ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:)
)
CLARA WATSON,)
) No. 86-6139
Petitioners)
v.)
)
FORT WORTH BANK AND TRUST)

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CLARA WATSON, :

4 Petitioner, :

5 v. : No. 86-6139

6 FORT WORTH BANK AND TRUST :

7 ------------------------------x

8 Washington, D.C.

9 Wednesday, January 20, 1988

10 The above-entitled matter came on for oral argument

11 before the Supreme Court of the United States at 10:07 a.m.

12 APPEARANCES:

13 ART BRENDER, ESQ., Fort Worth, Texas; on behalf of the

14 Petitioner.

15 BRUCE W. McGEE, ESQ., Fort Worth, Texas; on behalf of the

16 Respondent.

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1 C O N T E N T S

2 ORAL ARGUMENT OF: PAGE:

3 ART BRENDER, ESQ.

4 On behalf of the Petitioner 3

5 BRUCE W. McGEE, ESQ.

6 On behalf of the Respondent 26

7 ART BRENDER, ESQ.

8 On behalf of the Petitioner - Rebuttal 44

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

2 (10:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument this

4 morning in Number 86-6139, Clara Watson v. Fort Worth Bank and

5 Trust.

6 Mr. Brender, you may proceed whenever you're ready.

7 ORAL ARGUMENT OF ART BRENDER, ESQ.

8 ON BEHALF OF THE PETITIONER

9 MR. BRENDER: Mr. Chief Justice, and may it please

10 the Court:

11 The question that this case presents is whether or

12 not Clara Watson can test her employer's subjective employment

13 practices by disparate impact theory.

14 We ask the Court to reverse the decision of the 5th

15 Circuit.

16 I'd like to discuss some of the pertinent facts and

17 then discuss the five main points or our reasons for asking the

18 Court to reverse this case.

19 Those reasons in summary are that the Griggs v. Duke

20 Power that announced the doctrine of disparate impact did not

21 carve out an exception for subjective practices, that the

22 legislative history of the 1972 amendments to Title VII also

23 endorsed both disparate impact and the prior case law.

24 Furthermore, that the EEOC guidelines have applied

25 disparate impact to subjective practices since at least 1970,

1 that there is no bright line between objective and subjective
2 practices that the Respondent would have this Court adopt, and,
3 lastly, that the adoption of this exception would urge
4 employers or at least foster employers more use of subjective
5 practices.

6 Clara Watson, after having nine years experience as a
7 cashier at a Montgomery Wards, applied in 1973 to Fort Worth
8 National Bank as a teller. She applied actually several times
9 before she was hired. When she was hired, she was hired not as
10 a teller but as a proof operator. The bank had at that time
11 four black employees, none of them in positions that were
12 visible to the public, and the proof operators and the two
13 proof -- I mean printing employees were in the basement and
14 there was a cafeteria employee and a porter.

15 After three years on the job, she was made a teller
16 at the bank and then, after seven years on the job, in 1980,
17 she first applied for a position, for a supervisory position
18 and actually, in February of '80, there were two supervisory
19 positions that were available; one as the supervisor of the
20 lobby tellers and the other as supervisory of the motor bank
21 tellers.

22 She applied for each and in each case, she was
23 refused the job and a white male in one instance, white female
24 in another instance, was selected. One year later, the same
25 two positions became available and she sought both of those

1 positions again with the same result. A white female was
2 selected for the lobby supervisor and a white male for the
3 motor bank supervisor.
4 In 1984, even long after the 1981 refusal, she --
5 there were still no black directors, officers or supervisors at
6 the Fort Worth Bank and Trust, despite the fact that the bank
7 is within a few miles of the two main areas of concentration of
8 the black population in Fort Worth, a city that has about a
9 twenty-two percent black population.
10 The bank system of both hiring and assigning persons
11 to jobs within the bank was one that relied on the decisions of
12 the supervisors, department supervisors, with very little
13 interference from the upper management. Those supervisors
14 were, of course, all white.
15 The compensation system that the bank used was a
16 series of -- they used evaluations for both supervisory
17 personnel and for line personnel, but those evaluations were
18 filled out by the same supervisors and, once again, all were
19 reviewed by a salary review committee. The salary review
20 committee rarely changed or affected the decision of those
21 supervisors.
22 The -- both the District Court and the Court of
23 Appeals found that this limited group of white department heads
24 made virtually all the hiring and promotion decisions as well
25 as evaluations used to compute compensation and that the upper

1 management routinely approved those decisions.

2 Clara Watson, at trial, based on a stipulated data

3 base, presented a very comprehensive statistical study which

4 showed that in the area of hiring, blacks were hired at a rate

5 of 3.5 percent while whites were hired at a rate of 14.8

6 percent, almost four times greater, and that figure was

7 disputed somewhat by the bank, who claimed that they only hired

8 people -- we used all the applications and all the persons who

9 were hired, they disputed that and said we only hire people

10 whose applications were on file for two weeks.

11 So, during trial, that was also analyzed, although we

12 were able to show that that really wasn't true because --

13 QUESTION: Well, we don't have a hiring case anymore,

14 do we?

15 MR. BRENDER: No, but the same supervisors that were

16 making those hiring decisions were also making the promotion

17 decisions.

18 QUESTION: I mean, all that's left now is the

19 promotion aspect for an individual plaintiff?

20 MR. BRENDER: That's correct, although the hiring

21 case actually has been remanded to the District Court where

22 it's still pending.

23 QUESTION: Yes, but we're not concerned with that

24 here?

25 MR. BRENDER: That's correct, Justice O'Connor.

1 QUESTION: Mr. Brender, I assume that the proof
2 offered at trial, the statistical evidence, is exactly the same
3 evidence that would be offered either under a disparate
4 treatment or a disparate impact case.
5 MR. BRENDER: I think that's correct, Justice
6 O'Connor. We -- it could be used either way, and I think this
7 Court's footnote in Teamsters says that the matter of proof may
8 be applied to either theory.
9 QUESTION: And if it were remanded, you wouldn't have
10 different proof, it would still be the same statistical
11 evidence?
12 MR. BRENDER: Yes, I believe so.
13 QUESTION: So, what is really at stake here? Does it
14 turn on the different burden of proof aspects under the two
15 types of cases? Does it turn on what the defendant's burden is
16 to rebut the statistics, in effect? Is that how you see the
17 bottom line?
18 MR. BRENDER: Probably both. As I see it, to apply
19 statistical evidence under a disparate treatment theory or
20 pattern of practice theory, that the level of proof is greater.
21 This Court has said --
22 QUESTION: Well, we haven't said that, have we?
23 MR. BRENDER: Not exactly. I may be interpreting
24 that.
25 QUESTION: And I'm just wondering if there's any

1 difference at all in the initial burden of proof under the two
2 types of cases.
3 MR. BRENDER: Well, I think there is in this sense,
4 because at least under Castenada v. Partida, where the Court
5 addressed the two or three standard deviation argument on
6 applying an intent theory, that would be greater than under
7 Griggs, where you could show under the eighty percent rule, the
8 three-fourths rule, you wouldn't necessarily have to have
9 statistical significance.
10 In other words, two or three standard deviations is
11 either .05 or .01 statistical significance, but the eighty
12 percent rule wouldn't have to come to that level. So, I think
13 there would be a difference in terms of statistics.
14 Now, in fact, our statistics were basically statistic
15 significant. So, -- but I do think there is that difference
16 statistically. The other thing, in the 5th Circuit held this,
17 that in a pattern and practice case, they held it had to be a
18 class action because they refuse -- the majority at least
19 refuse to review this under a disparate treatment pattern and
20 practice theory.
21 There certainly are some cases, and I believe Judge
22 Goldberg cites those in his dissent, where courts have held the
23 statistics are not sufficient in and of themselves to show
24 disparate treatment.
25 QUESTION: So, the courts below, although you have

1 the statistical evidence, decline to even treat it as a pattern
2 and practice case --
3 MR. BRENDER: The --
4 QUESTION: -- because the class was discharged, she
5 wasn't representative of the class?
6 MR. BRENDER: I believe that's what they did because
7 they just simply said this was not a -- we had disbanded the
8 class or we have upheld the District Court's feeling to that
9 extent, and, but it really wasn't analyzed at all nor, of
10 course, would they allow us to analyze it under the disparate
11 impact.
12 We also --
13 QUESTION: Suppose the Court had allowed you, what
14 would you have done?
15 MR. BRENDER: Well, of course, we attempted in the
16 District Court to prove it. We were pointing in that direction,
17 but I don't think we would have -- I don't know that we would
18 have done anything different with the statistical evidence.
19 QUESTION: Well, what would you have done? You said
20 the court wouldn't let you analyze it under disparate impact.
21 What if it had said okay, go ahead, what would you have done?
22 MR. BRENDER: Oh, okay. I think the disparate impact
23 proof is there. I mean, I think we did present --
24 QUESTION: What would you have said?
25 MR. BRENDER: Maybe I'm not understanding your

1 question, Justice White, but I --

2 QUESTION: Well, how would you -- how could you have

3 won the case?

4 MR. BRENDER: Oh. Well, I think it would have then

5 been up to the employer to come forward and justify on business

6 necessity their practices, which they didn't do. They did not

7 attempt to prove business necessity or validation of their

8 processes.

9 QUESTION: So that in disparate impact case, you

10 really don't need to prove intent, do you?

11 MR. BRENDER: No, no. You wouldn't have to prove

12 intent.

13 QUESTION: And in disparate treatment, you do?

14 MR. BRENDER: That's correct. And in this case, they

15 did not present a statistical case or a statistical expert.

16 QUESTION: In the disparate impact, is the bottom

17 line, nevertheless, intent in the sense that the employer must

18 justify as in Griggs or what do you conclude, intent or --

19 MR. BRENDER: I don't believe they have to prove

20 intent. I think that a disparate impact case can be totally

21 devoid of intent.

22 QUESTION: But under a pattern and practice case, you

23 don't directly prove intent. You offer statistics as evidence

24 of -- from which the trier of fact could infer.

25 MR. BRENDER: Could infer intent.

1 QUESTION: Right?

2 MR. BRENDER: That's correct.

3 QUESTION: And in actuality, the proof is much the

4 same from the plaintiff's side, isn't it?

5 MR. BRENDER: Well, I think proof can be used both

6 ways, but I think the disparate impact probably hones in more

7 on the group discrimination, whereas, you know, --

8 QUESTION: My impression is that the plaintiff's

9 initial proof would be exactly the same and what you might be

10 quibbling about is what the defendant's burden then is under

11 the two types, and I guess we haven't spoken to that, really.

12 MR. BRENDER: No. The only disagreement I have with

13 that is a lot of the language in the disparate -- in the

14 pattern and practice cases talks about a pervasive all invasive

15 system of discrimination and so forth that's intent, and I

16 interpret that to mean you've got to basically show statistical

17 evidence of intent at every stage of the process; whereas, I

18 think under disparate impact, you can simply show that the

19 overall result is disproportionate and then the employer must

20 come in and justify those.

21 QUESTION: And he justifies it by showing job-

22 related.

23 MR. BRENDER: That's correct.

24 QUESTION: So, he doesn't rebut any notion of intent

25 directly.

1 MR. BRENDER: No, no. He could rebut the case by
2 trying to show that there is no impact. In other words, he
3 could come in and try to --
4 QUESTION: Or he could show, as I understand it, that
5 even if there is an impact, there is a job-related reason for
6 giving it.
7 MR. BRENDER: That's right. Either by validating it
8 under the procedures set out in the EEO guidelines or by simply
9 showing that it's necessary to the efficient operation of the
10 business.
11 QUESTION: And if he fails to do that, he's liable
12 not because he intends anything, but because as the law is
13 interpreted, intended to give relief --
14 MR. BRENDER: That's right.
15 QUESTION: Griggs, I guess.
16 MR. BRENDER: That's Griggs, Your Honor. Griggs says
17 that by the effect of the impact, he must then come in and
18 justify those practices. If he's unable to justify those
19 practices, then he's liable. If he is, then he can continue on
20 with the practice and he's not liable despite the impact.
21 QUESTION: Mr. Brender, may I just -- I'm not
22 entirely clear on what you think the employer has to show in a
23 case in which the practice being challenged is the practice of
24 using subjective discretionary approach by the supervisors at
25 each branch office.

1 You say you proved statistically that this has
2 resulted in discriminatory impact. How can the employer
3 justify that? Does he have to prove that he must, that it's
4 necessary for him to use discretionary --
5 MR. BRENDER: Justice Stevens, I think he can do it
6 several ways. I think that -- and the courts have addressed
7 those. First, he can validate under the EEOC guidelines and,
8 of course, we have cited and talked about the brief of the APA
9 which shows that contrary to what is being argued by the
10 Respondent, subjective procedures are validated. There are
11 legitimate ways in which you can validate those type of
12 criteria.
13 The other way --
14 QUESTION: By that, do you mean you validate each
15 factor that the local manager uses or validate the practice of
16 using multi-factor discretion? I'm a little puzzled.
17 MR. BRENDER: I think one problem with the facts of
18 this case is that the subjective -- I don't know whether it's
19 subjective process being used, but there was really no criteria
20 that was out there for which the supervisors were supposed to
21 make decisions.
22 But I think -- so, that system that they were using,
23 I think, is kind of far out from where a general subjective
24 hiring practice decision may be or promotion practice,
25 whatever, but I think that -- for instance, the practice that

1 they had, which was kind of a gut-level system, I want to --

2 QUESTION: The people who were familiar with the

3 employees in the best position to make a judgment as to which

4 would be the best supervisor, and there's really no way to

5 prove that that's a necessary way to hire people, is it?

6 MR. BRENDER: Well, I think there is, but I think you

7 could also validate it. In other words, you could simply take

8 -- for instance, one way you could validate this system would

9 simply be to take upper management and say okay, give us a

10 series of fact situations that you would want your supervisor

11 -- the supervisors would handle, from routine things, like a

12 social security check doesn't get credited, to things like, for

13 instance, attempted forgery. Give us those situations, tell us

14 how a successful supervisor would deal with those in a way that

15 we can rate those things in terms of knowledge of the job,

16 knowledge of the bank procedures, knowledge of maybe the law in

17 some instances, the speed with which they resolve them, and

18 those sorts of things.

19 And then what you do is you simply take the two

20 groups, you have the group --

21 QUESTION: It seems to me you're saying don't do it

22 on a subjective basis, that you must have a series of objective

23 criteria that can be reviewed.

24 MR. BRENDER: Only to validate, only to validate. In

25 other words, if you go through that processs, you take and you

1 test the people who are the successful people, the supervisors,
2 and then you test those who are the applicants but did not
3 succeed, and you find that there is a statistical difference on
4 the side of those who are selected.
5 In other words, you find that they are -- they were,
6 in fact, selected properly, then you could continue on with
7 your gut-level system. In other words, that only applies --
8 QUESTION: And if you find they made a few mistakes,
9 why, then, you're in trouble.
10 MR. BRENDER: If you made some mistakes, you're going
11 to have to either find an alternative process or put in some
12 criteria in this case that would --
13 QUESTION: And these are all by hypotheses innocent
14 mistakes? I mean there is no racial animus motivating any of
15 this.
16 MR. BRENDER: There wouldn't have to be.
17 QUESTION: Well, I mean, if you can prove racial
18 animus, you don't need any of this theory.
19 MR. BRENDER: Well, if you don't -- as I see
20 disparate impact, you could have racial animus. That doesn't
21 imply intent or lack of intent.
22 QUESTION: Mr. Brender, the sort of system that you
23 suggest for validating in response to Justice Stevens' question
24 may be find for a company like the Fort Worth Bank and Trust
25 Company that has a number of employees. How about an employer

1 who employs just a minimum number that's subject to Title VII?

2 Is he supposed to go through all of that, too?

3 MR. BRENDER: First of all, --

4 QUESTION: What is it, fifteen people or twenty

5 people?

6 MR. BRENDER: First of all, Your Honor, I think the

7 thing we've got to realize is that you have to be able to show

8 impact first, and I do think in smaller employers, it's going

9 to be difficult to show an impact simply because of the number

10 of decisions would not be sufficient to show statistically that

11 there's an impact.

12 But assuming that you could do it, there are other

13 ways to validate. That would not be the only way. You could

14 --

15 QUESTION: What would a small employer of twenty

16 people, how could he validate, you know, that sort of

17 subjective system that I think most of those employers probably

18 use?

19 MR. BRENDER: I think, first of all, there are the

20 transportability provisions to the guidelines. Those are

21 things that say -- for instance, a bank teller's job is not

22 that much different than a bank teller's job anywhere else.

23 You can take studies that have already been done.

24 QUESTION: But even an employer of twenty people

25 would have to go to studies and that sort of thing.

1 MR. BRENDER: Only if, only if they have a disparate
2 impact.
3 QUESTION: Of course, he doesn't know at any given
4 time whether his practices may be shown to have a disparate
5 impact or not. I take it that doesn't depend on intent.
6 MR. BRENDER: Well, it doesn't depend on intent, but
7 he is under the guidelines required to be looking at his
8 practices and aware of his practices under the provisions of
9 self-help provisions of the guidelines, where an employer is
10 encouraged to try to eliminate racial bias or racial effects in
11 his employment practices.
12 QUESTION: Well, Mr. Brender, isn't there something
13 short of this so-called validation that would suffice to
14 determine or establish that a particular employer's system of
15 evaluating or promoting employees is generally fair and
16 uniformly applied?
17 It seems to me there is a body of case law out there
18 to that effect.
19 MR. BRENDER: There is, and we have cited some of
20 those cases in our reply brief, where courts have simply held
21 that on different sorts of things, one of them that comes to
22 mind is the Zahorik v. Cornell University, where their process
23 of assessing people for tenure was found to be -- to satisfy
24 business necessity.
25 QUESTION: I mean, you would concede, I suppose, that

1 for supervisory and managerial positions, it probably isn't
2 possible to always use subjective standards in hiring, that
3 there will almost always be a subjective component in hiring
4 and promotional decisions for that kind of job.
5 MR. BRENDER: Well, I think there's --
6 QUESTION: Isn't that right?
7 MR. BRENDER: I think that's true. I think --
8 however, I do think that you can narrow subjective things. I
9 don't think there's a fine line between subjective and
10 objective.
11 For instance, by their definition, a test would be
12 objective, but an essay test could be very, very subjective.
13 By the same token, things like personal appearance, which were
14 on the rating form that they used and they had what they termed
15 was a professionally-developed form which they just simply
16 didn't use for promotions, but that can be very, very
17 objectively determined. If the criteria are set out, that's
18 what this case addressed in -- this Court addressed in
19 Albemarle, that if the criteria are set out and they are
20 specific, it really narrows subjectivity considerably, and I
21 think attempts -- some of the case law simply attempts to try
22 to get at narrower and more objective standards, have been held
23 to be justified by business necessity, and the same thing with
24 regard to the other factor that the Respondent raises about
25 cost studies.

1 There's certainly no evidence in this record that
2 such studies would be costly. There's no evidence at all.
3 They didn't attempt to produce that. Likewise, the --
4 QUESTION: Well, it must go without saying that a
5 strict validation procedure would, indeed, be very costly, and,
6 so, we need to look at this body of case law out there to see
7 what else might --
8 MR. BRENDER: Well, I think that body of case law can
9 he helpful. However, I don't think that the estimates of costs
10 are very accurate. There are, I think, four cites, none of
11 which are specific at all. In one of them, this OPM study, I
12 believe, says that this is entirely unreliable data.
13 Costs would not have to be great if, for instance,
14 one simply hired some expert to simply examine the procedure
15 and validate by content type studies, where they simply decide
16 that certain things in the interview are really relevant,
17 they're looked at and those relevant factors are applicable in
18 the job requirements, and then design the application or the
19 interview form so that it goes to those behaviors, and that's
20 not terribly costly to do one of those type studies.
21 Once again, those costs only have to be incurred
22 after there's an impact, after there's an adverse impact shown.
23 The studies that we've performed, the statistical studies,
24 showed that, for instance, in the assignment and in the
25 promotion, blacks, for instance, average fourteen months in a

1 particular pay grade as opposed to sixteen months for whites,
2 that blacks averaged about .18 pay grades, increase in pay
3 grade per year, as opposed to .53 per year, and in order to
4 test for things like education and tenure on the job and
5 experience on the job, we did a study that included those of
6 multiple regression, and that showed that over the four-year
7 period of time, blacks were 1.22 to 1.38 pay grades behind
8 comparably-situated whites.
9 QUESTION: May I ask what -- we're talking about
10 individual claims here, not class claims, aren't we?
11 MR. BRENDER: That's correct.
12 QUESTION: Does that mean that every individual --
13 say we accept your theory, does that mean that every individual
14 who is a minority person who sought promotion or sought a
15 higher wage during the period in issue would be entitled to
16 recover?
17 MR. BRENDER: I don't believe so, Justice Stevens.
18 QUESTION: How do you screen out those that do win
19 and those that don't win?
20 MR. BRENDER: Well, what -- as I understand it, I
21 think this is what the Court said in Connecticut v. Teale,
22 disparate impact is simply inference. You're taking the effect
23 on the group and from that, by being a member of the group,
24 you're inferring that you were so injured and that's how you
25 establish liability.

1 QUESTION: Well, but they're all injured if they all
2 applied.
3 MR. BRENDER: I agree, but if it's not a class
4 action, I don't believe, unless they came in and applied within
5 the 180 days and fulfilled the other agreements, that they
6 would be eligible for any relief.
7 QUESTION: It seems to me each one would be equally
8 entitled to relief under your theory because there's an absence
9 of intent or any -- I may not quite get the understanding here.
10 MR. BRENDER: I think that if they were in the case,
11 but what I'm saying is the statistical proof would not put them
12 in the case.
13 QUESTION: Why not, if they're a member of the group
14 to which the statistics apply? Of course, you have to file a
15 lawsuit, I realize that, but I would think all lawsuits would
16 become fungible by members of the class.
17 MR. BRENDER: Well, if there was a class action, they
18 could certainly come in and show they were members of the
19 class.
20 QUESTION: Right. That's easy if you've got a class
21 action. We don't -- we have a case where, by hypothesis, we
22 have no class action and no invidious intent. We have
23 statistics to show that every member of a particular class was
24 not promoted. There are thirty people in the class and there
25 are five jobs. They would all prevail.

1 MR. BRENDER: Well, I don't think the proof
2 necessarily says they would all prevail because they couldn't
3 all get the one job. It just simply says --
4 QUESTION: How do you decide which would have gotten
5 it? I don't understand.
6 MR. BRENDER: Well, all you're showing is that the
7 decision-making was based on an impermissible racial component.
8 That's what the statistics are saying. They're not saying that
9 everyone --
10 QUESTION: I thought they were showing that the
11 permissible factors that were used involving discretion had the
12 unfortunate consequence, unintended, of ending up with either
13 getting many more males than you should have or many more
14 females than you should have.
15 MR. BRENDER: That's correct.
16 QUESTION: And whichever way it goes, it seems to me
17 the employer --
18 MR. BRENDER: That wouldn't mean every applicant
19 would then be entitled to the job.
20 QUESTION: But how do you decide which ones are and
21 which are not?
22 MR. BRENDER: I think --
23 QUESTION: Each case would have discretionary
24 decision.
25 MR. BRENDER: That's right, but I think that applies

1 in class actions, too. I mean, the court then has to decide
2 whether a person was actually injured or not, and usually they
3 do that sometimes on the percentage allocation of resources.
4 I see what you mean. If you have like three or four
5 people who are all complaining about the same --
6 QUESTION: Well, very frankly, what's running through
7 my mind, I hire a lot of law clerks, and I do it on a
8 discretionary basis, and I suppose statistically I either
9 discriminate against men or women, just to take a simple case,
10 and say all the male applicants who applied and I turned down
11 come in and say, well, statistically, you've got a
12 disproportionate number of women clerks, and I say I guess I
13 have, but I just kind of pick them as they come.
14 Which law clerks will prevail and which won't? I
15 don't --
16 MR. BRENDER: Well, if you were shown to have a
17 disparate impact because you greatly were favoring one group
18 over another in your hiring practices, and then the question is
19 what individual out of that group would then prevail --
20 QUESTION: And there are a lot of them who are
21 qualified that were turned down.
22 MR. BRENDER: Well, the only one -- okay. Only one
23 person could get the job, let's assume.
24 QUESTION: Right.
25 MR. BRENDER: If that's the case, then the Court is

1 simply -- it's a matter of damages, as I see it. They're not --

2 QUESTION: Well, why? Why is it any different from

3 the ordinary case? Let's say you have an employer who will not

4 hire blacks. He turns down five blacks for a single job and

5 hires a white individual for it. Wouldn't each one of those

6 five blacks have a cause of action?

7 MR. BRENDER: They would have --

8 QUESTION: Do you think just one would?

9 MR. BRENDER: I think -- yeah. I think they would

10 have the cause of action. I don't think they would have the

11 relief, is what I'm saying.

12 QUESTION: What good is the cause of action without

13 relief? What do you mean? They have a cause of action for

14 what?

15 MR. BRENDER: By that, I don't mean they would not

16 have total relief. They might have -- let's say that they had a

17 back wage award which would be determined by the fact that only

18 one of them would have gotten the job, so that let's just say

19 that they were disadvantaged by one year's worth of half wages,

20 and you had two people who were equally disadvantaged by the

21 process, then they would have to -- the way it's commonly done

22 in class actions is that they would simply split that back wage

23 award.

24 QUESTION: Anyway, I suppose your answer to all this

25 is if this is a problem, it's not a problem you're creating,

1 this must be a problem under Griggs, too.

2 MR. BRENDER: Well, I think it would be a problem

3 under intentional discrimination, too. I mean, it wouldn't be

4 specific to impact analysis, it would be the same thing if it

5 was disparate treatment analysis because you could show the

6 same thing statistically.

7 You know, it's a problem of relief and I've dealt

8 with it in class actions, not on individual contexts, and

9 that's usually the way it's been done in class context, but I

10 don't think it would have anything to do, you know, relative to

11 the matter of proof because all we're talking about is an

12 inference of discrimination, liability, in other words, and

13 then the damage situation would be another portion.

14 I can see that in terms of the injunctive relief

15 might be difficult if you have one position and two people who

16 have filed a claim, which can happen outside of the class

17 action, and/or there's just a limited number of applicants that

18 have been determined to be eligible for those said positions.

19 But, once again, I don't think that's particular to

20 this particular method of proof.

21 I'd like to at this time reserve my time for

22 rebuttal.

23 Thank you.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Brender.

25 We'll hear now from you, Mr. McGee.

1 ORAL ARGUMENT OF BRUCE W. McGEE, ESQ.

2 ON BEHALF OF THE RESPONDENT

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

5 Much of Petitioner's account of this case today is
6 irrelevant and perhaps, to some extent, even inaccurate. What
7 is clear and what is important for this Court's consideration
8 is that the judgment of the Court of Appeals found that my
9 client was not a discriminator. That is to say that the Court
10 of Appeals -- that the Petitioner did not prevail in its
11 disparate treatment claim against the bank.

12 It's also clear that --

13 QUESTION: Did not prevail on discrimination.

14 MR. McGEE: That is correct, Justice White.

15 It is also clear that the judgment of the Court of
16 Appeals found that this was the judgment of the trial court as
17 well.

18 The 5th Circuit did --

19 QUESTION: Mr. McGee, did the trial court consider
20 the statistical evidence in the disparate treatment claim?

21 MR. McGEE: Yes, Justice O'Connor, it did. The --

22 QUESTION: And held that it didn't raise any
23 inference?

24 MR. McGEE: They considered it both in whether or not
25 it raised the prima facie case under McDonnell Douglas and then

1 whether or not it had been used to show, by the Petitioner to
2 show that the articulated reasons by the bank were a pretext
3 and they found that the District Court considered those fully
4 or at least there was no suggestion that it did not, and
5 concluded that the statistics had been given full weight by the
6 trial court.
7 The difference in the two types of causes of action
8 or methods of proof that the Petitioner seeks today are quite
9 clear and have a dramatic effect on this case.
10 On the one hand, the case was tried under the
11 disparate treatment method, which is the McDonnell Douglas,
12 Furnco, Burdine method of proof. The court, applying 5th
13 Circuit precedent, applied those tests and determined that the
14 Petitioner had made a prima facie case of her claim of racial
15 discrimination, but that the bank had articulated a reasonable
16 legitimate excuse, a reason for its actions --
17 QUESTION: What was that?
18 MR. McGEE: They described four different reasons for
19 the non-selection. With the case of the first selection, the
20 court determined that the bank chose Mr. Burt over Ms. Watson
21 because of considerations of his experience, his previous
22 supervisory experience, his close working relationship with Mr.
23 Shipp, who was the bank's operation officer at that time.
24 Also, his greater or better qualifications than Ms. Watson.
25 With regard to the second decision, that being the

1 one where Ms. Cullar was chosen as the motor bank supervisor,
2 the same types of considerations were made. The court
3 concluded that Mr. Burt had a greater opinion of Ms. Cullar's
4 qualifications than those of Ms. Watson and that those reasons
5 were not pretext for discrimination.

6 Likewise, with the other two selections, the same
7 type of considerations were made and the same type of
8 determinations was made. The qualifications were not identical
9 in each case, but they were similar. They were all these
10 discretionary intuitive-type of judgments that this person is
11 the best qualified for this particular job.

12 That highlights the distinction between the disparate
13 impact test which would require no proof of discriminatory
14 treatment, no proof of intent or motivation, but would rather
15 require only that the Petitioner here show that there was a
16 disproportionate representation of blacks in the bank's work
17 force.

18 QUESTION: Well, Mr. McGee, it seems to me the
19 initial proof would be the same under the statistics, under
20 either theory.

21 MR. McGEE: The initial proof would --

22 QUESTION: The initial proof by the Plaintiff and
23 apparently there was enough to make out a prima facie case of
24 disparate treatment here.

25 MR. McGEE: That is correct, Justice O'Connor.

1 QUESTION: And I assume the exact same proof would be
2 offered and considered under disparate impact.
3 MR. McGEE: I know of nothing that could be offered
4 at trial that would be any different. This case was tried over
5 four days. It was --
6 QUESTION: Right. So, it just turns on what the
7 Defendant's burden is after that?
8 MR. McGEE: That is correct. It is a greater burden
9 under the impact theory that's thrust upon the Defendant that
10 would affect this case.
11 QUESTION: And what do you think the difference is in
12 the Defendant's burden under the two?
13 MR. McGEE: Well, with this particular case, --
14 QUESTION: And do you think this Court has spoken to
15 that?
16 MR. McGEE: No, I do not. I don't believe this Court
17 has spoken to it. However, by the very nature of the impact
18 burden of proof or the burden that's put upon the Defendant,
19 the requirement of validation of his selection process, there
20 is, in this case, a virtually insurmountable burden of proof.
21 The nature of subjective criteria are such that
22 despite what the APA says --
23 QUESTION: Well, I don't think it's established that
24 there is a need to prove validation, is there? I mean, I'm
25 just trying to get out the bottom line of what the Defendant

1 has to show in these cases under the two theories.

2 MR. McGEE: As I read Griggs and those that follow,

3 there is a requirement that the Petitioner or that the

4 Plaintiff point out a specific facially-neutral arbitrary-type

5 of standard or requirement that causes the impacts complained

6 of. That's not been done here.

7 So, under my theory or my view of this case, the

8 Petitioner would still lose because she has never made her

9 prima facie case, but the trial court could and very well

10 likely would conclude that they had and then would put us to

11 validating our entire selection process without ever having

12 been pointed to the one specific point in that selection

13 process that caused the impact.

14 I don't think that that validation can be done. What

15 the APA talks about as validation are really objective-cation

16 of a subjective system, which is quite a long ways from

17 validating the bank's selection system.

18 The trial court found that the bank was absolutely

19 free of any racial discriminatory intent or motivation. It

20 selects -- it uses and has selected a process which it believes

21 best serves its needs, its legitimate business needs, as an

22 employer, and there was --

23 QUESTION: Well, not necessarily. It may be wrong.

24 I mean, isn't the big difference between validation under the

25 impact test and what you urge be applied here, isn't the big

1 difference that the employer, if he's using an objective test
2 under Griggs, he has to be right? He has to be not merely --
3 the reason he failed to hire this individual has to be not
4 merely something that has nothing to do with racial
5 discrimination or any other unlawful discrimination, but it has
6 to be correct.
7 MR. McGEE: That is correct.
8 QUESTION: Whereas, under your theory, this bank
9 would be entirely entitled to put the wrong people in the
10 position, so long as they didn't pick the wrong people because
11 of racial animus or sex animus.
12 MR. McGEE: Obviously, errors can occur and we would
13 submit that we have the right to make those errors.
14 QUESTION: You're not asserting that you established
15 below or that the Court thought you established below that, in
16 fact, your system's a good one, that you're picking the best
17 people? All the Court really found is that it may be terrible,
18 but whatever is terrible about it had nothing to do with racial
19 or sexual animus.
20 MR. McGEE: That's correct. The system was not on
21 trial at the District Court. The --
22 QUESTION: Let me just go on further. But the
23 question, it seems to me, this raises is there's no racial
24 animus in the objective -- say you require a high school
25 diploma. That's not job-related, but it has the impact of

1 denying a lot of minority applicants jobs.

2 Well, what if your use of this discretionary factor

3 also has the same impact? You didn't mean it. Just like

4 requiring a high school diploma. You didn't mean to hurt

5 anybody, but, in fact, you did.

6 If this system, in fact, causes precisely the same

7 harm, why should you not have to have precisely the same

8 defense?

9 MR. McGEE: Well, the difference is, Justice Stevens,

10 that with the facially-neutral objective requirements, there is

11 a uniform or automatic disqualification of certain people.

12 It's applied across the board. But in our -- my client's

13 employment system, each selection, each of these four

14 selections that are involved in this case, were done on an

15 individual basis.

16 The criteria differed to some extent in each case.

17 There was no automatic disqualification. The impact, if you

18 will, is not really shown because of the system itself, but

19 rather the results of things that may be totally unrelated to

20 the subjective system that is being criticized.

21 QUESTION: What if it goes on for ten years and you

22 just get hundreds and hundreds of black applicants turned down

23 and you never hire anybody but white, would you say the same

24 thing?

25 MR. McGEE: This Court has provided an adequate

1 method for challenging that type of result. The pattern and
2 practice tests that are referred to in McDonnell Douglas and
3 Justice Powell's opinion make clear that an individual can show
4 that the employer's procedure or practices in carrying on its
5 business are evidence of racial intent itself, and if they are
6 sufficiently great of the type you described, I feel certain
7 that the Plaintiff would be able to obtain a finding that, in
8 fact, any reasons offered by the Defendant were, in fact, a
9 pretext for his racially-discriminatory intention.
10 If my client is found wrong here today, even though
11 he's not -- he's been found not to have any racial intention or
12 any discriminatory intention or motivation, the result will not
13 be that he -- that it switches to an objective system for
14 making its promotional decisions. It will, instead, not go to
15 objective tests because we don't believe that any tests exist
16 today which will give my client the type of decisions they
17 choose and we don't believe that they can be formulated or
18 devised in any time in the foreseeable future at a cost that
19 would be acceptable to my client.
20 But what my client will continue to do is to make the
21 subjective decisions that it has in the past because it
22 believes this is the best and most fair way to satisfy its
23 legitimate business need to supply itself with employers and
24 supervisors, rather, who are the best qualified.
25 But what it will be forced to do to protect itself in

1 the future is to overlay on that subjective system a numerical
2 quota system, and I do not believe that this is what the
3 Congress intended when it enacted Title VII.
4 The subjective system that is challenged sounds, on
5 the basis of the briefs on the Petitioner's side, to be maybe a
6 little bit sloppy and somewhat inferior, and particularly when
7 you have thrown up on the other side the concept of objective
8 tests, which have the sound of being scientific and fair, but,
9 really, the decisions that are being made at my client's place
10 of business are the types of decisions that are made all over
11 this country by employers of all sizes, particularly those that
12 are smaller, like my client, but all employers.
13 The -- no one would suggest, I don't believe, that
14 the employer would prefer to continue to have the right to make
15 his judgments on promotion based upon his view of what is most
16 important to him, who best typifies those criteria and those
17 traits which he thinks are most important to his business
18 decisions.
19 The experience that the employer has with dealing
20 with these people who are applicants for promotion puts him in
21 the best position to determine who has the characteristics,
22 such as leadership or ability to relate to other people or the
23 respect of the co-workers, the honesty, integrity, those types
24 of subjective discretionary criteria that were employed here.
25 QUESTION: Mr. McGee, I'm not sure that validation of

1 an objective test is a very simple operation either. I mean,
2 I've heard argument in other cases bemoaning the difficulty of
3 validating an objective test and what many employers in that
4 situation simply say is just what you've said, that the way to
5 solve the problem is simply to make sure that whatever kind of
6 an objective test you apply, it ends up with a work force that
7 is more or less balanced by race, by sex, and so forth.
8 Now, what's the reason for treating your employer
9 differently just because he's using a subjective test? I mean,
10 I gather that we've made the decision that if you use an
11 objective test, you not only have to be free of discrimination,
12 you have to be right. You have to be using tests that really
13 do work to get the best people.
14 Why should -- morally, why should we have a different
15 test for subjective employers?
16 MR. McGEE: I think because while validation of
17 objective testing devices may be hard, it has been demonstrated
18 that it can be done. There has absolutely been no
19 demonstration even though many years of efforts and studies
20 have been done, there's been no indication that subjective
21 criteria can be validated.
22 I believe that the result will be that a subjective
23 system, if challenged under the theory proposed by the
24 Petitioner, will result in an automatic finding of liability if
25 there's an imbalance.

1 QUESTION: The fact is that it's doable for an
2 objective test, but the cost of doing it is usually more than
3 the cost of simply adopting a relatively balanced work force,
4 and it's my impression that that's the way most employers meet
5 the problem, and if that's the case, then I see no difference
6 between their situation and your client's.
7 MR. McGEE: Well, I am not familiar with what other
8 employers do and whether that is how they respond to the
9 question, but there's no question in my mind that that's what I
10 would have to recommend to my client.
11 The numerical quota system is the only appropriate
12 response to a finding of the type Petitioner seeks.
13 My problem with that, Justice Scalia, is that that is
14 not the intention of Congress, at least not the way I read
15 Title VII and the history of Title VII. It's just the
16 contrary. It places the decision of who is promoted, instead
17 of being free of racial consideration, race becomes the
18 paramount consideration.
19 To me, that's just an absolute abomination of the
20 purpose of Title VII.
21 The cases of this Court have uniformly, I believe,
22 recognized a distinction between the objective types of
23 criteria as opposed to the subjective criteria that we're
24 considering here today.
25 The Griggs case, of course, dealt with the objective

1 test of the high school education requirement, and also the
2 standardized testing. That type of objective standard was
3 easily identifiable. The causation could be pointed to and the
4 impact shown.

5 Those type of objective standards have been found in
6 other cases, such as Dothard, involving the minimum height and
7 weight requirement, the New York Transit Authority case, which
8 dealt with the exclusionary rule that disqualified persons who
9 had a history of drug use, Teale that dealt with a written
10 test, and Albemarle that dealt with written tests.

11 But opposed to those type of cases are the McDonnell
12 Douglas, the Furnco, the Aikens and the Burdine cases, which
13 recognize a different set of proof and a different set of
14 facts.

15 The situation in McDonnell Douglas was an individual
16 who complained that he was not hired because of his
17 participation -- was not hired because of his race. The reason
18 articulated by the employer was that he was not hired or not
19 rehired because of his participation in illegal activities.

20 The Court held and pointed out the distinction
21 between that type of an articulated reason that is subjective
22 and inherently unique to the employer as opposed to those which
23 were present in Griggs which had the effect of disqualifying
24 large groups of people automatically, and I think that's the
25 key to the distinction between McDonnell Douglas and Griggs, is

1 that, on the one hand, you have these objective artificial
2 rules which disqualify large groups of people, regardless of
3 consideration of their individual qualifications, where, with
4 McDonnell Douglas, you have a consideration of qualifications.
5 Here, in my case, the bank recognized that Clara
6 Watson was fully qualified for the job she sought or at least
7 possessed the minimum qualifications as well as did others.
8 Some of the selections that were involved here today, there
9 were four or five other people considered, including in that
10 group was at least one other black person.
11 The bank considered the qualifications of each of
12 those people on an individual basis and reached the conclusion
13 that the person selected was the best qualified and, therefore,
14 the others were less qualified. But that's the type of
15 selection process that was referred to in the Johnson v.
16 Transportation Authority opinion from last term.
17 The purpose of Title VII impact cases is to remove
18 these arbitrary barriers which prevent large groups of
19 minorities and women from being qualified. But once they've
20 been qualified, then the decisions as to whether they were
21 chosen or not chosen should be considered under disparate
22 treatment theory.
23 If there is a pattern and practice of racial
24 discrimination or discrimination on other prohibited bases,
25 then that will come out as a part of the disparate treatment

1 proof, and if it is proved by the statistical evidence, it can
2 be dealt with and can be the basis for finding that the
3 defendant is guilty of discriminatory intent.
4 QUESTION: What is the EEOC's view?
5 MR. McGEE: The EEOC views the case exactly the same
6 way I do. They have filed a brief before this Court which
7 supports --
8 QUESTION: Have they always had that view?
9 MR. McGEE: No, Justice White. I think their view is
10 best described as having been inconsistent. They have had
11 varying views over the history of Title VII.
12 QUESTION: Well, what was its view immediately before
13 the present view?
14 MR. McGEE: Let me see if I can go back in time. I
15 believe --
16 QUESTION: Well, it shouldn't be too long.
17 MR. McGEE: In 1978, when the uniform guidelines were
18 adopted, they had the view that subjective selection processes,
19 such as present here, might not be verifiable or validateable
20 and, therefore, need only be validated under the federal law,
21 which comments to the uniform guidelines suggest would be under
22 the disparate treatment theory as announced in McDonnell
23 Douglas.
24 Prior to that, there was the 1970 guidelines, had
25 some rather harsh validation requirements on all forms of

1 selection processes.

2 QUESTION: Including subjective?

3 MR. McGEE: Objective and subjective. Yes, sir. And

4 the '78 guidelines were seen as a response to the complaints of

5 the APA and other professionals that they were basically

6 unachievable goals and objectives and put the defendant, the

7 employer, in the position of basically being out of compliance

8 automatically, and that is the reason for the '78 guidelines

9 and why the EEOC supports our position here today.

10 The -- one other thing that I'd like to point out in

11 response to a question to Mr. Brender, the numbers in this case

12 do not make disparate impact an appropriate method of proof.

13 There are only two black employees who sought

14 promotions, Clara Watson and one other employee. Those numbers

15 are entirely too small to make any kind of determination of

16 statistical impact or statistical significance, and --

17 QUESTION: By your own figures, how many employees

18 are there involved in the whole bank?

19 MR. McGEE: How many employees are involved in the

20 whole bank?

21 QUESTION: Yes.

22 MR. McGEE: There are approximately eighty employees.

23 QUESTION: And how many are those are Negroes?

24 MR. McGEE: Approximately nine or ten.

25 QUESTION: And one's a cook and one's a janitor.

1 What are the others?

2 MR. McGEE: There are no employees that I'm aware of

3 in those positions any longer, Justice Marshall.

4 QUESTION: I thought one Negro was in the cafeteria.

5 MR. McGEE: The bank does not have a cafeteria at

6 this time nor did it have at the time of the trial. They did

7 have a --

8 QUESTION: What jobs do the nine have?

9 MR. McGEE: There is one employee, I believe, that

10 has the position that you're referring to, it's not a -- they

11 do not have a cafeteria, but there's someone in a position

12 that's similar to what you have described. The other positions

13 are all employees of the bank in either operations or in the

14 teller's --

15 QUESTION: Like what? How many are on the floor of

16 the bank?

17 MR. McGEE: There are approximately four. Fifty

18 percent of those people are on the floor of the bank.

19 QUESTION: Four?

20 MR. McGEE: Yes.

21 QUESTION: Out of how many?

22 MR. McGEE: Out of eight.

23 QUESTION: So, only half of them are Negroes.

24 MR. McGEE: That's correct. How many Negroes are on

25 the --

1 QUESTION: That was what I asked.

2 MR. McGEE: Yes. Half of those people are operating

3 in positions similar to the one Ms. Watson's in.

4 QUESTION: You mean they're tellers?

5 MR. McGEE: Some are tellers, some are customer

6 service personnel, but they all function in the same area of

7 the bank.

8 QUESTION: You know, one time I had a case where they

9 reported that they had a Negro employed as a telephonic expert.

10 They were talking about a telephone operator. I mean, I didn't

11 want to get in that category.

12 MR. McGEE: I don't think that's what we have here.

13 I think all of the positions, including the position that you

14 referred to, are all legitimate important positions to the

15 bank, including, at the time of trial, one black employee who

16 was serving as an assistant supervisor in the motor bank

17 facility. This is the same employee who had sought some of the

18 earlier promotions that Ms. Watson sought.

19 The subjective selections that my client uses are not

20 inherently bad. They have just been thrust in this position by

21 the Petitioner. They are no different than the type of

22 selection process that Justice Stevens referred to with his law

23 clerks.

24 If, for instance, Justice Stevens determined that he

25 chose to retain one of his law clerks for a second term, and he

1 wanted to choose among the law clerks he had which one that he
2 would retain for that second term, he's going to necessarily
3 rely upon his intuitive subjective judgment as to which one is
4 the best qualified, will most fulfill his needs as a law clerk,
5 and I think it's just ludicrous to suggest that Justice Stevens
6 should have to hire an industrial psychologist to devise some
7 form of test so that his decisions can be validated so as he
8 can avoid a claim of discriminatory impact.
9 QUESTION: Actually, that's a bad example. That
10 would be easy to validate. You would pick the masochist, I
11 think.
12 QUESTION: No. I was going to say if I did that,
13 maybe I'd have better law clerks.
14 MR. McGEE: That's important.
15 QUESTION: We won't quote you.
16 MR. McGEE: McDonnell Douglas makes clear and Burdine
17 makes clear that the law does not require that the employer
18 have the best or the most balanced work force. It's only that
19 he make those decisions free of discriminatory intent and
20 animus, and that is what the trial court found and is what the
21 Court of Appeals has affirmed.
22 They found that my client was not a discriminator,
23 and we suggest that the opinion of the --
24 QUESTION: But when you say he was not a
25 discriminator, what you mean is he did not intentionally

1 discriminate? The problem the case really raises is a very
2 difficult one. There are a lot of people who don't think
3 they're discriminators but who maybe really are without knowing
4 it, and that's what the -- that's the troublesome problem this
5 case raises.

6 MR. McGEE: Well, I agree that that is the problem
7 with this case, but this case differs from those, such as
8 Griggs, where you're dealing with non-intent. By definition,
9 these judgments and selections that my client made were
10 intentional decisions. They made a judgment to choose this
11 person or to not choose that person. Those are intent-based
12 decisions by definition and should be properly analyzed under
13 disparate treatment tests.

14 We would urge that the opinion of the court below be
15 affirmed.

16 Thank you.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. McGee.

18 Mr. Brender, you have two minutes remaining.

19 ORAL ARGUMENT OF ART BRENDER, ESQ.

20 ON BEHALF OF THE PETITIONER - REBUTTAL

21 MR. BRENDER: Thank you, Mr. Chief Justice.

22 Justice White, the EEOC position has changed much
23 more recently because, in 1986, in the 8th Circuit, in EEOC v.
24 Rath Packing Company, the EEOC prosecuted the Rath Packing
25 Company for subjective hiring and promotion practices under the

1 disparate impact theory and prevailed. The court so found.

2 Their guidelines for eighteen years have required

3 that subjective practices be treated under the disparate impact

4 theory and the questions and answers that are supposed to guide

5 employers in applying the guidelines state that, too, and we

6 have that in our reply brief.

7 There's no difference between the provisions that the

8 Respondent cites for subjective procedures and the ones for

9 objective procedures. Just like in the case studies for costs,

10 there is no difference between objective -- the cost for

11 objective and subjective validation. They just don't make that

12 distinction.

13 QUESTION: Well, the Solicitor General, speaking on

14 behalf of the EEOC and the United States, said that the

15 subjective methods must be justified, need only be shown that

16 the selection procedure is reasonably related to the

17 requirements of the job or other business needs, and has been

18 applied in a non-pretextural fashion. That's what its brief

19 says.

20 MR. BRENDER: I know. He kind of combined --

21 QUESTION: Let me just ask you. Assume that that is

22 the right test, assume that that is the right test, was that

23 test satisfied in this case? Was that kind of a justification

24 offered?

25 MR. BRENDER: No. Well, the problem is --

1 QUESTION: Or found or applied by --

2 MR. BRENDER: No. They provided no justification

3 whatsoever for their practices. I mean, they just said we have

4 them, we try to select the best person. Of course, the problem

5 is the best person was always white. There were many more

6 decisions, by the way, in our statistics.

7 We took into account every increase in pay grade.

8 So, that was --

9 QUESTION: What I'm trying to find out, if that's the

10 test -- was that the test that was applied in this case by the

11 courts below or not?

12 MR. BRENDER: No. He has kind of a hybrid test there

13 where he uses disparate impact analysis not to justify the

14 particular decision, but to justify the particular -- they

15 don't address what the burden of proof is going to be on the

16 employer in doing that, and I don't find any support in any

17 case law for that test. It wasn't applied in this case.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Brender.

19 The case is submitted.

20 MR. BRENDER: Thank you, Your Honor.

21 CHIEF JUSTICE REHNQUIST: We'll hear argument next in

22 Number 87-5002, Ellis T. McCoy v. The Court of Appeals of

23 Wisconsin.

24 (Whereupon, at 11:01 o'clock a.m., the case in the

25 above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-6139

CASE TITLE: Clara Watson v. Fort Worth Bank and Trust

HEARING DATE: Wednesday, January 20, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States.

Date: 1/20/88

Margaret Daly
Official Reporter

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