In the

Supreme Court of the United States

CONNECTICUT ET AL.,	:	
	:	
Petitioners,	:	
	:	
v.	:	No. 80-2147
	:	
WINNIE TEAL ET AL.	:	

Washington, D. C.

Monday, March 29, 1982

Pages 1 thru 41

ALDERSON REPORTING

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Monday, March 29, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:53 o'clock a.m.

APPEARANCES:

BERNARD F. McGOVERN, JR., ESQ., Assistant Attorney General of Connecticut, Hartford, Connecticut; on behalf of the Petitioners.

THOMAS W. BUCCI, ESQ., Bridgeport, Connecticut; on behalf of the Respondents.

C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments next in Connecticut against Teal.

Mr. McGovern, you may proceed when you are ready.

ORAL ARGUMENT OF BERNARD F. McGOVERN, JR., ESQ.,
ON BEHALF OF THE PETITIONERS

MR. McGOVERN: Mr. Chief Justice, and may it please the Court, this is a Title VII disparate impact case dealing with an employee selection process which as a whole had no adverse impact upon the Respondent's protected group, but which contained a component that did. Now, although eight Respondents are listed in this writ, it concerns really only four, and those are the four black Respondents.

All the Respondents in 1978 were welfare eligibility technicians who sought promotion to the rank of welfare eligibility supervisor. This meant competition and a selection process, the first step of which was the taking of a written examination. Now, the examination was designed and developed over the preceding year expressly for the selection process by specialists from the Department of Administrative Services Personnel Division working with supervisory personnel in the Department of Income Maintenance, in

which agency the Respondents worked.

The exam was given in December, 1978, to 329 employees of the Department of Income Maintenance, and of that 329, 314 were racially identified, and of that 314, 48 were black and 259 were white, and of the 48 black, 26 passed the examination, for a pass rate of 54.17 percent. 206 white employees passed the examination, for a pass rate of 79.5 percent. The black pass rate was 68 percent of the white pass rate.

Respondents learned that they had failed this examination on or about March 15th, 1979, and as a result they could not continue on in the selection process. Now, the process continued as follows. The Personnel Division took all scores of all passing candidates and listed them on a promotion list by order of rank. Each rank corresponded to a particular score on the examination. Thus, all persons with the highest score were in the first rank. All persons with the second highest score were in the second rank.

QUESTION: General McGovern, I suppose that that test, however, was an effective barrier to the further progress of those who failed it.

MR. McGOVERN: That is correct, Mr. Justice.

Now, at this point, the -- for each vacancy -- excuse me -- in the -- which an appointing authority,

here the Commissioner of Income Maintenance, had to fill, he was entitled to have certified to him five ranks. This is called the rule of five. For additional vacancy which he had at this particular time, he was entitled to an additional rank. He could select anywhere from among the ranks which were certified to him.

Therefore, if there were five vacancies, he could choose any five people from within the nine ranks which had been certified to him.

Here we have a somewhat unusual situation, and that is by the time which the promotions were finally made, there were 46 vacancies but only 25 ranks of passing candidates. Therefore, the appointing authority had the option of selecting from among all candidates who passed the examination, all 25 ranks. As I say, this is unusual.

The appointing authority, in making his selections, considered not only rank on the list but recommendation of superiors and job evaluations. However, before these appointments could be made, Respondents sought an injunction in the district court for the District of Connecticut, and as it pertains to this matter here, the black Respondents claimed that their elimination from the process violated Title VII in

that there was a disparate impact upon black candidates at the examination stage by virtue of an examination which they allege to be non-job related.

At this point in time there was a chambers conference, shortly after the injunction had been sought. The Petitioners agreed not to appoint any persons off the list until the case could be heard on the merits. When nearly a year had passed, and still the case had not been brought to trial, and the exigencies of the department's business necessitated the making of appointments, the Petitioners informed the court that they intended to make appointments.

The court agreed not to proceed on the temporary injunction motion as long as eight positions were saved for the eight respondents pending the outcome of trial.

QUESTION: General McGovern, may I ask you a question? You may want to think about it over lunch. Supposing the test had different passing scores for blacks and whites, that a black had to get a 75 score and a white could pass with 65, and therefore it was plainly disriminatory, but then when the whole process was completed, why, there was a fair number of blacks and whites hired, as there are here. Would you still apply the bottom line approach?

MR. McGOVERN: I don't believe the bottom line would apply in that situation, because there the device would be discriminatory on its face.

QUESTION: But the argument here is that the test is not job-related, and is discriminatory, so why is that a different case?

MR. McGOVERN: That is a different case because in this situation, it is not foreseeable to the appointing authority that the test is a vehicle of discrimination. In fact, quite to the contrary --

QUESTION: But your position is that even if it is discriminatory and not job-related, you nevertheless look at the bottom line.

MR. McGOVERN: It is our position that in a test given -- well, maybe -- I'll withdraw that. First of all, in the situation which you gave, Justice, there, the device would on its face be discriminatory. In another situation, if the test were such --

QUESTION: Well, supposing they remodeled their allegations in this complaint and said, this is clearly not a job-related test. It will produce the same kind of results as if you had two different passing scores. Would that be enough?

MR. McGOVERN: Well, I still say that it would be a different device, because there it doesn't matter

-- when a device is on its face discriminatory, such as in Manhart, then the bottom line makes no difference whatsoever. We, however, are in a different situation in this case, and that is --

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Mr. McGovern.

(Whereupon, at 12:00 o'clock p.m., the Court was recessed, to reconvene at 1:00 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. McGovern, you may continue.

ORAL ARGUMENT OF BERNARD F. McGOVERN, JR., ESQ.,
ON BEHALF OF THE PETITIONERS - CONTINUED

MR. McGOVERN: Thank you, Mr. Chief Justice.

I just have one or two more facts I would like to bring to the Court's attention, and that is, when the selections, the promotions were actually made in this case, there were 46 promotions, and of those 46 promotions, eleven black candidates were promoted and 35 white candidates were promoted. The black candidate promotion rate was 23 percent of the original black applicant pool, while the white candidate promotion rate was 13.5 percent of the original white applicant pool.

QUESTION: What did you say about the blacks?

MR. McGOVERN: The promotion rate --

QUESTION: Yes.

MR. McGOVERN: -- of black candidates was 23 percent of the entire black applicant pool.

QUESTION: Yes.

MR. McGOVERN: Now --

QUESTION: Mr. McGovern, was that the result of an affirmative action program on the part of the state?

MR. McGOVERN: Justice O'Connor, the actual promotions were the result of an affirmative action program only to the extent as defined by statute. That is Section 46-70 of the Connecticut General Statutes, which provides to the effect that promotions shall be made on the basis of merit and qualification, and without regard to race, color, creed, and so forth.

The Respondents have suggested --

QUESTION: Well, what does that mean? You said, yes, it was the result of affirmative action.

MR. McGOVERN: It was a result of state affirmative action statutes to the extent that race is not considered in making promotions under our state affirmative action laws, and appointing authorities are sensitized to keep the selection process free of discrimination of all types. Certainly, for the state in this particular proceeding to make appointments at this juncture of the examination process on the basis of race, whether to meet a certain number of for any other reason other than on the basis of merit and qualifications would be a violation of state law, and I dare say it would also be a violation of the Fourteenth Amendment of the United States Constitution and probably Title VII.

We are not in a situation here in which there

is a past history of discrimination on the part of the state of Connecticut as an employer.

QUESTION: I remain puzzled by your answer to Justice O'Connor's question. As I understand your oral recitation of the Connecticut statute, it simply says, no consideration shall be given to race, creed, sex, et cetera, and yet did you say, or am I mistaken in thinking you said it, that this was to an extent an affirmative action?

MR. McGOVERN: Well, if I confused the issue, I apologize, Justice Rehnquist. State affirmative action statutes, Connecticut attempting to be an exemplar in the area and requiring agencies to engage -- and equal opportunity is -- our affirmative action statutes are basically equal opportunity statutes. They require state agencies to review their procedures and policies, and to make certain that discrimination, either racially or religiously or otherwise, does not enter into the picture, so that the only affirmative action in the selection process was to the extent that state officials are, shall we say, sensitized not to allow race to come into play in making a promotion decision.

QUESTION: And I think you told me, did you, Mr. McGovern, that the bottom line was 23 percent of the

black applicants --

MR. McGOVERN: Total black --

QUESTION: -- were promoted, and only 13 percent of the whites?

MR. McGOVERN: That is correct.

QUESTION: And there is no reflection of any preference for blacks in those percentages?

MR. McGOVERN: We feel certainly there isn't, and to do so would be in violation of state law, and there is certainly no evidence that we did in this particular case.

QUESTION: While I have you interrupted, Mr. McGovern, may I ask you, Section 2(A)(2), the section I guess we have involved here for construction, provides that it is an unlawful employment practice to classify applicants in any way which would deprive or tend to deprive. Is the issue here whether this examination effects a classification in violation of that provision?

MR. McGOVERN: We contend that any classification is in the actual employment decisions.

QUESTION: And not at this stage?

MR. McGOVERN: Not at this stage, that here there is no evidence --

QUESTION: Well, it does say, doesn't it, to classify applicants in any way. It is a prohibition

against classification of applicants, too, is it not?

MR. McGOVERN: Well, we actually contend that if there is any real prohibition here, it is under Section 1, which is failure or refusal to hire or discharge or otherwise discriminate against any individual --

QUESTION: Well, then, your answer to me is that 2 is not at all relevant to the decision in this case?

MR. McGOVERN: It is our position that if there is discrimination, it is under Section 1.

QUESTION: I thought you conceded to Justice Stevens that if they had one test applicable to blacks and one to whites, that that in itself would be the end of the matter.

MR. McGOVERN: Well, that would be because there would be --

QUESTION: That would be because there would be a racial classification.

MR. McGOVERN: Which would end up ultimately in discrimination with respect to hiring or promotion.

QUESTION: Well, that may be. You still say that the passage that Justice Brennan read to you would not be relevant?

MR. McGOVERN: I would say it would not be the

basis of a violation in this case, Mr. Justice.

QUESTION: Well, I thought you said to Justice Stevens that even if the bottom line in the example that I gave you was the same as in this case, the express racial classification on the test would be a violation. I thought you answered Justice Stevens that way.

MR. McGOVERN: Well, perhaps it would be in the extent that --

QUESTION: Well, if it would, what would it violate? What Justice Brennan read to you, or something else?

MR. McGOVERN: In that sense, in that sense the classification would be express and would be intentionally discriminatory. Here, classification is in the final selection process because there is no intentional discrimination. In the example which Justice Stevens gave, clearly, to set a passing point of 75 for blacks and 65 for whites would be a case of intentional discrimination. Here, if there is an --

QUESTION: If it were just the reverse? If it were just the reverse, what would you say?

MR. McGOVERN: That would be discrimination against whites, Mr. Chief Justice.

QUESTION: Well, did any whites complain when twice as many Negroes were promoted, almost twice as

many here?

MR. McGOVERN: Not to my knowledge.

QUESTION: Mr. McGovern, was this case tried on a disparate impact theory, or a disparate treatment theory, would you say?

MR. McGOVERN: Justice O'Connor, it was tried on a disparate impact theory, or perhaps I should qualify it, because the Respondents as plaintiffs in the case did allege disparate treatment with respect to the test. However, both lower courts found that the approprite rationale for this case, the appropriate model of proof was disparate impact.

QUESTION: Would the example that Justice Stevens gave earlier today fit better under the disparate treatment theor?

MR. McGOVERN: I say it would fit better under the disparate treatment theory, because it is intentional, specific discrimination against the protected group.

QUESTION: General McGovern, the complaint alleges that the defendants knew or should have known that the examination would discriminately exclude black applicants for promotion, so how do you -- why is that different than the 65-75? That is the comment from the complaint.

MR. McGOVERN: Well, as the court of appeals pointed out, it takes more than just an allegation of discrimination to make a case for discrimination. Here --

QUESTION: Well, of course, you haven't had the trial on this issue yet --

MR. McGOVERN: Well --

QUESTION: -- so don't you have to assume the facts favorable to the other side at this stage of the proceeding?

MR. McGOVERN: Well, in that, we actually did have the trial. The court actually heard the case on the merits, and then dismissed it on the grounds that the plaintiffs had not proved a prima facie case in this instance.

QUESTION: But didn't he do it on the assumption that the test was -- the test might be shown to be an improper test?

MR. McGOVERN: The court did not rule on that question, Mr. Justice Stevens.

QUESTION: Well, then, it is as though we didn't have a trial of the issue.

MR. McGOVERN: It is as though we -- at this point it is that.

QUESTION: So if you haven't had a resolution

of the issue to dispose of it in a summary fashion, must you not assume that the plaintiffs could prove what they allege?

MR. McGOVERN: In point of fact, the court found that there was no intent to discriminate in this case, or no intent to give a test which had an adverse impact. Here, the test was not a standardized device such as we had in Griggs, from which the Petitioners could have concluded before they gave the test that if they gave it it would have the effect of excluding blacks from the candidate pool. This was a test which was devised especially for this process, and was being given for the first time. There was no way in which the Petitioners from demographic evidence, or, you know, objective manner in which they could determine what the effects of this test would be until after it had been given and the selection process was well under way.

Therefore, the problem we have here in a case such as this, which is free --

QUESTION: I'm sorry. I don't mean to press this, but did you tell me that the district court found there was no intent, or merely didn't have to reach the question?

MR. McGOVERN: No, the court found that there was no intent. I believe it would be on Page 24a, where

the court said, the third line down --

QUESTION: Where are you reading from?

MR. McGOVERN: -- "absence of discriminatory motive was wholly absent."

QUESTION: Counsel, where are you reading from, 24a of what?

MR. McGOVERN: Oh, excuse me. This is from our petition for write, the appendix, Page 24a, Mr. Chief Justice.

QUESTION: Now, what was the --

MR. McGOVERN: The -- Justice Stevens asked whether the court actually found that there was no intent to discriminate in this particular case --

QUESTION: I see.

MR. McGOVERN: -- as opposed to just no evidence on the matter, and we cite the district court's decision on --

QUESTION: What did he say? What did it say?

MR. McGOVERN: The court said that "evidence of discriminatory motive was wholly absent."

QUESTION: Is there any dispute about that in the case?

MR. McGOVERN: Not to my knowledge, Mr. Justice.

Therefore, the problem we have here in a case

free of racial animus is, where do we measure discrimination, since discrimination is what Title VII is all about. Do we measure it at each step of a multi-component process, or do we measure it at the so-called bottom line? It's the Petitioners' position in a process such as this the focal point should be the end result of the process.

Here we have a statute. We are attempting to peg an evidentiary rule to a statutory prescription. The Court's focal point therefore should be Congress's focal point. In enacting Title VII, we glean from the decsiions of this Court and the legislative history that an overriding concern of Congress in this instance was opening opportunities and skilled positions to blacks and doing away with racial job stratification by eliminating discrimination, not only in intent but in effect, and as this Court in Teamsters pointed out, that it is to be expected that a non-discriminatory environment will result in a work force which mirrors demographically the community.

Therefore, Congress was interested in the overall picture. In addition to dealing with individual instances of specific intentional discrimination, Congress was concerned with whether minorities got skilled jobs in sufficient numbers to penetrate the

ranks of the skilled work force. It was interested in final employment decisions.

Our position is consistent with all relevant disparate impact cases of this Court. Griggs versus Albemarle -- excuse me, Griggs versus Duke Power, Albemarle Paper Company versus Moody, Dothard versus Rawlinson were all bottom line cases in the sense that in each of those cases there was disparate impact at the hiring level.

By the same token, in Espinoza versus Farah, the Court found no Title VII violation because inter alia the employer had hired a large number of the plaintiff's protected group. In Dothard --

QUESTION: But it hasn't hired a large number or any of the plaintiffs who claim to be discriminated against.

QUESTION: I suppose the difference between you and the opposing side is the difference between the group on the one hand and the individual on the other, and what does Title VII intend to protect, the individual or the group?

MR. McGOVERN: It is our position, Mr. Justice, that Title VII protects individuals. We do not dispute that fact with the other side. However, here, we are dealing with a particular model of proof,

disparate impact, and it is our position that in such a situation, disparate impact, non-intentional discrimination, that the --

QUESTION: Of course, you will never convince these plaintiffs of that, will you?

MR. McGOVERN: I beg your pardon?

QUESTION: I say, you will never convince these plaintiffs of that, will you?

MR. McGOVERN: Well, I hope we convince the Court in that respect, but it is our position that in this model of proof the individual's rights are really tied to the group's rights in the sense that in a case such as this, we do not deal with the individual's particular situation other than identifying his protected status, and so we do not know about his education, his background, or any other -- how he even came to apply for the job.

In this respect, all we know, that if an individual is to succeed in proving a prima facie case of discrimination, that is contingent upon how his group does, and if his group, with respect to the selection process, does not succeed as a group, then he succeeds in proving a prima facie case. However, if his group does succeed in the extent that there is no disparate impact against the group, then he fails or does not

prove a Title VII violation, and in fact there is none, absent intentional discrimination.

Now, in Dothard, this Court described Griggs and Albemarle as dealing with facially neutral employment standards which disproportionately exclude blacks from employment, and the Court stated that Griggs and Albemarle guided its decision in that case, but in addition, those cases have elements which are not present in this particular case.

In addition to containing disparate impact at both the selection level and the component level, these cases contain another element not present in this case, and that is an element of invidiousness, and the Court pointed out in both Griggs and Dothard that Title VII deals with removal of artificial, unnecessary barriers which operate invidiously to discriminate on the basis of racial or other impermissible classifications.

Now, in Griggs and Albemarle, the status quo of past patterns of discrimination was frozen by diploma and test requirements which had a certifiable, foreseeable effect through demographic statistics on the protected groups, and which also in the case of tests excluded members of an educationally deprived group, blacks in North Carolina, which educational deprivation was directly traceable to race due to education in de

jure segregated schools, of which the Court took notice.

In Dothard, the height and weight requirements were invidious in the sense that the employer knew or should have known in advance from demographic statistics, could have certified such, that the particular component would have an adverse impact on women, and that component was related to gender. Here there is no invidiousness. There are no built-in headwinds verifiable in advance from demographic statistics. This test was developed for this process. It had no prior usage, no track record.

QUESTION: May I ask you a question there? Supposing they used the same test with the same statistical results for five years in a row, so it was predictable it would continue to be biased. Could they continue to use the test?

MR. McGOVERN: I would say, no, they could not continue to use the test because the test would have over a period of time through study, demographic statistics, shown that it would in effect have an adverse impact on a protected group because of race. Now, where you draw the line is a matter, I think, for a trial court in a particular case to determine, but certainly if an employer continued to use a test time after time, and knowing or was able to conclude from the

results of this test that it would have an adverse impact, in that situation he should be forced to proof the job-relatedness of the test.

I would like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Very well.

Mr. Bucci.

ORAL ARGUMENT OF THOMAS W. BUCCI, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. BUCCI: Mr. Chief Justice, and may it please the Court, the claim of discrimination by the Respondents in this case is that they were denied a promotional opportunity solely on the basis of the results of an examination that disproportionately excluded black candidates from promotional eligibility.

Their claim -- the claim rests upon an examination that was held to determine whether individuals were qualified for promotion. Those candidates who passed the examination entered into a promotional eligibility pool from which the appointing authority in his discretion made final selections. There was no other component that further screened the candidates once entering that eligibility pool.

QUESTION: May I ask, Mr. Bucci, the question I asked your colleague? Do you rely on that provision of 2(A)(2)?

MR. BUCCI: Yes, I think in Judge Meskill's decision --

QUESTION: No, do you rely on it.

MR. BUCCI: Yes, I do. Yes.

QUESTION: You say that the violation was that this constituted a classification.

MR. BUCCI: Classification adversely affecting the Respondents in this case.

QUESTION: Yes.

MR. BUCCI: That's the language from (A)(2). Judge Meskill in his footnote, his first footnote to his opinion, sites both (A)(1), (A)(2), and Subsection (h), I think.

QUESTION: But you don't support --

MR. BUCCI: The claim --

QUESTION: -- the court of appeals to the extent it suggests a violation of (1), or do you?

MR. BUCCI: Oh, yes, I --

QUESTION: You do also?

MR. BUCCI: Yes.

QUESTION: (1) and (2)?

MR. BUCCI: (1) and (2).

QUESTION: All right.

Those candidates who failed the examination were excluded from any qualification for promotion.

Those who passed entered into the eligibility pool from which selections, discretionary selections were made. The claim of discrimination is not a claim of overdiscrimination, nor is it a claim of a pattern and practice of discrimination. It rests upon the disparate results this examination had adversely -- that it had adversely affecting black candidates in this case.

QUESTION: Once they had passed the examination, I take it you don't claim any disparate treatment.

MR. BUCCI: No. Well, I don't --

QUESTION: In fact, it was just the other way, wasn't it?

MR. BUCCI: It was just the other way. I think there would be serious question whether those candidates who failed the examination would have standing to challenge the final appointments, in not meeting the threshold requirement for appointment.

QUESTION: Does this fact that such a larger number of the minority candidates were promoted out of the successful pool suggest anything about intent?

MR. BUCCI: Well, I -- if this was a claim of intentional discrimination, I think this Court has said that the bottom line numbers can be used as evidence of intent, but I think maybe it goes the other way around

in this case, when you --

QUESTION: You say they were -- the exclusion came at the initial stages.

MR. BUCCI: Yes, the exclusion came here at the examination stage, and did not come in at the final selections. So, on that basis, the question of these appointments really are not relevant to the issue at hand. The issue at hand is whether this examination was job-related, and that the plaintiffs did establish that it had a disproportionate impact upon the black candidates taking the examination.

QUESTION: Mr. Bucci, I suppose your clients could have recovered if they could show disparate treatment of those who failed the test.

MR. BUCCI: If they showed intentional disparate treatment, yes, that would be an alternative theory to proceed under.

QUESTION: And basically you did not proceed further under that theory --

MR. BUCCI: Well, there was an alternative claim made to the district court and the court of appeals of disparate treatment, in the sense that the examination -- that a passing point was not set for this examination until after it was graded, and then a passing point was selected, when it should have been

evidence, there was all the statistics before the Petitioners to realize that the setting of this passing point would exclude a disproportionate number of black candidates.

In fact, there was testimony at the district court that a 70 was the initial passing point that the statistics of the exam would have required, but it was lowered to 65 so as to lower the disparate impact of the examination if the passing point had been set at 70.

There is no dispute before this Court, Petitioners do not dispute that this examination disproportionately excluded black candidates. This Court has on various occasions held that a claimant establishes a violation of Title VII by showing that an employment practice or device which is facially neutral in the way it treats various groups but which in fact falls more harshly on one group than another, if that device cannot be shown to be justified by business necessity.

QUESTION: What do you rely on for that proposition? Griggs, Albemarle, and Dothard?

MR. BUCCI: Griggs, Albemarle. There is -- in Teamsters versus --

QUESTION: Those were all entry level cases, though, weren't they?

MR. BUCCI: Yes, but I think the language also in Washington versus Davis, although not specifically under Title VII, Title VII principles were applied, that --

QUESTION: That was just the Fourteenth Amendment.

MR. BUCCI: Yes, but the language and its dictum from the Court was that employment and promotional practices that had a disparate impact under Title VII would give rise to a prima facie violation of Title VII.

QUESTION: Do you rely on any strictly Title VII case dealing with promotions as --

QUESTION: With promotions, no, but I don't see the difference in that at the entry level, the claim is being made that people are not being given an equal opportunity to an employment -- equal access to an employment opportunity. Here we are claiming that we are not being given equal access to a promotional opportunity, and we are being denied that by a facially neutral device which disproportionately excludes members of a protected class.

The same rationale applies, and I think the bottom line theory being advanced by the Petitioners in this case misconceives the entire disparate impact

theory. It wasn't formulated by this Court just to guarantee group rights. It was recognition that the purpose of Title VII was to guarantee equal employment opportunities and also to eliminate employment devices which had a -- discriminated in effect.

This Court went on to say that Congress in achieving that purpose chose not only to outlaw overt discrimination, but also those practices fair in form but which discriminated in effect. Congress chose the method on how to achieve its purpose.

QUESTION: To what extent, if any, in your view would the evidence of 160 percent, I think it was, of the successful candidates, 160 percent of minorities were promoted over non-minorities? How would that figure in your view, in the evaluation of the whole problem?

MR. BUCCI: My evaluation of the whole problem, it would lead, those -- it would lead the -- it should lead the Court to question the legitimacy of those appointments.

QUESTION: Of the successful ones?

MR. BUCCI: Of the successful appointments, in the following sense. Those candidates who passed the examination, there were 26 black candidates who passed and 206 white candidates. That made up the promotional

eligibility pool. From those candidates in that pool, eleven black candidates were selected as opposed to 35 white candidates. The selection rate from that promotional eligibility pool was 42 percent black candidates as opposed to 17 percent white candidates.

Now, the state is saying that there was no affirmative relief given to these candidates, but that -- such a gross disparity would lead to question why was there such a disparity, when in this case each candidate supposedly who passed the examination had an equal opportunity for selection. The appointments came just one month prior to trial. The state has stated that that was because of an agreement, a chambers agreement. There is a dispute as to what actually occurred in chambers, but that is where I suggest those numbers come into play.

I don't think those numbers, the selection of those candidates who passed over the barrier in any way alleviates the claim of discrimination of those candidates who couldn't get beyond that barrier. Their claim that they were excluded by a discriminatory exam remains whether the full number of black candidates who passed the exam were finally appointed. Our claim is that intentional discrimination, the intent to discriminate is not at issue in the disparate impact

theory, under a disparate impact theory.

QUESTION: You are really arguing, are you not, over a burden of proof problem?

MR. BUCCI: Yes. Our claim --

QUESTION: Basically.

MR. BUCCI: Basically. Our claim before the Court is that the disparate impact theory addresses the Congressional decision to eliminate discriminatory devices that discriminated in effect.

QUESTION: How do you deal with the uniform guidelines of the EEOC where they say that if the total selection process for a job has an adverse impact, then the individual component should be evaluated?

MR. BUCCI: All right, when those --

QUESTION: Does that indicate that under the EEOC view, at least, that you look at the total picture?

MR. BUCCI: I think in the prefatory materials that accompanied the guidelines when they were first published in the Federal Register, it is stated in there, and it says, these should be viewed as legislative history of these guidelines, but it stated in there, and it's a statement by the EEOC, that the bottom line approach adopted by the agency in the uniform guidelines was not in response -- it does not address the question, the underlying question of law.

All it was was prosecutorial discretion in what instances to root out, that the government would root out claims of discrimination.

It goes on to say that they would still accept claims by individual claimants who claimed to have been disproportionately excluded by a component of a selection device.

QUESTION: Would you care to comment on the SG's approach to this problem?

MR. BUCCI: No. I know a brief has been filed. I know the Equal Employment Opportunity Commission -- my understanding is, they have not joined in on that brief.

QUESTION: That is what the brief specifically states.

MR. BUCCI: Yes. That is what the brief specifically states, so I think if anything that shows that the EEOC is not in agreement that their uniform guidelines address the question of law, and that it sets a standard as to determining the question of law on the bottom line approach.

QUESTION: Well, if that is what EEOC wanted to say, why wouldn't they have said it affirmatively instead of leaving it to this backhanded, negative inference?

MR. BUCCI: I have no idea, and I --

QUESTION: I suggest you are reading more into their silence than is there.

QUESTION: Well, the EEOC just issues guidelines anyway.

MR. BUCCI: They have issued guidelines.

QUESTION: They don't have regulations that have the force of law.

MR. BUCCI: No, and this Court on occasion has stated that they would be guided but they do not have the force of law.

QUESTION: And if we are to believe the footnote in the SG's brief, it emphasizes administrative and prosecutorial discretion in these cases.

MR. BUCCI: That was the reason for adopting the bottom line approach.

QUESTION: Exactly.

MR. BUCCI: That is also stated again in the prefatory material.

QUESTION: So we don't know what the United States government's position is, do we?

MR. BUCCI: Well, they have filed an amicus brief.

QUESTION: Well, can we take either EEOC or --

MR. BUCCI: That --

QUESTION: Which one shall we take?

MR. BUCCI: The --

QUESTION: The EEOC hasn't filed a brief.

MR. BUCCI: No, they haven't.

The adoption of a bottom line approach, it is the Respondent's claim, would also be contrary to two fundamental principles of Title VII, the first principle being that the Title VII was enacted to prohibit discrimination against individuals. Again, Congress chose the means of prohibiting discrimination against individuals. It selected to eliminate or decided to eliminate selection processes that discriminated in effect unless they were shown to be job-related.

Respondents aren't here saying that this examination is illegal merely because it had a disproportionate impact. They have made the claim that it was not job-related, related to the job. All these individuals, these four Respondents in this case, were serving for up to two years provisionally in the positions at question. They were serving, as the testimony at trial indicated, successfully in their positions. They were eliminated by this test. It is their claim, and if this Court decides in favor of the Respondents, that issue would have to be addressed whether the exam was job-related or not.

Also the claim is made here that this was one step in a multiple component selection process. The EEOC has issued questions and answers as a means to attempt to interpret their guidelines, and in one of their questions, Questions 14, it addresses this bottom line approach, and it defines selection process as all the component selection procedures leading to the final employment decision.

It is the claim of the Respondents in this case that there was only one component leading to the final employment decision or promotional decision in this case. That was the examination. After the examiation, the commissioner made selections, discretionary selections. There was no other component that further screened candidates for qualification for promotion.

The claim is also made that the bottom line approach satisfies the Congressional purpose of placing more black candidates, black individuals into employment positions, but again, the purpose that this may serve the purpose of Congress as to a group, as to a classification, runs contrary to the idea that Title VII is aimed at the individual, its focus is on the individual, and that that focus on the individual prohibits the treatment of individuals merely as

components of a class.

The disparate impact analysis is focused upon a device, but the claim is that it discriminates against it individuals. Disparate impact analysis is a method of an order -- it's an order and allocation of proof. It's an evidentiary method on addressing the order and allocation of proof in a claim that an employment practice is discriminatory in effect.

To adopt the position advanced by the Petitioners in this case, this Court would be sanctioning the use of selection or promotional devices that have disproportionate impacts, that do discriminate, and that are not related to business justification, that are not job-related.

The touchstone -- this Court has said the touchstone of Title VII is business necessity, and that runs throughout the Court's decisions, that if a selection process or a promotional process excludes disproportionately one member -- members of a protected group, then that device has to be shown to be job-related, and that teaching was from Griggs right down to Dothard versus Rawlinson.

The Court has addressed the bottom line approach in a number of instances, not explicitly. In Furnco, the Court did say that the bottom line numbers

were relevant as to the question of intent in a disparate treatment case, but in New York Transit Authority versus Beazer, dealing with a disparate impact case, although the Court found a weak prima facie case of discrimination, and found that the employment practice was job related, the Court did not rely on the bottom line numbers in that case as dismissing or saying that there was no prima facie violation of Title VII.

Those statistics showed that the employment by the New York Transit Authority, they employed minorities twice as high as their numbers in the relevant labor market. The Court did say in a footnote that that would be relevant to a disparate treatment case where intent was required, where proof of intent was required.

I think to adopt the position advanced by the Petitioners in this case would bring the Court close to sanctioning in effect a subjective quota system, in that as long as the bottom line numbers, as long as the numbers match up, irregardless of the legitimacy of the devices screening the candidates, then there would be no violation of Title VII.

Thank you.

ORAL ARGUMENT OF BERNARD F. McGOVERN, JR., ESQ.,
ON BEHALF OF THE PETITIONERS

MR. McGOVERN: Mr. Chief Justice, I think Mr. Bucci and I can agree on one point, and that is, if there were but one component to this examination process, and if the appointing authority were required to go down the list, one, two, three, four, five, as the examination results ranked the candidates, then there would be a prima facie case, because the examination would in effect be the selection process.

Here, there was an examination. Candidates were listed in a particular order. However, the appointing authority was not bound to go down the list, one, two, three, four, five. He had other selection devices, and in fact employed them in this case. So that we are not here dealing with a simple component selection device.

Further, it was pointed out to the Court that the court of appeals as a general proposition endorsed the bottom line rule, and it said, viewing the overall results of a selection process ordinarily is a prudent course to pursue. Now, it did draw the line with respect to an identifiable pass-fail barrier and said in that situation a different result would obtain.

Under the court of appeals rationale, if all persons in the selection process were allowed to continue until the end of the process, and then the

exact same selections were made as were made in this process, there would be no disparate impact case, no case for the Respondents under any circumstances. However, Furnco and Burdine do not require the employer to use a process which maximizes consideration of minority candidates, nor does it require the best hiring process to be used, and in point of fact, the Court's emphasis on a passing score, some kind of a watershed or great divide is totally illusory, because in this situation particularly, where we have the rule of five, there are many passing points with respect to the selection process, all the way up and down the list.

For example, if we had a situation in which a person was in the eleventh rank, and there were but six vacancies, so that the appointing authority was -- certified the first ten ranks, if in that situation, a person in the eleventh rank were, say, black, and there were disparate impact from the eleventh rank down, would, under the rationale of the court of appeals, would he be allowed to prove a prima facie case with respect to disparate impact at the eleventh rank, because that to him was a de facto passing score with respect to those particular six jobs, and this could carry up and down the whole process, and we could end up with three or four cases on a particular selection

process involving numerous minority groups.

QUESTION: Mr. McGovern, the Solicitor General suggests that the burden of proof shifts earlier, once there is an adverse impact shown as to a particular test or portion of the requirements, and that that then shifts the burden to the employer. Would you like to comment upon that?

MR. McGOVERN: Yes, Justice O'Connor. We disagree with that position. Here we are a case of establishing a prima facie case, and in a case of non-intentional discrimination. Therefore, it is our contention that the plaintiffs in that case have the burden of making a prima facie case, and in a situation such as in this selection process, there is no prima facie case, no showing in any sense of discrimination until such time as the plaintiff showed disparate impact with respect to the final employment decisions.

Thank you.

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

(Whereupon, at 1:44 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Connecticut Et Al., Petitioners, v. Winnie Teal Et Al. No. 80-2147

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BY Irene Hammond