Supreme Court, U.S.
FILED
MAR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1387

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1987

WARDS COVE PACKING COMPANY, INC. and
CASTLE, & COOKE, INC.
Petitioners,

vs.

FRANK ATONIO, EUGENE BACLIG, RANDY del FIERRO,
CLARKE KIDO, LESTER KURAMOTO, ALAN LEW,
CURTIS LEW, ROBERT MORRIS, JOAQUIN ARRUIZA,
BARBARA VIERNES, as administratrix of the estate of
Gene Allen Viernes, and all others similarly situated,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Abraham A. Arditi
Northwest Labor and Employment Law Office
900 Hoge Building
Seattle, Washington 98104
1-206-623-1590
Counsel of Record for Respondents

Bobbe Jean Bridge
Garvey, Schubert & Barer
Waterfront Place Building
1011 Western Avenue
Seattle, WA 98104
1-206-464-3939
Counsel for Respondents

TABLE OF CONTENTS

Statutes 1
Statement of the Case 1
Summary of Argument 4
Reasons for Denying Writ 5
Conclusion 14

TABLE OF AUTHORITY

Table of Cases

Connecticut v. Teal, 457 U.S. 440 (1982) 5-6, 8, 9

Domingo v. New England Fish Co., 727 F.2d 1479 (9th Cir. 1984), *modified* 742 F.2d 520 (1984) 7, 11

Dothard v. Rawlinson, 433 U.S. 321 (1977) 9, 12

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 10, 12

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 6, 12

Hazelwood School District v. United States, 433 U.S. 299 (1977) 8

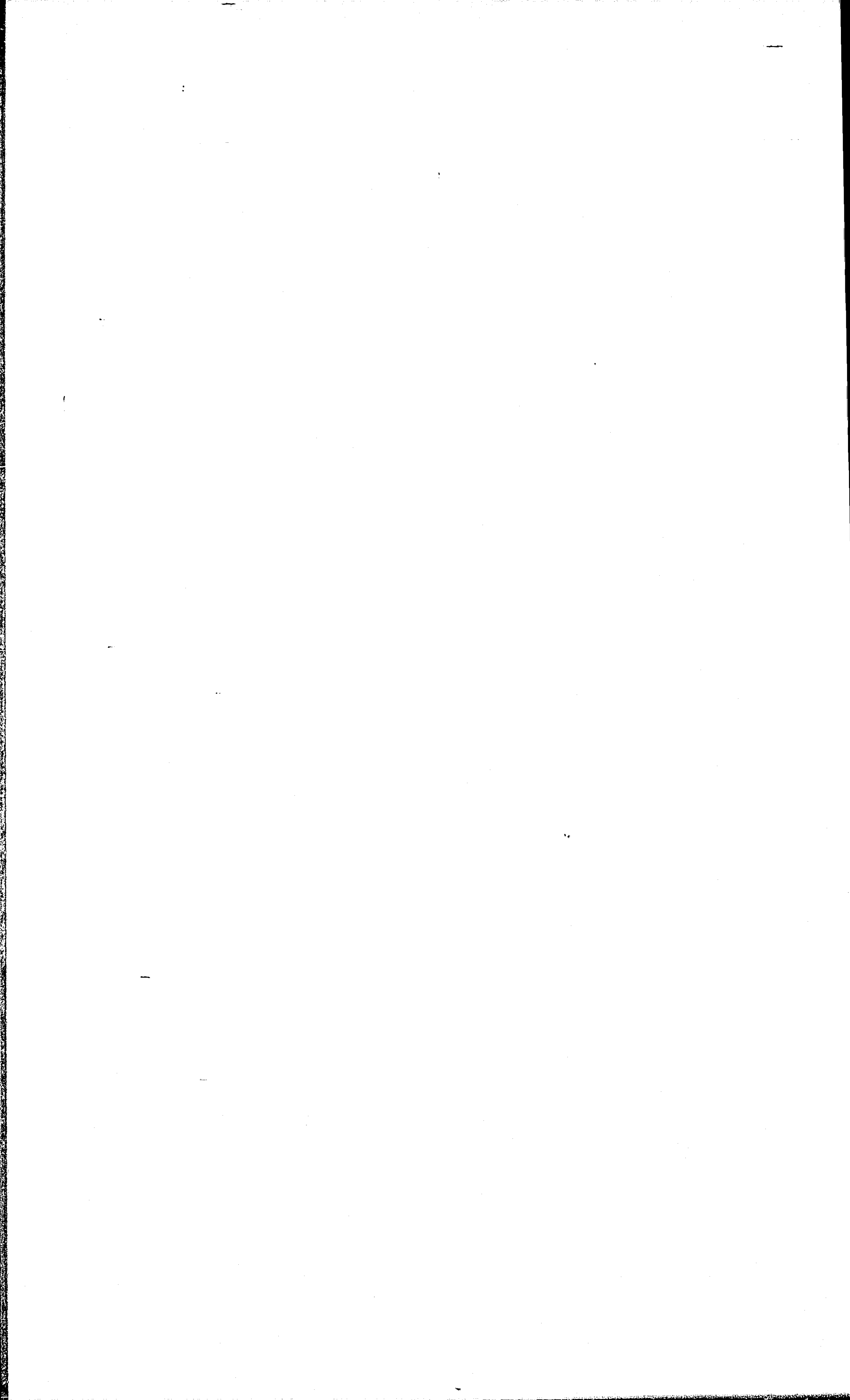
Satty v. Nashville Gas Co., 434 U.S. 136 (1977) 5

Teamsters v. United States, 431 U.S. 324 (1977) 6, 7

Watson v. Fort Worth Bank and Trust, ___ U.S. ___ (1986) (No. 86-6139) 13

Statutes

42 U.S.C. §2000e-2(a) 1, 5
42 U.S.C. §2000e-2(h) 6



STATUTES

This case involves 42 U.S.C. § 2000e-2(a), which appears in the Appendix to the petition for certiorari filed by the employees.

STATEMENT OF THE CASE

This class action challenges a pattern of racial segregation in jobs, housing and messing at several Alaska salmon canneries. Two employers seek review of a decision by the court of appeals recognizing disparate impact claims under Title VII against them. The employees have also filed a petition for certiorari, but on other issues. For the Court's convenience, the employees reiterate a portion of the statement of the case from their petition here.

The Alaska salmon canning industry has been heavily non-white since the turn of the century. Because the canneries are generally located in remote areas, they hire migrant, seasonal workers, who live in company housing. The percentage of non-white employees in the industry was 40% to 70% during 1906-1978, stabilizing at about 47% to 50% toward the end of this period. (Appendix, p. A-250.[1]) The work force at the canneries here reflects industry-wide figures, for it has been about 43% non-white overall since 1970. (Ex. 583-87). But while the percentage of non-whites overall at the canneries is high, jobs are racially stratified. Non-whites are concentrated in the lowest paying jobs, while whites clearly dominate the higher paying jobs.

The degree of segregation varies somewhat, but the administrative, machinist, fisherman, tender, carpenter, beach gang, office and store departments are all white or heavily white. In contrast, the largest department—namely, cannery worker—is heavily non-white. At some canneries, the laborer department is also heavily non-white.

For example, at Bumble Bee cannery during 1971-80, seven departments—in which there were 342 new hires—were at least 90% white, although the cannery worker department

---

[1]Citations are to the appendix to the petition for certiorari filed by the employees rather than the employers.

was 52% non-white. (Exhibit A-278 SN, Table 4.) At Red Salmon cannery, four departments—in which there were 146 new hires—were at least 94% white, although the cannery worker department was 64% non-white. (Exhibit A-278 RS, Table 4.) At Wards Cove cannery, six departments—in which there were 228 new hires—were at least 93% white, although the cannery worker department was 31% non-white. (Exhibit A-278 WC, Table 4.) At Ekuk cannery, five departments—in which there were 111 new hires—were at least 90% white, although the cannery worker deaprtment was 67% non-white. (Exhibit A-278 EK, Table 4.) At Alitak cannery, seven departments—in which there were 299 new hires—were at least 62% white, while the cannery worker department was 65% non-white. (Exhibit A-278 AK, Table 4.)

The pattern of segregation is matched by express race labelling of jobs, bunkhouses and messhalls. Company records refer to "Filipino cannery workers," "Native cannery workers," the "Filipino union," "Philippine Bunkhouse," "Native Galley Cook " and "Filipino Mess." (Appendix, p. A-283-284.) A mail slot in the office at one cannery is marked "Oriental bunkhouse." (Appendix, A-285-286.) The president of one employer testified Alaska Native crews are race labelled "for mere ease or habit of identification." (RT 1143.) Employee badge numbers are assigned along racial lines. (Appendix, p. A-284-285.) Even the salmon butchering machine has a name with racial overtones, the "Iron Chink." (Appendix, p. A-37.) Far from being incidental, the "[r]ace labelling is pervasive at the salmon canneries." (Appendix, p. A-37.)

The pattern of job segregation is enforced by several practices.[2]

First, race labelling "operates as a headwind" to advancement of non-whites, because it conveys a "message" that they need not apply for upper level jobs. (*See* Appendix, p. A-37 and 43.)

Second, the employers use essentially segregated hiring channels for different jobs, which prevent non-whites from competing on the basis of qualifications with whites. The

[2]The employers say the employees challenged 16 practices which fostered job segregation, but only eight were treated by the court of appeals.

employers recruit from non-white sources such as Alaska Native villages, foremen of Asian descent and the heavily Filipino Local 37, ILWU, but only for the lowest paying jobs. (Appendix, p. A-31-32; Revised Pretrial Order, p. 14.)

Third, to fill higher-paying jobs, the employers rely on informal word-of-mouth recruitment among friends and relatives of white foremen and superintendents. (Appendix, p. A-32.) The employers neither publicize vacancies for upper-level jobs nor promote from non-white to white jobs, so the effect of segregated hiring channels is aggravated. (Appendix, p. A-241-242; Revised Pretrial Order, p. 16-19.)

Fourth, the employers do not use objective job qualifications for jobs at issue. They retained an expert who prepared qualifications for litigation, which the district court found could be "reasonably required." (Appendix, p. A-26.) But the expert testified the qualifications were never actually applied. (RT 3113; *see also* RT 3067.) The anecdotal evidence also indicates they were never actually applied. The use of subjective qualifications has a disparate impact on non-whites, which prevents them from competing on equal terms for upper-level jobs. (*See* Appendix, p. A-28-30.)

Fifth, there is pervasive nepotism at the canneries, which contributes to the racial segregation, since white supervisors control the upper level jobs. "[O]f 349 nepotistic hires in four upper-level jobs during 1970-75, 332 were of whites, 17 were of non-whites." (Appendix, p. A-24.)

Sixth, the employers give re-hire preference to employees in their old jobs, a practice which perpetuates the segregation by race in jobs. The court of appeals affirmed a finding the practice was justified by business necessity, although no evidence of business necessity was offered in the district court. (*See* Appendix, p. 36.)

Seventh, the employers maintain racially segregated bunkhouses, a practice which "aggravate[s] the isolation of the non-white workers from the 'web of information' spread by word of mouth among white people about the better paying jobs." (Appendix, p. A-41.)

Eighth, the segregated messhalls have a similar effect, again enforcing the pattern of job segregation. (Appendix, p. A-42-32.)

The employers justify the job segregation by arguing they hire too many non-whites in the lower paying jobs, rather than too few in the upper-level jobs. The centerpiece of their approach is a labor market comparison, which assumes non-white availability of only about 10%, even though non-whites comprise about 48% of employees in the industry. (RT 1870 *et seq.*) The job segregation is so graphic even the economist hired by the employers testified non-whites were absent from certain jobs at statistically significant levels. (RT 1871-73; *see also* RT 1875.) But overall, he testified there was no pattern or practice of discrimination, because recruiting through largely non-white sources for low paying jobs distorted the racial composition of the labor pool.

Following trial, the district court dismissed all claims. A panel of the court of appeals initially affirmed, but its opinion was withdrawn, when rehearing en banc was granted. Sitting en banc, the court of appeals held the disparate impact approach could be applied to the challenged practices. It then returned the appeal to the panel to apply this ruling.

The panel reversed dismissal of disparate impact challenges to nepotism, lack of objective qualifications, use of separate hiring channels, word of mouth recruitment, segregation in housing, segregation in messing and race labeling. Because it was not clear what—if any—job qualifications were actually applied, the court of appeals remanded for findings on this issue. It affirmed dismissal of a disparate impact challenge to use of certain re-hire preferences, because of a finding they were justified by business necessity.

SUMMARY OF ARGUMENT

The Court should deny the writ, since virtually every issue raised by the employers has been foreclosed by controlling decisions of the Court. The departures the employers cite from decisions of the Court are based on a mis-reading of the opinions below.

REASONS FOR DENYING THE WRIT

1.
The Ruling of the Court of Appeals on the Prima Facie Case is Consistent With Controlling Decision of this Court

The court of appeals correctly held that the job segregation statistics—as well as other evidence—established disparate impact, regardless of findings on the percentage of non-whites in the labor market area. Because this holding is consistent with controlling decisions of this Court, there is no reason to grant certiorari.

First, by its terms, Title VII makes segregation in jobs by race unlawful.

> It shall be an unlawful employment practice for an employer—
>
> to limit, *segregate,* or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . .

42 U.S.C. §2000e-2(a)(2). (Emphasis added.) This Court has recognized claims of disparate impact under this section. *Connecticut v. Teal,* 457 U.S. 440, 445-46 (1982); *Satty v. Nashville Gas Co.,* 434 U.S. 136, 144 (1977).

Second, because the disparate impact approach focuses on lost opportunities rather than simply lost jobs, labor market comparisons with those hired are irrelevant. This Court has already rejected the "bottom line" defense in disparate impact cases in *Connecticut v. Teal, supra.* Since a labor market argument is one form of a "bottom line" defense, *Teal* is controlling here.

> In considering claims of disparate impact under §703(a)(2) this Court has consistently focused on employment and promotion requirements that create a discriminatory bar to *opportunities.* This Court has never read §703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or

> promoted. Thus *Dothard v. Rawlinson,* 433 U.S. 321 (1977), found that minimum statutory height and weight requirements for correctional counselors were the sort of arbitrary barrier to equal employment opportunity for women forbidden by Title VII. Although we noted in passing that women constituted 36.89 percent of the labor force and only 12.9 percent of correctional counselor positions, our focus was not on this "bottom line." We focused instead on the disparate effect that the minimum height and weight standards had on applicants: classifying far more women than men as ineligible for employment. *Id.,* at 329-330 and n. 12. Similarly, in *Albermarle Paper Co. v. Moody, supra,* the action was remanded to allow the employer to attempt to show that the tests that he had given to his employees for promotion were job related. We did not suggest that by promoting a sufficient number of the black employees who passed the examination, the employer could avoid this burden. See 422 U.S., at 436. See also *New York Transit Authority v. Beezer,* 440 U.S. 568, 584, (1979).
>
> . . . .
>
> In short, the District Court's dismissal of respondent's claim cannot be supported on the basis that respondents failed to establish a prima facie case of employment discrimination under the terms of §703(a)(2). The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job related criteria.

Connecticut v. Teal, supra at p. 450-51. (Emphasis in original.)

Third, beginning with *Griggs,* this Court has endorsed disparate impact attacks on practices which foster job segregation. *Griggs* involved education and testing requirements, which operated as "built in headwinds" to transfers in a plant where "Negroes were employed only in the labor department," while "only Whites were employed" in the other four departments. *Griggs v. Duke Power Co.,* 401 U.S. 424, 427, 432 (1971). Similarly, in *Teamsters v. United States,* 431 U.S. 324 (1977), this Court observed that a seniority system which enforced a pattern of job segregation would have been subject to a disparate impact challenge but for the exemption for seniority systems in 42 U.S.C. §2000e-2(h).

> The vice of this [seniority] arrangement, as found by the District Court and the Court of Appeals, was that it "locked" minority workers into inferior jobs and perpetuated prior discrimination by discouraging transfers to jobs as line drivers.
>
> . . . .
>
> Were it not for §703(h), the seniority system in this case would seem to fall under the *Griggs* rationale.

Teamsters v. United States, supra at 344, 349.

Fourth, while the job segregation statistics illustrate the effect of the challenged practices, they are not the only evidence of disparate impact. Plaintiffs offered separate statistics on nepotism, which showed that fully 332 of 349 nepotistic hires in four upper-level departments during 1970-75 went to whites. (Appendix, p. A-24.) Similarly, the effect of segregated hiring channels is obvious, as the court of appeals pointed out.

> [T]he companies sought cannery workers in Native villages and through dispatches from ILWU Local 37, thus securing a work force for the lowest paying jobs which was predominantly Alaska Native and Filipino. For other departments the companies relied on informal word-of-mouth recruitment by predominantly white superintendents and foremen, who recruited primarily white employees. That such practices can cause a discriminatory impact is obvious.

(Appendix, p. A-31-32.) *See also Domingo v. New England Fish Co.*, 727 F.2d 1479, 1435-36 (9th Cir. 1984), *modified* 742 F.2d 520 (1984). Beyond this, the employers conceded the effect of the practice in the court of appeals by arguing that the concentration of non-whites in lower level jobs results from recruiting in Alaska Native villages and through Local 37 for cannery worker jobs.[3] Similarly, the employers acknowledged in the court of appeals that the racial imbalance in jobs results from the inability of non-whites to meet the undisputedly subjective qualifications they impose.[4] But this is simply

[3] Brief of Appellees, p. 8 and 29.

[4] Brief of Appellees, p. 27-28.

another way of saying that the qualifications disqualify non-whites at a higher rate than whites, an observation which lies at the heart of a disparate impact violation.

Fifth, whether the employers fill the upper level jobs with new hires rather than promoting from within is irrelevent to the existence of disparate impact. A non-white who is condemned to a menial job because of an employer's recruitment practices is no less a victim of discrimination than a non-white who is denied a promotion once hired. Segregated hiring channels cut non-whites off from opportunities in the better jobs. Because the abilities of those recruited through different channels are not compared, non-whites are foreclosed from competing effectively on the basis of qualifications for upper-level jobs.

2.
The Court of Appeals Correctly Applied the Disparate Impact Approach in a Way Which is Consistent with Controlling Decisions of this Court

Because the court of appeals applied the disparate impact approach in a way which is consistent with controlling decisions of this Court, certiorari is inappropriate.

a.
The Court of Appeals Did Not Override the Findings of the District Court

The employers argue that the court of appeals ignored the district court's findings on the labor market. But because a labor market defense is precisely the sort of "bottom line" argument this Court has rejected in disparate impact cases, the findings were irrelevant. (*See* page 5-6, *supra.*) *Connecticut v. Teal, supra.* Beyond this, statistics offered by the employers establish disparate impact, as is apparent from the job segregation figures—all of which are taken from defense exhibits—which are cited above. (*See* page 1-2, *supra.*) Even the economist who testified for the employers testified that there was statistically significant underrepresentation of non-whites in certain upper-level jobs. (*See* page 3, *supra.*) The employers argue *Hazelwood School District v. United States,* 433 U.S. 299 (1977), requires a labor market comparison. But

since it involves neither a disparate impact nor a job segregation claim, it is not pertinent here.

The employers also maintain the court of appeals ignored the district court's findings on nepotism. However, the district court found there was a "pervasive incidence of nepotism in the canneries." (Appendix, p. A-315.) Far from overturning this finding, the court of appeals simply corrected the district court's misunderstanding of the term "nepotism." (Appendix, p. A-23-24.) Since the only authority the employers cite is *Webster's*, this issue hardly merits a grant of certiorari.

b.

The Court of Appeals Followed the Allocation of the Burden of Proof Set By Controlling Decisions of this Court

The court of appeals held that the employees made a prima facie case of disparate impact by:

> (1) show[ing] a significant disparate impact on a protected class, (2) identify[ing] specific employment practices or selection criteria and (3) show[ing] the casual relationship between the identified practices and the impact.

(Appendix, p. A-71, A-81, A-87-88.) These elements track precisely the guidelines this Court has set for a prima facie case on a disparate impact claim. *Connecticut v. Teal, supra* at 446 ("[t]o establish a prima facie case . . . a plaintiff must show that the facially neutral employment practice had a significant discriminatory impact"); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) ("to establish a prima facies case . . . a plaintiff need only show that the facially neutral standards select applicants for hire in a significantly discriminatory pattern"). Any claim that the court of appeals required a lesser showing is based on a misreading of its opinions.

c.

The Court of Appeals Correctly Allocated the Burden of Proof on Qualifications Here

The court of appeals correctly allocated the burden of proof on qualifications here. While the employers maintain the issue

is one of general importance, it in fact arises largely from circumstances peculiar to this case.

The employers argue that the employees bear the burden of offering statistics on the percentage of qualified non-whites. But this Court has held that only "non-discriminatory standards *actually applied*" by the employer are pertinent in a Title VII case. *Franks v. Bowman Transporation Co.*, 424 U.S. 747, 773 n. 32 (1976). (Emphasis in the original.) Since the employers never articulated what—if any—qualifications they actually applied, the employees could not offer statistics on qualified non-whites.

The employers called an expert witness to testify at trial about qualifications, but he admitted the qualifications he devised had never been applied.

> THE COURT: All right. Mr. DeFrance, in this case, I believe you have already testified that the Defendants have not adopted, to your knowledge, the minimum qualifications that you recommended; is that correct?
>
> THE WITNESS: That's correct. I don't know that they have ever been adopted.

(RT 3113; *see also* RT 3067.) One management employee who recruited in nearly all upper level jobs testified,

> Q. But there were not set qualifications a person had to meet?
> A. No.
> Q. Pardon?
> A. No.

(RT 622-23, 627-30 and 637.) A cannery superintendent conceded in deposition testimony offered at trial,

> Q. You don't have any written job qualifications at Bumble Bee, do you?
> A. No.
> Q. Have you ever had them?
> A. No.
> Q. You just rely on your own judgment and the judgment of the foreman who is hiring?
> A. Yes.

(Dep. Leonardo-1978 p. 2 and 46-47.) The employers neither give tests nor impose education requirements.[5] They make no attempt to hire on standardized qualifications, even when several people hire for the same job.[6] They have no written qualifications for any job at issue.[7] Nor with rare exceptions, do they have written job descriptions.[8] Witness after witness called by the employers acknowledged on cross-examination that there were no objective qualifications.[9] The district court cited evidence of a "general lack of objective job qualifications." (Appendix, p. A-317.) The employees offered anecdotal evidence that individuals were hired on much lower qualifications than the employers asserted at trial. (*See* Appendix, p. A-29.) Understandably concerned, the court of appeals remanded for findings on what—if any—objective qualficiations were actually applied. (Appendix, p. A-28.) Where job qualifications are unknown, it is unrealistic to require the employees to prove the percentage of qualified non-whites. *Domingo v. New England Fish Co., supra* at 1437 n.4.

Beyond this, the employees were not required to show that they were qualified under selection criteria which were them-

---

[5]Ex. 156-159; Dep. A.W. Brindle-1975, p. 30; Dep. Jorgenson, p. 7-8; Dep. Snyder, p. 12-13; Dep. Rohrer, p. 43; Dep. Leonardo-1975, p. 21; Dep. Leonardo-1978, p. 46-47; Dep. W.F. Brindle-1978, p. 49. One cannery has given home-made tests but has neither kept scores nor recorded the results, since "the proof is in the pudding." (Ex. 160.)

[6]Dep. Rohrer, p. 43; Dep. Jorgesen, p. 8; Dep. Snyder, p. 13.

[7]RT 2365, 2548, 2569, 2758, 2805, 2819 and 3316; Dep. Gilbert-1980, p. 10; Dep. W.F. Brindle-1978, p. 49; Dep. Snyder, p. 13.

[8]Dep. Gilbert-1980, p. 11; Dep. A. Brindle-1975, p. 29.

[9]RT 2365, 2548, 2569, 2617, 2642 and 3161; Dep. Aiello, p. 19. Aside from expert testimony, the only arguable listing of qualifications came in certain interrogatory answers. (Ex. 68-72.) However, the qualifications given are more modest than those asserted at trial, are often purely subjective and in any case were not actually imposed. As one cannery superintendent testified,

> Q. So [the interrogatory answers] are your ideal for qualifications?
> A. Yes.
> Q. And Alitak may have hired on lower qualifications?
> A. Oh, Yes. We always shot for the best.
> Q. So your answer to Interrogatory 20.C does not get job qualifications as they were actually imposed at Alitak from 1970 onward?
> A. Right.

(Dep. W.F. Brindle-1978, p. 12 and 14.)

selves discriminatory. Once they made a prima facie case of the disparate impact of subjective criteria, they were relieved of proving that they met these qualifications. To hold otherwise would have meant the plaintiff in *Griggs* had to have a high school diploma before challenging the discriminatory nature of the high school diploma requirement. Once again, only a failure to meet "non-discriminatory" standards is pertinent under Title VII. *Franks v. Bowman Transportation Co., supra* at 773 n. 32.

d.
The Court of Appeals Correctly Allocated the Burden of Showing Business Necessary for Separate Hiring Channels

The employers complain that the court of appeals unfairly placed on them the burden of justifying their practice of using segregated hiring channels. But because the employees established the disparate impact of separate hiring channels, it fell to the employers to establish the business necessity of the practice. *Dothard v. Rawlinson, supra* at 332 n. 14; *Griggs v. Duke Power Co., supra* at 431.

3.
The Employees Have Shown the Impact of Each Practice They Challenge

The employers maintain that the employees challenge the cumulative effect of a variety of practices with no more evidence than job segregation statistics. But in so doing, the employers mis-characterize the rulings below. This Court should not grant certiorari to review an issue which is absent from the case.

Sitting en banc, the court of appeals wrote,

> We note that a related concern is that the "impact model is not the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." *Spaulding*, 740 F.2d at 707. *However, this is not such a case. The class has not*

> *simply complained about the overall consequences of a collection of unidentified practices;* rather it has identified specific employment practices which cause adverse impact. These specific practices which cause adverse impact may be considered individually and collectively.

(Appendix, p. A-91 n. 6.) (Emphasis added.) It also noted the employers conceded that the challenged practices caused the disparate impact.

> The statistics provide evidence of a significant disparate impact and *the challenged practices are agreed to cause disparate impact.*

(Appendix, p. A-81.) (Emphasis added.)

On return to the panel, the court of appeals cited proof of or a concession about the disparate impact of each challenged practice. From statistics showing 332 of 349 hires in upper-level departments of relatives were of whites it concluded that nepotism had a disparate impact. (Appendix, p. A-24.) When treating subjective criteria, it observed, "The companies concede the casual relation between their hiring criteria and the number of nonwhites in the at-issue jobs. . . ." (Appendix, p. A-28.) Similarly, it commented it was "obvious" that recruiting for menial jobs from non-white sources while soliciting white applicants by word of mouth had a disparate impact. (Appendix, p. A-32.)

4.
The Court Need Not Grant Certiorari on the Application of the Disparate Impact Approach to Subjective Practices

While the Court has granted certiorari in *Watson v. Fort Worth Bank and Trust,* ____ U.S. ____ (1986) (No. 86-6139), to decide the suitability of the disparate impact approach to subjective practices, the employers say this case involves somewhat different issues. Under these circumstances, the Court should not grant certiorari here.

CONCLUSION

The Court should deny the writ of certiorari.

Respectfully submitted,

Abraham A. Arditi
Attorney for Respondents