(9)

No. 87-1387

IN THE
Supreme Court of the United States

October Term, 1988

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

v.

FRANK ATONIO, *et al.*,
Respondents.

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Does statistical evidence that shows only a concentration of minorities in jobs not at issue fail as a matter of law to establish disparate impact of hiring practices where the employer hires for at-issue jobs from outside his own work force, does not promote-from-within or provide training for such jobs, and where minorities are not underrepresented in the at-issue jobs?

2. In applying the disparate impact analysis, did the Ninth Circuit improperly shift the burden of proof to petitioners?

3. Did the Ninth Circuit commit error in allowing plaintiffs to challenge the cumulative effect of a wide range of non-racially motivated employment practices under the disparate impact model?

LIST OF PARTIES

Petitioners are Wards Cove Packing Co., Inc., and Castle & Cooke, Inc., who were defendants in the trial court proceeding. (Claims against a third defendant, Columbia Wards Fisheries, were dismissed. This was affirmed on appeal. *See* fn. 1 *infra.*)

Respondents are Frank Atonio, Eugene Baclig, Randy del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Joaquin Arruiza, and Barbara Viernes (as administratrix of the Estate of Gene Allen Viernes), who were individual plaintiffs and representatives of a class of all nonwhite employees in the trial court proceeding.

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OPINIONS BELOW

On October 31, 1983, the United States District Court for the Western District of Washington (Quackenbush, J.) entered an opinion following a nonjury trial. Pet. App. I. *See* n. 3, *infra.* An order correcting the opinion and judgment in favor of petitioners was entered December 6, 1983. Pet. App. II. The District Court's decision was published at 34 E.P.D. ¶ 34, 437 (Commerce Clearing House, Inc.). The opinion of the Court of Appeals affirming the judgment was published at 768 F.2d 1120. Pet. App. III. An order that withdrew the opinion and ordered rehearing *en banc* was published at 787 F.2d 462. Pet. App. IV. An opinion of the *en banc* Court of Appeals was published at 810 F.2d 477. Pet. App. V. An opinion of the panel of the Court of Appeals on remand from the *en banc* panel was published at 827 F.2d 439. Pet. App. VI. An order clarifying the opinion was entered on November 12, 1987, Pet. App. VIII, and a petition for rehearing denied. Pet. App. IX.

JURISDICTION

Federal jurisdiction in the trial court was invoked under 28 U.S.C. § 1331. The decision of the Court of Appeals sought to be reviewed was entered on September 2, 1987. Pet. App. VI. A timely petition for rehearing was filed on September 16, 1987, Pet. App. VII, and the petition was denied on November 12, 1987. Pet. App. IX. Jurisdiction in this Court is invoked under 28 U.S.C § 1254(1).

PERTINENT STATUTE

Plaintiffs' claims arise under Title VII of Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) 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, color, religion, sex, or national origin.
>
> ***
>
> (j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group

on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

STATEMENT OF THE CASE

A. Nature of the Case.

The respondents in this class-action suit are former employees at several salmon canneries in Alaska. They brought this action against their former employers, petitioners Wards Cove Packing Company, Inc., and Castle & Cooke, Inc.[1] charging employment discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The class is defined as all nonwhites who are now, will be, or have been at any time since March 20, 1971, employed at any one of five canneries.[2]

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[1] Title VII claims against a third defendant, Columbia Wards Fisheries, were dismissed and a judgment was entered in its favor on the claims brought under 42 U.S.C. § 1981. Plaintiffs' Petition for Writ of Certiorari on these claims was denied April 4, 1988 (No. 87-1388).

[2] These canneries are Bumble Bee at South Naknek (owned by Castle & Cooke, Inc.); Wards Cove and Red Salmon (owned by Wards Cove Packing Co., Inc.), and Alitak and Ekuk (operated by dismissed-defendant Columbia Wards Fisheries).

Following a lengthy non-jury trial, the trial court found that plaintiffs had not established discrimination under § 1981 or Title VII and judgment was entered for petitioners. The Ninth Circuit affirmed this decision, but on rehearing *en banc* resolved a conflict within the circuit by determining that the impact analysis could be applied to subjective employment practices and remanded to the original panel. The subsequent panel decision vacated the judgment and remanded to the district court with directions to apply the disparate impact analysis in a manner inconsistent with decisions of this Court and in conflict with other circuits.

B. Material Facts.

The salient facts may be found in the detailed findings of the District Court (Pet. App. I:1-43).[3] *See also* the Court of Appeals summary (Pet. App. III:3-9). Petitioners operate salmon canneries and fish camps in remote and widely separated areas of Alaska. Of eleven facilities, five were certified for this class action, and three remain in the litigation. *See* n. 1, 2, *supra*. The canneries operate only during the summer salmon run. For the remainder of the year they are vacant. Petitioners' head office and support facilities are located at Seattle, Washington, and Astoria, Oregon.

Throughout the case period, minorities have held top positions with petitioners, including three at the superintendent

[3] The following abbreviations are used herein for citations to the record: "Pet. App." refers to the Appendices attached to the Petition for Writ of Certiorari; "J.A." refers to the Joint Appendix filed herewith; "E.R." refers to the Excerpt of Record lodged with the Court which contains certain trial exhibits that did not lend themselves to the Joint Appendix format; "Ex." refers to trial exhibits; "R.T." refers to the Reporter's Transcript of the trial; "FF" refers to the District Court's Findings of Fact; "Dep." refers to a Deposition transcript offered in lieu of live testimony at trial; and "Tbl." refers to a Table in a composite statistical exhibit.

level.[4] At petitioners' Alaska facilities combined, for the period 1971-80, minorities were nearly 24% of the new hires in the at-issue jobs — the jobs from which respondents claim minorities were excluded.[5] The five class facilities combined hired nearly 21% nonwhites, and each of the three remaining canneries hired from 10%–18% nonwhites in those jobs.[6]

The manner in which petitioners operate is dictated in large part by geography and nature: until the long Alaska winter is over in late April and early May, petitioners can do little at the canneries to prepare them for the salmon run.

Based upon the size of the predicted run for the coming season, management will decide whether to open a particular facility for canning and, if so, how many canning lines to run, tenders to operate, and employees to hire. Pet. App. 1:16-18. Three canneries (Red Salmon, CWF-Ekuk, and South Naknek) are located in Bristol Bay in the southeast corner of the Bering Sea, north of the Aleutian Islands. One cannery is located on Kodiak Island (CWF-Alitak) and one at Ketchikan (Wards Cove). Pet. App. I:5, 6.

Of the class facilities, Red Salmon, South Naknek, and Wards Cove were closed for canning during certain years in the case period but did operate as fish camps.[7] Pet. App. I:18, FF 18.

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[4] R.T. 1122, 2862, 2889-90, 2439-40, 3271-72.

[5] Ex. A-403, Tbl. 22 (E.R. 13).

[6] *Id.* Tbl. 23, 1, 2, 5 (E.R. 14, 10-12).

[7] A fish camp is a support base for tenders and fishing vessels. It performs no processing. Many at-issue jobs are held at the fish camps: *e.g.*, beachgang, carpenters, cooks, tender crews, and fishermen. There is no racial stratification between cannery and at-issue jobs because no canning is performed and Local 37 has no contract for any jobs. Accordingly, respondents did not name the fish camps at Egegik, Moser Bay, Craig, and Chignik as class facilities.

Each facility is a self-supporting installation where the employees are housed and fed by the company. The canneries must rely almost entirely upon their own on-site employees to maintain and repair the cannery buildings and equipment.

There are two general categories of jobs: cannery worker and laborer jobs which are not at issue, and non-cannery jobs which *are* at issue. (Pet. App. I:28, FF 82.) The non-cannery workers are hired during the winter and early spring and sent to Alaska during the preseason. The cannery workers are not needed until several weeks later when the salmon run actually commences.

The non-cannery workers include such jobs as carpenters, machinists, tender crews, and a beachgang. During the preseason, these personnel drive piling, launch boats, get the machinery running, and repair and de-winterize the cannery. They are housed in bunkhouses insulated and heated for the cold spring weather. The preseason is an intense period between the winter "break up" and the commencement of the salmon run, and there is no time to train unskilled workers for skilled jobs. (Pet. App. I:18-19). The non-cannery workers are hired laterally from an external labor market. (Pet. App. I:39, FF 112.) This hiring is done during the first three months of the year and requires availability by the end of April. (Pet. App. I:30, FF 86.)

In June, after the canneries are in operating condition, nonresident (outside Alaska) cannery workers are mostly hired through Local 37, I.L.W.U.[8] They are transported to Alaska in time to process the first of the salmon caught. Resident cannery workers were hired in the early case period from the

[8] Local 37 did not have a contract with Ekuk. Pet. App. I:32, FF 91.

areas near the canneries.[9] When cannery workers arrive, additional bunkhouses are opened for them. These are bunkhouses suited for the summer weather. (Pet. App. I:83-84, FF 149 A-B.) During the season, which will last from three weeks to two months, most employees, both cannery and non-cannery workers, have season guarantees in their union contracts, a fact which inhibits transfers across union lines during the season because it would require the employer to pay an additional guarantee. (Pet. App. I:39, FF 111.) There are few midseason vacancies, and transfers across departmental lines during the season, and even between seasons, is rare. (Pet. App. I:34, FF 98, 99.)

As soon as the salmon run ends, the cannery workers are discharged and sent home; the non-cannery workers then haul out the boats, sail the tenders south,[10] and winterize the canneries.

The union contracts for the carpenters, machinists, tender crews, culinary crews, and also for Local 37 have rehire preference clauses which operate like a seniority system. (Pet. App. I:29-31, 35, FF 85, 87, 101.) This rehire preference clause obligates the petitioners to rehire satisfactory employees in the same job for the upcoming season and this accounts for nearly one-half the hires for at-issue jobs.[11]

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[9] As pointed out by the District Court, the racial composition of the hires of Alaska residents is largely dictated by geography (Pet. App. I:38). Some canneries hired few local residents as cannery workers — Red Salmon hired only 18 nonwhite Alaska residents out of 338 total new hires during the entire case period. Ex. 497, Tbl. 3(b) (E.R. 16).

[10] Some tenders move on to other canneries for later seasons. Respondents' comparative statistics sought to count each tender crew member on arrival at each cannery as a new hire. The District Court was not impressed with this. Pet. App. I:120.

[11] *See* Ex. A-320 (a), p.5, col. "same dept., same job" (40% of at issue jobs filled by rehires).

Although the labor market for cannery worker and laborer jobs is 90% white, nonwhites are greatly overrepresented in these jobs because of institutional factors: Local 37 is dominated by Filipinos as are the crews it dispatches, and the geographic areas surrounding most of the canneries are heavily nonwhite. (Pet. App. 1:36-39, FF 105-109.)[12]

Petitioners, however, do not exclude members of Local 37 or Alaska Natives from consideration for at-issue jobs.[13] For instance, respondent Atonio originally obtained a cannery worker job through Local 37; later, after two untimely oral requests for other jobs, he made a timely application and was hired first in the beachgang and later as a tender deckhand. He was rehired for a job as deckhand in 1981, but quit before the boat departed. (Pet. App. I:87-88, FF 159.)

For at-issue jobs, petitioners obtain many more applications than there are vacancies. (Pet. App. I:31, FF 89). Consequently, petitioners do not advertise; however, the Alaska

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[12] As the District Court found (Pet. App. I:38) and the panel also recognized (Pet. App. III:32), Alaska Natives comprise a high percentage of local labor market for resident cannery workers at the remote canneries. For example, at Ekuk, the most remote cannery, of the Alaska residents hired as cannery workers, 97% were nonwhite, Ex. A-497, Tbl. 3(b) (E.R. 16); at the same cannery for Alaska residents hired for at-issue jobs, 91.6% were nonwhite (J.A. 290-91; Ex. A-501, Tbl. 2(A)).

By comparison, at Wards Cove, located near the city of Ketchikan, the majority of Alaska residents hired for cannery worker jobs were white (402 out of 471 openings). Ex. A-497, Tbl. 3(b) (E.R. 16).

[13] Of Alaska residents hired, Alaska Natives filled 60% of the at-issue jobs and 60% of the cannery worker and laborer jobs overall. Ex. A-501, Tbl. 1(A); J.A. 290-91, ¶ 45. The hiring of nonwhites for at-issue jobs is far in excess of their availability in the labor market for Alaska. Nonwhites only comprise 15.6% of that market. J.A. 290-91; Ex. A-501, Tbl. 18.

Unemployment Service has been called. (Pet. App. I:28-29, FF 83.) Petitioners do accept walk-in applicants and referrals from unions. R.T. 2769, 2771; Dep. Lessley, p. 7, J.A. 15. There is not time to post openings during the season because the job needs to be filled immediately and management cannot wait for an interview structure. R.T. 1135; 2772; Pet. App. I:34, FF 96.

In 1974 respondents commenced a class action against petitioners. The suit mounted a broad-scale attack against the gamut of petitioners' employment practices. Respondents identified 16 "practices"[14] which they contended caused an imbalance and thus a "concentration" of nonwhites in the lower-paying cannery worker jobs. Respondents used comparative statistics to argue that of the total work force, the majority of the nonwhites were concentrated in the lower-paying jobs and that there should have been a balance of 50% white/nonwhite employees in all job classifications.

After 12 trial days, in which more than 100 witnesses testified, over 900 exhibits were admitted, and over 1,000 statistical tables were submitted, the trial court entered extensive findings of fact in a 73-page opinion. Pet. App. I.[15] The findings determined that respondents' comparative statistics were of little probative value; that the labor supply for petitioners' facilities is approximately 90% white; that minorities were not underrepresented in the at-issue jobs; that cannery workers are not the appropriate comparison labor pool for

[14] In the Revised Pretrial Order, plaintiffs listed word-of-mouth recruitment, separate hiring channels, nepotism, termination of Alaska Natives, rehire preference, retaliatory terminations, menial work assignments, fraternization restrictions, housing, messing, English language requirement, race labeling, subjective hiring criteria, lack of formal promotion practices, failure to post jobs, and discrimination in pay in certain jobs.

[15] Although respondents contended there was discrimination against Alaska Natives, not a single Alaska Native testified in plaintiffs' case. Only petitioners called Alaska Natives to the witness stand. *E.g.*, J.A. 414.

at-issue jobs; that petitioners hire from an external labor supply and do not either promote-from-within or train inexperienced, unskilled workers for at-issue jobs; that the jobs are not fungible and most jobs at issue require skill and prior experience that is not readily acquirable at the canneries; that Local 37 provides an oversupply of nonwhite cannery workers and that this overrepresentation is an institutional factor in the industry.

In addition, the trial court found that no individual instances of discrimination were proven; that petitioners did not give job preference to friends and relatives; that respondents' "nepotism" statistics were distorted and unreliable; that hiring was "on the basis of job-related criteria";[16] that giving experienced personnel a preference in hiring was a business necessity; that the rehire preference clauses in the union contracts operated like a seniority system; that housing is not racially segregated, that housing and rehire policies were dictated by business necessity; and that Local 37 was responsible for messing.

The trial court found that respondents had failed to establish intentional discrimination and the disparate impact analysis was not appropriate for application to respondents' wide-ranging multiple practice challenge nor to subjective hiring practices. In applying the impact analysis individually to five of petitioners' practices (rehire preference, English language, "nepotism," housing, and messing), the District Court again found in favor of petitioners. (Pet. App. I:102-107, 124-129.)

The court found that petitioners had not discriminated on the basis of race and entered judgment in their favor. (Pet. App. I:130.)

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[16] This finding was supported by substantial evidence. *E.g.*, petitioners' skill expert DeFrance analyzed the skills necessary for several job classifications. He then compared a survey of incumbents and found that of 139 persons for which adequate information was available, 131 did possess the requisite skills and 8 were not qualified. R.T. 2988. This finding was also uniformly supported by testimony of management, supervisors, and incumbents, who testified to the need to hire persons with prior skill and experience in the at-issue jobs. *E.g.* J.A. 161; 439-443; 596-607.

C. Court of Appeals Rulings.

On appeal a panel of the Ninth Circuit affirmed the judgment. Pet. App. III:56.

The Court of Appeals recognized that respondents had failed in their labor market proof, that respondents' comparative statistics were of little probative value, that nonwhites were overrepresented in cannery worker jobs, and that institutional factors distorted the racial composition of the work force. Pet. App. III:20-36. The petitioners' labor market statistics and findings thereon by the District Court were affirmed,[17] as were the findings that respondents had not given friends or relatives a preference in hiring and that petitioners hired according to job-related criteria. The panel concluded:

> The [district] court stated, "regardless of the manner in which a prospective employee came to the attention of the hiring personnel, the person was evaluated according to job-related criteria." Thereafter, in concluding the case, the [district] court encompassed all of the claims when it said "defendants did not discriminate in the hiring, firing, promoting, or paying . . . ." The decision of the District Court will not be disturbed."

Pet. App. III:39-40.[18]

This holding would seem to have disposed of respondents' claims regardless of the analytical theory on which presented. The panel noted, however, a conflict in decisions of several circuits and within the Ninth Circuit itself as to whether the disparate impact analysis could be applied to subjective

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[17] None of the findings of fact by the District Court were overturned as clearly erroneous.

[18] The court also held "the ultimate fact, that there existed no pattern or practice of discrimination in hiring, promoting, paying, and firing, is supported by the numerous subsidiary findings of the District Court." Pet. App. III:38.

practices. Pet. App. III-46-55. A petition for rehearing *en banc* was granted, Pet. App. IV, and the *en banc* court subsequently held that the impact analysis could be applied to subjective employment practices. The case was returned to the original panel. Pet. App. V:39.

On remand the Court of Appeals panel affirmed the District Court on rehire preferences, did not discuss the English language requirement, but held that plaintiffs' "comparative statistics," which showed only a concentration of minorities in the cannery worker jobs, were nonetheless adequate to force petitioners to prove their hiring practices were justified on grounds of business necessity. In doing so, the Court of Appeals did not hold that any practice caused disparate impact, and ignored the District Court's findings that respondents' statistics were distorted and unreliable, that petitioners hired more nonwhites than the proportion available in the labor supply, and that institutional factors, not the petitioners' practices, caused an overrepresentation of minorities in cannery worker jobs. Pet. App. VI.

The court also held, contrary to trial court findings, that a preference for relatives ("nepotism") existed and had an adverse impact on nonwhites. Finally, the court questioned the District Court's findings of business necessity for petitioners' housing and messing practices, but did not hold them to be clearly erroneous. The Court of Appeals selected seven of the 16 practices complained of by respondents to be examined under a business necessity standard. (Word-of-mouth recruitment, nepotism, subjective criteria, separate hiring channels, labeling, housing, and messing.) The Court of Appeals vacated judgment for petitioners and remanded. Pet. App. VI.

SUMMARY OF ARGUMENT

Although they mounted a broad scale attack on behalf of over 2,000 class members, respondents were unable to prove any instance of individual or class-wide disparate treatment of nonwhite employees in any aspect of the employment relationship. Respondents' fall back position was to allege under the disparate impact theory that their same marginal evidence proved petitioners' practices combined to cause unintentional discrimination.

Respondents' impact case was centered on comparative statistics showing internal work force comparisons. The Court of Appeals held that these statistics were sufficient to raise an "inference" of discrimination under the disparate impact model. The Court of Appeals fashioned a new allocation of the order of proof. This order of proof erroneously establishes a much lower threshold for a plaintiff in Title VII litigation than has been developed under decisions of this Court and the courts of appeal. It deprives the employer of the usual defenses, *e.g.*, that the plaintiff's statistics are flawed, that the relevant labor market shows minorities are not underrepresented in at-issue jobs, and that the inferences urged by plaintiff are less probative than those urged by the employer.

The District Court properly considered the structure and practices of respondents' business and in a carefully reasoned opinion found that the imbalance was nothing more than the result of institutional factors which produce an overrepresentation of minorities in cannery worker jobs.

The District Court properly rejected respondents' statistics in favor of petitioners' labor market analysis that showed that class members were not underrepresented in the jobs at issue. The District Court also found that respondents had failed to prove a discriminatory preference for relatives existed and rejected respondents' statistical evidence on that issue as flawed. In rehabilitating respondents' case under the impact

theory, the Ninth Circuit ignored the foregoing findings, as well as a long line of decisions of this Court and the circuit courts that supported the District Court's action.

The Ninth Circuit improperly allowed respondents to extend the reach of the disparate impact analysis to challenge the cumulative effect of a wide range of practices respondents chose to name. Respondents have the burden of proving the causal connection between any challenged practice and the alleged disparity, but the Court of Appeals decision effectively dispenses with that requirement. Combined with its acceptance of respondents' evidence of racial imbalance in job categories, the Ninth Circuit has forced the employer to shoulder the burden of justifying each practice the respondents choose to name based on a mere showing that the employers' work force is not racially balanced. This is at odds with the Congressional purpose stated in Title VII, 42 U.S.C. § 2000e-2(j), and all but compels employers to engage in quota hiring and other activities that *reduce* job opportunities for minorities.

Any doubt that the Ninth Circuit was revolutionizing the allocation of burdens of proof was removed when it held, without relevant authority, that any attempt by an employer to explain or justify his practices in response to respondents' disparate *treatment* claim, precluded the employer from challenging respondents' *impact* case; by ruling that employers must prove the business necessity of job qualifications without requiring respondents to prove the qualifications had a disparate impact; and requiring respondents to justify why they did not use certain labor sources that the Court of Appeals apparently decided might result in increased minority hiring — in the face of the fact that minorities were not underrepresented in the jobs at issue. This misallocation of the burdens of proof conflicts with decisions of this Court and the circuit courts and should be rejected.

ARGUMENT

I. Respondents Failed to Prove Discrimination Under the Disparate Impact Theory

The linchpin of respondents' case is the undisputed fact that nonwhites are overrepresented in the cannery worker category. That one fact, reflected in various forms in respondents' statistics, is the foundation of their claim that nonwhites are disproportionately excluded from at-issue jobs and are racially segregated in housing and messing. That overrepresentation is caused by institutional factors in the industry and is without legal significance. Because respondents' other evidence failed to establish that nonwhites were excluded from the at-issue jobs by any identified practice, their impact case must fail — particularly since petitioners met their burden of justifying many of the practices respondents challenged in the aggregate.

A. Statistical Evidence That Shows Only a Concentration of Minority Employees in Jobs Not at Issue Fails As a Matter of Law to Establish Disparate Impact of Hiring Practices Where the Employer Fills the At-Issue Jobs From Outside His Own Work Force, Does Not Promote From Within or Provide Training for Such Jobs, and Where Minority Employees Are Not Underrepresented in the At-Issue Jobs According to a Labor Market Analysis Accepted by the Trial Court.

The trial court found against respondents on the treatment theory, *i.e.*, the petitioners did not intentionally discriminate against the class or any individual class member in the adoption of or application of any of the employment practices challenged by respondents here.[19] This decision was affirmed on appeal.

[19] Thus, for instance, plaintiffs alleged, but did not prove that employers hired nonresident cannery workers through Local 37, ILWU "because of, rather than in spite of" the predominantly Filipino composition of that union, *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979), and they failed to establish that any similarly situated employees were treated differently on the basis of race under any practice challenged.

Nonetheless, certain practices that are fair in form and are equally applied may have a "disparate impact" on Title VII protected class. That is, they "may in operation be functionally equivalent to intentional discrimination." *Watson v. Ft. Worth Bank & Trust*, 487 U.S.____, 101 L.Ed. 2d 827, 840 (1988). This "disparate impact" analysis was first adopted in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Under it, the plaintiff can establish a *prima facie* impact case if the evidence establishes that an employer's practice causes a "substantial disparate impact," *i.e.*, that the practice has the effect of disproportionately denying job opportunities on the basis of race. *Id.* Failure to justify a practice in the face of such evidence will subject the employer to liability. *Id.*

1. *Petitioners' Labor Market Analysis Was More Probative Than Respondents' Comparative Statistics, Refuted Any Showing of Disparate Impact, and Should Not Have Been Ignored by the Ninth Circuit.*

The parties offered starkly contrasting statistical evidence on the issue of whether a disparate impact in hiring existed. Respondents argued that the petitioners' actual hiring results in the at-issue jobs should be compared "internally," *i.e.*, compared to the racial composition of the cannery worker jobs.[20] Because this showed a "stratified" work force, *i.e.*, nonwhites were concentrated in the cannery worker jobs, respondents contend impact has been proven.[21]

[20] A variant of this same theme was to make an internal comparison between the petitioners' hiring results for its entire work force (at-issue and not at-issue jobs combined) with the hiring results in the at-issue jobs.

[21] In essense, plaintiffs are arguing either that the cannery workers *are* the available labor supply or the racial composition of the cannery workers is a reasonable proxy for the available labor supply for the at-issue jobs. The trial court found against them on both points: the cannery workers did not form the labor supply for the at-issue jobs, the company does not promote-from-within in any jobs, and the race of cannery workers is not representative of the relevant labor supply.

Petitioners' countervailing evidence compared their hiring results in the at-issue jobs with the racial composition of an "external" labor market for the jobs at issue. This evidence showed that nonwhites were overrepresented in the cannery worker category and not significantly underrepresented in the at-issue jobs.[22] Although the trial court explicitly found petitioners' statistical evidence more probative, the Ninth Circuit credited respondents' statistics as raising an "inference" of disparate impact. In so doing, the Ninth Circuit also ignored decisions from this Court and the circuit courts that compelled a finding that disparate impact was *not* proven.

In determining whether the evidence established disparate impact, the District Court properly considered the evidence and arguments of *both parties*. The Ninth Circuit did not. This was serious error. *Watson, supra*, 101 L.Ed. 2d at 846 (plurality), citing *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977), and *id.* at 338-39 (Rehnquist, J., concurring in result and concurring in part) (must examine plaintiffs' evidence of impact in light of the facts, defendants' attack on that evidence, and defendants' own evidence).[23]

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[22] Ex. A-278, Tbl. 4 (each facility) (E.R.2-7). Nonwhites were *overrepresented* in the at-issue jobs combined whether considered on a cannery by cannery basis or combination of facilities. *See* table at J.A. 279; Ex. A-278, Tbl. 4, col. "At Issue" row "CMPS DEV" for each facility (E.R.2-7). It was only when the statistics were disaggregated and analyzed job family by job family on an individual cannery basis that any evidence of underrepresentation of nonwhites surfaced; however, even then, there were only three instances out of a possible 65 at the five class canneries where the underrepresentation was *significant* and in each of those three instances, the underrepresentation was less than three standard deviations. J.A. 280, summarizing J.A. 266-78.

[23] *Accord Shidaker v. Carlin*, 782 F.2d 746, 750 (7th Cir. 1986); *EEOC v. American Nat'l Bank*, 652 F.2d 1176, 1189 (4th Cir. 1981); *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1273 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982); *Pouncy v. Prudential Ins. Co.*, 668 F.2d 795, 801, n. 8 (5th Cir. 1982).

In analyzing such evidence, this Court cautioned ten years ago that statistics come in an "infinite variety" and their usefulness "depends on all of the surrounding facts and circumstances." *Teamsters v. United States*, 431 U.S. 324, 340 and n. 20 (1977).[24] Here, the key factual findings (*supra*, pp. 9-10) plainly undermined whatever probative value respondents' imbalance evidence had and just as plainly supported the petitioners' labor market analysis.

Where the plaintiff, as here, alleges that the employer's recruiting practices and hiring criteria have caused a disproportionate exclusion of a Title VII protected class from certain jobs, identifying the relevant labor market for those jobs and determining its racial composition is "usually the starting point for impact analysis." *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983).[25]

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[24] Failure to heed this simple, but crucial admonition has often been fatal to a party's statistical case. *E.g., Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183, 191 (5th Cir. 1983) (plaintiffs' applicant flow statistics disapproved because they fail to account for recruiting efforts that resulted in artificially high number of black applicants); *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 426 (5th Cir. 1980) (in *promotion* case, employer's "statistics comparing Uncle Ben's work force to the external labor market are irrelevant"), *vacated and remanded*, 451 U.S. 902 (1981), *aff'd on remand*, 657 F.2d 750 (5th Cir.), *cert. denied*, 459 U.S. 967 (1982).

[25] This "often-decisive. . . labor pool definition" requires findings as to the source from which the employer normally fills such jobs and the qualifications of potential applicants for such positions. *Rivera v. City of Wichita Falls*, 665 F.2d 531, 540 (5th Cir. 1982), citing *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308-312 (1977).

Because petitioners' vacant positions are "filled by lateral hires" from outside their work force, then the "external labor market" is the relevant one. *Rivera v. City of Wichita Falls*, 665 F.2d 531, 540-545.[26] Using accepted methodology, petitioners' experts determined the proper geographical boundaries of and the racial composition of the persons in that market most likely to possess the qualifications for the jobs at issue.[27] *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308; *Rivera, supra; EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 658-62 (4th Cir. 1983), *rev'd on other grounds sub nom Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984); *De Medina v. Reinhardt*, 686 F.2d 997, 1004-1009 (D.C. Cir. 1982); *Clark v. Chrysler Corp.*, 673 F.2d 921, 927-929 (7th Cir. 1982).[28] They then compared petitioners'

[26] On the other hand, the employer's existing work force or "internal labor pool" is most appropriate where the employer fills the jobs at issue from lower level positions by promotion-from-within. *Rivera, supra*, 665 F.2d at 540-41; *Uncle Ben's, supra*, 628 F.2d at 425-426.

Indeed, plaintiffs themselves, in recognition of these facts, offered their own external labor market analysis, but it was rejected by the trial court. Plaintiffs do not challenge that finding here. Although plaintiffs initially alleged there was promotion discrimination, they offered no statistics purporting to show promotion bias.

[27] Petitioners' labor market theory and hiring analysis was explained by their expert labor economist, Dr. Albert Rees, J.A. 250-303; the statistical theory was explained by expert statistician Dr. Donald Wise, R.T. 1688-1726 (*see* excerpt discussing Ex. A-278 at J.A. 237-246); and the terms in the statistical tables (*e.g.*, Ex. A-278) and other foundational material are explained by Dr. William Price, an expert computer programmer, R.T. 1553-1662 (index of terms set forth at R.T. 1674-77).

[28] This approach is also used to assess the validity of the voluntary adoption of affirmative action plans where such adoption is challenged in "reverse" discrimination cases. *See Johnson v. Transp. Agency*, 480 U.S.__, 94 L.Ed. 2d 615, 631 (1987) (citing *Hazelwood* with approval); *Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987) (plan disallowed where minority employees not underrepresented in the jobs at issue in comparison to the area labor market).

actual hiring results in filling vacancies over the relevant time span using the "standard deviation" analysis approved by this Court in *Castaneda v. Partida*, 430 U.S. 482 (1977) (jury selection case), and in the employment discrimination context in *Hazelwood, supra*, 433 U.S. at 311, n. 17; *Rivera, supra*, 665 F.2d at 536, n. 7. The District Court accepted this evidence.

At least four post-*Hazelwood* circuit court decisions hold that comparative statistics like those offered by plaintiffs will be refuted by credible external labor market evidence that shows no underrepresentation of minorities in the jobs at issue.[29] *Hilton v. Wyman-Gordon Co.*, 624 F.2d 379, 380 (1st Cir. 1980); *Coser v. Moore*, 739 F.2d 746, 752 (2d Cir. 1984); *Federal Reserve Bank of Richmond, supra*, 698 F.2d at 658-62 (4th Cir.); *Rivera, supra*, 665 F.2d at 539, 544-45 (5th Cir.). *See Clark, supra*, 673 F.2d at 929 (7th Cir.) (external labor market data relied on to show no disparate impact in hiring).[30] If nonwhites are not underrepresented in at-issue jobs, it can hardly be said that they have established a *prima facie* case of disparate impact against them in those jobs. *See Johnson v. Transp. Agency, supra*, n. 28, 94 L.Ed. 2d at 631, n. 10.

The District Court's determination as to the racial composition of the relevant labor market was undoubtedly factual and reviewable only under the clearly erroneous standard,[31] as was

[29] Moreover, even if plaintiff's objections to Dr. Rees' analysis were accepted and general labor force figures were *not* adjusted for qualifications or availability, seasonal nonwhites are still overrepresented in the at-issue jobs combined and there is no change in the findings as to the few instances of underrepresentation. Ex. A-278, Table 5 (for each cannery or combination of facilities)

[30] Two Ninth Circuit cases rejected contentions of discrimination where plaintiffs relied on comparative statistics without a showing of relative qualifications. *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983) (impact); *Pack v. Energy Research & Dev. Admin.*, 566 F.2d 1111 (9th Cir. 1977).

[31] *Markey v. Tenneco Oil Co.*, 707 F.2d 172, 174 (5th Cir. 1983); *Clark v. Chrysler Corp., supra*, 673 F.2d at 928.

its determination of the probative weight of the parties' statistics.[32]. *Allen v. Prince George's County, Md.*, 737 F.2d 1299, 1303 (4th Cir. 1984). Like the circuit court in *Hazelwood*, the Ninth Circuit "substituted its judgment for that of District Court" in accepting respondents' proof and ignoring petitioners' evidence that told "a totally different story." *Hazelwood, supra*, 433 U.S. at 308-10. This fact finding was error. *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

2. Allowing Proof of Racial Imbalance to Establish Disparate Impact is Inimical to the Desirable Purposes of Title VII, and Provides an Unreasonable and Unworkable Standard in Practice.

Most responsible employers attempt to utilize employment practices that provide equal opportunity for women and minorities. Because respondents' theory simplistically assumes that the highest nonwhite percentage in any job category (or in the overall work force) is the standard against which an employer's hiring in *all* categories will be measured, even responsible employers would at least consider covert policies that could *reduce* job opportunities for protected classes *e.g.*, establishing self-imposed *ceilings* on the hiring of women and minorities, both at the hiring stage and through layoffs that bring the work force into "balance."

Respondents' theory discourages affirmative action programs because successful recruitment of a large percentage of minorities in one category will be penalized where it is not achieved in all other categories — even if women and minorities are already proportionately represented in relation to the labor market.

Finally, respondents' theory imposes an unworkable standard on employers. Because the focus is on the racial balance of persons *hired*, rather than on the percentage of persons who

[32] The Ninth Circuit recognized this latter rule on appeal, Pet. App. VI:14, but did not adhere to it.

are *available*, the employer never knows to what standard he will be held until *after hiring is completed.* Since there is no solace for the employer in achieving the available labor supply percentage (or even matching the racial composition of his applicant flow), the employer never knows in day-to-day practice what the standard will be or how to meet it — unless a self-imposed strict one:one racial hiring ratio is set up — that is, quota hiring. This is directly at odds with the purpose of the statute. *Watson, supra*, 101 L.Ed. 2d at 843-44 (plurality); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring in judgment).

The Ninth Circuit's application of respondents' imbalance theory demonstrates the unfairness and the absence of common sense of the theory. These petitioners hired a very large percentage of nonwhites in the cannery worker category principally because they adhered to their obligations under a union contract. The Ninth Circuit then demanded that petitioners justify why that level has not been reached in *all* of their other (at issue) jobs, regardless of the fact that nonwhites are nowhere near that portion of the available labor supply for those jobs.

3. Respondents' "Separate Hiring Channels" Argument is a Red Herring: Where Respondents Have Failed to Show That the Petitioners' Practices for Filling Jobs Not at Issue Either Intentionally or in Effect Excluded Nonwhites from Jobs At Issue, Those Practices Are Irrelevant.

The principal cause of nonwhite overrepresentation in cannery [illegible]obs was the dispatching practices of Local 37. (Pet. App. I:116, I:35-37, FF 103, 105-108.) Petitioners did not intentionally hire cannery workers through Local 37 because of the race of the union members or the racial composition of the crews it dispatched. *See* Pet. App. I:33, FF 93; I:119 (no discriminatory animus). More importantly, respondents failed to establish that hiring cannery workers through Local 37 had the effect of disproportionately excluding nonwhites from the at-issue jobs.[33] There is no evidence showing that nonwhites,

[33] To the contrary, the court found that nonwhites were not significantly under-utilized in those at-issue jobs, that nonwhites were

(footnote continued on next page)

once they were hired as cannery workers, were "locked in" or were precluded from applying for or being considered for the at-issue jobs. It is the cannery workers themselves who decided to become cannery workers by going to Local 37 in the first place; many other nonwhites initially sought work with the companies, instead of Local 37, and were hired.[34] Thus, not only is the racial composition of the cannery worker crew legally insignificant, the practices used to fill those jobs are irrelevant. *See* Pet. App. I:105, n. 1 (union nepotism in filling cannery worker jobs has "little, if any, bearing upon at-issue jobs.")

That these petitioners looked to Local 37, a narrow slice of the general labor market, for nonresident cannery workers is reasonable. Local 37 was the exclusive bargaining representative for the jobs and therefore dispatched such workers to the canneries.

The fact that this "source" produced an overrepresentation of nonwhites in the cannery worker jobs does not alter the fact that nonwhites are not underrepresented in the jobs from which they claim exclusion. But for the historical anomaly that this union is run by and dispatches primarily Filipinos, respondents would not even have a case: if the racial composition of the crews Local 37 dispatched had matched the 10% nonwhite labor market, even respondents' "imbalance" theory would fail.[35] Respondents should not be allowed to use this institu-

not "deterred" from applying for at-issue jobs, that whites and non-whites alike were free to apply for at-issue jobs and that similarly situated applicants were treated equally. (Pet. App. I:42, 43, FF 123, 94.)

[34] Ex. A-403, Tbl. 22 (790 nonwhite new seasonal hires in at-issue jobs in petitioners' Alaska facilities combined), Tbl. 23 (433 nonwhite new seasonal hires in at-issue jobs at the five class canneries combined) (E.R. 13, 14).

[35] The effect of Local 37 on nonresident (of Alaska) hiring is graphically demonstrated in Ex. A-499, Tbl. 1 (E.R. 19): Examining hiring of nonresident employees shows that with Local 37 members *excluded*, whites held 90.2% of the cannery worker and laborer jobs and 91.6% of the at-issue jobs at the five class facilities

(footnote continued on next page)

tional distortion of the labor market to establish an artificially high standard for nonwhite employment. *See Carroll, supra,* 708 F.2d at 191 (artificially high minority applicant flow not allowed as comparison standard). It is as irrelevant a standard as the race of *students* was in a case involving discrimination against black *teachers. Hazelwood, supra,* 433 U.S. at 308.[36]

B. Respondents Failed to Prove a Practice of "Nepotism" Existed, Their Statistics Purporting to Show Its Existence Were Properly Rejected, and The Ninth Circuit Committed Error in Finding Otherwise.

The only alleged hiring practice that respondents attempted to offer separate proof of causation or impact was the hiring of relatives. Petitioners concede that relatives *were* hired in some jobs, but deny that respondents ever established that a practice of "nepotism" existed. Nepotism is defined as "favoritism shown to . . . relatives as by giving them positions because of their relationship rather than on their merits." *Webster's Third New International Dictionary of the English Language Unabridged,* p. 518. It has also been defined as the "use of family relationship qualifications for employment . . . opportunities." B. Schlei and P. Grossman, *Employment Discrimination Law* (2d ed. 1983), p. 573.[37]

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combined. *See also* Testimony of Dr. Rees, J.A. 294-299; Ex. A-498, Tbl. 4 (E.R. 17). At Ekuk, which had no Local 37 contract, not a single Filipino was employed as a cannery worker during the case period. R.T. 2892.

[36] A more pertinent application of the impact model to the cannery worker hiring practices would be to compare the labor market for cannery workers (less than 1% Filipino; 10% nonwhite, E.R. 8-9) with the actual percentage hired (20-50%, E.R. 10-14). If the use of this practice has a disparate impact at all, it is on *whites* seeking *cannery worker jobs* — not on nonwhites seeking at-issue jobs.

[37] *See Gibson v. Local 40,* 543 F.2d 1259, 1268 (9th Cir. 1976) ("preference" given to relatives); *United States v. Ironworkers Local 1,* 438 F.2d 679, 683 (7th Cir.) *cert. denied,* 404 U.S. 830 (1971) (discovery into "nepotistic practices" allowed because giving "preference to relatives" of union members can violate Title VII).

In the cases where the plaintiff has prevailed in challenging nepotism, the issue was not whether the practice existed, but whether the practice had a disparate impact on the class or was justified. *See, e.g., Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1303 (9th Cir. 1982); *Gibson, supra*, n. 37; *Asbestos Workers, Local 53 v. Vogler*, 407 F.2d 1047, 1053-54 (5th Cir. 1969). To prevail, respondents must establish both the existence of nepotism and its impact on the protected class. *See id.; EEOC v. Sheet Metal Workers, Local 122*, 463 F. Supp. 388, 422 (D.Md. 1978) (inference of discrimination through nepotism negated by number of blacks entering apprenticeship program under affirmative action plan); *United States v. Jacksonville Terminal Co.*, 316 F. Supp. 567, 592, n. 36 (M.D. Fla. 1970), *aff'd in relevant part, rev'd and remanded on other grounds*, 451 F.2d 418 (5th Cir. 1971), *cert. denied* 406 U.S. 906 (1972) (no showing policy of nepotism invoked).

Respondents' proof that nepotism existed consisted of evidence that relatives were employees. No policy of preferential treatment was shown to exist and, importantly, respondents failed to establish the crucial element of *causation*: not a single instance (let alone a pattern) of a relative being hired in an at-issue job *because of* that relationship was proven. The District Court considered respondents' evidence, but declined to draw the inference respondents urged. Instead, it was found that there was "no 'preference' for relatives" (Pet. App. I:105); that employees were "chosen because of their qualifications" (*Id.*) after being "evaluated according to job related criteria" (*Id.*, I:122); and "that numerous white persons who 'knew' someone were not hired due to inexperience" (Pet. App. I:122-23).[38] These findings of fact were not clearly erroneous and the Ninth Circuit should not have ignored them

[38] Given these findings, the District Court's reference to the "incidence of nepotism" being "present" (Pet. App. I:103, I:105) must be read as simply references to the existence of the fact that relatives were hired, not to nepotism as a term of art.

in finding that a practice of discriminatory nepotism *did* exist (Pet. App. VI:19-21).[39] *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

In addition, the statistics on which respondents relied to establish both that nepotism existed and that it had a disparate impact were severely distorted by gross overcounting due to unproven assumptions and obvious methodological errors.[40] These flaws justified rejection of the statistics. *Teamsters, supra*, 431 U.S. at 340, n. 20. The Ninth Circuit simply assumed that respondents' statistics were accurate. Pet. App. VI:21. The 349 "nepotistic hires" referred to is based on the evidence found to be flawed by the District Court. Pet. App. I:105.

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[39] The Ninth Circuit's finding is particularly confusing because the court *accepted* the District Court's findings relating to the hiring of relatives (*see* Pet. App. VI:20-21) and the same panel had found in their first opinion that nepotism did *not* exist. *See* 768 F.2d at 1126, 1133 (Pet. App. III:22-23, 56).

[40] Flaws in methodology were pointed out in cross-examination. J.A. 407-413. Among these flaws were: (1) every hire that is counted in the tables assumes that respondents have otherwise established that the person was hired because of the relationship, rather than for some other reason, such as skill. The trial court found otherwise. (2) Respondents' statistics failed "to differentiate those persons who became related through marriage *after* starting work in the canneries." Pet. App. I:105. (3) Respondents counted as *two* nepotistic hires *both* persons who were related at a cannery. J.A. 410. Obviously, one of them had to be hired first and should not be counted at all. This factor alone means that respondents' tables overstate the number of hires by approximately 50%. (4) Respondents continue to count the same employee year after year as being a new "nepotistic hire" so long as he was employed, regardless of when he was first employed or why he was first hired. Illustrative of the flawed methodology is the fact respondents counted three men a total of *seventeen* times in the machinist department at Bumble Bee (of a total of 28). *See* Ex. 603 (E.R. 57-59 "Machinists only") (E. Puffinberger, Juola, Snyder).

Moreover, in deciding that the hiring of relatives (even if proven to be "nepotism") had no disparate impact on minorities, the District Court was entitled to consider the fact that minorities were not underrepresented in the at-issue jobs.[41]

C. Respondents Failed to Prove Unlawful Discrimination Under the Disparate Impact Theory in Housing, Messing, or So-Called "Racial Labeling."

Respondents claim that the disparate impact of the housing and messing practices was that class members were racially segregated and deprived of job opportunities. The District Court found that petitioners did not house or feed employees based on race. The "segregation" was not racial—it was based on factors such as job crew and date of arrival. Most employees lived in integrated housing. Whatever imbalance did exist in the bunk houses and mess halls, existed primarily because of the racial composition of the cannery worker crews. As was true of hiring, if Local 37 had not dispatched an overrepresentation of nonwhites, respondents would not have a claim of "segregation" (*i.e.*, imbalance) in housing or messing.

To the extent there were differences in food in different mess halls, it was attributable to personal taste and the ability of the cooks, not race. Separate messing during the season[42]

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[41] *See Scott v. Pacific Maritime Ass'n*, 695 F.2d 1199, 1207-08 (9th Cir. 1983); *Presseisen v. Swarthmore College*, 442 F. Supp. 593, 625-26 (E.D. Pa. 1977) ("old boy network" for filling faculty positions not discriminatory in absence of evidence of under-utilization of women), *aff'd*, 582 F.2d 1275 (3d Cir. 1978).

[42] All employees at all canneries ate in only one mess hall during the pre-season and the post-season, *i.e.*, before and after the cannery workers arrived. It was only during the season that the second mess hall was opened up at the canneries with a Local 37 cannery worker crew (*i.e.*, other than CWF-Ekuk) when the large influx of cannery workers arrived just before canning started. *E.g.*, J.A.

(footnote continued on next page)

and a different menu for the Local 37 crew was demanded by union leaders, reflected in the union contract, and desired by a large number of the Local 37 cannery workers — requests and demands to which management acceded.

The Ninth Circuit made a finding that the "impact is clear" of housing and messing practices (Pet. App. VI:36) because nonwhites were deprived of job information at the canneries. Pet. App. VI:36-37.[43] However, the evidence showed and the District Court found that job opportunities *during* the season were "rare"; that whatever openings were filled then were filled from *outside* the cannery work force; and that union contracts providing for payment of guaranteed wages discouraged mid-season transfers because the company might have to pay double guarantees. Morever, there was not time for mid-season training of inexperienced, unskilled personnel. Thus, job opening information would have had little value to *any* employee.[44] The complained-of practices had no effect once the season was over, at which time all employees were free to apply for work at the company offices. Pet. App. I:33, FF 94.

Most Local 37 cannery workers did not object to a separate mess hall or to the food served therein, but employees who did

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422-24. Even then, if the crew is small enough, the cannery workers will be fed with the other employees in a single mess hall. *See, e.g.*, R.T. 2773, 2803. (Red Salmon 1977: because of limited canning operation, all employees, including cannery workers, fed in a single mess hall); R.T. 2316 (South Naknek 1980). Ekuk, which had no contract with Local 37, had one mess hall. (R.T. 2441.

[43] In so finding, the Ninth Circuit cites not to the evidence, but to another case tried by plaintiffs' counsel involving a different company and different facts. Pet. App. VI:37.

[44] Plaintiffs also made no showing that whatever little job opening information was available during the season was discussed only in bunkhouses or during meals, as opposed to during working hours, during mugups, or during off-hour recreation periods when job crews intermingled freely.

could change mess halls if they gave notice.[45] Thus, class members could "opt out" of any alleged impact. *Cf. Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) (English-only rule did not discriminate where bilingual plaintiff could avoid it by speaking English on job). To the extent they did not do so, it was either personal preference or "peer pressure." *See e.g.*, J.A. 620; 463-64, ¶ 14.

Even if there was a *prima facie* case to rebut, petitioners demonstrated the business justification for each of the practices because they "significantly served" the petitioners' "legitimate business goals" of efficient and economic use of its scarce resources in housing, and accommodating the preferences of a significant number of class members and the demands of their union representatives in messing. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979); *Watson, supra*, 101 L. Ed. 2d at 827 (O'Connor, J. plurality); *Contreras v. Los Angeles*, 656 F.2d 1267, 1275-80 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). Respondents offered no alternatives. *See* J.A. 455-46 (discussing practical effect of respondents' housing contentions).

The District Court also found that race labeling was used by whites and nonwhites alike, but that it was not evidence of intentional discrimination as urged by respondents. Pet. App. I:123. Respondents have offered no evidence that race labeling, whether done by whites or by class members, had a significant disparate effect on nonwhite job opportunities. If such labels were overheard by or used by class members, respondents have made no showing that this excluded them from job opportunities. To the extent respondents claim it resulted in "deterrence" of nonwhite applicants, the District Court found otherwise. Pet. App. I:123. It did not result in a significant underrepresentation of nonwhite employees in the at-issue jobs.

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[45] *See* R.T. 2393, ¶ 1-2; 2394-95, ¶¶ 6-10; and 2413, lns. 15-20 (see excerpts in J.A. 432-33); R.T. 2542, ¶ 11 (J.A. 435-36); R.T. 2708, ¶ 11; R.T. 2713, lns. 1-30; R.T. 3190, ¶¶ 7, 9 (J.A. 587-88); Dep. of Leonardo (4/5/78), p. 37, lns. 10-14.

II. Allowing Respondents to Challenge the Cumulative Effect Of An Entire Range of Non-Racially Motivated Employment Practices Based Merely On A Showing The Petitioners' Work Force Reflects An Uneven Racial Balance Is An Improper Application Of The Disparate Impact Model, Unfairly Allocates The Burdens of Proof And Encourages Conduct At Odds With The Purposes of Title VII.

A. Respondents Are Required to Prove the Causal Effect of Each Practice They Choose to Challenge Under the Impact Model.

The impact model was not designed for this type of shotgun, undifferentiated attack on a large number of diverse employment practices. In *Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795, 800 (5th Cir. 1982), the court held that the disparate 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.[46] *Accord Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183, 189 (5th Cir. 1983); *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1014, 1016 (1st Cir. 1984); *A.F.S.C.M.E. v. State of Wash.*, 770 F.2d 1401, 1405-06 (9th Cir. 1985) (Kennedy, J.) (impact analysis limited to challenge of "a specific, clearly delineated employment practice applied at a single point in the selection process"; "decision to base compensation on the competitive market, rather than on a theory of comparable worth, involves an assessment too multifaceted to be appropriate for the disparate impact analysis."). The Court of Appeals unpersuasively sought to distinguish a similar case (*Spaulding v. Univ. of Wash.*, 740 F.2d 686 (9th Cir. 1984), because respondents here had "identified" the practices. Pet. App. V:38, n. 6.

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[46] In its first panel opinion, the Ninth Circuit described plaintiffs' case here: "By and large, however, [plaintiffs] have not challenged a specific facially neutral practice. Rather [plaintiffs] have mounted a broad-scale attack against the gamut of defendants' subjective employment practices." Pet. App. III:48.

In *Pouncy,* as here, the employer had "an uneven racial balance" in the work force in which nonwhites were "over-represented in the lower levels." 668 F.2d at 800, 801. The plaintiff "singled out" three employment practices as being discriminatory, but because he relied only on cumulative hiring results, he could not show "that independent of other factors, the employment practices he challenge[d] . . . caused the racial imbalance in Prudential's work force." *Id.* at 801. Petitioners submit that the *Pouncy* view is correct, particularly when applied to the facts of this case.

Respondents here chose 16 different practices that they assert had a discriminatory effect in job allocation. *See* n. 14, *supra.* With but one exception,[47] they point to the same and only set of cumulative comparative statistics as evidence of the disparate impact of each and all of these practices. But by so doing, respondents necessarily must concede that they cannot prove causation by any one of the challenged practices. Without proof of causation, however, respondents' impact claims must fail at the threshold. *Pouncy, supra,* 668 F.2d at 800-802; *Robinson, supra; Carroll, supra,* 708 F.2d at 189.

This causation requirement is implicit in the decisions of this Court: in each of the successful impact cases, the plaintiffs established the discriminatory effect *separately* for *each* practice. *See, e.g., Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) (high school diploma and aptitude test); *Dothard v. Rawlinson,* 433 U.S. 321 (1977) (height/weight requirements); *Connecticut v. Teal,* 457 U.S. 440 (1982) (test). This past Term, Justice O'Connor, speaking for a plurality of the Court, recognized this fundamental threshold burden on plaintiff:

> [T]he plaintiff is in our view responsible for isolating and identifying the specific employment practices that are

[47] Nepotism — *see* discussion, *supra,* pp. 24-26.

> allegedly responsible for any observed statistical disparities. *Cf. Connecticut v. Teal*, 457 U.S. 440 (1982).
>
> Once the employment practice at issue has been identified, causation must be proved; that is, the *plaintiff* must offer statistical evidence of a kind and degree sufficient to *show that the practice in question has caused the exclusion* of applicants for jobs or promotions because of their membership in a protested group. (Emphasis added.)

Watson, supra, 101 L. Ed. 2d at 845.

Respondents urge a "collective" approach because their proof as to the existence or effect of individual practices failed. For instance, respondents complain that the petitioners fill at-issue jobs by "word-of-mouth recruiting."[48] The implicit assumption is that this practice must result in disproportionate numbers of whites being hired. That assumption can be tested by comparing the racial results of employers' hiring with the racial composition of the relevant labor market. *E.g., Clark, supra*, 673 F.2d at 927-929.[49] Here, that very comparison showed nonwhites were not significantly underrepresented in the jobs at issue. Pet. App. I:42-43, FF 123; Ex. A-278, Tbl. 4 (for each cannery or combination of canneries) (E.R. 2-7).

With respect to the practice of hiring nonresident cannery workers through Local 37, as discussed, *supra*, pp. 22-23, there was no evidence that this practice disproportionately excluded nonwhites from the at-issue jobs.

Some of the practices "named" as causing racial disparities in hiring did not even exist, were unproven or were

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[48] Word-of-mouth recruiting was only one of several methods of finding employees. Petitioners proved and the District Court found that petitioners accepted walk-in applicants and also looked to unions with appropriate jurisdiction as a source of employees.

[49] Plaintiffs attempted to so prove impact with their own labor market theory. It postulated nonwhites were 50% of the available labor supply and assumed that nearly all of the at-issue jobs required no skills, but it was rejected.

irrelevant. The trial court found the petitioners did not discriminate in terminations (individually or by ceasing to recruit in remote villages), did not discriminate in pay in any jobs, did not grant preference to relatives ("nepotism"), did not discriminate in fraternization restrictions or in assigning "menial tasks," and, however "informal" the petitioners' promotion procedures were, it did not matter because petitioners did not promote from within anyway.[50]

Finally, respondents' case failed on several practices because they were found to meet the "job relatedness" or "business necessity" test.[51] *See infra*, p. 34.

Since respondents were unable to establish their case as to any practice separately, their burden should not be lessened on the mere allegation that the practices "collectively" caused an impact, particularly where that "impact" is nothing more than lack of racial balance.

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[50] The remaining challenged practices, *e.g.*, "labeling," were, again, not separately analyzed by plaintiffs for their effect on hiring. Presumably, their claim was that these practices had the effect of "deterring" or "chilling" nonwhites from applying. However, the District Court found that there was no deterrence. Pet. App. I:123.

[51] *E.g.*, English language requirement; rehire preference.

B. Dispensing With the Causation Requirement for Plaintiffs Places an Unfair Burden on Employers, and Encourages Conduct at Odds With Title VII's Purpose.

If the plaintiff fails (or refuses) to show the causal connection between any practice and any showing of disparate impact, the employer does not know *which* practice (or all) he must justify under the "business necessity" or "job-relatedness" defense.[52] This is unfair in and of itself, but as applied by the Ninth Circuit, the employer must justify *all* of the practices named by the plaintiff.

Here, the District Court found that employees in the at-issue jobs were "hired according to job-related criteria," and that the English language requirement, the rehire preference, housing practices, and messing practices were all business necessities. That is, the District Court found that the petitioners met their burden on at least five of the 16 practices named — and the Ninth Circuit affirmed on at least two (language requirement and rehire preference). (And, as discussed above, several others were shown not to exist.) If the plaintiffs insist that all of the practices "combined" to cause the impact but failed to show the causal connection for any one, then proof of business necessity of one of those practices should satisfy the employer's burden, absent evidence by plaintiffs that the remaining practices had a significant effect. Such proof on five of those practices is present here. To require an employer to prove the necessity of all practices would simply encourage a plaintiff to name as many "practices" as he could in the reasonable expectation that the employer could show the business necessity of less than all. *Pouncy, supra*, 668 F.2d at 801.

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[52] Nor would the *trial court* know which practice(s) to "change" at the injunctive relief stage if the employer fails in his burden.

Under respondents' theory, the burden of justification could still be shifted to the employer if there is a disparity, but it is caused by a practice *not* identified by plaintiff. For instance, here the employers filled at-issue jobs from walk-in applicants and by referrals from other unions, as well, but respondents did not challenge these practices, nor did they attempt to prove their relative significance.

It might be argued that the employer *should* be required to prove causation where the plaintiff is unable to do so. *E.g., Griffin v. Carlin*, 755 F.2d 1516, 1526-28 (11th Cir. 1985). First, this completely reverses the causation requirement explicitly stated in *Watson, supra*, 101 L. Ed. 2d at 845 (O'Connor, J., plurality), and implicit in this Court's other impact opinions. Second, it is grounded on the belief that plaintiffs might not be able to obtain evidence of causation of the practices they challenge through normal civil discovery. If these processes are sufficient to allow plaintiffs the means to prove discriminatory *motive*,[53] they should also suffice to prove discriminatory impact.[54]

Third, the practical effect of reversing this burden of proof is both staggering and ominous. While the employer would know the reasons he has used certain practices, it is entirely unlikely that he does or could keep track of the *statistical effect* of each possible practice that *might* be litigated on *each* protected class and subclass that might raise a Title VII claim against the business. Obviously, this would be a mammoth effort because:

> [It is] unrealistic to suppose that employers can eliminate, or discovery and explain, the myriad of innocent causes

[53] *Texas Dep't Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981).

[54] Indeed, numerous plaintiffs have succeeded in establishing both impact and causation where they attack more than one practice. *E.g., Griggs, supra*, 401 U.S. 424 (diploma requirement and test); *Clady v. County of Los Angeles*, 770 F.2d 1421 (9th Cir. 1985) (written exam, education requirement, physical agility test), *cert. denied*, 475 U.S. 1109 (1986).

> that may lead to statistical imbalances in the composition of their work forces.

Watson, supra, 101 L. Ed. 2d at 843 (O'Connor, J. plurality).

Many would find it more practical, particularly if plaintiff is allowed to proceed with a base showing of racial imbalance, simply to adopt an in-house policy of maintainig strict racial and gender balance in all job categories, *i.e.*, quota hiring and layoffs, a specter this court warned about only last Term in *Watson, supra*, 101 L. Ed. 2d at 843-44 (Section II-C) (plurality), 856 (Stevens, J. concurring in the judgment, citing Section II-C of plurality opinion favorably).

However, even if the petitioners in this case had such a burden, they have met it. The proof of disparate impact credited by the Ninth Circuit was respondents' showing of imbalance. As to one "side" of the scales: the trial court found that the principal cause of the overrepresentation of nonwhites in the cannery worker jobs was the dispatching practices of Local 37, ILWU. As to the other side: the relatively low percentage of nonwhites in the at-issue jobs is attributable to hiring laterally from the relevant labor market that happens to be approximately 10% nonwhite and to the "rehire" practice, *i.e.*, rehiring persons returning in the same job that they held the preceding season.[55] Plainly, all of these "practices" were justified and respondents offered no practical alternatives.[56]

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[55] *See* Pet. App. I:33, FF 95; Ex. A-320(a), pp. 3-5: 85% of all at issue jobs are filled by either rehires (40%) or new hires from outside petitioners' workforce (45%).

[56] When one examines the "alternatives" to eliminate the imbalance of which plaintiffs complain, the fallacy of plaintiffs' "hiring channels" argument becomes readily apparent: an obvious, cost-effective way is to *stop* hiring from Local 37 and begin hiring *all* cannery workers from the 10% nonwhite general labor market.

III. The Ninth Circuit Improperly Shifted The Burden Of Proof To Petitioners.

On remand from the *en banc* court, the Ninth Circuit panel proceeded to fashion a new allocation of the burdens of proof in an impact case, drastically lowering respondents' and raising petitioners'.

A. Respondents Did Not Meet the Initial Requirements to Establish An Impact Case.

As in any civil lawsuit, the plaintiff must bear the ultimate burden of persuasion; this is equally applicable to the impact or treatment models. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587, n. 31 (1979) (impact); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (treatment); Fed. R. Evid. 301. *Accord Watson, supra*, 101 L. Ed. 2d at 847 (plurality).

Before *any* burden can be shifted to the employer, the plaintiff must establish a *prima facie* impact claim. These elements include (1) a significant statistical disparity (2) caused by an employment practice. *E.g., Watson, supra*, 101 L. Ed. 2d at 851 (Blackmun, J. concurring in judgment). In fact, the Ninth Circuit recognized that the respondents' burden in the impact case is more onerous than in a treatment case. Pet. App. V:37.[57] The Ninth Circuit paid lip service to these requirements but did not apply them. Pet. App. V:37; VI-3, 19.

The Ninth Circuit said that respondents' comparative statistics, showing only racial stratification by job category, were "sufficient to raise an *inference* that *some practice or combination of practices* has *caused* the distribution of employees by race and to place the burden on the employer to justify the business necessity of the practices identified by plaintiffs." Pet. App. V:18 (emphasis supplied).

[57] "The burden of proof on the employer is commensurate with the greater burden on the plaintiff to prove impact and establish the causal connection." The Ninth and Fifth Circuits have held that

(footnote continued on next page)

As noted above,[58] respondents' comparative statistics, coupled with a litany of practices, is not adequate to establish disparate impact under the decisions of this Court. The ultimate question is whether petitioners *did* engage in racial discrimination. Respondents' mere proof of *prima facie* treatment case (described as "marginal" by the District Court for the skilled jobs) establishes only an *inference* of discrimination. *See infra*, pp.41-42. The Ninth Circuit erroneously concluded this showing sufficed to prove impact. Pet. App. VI:4-5 (proof of *prima facie* case *identical* under both theories). Under the impact model, the plaintiff must establish more than mere inference, he must establish that the practice has an improper effect. *Watson v. Fort Worth Bank & Trust*, 487 U.S.____, 101 L. Ed. 2d 827, 851 (1988) (Blackmun, J., concurring in judgment).

B. The Ninth Circuit's Decision Conflicts With the Order of Proof Requirements of Burdine.

The Ninth Circuit holds that petitioners' treatment case "explanation" supplies the missing elements of respondents' case on causation, and also makes unnecessary the consideration of petitioners' labor market evidence and attack on respondents' statistics. It recognizes that under the order of proof for a treatment case the employer is only required to meet respondents' *prima facie* case with the articulation of a nondiscriminatory reason for the selection process. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Pet. App. III:16. The court also recognizes that

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for a disparate impact, plaintiff must not merely prove circumstances raising an inference but must prove the discriminatory impact at issue. *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983); *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750, 753 (5th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982).

[58] Section I.A.; II.

petitioners do not have to accept respondents' statistics and may introduce statistics of their own. Pet. App. VI:5. However, the court states that if the employer defends by explaining the reason for the disparity, articulation is insufficient; the employer must then prove the business necessity of the named practices. Pet. App. VI:5.

Petitioners did articulate, and prove to the trial court's satisfaction, a number of nondiscriminatory reasons for the disparity: institutional factors caused stratification, the employers did not promote from within, transferring personnel between departments during the season required payment of two guarantees, there was insufficient time to train inexperienced help for most jobs, skills of a cannery worker are not a substitute for the skill and experience requirements of the skilled non-cannery jobs, and that the relevant labor market is 90% white.

The Court of Appeals states — incorrectly — that petitioners "conceded" causation. Pet. App. VI:24. This apparently is that court's view of the explanation offered by petitioners to meet the treatment claims. The Court of Appeals erroneously cites *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1975), in support of the proposition that *explanation* of the imbalance shifts the burden to the employer to show business necessity. Pet. App. VI:5. *Albemarle* holds that once the impact of a practice *is* established, the employer has such a burden.

A similar citation to *Albemarle* may be found in *Segar v. Smith,* 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied sub nom Meese v. Segar,* 471 U.S. 1115 (1985). In *Segar,* plaintiffs advanced a treatment case. The Court of Appeals there speculated that the degree of proof required of an employer in defending a class action case — as opposed to one of individual discrimination such as *Burdine* — might require more than just articulation of a reason to succeed. In this process the court states, an employer "will in all likelihood" point to a

specific job qualification as an explanation for the disparity. 738 F.2d 1249, 1271. The statement is *dicta* since the court affirmed a finding of disparate treatment and went on to say that if the employer had advanced the requirement of an additional year's experience as the reason for the disparity that discrete requirement "would have been" subject to an impact analysis. 738 F.2d 1249, 1288. A similar statement appears in *Griffin v. Carlin*, 755 F.2d 1516, 1528 (11th Cir. 1985), where the court stated that if on remand the plaintiff succeeded in establishing a treatment case, and if the employer defended by reliance on a supervisory register and a test, the employer had to validate those procedures. Simply stated, *Segar* and *Griffin* merely hold that if an employer defends a treatment case by explaining that the disparity is caused by a test, he may have to defend the test.

No circuit court appears to have actually applied this requirement nor have any circuits followed *Segar* or *Griffin* on this point.[59]

The concept advanced by the Ninth Circuit here is much broader than *Segar* or *Griffin* and is directly at odds with the holding of *Burdine*. There, the Fifth Circuit required the employer to prove — not merely articulate — a nondiscriminatory reason for the employer's conduct. 450 U.S. at 252. This Court held that to be error, that the employer need only come forward with evidence sufficient to allow an inference of nondiscriminatory conduct. The policy reasons stated are sound: it is plaintiffs' case; defendants' explanation must be clear enough to allow an attack on pretext grounds; the employer has the incentive to persuade; and liberal discovery rules are supplemented by the EEOC investigatory files.

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[59] The Third Circuit in *Green v. USX Corp.*, 843 F.2d 1511 (3d Cir. 1988), *pet. for writ of cert. filed* (No. 88-141), has approved the use of a multiple practice impact analysis in reliance on *Segar* and *Griffin*.

C. Respondents' Evidence Was Not Adequate Under Either Impact or Treatment Order of Proof Requirements.

In *Burdine*, this Court described the establishment of a *prima facie* case as evidence which — if believed — and if the employer is silent — requires the entry of judgment for plaintiff. 450 U.S. 248, 254. This *prima facie* case is used in the sense of a rebuttable presumption; but the rebuttal is made by offering evidence which need not persuade the court of nondiscrimination but merely raises an inference of such conduct. *Id.* at 254.[60] This form of presumption of discrimination, though fragile, was the one adopted in Fed. R. Evid. 301.[61]

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[60] This Court recognized that a *prima facie* case in common law may either refer to the level of evidence sufficient to allow a case to go to a jury, or a legally mandatory rebuttable presumption. The court used the term in the latter sense. The presumption disappears as such when countervailing evidence is produced — even though the countervailing evidence is not believed. At that point in the case, the trier of fact may still consider both sides of the evidence. 450 U.S. 254, citing 9 Wigmore, Evidence, § 2491 (3d ed. 1940) and Fed. R. Evid. 301. In adopting Rule 301, this Court accepted the Thayer or "bursting bubble" view of presumptions rather than the Morgan view, which would give greater effect to a presumption than the mere burden of putting in evidence which may be disbelieved by the trier of fact. Wigmore, § 2493C (1981).

[61] *Rule 301.* In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion which remains throughout the trial upon the party on whom it was originally cast.

The use of the term *prima facie* case in the impact case may be analyzed on the same basis. If the plaintiff comes forward with statistics and other evidence showing that a specific practice has disproportionately excluded a protected group, he has made a *prima facie* case which will entitle him to entry of judgment if the employer remains silent. If the employer comes forward with his own statistics showing (but not necessarily proving) no disproportionate exclusion or that the practice complained of may not have caused the disparity, or if on cross-examination he shows flaws in plaintiffs' statistics, or impeaches or discredits plaintiffs' witnesses, he has met his burden of production and the trier of fact may believe either side's witnesses. Under a strict reading of *Griggs*, if the employer remains silent on the issue of disparate impact, that issue is established and he then must come forward with what amounts to an affirmative defense of business necessity. *See* Wigmore, § 2487 (1981).[62] Such a strict reading has recently been questioned by a plurality of this Court. *Watson, supra*, 101 L. Ed. 2d at 847.

Here, however, petitioners did not stand silent before respondents' evidence. That evidence was vigorously attacked as to reliability and credibility.[63] The respondents' labor market, nepotism tables, and comparative statistics were all shown to be flawed. Their contentions of fraternization restrictions were flatly disproved by evidence of fraternization. Their claims of individual discrimination were demonstrated to be without merit because of lack of application, untimely application, lack of qualification, or the jobs were full at the

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[62] Citing *Speasu v. Merchants Bank & Trust Co.*, 188 N.C. 524, 529, 125 S.E. 398, 401 (1924), "The burden of proof continues to rest upon the party who, either as plaintiff or as defendant affirmatively alleges facts necessary to enable him to prevail in the cause."

[62] The Court commited plain error in concluding that petitioners *did not argue* the practices had "no impact." Pet. App. VI:30. This error was pointed out in the Petition for Rehearing. Pet. App. VII.

time. Defendants' labor market and other evidence showed that no disparity existed and that persons were hired according to job-related criteria. Thus, regardless of the analytical theory under which respondents advanced their case, there was not an unrebutted presumption of discrimination.

D. It Was Not Petitioners' Burden to Show Lack of Qualifications of the Respondents Nor Should Petitioners Be Required to Target Labor Sources Chosen by the Court of Appeals to Maximize Minority Hiring.

The Ninth Circuit's application of the impact theory to hiring criteria and labor sources is erroneous and should be rejected.

The panel recognized that a plaintiff normally is required to show statistics which reflect the percentage of qualified nonwhites who were available for the at-issue jobs when challenging hiring in skilled jobs. Pet. App. III:35. However, when the panel proceeded to analyze the same issue and evidence under the impact analysis, it stated that since respondents had placed the job qualifications in issue, the burden shifted to the employer to show lack of qualifications, citing *Kaplan v. Int'l Alliance of Theatrical & Stage Employees*, 525 F.2d 1354, 1358, n. 1 (9th Cir. 1975); and *Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982).[64] Pet. App. VI:17, 26. The *Kaplan* case did not involve a dispute as to

[64] The Ninth Circuit also supports its conclusion by mischaracterizing petitioners' argument. Petitioners do not argue there are "no qualified nonwhites for the at-issue jobs." Pet. App. VI:25. Petitioners *hired* hundreds of minority workers for those very jobs. *See supra*, n. 34. Petitioners argued (and the District Court found) that the relevant external labor supply is only about 10% nonwhite and *that fact* shows there are *relatively* few nonwhites available in comparison to whites, *i.e.*, 10% vs. 90%, as opposed to *equal* 50%/50% availability argued by respondents.

qualifications. *Wang* did not involve the qualifications of a statistical pool.[65]

This alteration of the burdens of proof is inconsistent with decisions of this Court that stand for the proposition that if a plaintiff wishes to challenge a hiring criterion as having a disparate impact, he must prove *that criterion* causes the impact. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), plaintiffs established the disparate impact of a high school diploma requirement with unrebutted evidence that a disproportionately smaller percentage of blacks had diplomas. 401 U.S. at 430, n. 6. In *Dothard v. Rawlinson, supra*, plaintiffs established the disparate impact of a height and weight requirement by showing that a disproportionate number of women were less than 5'2" tall and weighed under 120 pounds. 433 U.S. at 429–30. In neither case would the plaintiffs have been allowed to establish an impact case by simply *alleging* the practice was discriminatory without independent evidence that the qualification *had* an impact. *Watson, supra*, 101 L.Ed.2d at 845.

Yet, this is precisely what the Ninth Circuit has done here. It held that since respondents *claimed* the criteria are discriminatory, they are *not* required to take those criterion into account to prove impact. Pet. App. VI:17, 27. Respondents chose not to do so (relying instead on their argument that the at-issue jobs were not skilled and did not require experience), but they did so at their peril. The trial court found that petitioners *did* hire on the basis of job-related criteria.

Other Ninth Circuit cases do require plaintiffs to use statistics from a qualified pool and reject comparative statistics where the jobs are not fungible. *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 479 (9th Cir. 1983); *Pack v. Energy Research & Dev. Admin.*, 566 F.2d 1111, 1113 (9th Cir. 1977).

[65] *Wang* does, however, stand for the erroneous proposition that a plaintiff does not have to prove his qualification for promotion.

Other circuits are in accord. *Ste. Marie v. Eastern R. Assoc.*, 650 F.2d 395, 400-401 (2d Cir. 1981); *Coser v. Moore*, 739 F.2d 746, 752 (2d Cir. 1984); *EEOC v. Fed. Reserve Bank of Richmond, supra*, 698 F.2d at 658-660.

It is not surprising that respondents chose not to account for even the most basic qualifications of the "proxy" population of potential employees. *Petitioners* did so with their labor market analysis and it established that qualified nonwhite availability was closer to 10% than to the 50% argued by respondents. *See* J.A. 255-56, ¶ 7; 258-60, ¶¶ 12-13. The Ninth Circuit demanded that petitioners prove the qualified nonwhite component in the labor market (Pet. App. VI:17, 26), but ignored the evidence doing just that. This evidence accounted for the fact that the different "job families" at the canneries required different skills and experience (*e.g.*, machinists vs. cooks vs. carpenters). As adjusted, the nonwhite availability percentages range from about 2% (administration) to 20% (culinary), depending on the job family, and "centered" on 10% for the at-issue jobs combined. Exhibit A-278, labor pool tables, Tbls. 4(a)-4(b), row "Nonwhite" for each job family column (E.R. 8-9). These adjusted availability figures were compared to actual hiring in the job families at issue: nonwhites were not significantly underrepresented. *See* J.A. 266-280. Use of the unadjusted availability figures does not change the conclusion. *See supra*, n.29.

The panel also placed the burden on petitioners to prove why they *did not* hire from different sources for at-issue jobs, *e.g.*, promote from within, target Local 37 as a source of machinists, or scour the remote areas of Alaska for persons to fill at-issue jobs.[66] Pet. App. VI:30. In doing so, the Ninth Circuit is plainly substituting its judgment for management as to the best way to operate the business. The Ninth Circuit is merely attempting to require petitioners to maximize the

[66] A practice the District Court found unreasonable. Pet. App. I:32, FF 90.

number of minority workers hired. This is a flat violation of the admonitions of this Court in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978); *Burdine, supra*, 450 U.S. at 259; and *Watson, supra*, 101 L. Ed. at 848.

Moreover, since nonwhites are not underrepresented, the Ninth Circuit's demand is inconsistent with this Court's opinion in *Johnson v. Transp. Agency*, 480 U.S.____, 94 L.Ed. 2d 615 (1987) (inappropriate to adopt voluntary affirmative action plan to boost minority hiring in jobs where there is no underrepresentation of minority workers).

E. Clarification of the Order of Proof.

It is apparent that the Ninth Circuit misunderstood the proper allocation of proof and sailed into uncharted seas. When this Court defined the order of proof in *Burdine*, it was clarifying the discrete order of proof to raise a *prima facie* case under *McDonnell Douglas*. The Court should offer guidelines with respect to the order of proof in impact cases. Petitioners submit this can be accomplished within the principles announced by both the plurality and concurring opinions in *Watson*.

A plaintiff may offer various forms of evidence in his case in chief to show discrimination. In the impact case, he will offer statistics and evidence of causation, and he may proceed simultaneously on a treatment theory and offer *McDonnell Douglas* evidence and anecdotes. The employer, then, has an opportunity to come forward. The employer should be able to meet his burden of production with evidence showing that no inference of discrimination should be drawn. If plaintiff relies on a mere imbalance in job classifications as his impact case, the employer should be able to show — as in this case — that he chooses to hire his noncannery workers from lateral sources. He may also show that there are practical, nondiscriminatory reasons for not promoting or transferring from

within. The employer thus meets the inferences put forward by plaintiff with inferences showing lack of discrimination. He may also offer evidence of the business necessity of a discrete practice. The plaintiff can still attempt to show pretext. When all the evidence is before the trial court, it is weighed and the facts are found.

Prior to *Watson*, as the plurality noted, the impact analysis had not been extended into the context of subjective selection practices. Traditionally, that analysis had been applied to rigid objective criteria which automatically disqualified a portion of the protected group, *Dothard v. Rawlinson, supra*, 433 U.S. at 338 (Rehnquist, J. concurring), or as Judge Sneed stated in the *en banc* proceeding, criteria which make the "plaintiff's true qualifications irrelevant." Pet. App. V:59. Such criteria are arguably subject to standardized testing and necessity, job relatedness and manifest relationship may be determined.

However, the exercise of sound business judgment is far less subject to testing or validation. Discretion by its very nature is never rigid. Those who survive in business are probably far better able to predict success than psychologists, economists, professors, and courts. Since it is his business at risk, an employer must be allowed the freedom to make legitimate choices. The *Watson* plurality observed that the employer may find it easier in the context of subjective decision making to produce evidence of a manifest relationship. 101 L. Ed. 2d at 848. Indeed, the rigid formula of *Griggs* itself should be re-examined in this context. In many cases the formula will be difficult to apply, particularly if the plaintiff's case is marginal or is a shotgun attack on all practices. In that situation, a showing of a legitimate business reason — rather than necessity — should be adequate. At that point, the plaintiff's case is still in the inference stage and any countervailing evidence should be adequate rebuttal of the inference.

CONCLUSION

This case has been pending for nearly 15 years. It should end here. Respondents' evidence was carefully considered by the trial court and found insufficient to prove class-wide or individual disparate treatment. That evidence is no stronger under the impact analysis. The Ninth Circuit resurrected respondents' case by inappropriately applying the impact analysis. In so doing, it ignored binding legal precedent, erroneously reallocated the burdens of proof, and filled respondents' evidentiary gaps with its own fact-finding. The end result is an unwise decision that drastically reduces the quality and quantity of evidence expected of plaintiffs and imposes unfair and unrealistic burdens on employers. As such, it represents a major intrusion into the operation of American businesses that all but compels employers to take actions at odds with the salutory purposes of Title VII of the Civil Rights Act of 1964. The decision should be reversed with directions to enter judgment for petitioners on all claims

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