ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-2042

TITLE WESTINGHOUSE ELECTRIC CORPORATION, Petitioner v. CHRISTINE VAUGHN

PLACE Washington, D. C.

DATE March 19, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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WESTINGHOUSE ELECTRIC CORPORATION, :

Petitioner :

v. : No. 82-2042

CHRISTINE VAUGHN :

- -x

Washington, D.C.

Monday, March 19, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

JAMES W. MOORE, ESQ., Little Rock, Arkansas; on behalf of the Petitioner

CLYDE E. MURPHY, 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: Mr. Moore, you may proceed whenever you're ready.

ORAL ARGUMENT OF JAMES W. MOORE, ESQ.,

ON BEHALF OF THE PETITIONER

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

This is the second time that this case comes before the Court. It is an individual employment, race, disparate treatment case brought under Title VII of the Civil Rights Act of 1964.

The petitioner, Westinghouse Corporation, is concerned with this case as other employers, because it involves a very important management right to achieve productivity in a manufacturing operation by the use of a fair, progressive, uniform, disciplinary system applied by employees' immediator supervisor, without disparate treatment based upon race, sex, color, or national origin.

As this Court has said in Furnco Construction Corporation v. Waters, courts are generally less competent than employers to restructure business practices and, unless mandated to do so by Congress, they should not attempt it.

This particular case centers around one single

job disqualification of one employee in the plant in 1971 in a Westinghouse light bulb manufacturing plant. It is not a termination case. The employee was not terminated from employment, but the employee was reduced from a higher-rated pay job to a lower-rated pay job because of poor productivity and excessive wasted product, as determined by her immediate supervisor.

With the Court's permission -- and I have mentioned this to opposing counsel -- the trial judge did take a tour of the plant in order to see the various job operations that were involved in this particular lady's job itself.

While the exhibits were not made -- while these were not made exhibits to the trial record, the judge did observe what this lady actually did, and I thought it would be helpful to just briefly demonstrate that for the Court.

QUESTION: You mean they're not part of the record?

MR. MOORE: They are not part of the record as an exhibit. The judge did see it in the plant when he took the tour, but he did not want to make these as exhibits to the record.

QUESTION: Was it offered in evidence.

MR. MOORE: No, sir.

QUESTION: Then I'm a little puzzled by why we should look at them at all, even if the judge offered to look at them.

MR. MOORE: I just simply wanted to provide a visual aid for the Court to observe what the particular job employee's job operation was, but I will --

QUESTION: As a visual aid, does your friend agree or not?

MR. MURPHY: I have no objection.

QUESTION: You have no objection?

QUESTION: Well I, for one, do. I object to something put on that's not in the record.

QUESTION: Well, if it's a stipulated item, that alters the situation.

You may leave them with the clerk and the members of the Court will decide --

MR. MOORE: Because of Mr. Justice Marshall's expression of objection, I'll refrain from doing it.

I would like to point out that in this particular case, the supervisor who was involved in giving the counseling sessions to the employee befor the disqualification occurred, gave five performance counseling reprimands to the particular employee over a five-week period from March 9 until April 19, 1971 in five separate meetings.

I would request the Court to direct its attention to petitioner's exhibits 37 through 40, which are at pages 296 through 311 of the Joint Appendix. These notes were recorded by the supervisor at the time that he had the counseling sessions with the lady at her work station.

The problems that Supervisor Turnage, the immediate supervisor, was having with this employee was that when she inserted the filiament into the light bulb and it was sealed -- her job was a sealex operator -- it resulted in too many of the little filiament wires at the bottom of the light bulb being burned, which was her responsibility to see that they were not burned so that they later could be joined to a mount or base on the light bulb and give a good light bulb which could be sold.

QUESTION: Mr. Moore?

MR. MOORE: Yes, Your --

QUESTION: Which of the three questions presented in the writ of certiorari is this part of your argument addressed to?

MR. MOORE: This pertains to the portion concerning that the court should have looked at the evidence concerning the supervisor's reasons for the job disqualification and should have focused in upon his

particular reasons.

He credited this testimony of Supervisor Turnage, but then he then went and looked at other generalized evidence to find pretext. This deals with both of our arguments, the argument on what should be the plaintiff's burden of persuasion at the pretext stage of a Title VII case, and also the argument that it is a clearly erroneous finding of fact because the trial judge credited Supervisor Turnage and found that the reasons that he put forth in his note as a result of the counseling sessions were not to be disbelieved. And he credited all that testimony.

We state that once that occurred, it was error for the trial judge to then turn to hiring statistics, promotion to management, job statistics, discharge statistics, in order to find pretext at the third stage of the plaintiff's burden of proof in an individual disparate treatment case.

QUESTION: This part of your argument, then, doesn't go to your point 3; that the defendant can overcome a finding of discrimination by showing that discharge would have been made anyway.

MR. MOORE: No, sir.

The trial judge, in his second opinion, found at Footnote 5 of his decision, at pages B-6 of the

Petition for Certiorari, "I have read and reread Mr. Turnage's testimony. There is no reason to disbelieve any of it."

In Mr. Turnage's notes, which are the exhibits 37 through 40, they were reduced in writing at the time the decision was made, eight years before the case was brought to trial, and made a part of the personnel file of the respondent.

He chose a method of determining whether or not she was producing too much wasted product, of comparing her rate of wasted product with the rate of other operators on other shifts. And, for example, during the period February 25, 1971 until March 8, 1971, the respondent had a total of 169 burned wires, compared to the first shift and second shift operator for the same period, they only had 71 and 78 respectively, twice as many burned wires.

He discussed this with her, specifically, and he made a note of this at the time and placed it in the file of the respondent. However, despite crediting that testimony and despite crediting testimony that, thereafter, he warned her a total of five times before he finally told her, "I don't think that you are able to do the job," that "you're having too many burned wires," and she had expressed a dislike for the job, and he had

told her that she must perform it under the labor contract for an additional four months before she could bid off of it -- he finally said that he was going to have to disqualify her and reduce her from a job at level 4 to a job at level 1, which represented a 24-cent cut in pay.

QUESTION: Didn't he earlier mark her as satisfactory?

MR. MOORE: I beg your pardon?

QUESTION: Didn't he earlier mark her as satisfactory?

MR. MOORE: The earlier marker?

QUESTION: Mark her as being a satisfactory employee. Didn't he?

MR. MOORE: Mr. Justice Marshall --

QUESTION: Didn't he?

MR. MOORE: Did the earlier --

QUESTION: Did he do that?

MR. MOORE: I'm sorry. I'm having a hard time understanding you.

QUESTION: Did this supervisor at one time mark her work as satisfactory?

MR. MOORE: No, sir, Mr. Justice Marshall.

QUESTION: Never?

MR. MOORE: No, sir.

During the period of time that Supervisor Turnage -- and I think I know what Your Honor is referring to -- had this employee from January 25, 1971 until April 19, the date of the disqualification, he had found that on occasion she did improve, but she never improved to the point that her burned wire rate was satisfactory.

An earlier supervisor, when she first hired in, a supervisor by the name of Mr. Maynard had said that she was satisfactory. However, the immediate supervisor on the shift on which she was on, even before she --

QUESTION: So the answer to my question is yes.

MR. MOORE: Sir?

QUESTION: Prior thereto, she had at least one time been noted as being satisfactory.

MR. MOORE: Yes, Your Honor.

QUESTION: That was the question I asked.

MR. MOORE: Yes, sir.

QUESTION: But it was a different supervisor?

MR. MOORE: It was a different supervisor, Your Honor.

She had three supervisors before she was finally terminated. The last two, however, had found problems with her productivity. And the trial judge

noted that. But the trial judge --

QUESTION: Before you get into that, could I ask one question? You called our attention to the exhibits at page 299 of the Joint Appendix, which shows the 169 burned wires in her shift and 71 and 78 in the other two shifts.

Can you tell me what the figure in the right-hand column is that says "Production, 7104, 5952," and so forth? Does that mean the number of bulbs, or what is that?

MR. MOORE: Mr. Justice Stevens, I am not sure whether it's the production. I think that it is the number of bulbs produced.

QUESTION: So that, out of 7,000, she had 17 that were bad? Is that what it --

MR. MOORE: No, those are the wires. I'm sorry. Those -- the column that says "Total," those are burned wires.

QUESTION: But then the column to the right, which -- what does the 7,104 under the "Prod" stand for? In other words, it makes a difference. If it's 17 out of 20, it's pretty bad. If it's 17 out of 7,000, it's perhaps less significant. I'm just trying to --

MR. MOORE: I can't answer Your Honor's questions definitely. I do not know if that is the

amount of production or the entire operation for that particular shift or not

QUESTION: Well, so far, it sounds like you're just arguing the evidence as to whether the plaintiff in this case sustained her burden of proof.

Is there some legal error you're complaining of?

MR. MOORE: Yes, sir, Mr. Justice White.

The legal area is that the trial court at the burden of proof pretext level. Where the court in the Burdine case said that the trial judge should look at the evidence and proceed to a new level of specificity, instead of looking at the supervisor's performance of this lady, he chose to look at hiring statistics, promotion statistics --

QUESTION: Well, still, you're just arguing the evidence. Are you submitting that, once the employr has stated the reason, that there must be new evidence taken in every single case?

MR. MOORE: Would you restate that question, please?

QUESTION: Well, once the employer states some kind of a rational reason, then the employee must show it's a pretext.

MR. MOORE: Yes, sir.

QUESTION: And you think, in showing it's a pretext, there must be additional evidence taken in every case?

MR. MOORE: No, sir. But the evidence that he must use to show pretext, even if it is indirect or circumstantial or generalized, must have some causal relation to the individual employment decision --

QUESTION: Well, that's just an evidentiary argument then. I don't know that it's a legal argument. Of course, you can argue the facts if you want to. I mean after all --

MR. MOORE: We have two arguments. One, that if you looked at this record of evidence at the disparate treatment pretext stage of an individual employment decision, you will find, we submit, that while there's some evidence to support the trial judge, that evidence on the record as a whole will lead, we feel and submit to the Court, with a clear and definite conviction under United States v. United States Gypsum Company, that a mistake has been committed because the trial judge found that the supervisor --

QUESTION: But you're arguing against two courts now, aren't you?

MR. MOORE: Yes, sir; that's correct. And the case was sent back under the Burdine directive, and we

feel that the reason it did is --

QUESTION: Well, the judge just felt that on the record it was already made. The reason given by the company was pretextual. Maybe, as a matter of fact, he was wrong, but legally he didn't commit any error, did he?

MR. MOORE: It's a mixed question of law and fact, I think, when you reach the pretext stage of one's burden of proof. If you use the wrong type of evidence, that's a legal error, I think. The evidence that he chose to use to find pretext dealt with unrelated matters that weren't causally related.

This Court has said that these cases should be tried like any other lawsuit, and I've always understood that there should be some proximate causation between the faulting act and the damage.

QUESTION: Yes, but the question really is what sort of evidence you're going to use to deduce such a conclusion.

Now, supposing the trial judge in this case had said, "I can't find anything that will squarely say that the supervisor's actions here had a racial animus to them." But, in nine other incidents, such as Judge Arnold's first opinion talks about a woman who had represented a number of blacks who had employment

problems, and he had concluded that she was a credible witness, and there was evidence of disrimination in the case of other people.

Now, can't a trial judge say, in view of what I'm convinced was discrimination in nine other instances, I'm going to infer from thes facts that there was discrimination here?

MR. MOORE: No, sir. I do not think that shouli be the burden of the employer, to have to prevail in one individual case, based on one set of facts, by being able to show that it had absolutely nothing whatsoever to do with the other instances of alleged racial discrimination.

In that particular --

QUESTION: Well, I don't think that's putting a burien on the employer. I think it's just saying that a finder of fact, if he finds very credible, believable evidence of discrimination in nine other employment actions, even though he doesn't find the same kind of "smoking gun" evidence in the tenth, he can infer from the nine other cases that perhaps involve nine other supervisors, that there may have been an overall policy in the plant.

MR. MOORE: Mr. Justice Rehnquist, if it were a pattern practice case, I would agree with Your Honor

But in that particular employee who testified, she was not hired until after this employment decision involving the respondent had already been made by another supervisor.

She had been supervised by Supervisor Clinton Turnage, the same supervisor who performed the disqualification decision, and she testified as to no racial discriminatory acts by him.

What I'm saying is that, if what Your Honor says is true, then Supervisor Turnage could never legally, under Title VII, make a legitimate decision based on business reasons to disqualify --

QUESTION: Oh, yes, he could. All he would have to do is convince the judge of it. There wouldn't be any rule of law that would prevent him from that, if the judge really believed him.

MR. MOORE: And that's -- and Judge Arnold said at page -- Footnote 5 of his decision -- "I have read and reread Mr. Turnage's testimony. There is no reason to disbelieve any of it."

We felt at that point, that that should end the matter, that he did believe Supervisor Turnage; that Supervisor Turnage acted in good faith with lawful reasons, and that he documented his decisions, and that there was a production problem.

And Mrs. Vaughn never complained that Mr. --

QUESTION: But to conclude that the employer's reason is pretextual, which apparently the judge concluded -- right?

MR. MOORE: Yes, Your Honor.

QUESTION: You had to discount the employer's reason. You had to say it really was a phony.

MR. MOORE: Yes, Your Honor.

QUESTION: And I suppose if you say it's a phony, does that mean that that reason played no part at all in the discharge, to say it's pretextual? I suppose it does, doesn't it?

MR. MOORE: Yes.

QUESTION: Well, if it does, you can't rely on the Mt. Healthy analysis either, can you? Which is in one of your submissions -- one of your submissions is that you should go through the Mt. Healthy routine.

MR. MOORE: That's correct. Like in a union case where union activities are involved.

QUESTION: But if the employer's reason is a pretextual one, you would think maybe it didn't play any part at all in the discharge.

MR. MOORE: That would be correct. But the judge did not find that Supervisor Turnage's reason was pretextual, and I submit that the employee herself did

not testify, and there was absolutely no evidence in this record that Supervisor Turnage harassed her, or harassed any other employees on account of racial overtones.

QUESTION: No, but the case was remanded on Burdine, wasn't it?

MR. MOORE: Yes, sir. Burdine, because I believe this Court felt that the trial judge --

QUESTION: Well, didn't the trial judge have to find the employer's reasons pretextual?

MR. MOORE: He did. In part, he said. I don't think that you can find something pretextual in part. It's either pretextual, or it's not pretextual. But that doesn't gibe with his finding that he credited Mr. Turnage, including Mr. Turnage's notes that show that he did not act for racial reasons, and in fact he stated that -- when discussing this with the lady, during one of these supervisor sessions on March 30, 1971, "I told her I wanted her to consider this meeting a verbal warning, and went on to say that I was not doing this for any reason other than she was not doing her job as she should.

QUESTION: Mr. Moore, this litigation has been kicking around for years, hasn't it?

MR. MOORE: Yes, sir.

QUESTION: It's kind of moldy.

Just as a matter of curiosity, where is Ms. Vaughn now?

MR. MOORE: Ms. Vaughn is at the Westinghouse Electric plant --

QUESTION: She's still working there?

MR. MOORE: Working, and she, I believe, is a labor grade 3 job. She continues to work there.

During the course of the litigation, at one point, we offered her the opportunity to go back on this job, and she declined.

QUESTION: Mr. Moore, you said this is the second time around for this case.

MR. MOORE: Yes, sir.

QUESTION: Do you want us to send it back again?

MR. MOORE: No, sir.

QUESTION: For the third time around?

MR. MOORE: Judge, alternatively, I would prefr that as to having it affirmed, but I would think that the --

QUESTION: Don't we have to put ourselves in the position of the trial judge and make an independent finding in order to do that?

MR. MOORE: Under -- I think you do under --

and I think you're entitled to under Pullman - Standard v. Swint.

QUESTION: And what is the reason for us passing on the case three times?

MR. MOORE: I don't believe it should go back. I think that the record of evidence will show that the facts will issue of lack of discriminatory intent is acceptable, and only one reasonable interpretation.

QUESTION: Well, you keep emphasizing the fact that the company's witnesses all denied that they had used race. Isn't that true?

MR. MOORE: Mr. Turnage, her immediate supervisor, who made this particular decision --

QUESTION: Well, did any one of them admit it? that they used race?

MR. MOORE: No, Your Honor. No, sir.

QUESTION: Have you ever heard of a case where one did?

MR. MOORE: No, sir.

QUESTION: I take it you're relying on the fact that there were these six or seven written warnings that her work was inferior, and that that makes the holdings under review clearly erroneous under the Federal Rules.

Is that your position?

MR. MOORE: Yes, Mr. Chief Justice.

QUESTION: Did you argue that to the Court of Appeals?

MR. MOORE: Yes, sir; we did.

QUESTION: And you lost it.

MR. MOORE: Yes, Mr. Marshall, but we had a strong dissent. Both times it went to the Eight Circuit, we had very strong dissent, and it was 2-1 decision, and the Eighth Circuit majority, in the last case, itself said if we were looking at this case ourselves for the first time, we might hold otherwise.

I wish to reserve --

QUESTION: May I ask you one question, Mr. Moore?

MR. MOORE: Yes, Mr. Justice Stevens.

QUESTION: Turnage's testimony is, of course, quite important here. And the trial judge said he didn't disbelieve any of it, but then he also went on and pointed out that Turnage never expressly denied that race was a factor in the decision.

Did he ever say what the -- did he ever affirmatively say what the reason was? I don't even find that in his testimony. He just recites all the events.

MR. MOORE: Yes, sir. And he says that he thinks race may have played some part in the decision.

QUESTION: No, no; I'm not talking about what the trial judge said. Did Mr. Turnage, as a witness, ever tell the court what the reason was for the personnel action?

MR. MOORE: Yes, sir. Excessive wasted product. Too many burned wires.

QUESTION: No, no. I know he described that, but did he say that's why he demoted her?

MR. MOORE: Yes, sir.

QUESTION: He does?

MR. MOORE: And those are also in his notes, and he also went on to say that "I told her it was not for any other reason." And we find that clearly contrary to the finding of the trial judge in that same footnote I read, "There is no reason to disbelieve any of it." But at no time did he testify that Mrs. Vaughn's race was not a factor in his decision.

And the note I just read, which was part of his credited testimony, that the trial judge found wsa true, says that he told her that it was her poor productivity and not any other reason that he was warning her.

QUESTION: But the testimony you're relying on

is his reading of the note. Is that right?

MR. MOORE: Yes, sir. And he read that. And these --

QUESTION: He doesn't say that's the truth, though. He just reads that memo.

MR. MOORE: He says there was no other reason.

QUESTION: In the note he says that.

MR. MOORE: Yes, sir.

QUESTION: And he doesn't say it independently as a witness, does he?

MR. MOORE: He testified from his notes. This case was tried eight years --

QUESTION: He didn't testify from his notes. He just read the note, if I read it correctly.

MR. MOORE: Yes, sir.

QUESTION: Mr. Moore, are you going to leave your Mt. Healthy point to the brief? You're not going to argue --

MR. MOORE: I felt constrained by the requirements of time to leave that point.

Thank you, Your Honor.

CHIEF JUSTICE BURGER: Mr. Murphy?

ORAL ARGUMENT OF CLYDE E. MURPHY, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MURPHY: Thank you, Mr. Chief Justice, and

may it please the Court.

The record in this case and the holding of the District Court make claim that there was both direct and circumstantial evidence in support of the respondent's claim that race played a substantial part in the decision to disqualify her.

While the petitioner presented testimony that Ms. Vaughn had performed poorly, there was contrary documentary evidence that her prior supervisor had considered her work entirely satisfactory. Ms. Vaughn received progressive pay increases, an indication of satisfactory performance, until several months before her disqualification, she had reached the top rate available for a sealex operator.

A memorandum dated January 18, 1971 indicated that Ms. Vaughn had peformed satisfactorily on the sealex machine. A bump sheet, representing the state of the company's records as of January 1, 1979, indicated that she had previously performed the sealex machine operator's job satisfactorily, and continued to be qualified for that job.

In addition, the District Court held and the record supports the conclusion that Ms. Vaughn has served in a variety of capacities, including utility operator, which requires an employee to operate a number

of different machines in rapid succession, and that she was never a discipline problem, and was always cooperative.

QUESTION: When are you going to come and tell us something about these five or six notes of unsatisfactory service?

MR. MURPHY: Yes, Your Honor?

First of all, I've indicated that there was testimony on the record that Ms. Vaughn was disqualified. Ms. Vaughn's testimony indicates that those sessions never, in fact, took place.

Our position, Your Honor, is that while there was some evidence in the record that Ms. Vaughn's production was not -- came under criticism from Mr. Turnage, there was also evidence in the record that supported the fact that she was qualified to do the job.

As I think is somewhat evidenced by the presentation --

QUESTION: The District Court didn't go that far. I mean I don't think the District Court gave Ms. Vaughn an qualified bill of health. He says, "It seems likely, in fact, that plaintiff's job performance did leave something to be desired, and the defendant was, in part, legitimately motivated in disqualifying her."

MR. MURPHY: I believe the point I was making, Your Honor, was that there was evidence that she was both qualified and unqualified, evidence that her performance was satisfactory -- some evidence that it was satisfactory, which the court, in the examples that I've just given, are instances that are specifically named in all of the opinions, or in one or more of the opinions of all of the courts that have considered this question below.

I'm not suggesting that there was no evidence on the record that Ms. Vaughn was disqualified. What I am suggesting is that there was evidence on the record that she was qualified; there was evidence on the record that she was unqualified. And, following what I think to be this Court's instruction in Aikens and other cases, the court reviewed the record in its totality and found that a preponderance of the evidence suggested that there was discrimination.

QUESTION: But I think his finding is somewhat ambiguous on the point that he says, "The finding was, in part, motivated by legitimate reasons for disqualifying her, but it was also motivated, in part, by race."

Isn't that what he says?

MR. MURPHY: Well, what he says is that -- he

held that race was a substantial factor in the decision to disqualify her.

QUESTION: But not the only factor.

MR. MURPHY: It was not the sole factor, perhaps.

QUESTION: Do you think his opinion can be read as saying that even -- that she would not have been disqualified, but for her -- demoted, but for her race, regardless of the other factors involved?

MR. MURPHY: I think such a conclusion is possible in this case, because of his holding -- or likely, for that matter -- because his holding that race played a substantial factor. I mean this is not a case where the Mt. Healthy question was raised either before the original District Court or in the Eighth Circuit or in the first petition to this Court, or on any of those decisions on remand.

But I think that if the Court holds that race was a substantial factor in the decision to take an adverse action on the employee, then it seems to me that that would meet --

QUESTION: May I ask this question? Let's assume a case where it is perfectly clear from all of the evidence that the only individual discharged, let's say, or not promoted, or demoted -- that the only

individual was totally incompetent. No argument about it, the lower court so found, the Court of Appeals affirmed it. But, looking to statistical evidence as to the total employment in the plant, both of those courts, as in this case, held that, looking at all of the facts and circumstances, we conclude that race was a part of the motivation.

Is that your position?

MR. MURPHY: No, Your Honor.

First of all, I don't think that's this case. As I've indicated, I think --

QUESTION: If you had that case, what would your position be?

MR. MURPHY: It is not the respondent's position that proof of pattern and practice establishes every individual -- that every individual has also suffered individual discrimination. That's not our position.

In the situation that you give, I would say that you probably could not hold that there was individual discrimination in that case, notwithstanding the statistical evidence that there was a pattern and practice of discrimination.

I wouldn't go so far as to say, however, that such a conclusion could never be drawn on any set of

facts, but certainly if part of the hypothetical that I'm given is that the person was completely unqualified, and that the only evidence of racial discrimination was evidence that treats the entire work force and deals with whether or not a pattern and practice was dealt in that way, then no, I don't think that would, by itself, support a finding.

As I said, I hasten to point out, however, that that's not, in my view, the position that either the District Court on two occasions or the Eighth Circuit on two occasions was confronted with here.

QUESTION: And those two, of course, relied almost 100 percent, as I understand it, on statistical evidence.

MR. MURPHY: In this case, Your Honor?

QUESTION: Yes.

MR. MURPHY: No, Your Honor, I don't think that's accurate at all.

QUESTION: Well, what, in addition to the one favorable report that was mentioned by the opionions below?

MR. MURPHY: First of all, there were two favorable reports and, in addition to that, the fact that the employee had received progressive pay raises.

In addition to that, there was the fact --

QUESTION: Which were the two? I remember one by -- oh, what was it -- the first supervisor?

MR. MURPHY: Right. There was one by -- there was one that signed by Mr. Brazil, which was dated January 18, 1971.

QUESTION: And didn't Brazil give a subsequent unfavorable report?

MR. MURPHY: Yes, he did, two days later in an evaluation, he did give an unfavorable report of her performance. However, that inconsistency in the record remains unexplained, I should point out, and I would also add that the District Court must have also been concerned about that, as he mentions both that and the other memorandum which indicates that Ms. Vaughn was, in fact, qualified.

QUESTION: And there was a favorable report before Brazil's first report?

MR. MURPHY: Well, before --

QUESTION: You said there was --

MR. MURPHY: Right. Well, the second repot, the second document is a -- what's called a "bump sheet," which indicates where employees can go in the event of an employee layoff. That document purported to give the stated employee's work force as of January 1, 1979. This came both after Mr. Brazil's memorandum and

also after this disqualification. It indicates that, at least as of that date, the company records indicated that Ms. Vaughn remained qualified for the job.

What I had meant to indicate with regard to Mr. Maynard's evaluation of her, which would have occurred prior to Mr. Brazil, was that during the time that she was functioning under Mr. Maynard's supervision, she reached the top pay level that could be paid for that job, which you only reach if you are found to be qualified to function in that job.

So my point was that there were the two documents, as well as the fact that she reached that top level, and there were exhibits put into the record which indicated that she did -- that she did reach that pay grade.

Again, getting back to my point with regard to what the District Court was confronted with in this situation, I think it's important to note that he was faced with these conflicting assertions regarding Ms. Vaughn's comptence. And in seeking to resolve that conflict, and also the fact of petitioner's unsuccessful efforts to explain its admissions that Ms. Vaughn was qualified to perform the judge -- to perform the job, rather -- this trail court toured the plant, heard testimony, observing the demeanor of the witneses, and

considered all the evidence, both direct and circumstantial, before concluding that discrimination had occurred.

In making the ultimate determination of whethr there was intentional discrimination, the trial court appropriately reviewed the record and correctly considered both stastical evidence and other evidence that shed light on the defendant's motivation.

The petitioner below was not required to disprove the causal connection between the statistics and the disqualification of Ms. Vaughn. Rather, the respondent was able to establish, by virtue of evidence that Ms. Vaughn was qualified for the job from which she had been disqualified, and that the petitioner's disqualification of her was consistent with a pattern of conduct that was adverse to black employees.

This Court has sought, since McDonnell Douglas, to clarify the standards governing the disposition of an action challenging employment discrimination, and through its decisions in Furnco, in Burdine, in Aikens, would seem to have put to rest any remaining ambiguities regarding the proper standards and shifting burdens which arise in this context.

Aikens raised the question of whether the prima facie proof standard ought to be changed. This

Court said no and, recognizing the fact that evidence of illicit intent is difficult to obtain, also indicated the overriding importance of reviewing the whole record as opposed to the rigid application of legal rules and rituals.

Burdine focused on the second stage of proof, resolving the question of the employer's burden, by making it clear that it was one of production only; that is, producing admissible evidence of reasons for the employment action. That opinion, read with Aikens, makes clear that the employer's articulation merely establishes the existence of a question of fact for the trial court and, once that is established, the court must weigh the evidence, giving it whatever credence or weight it deserves, and decide the ultimate question of discrimination on the record as a whole.

The petitioner takes the view that the employer's articulation requires the court to ignore all evidence that does not directly respond to its articulation. Nothing in Burdine, Aikens, McDonnell Douglas, or other opinions of this Court demand such a result.

Rather, the burden of establishing pretext merges with the ultimate burden of persuading the court that the employee has been a victim of intention

discrimination.

QUESTION: Mr. Murphy, is it your view that if the employer articulates the principle that we fire unproductive employees, that the plaintiff can come back and say (a) I was not an unproductive employee, and that would therefore -- although the reason -- it's a legitimate, actually existing policy, but it wasn't applicable in this case; or (b), the company only fires unproductive black employees, and therefore if it were -- the policy isn't applied uniformly to whites or blacks.

Now, the second, I suppose, would be an argument that the standard is a pretext.

MR. MURPHY: If I understand your question correctly, I think both would be appropriate. Certainly, the latter involves a comparison of situations where unproductive white employees are not fired and unproductive black employees are fired. So certainly, that's a situation in which discrimination has occurred.

I would also submit that if the company comes back and says that they fire unproductive employees, and the plaintiff establishes that she is a productive employee, then I think that that would also establish discrimination.

QUESTION: But does that necessarily establish discrimination? It could be just a mistake. If she could show that those kinds of mistakes are made all the time in case of black employees, but never in the case of white employees, perhaps that would be protection.

But if may be they make that kind of mistake with respect to a number of employees. They just treat actually productive employees as unproductive employees.

MR. MURPHY: We have also started with the presumption that the prima facie case -- I mean, presumably, it is also the prima facie case that has been made out under the assertions of McDonnel Douglas, but it doesn't seem to me that it's improper to draw that conclusion in a situation where you have the black employee who was qualified for the job, was dismissed from that job, was replaced -- the job remained open -- the only reason that the defendant gave for having done that is that she was unproductive, and the plaintiff establishes that she was productive.

It seems to me that is the disparate treatment situation.

QUESTION: May I ask you the same question I asked your opponent?

Do you happen to know -- the record at 299 -- what these figures about production mean? Is it 17 out

of 7,000?

MR. MURPHY: That's my reading of the record. There is consistent discussion of production.

Unfortunately, Mr. Turnage's testimony does not specifically identify that specific column, but I think it's plain from a reading of his testimony and the testimony of other witnesses, both company witnesses and others, that that would have to stand for production, i.e., the --

QUESTION: Those figures suggest that she was just about as productive as the others, as I look at it.

MR. MURPHY: I think that's a reasonable conclusion to be drawn from looking at that, Your Honor.

QUESTION: Yet, the District Court didn't draw that conclusion.

MR. MURPHY: I would say that the conclusion that the District Court drew was that there may have been some -- that there were some problems with production. He did not find, I don't believe, that she was an unqualified employee. I think that would, in effect -- you know -- well, I mean it would be difficult to draw that conclusion and reach the conclusion that he did.

QUESTION: He did find, though, in the last sentence on B-5, "It seems likely, in fact, that

plaintiff's job performance did leave something to be desired."

MR. MURPHY: But that doesn't mean that she's -- he didn't hold that she was unqualified.

QUESTION: No.

MR. MURPHY: He may have held that she wasn't the optimal employee at the plant, but I think there was enough established in the record that she was qualified to do the job.

Plaintiff's contention is that, as the burden of establishing pretext merges with the burden of persuading the court that the employee has been a victim of intentional discrimination, it follows that the new level of specificity to which the factual inquiry proceeds after the employer's articulation, concerns the court's consideration of the ultimate question of intentional discrimination, not that the court close its eyes to evidence that may shed light on the employer's state of mind or intent.

In Burdine, this Court indicated the simple nature of the employer's burden in meeting the plaintiff's prima facie case. To adopt the petitioner's position of greatly restricting the plaintiff's ability to place the employer's action in the context of his general policy with regard to minority employment would

seriously curtail the ability of an individual plaintiff to establish the state of mind of his employer, or to otherwise establish pretext.

The evidence adduced below showed an employment situation of subjectivity and discretion regarding all types of employment decisions. The same subjective and discretionary decisionmaking process that led to the disqualification of Ms. Vaughn was also at work in hiring, discipline, and dismissal decisions which were shown to be consistently adverse to blacks.

As is indicated by respondent's brief and the four opinions below, this is not a case in which the employer's articulation went unrebutted. Similarly, the District Court did not rely on statistical evidence and generalized testimony -- did rely solely on statistical evidence and generalized testimony in order to find for the plaintiff.

It is important to note in this context that the trial court specifically found against two other plaintiffs in this action, notwithstanding the fact that the statistical and contextual evidence certainly applied to their cases as well as to the case of Ms. Vaughn.

It is equally noteworthy that even Ms. Vaughn, respondent here, did not prevail on several additional

claims of discrimination that were raised below.

Rather, as a the trial court noted in rejecting the claims of the two original plaintiffs below, at the Joint Appendix, page 333, the fact that the company may have discriminated generally is not an automatic shield for every black employee who claims unfair treatment.

The question on appeal cannot properly be stated as whether statistical or generalized or contextual evidence is conclusive on the issue of individual discrimination. As the record plainly indicates, there was direct evidence introduced below, challenging the petitioner's articulation.

The actual question presented in this appeal is whether such evidence will continue to be relevant on the ultimate question of discrimination, or will the trial courts be limited in the type of evidence that they may consider in determining that question.

In Pullman - Standard v. Swint, this Court strongly emphasized the importance of Rule 52-A of the Federal Rules of Civil Procedure, and explicitly held that the issues of intent are properly treated as factual matters for the trier of fact.

The four opinions below, set out with varying degrees of specificity, the direct and circumstantial

evidence which supports the conclusion of the trial court that race was a substantial factor in the petitioner's decision to disqualify Ms. Vaughn.

Moreover, entirely consistent with this Court's holdings in Swint and Aikens, the District Court specifically held, at the petition on page B-2, circumstantial evidence of intent as well as direct is relevant and can be persuasive. Direct evidence of discrimination is rare. An individual personnel action can usually be properly judged only if it is placed in the broader context of the defendant's actions over a substantial period of time.

In addition to the direct evidence relating to Ms. Vaughn's disqualfication, both before and after her disqualification, the court also considered evidence which established that the job from which Ms. Vaughn was demoted was held largely by whites, and the job to which she was demoted was held largely by blacks.

The fact that blacks were often harassed by supervisors and subjected to work demands different from their white counterparts, and the fact that the ongoing frictions between black employees and petitioner's all-white supervisory force were particularly acute on Ms. Vaughn's shift.

The court also held that blacks were

overrepresented in the discharge population of the plant, accounting for some 60 percent of the discharges between 1972 and 1978.

The trial court also found probative of discriminatory intent the testimony of Ms. Wilma Donley, which recounted the racial atmosphere of the plant and the discriminatory treatment received by black employees at the hands of the supervisory staff.

In Swint, this Court underscored the relevance of statistical evidence or evidence of discriminatory impact in reaching a finding on whether there was discriminatory intent as a factual matter. Perfectly in tune with this Court's holdings in Swint, Furnco, and McDonnel Douglas, two separate panels of the Eighth Circuit have rejected the petitioner's argument that the trial court's findings are clearly erroneous under Rule 52.

Moreover, the Eighth Circuit's holdings do not suffer the same infirmity as found by this Court to be the principal errors in Swint. First, the Court expressly noted the application of Rule 52-A in regard to its holding, and gave proper weight to the trial court's findings, refusing to overrule those findings.

Second, to the extent that the trial court's original findings suffered from an erroneous view of the

law, on remand the District Court made additional findings in the context of the Court's statement of the proper legal standard as set down in Burdine.

Significantly, on the second appeal, the Eighth Circuit found the trial court's opinion to be without factual or legal error.

The trial court was well aware of its responsibility to make the sensitive and difficult determination of an employer's state of mind. As such, that court was mindful of the fact that other evidence of discrimination during the relevant time period might be probative of the employer's motivation.

Consequently, the trial court admitted evidence tending to show the arbitrary and unequal exercise of supervisory discretion. While it is undeniable that the trial court properly considered evidence of discriminatory impact of the petitioner's policies in making its determination, it is also clear that it was the combination of this evidence and evidence of Ms. Vaughn's qualification, taken together, which led to the holding that Ms. Vaughn's demotion was motivated by impermissible racial considerations.

QUESTION: The holding is not an impact holding at all, is it? It's a particular example of discrimination.

MR. MURPHY: Yes, Your Honor.

The petitioner's argument concerning the application of the court's decision in Mt. Healthy raises issues that are not present in this case. As we stated earlier, these issues were not raised or considered by any other courts below, either in its original consideration or in the considerations after remand from this court.

QUESTION: Does your opposition disagree with that statement?

MR. MURPHY: I beg your pardon?

QUESTION: Does Mr. Moore disagree with what you've just said?

MR. MURPHY: I don't think so, Your Honor. I mean as I understand their argument with regard to the Mt. Healthy question, the question is raised primarily as a means of arguing that race was not shown to be a factor. I mean it's argued in the sense of who has the burden of establishing -- or when the burden shifts to the employer to establish that the decision that was made would have been made in any event, without respect to race.

And, in fact, they argue in that instance that there was never any evidence to show that race was a factor. This, it seems to me, is an additional attempt

to raise a clearly erroneous question, only in a different context, since the trial court's opinion is clear that the question in the case was whether race played a substantial factor -- a substantial part, rather.

QUESTION: Let's assume there's a dual motive case, that race didn't play a substantial factor. Is that the end of the case as far as you're concered?

MR. MURPHY: If it's a dual motive case? Do I think that's the end of the case?

QUESTION: Let's take the case where race is found to be a substantial factor, but bad performance is also a substantial factor.

I suppose there can be two types of factors.

But is the case over then, as far as you're concerned? You win the case.

MR. MURPHY: I think so.

QUESTION: You just say that the Mt. Healthy approach is inept.

MR. MURPHY: Well, I say even if the Mt. Healthy approach applies, I think that would satisfy it. I think there is justification for the view under the legislative history of Title VII, that once you establish --

QUESTION: Well, what if the employer comes

back and says, well, I would have fired the employee anyway, and the trial judge says, well, I believe you; I think you would have. But, nevertheless, race was a substantial factor as a matter of fact. So you lose.

MR. MURPHY: It's my view that if race was a substantial factor in the decision to either fail to promote or disqualify an employee, then that's sufficient to establish a violation of Title VII.

QUESTION: And so the Mt. Healthy approach is then irrelevant.

MR. MURPHY: Yes, I think so.

QUESTION: That's your -- but no one - are there some cases holding that?

MR. MURPHY: I'm not aware of a specific case.

QUESTION: There certainly aren't any here.

MR. MURPHY: No, there have been none from this Court. No, Your Honor.

QUESTION: But, now that is a -- was that ground presented below?

MR. MURPHY: It was not argued below; no.

QUESTION: And do you think it's open here?

MR. MURPHY: I don't think it's open on this record, certainly, because --

QUESTION: Can we even deal with it?

MR. MURPHY: Well, certainly the Court can

view the question. My view is that --

QUESTION: Well, we certainly wouldn't remand and make a further record without saying that the Mt. Healthy approach is applicable.

MR. MURPHY: Well, I don't think the Mt. Healthy approach is applicable, certainly not to this case, and probably not to Title VII.

QUESTION: Well, is its applicability open here, right in this case?

MR. MURPHY: No, Your Honor.

QUESTION: Why not?

MR. MURPHY: Because in this case, first, the court has already found that race was a substantial factor in the decisionmaking.

QUESTION: I just -- all I want to know is, is the applicability or the relevancy of the Mt. Healthy approach an issue here that we may address, even though we don't resolve it? If we said yes, it is an issue that can be considered, but we would remand for the lower courts to consider it.

MR. MURPHY: I don't think there's any basis for such a determination as that.

QUESTION: Either on the record or --

QUESTION: Was Mt. Healthy argued in the lower courts?

MR. MURPHY: No, Your Honor.

QUESTION: In neither court at any time?

MR. MURPHY: No, Your Honor.

There has never been any question as to the fact that one of the central goals of Title VII is the elimination of intentional discrimination. The question of what evidence the court may consider in determining whether intentional discrimination has occurred should be assessed in terms of whether it would further this goal by helping courts to determine fairly and accurately whether intentional discrimination has entered into an employer's decisionmaking process.

Limiting the trial court's ability to consider certain evidence can only have the effect of impeding the attainment of that goal.

Therefore, respondent urges that the decision of the court below be affirmed.

QUESTION: Do you have anything further, Mr. Moore?

MR. MOORE: Yes, Your Honor.

ORAL ARGUMENT OF JAMES W. MOORE, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

QUESTION: Tell me, Mr. Moore, why do you believe you are entitled to present an issue here as a petitioner, not as a respondent, but as a petitioner

here, when the issue was never raised in the courts below? The Mt. Healthy issue.

MR. MOORE: The issue was, we felt, an error of law. It was in the process of being evolved at the time that this case was tried. I don't believe it had been finally resolved by this Court at the time this case was decided --

QUESTION: Well, the issue has never been resolved in a Title VII case.

MR. MOORE: That's correct, Your Honor. In other words, we didn't know that it was a possible argument at the time that we tried the case, because we tried it in 1979, and those Wright Line cases were developing at that time and have since developed and determined what the dual motive law should be, so we felt like that it should be included as a legal argument for reversal.

QUESTION: Well, Mt. Healthy was in 1976.

MR. MOORE: Yes, sir. I was speaking, though, of the Wright --

QUESTION: That's a labor case.

MR. MOORE: Yes, sir; the Wright Line cases which dealt with dual motive.

I would, in closing, Your Honors, ask the Court to look at Supervisor Turnage's reasons for the

action that he took. He, during his four-year period as a supervisor -- the evidence is undisputed -- only disqualified or failed to qualify three employees, the other two of whom were both white males. Ms. Vaughn was the only black employee that Supervisor Turnage had ever disqualified.

There is absolutely no evidence that Supervisor Turnage ever discriminated or conducted any sort of activities with respect to any black employee --

QUESTION: The remarkable thing -- and I just finished reading his tesimony -- he doesn't tell us why he disqualified her. He just tells us what he told her.

Isn't that right?

MR. MOORE: In his notes, he did. And in --

QUESTION: In his notes. But he never testified as to why he disqualified her, which I was just looking at what Judge Arnold remarked on.

MR. MOORE: I believe that his testimony will state that --

QUESTION: He said, "Let me read my memo." And he read the memo which described what he said to her. That's all he did.

MR. MOORE: He was testifying eight years after the fact.

QUESTION: But he was never asked, why did you

disqualify her? He was never asked that question.

MR. MOORE: I would have to rely on the record on that, and I feel like that he did address that question and did state it in detail as his reasons for --

QUESTION: I suppose he thought he was really testifying as to why he fired her by reading his notes from years ago.

MR. MOORE: Yes, sir.

QUESTION: Is that what your position is?

MR. MOORE: Yes. He's a first echelon supervisor in the plant, and he records what he does with respect to an employee under his supervision by a personnel note, and that's what he was relying on.

QUESTION: Do you think that's the equivalent to testimony under oath? To read something you wrote, not under oath, a year or two earlier? Is that testimony under oath?

MR. MOORE: Well, he read from those notes.

QUESTION: He told us what he wrote down. And that's all he said.

MR. MOORE: Yes, sir.

I feel that he felt that he was testifying to those notes under oath.

QUESTION: Well, I understand that, but there's a big difference between what he might have felt

and what he testified to.

QUESTION: Is it possible that the written record could be more reliable than an eight-year memory?

QUESTION: It's not completely accurate as to what he told her. The question is, did he tell her the truth, or was he willing to testify that he told her the truth.

MR. MOORE: He testified that what he told her was in the notes that he prepared at the time of the decision.

QUESTION: We know what he told her.

MR. MOORE: Yes, sir.

MR. MOORE: I would state that Supervisor Turnage was not the subject of any racial activity with respect to any employee. As far as this lady's performance on his late night shift, she had transferred from the second shift, the 3:00 to 11:00, to the 11:00 to 7:00 a.m.

And he felt like he could not motivate her.

QUESTION: Is that what's known as the graveyard shift?

MR. MOORE: Yes, sir.

And he felt like that she disliked working on this shift, and that she was not performing up to what she could have. And he told her that she would have to

wait four more months in this job, and then she would have labor contract rights to bid off the job.

He attempted to motivate her, and he felt like that she was not responding to his counseling. So he disqualified her after a five-week period of evaluation. She had not performed up to his expectations on his shift satisfactorily.

And the immediate shift before this shift, it is also clear, from Supervisor O. D. Brazil's work evaluation form -- not the bump sheet -- that he also found, when she moved from his shift to Mr. Supervisor Turnage's shift, that her quantity of work was poor, her quality of work was poor, and that she was unable at that time to get production, and that he would not recommend rehire if she left the company's employment.

In closing, Your Honors, it's an individual disparate treatment case dealing with one supervisor's decision on a given shift. We ask that the evidence with respect to that decision be addressed, and that we content that after that evidence is looked at, it will be concluded, as did the trial judge, that Supervisor Turnage testified credibly and that race was not a factor in his decision to disqualify.

Thank you very much.

CHIEF JUSTICE BURGER: Thank you, gentlemen,

the case is submitted.

We'll hear arguments next in Cooper against Federal Reserve Bank.

(Whereupon, at 1:58 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:

#82-2042 - WESTINGHOUSE ELECTRIC CORPORATION, Petitioner v. CHRISTINE VAUGHN

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