ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: WARDS COVE PACKING COMPANY, INC., ET AL., Petitioners V. FRANK ATONIO, ET AL.

CASE NO: 87-1387

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IN THE SUPREME COURT OF THE UNITED STATES

WARDS COVE PACKING COMPANY, INC., ET AL., Petitioners

v. : No. 87-1387

FRANK ATONIO, ET AL.

Washington, D.C.

Wednesday, January 18, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:58 o'clock p.m.

APPEARANCES:

DOUGLAS M. FRYER, ESQ., Seattle Washington.

ABRAHAM A. ARDITI, ESQ., Seattle, Washington.

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P R O C E E D I N G S

(1:58 p.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument next in Number 87-1387, Wards Cove Packing Company v. Frank Atonio.

Mr. Fryer, you may proceed whenever you are ready.

ORAL ARGUMENT OF DOUGLAS M. FRYER

ON BEHALF OF THE PETITIONERS

MR. FRYER: Thank you, Mr. Chief Justice, may it please the Court:

This Court has granted certiorari to review three important questions.

I would like to discuss the questions in the order presented in the petition.

The first question really goes to the heart of this case. And that is, whether comparative statistics, which show only a racial imbalance in the work force are to be preferred as a matter of law, over the trial court findings of fact as to the relevant labor market. There is a stark contrast between these two measurements.

Petitioner's labor market analysis is widely used in civil rights litigation and it has been backed by every level of the federal judiciary, including this Court. It is explicitly adopted by the very

EEOCguidelines which are relied upon by the Respondents in their brief.

Indeed, it is ironic that in order to prevail in this case, the Respondents, and the amicus supporting them, are urging this Court, to urge as a matter of law that one of the most formidable tools that we have to measure employment discrimination, namely the labor market analysis, is to be discarded.

QUESTION: You say, Mr. Fryer, that your labor market analysis is approved by the EEOC. Can you give us a couple of sentence description as to what your labor market analysis is?

MR. FRYER: The labor market analysis was based upon the one percent sample from the Census. It was drawn from the large geographic areas, where the employees were drawn from -- from the western United States, in the areas that supplied people for this industry -- Alaska, Oregon, Washington, and California.

QUESTION: Well, Mr. Fryer, I gather the district court relied on your expert's suggestion of just using Census data for a very wide area of the Pacific Northwest --

MR. FRYER: That is correct.

QUESTION: -- as the relevant labor market?

MR. FRYER: That is correct.

QUESTION: Now, the Ninth Circuit rejected that and relied upon the pool of workers -- the cannery workers themselves -- and a more restricted pool and said that was determinative, is that correct?

MR. FRYER: That is correct.

QUESTION: They just looked at the labor force.

MR. FRYER: The internal work force, yes.

QUESTION: The internal labor force of the cannery workers.

MR. FRYER: The internal labor force, including the cannery workers.

QUESTION: Including the cannery workers.

MR. FRYER: Yes.

QUESTION: Now, if we were to reject the Ninth Circuit's view of the appropriate pool, we then go back to what the district court found?

MR. FRYER: That is correct, Your Honor.

QUESTION: And even your expert said that the figure should not include college professors and construction workers and other groups which are not reasonably available for the jobs at issue. And yet, the district court accepted that Census data, even though your own expert said some of these groups shouldn't be included.

So what do we do with that? What if we

thinkthe district court erred, too?

MR. FRYER: Well, first that is a finding of fact. It has never been challenged. It is clearly erroneous.

QUESTION: So, we just accept it?

MR. FRYER: I think the Court should just accept it. And a person could, if they wished, get into the nuances, the evidentiary nuances as to why or why not some of this labor market analysis might or might not apply in a given situation.

But you see, with the broad numbers, and the various methods that Dr. Rees took into consideration -- it really dcesn't make any difference and those are credibility arguments. The attacks on the statistics are credibility arguments. The Respondents did not challenge those findings under the clearly erroneous standard. They challenged those findings as a matter of law.

And --

QUESTION: And, and the Ninth Circuit said, as a matter of law, the relevant pool is all the workers?

MR. FRYER: Yes, that is correct.

QUESTION: And nothing outside?

MR. FRYER: And nothing else.

QUESTION: You would take the labor force

anddo what with it? You would compare what?

MR. FRYER: We would compare the employer's hiring practices against that measure of racial composition.

QUESTION: And you would compare how many minorities were hired -- compare that with how many minorities there were in the labor force?

MR. FRYER: That is correct, Your Honor.

QUESTION: I mean not in the labor force, the market.

MR. FRYER: The labor market.

QUESTION: The labor market.

MR. FRYER: Yes. The discrete finding of fact is finding of fact number 123, of the trial court.

QUESTION: What would you do -- would you take the cannery and non-cannery workers together to compare with the labor force -- market statistics, or would you do them separately?

MR. FRYER: Well, you do them separately but you do them separately for a distinctive reason and that is the cannery workers are a part of this labor force, this labor supply for the entire industry. And I think that is one of the ways the Ninth Circuit seemed to get off track here.

You have to look at the labor supply as

awhole. Now, there is a very small slice of that labor supply that is represented by Local 37 of the ILWU. That is the union that has the contract for jurisdiction over particular jobs.

Now, now the way this industry operates -- you have to understand the way the industry operates to understand the statistics. I think the error of the Ninth Circuit was a misunderstanding of the industry which the trial court apparently understood very well.

Now, the way that people are hired in this industry, first you have to start with the basics. The canneries are located in remote areas of Alaska, that is a given fact. The seasons are short. They are very intense. There is no time during the season to train skilled people. Once that cannery is in operation and the fish are coming in, the fish have got to be canned.

That season is over in from three weeks to two months. As soon as the canning stops, the cannery workers go home, the rest of the workers put the cannery away and then everybody is terminated and they return to their homes.

Now, over the winter months, the employer faced with this industrial situation has determined that since he doesn't have time during the season to train people for the skilled jobs, he has got to look to

a labor market for those jobs.

And it is a given fact that he has to deal with that that labor market is 10 percent non-white and 90 percent white. That is --

QUESTION: That is if you say the relevant market is the whole Pacific Northwest and you rely on Census data. This is a disparate impact case, right?

MR. FRYER: That is correct.

QUESTION: Now, in such a case, do you think that the use of a particular hiring channel or market can be a facially neutral practice that is subject to disparate impact analysis?

Suppose there is an employer who has the factory, in let's say the Harlem section of New York, and that employer chooses to do all of his hiring out in Westchester County, and the result is largely a white work force.

Now, is that a practice subject to disparate impact analysis?

MR. FRYER: Well, it certainly could be subject to disparate treatment analysis.

QUESTION: That is not my question.

MR. FRYER: Yes --

QUESTION: And if so, what does the Court do? Is the Court's first task to draw an ideal market out

ofwhich the employer must draw the work force as a means of testing it; is that the first step?

MR. FRYER: Well, perhaps, perhaps I could answer it this way -- for disparate impact we have got to have some -- disparate impact analysis is statistical. It has got to be statistical on some basis.

So, we have to look to some objective measure to judge the employer's practice. And then the question is what is that measure?

Our case is not a situation where we look to a discrete area dominated by whites. That is not the situation. We look to broad areas in the western United States.

QUESTION: Well, what does the plaintiff have to do and how does the Court get into it on a disparate impact analysis; that is what we have. What does the plaintiff have to show for the market?

MR. FRYER: The plaintiff has to develop some measure of the employment practices, obviously.

QUESTION: This Plaintiff says, we want to look just at the in-house work force.

MR. FRYER: At the internal work force, yes. And our position is that that is not really relevant. That the internal work force is only a small measure of this overall labor market. You see, it takes months

tofill the at-issue jobs.

QUESTION: The what jobs?

MR. FRYER: The at-issue jobs.

QUESTION: The ones that issue in this lawsuit?

MR. FRYER: The ones that issue in this lawsuit -- it takes months to draw these people in. When those jobs are filled --

QUESTION: Are you talking now about the cannery workers or about the non --

MR. FRYER: No, the non-cannery workers, Your Honor. Those jobs are all filled by early spring. After those jobs are filled and after those people are sent to Alaska to open up the canneries, then Local 37 which has a contract, is contacted to supply cannery workers.

QUESTION: Was there a claim in this case, that people who were cannery workers should have been promoted to the non-cannery jobs?

MR. FRYER: That was a contention early on in the case period, yes, it was.

QUESTION: So far as you know, does the respondent still take that position?

MR. FRYER: I think it is implicit in their position, yes, that -- I think it has got to be implicit in their position that the employer should have

trainedpeople in the cannery worker position to take other jobs and should have promoted --

QUESTION: And what was your position in response to that?

MR. FRYER: First of all, the employer did not promote from within as a matter of practice, because of these industrial circumstances there was just no time to train people. And because of the lack of training, when you needed the ability to train, when you needed somebody you had to go to this outside labor market.

Those are the facts of our case and that was our response. You see it's not --

QUESTION: Was there a finding of fact to support you in this?

MR. FRYER: Yes, there is, Your Honor.

QUESTION: Or was this a contested issue?

MR. FRYER: This was a contested issue and it is in the findings and it is in the 80 to 90 series some place, I believe. There is a whole series of findings on hiring practices, that is one of them.

QUESTION: Is this anything more than a hiring case? I mean there are other allegations here, having to do with housing and the feeding arrangements and nepotism, and one thing and another.

Suppose that we were to determine -- I

meanjust make that assumption -- that no prima facie case was made out here as to the hiring claims. Are there still other claims on which a remand is appropriate?

MR. FRYER: I don't think so. The --

QUESTION: Status claims? I mean, is it possible that housing people in the fashion that was done here could amount to a status claim under Title VII -- treating minorities worse than non-minorities in housing and in food?

MR. FRYER: Those claims were dismissed under the treatment analysis and that dismissal was affirmed so that the --

QUESTION: Yes, but this is now a disparate impact case, and I, I gather from the briefs that the respondents say somehow that if you are right that there was no discriminatory treatment, that the assignment according to neutral principles, nevertheless has a discriminatory impact. It treats them worse, because they are minorities.

MR. FRYER: Well, I, I think that the argument is yes, yes, that there is impact. But it is brought up in the context of how those practices may affect the hiring and that is the way that the court of appeals --

QUESTION: And you think that is all -- that

there is nothing left, in and of itself, on these otherclaims?

MR. FRYER: That is the way that the court of appeals appeared to address it in its last opinion. It said that --

QUESTION: Did the Respondents ever press those claims as status claims, employee status claims, independent of hiring?

MR. FRYER: They did press them as status claims and the district court analyzed those claims under the disparate impact model as well as the treatment model and it found business necessity for the housing; it also found that the messing claims were a matter of individual taste.

The key on messing is the evidence that an employee could opt into another mess hall if he so chose. So the district court disposed of them that way and the way the court of appeals appears to have dealt with it on the third opinion is to direct the party's attention to those allegations as they may have affected hiring.

The court of appeals talks about how the minorities may have been deprived of the web of information but there was no evidence on that. The specific finding of fact of the trial court expressly

states that there was no deterrence to minorities, interms of applying for any job.

And, of course, that is one of the critical findings of fact of the trial court that really goes to all of these allegations. The trial court made findings that there was no deterrence; that each employee was free, at any time, to apply for any job he wished; that the employees were evaluated on the basis of job-related criteria.

QUESTION: Were any of these findings set aside by the Ninth Circuit as clearly erroneous?

MR. FRYER: No, they were not, Your Honor, and none challenged as such. Now, the challenges were made by the Respondents as to the findings being incorrect, as a matter of law, but they were not challenged and not held to be clearly erroneous.

QUESTION: But would you correct me on thing? This is a hard case to keep all the facts in mind, and I read the briefs a little while ago, so that I am a little rusty.

MR. FRYER: Yes.

QUESTION: But I recall that the error the district court made, the basic error of law, was that it thought that disparate impact analysis did not apply to subjective employment decisions, subjective employment

hiring practices?

MR. FRYER: That is correct.

QUESTION: And it was wrong in that regard?

MR. FRYER: It was.

QUESTION: And are you saying -- and therefore, the court of appeals said go back and take another look at it.

And you are saying that even without that basic error, the findings are adequate to make it perfectly clear that there is no prima facie case?

MR. FRYER: Yes, I agree. I think so.

I think that --

QUESTION: That that finding was not an essential part of the district court's analysis, it was just kind of thrown in as an alternative ground of decision?

I am a little puzzled by how that could work.

MR. FRYER: Well, the error of the district court was as to the legal theory on how to deal with the findings.

QUESTION: Right.

MR. FRYER: Our position is that once you have got those findings in place, as to the statistical results of hiring practices, once those findings are made, it simply doesn't make any difference if you

change legal theory.

QUESTION: Did you argue to the court of appeals that there is no need to review the legal question of whether the -- you know, the subjective aspect of the case?

MR. FRYER: We did.

QUESTION: You did? I see. But the court of appeals disagreed with you on that then? They thought that you ought to have, you know, needed a further hearing in view of the rather different change in the view of the law.

MR. FRYER: They did not really seem to direct --

QUESTION: Well, Judge -- as I remember Judge Sneed wrote a separate opinion.

MR. FRYER: Yes.

QUESTION: Which he said as to some issues, he thought you were dead right and other issues you weren't, but you say he was even wrong on those where he thought there was a trial?

MR. FRYER: We do. Our position is that if you accepted the trial court's findings, and they are really not challenged, once those findings are accepted, it simply does not make any difference if you change legal theories to go to an impact analysis.

QUESTION: Well, your theory, as I understandit, is that the district court accepted as the relevant labor market this wide geographic area and the Census data showing 10 percent minority population.

MR. FRYER: Yes.

QUESTION: And in the jobs at issue, the employer hires 24 percent minority workers, is that right?

MR. FRYER: That is right.

QUESTION: So you say, gee, we are way over the numbers and the population so that you lose, as a prima facie case on disparate impact. Is that --

QUESTION: Yes, but then they say that there are three job categories so that it works the other way even your own figures, as I remember.

MR. FRYER: Well, they do. But, you see, all of those three job categories show is a standard deviation of more than two and less than three which is about what you would expect if you pick out about 60 job classifications. You see, you figure that one in 20 times, purely by chance, you are going to have the two standard deviations.

Now, secondly, two standard deviations is not equal to discrimination. All it infers, all it supports for an inference, is that something did not happen by

chance. And you see there was other evidence that thedistrict court could consider that these things did not happen by chance.

QUESTION: See, the thing that troubles me frankly, is that you are asking us to make an even more detailed, factual view of the district court's findings and the evidence, than any judge on the court of appeals was willing to make, even though they heard the case en banc.

No judge on the Court of Appeals bought your theory, and there were a lot of them heard the case.

MR. FRYER: Well, that is true.

QUESTION: You may be dead right. I mean there is just kind of a little inertia that kind of troubles me in a case with this big a record, and this many issues.

MR. FRYER: Sure. We are willing to take on the inertia. I think the -- I think the court of appeals, the last time around, was so focused on the legal theory of the subjective employment analysis being tested under the disparate impact model, that they really didn't address the facts that well.

And if --

QUESTION: Well, if you are saying it is a matter of law, the court of appeals erred in finding --

in saying that it must look just to the labor force.

MR. FRYER: Absolutely. That is a flat out error and --

QUESTION: They may be making an error, but you also may be making an error in what you should start off with. And are there only two choices -- labor force or labor market?

MR. FRYER: There are not only two choices, but these were the only choices posed to the trial court and you have to --

QUESTION: But aren't you also saying that the court of appeals erred as a matter of law in what the employer must do?

MR. FRYER: Yes, yes.

QUESTION: That they shifted the burden of proof incorrectly?

MR. FRYER: Yes, Your Honor.

QUESTION: Those are two legal issues, at least here, I think.

MR. FRYER: Absolutely.

QUESTION: Can you describe in a couple of senses the difference, as you see it, between labor force and labor market?

MR. FRYER: Labor force are those hired. The labor market are the people available for hiring.

QUESTION: And one of the arguments between you is what labor market you should look to, to compare the labor market with the labor force, is that fair?

MR. FRYER: That is correct, that is correct.

You see the Respondent's position is that you look at the labor force as the measure of the labor force.

QUESTION: Yes, but the issue in this case is the non-cannery positions.

MR. FRYER: That is correct.

QUESTION: And the court of appeals said to find out if there is a disparate impact, you compare the minorities in the labor force, the entire labor force, with the minorities in the non-cannery positions.

MR. FRYER: That is correct.

QUESTION: And when, when you say that they should have compared the non-minority people -- the minority people in the non-cannery positions with the labor market composition.

MR. FRYER: Yes. With those that were available.

QUESTION: Exactly.

QUESTION: You explain it very well.

QUESTION: Mr. Fryer, what if I think you are both wrong; how does the case come out? I mean what if I

check neither of the above?

(Laughter)

MR. FRYER: You would have to tell me how, some how.

QUESTION: Well, suppose I think that your description of the appropriate labor market is unrealistic because it takes -- it assumes that you are dealing with people who are employable for a whole year, but it is a very distinctive kind of a character your employer is looking for -- he is looking for somebody who will -- needs work during the spring and is willing to take a job to go to Alaska just during the spring and not during the rest of the year.

Now, suppose I think for that reason that your labor market was not the correct one? But I also think that your opponent's labor market was not the correct one -- do you win because it is their burden to establish a labor market?

MR. FRYER: Yes. And further, --

QUESTION: I thought you were going to say that.

MR. FRYER: And further, of course, if you thought that was the better source, I would respond by saying, that is a finding of fact; and we, we really should leave that kind of decision to the trial court.

This trial judge spent a lot of time analyzing this labor market and the various experts, and that is a fact-finding function.

Going to the next question -- well, I would like to pause and say one thing about housing and messing, because I do think that, again, there is a lack of clarity on this.

The employees in the at issue jobs, more than 20 percent of whom were minorities, were housed together and fed together and they worked together, side by side. Now, if it were not for this large number of minorities dispatched by Local 37, a fact over which the employers had no control --

QUESTION: In the cannery position?

MR. FRYER: In the cannery position, nobody would criticize the employer's practices regarding housing and messing for the at-issue jobs.

QUESTION: Or with the housing and messing of the cannery positions?

MR. FRYER: Yes, yes. And our position is that how we fill the cannery worker jobs is simply irrelevant to how you are to be judged as to filling the at issue jobs.

QUESTION: You have not got much time for your other -- if you are going to argue it at all.

MR. FRYER: Well, I better save the rest of mytime for rebuttal.

QUESTION: Mr. Arditi?

QUESTION: Could I ask first?

Do you agree with the United States on the second issue? You -- I guess you can save that.

MR. FRYER: Okay.

QUESTION: You can tell us on rebuttal, yes.

QUESTION: Mr. Arditi?

ORAL ARGUMENT OF ABRAHAM A. ARDITI

ON BEHALF OF THE RESPONDENT

MR. ARDITI: Thank you, Mr. Chief Justice and may it please the Court:

This case involves patterns of segregation by race, in jobs, housing and messing at three Alaska salmon canneries, two of which are in remote locations.

The work is of a migrant, seasonal nature, and that means, as a practical matter, that the employer provides housing and messing facilities. The segregation, as a result of that fact, completely pervades the lives of employees at the cannery. What you have is, in effect, a company town, where virtually every aspect of the employee's life is dominated, and controlled and set by the employer.

QUESTION: What is the number of employees?

MR. ARDITI: The total number of employees?There are probably 200 at the cannery in a given year. It varies depending on the fish run and it also depends on the canneries. One cannery, in Ketchikan, hires a lot of employees on an as-needed basis for a day or two at a time. The others don't have that option.

The largest department at the cannery is the cannery worker department and that is 37 percent non-white to 70 percent non-white, depending on which cannery we are talking about. Despite this very heavy concentration of non-whites in this, the lowest-paying department, there are five-to-seven -- again, depending on which cannery we are talking about -- departments that are at least 90 percent white and many of those jobs and many of those departments have been 100 percent white for the entire case period concerning -- that this litigation concerns.

QUESTION: Your opponent says that that is because the cannery is seasonal, hired on the spot, and that the others aren't.

MR. ARDITI: They all hired for seasonal work. I think that Mr. Fryer was saying, and incorrectly I might add, that the concentration of non-whites in the cannery worker jobs is due to dispatch

practices of Local 37. There are, for union purposes, two types of cannery workers -- non-resident cannery workers whoreside in the lower 48; and resident cannery workers who reside in Alaska during the rest of the year.

First of all, Local 37 represents only the non-cannnery -- non-resident cannery workers. Even the hiring for the resident cannery workers, where there is no Local 37 involvement, is very heavily non-white. In fact, of the five canneries that this case initially covered, the most heavily non-white cannery was Ekuk, which hires only resident cannery workers.

QUESTION: Well, the residents of Ekuk, how are they broken up by minority status?

MR. ARDITI: How are they broken up?

QUESTION: Yes.

MR. ARDITI: The primary minority group at Ekuk is Alaskan native. And the cannery workers are almost all Alaskan native.

QUESTION: Well, that seems reasonable to me. I don't understand why that is a criticism of the fact that -- you say you can't attribute the high minority in the cannery workers to the fact that the union sends mainly Filipinos, I gather.

MR. ARDITI: Right.

QUESTION: Because a lot of the people are

hired locally, but then you tell me that the people available to be hired locally are also minority people,not Filipinos, but Alaskan natives.

MR. ARDITI: That is correct. That is correct. We are saying --

QUESTION: But why is that good for you? I think that is bad for you.

MR. ARDITI: Why is that good?

QUESTION: I mean it seems to me that this employer is doing what a reasonable employer would do -- he hires who is available to be hired.

MR. ARDITI: The difference, Your Honor, is that this employer hires, in cannery worker jobs, virtually all non-whites and has other departments that pay more, substantially more, sometimes three or four times more than cannery worker jobs, that are almost all white.

The problem is that --

QUESTION: Are there such skilled people available in Ekuk or these other towns? Are there carpenters and so forth?

MR. ARDITI: There are, absolutely. The recruitment of Alaska cannery workers, the Alaska natives, comes primarily in coastal villages. And the cannery workers -- I am sorry, the residents of those

coastal villages grow up around the water. They have an enormous amount of fishing and boating experience thatwould imminently qualify them for even the most difficult fishing jobs at the cannery and tender jobs. And the tender is the vessel that brings the fish in from the fishing boat to the cannery docks.

So there is really no question about the availability of skilled personnel.

QUESTION: Well, does the plaintiff have the burden of establishing the appropriate labor market from which the employer must do the hiring for the jobs at issue?

MR. ARDITI: No.

QUESTION: Who has that burden?

MR. ARDITI: First of all, if I can, I would like to try to explain how I am going to use these terms.

Labor market is the area from which people are hired.

QUESTION: Yes.

MR. ARDITI: Okay. The labor force is a combination of those hired and those available to be hired, and the work force is those hired.

QUESTION: Yes, and the district court accepted as the relevant labor market, the whole Pacific Northwest, using Census data figures?

MR. ARDITI: Right, and we contend that that finding was induced by three errors of law, and, as aresult, is clearly erroneous.

We also contend that one need not make a labor force or a labor market finding because the wording of this statute here, prohibits job segregation on its face.

And Section 703(a)(2) just simply says that it will be an unlawful employment practice for an employer to classify, limit, or segregate employees in a way that denies them opportunities on the basis of race.

QUESTION: Well, you may have a separate status claim under that section for housing, or feeding, or something, but we are talking about hiring, primarily, aren't we?

MR. ARDITI: Yes, we are.

QUESTION: Hiring in certain higher paying jobs?

MR. ARDITI: Right.

QUESTION: That is what is at issue?

MR. ARDITI: Right.

QUESTION: And to decide that, you think we don't -- that the Court doesn't have to establish a relevant labor market to look at the figures?

MR. ARDITI: Not in all instances.

First of all, we are dealing with --

QUESTION: Well, doesn't the Court have to do it here for the hiring problem?

MR. ARDITI: No. I think that the Court can look just to the internal statistics in a case like this.

QUESTION: Look just at the cannery worker and other worker pool and nothing else?

MR. ARDITI: Yes. The Court can do that in this case.

I would like to emphasize --

QUESTION: Well, why is that appropriate, if, in fact, the employer hires from a broader area and says, the market, in fact, is from a broader area?

MR. ARDITI: Perhaps I misspoke, when I said that it can confine its examination, I meant to the work force -- namely those hired, rather than those around the cannery.

And it is permissible to do that simply because that is what the wording of the statute.

QUESTION: I don't see that Mr. Arditi. It seems to me that you are reading out the last part of the statute. You are saying that if you simply segregate in a way which would deprive or tend to deprive an individual of employment opportunities, that that's -- that that's enough.

It seems to me, you have to limit, segregate,

or classify because of such individual's race, color, or religion, sex or national origin?

MR. ARDITI: Yes, I would like to explain what I understand that phrase to mean. The phrase, because of such individual's race, sex or national origin appears both in Section 703(a)(1) and Section 703(a)(2). All that phrase does is introduce the prohibited bases for discrimination.

In other words, Title VII prohibits discrimination on the basis of race, but not age, and not handicap.

QUESTION: Right.

MR. ARDITI: If it meant something more, then we would have a situation where the phrase, because of which might suggest intentional discrimination, means something, in fact, different in those two sections.

QUESTION: No, but still in all, to establish that the classification has been because of the race, color, religion, sex, or national origin, you have to get to labor market. Because the mere fact that these people turned out to be segregated in jobs in this fashion doesn't mean anything. It doesn't prove that they are segregated there because of race, color, religion, sex, or national origin, unless you can show by a statistical showing, compared to the labor market

that this would be very unlikely to happen otherwise.

MR. ARDITI: Perhaps I could emphasize thefact that this is a very unique industry. We are fortunate in this case to have statistics that go all the way back to 1906 on the racial composition of people in the industry.

From 1906, all the way through 1978, the composition of those employed in the industry was far more heavily non-white than the racial composition of individuals in the labor market.

When we start with a labor market analysis and look at the racial composition of people in areas from which the employer hires, we do so, at least as Teamsters explains to us, because over time we expect the work force, absent discrimination to reflect the racial composition of the labor market.

We don't have a situation like this here because we know that historically that has never been true. And, in fact, it is true in a number of migrant, seasonal industries that those employed in the industry are far more heavily non-white than those in the areas from which people or workers are drawn.

QUESTION: Couldn't have anything to do with better transportation now, than was the case in 1905? Or the fact that there are many more whites in Alaska

now than there were in 1905?

I find --

MR. ARDITI: I think that it has very little to do with that. Then, as now, people were transported from the lower 48. If transportation were an issue, then you would have expected some change in the hiring patterns and there really hasn't been a change in the hiring patterns, at least as far as the number or percent of non-whites in the industry as a whole.

So, it is an unusual situation. It is not a situation that crops up in the kind of cases that the courts are accustomed to dealing with -- namely those that involve full-year employment at a fixed location.

QUESTION: Maybe minorities were unduly favored in prior times. There was no law against that. Maybe they worked for less. Maybe there was no unionization, so that the -- so that the fisheries found that they could hire minorities cheaper.

MR. ARDITI: Well, no doubt that they found that they did. A high percentage of non-whites in the industry has persisted from the time before unions were formed, through today, when we now have unions.

The fact is that those minorities are in the industry and it is simply not fair, nor does it comport with Title VII, to say that they can, on this long-term

basis, be confined to the low-paying, menial jobs.

QUESTION: Mr. Arditi, what if we disagreewith the Ninth Circuit's look at just the labor force of this employer as the source of the employees, perspectively?

What if we disagree and we think that that was an error as a matter of law?

MR. ARDITI: It would be possible for the Court to vacate the finding and remand for additional findings in light of the five factors mentioned in Hazelwood, which the district court here, did not consider.

QUESTION: And Hazelwood does contemplate the location of a market from which employees can be drawn?

MR. ARDITI: Yes, it does.

Another alternative for the Court is to ask the district court to reexamine the expert testimony that we offered on labor supply that is, we believe, better tailored to this industry. And that look not at the geographical areas, but at the historical percentage through to the present of non-whites in the industry as a whole, rather than --

QUESTION: The U.S. Fish and Wildlife Service studies?

MR. ARDITI: Yes.

QUESTION: That ended in 1955?

MR. ARDITI: It ended in '55, and then for thelater years, we offered statistics on a sample of those employed in the industry through 1978. It comprised about 50 percent of those in the industry, and the statistics showed the same percentage of non-whites.

QUESTION: As long as I have you interrupted --

MR. ARDITI: Sure.

QUESTION: This was presented mostly as a hiring claim, wasn't it?

MR. ARDITI: Hiring and promotion. It is hard to draw the line in a seasonal industry.

QUESTION: Well, what do we do with these housing and feeding allegations? They were tried below under the disparate treatment theory and you lost.

MR. ARDITI: They were tried under both --

QUESTION: Now, are they presented and were they presented as separate status claims of some kind?

MR. ARDITI: Yes.

QUESTION: So, regardless of hiring?

MR. ARDITI: Yes.

QUESTION: You still pursue those as status claims?

MR. ARDITI: Absolutely and fringe benefit claims.

QUESTION: On, on the labor market question. Number 90 of the Supreme Court's findings, concludes with the sentence, "It is not a reasonable business practice to scour such sparsely populated, remote regions for skilled and experienced workers." Are you saying that that is clearly erroneous?

MR. ARDITI: Well, I would say that, but I don't think I have to. I think I can also just simply say that that is not a business necessity finding.

QUESTION: Well, but you don't get to business necessity until you get to the relevant market and isn't this the trial court's finding of fact that bears on the relevant market?

MR. ARDITI: No, I don't think so, Your Honor. First of all, there are many of --

QUESTION: He did not make that finding for that purpose?

MR. ARDITI: I am not sure what purpose he made it for. I think he made it as a rebuttal to our prima facie case of treatment, namely that that was a non-discriminatory explanation, rather than a business necessity finding.

QUESTION: Well, that whole finding, that whole series of findings, plus this one specifically, is directed at describing the general labor force, by which

he means the general labor market.

MR. ARDITI: That -- that may be. That is not how I understood it. That is not how I understood the reason that the employers were offering that testimony at trial.

QUESTION: But there is ample evidence to support that finding, is there not?

MR. ARDITI: No, there is no finding at all about the skill level of people in these villages, except the fact that many of them do have ample boating and fishing experience.

Beyond that, we are not asking the employers to --

QUESTION: Did you challenge that finding in the Ninth Circuit?

MR. ARDITI: I am sure we did. It is not a business necessity finding. It does not say --

QUESTION: Well, then it must be a market -- relevant market finding.

MR. ARDITI: Well, the reason that I say it is not a business necessity finding is that the district court never reached the issue of separate hiring channels on disparate impact grounds.

And, as a result of that, the district -- district court never made findings on whether or not

there was a business necessity.

To get back to that finding -- first of all,there are a number of jobs that are at issue --

QUESTION: Well, are you now claiming that this finding is clearly erroneous?

Are you arguing that to us?

MR. ARDITI: Well, what I am arguing to the Court is that it is not a finding that is couched in business necessity.

QUESTION: Well, I asked you if you are now arguing to us that that finding is clearly erroneous?

That is a question that can be answered yes or no.

MR. ARDITI: Yes. I would say that there is no, no support for it.

QUESTION: You are arguing that to us?

MR. ARDITI: Well, Your Honor, what I would like to do is perhaps try to explain the fact that there are many at-issue jobs, upper-level jobs that even the district court found were unskilled, and so, we are not dealing in all cases with scouring a remote area.

QUESTION: How many at-issue jobs are you talking about?

MR. ARDITI: That were unskilled?

QUESTION: No, no, just how, how many at issue

jobs -- how many non-cannery workers are there in one of these canneries?

MR. ARDITI: I would say there are approximately 30 at-issue job titles. If you would like the number of individuals in those jobs, I can tell you.

QUESTION: Well, are there as many non-cannery workers as cannery workers?

MR. ARDITI: No.

QUESTION: Maybe half or what? Vaguely, just vaguely.

MR. ARDITI: Roughly, yes.

QUESTION: All right.

MR. ARDITI: Beyond that, we are not asking that the employers be required to scour these areas. They are talking to these people already about hiring them for lower-paying jobs. They can easily say, this is the procedure for also seeking an upper-level job. There is no reason, no practical reason why they have to limit the options of these individuals only to the low-paying, menial jobs.

Finally, of course, that finding really does not explain, in any way, the refusal to consider, given the separate hiring channels, many of the people from the lower 48, particularly the Filipino class members, for upper-level jobs.

QUESTION: Well, I thought that the findings of the district court showed that upon application atthe proper time, that the employer did consider and receive and hire people who had been cannery workers?

MR. ARDITI: I don't think the district court made a specific finding on considering and hiring cannery workers. On making an application --

QUESTION: I thought its findings covered that, for instance, Mr. Antonio, himself.

MR. ARDITI: Mr. Antonio made several applications. Toward the end --

QUESTION: And he was hired?

MR. ARDITI: Only about five or six years after his first application for an upper-level job. He made several applications, several requests.

QUESTION: Well, and I thought that the district court found that some of those were submitted at the wrong time, or not actually submitted, or one thing or another?

MR. ARDITI: That is right and the court of appeals vacated that finding because the court of appeals began with the proposition or found, from the record, that the way in which whites and non-whites were hired was, itself, discriminatory. And that while whites were being recruited by word-of-mouth for many of

these upper level jobs, without necessity for an application, given that, there was no need orjustification to require cannery workers to make applications.

QUESTION: What business did the court of appeals have making factual findings of its own, in this case.

MR. ARDITI: I don't think that the court of appeals did that.

QUESTION: I thought that what you referred to, you said that the Court of Appeals found such and such.

MR. ARDITI: If I did, I misspoke.

I think the court of appeals set aside a legal error of the district court and said that its findings on applications and what constituted a proper application had to be reconsidered in light of its own legal rulings.

QUESTION: But the court of appeals did not make its own finding, then?

MR. ARDITI: No, and if I said that they did, then I misspoke.

I would like, if I can, to try to explain the mechanics, to some degree, of how the separate hiring channels work.

Non-whites are recruited from largely non-white sources, such as Alaskan native villages, andthrough foremen of Asian descent, and at Local 37, which is a union with a large Filipino membership. It is undisputed that those who hire for the low-paying, menial jobs, that these primarily non-white sources have no authority to discuss, in any way, shape or form, the possibility of employment in another upper-level job with potential candidates.

We have talked a little bit about the fact that there are Alaskan natives recruited from coastal villages who, at least would appear to have significant skills, for the tender and the fishing jobs, that they are excluded.

At the same time, we have whites, often who are related to people in management, who are as young as 14 years old, 15 years old, 16 years old and so on, who are employed in the upper-level jobs, the better-paying jobs.

Mr. Fryer discussed at length the effect of Local 37 on hiring -- the effect of Local 37 on the labor market and on hiring here.

We would ask simply that the Court read the provisions of the Local 37 agreement, because the Local 37 agreement vests management with full authority to

hire.

There are three preferences and thepreferences are the only provisions in the labor contract that address hiring.

The third preference, which is the last preference, goes to those individuals who are acceptable to management. The other two preferences simply perpetuate the past management choices, by saying that individuals who worked at the same cannery are entitled to first preference on a rehired basis; individuals who worked for the same company at another cannery are entitled to second preference on a rehire basis.

QUESTION: Excuse me, Mr. Arditi?

MR. ARDITI: Sure.

QUESTION: Can I ask you about this nepotism thing?

Do you agree that it is ultimately the plaintiff's burden to show that the reason for the, the impact is racial -- that it is because of one of the forbidden discriminatory factors?

Even if you do it by beginning with an impact, the ultimate thing that you have to persuade the finder of fact of is his racial bias, in this case.

MR. ARDITI: We have to persuade the fact finder that there is a disparate impact on the basis of

race, yes.

QUESTION: Well, but the reason for thedisparate impact is racial bias, not that you just have --

MR. ARDITI: The reason I am having trouble with that, Your Honor, is that racial bias suggests discriminatory intent. And certainly there is no requirement of discriminatory intent in an impact case.

QUESTION: Well, that is how I take the language "because of such individual's race, color, religion, sex, or national origin."

MR. ARDITI: Well, the Court would have to overrule a long line of very explicit holdings of this Court in order to reach the result that intent is required in a disparate impact violation.

QUESTION: Well, as far as maybe burden of production is concerned, but I am talking about ultimate burden of proof.

MR. ARDITI: I would have to disagree with the Court on that.

QUESTION: Then it is a violation of the law if I run a small company and I hire my own relatives, if that produces, if that produces a work force less than -- that is not divided racially the way the labor market is?

MR. ARDITI: As for the size of the business, first of all, Title VII exempts very small businesses, and --

QUESTION: But this is a big business and I have a lot of relatives.

MR. ARDITI: Okay.

QUESTION: If, and I say to my supervisors, look I want this to be a family kind of operation, you hire your relatives, too. And it is not, you know, I have no racial bias at all, I just want a family kind of a place, and that would be a violation of law, then?

MR. ARDITI: If the practice has a disparate impact and it cannot be justified by business necessity, then it is a violation of the law, yes.

Going further to the issue of Local 37 involvement in the hiring process, again, I would ask the Court to note the fact that the collective bargaining agreement does not provide for a hiring hall. This is not the situation that we often see in the construction industry. It is a situation in which the collective bargaining agreement reserves to management full hiring discretion and authority and management, even if it gets a referral, has every right on earth to simply reject that referral.

I would like to address Mr. Fryer's comment

that the district court found that there was no deterrence. In fact, the district court made contradictory findings on that. When the district courtdiscussed individual instances of discrimination, made express findings that particular individuals did not seek upper-level jobs because of the segregation in jobs, messing and housing.

Also on the question of whether there were, in fact, 24 percent non-whites in the at issue jobs, I don't believe that a reading of even the employer statistics bears that out.

What the employer did was include some jobs that are not at-issue, such as, laborer jobs, and I would refer the Court to our Appendices A and B, in which we set out both our own statistics on a department-by-department basis and the employer's statistics on a department-by-department basis. And they show a high degree of racial segregation.

Because of the wide geographical area from which people are hired, and because of what appears to be a prevalence of favoritism, particularly in the nepotism area, it is often unrealistic to expect a non-white from one remote area, such as Wapata, Washington, or Bristol Bay, Alaska, to make contact with the tender captain, whose recommendation is the most

influential, or the machinist foreman, who, as a practical matter, may make the hiring decisions.

Given the far-flung labor market area, fromwhich the employer hires, the effect of the separate hiring channels is really aggravated to an extreme. By the time that the cannery workers arrive at the cannery, the upper-level jobs are already filled. The employer articulated in its brief, and at trial, a policy of discouraging transfers from the heavily non-white cannery worker jobs to the upper-level jobs during the season.

So cannery workers are locked in. And the employer also, at a time when the cannery workers have the easiest access to the employer -- namely while they are at the cannery -- might listen to a request for a better job, but will not consider that an application.

Seeing that I am close to the end of my time here, there are a number of practices -- there are seven in all -- that we challenged. They have produced a work force that is racially stratified, and a work force which has jobs which even the employer expressly labels by race.

The employer, in its company records, and in conversation among management officials, refer to Filipino jobs, or Filipino cannery worker jobs, to the

native crew, to the Filipino bunkhouse, to the white mess house and all of those are amply documented in the record.

The phrase that the Court of Appeals used in discussing this practice was that it was pervasive.

This is a case of the sort that we would have expected to see more reasonably in the late '60s or the early '70s, at the dawn of Title VII.

It is, in fact, a case that was filed in the early '70s, in 1974. The record, we believe, makes a very strong showing of the disparate impact of each of these separate practices.

Despite this, the employers never really offered evidence that would constitute, in any way, a business necessity, although there is one finding on business necessity that the district court made and that the court of appeals affirmed.

Generally, the employer's evidence was not geared toward making the type of showing that this Court has recognized as justifying a disparate impact.

QUESTION: Thank you, Mr. Arditi.

Mr. Fryer, you have four minutes remaining.

REBUTTAL ARGUMENT BY DOUGLAS M. FRYER

MR. FRYER: Thank you, Mr. Chief Justice.

To respond to Justice White's question, we

don't go quite as far as the government on point two, Your Honor. And I think that is a somewhat extended discussion and perhaps you can refer to the brief.

QUESTION: Do you think that the employer just has the burden of production or a burden of proof?

MR. FRYER: You don't have to decide that In this case.

QUESTION: I didn't ask you that.

MR. FRYER: All right, our position is that it depends on the strengths of the plaintiff's evidence, in a nutshell. And that is the standard we have been applying for civil litigation for probably 200 years -- that you weigh the strength of the employer's intermediate burden, depending upon the strength of what the plaintiff has come forward with.

QUESTION: And anyway, you think that the Court of Appeals was wrong?

MR. FRYER: We certainly do.

Well, first of all, they ignored our evidence and they ignored our attacks on the Plaintiff's evidence.

QUESTION: But they said that you had to prove what, a business necessity?

MR. FRYER: They said that we had to prove business necessity based solely on the Plaintiff's comparative statistics.

A couple of things I would like to run over, the respondent's, Mr. Arditi, argued for his labor market theory based upon the history in the industry. That was specifically rejected -- rejected by the trial court in findings of fact.

Cannery workers are never locked into any of these jobs; they are free to apply at the end of the season and they have seven months to do so. And the district court found that they were treated equally and everyone was free to apply.

Contrary to Mr. Arditi's statement, the trial court expressly found that he could find no deterrence on this record, although some of those that testified, testified that they felt they were deterred.

In summary, I would urge you to consider that this employer, who has hired more than the available percentage of minorities in the at-issue jobs, should not be penalized simply because he has employed evenmore in another job classification.

Further, when you get to the standard of proof here, and what we must examine the employer's practices by, I would urge the Court to look at the practices the employer actually did use, not the practices the Respondents, or the court of appeals, contend he should have used. That is simply speculation.

Look at this employer as to how he did, in fact, employ minorities in this industry.

Finally, on the multiple practice challenge, which I really didn't address. In a nutshell, our position on that is, if the employees, if the plaintiffs challenge an employer's practices, under the impact analysis by challenging the bottom line of the total effect, of all of the employer's practices; or if they challenge several practices, their burden is still to prove causation.

It is implicit here that the plaintiffs could not prove causation; that is why they have got difficulty. That is why they go to the employer and say, okay, Mr. Employer, you explain it. But that is not how we try civil cases. The plaintiff has simply got to prove his case; it is his theory, it is case.

Under the discovery standards, the information may be possessed by the employer, but it is equallyavallable to both sides.

In conclusion, I would urge that this Court vacate the decision of the court of appeals and remand for entry of judgment in accordance with the trial court's decision.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fryer.

The case is submitted.

(Whereupon, at 2:58 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

NO. 87-1387 - WARDS COVE PACKING COMPANY, INC., ET AL., Petitioners V.

FRANK ATONIO, ET AL.

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BY Judy Freilicher

(REPORTER)