# Supreme Court of the United States



OCTOBER TERM

**In the Matter of:**

IDA PHILLIPS,

Petitioner

vs.

MARTIN MARIETTA CORPORATION

Respondent

**Docket No.** 73





Place Washington, D. C.

Date December 9, 1970

**ALDERSON REPORTING COMPANY, INC.**

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

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| IDA PHILLIPS, Petitioner | ) | |
| vs | ) | No. 73 |
| MARTIN MARIETTA CORPORATION, Respondent | ) | |

The above-entitled matter came on for argument at 1:05 o'clock p.m. on Wednesday, December 9, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

WILLIAM L. ROBINSON, ESQ.
10 Columbus Circle
New York, N. Y. 10019
On behalf of the Petitioner

LAWRENCE G. WALLACE, ESQ.
Office of the Solicitor General
Department of Justice
Washington, D. C.
(for U.S. as amicus curiae)

APPEARANCES: (Cont'd)

DONALD T. SENTERFITT, ESQ.
Suite 506
First National Bank Building
P. O. Box 231
Orlando, Florida 32802
On behalf of the Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in Number 73, Phillips against Martin Marietta Corporation.

Mr. Robinson you may proceed whenever you are ready.

ORAL ARGUMENT BY WILLIAM L. ROBINSON, ESQ.

ON BEHALF OF THE PETITIONER

MR. ROBINSON: Mr. Chief Justice and may it please the Court: This case is before the Court on writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

The case involves a question of statutory construction of Section 703(a) of the 1964 Civil Rights Act.

The question before the Court is whether Section 703(a) permits an employer to refuse to hire women with pre-school-age children, while hiring men with pre-school-age children.

The bona fide occupational qualifications standard or extension under Section 703(e) is not involved in this case.

Q What was that?

A The bona fide occupational qualifications standard, which permits an employer to discriminate on the grounds of status: religion or national origin, if it is a bona fide occupational qualification. That is not involved in this case --

Q Is this agreed to by both sides, Mr. Robinson?

A That it's not in the case?

Q That it's not in the case.

A I don't know whether it's agreed to by both sides, sir, but it was not raised by the defense below. We will concede, of course, Your Honor, that if the case is reversed and goes to a trial below, they would have the opportunity to raise that defense then.

Q At least, am I not correct, the en banc court made reference to it, at least the dissenters?

A Yes, the defendant said that the company should have the right to raise the defense, which we, of course, concede.

Q All right.

Q Could you keep your voice up a little, sir?

A Yes, sir; I will.

Q Petitioner, Mrs. Ida Phillips, is the mother of seven children who range in age from 3 to 15 years, when she applied for work with Respondent, Martin Marietta Company.

In September of 1966 Petitioner applied for a job with Respondent as an assembly trainee, in response to its advertisement of 100 such positions. Petitioner had a high-school diploma, which was the only stated qualification for the job. However, Respondent told her that it would not consider her for the job because she was a woman with pre-school-age children.

Thereafter, Petitioner filed a timely charge, alleging discrimination because she was a woman with preschool age children with the EEOC. The EEOC made a finding of reasonable cause to believe that the refusal to hire her because she was a woman with preschool-age children, constituted a violation of the Act.

When the Commission was not able to attain voluntary compliance, the Commission authorized her to file suit, which she did.

After Petitioner filed suit, Respondents filed a motion to dismiss, which the District Court treated as a motion to strike and struck from Petitioner's claim -- Petitioner's complaint those allegations claiming that she was discriminated against because she was -- because she had preschool-aged children.

Thereafter Respondent answered the complaint, admitting that its receptionist told Petitioner she would not be considered because she was a woman with preschool-aged children, but denying that they discriminated against her solely on the grounds of her sex.

Thereafter, Respondent moved for summary judgment, which motion the District Court granted, based on statistics that approximately 75 percent of the people hired as assembly trainees were women.

Q What was the allegation that they -- was it

stricken?

A The allegation that she was discriminated against because she had preschool-aged children, leaving standing then, morally the fact that she was discriminated against because she was a woman.

The District Court --

Q What was the theory of striking that --

A The theory of striking that was that as a matter of law discrimination against a person because of their sex-plus -- she being a woman with preschool-aged children, did not constitute a violation of the Act.

In ruling on that, the District Court specifically said: "The responsibilities of men and women with small children are not the same and employers are entitled to recognize those different responsibilities in establishing hiring policies."

Q And you say that is not so?

A I say that is not so; yes, Your Honor.

Q Does this act reach the government as the employer?

A No, Your Honor; it does not reach government as an employer. It does, however, reach state employment services. I don't -- there might be some question at some point or other whether or not that reaches government employment, but I don't think so; no.

Q Then if the Federal Judge, as a matter of general policy, would decline to hire law clerk who had an infant child, a lady law clerk, but was willing to hire men whose wives had infant children, they would be in violation of the statute, if the statute applies to them?

A If the statute applies; yes, but it does not apply to Federal Judges, of course.

Q You are sure it doesn't apply to Federal Judges?

(Laughter)

A Yes; the statute on its face, says that it doesn't apply to Federal Government employment.

Q Doesn't apply to what?

A Employment with the United States Government.

Q We can't be that sure that the Judicial Branch is necessarily in that category?

(Laughter)

A Yes, sir, Your Honor.

Petitioner appealed the District Court decision to the Fifth Circuit, which affirmed and rather clearly announced a sex-plus exemption to the act of which we complain here. The court held that a per se violationof the act can only be based solely on one of the categories of the act and that Petitioner had not been subjected to discrimination on the grounds of sex because here there was a two-pronged

qualification. That is: she was a woman with preschool-aged children, or in other words, sex-plus.

????? Thus, the lower courts judicially engrafted on the act a further exemption based on sex-plus. And we submit that this doctrine should be rejected, for several reasons. First, it conflicts with the basic purpose of Title VII. The basic purpose of Title VII is to ensure that women and other protected categories are not excluded or otherwise hindered in their employment opportunities on the basis of stereotypic assumptions or prejudgments about their desirability as employees.

Rather, the act requires that an employer consider each person on an individual basis or present a bona fide occupational qualifications defense. This is, of course, the defense that the statute provides.

In this case the lower courts permitted Respondent to exclude Petitioner, based on the unsupported assumption of differences between the normal relationships of working fathers and working mothers to their preschool-aged children. It would seem that these differences are that the father goes out and works and the mother stays home and takes care of the children. And this, we submit, is exactly the kind of stereotypic assumption that Title VII is intended to prohibit.

It is, of course, true that many women do indeed stay home to take care of the children. On the other hand, many don't. The point of the statute is that they should be

treated as individuals rather than as members of the broad category.

The second reason, we submit, that the decision below should be reversed is that it conflicts with the language of the act. Section 703 on its face, would seem to prohibit the policy of refusing to hire women with preschool-aged children, while at the same time hiring men with preschool-aged children. The act declares that "It shall be an unlawful employment practice to fail or refuse to hire or otherwise to discriminate against any individual with respect to his terms, conditions or privileges of employment because of such individual's sex."

The Court of Appeals attempted to avoid this plain language of the act by asserting that the act only prohibits discrimination based solely on one of the categories. However, the Senate, by roll call vote, specifically rejected an amendment which would have inserted before each of the enumerations in the act, the word "solely." In speaking against that amendment, Senator Case, one of the joint floor managers said that such an addition would completely vitiate the act.

And the sex-plus doctrine enunciated by the courts below in this case, clearly illustrates why that is so.

Restricting the sex-plus doctrine just to the notion of women with preschool-aged children it would exclude, based on a recent study done by the Department of Labor, 4.2 million

women currently in the labor force under protection of the act, and allow solely on the grounds that they are women with pre-school aged children, their employers to discriminate against them.

This would go far toward vitiating the act, but of course, the sex-plus doctrine can easily be extended just as to women. For example: an employer could, under this act, announce a decision to refuse tohire based on sex-plus marital status or sex-plus an age requirement, i.e., refuse to hire women who are 26 years of age or over; or refuse to hire women who are over 32.

Thirdly, if the act permits discrimination on t he basis of sex-plus it would also permit discrimination on the basis of race-plus, religion-plus or nationality-plus. For example, an employer could then refuse to hire Negroes with kinky hair or on the other hand, Negroes with straight hair.

Q Do you think that would follow automatically from the Court of Appeals' opinion?

A It would not follow automatically, but it is certainly a logical, rational application of the very doctrine--

Q Wouldn't it require quite an extension of that doctrine?

A No; I don't think so at all. The doctrine, itself, that is a factor, one of the enumerated categories, plus another factor, is exactly the doctrine announced by the

Fifth Circuit. The Fifth Circuit did note -- and this might be what His Honor is getting at -- when an enumerated category of the act is added to -- another factor is added to an enumerated category of the act, that the Court must look to determine whether or not there is discrimination. I suggest that that is now a substantial qualification to the blanket doctrine.

The blanket doctrine of sex-plus removes the seemingly -- the case of discrimination on its face, from the act and I think that for the reasons I have stated before, directly contrary to the intent of the statute and the language of the act, Congress engrafted the exception that it saw fit to put onto the act. And when there is something which, on its face, discriminates against one of the enumerated categories, then the initial inquiry should end right there.

Q Do you think an employer could have a policy of refusing to hire expectant mothers, although he does hire expectant fathers?

A Just based on that statement, Your Honor? No. But, by the --

Q Women who are pregnant, in other words.

A Yes; that violates Title VII. Of course --

Q That's -- there are some things that only women can do.

(Laughter)

A That, of course is correct, Your Honor. No. If he wanted to refuse to hire women who are pregnant, or on the basis of any other physical disability that has to do with sex, he could present his bona fide occupational qualifications, but if, indeed, women who are pregnant can adequately perform his job, there is really no reason why he ought to be permitted to exclude them.

Q But he can't have that rule just because he doesn't want to take the risk?

A No.

Q What if his history showed that there were considerable risks. Would that be a justification, then?

A If he raises the bona fide occupational qualifications defense and meets the standards that the courts have announced with respect to utilizing that defense; yes, he could successfully defend the case of discrimination. But, he cannot use those as a prejudgment. If he can't make out a bona fide occupational defense, in short, he must give each woman individual consideration.

Q Could he have, on the occupational section of the statute, could he have an announced policy under this act that he would not hire either an expectant mother or a woman for six months after her last child was born? Is there a rational basis for that?

A There might be, Your Honor; I don't know.

But, doctrinally, it is exactly this case. It's sex-plus.

Q Well, see how far it --

A I suggest that whenever there is sex-plus, you have got a prima facie case of discrimination. It's, on its face, discrimination on the basis of sex. And Congress has said that if you want to avoid or defend successfully a charge of discrimination on the grounds of sex, then you have the defense of the bona fide occupational qualifications, but that's all.

Q Do you see any possible problems of equal protection issues with the government and its millions and millions of employees not being subject to the act and private employers subject?

A People able to obtain employment with the government on the one hand, where they could not, on the Fifth Circuit theory, gain employment with the private employer?

A No. I hadn't thought of this problem to date, Your Honor, and I don't see that it's a problem at all. I don't even understand the suggestion. But, I would note, however, that the 14th and the Fifth Amendments to the constitution cover government employment and it prohibit the government from discriminating in its employment.

Also, there are varous regulations which the government has promulgated which prohibits discrimination in governmental employment; specifically: rules administered by the

Civil Service Commission and --

Q Well, the are you suggesting that perhaps Federal Judges, for example, could not have such a rule as I suggested?

A Oh, I am suggesting that, but they would not be based on the act; it would be based on the Fifth Amendment.

In addition to the statutory intent and the plain language of the act, we also point out that the EEOC has issued regulations which prohibit an employer from disqualifying women with preschool-aged children on the grounds of sex-plus. The court below rejected these regulations by the EEOC. We suggest that it would be appropriate for this Court, should it see fit to reverse, to remind the Circuit Court that agencies encharged with the interpretation and implementation of statutes such as Title VII, are entitled to deference; that their regulations are entitled to deference and that their expertise should be given great weight.

Q And the fact was that that issue arises without any kind of a record at all; doesn't it?

A That's correct, Your Honor. It was decided on --

Q Which, in effect, deciding this question as if it just arose on the pleadings, to be sure --

A That's correct --

Q -- not on the summary judgment motion.

A That is correct, Your Honor.

Q Pretty barren record.

A That's correct, and there is no evidence in the record at all. The District Court specifically decided the case as a matter of law.

Q In other words, what you're saying is that the construction of the -- put on this statute is that although the -- all discriminatory practices are -- no discriminatory practices are reached by this act if the condition of employment is something that is attached to the fact that the person is a woman. Is that it?

A That no discrimination is reached?

Q Yes.

A No. Discrimination is reached. The discrimination has occurred. The exclusion attaches on the grounds of her sex plus another factor.

Q Which is the neutral word, distinction. You say no distinction can be made if it's something in addition to being a woman?

A Yes. No distinction.

Q That's the consequence of this decision?

A No. That would be the consequence of a decision of reversal.

Q If you prevail that would be the result?

A Yes. And again, we know, of course, that all

we are thereby doing is instructing the court below that should it find, after a record has been made, that the company indeed, refused to consider women with preschool-aged children while at the same time hiring men with preschool-aged children. And there was no defense of bona fide occupational qualification made.

Q No what?

A Then -- there was no defense on the bona fide qualifications -- bona fide occupational qualifications exception to the act.

Then the court below must find discrimination, contrary to the act.

Q What defense does the statute provide can be made?

A The statute provides a defense of bona fide occupational qualifications, sir. That is, the employer is given an opportunity to prove that his discrimination on the basis of sex is reasonably necessary to the normal operation of his business. If he can do that then the court finds discrimination but finds it is not a violation of the act. The act provides that defense.

Q Suppose the company was engaged in the business of digging ditches and digging construction work all over the country and a men declined to hire a woman because he somehow had an antipathy to hire women to dig ditches. Would

that be a defense?

A No, it would not, Your Honor. That conduct --

Q Does the law require that the employer give the women the job of digging ditches and things of that kind?

A Yes.

Q Absolutely; absolutely?

A If his distinction is going to be based on her sex then he has no right to make that distinction any more. Congress has said that employers can no longer make that kind of a distinction.

On the other hand, if his distinction is on the grounds that women think they cannot do the job and he can prove that as a defense under the bona fide occupational qualifications exception to the act, then he would be permitted to make that distinction.

Q Could he -- would he be permitted to try to defend for the ditch digging on the grounds that women just can't dig ditches as well as men?

A Yes, he would, Your Honor.

Q He would?

A He can make that defense; yes. He cannot, however, contend that he just doesn't think it's proper for women to dig ditches. Congress has taken that prerogative from the employer; that is, to make prejudgments and to make moral decisions or decisions about what is proper on the basis

of sex.

Q As I recall it, this provision, this classification was added to the bill at a later stage. How long after the sex classification was added was the vote taken and the bill passed? Or the vote taken.

A I think, Your Honor, that sex had already been put in when that amendment was --

Q Well, obviously it was put in before the passage, but how long --

A When that amendment was rejected, I think --

Q No, I wasn't speaking of that; I was speaking of the addition of sex as a classification to the other classifications involved.

A I don't know at what point the --

Q Wasn't it quite late in the --

A Yes, it was; it was quite late. But, Your Honor, we must remember that when Congress wrote the statute they included sex in the statute just as they included race, nationality and religion. I think in interpreting this statute, as lawyers and as judges, we should interpret the sex provisions just as we do the others, irrespective of when it was added.

In summary, so that I can reserve the rest of my time for rebuttal, I would like to say that Title VII is one of a number of Congressional acts which seek to eliminate

irrational factors from being utilized as a basis for employment, and require that employment policies be based on rational factors --

Q Doing away with the age of chivalry.

A In small part, Your Honor. Title VII seeks to prohibit employment policies based on stereotypic assumptions, prejudgments and require that applicants for employment be considered on their individual merit.

The act provides a narrow exception not raised in this case: only where sex is a bona fide occupational qualification, reasonably necessary to the normal operation of the business, by engrafting the further exception to the act, sex-plus, the courts below misconstrued Section 703 and the decision should be reversed.

Q Mr. Robinson, could I ask you one question? And educate me along this line: suppose a hospital, for years had employed nothing but female registered nurses --

A Yes.

Q -- and then today after the passage of this act, a male nurse applicant comes along. Do I understand your interpretation to the act to be: just because they have always had female RNs and liked them and got along well they could not refuse to hire the male nurse. That is the nexus of the exception in the statute?

A That is correct.

Q The same would be true of private secretaries who, by and large, 99 percent plus, are women?

A Are female; that is correct. In essence, what Congress has said is that you can no longer have man jobs and woman jobs, because that constitutes, when imposed by the employer, that constitutes discrimination on the grounds of sex. It's exactly what Congress seeks to prohibit.

Thank you.

Q Does it provide anything about discrimination in giving women jobs on account of their sex?

A The act doesn't specifically provide anything about giving women jobs, but the act, of course, overall, Your Honor, does not require any affirmative consideration on the grounds of a prohibited category or if it does, it's only after you prove a case of discrimination and are dealing with the question of remedy.

MR. CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT BY LAWRENCE G. WALLACE, ESQ.

OFFICE OF THE SOLICITOR GENERAL, FOR THE UNITED STATES AS AMICUS CURIAE

MR. WALLACE: Mr. Chief Justice, and may it please the Court: This is the first case under Title VII, the Equal Employment Opportunities Provision of the 1964 Civil Rights Act, to be argued before this Court and for that reason, as well as the reasons reflected in the statistics about working

mothers reproduced in our brief, the United States believes the case to be an important one.

Before proceeding to the merits, I would like to make one correction of the brief that we filed in the case last April. We stated in that brief that a petition for rehearing was filed in the Court of Appeals --

Q What page is this?

A Well, both on pages 2 and 3 and again on page 4, but we are informed by counsel for the parties that no such petition was filed and we regret our error about this, which resulted from the fact that the Court of Appeals, under its own rule, treated the request by one of the members of that court for reconsideration of the panel decision, as a petition for rehearing.

Q That's common practice in all the circuits; is it not?

A To my knowledge it is a specific rule about it in the Fifth Circuit and in the denial of the rehearing en banc you will note, in the record that denial begins with the statement on page 42-A of the record. The petition for rehearing is denied and the court, having been polled at the request of one of the members of the court, a majority of the circuit judges, not having voted in favor of it, rehearing en banc was also denied.

I mention this correction because of the

Respondent's contention that the petition for certiorari is untimely. We believe, along with the Petitioner, that the petition is timely, substantially for the reasons stated in the Petitioner's reply brief. And if the Court is satisfied, I'd like to proceed to the merits of the case.

As already recounted, the summary judgment in this case was based on the factual premise partly assumed by the District Court that the Respondent excludes men but not women -- excludes women but not men; I am sorry. That the Respondent excludes women but not men with preschool-aged children from employment as assembly trainees.

Q What is that job?

A That is to be trained to work on the assembly line, as far as I know. The record doesn't specify what the job is; they keep referring to it as assembly trainee.

Q What do they assemble at Martin Marietta?

A I am sure counsel for Martin Marietta could tell you --

Q It is shown that 75 to 80 percent of the trainees are women.

A That is correct. There is an affidavit that is uncontradicted that 75 to 80 percent of them are women and that a higher percentage of women than of men who apply are hired for the job, and that is, essentially, all the record there was, other than the complaint and the answer and the

District Judge's assumption that Martin Marietta did hire men with preschool-aged children for this job. And since this is the first case under Title VII, I might say for purposes of clarity, that in our view and the lower Federal Court had quite uniformly agreed with this, a suit of this kind is a de novo proceeding completely. The only record is the record made in court. This is not a review of an administrative decision and there is no administrative record being reviewed in this kind of a suit, even though the Equal Employment Opportunity Commission had investigated this complaint and --

Q Did that company have any women employed in it?

A It certainly does. Most of the people employed in this job are women.

Q And yet they refused to hire these because they were women?

A Because they are women with preschool-aged children and because they have little children. They won't hire any women with little children.

Q That's the only issue, then is --

A The only issue is whether they can hire men with little children but refuse to hire women with little children. The complainant here says it doesn't benefit her very much if they hire other women; they won't hire her, even though they will hire men in the same situation. And it

doesn't benefit those children who depend on her for support, either, that they are willing to hire other women. She needs the job and that's what her complaint was to the Equal Employment Opportunity Commission and that is what her complaint is in court.

Q Is it contended -- I heard somebody use the word "rational" -- that a decision of that kind, not to employ women who have children of preschool age is irrational?

A We do not contend it is irrational; we contend that it's illegal. Congress made a judgment --

Q Well, somebody used the word "irrational," and I was trying to get it --

(Laughter)

A Many things that are illegal may not be irrational.

Now, in our view, the court below erred in holding that what had been alleged and assumed here was not a discrimination on the basis of sex; it was a qualification for employment, applying to members of one sex and not the other and therefore, on its face, which is all we have here -- there is no attempt to justify it -- the requirement is no less a forbidden discrimination than would be a state voting qualification requirement that said that men with preschool-aged children could vote but women with pre chool-aged children could not vote.

Could there be any doubt as to whether that violates the 19th Amendment? In other words, the error, obviously, is a very basic one of not recognizing what it is that constitutes a discrimination. You don't have to exclude all women in order to be discriminating against women, when you exclude some of them on grounds that aren't used to exclude men. That's, in essence, what this case is about, and as a matter of fact, the Court of Appeals for the Fifth Circuit has itself, apparently recognized that its sex-plus standard is not a viable way to interpret the act, in a recent decision of theirs, which to our way of thinking, backs away quite considerably from this Phillips decision and this is an addition that we should make to our brief.

On page 12 of our brief we refer, at the end of the lengthy footnote on that page -- that's page 12 of our brief, to a District Court decision in the Southern District of Florida, called Lansdale against United Airlines Company. In there, after the Court of Appeals decision in Martin Marietta, quite understandably a District Judge held -- he was sitting there in the Fifth Circuit, that it was no violation of the act for the airline company to fire its stewardesses when they got married, even though it continued to employ its male stewards after they were married. It was sex-plus and the Fifth Circuit had said that this doesn't violate the act.

Q Do they have male stewards on the --

A They have both male stewards and female stewardesses and when they get married the women are fired but the men are allowed to continue in their jobs.

Q Does it get any passengers?

A And on August 13 of this year the Fifth Circuit, in a little per curiam decision, reversed this Lansdale case and held -- this is case Number 29410 in the Fifth Circuit --

Q 29410?

A 29410, decided on August 13th of this year, after our brief was filed. And they said in a little per curiam opinion that the Phillips case provided no authority for the decision, but they didn't explain why not.

Q Doesn't this case have a name?

A That case is also called Lansdale against the United Airlines Company. It's the same name as in our footnote.

Q Could an airline decide that it only wanted to have the job position of stewardess; that it didn't want to have the job position of steward?

A There is litigation about that in the lower courts now as to whether they have been able to establish a defense under the act, under the bona fide occupational qualification defense. And this is a matter that is being litigated.

Q Well, back in the days when railroad trains

were still running, could the Pullman Company decide it only wanted porters; it didn't want porteresses?

A Well, this is the kind of decision that now has to be justified as in the matter relating to the business needs of the company or else it can no more be done -- can no more be perpetuated than a decision that you prefer to hire whites and not blacks.

Q Has the Commission taken a position on that, on the stewards and stewardesses?

A I couldn't say with authority. My belief is that the Commission has opposed that discrimination, but I couldn't say for sure.

Q And that is in litigation, you say?

A I have an affirmative nod from one of the Commission lawyers that the Commission has been opposing that discrimination.

Q What Commission?

A The Equal Employment Opportunity Commission.

Q How many on that?

A It's a five-member commission.

Q May we ask how many of them are women?

(Laughter)

A I don't know the answer to that, Your Honor. Well, one, I am told. Well, not only has the Fifth Circuit --

Q You mean only one out of five?

(Laughter)

A They have been appointed by the President.

(Laughter)

Not only has the Fifth Circuit, in our view, backed away from the rationale of this decision but, as we read its brief in this court the Respondent does not itself contend that the broad holding of the court below should be sustained on the merits and itsuggests, instead, that a more fully developed record might show that its refusal to hire the Petitioner did not violate Title VII.

Well, it seems plain to us that what prevented development of the record was the erroneous granting of the summary judgment prematurely, and that a reversal and remand of the case are called for and on that premise I'd like to comment briefly on how some of the Respondent's suggestions about development of the record seemed to us to bear on the issues to be resolved on a remand.

One suggestion is that what the receptionist told the Petitioner may not have accurately reflected the company's policies. Now, that possibility might effect whether an injunction should be granted or what the terms of the injunction should be, but it would not, in our view, be a defense to the charge of discrimination against Petitioner herself. Her right to relief under the act should not depend on whether there had been a pattern or general practice of discrimination.

Section 703 of the act, which is set out in our brief on page 2, on which she relies, specifically forbids discrimination against "any individual," on account of sex. And if that prohibition is to be effective, employers must be held responsible for the acts of their agents who have apparent authority to reject employment applicants.

Petitioner's only contact was with the receptionist; there was no other spokesman of company policy for her and the company never undertook to rescind the receptionist's rejection of her employment application.

So, the practical, sensible way to apply the statute, in our view, is to look at the situation realistically from the standpoint of the person upon whom the statute confers the right not to be discriminated against and that is precisely what this Court did in applying a similar right not to be discriminated against under the Interstate Commerce Act in Boynton against Virginia, in 1362 U.S.

The Court there held that there was a statutory right to nondiscriminatory service in a bus terminal restaurant even though the record did not show whether the restaurant was owned or controlled by a carrier. It was enough that the terminal restaurant operated as an integral part of the carrier's transportation service for interstate passengers and in those circumstances the Court said, "An Interstate passenger need not inquire into documents of title or contractual arrangements

in order to determine whether he had a right to be served without discrimination."

And it seems to us the same general approach should be applied here.

Now, Respondent's other suggestion that there may, in fact, be no disparity in its treatment of men and women or that whatever disparity exists may be justifiable, raised somewhat more complex issues. We recognize that the act does not prohibit discrimination between parents and nonparents or between married and single persons, so long as those discriminations fall equally on persons of both sexes and of all races, religions and nationalities.

But, the Commission and the Government have contended with some success in the lower courts that when the burden of a discrimination, based on a nonstatutory factor -- one of these so-called "neutral" factors, such as seniority or educational background, in fact, fall substantially more heavily on persons of a particular race or sex, et cetera, the discrimination is prohibited unless it is justified by reasons of business necessity.

Now, that is the issue to be explored in the case of Griggs against Duke Power Company, Number 124, which will be argued in a few days in which we have also filed a brief.

The Commission has been reluctant, however, to see that approach and that possible justification extended to

discriminations applied directly to the categories of persons specified in the act, such as discriminations between men and women.

Now, on the other hand, the act itself in Section 703(e) which is quoted in our brief, the bona fide occupational provision, expressly authorizes the restriction of certain jobs to persons of a particular religion, sex or national origin, although not, interestingly, persons of a particular race, in instances where this is reasonably necessary to the normal operation of the business.

The legislative history indicates that this exception was intended to be a narrow one, confined to the need for employees of a particular nationality, religion or sex to perform a particular job. The examples given by the act sponsors were: a French chef for a French restaurant, or male baseball players for a male baseball team. And the Commission, accordingly, has been reluctant to see this exception extended to cases such as the present one in which it is admitted that women as well as men can and do perform the job of assembly trainees and this explains why --

Q What did they hold about the baseball player?

A Congress said that they ought to be able to qualify under this exception and that they ought to be able to restrict it to men, that that's a bona fide occupational qualification. The act sponsors said that that's the kind of

Q Suppose an airline has a man come over and apply to be a stewardess -- I mean a steward -- to take the place of the stewardess and they tell him their customers like women better in that place -- younger women, probably -- would that be good defense?

A Well, they are trying to justify their discrimination against men on just that ground under this statute and the Commission has opposed their justification of it. But that is an issue in the lower courts now.

But what I was trying to do was to explain why, in its first brief in the Court of Appeals in this case, the Commission argued that there could be no possible justification under the act for the kind of discrimination involved in this case. And that any requirement of work attendance or other legitimate business requirements must be applied by the Respondent to its assembly trainees neutrally, without regard to sex.

But, after the unfavorable decision by the Court of Appeals panel the Commission took a more moderate position in its second brief in the Court of Appeals and our brief in this Court also recognized that in light of the express Congressional judgment that there should be some accommodation to the legitimate, serious business needs. The possibilities should be left open that a sufficient showing of overriding business necessity might be made in a particular case to warrant the

exclusion from particular jobs of a subcategory of one of the classes of persons protected by the act, such as: women with preschool-aged children.

Q What had you envisioned, or hypothesized as the kind of case that could be made to justify that? Statistical evidence of absenteeism and so on had been very much worse in that subgroup --

A In our view justification would have to be a very strong showing and I don't know that it need be to limit it in this case without a record by this Court now --

Q Well, an example --

A An example would be that the company invests very heavily in the training of personnel for that particular job and that the great majority or substantially all of the excluded group have in the past proved to be unable to fulfill reasonable attendance or other requirements for the job. That would be the kind of thing we would have in mind.

Q If their statistics showed that they had a higher rate of accidents of women with children two, three and four years of age, would that be justification?

A Well, not merely a higher rate, because statistics only show some disparity between every group, virtually and --

Q Well, wouldn't that be quite significant --

A The purpose of Congress -- it would be --

it would be significant -- I'm sure it would be significant to the employer, but the purpose of Congress is to say that people can't be just put into classes and denied a chance to show their individual ability to perform a job; that their idea was to get away from employment discrimination by stereotyped groups of people and to let each individual meet the qualifications and the requirements for the job on his own merits.

Q This might get down to very, very seemingly small things when we got into it. For example, it might show that married women with preschool-age children made on an average of five telephone calls to one for all other women. Wouldn't that be relevant? Telephone calls home?

A I think it would be relevant, showing that kind of experience, but I am not sure that it would be material.

Q On an assembly line?

A Well, I mean, that some women did this doesn't necessarily mean that this woman would do it, or that she should be denied her opportunity to earn her living, a living for her children, because of what some other women had done in the past. That's what Congress decided. That's the whole purpose of the act. This woman had seven children to provide for, and she wants to work.

Q And you don'tthink the employer has an interest in seeing that if he can show that the women in that posture with those responsibilities makes five times as many

telephone calls as other types of persons?

A Well, he can require that she not do it and if she does it he can fire her.

Q Well, must he hire her in the first place or would that not be dispositive under the --

A Well, we don't think it's dispositive unless the showing is a very strong one; a very strong one, not merely statistically they are more likely to do it, because that's denying her her chance to perform the job. If she is willing to do it and she is willing to accept his terms, Congress has said she should have the opportunity; Congress wanted to afford her that protection and we are asking this Court to afford it to her.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wallace.

Mr. Senterfitt.

ORAL ARGUMENT BY DONALD T. SENTERFITT, ESQ.

ON BEHALF OF THE RESPONDENT

MR. SENTERFITT: Mr. Chief Justice and may it please the Court: Martin Marietta Corporation does not have and has never had any such policy of discrimination as has been suggested here.

And this Respondent does not concur in the language of the opinion of the Court of Appeals, which has been denominated the "Sex Plus Doctrine," or the "Coalescence Principle."

The statement attributed to our receptionist does

not and did not reflect any sort of company policy of discrimination; rather, the record in this case shows that the Respondent did not practice discrimination against women or anyone else in its employment practices or procedures, and this is highlighted by the documentation in the record which reflects the company's absolute policy of nondiscrimination and equal employment opportunities which is consistent with its particular reputation as an equal employment opportunity and a substantial government contractor particularly sensitive to the pronouncements of the government in this field.

We do, however, vigorously defend the correctness of the result reached by the District Court and the judgment of the Court of Appeals which affirmed it. We consider it to be elementary, of course, that a correct decision shouldn't be reversed simply because it may have been reached through an avenue of erroneous reasoning.

We would suppose that a court reviewing a correct judgment with an incorrect opinion, might have a duty to enunciate the appropriate reasons for the decision while affirming the judgment itself.

The facts in this case simply do not justify escalation into a cause celebre. The Petitioner and her anarchy have invited this Court to decide far more than is necessary for an appropriate disposition of this case. There is but a single issue and the resolution of this can appropriately determine

the question of affirmance or reversal of the judgment of the Court below. That question is, of course, very simply and obviously whether the District Court's order for summary judgment in favor of the Respondent was correct. And essential, of course, to the determination of that question is a review of the framework of the record upon which the District Court's summary judgment order was entered.

The essence of this Petitioner's complaint or efforts to charge the Respondent with a violation of her rights under Section 703(a) appears in the two sentences where she said first that when she gave her application to the receptionist, she was told -- she, a woman, was told that her application -- that the defendant was not considering applications from women with preschool-age children.

She followed this by the general and rather conclusionary charge that the defendant refused to employ her solely on account of her sex.

Now, we think it appropriate to observe here it would be difficult to imagine a more normal or natural term for a receptionist to use in addressing herself to the Petitioner, who was a woman, than to use the word "women," in speaking to her, diluting any innuendo which it otherwise might have had.

Now, the Petitioner annexed to her complaint a copy of the decision of the EEOC which made no finding or affirmative assertion that the Respondents treated women with preschool-age

children differently than it treated men similarly situated. In fact, it twice referred to the Respondent's nonconsideration of people with preschool-aged children.

To the complaint the Respondent filed a motion to dismiss and a motion to strike and a motion to strike has no relevancy to this issue. And the court, while not granting a motion to dismiss as such, the District Court's order struck the allegation based on a refusal to hire the Petitioner because she had preschool-aged children.

Q Would you want us to decide this case on an assumption that perhaps Martin Marietta refuses to hire men with preschool-aged children.

A We think, Your Honor, that the record in this case does not show that it did not and it does not show that it treated women with preschool-aged children any differently than it treated men with preschool-aged children and that there was nothing in the record before the District Court to enable him to rule otherwise than the way he did.

Q Do you deny that what the receptionist said was the rule of the company?

A We have admitted, Mr. Justice Marshall, in our answer that the receptionist made the statement that was alleged. There has been, you might say apropos to the Justice's inquiry, there was, as we would develop in the recounting of the record, a request for an admission was filed shortly before --

just a few days before the hearing on the motion for summary judgment, in which the Petitioner requested that we admit that we -- now this was some two years later -- that we -- that it now employs men with preschool-aged children.

Now, aside from the irrelevancy of the time periods involved, because two -- the relevant time of the application was some two years prior and the request says now -- aside from that however, the time for responding had not expired at the time of the hearing on the motion for summary judgment. We can advise the Court in all candor that the answer to it, if we have answered it, would have been yes.

But, also that if they had asked whether we hired women with preschool-aged children for the same job at the same job the answer would likewise have been yes.

Q You mean you have changed the policy?

A The policy was exactly the same at that time.

Q Well, why did the receptionist say what she said? Is there any explanation in the record for that?

A There is no explanation in the record for that, Your Honor.

Q Well, would it be fair to assume that when the receptionist said, "We don't hire women with preschool-aged children," in preference to saying, "We don't hire people with preschool children," that she meant women? Is that a correct assumption?

A We think, Your Honor, that it was a perfectly natural thing for the receptionist, in talking to a woman, not to say "We don't hire men or women with preschool age children," but simply to say, "We don't hire women." Now, I cannot undertake -- I am not undertaking to suggest that we have a policy or not. I am not able to explain these reasons why this young lady said this. We have admitted that she said it because we are unable to prove that she didn't, but we certainly are not in any position to --

Q You say now that you don't know whether that was the policy at that time or not?

A I know it was not the policy at the --

Q At that time?

A -- at that time to refuse to hire women or men with preschool-aged children. And the decision of EEOC so reflects, even though it has --

Q And that's the -- and that's true now?

A That is true now; yes, sir.

Q Well, quite apart from policy, if this Applicant was, in fact, not considered for employment because she was a woman with preschool children, then there was a violation of the act; wasn't there? Quite apart from any policy --

A I understand --

Q Somebody in the company just didn't know, just

didn't get the word or was mis -- misunderstood what the policy was and if this woman, in fact, was denied consideration as an employee on that ground then there was a violation; wasn't there?

A Well --

Q A violation of her legal rights, wasn't there?

A We point out in our brief, Mr. Justice, that the record, the skimpiness of which we must accept a degree of responsibility for --

Q Because it was your motion for summary judgment?

A As Advocates we filed a motion and we won it, and --

Q Right.

A And it was appealed and we won that, and that seems to be our only problem here. The skimpiness of this record doesn't provide a real basis for determining whether or not this woman was actually refused employment. We do have in the record, the affidavit of the manager of the employment department, who was there and said that no discrimination was there at the relevant time. He said that no discrimination was practiced and the record reflects that every possible effort in the world had been made to disseminate the requirements of Title VII of the Civil Rights Act of 1964 to every person that

we could conceive in the company could possibly have any -- and the record shows this in answers to interrogatories.

Q So, then do I understand that you would agree that if, regardless of all of these good faith efforts, if and regardless of what the company's policy was, if regardless of all of those things, if this woman, in fact, was, her application was refused consideration because she was a woman with preschool-aged children at a time when the company was hiring men with preschool-aged children and then her individual rights were violated under the act. Do you concede that, or don't you?

A Well, not, Your Honor, unless --

Q Because I understood you to say that you virtually concede that the rationale of the Court of Appeals was in error.

A Right. Not unless if it were considered it were a -- shall we say -- a per se violation, and unfortunately the case confused in that framework at a point.

Unless the comparison were made with men similarly situated with similar custodial problems. Although the record doesn't show what the status of Ida Phillips was, with respect to custodial problems, the record shows nothing on that. Well, we don't know what the term "with preschool-aged children" meant.

Now, perhaps in common experience we might assume it

to mean what this Petitioner apparently assumes it to mean, that that is -- or could mean simply the mother of a child which is under school age, regardless of whether or not this mother has the custody. There certainly is nothing in this record to show this.

If it gives any further light on our position in this regard, we have conceded that sex-plus as a concept is --

Q Is erroneous.

A Is erroneous --

Q Is erroneous under the statute. Well, then I would infer, perhaps for some practical reason you don't want to publicly agree with me and I don't expect you to, but the inference I got from your argument is that you pretty well agree with your adversary that this judgment ought to be set aside and the case remanded for a trial on the merits.

A We think, Your Honor, that there is more than one way to develop -- that is a way to develop a fuller record. We think, however, that the record as it stood before the District Court, where there were two questions before it at that time, in the framework within which the record had been constructed, where the Petitioner had elected to stand on the per se issue and not to produce any countervailing affidavits or to introduce into the record anything to show any discrimination or to show that men similarly situated with her custodial situation were treated differently than she, since she elected to

stand on the per se issue, had left the court -- the District Court, with no alternative but to enter a summary judgment on the record as it stood at that time.

Q Are you saying that we've got to view this record just as though it had evidence or allegations that men who have preschool-aged children with no mother home to take care of them -- in other words, where the man has the same custodial and supervisory role as the wife -- would not be hired? That seems to me what your position adds up to.

A First of all, Mr. Chief Justice, I wouldn't pretend to tell this Court what it must, how it must view this case,but I am not certain that I understand --

Q Well, you make an argument that there is no showing on this record, this admittedly limited record, that men were not treated the same way if they had custodial care of children at home and that, therefore, the record is sufficient to support the District Judge's findings without more?

A We would say, Your Honor, that the fact that it does not at first -- there is no affirmative showing in the record -- that there was any difference in the treatment. Simply to say that we are not going to hire preschool-aged -- women with preschool-aged children without being coupled with a comparison of the treatment of men similarly situated, does not constitute an allegation of violation under the act.

And, insofar as sustaining the result reached by the

Court of Appeals, this is our position, Your Honor.

Q What do you think the Court of Appeals would have done --

A Sir?

Q What do you think the Court of Appeals would have done if they had taken a different view of the legal question and said, or you implicitly say they should have said; what do you think they would have done with the summary judgment motion?

A They would have had the alternative, the same alternatives that this Court has.

Q Wouldn't they send it back?

A Your Honor, ten of them decided that it shouldn't be.

Q I didn't get that.

A Ten members of the Court of Appeals decided that it should not be.

Q But they had the wrong view of the law, as you concede; as I understand you now to concede.

A They had the alternatives -- as far as the Court of Appeals, it had the same view of the law as Petitioner, and which we concede has some merit. It would have had to determine then whether or not it felt that the District Court on the record before it was correct in entering summary judgment; not whether or not Martin Marietta tried to discriminate.

That's the per se issue and that's where it became all confused.

Q May I ask a question: suppose the case was reversed and sent back to the court and assume also that you are not defending on the ground that because of mother -- it would be a reason for a mother not to get a job, might still be no reason why the husband should?

Suppose you get all that. Do you think you would have any defense byshowing by statistics or by anything else, that the practice of not hiring mothers of preschool-aged children was necessary to carry on your business in an orderly fashion, or would you attempt that? Are you saying that you ought to have that chance?

A Certainly if it's appropriate at the time, Your Honor,and under the circumstances, if it should be remanded for the development of a fuller record, then we should have the opportunity if it's considered appropriate at that time.

I may say, however, that as a sort of an aside to Mr. Justice Black's query, that there are governmentally published statistics which show that women with preschool-aged children have a higher incidence of absenteeism --

Q Well, do you think you would be entitled to offer that as a defense or is it an automatic thing that without regard to business or anything else you have just got to hire

them?

A If the Court please, we feel that our position on this is that this record in its truncated posture, is not one that really affords the basis of speculating on what we might be able to do at that time --

Q I thought maybe you were putting up as a defense, and hoped to put up as a defense that the rule is a good one; from a business standpoint it can throw the business out of shape and out of kilter and that you want the chance to prove it, by statistics or whatever you can and that's a reasonable rule. And that you should not be -- on that basis.

A Your Honor, I believe if the -- if it seemed to be appropriate at that time if it should be remanded; if the District Court should first find that we have disseminated under the act, then certainly to the extent that the business necessity doctrine would be available to us as a defense it would be asserted vigorously.

Q Mr. Senterfitt, you say a government study shows that women with preschool children have a higher percentage of absenteeism --

A I did not, Mr. Justice --

Q Well, what did you say?

A I did not, Mr. Justice Marshall, intend to suggest that government studies show, but that government

published statistics as cited in our brief in footnotes 4 on page 28 --

Q Well, what are your statistics on men with preschool children?

A I have not seen any, Your Honor.

Q And isn't it a fact that nobody even thought of doing it; did they? Nobody even thought of doing it, making such a study?

A I think not --

Q That's right.

A There seems to be a --

Q So what good are the figures on the women as comparable to the men? If you have nothing to compare them with?

A It is my understanding that the figures referred to were indicating a higher incidence than those of men.

Q With preschool children?

Q Well, common sense --

Q They didn't draw any line with the men --

Q Common sense would tell you that one.

Q I was just trying to give you some suggestions in case it goes back.

(Laughter)

Q Mr. Senterfitt, there has been some suggestion of what the Court of Appeals en banc, the ten judges thought.

The Court of Appeals as a whole didn't do anything with this case except to refuse to rehear it; isn't that right?

A Correct.

Q So that all we have is the views of three members of the Court of Appeals and views of other members of the Court of Appeals who thought that this ought to be heard by the entire court.

A That is correct, sir.

Yes, I did not mean to imply that -- that they shared in the opinion.

Q No.

A Having had our discussion on the state of the record fairly preempted and concluded through the questioning rather than through an narrative, we would simply reiterate that our position on this point is that there was simply nothing in the record before the District Court under which or upon which it could rule any other way that it did on the motion for summary judgment.

On our point on the matter of jurisdiction of this Court, we would simply say that for the reasons that are amplified in our brief, we suggest that the Petitioner has failed to comply with the jurisdictional requirements of the statute with respect to the timeliness of the filing of the petition for certiorari and we would thank the Court.

Q May I ask you one more question: I have been

curious and I haven't been able to get at it yet; what is this job?

A The job, Your Honor, is an assembly line requiring shift work --

Q Assembling of what?

A Of small electronic components that would become ultimately a part of a missile under the Martin Marietta's defense contract work.

Q Well, is it extra heavy or anything, why either one should have any preference; man or woman?

A I think on the contrary, Your Honor, that it is intricate work and not heavy work. It is not a heavy assembly type of thing.

Q Well, is there any reason why you should have a desire to hire one instead of the other, unless it would be that women might be absent more when they have young babies.

A This could be -- could very well become a valid reason.

Q Well, I have assume up to this time, Mr. Senterfitt, that the reason you have 75 or 80 percent women is that again something that I would take judicial notice of, from many years of contact with industry, that women are manually much more adept than men and they do this kind of work better than men do it, and that's why you hire women.

A Mr. Chief Justice --

Q For just the same reason that most men hire women as secretaries, because they are better at it than men.

A I am so pleased -- I couldn't say that because it appears to fall into this stereotype preconception concept that --

(Laughter)

Q It's a preconception that --

A We don't think it appeals to reason.

Q The Department of Justice, I am sure, doesn't have any male secretaries. This is an indication of it. They hire women secretaries because they are better and you hire women assembly people because they are better and you make the distinction between women who have small children and women who don't; so it appears on the record.

MR. CHIEF JUSTICE BURGER: I think there are two minutes remaining, Mr. Robinson.

REBUTTAL ARGUMENT BY WILLIAM L. ROBINSON, ESQ.

ON BEHALF OF PETITIONER

MR. ROBINSON: Thank you, sir. I think we will only need two minutes.

I merely want to point out a couple of things. First, I agree with Mr. Senterfitt that the record is very cloudy, but I suggest that we cannot simply accept, on the basis of this record, the suggestion that the company does not, in fact, discriminate because this company, after all, did not conciliate

the case with EEOC and it would seem if there was no discrimination present it would be a classic case for successful conciliation by the Commission.

And then I'd like to go on to suggest that the legal issue here is, in fact, squarely put. The District Court rejected or struck those portions of our complaint which completed the legal theory. That is: sex-plus, preschool-aged children. Having struck that, as a matter of law, that squarely puts the legal issue, but moreover, in granting the motion for summary judgment, the court specifically assumed, for purposes of the record, that they hired men with preschool-aged children and held that immaterial. As a matter of law it had nothing to do with the material proposition of law in this case.

It squarely puts the legal issue and should give us the opportunity to develop, through discovery, that legal issue, and the evidence with respect to it.

Q You concede, of course, that Martin Marietta is not discriminating against women?

A Against all women?

Q Yes.

A Yes. But, what we have involved in this case, Your Honor, is a subgroup of the group: women who are also, of course, the subgroup of the larger classificationof women, protected by Title VII.

One further remark: mere statistics alone, Your Honor,

I suggest, would not -- mere statistics alone with respect to an absentee rate will not establish a BFOQ. There would rather have to be statistics with respect to an absentee rate coupled with a strong --

Q Do you agree that it would better for this case to go back to find out: (1) what was the policy of the Respondent at the time she applied; (2) what is their policy as of now as to hiring women with preschool children?

A Yes, under appropriate pronouncement of the law by this Court.

Q Well, we don't -- well, I don't know what we're going to pronounce --

A I don't either, Your Honor.

(Laughter)

Q I, as of right now,I don't know what their policy was.

A Your Honor, on --

Q All I know is that a receptionist said this. That's all I know. Am I right?

A Well, no.

Q What else do I know?

A WEll, you know that in deciding this case the District Court specifically accepted the fact -- he assumed it --

Q What fact --

A It was not a fact -- he assumed it --

Q Oh, he assumed --

A Well, it's an assumption, the basis of which, on the basis of which he decided the case.

Q But what was the basis of his assumption?

A The basis of his assumption was his belief that the law didn't prohibit an employer from differing between men with preschool-age children and women with preschool-age children.

Q Oh, I see.

A And that's what squarely puts the issue, Your Honor. It means that we should have an opportunity to develop that legal theory below.

Q And you were suggesting, Mr. Robinson, that it wouldn't be enough as a defense for the employer to show statistical data indicating a significantly higher absentee rate or accident rate for women with preschool-aged children as distinguished from other men and women?

A With preschool-aged children. Unless --

Q Well, all right, particularly as distinguished from men with preschool-aged children.

A Yes. Particularly, that is, unless the company can also show that the normal operation of their business prohibits them from absorbing that rate of absenteeism. It's not merely that there was a difference, Your Honor; it's that there is a difference which is necessary --

Q Would have a significant impact on their business operation such as that of an assembly line operation is significantly hurt by absenteeism.

A Not significantly hurt; can no longer be normally operated. That's the narrow way that Congress intended this exception to be applied.

Q Well, that's rather collateral to the basic issue in this case; isn't it?

A It is.

Q Do I understand that all you are asking is that this case be reversed because of an error in rendering summary judgment in this case?

A Granting the motion to strike and summary judgment; yes, sir.

Q Mr. Robinson, I suppose as a practical matter, if this case goes back, would it be your guess it will be developed on the proviso or exception in the statute?

A I don't know, Your Honor. I, frankly, would rather doubt it, because I would imagine that the company's admitting here today that they already hire women with preschool-age children, that they are not going to seek to demonstrate that women with preschool-age children can't do the job.

Q Well, I think there have been intimations to the contrary, though, and my guess is that if it goes back good lawyers will try to zero in on that one and we will have an

entirely different case when it comes back here.

(Laughter)

A Yes, sir.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Robinson. Thank you gentlemen. The case is submitted.

(Whereupon, the argument in the above-entitled matter was concluded at 2:30 o'clock p.m.)