ORIGINAL

In the

Supreme Court of the United States

NEW YORK CITY TRANSIT AUTHORITY, ET AL.,	)	
PETITIONERS,	)	No. 77-1427
V.	)	
CARL A. BEAZER, ET AL.,	)	
RESPONDENTS.	)	

Washington, D. C.
December 6, 1978

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NEW YORK CITY TRANSIT AUTHORITY, et al., Petitioners, v. CARL A. BEAZER, et al., Respondents.	No. 77-1427

Washington, D. C.,

Wednesday, December 6, 1978.

The above-entitled matter came on for argument at 11:35 o'clock, a.m.

BEFORE:

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

APPEARANCES:

MISS JOAN OFFNER, ESQ., 370 Jay Street, Brooklyn, New York 11201; on behalf of the Petitioners.

MRS. DEBORAH M. GREENBERG, ESQ., Legal Action Center, 19 West 44th Street, New York, New York 10036; on behalf of the Respondents.

C O N T E N T S

[Afternoon Session - pg. 20.]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in New York City Transit against Beazer.

I think we'll defer a moment until two of our colleagues get back, Miss Offner. Three -- three colleagues.

[Discussion off the record.]

MR. CHIEF JUSTICE BURGER: Well, I think we will proceed whenever you're ready, Miss Offner.

ORAL ARGUMENT OF MISS JOAN OFFNER, ESQ.,

ON BEHALF OF THE PETITIONERS

MISS OFFNER: Thank you. Mr. Chief Justice, and may it please the Court:

This case involves a challenge to an employment policy of the New York City Transit Authority which excludes from employment heroin addicts participating in methadone maintenance programs.

The district court found this policy to be an unconstitutional denial of equal protection of the law to methadone patients, and found further that the policy had a disparate impact on blacks and Hispanics, in violation of Title VII of the Civil Rights Act of 1964, as amended in 1972 to apply to government agencies.

The Second Circuit affirmed the finding of unconstitutionality and declined to rule on the Title VII question, finding it unnecessary to do so.

Both the constitutional question and the Title VII question are before the Court today.

I propose to address myself first to the equal protection issue.

QUESTION: Well, it's conceivable, is it not, that if we were to decide that the Court of Appeals had been incorrect on the constitutional issue, we would not decide the Title VII issue ourselves, but send that back?

MISS OFFNER: Send the Title VII question back?

QUESTION: Yes.

QUESTION: Under the new statute.

MISS OFFNER: To the Circuit Court?

QUESTION: Yes.

MISS OFFNER: That could be done. That could be done, Your Honor.

QUESTION: But didn't the Circuit Court say there was a violation of Title VII?

MISS OFFNER: No, the Circuit Court did not. What happened in this case, Mr. Justice White, is that --

QUESTION: Well, they did for the purposes of attorney's fees, didn't they?

MISS OFFNER: The district court found a Title VII violation for the purpose of awarding attorney's fees.

QUESTION: Yes.

MISS OFFNER: At that time the Civil Rights

Attorney's Fees Awards Act of 1976 had not yet been enacted.

QUESTION: Oh, yes.

MISS OFFNER: During the pendency of the appeal it was enacted and therefore the Circuit Court found it unnecessary to consider the Title VII question.

QUESTION: Well, did the -- did either court or anybody suggest why the constitutional issue was reached without deciding the statutory issue?

MISS OFFNER: No, as a matter of fact I think it went just the other way in the district. The district court found the equal protection violation and said it was therefore unnecessary to deal with the Title VII question.

QUESTION: Well, do you see anything odd about that?

MISS OFFNER: Do I see anything odd about it? I certainly do. But that is the way the original district court decision went.

QUESTION: And the Court of Appeals apparently didn't find anything wrong with that, either?

MISS OFFNER: Apparently they did not. That is expressly stated in the district court's decision. They said, toward the end of their decision, that having found an equal protection violation, there was no need to deal with the Title VII question.

The group that we are dealing with in this case, in terms of the equal protection issue, consists of heroin

addicts who are participating in methadone maintenance programs. It is the contention of the respondents that this group is entitled to equal consideration for jobs to the same extent as the non-addict job applicant.

QUESTION: For all jobs?

MISS OFFNER: For all jobs.

Well, let me qualify that. To the extent that the district court established narrower boundaries for consideration of these people for jobs, there is that limitation. The district court said that in certain, what they regarded as safety-sensitive positions, it would not be necessary.

QUESTION: Yes, the district court opinion would not let a drug addict run one of these subway cars.

MISS OFFNER: Well, the district court specified motorman, conductor, bus operator, and positions dealing with power equipment.

I suggest, however, Mr. Chief Justice, that the district court exceeded its boundaries in reaching that decision. In the first place, the district court had to make a finding of unconstitutionality in order to reach the point of addressing itself to what ought to be a rational policy for the Transit Authority.

The Transit Authority's contention is that its policy has a rational relationship to a legitimate need, and that the Constitution does not impose on employers an

obligation to participate in what amounts to a sociological experiment.

The Transit Authority's refusal to employ methadone patients is based on a variety of considerations, all of which are supported by the record in this case. In the first place, the Authority is involved in a very difficult and demanding job of providing subway and bus transportation to the people of the City of New York on a vast scale, transporting something like two billion passengers over the course of a year.

It is our considered view that the responsibilities involved in that operation require us to employ people in all job categories who meet at least reasonable standards of the liability and stability. And those considerations, taken together with the uncertainties and the failures of methadone treatment and the difficulties of determining the employability of methadone patients, form the basis and the underpinning for the Authority's policy.

And I think it's appropriate to note in this connection that this Court, in Marshall v. United States, expressed the very same concerns about the state of drug rehabilitation programs, the validity, the uncertainty; and, interestingly enough, Marshall v. United States was decided in the very same year as the trial that was conducted in this case, 1974.

The record in this case contains the testimony of a number of medical experts, most of whom were proponents of methadone maintenance. At the same time that they were extolling the virtues of methadone maintenance as a treatment for heroin addiction. They nevertheless were constrained to admit that there was, and is, substantial drug and alcohol abuse among methadone patients. They testified to the disruptive behavior of methadone patients at the clinics, to the black market that exists in methadone with patients selling their take-home doses on the street, and, most importantly, the issue in this case, they testified to the fact that methadone as a treatment for heroin addiction works sometimes.

Indeed, one of the respondents --

QUESTION: Works sometimes what?

MISS OFFNER: Sometimes, for some heroin addicts. It works for some heroin addicts. It stabilizes some of them.

QUESTION: Miss Offner, before you get too deep into your argument, I'd like to ask you a question about the precise class we're talking about.

MISS OFFNER: Yes.

QUESTION: As I understand the Transit Authority's rule, it's Rule 11(b) that is challenged --

MISS OFFNER: Yes.

QUESTION: -- as being an improper classification,

and that talks about people who are using drugs in one form or another, and the challenge is that you treat methadone as a drug.

MISS OFFNER: Correct.

QUESTION: And you say that's right. Now, what is the state of the record with respect to persons who formerly used methadone but do not now take any drugs at all, say, someone who had gone on rehabilitation program and claimed he was cured? Is the record clear on what the Transit Authority's policy is there?

MISS OFFNER: There was very little attention paid during the course of the trial to people who detoxified from methadone. In other words, people who were totally drug-free.

The Transit Authority's Executive Officer for Labor Relations testified that the Transit Authority indeed will categorically exclude from employment current methadone users --

QUESTION: Right.

MISS OFFNER: -- and people who are relatively recent methadone users. But that the Authority would give individual consideration to people who have been totally drug-free for a period of at least five years, and can demonstrate that they are maintaining a stable existence in terms of jobs, in terms of family life, in terms of their social obligations.

The district court's opinion in two places that I

can recall indicated that they were sure that the Transit Authority's policy extends as far back as relatively recent methadone users, but that it was not clear as to what the policy was with regard to people who were totally drug-free for a substantial period of time.

Now, it is our contention that the record is clear, because we have the testimony, uncontroverted testimony of our Executive Officer with regard to that policy.

QUESTION: So your view would be that there is no absolute exclusion of those persons who have been free for four or five years?

MISS OFFNER: Correct.

QUESTION: And certainly the language of 11(b) itself would be consistent with your information, your position?

MISS OFFNER: That is correct, Mr. Justice Stevens.

QUESTION: Three of the four members of the class were presently participating in methadone, were they not?

MISS OFFNER: Yes. That is right.

In terms of the usefulness of methadone as a treatment for heroin addiction for the class as a whole, I think it's very interesting to note the testimony of one of respondents' own medical experts, who testified that out of the 600 patients in his clinic only 10 had achieved a sufficient level of stability at the end of two years in

treatment to qualify for reduction of their mandatory clinic visits, down to twice a week.

QUESTION: In how many years?

MISS OFFNER: Two years in treatment.

There was also conflicting testimony from the various experts as to the relative merits of high-dose methadone programs as opposed to low-dose methadone programs, and with regard to methadone programs as such compared with detoxification programs.

There has obviously not been any unanimity among the medical experts as to what constitutes an effective tool for dealing with heroin addiction.

QUESTION: Miss Offner, if this were a diversity case, where the issue had been whether or not methadone participants can be satisfactory employees, and the district court had heard the evidence it did and made the findings it did, would you say that a successful argument could be made to a Court of Appeals that its findings were clearly erroneous?

MISS OFFNER: That is not my contention, Justice Rehnquist.

QUESTION: You don't have to go --

MISS OFFNER: Excuse me?

QUESTION: You don't have to go that far yet, do you?

MISS OFFNER: No, I don't go that far. The essence

of my argument with regard to what the district court did here is that the district court misunderstood the rational basis test.

For the most part I am not challenging what the district court found. They found no more than that "substantial numbers of heroin addicts are helped to a stable condition by methadone."

The essence of my argument is that that is not enough to establish a finding of unconstitutionality under a proper application of the rational basis test.

The uncertainties of methadone treatment are compounded by the difficulty of ascertaining the employability of individual methadone patients. The experts were generally in agreement that when a methadone patient applies for a job he presents a special problem to the employer, and that the employer needs some assistance in evaluating this individual. The question is where that assistance is to come from.

A number of the experts were frankly skeptical about the validity and usefulness of information that the employer might obtain from the personnel at the methadone clinic. On the average there is one doctor for every 200 methadone patients at a public methadone clinic. So that, by and large, evaluation of the patient's progress in treatment is coming from nonprofessional counselor personnel of the methadone

clinic who, as the experts indicated, vary considerably in their competence and in their reliability.

This problem is further compounded by federal confidentiality regulations, which provide that even if there is consent by the patient, the methadone clinic cannot disclose information, specific information, about a patient's condition to an employer unless the employer makes a commitment that he will not, or that it will not use the information adversely to the patient's interest.

It is almost a Catch-22 situation, where the employer will not be given specific information about the patient unless the employer makes a commitment not to use the information. The idea is that the employer is supposed to use information to make an effort to rehabilitate the patient, which is all well and good, but the employer, as we see it, has other obligations, and that is to keep the subway system running.

The classification in this case does not involve any fundamental interest as that term has been defined by this Court, nor does it involve any suspect category as enumerated by the Court: race, national origin, alienage in some instances as well. Nor does it involve immutable characteristics of birth, such as those inherent in sex classification and classifications of illegitimacy.

The group characteristic in this case consists of a self-inflicted heroin addiction and methadone maintenance,

and that being so, there is no dispute among the parties that the proper test to be applied in this equal protection analysis is the rational basis standard.

That standard, as clarified by this Court in recent years, gives to the Transit Authority's policy a presumption of validity, does not require individualized consideration, approves the use of broad classifications, as long as those classifications are rationally related to legitimate objectives.

Contrasted with that standard, of course, is the strict scrutiny standard in which there is not a presumption of legitimacy, in which broad classifications are not acceptable, and in which the government classification must be shown to be based on a compelling need.

What happened in this case was that both the district court and the circuit court thought they were applying, or intended to apply, rational basis standards, but took their instruction from cases that dealt with the strict scrutiny standard; specifically Sugarman v. Dougall and LaFleur v. Cleveland School Board.

As a result, they misunderstood the rational basis standard and, in effect, viewed the evidence in this case through the wrong end of the telescope. They focused their attention on the minority of methadone patients who become stabilized, and did not deal with the fact that the majority

of methadone patients do not become stabilized.

Influenced by the strict scrutiny standard, both of the lower courts decided that the Transit Authority policy was overly broad, and that the equal protection clause required a more individualized approach.

We submit that under a proper rational basis analysis the operative fact in this case is not that some methadone patients may become employable, but that most of them do not. And added to that, of course, is the difficulty of determining employability in individual situations.

We submit, therefore, that there is ample evidence to support the policy of the Transit Authority and the absence of the invidious discrimination necessary for a finding of unconstitutionality under the equal protection clause.

I would like to turn now to the Title VII question.

Several months after finding an equal protection violation, the district court rendered a supplemental decision in which it found that the policy of the Authority had a disparate impact on blacks and Hispanics and therefore violated Title VII of the Civil Rights Act.

I submit to this Court that the district court decision totally distorts the concept of disparate impact, as established in Griggs v. Duke Power, and as carried forward in Albemarle v. Moody and, most recently I think, in Dothard v. Rawlinson.

QUESTION: May I ask, Miss Offner -- I am correct, am I not, in my understanding that the Court of Appeals didn't reach the Title VII issue?

MISS OFFNER: Did not reach the Title VII issue, yes.

QUESTION: And since it didn't do so, how or why is that issue now before us?

MISS OFFNER: It was one of the questions that I posed in the petition for cert, Mr. Justice Stewart, and cert was granted on that issue.

QUESTION: In other words, it was a question wholly undecided by the Court of Appeals, whose judgment we are now reviewing, isn't it?

MISS OFFNER: That is quite true. Nevertheless, as I say, it was one of the two questions on which this Court granted certiorari.

QUESTION: All right.

QUESTION: That would not be uncommon, perhaps, with a view to keeping the matter before the Court, or possible remand for consideration by it if there were no other basis of disposition?

MISS OFFNER: I do not disagree with the Chief Justice.

QUESTION: Miss Offner, are you going to address the argument of the effect of the Rehabilitation Act?

MISS OFFNER: Yes. I do intend to do that.

I would just like to say very briefly on the Title VII question that, as I understand the disparate impact cases which this Court has decided, each of those cases involved an actual absence, significant absence of minorities from the particular employer's work force. And that absence existing, the Court then looked to the particular challenged employment policy, to determine whether that policy was where the fault lay.

In our case, no such absence exists. In fact, the Transit Authority's employment pattern includes 46 percent blacks and Hispanics, against a profile in the relevant labor pool of 20 percent blacks and Hispanics. And so we have more than double the percentage of minorities in the Authority's work force than are represented in the Metropolitan Area work force.

The respondents have suggested that this Court should dismiss this case on the basis of a newly enacted amendment to the Rehabilitation Act. This new amendment provides in general terms for inclusion of rehabilitated drug addicts and alcoholics as handicapped persons under the Rehabilitation Act.

The amendment does not expressly apply to methadone patients, and it is our contention that any attempt to include methadone patients within the category of protected persons would be certain to result in litigation.

As a practical matter, what the respondents are asking this Court to do is to interpret the scope of this new statute, which has not yet begun to be implemented, and apply it retroactively to the Transit Authority. They are asking the Court to sanction the enormous equitable and monetary liability imposed on the Transit Authority in this case on the basis of a statute which was not enacted until four years after the trial of this action, and, as I say, which has not yet even begun to be implemented.

Finally, and perhaps most important, they are asking this Court to interpret the scope of this new statute and to establish a precedent in this case which will undoubtedly have a compelling influence on the shape of any future litigation under the Rehabilitation Act.

QUESTION: There were judgments for back pay here?

MISS OFFNER: There are judgments for back pay for the members of the class. There is a very substantial attorney's fee award. And there is very extensive equitable relief demanded of us in terms of evaluating and hiring anybody who was turned down in the past by reason of being a methadone patient.

QUESTION: Miss Offner, I gather that you do not concede, far from it, that the statute, even as amended this past October, requires you to hire these people?

MISS OFFNER: That is exactly right, Mr. Justice

Stewart. That is our position, yes.

And we do believe that this is not a proper case for interpretation of that provision, and that the Court should decline to interpret it until a proper case is presented on a full record.

I would like to reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

We'll resume at this point at one o'clock.

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

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mrs. Greenberg, I think you may proceed.

ORAL ARGUMENT OF MRS. DEBORAH M. GREENBERG, ESQ.,

ON BEHALF OF THE RESPONDENTS

MRS. GREENBERG: Mr. Chief Justice and may it please the Court:

I would first like to respond to a question asked of counsel for petitioners about the propriety of the lower courts having addressed the constitutional issue before the Title VII issue.

It may be that the Title VII issue, that Title VII would not provide full relief to all members of the class, some of whom are white. However, if this Court should hold that the Transit Authority's policy does violate Title VII, there's no decision of this Court which forecloses its ordering equitable relief, including back pay and seniority credit.

QUESTION: But isn't it possible that the district court thought that it might as well reach the equal protection issue first, because the Title VII issue also had a constitutional issue in it?

MRS. GREENBERG: I don't know why the district court decided that.

QUESTION: Yes. But there was, wasn't there?

MRS. GREENBERG: Yes, sir.

QUESTION: And furthermore, the constitutional issue in the Title VII question involved the constitutionality of an Act of Congress.

MRS. GREENBERG: Yes, Your Honor.

QUESTION: But, in any event, that's a possible.

MRS. GREENBERG: I was just trying to recall whether the Transit Authority raised the constitutional issue relating to Title VII at the time that --

QUESTION: Well, it certainly had by the time the district court ruled.

MRS. GREENBERG: Yes, it had, at that time.

QUESTION: Yes.

MRS. GREENBERG: Counsel for petitioners has overdrawn the scope of respondents' argument and of the decisions of the courts below. We are not concerned with some abstract question of whether there would ever be a rational basis for discriminating against methadone patients.

The narrow constitutional issue before the Court is whether the Transit Authority's unwritten rule of flatly excluding successful methadone patients, the overwhelming majority of whom are fully employable, from even consideration for any of its 47,000 jobs, while giving individualized consideration to every other applicant.

Whether this constitutes a denial of equal protection --

QUESTION: Mrs. Greenberg, you lay some stress on the fact that the rule is unwritten. Do you feel that helps you or hinders you or is a neutral fact?

MRS. GREENBERG: I think it helps us in the sense that it goes to the degree of deference which this Court should afford to the Transit Authority's rule.

QUESTION: Haven't we said that a municipal corporation's rule, when it's challenged constitutionally, is just as if the New York Legislature had enacted a statute to that effect?

MRS. GREENBERG: That may be so, but even when this Court is evaluating a legislative rule, as it did in Murgia, it paid a great deal of attention to the legislative -- the basis for the Legislature's action.

QUESTION: And that would be true whether it's written or unwritten?

MRS. GREENBERG: Yes, Your Honor.

QUESTION: Mrs. Greenberg, isn't it correct that the issue isn't cla-sification of methadone users, but, rather, the question is whether Rule 11(b), as interpreted to include methadone users, is too broad, that it's irrational because it's too broad?

MRS. GREENBERG: Rule 11(b) is directed only to

practices by incumbents, that is, persons already employed by the Transit Authority; it is not directed to applicants for Transit Authority employment. So it is not merely Rule 11(b) that we are concerned with, it is the Transit Authority's over-all rule of not considering for employment anyone and, as well as terminating from employment, anyone whom it discovers to be in methadone treatment, to ever have been in methadone treatment --

QUESTION: Well, isn't it more precise to say anyone who falls within the terms -- who would fall within the terms of 11(b) if an employee? And then they construe 11(b) to include methadone users.

MRS. GREENBERG: Yes, that's certainly part of our argument, that it is irrational to do so, particularly in view of the consideration that is given to all other employees and applicants, some of whom may violate rules. For example, the --

QUESTION: Well, but you wouldn't consider 11(b) irrational if it did not, if they did not define methadone users as persons who used drugs within the meaning of the rule? Or would you?

MRS. GREENBERG: Well, we are, of course, representing methadone users. If you are asking whether it would be -- we could consider it irrational for the Transit Authority to have a rule against the present use of narcotics by its

employees, our answer would be that it certainly would be an irrational rule for the Transit Authority.

But I might point out that --

QUESTION: Well -- and they do have such a rule?

MRS. GREENBERG: Pardon?

QUESTION: They do have such a rule, which is quoted on page 5 of petitioner's brief.

QUESTION: Page 5?

QUESTION: Yes. That's what we're talking about.

You don't contend that that rule would be irrational if the definition did not encompass methadone users, as I understand it.

MRS. GREENBERG: If it did not encompass present methadone users and only encompass present narcotic users who did not have the permission of the Medical Director, we would not consider it irrational.

The rule is not an absolute -- as written, is not an absolute rule. It is a rule that no one may use certain kinds of drugs without permission, written permission of the Medical Director.

The Transit Authority does not exclude from employment or terminate from employment persons who use other drugs that are encompassed within that rule, for example, amphetamines or tranquilizers. In that case it makes an investigation to see whether there's some reason why the person

should be using those drugs.

QUESTION: But just like Mr. Justice Rehnquist asked about a statute, can't we look at the rule as though it were somewhat like a statute and we'd have to determine its meaning by the way it's been construed; and it has been construed in some of these fringe areas to require individualized treatment and in other areas it includes methadone users.

It seems to me the basic classification you're challenging is this classification made by the rule as interpreted by the Transit Authority. And you're saying it's too broad a rule.

MRS. GREENBERG: Yes, it is too broad a rule. We are challenging it because the Transit Authority -- it is only in the case of persons who use narcotics that the Transit Authority does not give individualized consideration.

Not at issue here is the Transit Authority's right to exclude methadone patients from any position which impinges on the safe operation of the Transit Authority. The district court did not designate which jobs the Transit Authority could consider safety sensitive, it gave some examples of jobs, such as motorman, conductor.

QUESTION: How does that become the business of the court?

MRS. GREENBERG: No, it does not become the business of the court, the court left it to the discretion of the

Transit Authority to determine which of its jobs were safety sensitive.

QUESTION: But then it went on to say -- it's going to review that determination, is it not?

MRS. GREENBERG: I should think that if the Transit Authority abused its discretion and designated a job that was obviously not safety sensitive, such as a file clerk job.

QUESTION: How about an accountant who handled a lot of money?

MRS. GREENBERG: Well, --

QUESTION: Revenue people. Their money comes in in small bits and pieces. It's not been unknown that heavy embezzlements, in the aggregate, have been arranged by people at that level. Would that say that's a sensitive position, or is it rational to say that there's a risk that the methadone user, either getting off of methadone or trying to get more black-market methadone, is going to embezzle money to support a hundred-dollar-a-day habit?

MRS. GREENBERG: There is nothing in the record to support the proposition that a successful methadone patient who has been rehabilitated, who has been identified as employable --

QUESTION: No, who has been --

MRS. GREENBERG: Pardon?

QUESTION: If we accept the idea "who has been

rehabilitated", that's one thing.

MRS. GREENBERG: Yes.

QUESTION: But how do you identify a rehabilitated one? And what does the record show about the success of rehabilitation?

MRS. GREENBERG: The record shows that after an initial period of adjustment, which can last from a few weeks up to, at most, a year, that after that period has passed, the vast majority of methadone patients are employable. And that that proof, the group that has been in treatment for a year or more, is directly comparable to any group of applicants for positions in the Transit Authority.

QUESTION: But if that's so, why did the district court put aside the sensitive positions?

MRS. GREENBERG: The district court, acting out of an abundance of caution, wanting to adopt the least intrusive rule that it could, allowed the Transit Authority to work with -- to set aside certain jobs to fit within the --

QUESTION: I know what it did -- I know,why -- I know what it did, but I wonder why?

MRS. GREENBERG: Well, I think again it's difficult to know why the district court did what it did, there is no basis in the record for its distinguishing between safety sensitive --

QUESTION: Did you object? I would suppose, based

on what you just said a moment ago, that you would think that that reservation of those positions would also violate the equal protection clause?

MRS. GREENBERG: I think it is a more difficult case, because the Transit Authority already has a structure for -- it in fact already does designate certain jobs as sensitive or nonsensitive.

QUESTION: Well, I know, but whatever the jobs, you just said that these people that have been in the program successfully for a year are just like the general population --

MRS. GREENBERG: They are just --

QUESTION: -- and yet the district court didn't think so, obviously.

MRS. GREENBERG: They are just like the general population, some of whom may -- the Transit Authority will employ, and some of whom it won't. The Transit Authority --

QUESTION: Yes, but the district court let the Transit Authority, just on a per se basis, exclude any methadone -- the district court let the Transit Authority apply its rule to any sensitive position.

MRS. GREENBERG: Yes, it did, and we are --

QUESTION: Without individualizing anything.

MRS. GREENBERG: Yes, and it's our position that there was no basis in the record for doing so.

QUESTION: But you haven't challenged that here.

MRS. GREENBERG: We did not -- we did not challenge that.

QUESTION: Now, what about the figure that --

QUESTION: But it is some indication that the district court thought there was a difference?

MRS. GREENBERG: It's only an indication, I think, Your Honor, that the district court was proceeding very cautiously --

QUESTION: But was it proceeding irrationally?

MRS. GREENBERG: Was the district court proceeding irrationally?

QUESTION: Yes, in drawing that distinction.

MRS. GREENBERG: Perhaps.

QUESTION: Well, there is a difference between a motorman driving the train at 80 miles an hour and a porter pushing a broom at one mile a year, isn't there?

[Laughter.]

MRS. GREENBERG: Yes, sir, there is.

QUESTION: What about the figure that your friend gave us, that out of 600 patients only 10 were found free of addiction after two years of therapy? Is that figure wrong, or is it not supported by the record?

MRS. GREENBERG: That figure is, I would say, an aberration. The context from which that was drawn was the following: one of the class members was trying to get a job

with the Transit Authority. His treatment director wrote an affidavit, signed an affidavit, in which, trying to show what an exceptional and what an eminently employable person this Mr. Wright was, said, "He's so good he's been allowed to take home his dosage, so he will only have to come in two or three times a week; and I run a very tight ship, most of the patients in my program have to report every day."

The great weight of the expert opinion was that after one year, at least two-thirds -- and the testimony was roughly from two-thirds to 80 or 85 percent of patients in treatment are fully employable.

QUESTION: When you say "the great weight of expert opinion", you do admit, I take it, that there was conflict in the district court, that differing views were presented, and he chose to believe the one that he thought was more persuasive?

MRS. GREENBERG: Not really. There was a difference in the numbers that were talked about. One person said two-thirds are employable, another person said 80 percent are employable. One difference is that there are different kinds of programs.

For example, Irving Lukoff testified about employability at one program called Addiction Research and Treatment Corporation, at which, by his testimony, employees -- pardon me, has as its patients the hardest core addicts, people who

have been incarcerated for an average of seven years, with long criminal records, very long addiction histories. In that program, after one year, two-thirds are employable.

In some of the other programs which have a different population, 80 or 85 percent are employable.

That's the only difference.

QUESTION: Well, what if, instead of all this testimony being presented to the district court first, it had been presented to the New York Transit Authority, and after hearing exactly the same testimony the Transit Authority had adopted the rule it did; do you think you could then have gone into the district court on that record and said that this is an irrational conclusion?

MRS. GREENBERG: I think we could have gone in on that record -- indeed, a lot of this, the few persons the Transit Authority ever had contact with who were methadone treatment experts, all told the Transit Authority that methadone patients were employable.

I think we could have gone -- that given the facts that through this normal ordinary personnel screening procedures of the Transit Authority, it could readily identify those methadone patients who were employable. And that conclusion is based on solid, unchallenged, uncontraverted findings of fact by the district court. We would have gone in and challenged the Transit Authority's policy as

irrational.

QUESTION: On the use of the term "employable", did anyone define or did they agree on a definition of employability?

MRS. GREENBERG: Everyone was talking about people who were free of drug use, or illicit drug use, free of alcohol abuse, people who had in fact employment records. One-third of the persons going into methadone treatment are already employed at the time they enter treatment.

And people who are generally evaluated by the treatment personnel as being people who would make reliable employees.

QUESTION: Would it be extraordinary to at least have a rebuttable presumption that the people then employed, who, -- in some capacity -- who went into a methadone program, had not yet shown such objective symptoms as to alert their employers?

In other words, that they were performing. There are degrees --

MRS. GREENBERG: Exactly.

QUESTION: There are degrees of addiction, we certainly know that, don't we?

MRS. GREENBERG: Two of our named plaintiffs were employed by the Transit Authority and were fired solely because they were in methadone treatment, and, in the case of

Carl Beazer, who had worked for the Transit Authority for eleven and a half years, had worked his way up from a job as a car cleaner to conductor to a tower man, the Transit Authority's own impartial disciplinary review board found that his performance was satisfactory throughout the term of his employment.

QUESTION: You mean in the tower?

MRS. GREENBERG: Yes.

QUESTION: In this control?

MRS. GREENBERG: Yes.

QUESTION: Suppose they had a tragic accident and it could be traced to some aberration of this man, that would expose them to some rather difficult liability questions, wouldn't it?

For having knowingly retained a person who was an addict.

MRS. GREENBERG: I think it -- perhaps it could expose them to some, if indeed the -- now, are we talking about -- if he was on methadone, there is nothing in the record to indicate that his performance would be in any way affected. In fact, there is much in the record to show that methadone does not affect people's ability to perform any job involving, you know, quick reactions, alertness.

But the fact was the Transit Authority fired this person solely because he was in a methadone program.

One other thing that is not at issue here, the Transit Authority's right -- first of all, its right to refuse to hire any methadone patient who has not completed a year of successful treatment. It can also refuse to hire anyone who does not meet its normal objective employment standards. If the Transit Authority requires so many years of relevant employment experience, it can require that of the class.

The persons whom the Transit Authority refuses to consider for even the most ordinary, menial jobs are socially responsible citizens who have valiantly struggled and have succeeded in their efforts to overcome their drug habits. They are free from drug and alcohol abuse, and they are employable by any relevant selection criteria.

QUESTION: Did you agree with the one-year test?

MRS. GREENBERG: Yes, we did agree with the one-year test.

QUESTION: That wasn't your proposal, though, was it?

MRS. GREENBERG: I think that by the time we put in a proposal, we did agree that --

QUESTION: How did you arrive at that, just based on the --

MRS. GREENBERG: Based on the evidence which was that it takes a little time for -- first of all, it takes a little time for a methadone patient to become stabilized on

his dosage, they go in and they are built up to a certain dosage.

Secondly, it is conceded that a number of persons who enter into methadone treatment are not appropriate patients. Those are the people who are going there just to get a, I guess you might call it a free fix. Those are the people who cause disruption outside of the methadone clinics. Those are the people who either drop out of the program or are terminated by treatment personnel.

The longest period that was mentioned as an adjustment period by anyone was one year.

QUESTION: You mean, after one year he's off of dope forever?

MRS. GREENBERG: After one year, in a methadone treatment program, the patient is still taking methadone, --

QUESTION: How --

QUESTION: Is stabilized.

MRS. GREENBERG: -- but he is stabilized --

QUESTION: Stabilized?

MRS. GREENBERG: -- and he is as employable as anyone else.

QUESTION: As long as he takes methadone?

MRS. GREENBERG: He's employable as long as he --

QUESTION: Except where it might make a difference in safety positions, is that it?

MRS. GREENBERG: We would certainly not concede that exception.

QUESTION: No, but the judge conceded that exception.

MRS. GREENBERG: Yes.

I would --

QUESTION: You're not really suggesting that a person who has been one year -- this generalization, that doesn't probe into what the degree of the habit was before the methadone treatment, how much methadone they took, but then when they are stabilized on whatever the dosage is -- which might be very high, medium or low -- that that person is employable as an airline pilot? For example.

MRS. GREENBERG: I don't know what the standards of performance required of airline pilots are. All of the tests that were testified to in this case about performance showed that the reaction time, the alertness of methadone patients was well within the normal range of reaction times, alertness, intellectual functioning. There may be different -- it's clearly within the range required for people who are going to be porters or clerks. There may be very different standards for airline pilots, and I just don't know the answer.

I would like to address myself to what the judge found about the ability of the employer, of the Transit Authority to screen out, or screen in employable methadone

patients.

First of all, it is undisputed that there is no class of persons other than methadone patients and others with a history of narcotic addiction to whom the Transit Authority denied individualized consideration for employment. The Transit Authority has no blanket prohibition against the hiring of persons with potentially disabling physical conditions, such as diabetes or epilepsy or cardiac disease; it has no blanket prohibition against the hiring of persons with histories of alcoholism; it has no blanket prohibition against the hiring of persons with criminal records or persons taking transquilizers or amphetamines, or of persons who have been confined to mental hospitals.

QUESTION: How does this advance your argument? I mean, the question is whether the one blanket inclusion they have is rational or not. Maybe they could have had a whole bunch of other rational exclusions. How does that affect the argument?

MRS. GREENBERG: The argument is that there is no --

QUESTION: That this is an irrational classification.

MRS. GREENBERG: It is an irrational classification --

QUESTION: It would be equally irrational, I suppose, if they excluded alcoholics on a blanket basis,

wouldn't it?

MRS. GREENBERG: Not necessarily. Because the -- under the Transit Authority's procedures, screening procedures, they can tell who would make a good employee, whether he is a methadone patient or whether he is a former alcoholic. There is no -- the classification here is between persons whom the Transit Authority will not even given individualized consideration to --

QUESTION: That's the people defined in Rule 11(b) as construed to mean methadone users; either it's rational or it's irrational.

MRS. GREENBERG: So that methadone patients and people with histories of drug abuse -- 11(b) doesn't talk about histories of drug abuse, but there is no question that the Transit Authority --

QUESTION: They would so construe it to cover them.

Let me ask you, because your time is going, is expiring -- with your Title VII case, does the record tell us the relative number of black and Hispanic persons actually employed by the Transit Authority?

MRS. GREENBERG: The record tells us that 46 percent of the employees of the Transit Authority are black or Hispanic. However, the record does not tell us what proportion of applicants for Transit Authority positions are black or Hispanic; so that the 46 percent figure is irrelevant.

QUESTION: Well, how is --

MRS. GREENBERG: It may be that 60 or 70 percent of the applicants in New York City to these jobs are black or Hispanic.

QUESTION: Well, do you really mean that it's irrelevant?

MRS. GREENBERG: Yes.

QUESTION: Then now do we know that the exclusion of the methadone users has a disparate impact on blacks and Hispanics? Perhaps they have all been replaced by people who are black or Hispanic. Non-methadone users.

MRS. GREENBERG: We would not contend that it has a disparaging effect on all blacks or Hispanics.

QUESTION: Then how does it violate Title VII?

MRS. GREENBERG: Because it -- that the individuals who are affected by it -- the blacks who --

QUESTION: Would you contend it was unlawful even if every person rejected for this reason was replaced by a person of the same race?

MRS. GREENBERG: Yes, Your Honor. Because the individuals who are rejected are entitled to be considered on their merits and not on the basis of a criterion which has the effect of excluding disproportionately large numbers of blacks and Hispanics and does not meet the business necessity test.

the impact is discriminatory on Negroes and Hispanics.

MRS. GREENBERG: Yes. What I'm saying is that the Transit Authority's claim that they are immunized, that their methadone policy can't be a violation of Title VII because 46 percent of their employees are black or Hispanic, that claim doesn't make sense because, first of all, we don't know what percentage of all applicants to the Transit Authority are black or Hispanic. It may be that as many as 60 to 70 percent are.

QUESTION: Well, my question just went to relevancy here. You can't really say that it's irrelevant in making these evaluations; do you?

MRS. GREENBERG: I'm saying that it's irrelevant in the absence of any data about what even a -- if all of their policies did not result in a -- it's relevant because we don't know what the racial composition of their applicants were. If 80 percent of their applicants were black or Hispanic, the fact that 46 percent of their employees were black or Hispanic would just mean that their selection policy as a whole was discriminating against blacks and Hispanics.

QUESTION: Well, wouldn't you say that if 100 percent of their applicants were black or Hispanic, and 100 percent of employees were black or Hispanic, it still violates Title VII? Because the ratio of methadone users took the population in general.

MRS. GREENBERG: I would say that it would still violate Title VII, yes, Your Honor, because the individuals who would be affected, and those individuals are -- it is to individuals that the Act is directed -- would still be being unlawfully discriminated against.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, counsel?

MISS OFFNER: I have no further comments.

MR. CHIEF JUSTICE BURGER: Thank you, ladies.

The case is submitted.

[Whereupon, at 1:30 o'clock, p.m., the case in the above-entitled matter was submitted.]

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