OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1623

TITLE PHYLLIS A. ANDERSON, Petitioner v. CITY OF BESSEMER CITY, NORTH CAROLINA

PLACE Washington, D. C.

DATE December 3, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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PHYLLIS A. ANDERSON,

Petitioner

v. : No. 83-1623

CITY OF BESSEMER CITY, NORTH CAROLINA

- -x

Washington, D.C.

Monday, December 3, 1984

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

APPEARANCES:

JONATHAN WALLAS, ESQ., Charlotte, North Carolina; on behalf of the Petitioner.

MS. CAROLYN F. CORWIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amici curiae.

PHILIP M. VAN HOY, ESQ., Charlotte, North Carolina; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Wallas, you may proceed whenever you're ready. You may raise that lectern, if you would like.

MR. WALLAS: This is fine, thank you.

ORAL ARGUMENT OF JONATHAN WALIAS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WALLAS: Mr. Chief Justice, thank you; may it please the Court:

The issue in this case is whether the court of appeals erred in its application of Rule 52(a) when it concluded that the district court's findings of fact, including the ultimate finding of sex discrimination, were without evidentiary support.

The facts of this case can be briefly stated as follows. In March 1975 the job of recreation director became vacant -- became vacant in the city of Bessemer City. Eight applicants for the job were interviewed by a five-person committee. The committee consisted of four men and one woman.

Prior to selection, no job duties, selection guidelines or criteria for selection, written or otherwise, were provided to or promulgated by the selection committee, except the requirement that the successful applicant live in Bessemer City or be willing

to relocate there.

Although no job description was provided to the selection committee, the committee unanimously agreed that the recreation director's job was to develop a diverse program of recreation activities for all ages and sexes in the community.

The unanimous first choice of the committee for the job was a man by the name of Burt Broadway, but Mr. Broadway was not willing to relocate to Bessemer City, and he was not formally offered the position.

The committee found two other applicants well qualified for the position -- Donald Kincaid and Phyllis Anderson. Kincaid was selected by a 4 to 1 vote. The four male members of the committee voted for Mr. Kincaid; the one female member of the committee voted for Ms. Anderson.

At trial the parties presented conflicting evidence about a number of material facts, especially about the motivation of the selection committee. The district court, citing and following a law established by this Court in the McDonnell Douglas case and the Burdine case, a legal analysis that has not been challenged by the respondent and which was not criticized by the Fourth Circuit, found that the city's sole articulation that Kincaid was selected, because he

had a college degree in physical education, was pretextual.

The district court specifically found that the male committee members voted for Mr. Kincaid because he was a male, and that but for discrimination based on sex, the plaintiff would have been selected for the position.

The City appealed, contending that the court's findings of fact were clearly erroneous under Rule 52(a). The Fourth Circuit, largely adopting the City's analysis of the evidence, reversed.

We contend that the district court correctly assumed and applied its responsibilities and finding of facts, including the issue of discriminatory motivation, as explicitly required by this Court's decisions in Swint and Aikens, and that the findings of the district court are supported by substantial evidence.

Conversely, we contend that the Fourth Circuit strayed from its proper role under Rule 52 as an appellate court and that it wore blinders which prevented it from discovering the ample evidence which in fact supports the district court's findings; it selectively cited only those portions of the record which supported the facts found by the Fourth Circuit on the de novo basis, even going so far in footnote 4 to

its opinion to excise a portion of Mrs. Boone's testimony about the relative qualifications of Ms. Kincaid and Mr. Anderson, thereby misrepresenting the substance of Ms. Boone's testimony.

It adopted a working wife defense, contrary to reason and law, which was then utilized to rebut the substantial evidence of bias found by the district court.

I would now like to discuss the evidence of discrimination found by the district court, evidence of such quantity and quality and with such support in the record that we contend strongly calls for this Court to reverse the court of appeals with instructions to reinstate the district court's verdict.

QUESTION: Mr. Wallas, would it be accurate to describe Bessemer City as a suburb of Gastonia?

MR. WALLAS: Your Honor, I don't think it's a suburb of Gastonia. It's a small, independent town fairly close to Gastonia.

QUESTION: But not really a suburb.

MR. WALLAS: That's correct.

The district court found discrimination based on six separate subsidiary findings of fact. First, the district court found that Mr. Nichols, one of the male committee members, made direct statements indicating his bias against selecting a woman for the position. Mr.

Nichols stated, "It would have been real hard for a lady to do the job. I wouldn't want my wife to have it. I have three children at home, and I think my wife should be at home."

The district court found that these statements provided direct evidence of Nichols' illegal motivation. Second, the district court found that committee member Butler actively solicited four men for the position, including the successful candidate, Mr. Kincaid, and Mr. Broadway. He further testified that he knew 12 -- excuse me -- knew two well-qualified women who he would have voted for for the position, but he had not actively solicited their applications.

Third, the district court found that the committee had manipulated the selection criterion. When it first emphasized experience when experiencing Mr. Broadway, who had no college degree, and then emphasized the particular degree that Mr. Kincaid had, a degree in physical education, when it selected him. It thus ignored the petitioner's combination of education and experience, including her diverse work experience and previous work in recreation, as well as her leadership experience, her experience gained -- that leadership experience was gained working with various civic groups, her job-related experience working with schoolchildren

and her various other job positions.

Fourth, the district court found the petitioner and only petitioner was asked certain questions, which because they were only asked of a female candidate for the job, implied substantial doubt that a woman should have a job which required night work, and which implied a sexually stereotypical attitude that a woman ought to be home at night instead of working.

The plaintiff had in this case --

CHIEF JUSTICE BURGER: We'll resume there at 1:00, Mr. Wallas.

(Whereupon, at 12:00 p.m., the hearing was recessed for lunch, to be reconvened at 1:00 p.m., the same day.)

AFTERNOON SESSION

(12:58 p.m.)

CHIEF JUSTICE BURGER: You may resume, Mr. Wallas.

ORAL ARGUMENT OF JONATHAN WALLAS, ESQ.,

ON BEHALF OF THE PETITIONER -- RESUMED

MR. WALLAS: Good afternoon, Mr. Chief Justice; may it please the Court:

Prior to the lunch break I was discussing the fourth separate finding of discrimination found by the district court concerning certain questions that the district court found were asked only of the female applicants -- of the female applicant for the recreation director job.

The plaintiff had in this case what the Aikens case acknowledges as rare: an eyewitness -- that is, Ms. Boone -- who testified about the interviews. The district court found that petitioner and only petitioner was asked how my husband felt about me applying for the job; if she realized that there was night work involved; and if she realized that there would be travel involved in the job. There was no evidence that anyone but Ms. Anderson was asked a question about her spouse's reaction to seeking the job, or about travel. There was conflicting evidence about whether other applicants were

asked about night work -- a factual dispute which the district court resolved in Ms. Anderson's favor.

And I might point out that the defendant admitted in the post-trial arguments -- immediately after the trial there were arguments to the court by counsel -- that whether these questions were asked of all of the candidates was a credibility issue. And that appears at page 176A of the Joint Appendix.

QUESTION: Do you think it would be unconstitutional for the inquiry to be made how many children you have and what are their ages if they were addressing that only to women?

MR. WALLAS: Your Honor, I think that that smack of Title VII -- of a Title VII violation to ask that question only of women who applied for a job. It -- it would imply that the women had the sole responsibility for raising the children, that men don't also have some responsibility for that. And it --

QUESTION: Well, you say it would smack of, but you wouldn't think -- you didn't respond that it was unconstitutional to ask that question.

MR. WALLAS: Well, I'm not sure we have to reach constitutionality. We're talking about the Title VII statute, and I think that if, as here, a district court used that piece of evidence with as much other

evidence as was used by this district court to make a finding with respect to motivation, as this district court did, that that would be certainly within the province of the district court.

In the Aikens decision -- I believe it's the footnote 2 -- Justice Rehnquist, as I recall, discussed some type of evidence which apparently was forecast by the plaintiff in that case and said if the plaintiff were able to show this, and if the Court found these particular facts, which were not exactly the same as was shown in this case, but similar type evidence of discrimination, that that would -- and the district court found motivation and found discrimination, that that would not be reversed. And I think -- I think this is just one of the -- of the legs that -- upon which the finding was based.

In addition, the district court found, fifth, that two committee members, Butler and Nichols, had solicited Kincaid to apply for the job, and they referred to the job as athletic director, thereby improperly emphasizing the traditional male athletic component of the position.

Sixth, the district court found that no credit was given to the plaintiff for the detailed recreational program she advanced or the fact that she possessed a

recreation supervision certificate obtained as a result of her previous experience in recreation supervision -- a certificate which Mr. Kincaid did not possess.

We contend this body of evidence, these six examples or six findings of the district court of disparate treatment, both direct and circumstantial evidence, was more than sufficient under such cases of this Court as the Arlington Heights case to permit the finding in favor of petitioner.

QUESTION: Mr. Wallas, what is this Court's standard of review in a case such as you've brought? Do we simply sit in exactly the same capacity as did the Fourth Circuit to decide whether the district court's findings were totally erroneous, or do we defer at all to the conclusions of the Fourth Circuit in that respect?

MR. WALLAS: I think the primary role of this Court would be to do basically what the court of appeals was to do: to look at the evidence found by the district court. And if there is evidence to support that, then unless that evidence is clearly outweighed by other evidence of record, then you should reinstate the district court's verdict.

I think in addition, as I pointed out, you should take a very close look at what we say were the de novo findings of the court of appeals and the

justification of the court of appeals for their decision.

QUESTION: Then we really have to review the entire record.

MR. WALLAS: I think you do, Your Honor. You do, because there's no way for you to, I think, to properly decide this case without looking at what the district court found and looking at what the court of appeals found. Yes, sir, I think that has to be done under the circumstances.

What, of course, I think this Court has been trying to do, and I'm sure will hopefully try to do in this case, is try to again send a message to the lower courts about the proper role of -- of an appellate court under Rule 52 and the proper role of a district court.

QUESTION: Mr. Wallas, the ultimate question in this case, I suppose, is which of these two were better qualified for the job. Are you familiar with Appendix B in Respondent's brief?

MR. WALLAS: Yes, sir.

QUESTION: Is that a fair summary of the qualifications of the two applicants?

MR. WALLAS: No, sir.

QUESTION: Would you address that briefly?

MR. WALLAS: Yes, sir. I think a fair summary of the qualifications of the two applicants is contained

in the opinion of the district court, who addressed the question of qualifications.

QUESTION: In the opinion in this case?

MR. WALLAS: Yes, Your Honor.

QUESTION: Of which court?

MR. WALLAS: Of -- of the district court.

QUESTION: Right. The district court.

MR. WALLAS: Yes, sir. And that's -- I believe that appears in the petition at pages 15A through 19A. And what the district court did in --

QUESTION: Right. But it would help me if you identified by number which of the findings in Appendix B with respect to these -- to these respective qualifications you think Appendix B is erroneous.

MR. WALLAS: I think the way -- Your Honor, I can go through these if you would like. I had not --

QUESTION: I don't want to take your time and the Court's time, but do -- are you able by numbers to say that --

MR. WALLAS: Not without reading --

QUESTION: -- three, five and seven are erroneous?

MR. WALLAS: Not without reading through this entire appendix, Your Honor.

QUESTION: Well, let me ask you this. Is the

burden on petitioner in a case like this -- not the petitioner but the plaintiff -- in a case like this to show that he or she is better qualified or is it sufficient if in this case, for example, Anderson had proved when the burden reverted to her under McDonnell Douglas to show that she was equally well qualified?

MR. WALLAS: Our opinion would be that under -- as I -- as I read your decision in the Burdine case, Your Honor, that -- that if two candidates are equally qualified, that the employer can take either one, but it can't discriminate on the basis of sex. And the point of this case is that the only reason, the only articulation in Burdine terms that was advanced by the City was that Mr. Kincaid had a degree in P.E. They really didn't discuss the overall qualifications of the candidates, and that's why I was referring the Court to what the district court did.

What the district court did was look at the job duties, because -- because the -- the -- you need to recall that the City had not established any criteria for the job prior to selection. It looked at the job duties and then juxtaposed the qualifications of the two candidates.

So to answer your question, I think that if discrimination is shown, and if the sole articulation

advanced by the employer is rebutted and shown to be pretextual, then the plaintiff wins. And in that situation if the plaintiff was -- you've got a problem with look what's meant by qualifications and --

QUESTION: But the burden -- the burden always, the burden of ultimate proof, was on the plaintiff, of course.

MR. WALLAS: Yes, sir. That's what the district -- that's the burden that the district court applied.

QUESTION: When the employer produced evidence that at least arguably rebutted the initial prima facie presumption, was the burden on the defendant -- on the plaintiff that she was better qualified or equally qualified?

MR. WALLAS: The burden was to show that the reason advanced by the defendant, the articulation was pretextual or, as Burdine suggests, to show that there was evidence of intentional discrimination, which is the sixth matter --

QUESTION: So you're -- you're saying that the evidence here shows that the respondent, the defendant in the case advanced only pretextual reasons?

MR. WALLAS: That's correct. That's what the district court specifically found.

QUESTION: Yes. I understand that. But do you think that could not be reviewed by the court of appeals?

MR. WALLAS: Yes, sir, that certainly could be reviewed by the court of appeals, but it can't review it -- but that -- that ultimate finding of -- of intent is based on some subsidiary findings. And as I've discussed, all of those subsidiary findings are well grounded in the record, and the court of appeals can't reverse those if they're grounded in the record.

QUESTION: The subsidiary findings with respect to qualifications were all objective in a sense, weren't they?

MR. WALLAS: Well, what Your Honor? I'm sorry.

QUESTION: Objective in terms of experience, the education of the respective candidates.

MR. WALLAS: The ones that the district court used were -- were -- were an objective weighing of the qualifications. And as the Government points out in its brief, there is substantial evidence to support the district court's conclusion that Anderson was more qualified than -- than Mr. Kincaid. The district court made that finding of fact. They also made a "but for" finding. They said but for discrimination, she would have been selected. So those -- those findings have

been made. And I think that a finding of relative qualifications is also protected by Rule 52.

I hope I've answered your question, Your Honor.

In response to the six separate findings of discrimination carefully delineated by the district court in its opinion, the court of appeals' sole response in footnote 5 was -- and I quote from that footnote -- "This evidence, however, is inadequate to support a finding of bias, and it is dispelled by other portions of the record. For example, there is nothing to show the male committee members had a bias against working women. All four testified that their wives had worked and were accustomed to being away from home during evening hours."

We contend that the excesses and mistakes of the Fourth Circuit in this record suggest that a stardard other than that which Swint requires exists in the Fourth Circuit where findings in favor of a plaintiff in an employment discrimination -- discrimination case were attacked on appeal.

If, as we believe, the rule must be what's Swint for the goose must be Swint for the gander, we respectfully contend this case should be reversed with instructions to reinstate the district court's judgment.

And I'd like to reserve the rest of my time

for rebuttal after Ms. Corwin.

CHIEF JUSTICE BURGER: Very well, Mr. Wallas.

Ms. Corwin.

ORAL ARGUMENT OF CAROLYN F. CORWIN, ESQ.,

AS AMICI CURIAE

MS. CORWIN: Thank you, Mr. Chief Justice, and may it please the Court:

As Mr. Wallas has suggested, this case raises a straightforward question whether the court of appeals correctly applied the clearly erroneous standard of review.

Based on our examination of the court of appeals' opinion and the record in this case, we've concluded that the court of appeals erred in the application of that standard. There's no real dispute about what the proper standard is in this case. Everyone agrees it's the clearly erroneous standard, and that's what the court of appeals purported to apply. But we think that in applying the standard, the court of appeals departed from this Court's mandate that a reviewing court is not to place itself in the position of the trial court and simply to duplicate the trial court's factfinding function.

The United States finds itself at various times on both sides of Title VII cases, sometimes as a

plaintiff and sometimes as a defendant. It therefore has a general interest in the proper application of the clearly erroneous standard.

In this case there was conflicting testimony on a number of points, and that is almost always the case with Title VII cases that go to trial. You have different participants in a personnel decision who have different perspectives on what may have happened.

Here you have five selection committee members who testified, as well as two of the applicants who testified. They had different recollections of what happened in the selection process.

Some of the evidence that went into the record supported petitioner's view that the committee had discriminated against her, had decided that she shouldn't have the position of recreation director because that was an unsuitable job for a woman. There was other evidence that was put in by respondent that seemed to go the other way, that seemed to suggest that the committee members thought Mr. Kincaid was more qualified than petitioner.

The trial clerk -- the trial court heard all of that evidence, and it resolved the conflicts on the significant issues. Our review of the record --

QUESTION: Ms. Corwin, may I just interrupt a

moment to ask you whether you think the plaintiff in this suit had a burden of proving that the impermissible considerations were a substantial factor in the decision, or is it a "but for" causation test?

MS. CORWIN: Well, I suppose the "but for" goes to the remedy certainly. I think the plaintiff did have the burden of proving that she was discriminated against; that is, that the employer had a discriminatory motive in making this particular hiring decision.

Now, you may get into situations in which you have -- you have several motives, and you may get into a Mt. Healthy sort of analysis there. That's not this case here. What the district court found was that there was a single motive, and that was discrimination. And as Mr. Wallas suggested, the district court did -- did put the burden on the plaintiff and concluded that she had met it in this case.

QUESTION: Ms. Corwin, you used the word "most qualified" a moment ago. I suppose if the district court is going to find that one applicant or the other is more qualified, the district court has to accept the employer's definition of qualification, doesn't it?

MS. CORWIN: Well, that -- yes. I think it's important to recognize that there are several steps in this issue of qualifications. There is first the

definition of what it was that the selection committee was looking for, what the city was looking for in a recreation director. Then you move to the qualifications of the applicants and how they relate to those criteria.

QUESTION: Yeah, but is it always easy -- that easy to break it down? I mean if the selection committee isn't given any standards, can't the definition of qualification evolve while they're considering the position?

MS. CORWIN: It is, of course, conceivable that that can happen. If you don't have evidence, as you did not in this case, that there is a mandated list of qualifications ahead of time, you may well have that evolving, as I think the qualification of residence in Bessemer City probably evolved, as I read the record, durin the selection process.

But here I think the court looked at what the selection committee members said in the course of the trial about what they were looking for, so it had some evidence on just what it was that had evolved during the selection process. And the -- the court took the selection committee members at their word, and some of them said we were looking for the all-around qualifications of someone who could provide a full range

of programs, not only athletics, but art, music, dance and so on.

Our review of the record in this case indicates that there was substantial evidence to support the findings of the district court, and that the entire record -- and we agree with respondent that the court of appeals ought to look at the entire record -- shows that the contrary evidence does not clearly outweigh the evidence in support of the petitioner. In these circumstances we think the court of appeals should not have concluded that the trial court findings were clearly erroneous.

We think the trial -- we think the court of appeals went wrong in this case because it failed to give the proper regard to the trial court's factfinding function. Instead of asking how the trial court's findings measure against the evidence in the record, the court of appeals appears to have taken a fresh look at the record and to have put itself in the position of the trial court.

I would like to refer just for a moment to digress on few points that we think may create some confusion and that the Court might want to address in deciding this case. One of them was raised by Justice Powell.

We agree with petitioner that there is some confusion in the court's -- the court of appeals' flat statement that petitioner had the burden of showing that she was better qualified than Mr. Kincaid. Now, the trial court did find that she was better qualified based on what it understood the qualifications to be based on the testimony; so I'm not sure it affects the bottom line in this case. But the statement seems to suggest that even when the plaintiff has -- has shown affirmatively that an employer acted for a discriminatory motive that she somehow can't prevail if she was only equally qualified. That seems counter to what the Court said in Burdine, and it also seems counter to the Court's explanation in the Aikens case that you look at all types of evidence; you look at the full range of evidence on discriminatory motive.

Here you had not only the evidence on qualifications, but you had some other evidence about what was in the minds of the committee members and the way they went about their selection process that was also relevant.

QUESTION: Well, if you're right, what's the remedy that is shown to be equally qualified but not better qualified? Do you send them back and have somebody draw straws?

MS. CORWIN: Well, I don't -- I don't think in this case we're talking about liability, but I think at least the employee has an injunctive remedy in that case if the employer has acted with a discriminatory motive. You may get to the second step in which you inquire about the remedy, and you make the Mt. Healthy inquiry, and that may be more complicated. You may have to sort more out and -- and put the burden on the employer at that point to show that he would have hired the other person in any event. But here we are just -- we are talking about Title VII liability in a single motive case.

As I noted earlier, here the trial court found that the qualifications -- that that was a pretextual point on the part of the employer, and that the only motive you had was discrimination in this case.

We also agree with the petitioner that there is a problem with this working wife defense issue, and the court of appeals opinion seems to be phrased in a way that at least suggests to other courts and to litigants that this may be relevant evidence. We've suggested in our brief we think that common sense indicates that is simply not relevant evidence in most contexts in most Title VII cases.

QUESTION: Ms. Corwin, as well as your general

view of how the court of appeals proceeded under Rule 52, is there some subsidiary question about how they dealt with the trial court's credibility --

MS. CORWIN: Well --

QUESTION: Findings. Is that part -- is that subsumed in your argument?

MS. CORWIN: I think we regard that as subsumed in the application of the clearly erroneous standard.

QUESTION: Well, let's assume that -- let's assume that the only thing that was wrong, that was arguably wrong with the court of appeals opinion was that it seemed to disregard the -- at least on one or two factual issues -- the credibility conclusions of the district court, but otherwise complied with Rule 52. Would that be enough to reverse?

MS. CORWIN: Well, I think it -- it might be enough for this Court to find that the court of appeals had misapplied the clearly erroneous standard. I can't give you any cut --

QUESTION: Do you think that's part of the clearly erroneous standard to say that a district judge says we have contradictory testimony on the same historical fact, and I just happen to believe A instead of B, and the court of appeals says well, we happen to

believe B instead of A?

MS. CORWIN: Well, I don't think the court of appeals is really in the business of doing that --

QUESTION: I know it isn't, but part of the -- as I understand it, part of the petitioner's argument is that that's exactly what the court of appeals did with respect to one or two facts.

MS. CORWIN: Well, I think that's right, and I -- and I think the court at that point can say that the clearly erroneous standard was misapplied, and -- and there we would regard as part of that argument the further point that under Rule 52(a) you have to give due regard to the credibility determinations of the trial court.

QUESTION: Do you agree with the petitioner's discussion of the -- of the credibility findings, which kind of credibility findings should just not tinker with at all, and others that it -- do you agree with that part of its brief?

MS. CORWIN: We have not taken a position on that part of the brief. I -- I think there is plenty of common sense that says that the trial court is the only one who can observe the demeanor of the witnesses, and for that reason, you ought to give great weight. This Court has said that before, and I think Rule 52(a)

indicates --

QUESTION: And is that enough to just give -- give it great weight? Can the court of appeals ever disagree with a credibility finding if it's expressed as such?

MS. CORWIN: Well, I -- I think that there is some sense to what the petitioner has said about the fact that you may have the weight of the evidence affecting how you come down on whether a particular piece of evidence -- and it may be oral testimony -- whether that is believable or not. But I don't think it makes sense to decide that question in the abstract. I think here it is part of the overall clearly erroneous standard.

Thank you.

CHIEF JUSTICE BURGER: Mr. Van Hoy.

ORAL ARGUMENT OF PHILIP M. VAN HOY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The respondent's position in this matter is that the only proper issue to which at least to some extent is agreed by the petitioner is whether the Fourth Circuit properly conducted its review of the critical subsidiary and ultimate finding of discrimination under

the clearly erroneous standard of Rule 52. Where we very clearly part company and believe that we have the weight of -- the authority of this great Court over the last 40 years in stare decisis in decision after decision is where we disagree with the petitioner's position -- and it's on page 4 of their reply brief -- where they say that a court of appeals cannot reverse -- and that's clearly erroneous -- a district court opinion which is supported by evidence which by itself may appear to be substantial or even by substantial evidence.

We have, of course, the seminal decision of U.S. Gypsum of this Court in 1948 that says that the not only opportunity but duty of the reviewing court on factual matters is to review the entire evidence and to reverse if it determines that a mistake has occurred, and that it has concluded that such a mistake has occurred in how the facts have been viewed by the district court.

That 1948 decision, which has been cited in so many subsequent decisions by this Court, was cited specifically and applied both in determining the subsidiary effects to be judged in a clearly erroneous basis by the district court, and the ultimate fact of intentional bias.

The U.S. Gypsum court was cited relative to

each of these in a seriatim fashion. First the court looked at the issue of disparate selection criteria -- that is, whether everyone was asked about the night work inquiry -- applied Rule 52, applied U.S. Gypsum. It did the similar thing on the qualifications issue. And then after reviewing the evidence as a whole, in stating that it did, it said absent record evidence to support those two subsidiary findings of bias, the rest of the record, particularly relative to the plaintiff's continued burden of proof in Title VII cases, is simply insufficient to establish bias; that is, insufficient to carry the plaintiff's Burdine burden of proof -- Burdine and related cases.

Now --

QUESTION: Mr. Van Hoy --

MR. VAN HOY: Yes, Justice Blackmun.

QUESTION: -- the Fourth Circuit has consistently reversed Judge McMillan in these cases, hasn't it?

MR. VAN HOY: Not -- well, it depends on your definition of consistent. There are cases where his decisions have been affirmed -- Klein v. Railway Express, for example.

QUESTION: There were very few, weren't they?

MR. VAN HOY: Very few. That is correct.

QUESTION: There are many in which he's been reversed.

MR. VAN HOY: That particular judge, that is correct. That is not so as to other district court judges in the Fourth Circuit. But, Justice Blackmun, as to your observation about this particular judge, that is correct.

QUESTION: Is that because he, in your estimation, doesn't appreciate the rules or what?

MR. VAN HOY: Any opinion I would offer would certainly be a personal one in that regard. I would suggest that in many cases, including this one, that is the case because of the delegation of the opinion-writing function. After being admonished by the Fourth Circuit, that he has continued to do that in a number of subsequent cases, and that, therefore, his factfinding his is entitled to less weight than the unfettered discretion of the trial judge as it has been defined by this Court in the Crescent Amusement case, for example; that the genesis, the etiology of the opinion has affected and afflicted the result of the outcome of a number of these Fourth Circuit opinions on review from this particular district court.

QUESTION: May I ask you to comment on the practice of a district judge asking prevailing counsel

to prepare proposed findings of fact? Do you think that's an improper or proper practice?

MR. VAN HOY: As a general proposition I do in the manner in which it occurred, the chronology in which it occurred in this case. And I make that suggestion because by reference to the Crescent Amusement case, the El Paso Natural Gas case from this Court that says since we operate in an adversary system of law -- that's our Anglo-American tradition -- the obligation and responsibility of the counsel is to be an adversary for his party. If the court announces the opinion of the court without more or without much more, as in this case, a very conclusory opinion, very generally stated, and then leaves it to an adversary to write that opinion for the court, it is inevitable -- and it occurred in this very case; this case is illustrative -- that you will get an opinion generated by that adversary which emphasizes the points in his favor and either fails to consider or doesn't emphasize the other ones.

Excuse me.

QUESTION: Is this judge's practice where he let's one -- the prevailing party submit proposed findings, gives the losing party an opportunity to comment on the proposed submission by the prevailing party?

MR. VAN HOY: In this particular case, yes. This was a permutation of --

QUESTION: Well, if that practice is followed where the prevailing party submits those that he thinks are appropriate, and then the other side has a chance to criticize them so that you find out where the real dispute is, what's wrong with that -- that procedure?

MR. VAN HOY: Justice Stevens, what is wrong with that decision, and as at least the Third Circuit has held in the case we cited in our brief, is that the opinion of the court has already been announced. There is an inherent advantage given to the party who is to prevail because he knows that he's got the force of the court's opinion behind him already.

I would suggest to you -- excuse me. Yes, Justice -- Chief Justice Burger.

QUESTION: Well, finish your response.

MR. VAN HOY: That permitting, as in this case, permitting the other side, the losing side, to respond does not cure that defect. What it did in this case, we felt compelled to respond because of another case pending in the Fourth Circuit at the same time, which this Court had denied cert in, the Lily v. Harris-Teeter case. The Fourth Circuit stated in oral argument if you don't comment on the proposals that have

been drafted by plaintiff's counsel or the prevailing party's counsel, you have not exhausted the remedies necessary to preserve your issue on appeal. We felt therefore constrained to do so. We did so with the result -- and once again, this case is illustrative of the problems with this sort of process -- we came back with an initial memorandum of decision, a decision announcing the opinion of the Court, the two-page decision that said the successful job candidate was not asked about night work.

The initial opinion drafted for the court, the expanded 28-page opinion by the plaintiff's counsel, said the same thing. We commented on it and demonstrated through several different places in the record that every witness had testified that at least Mr. Kincaid, the successful applicant had been asked. The plaintiff's own -- own witness on the selection committee had said so.

Then we come back with in the chronology after this memorandum of decision, the plaintiff's counsel's opinion, our comment saying that it just didn't happen that way. The court, in a sense, has an opportunity to try to appeal brief its case, as it did here, by incorporating changes into the final opinion that say now that I've seen the comments made by the defendant's

counsel, I admit that the question was asked, but I will discount it as a credibility determination. I now say in my final opinion, having had all this work product from three different sources to look at, that the question was asked, but was only asked facetiously and out of frustration, which is, I would say, number one, a distortion of the proper view of the trial court in deciding what is a credibility determination. Because that's how it developed, that was the genesis of the credibility determination we're talking about in this case, not that it was made ab initio by the court.

QUESTION: Mr. Van Hoy, I don't know whether the Chief Justice is waiting to ask you --

QUESTION: No.

QUESTION: I wanted to ask you one in that event. I take it we're dealing with a busy district court judge, and he hears a case on September 13th and 14th, 1982. When he leaves the bench, he says nothing. Two days later he obviously has dictated a memorandum based on his recollection of the evidence without any chance to review a reporter's transcript, and sets forth in fairly general terms his impression of the case, says here's how I'm going to decide it. The prevailing party should present amplified findings. The prevailing party then presents amplified findings at great length. You

have an opportunity to dispute them, and the judge makes a few changes.

Now, I don't know how district courts can function in a better way than that. What is it that strikes you so unreasonable about that?

MR. VAN HOY: It has been suggested by a number of courts, including the Fourth Circuit, that if the court wishes to utilize the input of the parties that it do so before making the submission of its judgment of what the result will be, and that it consider -- elicit and consider that input from both sides, not in a -- not in one side and then the other commenting on it.

QUESTION: Well, but then -- then both parties are put to a tremendous amount of work in proposing sets of findings, only one of which will -- will be used. And I would think Judge McMillan's system has the advantage of without any further input from the parties at all, just on the basis of his own recollection of the testimony, he says here is who I believe, and here's how I'm going to come down. I -- I think it would be in a way hard to improve on that.

QUESTION: And even if -- even if there was something wrong with it, would you think the remedy in the court of appeals should be an enhanced examination

of the record, or should they just say well, you ought to start over, judge? Because here, as -- as I get it, they used this -- this submission business as an excuse to give a closer look at the facts.

MR. VAN HOY: Yes, and I -- our position is that we agree with what they refer to as close scrutiny being justified by these facts.

QUESTION: Well, that's --

MR. VAN HOY: Once again, since the work product of the court is actually the work product of the adversary.

QUESTION: Well, is that really consistent with Rule 52?

MR. VAN HOY: Yes, I believe it is, Your Honor. It -- to reiterate, as this Court has pointed out in cases before, that this is a problematic area. The most basic disagreement between the parties is, once again, whether if a case is supported by some substantial evidence, is the court of appeals allowed to review it at all. We say that it clearly can do so. I would cite in particular the Dayton School case, the Brinkman case the second time it came to this Court, where the Court described that Rule 52 duty as an unavoidable duty to reverse if the district court's factfinding was clearly erroneous. And that's even if

the subsidiary facts, subsidiary to the issue of discrimination -- it was discrimination as to -- in the context of school busing in that case, or school segregation -- but still discrimination, as in this case, if the subsidiary facts are uncontroverted, that the district court -- excuse me -- the court of appeals of first review has the, as this Court put it, unavoidable duty to see if that ultimate determination can stand the weight of scrutiny of the entire evidence.

QUESTION: Well, Mr. Van Hoy, isn't the practice which, at least as I understand Justice Stevens' question and Justice Rehnquist addressed, the common, overwhelmingly prevailing practice of all district judges and all trial judges in this country to reach his conclusion, ask the prevailing party to submit findings, refer them to the other party, and get comments? Isn't that a logical extension of the adversary system?

MR. VAN HOY: I frankly, Your Honor, do not know what the national practice is. My practice is within the three courts of North Carolina and the 12 district judges within that state. I can say, having tried cases before all but two of them, that I have never seen the process used by any other district judge within the state of North Carolina. That's my universe

of experience. That's all I can say.

QUESTION: Then they are not consistent with my experience of sitting and trying cases in seven circuits in this country. The common practice in federal courts was to do exactly that, and frequently there was a great engagement over the findings, and the losing party, thinking in terms of appeal and Rule 52, would come in and they'd have even on rare occasions supplemental arguments on a particular finding, which compelled the judge to really go back to the record.

Well, you can trust your view anyway.

MR. VAN HOY: Yes, sir.

It has been pointed out by this Court in the Inwood case and in the Swint case that although a review of the entire evidence to determine whether factual conclusions -- excuse me -- factual findings by the district courts are erroneous, clearly erroneous or not, that that is justified, but that a de novo review of the record is not justified. Thus, the question becomes what is the distinction between a Rule 52 Gypsum sort of review of the entire evidence as opposed to a de novo review, since one is not only permitted but mandated, and the other one is clearly precluded.

We would point out for the consideration of the Court that the distinction is twofold. Number one,

and as this Court pointed out in Justice White's opinion in the Swint case, an opinion drafted free of the strictures of Rule 52(a), equals an opinion which is undertaken de novo review; and number two, and more specifically, that reversing a trial court without holding that the trial court's findings were clearly erroneous by review of the entire record constitutes a de novo review.

In that regard we would argue to this Court that the review by the Fourth Circuit in this case stated the applicable legal standard, Rule 52, and the Gypsum case, and at least sub silenio applied Gypsum's progeny in reaching by review of an entire record the appropriate conclusion and perhaps inescapable conclusion, given the plaintiff's burden of proof, that clear error had abounded in the district court's decision.

That is our position as to why de novo review, which is one of the concerns of the Government in this action, was not what occurred in this case and is why this case is clearly distinguishable from the Swint case in that regard where the --

QUESTION: Well, Mr. Van Hoy, I thought you had just been discussing how the Court applied a closer scrutiny, if you will, here than in the normal case.

MR. VAN HOY: Yes. Now, I -- if I may be presumptuous enough to do so without really knowing what went into the thought processes of the Fourth Circuit panel and the entire Fourth Circuit when the request for reconsideration in this case was denied unanimously, I would suggest that they looked at the decision and its genesis, that it had been generated, at least substantially, with some minor revisions to help perhaps get around the credibility problems, by an adversary, and since all of us in the bar and on the courts are products of the adversary system, we know what that can result in.

I may be making the point or attempting to make the point with a little too much reiteration, but that -- that is my impression, and I believe supported by the case law, as to how the Fourth Circuit in this case and a number of other cases determined that close scrutiny was required. It related to how the opinion came to be.

QUESTION: Well, I have a little difficulty seeing how if that's what the court did, it was at the same time following a normal Rule 52(a) type review.

MR. VAN HOY: I would not -- Justice O'Connor, I would not agree that two the principles are mutually exclusive; that close scrutiny does not foreclose the

usual deference given to and required by Rule 52.

The point I would also make is that the corollary of Rule 52 to the general deference given to the factfinding responsibility and function of the trial court is also contained in Rule 52 where the rule states specifically that factfinding will be accomplished by the court specially -- not by the parties, but by the court. That is right there in the very first sentence of Rule 52 and is the corollary, the quid pro quo, for the deference to the factfinding by the court of first review.

QUESTION: Well, then, isn't your answer to Justice O'Connor's question really that the court of appeals is entitled to exercise a different standard of review when the findings have been prepared by the party?

MR. VAN HOY: I don't think the standard of review is any different, Justice Rehnquist. Not that the standard of review is different, but that the assumption that the facts that come to the first reviewing court -- in this case, the Fourth Circuit -- are necessarily going to be supported by the record or are more likely to be; that you have to look at the record to see. That may be a pretty fine distinction, but I believe that's what the distinction is.

Now, in that regard, Justice Rehnquist, there

was a question during my opposing counsel's oral argument, I think, about the related -- I'm sorry; it escapes me right now, but I'll come back -- oh, whether this Court serves the same function as the Fourth Circuit did in applying a clearly erroneous standard.

I would suggest that the answer is no. If this Court were the court of first review of the factual determinations -- that is, in a direct appeal case such as the U.S. Gypsum case -- the answer would be yes. But it is not our position that the function of this Court at this level is to give a -- once again to look at the entire record as a whole to determine if the Fourth Circuit's finding of clear error was correct vis-a-vis the district court. And I think the distinction there is between direct appeal cases and at what point this Court is or is not the court of first review on the factual issues.

QUESTION: Isn't the language of Justice Reed's opinion in the Gypsum case, the latter part of the sentence, if the Court is left on the entire evidence, let with the definite and firm conviction that a mistake has been committed, then the Court must operate --

Now, doesn't that by implication indicate that the second reviewing court, this Court, must look at the

record if you were to apply that standard?

MR. VAN HOY: Chief Justice Burger, my recollection -- and I believe I'm correct on it -- is that that case was a direct appeal case under an antitrust law, which in 1948 somehow became -- came to this Court on direct appeal. I don't believe this was the second court of review of the Gypsum decision.

QUESTION: But did the opinion of the Court in Gypsum -- I don't recall -- make that distinction as pointedly as you make it now?

MR. VAN HOY: Implicitly --

QUESTION: Or is that something that's evolved later on as -- as lawyers and judges have looked at the direct appeal and -- and all others?

MR. VAN HOY: That historical development I -- I -- I do not know, frankly. I do not know.

QUESTION: Mr. Van Hoy, let me try this. You're asked -- we are being asked by the other side to decide as to whether the Fourth Circuit is correct. The Fourth Circuit based its opinion on reading the whole record. How can we decide whether they're right or wrong without also reading the whole record, end of quote.

MR. VAN HOY: Justice Marshall, I think I may have misstated our intent in this regard. We would not

only discourage this Court from -- not only not discourage this Court from reading the entire record, but given the manner in which the record has been presented in the briefs, I think it's necessary to do so to determine what the real facts are in this record.

What I -- what I am saying is that it is our position that whether -- the issue of whether this Court is to re-evaluate every fact to determine whether there was clear error is not the proper function of this Court -- error on the factual issues. On the legal issues, yes; on the factual issues, no.

QUESTION: In other words, what you're saying is that we conceivably might affirm without looking at the entire record, but that if we were going to reverse, we must look at the entire record.

MR. VAN HOY: No. I'm encouraging -- we are encouraging the Court to look at the entire record, certainly not to assume that what we say about the record is correct or that what the other party says is correct, because there are certainly distinctions in that record, to say the least.

QUESTION: Mr. Van Hoy, are there any legal issues in the case? Did the district judge commit any errors of law?

MR. VAN HOY: No. Applying the facts to the

law. There -- there is an -- an inference possible that, for example, relative to the qualifications issue that the burden of proof was shifted to the defendants to show the absence of discrimination. That -- that -- this record is susceptible of that interpretation. That is not our position, that there were legal errors. In fact, our position is that the strictures of Rule 52 are well set out, that the Fourth Circuit does have clearly the authority under Gypsum and its -- the cases following Gypsum to review the entire record to determine if there was clear error, even if there are credibility issues involved, and that there really is no legal issue in this case at this time, nonetheless any one of momentous proportions. We think the stare decisis clearly dictates the way that this case would go, and that that is that the Fourth Circuit acted -- knew what it's authority was under the Swint case, under the Gypsum case, and that it applied that authority correctly in reviewing the entire evidence.

On the issue of credibility, which has been broached by the petitioner in this case, we have several observations to make in that regard. Number one, we do not believe that it's actual justiciable issue in this case, because the only references to credibility in this action in the record below -- and I must get back to the

genesis of the opinion to address that -- are general findings in the final opinion of the Court adopted from the plaintiff's counsel's draft, expanded draft of the memorandum decision, prefatory language in the first part that says after viewing the witnesses and making the necessary credibility determinations, I make the following findings of fact and conclusions of law.

That's the only place credibility really comes out. It was not in in the initial decision.

Number two, we reiterate that even if there are genuine germane credibility issues here, that the Fourth Circuit, under the clearly erroneous standard, still has authority to review. And in this regard, we disagree quite directly with the opinion of the amicus ACLU, and to the extent that that opinion is expressed by the brief of the petitioner.

The credibility issue was not related to any specific factfindings in the district court other than this matter I addressed earlier: that the successful applicant initially, it was determined by the district court, was not asked a question which the court later said he was asked but only facetiously after our side, the defendants, had commented on the case to the court.

QUESTION: Well, nevertheless, the -- on that very fact, the court of appeals came to a different

conclusion, didn't they?

MR. VAN HOY: Yes, yes. On the basis of the plaintiff's own witness and her admission --

QUESTION: Well, I know, I know, but the district court said the -- the district court had it one way and the court of appeals another on a historical fact.

MR. VAN HOY: That's right. As --

QUESTION: Now, what business -- what business has the court of appeals got doing that? I mean it was on a rather relevant fact.

MR. VAN HOY: Oh, yes, yes -- the night work question. Because it was right there in the record that the plaintiff's own witness on the selection committee had, as she said herself and volunteered the testimony, and I asked him myself what will your new wife think about you working at night; that it was a historical fact from the record, but it was only susceptible of that interpretation because of what she'd said.

It's analogous to a point Justice Rehnquist made last spring in the arguments in the Bose case and which it is why it is so necessary that the collective wisdom of the appellate process be applied to -- under the strictures of Rule 52 to be able to determine whether the credibility determinations or any sorts of

fact determinations will stand the light of analysis.

As Justice Rehnquist pointed cut -- and I gather from the transcript he looked at the clock when he said so that day -- he said if a witness says at the district court level it is not now ten minutes till 2:00 and the judge agrees, if that is not historical fact, there must be a way to review it. And that's what our position here is.

Now, in very recent cases this Court in a number of decisions has reached results which very clearly implicate increased civil rights, job rights for individuals. I would point out, for example, the Hishon v. King and Spaulding case, the Cooper v. Federal Reserve case, the U.S. Jaycees case.

If the right and responsibility, the duty, as this Court has put it, to review factual determinations is minimized by some decision that comes out of this Court, there will be no clear message or clear result of increased civil rights.

Take, for example, the situation of a judge skeptical of Title VII at the district court level, particularly in an era when the selection of the federal district judges has become a matter of such highly politicized magnitude that one of the political parties is saying unless you pass a litmus test on a particular

issue, which this Court has addressed, you shouldn't be qualified as a district court judge. That's -- that's a position of a political party now.

Say that we end up with someone who's skeptical of Title VII on a district court. He is -- he or she would be just as unfettered in casting the talismanic characterization of credibility on a factfinding which is not supported by the record with which he happened to agree as a political matter, he or she, as a political matter, and insulate the opinion from review.

This case would not be a blessing for the civil rights community. It would be a mixed blessing at best; a parochial result at worst.

Thank you.

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

ORAL ARGUMENT OF JONATHAN WALLAS, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. WALLAS: Your Honor, thank you. I would like to comment very, obviously, briefly on the method in which the findings of fact were prepared, and I would refer the Court to footnote 6 of the Government's brief.

Whatever ought to be the rule, in this case Judge McMillan prepared his own findings of fact at the

end. He added numerous transcript references. There are substantial differences between what the plaintiff initially prepared and what he prepared. And it was simply not the work product of what -- of what we presented; it was the judge's work product. It was several months later. And we urge you to look and compare those. The Government has done that, and in its footnote 6 it points out the various distinctions.

So whatever the rule is -- and I agree that this judge made his decision right after trial. And it would be totally unfair to penalize the plaintiff because -- in whom the judge had ruled. I mean she -- he ruled in Ms. Anderson's favor two days -- two or three days after the trial. And yet -- and yet, now, because of some procedural thing, they ruled against us.

Finally, the one other thing is that on page --

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

MR. WALLAS: Okay. Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

We will hear arguments next in Lindahl against Office of Personnel Management.

(Whereupon, at 1:53 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

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BY Paul A. Richardson

(REPORTER)