OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: HAZEN PAPER COMPANY, ET AL., Petitioners v.

WALTER F. BIGGINS

CASE NO: 91-1600

PLACE: Washington, D.C.

DATE: Wednesday, January 13, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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HAZEN PAPER COMPANY, ET AL. :

Petitioners :

v. : No. 91-1600

WALTER F. BIGGINS :

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Washington, D.C.

Wednesday, January 13, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:14 a.m.

APPEARANCES:

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MAURICE M. CAHILLANE, JR., ESQ., Springfield, Massachusetts; on behalf of the Respondent.

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P R O C E E D I N G S

(11:14 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 91-1600, the Hazen Paper Company v. Walter F. Biggins.

Mr. Gordon, you may proceed.

ORAL ARGUMENT OF ROBERT B. GORDON

ON BEHALF OF THE PETITIONER

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

The petitioners have asked this Court to review and set aside a fundamentally flawed decision of the Court of Appeals for the First Circuit. The First Circuit in this case misapplied the Federal Age Discrimination in Employment Act first by upholding a jury finding of age discrimination not on the basis of any demonstrated bias or prejudice against Mr. Biggins relating to his age, but instead on the theory that the Hazens discharged Mr. Biggins from their employ in order to interfere with his vesting in the company pension plan.

The court of appeals then compounded this error by reinstating previously vacated liquidated or double damages based on an improper application of the knew or showed reckless disregard test for willfulness approved by this Court in TWA v. Thurston.

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The pertinent facts of this case can be recited very briefly. In 1977, the Hazens hired Mr. Biggins, then age 52, to serve as the company's technical director. The Biggins held this position, as well as a seat on the company's executive committee, for approximately 9-1/2 years, at which point a dispute arose between the parties concerning Mr. Biggins' involvement in certain consulting activities.

At that point, the Hazens discovered that unbeknownst to them, Mr. Biggins had been marketing the services of a company he had founded and named for himself to competitors of Hazen Paper Company. Accordingly, the Hazens required Mr. Biggins to sign a confidentiality and noncompetition agreement as a condition of continuing employment at the company in order to protect Hazen Paper from what the Hazens saw as a conflict of interest.

QUESTION: Mr. Gordon, does the record show the total number of employees at the Hazen Paper Company?

MR. GORDON: I don't believe it does, Your Honor.

Mr. Biggins, by his own trial testimony, acknowledged that he had no problem with either the substance of the tendered agreement, or, indeed, with the Hazens' reasons for insisting that he sign such an agreement, yet Mr. Biggins refused to sign the agreement

unless his annual compensation at the company were more than doubled and increased to $100,000 a year.

The Hazens refused, the parties reached an impasse, and Mr. Biggins employment was terminated. That's all that happened in the case, and none of it had anything to do with Mr. Biggins' age.

Yet by reason of the timing of the termination, Mr. Biggins failed to reach the 10 years of service required to vest in the company's pension plan, and it was this fact -- Mr. Biggins' pension loss -- that the First Circuit relied upon most explicitly as the central basis for upholding age discrimination liability.

QUESTION: That wasn't all it relied on.

MR. GORDON: Its holding, Justice White, was very clear: that the evidence permitted an inference that the Hazens intended to defeat Mr. Biggins' pension vesting, and that there was a relationship between Mr. Biggins' pension status and his age that rendered such pension interference age discrimination within the purview of the ADEA.

QUESTION: How long did he have to go yet before vesting of his pension rights?

MR. GORDON: At trial, Justice Blackmun, Mr. Biggins first testified that he thought it was a matter of hours, without specifically saying how long he had to go.

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On cross-examination, he was asked if it were not true that vesting was 8 months away, and he acknowledged that he had been told that. The record goes no further on the point, and it stands in precisely that conflict, that it could be as low as a matter of hours, or as low as 8 months.

QUESTION: In his case, the payments would commence almost coterminously -- or, concomitantly with the vesting, would it not?

MR. GORDON: Well, depending upon when he chose to retire.

QUESTION: But they could begin at once.

MR. GORDON: Yes, Your Honor.

Now, turning first to the issue of underlying liability, the First Circuit's very explicit reliance on pension interference as a basis for sustaining ADEA liability was erroneous for each of three independently sufficient reasons. Reason number 1, it is the petitioner's position, first and foremost, that judicial substitution of any factor that is not age for age under the ADEA is inconsistent with the language and legislative history of the statute and is simply wrong.

The ADEA provides in very plain and straightforward --

QUESTION: May I interrupt you there? It may be

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wrong to equate it as a matter of law, but it is not wrong to consider it as conceivably -- or, strike conceivably. To consider it as possibly relevant evidence. Do you agree to that?

MR. GORDON: It may be relevant evident in the total context of the ADEA, Justice Souter, and certainly it is relevant to the question of damages under the ADEA, and it was on that basis, as well as the fact --

QUESTION: No, but let's just consider liability here. It could be relevant evidence on liability, couldn't it?

MR. GORDON: It is difficult to see a situation where it would be relevant evidence, except as evidence defeating the requisite intent under the ADEA. If your intent is to defeat pension vesting, then your intent is not animated by considerations of age.

The ADEA again provides in straightforward terms that the statute was meant --

QUESTION: I find it hard to believe that a trial court would be required to sustain an objection to the evidence in an ADEA trial, especially when his payments are going to begin at once.

MR. GORDON: His payments, Justice Kennedy, were not --

QUESTION: Or, as soon as he retires.

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MR. GORDON: And in fact, the issue of when his payments would commence is really not a relevant consideration in terms of the calculus of liability here, because under this pension plan, as in most pension plans, once an employee is vested in their pension benefits, it belongs to the employee. There's no economic benefit to the employer as to when payments do and do not begin, so that issue really has nothing to do with whether or not pension interference can relate to age discrimination.

QUESTION: Well, I suppose you can use one -- must you not acknowledge that you can use some other factors as surrogates for age, where the substitution is obvious, such as you fire everybody who has gray hair, or fire everybody with wrinkles. Wouldn't that violate the Age Discrimination Act?

MR. GORDON: Yes, it would, Justice Scalia --

QUESTION: Okay, and I --

MR. GORDON: But not because they're surrogates, but because the articulated reasons for your actions are so facially unworthy of credence that one may draw an appropriate inference that there is true age animus underlying your decision, but the issue of proxies has been addressed before.

This is the core principle embraced by Chief Justice Rehnquist's dissent from the denial of certiorari

in Markham v. Geller, and the logic of Chief Justice Rehnquist's position on this point we submit is unassailable and, indeed, consistent with the long tradition of this Court.

In determining the non -- the existence or nonexistence of discriminatory intent under statutory and constitutional provisions, this Court has a long history of strictly respecting the textual limits of the protected category at issue.

For example, in Personnel Administrator of Massachusetts v. Feeney, the Court held that it was not discrimination on the basis of sex to enact a statute providing a job preference to veterans, notwithstanding that at the time of such statutory enactment only males were eligible for service in the Armed Forces.

QUESTION: Mr. Gordon, can I ask you a hypothetical? Supposing a company had a policy of hiring -- or firing, rather, all executives with 17 years of seniority because it would be cheaper to hire young men to replace them -- employees with less seniority to replace them. Would that be relevant evidence in an age discrimination case?

MR. GORDON: To the extent that it permitted an inference of adverse impact, to the extent that theory of liability is applied by this Court to actions under the

ADEA, that could be relevant, and it could in theory state a claim, but the issue we're talking about here --

QUESTION: Well, why are pension benefits different than a salary scale that's associated with seniority with the company?

MR. GORDON: If the intent of the company, Justice Stevens, in your hypothetical is strictly to save money based --

QUESTION: That's my hypothesis. It's cheaper to hire young men than it is --

MR. GORDON: That would not be a violation of the ADEA.

QUESTION: What's your -- what authority do you have for that?

MR. GORDON: The statute simply prohibits discrimination on the basis of age, and this is --

QUESTION: I see.

MR. GORDON: This result is consistent with the decision in Feeney. It's likewise consistent with this Court's pronouncement in General Electric v. Gilbert, where the Court held that it was not discrimination on the basis of sex for an employer to exclude pregnancy from its benefits coverage, not withstanding the fact that pregnancy is a condition uniquely correlated with being female. Likewise --

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QUESTION: Feeney is a constitutional case, isn't it?

MR. GORDON: Yes, it is, Your Honor.

QUESTION: Might not there be a different, broader definition of discrimination under title VII than there is under the Constitution?

MR. GORDON: There could, and in fact under title VII, because adverse impact liability has been applied in that arena, there arguably is. But the same principles that we are submitting have also been recognized by this Court under title VII as in Gilbert, and in Espinoza v. Farrah Manufacturing Company, where Justice Marshall, writing for the Court, found that it was not discrimination on the basis of national origin to refuse to hire non-United States citizens, notwithstanding a logical correlation between the two.

It's thus our first point that judicial substitution of any factor -- here it was pension interference, but it would apply to other factors -- for age is not allowed by the statute at all. Barring a showing of adverse impact in the manner contemplated by Griggs v. Duke Power, this would require reversal of the First Circuit's decision here, which rested not on legitimate inferences of age bias, but instead on pension interference.

Reason two: even if this Court were, in certain situations such as those suggested by Justice Stevens, prepared to endorse the proposition that a trier of fact applying the ADEA may substitute surrogates for age when there is a factual relationship for the surrogate and age, the case at bar would not satisfy the condition precedent for such a substitution.

Here, the First Circuit simply presumed that there was a factual relationship between Mr. Biggins age and his pension status. The court of appeals reasoned that Mr. Biggins' age and pension status were, to borrow the Court's phrase, inextricably intertwined, and that if it were not for Mr. Biggins' age -- 62 -- he would not have been within a hairbreadth of vesting in the Hazen Paper pension.

As the Solicitor General has conceded, however, and as the undisputed facts bear out, the First Circuit's reasoning on this point is completely without force.

QUESTION: Did you ask the trial court to instruct the jury that the evidence of the pension was irrelevant?

MR. GORDON: No, Your Honor, we did not.

QUESTION: Did you object to the admission of the evidence?

MR. GORDON: It would have been appropriate to

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object, but there was no objection. The evidence was clearly relevant to the ERISA section 510 claim, and it was clearly relevant to the question of damages under the ADEA. The trial judge gave appropriate ADEA instructions, which made no mention of allowing the jury to infer age animus on the basis of pension interference.

Now, it is true there was no objection made to the introduction of the evidence as being nonprobative of age discrimination, but that, of course, was true of every piece of evidence --

QUESTION: Was there any request for an instruction to the jury to that effect?

MR. GORDON: There were no requests for instructions on this point by either side, Justice White.

QUESTION: So your issue is entirely framed by your motion for judgment NOP.

MR. GORDON: Yes, Your Honor. Here again, the First Circuit simply presumed a factual connection between pension status and age that simply does not exist. Employees at Hazen Paper vest strictly on the basis of length of service.

Indeed, ironically, the only reason Mr. Biggins himself was not long vested in the Hazen Paper pension at the age of 62 was the unusual fact that he'd been hired by the Hazens at the age of 52, obviously a fact tending to

negate any inference of age animus on the part of the Hazens.

QUESTION: Is that clear from the record? There's a lot of -- I had some -- the pension agreement isn't in the record, is it?

MR. GORDON: It was in the trial record -- the summary plan description of the pension, not the pension plan itself.

QUESTION: Oh, I see. I thought -- thank you.

MR. GORDON: Finally, in addition to the fact that age proxies are not allowable as surrogates under the IDEA at all, and in addition to the fact --

QUESTION: Well, may I just interrupt? If the plan is in the record, why can't we -- and we know the day this man was hired --

MR. GORDON: Yes.

QUESTION: Well, why can't we compute whether it was 6 hours -- he was fired 6 hours before it vested, or 8 months before that?

MR. GORDON: Because I believe the plan depends on hours of service, and that's computed not simply chronologically, but based on hours.

QUESTION: I see, so the 10 years is a proxy for hours -- a certain number of hours of service.

MR. GORDON: Yes, that's correct, Justice

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Stevens.

(Laughter.)

MR. GORDON: As our third point on underlying --

QUESTION: I take it you have no objection to that.

MR. GORDON: No, Justice Scalia.

(Laughter.)

QUESTION: As our third point, even if age proxies were allowable under the ADEA at all, which we submit they are not, and even if in this case one were prepared to endorse what the First Circuit has done and no other court has ever done -- that is, allowed a factor having no factual relationship to age whatsoever to serve as such a surrogate for age, petitioners submit that under no circumstances may pension interference properly provide the predicate for an inference of age animus.

This Court held in Patterson v. McLean --

QUESTION: So if the court of appeals used that -- relied on the pension to any extent to find age discrimination, they should be reversed --

MR. GORDON: We think --

QUESTION: To any extent.

MR. GORDON: No, Your Honor. If it's not material to the judgment, and the judgment is sustainable on other grounds, which it clearly is not, then the Court

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could, under its prior holdings, affirm the judgment on other grounds, but here, it is absolutely plain that there is no basis for sustaining the judgment of the First Circuit.

QUESTION: Well, the Solicitor General doesn't agree with that, and I suppose if you're right that evidence should not have been used at all, perhaps we should remand. If you're right, we could say that the court of appeals made an error in relying on it to any extent and remand it to see what the other evidence might amount to.

MR. GORDON: Justice White, that is an option that the Court has which was suggested by the Solicitor General. We submit that it's unnecessary. We submit that when the First Circuit opinion is taken on its own terms and divested of its improper reliance on pension interference as a basis for ADEA liability, the entire inference of age animus evaporates.

QUESTION: I'm not sure that's correct, Mr. Gordon. The court of appeals mentions in its opinion that there were several adverse comments made by the employer on -- is it Biggins age? -- and that the fellow who replaced him, McDonald, was given a much more generous confidentiality agreement than Biggins was offered. Now, certainly that tends to give some support to the

plaintiff's case, doesn't it?

MR. GORDON: No, Your Honor, we'd respectfully disagree, and if I could answer Chief Justice Rehnquist's position by dealing with each of those separately, in 10 years' employment and in a 5-day trial reviewing this extremely intricate relationship between Mr. Biggins and the Hazens, the only evidence that in any way concerned age were two isolated remarks that were, we submit, completely innocuous in content.

In the context of the entire record, those remarks, simply as a matter of law, cannot support the inference that the Hazens were motivated to require Mr. Biggins to sign a confidentiality agreement based on age animus. These are the classic stray remarks that have absolutely no basis for sustaining ADEA liability.

Indeed, every business in America would be subject to ADEA liability if the mere fact that those kinds of utterances are mentioned at some indeterminate point in a working relationship could sustain liability.

As for the differential treatment --

QUESTION: What were they again?

MR. GORDON: The first comment was a joke about a handball court, and of course there was no evidence that Mr. Biggins was denied membership in the handball court. It was a joke that the handball court --

QUESTION: Something like an old duffer like you wouldn't need the handball court, or something like that.

MR. GORDON: It was that Mr. Biggins and Mr. Gezner wouldn't have as much use for the handball court because they were so old, and the second comment, we submit, was simply a true statement --

QUESTION: Something like 50, eh?

(Laughter.)

MR. GORDON: The second remark --

QUESTION: Oops -- right.

MR. GORDON: The second remark, Justice Scalia, was simply a true statement of what, in fact, every businessman in America knows to be fact -- that it does cost more to insure older persons.

Indeed, the Congress which enacted the ADEA recognized that very same fact, and that is why there is a specific privilege embodied in section 4(f)(2) of the statute allowing employers to make certain benefits distinctions based on age, a recognition by Congress. Congress is no more motivated by age animus in recognizing that fact than the Hazens were here.

QUESTION: Do you think it would be permissible under the statute to fire all your people for whom the insurance premiums were higher because they were older?

MR. GORDON: Absolutely not.

QUESTION: Well then, this remark goes right to the heart of the statute, then.

MR. GORDON: But there's no suggestions that the Hazens discharged Mr. Biggins for anything to do with his insurance coverage. Indeed, Mr. Gezner --

QUESTION: Well, but the comment about, it's more expensive to insure you, says, in effect, because of your age, there are certain reasons why we wouldn't want you in our employ, doesn't it?

MR. GORDON: And if in fact that was the policy of the company, Justice Stevens, that would perhaps state an adverse impact violation, but here, adverse impact, as all parties to the court concede, has no application to the case.

As just a very brief final point with respect to predicate liability, we would submit that under the rules stated in Patterson v. McLean Credit Union, pension interference may not ever, as a matter of law, provide the predicate for an inference of age animus.

In Patterson, this Court held that when construing a civil rights statute, it is inappropriate to construe an earlier statute broadly and beyond the reach of its text in order to cover conduct that is clearly and in terms covered by a later enacted statute.

Recall that in Patterson, this Court refused to

extend the reach of section 1981 of the Civil Rights Act of 1866, which simply barred discrimination in the making or enforcement of contracts. It refused to extend the reach of that statute to cover on-the-job racial harassment when Congress had later, and in clear terms, covered such conduct under title VII of the Civil Rights Act of '64.

The Court's holding rested both on prudential principles of statutory construction, which we submit are applicable here, and further on a desire to avoid circumvention of the detailed enforcement mechanisms provided for by Congress in the later statute.

Here, precisely as in Patterson, the existence of a clear statutory remedy under ERISA section 510, a later-enacted statute with its own independent enforcement mechanism militates very strongly against stretching the coverage of the ADEA beyond its text to provide a duplicative legal remedy.

Turning next to the issue of liquidated damages, I would begin by pointing out that under the law a necessary precondition to an award of liquidated damages is a legitimate and sustainable finding of underlying age discrimination.

Should this Court conclude, as the petitioners have urged, that there is no proper basis for sustaining

ADEA liability at all here, then the First Circuit's reinstatement of liquidated damages must be struck automatically, and this Court would not need to reach the question of what the appropriate standard for awarding such damages ought be.

However, even if predicate liability could on some theory which has yet to be articulated by any party be sustained, petitioners submit that under no rational application of the statutory standard of willful can the jury's finding of willfulness be upheld, and the district court's decision to vacate liquidated damages should accordingly be reinstated.

The ADEA provides in section 7(b) that liquidated or double damages shall only be awarded in cases of willful violations of the statute. This Court has stated numerous times and in numerous different contexts that willful is a term of varying meanings and must be construed according to its context.

Now, in Trans World Airlines v. Thurston, the Court held that in the context of the ADEA, Congress used the term willful in order to provide a form of punitive damages. The Court in Thurston found that by deliberately providing for liquidated damages only in cases of willful violations of the statute, borrowing that standard from the Fair Labor Standards Act's provision for criminal

penalties, Congress meant to create a two-tiered scheme for ADEA liability, with liquidated damages specifically reserved for those most especially blameworthy and reprehensible violations of the statute.

Petitioners -- in reaching this result, the Court in Thurston specifically rejected interpretations of the term, willful, that would, in the words of the Court, result in an award of liquidated damages in all or virtually all cases where underlying liability were found.

Petitioners most respectfully submit that the time has come for this Court to modify the knew or showed reckless disregard test for willfulness it approved in Thurston. Experience in the lower court since Thurston was handed down has demonstrated that this test, when applied by its terms, does the very thing which Congress and the Court in Thurston indicated a punitive willfulness standard ought not do.

QUESTION: Does it do it in disparate impact as opposed to disparate treatment cases?

MR. GORDON: It need not do it in disparate impact cases, Your Honor, or again I would remind the --

QUESTION: Well, if it doesn't do it in disparate impact cases, then it seems to me your argument is gone that as a practical matter the application of Thurston under the act is simply providing an almost

automatic enhancement in every case.

MR. GORDON: It provides an automatic enhancement in virtually every case. There is a narrow band of cases, and they are accurately identified by the Solicitor General, in which liquidated damages liability can be avoided, but they are limited explicitly to adverse impact cases, which again research shows represent less than 2 percent of the cases in ADEA litigation and cases where legal affirmative defenses are involved, which this Court has stated numerous times, such as in Criswell and in last term's decision in Johnson Controls, are very, very narrow. As a practical matter --

QUESTION: So that basically your answer to the argument from the other side that there's still a two-tier system is that the lower tier is so minuscule that it could not have been within the contemplating of Congress as sufficient.

MR. GORDON: That is precisely our position, Justice Souter, and indeed, the reason we know that Congress could not have intended to award liquidated damages in even virtually all cases where predicate liability is established, is revealed in its departure from the standards of the Fair Labor Standards Act. Had Congress intended that result, it would have done precisely what it did in the Fair Labor Standards Act. It

would have authorized an award of liquidated damages as a matter of course for every violation of the statute subject only to a narrow exception where the employer can demonstrate good faith as Congress provided for in the Portal to Portal Act Amendments, but by doing the precise opposite -- specifically borrowing the statutory standard from the criminal penalties provision -- Congress created the diametrically opposed presumption.

Numerous courts that have confronted this question have recognized that when applied by its terms, Thurston's new or showed reckless disregard test essentially reads the term, willful, out of the statute.

These courts are properly recognizing that in a statute such as the ADEA, where a specific intent is part and parcel of the underlying violation itself, that a standard of punitive damages activated merely by a requirement that such violation have been nonnegligent, is in reality no standard at all.

It is for this very reason that a majority of the circuits, as we've cited in our brief, are departing from Thurston's definition of willfulness and imposing a heightened standard for liquidated damages which properly resembles the common-law test for punitive damages. These courts, by modifying Thurston in this way, giving life to the common-law sense of punitive damages, are properly

serving Congress' intent to preserve two discrete tiers of ADEA liability with liquidated damages reserved only for the most reprehensible violations of the statute.

Accordingly, we are asking the Court to use this case as an occasion to refine the definition of willfulness approved in Thurston and return liquidated damages to their punitive moorings. A violation of the ADEA should only be deemed willful if the employer's age discrimination is especially reprehensible, and in this respect we have alerted the Court to a series of considerations which at common law reflect how that determination ought be made by a jury -- namely, whether the employer showed reckless disregard for the matter of whether its conduct violated the ADEA, whether the employer's actions were repeated, were without colorable justification, were otherwise unusually harsh, egregious, or outrageous.

These are well-established standards for common-law punitive damages, as this Court's decision in Pacific Mutual Life Insurance Company v. Haslip reflects. Justice Blackmun's majority opinion as well as Justice O'Connor's concurrence reflect that these are standards that the Court is comfortable with insofar as punitive damages standards are concerned, and they should be the ones which inform the meaning of willfulness under the

ADEA.

When this standard is applied to the facts of this case, it is absolutely clear, we submit, that the jury's finding of willfulness cannot stand. There was no evidence that the Hazens engaged in a pattern of discriminatory conduct, that there was prior evidence of repeated discrimination, that they singled Mr. Biggins out for unusually harsh or oppressive treatment relating to his age, nor was there evidence that the Hazens' actions were utterly without colorable justification, a term this Court has used in interpreting willful in its decisions in Murdock and Spies.

The most the evidence showed here was that the Hazens confronted an employee who was marketing services to competitors and demanded that he signed a confidentiality agreement. Given Mr. Biggins sensitive position at the company and having a seat on its executive committee, this cannot be construed as discriminatory at all.

QUESTION: Willful is a strange term to represent all of the things that you've just mentioned. I mean, I can see how it might represent knowledge of the existence of the statute, or something like that, but how could it represent singling the defendant out, or repeated violations?

I mean, it's either willful or it's not willful. You can be willful repetitive, or willful one shot. I don't know how willful bears on any of this.

MR. GORDON: Justice Scalia, we submit that willful is a term of some elasticity, and this Court has specifically stated -- has specifically stated on many occasions in the past that it must be construed according to its context.

In Murdock, the Court construed the term willful to mean persistently, perversely, and utterly without justifiable excuse. Those are many of the same factors that we are submitting should inform the definition of willfulness here.

As a final point, the petitioners submit that even if this court determines not to modify Thurston, even an unmodified application of that test cannot sustain liability here.

The First Circuit's decision to treat Thomas Hazen's acknowledgement that he knew age discrimination was illegal as conclusive proof of willfulness is illogical on its face, flatly inconsistent with Justice Stevens' reasoning in McLaughlin v. Richland Shoe, and in fact restates the Jiffy June in the picture test that has twice been discredited by this Court.

QUESTION: Why isn't it enough to say that

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willful means that you know you're violating ADEA?

MR. GORDON: Justice Scalia, given the fact that the ADEA requires itself that employers post notices acknowledging the illegality of discrimination, an underlying finding of discrimination by the trier of fact would represent an adjudicated conclusion that the violation was knowing. It would practically mandate imposition of liquidated damages in virtually every case.

It cannot mean that, and it certainly cannot mean what --

QUESTION: It wouldn't mandate it. It would allow the jury to find it. I mean, the mere fact that age discrimination does violate ADEA doesn't necessarily mean that when committing age discrimination the person adverts to it. He may not advert to it, but you can have a conversation that shows, look, let's cover this up, because it's in violation of Federal law. That's willful.

MR. GORDON: But the evidence certainly wouldn't require -- wouldn't have to go that far, Justice Scalia, to permit the inference of knowledge. Again, given that the statute requires specific intent, and given that the statute also requires knowledge of the statutory prohibition -- and this is not a statute of great complexity like the tax laws.

Given those two facts, taking them together,

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there's simply no avoidance of liquidated damages for employers under Thurston, and it should be changed, but at a minimum, even Thurston itself can't sustain liability here, because there was no evidence in the record that the Hazens knew or showed reckless disregard for the matter of whether pension interference could possibly constitute an ADEA violation.

QUESTION: Thank you, Mr. Gordon.

Mr. Cahillane, we'll hear from you.

ORAL ARGUMENT OF MAURICE M. CAHILLANE

ON BEHALF OF THE RESPONDENT

MR. CAHILLANE: Mr. Chief Justice and may it please the Court, respondent submits that the First Circuit correctly adopted this Court's previously determined definition of willfulness in Thurston and properly considered the evidence concerning Mr. Biggins' pension status, and I wish to first address why the Thurston definition has been properly applied by the First Circuit in this case, and then, secondly, why the pension issue as presented does not actually appear in the facts of this case, and that, even if it did, pension interference would be proper evidence of age discrimination.

With respect to willfulness, the petitioners are effectively asking this Court to reverse this Court's

definition of willfulness set down in TWA v. Thurston and in McLaughlin v. Richland Shoe under the FSLA, the definition that was adopted here by the First Circuit which is currently adhered to by a majority of the circuits in all cases, including those of disparate treatment.

That definition as shown by Thurston is consistent with the statute's plain meaning, it's consistent with the legislative history, and it's consistent with the use of that term in other statutes in Federal law.

The objection that is raised that presumably this creates automatic double damages is simply not the case. The employer, most importantly, always has the opportunity to convince the jury that it was acting in a good faith attempt to comply with the law, something which there was no evidence of here.

In addition to that, the employer has a host of other defenses which may justify actions that may still be underlying violations such as a legitimate belief on the employer's part that there was a BFOQ, or that he was exempt from the act, so it's simply not true that this is a situation of automatic double damages.

But where, as here, the employer engages in an intentional and purposeful scheme to discriminate against

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someone on the basis of their age, there's no reason to believe that Congress sought to shield that employer from what is a very limited additional remedy, in this case of doubling the back pay award that the plaintiff would otherwise be entitled to.

QUESTION: Well, I think your last remark indicates what the problem is. The more we're willing to accept your position on how easy it is to establish age discrimination, the truer it is that everybody who commits it is not necessarily willful. That is to say, you say BFOQ.

I think the other side would say there's no such thing as age discrimination using a surrogate, so you don't even have to talk about a bona fide occupational qualification. Unless you actually intend to discriminate on the basis of age, the other side says, there's no liability.

Now, you don't accept that, but if you accepted that proposition, then I think you would probably have to accept that in the vast majority of cases, you can establish willfulness.

MR. CAHILLANE: Your Honor, we don't dispute that in the vast majority of cases of intentional discrimination it will be -- the plaintiff will be capable of establishing willfulness.

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However, the two-tier structure means there's also a two-tier inquiry, and the standard for the second tier of inquiry can't be determined by the standard for the first tier, and there's simply no reason to believe that just because there is a two-tier structure, that that somehow tells us how many cases Congress wanted to have fall into which category.

What I submit that we should do is simply follow the language that Congress used, follow what that term has been held to mean before, and let the parties argue to the jury -- it's a factual question -- as to whether or not they had a legitimate reason for believing what they were doing was or was not legal.

With respect to the alternative that the petitioners propose, it is one of, or similar to one of a real hodgepodge of conflicting and inconsistent alternatives that various circuits have suggested, but what the petitioners are suggesting is purely result-oriented. It is not an attempt to interpret the words of the statute.

It is simply an attempt to, as they put themselves, put a gloss on the statute, which is another way of saying, rewrite it, in order to achieve a particular result in this case, and it creates what is effectively a different meaning for one term in the same

statute, in the same place in the same statute, the depending upon what type of plaintiff there is or perhaps how many plaintiffs there is, something that there is simply no principle of statutory construction that would justify.

It also leads to extremely subjective and contradictory results. In fact, the lower courts cannot even agree as to whether or not to apply this to disparate impact versus disparate treatment cases or whether it applies to cases supposedly involving policies as opposed to just individual age animus, and in fact that's a distinction that is probably useless, since any policy could just as easily apply to a single individual as well as to a group of employees.

And the petitioner's standard adds additional requirements, requiring repeated actions, or without colorable justification, that no court, anywhere, has ever suggested, and which certainly isn't suggested by the language of the statute.

And one of the reasons why all of the lower courts cannot agree on what an alternative standard would be, and one of the reasons why the petitioners themselves have their own standard and in fact there seem to be as many standards as there are defendants, is simply because they are not looking to the language of the statute.

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There's no real reference point; it's purely result-oriented, looking to minimize the number of cases in which this would appear. And, as it happens in this case, what is presumably the highest standard of all which the Third Circuit sets out, requiring outrageousness, the Third Circuit and the Fifth Circuit which has sometimes talked about a similar standard, both agree that terminating an employee on the eve of his pension vesting, as happened here, would be outrageous conduct, so Mr. Biggins would prevail under any of these theories anyway.

QUESTION: Well, Mr. Cahillane, you know, reviewing this record from the standpoint of an appellate court, which is obviously not the -- I would find it very, very difficult to say that the conduct made out here is outrageous. I think the evidence of discrimination is extraordinarily weak, but that doesn't mean that the court of appeals may not have been right in what it did, but I don't think your strongest point certainly is that this was outrageous conduct, because I think many people would disagree with you.

MR. CAHILLANE: Well, Your Honor, I think that that gets at the heart of the problem. If the standard were outrageous, there will always be somebody who will disagree, because it's a very amorphous term, and it's a

very vague and subjective term, and that's a good reason why it shouldn't be adopted by the Court.

I'd like to talk, as well, about the underlying case and the pension question that has been suggested here, and why we contend it is not really presented by the facts of this case in the way that the petition for certiorari presents it.

The case was tried under a McDonnell Douglas scenario, and in fact analyzed by the First Circuit under the principles of McDonnell Douglas, and Mr. Biggins made out a prima facie case, there's no dispute about that.

The defendants then asserted a justification for letting Mr. Biggins go. Namely, they said that he was a disloyal employee. Mr. Biggins then presented evidence to rebut that, direct evidence that he presented himself to show that that was a false reason that that was a trumped up charge.

QUESTION: So in that kind of a case, is the conclusion that it had to be intentional discrimination on age, therefore?

MR. CAHILLANE: It may well be, Your Honor, but it's not -- that question isn't presented by this case, because in addition to doing that, Mr. Biggins also presented additional evidence of age motivation in that he was taken at age 62 and forced --

QUESTION: Yes, but what normally is to be inferred from the finding of pretext? If it's pretextual, does that mean that it's intentionally discrimination-based on age?

MR. CAHILLANE: Yes, Your Honor, I think that's essentially what the Burdine case means, that -- well, if -- assuming, of course, in the beginning, that the plaintiff's case is a disparate treatment case and the plaintiff is using a McDonnell Douglas scenario to make out his case, that would be the result.

However, here, Mr. Biggins was singled out among everyone who supposedly had confidential information, all of whom were younger, and asked to sign a very restrictive agreement.

Now, my colleague says that Mr. Biggins could have signed this agreement except that he demanded a doubling of his compensation, and I submit that that is simply not the facts here.

What happened is that Mr. Biggins had already been given and had already earned stock compensation to which he was already entitled. He wasn't demanding anything additional. He was asking for something that was already his that had not yet been given him.

QUESTION: You say he was the only one asked to signed this confidentiality agreement. He was also the

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only one who -- as far as the record shows, that had in the view of the owners of the company violated confidentiality in the past.

MR. CAHILLANE: True, Your Honor, in the view of the owners of the company. However, that was the asserted reason of alleged disloyalty which the plaintiff proved to be a false reason and, in fact, there was considerable evidence to believe that that was never the belief of the defendants in taking their action, that it was a completely phony charge, because in fact, just before Mr. Biggins was fired, he was told by Mr. Hazen that he was a loyal employee. When this information came to them they waited a considerable period of time to bring it to anyone's attention.

QUESTION: And, since that's the case, the reason they wanted to get -- since that was a pretext, it therefore becomes clear immediately that the reason they wanted to get rid of him was that he was too old. Not that his pension was about to vest -- leave that aside -- but that he was too old.

Why would that ever occur to anybody -- just because of the two remarks during 10 years of employment that were described earlier?

MR. CAHILLANE: It's not just the two remarks, Your Honor, it's the fact that Mr. Biggins was being

treated differently on the basis of age in being asked to sign that agreement, and that he was replaced by a 35-year-old.

QUESTION: You say he was being treated differently on the basis -- why on the basis of age? He was being asked to sign that agreement. Now, the jury disbelieves that the reason he was asked to sign it was because they believed he had been disloyal, okay. The jury disbelieves that. Why does the jury leap to the conclusion from that that therefore the reason they did it was because of his age? What evidence is there that it was his age?

MR. CAHILLANE: Because at that point, Your Honor, Mr. Biggins was in a position only because of his age that he could not only vest in the pension but that he could draw on the pension --

QUESTION: Okay, leave out the pension. Suppose I don't think that that works. What is there besides the pension?

MR. CAHILLANE: And in addition to that, Your Honor, Mr. Biggins was then replaced by a 35-year-old individual who was then given the very things that he was requesting in order to be able to sign that, a far more favorable treatment than he was given.

QUESTION: Well, the fact that he was given far

more favorable treatment doesn't prove anything, but you got something there. He was replaced by somebody younger, and you think that's enough. Whenever you fire somebody and replace him with somebody younger, that's evidence of age discrimination --

MR. CAHILLANE: No, Your Honor, and I think --

QUESTION: Enough to support a verdict.

MR. CAHILLANE: No, Your Honor, it would not be. However, we have to look at the entire set of facts here, which not only is that he was replaced by a 35-year-old, not only that he was singled out for disparate treatment, unlike everyone else who was younger, not only that the defendants were using his age as a weapon against him in attempting to get him to sign that agreement because of the position he was in because of his pension and the age that he had, not only the fact that there were these age-based remarks, which incidentally went directly to the question of his benefits -- his insurance, and -- which is very similar to the pension situation, in that it cost them more because of his age.

So it's not a situation where we have just the remarks or just the pretext, there are a whole slew of age-related matters which directly bear on what happened in this case which allowed the jury to properly draw the inference that in fact this was age discrimination and in

fact it was intentional age discrimination.

The petitioners have attempted, I believe, to contrive a purely legal issue out of that pension evidence and attempted to emphasize what is essentially a factual issue about Mr. Biggins' loyalty, because unless they can escape the jury's factual determination that Mr. Biggins was in fact a loyal employee, they are left with no other explanation for what happened except age discrimination and intentional age discrimination that the Hazens knew to be illegal.

I would like to also note that, in addition to this, there was evidence --

QUESTION: How do you know that the jury found that he was a loyal employee?

MR. CAHILLANE: Well, Your Honor, that was the reason advanced as a justification for Mr. Biggins' termination which, if it had been believed, the jury could not have otherwise concluded that Mr. Biggins was a victim of illegal age discrimination, because they then would have had legitimate cause for letting him go that was not related to age, and in fact that was the central factual issue of the entire trial on which both sides presented evidence and the jury drew its conclusions. They believed Mr. Biggins, and they did not believe the defendants.

I'd like also to note that in this case the

defendants after Mr. Biggins had been terminated then attempted what amounts to a cover-up in that they filed with the Division of Employment Security in Massachusetts under oath a false reason for Mr. Biggins' termination, and in fact said that he wasn't terminated at all and said that he had voluntarily quit, and as many cases have indicated, this is also additional evidence not only of the falseness of the reason given for what they had done, but also of willfulness on their part.

QUESTION: On their account of the thing I -- well, I don't know. If a jury is assumed to disagree with their account. Their account was that the reason he was terminated was that he would not sign this agreement, and therefore in a way he brought it on himself. That was their position in the case, wasn't it?

MR. CAHILLANE: Yes, Your Honor.

QUESTION: They said, we'll keep you on if you'll sign this agreement. He said, I won't sign this agreement.

MR. CAHILLANE: But in being asked to sign that agreement and being asked to do what nobody else was being asked to do, and in being asked to agree to what were very onerous terms for him, he was effectively being asked to sign away the stock compensation that he had been promised that was worth hundreds of thousands of dollars, so this

was not a question of Mr. Biggins simply refusing to do something that was reasonable in any other way.

QUESTION: We'll resume there at 1:00 p.m., Mr. Cahillane.

(Whereupon, at 12:16 p.m., oral argument in the above-entitled matter was recessed, to reconvene at 12:58 p.m., this same day.)

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AFTERNOON SESSION

(12:58 p.m.)

QUESTION: Mr. Cahillane, you may resume.

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

I have just a couple of brief points. The petitioner here effectively is trying to reverse here on what is an evidentiary issue, where they never objected to the evidence being entered at trial, and even if the evidence was arguably relevant under ERISA, never saw a limiting instruction from the judge --

QUESTION: Could I ask, let's suppose that the only evidence the court of appeals relied on was the pension item, would you say that we should still affirm?

MR. CAHILLANE: Yes, Your Honor, in this sense, because the pension -- we agree with the contention that the pension -- just vesting in and of itself wouldn't be evidence of age discrimination.

But in the circumstances of this case, where the plaintiff was 62 and was eligible -- was not only going to vest, but was also eligible to draw on the pension and take money out of the plan, only because of his age, and he could only do that if and because he was 60 years old, or over 60 years old, then in fact, yes, that would be sufficient to show that the motivation was age, but of

course, as we contend, there are a number of other factors that also add on to that.

In addition to the problem of not having objected to this going into evidence --

QUESTION: I understand the objection point. If evidence is admissible for one purpose but not for another, do you have to make an objection or ask for a limiting instruction before you can say that there's not enough evidence to support the jury verdict?

I don't know that that's a rule of law. It seems to me there has to be enough evidence, period, whether you objected to its entrance or not. Even if it was not relevant for any purpose, and you let it get in irrelevantly, so what? It's your burden to have enough evidence there in the record to support the jury verdict, isn't it?

MR. CAHILLANE: Well, yes, Your Honor. I think, certainly it's our burden to have enough evidence in the record, but it is in evidence, and if -- but with respect to the question of whether or not it should be relevant evidence, which is the way I understand what the petitioner's contention is, I don't think you could raise that point, not only if you never objected to it going into evidence, but this was also not a theory that was argued either in the post-trial motions or to the circuit

court of appeals.

QUESTION: I don't understand. You mean, everything you let in without objection must be considered to be evidence that is valid evidence against you, even if it isn't?

MR. CAHILLANE: No, Your Honor. I'm raising it strictly as a procedural point, that you can't appeal the failure of the Court to deny the record.

QUESTION: Certainly, you can't appeal giving the jury an opportunity to consider it, I suppose, but if that is the only evidence supporting the verdict, you can still say there is no evidence supporting the verdict, can't you?

QUESTION: Those are two separate questions -- objection to admissibility and review of the evidence to see if it's sufficient to support the verdict.

MR. CAHILLANE: That may be, Your Honor, but in addition to that, this issue was not addressed by -- just in terms -- forgetting about whether it should be entered into evidence, the whole issue of whether or not it was evidence of age discrimination was not addressed by the district court and not addressed by the circuit court. It was really raised for the first time on the petition for certiorari.

QUESTION: Well, doesn't a motion -- was a

motion to set aside the judgment on the basis of insufficient evidence made in the district court?

MR. CAHILLANE: Yes, Your Honor.

QUESTION: Well, doesn't that raise the question, was there sufficient evidence to support the verdict?

MR. CAHILLANE: It does, Your Honor, there's no question about that. I simply want to point out to the Court that the courts below have never had the opportunity to address this specific issue because it was never argued under that theory.

If there are no other questions --

QUESTION: Thank you, Mr. Cahillane.

Mr. Dunne, we'll hear from you.

ORAL ARGUMENT OF JOHN R. DUNNE

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE SUPPORTING THE RESPONDENT

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

The position of the United States is that there is no need to modify or qualify the definition of willfulness as set forth in Thurston. A reaffirmation of that clear standard will not subvert the intent of Congress, and to do otherwise would impose an unreasonable burden of proof upon an individual victim of

discrimination.

In a disparate treatment case, there are two entirely separate factual inquiries. They are, simply stated, what were the grounds for the employer's action, and, if age was one, did the employer know or just not care that it violated the law?

The liability inquiry --

QUESTION: Mr. Dunne, is it enough for a finding of discrimination that age was a factor, perhaps a very minor factor? That's what I would gather from your statement.

MR. DUNNE: If the jury concludes that it was a factor contributing to or determining the employment decision made by the employer, that is sufficient to find liability.

QUESTION: Yes, but -- excuse me.

QUESTION: Go ahead.

QUESTION: No -- sorry.

QUESTION: What's your authority for that proposition?

MR. DUNNE: A series of cases, as indicated, that if it is a contributing factor or is a determining factor --

QUESTION: Well, can you tell me one case in this Court that supports that proposition?

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MR. DUNNE: I believe that it runs through Thurston as well as in Richland, that that is a factor -- that is a principle for this law.

QUESTION: Well, now, liability. Do you mean willfulness, or not?

MR. DUNNE: No, I'm talking about the underlying --

QUESTION: That's what I --

MR. DUNNE: Age discrimination liability.

QUESTION: Yes, all right.

MR. DUNNE: That's the -- that is the so-called tier 1 factual determination. Tier 2 relates to the issue of willfulness. On the tier --

QUESTION: What do you mean by contributing factor? I mean, is a contributing factor if you want to fire him in order not to have to pay him his pension, and it so happens that he hasn't quite reached his pension yet but he's close to it because he's older, does that make age a contributing factor?

MR. DUNNE: If the trier of the fact concludes that the employer factored in and it was a consideration when he determined to discharge the person, that would be a determining factor.

QUESTION: Well, I don't know what you mean by --

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MR. DUNNE: It doesn't have to be the predominant --

QUESTION: He fired him because he was close to vesting in his retirement fund --

QUESTION: To save money.

QUESTION: You get close to vesting by getting older -- by being there longer, which means by getting older. Does that make age a contributing factor?

MR. DUNNE: Not necessarily --

QUESTION: Okay.

MR. DUNNE: But if the jury concludes that in the course of his determination whether or not to discharge Mr. Biggins here, did it enter into his considerations -- not that it was just hanging out there and it was a coincidence, but that it was actually part of his determination in making up his mind to discharge.

QUESTION: You mean like, I want to avoid having to pay the pension, and besides, he's 62 years old --

MR. DUNNE: Correct, and --

QUESTION: He's getting along?

MR. DUNNE: He's getting along --

QUESTION: Okay.

MR. DUNNE: And it's that sort of thinking that I believe motivated the Congress to enact this legislation.

Now, the tier 2 inquiry --

QUESTION: But if we agree that the only proof is that the purpose of the discharge was to prevent the vesting of the pension, how can that be enough to sustain the ADEA claim?

MR. DUNNE: We are not taking the position that it alone is sufficient to find the underlying discrimination. We figure -- we believe strongly that there is stronger evidence of underlying discrimination.

QUESTION: Well, that may be, but if that's all there was --

MR. DUNNE: If that's all there was, as we have suggested in our brief, that it appeared that the court of appeals overemphasized that factor, it would be appropriate for the Court to remand this to the circuit court for reevaluation, whatever this Court might hold.

QUESTION: And do you agree that the court of appeals did place heavy emphasis on that factor here?

MR. DUNNE: It would appear from a fair reading of their decision, yes, they singled that out in particular, but once again, it would appear that there's simply additional strong evidence of age discrimination.

QUESTION: Well, you say there's enough that we would be justified in affirming.

MR. DUNNE: That finding of underlying --

QUESTION: Yes.

MR. DUNNE: Not --

QUESTION: You -- I thought your brief suggested that there's enough other evidence that we could affirm --

MR. DUNNE: Yes, indeed --

QUESTION: The judgment of --

MR. DUNNE: Indeed, Justice White --

QUESTION: Yes.

MR. DUNNE: That is our position.

QUESTION: And I suppose if the only evidence that there was was the pension item, there wouldn't have been -- shouldn't have been a prima facie case made.

MR. DUNNE: We acknowledge that that could be a basis for denying the underlying age --

QUESTION: Yes.

MR. DUNNE: Discrimination relief, yes, but the important factor to be considered in this presentation is the tier 2 inquiry, which does not talk about or properly consider as a predominant factor the age discriminatory conduct, but rather, was that conduct done in a manner, with the knowledge that it violated the law?

That is what is the touchstone for outrageousness, and we believe that the Court very clearly in Thurston, reaffirmed in Richland, has made it quite clear that that is the proper consideration here.

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QUESTION: So for purposes of this case at least the statutes -- if a statute said, there shall be liquidated damage for a knowing violation, that would be the same result as, there should be liquidated damage for a willful violation.

MR. DUNNE: That is --

QUESTION: For purposes of this case, at least synonymous.

MR. DUNNE: Knowing, or the reckless disregard for knowledge, yes, that is our position, and that -- and when, in making the factual inquiry with regard to whether there was an entitlement to liquidated damages, the Court should look to the question of what was the actor's knowledge at the time he engaged in these discriminatory acts.

I think that's very clear from a reading of both Thurston and Richland, and the mischief, if you will, or the confusion which has arisen among the various circuits comes from having tried to translate the underlying conduct to meet some standard in order to determine knowledge of what the law was.

I think that's the very point that was made by this Court in Thurston.

QUESTION: But in Thurston, Mr. Dunne, wasn't that a disparate impact case?

MR. DUNNE: No, it was disparate treatment.

QUESTION: Was it disparate treatment?

MR. DUNNE: Absolutely. There was -- it was facially discriminatory against 60-year-old pilots.

QUESTION: Policy. It was a policy -- a group.

MR. DUNNE: It was -- yes, it was a policy, a policy because this was a large corporation employing thousands of people.

Consider, for example -- the argument is made, well, you ought to treat individual treatment cases differently than a group, such as the pilots. Supposing Thurston had been working for a small airline and was the only person who had been discriminated against by a policy, whether it's a big corporation or otherwise.

There is no reason, either in looking at the statute or in the cases, which would suggest that Harold Thurston, had he been a lone 60-year-old pilot being discriminated against, should have some heavier burden in order to establish the knowledge of TWA or his employer.

So that what is important here is to reaffirm for the circuits that the inquiry with regard to willfulness relating to liquidated damages, not using the standard approach for punitive damages -- these are only punitive nature -- that the inquiry should be, what was the extent of the actor's knowledge when he made this

employment decision, which was basically discriminatory, in violation of the statute?

QUESTION: Do I take it correctly from your brief, Mr. Dunne, that your response to the argument that as a practical matter this will mean that in any disparate treatment case there will always be the liquidated damages, that your response to that basically is, yes, so be it? That's --

MR. DUNNE: No, the answer is not yes, so be it, most respectfully, Justice Souter. It is -- as the circuit court observed, it's in the nature of the beast that there would be a greater incidence of the award of liquidated damages in discriminatory treatment cases.

However, when you consider that there are all kinds of alternative means for getting out from the awarding of liquidated damages -- a good faith exception, a mistake, an exemption under the statute, such as was pointed out in both TWA, Thurston, and Richland, there's ample evidence that there will continue to be preserved what this Court called for, and that is, a two-tier liability.

QUESTION: I'm not sure there's a good faith exception. You intentionally discriminated on the basis of age in good faith. I don't see how there could be a good faith exception.

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MR. DUNNE: Oh, well, take the Thurston case. TWA knowingly issued a policy which discriminated on its face, knowingly did, against 60-year-old pilots.

They went to their attorneys. The attorneys said, this is not good, change it. They changed it. They obtained further counsel from their attorneys, and they knew that they were discriminating, but they thought in good faith that their action constituted an exemption from the statute.

So there's a whole panoply of opportunities for an employer to show that despite underlying age discrimination conduct he should be exempt from the liquidated damages.

I think that's an important factor, and I think as this Court observed yesterday in the Roland v. California case, despite the fact that there were a series of circuit court decisions interpreting the statute in different manners, the statute clearly did not provide that in Thurston.

The Congress was very clear when it said, willfulness is the standard, not the standard as set forth as this Court did under 1983.

Thank you very much, Your Honor.

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

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(Whereupon, at 1:12 p.m., the case in the above-entitled matter was submitted.)

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Hazen Paper Company, et al., Petitioners v. Walter F. Biggins

Case No: 91-1600

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

BY Ann Marie Federico

(REPORTER)