In the ORIGINAL

Supreme Court of the United States

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST, Petitioner	)	
v.	)	NO. 81-574
MARIANO S. FALCON	)	

Washington, D. C.

April 26, 1982

Pages 1 thru 33

ALDERSON REPORTING

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IN THE SUPREME COURT OF THE UNITED STATES

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THE SOUTHWEST, :
Petitioner :
v. : No. 81-574
MARIANO S. FALCON :

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Washington, D., C.

Monday, April 26, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

NOYES THOMPSON POWERS, ESQ., Washington, D.C., on behalf of the Petitioner.

FRANK P. HERNANDEZ, ESQ., Dallas, Texas, on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in General Telephone Company against Falcon.

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

ORAL ARGUMENT OF NOYES THOMPSON POWERS, ESQ.,

ON BEHALF OF PETITIONER

MR. POWERS: Thank you, Your Honor. Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to the Court of Appeals for the Fifth Circuit. It involves the proper scope of an employment discrimination class action. The Petitioner, General Telephone, challenges the so-called across the board approach to class certification of the Fifth Circuit. Under that approach the claims of applicants, employees and former employees can all be litigated in a single class action as long as the Plaintiff alleges that he and members of the class belong to the same race, sex or ethnic group and that each of them has suffered in some way from an employer's discrimination against their group.

The facts of this case vividly illustrate why that approach is wrong. The Plaintiff, Mariano Falcon, an employee of General Telephone, charged that he was not promoted to a management job because he was a

Mexican-American. In the civil action that followed, Falcon also sought to represent a class of Mexican-Americans who had applied for work at General Telephone but had not been hired.

Without holding a hearing or stating any factual support for its action, the trial court certified Falcon as the sole representative of this class of unsuccessful applicants. It did so despite the existence of facts which the company contends should have resulted in a denial of class certification.

For example, Mr. Falcon had never been an unsuccessful applicant at General Telephone. Indeed, he was hired when he first applied as part of the company's affirmative action program. Morever, Falcon's promotion claim was based on a disparate treatment theory of discrimination, while the hiring claims he presented for the class were based on disparate impact. And the evidence which he introduced in support of his own promotion claim was entirely unrelated to the hiring claims of the unsuccessful applicant class.

Finally, there was a conflict in interest of Falcon and the applicant class, because increasing the number of Mexican-Americans employed at General Telephone would have reduced Falcon's own chances of receiving the management promotion he sought.

On appeal, the Court of Appeals for the Fifth Circuit affirmed the class certification. In so doing, it expressly relied on its own policy favoring across the board class actions in employment discrimination cases. The court held that the fact that Plaintiff's claims and the class claims were both based on alleged discrimination against Mexican-Americans outweighed the differences in the employment practices that Falcon and the class were complaining of.

The court did declare that there was a similarity of interests between Falcon's claims and those of the class based upon job location, job function, and other considerations. But it's clear from the record that the jobs that were included and those sought by the applicants went far beyond the management job which Falcon was complaining of not being promoted to, and there is no indication in the court's opinion or in the record as to what other considerations may have been similar between Falcon's claim and those of the applicant class.

General Telephone contends that Mr. Falcon is not a proper representative of an unsuccessful applicant class, for three reasons. First, Falcon's promotion claim was not typical of the hiring claims of the unsuccessful applicant class. This Court said in

General Telephone of the Northwest against EEOC that typicality limits the claims of the class to those that are fairly encompassed in the representative's personal claim. That certainly was not true here.

Falcon's claim was based on a disparate treatment theory, while the hiring claims were based on disparate impact. And the evidence he introduced in support of his own claim was entirely unrelated to the claims of the applicant class. And so we say that there's no typicality as required under Rule 23(a)(3).

Indeed, the differences between Falcon's promotion claim and the hiring claims of the class are so great that we contend that in this action there is not even the necessary common issues of fact or law required by Rule 23(a)(2).

And finally, because of these differences between the claims of the putative class representative and the class and because of the conflict that we have referred to in the interests of Falcon and the class, we contend that Falcon is not an adequate representative as required under Rule 23(a)(4).

Let me restate at this time what the Petitioner is seeking in this action and what he is not seeking, what it is not seeking. First, General Telephone is seeking in this action the careful

application of the elements of Rule 23 that this Court said was required in its decision in Rodriguez. We're not seeking a per se rule that under no circumstances can an employee ever include applicants in a class action which he is bringing. If there is a common policy that similarly discriminates against both employees and applicants, if there is sufficient numerocity and if there is no conflict in interest, then it would be possible for an employee to represent an applicant.

But those elements are not present in this case. And that is the second thing that we are seeking, which is the careful application of Rule 23 to this case, and we say if there is such a careful application it will be clear that Mr. Falcon --

QUESTION: Mr. Powers, are you taking the same position the Government takes?

MR. POWERS: Your Honor, the Government has supported our petition and says that in their judgment the Fifth Circuit across the board rule is too broad. They would suggest that the Court base such a decision on lack of common questions. We think that their argument is similar to ours.

As we indicated in our reply brief, while we think there is a lack of common questions here, we think

that certainly there is a lack of typicality. But however the Court chooses to define the defect, we think it clear, as the Government does, that the Fifth Circuit and the court below did not require the necessary symmetry of claims.

QUESTION: Well, they suggest that when the case is remanded that the class question be reexamined. Do you agree with that?

MR. POWERS: We certainly do not agree with that. We see no need --

QUESTION: Your position is not the same as the Government's.

MR. POWERS: We see no need for a remand. We think the record makes clear that Falcon is not a proper class representative, never was a proper class representative, that the initial certification was wrong, and that the proper remedy here or the proper action for this Court is as the Court acted in Rodriguez, which is to reverse with instructions to dismiss the unsuccessful applicants from the class.

Finally, we think it clear that the careful application of Rule 23 that we seek in this case will not mean the end of employment discrimination class actions. As I said earlier, when there is the proper identity of interests, where a policy is being attacked

that affects various groups of employees and at various locations, Rule 23 would support a broad class action.

But we contend that there is not a basis for such a certification in this case and that the Court should direct the lower court, the trial court, to dismiss the unsuccessful applicants from this class and then proceed in accordance with this Court's prior remand for consideration of Falcon's own promotion claim in the light of Perdine.

QUESTION: Mr. Powers, are you asking for any more than the application of the traditional rule that a class representative has to be part of the class and possess the same interests and suffer the same injury?

MR. POWERS: We think that's certainly the core of the relief that we are seeking. We think that when you look at the three elements of Rule 23(a) that we have cited, each of them provides a basis for reversal in this action. Not only is Mr. Falcon not an unsuccessful applicant, but his own claim of being denied a promotion is not typical of the claims of unsuccessful applicants, and we think he's not an adequate class representative.

We have -- I would say a word also about the contention in amicus brief that the writ was improvidently granted. We think nothing could be more

erroneous than that. The record is clear in this case that Rule 23 was not properly applied. General Telephone tried repeatedly in the district court and before the Court of Appeals to have Rule 23 properly applied. Its contentions were always dismissed with the contention that under the Fifth Circuit's across the board approach this type of action is permissible despite the differences in the claims of the class representative and those he's seeking to represent.

There's no other place this employer can get what it's seeking other than before this tribunal. What it wants is an end to this litigation of the claims of applicants, which has gone on for seven years, without this class representative having any personal interest, any personal experience regarding that particular element of the litigation.

There's no question that at the time the court made its final certification at the conclusion of the trial that there was sufficient numerocity. So this Court must provide the relief that we seek and only this Court can do it. The issue is ripe for decision, it's not moot, and again we simply ask that Rule 23 be applied as it's written.

And unless there are further questions, I'll reserve --

QUESTION: I have one.

MR. POWERS: Yes.

QUESTION: Is it your position that a hearing is always required at the district court level in order to apply the rule?

MR. POWERS: No, that is not our position. But we do believe that the court must satisfy itself, either through an evidentiary hearing or by reviewing discovery --

QUESTION: Discovery techniques.

MR. POWERS: -- that there is more in support of the class allegation, more in support of the class than simply the allegations in the complaint.

Thank you very much.

CHIEF JUSTICE BURGER: Mr. Hernandez.

ORAL ARGUMENT OF FRANK P. HERNANDEZ, ESQ.

ON BEHALF OF RESPONDENT

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

This case did not have a hearing on the class certification issue. I think in order to understand this case one needs to put it in its proper historical perspective. This case was tried before Rodriguez, it was tried before General Telephone. It was tried right after Eisen.

And at the time, as the brief points out, that class certification issues were before the court, at least in the Northern District of Texas, the way they were handled was that the litigants representing the respective parties met in a pretrial conference, informal conference with the court to discuss potential class issues. And that was done.

The court entered an order in effect and advised counsel for both parties that they had, I believe, until October the 10th of 1975 to file their brief on the class action issues. The Plaintiff, Mr. Falcon, filed his brief. The Defendant chose not to file a brief and deprived the court of any thinking it may have had on the class action issue.

In February of 1976, in response to interrogatories propounded by the Plaintiff, the Defendant answered them, and they were filed with the court immediately prior to a subsequent conference with the court to discuss the class action aspects of the litigation.

Subsequently in March of 1976, after the court had an opportunity to view some of the factual data pertaining to the class and had an opportunity to review the Plaintiff's brief, the court entered a provisional class order and clearly made it known to the Defendant

that the Defendant could at any time move or put on evidence, discuss, bring to the attention of the court, the class action aspects of the litigation.

It was not until after the provisional certification of the class that the Defendant then did something to move to try to get the class decertified. It wasn't until that point. And in that regard this trial court, I think, Judge Hughes probably handled this case as well as it could be handled in light of the time and the historical perspective.

She did not give us a class unconditionally. It was provisional. She told the Defendant that at any time they could put on evidence. She said she would reconsider the class prior to trial, which she did. She would reconsider the class during trial, which she did. She would reconsider the class after trial, which she did.

And I point out to the Court that the Plaintiff never was satisfied with the class that it got, nor was the Defendant. But the court was constantly made aware of the class action aspects of this litigation.

Now, a hearing in that regard I don't think was necessary, nor did the litigants or the court have the benefit of some of the later decisions that deal

with class certification hearings as are now being held in the Northern District of Texas and I trust in other districts throughout the country.

But this is the way it was done at that time and it certainly afforded the court ample opportunity to be aware of Rule 23 and the various aspects of Rule 23 as she applied it to this case.

QUESTION: Mr. Hernandez, do you contend that an across the board approach is appropriate or do you contend that the rule was -- the requirements of the rule were complied with in this case?

MR. HERNANDEZ: The requirements of the rule were complied with. Across the board is a concept that developed out of the Fifth Circuit, but you don't find the words "across the board" anywhere in the rule.

QUESTION: Do you think the court applied that approach here?

MR. HERNANDEZ: I think the court looked at that aspect of it, because we certainly argued in our brief for the across the board approach, the concept being that wherever you have discrimination against an employee it is generally class-wide.

QUESTION: Do you think that there are instances where groups of employees might have conflicting interests in a case like this?

MR. HERNANDEZ: There possibly could be some areas where you might have a conflict of interest. I don't think this case has any conflict of interest. The conflict of interest was not really raised. It became sort of an imagined conflict in the Fifth Circuit and it was elevated up to an actual conflict in this Court. But I think you'll find the record devoid of anything that gets close to a conflict.

QUESTION: If you multiply the number of Hispanic named employees, doesn't that dilute -- it enlarges the pool from which promotions will be drawn. Doesn't that dilute his future, as was suggested in the briefs?

MR. HERNANDEZ: I suppose that it would in some fashion dilute it. But I think that the facts of this case clearly show that, although the company may tout its affirmative action program, Operation Attainment was a one-shot affair, they only used it one year; that the affirmative action plan which had the management by objective portions was never followed or actually utilized by the company. Mr. Goldston and Mr. Sumner, the supervisors, testified they weren't even aware the affirmative action program was in effect.

So it could, but I think that the exhibits, the statistical data in this case, would clearly show

that even as late as '75 and '76 General Telephone was hiring so few Mexican-Americans that the potential for conflict is very, very rare in this case.

QUESTION: Well, do you think our holding in the East Texas Motor Freight versus Rodriguez requires actual conflict? Doesn't that case lay down a considerably narrower requirement than you suggest when you say that virtually all discrimination cases are certifiable under 23?

MR. HERNANDEZ: Well now, I didn't say all discrimination cases are certifiable under Rule 23, nor do I say that all Title VII cases are class actions. And I think that the Rodriguez versus East Texas really has very little to do with the facts of Falcon. There are so many differences in that case factually as compared to this case.

QUESTION: But Rodriguez does lay down some general principles, though, like the class representative has to be a part of the class and possess the same interest and suffer the same injury.

MR. HERNANDEZ: Exactly.

QUESTION: It doesn't seem to me that you demonstrated very convincingly that Falcon had the same interests and suffered the same injury. He suffered a failure of promotion and the people, some of the people

he's trying to represent, suffered a failure to hire.

MR. HERNANDEZ: That's correct, and if you're not hired you're never promoted. The problem is, is that I suppose this Court used same interest and same injuries in Schlesinger and then in Rodriguez. It's never been defined what the same interest or same injury is.

But Mr. Falcon suffered, as did the other Mexican-Americans, because he was a member of a class of individuals who were discriminated against, as the trial court found. Now, he was not promoted. People who are not hired can never be promoted. They all certainly had common issues in terms of financial deprivation in the form of back wages, and they certainly had another common interest in job opportunities, either initially or in promotional aspects.

And perhaps more important than anything, the one thing that they all had in common, other than being Mexican-Americans, is that they were entitled to work in a work environment that's lawful and free from discrimination. That's very important, and that's common. That's a common interest.

QUESTION: If that's sufficient, then, that really does away with any other requirement. If you say our commonality is that we all want to work in a lawful

work environment. Do you think that would be enough?

MR. HERNANDEZ: I don't think it's enough, but I think it's an important factor. I think that Rule 23, with the four aspects -- if the trial judge will go down those aspects, he can determine whether or not there actually is a class. You see, because where there's the same interest -- you talk about same interest, same injury. Same interest, well, obviously unless you're all Mexican-Americans you may not have the same interest.

Obviously you have to be an employee or an applicant for employment. We're not representing people who just happen to be walking by a General Telephone parking lot. Obviously you have some of the same job functions. They had a promotional scheme here where they tried to promote from within most of the time. However, they did hire directly in. One of the class employees here actually applied directly for a field inspector's job.

Some of the supervisors, the supervisors who did the evaluation on the promotion under the affirmative action program, which I doubt they were implementing very strongly, still were to interview and supervise the new hires.

You have some -- you have a same, similar job

location. They all worked in the north Texas area. General Telephone drew their employees from the Dallas-Fort Worth metroplex.

You have a lot of similarities, a lot of same interests and a lot of same injury. And if you take those under Rule 23, if the court will take them and look at them individually -- and I think that you have to do that on a Title VII class action. And I think this record demonstrates, for example, quite clearly that Judge Hughes did not just go along across the board.

I think the record will demonstrate that there was discrimination on a class-wide basis probably against black American males and females, there was discrimination against females on a class-wide basis. But the court didn't give us that type of class. We limited it from a litigation standpoint to the individuals in terms of the Mexican-American promotion and hiring.

Now, by the same token, I think that what I would like for the Court to consider is that there is no perfect class, that there's just not a perfect class; that Rule 23 doesn't require that you have a perfect class.

QUESTION: Your argument sounds as though you

would reduce it to one component, without taking into consideration the other factors that have been indicated in our opinions.

MR. HERNANDEZ: No. Your Honor, I think that I would take into account all of the components under Rule 23, and all of them with equal effect. I don't think, for example, that adequacy of representation in this case is really an issue. The Plaintiff prevailed.

And in looking at the various aspects, in terms of numerocity there's no question but that numerocity was fulfilled.

Suppose that -- if we're going to limit, if this Court is going to limit classes of employees who can bring an action to that employee who has suffered the exact same interest or same injury, then we're going to have a multiplicity of litigation, and the Title VII litigant will not be able to wrong these remedies. And that's not the purpose and the intent of Title VII.

I think that the analogy I like to think of is that if the Plaintiff with his counsel is a private attorney general under Title VII, then that attorney general, private though he be, cannot be, should not be, limited only to the very narrow claim or charge of discrimination that is filed by sometimes an ill-informed, uneducated individual who knows something

is being done wrong to him but doesn't know quite what it is and perceives it to be based on race, sex, national origin.

And so how is that private attorney general, how is he regulated? He's regulated in two instances: First, he's regulated by the EEOC and by the charge. That's where it all starts. And in this case, for example, the EEOC, following Sanchez versus Standard Brands, sent the Defendant the request for like and related matters, to wit hiring discrimination. The EEOC made a finding and a determination that this Defendant, this company, discriminated as a class against applicants in failing to hire.

So at that point it was brought to -- this was long before this lawsuit was started. This private attorney general, that's his first regulating factor.

The second place where he's regulated is by the district judge, and in the real world of Title VII plaintiffs' attorneys, when that original petition is filed you don't expect to put out all of the factual allegations that make up your class. You do expect to notify the court and the company that you are making class allegations.

And now, under the procedure at least in North Texas, you have 90 days to file your class certification

motion, at which time all of these issues are taken up, not on the merits, but they're all taken up to determine whether or not you can in fact sustain your burden of proof preliminarily on the class. And there's nothing to say that once a class has been established that it cannot be decertified, which has occurred.

If you're going to follow this, this area, then the private attorney general should not be limited to having the private -- to having a perfect class. Now, in reality what's going to happen, I believe, if across the board is not approved -- and this was a term which I said was just developed by the court -- but if it's eliminated, as General Telephone would ask you to do, and this case is reversed and not remanded, what's going to happen to those 13 Plaintiffs who have now been absolutely proven to have suffered discrimination? What's going to happen? How are they going to be handled?

Well, as a plaintiff's attorney, what's going to happen is very simple to me. You're going to have Rule 23(c)(4)(B) subclasses being applied for, and you're going to have counsel for the plaintiff who says, well, if there is a conflict or a potential conflict of such a magnitude, then I move the court to designate a subclass, I move the court to appoint counsel for the

subclass.

QUESTION: Is there anything to prevent them from starting over and drawing from the people within the class that you've described?

MR. HERNANDEZ: From starting over altogether? Well, there's the time limitation. They didn't file charges with the EEOC. The time limitation I think would stop them, I think these 13 anyway.

Now, I want to comment a little bit on the question that related to the Government --

QUESTION: What you're saying is that the members of the putative class have no standing to amend the showing, enlarge the showing, and maybe get a different class representative?

MR. HERNANDEZ: I think that we could try to amend and get a different class representative of that particular class. I don't think that's necessary under this case and I do think that Mr Falcon was an adequate representative of the class.

You know, there have been some allusions in the briefs to the fact that the Plaintiff perhaps didn't somehow prove his case or the statistics that they put into the record weren't somehow sufficient. As a private litigant in Title VII, I have no qualms with Berdine, which says you have to prove your case. I have

no qualms with McDonnell Douglas, which gives you the four different ways, more or less, how you can rely on to do the prima facie case.

But it escapes me how we forget that the burden of proof, although it is on the Plaintiff, should be no greater than the preponderance of the evidence. And the preponderance of the evidence in this case clearly demonstrated that this company discriminated in hiring, and the record and the statistics are there.

Now, the Fifth Circuit did remand because the court did not deal with the years 1974 and '75. But I think looking at Plaintiff's Exhibit No. 17 and Plaintiff's Exhibit No. 20, that that will not be very difficult to amend or to expand upon in terms of additional findings.

I wanted to comment a little bit on the Government's position and the reason for, or at least the way that I envision the reason for private attorney generals. It deals with the Congressional intent of Title VII and the broad-based attack. And I gather that the reason that it's called an across the board attack, at least in my mind, is that because discrimination to me is like a cancer, and you don't treat cancer very nicely. You attack cancer and you attack discrimination, and that's why they call it across the

board, because when you find a company that discriminates against an employee because she's a female or because he's black or because he's a Mexican-American, this is -- you attack.

And once you do find it, then you look. Generally companies -- generally companies who discriminate in one area will discriminate in another. It's true, you have to look and see whether or not there's a central authority, one personnel office, whether or not it might just be one supervisor. But all of that is done, particularly in the concept of Title VII and Rule 23, by the district judge.

The Government in its amicus has changed its position, has changed its position from where it's been in Rodriguez, changed its position from where it's been in other cases. I think it's significant that it did, because that's the public attorney general and the public attorney general we know is motivated not always by the same motivation that private attorney generals are, and that may all be well and proper.

There are some problems with that, because public attorney generals tend to change quite often. Private attorney generals and litigants may not. And I think that's why this Court, and I think that's why Congress, has recognized that you need to have both.

Now, what we are asking is that this Court do several things: that it provide not only plaintiffs, but it provide companies, management, with some clearcut guidelines on how a district judge on a case by case basis can approach the across the board, broad-based, however you want to term it, challenges to employment discrimination.

We suggest that the same interests, same injury requirement from Schlesinger or Rodriguez be broadly viewed as Title VII has been broadly viewed if we are to reach the results envisioned by Title VII in eradicating employment discrimination; and that that broadness or the liberal approach to that rule be held in check, so to say, by the district judge by following the reasonableness test, by looking and being able to look at all the factors, not just one of the factors of Rule 23, by being able to concern itself with the various aspects that go into making up whether or not the claims are typical, whether or not there are common questions of law and fact, whether or not there's numerocity, whether or not there's adequate representation, but that the district judge have some guidelines for doing that.

We suggest that the local rule as it's promulgated in the Northern District under 10(b)(2) is a

good model to follow, because it requires the litigants to face the class certification issue long before you get into the merits, and it requires it specifically by having you as a litigant set forth, in response to the seven different areas that it requests --

QUESTION: Do you think the position of the Fifth Circuit, it's across the board approach, can be reconciled with the Western Electric case in the Fourth Circuit?

MR. HERNANDEZ: I'm not sure that it can, but if I had the choice I would choose the Fifth Circuit across the board method.

QUESTION: Well, I can understand that.

MR. HERNANDEZ: I'm not sure that it can. But as I said, I think that the across the board attack method is a mere terminology. You could call it broad-based, whatever you want it to.

We would ask the Court to affirm the Fifth Circuit, affirm or give some application to the across the board attack method, and to allow this case to be remanded. It has been almost ten years since Mr. Falcon filed his complaint with the EEOC, and this litigation does need to come to an end.

But more than that, the specific instances in this case are not such that the trial judge just merely

said, okay, because you're a Mexican-American, or okay, because you're male, you're entitled to class action and I'm going to find there's discrimination. That wasn't the case at all.

There was careful attention by the trial judge, without the benefit -- you know, when we tried this case we didn't have Teamsters, we didn't know what disparate treatment versus or being analogous to disparate impact was. We knew there was discrimination at General Telephone and we knew we could probably prove it.

And when we got down to looking at the statistics and to some of the testimony, it was true in certain areas. And the judge didn't just merely not look and consider the evidence.

I ask this Court to look at the statistical evidence, look at the testimony of the EEOC investigator and the Plaintiff's exhibits, look at the letters from the General Services Administration which indicated in 1972 that this company was lacking in its employment of minorities, black, Mexican-American and females, particularly in managerial positions.

Look at the fact that in the management of this company there was one Mexican-American out of 66. Look at the fact that this company in the Irving

Division, which the trial court limited us to, failed to hire any Mexican-American males from 1972 to 1976. And this was a company that was basically run by white male Americans.

Look at the fact that this company used the so-called Operation Attainment only one time. Look at the fact that it did not use its affirmative action program. The supervisors testified that they weren't familiar with it, even though it applied to them. Look at the fact that most of the minority employees were at the lower end of the job scale and the pay level.

That was the kind of testimony, those were the kind of things that led this trial judge to find that there was discrimination. The statistical evidence and the other testimony led it to find that it complied with Rule 23.

I don't think that you have to, in order to represent one member in terms of the employee or the applicant as to the promotional aspects, you need not suffer the same exact injury as long as you have the same interest and you suffer some injury. Totally different from Rodriguez. In Rodriguez there was no injury. In Rodriguez there was no motion for class certification. In Rodriguez the trial court did not certify a class; the appellate court did. Those are the

differences from Rodriguez.

And in fact, in Rodriguez this Court recognizes that we are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits involving class-wide wrongs. That's what Rodriguez stands for, too. Common questions of law or fact are typically present.

We too want all of the courts to resolve this issue in terms of class-wide and class action. If we're not careful we'll have fragmentation where the plaintiff's attorney, depending on the district judge, will either be litigating a statewide class, a national class, or a committee class, depending on where and how the court views the same interests, same injury, and the breadth and the scope of what a plaintiff can or cannot prove.

We too want this Court to apply Rule 23 carefully, keeping in mind that Rule 23 as it was finally amended came into effect finally, I think, in 1966, and Title VII was passed in 1964. Rule 23 is not a civil right rule. It happens to be a rule that's available to Title VII litigants, and with good reason.

With that, we would ask the Court to remand, affirm the Fifth Circuit, provide some guidelines for litigants, for management, and for the district court.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Powers?

REBUTTAL ARGUMENT OF NOYES THOMPSON POWERS, ESQ.

ON BEHALF OF PETITIONER

MR. POWERS: Yes, I do, Your Honor.

Your Honors, General Telephone is prepared to defend its hiring in the Irving Division whenever there is a proper charge and a proper complaint. But it is our contention that this case does not provide either a proper charge or a proper complaint for such litigation. And what we are seeking is an end to this litigation of hiring claims in an action brought by an individual who is not a proper representative of unsuccessful applicants and whose claim is not typical of their claims.

Mr. Hernandez referred to the answers to interrogatories which were before the district court in connection with its consideration of class certification. Yet it's clear if one looks in the appendix at page 34, where the answer which the company provided -- or which Mr. Hernandez provided concerning common questions is set forth, that he referred only to incidents involving promotion claims. He never alleged anything in terms of a common issue affecting both

applicants and employees.

It's also clear from the record that, while Mr. Hernandez talks now about the associational injury which Mr. Falcon may have suffered, that he stated during the trial in volume one of the record at page 355 that the first time that Mr. Falcon experienced discrimination was when he sought to pierce the management veil, as he referred to it, and he sought no relief from any personal injury that he may have suffered. So this I think quite clearly is an argument that's been advanced at this time.

It's also clear from the record that the hiring was done not by supervisors, but by people in the personnel office.

I would note particularly that the thing that it seems to the company is most needed in this area is for this Court to spell out more clearly to the lower courts and to litigants what Rule 23 requires in an employment discrimination case. There has been an unfortunate tendency to view Rodriguez as only dealing with inadequacy of representation, and not to recognize that Rule 23 has other elements that must also be carefully applied, particularly the typicality requirement.

And it's our position, and we believe the

Government supports that position, that certainly for a class representative to represent others his claim must advance their claims. If it doesn't partially establish the class claims, then it cannot be considered typical.

In conclusion, I would simply note that at page 11 of Mr. Falcon's brief he urges approval of a golden rule of reasonableness in reviewing class certifications. We submit respectfully that there is nothing golden nor reasonable about the across the board approach of the Fifth Circuit.

It places absent class members at risk of conclusive judgments in cases brought by persons having no direct interest in their claim. It subjects defendants to the risks of successful collateral attacks in cases where a defendant is successful. And it burdens both the court and the defendants with unnecessary litigation.

Thank you.

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

(Whereupon, at 1:50 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:

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST vs. MARIANO S. FALCON

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and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Diane Hammond