OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JAMES O'CONNOR, Petitioner v. CONSOLIDATED COIN CATERERS CORPORATION

CASE NO: 95-354

PLACE: Washington, D.C.

DATE: Tuesday, February 27, 1996

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES O'CONNOR, :

Petitioner :

v. : No. 95-354

CONSOLIDATED COIN CATERERS :

CORPORATION :

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Washington, D.C.

Tuesday, February 27, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

GEORGE DALY, ESQ., Charlotte, North Carolina; on behalf of the Petitioner.

PAUL R. Q. WOLFSON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

JAMES B. SPEARS, JR., ESQ., Charlotte, North Carolina; on behalf of the Respondent.

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 95-354, James O'Connor v. Consolidated Coin Caterers Corporation.

Mr. Daly.

ORAL ARGUMENT OF GEORGE DALY

ON BEHALF OF THE PETITIONER

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

James G. O'Connor had a successful career with the Consolidated Coin Caterers Corporation until the summer of 1990, and at age 56 he was terminated. He was replaced by a 40-year-old employee.

Two weeks before the termination decision was announced to him, and arguably on the day that it was made, his boss came to his office and he said, O'Connor, you are too damn old for this kind of work. After a little brief colloquy after that, he got up and left.

Mr. O'Connor was terminated despite having an exemplary record, both historically and recently. His most recent performance evalued was commendable.

He had at the end of the preceding year received the largest performance bonus of anybody in the company. He had a better record than his replacement, who had a

slightly below average performance evaluation for the preceding year, and who throughout their career had ranked lower in the company salary class classification.

QUESTION: Mr. Daly, the question on which we granted certiorari

was whether a plaintiff can allege a prima facie case under the Age Discrimination Act by showing that he was replaced simply by a younger person, or does he have to show that he was replaced by someone outside the protected class.

MR. DALY: Thank you, sir, I --

QUESTION: I think some of the facts that you're talking about would be relevant perhaps in the trial court or the court of appeals but less relevant here.

MR. DALY: Well, I appreciate that. I state them briefly thus because they are such an important background and they focus the importance of the issue, which, as you say, is whether this plaintiff

yis going to lose the benefit of the McDonnell Douglas presumption because the person who replaced him is 40 rather than 39.

QUESTION: I'm not sure why he needs the presumption, given the facts you've stated. I mean, if he has his employer saying you're too old for this job, does he really need a McDonnell Douglas presumption? Wouldn't

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that be enough to establish a prima facie case?

MR. DALY: In the Fourth Circuit in this case, it was not. The Fourth Circuit ruled that he did not have a prima facie case under McDonnell Douglas because his replacement was not under 40.

QUESTION: Well, I know under McDonnell Douglas he wouldn't have one, but what does it take to establish enough to survive a motion for summary judgment?

MR. DALY: In the Fourth Circuit it takes nexus, and they held that he did not have nexus because, even though under the record it's quite possible that the boss came in and said you're too old for this kind of work on the very day that the decision was made, since he was fired 2 weeks later, the circuit court said there's not enough nexus. I suppose that's their new word for causation.

And for that reason, this very meritorious case is dependent precisely and only upon the McDonnell Douglas paradigm in order to succeed.

QUESTION: Mr. Daly, I thought that the Fourth Circuit said that that was just a sporadic comment, bantering. It wasn't enough, just that -- there were a few isolated comments, they said.

MR. DALY: They said that they were stray remarks.

QUESTION: Right.

MR. DALY: Yes, but the record shows that the person that made the decision, Ed Williams, made the remark on the decision day, arguably, O'Connor you are too damn old for this kind of work. That's smoking gun evidence. That's clear evidence of intent. That's a dead body lying on the floor with a smoking gun next to it.

QUESTION: And I take it -- correct me if I'm wrong -- that if you prevail in your argument on the prima facie case and you obtain a reversal, then you're hoping to be able to trial, and then you can talk about all this evidence.

MR. DALY: That's correct. What we want is --

QUESTION: All right, but then maybe we should get back to the prima facie case.

MR. DALY: Thank you, Justice Kennedy. The problem with the under-40 replacement is -- there are several problems with it. The first problem is that it gives irrational results. You have a 65-year-old replaced by a 40-year-old, you don't have a prima facie case. You have a 41-year-old replaced by a 39-year-old, you do have a prima facie case.

QUESTION: Well, do you take the position that, under the McDonnell Douglas framework, a plaintiff has to show that he was replaced, or she, by a younger worker, or

do you adopt what the SG appears to be arguing, that a plaintiff doesn't have to prove that he was replaced at all in the McDonnell Douglas framework?

MR. DALY: We adopt both positions. The only one we need to prevail on to prevail in this court is the first one, that you just need a younger replacement.

QUESTION: But obviously you're going to have to articulate what's required. You have no position --

MR. DALY: I --

QUESTION: -- on which is the better approach?

MR. DALY: Our position is that all you need to do in this case is to say that the replacement was younger, and leave for a later day the case that's not presented, which is the case of whether there needs to be any showing about the characteristics of the replacement at all.

QUESTION: Is your position as uncompromising as it sounds when you say you need only allege replacement by a younger person, or do you mean that there must be a replacement by a person sufficiently younger so that it might reasonably be the case that age had been the reason? If somebody 55 is replaced by somebody 54, are you going to say that's enough?

MR. DALY: Yes, although that's not the case presented here.

QUESTION: I realize.

MR. DALY: It's a difficult line to draw, as all lines are difficult to draw, but --

QUESTION: Or another way to put it would be that the result is irrational, which is what you charge the -- your opponent's position would be. I don't see that this is any less rational, to say that firing somebody 54 and replacing them with somebody 53-1/2 establishes a prima facie case. That's just not rational.

MR. DALY: It really plays into the alternate argument that you shouldn't require anything at all. This is a characteristic that sometimes is not within the knowledge of the person who is replaced. Mr. O'Connor didn't know, for instance, who replaced him when he first came into my office. We only found it out in discovery.

But as to your question of the 56-year-old who is replaced by the 55-1/2-year-old, I understand that creates some difficulties at the edges. I think it creates more difficulties not to do it that way. If you start talking about substantially younger, then you've just made a litigation minefield.

QUESTION: As I understand the effect of this prima facie case, it is to entitle the plaintiff to judgment if the employer does not come forward with an explanation. Isn't that correct?

MR. DALY: That is the correct statement, along with St. Mary's.

QUESTION: Is there no due process limitation upon that? I mean, you're telling me if I fire someone who's 41, within the protected class, and you don't even know who I replaced him with -- I might have replaced him with someone 60, you say -- that's enough to establish a prima facie case, the mere fact that I fired somebody 40, and if the employer doesn't come up with a reason for firing him -- or, I mean, maybe he just got up on the wrong side of the bed. That's not a reason.

He just doesn't come up with a reason. He says, I don't want to come up with a reason, and you think that we can give judgment for the plaintiff in a case like that?

MR. DALY: Precisely yes. That's nothing more than what Mcdonnell Douglas says. That's nothing more than what mandatory rebuttable presumptions do every day.

QUESTION: That seems to you like due process of law. When you fire somebody who's 40, you have established by a preponderance of the evidence, arguably established by a preponderance of the evidence, that the reason you fired this person who was 40 was that he was 40. That seems to me --

MR. DALY: In the very unusual case in which the

employer articulates no explanation, which is the very unusual case, that presumption would establish enough to go to the jury and if the jury believed, on that evidence alone, that there had been age discrimination, then under this Court's precedents and the test we announced, you could get a judgment, just as --

QUESTION: Have we held that the presumption applies, that the McDonnell Douglas presumption, the prima facie case rule, applies in an ADEA case?

MR. DALY: No, you have not held that.

QUESTION: I take it that the respondent -- and correct me if I'm wrong, how you interpret his brief -- doesn't take issue with that. Both parties seem to assume that the McDonnell Douglas prima facie case rule should apply in an ADEA case, and we've never held that, have we?

MR. DALY: No. There's a dictum in the dissent in the St. Mary's case that assumes that. All of the circuits have held it. All 12 circuits have held that the McDonnell Douglas prima facie case paradigm applies to age cases. All of the parties agree with it. The Lorillard v. Pons case says that these statutes are drawn from the same fundament, and basically McDonnell Douglas is a method of organizing the proof in a discrimination case.

QUESTION: Well, the reason I ask is because Justice Scalia's question indicates that perhaps we should

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think about it.

Basically, what you're saying is that we're making an empirical judgment that most people that are 40 years of age or older and that are terminated are terminated by reason of their age. I find that rather difficult. I recognize that there are some other tests, some other criteria before the prima facie case applies.

MR. DALY: Well, I don't think you're making that much of an empirical judgment, because as a litigation practicality, once -- there's almost always a statement of, an articulation of a reason by the employer.

QUESTION: Why would there be, because this applies not just to dismissals, it's also refusals to hire, isn't it, and it's also when you reduce force and you have two people doing the job of four, and so why -- I mean, and it's the same problem whether or not you are interested in the question before this Court, because somebody 40 years old is not hired, and they hire somebody 39-1/2 years old.

The employer -- you say to your employer, what's the reason? He says, I don't know. I had to hire somebody. I guess I like that person's looks a little better.

MR. DALY: Well --

QUESTION: He then -- and then under those

circumstances you're saying McDonnell Douglas requires this to go to the jury, so for -- I mean, there's no other evidence in the case?

MR. DALY: In the very odd case when there's not only --

QUESTION: Well, is it very odd that people sometimes hire people where there are very equally qualified, and one is a few months older than the other, and you don't really know why, you just thought this was a little better, this person, you're not sure? Is that odd, really?

MR. DALY: I'm sure it happens, but the function of the presumption is to set out the generality of cases in which we have identified factors that, as a due process matter, allow you to say with some assurance that it is more likely than not that there's been a prohibited reason.

QUESTION: Mr. Daly, you said that all of the circuits adopt the McDonnell Douglas test, but they don't all adopt it in the same way. They all have to make some adjustment, because it's not identical to race or gender, and some of them don't -- some of them say, the person hired or promoted must be younger, and others go beyond that and say, and there must be a decent interval distance in the age of the person not hired or not promoted and the

person hired or promoted.

So to say that it's McDonnell Douglas and the circuits are uniform gives a false picture, does it not?

MR. DALY: To that extent, you are correct that the circuits have not absolutely adopted the McDonnell Douglas test as written, except for the First Circuit in the Loeb case and the Banco Santienda case most recently. They say that you don't consider the age of the replacement, or the characteristics of the replacement at all.

Nine other circuits, and sometimes the Sixth Circuit, have one or another form relations younger, substantially younger, younger enough to create an inference of discrimination.

My position, the petitioner's position, is that simply younger is the best choice of those various competing formulations.

QUESTION: It embraces the case that a couple of my colleagues are talking, where someone 55, 56 is replaced by someone 55, where it certainly isn't a rational presumption, it doesn't seem to me.

MR. DALY: When someone 56 is replaced by someone 55, it is entirely possible that the motive is age discrimination. The replacement could have been made by a different person, so to that extent the age of the

replacement is a flawed proxy.

In a large corporation, if a middle manager gets terminated, sometimes you call Human Relations and you say, send me another middle manager, and sometimes there's a large gap of time.

QUESTION: But are you saying that it is the most logical assumption, if someone 56 is replaced by someone 55, that there's been discrimination because of age?

MR. DALY: Yes. If --

QUESTION: I certainly don't agree with you on that.

MR. DALY: If you have a person who is qualified and who sought the job, and who's within the protected class, and who didn't get the job, we say that at that point it is fair to call on the other side for an explanation.

QUESTION: Mr. Daly, why do you say that considering -- what was the difference in age between your client and the person who got the job?

MR. DALY: The difference in age was 16 years, which survives under any --

QUESTION: So isn't it sufficient for your case simply to say, you don't have to be outside the protected class, that the person who got the job doesn't have to be

outside the protected class, period?

MR. DALY: That's correct. We prevail under that standard. Out of all the possible standards that would allow us to prevail, we particularly argue in favor of the younger standard, as opposed to the younger enough to create an inference, or the 10-year standard, which was proposed by somebody.

But you are quite correct, we'd prevail on any of the above standards, as long as you don't adopt the irrational under-40 standard which, of course, is just a road map to how to avoid the application of the statute.

QUESTION: Mr. Daly, I want to get clear -- going back, I guess, to your original answer to Justice Scalia's question, I want to get clear on what you think happens in applying the so-called prima facie case rule, or presumption rule.

As I understand it, you don't take the position, and I don't know that anybody's taking the position that if the employer -- if the employee simply proves qualification, continuing existence of the job and, let's say, replacement by a younger person, that that entitles the employee to judgment.

The employee is not entitled to anything at that point, as I understand it, except, under McDonnell Douglas, a reason from the employer, right?

MR. DALY: Yes, exactly, an articulation.

QUESTION: Okay. Now, if the employer stands mute and says, I don't know why, then you take the position, and I guess McDonnell Douglas does, that considering the employer's incapacity to give a reason, which does not trench on the forbidden category, that is enough to get to the jury, right?

MR. DALY: Right.

QUESTION: All right. Now, if the employer does give a reason, as I understand it, therein -- and let's say in this case an age-neutral reason -- all that does is dissolve the presumption, and whether you get to the jury or don't get to the jury is going to depend on other things, I suppose.

MR. DALY: Right. It's going to --

QUESTION: It's going to depend on what else you put in.

MR. DALY: On pretext, yes.

QUESTION: Yes. Yes.

MR. DALY: Yes.

QUESTION: So there's no -- so we keep using prima facie case, and so do you, but you don't mean by it that there is a prima facie -- before the moment at which the employer either gives a reason or stands mute, you don't mean by that that there is a case that goes to the

jury.

MR. DALY: No, not at all. The employer has the opportunity to present --

QUESTION: It's the silence which is evidence --

MR. DALY: Exactly.

QUESTION: -- if the employer doesn't come up with a reason.

QUESTION: And you say that it goes to the jury automatically if the employer does not come up with a reason?

MR. DALY: If you meet the presumption -- if you mail a letter, and you put it in the post office box, and you put the right postage on it, and you properly address it, and you prove those facts, you get to the jury on that and the jury can consider what the person who is supposed to have gotten the letter wants to say.

QUESTION: And the jury is able to come in with a verdict for the plaintiff based on nothing other than the fact that he fired someone who was 55, hired someone who was 54-1/2, and stood mute when asked what the reason was.

MR. DALY: Right, and this employer comes into court and sits there with his lawyer and says absolutely nothing, and you've got a perfectly qualified 55-year-old who didn't get the job, was replaced by a younger person.

QUESTION: That would be the case even when the person who did the hiring was a former employee of the employer who is now dead, or has since been fired and is antagonistic to the employer and the employer says, gee, you know, it was one of my agents that did it, he's no longer with the company, I can't give you a reason, and you'd say the plaintiff would still be entitled to judgment.

MR. DALY: No. At that point the employer has come in and said something.

QUESTION: He hasn't given a reason.

MR. DALY: The presumption only --

QUESTION: He hasn't given a reason. He has said, I don't know the reason.

MR. DALY: Well, he's articulated a nondiscriminatory reason, I suppose, which is that we can't tell what --

QUESTION: No, listen to me. He has not articulated a nondiscriminatory reason. He has said, I have no idea what the reason was.

QUESTION: Okay, so that's the answer to my question, too. Your answer to my question is, it's not a big deal, 39-1/2 or 40. All he has to do is come in and say, I don't know why I chose the guy.

MR. DALY: Right.

QUESTION: That's all you have to say, and that's the end to all these presumptions.

QUESTION: Do you have any authority in the circuits that the explanation, I don't have a reason, is sufficient to overcome the prima facie case and make it dissolve and go away?

MR. DALY: No, I don't, but in all presumptions there are going to be cases at the margins.

QUESTION: Are you aware of any case that had those bare bones facts in it? Didn't the employer always at least say, we've always told our people not to discriminate, they're forbidden grounds? Don't they always say something like that?

MR. DALY: I don't bring cases if a person who comes in and says, I'm 40, I was replaced by a 39-1/2. I'd analyze their case about what they've got.

QUESTION: Thank you --

MR. DALY: I wouldn't go to trial --

QUESTION: Thank you. Thank you, Mr. Daly. Mr. Wolfson, we'll hear from you.

ORAL ARGUMENT OF PAUL R. Q. WOLFSON

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

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The lower courts ruled in this case that any older employee who is replaced by someone who is 40 years old cannot rely on the McDonnell Douglas framework to make out a case of age discrimination, even if the inference of discrimination in the case might be strong.

That rule makes McDonnell Douglas useless in a large number of age discrimination cases. And it particularly hobbles experienced employees who are at the upper end of the age group who are the most likely to be the targets of age discrimination. And it has that effect, ironically, because Congress gave the act a broad remedial reach and it extended the protections of the act to include those who were 40 years old.

QUESTION: Mr. Wolfson, those courts that have adopted the within-the-class rule that you have to show that whoever you fired was within the protected class, or outside the protected class, I'm sorry --

MR. WOLFSON: Right.

QUESTION: -- have they applied that only for purposes of the McDonnell Douglas rule, or have they applied that as a substantive test for liability as well? Can you do the one without doing the other?

MR. WOLFSON: Theoretically you can do the one without the other. That is, they've only applied it for the -- only the Fourth Circuit is really what we're

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talking about that has the -- really applies it totally outside the protected class rule. But the rationale for the McDonnell Douglas framework was that direct evidence of discrimination is going to be very rare, and the purpose of the framework was to allow an employee, or the EEOC, I may add, to use McDonnell Douglas to prove the ultimate issue in the case, which is: Was there discrimination or not?

And what McDonnell Douglas recognized is that in most disparate treatment cases the evidence on the issue of the ultimate question of discrimination is going to be pretext. That's the -- the burden of proof on pretext merges with the burden of proof on the ultimate issue of discrimination.

Now, the age of the replacement employee is relevant to the ultimate issue of discrimination. It's part of the answer to the ultimate question in the case, but it is not the complete answer one way or the other.

QUESTION: Well, Mr. Wolfson, you suggested a moment ago that perhaps the plaintiff could prevail on the basis of the McDonnell Douglas test. Does the McDonnell Douglas test, if satisfied the plaintiff -- do more than allow the plaintiff to go to the factfinder, the jury?

MR. WOLFSON: No, and in some cases it wouldn't even allow the plaintiff to go to the factfinder.

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QUESTION: But does it ever allow the plaintiff to do more than that?

MR. WOLFSON: No. Well, yes, if the employer is just simply mute in response to the prima facie case, but I can say other --

QUESTION: Well, if the employer is mute, then my understanding was it allowed you to go to the jury, but you're saying it entitles you to judgment?

MR. WOLFSON: If a plaintiff makes -- under Hicks, if a plaintiff makes out a prima facie case, and the employer is entirely mute, then judgment must be entered for the plaintiff. But I can tell you that that simply does not happen. In other words, it does not happen and the employer offers no explanation whatever for its --

QUESTION: Mr. Wolfson, on the second step of McDonnell Douglas, there are cases saying what that reason must be and, as I recall, it doesn't have to be a good reason as long as it's a nondiscriminatory reason.

MR. WOLFSON: That's correct. It has to be an age-neutral reason, and after -- and all of the -- the only effect of the prima facie case, really, is to require the employer to offer its explanation, and then the --

QUESTION: It does have to be something more than I don't know. You agree with that.

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MR. WOLFSON: The answer -- in effect the answer is never, I don't know. I mean, the employer may say, I have a reason, and I may have difficulty proving it, like the situation that you mentioned, but the --

QUESTION: Could it be that I prefer gregarious people, or I prefer quiet people?

MR. WOLFSON: Yes. It could be anything, and then it's up to the employee or the EEOC to prove, on the basis of other evidence, that that reason is a pretext and a cover for age discrimination, and if there is no evidence of pretext, then the court can grant summary judgment for the employee on the ground that the factfinder could not return a verdict of discrimination.

QUESTION: Well, why does the factfinder have to believe the employer's reason?

MR. WOLFSON: No, it's not that the factfinder has to believe the employer's reason. The burden of proof of discrimination is on the employee. But the point is, at the summary judgment stage, if the plaintiff says, well, I was 55 and I was fired. And the employer says, well, I replaced you with someone and I replaced you for what to me is a perfectly good reason. Unless the employee can show that that is not the employer's, not the real reason, and that the factfinder could disbelieve it --

QUESTION: What I'm trying to get at is, one -- at one point you grant summary judgment to the defendant because the plaintiff hasn't made an adequate showing. Another point, you say, this can go to the jury, it will determine it. And a still third point on the spectrum is to say that the plaintiff prevailed on the basis of this showing without submitting it to the factfinder. And I think some of your answers tend to blur those three stages.

MR. WOLFSON: Well, let me be clear. The effect of the prima facie case is to call upon the employer to offer a nondiscriminatory explanation for its action against the employee. That is all. The burden then is on the employee to show -- to prove, by a burden of persuasion, that that nondiscriminatory explanation is false, that it is a pretext. Only --

QUESTION: And who decides the question of whether it's false or not, the jury?

MR. WOLFSON: Well, the --

QUESTION: Or the judge? I mean --

MR. WOLFSON: The jury has -- the jury, ultimately, but only if -- only if -- it only gets to the jury if there is some evidence tending to discredit what the employer's case is.

QUESTION: Is that enough? I mean, you use the

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phrase, it's false and it's a pretext, to mean one and the same thing.

MR. WOLFSON: A pretext for discrimination.

QUESTION: Ah, okay.

MR. WOLFSON: All right. But --

QUESTION: But what if you just show that's false, but you haven't shown any evidence of age discrimination? You've just shown how the employer had to show something to get out of this McDonnell Douglas hold. So he came up with, I didn't like the way he combed his hair. And that's false. Is that enough --

MR. WOLFSON: I think it --

QUESTION: -- to sustain judgment?

MR. WOLFSON: If the only -- if the employer's only explanation is, I didn't like the way -- I thought he was not gregarious.

QUESTION: Right.

MR. WOLFSON: And you show that that is false, and that there's no -- the evidence suggests no other explanation such as, I fired him because he was not gregarious but also some other reason, if that's -- if the evidence --

QUESTION: Who decides whether the explanation is false, the jury or the judge?

MR. WOLFSON: The jury decides whether it's

false, but there has to be evidence --

QUESTION: Well, that is -- by hypothesis at that point it has gone to the jury.

MR. WOLFSON: No, I don't agree with that because --

QUESTION: Well, but now wait a minute. You just said that the jury decides whether it's false, and now you're saying no, it may not have gone to the jury. Well, what do you mean?

MR. WOLFSON: Applying the standards of Rule 56 on summary judgment, the judge can determine whether there is evidence in the case tending to discredit the employer's offered nondiscriminatory action.

QUESTION: Well, what if the employer's statement stands alone? Why is the factfinder required to believe that, even if there's no evidence to discredit --

MR. WOLFSON: No, I agree with you, Mr. Chief Justice, if the employer's evidence stands alone and the employee has offered nothing in response to that, nothing to rebut that explanation, then the case should not go to the jury and summary judgment --

QUESTION: Well, why not? Why shouldn't the jury decide whether the employer's reason is pretextual or not?

MR. WOLFSON: Well, there has to be -- there has

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to be some evidence --

QUESTION: But you -- the jury is free to disbelieve any witness.

MR. WOLFSON: But there has to be -- but there has to be evidence on which, if an -- there has to be some evidence to show that that was not the case.

QUESTION: Mr. Wolfson, is it because this Court has said once the defendant articulates -- not proves, just articulates a nondiscriminatory reason, then the burden shifts to the plaintiff to show --

MR. WOLFSON: To show pretext.

QUESTION: -- that it was indeed proscribed discrimination?

MR. WOLFSON: Right, and that is the burden of persuasion at the pretext stage, that the employee has to come forward with that evidence.

QUESTION: It's not clear what we mean by pretext, though, or I -- I think what we mean by pretext is, he has to show not only that it's false but that it's a cover for discrimination.

MR. WOLFSON: Yes.

QUESTION: Just showing that it's false is not enough.

MR. WOLFSON: Well, it is enough if the only explanation that the employer comes forward with is shown

by the employee to be entirely false, and if there was evidence the employee has made, because then the factfinder could conclude that the reason why the employer is lying is because it was engaging in age discrimination, but there has to --

QUESTION: Why wouldn't the jury conclude he's lying because the procedural gimmicks that we've set up requires him to come up with an answer, whether he has one or not? You've said so long as he comes up with an answer he gets to the next stage. If he doesn't come up with an answer there's judgment against him.

Why wouldn't a reasonable jury conclude that an employer didn't come up with some reason because we told him you've got to come up with a reason or we're going to give judgment against you?

MR. WOLFSON: Well, that is part of the fact that the risk of nonpersuasion is on the employee, and the employee has to come forward with the evidence that the employer's offered reason was a pretext for discrimination.

I want to point out that, as I said, the ultimate issue in the case is whether there was discrimination, and the effects of the Fourth Circuit's rule is really to prevent the court under McDonnell Douglas from reaching that -- from reaching that question,

and the McDonnell Douglas framework is intended really to sharpen the court's focus on the evidence and not to sort of un -- to artificially prevent the court from reaching the important issue in a case.

QUESTION: Thank you, Mr. Wolfson.

Mr. Spears, we'll hear from you.

ORAL ARGUMENT OF JAMES R. SPEARS, JR.

ON BEHALF OF THE RESPONDENT

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

The respondent respectfully urges the Court to affirm the decision of the Fourth Circuit, which was based on a proper evaluation of the particular facts and circumstances in that case.

The Fourth Circuit's test for a termination replacement fact scenario is particularly important for several reasons. Number 1, it's an objective test. It measures whether or not a mere difference in age implicates the act's prohibitions, the age act prohibitions.

Number 2, the protected-nonprotected distinction incorporates title VII principles. It is not a new concept to this Court.

Number 3, it accommodates the reality of life that in most situations a younger person is almost always

going to be replacing someone older. That age difference might be a year, it might be half-a-year, it might be 20 years.

That's a reality of life. That doesn't come out of a court decision. That's just life, and it doesn't go away because Congress passed an age statute. It comes into focus in this case because we can't change that fact, and courts should deal with that fact where the issue of discrimination is presented.

What you end up with in any other test is merely an age difference, where they're simply pointing to the plaintiff's age, whatever that might be, and the replacement's age, whatever that might be. That's only a difference of numbers. A difference in numbers is never sufficient standing alone. There has to be more. This Court --

QUESTION: Well, why isn't that at least a starting point?

MR. SPEARS: It's a starting point but not sufficient for prima facie, Mr. Chief Justice, because in -- this Court in Hazen Paper I think makes clear that the essence, the particular essence of the age act is differential treatment, and differential treatment is not just a difference in numbers.

Differential treatment, as I understand it, is

actually a difference in treatment among people where they're similarly situated, and similarly situated goes to a number of things, but that's what the essence of the age act is and requires, and without some information --

QUESTION: Well, Mr. --

MR. SPEARS: -- that relates to that, the different -- the numbers alone are not sufficient.

QUESTION: Mr. Spears, do you take the position that if a 65-year-old worker is replaced by a 41-year-old worker, that it cannot constitute a violation of the ADEA?

MR. SPEARS: That alone?

QUESTION: Right. Well, the 65-year-old was replaced, and he claims to be equally well-qualified, and it fit the other McDonnell Douglas factors.

Now, do you say that there can be no violation of ADEA when the replacement worker is 41?

MR. SPEARS: No. There are -- if other --

QUESTION: There can be.

MR. SPEARS: Not on that alone. Appropriate other circumstantial evidence would have to come into play and suffice to show that there was an intention to consider the person's age.

QUESTION: Okay, but you would say it's a different case if a 50-year-old worker were replaced by someone 39.

MR. SPEARS: I can't differentiate between those two because, with all respect, that's simply a difference in numbers.

Numbers, when it's just measuring the difference --

QUESTION: But I gather in the court of appeals that we're reviewing here in the Fourth Circuit if it were 39 that would have been enough for a McDonnell Douglas presumption.

MR. SPEARS: That's correct.

QUESTION: Well, you agree with the court of appeals, don't you?

MR. SPEARS: Oh, entirely. I'm not arguing for any different standard. I think that is precisely the appropriate standard under the age act.

QUESTION: But why should it make any difference if you have the 65-year-old replaced by the 41-year-old versus a 55-year-old replaced by a 39-year-old? I mean, why --

MR. SPEARS: Justice O'Connor, I think there are two reasons for that. Number 1, the statute itself. The statute says, a violation has to be based on a finding that the individual's age was the cause of the discrimination.

Number 2, this Court in Hazen Paper emphasized

that it would require a finding that that person's age, not someone else's age, be they 25 years younger, or 6 months younger, but that the plaintiff's age played a difference in -- made a difference in that decision, and not only played a part, but had a determinative influence in that.

The problem with simply talking about younger, whether it's substantially younger or any younger, is that that focuses excessively, in our view, upon the age of a younger person.

QUESTION: Well, just --

MR. SPEARS: And that's contrary to the age --

QUESTION: Just to fill out the numbers of hypotheticals, we should add to Justice O'Connor's hypothetical a hypothetical of someone who is 40 who is fired and replaced by someone who is 39. As I understand your case, you would allow a McDonnell Douglas presumption in that case.

MR. SPEARS: Yes, and the reason I think that case is appropriate, even though you can always construct some difference of numbers that might appear arbitrary or may appear even nonsensical, that while that --

QUESTION: I think that's a fair description.

MR. SPEARS: But even though that may be true, it focuses upon whether or not there's an inference that

the plaintiff's age made any difference, and I think that's what he's --

QUESTION: Well, if we're going to resort to some kind if presumptions based on inferences, why shouldn't we try to make them rational, things that we would think could properly lead the factfinder to infer something or other? I don't see how these distinctions make sense.

MR. SPEARS: All we're saying is that those distinctions alone should not be sufficient to establish a prima facie case.

If the plaintiff, for example, shows circumstantial evidence of a different treatment based on the plaintiff's age -- it could be other experiences the plaintiff had. It could be other instances of other protected --

QUESTION: Well, you keep talking about that. The McDonnell Douglas so-called factors are several in number and, as I understood it, anyway, the Fourth Circuit thought everything was met except there was not an allegation of replacement by someone younger than 40.

MR. SPEARS: Well, there was an allegation, and that was the heart, the center of the plaintiff's case, and they felt, because the actual replacement was within the protected age class, that did not meet its test.

QUESTION: May I ask a question about -- we're arguing all about McDonnell Douglas now. McDonnell Douglas, as I read the opinion, did not require, as an element of the prima facie case, that you prove that the replacement was not a member of the protected class. There's nothing to that effect in the McDonnell Douglas opinion.

MR. SPEARS: The fourth element has -- of course, McDonnell Douglas facts were hiring phase, but even there --

QUESTION: It was a refusal to hire case, of course, too.

MR. SPEARS: Yes.

QUESTION: You have to prove qualification, the position remained open, and they interviewed people afterwards and they ultimately hired someone. They didn't say it has to ultimately be, hired someone outside the protected class.

MR. SPEARS: No, but it did say, the fourth element says someone who had the qualifications comparable to the plaintiff.

QUESTION: Correct.

MR. SPEARS: They did relate to some extent, even in a hiring context, to other people.

QUESTION: Yes.

MR. SPEARS: And -- but footnote 13 in McDonnell Douglas I think anticipated a lot of confusion, which I think has occurred, and said different claims, different fact situations will call for the different formulations of the prima facie.

QUESTION: Well, isn't that necessary, if you're dealing with a hiring case and you're going to apply the standard to a promotion case, that there has to be some adjustment?

MR. SPEARS: And discharge and demotion and -- yes. Whatever the -- in fact, Justice Ginsburg, I think it's appropriate to -- if -- dependent upon the facts and the contingence of a particular case, I think that they may impact that. I don't think there's any particular prima facie specification that applies in every hiring case.

For example, in the Fourth Circuit there is a case cited in the petitioner's brief, Fink v. Western Electric. That was a reduction-in-force case, but because of the facts and the contingents of the parties, the court in that case designed a prima facie that dealt not with the selection for the reduction. It went beyond that because the facts and the contingents of the parties went beyond that.

It designed a prima facie that dealt with

opportunities after the prima -- after the reduction occurred, employment opportunities with other employers, and because that was the claim of the plaintiff, therefore the court designed the prima facie test around those facts and contingents.

That's what McDonnell Douglas directs, I think, in footnote 13, Justice Ginsburg, and that flexibility is exactly what the Fourth Circuit I believe has demonstrated.

QUESTION: The one requirement of McDonnell Douglas that hasn't been emphasized very much in the argument so far is one of the elements of the prima facie case is to prove that the person is qualified for the job, which then you say, why did you fire him? That would generally raise the question, why did you fire a qualified person, and one possible answer is, well, he's a member of a protected class, and then the employer comes in and says otherwise, it's not true.

But it's important that the plaintiff must prove that he or she was qualified for the position.

MR. SPEARS: Yes.

QUESTION: And I guess you don't deny that that proof was met in this case.

MR. SPEARS: No, we do dispute that. On the third element the Fourth Circuit found that Mr. O'Connor

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was clearly not similarly situated because he had just, a month before, had his territories reduced because of some performance problems. He pointed to no one else, no one else --

QUESTION: But we never got to that in the case itself because the plaintiff here was disqualified, was he not, because the person who was put in the position was over 40?

MR. SPEARS: Justice Ginsburg, the court did get to that because of the Rule 56 summary judgment motion.

The employer went on the offense here, which it's entitled to do under 56. It presented its reason for the decision it made here. That required the plaintiff to deal with the issues of similarly situated.

QUESTION: Well then we wouldn't even have the issue posed on which we granted review. The Fourth Circuit, as I understood it, said you don't fit McDonnell Douglas because the person who got the job was not outside the protected class, that's number 1, and these statements that you have put in are stray remarks, so you don't have enough.

Did -- there was no finding that assuming you alleged enough you didn't prove enough, that is, that you didn't prove that you were qualified. But I thought that the whole case was about whether you were excluded from

the McDonnell Douglas formula whenever the replacement is inside rather than outside the protected class.

MR. SPEARS: Justice Ginsburg, the entire case in the Fourth Circuit was not about that.

QUESTION: But isn't that the issue on which we granted cert?

MR. SPEARS: That is the issue on which we granted cert, but I don't think that can be viewed in a vacuum here with regard to why the plaintiff lost.

QUESTION: Well then maybe, if plaintiff lost, if that's an irrelevant question, if plaintiff lost independent of the answer to that question, then I suppose you're telling us we should not have granted review.

MR. SPEARS: Well, that's not for me to comment upon, whether you should or shouldn't.

I think the U.S. v. Aikens case is an exact parallel to what we have here. Because the Rule 56 summary judgment motion, the employer did everything it would have been required to do even if the prima facie had been met.

QUESTION: Well, are you taking the position that if, in fact, we conclude that on the point on which we took cert that the Fourth Circuit was wrong, that we will nonetheless have to affirm the case because there was another element of McDonnell Douglas which was found by

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the court, by the Fourth Circuit, not to have been met? Is that what you're saying?

MR. SPEARS: Not -- well, there was another analysis of McDonnell Douglas under writ, but beyond that, Justice Souter, the Rule 56 motion required the opposing party to put --

QUESTION: No, I'm -- with respect, I'm just asking you about the McDonnell Douglas presumption. Are you saying that if we conclude the Fourth Circuit was wrong in its assumption that the replacement must have been from outside the protected class, that we will nonetheless, on the record before us, have to affirm the judgment anyway because the Fourth Circuit found that another McDonnell Douglas prong had not been met?

MR. SPEARS: Yes, for that reason and an additional reason, because Rule 56 required the opposing party to put their evidence out there, the court evaluated all the evidence --

QUESTION: No, but we just took a McDonnell Douglas case.

MR. SPEARS: Excuse me?

QUESTION: I mean, we just took this case for the McDonnell Douglas --

MR. SPEARS: That issue was the limited issue before this Court.

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QUESTION: Yes.

MR. SPEARS: But that deal with --

QUESTION: And tell me just so that I don't misunderstand it, what is the other prong which the Fourth Circuit held had not been satisfied? It was the prong of competence to do the job?

MR. SPEARS: Under -- that he failed to show that anyone was performing at a level equal or lower than him, and that's under the --

QUESTION: Well, McDonnell Douglas simply requires -- as I recall, simply requires a demonstration that the complaining employee was qualified to do the job.

Did the Fourth Circuit conclude that he had not shown that he was qualified?

MR. SPEARS: The Fourth Circuit concluded he had not been able to point to anyone else similar to him, similar to --

QUESTION: That's not my question, and I don't think that's what the McDonnell Douglas criterion is. Did the Fourth Circuit conclude that he had not shown that he was qualified to do the job?

MR. SPEARS: With regard to the termination replacement prong --

QUESTION: Yes or -- I think it's a yes or no question.

MR. SPEARS: Well, the -- under the issue of termination replacement, it did not address that issue. They did not address that.

QUESTION: Well, what the --

QUESTION: So it's an open question. We wouldn't necessarily have to affirm, we'd have to send it back.

MR. SPEARS: On the termination replacement analysis, but here were other analysis which makes that unnecessary.

QUESTION: Well --

QUESTION: That is --

QUESTION: Please.

QUESTION: At pages 12 and 13 of the appendix to the petition for certiorari the Fourth Circuit is discussing this point, and before the beginning of the paragraph on page, appendix 13, the court says -- concludes, examining the third prong, before it gets to its fourth prong discussion, because under arts reorganization the geographic territories were even larger, and O'Connor's territory was already reduced, O'Connor's evidence tending to establish that he was working up to expectations does not create a genuine issue of material fact.

Are you saying that that is a finding that the

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third prong has not been established by O'Connor?

MR. SPEARS: I'm saying there was no -- as the court is, that there was no issue of that because the employer's explanation was undisputed. He had had his territories reduced.

QUESTION: When you're saying there's no issue, does that mean that the third prong, that he's failed to establish the third prong? It says it does not create a genuine issue of material fact. That's not the way we usually talk when we're asking whether a prima facie case has been made out.

MR. SPEARS: Well, not a -- but when summary judgment is brought forward, then the evidence has to be -- the evidence has to create an issue of fact at the Rule 56 position, and that's exactly where this case was ultimately resolved.

QUESTION: All right, I -- you can just say I'm wrong. Don't go into it further if I'm simply wrong. Just say I'm wrong if I'm wrong.

My understanding was that the Fourth Circuit had two ways of analyzing it. They said first, let's see if it's a discharge case.

MR. SPEARS: Right.

QUESTION: Then, let's see if it's a reduction-in-force case.

As to the first, they articulate the third prong as, was he performing his job at a level that met his employer's legitimate expectations? As to that, they didn't answer the question.

MR. SPEARS: Correct.

QUESTION: They said, we just go to the fourth.

Then they looked at it as a reduction-in-force case, and on that, the third prong is phrased differently. It is phrased whether he was performing at a level substantially equivalent to the lowest level of those the group retained. As to that part, they said, he satisfies neither the third nor the fourth.

So, if we were considering it as a reduction-in-force case, we'd have to say there are two grounds, but if we're considering it as a firing case, which was the first thing they did, they never considered the third ground, and therefore we can't say you would have won anyway. We have to reach the issue that we granted cert on.

And so if I'm right so far, let me ask you a question about that issue.

(Laughter.)

QUESTION: Am I right so far?

MR. SPEARS: I think so.

QUESTION: Okay, fine.

(Laughter.)

QUESTION: Okay, good.

MR. SPEARS: It sounds real good.

QUESTION: Good. Then I get a -- now I get a free question.

(Laughter.)

QUESTION: The -- this would be the question. We just assume for a minute -- this is where I'm actually having some trouble on this. Suppose I were to assume against you that this thing of considering the 39-year-old but not the 40-year-old, really it doesn't make any sense, and the reason that you -- it's the protected class versus the nonprotected class, actually it doesn't make any sense. Suppose I thought that.

I'd still have to say whether you make out this prima facie case if there's a substantial age difference, or you made it out if there's any age difference, and that's what they were -- both the SG says substantial, I think, and a lot of them say substantial in the circuits, anyway, but your opponent has said no, any age difference.

Now, I would have thought substantial, until I heard him argue. Then he said, look, it doesn't matter that much if there's only a year difference. The employer will come in and say, I like this other person better. Besides, there's only a year's difference. Isn't it

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obvious it wasn't age? And he'll get summary judgment.

That's what I take his argument to be. You might as well -- so I'd like you to respond to that argument.

MR. SPEARS: The prima facie?

QUESTION: Should it be substantial, or just any difference? And whereas I thought it should be substantial, he said, hey, that's going to lead to a lot of people doing it all kinds of different ways. Please, stay away from that, just say, any difference, and it's no big deal, because all the employer has to do is come in and say, I didn't like his looks, that's why I didn't hire him, okay, and there's no age difference here. After all, it's only 6 months in age.

And any sensible judge wouldn't even send that case to the jury. They'd just grant defendant verdict, the summary judgment.

MR. SPEARS: It should be neither of those standards.

QUESTION: All right.

MR. SPEARS: The reasons are that neither of those standards accounts for the reality of life. There will always be someone younger, or almost always someone younger replacing someone that's leaving. That reality has to be recognized in a termination replacement context.

That's why the protected-nonprotected distinction accommodates that.

Their standard doesn't. It ignores it. It wants nature to go away. It just wants to focus upon one number here and one number there and say, and whatever the difference is, that's enough. In Hicks --

QUESTION: But I understood this law to be against nature, if you consider that against nature --

(Laughter.)

QUESTION: Because I think you're probably right that ordinarily when an employer fires someone who's been around for a long time, he tries to get someone who will also be around for a long time and tries to hire someone younger as a replacement. But I gather that what this law says is, when you're replacing a 65-year-old you have to give a 67-year-old as much of a chance as 50-year-old. And you cannot discriminate between the two. So I think your view of natural law simply comes up against the statute here. Isn't that what the statute says?

MR. SPEARS: That no person's age shall be considered. I fully agree.

QUESTION: Even when you're firing a 67-year-old, if there's a 69-year-old who's been with the company 30 years, and you tell me the normal employer would want to get somebody else who'll be around for a while, the

statute says no, you can't do that. You have to hire a 69-year-old if he applies. Isn't that what the statute says?

MR. SPEARS: No.

QUESTION: It isn't?

MR. SPEARS: Well, I don't view the statute as mandating any sort of affirmative action for older people, if that's what you're --

QUESTION: Oh, it's -- but you cannot say, you know, these two people are even. I can't decide between the two, but this fellow -- I want somebody in this job who'll be around for 30 years. The 69-year-old is not, and therefore I'm going to take the -- you can't do that, can you?

MR. SPEARS: No, I don't think so. I'm sorry, I misunderstood your question the first time.

QUESTION: So you're positing that it's in the nature of things that when you fire an older person you normally hire a younger one. This law is against that nature of things, I take it.

MR. SPEARS: Well, I'm saying where a plaintiff in an age discrimination lawsuit relies upon that difference, that reliance simply -- and any test of a prima facie doesn't accommodate for what frequently happens without there being any age discrimination clause.

QUESTION: Yes, but isn't it --

MR. SPEARS: That's all I'm saying.

QUESTION: Isn't it fair to say that -- Benjamin Franklin was right. We can always find a reason for what we want to do, and employers do that, too. And the only thing that McDonnell Douglas is addressing is, in fact, an admittedly very strange situation in which the employer can't come up with any reason at all.

And in that case, when qualification has been proven, when the existence of a job has been proven, when we will assume some age differential has been proven, all McDonnell Douglas is saying is, there's something very strange here if he can't come up with any reason at all, and therefore the reason probably is the age -- in this case, the age differential.

That's all McDonnell Douglas is saying, isn't it, and is that so contrary to the laws of nature?

MR. SPEARS: I may have been misunderstood. I'm not arguing that McDonnell Douglas is against the laws of nature. That's not my --

QUESTION: Good. Good.

(Laughter.)

MR. SPEARS: And if I --

QUESTION: Justice Powell will be glad to hear

that.

(Laughter.)

MR. SPEARS: If I misspoke on that, I apologize, and I apologize for any confusion I've created by --

QUESTION: But Mr. Spears, you are arguing that in the application of McDonnell Douglas there is a bright line between 40 and 39, and if the replacement is 39, you have a case, and if it's 40, you don't. You are arguing that.

MR. SPEARS: On the replacement, if that's the age of the replacement. Is that --

QUESTION: Whatever -- whether it's a promotion, whether it's initial hiring, whether it's a discharge case, the line you are drawing is between the 39-year-old who gets in, and the 40-year-old. That's your case, as I take it.

MR. SPEARS: No. It's not that broad. With regard to promotions and hiring, I don't think the realities of life are necessarily implicated in that.

QUESTION: I thought the Fourth Circuit said, don't give us a person who's in the protected group. If you give us a person who's within the protected group, we're saying that doesn't qualify. You have to give us someone who's outside the protected group, meaning under 40.

MR. SPEARS: For a termination replacement case, yes, Justice Ginsburg, that is precisely what they said, but I think it's limited to that. I don't think it applies to hiring or promotion.

QUESTION: But that's the case that we have here, and that's why your answer to Justice Breyer's question, understandably, is, you're wrong both times, because it doesn't matter to you whether the age differential is 20 years, 25 years. As long as the person who got in is 40 or older, nothing else matters. It could be 1 year, it could be 25 years. Isn't that your position?

MR. SPEARS: In a termination replacement case, where the plaintiff relies upon that difference, yes.

QUESTION: And is that your position simply because a line has got to be drawn, the statute draws it somewhere, and that's it? Or is it your position for McDonnell -- I shouldn't say the statute draws it there. The McDonnell Douglas presumption ought to draw it there. Or is that your position because substantively there cannot be liability under the ADEA unless the replacement is outside the protected class?

MR. SPEARS: The second part of that, Justice Souter, I don't think is correct, and we don't --

QUESTION: Okay, so you're simply, a line --

MR. SPEARS: -- that came up in the briefs.

QUESTION: You're simply basing your position on the fact that a line has got to be drawn somewhere or your presumption starts getting useless.

MR. SPEARS: Well, not that a line has to be drawn, but the line drawn by Congress is the appropriate line, not some other arbitrary or different line.

QUESTION: Sure. Oh, I understand that.

MR. SPEARS: And --

QUESTION: But ultimately it's because you should draw a line somewhere or your presumption basically ceases to be useful.

MR. SPEARS: Where the presumption of --

QUESTION: Yes. If you didn't draw some such line as this --

MR. SPEARS: Right.

QUESTION: -- the presumption would produce results which were irrational.

MR. SPEARS: I think they'd produce results contrary to the intent of Congress in the age act. I think --

QUESTION: That, too, I suppose.

MR. SPEARS: Yes, and so I think a line should be drawn and the Fourth Circuit --

QUESTION: But not --

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MR. SPEARS: -- drew the right line.

QUESTION: But not because Congress intended that there would be no liability under the age act in the event that the person hired was, himself, within the protected class. That's not your reading.

MR. SPEARS: That's not our position, and there's an EEOC guidance on that. We don't disagree with that, and don't --

In summary, very quickly, the lower courts here examined all the evidence that the plaintiff presented which was required because of the Rule 56 motion. It was found lacking under any measure.

Something we haven't talked about here this morning was the third mode that the Fourth Circuit used, and that's under traditional methods of proof. That was also -- plaintiff's evidence was tested under that, and it was found lacking under all three of these measures.

The Fourth Circuit's test we think is clearly appropriate, because it supports what the age act is aimed at, and that is age only discrimination. It keeps the age act from being distorted into some sort of, the older you get the better your case gets, therefore your prima facie case gets older, because the older you become, if it's simply just anyone younger, that becomes and is your prima facie case.

The Fourth Circuit readily accommodates the McDonnell Douglas paradigm if it has to be used to the realities of life. We think that's important.

Footnote 13 to McDonnell Douglas indicates, and I believes directs, the circuit courts to design prima facie standards that are flexible that are designed around the facts and contentions of the parties, and we think that's very important.

Any other questions? Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Spears.

The case is submitted.

(Whereupon, at 11:09 a.m., the case in the above-entitled matter was submitted.)

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JAMES O'CONNOR, Petitioner v. CONSOLIDATED COIN CATERERS CORPORATION

CASE NO: 95-354

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BY Ann Marie Federico

(REPORTER)