OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC. Petitioner V. EUGENE F. BRIECK

CASE NO: 87-271

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner,
vs. : No. 87-271
EUGENE F. BRIECK

Washington, D.C.
Monday, October 31, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:58 o'clock p.m.

APPEARANCES:

ANDREW M. KRAMER, ESQ., Washington, D.C.;
on behalf of the Petitioner.

JAMES H. LOGAN, ESQ., Pittsburgh, Pennsylvania;
on behalf of the Respondent.

BRIAN J. MARTIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.;
Amici Curiae on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(12:58 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now on Number 87-271, Harbison-Walker Refractories versus Eugene Brieck.

Mr. Kramer, you may proceed whenever you're --

ORAL ARGUMENT OF ANDREW M. KRAMER

ON BEHALF OF THE PETITIONER

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

This case involves a legal question under Rule 56 of the Federal Rules of Civil Procedure of whether a reasonable jury on the basis of the entire record in this case could find that Respondent was laid off and not recalled because of his age.

Since the court below reversed the District Court's grant of Petitioner's motion for summary judgment, it is first appropriate to review the facts underlying this matter.

Petitioner Harbison-Walker provides technology and specialized refractory products to high-temperature natural resource industries, the largest of which is the steel industry.

As the business fortunes of the steel industry declined in the early eighties, so did the business

fortunes of Harbison-Walker. Between 1980 and 1982 Harbison's employment was reduced from approximately 5,400 employees to 2,700 employees.

In 1982 sales declined some 31 percent, the posted and net operating loss of $21 million or $20.5 million, and employment in that year alone was reduced 38 percent.

In making decisions as to which groups of employees would be laid off, Harbison considered among other things length of service and the skills necessary to perform work in a reduced work environment.

Among the employees hardest hit by the downturn were those working in the company's iron and steel marketing group. Within that group were four installation specialists. Respondent who at the time of this action was aged 55 with 17 years of service; Mr. Malarich, aged 59 with approximately 16 years of service; Mr. Faust, aged 39 with approximately 16 years of service; and Mr. Meixell, aged 59 with approximately two and one half years of service.

Because of a substantial reduction in shipments, Petitioner elected in early July 1982 to lay off, among others, two of its installation specialists, the Respondent who was 55 years old, and Mr. Meixell, who was 59 but was the least senior of the installation

specialists.

Petitioner retained the 59-year-old, Mr. Malarich, and the 39-year-old, Mr. Faust, because they possessed more diverse or versatile skills and had higher job performance evaluations. Mr. Faust, the 39-year-old, had previously worked for Petitioner as a sales correspondent, and his work duties included pricing and margin work, which work he continued to perform after he became an installation specialist.

The skills of pricing and margin work were skills that Respondent concedes and the courts below found he did not have and would require training to perform. Faust had before his --

QUESTION: Mr. Kramer, when you say, "The courts below found," this came up on summary judgment, so you're obligated, of course, to take the facts against you --

MR. KRAMER: Yes.

QUESTION: -- and to the extent that they can be.

MR. KRAMER: Yes. The courts noted that there was no record evidence to support the assertion, Mr. Chief Justice, that Mr. Brieck, the Respondent in this case, had performed that work while employed at Harbison, and there is an affidavit at pages 52 and 53

in the record from the Respondent himself in which he concedes that, in fact, those were jobs that he had not performed but, to the extent he had not, he could be easily trained to perform them.

Prior to the layoffs in question, Mr. Faust, the 39-year-old, had spent approximately 60 percent of his time doing office work and 40 percent of his time doing installation work outside of the office.

Business conditions worsened. In late July of 1982, Mr. Malarich, the 59-year-old, was laid off. Three months later, Mr. Faust himself, was laid off.

In the spring of 1983, Mr. Malarich, the 59-year old, was recalled, first on a temporary and then on a permanent basis. In the summer of 1983, Mr. Malarich, the 59-year-old, at that time approximately approaching 60, indicated to Petitioner that he was going to elect to retire that fall. At that time Petitioner recalled Mr. Faust, the 39-year-old.

After his recall Mr. Faust in deposition testimony stated he performed approximately 75 percent of his work doing installation work outside the office, 25 percent doing office work, an undetermined amount of which was pricing and margin work.

Of the 12 individuals laid off from Petitioner's iron and steel marketing group between July

and November 1982, 75 percent were under the age of 40, and one of the three who was over the age of 40 who was laid off, was subsequently recalled, Mr. Malarich. Of the 21 remaining employees after the layoffs took place, over half were over the age of 40 and over half of that group were over the age of 50.

Within two weeks or -- yeah, within two weeks, excuse me, of his July layoff, Respondent filed the charge of age discrimination. Approximately two years later, he filed the lawsuit challenging among other things his layoff and his failure to recall on the basis of age discrimination.

Full-scale discovery commenced, and Harbison subsequently moved the District Court for summary judgment. The District Court granted this motion.

The District Court found first in a reduction-in-force case there is not an onerous burden to establish a prima facie case of discrimination and, in fact, found that a prima facie case was made solely because of the fact that Respondent was 55 years old at the time of his layoff and had been qualified to be an installation specialist.

QUESTION: Do you challenge that?

MR. KRAMER: No, not at all. And, in fact, at this stage, Justice White, it's really a question of

whether a reasonable jury could conclude because at this point in time --

QUESTION: So, the prima facie case was made out?

MR. KRAMER: No, it was made out, and we have no challenge to that.

QUESTION: And if you hadn't said anything in response, judgment could have been entered against your client.

MR. KRAMER: Yes, that's right. And, in fact, at that time in light of Texas Department of Community Affairs v. Burdine, the burden of production then shifted to my client to produce a legitimate, nondiscriminatory reason for its actions.

The District Court found that this was satisfied since, in fact, three of the five years before the layoff the Petitioner had rated Mr. Faust higher than the Respondent and that, in fact, there was no doubt that Mr. Faust possessed the diverse skills that Respondent or that Petitioner contended it was going to use as one of its guides as to who would be laid and who would be recalled.

The District Court then went on to reject Respondent's effort to show that these reasons were a pretext for discrimination.

QUESTION: Is it your position that when you -- when you came forward with what you said was a neutral explanation, was it your position that if they -- I guess it must be -- that if the plaintiff hadn't done anything, then, said anything or offered anything, that judgment should have been entered for you?

MR. KRAMER: Yes, Justice White.

QUESTION: You mean after step two of the Burdine phase where the plaintiff has shown a prima facie case, and you have articulated a reason whereby the -- a legitimate reason, a nondiscriminatory reason for his treatment, still if a plaintiff has introduced enough to satisfy -- to prove his case to a jury --

MR. KRAMER: Mr. Chief Justice, the -- if -- plaintiff has ample opportunity to show pretext. That wasn't the decision. And that could simply be that there was competing inferences, that a reasonable jury could conclude despite the reason that we asserted that it was still a basis for discrimination.

At at that time summary judgment is not appropriate, and we are not contending otherwise.

QUESTION: Well, supposing the plaintiff says, you know, I have proved the following facts, and I think, Trial Judge, that a reasonable jury could infer discrimination from that. Now, that should mean if he's

right, that should mean a denial of the summary judgment motion.

MR. KRAMER: If there is facts in the record which could allow a reasonable jury to conclude that he was a victim of age discrimination.

QUESTION: Precisely.

MR. KRAMER: That's right. And we contend in this case that a reasonable jury could not on the basis of the evidence in this record conclude that he was a victim of age discrimination.

QUESTION: Well, now, the Respondents in their brief submit a number of additional facts which don't seem to have been mentioned either by the District Court or the Court of Appeals as saying that if you take all these facts, there would have been enough evidence. But, I take it your criticism is the way the Court of Appeals handled this case.

MR. KRAMER: Yes. Well, the criticism because we're on review of that decision but, at the same point, I would not, Mr. Chief Justice, the fact that there are factual disputes does not preclude summary judgment. They have to be genuine factual disputes. I would submit that what Respondent has attempted to do in its brief raised a number of potential factual issues are neither material nor genuine in the sense of requiring a

verdict in Respondent's favor if accepted.

QUESTION: But you do agree that the test, the trial court and every court should have applied is, has the plaintiff adduced sufficient evidence to support a finding of discrimination.

MR. KRAMER: Yes.

QUESTION: If believed.

MR. KRAMER: Yes.

QUESTION: At any of these stages?

MR. KRAMER: At any of these stages and, in particular --

QUESTION: I mean, one by one, and that's the question in any of these stages.

MR. KRAMER: Yes. It's a question of whether or not a reasonable jury could for purposes of summary judgment in this case could conclude that the Respondent was a victim of age discrimination.

QUESTION: But I would suppose you would say that after you present this neutral reason that if the Plaintiff doesn't do anything else that judgment should go for you.

MR. KRAMER: Well, it depends --

QUESTION: Or does it have to go to the jury?

MR. KRAMER: It depends --

CHIEF JUSTICE REHNQUIST: Does it have to go

to the jury?

MR. KRAMER: All right. It doesn't have to go to the jury unless you conclude that if I look at the Respondent's evidence, I look at Petitioner's evidence, and let's assume that there's competing inferences that can be drawn from that evidence. Then that case should go to the jury.

We do not dispute the fact that this Court, whether it be in Celotex, Anderson, Matsushita v. Zenith, what it established was was whether a reasonable jury could so conclude.

What we contend is first, the Court of Appeals was in error in terms of the legal standard under Rule 56 under which it reviewed the evidence in this case.

QUESTION: You're also saying, are you not, that what is a prima facie case under McDonnell Douglas, just showing you're a member of the protective class and so on, well, is not necessarily enough to get you to the jury.

MR. KRAMER: Well, that's right. In fact, this court noted in Burdine and it also stated, in fact, in McDonnell Douglas itself that a prima facie showing is not the equivalent of a factual finding of discrimination. Indeed, this court in Burdine held —

QUESTION: But that's still a third thing. A

prima facie showing under McDonnell is one thing. Sufficient evidence to get to the jury is a second thing, and a factual finding of discrimination is the third thing.

MR. KRAMER: That's right. And Aikens dealt with the third thing in terms of the factual finding of discrimination.

What's present in this case, however, is the Court of Appeals in reversing the District Court's grant, the District Court contrary to the statements both in Respondent's brief and the brief of the United States, did not simply find Petitioner's reason plausible. The District Court reconsidered its decision at Plaintiff's request, at Respondent's request.

In its decision upon reconsideration it reviewed the evidentiary burdens, it reviewed the evidence, and it concluded that a reasonable jury could not find age discrimination on the basis of the evidence in the record.

The Court of Appeals in a 2:1 opinion disagreed solely because the court said there was a potential inconsistency. It said that since Mr. Faust had admittedly or -- had been retained in part because of his admitted diverse skills, that after his recall, he only spent 25 percent of his time on office matters;

75 percent of the time, according to the court below, were spent on installation matters. And since of that 25 percent only a small amount might have been the type of work that Respondent could perform, that that was, in and of itself, sufficient to send it to a jury.

QUESTION: The Court of Appeals really never examined the Plaintiff's case, did it? It just said that you could poke holes in the stage two articulation of a neutral reason.

MR. KRAMER: Well, no, it actually -- it elevated the case immediately to the stage -- it never reviewed the Plaintiff's case and, more importantly, it never reviewed the Petitioner's evidence in this case.

QUESTION: Well, why should it have reviewed the Petitioner's evidence since, you know -- if you put a manager on -- if you submit a manager's affidavit in a summary judgment proceeding, the jury's entitled to disbelieve everything the manager says.

MR. KRAMER: Well, I would submit that if this Court has rejected Anderson in First National Bank v. City Services and Matsushita v. Zenith, there mere fact that there could be credibility determinations or that in Anderson the issue of intent is not enough to go before a jury. Now, it might be, Mr. Chief Justice, that a given affidavit might be susceptible to

inferences in light of competing evidence from which to conclude discrimination.

QUESTION: You're telling me I'm wrong then in saying that a district court on summary judgment motion can disregard the testimony of an interested party who is seeking summary judgment?

MR. KRAMER: Oh, it can disregard it. But what I'm only saying is is that -- I thought you were saying something else in terms of the fact that maybe a mere credibility dispute is enough to say that summary judgment should not be granted. It can, in fact, consider evidence with respect to the interest of the party just as it can consider the interest of the respondent to make conclusory or self-proclaimed assessments as to his or her performance.

QUESTION: Well, but the party -- I thought the party moving for summary judgment had to discount all evidence adduced by him simply because if it's from an interested party, it could be disbelieved.

MR. KRAMER: Well, under Celotex we were not required, a petitioner was not required to negate the claim. However, it could and it did in this case.

Petitioner in this case went forward and said accept all of the evidence, and I ask this Court to. You have to accept all the favorable inferences that can

be drawn from the evidence that Respondent presents to you. Accept that. Accept all of the findings or all of the facts that can be drawn in favor of Respondent. Accept that. You cannot find age discrimination in this case.

QUESTION: But, Mr. Kramer, aren't you leaving out one thing. Is it not permissible for the plaintiff in a situation like this to argue that the evidence of a neutral motive that you put forward is conflicting and is subject to the interpretation that was actually pretextual, and the pretext itself tends to provide discrimination.

MR. KRAMER: There is no question and we've not doubted, Justice Stevens, that you can establish pretext that way. However, you have to go back and look at the entire record evidence. The entire record evidence --

QUESTION: Do you agree -- just so I understand -- you look at the whole record, but if on the basis of the entire record what they put in initially and your defensive evidence, if the trier of fact could find that an inference of pretext could be drawn, would that not be enough to defeat summary judgment?

MR. KRAMER: Yes, if the trier of fact on the

basis of the record as a whole can find this pretext to be drawn, I would point out--

QUESTION: In fact, there's an inference of pretext?

MR. KRAMER: An inference of pretext, but I would point, however, that's the problem here.

QUESTION: So, you're saying here the record here is so clear it isn't even arguable that what you put forward was contradicted initially.

MR. KRAMER: The record here can only establish one potential according to the court below in consistency. It would say that in essence, and I would just point out -- for example, the brief of the United States contends that we do not believe you can establish pretext because the reason is unbelievable, that that's not unworthy of credence. Well, if anything, the opposite is here.

In a reduction-in-force situation --

QUESTION: Say that again for me. You say that they cannot establish pretext based on the fact that your testimony is apparently unbelievable?

MR. KRAMER: Oh, no, no, no. I'm saying the government says that we're taking the position that that is our position. And I'm saying that is not our position at all.

QUESTION: And what is your position?

MR. KRAMER: Our position is, is that to establish pretext though unworthy of credence you have to show that it is reasonable to infer on the basis of the record as a whole that discrimination took place.

Take a look at this record.

QUESTION: Well, can you not infer a discriminatory motive from the mere fact that you advanced a pretextual reason for the discharge decision?

MR. KRAMER: You can if the reason is itself subject to some unbelievable -- or other facts would show it's either false, that it's ridden with error, that it's so questionable on its face that one can infer, perhaps, but that's certainly not this case.

QUESTION: Why is that? See, I don't really -- maybe we should be clear what we mean when we talk about pretext. Some of our cases say if the plaintiff can show that it is a pretext for discrimination. Well, to provide that it is a pretext for discrimination is one thing. To prove merely that it is a pretext is something quite different.

You can prove that the excuse I give is a pretext without proving that it's a pretext for discrimination. Why must one conclude that the real reason is discrimination simply because I come up with a

phony reason that you don't believe. Maybe I didn't have any reason to fire the guy. I don't know. It was an irrational thing. I run a lousy business, and I fired this fellow. I'm sued. I come up with a reason that is implausible. It's a pretext. But is it necessarily a pretext for discrimination?

MR. KRAMER: Well, first, Justice Scalia, all of this Court's cases say it must be a pretext for discrimination.

QUESTION: No. What must be proved is not mere that it's false, but that it is false and the real reason is discrimination.

MR. KRAMER: And that you can have a reasonable jury conclude on the basis of the record that, in fact, it was for discriminatory reasons.

The burden at all times in this case --

QUESTION: It seems to me you're taking a different position than you did a minute ago.

MR. KRAMER: No.

QUESTION: Supposing you merely prove -- you don't know why, but you merely prove that the reason given is totally false. Then I ask you -- you say, well, why did he give a false reason? Could the trier of fact say well, perhaps he did it because he wanted to conceal his true motive? You can provide it, but you

just know he came up with a reason that's demonstrably false. Can you infer discrimination from that mere fact?

MR. KRAMER: This Court in Furnco said that employers are presumed to act for legitimate rational reasons and, therefore, if an employer gives an objectively false reason, it seems to me an inference can be drawn that that reason may be pretextual.

QUESTION: But on that --

MR. KRAMER: The courts below --

QUESTION: I wish you wouldn't use the word pretextual.

MR. KRAMER: -- ruled that it could be an inference that the employer acted for discriminatory reasons.

QUESTION: I see. That's a different answer than I thought you gave Justice --

MR. KRAMER: No.

QUESTION: I think it is.

MR. KRAMER: Justice Stevens -- what you need to do, though, in either case is go back and look to the entire record to see whether or not it is possible to infer discrminatory motive because --

QUESTION: Why do you have to do that if you agree that all you have to do is prove the only reason advanced was a false reason, and falsity itself gives

rise to an inference that the true reason was discriminatory. Why do you have to look at anything more than that?

MR. KRAMER: Well, first of all, this case doesn't involve any allegation of falsehood. This case --

QUESTION: Oh, yes, it does. Your opponent takes the position that the reason you gave is not the true reason.

MR. KRAMER: But --

QUESTION: That's the whole heart of the lawsuit.

MR. KRAMER: But this Court in all of its summary judgment cases such as Anderson, Celotex, Matsushita v. Zenith, have clearly rejected the notion that one particular piece of evidence that you can cite is enough to be probative where you look to the substantive evidentiary burdens that are still entailed on the Respondent in this case.

At no time did Respondent in this case lose the substantive evidentiary burden of requiring to show that his layoff and failure to be recalled were reasons of age.

I would contend, Justice Stevens, that it seems to me that a record that shows that the individual

first recalled was 59 years old, that the individual who was then recalled was 39, that the inference of age in terms of this record shows that what the court really was doing, was saying merely casting doubt on the employer's business decision is enough. Not any language with respect that it be a pretext for discrimination.

Our quarrel isn't looking at the record as a whole and saying whether or not you can infer pretext -- excuse me -- infer discriminatory motive. You have to look at the record as a whole to infer discriminatory motive.

The court below, however, makes no reference at all to the question of discrminatory motive.

QUESTION: You're saying, if I understand you correctly, and I share Justice Stevens' perplexity as to what you're saying, but it seems to me you're saying you don't have to show discriminatory motive. As I understand your description of our cases, we have held that there is a burden on the employer to produce a reason for firing someone, and if he does not produce a reason, the mere fact that you did not keep on someone who was within the protected class is enough for liability. Is that what you're asserting?

MR. KRAMER: If the employer --

QUESTION: The burden's on the employer to come up with a reason.

MR. KRAMER: The employer --

QUESTION: If he had no reason, that's his tough luck. He is guilty of discrimination.

MR. KRAMER: The employer bears the burden of production, and that burden is to articulate the legitimate nondiscriminatory reason.

QUESTION: And he must have had one.

MR. KRAMER: And he -- well --

QUESTION: Right?

MR. KRAMER: If -- no.

QUESTION: No?

MR. KRAMER: If you can show that the reason is false -- let's assume that occurs. The reason is false, and it's shown, but it's also shown that the reason is false for nonprohibited reasons -- just a stupid business mistake -- that what it was based on had nothing to do with age or race or sex.

QUESTION: But it nevertheless was nonexistent?

MR. KRAMER: Well, the reason doesn't go. The reason doesn't go. The ultimate burden is still for the court to determine whether a discriminatory act took place.

QUESTION: If this excuse that the employer

gives is false, it is a nonexistent -- it's just nonexistent. Why aren't you back in the same position as you would have been had you said nothing at all? The prima facie case is made out. You come out with a trumped up charge -- trumped up excuse which is really a nullity. Why aren't you back in the same position as you were?

MR. KRAMER: Because you have to look at the statutory basis of the lawsuit. The statutory basis of the lawsuit isn't that you made a stupid business mistake and can be penalized for it. The statutory basis for the lawsuit is I was laid off or I was failed to be recalled because of my age.

And if the record establishes, Justice White, that age was not a factor in that decision, even though the employer acted erroneously, the employer should not be held liable for a violation of the Age Discrimination Act. It might be engaged in some other types of activity that might be in violation of some contractual rights or other rights, but it certainly isn't in violation of the Age Discrimination Act.

And that's the problem with the court below here. The court below's focus here is not on the Age Discrimination Act. The court below's focus is, is that if I can raise a doubt in the employer's reason, ipso

facto, that creates a jury issue without, as we submit, following the dictates of this Court in Anderson and Celotex, which says that a reasonable jury must conclude on the basis of the entire record, not one piece of it.

QUESTION: Well, you'd never get a summary judgment on behalf of the employer in one of these cases if the possibility of disbelieving the employer's articulation of a reason meant that summary judgment was out.

MR. KRAMER: That's right. You would have questions of credibility prevail in every case. So, therefore, if intent's a factor, you would never have summary judgment at all.

And what we contend simply in this case is, the court below's standard was a standard premise, not on looking at the issue of pretext for discrimination or discrimination because in a given case, perhaps, a false reason will -- perhaps -- be enough to infer on the basis of that record that the employer acted for some elicit reason. And the Court noted that in Furnco.

What is inconsistent here is, is that the court's below focus was never on age. If you take a lock at the entire record and take a look at the evidence with respect to age, one must conclude that a reasonable jury could not have found age discrimination.

QUESTION: It is a logical premise of your case, is it not, that what suffices for the prima facie case does not suffice to the get to the jury?

MR. KRAMER: Yes. A prima facie case --

QUESTION: It's a rather strange use of the term prima facie case, isn't it?

MR. KRAMER: Does not in and of itself get to a jury.

QUESTION: It's just enough for a judgment against you if you don't come up with an excuse.

MR. KRAMER: If you don't answer it satisfactorily.

QUESTION: Well, then, Burdine tends to confirm that when it says that if a prima -- if the defendant meets his burden at stage two, the presumption raised by the prima facie case is rebutted.

MR. KRAMER: Yes.

QUESTION: That's the presumption that -- the presumption is there's a prima facie case, and the presumption means you get judgment entered against you. The fact that the presumption disappears doesn't destroy the prima facie case.

MR. KRAMER: Doesn't destroy the facts underlying that case. It destroys the presumption is what Burdine said of legally mandated discrimination.

It is not -- and that was not first held, I would submit, Justice White, in Burdine. It was held in McDonnell Douglas --

QUESTION: I agree.

MR. KRAMER: -- where that was initially stated.

QUESTION: But Burdine does insist on worthiness of the testimony. They used the word "credence," right?

MR. KRAMER: Yes, it does. It says, "unworthy of credence and it can be established for pretext."

QUESTION: Right. It reads something like that.

QUESTION: May I ask one other question. In your view is the summary judgment stage, is the defendant better off if he puts in no evidence at all or if he puts in a false defense and it's proven to be false? Would be in the same position in both or would be better off under one rather than the other?

QUESTION: Better than lying.

MR. KRAMER: He would be better off actually in that scenario putting in a false reason.

QUESTION: I thought that was your position.

QUESTION: Exactly.

MR. KRAMER: But that would be the context in

which that would be.

QUESTION: So, why act? You just told us --

QUESTION: But your case is enough to get to the jury.

MR. KRAMER: Well, a prima facie case, according to this Court --

QUESTION: But you just told us that a prima facie case isn't enough to get to a jury.

MR. KRAMER: No. A prima facie case establishes a presumption of rebuttable presumption of discrimination. This Court in Burdine said that the employer then has a burden of articulating a legitimate nondiscriminatory reason. If it articulates that reason, it goes to the next stage.

The employer runs a risk of being silent at that stage because the inference that is raised under McDonnell Douglas v. Green is that the prima facie case then has not been rebutted and while it's a rebuttable presumption of discrimination, it nonetheless exists in terms of its presumption. So, its presumptive effect has not in any way been rebutted by the employer in that sense.

QUESTION: But that wouldn't necessarily mean that the prima facie case wouldn't be enough to get to a jury. It would just be -- just that it wouldn't be

enough to require a judgment against the employer.

MR. KRAMER: Well, it would -- excuse me, Justice White. If you're saying it doesn't -- in a sense it doesn't mean the employer has a verdict against them? Is that what you're saying?

QUESTION: Well, if you come up with a facially neutral reason for taking the act, the presumption disappears.

MR. KRAMER: Yes.

QUESTION: Is that right?

MR. KRAMER: Yes.

QUESTION: I don't see why the prima facie case, the facts that made up the prima facie case are to be disregarded or that the -- or that they aren't enough for a jury determination.

MR. KRAMER: Well, I would say that, number one, we have never said they should be disregarded, but it is not enough for a jury determination solely on the basis of the prima facie case, unless a reasonable jury could so conclude that there was a discrimination.

QUESTION: I agree to that.

MR. KRAMER: And that we submit on the basis of this record is a reason why the court below should be reversed.

I would like to have any remaining time for

rebuttal.

QUESTION: Thank you, Mr. Kramer. We'll hear now from you, Mr. Martin.

ORAL ARGUMENT OF BRIAN J. MARTIN

ON BEHALF OF AMICI CURIAE SUPPORTING RESPONDENT

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

The question presented in the petition was whether a plaintiff in an age discrimination case can take his case to a jury if he has no evidence that the employer intended to discriminate. The answer to that question, of course, is no, but we think that that answer and, indeed, that question have little to do with this case.

The Third Circuit following this Court's guidance and summary judgment in Title VII cases found after reviewing the evidence that a reasonable jury could find that petitioner discriminated against Mr. Brieck.

QUESTION: Well, did this Third Circuit find that way in so many words? It seemed to me they concentrate almost entirely on possible disbelief of the employer's second stage proof and very little on what the Plaintiff had shown.

MR. MARTIN: Well, I think that's right, and

perhaps it's because it's an unpublished opinion coming shortly after their en banc decision in Chipollini. They may have considered it something of a footnote to Chipollini. Chipollini, they're more explicit.

I think the legal analysis of the Third Circuit -- and we have to build on a little bit -- it's not as express as it should be -- is that if a plaintiff sets forth a prima facie case and if there's enough evidence that a jury can disbelieve the proffered explanation, that it's really a lie or a cover-up, then a reasonable jury may infer intentional discrimination.

QUESTION: Well, is the Third Circuit saying that every time a plaintiff makes a prima facie case, which is simply showing that in this case he's a member of the protected class and he was discharged, that is always enough to get to the jury?

MR. MARTIN: No, definitely not. In fact, early on in their opinion they note that Mr. Brieck made out a prima facie case. It's not challenged. And then they continue on to analyze the proffered explanation.

I believe what they're saying is whenever a plaintiff makes a prima facie case and there's enough evidence that a reasonable jury could believe that the employer is not telling the truth about its business judgment, then the jury may infer age discrimination.

QUESTION: What does it mean if it is does not mean it's enough to get to the jury? That's what I don't understand.

MR. MARTIN: The prima facie case?

QUESTION: Yes.

MR. MARTIN: Well, I think Burdine answers that question. The prima facie case may be used in two senses. One, it's enough to get to a jury. Two, it's really a legal technique involving burdens of production, sort of that they're-bursting-the-bubble type of presumption.

QUESTION: I mean, the moment of truth with the burden of production is if you don't produce, you lose.

MR. MARTIN: Well, that's right.

QUESTION: That means it's enough to get to the jury.

MR. MARTIN: Well, I suspect it depends on the context of the litigation. Is it a summary judgment motion? Is it a motion to dismiss? Is it a directed verdict? It might depend on those types of cases. But, I think the language in Burdine in that the presumption drops from the case would mean that once in this case, as in Aikens, when you have the evidence from both sides in, the fact that there was a prima facie case is really

not very relevant. The question is whether a reasonable jury could find on the basis of all of the evidence intentional discrimination.

QUESTION: Mr. Martin, I have found at page 15A of the petition the statement of the Third Circuit in this case, that "The burden of making out a prima facie case is not onerous, and we find that Plaintiff has done so."

Now, you say somewhere else in that opinion they say that the Plaintiff has produced enough evidence to go to a jury on the issue of discrimination.

MR. MARTIN: I believe you were quoting from the District Court's opinion.

QUESTION: Perhaps you're right. Go ahead with your argument.

MR. MARTIN: We think that the Third Circuit's legal analysis that a reasonable jury may infer, may find intentional discrimination based on a prima facie case, plus enough evidence to disbelieve the employer follows directly from this Court's decisions in Furnco Construction Corporation and in Burdine.

The Court in Furnco noted that when all legitimate explanations for the employment decision are eliminated, it's reasonable to infer intentional discrimination. We don't believe that inference is

mandatory. The plaintiff would not get a directed verdict. They may be covering up some other legal motive. You can imagine perhaps they didn't want to hurt the employee's feelings at the time, so they made up some story.

It's not a mandatory inference. It's a reasonable one, and that's all that's required in this case to get to a jury.

We noted in our brief that this is an unexceptional case, and we believe that. We do not think that this is a case about a court or a jury second-guessing a legitimate business judgment. Was it fair? Was it efficient? Did it work out?

The question in this case, as the Third Circuit recognized, is whether Petitioner really made such a legitimate business judgment. And the Third Circuit --

QUESTION: Mr. Martin, what is enough to get to the jury from the Plaintiff's evidence in a case like this? I'm not clear on your answer. I think you've been asked before. Is it enough that the Plaintiff is in a protected group and was discharged without more?

MR. MARTIN: No, it is not enough.

QUESTION: What else is required?

MR. MARTIN: What is required is what is

required in any summary judgment case, enough evidence to prove your case, that a reasonable jury could find that you've proved your case. In this case that means proof of intentional discrimination.

We can imagine some prima facie cases where the evidence that the plaintiff presents is very strong at that stage and will be enough to get to a jury. We can imagine other cases where it would not be.

QUESTION: Is proof that the person is in a protected class and was discharged enough to require the employer to come forward with a reason?

MR. MARTIN: Absolutely. Absolutely. I believe that.

QUESTION: So, a prima facie case for that purpose is different from a prima facie case in your view to get to the jury?

MR. MARTIN: Yes, Your Honor. I agree.

To return to my point, this is not a case about a court or a jury second-guessing a legitimate business judgment, was it fair or was it efficient. The question is whether Harbison-Walker acted on the basis of a legitimate business judgment.

Of course, to answer that question you have to examine the judgment. You cannot take it at face value, nor assume that it's false.

QUESTION: Is that the question? I thought the question was whether Harbison-Walker discharged on the basis of age? Not whether it had --

MR. MARTIN: That's the ultimate question.

QUESTION: Oh, but that's quite different. That's quite different.

MR. MARTIN: I'm not sure it's quite different. If you have a prima facie case --

QUESTION: By putting it that way, you confuse me in the answer you gave to Justice O'Connor.

Let me ask this: Suppose the employee comes in with nothing, nothing whatever except that he was a member of the protected class, someone who was not a member of the protected class who was kept on.

MR. MARTIN: Um-hum.

QUESTION: Nothing else to show any age discrimination, just that statistical -- what could be an accident. The employer comes in with a justification. The justification is refuted.

MR. MARTIN: Um-hum.

QUESTION: What happens? This is the only evidence of discrimination you have. I was, you know, over a certain age. Someone who was under that age was kept on.

MR. MARTIN: If it's refuted in the sense that

I could find that was not the basis of the decision --

QUESTION: Right, that was not the basis.

MR. MARTIN: -- then I may infer as a reasonable person that the employer acted on the basis of age, that --

QUESTION: Why? Why would it lead to that conclusion? I can't imagine. There's still no evidence of discrimination on the basis of age except the statistic. That's the only thing you have.

MR. MARTIN: You have -- you have the evidence of the bare bones prima facie case.

QUESTION: That's it.

MR. MARTIN: And --

QUESTION: And?

MR. MARTIN: And the evidence that the employer is lying, that they're covering up something.

QUESTION: They're covering up something or trying not to be held liable? I mean, we have imposed on the employer the burden to come up with the reason. We're saying to the employer even though there's no evidence here of discrimination, you have to come up with a reason. So he says okay, here's a reason, and we don't believe the reason. And then you say that is proof of discrimination?

MR. MARTIN: I'm saying that it's a legitimate

inference based on all that evidence that he acted on the basis of some illegal criterion. I'm not only saying that. The Court's saying it.

QUESTION: You can say it, but I don't see that it's true.

MR. MARTIN: I hear you saying you question the -- whether it's appropriate to draw an inference from a prima facie case plus proof that the explanation is unworthy of credence.

QUESTION: But you don't have proof when you're talking about summary judgment. All you're talking about is possible inferences.

MR. MARTIN: Exactly. Exactly.

QUESTION: Well, you said proof as if the jury had found that the employer's explanation was not good.

MR. MARTIN: The Third Circuit found that there was enough evidence for a jury to so find in this case.

QUESTION: But you mean an argument or facts from which a jury might conclude?

MR. MARTIN: Exactly. Exactly.

QUESTION: Do you agree that if the prima facie case is made out, the bare bones, and then the employer comes forward with this reason, this neutral reason, then does the employer win if the plaintiff then

remains silent and doesn't attack that excuse at all and doesn't give any -- offer any further evidence? Has the employer then won or must the case go to the jury?

I take it on what you say the bare bones case that wouldn't itself get to the jury, I don't know why it would -- I would think the plaintiff would have to do something more when the employer comes up with this excuse.

MR. MARTIN: Yes. If it's merely a bare bones prima facie case, the weakest possible evidence that you can imagine, which would qualify as a prima facie case, there's a totally legitimate explanation -- for instance, the employee --

QUESTION: Yes?

MR. MARTIN: -- was convicted of armed robbery. That is not enough, in our view, to take it to the jury.

QUESTION: And -- so, there might be a lot of other prima facie cases that would have to go to the jury?

MR. MARTIN: Yes, Your Honor. Thank you.

QUESTION: Thank you, Mr. Martin.

CHIEF JUSTICE REHNQUIST: We'll hear now from you, Mr. Logan.

ORAL ARGUMENT OF JAMES H. LOGAN

ON BEHALF OF THE RESPONDENT

MR. LOGAN: Mr. Chief Justice, and if it please the Court:

The issue in this case is whether there are, whether there exist genuine issues as to any material facts so as to preclude the entry of the summary judgment. On the record in this case there are implausibilities and inconsistencies in the employer's stated reasons as to four different factors, and also evidence that has been proffered by the Respondent that would directly contradict the reasons put forth by the employer.

QUESTION: Never mind the refutation of the employer's reasons. Apart from that, what evidence of discrimination on the basis of age was there?

MR. LOGAN: There's the evidence that there were three of four individuals who were installation specialists who were in the protected age group, age 55, 59, and 59.

QUESTION: Um-hum.

MR. LOGAN: All three of those people were laid off in the initial layoffs in July 1982. The younger man with less seniority than the two -- two of the older people laid off was retained and not laid off until November 18, 1982, and he was the only one who was

permanently recalled.

QUESTION: Um-hum. And he was one who had somewhat different qualifications from the others?

MR. LOGAN: That's according to only one individual, and that is Mr. Faust himself. He's the only one that came forth with any evidence as to what, in fact, he did after the recall and after he was initially retained. 100 percent of the people in the protected age group were adversely affected by this decision.

QUESTION: Now, you've limited your response to that affirmative evidence. Do you also argue that the fact, as you contend -- your opponent disagrees -- that an incorrect explanation purported to be neutral explanation was given and that the inference of discrimination can be drawn from the fact of giving an incorrect explanation?

MR. LOGAN: That's what Burdine says.

QUESTION: And that's part of your affirmative proof of discrimination is what you just recited to Justice Scalia, plus your contention which may or may not be supported by the record, that the evidence -- that the so-called neutral reason was pretextual?

MR. LOGAN: We're arguing that a jury could reasonably conclude that the proffered reason is not

worthy of credence and that they could also --

QUESTION: And that that gives rise to -- itself to a inference of discrimination?

MR. LOGAN: That's correct.

QUESTION: All right.

QUESTION: Are you satisfied, Mr. Logan, that the Court of Appeals did address itself to the question of whether Plaintiff had made out a showing sufficiently -- sufficient to get to the jury?

MR. LOGAN: Yes, I'm quite comfortable with the Third Circuit decision, but there's much more than that.

QUESTION: Could you just mention where it is in its opinion that it says that.

MR. LOGAN: When it talked about the -- what -- the duties that Mr. Faust actually performed after his initial retention and after his layoffs. They cited to the record where Faust himself admitted that he spent a small portion of his time, a very small percentage is what he said, doing these allegedly non -- these allegedly -- utilizing these allegedly versatile skills.

QUESTION: But that really is just the Plaintiff's effort to break down the employer's explanation. I --

MR. LOGAN: That's correct.

QUESTION: Well, then, will it ever be possible for an employer to get a summary judgment in a case like this?

MR. LOGAN: Not under the records -- not under the record of this case .

QUESTION: But I mean where an employer produces a bare bones prima facie case, and an employer comes up with some explanation which on summary judgment the jury might disbelieve.

MR. LOGAN: I think -- I can't really think of a case where an employer who's an interested witness could properly get summary judgment.

QUESTION: Well --

MR. LOGAN: That isn't this case.

QUESTION: -- you can get summary judgment --

MR. LOGAN: We have plenty of disputes in this case.

QUESTION: -- if the employee didn't respond to the neutral explanation.

MR. LOGAN: Unless the --

QUESTION: If the prima facie case was just a bare bones prima facie case.

MR. LOGAN: If it were, if it were a bare bones prima facie case, which this one isn't --

QUESTION: I know, but bare bones prima facie

case as the Chief Justice posed, a neutral explanation, and the employee remains absolutely silent, doesn't say a thing, doesn't attack it as pretextual or anything else. He has to do something, doesn't he?

MR. LOGAN: He could cross-examine that interested witness.

QUESTION: Well, I know he has to do something.

MR. LOGAN: He has to do something.

QUESTION: He has to either call into question that excuse or offer some other evidence of direct discrimination.

MR. LOGAN: And we also have --

QUESTION: Isn't that right?

MR. LOGAN: Well, in this --

QUESTION: Is it? How about it?

MR. LOGAN: If it were bare bones --

QUESTION: Yes.

MR. LOGAN: -- you may have a point. But this is not bare bones, this prima facie case.

QUESTION: Well, I'm not asking -- whether I may have or not.

(Laughter.)

I just want to know if the employee stays silent when the -- after the employer offers his explanation doesn't do a thing and he concedes that his

-- his prima facie case was bare bones. Can he get to the jury on that?

MR. LOGAN: If it were much skinnier than in this case, sir.

QUESTION: Well, I give up.

QUESTION: Mr. Logan, isn't the answer to that easy? I mean, if -- supposing the employer's explanation is we have a policy of firing armed robbers, and this man has been convicted of armed robbery. We fired 15 people just like him. There's no dispute about those facts, and there's no evidence of discrimination other than the prima facie, you can enter summary judgment for the defendant in that case, can't you?

MR. LOGAN: If there was objective -- if there was objective information to rely on --

QUESTION: Certified copy of the conviction and --

MR. LOGAN: Other -- other than just the --

QUESTION: -- bylaws of the company and all that stuff and 35 other people fired for the same reason.

MR. LOGAN: It's possible in a case --

QUESTION: You think it's possible? No chance in the world you'd survive summary judgment on a record like that.

(Laughter.)

MR. LOGAN: In this case the Petitioner -- we have much more than a bare bones prima facie case in this case.

QUESTION: He just comes in and says we have a policy of -- this -- this fellow has a criminal record. We have a policy of firing people with a criminal record. Thank you. And he sits down. It's not doc -- he doesn't produce any documents or anything. He just asserts that, and the defendant does nothing. What happens?

MR. LOGAN: If there was a consistently followed --

QUESTION: Company plan.

MR. LOGAN: -- policy of the employer --

QUESTION: That isn't what I asked. I'm saying we don't know that. All the employer comes in with is the assertion that he has such a policy and the assertion that this individual has a criminal record, and then he sits down. What does the plaintiff have to do?

MR. LOGAN: I don't want to say that there's never a chance --

QUESTION: Would you say take his deposition and this is so bad.

MR. LOGAN: -- for an employer to get summary

judgment.

QUESTION: Well, who's the burden on? Is it -- is it the employ -- is it the employee's burden to knock that down or not?

MR. LOGAN: It is the employee's burden to do something with that. They can cross-examine the witness, have the witness --

QUESTION: And if he didn't, that would stand?

MR. LOGAN: -- the employer's supposed to be on the witness stand.

QUESTION: If he didn't, that would be sufficient to refute the prima facie case.

MR. LOGAN: It would be something for the jury to consider, depending on how bare bones it is.

QUESTION: Which means it's not enough to refute the prima facie case. Is it or isn't it? It is or it isn't.

MR. LOGAN: I'd be willing to concede the point under the hypothetical you posed.

QUESTION: That if the employee doesn't come in with something to refute that, it would not go to the jury; you could have summary judgment?

MR. LOGAN: Under that -- narrow hypothetical, yes.

In this case the Petitioner has asserted as to

the ratings that they've asserted as undisputed that the younger man had higher ratings in the years in question than the Respondent in this case.

That is not what the record reflects. The record reflects that the -- according to the testimony of an employer witness, the immediate supervisor of the Respondent in this case that for a period of seven years from 1975 to 1982, he had always -- that is always rated him a 3. If you look at Mr. Sekeras' affidavit, he indicated that for several years Respondent had been rated a 2.

This is a direct conflict between the employer's own witness as to a very important -- one of the proffered reasons.

In addition, you have a June 17, 1982 memo that antedated the implementation of the decision to make the July layoffs. It was from a Mr. Shonkwiler, a vice president of marketing, to the personnel manager. This is at the joint appendix, page 146, where he indicates that for 1981 and '82, the Respondent and the younger man were rated exactly -- exactly the same, fully satisfactory.

In that same document it indicates that the Respondent had more seniority than the younger man, 15 months more seniority. There's a direct conflict in the

testimony of the employer's own witnesses in that regard.

The company also indicated that seniority was one of the major reasons it relied upon in deciding which employees to lay off. This is according to a senior vice president, Ytterberg.

According to the testimony of three of the employer witnesses, Mr. Sekeras, Mr. Sheatsley, and Mr. Nicolella -- and this is all set forth in our brief -- they either ignored or gave no weight whatsoever to the employers having more seniority in the company and 14 more years in this particular job of installation specialist. And in the briefs the Petitioner said well, that's about the same.

Well, seniority, a jury could reasonably conclude that an employer meant what it said and its seniority meant seniority. It's plausible, it's reasonable for a jury to draw that inference.

The Petitioner itself -- and Mr. Nicolella, I might add, the personnel manager who reviewed the decision before it was made final -- the recommendation before it was made final -- was just plain out wrong when he said that Faust had more seniority than did the Respondent.

As Petitioner indicates in its reply brief at page 10, and its original brief at page 15, a jury could

infer from the employer's failure to follow its own established company policy and procedure, they could infer discrimination from that and that's what the petitioner concedes.

In addition, in the June 17, 1982 memo that was entitled "Personnel Changes-Justification" -- this is the joint appendix at page 145 -- they said that Mr. Brieck, the Respondent, had limited expertise.

Well, this is directly contradicted by the March 24, 1982 memorandum that appears at the very last page of the joint appendix from Mr. Jamison, Respondent's own immediate supervisor, where he commended him for his fine work, gave him a merit raise, said you're doing -- he commended him for his good work, thanked him for his fine efforts, and sent him out on another international assignment.

Respondent has come forth with evidence that he was the only one of all these installation specialists who had ever been sent out on international assignments. Chili, Mexico, Brazil, Argentina, Canada, and he said dozens of times.

A jury could reasonably infer that they wouldn't send out the least qualified installation specialist to go out and do international assignments. You wouldn't send out somebody with limited expertise.

The record is also full of evidence, even in Mr. Faust's own words, that he was the office gofer. A jury could conclude that these allegedly versatile skills were hardly more than clerical in nature.

A jury could infer that. We're not saying it necessarily leads to that conclusion. All we want is the chance to get this case to a jury. We think that there are genuine issues as to material facts.

Rule 56(c) does not require the employee in order to survive a motion for summary judgment to effectively raise a doubt as to all issues of material fact, but as to any issue of material fact which are in this case the employer's proffered reasons.

They attempted to introduce statistics. Well, the statistics will show that three out of five people aged 55 or over, that is, 60 percent, were laid off in July 1982. And if you look at four of these people, 100 percent of them were laid off. A hundred percent of them were not permanently recalled. So, I think there are plenty of issues of fact in this particular case under this record.

We request that the Court affirm the decision of the Third Circuit and remand for further proceedings.

QUESTION: Thank you, Mr. Logan.

Mr. Kramer, you have one minute remaining.

REBUTTAL ARGUMENT OF ANDREW M. KRAMER

ON BEHALF OF PETITIONER

MR. KRAMER: Just quickly, Your Honors, the issue here is whether a reasonable jury could conclude that there was age discrimination.

We would submit you have to look at the entire record and the facts from which the Court of Appeals inferred that a jury could determine age discrimination was insufficient.

They took one particular piece of evidence, held it up to a probative value that can't rise to any inference in light of the entire record of age discrimination.

QUESTION: So, this is just a fact-bound case involving no principle of law?

MR. KRAMER: It is involving two important principles. The court below said you could look at one piece of evidence and not the entire record as a whole. As a dissent of the court below said, that was inconsistent with this Court's opinion in Anderson and in Celotex.

Number two, the standard that the Court would apply into the ADA is one which really does not deal with the ultimate question of discrimination, but simply whether or not you can raise a sufficient question of

the judgment itself so as to allow a jury then to infer discrimination. Thank you very much.

QUESTION: I'm sorry that that wasn't the question you presented to us when you asked us to take this case. The question presented is set forth in your petition is whether a plaintiff who alleges intentional discrimination can survive summary judgment merely -- merely by questioning his employer's business judgment without presenting any evidence, direct or indirect, that his employer's judgment was, in fact, motivated by an intent to discrimination. That's an interesting question. What you've just been talking about isn't.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kramer. The case is submitted.

(Whereupon, at 1:53 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. 87-271 - HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC.

Petitioner V. EUGENE F. BRIECK

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

BY alan friedman

(REPORTER)