In the

Supreme Court of the United States

ALBEMARLE PAPER COMPANY, et al., Petitioners,
v.
JOSEPH P. MOODY, et al., Respondents.
------ and ----------
HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, Petitioner,
v.
JOSEPH P. MOODY, et al., Respondents.

No. 74-389

No. 74-428

Washington, D. C.
April 14, 1975

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HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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Washington, D. C.,

Monday, April 14, 1975.

The above-entitled matters came on for consolidated argument at 10:57 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

FRANCIS V. LOWDEN, JR., ESQ., Hunton, Williams, Gay & Gibson, 700 East Main Street, Richmond, Virginia 23219; on behalf of Petitioners Albemarle Paper Company, et al.

WARREN WOODS, ESQ., Wilson, Woods & Villalon, Suite 1032 Pennsylvania Building, 425 Thirteenth Street, N. W., Washington, D. C. 20004; on behalf of Petitioner Halifax Local No. 425, etc.

J. LeVONNE CHAMBERS, ESQ., Chambers, Stein & Ferguson, 951 S. Independence Boulevard, Charlotte, North Carolina 28202; on behalf of the Respondents.

JAMES P. TURNER, ESQ., Civil Rights Division, Department of Justice, Washington, D. C. 20530; on behalf of the United States and Equal Employment Opportunity Commission as amici curiae.

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C O N T E N T S

[Afternoon Session - pg. 40]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in the consolidated cases: 74-389, Albemarle Paper Company against Moody; and 74-428, Halifax Local No. 425 against Moody.

Mr. Lowden, you may proceed whenever you're ready.

ORAL ARGUMENT OF FRANCIS V. LOWDEN, JR., ESQ.,

ON BEHALF OF PETITIONER ALBEMARLE PAPER COMPANY

MR. LOWDEN: Thank you, sir.

There are two broad issues before the Court: testing and back pay.

Case 74-389 involves the employer petitioners, who I'll refer to throughout my argument as Albemarle. That case raises all of the issues.

Case 74-428 involves the union petitioner, and the issue there is primarily back pay.

Therefore, we have divided the argument, and it is our intention, if it pleases the Court, to -- for me to argue for fifteen minutes on the back pay -- on the testing issues, and then rely on Mr. Woods, who represents the union, to make our argument on back pay.

And we would hope to save ten minutes for rebuttal, particularly because we received a brief on Thursday from the Solicitor General, and we understand he's going to argue, and we'd like to have a little time to rebut after he gets through.

The one thing that seems to be agreed by everyone is that personnel tests are useful, invaluable employee selection device. The Congress has said so, I believe this Court has; even the guidelines of the EEOC admit that.

After that one thing, we part company.

I think the real question before the Court on the business of testing is whether, as a practical matter, the way the law has developed, these tests can be used at all.

Before getting to the heart of that, however, let me say a word about the theory of how tests discriminate.

There is some evidence that disadvantaged people do less well on tests than do educated people. So the theory is that if a test screens out proportionately more of a particular ethnic group -- in this case we're dealing with blacks -- and they are otherwise qualified, it is an unfair test.

The key, I think, is the proviso: if they are otherwise qualified.

So, really, when you talk about statistics in these cases, you are talking about a universe of people who are otherwise qualified to do the job you have. Furthermore, at our mill in Roanoke Rapids, we are going to employ and primarily employ people from the Roanoke Rapids area. In the paper industry, workers do not go from mill to mill, they are quite far apart, and there is no interchange.

So if you limit the universe to those people in the Roanoke Rapids area who are otherwise qualified, that is the significant statistics in our judgment.

And things like national statistics, we think are irrelevant.

Now, as we read the Griggs case, it holds that, on the issue of discriminatory testing, the burden is on the plaintiffs to show that the test they're talking about has a disparate effect on their particular group.

No such showing was ever made in this case. In fact, I would go so far, I think I can fairly say, no effort was made to show that before the district judge.

Now, on appeal in the Fourth Circuit, the issue came up for the first time in appellant's brief, I really believe it was in the amicus brief, where they tried to show, through some statistics that came up for the first time, that our test did exclude more blacks proportionately than it did whites.

From an exhibit in the case, which was merely introduced and which we always contended was not entirely reliable, they extracted the following statistics: that the blacks who took Albemarle's test, the Revised Beta Test, averaged 104.20; and we required, for certain employment in certain lines of progression, that they get 100.

On the two Wonderlic Tests: Wonderlic A was re-

quired, and Wonderlic B, if you take if you didn't pass Wonderlic Act, our cutoff scorewas 18. The blacks averaged 17 on that test.

At the recommendation of our expert who testified in this case, recommended that that be reduced to 17; so, since 1971, 17 has been the cutoff on the Wonderlic A.

We say that these statistics do not deal with the proper statistical universe. They are subject to some doubt as to their accuracy, and they were introduced in the Fourth Circuit for the first time.

We believe that there was no substantial showing in this case that our tests screened out a disproportionate number of black paople.

Furthermore, if the universe were limited to qualified employees, there is no evidence in this record that any black employee was ever denied a job for which he was qualified, not a single instance.

Gentlemen, if you would look at page 9 of our blue brief and notice the little diagram in there, "B Paper Mill Department", then on the left a line of progression called "Paper Machine", I think I can explain to you why this issue is so important to my client and we think to many other employers throughout the country.

We have in our mill at --

QUESTION: Is it the brief or the petition?

MR. LOWDEN: This blue brief, sir.

QUESTION: Is it the brief or the petition for cert?

MR. LOWDEN: It is the brief of the employer petitioner.

QUESTION: Thank you.

MR. LOWDEN: These two paper machines, modern machines at our mill, are about, nearly twice as long as a football field.

QUESTION: Now we're looking at the one at the top, are we, Mr. Lowden?

MR. LOWDEN: The paper machine --

QUESTION: Yes, thank you.

MR. LOWDEN: Paper machine.

QUESTION: Yes.

MR. LOWDEN: These machines run at about 2,000 feet per minute. That's how fast the paper is coming through. We turn out a thousand tons a day; and these machines would cost today thirty or more millions of dollars to replace, just the machine.

I think the briefs now admit that the paper machine line of progression is what is called a functionally related line of progression.

That means that as you learn the bottom jobs, Spare Hand No. 4, you learn at the same time the skills and

gain the knowledge and experience necessary for Seventh Hand. And then you progress up that ladder, by seniority, and in each case, when you're Seventh Hand you're learning how to be a Sixth, and so forth; until you finally get to the top job in our mill, which is the Machine Tender.

QUESTION: Are there fewer in number in each classification, as you go upward?

MR. LOWDEN: No, sir. The mill works 24 hours a day, seven days a week, 362 days a year; the shifts rotate, so you have four shifts; so you have four men in each one of those jobs on each of the two paper machines.

QUESTION: So there's as many Machine Tenders on each shift as they are Spare Hands No. 4?

MR. LOWDEN: Yes, sir. There's one Machine Tender on each shift, on each machine.

QUESTION: And one Spare Hand No. 4?

MR. LOWDEN: Yes, sir. One Seventh Hand. Spare Hand is only used on one of the machines.

QUESTION: So each one of these jobs is -- a single person fills it, and the whole ladder makes up the team on each machine?

MR. LOWDEN: Yes, sir.

For instance, when it's running smoothly, the machine tender is up at what they call the wet end of the machine, and he controls the speed of the machine, what kind of paper,

what the strength of the paper is going to be, and so forth.

The back tender works at the back of the machine, and he has electronic control that he can adjust if it gets a crease in it, and so forth.

QUESTION: Unh-hunh.

MR. LOWDEN: Then the other parts of the crew run the winders, sweep the floors, and so forth.

But the critical thing is that if something goes wrong with the paper and you have a break, and all this wet stuff is just flying around, then they work like a team, everybody cooperates, they run down to the machine and do various tasks, and get that machine back running.

We figured out -- and this is not in the record, but it's a mathematical thing -- if you figure out that a ton of paper is worth $360, and you have a bunch of paper breaks on your machine, and you don't repair them quickly, you're going to lose millions of dollars over the course of a year. It's just simple arithmetic.

So that the great emphasis here is on knowledge, it's on intelligence, what to do, and learn, and how to make this tremendous high-speed operation really perform efficiently, productivity. And you must be on the ball, so you don't get hurt. It's just -- a quick look at it, I think would convince anyone that the people in there have to be intelligent people.

Now, here's our problem: You cannot go into the labor market in Roanoke Rapids and employ a machine tender. We're the only ones that have them. And so forth down the line. It's possible to go a hundred miles away, perhaps, and hire one from some other mill, but the people in this business do not interchange between mills, they lose their benefits and so forth; and it's very difficult, and it doesn't happen at all that you employ experienced people.

So our problem is that when we hire a new employee, he's going to start down there at the bottom, and learn, and probably what he will do when he first comes there will be a very menial task. But when we hire these people, we've got to have people who will go on up that line eventually, when we need them; are going to be trained, and know how to run a paper machine.

And so we think the record here supports us fully. When these big machines were put in in the 1950's, we found that the people that we were employing just couldn't do the job. They would go halfway up the line and reach their level of competence, I believe is the word there; so they tried to devise some kind of way to predict that a man that they hired, at a 17, would be able to learn those jobs.

And the personnel man that we had at the time was a professional, almost a Ph.D., in industrial psychology, and he studied the matter and came up with the Revised Beta Test,

and got a correlation and they put that in.

But we think that it's an absolute necessary to our operation, not only in that line but in the others, that the people who get employed at the bottom have the ability, or apparently have the ability, to go to that top job. Because that's the only place we're going to get people to take that job and run our mill efficiently.

I saw that red light come on -- is it supposed to be on?

MR. CHIEF JUSTICE BURGER: Have you given him the signal?

THE TIMEKEEPER: Yes, sir.

MR. LOWDEN: Well, I really haven't gotten down to the argument -- but I best better let Mr. Woods take up the other subject.

MR. CHIEF JUSTICE BURGER: Mr. Woods.

ORAL ARGUMENT OF WARREN WOODS, ESQ.,

ON BEHALF OF PETITIONER HALIFAX LOCAL 425, ETC.

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

As counsel for the union petitioner in this case, in our view, the question presented is a very narrow one.

It is paraphrasing somewhat the question presented in our petition for certiorari: Whether a Court of Appeals has the power, in a Title VII private action, to order the

trial judge to award back pay as a matter of course whenever unlawful employment practices are enjoined, absent rarely encountered special circumstances, despite the congressional intendment in Section 706(g) of the Act, that the district court in its discretion may order -- may order -- such affirmative action as may be appropriate, which may include reinstatement or hiring of employees with or without back pay.

At the outset, we remind the Court that the AFL-CIO, with which this local union is affiliated, actively supported and lobbied for the Civil Rights Act of 1964 and its later amendment in 1972.

Indeed, the AFL-CIO has been in the forefront of the right to bring equal employment opportunities to all workers regardless of race, color, sex, religion or national origin, or, for that matter, age.

We do not,under this statement of the question in this case, question the propriety of back pay relief in an appropriate case. Indeed, in many cases where unions have been plaintiffs in Title VII actions, we have aggressively sought such relief at the trial court level and have often succeeded in obtaining it.

But, despite our approval of the philosophy, the policy, and the general structure of the Act, we believe, as this Court has often recognized in decisions relating to controversial new legislation, that type of legislation is the

product of give-and-take between opposing groups in Congress, and compromise produces particular forms of language, including 706(g). The language represents the political judgment of people in Congress, and we believe, under the separation of powers doctrine, this Court, where that judgment is expressed clearly, must give effect to it.

In the mandatory version, the original version of 706(g) as it developed in the House, would have made the granting of affirmative relief upon a finding of a violation of the Act mandatory. The actual version, which came from the Senate side, which was adopted as the present 706(g), and that uses the permissive and discretionary language which I mentioned in my statement of the issue.

Now, it is our position in this case that a Court of Appeals may not substitute a mandatory back pay rule whenever injunctive relief is granted, for the discretionary rule embodying traditional equity principles, which 706(g) sets forth; in short, it may not intrude on the legislative sphere by divesting the district court of the traditional equity jurisdiction vested in it by Congress; and, in effect, we write the legislation.

Now, I think it would be helpful here if we review precisely what the district court did in this case.

At trial, it had four issues before it, as Mr. Lowden has stated, only two of those issues, or three of them

really need concern us here now.

The first issue was whether the seniority system then in effect, as a result of collective bargaining between the union and the company, operated to continue into the present the effects of past discrimination.

The second issue was whether the testing system was unfair to blacks.

The third issue was whether back pay was an appropriate remedy under all the circumstances of the case.

Now, looking first at the seniority system, the court noted that prior to the effective date of the Act there had been a segregation of jobs as between blacks and whites, and that blacks had been relegated largely to the lower paying jobs.

It then noted,however, that in 1964 the employer and the union had established a maintenance apprenticeship program, which concentrated on the recruitment and training of Negro applicants for that program, and that the maintenance jobs were high-paid jobs, and that blacks had moved into that program and some had succeeded in reaching apprenticeship jobs and higher jobs.

It noted also that the parties to the collective bargaining agreement, the employer and the union, had early on opened up all lines of progression to transfers from other lines of progression.

And it noted specifically that in 1968 -- and this came after the first Quarles vs. Phillip Morris decree and the Local 189, Crown Zellerbach decree in the Fifth Circuit.

In '68 they had merged separate extra boards into one, which fed all lines of progression. They had agreed to permit transfers between lines of progression on the basis of mill seniority, instead of job seniority, or instead of on an arbitrary acceptance of transfers, as the company might deem proper.

They also agreed to allow a transferee from one line of progression into another, to carry with him into his new line of progression his previously acquired departmental and job seniority, which, as was testified at the hearing, was usually tantamount to plant seniority.

And they had also granted, in order to encourage blacks to transfer from lower paying lines of progression into higher paying lines of progression, they granted a red circle rate protection arrangement so that the black transferring into a new line of progression at an entry level job would continue to receive the higher rate he had in a preceding line of progression until he reached the level of pay in his new line.

This was all done in 1968.

Nevertheless, the court concluded that there was still left some vestige of the job seniority system in this

picture, and that there was not sufficient posting of jobs to make people aware of when they were available, and it concluded, therefore, that there should be an injunction decree issued directing certain affirmative action similar to that which had been issued in the Quarles and Crown-Zellerbach cases. And he did so.

The second issue dealing with the testing procedures, we pause only briefly to say Mr. Lowden has argued it, the union has taken no part in the litigation of that issue or in its briefing. We acknowledge, however, that in complex operations, such as paper mills, -- and I have represented the International Union in this field for some 25 or 30 years -- there is some, in our view, business necessity for a form of testing as long as it meets the guidelines and accurately predicts ability to perform the job.

On the crucial issue of back pay in this case, however, the judge refused to award it. He noted, first, that under 706(g) he had a broad discretion to order affirmative action with or without back pay.

He refused to order back pay because of the good-faith corrective steps which the parties had taken without delay to keep up with the expanding state of the law. And because plaintiffs had early in the case disavowed any back pay claims on a class basis, and had changed their minds nearly five years after the institution of this action.

This was one of the first cases brought under Title VII of the Civil Rights Act of 1964. Charges were filed with the EEOC in May of 1966, and this action was brought without benefit of any determination from the EEOCin August of 1966.

He also mentioned, in explaining his refusal to grant back pay, the business necessity in this industry for demanding a high degree of training and skills in the operation of complex machinery and the payment of wages generally higher than other industries in the area.

And he then left the attorney's fees issue to later determination, if the parties could not agree on an amount.

Now, there had been an opportunity at trial to present specific evidence on qualifications and individual claims. The judge had said that he would try this. As a matter of fact, however, only eleven members of a class of about a hundred people were called as witnesses in person, and five testified through deposition.

The record shows -- the Appendix shows here that many of these people were illiterate, had never applied for higher paying jobs, and had not even attempted to go to a school, which the company and the union jointly set up and operated to try and relieve literacy problems of both white and black employees of the mill.

Thus, plaintiffs had an opportunity to try the back pay issue on an individual basis in rejection.

QUESTION: This mill is in the Roanoke area?

MR. WOODS: Roanoke Rapids, North Carolina.

QUESTION: Oh, that's -- so it's not anywhere close to Roanoke, Virginia?

MR. WOODS: Not near Roanoke, Virginia, Your Honor.

QUESTION: Right.

What part of the State of North Carolina is it?

MR. WOODS: That is the north central part of North Carolina. It's up near the Virginia border.

QUESTION: Unh-hunh.

MR. WOODS: The Court of Appeals reviewed the actions, the panel, a majority, Judge Craven wrote the opinion and Judge Bryan, reviewed the record and finally said that, in their opinion, back pay should be payable in the same manner as attorney's fees were payable under Title II in the test that Your Honors set forth in the Piggie Park Enterprises -- Newman vs. Piggie Park Enterprises case.

In short, Piggie Park said, where there is a violation of Title II, public accommodations provision of the statute -- my time has concluded.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Woods.

Mr. Chambers.

ORAL ARGUMENT OF J. LeVONNE CHAMBERS, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

As has been indicated, this case involves or presents for review basically two issues: one involving the company's attempt to validate a test that it has been using since around 1955; and the other, the standard for review by a district court in determining whether to award back pay in a Title VII class action proceeding, where the plaintiffs have established a clear violation of the Act.

I will address briefly the testing issue, and then look into the matter of back pay.

Mr. Lowden has suggested that this company requires some training and preparation for a party to work.

We suggest that the test that was established by this Court in Griggs v. Duke Power require that whatever standard of criteria are adopted, if those standards of criteria adversely affect black employees, that those standards of criteria cannot be used unless they have been properly validated.

In Griggs this Court, correctly we submit, adopted a high standard of proof for companies to demonstate that test or criteria which adversely affect black employees properly measure a man for the job rather than a man in the

abstract. Only by following guidelines, such as those this Court endorsed in Griggs, like the EEOC guidelines, can a court, on review, properly determine whether efforts by a company to validate tests are proper and properly measure a man for the job.

If these standards are not adhered to, we submit to the Court that Griggs v. Duke Power will, in effect, be overruled.

One of the first requirements in a proceeding involving testing is that the plaintiffs show an adverse impact. We respectfully submit that that is more than abundantly clear in the record, as we have pointed out in our brief. We show statistically an adverse impact on black employees by the tests used by the company. The district court made specific findings that the tests adversely affected black employees.

The district court specifically found that blacks were not in the skilled lines of progression, the lines for which the tests were required, because they could not meet the educational and testing requirement.

We respectfully submit that we have more than shown an adverse impact of the testing battery. On that showing, the burden shifted to the company to establish that the test and employment criteria properly measured the applicant for the job or the employee for the job.

We submit that the proof presented by the company

clearly failed to establish any job relatedness.

The company hired a testing expert to validate the test, after this Court's decision in Griggs. This expert selected not all of the jobs for which the tests were required, but, as the Fourth Circuit indicated, six of the lines of progression were excluded.

Of those jobs that were tested, 80 percent proved not validated or not correlated to the test and the evaluation by the supervisors.

The 20 percent of those groups that were tested, and which the company claims showed some validation, we submit that the criteria or procedure followed by the company was clearly inadequate to establish any kind of job relatedness.

As the Fourth Circuit pointed out, the company failed to do any kind of job analysis, and that was essential in order for the company to establish any correlation between the test score and the supervisor's rating, to show that the tests were properly measuring the employee for the job.

As the guidelines require -- and we submit it's essential -- there must be some kind of job analysis and selection by the company of criteria to be measured in order that we don't have, as this Court suggested or prohibited in Griggs, a test of a person in the abstract.

The Fourth Circuit pointed out that the company had failed to comply with the guidelines to establish a properly

validated test.

We respectfully submit that that decision is correct and should be affirmed here. Since the company has not validated its test, and since those tests do adversely affect black applicants and employees, we submit that the testing program should be enjoined until the company has established that their test properly measure the applicant for the job, and that they are job related.

QUESTION: Mr. Chambers, where in these papers, if you can tell me without taking any undue inconvenience, are the Commission's guidelines?

MR. CHAMBERS: They are in the Appendix, Volume II of the Appendix, I think beginning on page 305.

QUESTION: Unh-hunh. And these were promulgated before or after this Court's decision in the Griggs case?

MR. CHAMBERS: Before this Court's decision in Griggs, sir.

QUESTION: Before?

MR. CHAMBERS: Yes.

They were adopted in 1970. This Court's decision was in 1971.

QUESTION: '71, yes. Thank you.

MR. CHAMBERS: Moving, then, to the question of back pay, we submit that in considering the matter of back pay, that the Court should keep in mind that we're not dealing with

a company and union here which simply used and excluded -- simply used the test battery which excluded blacks from better-paying job positions.

Mr. Woods suggest that the AFL-CIO supported the Civil Rights Act of 1964. That might well be. But there were many locals, like Halifax Local, which did not.

This company and union assigned black employees to lower paying job positions and then constructed a seniority system which prohibited them from transferring to better paying positions.

Despite the changes that were made in 1964 and the changes that were made in 1968, the district court found, correctly, that those changes did not permit black employees to escape the past discriminatory practices of the union and the company.

The court further found that because of these practices, black employees were assigned to lower paying job positions and sustained substantial economic loss. These are precisely the types of practices that Congress sought to reach in the enactment of Title VII in 1964.

We submit that the clear purpose of Congress was to insure, at least in employment opportunities, that employees could advance as far as their talents and skills would permit, and that they would not have to bear the financial losses which might be occasioned by discriminatory employment

practices.

Congress initially placed the primary responsibility for challenging employment discrimination for private litigants. These responsibilities were continued with the 1972 amendments, even though EEOC was then given enforcement authority.

The significance of private litigation cannot be ignored. As this Court noted in Newman vs. Piggie Park, a Title II proceeding, involving the standards that should be followed in determining whether to award back pay.

Private litigants in these proceedings are not simply seeking to enforce a private right. These are proceedings, public in nature, in which the private litigants are seeking to enforce rights Congress has considered are the highest priority.

In this sense, the private litigants become a private attorney general.

Necessarily, the proceedings affect more than the private litigants, for the plaintiffs in challenging an employment practice applicable to or directed against an identifiable class, as here, black employees. Class actions are not only appropriate but are clearly warranted. And in order to insure the implementation of congressional purposes of the Act, including particularly encouraging voluntary compliance or private litigation, where voluntary efforts are unsuccessful, and making whole the victims of discrimination,

this Court should, as Congress has clearly indicated, grant broad equitable relief.

This can be done only by fashioning an objective standard as in Newman, and as the Fourth Circuit has done in this case, which would provide for injunctive relief and back pay, unless there are special circumstances which would render such an award unjust.

This is all that the Fourth Circuit has done below, and we submit that it should be affirmed here.

In looking at the standard that the Fourth Circuit has adopted, and which has been adopted now in the several circuits that are cited in the brief, we call the Court's attention to decisions in other areas; in one of the leading cases in the Fair Labor Standards Act -- or involving the Fair Labor Standards Act, Mr. Justice Harlan set forth the correct principle, we submit, which should govern a district court in exercising its equitable discretion in a Title VII proceeding.

That case was Mitchell vs. Robert De Mario Jewelry, which is cited in the brief.

There, Justice Harlan stated that the standard which should govern the district court in exercising its discretion, is one which requires that the district court exercise the discretion in order to enforce the purposes of Congress in enacting the statute. And there Justice Harlan

noted that because of what the Court had found as the statutory purpose by Congress, there was little room for denying, there, recovery under the Act.

Here, in order to carry out the congressional purpose in Title VII, there is very little discretion to deny recovery for losses by victims of discrimination. They're here only by providing for relief, unless there are special circumstances will the Court be able to carry out the clear purposes of Congress in the enactment of Title VII.

Congress has shown -- or the legislative history further shows that this was the clear purpose of Congress, not only to provide for injunctive relief but to provide for back pay, where the victims have shown loss as a result of discrimination.

In the 1972 Amendments, the legislative history there clearly shows that Congress intended to provide back pay and to provide class action and class action back pay. The section-by-section analysis of the -- that Act in 1972, clearly shows that Congress intended to provide for class action proceeding and to provide the back pay relief.

The several Circuits which have considered the Act have held that Congress intended not only injunctive relief, but back pay as well.

A similar purpose in the construction of a statute, such as the Court has done below, has also been sustained in

other proceedings.

We have referred the Court, in the brief, to NLRB proceedings, where the Court has found a similar necessity for providing back pay as the Fourth Circuit has noted in this proceeding below.

QUESTION: Well, what most characterizes the Labor Board decisions is the deference that the Court will give to the Board itself in working out what might be an adequate remedy in a particular case; wouldn't that be fair to say?

MR. CHAMBERS: I would -- that's correct, Your Honor, but still the Court requires that that discretion be exercised with a view toward enforcing the Act.

QUESTION: Here, the -- if the same attitude that seems to pretty much pervade the decisions in the Labor Act cases were to be reflected in this case, wouldn't there be more deference given to what the district court did in this case?

MR. CHAMBERS: Not unless -- I don't think so. I think here that, and in constructing the statute and giving it meaning, that the Court should look at the purpose of Congress in the enactment of the statute. That purpose being, as several courts have indicated, to provide injunctive relief and to make the victim whole.

We think that the exercise of discretion by the district court should be limited in the sense of requiring

that the district court exercise that discretion for the purpose of carrying out the intent of Congress.

Here that intent being to make the victim whole, in addition to providing injunctive relief.

QUESTION: Are there any Labor Board decisions that say that the Board must, as a general rule, award back pay and not do so only under special circumstances?

MR. CHAMBERS: We think that the decision we cite in Phelps Dodge Corporation, which has been cited, interestingly, by all parties, --

QUESTION: Yes.

MR. CHAMBERS: -- clearly holds that while the Board has discretion, it must exercise that discretion with a view toward the purpose of Congress in the Act.

QUESTION: But Congress didn't say in the Act, You will award back pay, period. It certainly, by the language it used, appeared to allow considerable discretion to the district court.

MR. CHAMBERS: Congress did not say that you must award back pay in language in the Act, but we think that in the legislative history in 1972 the intent of Congress to make the victim whole is clear.

The section-by-section analysis from the committee, which we refer to in the brief, clearly points out that Congress intended class action proceedings and intended to make

the victim whole, and we think here that in reading the statute that the Court should find that the purpose was to make the victim whole, and this can be done only by awarding back pay.

We think that the standard adopted by the Fourth Circuit is necessary for policy reasons. Without a provision for back pay, there is no incentive to a company or union to review its practices and to make changes where appropriate. Rather, like the petitioners in this proceeding, an employer and union would simply sit back or make superficial changes until compelled to do so by the Act.

Similar examples of recalcitrance is found not only in employment discrimination cases, but in school desegregation cases as well, and in other civil rights cases which this Court had had many occasions to consider.

Uniformity in enforcement is promoted by the standard adopted by the Fourth Circuit. Indeed, the standard adopted by this Court in Newman, which is basically the standard that was adopted by the Fourth Circuit below, has assured widespread compliance with Title II, and virtually no need for further litigation in Title II -- in the Title II area.

Contrary to the petitioners' contention, the standard does not deprive the district courts of all discretion. Examples of the discretion which remain are cited by

the Fourth Circuit below.

Nor are there any special circumstances in this case which would render an award of back pay unjust. The defendants assert that they have not acted in bad faith, but have sought to correct their practices as the law evolved.

Good faith, however, is not an issue in this proceeding. The black employees who have suffered from the discriminatory practices of the company have nevertheless been victimized, even if petitioners' good faith in doing so were an issue.

Title VII was designed to make the victims whole, for it is the result of the practice rather than the motive or purpose that Congress sought to remedy.

As the courts have noted on many occasions, back pay is not a penalty imposed as a sanction for moral turpitude, but is compensation for tangible economic loss resulting from an unlawful employment practice.

Moreover, the good faith proposed by the petitioners here would introduce additional means for limiting the effectiveness of Title VII and defeating the purposes of Congress in its enactment. Although the petitioners made some changes in 1964 and 1968, the district court, as indicated previously, noted that these changes did not relieve blacks from the prior discriminatory practices of the past.

Nothing prevented the petitioners in this proceeding

from doing more prior to trial, to bring their practices into compliance with Title VII and eliminating all vestiges of past discrimination. And clearly, the victims of discrimination, the class members here, cannot be charged with bad faith, and their equities far outweigh the equities of the petitioners, particularly considering the limited resources of the victims involved in this proceeding.

The fact that the company paid higher wages than some other employers in the area does not provide an adequate basis for denying back pay. Black employees in the area still were deprived of earnings solely because of their race, and are entitled to relief under Title VII.

Nor does the delay in specifically praying for back pay bar the class from obtaining relief. Although the plaintiff did not specifically pray for back pay in the complaint, and at an early stage in the proceeding indicated that they were not seeking back pay for the class, the plaintiffs made their intention to see back pay for the class clear more than a year before trial.

The district court, by order more than a year before trial, indicated that back pay was still in issue.

In addition to setting forth long before trial comparative earnings of black and white employees, the plaintiffs, before trial, submitted answer to interrogatories and supplemented these answers before trial to show the

claims for back pay of each individual member of a class.

We submit that there is neither here a basis here for laches or waiver. There has been no purposeful delay, and no prejudice to the defendants, in the request for class back pay.

Rule 54(c) of the Federal Rules of Civil Procedure provide that where a party has established a right to relief, the court should award such relief even if not specifically prayed in the complaint, unless there is some showing of prejudice to the defendant.

Here, we submit that there has been no prejudice to the defendant, and relief should be awarded as provided under the Fourth Circuit decision.

I yield the rest of my time to the government.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Chambers.

Mr. Turner.

ORAL ARGUMENT OF JAMES P. TURNER, ESQ.,

ON BEHALF OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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

The United States appears as amicus curiae to urge the Court to affirm the decision of the Court of Appeals. We believe the Court of Appeals correctly interpreted the law, and its decision is consistent with this Court's opinion in

Griggs, and is otherwise a proper application of the will of the Congress.

Turning first to the testing issue. In Griggs, which is a strikingly parallel case in many respects, in response to Mr. Justice Stewart's question, I believe the location of this plant is maybe within a hundred miles of the Griggs plant in North Carolina -- the plant involved in Griggs, in North Carolina; same part of the State.

This Court set forth in Griggs the rule of job relatedness for tests which disproportionately disqualify black workers. That such tests should be enjoined unless the employer demonstrates them to be a proper and valid measure of the employee's successful performance of the job.

The Court of Appeals held that the petitioners had failed to offer convincing proof on this issue; although a validation study was done, we believe it did not meet the most basic professional standards of validation, and,even if it was accepted, it did not demonstrate that the tests were related to the jobs for which the tests were given.

In short, it's just not the kind of assurance, in our view, that this Court was seeking in Griggs, to justify the use of tests which have a disparate effect on the basis of race.

There is no question in our view that there was a disproportionate impact, the record seems to justify that.

Plaintiffs' Exhibit 10, when analyzed, indicates that blacks disproportionately were affected by the testing program.

The tests that were given, the Beta test and the Wonderlic A and B, were given to all applicants in the affected lines, and the rule was that you had to pass the Beta and one of the other two tests.

So the expert was hired, within a month or two after this Court's opinion in Griggs, indicating, incidentally, that the company must have felt that there was some disproportionate impact or some need under Griggs to validate these jobs.

He came there, he spent a half a day, he directed the tests be given to some incumbents, and went back to the university and analyzed the results with some job ratings by supervisors, that were also provided.

The EEOC guidelines, which this Court indicated should have great deference in Griggs, as the Administrative Interpretation by the agency responsible for enforcement of the law, and which other courts have said is a useful framework and a good beginning point and an analysis of a test validation study, simply were not properly followed in this validation study.

Essentially, there was no job analysis as all of the guidelines and all of the professional material seems to require. The OFCC guidelines, the Civil Service Commission, the EEOC, the American Psychological Association Standards

all say you start by looking at what the job is that you're going to validate, and deciding what the job consists of.

The criterion that was used here was simply how well does the guy do when he's feeling right; so it was a very subjective criteria.

Even the way the expert testified, we believe that testing program could not continue, and was properly enjoined because he had studied only eight lines in five departments, and without a job analysis it's impossible to verify the inference that he made that this made it proper to use all three tests in 13 lines and 18 departments.

I think, on this record, the Court should decline, and I would so recommend, the invitation of the petitioners and amici to evaluate the testing guidelines of EEOC and -- on the question of whether they are so stringent that they could never be followed. This is just not the case or the record on which that issue should be raised.

On back pay, turning to that, we start with the proposition that the congressional scheme in Title VII was to look to the federal courts for the ultimate enforcement of the Act, and in so doing Congress vested the courts with the necessary discretion to carry out the purposes of the Act.

Thus, the statute says the courts may grant injunctions, it says they may award back pay.

The standard for the exercise of the Court's

discretion in such situations, in our view, is to effectuate the purposes of the Act.

What the Court of Appeals said in this regard is not that back pay is mechanically compelled, but that where there is a class of identified victims who may have suffered economic loss because of the defendant's unlawful employment practices, unless there is some reason not to, the court of equity should proceed to design and issue that kind of an order which will make those victims whole as nearly as may be.

We find this to be a reasonable formulation, consistent with this Court's decisions and with other decisions under Title VII.

QUESTION: In making its -- in exercising its discretion in the district court, would it have been appropriate for the district court to take into account the efforts of the employer to provide training courses and to take new steps after 1964 and again after 1968 to try to meet these problems?

MR. TURNER: I think that would be a proper subject for the district court to address; as you indicated in the Griggs opinion, Your Honor, it certainly can never be error for a court of equity to address the question of good faith that, as the Court there said, good intent does not redeem the employer's conduct, since Congress directed the thrust of the Act to the consequences of employment practice not

simply their motivation.

So, while we think it's perfectly proper for a district court to look at good faith of a party, --

QUESTION: Well, in Griggs, the employer had not abandoned the high school diploma requirement as they had here; is that not correct?

MR. TURNER: I believe the high school diploma requirement was still in this case at the time of trial, too, Your Honor. That was one of the --

QUESTION: When was the --

MR. TURNER: -- decisions of the district court.

QUESTION: When was the high school diploma requirement abandoned in this case?

MR. TURNER: In this case, the district court's order said that since the Wonderlic tests were substantially an equivalent of high school measure, that he did not reach the question of the validation effort that had been made as to high school examination -- or high school diplomas, and he was enjoining their continued use.

QUESTION: Do you have any comment to make about the general statement, which I do not associate with any particular figures, that there was very little response by employees to the training program developed by the union and the company jointly?

MR. TURNER: Well, I've studied the record only,

and that's the limit of my experience in this case, Your Honor, and I don't recall any statistics in the record as to the participation. I know there was some, and I know it was minimal.

But the explanation for it, I'm sorry I can't give you.

QUESTION: Would that be an appropriate factor for the district judge to take into account in exercising his discretion about back pay?

MR. TURNER: I should think so, yes, sir.

But the -- we also think that a court faced with such a question ought to start with the purpose of the statute, and that the general principle that we would urge is that, as between an innocent victim of discrimination and the perpetrator or the employer or union violating the law, the economic loss presumptively, or initially at least, ought to fall on the people that violated the law and not the innocent victim.

QUESTION: Well, you concede, I take it, that this not quite as simple a matter in determining a violation of law as it is in some other areas?

MR. TURNER: Oh, I think that's right, Your Honor. The record here is quite lengthy and quite detailed as to the way Title VII was applied, and how it affected the seniority system and how the lines of progression had to be merged, because they were segregated. All those things a court has

to go into in great detail. When it concludes that there has been a violation, a pattern of practice, if you will, of violating Title VII, then we think that any identifiable victims who can prove that they've suffered economic loss because of that pattern of practice, ought normally to receive back pay.

MR. CHIEF JUSTICE BURGER: We will resume there after lunch, Mr. Turner.

MR. TURNER: Thank you.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Turner, you may continue.

ORAL ARGUMENT OF JAMES P. TURNER, ESQ.,
ON BEHALF OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE -- Resumed

MR. TURNER: Thank you, Your Honor.

When we adjourned, we were -- I was discussing the good faith requirements in response to the question of the Chief Justice.

Certainly we believe it's relevant, as I indicated, whether a defendant in a Title VII action conducted himself with good faith, as the Court indicated in Griggs; but that cannot serve as the justification, in our view, for a blanket rule that no one gets back pay.

The problem identified by the Court of Appeals here was that the district court, apparently without consideration of the "make whole" philosophy of the Act, had declined to consider back pay for any member of the victim's class, regardless of the individual merits of their claim.

QUESTION: Yes, but the Court of Appeals didn't just remand to the district court for perhaps additional consideration, it itself directed the award of back pay, didn't

it?

MR. TURNER: Well, that, Mr. Justice, could not happen as a practical matter unless there were some additional proceedings in the district court. The back pay amounts had not been determined, and the identities of who would be entitled to it had not been determined yet.

QUESTION: But the district court's discretion as to whether or not there was to be back pay, if the loss were made out, has been taken away by the Court of Appeals?

MR. TURNER: I think the standard that the Court of Appeals used, and the correct one, is to look to the purposes of the law, the "make whole" purposes. As I say, the Court of Appeals decided, and I think correctly, that the district court had not used that correct standard, that it had used rather an abstract equity standard, and had not referred to the purposes of the Act and the purposes of the "make whole" provisions of restitution.

QUESTION: Did the Court of Appeals in terms hold that the district judge had abused his discretion?

MR. TURNER: Not in so many terms -- in so many words, Your Honor, no.

QUESTION: Isn't that the way it's ordinarily done when there is --

MR. TURNER: Well, that's --

QUESTION: -- discretion involved, and --

MR. TURNER: If you wanted to phrase it that way, if you wanted to ask me was there an abuse of discretion, I'd have to say yes. But I'd hasten to add that the -- such abuse as there was was a failure to consider the remedial purposes of the Act in the "make whole" provisions which Congress, in '72, had virtually ratified as the purpose of the Act -- ratified court decisions to that effect.

QUESTION: Well, rather, can you say that the Court of Appeals really held the district court erred in not exercising its discretion according to the "make whole" standard; can you say that?

MR. TURNER: That -- that would be our formulation, sir.

QUESTION: Well, if that were so, I gather the remand would be an exercise in discretion according to the "make whole" standard, wouldn't it?

MR. TURNER: That's correct.

QUESTION: Is that what the remand is?

MR. TURNER: There is no remand stated in the Court of Appeals opinion. However, as I indicated in answer to Justice Rehnquist, there has to be additional proceedings before any back pay can be awarded. There are 80 claimants for back pay.

Now the question before the Court is which one of those is entitled to it.

QUESTION: Well, doesn't the Court of Appeals foreclose an independent determination by the district court according to the correct standard to "make whole"?

MR. TURNER: Oh, I think not. The -- as we read the Court of Appeals opinion, what they were saying was that normally, unless there's some reason not to, a class of victims of racial discrimination will be entitled to be made whole for any economic loss they've suffered.

The next step in that procedure, it seems to me, is to go back to the district court and make 80 determinations of whether there's an economic loss and, if so, how much.

QUESTION: This is essentially an accounting process, though, is it not?

MR. TURNER: Well, I think --

QUESTION: The only thing remaining to be done?

MR. TURNER: I think that's not entirely true.

Now, we've indicated in the brief that reliance on female protective legislation, for example, might be a basis for some discretion. There would be the misconduct of particular individuals, as in Green v. McDonnell Douglas. If you recall the facts there, an applicant had misbehaved, or criminally misbehaved in connection with the company.

QUESTION: Would the district judge be free, in your view, to make inquiry into whether or not a particular claimant had taken advantage of the union and the company's

joint training program, and put that in the scales against his recovery.

MR. TURNER: Well, if that's where it belonged in the scales, yes, Your Honor.

QUESTION: Well, I thought you said earlier that it did belong there, before lunch.

MR. TURNER: I said it was relevant. Now, I'm not -- I would not concede that it should be controlling. You would have to know why the man didn't take part in it, if he didn't; what the program was; what you got if you graduated from this school or training program; whether you -- if it was just a literacy business, how that related to your job. And it would seem to me you would have to make a kind of equitable judgment that I'm outlining.

And there are, in the Phelps Dodge case, in one of the footnotes, the Supreme Court indicated the kinds of discretion that the Labor Board had normally used in deciding to award back pay.

And it said it was not mechanically compelled, that there was discretion, and yet the over-all goal of making the individual whole for any economic loss he'd suffered by a violation of the law should be the touchstone.

There would also be the element of apportionment of the loss -- of the back pay award, between the two defendants, that would also call for some discretion. If there was an

applicant class, that might be another area of discretion, very seriously for the district court to consider.

The other special circumstance cited by the district court was the delay in bringing the issue forward, involving back pay, aside from the -- thank you very much.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, Mr. Turner.

Mr. Lowden, I believe there's ten minutes remaining for the petitioners' side here.

REBUTTAL ARGUMENT OF FRANCIS V. LOWDEN, JR., ESQ.,
ON BEHALF OF PETITIONER ALBEMARLE PAPER COMPANY

MR. LOWDEN: Thank you, sir.

Mr. Chief Justice, may it please the Court:

I'm afraid this will be a little disjunctive, I've got about five points I want to make and they're not really connected, but I'd like to make them if I possibly can.

First of all, in the government's brief, they indicate that we don't have any quarrel with their guidelines, and that we didn't prove that the guidelines weren't unreasonable.

At the present time -- let me say this first: The 1966 guidelines and the 1970 guidelines were published without any public opportunity to comment; they were just published and put into effect.

Under the new law, they are now having hearings on another set of guidelines, in which all the government agencies involved in equal opportunity will be involved. And they've had some testimony on the guidelines, and I'm quoting from the BNA Daily Labor Report for January 13, 1975, which is also in our brief at page 36. And at the hearings on the guidelines, the people who testified, described them as unworkable, incomprehensible, technically unsound, too stringent, beyond the state of the act, ambiguous yet restrictive, unnecessary, punitive; and as one witness said --

QUESTION: Do these comments, Mr. Lowden, have any effect on the validity of the guidelines, in so far as they are promulgations of the EEOC?

MR. LOWDEN: I think that the new guidelines are supposed to have relaxed the old ones. And so we're talking about the new proposal, that is supposed to have relaxed some of the requirements of the other guidelines.

And one witness at that hearing was quoted in the BNA as saying that they are "just irrational, unreasonable, and impossible."

And I wish I had time to point out in detail why I subscribe to that same view.

I would like to clear up one other thing, and that is what these tests apply to. This was not -- you can't take a given point in time and say that's the facts of these

cases. This is a moving thing, having new machinery, drop in various lines and so forth; so that since about the time of the validation study made by Dr. Tiffin at that time, we only used the tests in four departments: the power plant, the B paper mill; the pulp mill; and technical services.

And you'll find, if you look at his study, that he found validations in all of those lines. And this business about using it in 13 lines in eight departments, that's the way it was in 1967, but that was not the facts in 1971.

On the supervisory ratings, what Dr. Tiffin actually did was have these people's immediate supervisors -- who, incidentally, have done all these jobs, because we get our supervisors in the same way, up through the ranks -- to rate employee A against employee B. And the question they answered which one was better, Tom or Jack; and then they go, which one is better, Tom or Bill. So they only -- they didn't rate them in order, they just took each one: which one of these two can do the job better?

And we submit that that is a fundamental question that supervisors answer every day in the week, it's one of the most basic things that they're paid to know.

Now, Mr. Chief Justice, you asked about the high school education.

In 1965, the company waived the high school education for all incumbents, so there was no longer a requirement

for them. We continued it up until the time of the trial, and the judge knocked it out and we did not appeal that.

And of course the evidence is that we put the tests in because the high school education requirement didn't predict anything.

Furthermore, it hasn't been said, but the injunctive decree in the district court, we consented to; that was really a consent decree.

And one other thing hasn't been said, and I feel the Court should know: that as early as September the 24th, 1969, before there was any back pay or anything else in the case, I asked the judge for a trial; and he denied it.

One other thing, on back pay: the judge, in effect, has given all these people a trial on back pay. He ruled in the pretrial hearing that back pay was an issue. He said he would hear it, and if it got too complicated he'd send it to a Master, but that we were going to start this trial on Monday morning, and we were going to go for two weeks, and if we didn't finish, we're coming back; and he wanted every single thing we wanted him to hear in there; but when he adjourned, that was it.

They had a courtroom full of these employees. The testimony of 16 of them is in the record. And the kind of testimony -- and I read this last night -- they put one man on the stand, and when he got through the judge said, "Well,

what job is it that Albemarle didn't give you because of your race?" And he said, "None".

He said, "What job is it that you want?" He said, "I want the job I've got now."

And this is the kind of testimony that is the background of the judge's exercise of his discretion.

And if we go back on the issue of back pay, as I understand it we take these people and try to find out by, through evidence, what job they could do; was there ever an opening in it; what were the rates paid; could they have qualified. And it will be another elaborate proceeding all over again.

In conclusion --

QUESTION: But you never objected to conducting this matter as a class action at all?

MR. LOWDEN: Yes, sir. That's the first motion we made. Way back in 1967. The first motion we made, Your Honor, was that it wasn't a proper class action under Rule 23, and that is the time when we raised the question about the charges being filed.

And in 1967, the district judge, Judge Larkins at that time, overruled that motion; and we tried to -- when we got before Judge Dupree, he said he wasn't going to act as a district court -- I mean an appeal court, and anything that Judge Larkins ruled on we could forget about; he wasn't

going to change that.

So he didn't allow the motion on that.

QUESTION: Yes, but the class hadn't been designated.

MR. LOWDEN: Well, --

QUESTION: There hadn't been a certification, had there?

MR. LOWDEN: Yes, the class was described by Judge Dupree, the way these cases --

QUESTION: Well, Dupree didn't describe it until '71.

MR. LOWDEN: But the way these cases go in the district courts, they say, We'll treat it as a class action for purposes of discovery, and after they get through with all of that business, then we'll come back and describe what the class is, in light of what that shows up.

And this is a voluminous process. Very costly.

QUESTION: I notice at page 46 of the Appendix that Judge Dupree on June 15 of '71 ordered the plaintiffs to make a more specific answer to an interrogatory you had submitted as to the claims of the damages. Did the plaintiffs ultimately comply with that order?

MR. LOWDEN: We claim they did not, they claim they did. They came back and instead of telling us what job the man would have had, what job he was qualified for, they went back and took a couple of people who were employed at about the

same time, one might be white, and he made $10,000 a year; one might be black, and he made $8,000 a year. Then they would claim that shows that the man was damaged.

And we claim that we were entitled at that trial to have known what job was it that we didn't give the man that he wanted, that he was qualified for; and that if they had proved a case like that, then you might have a different situation on damages. But here nothing was shown.

In fact, witness after witness said: "I'm happy, Judge, with the job I got"; "all I want's a raise".

Thank you.

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

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:17 o'clock, p.m., the case in the above-entitled matters was submitted.]

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