ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1044

TITLE UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS
Petitioner v.
LOUIS H. AIKENS

PLACE Washington, D. C.

DATE November 9, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES POSTAL SERVICE :

BOARD OF GOVERNORS, :

Petitioner, :

v. : No. 81-1044

LOUIS H. AIKENS :

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Washington, D.C.

Tuesday, November 9, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 o'clock p.m.

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JACK GREENBERG, ESQ., New York, New York; 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 first this morning in United States Postal Service against Aikens.

Mr. Wallace, you may proceed whenever you are ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WALLACE: Mr. Chief Justice, and may it please the Court, this employment discrimination case involves a claim of disparate treatment which is under this Court's decisions of claim of intentional racial discrimination, under Title VII of the 1964 Civil Rights Act.

The case is before the Court for a second time. In June, 1981, on a petition for certiorari filed by Solicitor General McCree, the Court with two Justices dissenting vacated and remanded the case for further consideration in light of Texas Department of Community Affairs against Burdine, and the case is now here on certiorari from the court of appeals decision on that remand.

Our concern, and the question presented in both of the petitions, focuses exclusively on the legal standard adopted by the court of appeals for

establishing a prima facie case of employment discrimination in situations where the employer is selecting an individual from a group of qualified individuals which is racially or sexually or heterogeneous. The particular case arises in the context of promotions.

For present purposes, the facts may be simply stated. With respect to the promotions and details at issue, after an administrative investigation and hearing and appeal from that hearing were all resolved against him, the Respondent filed suit under Title VII in the district court. The Postal Service did not deny that the Respondent, along with other individuals under consideration, had the qualifications necessary to be eligible for the promotions and details, and there was no dispute that Respondent is a black person, and that the Postal Service selected white employees for the particular promotions and details at issue instead of Respondent.

The district court found that from 1952 to 1966, Respondent had advanced steadily through a succession of supervisory positions in the D.C. Post Office, and by March of 1973, he was the fifth highest ranking official in that Post Office. It also found no evidence of specific acts of discrimination against him,

and no other direct evidence that he was treated any differently because of his race from the way other employees were treated.

And the district court found no credible evidence that he was as qualified or more qualified than other individuals who were detailed or promoted during the period in question. It also found that there had been a considerable increase in the number of black employees occupying high level positions in the District of Columbia Post Office during the pertinent period, and that during that period, other blacks as well as whites were promoted or detailed to positions above the Respondent's position, and that by the time of the district court's opinion, almost all the high level positions in that post office were held by blacks.

Now, none of these findings was held to be clearly erroneous, and for present purposes, even though it's possible that other inferences could have been drawn from the underlying facts, which are rehearsed at some length in Respondent's brief, the underlying evidence, for present purposes, those findings are the premise of the case, because they are the premise on which the court of appeals rendered its decision, and those facts found by the district court do not in our view add up to a prima facie case of discrimination.

The reason for this can be simply stated. If unexplained, those findings do not show that it is more likely than not that the employer's selection was based on an impermissible consideration, such as race, to paraphrase this Court's opinion in the Fernco case, or if unexplained, these facts do not show circumstances giving rise to an inference of unlawful discrimination, to paraphrase what this Court said in the Burdine case.

In other words, when this Court had spoken generically about what constitutes a prima facie case of discrimination under Title VII, the standard is really no different from what it is in establishing any other prima facie case, a showing that if the showing is unrefuted in any way, that it is more likely than not that the case has been proven.

QUESTION: Mr. Wallace, when you say prima facie case, what exactly do you mean? Do you mean enough to get by a motion for a directed verdict if the case is tried?

MR. WALLACE: That is the way most of these cases arise, on a Rule 41(b) motion at the conclusion of the plaintiff's evidence, and that is what we mean here, what we are referring to here, and by and large what the Court has been referring to in its opinions in this field.

QUESTION: And it is not inconsistent with that to say that if the employer puts on no evidence, or does nothing, there must be judgment for the plaintiff?

MR. WALLACE: It's not inconsistent at all.

QUESTION: But isn't that what is required, under the existing rule under Title VII, that if the employer does nothing, judgment must be entered for the --

MR. WALLACE: That is what this Court said in Burdine.

QUESTION: Well, then it is something more than a motion to get by a directed verdict.

QUESTION: I don't think it is.

MR. WALLACE: Well, it is not really a directed verdict in these cases. Title VII cases are tried to the Court. It is a Rule 41(b) motion, and since the standard of proof is the preponderance of the evidence, if the district court at the conclusion of the plaintiff's evidence concludes that that evidence shows that it is more likely than not that discrimination was a factor and the -- and therefore denies the 41(b) motion, and the defendant rests, that's the same thing as saying that he has met his burden of showing by a preponderance of the evidence.

QUESTION: The district court can also rule on

a 41(b) motion at the end of the plaintiff's case that assuming that I were to believe the plaintiff's witnesses, there is enough to get by a motion -- there is enough to enter judgment for the plaintiff if the defendant puts on no case, but he might nonetheless, if the defendant chose to put on no case, after having denied a motion at the close of the plaintiff's case, I should think still enter a judgment for the defendant when it came to his duty to weigh the credibility of the witnesses.

MR. WALLACE: Well, it's conceivable, Mr. Justice, although he would be more likely to be reserving judgment on whether the plaintiff has made out a sufficient case to withstand the Rule 41(b) motion. He can't really be depending on the defendant's evidence to complete the plaintiff's showing.

QUESTION: Well, as a matter of prudence, a trial judge might simply decide, might he not, that he would like the whole record there so that if there is an appeal it will be disposed of in one stroke?

MR. WALLACE: He may very well, and that's essentially what happened in this case. There was a full trial in this case, although at the end of it the district court ruled, as the court of appeals read its ruling, that the plaintiff had failed to establish a

prima facie case. In any event --

QUESTION: Would not the obligation of the reviewing court be to decide -- go on beyond that and decide whether, assuming arguendo that a prima facie case had been made out, that the preponderance of the evidence didn't support the plaintiff?

MR. WALLACE: Well, we read the district court's opinion in this case as passing on that question as well, because the district court did hear all the evidence, but the court of appeals disagreed with us. We filed a petition for rehearing the first time the case was in the court of appeals, making that point, and that petition for rehearing was denied.

We have not contested that issue further before this Court, either on the first petition or on the second petition. We have accepted the court of appeals' ruling that in effect the district court granted the Rule 41(b) motion after hearing all of the evidence.

QUESTION: But in no other branch of the law where there's been a trial, where the plaintiff puts on evidence, the defendant puts on evidence, the judge enters findings of fact and conclusions of law, would something on appeal be talked about as failure to make out a prima facie case.

Do you think our decisions make the Title VII litigation unique for some reason?

MR. WALLACE: I do not, Mr. Justice. As I said, we thought initially that the court of appeals was in error in the way it read the district court's judgment in the case, but the district court's conclusions were not a model of clarity. In one conclusion, the district court did say that the plaintiff had failed to make a prima facie case, although the district court had earlier denied the 41(b) motion.

As we read what happened, the court of appeals in effect said that the district court belatedly granted the Rule 41(b) motion in this case, and treated the case as if the district court had not made findings about whether the prima facie case had been rebutted by the defendant, even though the evidence may well have been heard here in its entirety.

We don't really regard the procedural rules for Title VII cases as different from those in any other field of law. The confusion has stemmed, we think, from a misuse by the court of appeals in this circuit and by some other lower courts of the more particularized analytical framework that this Court applied in the McDonnell Douglas against Green case, that fit the facts

of that particular case in analyzing whether a prima facie case had been made out on the facts that were before the Court there.

We don't regard that framework as inconsistent with the later, more generic descriptions of what constitutes a prima facie case that I adverted to earlier in my argument, but rather as a useful analytical guide to the particular facts that were before the Court in McDonnell Douglas against Green, and that analysis is set forth on Page 6 of our brief.

And it fit that case very well, because it showed not only that the plaintiff was a minority applicant who applied and was qualified for the job, and despite his qualifications was rejected, but importantly, there's a fourth element, that after his rejection, the employer, contrary to his apparent economic self-interest, continued to carry the vacancy that he was trying to fulfill and continued to look for applications from persons of the plaintiff's qualifications.

Now, what the court below has failed to recognize is that in a different factual circumstance where that fourth element is neutralized by the employer's mere selection of one qualified applicant over another, these four elements in themselves no

longer add up to a prima facie case that makes it more --

QUESTION: So you think in McDonnell if there had been two applicants, one black and one white, both qualified, that the -- just because the white was chosen would not make out a prima facie case?

MR. WALLACE: That is exactly our point, Mr. Justice, that there has to be a showing of something more than these four elements if the fourth element is neutralized, because the fourth element was a necessary part of what added up to the prima facie case as those facts were analyzed, because it was an element of an employer acting contrary to his apparent economic self-interest, and therefore put a burden of production on him. The burden of persuasion never shifts, but a burden of production on him to come forward or else judgment would be re-entered against him to explain why he acted contrary to his apparent economic self-interest.

QUESTION: Mr. Wallace, is it the government's position that the plaintiff in this case would have met the burden that you say he should have met had he established that he was as qualified or more qualified than the person selected?

MR. WALLACE: Well, in order to come up with something comparable to the fourth element here, to show

that the employer was acting contrary to his apparent economic self-interest, one would have to say that that would be shown by his selecting someone less qualified than the plaintiff. If he is merely selecting someone equally qualified, the fourth element remains neutralized in our view. This Court said in Burdine that so long as impermissible considerations are not the governing factor, an employer has discretion to choose among equally qualified persons.

QUESTION: Well, isn't the utlimate question the question of discriminatory intent?

MR. WALLACE: That is the ultimate question.

QUESTION: And what set of facts will justify an inference of --

MR. WALLACE: Precisely so.

QUESTION: And in McDonnell it did, and you say here it does not.

MR. WALLACE: That is our point, that -- the fact that four elements were specified in McDonnell that added up to a prima facie showing has misled the court below into thinking that those are the only four elements one needs to analyze in a case of this sort, and even though the fourth element becomes neutralized by applying it to a different set of facts, the formula has been woodenly carried over to this different set of

facts.

QUESTION: Mr. Wallace, does the government place any reliance on the fact that this case was a promotional decision rather than an original entry decision?

MR. WALLACE: We don't really think that makes a difference from a situation where a new hire is made by selecting from among a group of qualified applicants.

QUESTION: Well, isn't there some difference at any rate? If you think of the ordinary McDonnell Douglas type hiring, you have presumably an indeterminate number of vacancies and minimum qualifications, and the inference is from business practice that the first people who come along and meet those minimum qualifications are going to be hired, but with a promotional decision, you frequently have only one vacancy, and a finite number of applicants within the organization.

MR. WALLACE: So long as there is a situation where the vacancy is carried in the initial hiring situation for any period of time where it would have been presumably economically advantageous to the employer to hire someone, then a prima facie case has been shown in our view, but if you have a situation

where it is known that a vacancy will be upcoming in a period of weeks or months, and applications are being collected and scrutinized, and then a selection is made to replace the individual who is retiring or leaving by selecting from among the applicants, that doesn't show that the employer acted in some way contrary to his economic interests, and unless there is something more of a showing, we don't see that a prima facie case of discrimination has been shown by the mere fact that another qualified applicant was selected rather than the plaintiff. That is our point.

QUESTION: Mr. Wallace, as I read Judge Wilkie's dissenting opinion, he was suggesting still a different test, and I wondered if you wanted to comment on his approach.

MR. WALLACE: Well, we think that, you know, there is much food for thought in what Judge Wilkie wrote, but he as well as the other members of the court of appeals focused exclusively in this case on whether there had been a sufficient showing of the second element of the four elements in the McDonnell Douglas analysis, a showing that the plaintiff in this case was qualified for the job.

There had been some dispute about that during the trial, because he had refused to accept assignments

to certain positions that were said to have been positions that would have made him better qualified to be considered for the promotions that he was interested in. And ultimately, the court of appeals focused on whether the employer had adequately specified that that kind of experience was a desirable qualification, even though not necessarily an indispensable qualification for the position at issue.

But no one on the court of appeals recognized that the real shortcoming was not that he wasn't qualified, at least minimally, for consideration for these jobs, but that he didn't show it added up to a showing that it was more likely than not that the selection resulted from discrimination because the fourth element had been neutralized in the McDonnell Douglas analysis.

QUESTION: Well, Mr. Wallace, it seems to me that if this case -- if there were proof in this case that the applicant for the position was more qualified, that would necessarily determine the fourth element, I would think.

MR. WALLACE: That is one way of showing that the employer --

QUESTION: And as you said before, it would not if he was just equally qualified, or less

qualified.

MR. WALLACE: That is correct, but --

QUESTION: So isn't the absence -- This record doesn't show, or there are no findings on the relative qualifications.

MR. WALLACE: Well, there is a finding that there is no credible evidence that he showed that he was as qualified or more qualified than the applicant -- than the successful applicants. There is a finding to that effect. The underlying evidence would have permitted the drawing of a different inference, but that is the inference that the district court drew, and the court of appeals --

QUESTION: The court of appeals didn't overturn that.

MR. WALLACE: -- didn't overturn it. And that is the premise on which the case is in this Court.

QUESTION: Mr. Wallace, you say the court of appeals didn't overturn it, but they do say -- the first of the two errors that they say the lower court made was that the majority on the first appeal rejected the district court's -- it calls it a legal conclusion, I guess, but that the appellant's claim failed because he did not prove that he was as qualified or more qualified than the individuals who were promoted, and then earlier

they had said that they had concluded he was more qualified, or as qualified or more qualified, and Judge Wilkie said they shouldn't have done that, that they were finding facts which they should, but weren't they implicitly saying that the finding was clearly erroneous?

MR. WALLACE: Well, one could --

QUESTION: It's a little hard to understand, because they also talk about it as a summary judgment, I know.

MR. WALLACE: Yes. One could possibly read it that way. The way we have read it is that they were holding that it was legally irrelevant whether he was as qualified or more qualified. So long as he was qualified for the job and the job went to a non-minority applicant, the standards of the McDonnell Douglas analysis had been met, and that it wasn't a proper legal basis for the district court to have done what it did. It never said that anything that the district court found was clearly erroneous.

QUESTION: It didn't use those words.

What about the second branch of the court of the court of appeals holding? They say also there was error in Conclusion of Law Number 7, in which the district judge said that there must be proof of

discriminatory motive. Do you disagree with their treatment of the motive issue, either at the district court level or the court of appeals level? What is your view of that issue?

MR. WALLACE: Well, ultimately, there must be a finding in a disparate treatment case of discriminatory motive. That doesn't mean that there need be direct proof of discriminatory motive. We have suggested in our brief, in the discussion of various ways to establish a prima facie case, that direct evidence, anecdotal evidence, evidence of discriminatory treatment of the individual in other ways could be introduced as a way of making a prima facie case.

But in light of the rest of the district court's findings, there was nothing improper about the district court noting as well that there was no direct evidence of discriminatory motive. The district court was looking to see whether there was anything that added up to a prima facie showing.

QUESTION: But the district court did more than that. The district court said, critical to this showing is proof of discriminatory motive on the part of the --

MR. WALLACE: Well, that is not correct.

QUESTION: Do you think that is a correct

statement of that law?

MR. WALLACE: That is not a correct statement of the law.

QUESTION: Well, then, what is the proper disposition of the appeal? Should it not go back to the district court?

MR. WALLACE: It --

QUESTION: That is one element of his holding that the court of appeals said was erroneous.

MR. WALLACE: Well, perhaps -- perhaps upon re-evaluation by the court of appeals, they would want a further finding made by the district court, although the rest of the district court's findings do not add up to a prima facie case regardless of whether the district court made a legal error in its discussion of the lack of evidence of discriminatory motive.

So long as the court of appeals does not set aside any of these findings, factual findings, as clearly erroneous, it seems to us the judgment that must be entered is clear. Perhaps the court of appeals --

QUESTION: Except if the district judge thought it was necessary to have direct evidence of motive, it would seem to me that might permeate the rest of the -- well, your view is that we could just disregard that finding.

MR. WALLACE: And the rest of the findings still do not add up to a prima facie case, and there is nothing left for the district court to resolve in his findigs that could add up to a prima facie case, so that I don't see that that is critical to the district court's disposition.

QUESTION: Because there was evidence in the record -- it is not necessarily recited in his findings -- of a pattern of filling a vacancy -- there were something like 20 or 25 vacancies that were regularly filled by a white person who had less education, less seniority, and less paper qualifications than the plaintiff, and I suppose it would be conceivable that one could draw an inference of discrimination from that circumstantial evidence, and yet the district court might have erred by thinking he had to have direct evidence of improper motive.

MR. WALLACE: Well, that is conceivable, although he did specifically find that there was no credible evidence that the plaintiff was as qualified or more qualified than the persons actually selected. That finding is quite precise.

QUESTION: And you say that ends the case. You say that ends the case.

MR. WALLACE: Well, in the absence of some

other finding that would have shown that the selection more likely than not was the result of discrimination, and there is no other such finding, and the error that Justice Stevens is talking about, if corrected, it still would not amount to a finding that could add up to a prima facie showing.

I would like to reserve the balance of my time, please.

CHIEF JUSTICE BURGER: Very well.

Mr. Greenberg.

ORAL ARGUMENT OF JACK GREENBERG, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GREENBERG: Mr. Chief Justice, and may it please the Court, the real question before this Court is whether on this record the plaintiff has made a prima facie case, and we submit that he clearly did so in four different ways, and that the judgment should clearly be affirmed.

Indeed, I would suggest the record is so clear that it is -- and so unlike the assertion of facts in the question presented, that it would be appropriate to dismiss the writ of certiorari as having been improvidently granted.

And I would like to recite now the four different ways in which the plaintiff made his prima

facie case. The four positions for which the plaintiff applied and concerning which he claimed he had been discriminatorily denied promotion were temporary appointments or details which were not posted. People didn't apply for them. Appointments were made at the initiative and the discretion of the supervisors.

All these four appointments were within the control or subject to the influence of the postmaster, Carlton Beall or "Belle." I am not certain how to pronounce it. And I beg the Court's indulgence, because I am going to use a term which I use advisedly, but it is based upon uncontradicted testimony. Beall was a racist, and there is really no two ways about that. I will just quote some of the testimony.

Three witnesses testified concerning Beall, two black and one white. Beall said, is supposed to have said, is testified to have said of blacks, "All they want to do is lay around and breed like yard dogs and collect relief checks." It was said of him by this witness that, "He was operating on an 1865 concept. He would only want black janitors. He very reluctantly gave any ground as far as I could see. I dealt with him quite frequently, and while we didn't always agree, I think he had a contempt for black people. I still think he has."

Another witness testified of Beall that he said of black people, "You know, they don't have to sit in the back of the bus any more," and that he testified concerning black people as "that crowd." Furthermore, it was testified that he frequently made sarcastic comments about this particular plaintiff, testifying -- I mean stating that this particular plaintiff, who had a great deal of education, that is, a master's degree and three years towards a Ph.D., making remarks about his education.

Now, Beall was a witness for the government. If anyone could deny such testimony made about him, he certainly would. Beall testified and did not deny a word of the testimony of these three witnesses, and I submit that focusing solely on the issue that is before this Court as to whether one made a prima facie case, that a prima facie case is made when it is demonstrated that the person in whose sole control the promotions were, and who never promoted a black person, but promoted 29 or 30 whites, made remarks of that sort, and was that kind of a person.

The second way in which a prima facie case was made was that there was an immense statistical disparity between the representation of blacks in the work force and whites in the work force and blacks and whites in

supervisory positions. Whites were 14 percent of the work force in the post office during the period in question. They occupied almost 50 percent of the supervisory positions. The likelihood of this occurring by chance I made an effort of calculating. It is something like one in a quintillion.

This, too, we submit, constitutes a prima facie case. In a total range of cases involving jury discrimination, employment discrimination, voting discrimination, this Court has looked at statistics, and has concluded from statistics far less persuasive than these, far less overwhelming than these --

QUESTION: Mr. Greenberg, are those statistics really that dramatic, if you look at the period when the statute was passed, and assume you started with a disparity at least that bad and maybe even worse which would have been produced by conduct that may have been something we don't approve of, but was lawful at the time it took place? Do your statistics demonstrate the --

MR. GREENBERG: I don't think that's an adequate explanation, but the question is, have we made a prima facie case, and if there is indeed such an explanation, they are free to come across and make it, but --

QUESTION: But the question is whether those statistics are meaningful unless you know what the statistics were at the date the Act was passed, and does the record show that?

MR. GREENBERG: The statistics were, as of, I think, 1974, and the Act was passed in 1964, made applicable to the Post Office in 1972.

QUESTION: So in the two-year period, you have to say that in the two-year period, there was a course of conduct that demonstrates that during those two years there was discrimination.

MR. GREENBERG: Well, it may be, but I think the issue before this Court is, given such overwhelming statistics, is some explanation called for, and that is the issue on a prima facie case.

QUESTION: Well, if you had the same statistics a week after the Act was passed, would that make a prima facie case?

MR. GREENBERG: If the same -- a week after the Act was passed --

QUESTION: Yes.

MR. GREENBERG: -- would that make a prima facie case? Well, perhaps not, but this is two years after --

QUESTION: But you think it clearly does two

years afterwards?

MR. GREENBERG: This is two years after the Act was passed, and indeed, there may be a perfectly plausible explanation for it. I seriously doubt that there is, but I think it is up to the government to make it, and the issue is, was there a prima facie case.

QUESTION: Well, Mr. Greenberg, is it often that in a disparate treatment case, the prima facie case is made out on statistics?

MR. GREENBERG: Sometimes. I don't know how often, but sometimes.

QUESTION: Have you got some cases on that? Perhaps in practice --

MR. GREENBERG: In Teamsters, there is -- there is a long footnote which discusses the use of prima facie case -- of statistics making a prima facie case in employment discrimination cases. I think if I am correct it refers to disparate treatment cases, but I wouldn't swear to that.

QUESTION: Does this record show what the breakdown was in management level personnel at the time the Act was passed?

MR. GREENBERG: I don't know. It shows it as of the time of the filing of the complaint.

QUESTION: Would you think that that was of

some importance as to -- to make a comparison?

MR. GREENBERG: It probably was worse at the time of the -- at the time that Act was passed than it was at the time of the filing of the complaint.

QUESTION: But then what do they do about that? Do they dismiss all the management level people to make way for new people?

MR. GREENBERG: Oh, I don't think anyone has suggested that. The question is, what do you do with an applicant who applies for a job at the time after the Act was passed that makes a prima facie case.

QUESTION: But doesn't that factor affect the weight of the statistics that you are suggesting?

MR. GREENBERG: Well, this plaintiff was applying for an opening. There was a vacancy.

QUESTION: The statistics don't bear on the immediate question of the opening, do they?

MR. GREENBERG: No, they don't bear on that point. But there were openings continuously occurring. There were many openings occurring in the post office. There apparently was a great deal of mobility there. Once the Act has been passed, then the Act of course applies to those openings. I don't think anyone has ever suggested --

QUESTION: When were the openings? At what

stage in this whole panorama were the openings where he declined to accept a promotion?

MR. GREENBERG: I can't give you the exact date. Certainly it was after the Act was passed.

QUESTION: Yes, I assumed that, but you don't know where in that sequence?

MR. GREENBERG: I would have to check on the date of those three positions. I might say as to those positions that whites who were promoted above them also had not occupied those positions, and some of them had declined comparable positions.

QUESTION: Mr. Greenberg, do you agree with the statement of the court of appeals, "The prima facie case in a suit alleging individual discrimination does not require a showing of discriminatory motive?"

MR. GREENBERG: In the sense of demonstrating the mental --

QUESTION: Whatever sense the court of appeals used it.

MR. GREENBERG: Well, I agree with it in the sense that it does not require the demonstration of a mental operation, but it can be demonstrated out of factual circumstances giving rise to an inference of that, yes.

QUESTION: Are you giving rise to an inference

that the individual was intentionally discriminated against?

MR. GREENBERG: Yes, giving rise to that inference, yes.

QUESTION: That the reason he was denied the promotion was that the employer was discriminating on the basis of race?

MR. GREENBERG: Yes, you ultimately have to show that in the disparate treatment case, but you don't have to show that someone was thinking, you know, syllogistically thought that I am not going to appoint this person because he is black, and demonstrate that that is what went on in his head.

QUESTION: Why not?

MR. GREENBERG: Because that can be derived from external circumstances. I guess it amounts to the same thing, really.

QUESTION: Doesn't the ultimate inference have to be that from this circumstantial evidence, we will conclude, or there is evidence to support --

MR. GREENBERG: Yes.

QUESTION: -- the inference that that is exactly what he was thinking about.

MR. GREENBERG: Yes, that's right.

QUESTION: You don't need any direct evidence

of --

MR. GREENBERG: That's correct. Yes. You don't need direct evidence.

QUESTION: So you disagree with this statement of the court.

MR. GREENBERG: If it means what we have just discussed it means, yes, I disagree with it.

QUESTION: Okay.

QUESTION: Mr. Greenberg, supposing that the plaintiff has put on its case in a Title VII action, and there is a Rule 41 motion to dismiss at the close of the plaintiff's case. Is it permissible for the judge to say at that time there is evidence here from which certainly a reasonable person could infer actual discriminatory intent on the part of the defendant, but I can weigh the evidence at this point and in that capacity I just don't choose to draw that inference. I think it is equally reasonable to draw an inference there was no discriminatory intent. So the motion to dismiss is granted.

Is there anything wrong with the trial judge --

MR. GREENBERG: If the judge doesn't believe the plaintiff's witnesses?

QUESTION: Well, he doesn't choose to draw the

inference from the -- of a state of mind from facts which could support that inference but really don't compell it.

MR. GREENBERG: I think as a matter of law under McDonnell Douglas, Burdine, and Sweeney and the other cases, he is compelled to draw that inference if he believed -- unless he disbelieves the witnesses.

QUESTION: Well, you think that if a witness simply testifies to facts which could support an inference, that the inference becomes mandatory?

MR. GREENBERG: I think that's what McDonnell Douglas says. I think McDonnell Douglas -- McDonnell Douglas is a rule, as I understand it, and it was reiterated in Burdine, and if I recall correctly, in Footnote 7, that if the evidence called for in the McDonnell Douglas case is presented, it then creates a presumption that there has been discrimination, which presumption is rebuttable, but if not rebutted, then the judgment must be granted for the plaintiff.

QUESTION: Well, then, you see Title VII litigation as being kind of unique, I take it, and not --

MR. GREENBERG: No. No.

QUESTION: -- the ordinary burden between the parties.

MR. GREENBERG: Presumptions -- I think

presumptions arise and are deferred to in all branches of the law. Res ipsa loquitur is a presumption. In antitrust cases, there are presumptions. In -- rights cases, there are presumptions.

QUESTION: But what other traditional rules of evidence would simply be a permissible inference in other branches of litigation? Is a presumption in Title VII litigation that carries one beyond a negative finding by the district judge?

MR. GREENBERG: Well, if the negative finding is based upon the fact that he disbelieves the witnesses, then the testimony is not worth anything, but if there is testimony which he believes and a demonstration of facts which he asserts to have occurred, then there is a presumption. If the elevator falls down the shaftway, that doesn't really prove that the elevator company was negligent. The law, however, says that he is unless he can prove that he wasn't.

QUESTION: Well, suppose in a hypothetical case there had been three whites appointed to vacancies and no blacks, and there is testimony from the supervisor that this is how he went about filling those posts, and both of those situations are before the district judge on a Rule 41(b) motion. He says to himself, this filling the three slots with whites rather

than blacks when they are equally qualified certainly would support inference of discrimination, but I am satisfied that the supervisor is telling the truth, and to me that negates the inference of discrimination, so I am going to grant the Rule 41(b) motion.

MR. GREENBERG: Well, I would want to know what it was that satisfied him.

QUESTION: Well, that he gave an explanation as to why each of the whites were promoted in preference to blacks that satisfied the trial judge that it was not a discriminatory animus.

MR. GREENBERG: Well, now you are posing a case in which the trial judge was satisfied to the contrary, but if a black applied for a job or a woman applied for a job and was rejected, and the job was then filled by a member of a non-protected group, the rule in McDonnell Douglas, as reiterated in Burdine, which is -- let me come to Burdine just for a moment.

Burdine is precisely this case. Burdine was the case in which a black woman applied for a job. People whom she trained had been promoted above her, and this Court and -- this Court held that she had made a prima facie case. On a weighing of all of the evidence, it was found that she had not carried her burden and she lost, but as to the issue of whether or

not she made a prima facie case, that is precisely the issue in this case as to whether or not Aikens made a prima facie case.

QUESTION: Well, then, isn't there something perhaps inconsistent between McDonnell Douglas and Burdine and perhaps Fernco on the one hand and the principle that in a bench trial on a motion -- Rule 41(b) motion the trial judge can weigh the evidence?

MR. GREENBERG: Well, no. Let me just go into the details of this case and explain to you how there is nothing inconsistent. In this particular case, we submit that plaintiff made a prima facie case. The supervisory positions were in the control of a racist, and it is a term I don't hesistate to use, because it is uncontradicted on the record.

The statistical disparity was enormous. This plaintiff, and I hadn't come to this yet, was not only qualified, as it has been asserted. He was extraordinarily well qualified. All his supervisory ratings were extremely high. He had been recommended for the job of postmaster. He had been recommended for other high positions.

And then we have the critical mass of all of these factors taken together. These shouldn't be seen in isolation. When they are seen together, that makes a

prima facie case, we submit. Okay. The judge then wants to hear what it is that the government's witnesses have to say to indicate that there was no racial discrimination in the selection of whites over the plaintiff in the government's case.

The government put on three or four witnesses. They all testified about a position which is not in issue here, that of postmaster. It had been an issue, but it is no longer an issue, because of statute of limitations problems. The only other witness to testify as to anything regarding the positions in issue was Carlton Beall, the person of whom I read all that testimony. He said, "Blacks lay around like yard dogs in the sun."

I think if the judge had gone through the McDonnell Douglas sequence of saying, is there a prima facie case, has it been rebutted, he might have said, I don't believe Beall. I might believe something else, but I can't believe Beall, and he might have ruled for the plaintiff. So the importance of the prima facie case is very great.

QUESTION: When did Beall go out of office in this sequence?

MR. GREENBERG: Seventy-three, I think. But he didn't go -- he went -- he was no longer postmaster

in '73. He was then promoted to district -- district manager, and still was involved in the appointing process.

QUESTION: I would be interested in your other two ways of proving your --

MR. GREENBERG: The prima facie?

QUESTION: You went through two of them, didn't you?

MR. GREENBERG: Well, I went through -- I went through Beall. I went through the statistics.

QUESTION: Right.

MR. GREENBERG: Then, this plaintiff was not someone who was merely qualified or only qualified. He was someone as to whom the record made it quite clear that -- he was a superior employee. He had been highly rated by the promotion advisory board. He was among those rated to be postmaster. His ratings called him very efficient. He was called "an outstanding supervisor." There was no derogatory information about him. That is hardly the case of your minimally qualified applicant.

QUESTION: You have a problem then with the district court findings as well as with the court of appeals. None of these three -- well, certainly your first two bases for making a prima facie case is not the

way the court of appeals approached the case.

MR. GREENBERG: That's right, but that was one reason I --

QUESTION: And this one is not either.

MR. GREENBERG: -- this case is not properly here. Yes.

QUESTION: This one is not either. We can't decide all these facts up here, can we?

MR. GREENBERG: These were uncontradicted.

QUESTION: But there's a contrary finding, isn't there? That is Finding 17. What do you do with that?

MR. GREENBERG: Finding 17 -- Finding 17 I think rests upon a fundamental misconception of what the McDonnell Douglas rule requires. The McDonnell Douglas rule requires -- Finding 17 calls for -- refers to a comparison between the plaintiff and the other applicants.

QUESTION: But your third ground, I think is --

MR. GREENBERG: I wasn't attempting to compare them, though I could do so.

QUESTION: Is your third ground that it is a prima facie case even if each of the other competitors for the same position was also extraordinarily well

qualified and perhaps even better qualified than the plaintiff?

MR. GREENBERG: No, I don't think it gets into that. I think that when you are -- and the government and the dissenting opinion below made much of the fact that this was a supervisory position. I think there is some force to the fact that if you are dealing with a supervisory position, if someone has the bare bones, minimal, nominal qualifications, one might say, well, you know, it is a different kind of thing. We really have to take a look at a person and see his various dimensions.

But this is a case of someone who far exceeds that, and I think in a way of stating the qualifications for a supervisory job, maybe you have to state them a little differently. Here they were stated beyond any possibility of dispute.

QUESTION: Well, that is strange, then, that both the district court and the court of appeals said there was a lack of evidence as to relative qualifications.

MR. GREENBERG: Well, I don't know what they meant by relative qualifications. If by relative they meant relative as to the other people applying for the job, I think that is an incorrect and a destructive

interpretation of McDonnell Douglas. If by relative you mean relative to the nominal qualifications for the job, I think -- I have no quarrel with that, and I think that is --

QUESTION: Mr. Greenberg, it sounds to me in your argument as though you don't really disagree with the government's proposed test. You simply disagree with the application or findings of fact that were made in this particular case.

MR. GREENBERG: Well, I have spoken about nothing but uncontradicted evidence so far, so I don't think there's any problem with findings of fact. There were no findings of fact about Beall, and there were no findings of fact about statistics, and there is no conflict about that. But I do disagree --

QUESTION: So accepting the government's test, you say --

MR. GREENBERG: I disagree with the government's test. I think the test of McDonnell Douglas is extremely important to maintain in this case, if this Court goes on to decide it, and precisely because of the kinds of facts which have been developed in this case. The case is very unusual. Nowadays one is not going to find evidence of a racist supervisor. People don't say the kinds of things that Beall said

openly, at least, any more.

So far as the statistics are concerned, these statistics are overpowering. A more typical case would involve statistics that have to be developed by expert witnesses, and it would be quite expensive and time-consuming to develop.

QUESTION: Mr. Greenberg, I don't think you have told us your fourth basis for saying there is a clear prima facie case.

MR. GREENBERG: The fourth basis is the critical mass of the first three bases. It may or may not be considered a fourth basis. But I think these can't be considered in isolation. We have a case in which all these things existed.

QUESTION: You don't rely, if I understand you correctly, you don't rely on the history of being -- openings for which your client was qualified that were filled repeatedly, I think 20 or 25 times, by white applicants.

MR. GREENBERG: I do rely upon that.

QUESTION: That is not one of your four theories.

MR. GREENBERG: Well, it was perhaps implicit in the whole thing. The government was saying that notwithstanding that, he didn't make a prima facie case,

and I was trying to show that all these factors added up to a prima facie case of all those denials being discriminatory.

QUESTION: I see.

MR. GREENBERG: But one really and probably almost never will find a person going around and opening saying the things that Postmaster Beall said. The statistics will rarely, if ever, be this overpowering. And so if we accept the fact, as the Congress has in 1964, and then in 1972, when it made the Act applicable to the federal government, and then in 1978, when it passed the Civil Service Reform Act, that racial discrimination remains an important problem in the United States, is something which this country is resolved to attack and eradicate, the McDonnell Douglas test makes it possible for someone to bring an action and cast the burden of coming forward with evidence upon the party in possession of the evidence, which is the government.

That is where we are talking about subjective decision-making here, particularly for supervisory positions. The government has the knowledge of or the employer of why it subjectively made these certain decisions. It has been argued by the government and by amici that this will and has given rise to a flood of

litigation. There is no evidence of that. There is no statistics. There are no citations.

Common sense argues against it. Your typical middle class or even less economically advantaged plaintiff is not going to be able to bring an employment discrimination action in the federal courts which is going to be expensive and time-consuming. Indeed, this particular plaintiff, until this stage of the litigation, was able to bring the action because his son represented him.

A civil rights organization is not going to be able to bring actions of this sort unless there is some reasonable prospect of prevailing and obtaining a counsel fee so that it can finance itself to go on to represent people in other actions. And so, only a plaintiff who sincerely believes his case is meritorious and counsel or an organization that are willing to support him in such a case in the same belief are going to be bringing cases, and that is going to screen out the unmeritorious cases, and unfortunately some meritorious ones as well.

QUESTION: Mr. Greenberg, I take it that the court of appeals didn't believe the plaintiff in such a case as this should have to prove that he was as or more qualified than the other persons, but that it was open

to the employer to offer evidence on remand about relative qualifications.

MR. GREENBERG: Correct.

QUESTION: Would you disagree that -- would you agree or disagree that if the employer shows that the person he appointed was more qualified, and the judge believed that, that the prima facie case has been rebutted?

MR. GREENBERG: Yes, except that the plaintiff then could show that was a pretext.

QUESTION: Exactly. Exactly.

MR. GREENBERG: Yes.

QUESTION: But absent that, it would be rebutted.

MR. GREENBERG: Yes.

QUESTION: But the plaintiff does not have to make that showing.

MR. GREENBERG: That's right, but that information particularly as to subjective selection --

QUESTION: Yes.

MR. GREENBERG: -- is within the control of the government or the employer.

QUESTION: And what would you say if the employer -- if the district judge said on remand, I just can't tell the difference between these two people?

They are both equally well qualified. Their paper record is the same. What is a judge supposed to do then? Has the employer failed to meet the --

MR. GREENBERG: Then the employer would have met, unless it could be shown that was pretextual.

QUESTION: But he would have met it if he showed that --

MR. GREENBERG: Yes, if the judge were convinced that it was equal, then you would show that it was -- unless the plaintiff would show that it was pretextual.

QUESTION: Yes.

QUESTION: What would your view be if the judge said in so many words, these people are equally qualified? If I were doing it, I think I would pick the one who was later rejected.

MR. GREENBERG: Well, if that's all there was in the case, and you didn't have also these other things that we have in this case, that would be the end of it unless you could show it was pretextual.

QUESTION: The judge can't substitute his choice for the administrator's choice.

MR. GREENBERG: No, I don't think -- In conclusion, we submit that the issue here is prima facie case. The plaintiff established it in many different

ways. If the Court decides to decide this case, there is only one way it can decide it, and that is in favor of the plaintiff, and we would hope that it does so in such a way which leaves the rule of McDonnell Douglas viable as a means of combating employment discrimination, which remains far too pervasive today.

Thank you.

CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF THE PETITIONER - REBUTTAL

MR. WALLACE: We do not say that there is no possible way of reading this record to give rise to a prima facie case of discrimination, or that there is no possibility that the court of appeals could have overturned the district court's factual findings as clearly erroneous. We think that is a job for the court of appeals, not this Court.

What we are concerned about is the standard that the court of appeals has applied in this and in other cases, and that is now generally applicable to cases with much simpler underlying facts for the establishment of a prima facie case, and that we believe is erroneous.

We see no inconsistency with this Court's holding in Burdine. In Footnote 6 of the Burdine

opinion, it is pointed out that the prima facie case was made there because the plaintiff showed that she was a qualified woman who sought an available position, but the position was left open for several months before she finally was rejected in favor of a male who had been under her supervision.

QUESTION: So you think the plaintiff as part of his prima facie case is going to have to prove that he was more qualified than --

MR. WALLACE: Well, that's one way of showing it.

QUESTION: That's one way.

MR. WALLACE: That's one way of showing that the employer acted contrary to his economic self-interest, or a showing can be made through statistics or through direct evidence of discrimination, or through the carrying of a --

QUESTION: How would statistics show that he acted contrary to his economic self-interest?

MR. WALLACE: No, well, that is only -- acting contrary to economic self-interest is only one way of showing a prima facie case. A statistical showing is an alternative method.

QUESTION: Well, that isn't so frequent in disparate treatment cases, is it?

MR. WALLACE: The statistical showing?

QUESTION: To make a prima facie case by statistics.

MR. WALLACE: It is not frequent. There was some effort made to do it here, as well as an effort made to show superior qualifications. The only presumption that has been applied differently in Title VII cases has been a presumption requiring judgment if the defendant has not come forward with any non-discriminatory explanation after the prima facie case has been made.

In practice, this question seldom arises because the plaintiff usually knows what the defendant's explanation is before the plaintiff ever puts on his own case, and his rebuttal of that explanation is usually put on as part of the plaintiff's case.

The discrete phases that are postulated in McDonnell Douglas are not the way these cases by and large are being tried. The plaintiff discovers through discovery or the administrative record what the reasons are, and then you have your normal rules applying.

QUESTION: So you may call a defendant's president or personnel manager or foreman or --

MR. WALLACE: In an effort --

QUESTION: -- and so all the evidence comes

out on --

MR. WALLACE: And then the Rule 41(b) motion is made, and the question is whether the trier of fact thinks it more likely than not that discrimination was the motivating factor.

QUESTION: Mr. Wallace, may I ask you one other question on your theory? The district judge at the end of his conclusions of law stated that the plaintiff had failed to prove that he was -- let's see if I can find the exact -- that he was "as qualified or more qualified than the individuals who were promoted or detailed." That was a reason why there was no prima facie case. I don't understand you to be arguing that in every case the plaintiff must prove either equal or superior qualifications.

MR. WALLACE: That is correct.

QUESTION: There are other ways which he could prove it even under your view. Is that right?

MR. WALLACE: That is correct.

MR. WALLACE: That is correct, and that was true in McDonnell-Douglas itself. He just showed that he was minimally qualified, but that the employer carried the vacancy rather than hired him, and that was a prima facie case. We have no quarrel with McDonnell-Douglas and supported it at the time.

QUESTION: So you do not ask for a rule that says the plaintiff must always meet this particular standard that this District Court seemed to apply.

MR. WALLACE: Precisely so, Mr. Justice.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:55 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS v. LOUIS H. AIKENS

#81-1044

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