Corrections
259	080	Cultural Affairs
269	090	Economic Development
282	100	Education
297	110	Elder Affairs
140	040	Ethics and Campaign Disclosure
270	095	Finance Authority
379	140	Human Rights
401	18A	Human Services
427	200	Inspections and Appeals
336	135	Iowa Communications Network
467	210	Iowa Law Enforcement Academy
553	261	IPERS
112	205	Justice
627	321	Lottery
532	230	Management
542	240	Natural Resources
547	250	Parole
582	280	Public Defense
572	270	Public Employment Relations
588	290	Public Health
595	300	Public Safety
285	106	Public Television
625	320	Revenue
635	330	Secretary of State
645	35A	Transportation
655	360	Treasurer
671	370	Veterans Affairs
309	12A	Workforce Development

