In the

Supreme Court of the United States

L. N. McDonald and Raymond L. Laird,
Petitioners

v.

Santa Fe Trail Transportation Company
Et Al

No. 75-260

Washington, D. C.
April 20, 1976

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Petitioners

v. : No. 75-260

SANTA FE TRAIL TRANSPORTATION COMPANY ET AL

- x

Washington, D. C.

Tuesday, April 20, 1976

The above-entitled matter came on for argument at 1:27 o'clock p.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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

HENRY M. ROSENBLUM, ESQ., 4635 Southwest Freeway, Houston, Texas 77027

J. STANLEY POTTINGER, Assistant Attorney General, Department of Justice, Washington, D. C. 20530

C. GEORGE NIEBANK, JR., ESQ., 80 East Jackson Boulevard, Chicago, Illinois 60604

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 75-260, McDonald and Laird against Santa Fe Trail Transportation Company et al.

Mr. Rosenblum.

ORAL ARGUMENT OF HENRY M. ROSENBLUM, ESQ.

ON BEHALF OF PETITIONERS

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

The Petitioners here seek and have sought redress under Title VII of the Civil Rights Act of 1964 and under Section 1981 of 42 United States Code, the codification of the Section I of the Civil Rights Act of 1866 for private racial discrimination in employment.

In all substantial respects there is no particular difference in this case than in the legion numbers of cases presently pending in the Federal Districts Courts around the country, except that in this case, the Petitioners who seek to redress the grievance of private discrimination based on race in their employment are white.

Basically, the two Petitioners, Mr. McDonald and Mr. Laird, were accused by their employer, Santa Fe, of misappropriating company property. Along with them stood accused a black coworker.

As a result of the accusations, the two Petitioners

were discharged. Their black coworker was not.

Because disparate disciplinary treatment so often smacks of illegal motive in a racial context, the Petitioners concluded that they had been discriminated against because of their race and accordingly instituted an action in the Federal District Court in the state, the Southern District of Texas, alleging that race was a factor in their discharge.

More clearly stated, the Petitioners concluded and urged that but for the immutable characteristics of the color of their skin, that they would have received the favored treatment accorded their black coworker.

In many respects, this is no different than a fact situation recently before the Court in Franks versus Bowman where it would be,one way of describing the circumstances in that case would be to say that the black employees had been excluded from the over-the-road driving classification.

Another way would have been to say that the white employees of Bowman Transportation were accorded the preference and this is precisely and only what these Petitioners had alleged.

The District Court dismissed the cause of action stating that a white employee charged with misappropriating company property and dismissed cannot complain of racial discrimination where a similarly charged black employee is not dismissed.

It also dismissed stating that Section 1981 confers no actionable rights upon a white person. The Fifth Circuit affirmed adopting an apparent finding of the District Court that the Petitioners had failed to deny the allegations of the complaint of the misappropriation on their complaint.

None of the Respondents -- neither of the Respondents and none of the Amicus have seriously disputed that Title VII embraces by its language discrimination against white persons.

This is supported by all of the many EEOC decisions which are entitled to great deference as the body charged with the administration of the Act. It is supported by the language in Griggs versus Duke Power Company wherein the Court stated that preferences whether for a majority or a minority are all that Congress intended to proscribe and it is supported by the legislative history.

Assuming then that Title VII may be invoked by white persons, we turn to the question of whether these Petitioners have stated a claim under which relief can be granted.

For the purposes of this consideration, it is not necessary that the Court consider the color of the Petitioners' skin but only whether racial motivation was a factor, or race was a factor in a framework of Section 703.A1 in their discharge or in the discipline accorded them.

That, of course, is the gravamen of any Title VII or Section 1981 employment discrimination complaint.

QUESTION: This complaint could not even conceivably or even arguably have been made -- have been lodged, could it, if all three employees had been of the same race and two were discharged?

MR. ROSENBLUM: Well, the gravamen of racial disparity would not be present, though, if there were disparity.

QUESTION: Could it conceivably have been?

MR. ROSENBLUM: I have thought about it a lot and I do not believe that it could have been, no, sir. We do not -- it is important that we point out that we do not urge that any employer is without the right to discipline within his discretion those who commit unlawful acts and those who commit wrongdoings within the employment of their employer.

However, what we do urge is that when an employer discharges employees for such wrongoings, that the criteria for such discharges must be evenly applied. That is not to say that you can't discipline a black person differently than a white person. It is to say that the reason for the different discipline cannot be founded or even touched by a racial factor and there may be no racial motivation between the difference in discipline accorded the different races.

In any event, the Petitioners did allege that the difference in discipline accorded them was because of their race and we are told in McDonnell-Douglas versus Green as well as other cases that an injured party, black or white, who makes

such an allegation has stated a claim under Title VII. The fact that the Petitioners are accused of a theft should be no impediment to such a holding. Clearly, it was no impediment in the McDonnell-Douglas v. Green case where the Respondent in that case, Mr. Green, was a convicted misdemeanant and here all we have is mere allegations of wrong-doing.

The Fifth Circuit seemed to bottom its affirmation on the fact that the District Court observed that the Petitioners had not denied in their complaint that they were guilty of misappropriation as alleged.

It appears to me to be fundamental error in the proposition that the Fifth Circuit bottomed its decision on and that is, for one, that the petition on its face says that the Petitioners were discharged without cause and therefore whatever reasons were ascribed, even though they suggest they were contextual reasons but whatever the reason that had been advanced is denied by the pleading.

Secondly, and assuming arguendo that they had failed to deny the truth of the allegation or the reason advanced for the discharge on their complaint, it really would make no difference at all.

The Petitioners alleged and the District Court considered in dismissing pursuant to Rule 12 B6 that the three parties, that is, the two Petitioners and Mr. Jackson, their black coworker, were equally charged and equally culpable when

it dismissed the decision -- the petition.

The Court has again reiterated in a recent decision treating -- touching on this case that given the same opportunity, it would hold the same way, that the failure to deny the allegations of misappropriation take a complainant, black or white, out of the embrace of Title VII and we submit that is simply wrong.

QUESTION: Well, from your point of view, is this something like prisoners who are all in the same prison but the people of one race complaining that they were habitually given sentences twice as long as the other on account of race, where there is no argument about the fact that they belong in confinement but that they had received disparate treatment.

MR. ROSENBLUM: Well, not precisely, but it is analagous. The argument that the persons receiving the more severe punishment would be that were I of a different color I would be getting the preferred or shorter sentence and, no, to the second part of your question. These were simply bare bones allegations.

QUESTION: But you --

MR. ROSENBLUM: Yes, sir.

QUESTION: -- I take it the guilt or the innocence from your point of view doesn't enter into this at all.

MR. ROSENBLUM: That would be correct.

QUESTION: Of your people.

QUESTION: Well, another step further, is there any question as to whether there were any ameliorating circumstances as to the negro? Yes or no?

MR. ROSENBLUM: Well, no. There was none advanced by the company in the sense that perhaps the employee had -- well, no, Mr. Justice Marshall.

QUESTION: Well, I know of instances where you fire the ringleader and you don't fire the others.

MR. ROSENBLUM: Well, in this particular instance it was a dismissal under Rule 12 B6. There was never any testimony taken. There was no --

QUESTION: I am talking about your pleadings. Did you allege that, that there were no reasons why different treatment was given except grace?

MR. ROSENBLUM: That is the gravamen of the complaint and race was not advanced as a reason for the discharge. It was simply that they had not been accorded the preferred treatment or, alternatively, they had been treated differently and because of the disparate treatment they could only conclude that race was a factor and that is impermissible under 703 A1.

They were entitled to make that showing. There were, for example, in McDonnell-Douglas this Court carefully articulated the proper allocations and burdens of proof. Had the case not been dismissed pursuant to Rule 12 B6, Petitioners would have gone forward with their proof that they were

discharged and a similarly situated black employee was not discharged, then the company would properly have advanced they stole, for example, and the burden would then -- and this is where the Court took the next step, and McConnell-Douglas would allow the Petitioners to show that, for example, in this case the reason of the discharge advanced was pretextural and a cover-up and to a preferred treatment which is violative of 703J and prohibited.

Significant to that type of showing would be that the black was equally culpable, that the company knew of the equal culpability and retained the black employee while discharging the white.

QUESTION: Well, I am worried with the "equally culpable" because I don't know what that means. Suppose the one of them stole $1.75 worth of stuff and the other one stole $14 million worth of stuff. Would they be equally culpable of stealing?

MR. ROSENBLUM: I can answer that question for you, Mr. Justice Marshall. On page 94 of the Appendix, the Court says, "I am considering these men equally charged and equally culpable and I am dismissing."

QUESTION: Well --

MR. ROSENBLUM: "And that there may well be ameliorating circumstances but not in the Court's eyes."

QUESTION: Well, let me try again.

MR. ROSENBLUM: Yes, sir.

QUESTION: In a hypothetical case, one man is charged with stealing $1.75 from the company and the other man is guilty of stealing $1.5 million from the company. Are they equally culpable of stealing?

MR. ROSENBLUM: That if --

QUESTION: Yes or no?

MR. ROSENBLUM: Yes.

QUESTION: How can they be?

MR. ROSENBLUM: It would be a matter of the mind --

QUESTION: I am just saying --

MR. ROSENBLUM: -- what was in the mind of the person discharging them and whether a price was a factor in this decision --

QUESTION: My only point is as to whether or not he is only a little more than culpable.

MR. ROSENBLUM: Well, it never --

QUESTION: I mean, to have alleged more, that's --

MR. ROSENBLUM: I understand. That was a criteria in this case.

QUESTION: Okay.

MR. ROSENBLUM: In any event, we submit that discrimination -- this discrimination did not occur against a backdrop of a pattern of discrimination worked for hundreds of years against white persons. We do submit that the racial

preference granted, in this case a minority, violates the standards set down in Griggs versus Duke Power and we further submit that the allegation of theft is no impediment to the entitlement of the Petitioners to make their proof.

We then turn to an inquiry regarding Section 1981. We may not stop with Title VII because, quite candidly, Petitioners in this instance may have a timely filing problem under Title VII. They don't have a problem in the Fifth Circuit because we are advised of the Guy versus Robbins and Myer in the Sixth Circuit which is presently pending on petition in this Court.

QUESTION: I am a little puzzled by what the district judge said at page 94 to which you referred. In parenthesis he wrote,"(This Court assumes for present purposes that the Negro employee had a similar work record and a similar degree of culpability in the offense." And then he goes on, "This point has received inadequate attention in the pleadings filed by the parties and has not been briefed."

To whom is the judge directing that observation? To your pleadings and brief, or --?

MR. ROSENBLUM: Judge -- Mr. Chief Justice, I -- he was addressing it to counsel. I assumed for both sides. I did not represent the Petitioner in the lower courts -- the Petitioners. There was not adequate briefing. But it was as to both parties from my recollection of the reading of the

record.

QUESTION: Of course, his earlier statement that he was proceeding on an assumption that they were equally culpable and, by implication at least, quite clear implication that there are no extenuating circumstances for one or the other would appear to make at least the briefing, the lack of adequate briefing, irrelevant.

MR. ROSENBLUM: I would think so and it would be -- ?
it would make the primatationess of our case until such time as, Mr. Justice Marshall, the company came forward and showed that there might be differences that one person, a black man, had stolen $1.24 and the white Petitioners had stolen a million dollars worth of goods.

But the petition was dismissed on the assumption that they were equally charged and equally culpable and had similar work records, which is precisely what caused the Petitioners to conclude that race was a factor in their discharge.

In any event, if I may, with regard to Section 1981, because that might be very vital to these Petitioners if remand occurred, we would ask that the Court consider the briefs and the Amicus which have abundantly demonstrated that the legislative history, if not the plain meaning of the statute itself, does indeed embrace white persons.

The problem-producing language as is enjoyed by

white citizens," we submit, and we believe we have adequately addressed, is a quantitative yardstick by which the rights of all citizens must be measured. We submit that it is not ambiguous.

In addition, the legislative history, if the Court felt it was ambiguous, plainly support the propositions that we advance, that white persons may state a claim under Section 1981.

QUESTION: Do you suppose that legislation was enacted under -- by virtue of Congress' power under the 13th Amendment or the 14th Amendment?

MR. ROSENBLUM: It was under the power of the 13th Amendment but recodified subsequent, two years' subsequent, to the enactment of the 14th Amendment --

QUESTION: The adoption of the 14th Amendment.

MR. ROSENBLUM: -- and must reflect their thinking of the quality guaranteed by the 14th Amendment to remain Constitutional. To give them all black construction makes them fly in the face of it, in my opinion.

QUESTION: Well, the 13th Amendment was concerned, of course, with the elimination of slavery and of all of its badges and white people were not enslaved in this country.

MR. ROSENBLUM: And also the protection of the Abolitionists who were suffering at the hands of their anti-Abolitionist white neighbors were directly spoken to and

protected by the 13th Amendment in its history.

QUESTION: As I remember it, it was readopted after the 14th Amendment out of an abundance of caution.

MR. ROSENBLUM: That it be misconstrued.

QUESTION: And they were relying on the 14th Amendment the second time. You can't just move the 14th out.

MR. ROSENBLUM: I couldn't agree more and to give it an all-black construction flies in the face of the 14th Amendment.

My time is running short and I am trying to reserve some of it.

I can see and fathom no compelling state or governmental, in this case, interest in hitting the construction of Section 1981 that would exclude white persons. Beyond that, I would ask the Court not be troubled by the absence of a background of racial discrimination against whites. It is perhaps too simple a statement to make, but simply true, that had the Petitioners here been black, neither of the lower courts would have had any trouble finding the cause of action.

Thank you.

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

Mr. Attorney General.

ORAL ARGUMENT OF J. STANLEY POTTINGER, ESQ.

ON BEHALF OF U.S., AS AMICUS CURIAE

MR. POTTINGER: Mr. Chief Justice, and may it please

the Court:

In the view of the United States, the central issue in the case is both basic and uncomplicated and that is, should a person, any person, who alleges that he or she has been the victim of racial discrimination in employment, have an opportunity to have those allegations be heard and tested in the atmosphere of an evidentiary hearing?

We think the answer to this question is yes, both as to Title VII of the Civil Rights Act of 1964 and Section 1981.

It seems to us that the courts below have misunderstood, particularly in light of the question raised by Mr. Justice Powell -- or, Mr. Justice Stewart -- that the allegation, the mere facial allegation of some form of wrongdoing, in this case theft, could supercede an allegation of racial discrimination.

Simply put, we believe that McDonnell-Douglas and the Griggs decision make clear that that particular allegation must be tested beyond the face of the pleadings and that to rely upon it outside the pleadings -- and, indeed, there was no summary judgment motion in this case -- is a mistake because it assumes a burden that should be shifted at least in some evidentiary fashion to the employer.

In the McDonnell case -- the McDonnell-Douglas case, the Court set a four-prong test in that case stating that if a person made out a prima facie case of racial discrimination by

being a member of a minority group, by having been qualified for the job but rejected, and by having others accepted for the position, the burden didn't shift and in some evidentiary fashion, those allegations would have to be tested.

We believe that the same essential ingredients are in this case, even though the Complainants were white because in this particular case they have met the burden of the first test of McDonnell-Douglas by indicating that not only was racial discrimination practiced, but that three people, two of which were white, one of which was black, similarly situated, were, indeed, of equal culpability on the face of the pleadings.

Now, we would concur with the implication of Justice Marshall's question that should, upon an evidentiary hearing, facts be developed that would indicate a greater culpability or a different culpability on the part of the white complainant as opposed to the black that those factors, assuming they were not racial in nature, ought to be able to be controlling factors. We don't disagree with that but on the course of the pleadings, on the face of the pleadings, those allegations simply do not appear and to dismiss the case entirely simply because of an alleged lack of standing, we believe makes a gross error and is a basic misconstruction of Griggs and McDonnell-Douglas.

With regard to the 1981 claim, it is our view that the 13th Amendment in answer to the questions presented here is

an adequate basis for the statute and that the reenactment of the statute subsequent to the passage of the 14th Amendment does impart a sense of equal protection concept which is not a racially-preferential concept into the statute itself.

The 13th Amendment on the face of it is not a racially-preferential statute. As Senator Trumbull said, who was one of the authors of the statute, the statute was passed to protect those who needed the benefits of it and clearly, in 1866, that was the black race and to protect freedmen after that through the passage of the 1866 statute but never on the face of the statute nor in the legislative history surrounding its passage did the debate suppose that it was only for black persons.

Indeed, there is a great deal of legislative history that made clear that in eliminating all badges of slavery and in insuring no involuntary servitude, there were effects of the institution of slavery that might go over to adversely effect whites and thereby protect them.

In other words, the statement was made that all discrimination between blacks and whites should be eliminated and that was the purpose of the 13th Amendment.

This position was also adopted, I think to a lesser extent, under the 14th Amendment in an 1897 case in which the Court stated that the implications of the Equal Protection Clause under the 14th Amendment had a gloss on the 1981 statute.

We think, in other words, that what has happened in this case is that the Court has misconstrued the nature of the allegation of theft at too early a stage, at least, before it could be clearly developed in evidentiary hearing.

In effect, what the Court has also done -- and this is partially out of having the benefit of Respondents' briefings is virtually to invite us to believe that racial discrimination did play a part in this case. For in the case, not only do the allegations make clear that the Complainants in this case and Mr. Jackson, the black, were equally culpable as a matter of allegation but that in addition to that there were no other factors presented.

In addition to that, in the Respondents' brief they acknowledged that -- at page 4 -- that by definition it -- in this case, affirmative action -- involves at least some measure of preference or advantage for blacks and other racial minorities in connection with employment decisions and they go on, at least in a hypothetical fashion, to suggest that as an abstract idea, perhaps every employment or personnel decision should be colorblind, but this is a practical world and few parts of it are more practical than employment decisions.

We submit that absolute racial equality under every conceivable circumstance would be counterproductive and, finally, at page 16, they invite us to assume racial discrimination may have played a factor further by saying that,

"Assuming for the moment that the local manager had been influenced to some slight degree by Mr. Jackson's race, perhaps thinking to himself, 'Jackson's black. All things considered, we'll give him a break,' we cannot believe that we thus ran afoul of the intent of Congress expressed in Title VII."

But to assume that those positions, if, indeed, they were developed upon an evidentiary hearing, to bear out the positions would, indeed, be to assume that the statement by the Court in Griggs was wrong, in which the Court said that the discriminatory preference for any group, minority or majority, is precisely and only what the Congress has prescribed. So our strong belief is that the case does not reach the questions of what constitutes affirmative action, especially since it compares individuals in this particular case, not groups or classes of protected persons but in that context, an evidentiary hearing must be granted in order to develop those facts.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Niebank.

ORAL ARGUMENT OF C. GEORGE NIEBANK, JR., ESQ.

ON BEHALF OF SANTA FE TRAIL TRANSPORTATION COMPANY

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

As this case has proceeded from the District Court through the Court of Appeals to this Court, it has taken on

a false, we believe, factual facade.

As you have heard, the way it is presented to you is that there were two whites and a black who were similarly situated. They talk about "equally culpable."

I invite your attention, if I may, to page 38 of the printed Appendix which includes paragraph 6 of the second amended complaint filed by the Petitioners in the District Court. You will notice there that the Petitioners allege that there was an investigation.

They next go on to allege that, as a result of that investigation they were discharged but their black coworker, Mr. Jackson, was not.

I submit to you that that complaint -- and, after all, we must bear in mind that this was the complaint which was dismissed, that complaint does not allege that these three men were similarly situated. It does not allege that they were equally culpable.

As a consequence, it does no more than draw a conclusion that as a result of an investigation, they were discharged and the black man was not. But we have not the slightest knowledge, based on this complaint --

QUESTION: Mr. Niebank, is that a fair reading? They allege in words that, the defendant imposed a more severe disciplinary sanction against them because of their race --

MR. NIEBANK: Yes.

QUESTION: -- Caucasian than against their negro counterpart. Isn't that an allegation of --

MR.NIEBANK: Mr. Justice, that is a conclusion but you don't know, they do not allege, sir, that Jackson, the black man, was equally culpable and I don't think --

QUESTION: Well, even if they were not precisely equally culpable, would it not still state a cause of action, at least under the classic terms, if they alleged that race was a factor in the decision? And they do allege that.

MR. NIEBANK: They allege that but they do not -- the case as it has been presented is that they were equally culpable and that --

QUESTION: But is that an essential ingredient of a cause of action?

MR. NIEBANK: I beg your pardon?

QUESTION: I say, is qual culpability an essential ingredient of the cause of action or is it merely enough to allege that race was a factor in the discharge decision?

MR. NIEBANK: Well, the way the case has been presented, the equally --

QUESTION: Well, I understand that but that doesn't answer my question.

MR. NIEBANK: Well, yes. Is equally culpable important or --

QUESTION: Is that essential to stating your cause of

action?

MR. NIEBANK: I believe it probably is.

QUESTION: Well, didn't the district judge read it that way?

MR. NIEBANK: He assumed that. As your Honor was talking with Mr. Rosenblum, you read that portion of it. He assumed for the sake of argument that they were equally culpable. Now, what I am suggesting here this afternoon is that that was the beginning of where this case started to acquire this mistaken factual veneer that there was, in fact, discrimination.

QUESTION: Well, are you defending the rationale of the courts below then, or not?

MR. NIEBANK: I beg your pardon?

QUESTION: Are you defending the rationale of the courts below?

MR. NIEBANK: Yes. Well, I am defending the result, Mr. Justice.

QUESTION: Are you saying -- but not the, you disown the reasoning?

MR. NIEBANK: No, I do not. I'll go on to that in a moment. I am saying that there is this disparity between the way the case is presented and the way it was actually pleaded.

QUESTION: Let me ask you a question, Mr. Niebank, if I may, about the paragraph of the complaint that Justice

Stevens just asked you about.

Supposing that the employer has a policy that anybody it believes to be guilty of a felony is to be fired and it concludes with respect to these three employees that the two whites were guilty of first-degree burglary and that the black was guilty of second-degree burglary but decides that because the black is a black, we won't fire him.

Now, they are not equally culpable and yet that is a decision based on race, is it not?

MR. NIEBANK: It is certainly a decision affected by race and as I'll get to in a moment; well, we'll turn to it right now, the --

QUESTION: Before you move on, I am looking at the paragraph that precedes the one that had been commented on. This is paragraph B on 38 which states that all three of these individuals were charged jointly and severally with the same offense. How do you square that with your argument --

MR. NIEBANK: I'm sorry, Mr. Justice, look at B.

QUESTION: Page 38, 6B, "On or about September 26th Plaintiffs, along with one negro employee, Charles Jackson, were all charged jointly and severally --"

MR. NIEBANK: But the unspoken conclusion --

QUESTION: "-- with misappropriation."

MR. NIEBANK: Excuse me.

QUESTION: Well?

MR. NIEBANK: The unspoken conclusion is that they were all three found guilty and, in fact, that is not alleged. But --

QUESTION: That is for the trial of the case, isn't it?

MR. NIEBANK: Well, if you can get that far.

QUESTION: You can't resolve that on the pleadings.

MR. NIEBANK: But what I am suggesting is that absent that, the complaint was properly dismissed. But even if --

QUESTION: To make that wash, you have got to say, this does not allege racial discriminatory motivation.

QUESTION: And, Mr. Niebank, in paragraph A, it certainly says that Plaintiffs allege that they were discharged because of their race.

MR. NIEBANK: That is what they allege, yes.

Now, as was adverted to earlier, in a subsequent case, Judge Bue had occasion to comment on his decision in McDonald and Laird in Spees v. C. Eto was decided on the 29th of January and in that case he was talking about Laird and McDonald. He said in that case, "This Court could find no allegation of racial discrimination on the face of the complaint," so that is -- pardon me --

QUESTION: Well, do you say his reference there was to this complaint that we have just been reading to you?

MR. NIEBANK: Yes, sir. Yes, sir.

QUESTION: Well, then, we have to read the complaint and determine whether that is correct.

MR. NIEBANK: Well, in view of the fact that the motion to dismiss this complaint was granted, I think it is incumbent on this Court to read the complaint.

QUESTION: And we must read it favorably to the opponent.

MR. NIEBANK: Most favorably to the Petitioners, correct.

QUESTION: Well, what do you suggest as a hypothesis that they needed to allege here to survive the motion which is not alleged?

MR. NIEBANK: Well, I believe they should have or should be required to allege that they were equally culpable and this is in order to sustain the conclusion that there was disparate disciplinary treatment, that they were -- the black man was just as guilty as they were but he wasn't fired and they were.

QUESTION: Well, fairly -- can't you read this complaint fairly as stating they engaged in a joint enterprise, as Mr. Justice Powell has just pointed out, that they all did the same thing, as described in detail?

MR. NIEBANK: Well, the point that came up before was that they were charged jointly with this theft.

QUESTION: We are only in the allegation stages here.

MR. NIEBANK: I know, but that is the point at which they have got to file a complaint which states the cause of action and the courts below found that they did not and I think properly so.

QUESTION: But they were pleading under the federal rules, Mr. Niebank, not under Chitting's rules.

MR. NIEBANK: That is correct, Mr. Justice, but still given notice pleading we are entitled, I believe, to more specificity than they have here.

If, however, you go ahead and assume, as the District Court did, that they were, in fact, similarly situated, still we believe that the court properly dismissed the claim for failure to state a claim upon which relief could be granted under Title VII because -- and here I would refer the Court --

QUESTION: You filed a full answer.

MR. NIEBANK: I beg your pardon?

QUESTION: You filed a full answer.

MR. NIEBANK: Yes, sir, we did.

QUESTION: And in the answer you didn't volunteer any fact that one of them was guilty and the other one wasn't, did you?

MR. NIEBANK: Well, in the answer, in the answer to the complaint --

QUESTION: Did you? You didn't.

MR. NIEBANK: No, we said that we denied that

Jackson was even charged. In fact, we denied that Laird was discharged for his participation in the theft. We said in our answer that he was discharged because he was a poor supervisor and had violated company rules. But --

QUESTION: Well, then, the issue is joined, isn't it? The issue is joined and you are ready to go to trial.

MR. NIEBANK: Except that they were still required in the district court to state a claim upon which relief could be granted in their complaint, even though we had filed the answer, we had filed a motion to dismiss under Rule 12B6.

Now, if you assume that they were, in fact, similarly situated, still we believe that the complaint was properly dismissed.

Here, referring to McDonnell-Douglas against Green, we are going to talk about the essentials of a cause of action in a case of this kind.

The Plaintiffs -- or the Petitioners in this case -- to the extent they allege that they had been discharged for theft, they, in effect, met the burden which might otherwise be placed upon us of coming back with our answer and saying they were dismissed for theft and then the burden would shift back to them.

They -- even though we had answered to that effect -- they met our burden and then it was incumbent upon them to allege something more and that something might have been a

pattern in practice, pretext. They at one point did allege pattern in practice but they abandoned that when it became obvious that they could never make it stick and you have heard some talk today about pretext. Well, that is an afterthought because they never alleged pretext in the complaint that the theft was a pretext to discharge them because of their race.

Also, I want to emphasize that our action in this case grew out of an exercise of management's discretion in discipline. Now, management must have a considerable degree of discretion in administrative discipline the same way courts do in administering sentences in criminal cases.

What the Petitioners would have this Court do is say that there must be a uniform sentence no matter what when you have got three people involved in the same transaction.

I submit to you that that is not so, that management has a right to be lenient if it chooses and that it would not thereby run afoul of the law.

I'd like to touch very briefly on the 1981 point which the court below held that whites are not entitled to claim that relief and there it seems to me that the parties are not starting at the right point. I think we have to start with the 13th Amendment which, of course was to -- the purpose of which was to abolish slavery and Section 1981 being part of the Civil Rights Act of 1866 was intended to implement that and if you read it, "All persons shall enjoy the same rights

as white citizens," if you read it to mean, "All whites shall have the same rights as white citizens," I submit that that is redundant.

Now, there is legislative history, of course, on both sides and the courts are divided but we believe that the best reading is one which would restrict 1981 relief to blacks and other minorities.

If 1981 is read to confer or to require -- or to confer a cause of action on whites, then you are going to open the gates to suits such as the Sears, Roebuck case, Hollander against Sears, Roebuck in which Sears set up a summer internship program for the benefit of blacks and a young man applied and was, of course, rejected so he sued.

Now, that will have a very serious impact on affirmative action programs which are the policy of the United States intended to assist the black men and other minorities.

Thank you.

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

Mr. Dixie.

ORAL ARGUMENT OF CHRIS DIXIE, ESQ.

ON BEHALF OF LOCAL 988

MR. DIXIE: If the Court please:

Both lower courts assumed that the two people -- the three people were guilty of theft and he had gone into various allegations in pretrial hearings and it was before the district

court that the theft concerned 60 cases of anti-freeze then and there in transit in the possession of a common carrier. That is a crime under state law, a felony, and it is also a crime under federal law.

Both courts held that if it is serious crime, it is outside of the purview of Title VII.

I would like to refer this Court to a line of cases by the lower courts that hold that under the National Labor Relations Act, if serious theft on the job is involved, the entire case is outside of the purview, even if the discharge was motivated by prohibited reasons. Please see NLRB versus Magnusson, 523 Federal 2nd 643 which collates the decisions of seven circuits to the same effect.

I mention this point because in most of the briefs that is the rejected brief. The point is made that you do the same thing under this statute that we do under the Labor Act because it was a model for this statute, Title VII and I want the Court to please examine this line of cases.

The theory of the lower courts is that when you get down to the question of serious theft on the job, it does not effectuate the purposes of the statute and it also demeans the court to reinstate and provide back pay for someone who is demonstrated to be guilty of that kind of conduct.

So here the Court must decide, I think, whether in your judgment it is necessary to provide equality in

punishment for serious theft on the job as a means of effective enforcement of Title VII or whether, as was done under the Labor Act, you leave a theft outside the purview of the statute.

Now, that is what this Court did in the ancient case of Fansteel, which was cited in McDonnell-Douglas versus Green.

In Fansteel, the sit-down strikers were not reinstated even though many sit-down strikers were reinstated. The Supreme Court said, that kind of conduct puts them beyond the purview of the statute and that is what we think is the issue in this case.

Under 1981, we join issue with the other parties. We say that the face of the statute does not accommodate this case --

QUESTION: What would you say if an employer found his business falling off? He wasn't organized and he was going to have to cut down ten employees and he discharged ten white employees and they brought a suit alleging that they were discharged because of their race.

MR. DIXIE: It would seem to me that they have an ideal cause of action. No one has disputed in this case that Title VII applies and protects the white people. As a matter of fact, it does. White people can file charges before EEOC.

QUESTION: How about 1981?

MR. DIXIE: That is what I was going to get to. I

might say that white people can even intervene in a proceeding under Title VII --

QUESTION: So you agree that both titles are -- at least Title VII protects the white as well as the black?

MR. DIXIE: Right. I am not only agreed to it, but I protested the implication to the --

QUESTION: And if the black were the Plaintiff here making the same allegations as the white person was making here, you would be arguing the same way.

MR. DIXIE: Certainly. All races, colors, national origins, religions and sexes have a cause of action under Title VII and in case there is a misunderstanding in the public, and I think there may be, this seems to be an ideal occasion for the Court to speak loud and clear on that subject.

I must say to you that a lot of misfortune has been visited upon white workers under Title VII without their presence before the Court. I think we have to recognize that but the remedy for that is not to stretch 1981, it is to point out the fact that they have ideal protection under Title VII, in the same forum and under the same substantive and procedural rules.

Please let me go to 1981 .

QUESTION: All right, you are going to 1981?

MR. DIXIE: Right now.

Your Honor, the 1886 Act as it was passed provided

first, all citizens born here are citizens and second, all citizens shall possess certain rights to the same degree as white citizens.

Now, isn't it interesting that no one on the other side, no brief comes to grip with that phrase, "same rights as are enjoyed by white citizens"?

Now, in making that language, Congress thus established the rights possessed by white citizens as the yardstick for measuring the rights of all citizens and this case does not fit the statute for the same reason that they require the court to say now that we are going to take the yardstick of black citizens in a single, isolated episode of theft to provide a converse or a reciprocal cause of action for white people.

Now, the legislative history does not require that or does not even permit it, as we see it.

Now, do not confuse Jones versus Alfred Mayer. In that case, the face of the statute supported the Plaintiffs and the inquiry of the court was whether there was something in the legislative history that required the court to go contrary to the face of the statute, but in this case, the face of the statute supports the Respondent and the burden is heavier.

QUESTION: Mr. Dixie, may I test that proposition with you, sir? Supposing a community had an ordinance that said white citizens shall be permitted to ride in the front of

the bus. Black citizens shall not be permitted to ride in the front of the bus and neither shall people named "Dixie."

Now, would Mr. Dixie have a cause of action?

MR. DIXIE: Yes, I think all persons --

QUESTION: Even though he was white.

MR. DIXIE: All persons, yes. I really think so.

QUESTION: So that it would be conceivable for a white person to have a cause of action.

MR. DIXIE: I think that is right and the statute even covers white aliens because alienage is a disability that Congress wanted to overcome but the ultimate thing we must get to in this case if we are going to be true to what reconstruction Congress enacted is, the adoption of a yardstick of white citizens' rights, whatever they are, and the granting of those rights to all citizens and that is the place where the statute does not fit the case and vice-versa.

QUESTION: Well, if you decide that white citizens generally have a certain right and then a certain white citizen is denied it, why doesn't he have a cause of action?

MR. DIXIE: They are not asking for the rights of white citizens in this case. They would have such an insurmountable burden of proof there that it would be futile to file such a case. Why, these Plaintiffs are not asking for the rights of white citizens. These Plaintiffs are asking for the rights of black citizens and they are asking the Court to

perform plastic surgery upon the statute and to do something that the Reconstruction Congress did not and they ask --

QUESTION: Isn't the right, Mr. Dixie, involved here, the right not to be discriminated against on account of race, which most whites had in 1866 that maybe some whites don't have.

MR. DIXIE: Well, that is not what is involved here, your Honor. In the post-slavery period in the implementation of the 13th Amendment, Congress was interested in elevating and protecting the position of freed men. They were not interested in protecting the rights of white people.

It is not incumbent on Congress to come up with a solution that is perfectly rectangular or perfectly square in every situation, but Congress may address itself to the evils at hand and in this connection, I would like to cite Williams versus Lee Optical Company, the 1955 term of Court, 348 U.S. 483, which collated all the cases up to that time and has been cited many times by this Court for the proposition that Congress may address itself to the evil that it perceives and that Congress understood that the white population had their feet on the necks of the black population and what they were trying to do was to elevate all non-whites, if you please, to the status of whites in each state, whatever that status was and so, in asking for this plastic surgery, they do not give -- they do not reach, I don't believe the legislative history, but I am not going to burden you with that except to say to your

Honors that the legislative history, after the bill took its final form -- not the early stages of it -- made a clear demonstration that the Senators and the Congressmen understood the structure and thrust of this statute is to provide relief for the freed men and the deprived people to elevate them to the level of white citizens.

They understood that. They articulated that. President Johnson said that in his veto message and Senator Trumbull, the principal sponsor of the bill, said that after President Johnson vetoed.

President Johnson said, "This thing is discriminatory."

Senator Trumbull said, "With what truth can this be said of a bill which declares that the civil rights and punishments of all races including, of course, the colored, shall be the same as those of white persons."

He didn't say that this gives a cause of action to white people, too.

Now, the last thing I want to say to the Court because I observed --

QUESTION: Mr. Dixie --

MR. DIXIE: Sir?

QUESTION: Mr. Dixie, is it your submission that no white person can make out a cause of action under this section even though he asserts he was denied the rights accorded to white people?

MR. DIXIE: No, that is not my position because there are lots of white people as we speak. White people under the statute means something else.

For example, there is no doubt in my mind that Mexican-Americans can reach under this statute. There is a very, very lengthy Law Review article in'63 California Law Review demonstrating why they are an identifiable ethnic group.

QUESTION: Well, how about a straight Caucasian. Can he ever make out a claim simply showing that he isn't being given the right that "white people" are being given?

MR. DIXIE: Well, can whoever make out a claim, your Honor?

QUESTION: A straight Caucasian or a not-so-straight Caucasian?

[Laughter.]

MR. DIXIE: A straight Caucasian. Well, I don't know exactly what a straight Caucasian is but I believe that theoretically he could. I just believe he would have a terrible burden of proof and that that question, while theoretically penetrating, is not a very serious practical problem, your Honor. But there are other groups who are put upon in this nation who could possibly invoke the rights of nonwhites. But in every case, they must reach for the yardstick of white people.

Now, no one in this case has given the Court any

reason why you should perform this plastic surgery.

Title VII is entirely adequate in the employment field. No one has said,"What is the use of doing this?"except the brief filed by the U.S. Chamber of Commerce and upon my word, they say right in there what we are worried about, and that is, that this kind of a cause of action invested in white persons under 1981 becomes a useful tool to contest against affirmative action programs which might be undertaken in the implementation of Title VII and that if the red light doesn't go on, I'll give you an illustration.

In Griggs versus Duke Power Company, this Court held that tests which disproportionately affect black people are not lawful unless they are job-related but if they are job-related, the tests can be as difficult as they need to be.

Let us suppose an employer determines that his tests are not lawful and he gets rid of them. He transfers blacks to other departments. He gives them plant-wide seniority for a remedial purpose and he has complied with Title VII. What stops a white worker from suing under 1981 to say that they have applied a different standard to a black than they do to me. That black didn't have to pass that test. That black now has plantwide seniority and I have been fighting for 20 years to get plantwide seniority.

QUESTION: Well, he might not even want to sue under 1981. He would probably just do it under Title VII.

MR. DIXIE: Certainly, but if he wants to --

QUESTION: Which you agree he could do.

MR. DIXIE: If he wants to stay away from the Equity Court and if he wants to invoke a jury, he will sue under 1981 and he will present issues of fact for the determination of a jury in a different forum under a different statute of limitations, your Honor, and have a jury pass upon whether or not that test which was discarded by the employer was in fact job-related or non-job-related.

Well, my time is up.

QUESTION: Mr. Dixie --

MR. DIXIE: In other words, it may be appealing to perform this plastic surgery but it might lead to trouble. I think it will and we ask the Court to consider that.

QUESTION: Mr. Dixie.

MR. DIXIE: Yes, your Honor.

QUESTION: Let's come back to Title VII. Your position, as I understand it is that Title VII does not apply to any employee who has committed a serious crime.

MR. DIXIE: On the job.

QUESTION: On the job.

MR. DIXIE: Right.

QUESTION: I'd like to put a hypothetical to you, having in mind that you cited the Fansteel case that involved a sit-down strike.

MR. DIXIE: Yes. And your Honor cited the Fansteel case in that opinion.

QUESTION: That is right, in McDonnell, but --

MR. DIXIE: That is where the lower courts got it.

QUESTION: But I didn't cite it for the same proposition you do, but let me put this case.

Let's assume a company that had 100 employees, 50 of whom were negro and 50 were white --

MR. DIXIE: Yes.

QUESTION: All 100 went on a sit-down strike and undertook jointly and severally to break up all the machinery in the plant. The management then said, "This is a great opportunity to get rid of all of the negro employees," so management fired the 50 negro employees and retained the 50 whites. Is it your position that Title VII would not apply?

MR. DIXIE: No, I really believe that that practice would be widespread enough to where the Court would have to make a further choice. But this is an isolated case of a single theft. This is one stealing of 60 cases of antifreeze.

The Chief Justice asked a question earlier, your Honor. Would people in the penitentiary be able to complain that habitually whites get shorter sentences than blacks? I think that they really should be allowed that but this is not a case of habitually complained, of habitual practice. This is an isolated case and --

QUESTION: Mr. Dixie, isn't your position also much broader than the crime, though? Wouldn't you say that any time there is a -- independently a reason for a discharge other than race that Title VII shouldn't apply?

MR. DIXIE: Absolutely not, your Honor.

QUESTION: Well, you mean, you draw the difference between a crime and some other reason for discharge?

MR. DIXIE: Why, of course. A crime committed on a job is a sui generis situation. That is not a part of a condition of employment to be able to demand equal punishment and after you have stolen seriously from the employer opposition is limited.

QUESTION: Well, what if he just doesn't do any work?

MR. DIXIE: What? And so are the authorities I cited. They are limited to the question of serious crime.

I'm not --

QUESTION: Serious crime, not just minor crime.

MR. DIXIE: That's right, serious crime and I don't think you are going to damage Title VII by accepting that. On the other hand, I don't think you are going to help either Title VII or the deprived races by getting the courts into the question of adjudicating individual punishments without any pattern or practice conduct, individual punishment for serious crime.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Rosenblum, you have a minute or two left.

REBUTTAL ARGUMENT OF HENRY M. ROSENBLUM, ESQ.

ON BEHALF OF PETITIONERS

MR. ROSENBLUM: First, I would like to make the observation that Petitioners have simply never been convicted of any crimes, theft or otherwise. There has been an allegation that there were 26 cans of antifreeze misappropriated and I remind the Court that in the McDonnell-Douglas v. Green case we had a convicted, confessed misdemeanant, so I simply reject Mr. Dixie's proposition plus, if we talk of floodgates and a criteria is created where the mere allegation of wrongdoing constitutes the basis for discharge without the embrace of Title VII or 1981 it is likely that ten years of ameliorating judicial interpretation of Title VII will go out the window.

This is precisely what happened in hundreds of cases upon which Title VII claims were based.

Mr. Dixie asks for reasons why we should have 1981 and why we should only worry about two people here.

One of the reasons is precisely that, that these Petitioners and, in particular, Mr. Laird, never -- he never filed a Title VII charge at the EEOC so it is altogether possible depending on constructions placed on his failure to file that 1981 is his only avenue of relief.

Furthermore, many hypotheticals have been tossed

around. If it turned out, for example, that this employer had less than 15 employees, 1981 is a necessary vehicle for redeeming discrimination if it occurs whether preferences are for the majority or the minority.

We have heard much of the legislative history. I don't intend to burden the Court overly but can't resist reading from the brief of the Respondent prepared by --

MR. CHIEF JUSTICE BURGER: We won't require you to read it. Your time is up now, Mr. Rosenblum.

MR. ROSENBLUM: Thank you.

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

[Whereupon, at 2:31 o'clock p.m., the case was submitted.]