ORIGINAL

In the

Supreme Court of the United States

FURNCO CONSTRUCTION CORPORATION,

PETITIONER,

V.

WILLIAM WATERS, ET AL.,

RESPONDENTS.

No. 77-369

Washington, D. C.
April 17, 1978

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WILLIAM WATERS, et al.,

Respondents.

Washington, D. C.

Monday, April 17, 1978

The above-entitled matter came on for argument at 11:30 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

JOEL H. KAPLAN, Esq., Seyfarth, Shaw, Fairweather, & Geraldson, 55 East Monroe Street, Chicago, Illinois 60603, for the Petitioner.

JUDSON H. MINER, Esq., Davis, Miner & Barnhill, 14 West Erie Street, Chicago, Illinois 60610, for the Respondents.

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 argument next in No. 77-369, Furnco against Waters et al.

Mr. Kaplan, I think you may now proceed whenever you are ready.

ORAL ARGUMENT OF JOEL H. KAPLAN ON BEHALF OF PETITIONER

MR. KAPLAN: Mr. Chief Justice, may it please the Court: This case concerns several issues regarding alleged racial discrimination in hiring and recruiting under various civil rights laws, principally Title VII,1964 Civil Rights Act. More particularly, this case brings into focus questions relating to (1) what constitutes legitimate nondiscriminatory reasons for refusing to hire minority applicants under McDonnell-Douglas; (2) the standard of review to be applied by a court of appeals after a district court has found an employer's refusal to hire were legitimate and nondiscriminatory, and, also,the court of appeals' authority unrestrained by either the evidence in the record or the district court findings to create its own hiring system; (3) it deals with the use and probative value of statistics by defendant in Title VII cases, and particularly whether under Title VII a hiring process which resulted in the hiring of black bricklayers far in excess of their statistical availability in the relative labor market can be fragmented into its various

subparts, and, finally, raises the issue of whether discriminatory intent or motive are essential elements to a prima facie case of disparate treatment under McDonnell-Douglas.

The genesis of this case is the relining of a blast furnace by Furnco at Interlake, Inc., in the late summer and early fall of 1971. Performing this work, Furnco hired firebricklayers, a very unique bricklaying craft. The exigencies confronting Furnco in performing this work in terms of the speed it had to perform it in, in terms of the quality of the work that had to be performed, and the risks of doing it in an untimely or improper manner are set forth at length in our brief and also in the district court's findings and need not be recounted here.

In meeting these needs, Furnco through its job superintendent followed three fundamental hiring policies: First, it only hired bricklayers known by the superintendent or recommended to him as such to be experienced and highly competent in this unique skill of bricklaying. It essentially hired firebricklayers with a proven track record of skill and ability.

Second, it did not accept applications from anyone. It did not hire at the gate. It is undisputed that neither blacks nor whites were hired at the gate.

QUESTION: Out of the firebricklayers known to the superintendent, the two blacks on the list known to him

were not hired?

MR. KAPLAN: That's not true, your Honor.

QUESTION: That's not true?

MR. KAPLAN: That's not true. It is alleged -- I think you are referring to both the amici and the respondents, the point that Mr. Samuels and Mr. Smith were not hired.

The first point, in the reply brief we point out at length that Donald Samuels had never worked for Dacies. There is a question in there by myself, "Have you ever worked for Mr. Dacies?" Answer: "No, I have not." So he had never worked for Dacies.

The second gentleman, Mr. William Smith, was hired on this job.

QUESTION: But after other white people who weren't on the list?

MR. KAPLAN: No, your Honor. The evidence shows that Mr. Smith had worked for Mr. Dacies previously and that at one point Mr. Dacies had met Mr. Smith at the job site and said words to the effect, "Smitty, what are you doing here? Go home. I am going to hire you."

The evidence shows that Mr. Smith was hired in a nondiscriminatory sequence of hiring. He was hired before white bricklayers, for example, he was hired before seven white bricklayers who were purportedly on this list and worked longer than 11 white bricklayers who were purportedly on this

list.

QUESTION: But he was not on the list.

MR. KAPLAN: Well, I think the list is really a red herring in this particular case. The list signified persons who were known by Dacies. Mr. Dacies had Mr. Smith's name in his head rather than on a piece of paper, and he was hired because he knew Dacies, and he was hired in a manner that was not dissimilar to the way white bricklayers were hired.

In that regard, the evidence showed that blacks worked on the average the same number of days as white bricklayers and were hired throughout the whole sequence of the job.

The third policy pursued by Furnco in hiring on this job was that it sought to recruit and hire black bricklayers who were experienced and skilled in firebrick in numbers substantially in excess of their statistical presence in the relevant labor force.

The district court found and the evidence showed that during the relevant time period 5.7 percent of the bricklayers in the relevant labor market were black. On the Interlake job, Furnco worked black bricklayers 13.3 percent of the man-days. Essentially black bricklayers worked on this job at two and a half times their availability in the labor force.

QUESTION: Mr. Kaplan, I am going to be sure I understand your answer to Justice Rehnquist's question. Are you saying that Smith and Samuels were on the list or that there was no list?

MR. KAPLAN: I am saying Samuels had never worked for Dacies.

QUESTION: I understand. Take Smith.

MR. KAPLAN: Mr. Smith. The list were various scraps of paper that Mr. Dacies kept that contained the names of various bricklayers he had worked with who were skilled in firebrick. Mr. Smith's name was not on that list, it was not on a scrap of paper. However, Mr. Smith was known by Mr. Dacies and he was hired because he was known by Mr. Dacies.

To get right to that issue, then, of the list, which seems to be kind of all-pervasive in this case, the all-white list is a very catchy slogan. It is wholly unrelated to this case, it's a red herring.

QUESTION: Is it correct that there were writings on pieces of paper and only names of white persons were on those writings?

MR. KAPLAN: That is true. However, prior to the job Mr. Dacies was instructed by the company general manager to make sure that black bricklayers were hired on this job in numbers substantially in excess of their availability in the labor force. Mr. Dacies wanted new black bricklayers prior

to this job and prior to the job contacted another Furnco superintendent in the area to obtain the names of other black bricklayers.

QUESTION: Is there any explanation of why he didn't write his name down?

MR. KAPLAN: There is none. He was never asked that question, your Honor.

The critical point is that prior to the job, prior to the hiring of bricklayers on this job, Mr. Dacies had the names of black and white bricklayers. He was hiring from an integrated pool. And by hiring from this integrated pool, the evidence shows that he was able to accomplish an integrated work force, integrated in terms of days worked, in terms of numbers hired, in terms of every conceivable way.

One additional point. There is no showing that this white list, this purported white list, was the exclusive avenue for obtaining work on this job. It was only one of several recruitment sources used by the job superintendent in hiring on this job. And the very fact that blacks were hired in the numbers they were evidences that fact, that it was not exclusive. Being on the list was not a prerequisite to being hired.

QUESTION: Were any whites hired who were not on the list?

MR. KAPLAN: Yes. One, who was recommended -- there

were two people recommended by persons working on the job, one white was.

As I was noting, the district court had found that the hiring policies we pursued on this job were legitimate and nondiscriminatory and had ruled in our favor against all eight plaintiffs. The court of appeals reversed as to three and affirmed as to five. The court of appeals in doing so completely ignored the legitimate and nondiscriminatory nature of Furnco's hiring on this job, and its decision is totally at odds with the evidence before the district court. It also chose to ignore the statistics in this case demonstrating the absence of racial discrimination.

This Court has often said that in racial discrimination cases statistics tell much. Here they tell that Furnco's hiring policies were nondiscriminatory.

QUESTION: I suppose an employer could, in a market where there were 20 percent blacks in the pool, have employed 30 percent and nonetheless if a black came to him and sought employment and the employer told the black, "I am not going to hire you because you are black," the fact that he was above the pool ratio would not excuse him.

MR. KAPLAN: I understand that. That's not the case here. The case is whether or not you can infer racial discrimination from what is going on. I think what statistics say, that in the absence of such blatant kinds of purposeful

discrimination, no blacks need apply --there was no sign that blacks need not apply -- that in the absence of such direct evidence, statistics tell you what is the environment in which hiring and employment decisions are being made. And I suggest that the statistics in this case tell that the environment in which the hiring was going on was not that Furnco was discriminating against blacks, but that Furnco was purposely seeking blacks out, purposely trying to recruit blacks. And this is best evidenced, I think, by the statistics --

QUESTION: Wouldn't he have been much better off if he had a list of those blacks?

MR. KAPLAN: I don't think that makes a difference, your Honor.

QUESTION: He did have a list of the laborers.

MR. KAPLAN: But the point is --

QUESTION: It would have been one thing if he had an integrated list, but since he had a white list, wouldn't it have been better if he had also had --

MR. KAPLAN: I don't think it would have made a difference in this case. I mean, certainly the form of it would have -- well, he has got an integrated list, that looks nicer. But the form of it would make no difference in the substance.

The point is that blacks were hired early on in this job and hired throughout the period of the job. There is no

evidence that they were disparately treated in terms of the time they worked on the job. So their absence from the list is a matter of form. It is not a matter of substance of racial discrimination.

QUESTION: Mr. Kaplan, let me just follow up if I may. I don't mean to suggest this is what the facts show because the facts are quite confused in this case. But assume that the evidence did show that the company hired what it regarded was an appropriate quota of blacks and it thought it had met its affirmative action obligation or something of that nature. Then thereafter it would be obligated with the remaining people it hired to take blacks and whites indiscriminately, would it not? What is your position?

MR. KAPLAN: I don't think that is really the -- there was no quota at play here. That is conceded, for example, by the amici, the Government and the EEOC. What the evidence shows is that there was a pool of bricklayers, black and white, and that we pulled people out of the pool --

QUESTION: You are answering my hypothetical question by saying that's not this case. I just want to get your legal position. Assume that you did affirmatively hire, say, 15, 20, whatever the percentage might be, and got that number of black workers on the job. Having done that, and say you have another 80 percent to hire, would it be your view that you could then say, "We will hire only whites in the other 80 percent"?

MR. KAPLAN: No. Not at all.

QUESTION: I see.

QUESTION: Would you be taking a risk if you did of having an attack made by the 80 percent that you were discriminating and using a quota system?

MR. KAPLAN: Well, I would think that there would be a grave risk in that regard. But the point is that, really, what we are talking about in those cases is a selection, that we are selecting people solely because of their skin color. And I think what is occurring here is recruitment of blacks and whites and bringing them into a pool and then taking bricklayers out of the pool.

QUESTION: Wasn't the important thing to you in this case that you don't have to hire at the gate?

MR. KAPLAN: Yes.

QUESTION: And isn't the important thing to you to sustain this case as though the list weren't there at all?

MR. KAPLAN: That's absolutely correct, your Honor.

QUESTION: And then if you lose the case on these two just because there was a list, that isn't such a big deal for you, is it?

MR. KAPLAN: Oh, it's a big deal that even one of them was discriminated against, your Honor.

QUESTION: But if they weren't discriminated against because the company doesn't have any obligation to hire at the

gate and can have this key-man selection system, so to speak, that's one thing. But if the only reason they were discriminated against is because the foreman had a list on which there were no blacks, that may be important to you, but it doesn't undermine --

MR. KAPLAN: Undermine the essence of the hiring system.

QUESTION: Yes.

MR. KAPLAN: That's correct, your Honor. But I want to go back to that list and particularly again Samuels never worked for Dacies and his exclusion from Dacies' mind or list is obvious because he had never worked for him.

Mr. Smith had worked for Dacies previously. Mr. Dacies meets Mr. Smith at the job site and says, "Smitty, go home, I'm going to hire you." And he hires him, and he hires him, as the evidence shows, as part of a nondiscriminatory sequence of hiring. There is no showing that Mr. Smith should have been the first person hired, and if he didn't have to be the first person hired, when did he have to be hired?

I suggest the evidence shows that blacks were hired throughout the period of the job, and that makes all the difference in the world. Mr. Smith was not hired at the end of the job because he was black. There were blacks hired early on. He was just hired toward the end of the job because that was the way it happened.

QUESTION: Is there an issue in this case that even if there hadn't been a list, that you were discriminatory, your client was discriminatory?

MR. KAPLAN: Well --

QUESTION: Is there an argument --

MR. KAPLAN: Apparently there is some argument made about our refusal to hire at the gate is discriminatory or refusal to take applications is discriminatory. I don't believe they raise any issues of discrimination for the very basic reason that there is no showing of disparate racial impact here. On the contrary, the evidence points in exactly the opposite direction.

QUESTION: Does it make any difference that this finding by the district court differed from that of the court of appeals, that it's the court of appeals that undertook to superimpose its findings on the record over the district court?

MR. KAPLAN: I think what was going on here, your Honor, is that the court of appeals did not apply a proper standard of review, and in fact applied no standard of review; rather, created its own hiring system and created facts that were not in existence. For example, they say that, "We see nothing in the record to show that our hiring system that we created out of thin air isn't feasible."

Well, the point of the matter is that every single person who testified with any experience as a mason contractor

said that they would have hired the way we hired, and there was no evidence whatsoever that their "feasible system" was in fact feasible, that anybody had ever built a blast furnace that way.

One of the two -- to make the point about the statistics in this case, and that is in the impact of the statistics here, using the Castaneda and Hazelwood methodology, the statistics show the blacks were hired at 14 standard deviations greater than the expected number. Now, that doesn't show purposeful discrimination; it shows purposeful bringing blacks in.

Back to the all-white list for a moment. Concentrating on the all-white list is wrong not only because there was an integrated pool prior to the job, but it also represents an attempt to fragment and parse the hiring process, to look at each individual source of hiring and saying, "What is the racial, ethnic, sexual, religious composition of that?" rather than looking at the results of the entire hiring process. I suggest that that kind of parsing up is not only inconsistent with case law but leads to ludicrous results, that no employer in this country would have a hiring system that didn't discriminate if that were the rule. It would be impossible to have any source that precisely reflected that kind of protected category makeup. Indeed, there is no evidence to show that the hiring system found "feasible" by the court of appeals or urged by the court of appeals would have passed

muster under that kind of standard.

The fatal defects of the court of appeals' system is that there is no showing that it would have created job opportunities for blacks in excess of what our system created. In fact, the evidence is exactly the opposite, that if you had a completely random system, as the court of appeals seemed to say we needed, that only 5.7 percent of the man-days on the job would have been worked by blacks instead of our 13.4 percent.

QUESTION: Is that a sufficient answer to a Title VII claim, if an employer refuses a black a job specifically on the ground that he is black, for him to say, "Look, I'm already 20 percent over the pool"?

MR. KAPLAN: I agree with you, that is not a sufficient answer where he says, "I am not going to hire you because you are black." But that's not the case here.

QUESTION: Don't you have two basically different kind of cases? One is the Griggs case where you are talking about disparate impact, and the other is the McDonnell-Douglas where you are talking about racially motivated refusal to hire?

MR. KAPLAN: That's right. Now, the court of appeals said this case fell under McDonnell-Douglas. In doing so, it made, I think, two fatal errors, first of all, in saying there was ever a prima facie case of discrimination in the first place. I think what McDonnell-Douglas says is how were similarly situated whites treated? And the answer is

similarly situated whites who appeared at the gate seeking employment --

QUESTION: Blacks?

QUESTION: No, whites.

MR. KAPLAN: No, similarly situated whites. Was there disparate treatment? And the evidence showed that whites appearing at the job site gate did not get jobs. So there was never a prima facie showing of discrimination in that sense. Nor is there a showing of discrimination --

QUESTION: Didn't the court of appeals say that a hiring scheme hiring only employees known to the superintendent was too fraught with potential for discrimination to be permissible?

MR. KAPLAN: It may have been fraught with discrimination --

QUESTION: Did they hold that?

MR. KAPLAN: What they said is that a subjective hiring system lends itself to discrimination. Now, there were two difficulties with that: One, that there is no evidence in this case of discrimination, and the cases of this Court and all the other courts are that you may have a subjective hiring system as long as it doesn't result --

QUESTION: Suppose there had been no petition for certiorari, and you are operating under the court of appeals' judgment and its opinion. Could you have maintained this system

without a list so-called? Could you, after the court of appeals' opinion, just told your superintendent to go ahead and hire but be fair?

MR. KAPLAN: I think our hiring in the first place was fair. The question is whether we would have had to take applications at the gate.

QUESTION: That is what I am asking you, under the court of appeals' opinion.

MR. KAPLAN: Under the court of appeals' decision we would have had to take applications at the gate.

QUESTION: So there is an issue here. You are attacking that, I take it.

MR. KAPLAN: Absolutely. That we did not --

QUESTION: I suppose the other side is defending that.

MR. KAPLAN: That is absolutely correct.

QUESTION: So there must be an issue here, then.

MR. KAPLAN: There is. The question relating prior thereto was to the list, your Honor. There is no showing that if we had hired at the gate that it would have resulted in the same kind of nondiscriminatory hiring we in fact had on this job.

We are talking about the fragmenting of the hiring system. It seems to me that Title VII does not prescribe that there were good hiring systems and bad hiring systems in terms

of the kinds of ways you recruit workers. It doesn't say you have to go to help wanted ads or TV advertising or write letters to every potential applicant. It says whether or not the sources that you choose, the recruitment sources you use, whether or not those are discriminatory or nondiscriminatory, whether or not they have a disparate impact on blacks or any other protected minority.

And the answer in this case is that the selection of recruitment sources that we chose did not have such a disparate impact and that to fragment and parse up the system totally distorts the hiring process.

One of the points also raised in the certiorari petition that I would like to comment on for a moment is the question of whether intent or motive are a necessary element to a prima facie case under McDonnell-Douglas. I believe that such a showing is necessary to show that there is a nexus between the prohibited criteria and the action taken, that there is a nexus between refusing to hire a black and the fact that you are refusing to hire him on that prohibited basis.

I think that the showing of intent and motive are a necessary element of the most analogous statute, which is the National Labor Relations Act.

QUESTION: But obviously in order to prove intent or motive, it's almost inevitably necessary to rely on circumstantial evidence.

MR. KAPLAN: That's right. And what I am suggesting here is the circumstantial evidence in this case completely dispels any notion that persons were not hired because of their skin color. And that evidence against is not only the statistics and the nondiscriminatory sequence of hiring, but also the treatment of blacks on the job. No discriminatory discharges, layoffs, no denial of benefits, nothing of that nature.

QUESTION: Mr. Kaplan, going back to hiring at the gate point, I am just trying to remember, does the evidence tell us when a man applied at the gate, he was told, "We don't take applications at the gate," did the company tell him how he should apply?

MR. KAPLAN: Mr. Dacies, who was the superintendent, didn't talk to anybody at the gate other than Smith. People just went up to the gate and they were in a sense locked out.

QUESTION: Was there any procedure for letting them know who they should write to or anything like that?

MR. KAPLAN: No, for the simple reason we did not take applications from anybody.

QUESTION: Except when Smith showed up, Dacies said, "Smitty" --

MR. KAPLAN: "Go home." It wasn't really an application. He said, "I intend to call you," and the district court credited that testimony.

MR. CHIEF JUSTICE BURGER: Mr. Miner.

ORAL ARGUMENT OF JUDSON H. MINER ON
BEHALF OF RESPONDENTS

MR. MINER: Mr. Chief Justice, may it please the Court: The issue of this all-white list is not a red herring in this case. That is precisely why this lawsuit was brought. This company has for years hired through Mr. Dacies. Mr. Dacies is a white superintendent who has run jobs and worked on jobs. He has worked with whites and blacks, competent whites and competent blacks, since 1958, and he never put a black man on his list. And he used that list not to fill isolated jobs, but to fill, in this instance, 90 percent of the jobs. According to his testimony he used it to fill every job except in those instances where his boss said, "On this job, Mr. Dacies, you must hire some percentage of blacks." In that instance, he went out and recruited some blacks to fill some jobs by alternative methods.

It's not a small, little practice. It is the practice that this man testified he used to fill all the jobs. He testified he could do it that way because he had ample names on his list and that this work was so lucrative that he had no trouble going out and recruiting people to come and work for him.

There are three basic facts in this case. Number one, the plaintiffs in this case are fully qualified and

competent bricklayers. They are men who have worked in this industry from between 18 and 30 years. Consequently, all of the discussion in defendant's briefs about the skills necessary to perform this kind of work doesn't apply to these plaintiffs because they are skilled. They simply want the opportunity to use those skills on jobs run by Furnco.

Secondly, there is not a piece of evidence in this record that a single bricklayer hired on this job was as qualified or more qualified than the blacks who were seeking work at this time.

QUESTION: This isn't a class action.

MR. MINER: No. It is an individual action brought by those blacks who sought to get on this particular job.

And the man selected to run this job was Mr. Dacies. He had unfettered discretion as to who he would hire and how he would hire for all but those limited number of jobs for which he was ordered to hire some number of blacks.

It's apparent from this record that the blacks that were hired come only from two sources: Number one, he called -- he testified that he got on the job and he was told to hire some blacks. He told his boss, "I don't know the telephone numbers of any blacks; therefore I called Mr. Urbanski on another job Furnco was running." Mr. Urbanski said, "I'll see if I have some who can do the work," and Mr. Urbanski subsequently sent him some names.

Now, Mr. Dacies , or Furnco, in their reply brief, tells us that these are examples of people that Dacies knew and that he hired because he knew them, and they give us three examples. They tell us that's Mr. Branch, they tell us that's Mr. Jones, and that's Mr. Smith. As to those three people, the record shows that Mr. Jones testified that he was never called by Dacies. He had a telephone call one night from his superintendent on the other job and they said, "You better get over to the Interlake job tomorrow," and he reported to work the next day. Nobody disputed that testimony. No supervisor of Mr. Jones disputed that testimony.

Mr. Branch isn't a bricklayer. He is what is called a gunite man. There is nothing in the record as to why Mr. Branch was selected to go and perform the gunite work on this job.

As to Mr. Smith, as we will show in our argument, he was not selected with the whites who were on Mr. Dacies' list. Thirty-seven whites who had not sought work on this job were put to work before Mr. Smith.

QUESTION: Is it your position the company must take applications?

MR. MINER: No. It is our position that a company that has -- we cannot look at the application end of it in isolation. A company that has systematically excluded blacks from its primary source of employees must provide some

alternative for minority people to make their credentials known.

QUESTION: So I suppose your answer is at least Furnco must -- after the court of appeals' opinion anyway would be required, and your position is it must take applications.

MR. MINER: Let me just define perhaps at the moment what this hiring at the gate was. When I say take applications, I would say yes, if taking applications means offering some alternative so that minority people can demonstrate that they have all the skills requisite to do this kind of work. That is not to say --

QUESTION: You say that any company that gives its superintendent carte blanche authority to just go out and hire its work force, they tell him, "We need 100 persons, now go out and hire them," and he just hires from people that he knows, it just so happens that he hires 10 Negroes out of 100, you would say that's an invalid system.

MR. MINER: No.

MR. CHIEF JUSTICE BURGER: You can finish your response to that at 1 o'clock.

(Whereupon, at 12 noon, the oral argument in the above-entitled matter was recessed, to reconvene at 1 p.m. the same day.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: You were in the process of responding to Mr. Justice White's question. You may continue.

ORAL ARGUMENT OF JUDSON H. MINER ON BEHALF OF RESPONDENTS (RESUMED)

QUESTION: What was the question?

MR. MINER: I believe the question was whether a company had turned over hiring to a superintendent and he in fact hired in a fair manner that resulted in a 10 percent black labor force, but they didn't accept applications, whether the refusal to take applications was legitimate. I assume the question is that 10 percent is a representative population.

QUESTION: Yes.

MR. MINER: Our position would be no. What makes the refusal to accept applications improper is the fact that the other side of the coin is an intentionally discriminatory mechanism that has historically excluded blacks --

QUESTION: Do you think the court of appeals would agree with your answer?

MR. MINER: Yes, because I think what the court of appeals said is contained on, I think it's page 6 of the appendix. It's in one paragraph. And what that paragraph says is, In light of historical discrimination, in light of historical

unequal treatment of blacks -- and I think they must have meant by Dacies, because that is the only evidence in this record -- a practice is prima facie racial discrimination if it refuses to consider minority job seekers when the alternative is to hire off an all-white discriminatorily created list.

QUESTION: The court of appeals gave this answer 13 years after the enactment of Title VII. Do you think it would be entitled to give the same answer, say, 23 years afterwards?

MR. MINER: If this job had been initiated in 1981, and in 1981 the evidence was that Mr. Dacies had worked from 1958 to 1981 without a single -- with blacks and whites, and his list was all white, and it was in 1981 that his boss said, "Now start hiring blacks."

QUESTION: But he doesn't hire only whites.

MR. MINER: He hired only whites off his list and 90 percent --

QUESTION: But he hired blacks and whites.

MR. MINER: That's right, but there are two segments of this hiring process.

QUESTION: What if he hired whites off his list and blacks off somebody else's list.

MR. MINER: If he had abolished --

QUESTION: Can the whites sue the other fellow?

MR. MINER: You have that case before you right now.

I think there would just be a whole number of factors that go into determining whether the --

QUESTION: Suppose he did hire whites off his list and blacks off somebody else's list?

MR. MINER: If what he had done was either abolish the intentionally discriminatory practice --

QUESTION: Which was what?

MR. MINER: Which was the creation and use for at least 90 percent of the jobs of an all-white list, or he had integrated the pool, in other words, he had created an opportunity for minority people to get their names before him and in some representative number so that indeed he now had a totally integrated and properly constituted pool, then we would have a different case. But we don't have that. What we have is, we have a case where 90 percent of the jobs were filled by the superintendent off his all-white list and 10 percent of the jobs are filled from other superintendents' --

QUESTION: Suppose Dacies has a list of 100 whites and his boss gives him a list of 100 blacks and he says, "We need 100 people, now go out and hire them. Hire the blacks off this list and the whites off that list." And he went ahead and did it.

MR. MINER: If the effect of that was indeed to absolish the practice, was to totally integrate the pool of people from whom the selections were being made, among whom the

selections were being made, you would have a different problem. But that isn't what happened here. What in fact happened was he had an all-white list that was used to fill a significant percentage of the jobs. His boss said, "Fill 10 percent of your jobs with these minority people," so they integrated the work force, but there is no evidence that they integrated in any way the process that went into the filling of those jobs.

QUESTION: How do you reconcile what you are saying now with the figures, the statistical factors in this case? What I hear you saying makes me think I read a different record than the one that I should have read. How about the record in this case of actual hiring?

MR. MINER: The record in this case is that there were three phases of hiring. There was hiring that went on prior to end of September 1971, and in that period of time, according to Mr. Dacies' testimony, he filled 37 --

QUESTION: What about this particular job that we are --

MR. MINER: On this job the first segment, through the end of September, he hires 41 bricklayers. Thirty-seven of them are whites who he called off his list; four of them are blacks who he had come to him through another superintendent Mr. Urbanski. One of them is a brother of one of those fellows. That's the first phase.

Then we get a telephone call from Mr. Wright, his

boss, and he says -- according to Mr. Dacies, Wright called him and said, "There is going to be some allegation or something, and here are six or eight black names." And he hires those people during the second phase.

And then, the third phase of the job, after he hires them, he reverts to his old practice and fills the last seven jobs again off his list and they are all white.

So what I am saying is there is nothing that suggests the practice was either abolished or neutral. We do have through the so-called affirmative action program some blacks being transferred to this job.

QUESTION: You are suggesting, then, that any particular black or indeed all blacks ought to be considered for every particular position.

MR. MINER: I am suggesting that certainly blacks who come to the job site and certainly blacks who worked for Mr. Dacies before and who went to the trouble of coming to the job site to get on should be considered. And I am suggesting that if the alternative to rejecting other blacks from trying to seek out jobs is to revert to this all-white intentionally created list, then they have a claim that they, too, should be considered.

QUESTION: The evidence is that he just had a white list. Is that your basis for saying he was intentionally discriminatory.

MR. MINER: The evidence is that he, since 1958, had worked with competent whites and competent blacks and that he had never put a black man on his list, and in fact we asked him if he ever hired a black man prior to 1969, and he said no. And then there was some question, it got confusing as to whether he had hired -- he claims he hired a black man on a job in 1969, although at that time he had no blacks on his list, so if he did hire him, he would have had to hire him at the gate.

QUESTION: From '58 to '64 he was under no obligation to hire them, was he?

MR. MINER: That's right. We are not suggesting that he was. But he worked with blacks at least on two or three jobs after 1964 and still had never put a competent black man on his list.

QUESTION: Mr. Miner, are you arguing that the process, if discriminatory, is all that one must find regardless of the effect?

MR. MINER: No. I think there has to be an effect, but I think we have effect in this case.

QUESTION: Well, let's assume that instead of ending up with 13-1/2 percent black, the contractor had said, "I want at least 50 percent black. Mr. Superintendent, you go ahead and recruit your force any way you think best so long as you meet that standard." If he had met it in this case with, say,

50-50 in terms of racial proportion with a labor market at a figure of what, 10 percent? So you obviously had an effect that was very favorable. Would you say that was all right or not?

MR. MINER: Well, there are two relative analyses. One is under McDonnell-Douglas. We are not looking at actual effect; we are looking at whether there was some unequal treatment. I would say that if an employer had a device that was intentionally discriminatory and it excluded qualified blacks from 50 percent of the jobs, its use for 50 percent of the jobs is still discriminatory as to blacks who are seeking those jobs. Now, if in fact no blacks are available and if in fact what happened was that they had to go out and recruit to fill all the jobs, then we would have a different story. But if in fact they needed 100 people and 100 blacks came and applied and they were all qualified and they hired 50 percent of them because they were told to have 50 percent blacks, but they excluded the other 50 percent because their hiring mechanism excluded blacks, then those 50 percent who were excluded would have a claim.

QUESTION: Even though 300 very highly qualified white applicants had also applied?

MR. MINER: Well, I was assuming we were talking about --

QUESTION: You were assuming just all black

applicants.

MR. MINER: If there are white applicants, there becomes a question as to the facts of that particular case, what is the percentage of blacks and whites, and what evidence is there that the intentionally discriminatory device is excluding the blacks, is keeping the blacks off the job site.

QUESTION: Are these figures that your friend gave us erroneous? Did he give us some wrong figures here today in his oral argument?

MR. MINER: Well, the figures, in terms of the number of people on the job during the first phase of the job, the number of blacks hired was approximately 10 percent. There is a dispute as to what the relevant labor market is. The trial court had not permitted us to offer evidence as to what we thought the relevant labor market was, which was made up of the particular bricklayers union.

QUESTION: What are the findings of the district court in that respect?

MR. MINER: The district court adopted data that was introduced by the defendants after he had rejected our data as to what the racial composition of the union that was responsible for that jurisdiction was.

QUESTION: Do we have to accept the findings of the district court, or did you bring it as an issue here?

MR. MINER: Pardon?

QUESTION: Did you bring that issue here?

MR. MINER: The court of appeals held that the judge abused his discretion in refusing to consider our evidence, and therefore in effect set it aside. But those statistics were not pertinent to their analysis. And the reason for that was that the Seventh Circuit applied a strict McDonnell-Douglas analysis, and as this Court has said, in a McDonnell-Douglas case statistics aren't controlling, they may be relevant, but the question was Dacies' motive, why was Dacies' list all white and why did Dacies' fill 90 percent of those jobs off his own white list even though during that period Mr. Smith was there who he has worked with on four separate occasions, he knows to be fully qualified, other blacks are there seeking work, and he doesn't hire them, he hires 37 whites after Mr. Smith has come to the job site, and those 37 were all on his list and none of them had sought work. And the statistics of Furnco's hiring as a result of order from the boss doesn't tell us anything about Dacies' motive.

Another thing that tells us about Dacies' motive is Dacies' conduct at the job site. The evidence there is that he was evasive to the blacks who came. He told blacks that he wasn't hiring when he was hiring. He never told a single black that this was not the way --

QUESTION: As I understand it, your colleague on the other side seemed to concede that if Dacies had said to

one of these fellows, "I am just not ready to hire you yet. I'm just not hiring blacks. I just don't want to hire any blacks right now," and turned these people away and went ahead and hired whites, that kind of intentional discrimination wouldn't be cured by any kind of proportional hiring. Do you understand that?

MR. MINER: That's right.

QUESTION: So is this just an argument then over whether there is a justifiable inference of an intentional discrimination in the case?

MR. MINER: I don't think there is any dispute over -- I don't think there is much room for dispute over the inference. The fact is that the man, to the extent that he had --

QUESTION: What did the district court find?

MR. MINER: Pardon?

QUESTION: Did the district court find --

MR. MINER: The district court makes no findings about the existence of the list. The district court makes no findings about any of the elements of the hiring practice. The district court focuses just on the refusal to hire at the gate and then makes some conclusory findings --

QUESTION: Did it find there was no intentional discrimination?

MR. MINER: I think that the district court's findings

simply said that the practice was nondiscriminatory and was necessary, without getting into any of the elements, the subsidiary facts that went into the whole hiring practice. That was glossed over by the trial court, and that's where the Seventh Circuit differed. The Seventh Circuit went to the specific facts that related to the hiring practice and these facts were uncontroverted and were all in the record and were not dealt with in the trial, and based on those uncontradicted facts, they concluded that the real problem was not the no hiring at the gate, but in fact no hiring at the gate was just the other side of the coin of the use of the all-white list, and that in 90 percent of the cases blacks were turned away in favor of whites who were on this list because for 20 years this man had never put a black bricklayer on his list.

QUESTION: Did the court of appeals itself make the specific finding that Dacies' refusal to hire blacks was racially motivated?

MR. MINER: I think they did. I think what the Seventh Circuit --

QUESTION: That shouldn't be a think question.

MR. MINER: In light of the historical discrimination, what they must mean in that is Dacies because it's Dacies that all the focus is on. They don't, in their opinion, say in light of Dacies' intention, there was discrimination. But they do talk about in light of the historical discrimination,

the refusal to consider these people at the job site,when the alternative is to hire from an all-white list,is discriminatory. Now, I think we are going to read that as referring to Mr. Dacies, and I would interpret it to say, yes, their practice is intentional discrimination.

QUESTION: Mr. Miner, the district court -- and I am looking at finding No. 15, on page A18 -- that Furnco's hiring policies and practices -- and I skip a few words here, this is A18 -- were neutral -- and I again skip part of it. "There is no evidence that these policies and practices either were a pretext to exclude Negro bricklayers or had a disproportionate impact or effect on Negro bricklayers."

Now, did the court of appeals conclude and state that there was no substantial evidence to support those factual findings?

MR. MINER: What the Seventh Circuit said was that those findings don't deal with the subsidiary facts that went into the explanation of how that hiring practice worked. And looking at those facts, it explained the intricacies of the hiring practice, which the Seventh Circuit found to be perfectly clear. The Seventh Circuit said that they were discriminatory, that they were not job related and that they did indeed exclude blacks from every job filled off that list.

QUESTION: Was there any specific finding by the court of appeals that the findings of fact by the district

court were not supported by evidence?

MR. MINER: No. The Seventh Circuit goes off on other facts. It says these are the relevant facts to the proper analysis of this case. This is what the plaintiff has been focusing on from day one, and these facts are undisputed. And the district court never deals with those facts.

The district court's facts -- and we spell this out in our brief -- I think are certainly suspect. The problem with these facts, there are findings in there that we argued were clearly erroneous. They don't become relevant to the Seventh Circuit's analysis of the case, but the judge says that the practice in the industry were such. The judge objected himself and excluded evidence throughout the trial as to what the practice of the industry was. He makes a finding that Dacies' practice is efficient and effective. The only question in the whole trial was a question by me to Mr. Dacies: Do you have any reason to believe that your practice is more efficient or more effective than a neighbor practice? And the judge objected for the defendant and he didn't answer the question. And then the judge in his findings had a finding that Dacies' practice is more efficient and more effective than any other practice.

So I think in fact there is some question as to whether those findings deserve the traditional weight. But the Seventh Circuit did not get to that point because in

light of their analysis of the problem, they didn't have to reverse any of the judge's findings of fact. They were able to base it exclusively on uncontradicted facts that were in the record that explained in detail the hiring practices of this company.

QUESTION: But a moment ago you said the court of appeals at least inferentially found that Dacies' refusal to employ was racially motivated.

MR. MINER: That's correct.

QUESTION: And here my brother Powell has pointed out your finding by the district court that it was not racially motivated, so the court of appeals did have to upset that finding of the district court in order to justify your argument.

MR. MINER: I guess that's right. There is a conflict there and I think that simply goes out from the fact that the district court just did not weigh any of the facts that led to the conclusion that there was a basis for discrimination, which is the creation and the use of this list.

QUESTION: It seems to be quite crucial to your position that there is something wrong and illegal about not hiring at the gate.

MR. MINER: If the other side of the coin is to fill either all jobs off an intentionally discriminatory device

or certainly the majority of those jobs when other jobs were merely filled because the boss says get a certain number of blacks in a certain number of these jobs.

QUESTION: That brings us back to the objective evidence again on the statistics, doesn't it? You certainly have to put those two things together.

MR. MINER: I don't think so because the question then is there are two people doing the hiring. There is Mr. Dacies who is hiring 90 percent of the people off his list and there is his boss who is in effect transferring some number of blacks to the job site. Now, the overall statistics may very well tell us a lot about what Furnco's ultimate goals are, but they don't tell us anything about Dacies'. They don't tell us anything about why Dacies met Mr. Smith at the job site on the day when this job was starting and he is under directions to get 16 percent blacks and he doesn't hire Mr. Smith and he doesn't ask Mr. Smith, "Who are these other blacks around here, are they competent bricklayers? I am supposed to find black bricklayers." We asked him why he didn't, and he said, "I don't hire at the gate." That's not a sincere answer to the problem.

QUESTION: Well, it was true and a matter of fact. There was no hiring at the gate of blacks or whites.

MR. MINER: But he knew Smith and he knew Smith's qualifications.

QUESTION: And Smith was hired.

MR. MINER: But not until after --

QUESTION: But not at the gate.

MR. MINER: That's right. And also --

QUESTION: There were whites, too, but he certainly didn't hire them at the gate. He knew a lot of whites he didn't hire at the gate.

QUESTION: Right.

MR. MINER: I would submit there is no evidence in this record that whites came to the gate. The evidence in this record is that historically this is the way blacks have gotten work in this industry. They have gone from job site to job site. The no-hiring-at-the-gate policy is Dacies'. It is not Furnco's. Every black in this record, every black who testified at this trial who had worked the firebrick industry had only gotten a job because he had gone to a job site and he was hired then. Not one black before this trial had ever received a telephone call from a superintendent saying, "Come on out, Mr. Smith, or Mr. Samuels, I've got a job for you." That's how blacks got jobs. It was Dacies who imposed as an absolute policy the refusal to consider people at the gate. And the alternative for him in filling 90 percent of the jobs was his all-white list.

QUESTION: But Dacies isn't the defendant here; Furnco is.

MR. MINER: Well, Dacies is their agent who was given responsibility.

QUESTION: We are talking about the overall hiring by Furnco.

MR. MINER: We parsed out and focused on Dacies because that is the way their hiring operation was handled.

QUESTION: Part of it. Part of it was from Dacies' list and part of it was from some other source.

MR. MINER: And our contention is so long as Dacies' portion is intentionally discriminatory and excludes all blacks --

QUESTION: When Dacies does it, it's Furnco's action, is it not?

MR. MINER: I think so.

QUESTION: Why this separation of Dacies and Furnco? It's all Furnco, isn't it, no matter who does it. If you had 10 different men doing the hiring, if they are all agents and servants of Furnco, why is that relevant at all?

MR. MINER: Because I think --

QUESTION: You may be showing that Mr. Dacies has some wrong attitudes, but Furnco is the party in interest here.

MR. MINER: But Furnco adopts those attitudes because it's Furnco whose vice president never really supervised this, never made any inquiry as to how Dacies was hiring. They testified they had no mechanism for determining

whether in fact Dacies was relying primarily on whites or whether Dacies' primary practices would lead naturally to an integrated work force. They had given him his head and he had basically unfettered discretion to hire who he wanted to, and consequently I think they are responsible for his actions.

Now, in the case of Smith, we submitted that there was a clear instance of intentional discrimination because he had worked for Dacies. The primary argument of the defendant is that exclusion from the list was not discriminatory as to Mr. Smith. He was not part of the so-called Batiste litigation, the settlement litigation that was going on, and in fact while he wasn't on the list, he was in Mr. Dacies' head.

The fact is, number one, that is factually wrong. Mr. Smith was part of the Batiste settlement negotiation and that is spelled out in detail in an affidavit that is part of the record in a motion in limiting in which plaintiff's counsel, a Mr. Grick, spells out that the settlement negotiations are not limited to the Batiste case but involved a case called Corcoran v. Furnco, and Smith is a party to that litigation, and Smith was involved in those settlement negotiations, and Smith's name does not come to Dacies until precisely the same time that Wright calls Mr. Dacies and says, "We should hire six or eight people."

Furthermore, it is absolutely clear from this record that by not being on the list, Smith had a handicap. He was

not going to be considered; 37 whites were considered, and the only thing they had different from him was that they were on the list. They had never sought to get work. Mr. Smith had sought to get work.

It seems to me that the burden was theirs to show that even if he had been on the list he wouldn't have been hired any earlier. And they certainly couldn't have established that because at the time he was applying and making himself available, they were looking for bricklayers and hired 41 after he first made himself available, and they were told to get 16 percent blacks. So I think the only conclusion to draw is that if he had been on the list, he would have been hired earlier.

The second question --

QUESTION: Where did this 16 percent come from?

MR. MINER: The general manager testified that he called Mr. --

QUESTION: It doesn't say where he got it from either.

MR. MINER: No. Just the number that --

QUESTION: It came out of the air.

MR. MINER: It came out of the air.

The second question is how the use of that list affects someone like Mr. Nemhard.

QUESTION: How about Samuels?

MR. MINER: We think Mr. Samuels was at that job.

We think that the evidence in this case was that Samuels worked at the U.S. Steel South Works job. Mr. Dacies worked at the U.S. Steel South Works job. Mr. Dacies takes credit for having worked on that job when several blacks were there. Mr. Samuels was one of the first blacks hired on that job. Mr. Samuels says, "I didn't work for Mr. Dacies," when he was asked that question. It turns out that in fact he was hired by Mr. Larkin. He worked for Mr. Larkin. But to clarify that I asked Mr. Dacies, "Name the blacks who were on that job when you were there," and opposing counsel objected. And now they say, "Had we not objected and had we let him answer that question, he would have said, no, he would not have named Samuels," and they point to some interrogatories, "But you are not in the record."

So I would say that based on the evidence we have, Samuels was on that job. Dacies says there were several blacks there. Samuels was one of the first. It's more likely than not that they were there together. But the trial court made no finding on that important question, and I don't think that the evidence in the interrogatories disputes it, particularly in light of their objection to my question.

QUESTION: Does Samuels' case depend on whether or not he was?

MR. MINER: No. Even if he was not in Smith's class, he is in the same position as Nemhard. As to Nemhard, we would

submit that the intentional discrimination still excluded him from the job, and the analysis goes something like this:

Mr. Dacies created an all-white list during the period prior to this job. His intention in creating that list was not limited to excluding the Smiths and people he worked with in the past. His intention is just as much to have an all-white list to use in the future and therefore to exclude those blacks who will come down the road in the future for jobs that he is looking at. Consequently when he applies that list to a black who is coming down in the future, that is a factor in the decision of the use of that list vis-a-vis that black.

Furthermore, the other side of the coin, once -- as this Court says in Keyes, when you had intentional discrimination as to one side of a practice, you have to infer discrimination as to the other side of the practice. The other side of the practice is the no hiring at the gate. And the inference that that is intentionally discriminatory is fully buttressed by Mr. Dacies' treatment of the blacks who came to the job site, his deceptive treatment of them, his refusal to tell them how they can go about getting a job. He almost runs Mr. Nemhard over with his car. Smith testifies at a later date that he had a conversation with Dacies in which Dacies said, "If you hadn't been with those other guys, I would have hired you." This is certainly not consistent with an attitude of a man who

is out to offer a new equal opportunity to blacks looking for work.

MR. CHIEF JUSTICE BURGER: Mr. Kaplan, do you have anything further?

REBUTTAL ARGUMENT OF JOEL H. KAPLAN

ON BEHALF OF PETITIONER

MR. KAPLAN: I have a few points to make, your Honor.

First of all, in response to Mr. Justice Rehnquist, the Seventh Circuit deals at A7 of the appendix to the petition for certiorari, it says, "The historical inequality of treatment of black workers seems to establish there is prima facie racial discrimination," et cetera. No reference to Dacies' list, no reference to any overturning of the district court's finding that there was no pretext, no intentional discrimination. Number one.

Number two --

QUESTION: Mr. Kaplan, you say no reference to the list? That very sentence --

MR. KAPLAN: No, no. No reference that there was any intentional discrimination going on. In regard to Dacies what they seem to be concerned about is societal discrimination against black workers. That's how I read the sentence, your Honor.

QUESTION: But the sentence is dealing specifically

with Furnco rather than with society at large.

MR. KAPLAN: No, I don't think so. I don't think it applies to black job seekers on this job. And it says, "How else will qualified black applicants be able to overcome the racial imbalance in a particular craft, itself the result of past discrimination?" That is not related to Furnco.

QUESTION: But the part of the sentence you left out was, "It is prima facie racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers." That's talking about Furnco.

MR. KAPLAN: Yes, but that based on historical inequality --

QUESTION: Is that the history of the industry as a whole or Furnco?

MR. KAPLAN: That's what I assume it is, and there is no evidence in the record about the histroy of the industry as a whole.

QUESTION: But there is evidence in the record about an approved list containing names of white bricklayers that Furnco had.

MR. KAPLAN: That is true, that Mr. Dacies had.

Second point. The evidence as to the U.S. Steel job, Mr. Smith was specifically recruited, didn't have to go to the gate to be hired, he was specifically recruited. On

page 5 of our reply brief:

"Q. So Mr. Larkin -- who was the assistant superintendent -- had in fact specifically sought you out because you had worked for him before?

"A. Yes," from Mr. Smith.

I think the briefs satisfied my concerns that this Court be fully apprised of the record.

The point I want to come back to is how should Furnco have hired on this job. The EEOC and the U.S. Government concede that our hiring system was legitimate and nondiscriminatory. The district court had found beyond a reasonable doubt that our hiring system was legitimate and nondiscriminatory, that it met Furnco's business need as well as not discriminating against blacks.

There is no evidence in the record that the system found "feasible" by the Seventh Circuit would have met our business needs and have led to as many blacks being hired. Indeed, the vice of the Furnco hiring system, the Seventh Circuit said, was that it was subjective, that somehow the job superintendent was making subjective judgments. But the vice of the Seventh Circuit system is that it is equally subjective. Indeed, it's even more subjective than our system. Our system was premised upon knowledge of persons' ability to do this very specialized skill. It wasn't premised upon what strangers had to say in terms of recommendations.

I would like to make one last point. There is no evidence in the record that Furnco had ever engaged in any discrimination prior to this job. There is no finding of any court, administrative agency that has been upheld that Furnco had discriminated against. The accusation is totally false. And given the backdrop of no discrimination and the statistics on this job and the legitimacy of the hiring system in terms of meeting our business needs, I don't believe there was any racial discrimination in this case, and I respectfully request that you reverse the court of appeals as to those three respondents.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:31 p.m., the oral arguments in the above-entitled matter were concluded.)