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In the

Supreme Court of the United States

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SUPREME COURT, U. S.

McDONNELL DOUGLAS CORPORATION,)
)
Petitioner,)
)
v.) No. 72-490
)
PERCY GREEN,)
)
Respondent.)

Washington, D.C.
March 28, 1973

Pages 1 thru 36

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IN THE SUPREME COURT OF THE UNITED STATES

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In the Matter of: :

McDONNELL DOUGLAS CORPORATION, :

Petitioner, :

v. : No. 72-490

PERCY GREEN, :

Respondent. :

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Wednesday, March 28, 1973

The above-entitled matter came on for oral argument at 10:39 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

VERYL L. RIDDLE, ESQ., Gaylord C. Burke, Thomas C. Walsh, 500 North Broadway, St. Louis, Missouri, 63102; On behalf of the Petitioner.

LOUIS GILDEN, ESQ., 722 Chestnut Street, St. Louis, Missouri, 63101; On behalf of the Respondent.

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on behalf of the Respondent 17

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-490, McDonnell Douglas Corporation against Green.

Mr. Riddle, you may proceed whenever you are ready.

ORAL ARGUMENT OF VERYL L. RIDDLE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. RIDDLE: Mr. Chief Justice, and may it please the Court:

This case is before the Court to review a decision of the Eighth Circuit.

The plaintiff below, who is respondent here, Mr. Percy Green, is a Black man, and the defendant below, who is petitioner here, is McDonnell Douglas Corporation.

We will refer to the parties to this suit by the names Mr. Green and by McDonnell during the course of the argument to the Court.

Mr. Green was a mechanic and had worked at McDonnell Dougas from 1956 up until the time of his layoff in 1964.

During that period of time, he had established work record that qualified him by the rating records of the supervisors at the plant as being of average, or, I suppose said another way, satisfactory.

He was, in that period of time, well, up until 1963, he was a member of the union and, as such, was protected by the union rights as it had bargained with the company for, such

as seniority, and what have you.

However, in 1962, the respondent here, Mr. Green, became interested in doing some work outside of the work that he had been doing, and made inquiry as to whether or not he could be transferred over to the electronics division of McDonnell.

At that time, he was told by his supervisors and people with whom he worked that for him to transfer over to that division would cause him to give up whatever seniority rights and whatever protection he had under the labor contract.

And it was pointed out to him that that new department that he was looking at was engaged in work related to the GEMINI program, that could be a one-shot contract, and because of that there was some uncertainty as to the durability of it.

Well, considering those factors, in 1962, Mr. Green declined to transfer and didn't make an application. A few months later, the next year, Mr. Green again looked over at the other department and decided that maybe he should transfer. The pay wasn't significantly greater but apparently it was a more prestigious position and would utilize his skills to a greater extent.

When he looked at it the second time, he was again advised that because, "You remember the union now. You have certain seniority rights." And again, "This is the GEMINI program and you may, when you get over there, as a non-union

member, employee of McDonnell, you won't have the security of the job that you have now."

Well, in spite of that, he decided to make the transfer, and for approximately a year thereafter --

Q That was in 1963?

MR. RIDDLE: That was in 1963 -- for approximately a year thereafter he worked as a technician over in the electronics division, working on simulators for the GEMINI program.

Well, as was predicted by some, the program was winding down and there was a layoff coming up. The company, using a pattern, or using a practice in this particular instance that they had used before called the totem pole, referred to in the case, made a determination that some of the excess technicians working on that program would have to be dismissed. And in due course of time, Mr. Green and 14 or 15 others, in fact, were dismissed or laid off.

At the time that they were laid off, at the time Mr. Green was laid off, he made some protest to his superiors and to some of the executives of McDonnell and pointed out that in his opinion he was being discriminated because he was a Black man and because he was a known protestor and leader in civil rights activities around town. He pointed out that his position in those activities was such that the company would be taking some risk if they laid him off.

But, in spite of the various and prolonged discussions,

he was laid off.

Now, sometime after, within a few weeks, and, in fact October, 1964, Mr. Green participated in what's referred to in the record and in the briefs as a "stall-in."

Now, this stall-in as was referred to by some of the witnesses in the case, as an attempt to sabotage the facility and the operations of McDonnell.

I think to fully understand the significance and the impact of the stall-in I would call the Court's attention to pages 5758 and 59 of the Volume I of the Appendix.

Q What pages?

MR. RIDDLE: It's in Volume I of the Appendix, at page 507, 508 and 509. It's the last two or three pages in the -- in that volume.

A look at the plan that was devised by Mr. Green and others, one can readily see that this wasn't a carelessly planned program. It was designed carefully and for the purpose of totally disrupting the flow of traffic to and from the plant facilities of McDonnell which are located on and near the airport, Lambert Field in St. Louis.

The plan being to park cars on roads that led to the access and roads that led away during a shift change where something between 10 and 15 thousand people are going to be going to and from on limited access. And this is not a case such as a football field where there are roads coming into it

from all directions. This is a case where there is an airport and the access roads are much more limited than the typical installation.

Q Is the plant of the company right out there near the regular St. Louis airport?

MR. RIDDLE: Yes, it is. It is right near the runways and, in fact, the manufacturing facilities are principally on the runway itself, or on the airport itself.

Q On the airport grounds.

MR. RIDDLE: Yes.

So, as a result of this activity, the participants, in fact, drove their cars and parked them at strategically located positions. And at that time, as the plan called for, they locked their doors, they put their brakes on, they shut their motor off, and planned to stay there in that position for at least one hour. And they were instructed to stay there and resist being taken away unless the officers made certain explanations to them as to why they should leave.

Now, the impact of a complete stall-in or a blockage of traffic at that time and under those conditions could have -- and except for alert police activity, could have been catastrophic, and could have destroyed an entire shift operation at the plant. And the amount of money and the amount of property, potentially, subject to destruction or damage as a result of this is very, very substantial.

Now, following that program, Mr. Green was arrested and paid a fine, and found guilty.

Sometime thereafter, I believe it was July 2, 1965, Mr. Green had continued in his activities, some of which were lawful and some of which were unlawful, and at that time his group action locked the gates, doors, at a building that housed McDonnell Douglas personnel downtown at a time when the employees were attempting to leave the building.

The effect of this was to temporary imprison the occupants of the building during a period of time that they would have been leaving.

Then, on July 22nd, just a few days after the lock-in at the Roberts Building downtown, Mr. Green applied for a job as a mechanic at McDonnell Douglas.

Q Does the record show whether or not he was employed during this period, after his original layoff from your company?

MR. RIDDLE: The record indicates that he was employed off and on, but I don't believe the employment was steady or with one employer throughout that period of time.

Of course, when he made this application, the reaction from the people at McDonnell was predictable. They said, "No, we will not be able to use you."

Following that, he filed his complaint with the EOC. The EOC made its investigation and made its report. They found that there was rea onable basis for Mr. Green to bring a

lawsuit, and he filed one at that time under Section 704 of the Act.

The case came on for trial, well, after a period of time had passed. Mr. Green filed his lawsuit in the United States District Court in Missouri. It came on for trial before Chief Judge Meredith there, and it was tried for about four days.

During the course of the trial, or before the trial actually began, Green made an effort to amend his petition to include race or cause of action under 703 in addition to 704, and that was denied by the court.

The case went to trial under 704, but during the course of the trial, Green attempted to interject 1981 Civil Rights Act as a basis for his discretion and a trial of the issues involving race.

At the close of that case, Judge Meredith made some findings, one of which was that the evidence shows that plaintiffs civil rights activities were not considered as a factor in the decision to lay off the plaintiff.

And then he made these findings, and I think it is important for the Court to carefully consider just what was before Judge Meredith, and what it was that he found. He says the plaintiff contends that defendant violated 704(3) because of his opposition to employment practices. Plaintiff also contends in his post-trial brief that defendant's refusal to

hire him was based on race and his participation in civil rights activities, violation of 1981.

And this important conclusion and finding by the court: the court feels that the court's discussion of the case under 704 will effectively dispose of any claim arising under Section 1981.

And these are the controlling standards that Judge Meredith applied in reaching his decision. He says this, "In the matter before the Court, the controlling and ultimate fact questions are: (1) whether the plaintiff's misconduct is sufficient to justify defendant's refusal to rehire, and (2) whether the "stall in" and "lock in" are the real reasons for defendant's refusal to rehire the plaintiff. The court finds that they are."

Then the trial court proceeded to say that the plaintiff there, Mr. Green, had failed to establish by the greater weight or preponderance that the defendant's refusal to rehire plaintiff resulted from racial prejudice or plaintiff's legitimate civil rights activities.

It seems clear from the record, and I am again quoting His Honor, "that the defendant's reasons for refusing to rehire the plaintiff were motivated solely and simply by the plaintiff's participation in the stall in and the lock in demonstrations. The burden of proving other reasons was on the plaintiff."

The case was appealed and went to the Eighth Circuit.

Q Doesn't that language sound like the District Court was dealing only with the alleged 704 violation? And he had stricken from the complaint the -- or what did he do, refuse to allow amendment of the complaint.

MR. RIDDLE: Under 703.

Q Under 703.

MR. RIDDLE: But the conclusion of the court there, Your Honor, was plaintiff has not shown that defendant was motivated by racial prejudice or because of plaintiff's legitimate civil rights activities. He made the joint finding.

Q It is your submission, I think, that although the amendment to the complaint was not allowed, that nonetheless in the course of the trial, it was by agreement, implicit agreement, that issue was tried.

MR. RIDDLE: It was tried and it was tried thoroughly. And four days of trial and a careful reading of the transcript will indicate that at least 80% of all subjects inquired about and all questions do relate to the question of race.

And I think it was for that reason that the trial judge, the District judge, felt that under the contentions being made that he could dispose of that issue in this case and did dispose of it.

Q Although he had, so far as the record goes, so far

as the formal record goes, he had stricken and not permitted that issue to be tried in this lawsuit. That's correct, isn't it?

MR. RIDDLE: If the lawsuit had been tried consistent with what that ruling, striking race, if it had been tried consistent with that theory, yes, I don't think there would be any validity in our position at all.

But, in fact, it wasn't, it was tried thoroughly, and this was the feeling of one member of the panel of the Eighth Circuit and, apparently, shared by four members of that court.

Q Mr. Riddle, I understand the respondent to contend even if it was tried by consent that he was handicapped by the trial court's failure to allow discovery on that account.

What's your response to that contention?

MR. RIDDLE: My position on that, Your Honor, is this, that there was adequate discovery, and there was enough discovery here to allow that issue to be tried. There was discovery opportunities available to the plaintiff's counsel that he didn't avail himself of, and voluminous records were, in fact, made available to him and he used during the course of the trial.

We think that the ruling made in the pre-trial, as to the extent of the discovery, was based upon the unreasonableness and burdensomeness of it. It required for tens and

thousand's and thousand's of documents that would have required weeks and weeks just to prepare, all on an issue that doesn't seem to be relevant to any of the issues that the case presented.

Now, the Eighth Circuit looked at the decision below and affirmed it in every respect except it sent it back for a retrial on the racial discrimination issue.

Now, if the court had stopped there and used the basis raised by His Honor, that it had been stricken and so, maybe he didn't have his full day in court, go on back and try it again -- if it stopped there, the case wouldn't be here today. But the court did some very significant additions to just that.

It said, one, that the prima-facie case is made when the applicant here, a Black man --I think I should read that exactly as it is from out of the court's opinion, "when a Black man demonstrates that he possesses the qualifications to fill a job opening, and that he was denied the job which continues to remain open, we think he presents a prima-facie case of racial discrimination."

Now, what that does is to reverse at the point when Judge Meredith says it was up to the plaintiff in that case to establish that his discharge, or the refusal to reinstate him, was based upon his race, that this was a burden that the petitioner, or the plaintiff, had in the lower court.

The Eighth Circuit is saying that he merely makes that _prima-facie_ showing and then the burden is upon the company, McDonnell here, to establish that it was not racially motivated.

Now, in addition to that, the shifting of the burden of proof -- I might say at this juncture that Congress, in considering this, one of the floor managers -- we've cited that in our brief -- one of the floor managers carefully explained to Members of Congress that the burden of proof in these cases, under Title 7, will be as it has always been, that the burden will always be on the plaintiff, the person bringing the lawsuit. And it made it abundantly clear that this is what Congress intended.

Here, the Eighth Circuit, by its opinion, is shifting that burden of proof.

But, that's not all it did. Second off, it said that subjective evidence from the employer, in this case, from McDonnell, would be given little weight or its weight would be limited.

In the context of this case -- and I might say further to that -- the third thing it said was that somehow McDonnel would have to establish or show that under these circumstances its refusal to rehire Green was related to job performance. While limiting the value or the weight of subjective evidence as the Eighth Circuit opinion did, plus the other

imposition added, plus the burden of weight shifting, caused one member of the Eighth Circuit to think that the effect of this opinion would be to order McDonnell to reinstate or rehire Green. And that view, apparently, was shared by four members of the court.

I think it is clear when the employer here is inhibited by testifying as to his reasons,subjective reasons, for making employment decisions, that when that is being told -- when the Eighth Circuit is telling the District Court that you are to give very little weight to that, we think that that means practically that once the plaintiff, Green, here, would make this prima-facie case, that we couldn't rebut that prima-facie case then by showing that our refusal to employ him was because he attempted to sabotage our plant, or lock some of our employees into the office building downtown.

I think the Eighth Circuit is saying that this is to be given very little weight and it probably will not justify your actions in refusing to employ.

Now, there seems to be no question but what unlawful activity of any person would be adequate justification for an employer to refuse to hire. And I think that would be true whether the applicant is White, whether he is an Indian or whether he is Black, or whether he is a Baptist or Jew or Catholic. I think that that is clear.

And I think the effect of this opinion, if it is

applied literally, will cause and create reverse discrimination.

For example, I don't think it could be seriously questioned that if a White man were to throw a rock in the Chairman of McDonnell's window last night and he called me this morning and says can I discharge the man, I would say yes.

Q You could also say put him in jail.

MR. RIDDLE: Yes.

And, if a Black man were to throw, by this opinion as it has been interpreted, and as we interpret it, a rock through his window, and he asked me if he could discharge him, I would have to say, following the mandate of this opinion, "We'll have to look to see how this might adversely influence his ability to perform the job."

Q But you could still put him in jail.

MR. RIDDLE: Still put him in jail. But when he got out of jail, if we had to look at job performance, then we could very well be in the position of having to get into that before I could be at ease in saying, "No, you can't discharge him."

I use that as an illustration of how --

Q The question would be, must we hire him, rather than can we discharge him? Isn't it?

MR. RIDDLE: I think the rule would be the same, Your Honor. I think it applies, not only to discharge, I think it would apply to promotion and I think it would apply to job

applicants.

Q Yes.

MR. RIDDLE: What remaining time I have, I would like to reserve for rebuttal, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Gilden.

ORAL ARGUMENT OF LOUIS GILDEN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GILDEN: Mr. Chief Justice, and may it please the Court:

In answer to a question posed by Mr. Justice Stewart, I want to comment that Judge Meredith stated that, "The court feels that the court's discussion of the case --

Q Where are you reading from?

MR. GILDEN: I am reading from page A-45 of the Petition for Writ of Certiorari.

"The court feels that the Court's discussion of the case under 42 U.S.C. §2000e-3(a), (that's 704(a)) will effectively dispose of any claim arising under section 1981. Section 42 U.S.C. §2000e-(a).

That's on the bottom of page A-45.

This case was treated as a 704 case all the way through.

And, Mr. Justice Rehnquist, I submit that Judge Lay's comments that the Hebrew expression, "We tie their hands and

then reproach them because they don't use them," is a classic statement in this particular case, because Plaintiff Green attempted to get statistical information by interrogatories, by motion to produce for inspection. And on the question of interrogatories, the court struck the interrogatories on the ground that they were oppressive.

On the question of the motion to produce for inspection, the court said, specifically, in its opinion, that this is a race case, and, therefore, you are not entitled to all these statistics.

So, therefore, on two occasions, plaintiff had to come in and try this case knowing full well what the decision of the court was, 704(a), both on the question of motion to produce for inspection and both in the comments of the court in its opinion that it is a 704(a) case.

This case was tried totally as a 704(a) case.

The only statistics that were brought into court were by Mr. Peter Robertson who is a representative of the Equal Employment Opportunity Commission, and he came in on the eve of trial. He was at that time, in 1965, a representative of the Missouri Commission on Human Rights, and he at that time, did the investigation of the case. And he came in with some statistical information. He came in on the eve of trial. I interviewed him just prior to trial. I had no opportunity -- I was plaintiff's counsel --I had no opportunity to produce any

of these figures. I was foreclosed totally in introducing statistics on employment.

If this was a race case, I would like to see it. It has never been submitted as a statistical case before Judge Meredith. It was totally a 704(a) case.

The records that were brought in by Mr. Peter Robertson related primarily to his dispirit treatment when he worked for McDonnell Douglas before his layoff in August of 1964.

This case is a case to be tried and listened to on this particular issue, the facts in this particular case.

Mr. Riddle has gone through a whole chronology of the "stall in" and the "lock in." And the lock in is not a matter before this Court. The court held that Mr. Green had nothing to do with it.

I take it, though, you do not dispute the fact that it took place?

MR. GILDEN: The lock in did take place, that's correct.

Q And the stall in?

MR. GILDEN: The stall in did take place.

Mr. Green pled guilty to the stall in. He was out there for 10 minutes.

And I submit to the Court that in October of 1964 there was no Equal Employment Opportunity Act. The Act became

effective July 2, 1965. There was no legal recourse in any of the laws of this country. We didn't know about 1981 at that time. That became somewhat crystal clear after Jones v. Mayer. We didn't know about 1981.

We all knew about an Equal Employment Act that had been enacted in July of 1964 to become effective in July of 1965. That's all we knew.

And on that particular day, what was he protesting? He was protesting discrimination in employment at McDonnell Douglas. That's what he was doing.

Q Is it your position that that includes the right to use unlawful means and that those unlawful means may never be then taken into account?

MR. GILDEN: No, Your Honor, I don't submit that. That isn't my position in this case.

McDonnell can use that reason. But I think what one has to look at, which is what the Court of Appeals had before it, was a record on 704(a).

They had a record before them that showed the treatment of Green when he was working for McDonnell Douglas, and they saw that in August of 1964, when this totem pole was drawn up, that the Vice President of McDonnell Douglas, based upon the evidence of Mr. Robertson, drew a line over Green's name. And he was the highest senior man in a whole department of 100 White men, in a research department, the only Black man.

And they drew the line over his name as the man to be laid off.

Q I thought that issue wasn't before us here at all, that everybody agreed that the statute of limitations had run out --

MR. GILDEN: Your Honor, I think it is important in terms of what the Court felt a _prima-facie_ case would be in the opinion of the Eighth Circuit.

I think it is a question of what the court knew at that particular time, based upon the evidence before it, and what Green would introduce in the race case, and that he would show the treatment he had to show that the treatment of discrimination when he worked there continued when he applied for the job.

Q You are not saying the Court of Appeals prejudged the case? It remanded the case to the District Court.

MR. GILDEN: That's correct, but only on those facts, Mr. Justice Stewart, only on those facts. They knew that Green was qualified. They said that in the opinion.

Q Well the respondent indicates that he was a satisfactory mechanic. That, too, is not an issue here.

MR. GILDEN: Yes, but the court said that Green could show that the reasons given were pretextual, and that would go to the race situation, and that he could show that the real reason why Green wasn't hired was because of the way that they treated him before, that --

Q No, no. No, no. The real reason was because of his race, that's what they have to show --

MR. GILDEN: That's correct. And they can also show -- and they also had this as part of the record -- that Mr. Windsor said there were fourteen or fifteen reasons why he wasn't hired. Fourteen or fifteen reasons -- now, they only used two reasons, and they also brought in the record that there was a picketing of Mr. McDonnell's home from the street, not anywhere near the house. One of the witnesses talked about that as a basis for not hiring.

Q If there was one good reason, the fact that there were fourteen others would make no difference, would it?

MR. GILDEN: That would be a matter for the trial on the race case before the District Court.

Q Yes, but when the Court of Appeals remanded it, they undertook to try to allocate the burden of proof.

MR. GILDEN: No, they didn't, Your Honor. What they did -- they didn't shift the burden. The burden of proof is still with the plaintiff in this case.

Q Did they not direct the District judge, virtually, not to give weight to this evidence?

MR. GILDEN: They didn't say that, Your Honor.

Q Give very little weight, if any --

MR. GILDEN: Oh, no, they didn't say that. They only said that employment decisions based upon subjective

criteria. They didn't say subjective evidence. They said subjective criteria.

And this Court, in Griggs, said that Congress directed the thrust of the Act against the consequences of employment decisions, not simply the motivation. And the consequences of not hiring Green --

Q What do you find in the statute that supports what the Court of Appeals said?

MR. GILDEN: In the statute, in terms of subjective evidence? It goes into some of the case law that we have had, Your Honor, in terms of the weight to be given to subjective criteria. Not subjective evidence, subjective criteria.

In fact, the second question presented by McDonnell here doesn't even relate to the decision.

They did not bar McDonnell from introducing subjective evidence. Nothing in the opinion is saying that, nothing.

Q What is your answer to the Chief Justice's question, that what do you find in the statute that supports the Court of Appeals decision on the burden of proof and on prima-facie case?

MR. GILDEN: There is nothing specifically in the statute relating to what the burden of proof would be in a case involving an application for employment, not specifically stated. But the court had before it a somewhat shallow record based on 704(a). They knew how Green had been treated and

based upon the facts before them, they set forth what could constitute a *prima-facie* case, and then they anticipated, they anticipated that Green could come forward -- would have to come forward with more evidence. They anticipated, they said that, because after they said that McDonnell would have to show that the reasons they didn't hire Green were because he was irresponsible toward his work. They then said that Green would have to come back and show that the reasons were pretextual or else that McDonnell Douglas had engaged in racially discriminatory practices at the plant.

And they showed what the burden would have to be with Green later on. They didn't anticipate that he could rest at the close of his *prima-facie*, so-called, minimal *prima-facie* showing, that he would have to come back.

They also knew that McDonnell would come in with the stall in as a reason and then Green would have to come in and show that reason was pretextual.

Q What's your response to Mr. Riddle's contention that in the Congressional debate preceding the enactment of this the question of *prima-facie* case was considered and the Congressional conclusion was that the burden of proof should be on the plaintiff at all stages?

MR. GILDEN: There is no question that the burden of proof is on the plaintiff, Your Honor, and there is no question that Green was called upon to assume that burden before the

District Court. There is no question about that.

And I would say to this Court that McDonnell hasn't even appealed that point to this Court. They haven't even raised it. They have raised two hypothetical questions before this Court that are merely going to be somewhat helpful, I assume, if this Court remands this case to the District Court, in terms of what some of the guidelines and standards might be.

In a Title 7 case, is an employer supposed to hire a person who engages -- a Black man who engages in unlawful activities? That's a matter for the District Court to decide in -- if that were the only fact presented, that would be a matter of judgment for the District Court, but the court contemplated more facts. It contemplated more discovery, more information.

I might submit -- I might submit it is not part of this record at all, and it's a matter not in the record. It is a matter that was presented by the Appendix in the Appellate Court that subsequent to these proceedings the F-15 contract was denied to McDonnell Douglas by the Secretary of Defense on the ground that they were discriminating against Blacks. That was subsequent to the trial of Percy Green against McDonnell Douglas.

Now, if the contract was denied to McDonnell Douglas on the F-15 because they were engaged in racial discrimination, I am quite sure that relates some substance -- not for just

going back to the court on some pretense, but on the basis that we have something to talk about.

Q Suppose instead of having just engaged in a -- the blocking of the highway, stall in, I guess it is called here, he had thrown some dynamite under trucks of the McDonnell Douglas, would you think then McDonnell Douglas would have to assume the burden of showing by objective evidence, some objective evidence, to use the Court of Appeals' term, that that rendered him an unsuitable employee?

MR. GILDEN: Well, Your Honor, the dynamite, Mr. Chief Justice, the dynamiting certainly would be objective evidence. There is nothing subjective about dynamiting a building, I would --

Q Well, is there anything subjective about blocking a public highway?

MR. GILDEN: The Court never said, Mr. Chief Justice, that they couldn't introduce that. They just said that -- the court found that McDonnell would come in with that evidence in the race case --

Q But the court instructed the Trial Court, in effect, you don't have to pay any attention to that and really said, "You'd better not pay any attention to it."

MR. GILDEN: Your Honor, I don't really read the opinion that way. I read it on the basis --

Q That's the way I read it.

MR. GILDEN: Well, it doesn't say that, specifically. It says that --

Q I don't know how you could read it any other way.

MR. GILDEN: Well, it says that employment decisions based upon objective criteria carry little weight.

They didn't say they forbade them from producing it as evidence -- carried little weight.

And that's just a line of decisions that the Eighth Circuit just went ahead and went along with. That wasn't a fact that they were mandating District Court to keep out the stall in. The stall in was objective. There is nothing subjective about a stall in.

Q Well, and that evidence was before the District Court, wasn't it?

MR. GILDEN: The stall in?

Q Yes.

MR. GILDEN: Yes, it was.

Q And the District Court decided the case on that basis, did they not?

MR. GILDEN: On the 704(a) issue, Your Honor. On the 704(a) issue. They decided on that basis, because the court was very specific about how it was trying this case. They never -- the court never changed its opinion.

In its opinion and its ruling on the discovery, it said it was not a race case. It was a 704(a) civil rights

protest case.

And there were two allegations that Green had made in his complaint before EOC, civil rights and the question of race.

And the Equal Employment Opportunity Commission had merely made one finding, and that was on civil rights and what the District Court did was strike race because it felt that there had to be a reasonable cause finding as a jurisdictional prerequisite to the institution of an action under Title 7.

In fact, McDonnell were the ones who filed the motion to strike race from the pleading. The court didn't do it on its own. And the court held it was not a race case, and the case was tried strictly on that.

Q Mr. Gilden, what do you understand the court to have meant by this, "If McDonnell can demonstrate that Green's participation in the stall in in some objective way reflects adversely upon job performance, McDonnell's refusal to rehire Green will be justified"?

MR. GILDEN: What page is that?

Q Page A-13, bottom of the page.

MR. GILDEN: Your Honor, that was excised from the opinion. That's the original opinion. That was excised.

Q Oh, it was?

MR. GILDEN: And that's why I want -- we had carried -- see, Point 5 was totally excised and changed by Judge Bright,

and the opinion was changed from a Griggs opinion to a non-Griggs opinion.

And so there is some confusion in this because you have to read the new Point 5 which is carried on page A-31.

Q You think there is no significance to be attached to the content of Section 5 after they excised it?

MR. GILDEN: You mean the original Point A-5? I don't think it has any bearing whatsoever. The court made a change in its decision, and I think we are only called upon to make decisions upon the change. I don't think we are called upon to anticipate or to -- no court would be bound by a court that struck an original opinion, use the original opinion as a basis for law.

The only opinion we have before us is A-31 to A-33, which is close to two pages that sets forth the standards, and in that case they said, "However, an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of responsible attitude toward performing work for that employer," but it didn't say it had to be job-related. It didn't say it had to be job-related. It was not a Griggs decision.

Q It doesn't have to indicate an irresponsible attitude toward his work.

MR. GILDEN: Right, right.

And I think the reason they are saying that, Your

Honor, is this, that I think --

Q McDonnell must demonstrate that or they must hire him?

MR. GILDEN: Well, I would say --

Q Isn't that right?

MR. GILDEN: Yes, that's right.

I would say that the stall in would be a basis for a trial judge to consider in the totality of the evidence before it, as to whether or not racial discrimination was the reason that Green wasn't hired in July of 1965, or whether the stall in in October of 1964, when there was no Equal Employment Opportunity Act, was the basis.

And the court was sending this matter back for what the real reasons were, whether the reasons were pretextual --

Q Would it be enough if the company showed -- showed and everybody accepted -- that the reason he was fired was because he participated in the stall in?

MR. GILDEN: If that were the only fact, Your Honor?

I would say that could be a basis for not hiring, yes. If that were the only fact. If that were the only fact, the only fact before the District Court.

But the court contemplated --

Q I know but that wouldn't necessarily show that -- or maybe not even intimate that he had an irresponsible attitude.

MR. GILDEN: Well, I would say that the court would make a decision based upon the guidelines and standards set forth in the opinion, as to whether the question of a stall in against an employer complaining about racial discrimination in the plant in October of 1964 would be an irresponsible attitude toward his employer for the type of illegal protest he was engaged in.

And that's the determination the court would make, the District Court would make, based upon the facts before it.

Q Focusing on that same language where the court said, "However," this is in the revised opinion, "an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude."

Where do you find -- what do you find in the statute that says that the employer might consider that?

MR. GILDEN: Well, Your Honor, I think -- you know, this is a double-edge sword. They -- McDonnell -- I would say it is not in the statute. This is mere dictum in the court, in the court's decision. The basic decision relates to whether or not Green had to have a reasonable cause finding as a statutory prerequisite to the insitution of an action.

That's the only decision before the Eighth Circuit. This is mere dictum.

Q When you say that's dictum, do you mean the District

Judge can completely ignore it?

MR. GILDEN: Well, I would say he would think about the guidelines set out by the Eighth Circuit, but it is dictum. It is not the rule of the case.

Q It is pretty pointed dictum, isn't it?

MR. GILDEN: It is pretty pointed, yes. And I would say that a District Court would do well to submit to those guidelines. And I submit that based upon these facts, based upon the facts submitted before the Appellate Court, that these guidelines would be appropriate. Because the court was well aware of what evidence had been submitted on the 704(a) issue, and based upon these guidelines that would be appropriate.

I submit that the two questions that have been presented to this Court today aren't even rules of this case, the question of whether a Black man can be denied employment if he engages in civil rights protest, under Title 7, and the question of subjective evidence. There is nothing in any of the decision which would keep McDonnel Douglas from submitting subjective evidence before the trial judge, if that's all they had.

And I might state for this Court -- and this Court well knows -- that if I come into court,as Mr. Crone did, in a trial and said, "I don't discriminate against Blacks," what kind of a statement is that? That's a subjective statement. That's not objective.

What the court is saying in subjective criteria is a mere, sort of declamation about your own integrity and your virtue and your honesty, I do not discriminate against Blacks, that kind of declaiming about your -- how virtuous you are and honest you are and how good a person you are. That is subjective evidence.

But when you come in and say that somebody engages in some activity or behavior, that would be something objective. The court never said the stall in was not objective.

Q Judge Thompson thought the District Court was going to have some problems with trying to figure out just what was the holding and what was the dictum and what was guideline, didn't he?

MR. GILDEN: I think Judge Thompson was still relating to the excised opinion, Your Honor. He was still going into job performance in his second dissenting opinion, and I think had he read the decision a little more closely he would have come to the decision that the question of Griggs was not before the court, the question of job performance was not before the court, and that the court had carefully laid down very, very accurate and very precise standards for the District Court to be guided by.

I submit that there is only one issue and I have been kept from my discovery -- the discovery on race as to McDonnell Douglas is engaged in racially discriminatory practices.

I haven't had that trial. It hasn't been tried.

I submit that Green should have that trial. He should have an opportunity to show that the reasons given were pretextual. He should have an opportunity to show the broad statistics, if there are any -- and I assume there might be in view of what happened and which I have informed the Court about -- about the racially discriminatory hiring practices at McDonnell Douglas.

And based upon that, I hope to prevail in District Court again, if this Court gives me that opportunity.

Thank you very much.

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

You have about three minutes left, Mr. Riddle.

REBUTTAL ARGUMENT OF VERYL RIDDLE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. RIDDLE: Mr. Chief Justice, I pain to have to correct brother counsel, here, on the F-15 contract, which he mentioned to the Court and acknowledge that it was not in the record.

The fact of the matter is that that contract has been awarded to McDonnell Douglas, and all of the orders made with respect to equal opportunity employment have been complied with in conformance with the Executive Orders for quite some time.

I pain to have to deny that off the record comment.

I would say, in closing, to this Court, that this law, Title 7, has been tremendously beneficial in achieving the objectives identified by Congress, and a lot of lawsuits have been filed at the District Courts throughout the country, and the Act has, I think, been a success, a remarkable success.

This case, particular case, as a result of the opinion from the Eighth Circuit, has created a lot of questions and has caused a lot of concern by members of the bar, by District Courts, and by employers and employees as well.

I think that because of the complete reversal of the traditional principles that are involved in trying this issue where the only issue ever is to determine the real reason why a person is refused employment, discharged from employment, or other action or relations that he has with his employer, and to get at the real issue in the traditional sense, courts have done a good job and they will continue to do a good job.

I think that there is nothing at all, nothing in the law, there is just nothing at all in the decisions in the past where you have a one on one, an individual employer -- or an individual applicant making an application for a job. And this decision, if it is followed, and conscientious District Courts are going to try to follow it -- for them to try this the law will be turned on its head.

And I submit for those reasons that the case clearly should be reversed and we think it ought to go back with an

order from this Court that the judgment of the trial court who heard the evidence, and who concluded that this sort of unlawful conduct was not protected and it would form an abundant basis for refusal to employ any person.

Thank you.

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

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:30 o'clock, a.m., oral arguments in the above-entitled case were concluded.)