OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-185

TITLE SYLVIA COOPER, ET AL., Petitioners v. FEDERAL RESERVE BANK OF RICHMOND

PLACE Washington, D. C.

DATE March 19, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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SYLVIA COOPER, ET AL., :

Petitioners, :

v. : No. 83-185

FEDERAL RESERVE BANK OF RICHMOND :

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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 1:59 o'clock p.m.

APPEARANCES:

ERIC SCHNAPPER, ESQ., New York, New York; on behalf of petitioners.

HARRIET S. SHAPIRO, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the U.S. and EEOC as amicus curiae.

GEORGE R. HODGES, ESQ., Charlotte, North Carolina; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Sylvia Cooper against Federal Reserve Bank of Richmond.

Mr. Schnapper, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ERIC SCHNAPPER, ESQ.,

ON BEHALF OF THE PETITIONERS

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

The question before the Court in this case is not whether all class actions bar as a matter of res judicata if unsuccessful all subsequent individual actions. This Court has repeatedly admonished both with regard to Rule 23 and with regard to res judicata against any such across the board sweeping approach. A series of decisions in this Court, most recently General Telephone versus Falcon, insist that careful attention be paid to the record in a class action in administering Rule 23.

Similarly, a number of decisions, most recently this Court's decision in Brown against Felsen, insist that there be similar care paid in the administration of the res judicata principles.

This case involves a conjunction of both of

those lines of cases, and we contend that the Court of Appeals paid insufficient attention to the actual decision in the class action in holding that the second action was barred by the principles of res judicata.

Although the primary question at issue before the Court in this case is the scope and meaning of the decision in the class action about which we are in disagreement with the bank, the overall procedural outlines of the case are relatively straightforward and clear.

The initial action, which we all refer to now as the Cooper action, was an action against the bank brought both by Sylvia Cooper and three other individual employees, and by the EEOC. The case was tried in September of 1980. Following the trial, the district judge handed down three distinct decisions.

First, he held with regard to the claims of promotion discrimination which were the subject of the lawsuit that there had been a pattern and practice of discrimination in Grades 4 and 5 at the bank. Second, the judge held that there had not been, or actually his phrase was there had been "insufficient proof" of, a pattern and practice of discrimination in Grades 6 and above.

QUESTION: Mr. Schnapper, you use the phrase,

"a pattern and practice of discrimination." Do you think when you put "a pattern and practice of" to modify the term "discrimination" it changes the substantive inquiry at all?

MR. SCHNAPPER: It does not change the substantive inquiry, but there are, in any Title 7 case, there are a number of kinds of acts which might be at issue. Whether or not, as Mr. Justice Powell pointed out earlier, whether or not there is a pattern and practice of discrimination and whether or not there are individual acts of discrimination are related but distinct questions. There could be a pattern and practice and yet an employee might have been dismissed solely for reasons --

QUESTION: But is the ultimate inquiry in a pattern and practice suit whether or not there was intentional discrimination?

MR. SCHNAPPER: Well, first of all, of course, there are two kinds of Title 7 cases, intentional and --

QUESTION: Let's assume this is not a Griggs type case, where you are talking about tests.

MR. SCHNAPPER: Right. There would be two questions that would come up, and because they were litigated at different phases, it becomes important to distinguish them. The first question, at least in a

bifurcated proceeding, the first question a court typically addresses is whether or not there was a classwide, systematic policy of discrimination.

If it holds that it was, then it goes on to determine as to each specific employee whether or not he or she was a victim of that practice.

QUESTION: But that is an inquiry as to whether it was intentional discrimination, not just disparate impact, isn't it?

MR. SCHNAPPER: Well, in the hypothetical case that you describe of an intent case, yes, both questions concern intentional discrimination, but they are not the same question. They are related, as, for example, in last month's decision in United States versus an assortment of 89 firearms. The issue in the civil forfeiture case was, of course, related to the issue in the previous criminal prosecution in the United States of Olvac, Mervers, and Mulcahy, but they weren't the same question.

QUESTION: There were some places in your brief I got the impression that you were suggesting that at the inquiry, the substantive inquiry in a pattern and practice case was disparate impact rather than intentional discrimination, but I must have misunderstood you.

MR. SCHNAPPER: It is more likely I misphrased the passage involved, but certainly that is not our position. If we are dealing with an intent case, then the question with regard to the existence of a pattern and practice would be the existence of a classwide practice of intentional discrimination.

In any event, the court, the District Court in the Cooper action, the class action, found that there was a pattern and practice of discrimination in Grades 4 and 5, that there was not -- that any discrimination in Grades 6 and above was not pervasive enough to warrant a classwide remedy, and then with regard to the four named individuals, all of whom were in Grade 6 and above, the court sustained the claims of two of them and rejected the claims of two others.

The Baxter litigation, the individual suit, were precipitated by a decision in Cooper to deny intervention to Baxter and the other Baxter plaintiffs, an event which is, I think, anticipated by Note 4 in this Court's decision last June in Crown Cork and Seal. In ruling from the bench on May 8th, 1981, that he wouldn't permit intervention, Judge McMillan squarely suggested that the Baxter plaintiffs ought to file their own lawsuit.

That is precisely what they did. Four days

later, individual actions on behalf of the five petitioners were commenced in the same court. Baxter alleged that she had been denied specific promotions based on race. The other plaintiffs made similar allegations. There was, however, in the Baxter complaint no allegation of a pattern and practice or a general policy of discrimination.

The bank moved to dismiss the Baxter claims as barred by res judicata. The District Court rejected that motion but then certified the question to the Court of Appeals under Section 1292(a) of the Judicial Code.

In the Court of Appeals, the Cooper litigation and the Baxter litigation were consolidated. With regard to Cooper, the Court of Appeals, relying on a number of Fifth Circuit decisions, held that the finding of intentional discrimination with regards to Grades 4 and 5 was a question of ultimate fact, and because it was a question of ultimate fact, the Court of Appeals believed that the clearly erroneous standard of Rule 52 did not apply.

The Court of Appeals undertook its own review of the evidence, and concluded that there had been no pattern and practice of discrimination with regards to Grades 4 and 5. In the case of the Baxter appeal, the Court of Appeals also reversed, and held that Baxter's

claims were barred by the principles of res judicata.

The question which we raise in our petition is not whether all class members are free to relitigate any issue they please following the failure of a class action. It is our position and, I think, the position of the bank that a specific question of fact or law in fact and necessarily resolved in a class action is binding upon the members of the class. What we and the bank disagree about is what Judge McMillan in fact decided in the earlier class action.

In order to assess the meaning of Judge McMillan's opinion, it is important to put it in the context both of the nature of the issue that was before the court and the procedure that was followed. There are, of course, certain kinds of class actions in which a resolution of the merits of the pattern and the sort of classwide liability claim would be absolutely dispositive of the individual claims.

A common example, happily uncommon example of that are class actions which arise in the case of an airplane crash. It is not possible under the normal state of things that the airline might be liable to a passenger in Seat A1 but not in A2, or so on. Everyone is going to have a right to recovery or nobody will.

However, Title 7 cases, as I think Mr. Justice

Powell's earlier question indicated, are different. It is quite possible that there could be a pattern and practice of discrimination and yet an individual who was dismissed or not hired or denied a promotion might still have had that take place for non-discriminatory reasons, and the decision in Mt. Healthy expressly focuses on that possibility.

Similarly, it is possible that in the absence of a pattern and practice of discrimination, there might, in the words of the Teamsters decision, be "isolated or accidental or sporadic" discriminatory acts. This Court in its decision in Furnco Construction Company versus Waters emphasized that a balanced work force, a racially balanced work force doesn't immunize an employer from liability for specific acts of discrimination, and the Court's decision in General Telephone versus Falcon also noted that there is a wide gap between the kinds of evidence that would prove an individual case and the kinds of evidence that would prove a classwide pattern and practice.

Thus, although in some cases, such as an airplane crash, it would be inconsistent for a judge to hold there was liability to some individuals but not to the class, in the case of Title 7, such judgment would be perfectly consistent, and indeed, that is precisely

what happened here with regards to Grade 6 and above. Judge McMillan held that there was no pattern and practice of discrimination in Grade 6 and above, and yet he held that there were two individuals, Cooper and Russell, who were the victims of discrimination in those grades.

It is also important to bear in mind here an understanding of what Judge McMillan did, the procudure that was followed. That procedure, of course, was the bifurcated procedure, recognized, approved, and, I think, commended to the District Courts by this Court's decision in Franks, and in Teamsters, and indeed it was the procedure that was being utilized in General Telephone versus EEOC, a decision of the Court a few years ago.

Under the bifurcated procedure, ordinarily the primary question which is considered at the Stage One hearing, the first trial, so to speak, is only whether there is a pattern and practice of classwide discrimination. If the court holds at the end of Stage One that there is a pattern and practice of classwide discrimination, then a second hearing is held to determine to some extent in light of Mt. Healthy what individuals were the victims of that discrimination and which individuals were not.

On the other hand, if the court finds after Stage One that there is no pattern and practice of classwide discrimination, that is typically the end of the class action.

QUESTION: Mr. Schnapper, from the point of view of class action litigation as opposed to whether the Attorney General can bring the action, how are the class plaintiffs benefitted by a Stage One determination that there was a pattern and practice if in Stage Two they have to show the circumstances of their individual job actions?

MR. SCHNAPPER: Well, the burden of proof is different at Stage Two. If the plaintiff establishes at Stage One that there was a pattern and practice of discrimination, then at Stage Two the burden of proof is on the employer to show that particular individual employees were not the victims of discrimination.

QUESTION: What is the basis for that shift in the burden of proof?

MR. SCHNAPPER: The Footnote 24 in the Court's decision in Franks, and there is a similar footnote in the decision in Teamsters, both of which adopt that rule.

QUESTION: That is if certain individuals want, really?

MR. SCHNAPPER: Well, in the manner in which these cases are typically tried, all the class members are sort of -- are putative candidates for relief unless the defendant comes forward and attacks them. I mean that, as a practical matter, is how Stage Two will be tried. If there are 150 class members --

QUESTION: Well, if you prove a pattern and practice of discriminating against a minority, there doesn't have to be any further proof to warrant some kinds of relief, does there?

MR. SCHNAPPER: No, that would result in a finding of liability for all the individuals, unless at Stage Two the company came forward and established that despite this practice, particular individuals had not been the victim of that discrimination. For example, in Justice Powell's case, a hypothetical, one might establish at Stage One that there was a pattern and practice of disciplining only black employers.

QUESTION: Well, can a court order -- Without any proof of any individual discrimination, can a court order after there has been proof of a pattern and practice of racial discrimination, can a court order the employer to bring his level of minority employment up to a certain point?

MR. SCHNAPPER: You could --

QUESTION: Without any proof of --

MR. SCHNAPPER: You could have generalized injunctive relief, but specific relief for specific individuals such as an order that Smith be promoted to Grade 8 --

QUESTION: Right, right.

MR. SCHNAPPER: -- or that Jones get $10,000, that would only --

QUESTION: How about a specific order that Jones be hired?

MR. SCHNAPPER: As the bifurcation procedure is now administered, that would only -- that order would only enter following Stage Two, at which the company would be given the opportunity to prove Jones out of the case. In other words, the company -- Stage Two you might want to think of as a Mt. Healthy here. It is an opportunity for the company to come forward and say, even though we had a general policy of discrimination, it wasn't responsible for our refusal to hire Smith. They are given that procedural opportunity at Stage Two.

QUESTION: Well, what if Smith claims that he not only should be hired, but that he should be given competitive seniority?

MR. SCHNAPPER: Well --

QUESTION: Does he have to claim individual discrimination against him?

MR. SCHNAPPER: At some point we have to be talking very specifically about what was found at Stage One. If there is a finding at Stage One that, for example, everyone who applied in 1960 was -- 1970 was rejected on race, on the basis of race, presumptively any black in that group gets 1970 seniority, subject to the right of the company at the Stage Two Mt. Healthy hearing to prove him out of the case.

QUESTION: Right. So in effect on your statement there he has already proved that -- under that finding he has already proved that he was discriminated against --

MR. SCHNAPPER: Well, he has shifted the burden of proof to the defendant. The defendant is required to come forward -- has an opportunity to come forward with additional evidence at Stage Two with regard to individuals.

QUESTION: But the bottom line is that whoever has got the burden, the bottom line before the court gives any individual relief is that he has to have been discriminated against.

MR. SCHNAPPER: That remains the issue at all times. That's correct.

Well, in any event, that is the procedure that was followed here, as in most Title 7 cases. It is our contention, and this is the central issue in the case, that although the district judge in the Cooper class action decided that there was no pattern and practice of racial discrimination in Grade 6 and above, he did not resolve at all the claims of Baxter or the other Baxter plaintiffs.

We rely in particular on three opinions by the district judge. First, in the judge's opinion of October 29th, 1980, the judge with regard to Grades 6 and above said only that the evidence of classwide discrimination was not "pervasive enough" to order classwide relief, a decision obviously limited to the classwide liability issue. There is no mention in the October decision of Baxter or any of the other Baxter plaintiffs.

Second, on May 29th, 1981, in denying Baxter the right to intervene in Cooper, the District Court emphasized that it had held in Cooper only that there was no classwide discrimination, and the word "classwide" is part of the sentence in which it describes its findings about Grade 6 and above.

Finally, twice, both on May 8th, 1981, and on May 29th, 1981, the district judge made it clear that on

his view, Baxter was free to go out and file her own lawsuit. In its May 29th order, the judge said he saw no reason why Baxter couldn't bring a fresh lawsuit.

Now, Judge McMillan is certainly sufficiently familiar with the principles of res judicata that if he had just decided the merits of Baxter's claims, he wouldn't have written an opinion which said he could see no reason why she couldn't bring a whole new lawsuit and start all over again.

QUESTION: Mr. Schnapper, as I understand your argument, even if that hadn't happened, your position is that the Baxter plaintiffs should prevail.

MR. SCHNAPPER: Well, it is our contention that he never -- That's right. We have two arguments. The first one is that the Baxter plaintiff's claims were never in fact resolved in Cooper. Then --

QUESTION: Regardless of what the judge said or --

MR. SCHNAPPER: Regardless of whether the judge reserved the right for them to go forth. That's right. We have two distinct arguments.

The bank relies primarily for its argument to the contrary on the Conclusion of Law Number 27, which is at 285 of the petitioners' appendix. That conclusion reads, "The court concludes that there was no showing

that the bank had discriminated against black employees with respect to promotions out of Grade 6 and above." The bank reads that as meaning that the district judge found there had never been any acts of discrimination at all in Grade 6 and above.

We suggest that reading is clearly inaccurate for several reasons. First, the same opinion in Conclusions of Law Number 7 and 11 specifically hold that plaintiffs Russell and Cooper, who were in Grade 6 and above, were the victims of discrimination. So Conclusion of Law 27 cannot mean that there were no such victims.

Secondly, the intervention order which I mentioned earlier, which was entered -- the order denying intervention was entered the very same day as Conclusion 27 -- describes the conclusions of law merely as holding there was no classwide discrimination.

Finally, as we have noted in our brief, where the district judge undertook to reject a claim, he did so quite specifically, and there is no such specific mention of Baxter and the Baxter plaintiffs in the case.

There may or may not be a second question presented by the case. There are portions of the bank's brief which suggest that it's the bank's position that

even if there -- even if Judge McMillan did not decide the Baxter claims in Cooper, nonetheless Baxter is barred by res judicata from seeking resolution of those claims in this case.

We think that's certainly wrong. It's inconsistent with the Court's decision in Crown Cork and Seal versus Parker, and with the purposes of Rule 23 it would be sort of a rule of res non-judicata, and I think there is no basis for that in res judicata law.

I would like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Mrs. Shapiro.

ORAL ARGUMENT OF HARRIET S. SHAPIRO, ESQ.,
ON BEHALF OF THE U.S. AND EEOC AS AMICUS CURIAE

MS. SHAPIRO: Mr. Chief Justice, and may it please the Court.

The problem in this case can be illustrated by considering the situation likely to face a class member who receives notice of a class action. He believes he has been denied a promotion because of his race. He does not know whether that race-based denial reflects a companywide practice or only the racial bias of the individual supervisor who denied him promotion.

If it is the company policy, he can get relief in the class action on proof of the general practice.

But if it is the particular racial bias of his own supervisor, he has instead an individual claim that is not typical of those of the class.

The named plaintiffs in the class action can present only the class claim based on the general practice of the company that affects all class members and any individual claims they may have. They cannot challenge individual promotion decisions that do not affect them.

Of course, if the class succeeds in showing a company practice of racially biased promotions, each class member's claim is covered by that decision. A class member has no additional claim that he was also denied a promotion because of his particular supervisor's racial bias. But if the class claim fails because of a lack of proof of a companywide practice of racial discrimination, that failure says little about whether the employee's claim that his own supervisor was baised is valid or not.

It is perfectly possible that the company has no pattern or pratice of discrimination, but that occasional discriminatory actions have occurred. An employee's participation as a class member in the class suit does not give him the chance to litigate his individual claims. He should not be forced to give up

his right to litigate that claim as the price of remaining in the class that tests the related question of whether there is a companywide practice of discrimination.

It is no answer to say that the employee can save his individual claim by intervening in the class action. The very purpose of class actions is to permit litigation by representatives rather than by massive intervention, and a class can be certified only when the class is too large to make intervention by class members practical.

If a class member must nevertheless intervene to preserve his individual claim, the District Court, faced with a class action and numerous intervention requests, has an insoluble problem. If he grants the requests, the case will become so unwieldy that the practical benefits of the class procedure will be lost, but if he denies the requests, the class procedure becomes a tool for the deprivation of substantive rights of the individual class members.

Nothing in Rule 23 requires the court to face this dilemma. The rule recognizes that a class can share a common interest that is properly resolved in a class action, but that individual class members can still litigate related individual claims that the class

action does not resolve. That is all that is at issue here.

The government is responsible for enforcing Title 7. It is also an employer facing Title 7 suits by its employees. In both capacities, it has a strong interest in preserving the class action as an effective tool for litigating Title 7 claims. That means that the District Court must be able to control class actions by limiting the issues to be litigated in those actions to the ones common to the class, without being unfair to the individual class member.

It does not mean that the class action must itself resolve all the individual claims of the class members. As a practical matter, an employer, including the government as an employer, gains a lot from a decision that it has not engaged in a pattern or practice of discrimination, even though its employees can still pursue their own suits on their individual claims.

Those suits will be more difficult to win than they would otherwise have been. The employee is bound by the finding that there has been no pattern or practice of discrimination. He must rely on his individual situation. He cannot draw support from statistical or anecdotal evidence of similar employment

actions not related directly to his specific claim.

QUESTION: What if the employee in his individual claim came across some evidence that the president of the company had issued a directive saying, telling all supervisors, I want you to get rid of as many black employees as possible, because I just don't like them around? And the class action decision had already gone against him. Would the employee be entitled to rely on that?

MS. SHAPIRO: No, not if the class action had been -- if the pattern of practice had been decided in a class action, he would be collaterally estopped by that decision.

QUESTION: Would that mean that he couldn't introduce the evidence?

QUESTION: Does collateral estoppel go to -- Because that evidence would tend to be probative of an individual claim, wouldn't it? He couldn't claim that there is a pattern and practice, but couldn't he say that since the president wrote that letter, it is rather probable that the supervisor had read it and acted accordingly.

MS. SHAPIRO: Perhaps he could introduce the evidence, but the issue that was decided in the class action would have been that there was no pattern or

practice, and that would be binding on the District Court.

QUESTION: Let me have that again. If he introduced -- that same evidence was introduced again, as Justice Stevens suggested, are you suggesting that is not probative evidence?

MS. SHAPIRO: No, I said it may well be that he could introduce the evidence, but it would not be --

QUESTION: Is there any reason why he could not introduce it?

MS. SHAPIRO: No, the only thing that he could not do would be to relitigate the question of whether there was a pattern or practice. In short, the party who wins the class action has an advantage in the later individual litigation. He does not have the right to foreclose that litigation entirely. The employer who loses the class action has a second chance to avoid liability to the individual employees in the Stage Two proceedings, and the employee who is a class member in an unsuccessful class action has a second chance to recover in an individual action of his own.

Unless there are any questions, that is my submission.

CHIEF JUSTICE BURGER: Mr. Hodges.

ORAL ARGUMENT OF GEORGE R. HODGES, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I must say that I differ in two respects with what petitioners have claimed to be the question here. The question is not whether the judgment in the first class action suit bars all subsequent actions brought by class members who are in that suit. The decision of the Fourth Circuit was far narrower than that.

That decision was simply that in a properly certified class action, where notice was given to the class members, and they were adequately represented, then they are precluded from raising in a separate suit those issues or those claims that were within the range of issues litigated in the first class action.

So, we do not claim, and the issue before this Court, I submit, on the Fourth Circuit's opinion is not whether all claims are barred.

QUESTION: Well, what if in the initial suit there is proof of actual intentional discrimination against two or three members of the class, but no other proof and no other statistics that convince the judge, and the judge says, well, there is just no pattern or practice? There is no pattern or practice. Now, do you think those three people who had -- who submitted

evidenc are foreclosed from suing again?

MR. HODGES: Yes, sir, under the facts of this case, because --

QUESTION: Why would they be?

MR. HODGES: Because of their election to litigate their claims through the class action and because of the representative nature of the class action. If they were named parties, if they were named intervenors, then they have submitted their individual claims for decision at that point.

QUESTION: Well, yes, but if the only claim is that there is a pattern or practice, and that issue is denied.

MR. HODGES: Well, as I say, that is a function of their election, and if you take this very case, the class members in this case were given notice of the class action and of what -- and of a choice that they had to make, and this flows straight out of Rule 23, and the notice followed Rule 23, and that is that they can --

QUESTION: Well, if the class action -- if the pattern or practice suit had been sustained, there was a pattern or practice of discrimination, then these three people themselves, at least they could have gone on and proved up individual relief, couldn't they?

MR. HODGES: That's true. As a matter of fact, at that point, if they had prevailed, they would have been entitled to injunctive relief, as this Court in Teamsters said.

QUESTION: I don't understand why you think they have elected themselves out of any individual relief just because the proof failed as to a pattern or practice.

MR. HODGES: Because -- well, two reasons. One, that is what American Pipe says. The American Pipe case, a decision of this Court, says that after 1966, when Rule 23 was amended, that as soon as practicable after the initiation is litigated, the decision should be made as to who is included in the suit. In other words, they are sent notice and are given the option to either pursue their claims through the class action or to opt out and pursue them separately, and this is a function of the representative nature of a class action. In American Pipe, as the Court said, after the rule was amended in '66, the class action became a truly representative action.

QUESTION: But that is only as to claims where there are common elements, isn't it? If you are making a claim that your individual supervisor was prejudiced against blacks, women, whatever, and therefore you as a

black or a woman were discharged by that supervisor, you don't have anything in common with plaintiffs who may have worked for another supervisor.

MR. HODGES: If that's the case, then it's not a properly certified class action, and you'd be right.

QUESTION: Well, but supposing that in addition, supposing you wanted to bring two claims, one that your supervisor was prejudiced against you and dismissed you for impermissible reasons; second, that the company as a whole had a practice, so that even if your supervisor hadn't been prejudiced against you, you would have suffered from the companywide practice?

MR. HODGES: If that's the case, I would say you would be well advised to opt out and to pursue your individual claims.

QUESTION: But why should you have to opt out if you think you would benefit from the determination that there is class liability?

MR. HODGES: Basically because that is what Rule 23 and American Pipe say, is that you are given the option. I think the problem here is looking at the pattern and practice. Pattern and practice is a method of proof. It is not a separate cause of action. There is one cause of action here, one claim, and that is the statutory right not to be the subject of employment

discrimination.

You can prove that several different ways. You can prove it several different ways in a class action. Take, for instance, an individual action where a plaintiff attempted to show that he had been a victim of discrimination, and he couldn't show any direct evidence of that, and so, to satisfy his burden of proof, he relied on statistical evidence of a pattern and practice of discrimination against black employees.

And say he failed, and the judgment of the court was that there was no pattern and practice, and therefore he fails in his prima facie case. That individual can't later go out and file a subsequent lawsuit saying that, well, this time I'm going to rely on the McDonald Douglas test, or I am going to rely on some other evidence of discrimination. The same is true --

QUESTION: Well, that is the question in the case.

MR. HODGES: Pardon?

QUESTION: That is the question in the case, one of the questions in the case, isn't it?

MR. HODGES: The question in this case, and the crucial question in this case, I believe, is not, as the petitioners say, what Judge McMillan did, but the

crucial question is whether the second suit involves the same cause of action as the class action. That is the test for res judicata, and it doesn't require that every shred of evidence be the same.

It is really, as this Court said last year in Nevada versus the United States, the more modern test is a transactional test, that is, whether these claims arose out of the same origins, the same motivations. Another test which was referred to in that case was the Baltimore Steamship.

QUESTION: Let's get a little more specific. With respect to Petitioner Cooper, had she ever filed a complaint, or was she just an a member of a class who was not a named party?

MR. HODGES: Cooper had filed a charge of discrimination and was the lead intervenor in the class action.

QUESTION: So she had a complaint.

MR. HODGES: She had a complaint and had stated the complaint.

QUESTION: How about Baxter?

MR. HODGES: Baxter had not. One thing I think is important to remember here is that none of these five Baxter plaintiffs had ever filed a charge of discrimination with the EEOC. They had never thought

enough of their -- whatever individual claims they now assert to even file a charge of discrimination.

QUESTION: Up until the time they sought to intervene, they were simply members of a class but not named parties.

MR. HODGES: That's right. They were sent the notice and did nothing for two years. They received the notice. That is stipulated. They did nothing for two years. On Thursday, before the trial was to begin on Monday, and I will say late in the afternoon on Thursday, these people appeared for the first time on a witness list, as witnesses that were going to be offered at trial.

QUESTION: This was the class action trial?

MR. HODGES: This was the class action trial, the one that was initiated by Cooper. They showed up on a witness list. We subpoenaed them on Friday, deposed them on Saturday, and they showed up for trial on Monday. And at that time, we asked the District Court to explain to us whether he was going to rule on any personal claims that they made or whether he was going to hear the testimony just as it related to the class action.

There was some ambivalence at first, but prior to the time the first witness testified, the District

Court asked the lawyer for the class if this witness was submitted to present a personal claim, and he said, no, she's a class member. She and the rest of these petitioners then testified in support of the class action. They didn't move to intervene at that time. They made no attempt to opt out. They made no attempt whatsoever to assert a personal claim in this lawsuit until after Judge McMillan --

QUESTION: But they did testify against, didn't they --

MR. HODGES: They testified about --

QUESTION: -- as to alleged discrimination against them?

MR. HODGES: About things that happened to them.

QUESTION: Right.

MR. HODGES: They and their lawyers were satisfied to offer that evidence in support of the class action.

QUESTION: Right. Right.

MR. HODGES: And they didn't make any --

QUESTION: In support of the class action claim of a pattern or practice.

MR. HODGES: Pardon?

QUESTION: In support of the class action

claim of what?

MR. HODGES: In support of the class action which was predominantly pattern and practice evidence.

One thing -- let me finish that -- complete that point. These people didn't move to intervene or make any effort whatsoever to assert a personal claim of discrimination until after they saw that the judgment was going against them. After Judge McMillan announced that their part of the class was entitled to no relief, they then sought to assert a personal claim, four years after the litigation had started.

Now, as to the pattern and practice, I think it is important to recognize that the pattern and practice and the class action really is nothing but the aggregation of these individual claims. Take Teamsters, for instance, which recognizes that although there is no pattern and practice, there may be individual cases. One way of telling if there is a pattern and practice of discrimination is to look at individual cases and see if there is enough individual cases of discrimination to conclude that that is the company's practice, the general operating procedure.

QUESTION: Mr. Hodges.

MR. HODGES: Yes, sir.

QUESTION: Let's back up a minute. If

somebody is notified that they are a member of the class, and they don't do anything in the class action at all -- this is a hypothetical -- but they file a lawsuit, to what extent are they barred by the class action?

MR. HODGES: I would say they would be barred to the same extent that these people were.

QUESTION: That's what I thought.

MR. HODGES: And I say that based on this Court's opinion in the American Pipe case and on Rule 23, which was designed to litigate in the class action these individual claims, and again, it is the representative nature of that lawsuit. These people get something out of a class action.

QUESTION: Well, Mr. Hodges, supposing that my name is Baxter, and I file a complaint against the Federal Reserve Bank of Richmond saying in one count that the bank had a policy of discriminating against all -- and I am a black -- all blacks, in violation of Title 7, and Count Two is that my supervisor was prejudiced against blacks and caused my dismissal by reason of race, and the District Court says, all right.

And I ask that Count One be certified as a class action, and the District Court says, all right, we will certify it and see if there is a pattern and

practice, and the District Court at the end of that evidence concludes that, no, there is not enough swallows here to make a summer, so to speak, there may have been individual instances.

Now, does that bar me on my Count Two that was never really certified as a class action?

MR. HODGES: No, if you filed your claim as a claimant or intervened. No, you have preserved that right.

QUESTION: Well, then, why shouldn't these people have the right to intervene after the decision on their individual claim after the class action suit is decided the way it was by the District Judge?

MR. HODGES: Well, because of the convention of the class action and how it works. The class action is designed, and all of this was noted in American Pipe, was designed to litigate numerous similar claims in one action, and it was amended in 1966, Rule 23 was, to bind the class members to those claims.

QUESTION: Well, you just said to Justice Rehnquist, though, and his example was a two-count example, one count a class action and the second count something else, you say that this person wouldn't be barred even though his class action, even though he lost his claim in the class action. He could still press his

individual claim.

MR. HODGES: I'd say yes --

QUESTION: Isn't that what you said?

MR. HODGES: -- because he has perfected his right by filing an individual claim. Here --

QUESTION: Well, I know, but he also elected to try out the class action, and he lost.

MR. HODGES: He may fail on one method of proof and recover on another.

QUESTION: Well, I don't understand then.

QUESTION: Do I understand you to say that the only way he can make use of this -- or avoid this situation is to opt out of the class?

MR. HODGES: That's what American Pipe would say, that as soon as practicable after the litigation is initited, the class should be set, and this is their due process.

QUESTION: I was addressing my question in the light of Justice Rehnquist's hypothetical to you.

MR. HODGES: In order to obtain a personal decision on your individual claim, I would say yes, you have to be a party either by intervention or by opting out. These people were given notice that that was the case and elected to pursue their claims as class members in a truly representative class action. Their claims

were there. In fact, that's all there is in the class action.

QUESTION: What you are saying, in effect, is that the so-called pattern and practice is just deciding how many swallows make a summer. It is a bunch of individual claims.

MR. HODGES: That's -- it's a bunch of --

QUESTION: It isn't as if it were different in kind some way from the trial of a bunch of individual lawsuits.

MR. HODGES: That's true. If you took each of these individual claims out of the class action one at a time, you would have nothing left when you got through. There is nothing about the class action or pattern and practice which is a separate legal right. It is purely and simply a method of proof.

QUESTION: What if Judge McMillan had found in this case when he heard the Baxters' testimony, he said, I think that you were discriminated against, Mrs. Baxter, but as to the pattern and practice issue, there are just not enough cases like this to make it a pattern and practice case, so I am making that ruling on the class action. Are the Baxters then barred on their individual claims?

MR. HODGES: I believe so. Because of

American Pipe, that binds them to their judgment. One way to look at it is, look what happens if that is not the rule. You go through a class action here for three years, and at great expense of hundreds of thousands of dollars, and you try the class action, and the defendant prevails. The government and the petitioners would say that all he has really done in that class action is determine a question of evidence.

QUESTION: Perhaps the error was in certifying the class.

MR. HODGES: No, I think this was a properly certified --

QUESTION: If it is just an aggregation of individual claims, you don't have a common issue, like a test, or a personnel policy of some kind that you are raising.

MR. HODGES: I disagree, Justice Stevens. This was properly certified under Rule 23(b)(3) and upon the consent of the parties and the judge making the specific finding that common questions prevailed and that the class action was a superior mechanism for litigating these actions.

QUESTION: How many employees were there in the class?

MR. HODGES: Roughly 300.

QUESTION: And if the rule of law is that it takes 78 to make it a pattern or practice, 78 acts of discrimination, and they litigate at their peril that they might prove only 73 or 74, is that your view?

It seems to me it is not a common question if you have 78 different cases you've got to try to decide whether it's a pattern or practice.

MR. HODGES: They are similar questions. The discrimination may have occurred in a similar way. Here it was a properly certified class action. As I say, this is a (b)(3) action.

QUESTION: What would you describe as the common question that justified certifying it as a class?

MR. HODGES: Whether the bank had discriminated against its black employees, primarily in promotions. There were some other issues, but primarily in promotions.

QUESTION: Whether it had discrimination at all against them? But he seemed to stratify it in those above Grade 6 and those in 4 and 5. He had subclasses.

MR. HODGES: The ultimate conclusion of the Court of Appeals was that there was no pattern of discrimination in any of the grades nor against any of the intervenors. So the bank ended up with a --

QUESTION: No, but in the trial court, he

found discrimination in Grades 4 and 5, didn't he?

MR. HODGES: That's correct.

QUESTION: Mr. Hodges, backing up again, help me out. This fact that you had to either intervene or opt out, that is just since the '66 amendment?

MR. HODGES: That's correct, Your Honor.

QUESTION: It wasn't before that?

MR. HODGES: That's correct. As a matter of fact, that's why the amendment was made. Before, and this is all noted in American Pipe at 414,550, is the page number, I believe, that prior to 1966, there was what is called a spurious class action, where people could sit on the fence, and I'd say these people are classic fence-sitters.

QUESTION: The original class action was on a spurious one.

MR. HODGES: That's correct.

QUESTION: Way back under the --

QUESTION: That's right, and these people have sat on the fence and taken no risk, and they sat there until such time as they saw that they had failed to obtain any relief in the class action, so then they filed separate actions.

Now, if they can do that, there is nothing to distinguish their status from any other class members.

QUESTION: You say it was too late for them to opt out at that time?

MR. HODGES: Yes, sir. I say they had elected to litigate their claims through the vehicle of class action, and there are very good reasons for doing that, pooling of resources, the advantages by multiple testimony of alleged discriminatory acts. There are very good reasons for a class member to pursue his case that way. But he has got to make the election.

QUESTION: What happens if I just don't want to be associated with other people?

MR. HODGES: You can opt out.

QUESTION: I have to, don't I?

MR. HODGES: You have to opt out if you are to perfect your separate claim. That is correct.

QUESTION: Then I go on my own. I am on my own, but I am still going to be bound by that judgment.

MR. HODGES: No, sir.

QUESTION: I won't?

MR. HODGES: No, sir. That is what American Pipe says, that you -- make the decision at that point. Either you are a party bound by the judgment, whether favorable or unfavorable, or you are a non-party, not able to participate in the benefits or to have to accept the detriments of the litigation.

It is not a perfect world, and it may be that Mrs. Baxter has a good claim. It may be that she does, but it was her election to pursue her claims through the class action that has determined what followed, that she doesn't get to relitigate the claims.

What you had prior to 1966 was exactly what the petitioners and the government propose here. It is a one-way street for the benefit of the plaintiff, and it is a deal anybody would love.

QUESTION: I don't see how you could argue that, because at least what the case, the class action disposes of is the claim that there has been some companywide, systematic discriminatory practice involved, and you have disposed of that in the class action. What you haven't disposed of is the individual claims based on some individual animus.

MR. HODGES: I beg to disagree with you, Justice O'Connor. All there is in this pattern and practice class action is those individual claims. It is the aggregation of those individual claims. That is why it is a proper (b)(3) class action.

QUESTION: Well, but typically what is involved is allegations that there is an employment market out there in the community with a certain percentage of minority employees, potential employees

available, and the employer is not reflecting that in hiring practice. You get these general systematic allegations, and at least you have disposed of those in the class action, right?

MR. HODGES: Yes, you have disposed of those. I believe you have also disposed of those individuals' claims who have elected to litigate through the vehicle of the class action.

QUESTION: I think the government agrees and the petitioner agrees that if the Baxters are allowed to intervene in this stage of the case, they couldn't come in simply with statistical evidence.

MR. HODGES: That's correct.

QUESTION: That didn't point to any direct discrimination, individual discrimination. They would be barred by that. So you gain something by winning the class action.

MR. HODGES: Something, but you are entitled to a judgment, because they have failed to prove their case. Their claims are there through their representatives. The representatives here were found to adequately protect their interests. There has been no dispute about that. It is the nature of a representative suit that they give up some of their individuality for the benefits they get of proceeding

through the group and the class. It is not a perfect situation.

QUESTION: Mr. Hodges, may I try another hypothetical.

MR. HODGES: Yes, sir.

QUESTION: Supposing you had a class action in which the only issue was a challenge to some kind of a test that was given to all employees before they could be promoted, and you certified a class, and all the employees -- no employee opted out, and you won on that, and they said it was discriminatory, and you won, they found it was an employment-related test.

Could a member of that class later sue on the ground that his or her supervisor had discriminated against him for some reason independent of the test?

MR. HODGES: Yes, sir. Yes, sir, because there the only issue was the impact of the test. If, say, the test given was a hiring test, and that was found not to be discriminatory, there may be one or more people who felt that they were not treated fairly because of some other requirements, either the --

QUESTION: See, there the claim would be that the test was a practice that applied to everybody. Here they have alleged there is an unwritten practice of discriminating against everybody, and you have won on

that. You don't have such a practice. But you say that does not --

MR. HODGES: That's not entirely true. The test is a classic disparate impact case, which doesn't involve intent. Here they are saying there is a pattern and practice of discrimination. Now, that pattern and practice is not made up of one test that is routinely given to everybody, and it is either go or no go.

QUESTION: No, but if it exists, it is company policy. It may not be manifested through a test, but it applies to everybody if there is such a pattern and practice.

MR. HODGES: It doesn't necessarily have to apply to everybody, and it is not necessarily a policy. It is a pattern if there is enough of it that -- as Teamsters says, it is the company's regular operating rather than isolated acts, and here we have a classic disparate treatment case of individual promotion decisions made by different supervisors at different times during a four-year span, any one of which may raise one or more individual claims among the people who were not promoted.

QUESTION: Well, nonetheless, you say that was a properly certified class action.

MR. HODGES: Yes, sir, under (b)(3), Section

23(b)(3), which is specifically designed for this kind of situation where the interests in the class action in obtaining the efficiencies and litigation in one suit of numerous claims outweighs the individual interest of an individual person, and the due process protection for that person is the notice.

QUESTION: But how much time do you save in a class action like this if in fact it is just a question of building up to a critical mass, whether, as Justice Stevens says, it is 70 out of 300, or 90 out of 300? If it has to be a bunch of people saying, I was individually discriminated against by my supervisor, and ultimately you infer, well, the supervisors weren't doing this on their own, it was really the top boss, is that a very sensible class action?

MR. HODGES: Yes, I say it is, because there are many ways you can do that. Statistics, for instance, could prove that. Statistics, head counts, things that really represent an accumulation of a number of individual decisions.

You really don't have an benefit of a class action if you do what the petitioners and the government would suggest, because then you spend three or four years trying a class action, and you end up with the potential for each and every class member filing a

separate lawsuit the next day alleging the same right that they tried in the class action, that is, the right not to be discriminated against, but just using a little bit different evidence.

That is precisely the one way intervention that Rule 23 was amended to prevent, and I don't want to run it into the ground, but I think American Pipe deals directly with that issue.

QUESTION: What if as soon as a class action is filed on behalf of all sorts of people, about 25 people show up and move to intervene as named plaintiffs? They are members of the class. They say, we are members of the class, but also, we don't want to lose our individual claims in the event this pattern and practice suit washes out, so we want to preserve, and so they make allegations of individual acts of discrimination against them, and the judge says, well, we are going to break this up into two parts, and we are going to let you intervene, but we are going to try the pattern and practice suit first. He finds no pattern or practice. Are these people then out?

MR. HODGES: Those people are not out. They were allowed to intervene. That may be a good indication, if that many people show up to intervene, that it is not properly a class action.

QUESTION: What do you mean, not properly?

MR. HODGES: Well, it might not be proper to certify that case as a class action. It may be that the claims are not so typical that it satisfies Rule 23(a). The same is true, though, Justice White, if you consider their rule, and that is that the individual claims of these class members are not presented in the class action. Then there should be no tolling effect on the running of the statute of limitations against those individual separate claims, so that in that situation --

QUESTION: Now, the first people that intervened in this case were the --

MR. HODGES: Cooper, Russell, and Moore.

QUESTION: Yes, and they came in and their complaint and intervention said that they themselves had been discriminated against individually.

MR. HODGES: Correct, that there had been discrimination against the class --

QUESTION: Yes. Now, do you think those three people are barred from presenting individual claims after the judge finds no pattern or practice?

MR. HODGES: No, no, they intervened and we didn't even object to their intervening, and they intervened --

QUESTION: All right, and then along come the

Coopers?

MR. HODGES: No, along comes Baxter.

QUESTION: Along come the Baxters --

MR. HODGES: After judgment.

QUESTION: Yes.

MR. HODGES: Or after decision.

QUESTION: And were they allowed to intervene?

MR. HODGES: I think the judge properly decided that it was too late.

QUESTION: Yes, too late for them. But their complaint, if they had been allowed to intervene, their complaint and intervention would -- it is in here in the record -- it would have alleged individual acts of discrimination against every one of them.

MR. HODGES: That's what it did. It also alleged that it was pursuant to the policy of pattern and practice.

QUESTION: So you think the Baxter group is in one category and the Cooper group is in another?

MR. HODGES: Oh, yes, sir. Yes, sir. Cooper --

QUESTION: In terms of res judicata.

MR. HODGES: Well, the Cooper group put their individual claims at issue --

QUESTION: Well, I understand that.

MR. HODGES: -- and we have a judgment on the merits against those individual claims, but I'd say yes, sir, they are in a very different group. The Cooper group intervened for the purpose of litigating their individual claims and pursuing a class action. That complaint at intervention, if you will look at the prayer for relief, seeks injunctive relief, front pay, and back pay for the class. So it is their individual claims that were very much at issue in this class action.

Again, this is -- I say this is not a perfect situation. The class action is a device for litigation of multiple claims in one suit, and it was amended to provide the prevailing party with a judgment that will bind class members. There is -- a class member gets some benefits out of that, not insubstantial benefits. A class member also as part of a tradeoff gives up some of his individuality, and here, no matter how bad anybody may want to rule on Mrs. Baxter's or the other individual claims, it is her and the others' own election to, through the discovery two years before the trial and even through the trial, and through the time of decision. They elected to pursue their claims as class members and not as individuals, and that is what binds them to the judgment of the class action.

Thank you.

CHIEF JUSTICE BURGER: You have one minute remaining, Mr. Schnapper.

ORAL ARGUMENT OF ERIC SCHNAPPER, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. SCHNAPPER: May it please the Court.

The position taken by the bank in Mr. Justice Rehnquist's phrase is that having proved in Cooper that there was no summer, the Baxter plaintiffs were now somehow precluded from litigating whether there were any swallows. We think that is incorrect.

The bank asserts that the method which the intervenors -- that Baxter should have used to protect herself from this res judicata effect, which all future plainfiffs, class members would have to use to protect themselves would be to intervene. That argument has a certain ring of familiarity, and if it does, it is because on April 18th, 1983, the petitioner in Crown Cork and Seal versus Parker made in this room the precise argument that was just made by the bank.

This Court rejected that argument in Crown Cork and Seal for reasons which go to the heart of Rule 23. Noting first that such a rule as here would induce not 25 members of the class but the entire class to intervene to prevent the kind of preclusion the bank now

seeks, thus defeating the very purpose of Rule 23, to create a vehicle which does involve massive intervention.

Secondly, this Court noted in Crown Cork and Seal --

CHIEF JUSTICE BURGER: Your time has expired, Mr. Schnapper.

Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:58 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:

#83-185 - SYLVIA COOPER, ET AL., Petitioners v.
FEDERAL RESERVE BANK OF RICHMOND

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BY _____

(REPORTER)