

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1129

TITLE PAUL E. JOHNSON, Petitioner V. TRANSPORTATION AGENCY,
SANTA CLARA COUNTY, CALIFORNIA, ET AL.

PLACE Washington, D. C.

DATE November 12, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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PAUL E. JOHNSON, :
Petitioner :
v. : No. 85-1129
TRANSPORTATION AGENCY, SANTA :
CLARA COUNTY, CALIFORNIA, ET AL. :

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Washington, D.C.
Wednesday, November 12, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:03 o'clock a.m.

APPEARANCES:

CONSTANCE E. BROOKS, ESQ., Denver, Colo.;
on behalf of Petitioner.
STEVEN WOODSIDE, ESQ., San Jose, Calif.;
on behalf of Respondents.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: You may proceed
3 whenever you're ready, Ms. Brooks.

4 ORAL ARGUMENT OF
5 CONSTANCE E. BROOKS, ESQ.
6 ON BEHALF OF PETITIONER

7 MS. BROOKS: Thank you, Mr. Chief Justice, and
8 may it please the Court:

9 This case is governed by the principles that
10 were established by this Court in Wygant versus Jackson
11 Board of Education, that before embarking upon a
12 voluntary affirmative action program a public employer
13 must have convincing evidence that remedial action is
14 warranted and, finding that convincing evidence, develop
15 a remedy which is narrowly tailored.

16 In this case, we have neither convincing
17 evidence that there was a remedial purpose nor was this
18 remedy narrowly tailored when the Santa Clara County
19 Transportation Agency deprived Petitioner Paul Johnson
20 of a well-earned promotion.

21 First, again, in the ideal world, before
22 developing a program an employer would look at his work
23 force statistics, compare them with the relevant labor
24 market, consider if there was other probative evidence
25 of discrimination, and finally, as a third step,

1 eliminate explanations other than discrimination, and
2 these are the kind of explanations that an employer
3 would ordinarily consider in rebutting a Title 7 case.

4 But even if the employer doesn't do this at
5 the outset, the employer could certainly do that when
6 the program and an employment action taken under it is
7 challenged.

8 The agency neither went through the process at
9 the beginning nor was the agency able to come forward
10 with convincing evidence of remedial purpose. The
11 district court heard the corroborating testimony of
12 discrimination.

13 QUESTION: Well, if a statistical imbalance in
14 the work force is evident and the adopt an affirmative
15 action plan, isn't it apparent on its face that its
16 remedial in the sense they're trying to remedy the
17 imbalance?

18 MS. BROOKS: Your Honor, they can only remedy
19 that imbalance if in fact it is the result of
20 discrimination. First of all --

21 QUESTION: So you say just statistical
22 imbalance will never justify by itself an affirmative
23 action?

24 MS. BROOKS: I don't believe that it should,
25 and let me explain why. On one hand, we know that

1 before you embark on an affirmative action program just
2 good intentions are not enough. On the other hand, we
3 know that we shouldn't require an employer to confess
4 liability under Title 7.

5 Somewhere in between lies the test, and we
6 don't necessarily have the written rule as to what
7 should be sufficient.

8 QUESTION: What else was there in Weber?

9 MS. BROOKS: I beg your pardon?
10 Specifically?

11 QUESTION: Beyond an imbalance?

12 MS. BROOKS: This Court took judicial notice
13 that you had had other findings of discrimination
14 against the same employer and the same union, and again
15 it found that the plan itself was sufficiently narrow to
16 justify it. But that was the remedial purpose.

17 Here, Your Honor --

18 QUESTION: You think in Weber the plan adopted
19 was to remedy past discrimination?

20 MS. BROOKS: This Court -- yes, Your Honor.

21 In this case, however, the job for road
22 dispatcher was not underrepresented with women, and the
23 fact that the agency relied on the fact that there were
24 no women in the skilled craft worker category should
25 have no bearing whatsoever on this promotion. There

1 were --

2 QUESTION: Do you agree that if the employer
3 has a firm basis for believing remedial action is
4 necessary, because otherwise the employer is likely to
5 be subject to some action against the employer under
6 Title 7, that that justifies or can justify taking
7 affirmative action?

8 MS. BROOKS: Yes, Your Honor. But I would
9 equate that firm basis with convincing evidence. And
10 what we would require, and which I think is what was the
11 problem here, is that the employer in developing that
12 firm basis needs to consider why its statistics are what
13 they are.

14 And there were a number of explanations
15 raised.

16 QUESTION: All right. Here there was a
17 category of skilled positions.

18 MS. BROOKS: Yes.

19 QUESTION: Totaling what, 278 or so?

20 MS. BROOKS: 238.

21 QUESTION: 238.

22 MS. BROOKS: Yes.

23 QUESTION: None of which were occupied by
24 women.

25 MS. BROOKS: Yes.

1 QUESTION: And you think that is not enough
2 for the employer to think that there might be a firm
3 basis here?

4 MS. BROOKS: In this case no, because, first
5 of all, on the face of the plan and the testimony in the
6 trial, it was conceded that the reason you had zero
7 there was societal and attitudinal, and not necessarily
8 discrimination.

9 And specifically, this agency had had an
10 affirmative action program in place for about five
11 years. They had been aggressively recruiting and hiring
12 women throughout the work force. They had been doing
13 the same with minorities. And they had made substantial
14 increases in the numbers.

15 And to infer, again by 1980, that you had
16 discrimination in the skilled craft worker category that
17 required an employment goal by promotion was simply not
18 correct.

19 QUESTION: What evidence -- or what is the
20 evidence in the record as to the percentage of qualified
21 women in the labor pool for these positions?

22 MS. BROOKS: Your Honor, when the agency
23 developed its program and when this case was tried there
24 was no evidence of what the relevant labor pool was.
25 And in fact, the agency relied entirely on the

1 countywide working force for women, not the labor pool.

2 We offered a Petitioner's lodging showing that
3 roughly seven percent of the women in this county at
4 that time were in the skilled craft labor jobs.

5 QUESTION: And the goal that the employer set
6 was only five percent?

7 MS. BROOKS: No, Your Honor. The goal set at
8 the time the Petitioner was denied the promotion was
9 36.4 percent. They didn't institute those short term
10 goals until after Petitioner filed suit against the
11 agency.

12 At the time Petitioner lost his promotion, the
13 goal was 36.4 percent.

14 QUESTION: That's the goal on which we have to
15 test this case? We have to compare it with the 36
16 percent or with the 5 percent?

17 MS. BROOKS: Certainly with respect to what
18 happened to the Petitioner, there's no question they
19 didn't have any short term goals. If this Court is
20 going to go forward with some guidelines, I think that
21 the relevant labor market is the appropriate test. That
22 has to be part of the convincing evidence standard that
23 the Court should look at.

24 But the Court -- but the agency needed to go
25 behind those statistics and consider whether that number

1 zero had sources other than affirmative actual
2 discrimination by the employer. We had testimony in the
3 trial that it was attitudinal.

4 The plan itself states that women were
5 "traditionally not employed in the job." The plan
6 doesn't suggest that the tradition had anything to do
7 with the agency's misdeeds.

8 And even -- and perhaps more important, we
9 find that the agency had been actively recruiting and
10 bringing women in. And because the agency never kept
11 applicant flow data, we have no idea how many women ever
12 applied for this job.

13 But I think that the factors of the effective
14 affirmative action program, the testimony that they were
15 having trouble recruiting women, necessarily means that
16 no women were applying for this specific job and at this
17 specific time.

18 And before we leave this subject, I think it's
19 very important to point out that in the road dispatcher
20 position specifically and dispatchers in general 25
21 percent of the agency's employees were women. We were
22 not in -- and the relevant labor market at that time was
23 about 22 percent.

24 So in the narrow focus of what happened to the
25 Petitioner and what the agency was doing, there was no

1 remedial purpose whatsoever, and the plan should never
2 have applied to that particular aspect.

3 I think it's also clear that this plan was
4 never narrowly tailored in an important sense. First of
5 all, we're in the promotion situation, not in terms of
6 hiring, promotions. And the burden of this plan applied
7 entirely upon the Petitioner.

8 We know from the record that the job of road
9 dispatcher did not come open very often. Petitioner had
10 worked for the agency for 13 years and this job came
11 open only twice.

12 The goals applied throughout the work force.
13 The goals were not limited to the lower echelon
14 positions. The goals applied whenever an employer was
15 going to make a decision. And this goes into what
16 clearly barred any non-minority employee when he was
17 going up for a promotion and was going head to head with
18 an employee that was deemed to be protected under the
19 plan.

20 In this situation, the plan requires that the
21 agency give the protected employee special
22 consideration. And again, this applies throughout the
23 job force.

24 The plan imposes substantial and coercive
25 measures on the agency to be sure and meet his

1 affirmative action goals. If there is an individual
2 manager, at the end of the year he'll be evaluated on
3 whether he met those goals.

4 And finally, there is no provision anywhere in
5 the agency policy to protect the rights of the
6 unprotected employees. And the whole attitude, the
7 focus was: We're going to give women and minorities
8 special consideration.

9 There was no countervailing balance to say:
10 Well, wait a minute; you have other employees with this
11 agency with civil rights and they're entitled to
12 protection also. And as a result, whenever -- and
13 again, we don't have applicant flow data, but it is
14 clear that as a matter of course when an unprotected
15 employee goes up for promotion with a protected
16 employee, the unprotected employee is going to lose.

17 This is not narrowly tailoring.

18 QUESTION: Let me just ask you another
19 question here. Supposing the plan -- it doesn't quite
20 say this. It's kind of vague and general, but supposing
21 there was a provision in the plan that said if there are
22 any substantial work pools, such as 238 skilled craft
23 positions, and they had described 10 or 15 of them, in
24 which there is absolutely no representation for women,
25 that it shall be an objective of the plan to hire the

1 first qualified woman that applies for that job, just to
2 break the line and get some representation, and that was
3 the sole reason given.

4 Would that also be equally invalid?

5 MS. BROOKS: Your Honor, on these facts I'd
6 have to say yes, because already we have women actively
7 in the work force. They'll be in line for promotions in
8 a relatively short period of time.

9 QUESTION: You're saying promotions always
10 have to be made on merit, then?

11 MS. BROOKS: I think that once you've opened
12 the doors and provided for equal opportunity, it's
13 appropriate to have these employees moving up through
14 the work force based on the merit system.

15 QUESTION: I agree it's appropriate. Do you
16 think the statute requires that all promotions be made
17 on merit?

18 MS. BROOKS: In the absence of --

19 QUESTION: In the absence of any proof of past
20 discrimination.

21 MS. BROOKS: Convincing evidence, yes, Your
22 Honor.

23 QUESTION: And why would the past
24 discrimination change the picture? I understand that
25 the judicial decree really doesn't have any broader

1 power than the employer would have just adopting a new
2 rule?

3 MS. BROOKS: Your Honor, I think that the
4 reason that it would make a difference to have past
5 discrimination is because we're trying to achieve a
6 reconciliation between the protection that Title 7
7 provides for individual rights and the recognized need
8 to promote voluntary compliance and to achieve the
9 purposes of Title 7, which is equal opportunity, and to
10 make people whole if they have suffered discrimination.

11 And we require past discrimination --

12 QUESTION: You think Weber, the Weber case,
13 requires proof of past discrimination?

14 MS. BROOKS: The Weber case -- yes, the Weber
15 case had evidence of past discrimination. And in this
16 case we had no evidence, and indeed an admission in the
17 plan that any statistical imbalances were attributed to
18 societal attitudes and to traditional norms.

19 And it's probably not a good thing in terms of
20 society, and if we were Congress perhaps we would want
21 to change that. But again, in terms of bringing women
22 into the work force, you can't force them into the
23 non-traditional jobs, and if they want those jobs they
24 can compete on merit, especially because the agency has
25 made effective efforts to recruit them and bring them

1 into the work force, and that have been very effective
2 in the first five years.

3 We were in the second half of the agency's
4 affirmative action program. We were in a second plan.
5 They already had it in place for three years and they
6 rewrote it at the time that the Petitioner went up for
7 the promotion.

8 I think that there are a lot of other narrower
9 tailoring aspects to the plan that are troublesome, and
10 this really focuses on the fact that we're dealing with
11 a promotion rather than hiring.

12 That is, the plan applied employment goals and
13 doesn't take into account that there might be other,
14 less intrusive measures to bring women into the work
15 force. We already know from the plan -- and indeed
16 we're not challenging many aspects of this plan that had
17 good affirmative action programs.

18 We are challenging the application of an
19 employment goal that applied throughout the work force.
20 And I think there are some aspects of the plan that
21 illustrate how difficult it was.

22 It's a broad plan. It seeks to achieve racial
23 and sexual parity in each job classification. And it
24 goes into substantial detail in order to achieve this
25 balance for every ethnic group, by Filipinos and by

1 Hispanics and by Asians.

2 QUESTION: May I just ask again. Really, it
3 doesn't seem to me under your view of the law that it
4 makes any difference what the plan is, because your
5 client was better qualified than the woman and that's
6 the end of the case. And there's no past discrimination
7 and we don't have to know anything else.

8 Why do we even have to look at the plan?

9 MS. BROOKS: Well, Your Honor, this is just in
10 case you were to find that there was an adequate
11 remedial purpose based solely on these statistics.

12 QUESTION: Based on statistics, I see.

13 MS. BROOKS: And again, we think that that
14 should not be enough, and especially upon the facts of
15 this case.

16 There's another aspect to this. If this Court
17 were to find that mere statistical imbalance justified
18 affirmative action employment goals, then it would be
19 very easy for an employer to adopt affirmative action
20 without having any incentive to protect the rights of
21 the other employees.

22 And this basically repeats a prima facie test
23 which this Court has applied for Title 7 plaintiffs as
24 opposed to Title 7 defendants. Because the employer has
25 the information and because the employer has a dual

1 responsibility, to both his non-minority and his
2 minority employees, I think it is appropriate to require
3 more of the employer.

4 But we're not going to require that he confess
5 liability. It has to be somewhere in the middle.

6 QUESTION: A promotion is involved in this
7 case.

8 MS. BROOKS: Yes, Your Honor.

9 QUESTION: How about a hire? Do you think an
10 employer may adopt a race conscious hiring policy,
11 establish a goal of three to one or two to one --

12 MS. BROOKS: Yes, Your Honor.

13 QUESTION: -- just because he wants to?

14 MS. BROOKS: No. The answer is yes, he may,
15 but only when he has convincing evidence that there's a
16 remedial purpose and he's determined that an employment
17 goal --

18 QUESTION: So you would make the same argument
19 with respect to a hiring goal?

20 MS. BROOKS: Yes, but I think that the latter
21 aspect goes to the tailoring aspect. When you're in a
22 hiring situation, you're able to diffuse the burden that
23 you're applying. You know, you have a pool of
24 applicants and you're looking for --

25 QUESTION: Yes, but you nevertheless would say

1 that just because the employer wants to isn't enough.

2 MS. BROOKS: That's absolutely correct.

3 QUESTION: And just because there's a racial
4 imbalance isn't enough.

5 MS. BROOKS: No, it shouldn't be. We need
6 more, and this is because Title 7 protects all employees
7 from discrimination in employment by race and sex.

8 QUESTION: Ms. Brooks, I want to be very
9 sure. Tell me again why this case isn't a
10 straightforward application of the Weber case?

11 MS. BROOKS: The first answer -- there are a
12 number of answers. I think the first is this Court
13 limited Weber to public employers. But that really begs
14 your question.

15 I think the second answer is because we're not
16 able to diffuse --

17 QUESTION: You meant private?

18 MS. BROOKS: Pardon?

19 QUESTION: You said public.

20 MS. BROOKS: Oh, I'm sorry. I meant Weber
21 applied only to private and we're a public employer.

22 QUESTION: But you say that isn't really a
23 very good distinction?

24 MS. BROOKS: Well, I think it begs your
25 question because you can always extend Weber to a public

1 employer.

2 (Laughter.)

3 MS. BROOKS: I think that there are -- I
4 didn't mean to make a joke. That's within your power.

5 But I think there's a more important
6 distinction, because in Weber you were able to diffuse
7 the burdens. Weber dealt with a new training program
8 that benefited both black and white employees, and
9 everyone was going to have something new and you didn't
10 have the kind of expectations that have been developed
11 in the work force.

12 Whereas in this case you had a relatively
13 small county work force. You had low turnover, which is
14 in the face of the plan. You had employees with certain
15 promotion expectations, that if they worked hard they'd
16 be judged on merit.

17 And again, to apply affirmative action in this
18 case without being sure that you have convincing
19 evidence of a remedial purpose and that you can narrowly
20 limit your application, you simply can't do that. Here
21 it would fall entirely on the Petitioner's shoulders,
22 and it did.

23 QUESTION: Ms. Brooks, you're at pains not to
24 require the employer to come in and confess that he's
25 been discriminating in the past, but I just wonder how

1 secure your assurance is.

2 He doesn't have to come in and say: I've been
3 guilty of discrimination in the past. But in order to
4 defend against a suit by the non-minority employee who
5 hasn't been promoted he's going to say: Well, you know,
6 I'm not saying I was, but I may have been.

7 Right? He has to come in and put in that
8 evidence, leaving himself open to later suits by people
9 who say: Well, he didn't say he was, but he said he may
10 have been, and to prove that he may have been he
11 confessed this, this, and this, right?

12 MS. BROOKS: I think there are a number of
13 answers to that. First, in undergoing a process before
14 adopting the affirmative action program, the employer is
15 able to have evidence, a process that he went through
16 and to be able to come forward.

17 So it immediately takes him off the really
18 dangerous point in the tightrope. He's got some
19 protection. But in doing the evidentiary process to
20 develop a basis for your plan, the employer is not
21 necessarily required to prove to a certainty that he's
22 discriminated.

23 QUESTION: No, just that he may have been
24 discriminating.

25 MS. BROOKS: Exactly.

1 QUESTION: Right.

2 MS. BROOKS: But I think that that's
3 necessary.

4 QUESTION: But no employer's going to like to
5 do that. I mean, you're just developing evidence for
6 somebody else to use in a later suit against you.

7 MS. BROOKS: Well, Your Honor, no person may
8 not be able to do it, but Title 7 says that you cannot
9 discriminate against your employees. And you have to
10 have some kind of credible basis. That was the holding
11 in Wygant.

12 QUESTION: It does seem to me to put the
13 employer between a rock and a hard place. In order to
14 validate his plan, he has to show that there is, what, a
15 likelihood, a potentiality, what, something that he's
16 discriminated in the past.

17 MS. BROOKS: The kind of evidence that we're
18 talking about -- and again, this is only some ideas --
19 would be to look at the statistics and give a careful
20 scrutiny to the statistics. In this case, the agency
21 used the wrong relevant labor market. As Justice
22 O'Connor pointed out, they never even looked at the real
23 relevant labor market.

24 And in fact, it's very interesting, because
25 this issue came up when they rewrote their plan in 1978

1 and the director testified at trial: Well, someone
2 raised it, but we really never got too far.

3 So first of all, what we're asking for is a
4 statistical scrutiny, which by itself should not expose
5 the employer.

6 Second, he looks for some kind of explanation
7 for these statistics other than discrimination. This is
8 a process that he would ordinarily go through in
9 defending a Title 7 case. I think it's an appropriate
10 process just as an employer. It's not burdensome, and
11 if he finds that there's discrimination and he looks for
12 other corroborative evidence it doesn't have to be
13 specific acts.

14 But we're talking about sort of a minimal
15 effort to ensure that when you've got a plan, you've got
16 a good basis for that plan. And by even doing this
17 minimal effort, you're in a much better position to
18 identify what you need to remedy and how to remedy it.
19 It's a process. It has an underlying substance.

20 But I don't think that employers would
21 necessarily be discouraged from doing that. And it's
22 got -- and again, in order to protect people like
23 Petitioner, who otherwise do have their rights lost, the
24 employer has to do something more than just throw out
25 statistics.

1 QUESTION: What would you say the prevailing
2 law is or was in the lower courts with respect to
3 whether racial imbalance alone would make out a prima
4 facie case under Title 7?

5 MS. BROOKS: I think if you're a Title 7 case
6 -- Title 7 plaintiff, excuse me, I don't think there's
7 any question that that is a prima facie case. But
8 again, and I think this is a question --

9 QUESTION: Well, how about if you're just a
10 court?

11 MS. BROOKS: Okay.

12 QUESTION: Not the plaintiff, but what about
13 --

14 MS. BROOKS: The prevailing law is --

15 QUESTION: The plaintiff gets through with his
16 case or her case and the only proof is racial imbalance,
17 and there's a motion to dismiss.

18 MS. BROOKS: Then that would be denied, Your
19 Honor, because statistical imbalances, if there's no
20 explanation, do establish a case. And that really was,
21 I believe, Judge Wallace's dissent. And we think that
22 it was a very good point, which is when an employer has
23 developed an affirmative action plan and is going
24 forward to discriminate against non-minority employees
25 pursuant to that plan, he's not asserting a

1 non-discriminatory reason.

2 QUESTION: Well, if that makes out a prima
3 facie case in a Title 7 case, just racial imbalance,
4 what's the employer then -- how can he win the case? By
5 proving there isn't racial imbalance or proving that,
6 what, there is no racial discrimination?

7 MS. BROOKS: The employer can come forward
8 with a number of explanations, and particularly I
9 believe this Court held in the Cooper case that you can
10 explain the statistical imbalance my reasons other than
11 no discrimination.

12 Again, in Wygant this Court held that mere
13 past history of racial discrimination is not enough.

14 QUESTION: Well, what if the employer who has
15 a racially imbalanced work force asks his attorney, if I
16 am sued -- he says there's a racially imbalanced work
17 force and it would survive a motion to dismiss in a
18 Title 7 suit. Should I do something about it or should
19 I --

20 MS. BROOKS: Yes, and that's precisely --

21 QUESTION: No, wait a minute.

22 MS. BROOKS: Oh, I'm sorry.

23 QUESTION: Should I also ask you what are the
24 chances of the plaintiff winning? You look around and
25 do you think that I might lose a Title 7 case?

1 MS. BROOKS: And that's exactly why having the
2 employer consider statistical imbalances and look for
3 explanations and then take a remedy before he gets sued
4 would solve the problem.

5 I would like to reserve the rest of my time.

6 QUESTION: Did you just give away your case or
7 not?

8 MS. BROOKS: No, I don't think we gave away
9 our case at all, because here the agency never did that
10 kind of a process. The agency never considered other
11 explanations, and we raised those other explanations in
12 the trial.

13 We showed that women were not applying --

14 QUESTION: You mean it never asked, might I
15 lose a Title 7 case?

16 MS. BROOKS: The agency has claimed that they
17 would. I don't think that they would on these facts,
18 because the plan shows that the lack of women was
19 attitudinal and that the agency was affirmatively
20 hiring.

21 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
22 Brooks.

23 We'll hear now from you, Mr. Woodside.

24 ORAL ARGUMENT OF
25 STEVEN WOODSIDE, ESQ.,

1 ON BEHALF OF RESPONDENTS

2 MR. WOODSIDE: Thank you, Mr. Chief Justice,
3 and may it please the Court:

4 I'd like to begin by answering the questions
5 that Justice White just posed and to tell you what my
6 advice to my clients would have been under these
7 circumstances. With no women out of 238 skilled craft
8 workers, with only one woman working on the road crews,
9 with evidence of practices -- the job descriptions were
10 male-oriented only and specifically stated that these
11 jobs --

12 QUESTION: Now you're putting some other facts
13 in the question. Let's just stick to a racial
14 imbalance.

15 MR. WOODSIDE: Very well, Your Honor. With
16 those statistics of no women in the skilled craft work
17 force and only one woman out of 110 road workers, I
18 think there would clearly be a prima facie case.

19 QUESTION: And you think that just regularly
20 in the district courts that evidence would survive?

21 MR. WOODSIDE: A motion to dismiss?
22 Absolutely, Your Honor.

23 QUESTION: But it would not mean that the
24 employer would necessarily lose the case?

25 MR. WOODSIDE: It would not mean that the

1 employer would necessarily lose. We would have to -- we
2 would have then the burden of articulating
3 non-discriminatory reasons for this particular
4 imbalance.

5 And I think on the facts of this case which
6 are in this record, we would have not been able to meet
7 that burden.

8 QUESTION: Well, so but you think the employer
9 should not only -- shouldn't adopt a policy just based
10 on racial imbalance, but that he should say, have I got
11 a good chance of actually losing the case?

12 MR. WOODSIDE: No, I believe that if there is
13 evidence of a prima facie case of discrimination, that
14 that's enough for an employer to consider.

15 QUESTION: Well, that means just racial
16 imbalance.

17 MR. WOODSIDE: That means racial imbalance,
18 that's right.

19 QUESTION: He needn't go on and say, well, I
20 think I can still win because I have a neutral
21 explanation?

22 MR. WOODSIDE: Well, as I tried to make clear
23 with the facts of this case --

24 QUESTION: Well, I know, but forget these
25 facts.

1 MR. WOODSIDE: Right.

2 QUESTION: Do you think the employer need not
3 go on and say that I do or I don't have a neutral
4 explanation?

5 MR. WOODSIDE: I think that's correct, Your
6 Honor. And the reason I say that is that these kinds of
7 statistical imbalances put the employer between the rock
8 and the hard place that Justice Scalia referred to
9 earlier.

10 QUESTION: What if the employer knows that no
11 woman has ever applied for any of these jobs, that it's
12 just the kind of job that for some reason women in that
13 area have not applied for?

14 MR. WOODSIDE: I think that would be a --

15 QUESTION: Is that something the employer must
16 weigh in addition to statistics?

17 MR. WOODSIDE: I don't think it's required
18 that the employer must weigh that. But your question
19 suggests that if the employer knew that factor; I think
20 that would make it a much closer case. That factor is
21 not present in this case.

22 QUESTION: Well, who's going to know if the
23 employer doesn't? Presumably, the employer is the one
24 that receives job applications.

25 MR. WOODSIDE: That's correct, Your Honor.

1 And given the liberal rules of discovery, in this case
2 had the Petitioner sought to pursue that line of inquiry
3 it could, Petitioner could have done so. It was not
4 pursued, and indeed the question of --

5 QUESTION: Well, then it really boils down to
6 the burden of proof in a sense, doesn't it? I mean, if
7 the burden was on you in that situation -- it wasn't up
8 to the plaintiff. But if the burden was on the
9 plaintiff, then the plaintiff should have discovered.

10 MR. WOODSIDE: I think that's correct, given
11 those limited facts and the limited hypothetical that
12 Justice O'Connor has --

13 QUESTION: Mr. Woodside --

14 MR. WOODSIDE: Yes.

15 QUESTION: -- I was under the impression that
16 the district court found that there had never been any
17 discrimination against women by the agency and that none
18 was occurring at the time of trial.

19 MR. WOODSIDE: That, Your Honor, was not a
20 litigated issue in the case.

21 QUESTION: It did make that finding?

22 MR. WOODSIDE: The district court judge did
23 make that finding.

24 QUESTION: Did the Court of Appeals hold it
25 clearly erroneous?

1 MR. WOODSIDE: No, the Court of Appeals did
2 not hold that clearly erroneous.

3 QUESTION: So you rely solely on the
4 statistics?

5 MR. WOODSIDE: I rely on the statistics, as-
6 well as evidence of other practices. And I think that
7 finding of no discrimination was the wrong finding to be
8 entered in such a case.

9 The relevant inquiry, it seems to me, should
10 be whether or not the employer believed and had a firm
11 basis to conclude that it may have discriminated against
12 women, based on its own knowledge of the statistics.

13 QUESTION: But don't we have to accept the
14 findings as they come to us?

15 MR. WOODSIDE: Yes, Your Honor, you do. And
16 I'm not suggesting that that finding be reversed as
17 clearly erroneous. But I think it was not one which was
18 litigated. There was nobody at the trial court pointing
19 the finger at the transportation agency and saying: You
20 in fact discriminated against women. That was not
21 litigated.

22 I certainly was not going to stand up and
23 concede discrimination against women.

24 QUESTION: Would you clarify for me what the
25 affirmative action plan consisted of? Was it a plan to

1 be geared to the percentage of women in the countywide
2 work force for every kind of position? Or was it geared
3 to the number of women qualified for these technical
4 jobs in this particular category?

5 MR. WOODSIDE: It actually has elements of
6 both, Your Honor. There was a general overall goal set
7 forth in the 1978 plan that for each job and each job
8 category the goal would be that all job categories would
9 be comprised of women, minorities, and others
10 approximately in proportion to their numbers in the
11 county labor pool.

12 QUESTION: So you concede, then, that this
13 employer affirmative action plan was not geared to the
14 number of qualified women in the pool of labor?

15 MR. WOODSIDE: No, Your Honor, I don't concede
16 that, because the next step and probably the most
17 important step in our plan, is that after those overall
18 goals were set the plan further requires that specific
19 goals be thereafter set for individual jobs, such as
20 skilled crafts.

21 And Your Honor correctly pointed out that
22 there was a goal set for skilled crafts of only three
23 women out of 55 expected new hires in 1983.

24 QUESTION: Where do we find that? I confess
25 that it was difficult for me in these opinions to know

1 what it was that the affirmative action plan really
2 consisted of in that regard as applied to these jobs.

3 MR. WOODSIDE: The agency's goal is contained
4 in the 1982 plan.

5 QUESTION: Is that in the appendix someplace?

6 MR. WOODSIDE: Yes, it is, Your Honor.

7 QUESTION: Where would I find it? Is it in
8 the appendix?

9 MR. WOODSIDE: Yes, it is.

10 QUESTION: Don't take your argument time. I
11 want to know where I can find it.

12 MR. WOODSIDE: It is in the joint appendix and
13 it is cited. The specific reference is cited in our
14 brief, Your Honor.

15 That specific goal of three out of 55 was the
16 goal for the skilled craft jobs.

17 QUESTION: Was that the goal that was applied
18 when Mr. Johnson was denied his promotion?

19 MR. WOODSIDE: There was at that time no
20 specific goal for skilled crafts.

21 QUESTION: So at that time they were using the
22 countywide pool?

23 MR. WOODSIDE: They were using the countywide
24 pool as a reference --

25 QUESTION: But that's the case we're trying,

1 right? We're not trying somebody else who came up after
2 there was a three out of 55 requirement, somebody who
3 came up when there was a what, 30 percent requirement?

4 MR. WOODSIDE: The long term goal was 36.4
5 percent.

6 QUESTION: So it seems to me your response to
7 Justice O'Connor is utterly irrelevant to this case.

8 MR. WOODSIDE: No, I don't believe so, Your
9 Honor, because I --

10 QUESTION: Well, this is Mr. Johnson's case, I
11 thought, and he's complaining about being denied a
12 promotion.

13 MR. WOODSIDE: He is, Your Honor. But the
14 plan does more than simply state there shall be a fixed
15 number of women in any particular job. The plan sets
16 absolutely no quota. The plan establishes no fixed
17 preference.

18 It simply says, given those numbers, the
19 director of the agency should give consideration to that
20 disparity, the absence of women for example, in making
21 hiring and promotion decisions.

22 QUESTION: I don't understand. You're saying
23 he was not applying a 30 percent quota?

24 MR. WOODSIDE: I'm not saying that, Your
25 Honor. That is the long term goal, that is the long

1 term goal.

2 QUESTION: When Mr. Johnson's case came up for
3 promotion, was the agency applying a 30 percent goal or
4 not?

5 MR. WOODSIDE: Quota? No, there was no
6 quota.

7 QUESTION: Goal.

8 MR. WOODSIDE: Long term goal, yes. Long term
9 goal, yes.

10 I think it's important, Your Honor, that the
11 long term goal, which was later refined to be more
12 specific for women in skilled crafts, that long term
13 goal did not require any fixed preference to be given.
14 Indeed, everyone who wished a promotion could compete
15 for a promotion.

16 Unlike what the Petitioner's counsel has just
17 said earlier, there is no evidence to indicate that in
18 every case women would get the promotion. Indeed, the
19 facts are to the contrary.

20 QUESTION: Well, Mr. Brooks, is it your
21 position that the county as an employer can set an
22 affirmative action plan goal that is geared to the
23 number of women in the labor force in the county
24 generally, as opposed to the number of qualified women
25 in the available pool?

1 MR. WOODSIDE: Yes, Your Honor.

2 QUESTION: That an affirmative action plan
3 geared to the larger percentage is valid?

4 MR. WOODSIDE: Yes, Your Honor.

5 Now, in this case I think the reason why that
6 is valid is that under the case law decided by this
7 Court one would ordinarily expect in jobs throughout an
8 agency that they would be comprised, absent
9 discrimination, of roughly their numbers that exist in
10 the general labor pool.

11 QUESTION: Is that right?

12 MR. WOODSIDE: Yes.

13 QUESTION: You mean it is statistically
14 reasonable to expect as many women to be working on road
15 crews and to believe that if there aren't that
16 proportion there must be discrimination, as there are to
17 think that there are women working in --

18 MR. WOODSIDE: I think that there would be an
19 inference of discrimination drawn from that factor
20 alone.

21 QUESTION: What is that based on? Human
22 experience or some governmental policy?

23 MR. WOODSIDE: I think it is based on both
24 human experience and governmental policy.

25 QUESTION: On human experience?

1 MR. WOODSIDE: Yes, Your Honor. I think women
2 do seek these jobs --

3 QUESTION: In this country?

4 MR. WOODSIDE: Yes.

5 If I may, Your Honor, the suggestion that's
6 made by the Petitioner's counsel, for the first time in
7 this case, is that the relevant labor pool was seven
8 percent or five percent as she stated in the reply
9 brief. If that is the case -- and it's too bad that
10 that was not litigated at trial or not even mentioned at
11 the Court of Appeals.

12 But if that is the case, then it's clear from
13 those numbers alone that there would have been a case of
14 discrimination against the agency. The difference
15 between zero, which is what we have here, and five
16 percent or seven percent or any of the higher figures
17 makes us vulnerable to a charge of discrimination and
18 gives us good cause, it seems to me, to take remedial
19 action.

20 QUESTION: Without even considering at all
21 whether you can bring forward any patently valid
22 justification for the statistical discrepancy, for
23 instance the relevant pool is not all women working in
24 the county, but rather women working in this particular
25 craft or this particular area?

1 Without even considering that, you're entitled
2 to say, oh, we're at risk for a discrimination suit, and
3 we can immediately begin discriminating on the basis of
4 race or sex in our promotion and hiring?

5 MR. WOODSIDE: I don't think I would say you
6 can immediately begin to discriminate. The plan says
7 that that fact should be considered in the hiring and
8 promotion decisions. It should be considered. It's not
9 necessarily determinative.

10 And at the time of this decision, there were
11 absolutely no women in the skilled craft jobs. Those
12 were the facts known to the agency director at the time,
13 and that was the basis upon which he made his decision.

14 QUESTION: Well, he not only considered it; he
15 did promote a less qualified woman over a better
16 qualified man.

17 MR. WOODSIDE: Well, the district court did
18 make that finding with respect to qualification.

19 QUESTION: Well, that's the case we're --
20 that's the case that's now here.

21 MR. WOODSIDE: Yes, Your Honor. But I would
22 point out that the agency director testified that in his
23 view they were equally qualified.

24 QUESTION: Well, could I ask you what you
25 think that our cases last term held with respect to what

1 circumstances justify giving relief to a non-victim?

2 MR. WOODSIDE: I think that your cases held
3 that in the context of the problem that we have here is
4 that where there is a firm basis upon which an employer
5 can infer that its own practices may have been
6 discriminatory, then the employer can voluntarily take
7 affirmative action which is not victim-specific.

8 And I would cite primarily the Wygant case for
9 that proposition.

10 QUESTION: Do you think our cases said that
11 the circumstances must evidence particularly egregious
12 instances of discrimination?

13 MR. WOODSIDE: I don't think the case law says
14 it has to be particularly egregious. I think the case
15 law suggests that where there are facts that suggest
16 there would be a prima facie case of discrimination, the
17 employer can voluntarily embark on an affirmative action
18 course.

19 QUESTION: But you wouldn't suggest that there
20 was any evidence here of egregious discrimination, would
21 you?

22 MR. WOODSIDE: There was no such finding, Your
23 Honor. But there was -- and I think it's important to
24 remember that the statistics were buttressed at trial by
25 evidence of the agency's own practices.

1 QUESTION: But the lady who, the woman who was
2 promoted, was not a victim of discrimination?

3 MR. WOODSIDE: Well, the district court made
4 one finding that's interesting. He suggested that one
5 of the interview panelists may have had discriminatory
6 intent against her because she was a woman, but that
7 that by itself did not justify the action taken.

8 So I think even the district court judge
9 conceded that under the facts presented here there was
10 evidence that she may have been deterred and in fact --

11 QUESTION: Of course, if that were the case
12 none of you would really be here.

13 MR. WOODSIDE: If the district judge had made
14 the finding that she had in fact been discriminated
15 against, yes, I think you're correct, Your Honor.

16 QUESTION: Let me make sure I understand the
17 sweep of your argument, Mr. Woodside. If I understood
18 your answer to Justice White correctly, you're asserting
19 that a government always has the right to institute a
20 plan that permits discrimination in hiring and in
21 promotion on the basis of race or sex whenever its work
22 force does not contain the same proportion of race,
23 minority race or that sex, as the work force at large?
24 Is that it?

25 MR. WOODSIDE: I think that --

1 QUESTION: That that alone is enough to show,
2 that statistical disparity is enough to justify an
3 affirmative action plan, that is to say discrimination
4 by the government on the basis of race?

5 MR. WOODSIDE: If those differences that you
6 describe are statistically significant, in other words
7 if the difference between --

8 QUESTION: Now you're hedging it. I mean, I
9 was bringing in statistical significance in my earlier
10 question, that the mere fact that the work pool in
11 general contains 30 percent women doesn't necessarily
12 mean that this particular craft or trade or occupation
13 should have 30 percent women.

14 And you rejected that. You said it's enough
15 if working women constitute 30 percent of the work
16 force.

17 MR. WOODSIDE: I think that raises the
18 question as to whether or not the practices in the
19 agency itself have been fair toward women. And under
20 our practice --

21 QUESTION: Well, now you sound like the other
22 side. Now you're saying that it isn't enough to just
23 have a statistical disparity, that the employer has to
24 have some reason to believe that the statistical
25 disparity is the result of discrimination.

1 MR. WOODSIDE: I understood your earlier
2 question to mean that any time there is a disparity
3 between the work force and the labor market generally,
4 would that constitute a prima facie case of
5 discrimination?

6 My answer to that is yes.

7 QUESTION: And justify immediate
8 implementation of an affirmative action action plan?

9 MR. WOODSIDE: That's right, and it would be
10 up to the Petitioner to prove that there is an
11 alternative explanation for those statistical
12 imbalances.

13 QUESTION: Well, but they're trying to prove
14 that here and you're saying it's irrelevant.

15 MR. WOODSIDE: No, they --

16 QUESTION: You're saying that your client was
17 authorized to institute the affirmative action plan
18 because of the statistical imbalance.

19 MR. WOODSIDE: But against the challenge, it
20 would be up to the Petitioner to prove that it would be
21 reasonable to have no women in the skilled craft
22 category. And there was not a shred of evidence --

23 QUESTION: No, not no women, just not
24 necessarily to impose 30 percent women. That's what
25 your plan was.

1 MR. WOODSIDE: The plan set a long term goal.
2 I want to emphasize that. It set a long term goal. The
3 factors that the agency director cited when he made the
4 decision was the absence of women in the skilled craft
5 category.

6 That's really the salient fact in this case.
7 We don't have before the Court the case where there were
8 several women in the job and it was another promotion
9 down the line that was at issue. The strong point in
10 the agency's plan here is that it calls for a case by
11 case review in hiring and promotion to look at the
12 statistics as you find them at that point in time.

13 And to me the very important factor in this
14 case is that this was the first time a woman got a
15 skilled craft job, and she didn't get it because there
16 was a quota. She got it because there was --

17 QUESTION: She didn't get it because she was
18 better qualified.

19 MR. WOODSIDE: She was certainly well
20 qualified and, as the district court judge found --

21 QUESTION: What percentage did women then make
22 up of the particular category of jobs, after her
23 promotion?

24 MR. WOODSIDE: After her promotion? I can
25 cite to you some record statistics that between 1978 and

1 1982 there was an increase of 111 skilled craft workers,
2 and of those 111 additional jobs 6 were women. So she
3 was the first and there were five more out of another
4 110.

5 So this was not the kind of plan where the
6 agency gave, as has been suggested, an automatic
7 preference for women. It simply did not occur here.
8 The agency's action was moderate and it was handled on a
9 case by case basis, given the facts known at the time of
10 each decision.

11 And that's a fluid situation, I would submit,
12 because as we learned more about this job and looked at
13 it more closely the goal for the job was refined to,
14 incidentally, between five and six percent women to be
15 hired for the expected new openings.

16 QUESTION: Mr. Woodside, I'm puzzled when you
17 say that this was not a case of an automatic preference
18 for a woman. But that's the only reason she got the
19 job.

20 MR. WOODSIDE: Oh, it's not the only reason,
21 Your Honor. She was --

22 QUESTION: I mean it's the only reason he
23 didn't get it, the other way around.

24 MR. WOODSIDE: That became the decisive
25 factor. If I can explain, the county's rules require

1 that hiring or promotion decisions be made from a list,
2 a civil service list, of the top seven applicants for
3 the job. She was one of those top seven applicants.
4 And if there was nothing said about sex in this case,
5 any of those top seven could have been appointed.

6 And I would submit, if the agency director had
7 just simply said, I liked her better, and appointed her,
8 that would probably be the end of it. But it is clear
9 --

10 QUESTION: But that's not what happened.

11 MR. WOODSIDE: Well, he did state that that
12 became a factor in the decisionmaking process.

13 QUESTION: Yes, but until she registered a
14 complaint with the affirmative action section she was
15 out, isn't that correct?

16 MR. WOODSIDE: Apparently she was out even
17 before the second round of interviews, according to her
18 testimony. Mr. Johnson apparently had the inside
19 track.

20 QUESTION: Well, I don't know. Maybe -- I
21 jsut don't understand how you can say this is not an
22 automatic preference.

23 MR. WOODSIDE: Well, what I'm trying to say,
24 Your Honor, is that there is no automatic preference to
25 be accorded women. These cases are to be --

1 QUESTION: Do you think it would be a
2 violation of the statute if the county said, in
3 departments where there are 238 men and you get a
4 qualified woman that comes in, let's automatically give
5 her some favored, better consideration than we would
6 give a man?

7 MR. WOODSIDE: On these facts, I do not think
8 that would be a violation. I'm trying to illustrate --

9 QUESTION: But you're just saying that's not
10 this case?

11 MR. WOODSIDE: That's correct, and I think
12 this case is more subtle. I think this case involves,
13 as I stated earlier, a case by case review of employment
14 decisions.

15 QUESTION: Mr. Johnson, who had had his eye on
16 this job for some time, apparently, and had taken a
17 demotion and worked in a lower paying job for several
18 years in order to obtain better qualification in order
19 to get this promotion, he competed head to head with the
20 woman who ultimately got the job.

21 He was selected and would have gotten the job
22 but for the fact of the affirmative action program. She
23 had been rated less qualified and was given the job in
24 preference to him, solely by reason of the affirmative
25 action plan. Isn't that the facts of the case?

1 MR. WOODSIDE: I think you could summarize it
2 that way, Your Honor. But I would not want to omit the
3 fact that Ms. Joyce also competed for this job. Ms.
4 Joyce in 1974 applied for the road dispatcher job. She
5 was told at the time that she was not qualified.

6 She then went and worked on the road crews
7 themselves for five years, which incidentally was twice
8 as long as Mr. Johnson did. So that by 1980, when they
9 were competing head to head, as you put it, both of them
10 were well qualified to perform the work.

11 And the scores that were arrived at in this
12 case based on an interview alone, without a test of
13 formal procedure, show them to be but two points apart.

14 QUESTION: He had served in the job?

15 MR. WOODSIDE: Pardon?

16 QUESTION: He had served in the job
17 previously, hadn't he?

18 MR. WOODSIDE: Without competing with anyone
19 else.

20 QUESTION: That's right, serving above his
21 grade, but on an acting basis.

22 MR. WOODSIDE: On an acting basis, without
23 competing with anyone for that job.

24 There's no question but that there are
25 competing interests here, and it would seem to be that

1 this Court would want to allow appointing authorities
2 and employers throughout the country to make decisions
3 which they believe are in their best interests and are
4 fair as can possibly be made to all concerned.

5 In this case a --

6 QUESTION: That sounds like you're saying that
7 any time an employer wants to adopt a race conscious
8 hiring or promotion policy, that should be permitted?

9 MR. WOODSIDE: No, I'm not saying that, Your
10 Honor.

11 QUESTION: Well, he thinks it's fair; that's
12 what you said.

13 MR. WOODSIDE: No.

14 QUESTION: He thinks it would be in his best
15 interest; that's what you said.

16 MR. WOODSIDE: I think because of the
17 statistics that were in this case and because of the
18 evidence of practices that women had been excluded from
19 training opportunities in the past, that the agency had
20 refused to hire pregnant women and the like, given those
21 facts, that it's permissible to engage in --

22 QUESTION: Well, you're adding something in
23 the balance besides a racial imbalance.

24 MR. WOODSIDE: Yes, but I believe those are
25 the facts here, and I tried -- I endeavored to answer

1 your question if we were only dealing with racial -- or
2 sex imbalance. But I think there is more in this case.

3 QUESTION: My concern, Mr. Woodside, is not
4 about preventing employers from doing what they think is
5 best for the work force. What I'm concerned about is
6 that, to go back to the rock and the hard place analogy,
7 the employer is faced with the possibility, and state
8 employers in particular, of getting caught with
9 affirmative action suits.

10 MR. WOODSIDE: Yes.

11 QUESTION: And one way to avoid being between
12 the rock and the hard place is to put Mr. Johnson
13 between you and the rock. And that's the risk. That's
14 the risk that occurs here.

15 In order to avoid all possibility of an
16 affirmative action suit, it's very easy for an employer
17 to say: Well, why should I worry about my skin; I'll
18 just adopt an affirmative action program, discriminate
19 against Mr. Johnson or anybody else on hiring, and
20 that's perfectly lawful, and simply appeal to
21 statistical disparity.

22 I'm not worried about his doing it for the
23 good of the work force. He'll do it for the good of the
24 employer. I mean, that's the way people are normally
25 motivated.

1 MR. WOODSIDE: Well, I think it was done for
2 the good of the work force. And also, there was an
3 effort made to be fair in the way this plan was
4 designed.

5 This plan was not designed to make -- to have,
6 for example, as was discussed in the case earlier this
7 morning, a one for one hiring quota. It's not like the
8 Weber plan, which stated that there shall be a 50
9 percent set-aside for black workers in the Kaiser
10 plant.

11 This case called for a case by case
12 consideration, and as applied it meant that there were
13 very few women who actually benefited from the
14 affirmative action plan, but a few did. And we think
15 that that's the type of moderate, sensible approach that
16 this Court should endorse.

17 QUESTION: Could I ask, did you say that some
18 goals have been refined to say five or six percent?

19 MR. WOODSIDE: Yes, Your Honor.

20 QUESTION: In what, these skilled category
21 jobs?

22 MR. WOODSIDE: Yes, Your Honor.

23 QUESTION: Well, suppose that prior to the
24 adoption of your plan you had looked around and you had
25 said, well, there's 30 percent of women in the work

1 force in the county, but we only have six percent in
2 these jobs. There's really a statistically significant
3 imbalance.

4 Now, under your argument I take it they could
5 have adopted this affirmative action plan and carried it
6 out, except that one of these days you really discover
7 that you made a mistake, it should have only been --
8 five or six percent is plenty.

9 MR. WOODSIDE: I understand, and that would be
10 a harder, much closer case, Your Honor. But I think the
11 facts here cannot be emphasized any greater than that
12 there were zero women. That's the real important factor
13 in this case.

14 I think this case illustrates well the
15 difficulty that employers, public or private alike, have
16 in meeting their obligations under Title 7 to both
17 prohibit discriminatory practices on the one hand and on
18 the other hand to really try to effectuate and provide
19 remedies where lawyers believe discrimination may have
20 occurred.

21 I think we have the facts there that
22 discrimination may have occurred. That statement was
23 made in the 1978 affirmative action plan, and I think
24 the agency should be entitled to take the modest steps
25 that it has done.

1 QUESTION: Let me just ask one more question.
2 I've still been trying to figure out the answer to the
3 one Justice O'Connor asked you a while ago. You have an
4 employer that employs 238 people.

5 MR. WOODSIDE: Yes.

6 QUESTION: He has no women in the work force
7 at all.

8 MR. WOODSIDE: Yes.

9 QUESTION: He knows that no woman has ever
10 applied. He's never discriminated. He knows that to be
11 a fact. Under your interpretation, he cannot decide
12 that he would like to hire a few women in order to
13 minimize the risk of suit or just because he thinks it's
14 a healthy thing to do, whereas somebody who knows he has
15 discriminated in the past can take and can adopt an
16 affirmative action program?

17 MR. WOODSIDE: Well, it seems to me that in
18 the question that you have asked, the absence of any
19 women and the absence of women applicants may not answer
20 the question whether or not there has been
21 discrimination. It may be that the employer's own --

22 QUESTION: Well, my hypothesis is, whatever
23 facts are relevant, he knows there just has never been
24 any discrimination here, whatever the reasons might be.
25 But I gather on your view he could not adopt an

1 affirmative action program?

2 MR. WOODSIDE: Well, if it were shown that he
3 knew there was absolutely no discrimination, that he the
4 employer knew that --

5 QUESTION: He did all the hiring himself and
6 he knows he never had any applications.

7 MR. WOODSIDE: I don't think he could --

8 QUESTION: Well, even though that would make
9 out a prima facie case of employment discrimination?

10 MR. WOODSIDE: Well, that's the difficulty.
11 Under the hypothetical that Justice Stevens has asked,
12 he's suggesting there is no prima facie case because --

13 QUESTION: Well, no. Under your view of the
14 law, the plaintiff, all he would have to do is to show
15 that imbalance, and that would survive a motion to
16 dismiss and then the employer would have to prove no
17 discrimination.

18 MR. WOODSIDE: Then he's suggesting further
19 that the explanation for that imbalance is no women have
20 ever applied. And what I'm saying --

21 QUESTION: That's a defense to the prima facie
22 case.

23 MR. WOODSIDE: Yes.

24 QUESTION: He has a prima facie case, and I
25 thought you had been saying that so long as there is a

1 prima facie case he can institute an affirmative action
2 plan.

3 MR. WOODSIDE: Yes, and I tried to --

4 QUESTION: So maybe you should have given a
5 different answer to Justice Stevens.

6 MR. WOODSIDE: I'm sorry.

7 (Laughter.)

8 MR. WOODSIDE: The closer --

9 QUESTION: Me, too.

10 QUESTION: I should have asked Justice
11 Scalia.

12 (Laughter.)

13 MR. WOODSIDE: I have nothing further to add.
14 Thank you.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
16 Woodside.

17 Ms. Brooks, do you have something that you
18 wish to say? You have four minutes left.

19 REBUTTAL ARGUMENT OF
20 CONSTANCE E. BROOKS, ESQ.,
21 ON BEHALF OF PETITIONER

22 MS. BROOKS: I just have a few points to
23 respond to. I think that the facts of this case show
24 why we would suggest that an employer has to show more
25 than a prima facie case before he adopts a voluntary

1 affirmative action plan.

2 And by a prima facie case, I'm talking about a
3 naked statistical balance, because here the agency
4 clearly never went behind and considered whether no
5 women had ever applied.

6 It's not quite correct to say that Petitioner
7 didn't ask for applicant flow data. It was requested
8 during discovery and we were told it wasn't available
9 because the county never got the computer program.
10 That's really not here or there, but I do want to make
11 it clear that we did look for applicant flow data and
12 were told it just wasn't available.

13 QUESTION: Ms. Brooks, can you explain one
14 thing to me? I'm a little -- what difference does it
15 make whether the proper proportion in this particular
16 labor pool, if we're playing statistics, was 30 percent
17 or 5?

18 What difference does it make? Inasmuch as
19 there were no women in this job category at the time
20 anyway, even if the percentage were, the proper
21 percentage were 5 percent instead of 30 percent,
22 presumably in implementing the affirmative action plan
23 the employer would have been justified in preferring
24 this woman.

25 MS. BROOKS: We don't agree that the employer

1 would have been justified in preferring the woman,
2 because if you look at the road dispatcher job you had
3 20 percent of the employees, 3 out of 18, were already
4 women at the time. So the plan should never have
5 applied.

6 But if you look at the plan in general, the
7 fact that they never looked for a relevant labor market
8 goes to the overall crudity of the affirmative action
9 plan. You don't have an employer here who made a good
10 faith effort to develop a plan.

11 You have an employer who basically looked at
12 the overall population, slapped some number in, and then
13 went forward, again without taking into account the
14 rights of the other employees. That's why it's
15 relevant, because this plan is facially discriminatory
16 with respect to all of the unprotected employees.

17 QUESTION: You don't believe there's a
18 harmless error rule? That is, that even if the employer
19 had used the right percentages, an affirmative action
20 plan based on that would have justified preference to
21 this --

22 MS. BROOKS: Not in this case, because there
23 are other explanations for the statistical disparity.
24 And in fact, you find these in the county's own
25 documents. They admit that they attribute the lack of

1 women here not to "past discrimination"; they attribute
2 it to societal attitudes.

3 And I don't think that this Court has ever
4 held that women will necessarily occupy the same jobs in
5 direct proportion to their representation in the working
6 force. I think it's rather obvious that women and men
7 prefer things differently. I'm not saying that that's
8 always good, but attitudes based on sex are different.

9 And I think it's an important factor here that
10 you have women applying for non-traditional jobs in the
11 transit agency and getting them. You had extensive
12 hiring in terms of women bus drivers and women utility
13 workers, which was the position below becoming a
14 mechanic.

15 I think what you have here is an explained
16 statistical disparity in that women were going into
17 other jobs and choosing not to work for the roads
18 division, where you had fewer openings and less future
19 opportunity for advancement.

20 But we don't know, because this agency never
21 looked and never considered other alternatives than
22 their assumption that they discriminated. And we say
23 that's wrong and that's why you should have more than
24 just a prima facie case when we talk about convincing
25 evidence that it is appropriate to go into a voluntary

1 affirmative action plan.

2 I think there's another factor here --

3 CHIEF JUSTICE REHNQUIST: Your time has
4 expired, Ms. Brooks.

5 MS. BROOKS: Thank you very much.

6 CHIEF JUSTICE REHNQUIST: The case is
7 submitted.

8 (Whereupon, at 12:03 p.m., the oral argument
9 in the above-entitled matter was submitted.)
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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:

85-1129 -- PAUL E. JOHNSON, Petitioner V. TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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