

Supreme Court, U.S.
FILED 1

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES GREENE,

Applicant,

vs.

WALGREENS EASTERN CO., INC.

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR WRIT OF CERTIORARI

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

**APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A
WRIT OF CERTIORARI**

*To the Honorable Stephen Breyer, Circuit Justice for the
United States Court of Appeals for the First Circuit:*

In accordance with Rule 13.5 of the United States Supreme Court Rules, James Greene requests a thirty- day extension of time, up to and including Monday, March 15, 2019, within which to file his petition for writ of certiorari. The First Circuit entered its judgment in this case on November 15, 2018 and therefore Greene's petition for certiorari is currently due February 13, 2019. Greene appealed several issues from the judgment of the District Court and the First Circuit decided these issues as follows [*See Attachment at end of document, page 28*]: (a) affirmed District Court's denial of essentially ALL of Greene's discovery motions; (b) affirmed the District Court's finding that Greene lacked evidence to establish a prima facie case of disparate impact discrimination; and, (c) remanded the case back to the District Court for further proceedings on Greene's disparate treatment claims.

Greene is seeking a writ of certiorari to have the Supreme Court reconsider the First Circuit Court's affirmation of the District Court's discovery denials and to reconsider the First Circuit Court's affirmation of the District Court's adverse rulings on Greene's disparate impact claims.

Please consider the following:

1. The Judgment of the First Circuit Court of Appeals was not published.
2. The Attachment beginning on the 13th page of this document contains the following:

Page(s)	Contents
A-1 - A-21	District Court Memorandum and Order
A-22 - A-28	First Circuit Court of Appeals Judgment
A-29	Table Shows Results of Promotion Process in 2014
A-30 - A-38	District Court Civil Docket

Brief History of the Case

3. The First Circuit did not recite the historical facts underpinning this case as the Court stated: “Because the parties are familiar with the underlying facts that gave rise to this dispute, we do not recount them here and proceed directly to the analysis.” *[See First Circuit judgment, Attachment page 22, 1st paragraph]*. However, the District Court presented the following facts:

(a) “Greene is an African-American man who worked for Walgreens from 2005 until 2014 as a Management Trainee (MGT). During his tenure at the company, Greene worked at several Walgreens stores in southeastern Massachusetts, in a territory designated as “District 106.” *[See District Court’s Memorandum and Order, Attachment pages 2,3]*.

(b) “In 2012, Walgreens decided to revamp its store management structure. The company eliminated the MGT position in all of its stores nationwide, and replaced it with a new position titled Assistant Store Manager-Trainee (ASM-T). All existing MGTs were either to be transferred to the new ASM-T position, demoted to a non-management “Shift Lead” position, or terminated.” *[See District Court’s Memorandum and Order, Attachment page 3]*.

(c) “Walgreens minimum qualifications for promotion to the ASM-T position were: (1) a rating of “Achieving expectations” on a 2013 performance review, (2) a high school diploma or GED, and (3) no written disciplinary actions during the prior 12 months.” *[See District Court’s Memorandum and Order, Attachment pages 3,4]*.

(d) “On June 12, 2014, after Greene’s application for an ASM-T promotion had been denied, Peavy [Greene’s store manager at the time] again offered Greene the choice of stepping down to a “Shift lead” position [a non-management job] or separating from Walgreens. Greene

elected to leave the company ...”.” [See District Court’s Memorandum and Order, Attachment page 8, 1st paragraph].

(e) “In November of 2014, Greene filed a complaint against Walgreens with the Equal Employment Opportunity Commission (EEOC) alleging that Walgreens had discriminated against him by failing to promote him to the ASM-T position. The EEOC dismissed the complaint in April of 2015.” [See District Court’s Memorandum and Order, Attachment page 8, 2nd paragraph]. Greene then filed a complaint in the US District Court, District of Massachusetts on July 10, 2015.

(f) “James S. Greene, a pro se plaintiff, brought this action against his former employer, Walgreens Eastern Co., Inc. (Walgreens), alleging that it discriminated against him on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.(Counts I, II, III), and his age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq.(Counts IV, V, VI) [See District Court’s Memorandum and Order, Attachment page 1, first paragraph].

(g) “Following discovery, Walgreens moved for summary judgment. Greene filed an Opposition on September 12, 2016”[See District Court’s Memorandum and Order, Attachment page 8, second paragraph]. In an Order dated November 18, 2016, the District Court allowed Walgreens summary judgment on all counts. Greene subsequently appealed the District Court’s Order to the First Circuit which issued its Judgment on November 15, 2018. [See First Circuit Court of Appeals Judgment, Attachment page 22].

4. In the Conclusion of its judgment entered on November 15, 2018, the First Circuit stated: “In sum, Greene has failed to present any substantial issue for review with respect to the District Court’s discovery rulings or its determination that Greene failed to establish a prima facie case of disparate impact discrimination.” [See First Circuit Court of Appeals Judgment, Attachment page 28].

Greene is seeking a writ of certiorari to have the Supreme Court reconsider the First Circuit Court’s affirmation of the District Court’s adverse rulings on discovery and to

reconsider the First Circuit Court's affirmation of the District Court's adverse rulings on Greene's disparate impact claims.

What the Known Data Indicated

5. In his District Court complaint filed in 2015 and in his First Circuit appeal, Greene claimed that district 106 which included about 35 stores in 2014 managed by district manager Christopher Cogdill, had a "whites only" policy as regards promotions and equal employment opportunity. Greene claimed that in his almost 9 years of working in various district 106 stores as an MGT, he had never seen a single non-white MGT get promoted to a higher management job grade such as assistant store manager or manager of any store in district 106. This, in spite of the very low eligibility requirements for promotion as outlined in paragraph 3(c) above. In its motion for summary judgment, Walgreens offered the data presented in the table below for promotions in 2014.

Summary of Data from Walgreens' Exhibit A, Dkt. # 47.2 Pages 64-68
[Taken from District Court Record]

ID	Job	Race	Age	Math	IRR	Interview	Promoted
1	MGT	White	59	3.71	3.33	3	YES
2	MGT	Two or More Races	41	3.71	3.56		
3	MGT	Hispanic or Latino	55	2.78	3.56	1.33	
4	MGT	Asian	43	4.06	4	2	
5	MGT	White	42	4.18	4	2.83	YES
6	SFL	White	27	4.06	4.22	3.92	YES
7	MGT	Black or African American	68	4.06	3.11	2.08	
8	SFL	White	25	4.53	4.56	4.08	YES
9	MGT	Black or African American	48	2.9	3.56	2.33	
11	MGT	White	32	4.3	2.89	3.08	YES
12	SFL	White	27	3.36	4.56	3.08	YES
13	SFL	White	32	4.77	4.67	3.25	YES
14	SFL	White	29	4.18	4.44	3.17	YES
15	SFL	White	28	3.71	4.44	3.42	YES
16	SFL	White	34	4.3	4	2.67	YES
17	SFL	White	24	4.42	4.11	3	YES
18	MGT	Two or More Races	36	3.13	3.11		
19	MGT	Black or African American	33	2.08	3.67		
20	MGT	White	45	2.9	3.11		
21	MGT	White	26	3.25	2.22		

Candidates who were promoted were the ones who were assigned the highest total scores based on three criteria (a) a computer-based math test; (b) a subjective rating by their current manager (the IRR); and (c) a subjective “management knowledge” interview score generated by a panel consisting of store managers excluding the candidate’s current store manager. So, 85 % of the total score was subjective (IRR +interview) and 15 % was objective. The following facts can be observed in the table:

- (a) 11 candidates of 20 were promoted, ALL were white (see last column)
- (b) 7 candidates were non-white and 0 were promoted (0 % of non-whites)
- (c) 13 candidates were white and 11 were promoted (84.6 % of whites)
- (d) 8 candidates were age 40 or older and 2 were promoted (25 % over age 40)
- (e) 12 candidates were under age 40 and 9 were promoted (75 % under age)

The E.E.O.C. allows disparate impact to be established through a simple calculation known as the “Rule of 4/5ths.” 29 C.F.R. 1607.3. Using this rule, a device (selection process) will have a presumed adverse impact if it produces a selection rate for any protected class that is less than 4/5ths – or 80% of the selection rate of the group with the highest selection rate. Using the Rule of 4/5s, both age and race disparate impacts are evident in the data in the table above.

6. The employment data presented in the table above was the ONLY data ever provided by Walgreens to indicate MGT job promotion statistics and this data confirmed the assertion Greene made in his initial District Court complaint and in both his District Court summary judgment defense documents and in his First Circuit appeal documents: Walgreens has a “whites only” policy as regards MGT promotions in the 35 stores comprising district 106 in Massachusetts.

7. A key observation from the data above is that although the MGT job elimination exercise announced by Walgreens in in 2012 (see items “b” and “c” in paragraph 2 above) had the stated intention of eliminating the MGT job grade, what the exercise really did was rename

the MGT job grade with a new label (ASM-T) and replace all of the prior management level MGTs (which included many minorities) with white employees who were previously in the lower-paid non-management job grade of SFL (shift leads); and, demote the prior MGTs into the SFL job grade or fire them. All of the SFLs in the chart were white and under 40 years of age, some as young as 24; and, all SFLs were promoted. In passing, five of the seven non-white MGTs were over the age of 40.

8. This data suggested disparate impact in both race and age in the data sample provided by Walgreens in their summary judgment. All of Greene's motions to obtain employment data for time periods prior to 2014 were denied by the District Court as being "time barred".

District Court Refused to Provide and Pay for Expert Witnesses and Data

9. In its Judgment document, the First Circuit stated [*See First Circuit Court of Appeals Judgment, Attachment page 23 under heading: 2. Disparate Impact Claim*]:

"The district court here found that Greene failed to establish his prima facie case because he did not identify a specific employment practice and instead seemed to challenge the "three wave promotion process generally. On appeal, Greene explains that he is challenging the weight given the subjective components of the selection process, i.e., the "Internal Reference Review" ("IRR") and interview, which together made up 85% of the final composite score. Even assuming Greene adequately articulated that argument in the district court, and even assuming that the weighting of the subjective factors is a sufficiently specific employment practice, **Greene has not produced evidence sufficient to support an inference that the weighting of the final composite score caused a disparate impact.**"

In order to produce evidence to support his claims as regards the weighting of the final composite score, Greene needed expert testimony in the field of industrial organizational psychology.

On August 29, 2016, Greene filed a motion for the District Court to appoint and pay for expert testimony in the field of industrial organizational psychology in opposition to Walgreen's motion for summary judgment. On August 30, 2016, the District Court denied this

motion. [See District Court Civil Docket, Attachment pages 36, 37 under dates 08/29/2016 and 08/30/2016].

In his petition for a writ of certiorari, Greene intends to ask the Supreme Court to determine whether the First Circuit Court erred when it affirmed the District Court's denial of an indigent plaintiff's (Greene's) motion to provide and pay for expert testimony in the field of industrial organizational psychology in a civil rights case where proof of discrimination hinges on the production of expert testimony and data.

10. The Supreme Court has held that a prima facie showing of disparate impact is "essentially a threshold showing of a significant statistical disparity and nothing more." *Ricci v. DeStefano*, 557 U.S. 557, 587, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009). See also *Fudge v. City of Providence Fire Dep't*, 766 F.2d 650, 658 n.8 (1st Cir.1985) (holding that a prima facie case of disparate impact can be established where "statistical tests sufficiently diminish chance as a likely explanation").

In its discussion of the statistical disparity in this case, the First Circuit stated in its Judgment document [See First Circuit Court of Appeals Judgment, Attachment page 24 under heading: **2. Disparate Impact Claim**]:

"In advancing his numerical claims, Greene relied upon two distinct groupings: those he classified as "non-whites" versus whites, and candidates over age 40 versus younger candidates. He argued that the selection rates for non-white and older candidates, as compared to the selection rates for other candidates, demonstrated a disparate impact. Because the relative selection rates for those whom Greene classified as non-white and older candidates fell below the EEOC's 80% standard (i.e., the "four-fifths rule"), Greene argued that the statistical disparity showed adverse impact. See 29 C.F.R. § 1607.4(D) (stating that a selection rate that is less than 80% "of the rate for the group with the highest rate will generally be regarded as evidence of adverse impact"); *Watson*, 487 U.S. at 995-96, n.3 (EEOC's 80% standard is "a rule of thumb for the courts"). But this rule of thumb application examines the outcomes of the entire selection process rather than the outcomes of the challenged component. Moreover, while a rule of thumb analysis may be quite helpful for some purposes, see *Lopez* at 52, we have never suggested that it could serve in lieu of a valid statistical analysis to provide sufficient support for a finding of disparate impact. See *Fudge*, 766 F.2d at 658_n. 10. **Without a proper statistical analysis, the numbers here are not**

such as to allow a reasonable jury on this record to find a disparate impact caused by the practice he challenges.”

In order to provide a proper statistical analysis, Greene needed an expert in the field of statistics to provide the required analysis and testimony.

On August 29, 2016, Greene filed a motion for the District Court to appoint and pay for an expert to provide testimony in the field of statistics in opposition to Walgreen’s motion for summary judgment. On August 30, 2016, the District Court denied this motion. *[See District Court Civil Docket, Attachment pages 36, 37 under dates 08/29/2016 and 08/30/2016].*

In his petition for a writ of certiorari, Greene intends to ask the Supreme Court to determine whether the First Circuit Court erred when it affirmed the District Court’s denial of an indigent plaintiff’s (Greene’s) motion to provide and pay for expert testimony and analysis in the field of statistics in a civil rights case where proof of discrimination hinges on the production of expert testimony and data.

District Court Denied Motions for Discovery of “Time Barred” Information

11. The District Court denied all of Greene’s motions for discovery for data from years prior to 2014. *[See District Court Civil Docket, Attachment pages 36-37, under dates 8/29/2016 and 8/30/2016].*

Recall that Walgreens announced its plan to eliminate the MGT position in 2012 and began executing this plan in 2013 by demoting and firing MGTs *[See paragraph 3(b) above]*. Further, eligibility for promotion in 2014 depended on events which occurred prior to 2014 *[see paragraph 3(c) above]*.

The District Court states *[See District Court Memorandum and Order, Attachment page 1, footnote]*:

“In his Complaint, Greene contends that Walgreens unlawfully denied him promotions in 2006-2007, 2011-2012 and 2014. Greene filed a charge of discrimination with MCAD

on November 20, 2014. In an Order dated April 14, 2016, the court found that “only the 2014 denial was filed within the applicable 300 days.” Dkt #40. Consequently, the court does not address the portions of Greene’s Opposition dedicated to the alleged earlier rejections.”

In addition, the First Circuit Court states *[See First Circuit Court of Appeals Judgment, Attachment page 27, last paragraph]*:

“To the extent that Greene challenges the denial of his first motion to compel the production of employee data he needed to compile statistics necessary to support his disparate impact claim, we find no abuse of discretion as Greene failed to link the information requested to the challenged employment practice or to the specific position Greene sought. Greene's second motion to compel was properly denied because it sought information relating to promotions denied prior to 2014. Finally, the district court did not abuse its discretion in denying three motions seeking to reopen discovery to obtain information that could have been sought before the deadline closed and before Walgreens filed its motion for summary judgment.”

In all of Greene’s motions for discovery, including interrogatories, admissions and requests for documents issued prior to the time Walgreens filed their motion for summary judgment, Walgreens and the District Court stonewalled Greene and refused to provide any employment data whatsoever for any other employees except Greene for periods prior to 2014. Greene’s assertion in his complaint and in all appeals documents filed thus far is that data for periods prior to 2014 will mirror the data presented in the table above and will indicate that Walgreens district 106 in Massachusetts has a “whites only” policy as regards employment opportunities.

In his petition for a writ of certiorari, Greene intends to ask the Supreme Court to determine whether the First Circuit Court erred when it affirmed the District Court’s denial of all of Greene’s motions for discovery which sought data from time periods outside of the 300-day time period during which the discriminatory employment event occurred.

Request for More Time to Research and Formulate Petition

12. Greene is a pro se litigant making an effort to address what he sees as egregious discrimination against minorities in employment within Walgreens in district 106 which included about 35 stores in 2014. At the outset of this case dating back to 2014, Greene tried to hire an attorney on a contingency fee basis but could not find anyone. Attorneys Greene contacted charged a minimum fee of about \$500 an hour. Even referrals from Massachusetts Bar Associations refused to take the case.

Greene then filed a motion with the District Court to appoint an attorney, but the Court denied this motion *[See District Court Memorandum and Order, Attachment page 31, item 7 dated 07/22/2015]*.

13. Greene is not a lawyer, does not have any formal legal training and therefore most likely does not use the most efficient, effective or correct methods in his attempts to complete documents required for legal work. Therefore, each legal step requires Greene to expend much more time and effort to complete than would be needed by a member of the bar.

14. Greene intends to file a petition for certiorari because he believes that the First Circuit Court of Appeals has decided key issues in conflict with other Circuits and in conflict with prior Supreme Court rulings. Also, Walgreens' discriminatory employment practices impacted more workers than Greene. There were anywhere from 50 to 100 or more MGTs (including many minorities and workers over the age of 40) on the payroll in Walgreens district 106 at the time the MGT job elimination program was announced. Based on the known data, the MGT job elimination program had the effect of demoting or firing minority and older experienced managers and replacing them with non-management and untrained white workers under the age of 40 as the table above clearly demonstrates.

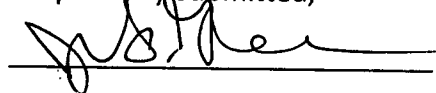
15. The Supreme Court has certiorari jurisdiction over this case under 28 U.S.C. § 1254(1). Greene currently has until February 13, 2019 to file a petition for writ of certiorari since Judgment of the First Circuit Court was entered on November 15, 2018.

16. Under Rule 13.5, a Supreme Court Justice may extend the time for seeking

certiorari for up to sixty additional days. Greene hereby requests an additional 30-day extension up to and including March 15, 2019, within which to file a petition for writ of certiorari.

Wherefore, Greene requests that he be granted a thirty-day extension of time, up to and including Monday, March 15, 2019, within which to file a petition for writ of certiorari.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'J. S. Greene', is written over a horizontal line.

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