10-1977

Furnco Construction Corporation v. Waters

Lewis F. Powell Jr.

done per Clerk's off. memo 10/6/77 law

C.F.R. Jim gave me a supplement

Enclosed to Dissy (Consider Joining Memo)

CA 7, in this Title VII case, seems to have applied wrong principles — apparently misapplying ~~McDonnell~~ McDonnell-Douglas and Int. Brotherhood

Preliminary Memo

Nov. 11
~~October 28~~, 1977 Conference
List ~~3~~, Sheet 2

No. 77-369

FURNCO CONSTRUCTION CORP.

v.

WATERS

Timely

Cert to CA 7
(Fairchild, Pell & DJ Christensen)
Federal/Civil

1. SUMMARY: Resps, eight black bricklayers, brought suit under Title VII and § 1981 against petr, a mason contractor specializing in refractory installation in steel mills and blast furnace relining; they charged that they had been denied access to petr's employment process on account of their race. The DC (Austin) granted petr's motion to dismiss filed at the close of all evidence on the ground that petr had proven

CFR & join 3 - see last page 8a

beyond all reasonable doubt that it did not engage in either racial discrimination or retaliatory conduct in its employment practices on the job in question. The CA 7 reversed as to three of the resps, holding that they had established racial discrimination under the principle of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Petr seeks review of that decision, contending that it is in conflict with the Court's recent decisions in Hazelwood School District v. United States, 45 U.S.L.W. 4882 (June 27, 1977), and International Brotherhood of Teamsters v. United States, 45 U.S.L.W. 4506 (May 31, 1977).

2. FACTS: Petr contracted in August 1971 with Interlake, Inc., to reline the blast furnace at Interlake's Chicago plant. Because of the time pressures of the job and the need for the work to be performed properly in order to avoid the risk of explosion while the furnace is operating, petr was expected to hire the most skilled and experienced fire bricklayers it could obtain. Petr hired Joe Dacies as job brick superintendent; he was given complete authority regarding selection, hiring, and retention of bricklayers. In accordance with what petr says is industry practice, Dacies refused to hire bricklayers at the gate or to take applications from those who came to the gate. Instead he hired off of a list of bricklayers with whom he had worked on previous jobs and in whom he had confidence. All of the bricklayer on this list were white.

Because of past charges of discrimination on jobs in Cook County, Illinois, petr had decided to have "a minimum, if at

all possible, of 16 per cent of the bricklaying force black." Dacies was directed to follow this policy; in order to do so, he sought recommendations of qualified black bricklayers from his general foreman, a black employee, and another Furnco superintendent in the area. Among the blacks that Dacies hired were six men who had been plaintiffs in an earlier discrimination suit against petr; they were hired after settlement negotiations between the parties had broken off. The result of the hiring for the Interlake job was that black bricklayers worked 13.3 per cent of the "man-days" worked on the job. (The percentage is measured in terms of man-days because the bricklayers were hired at various times; as the CA 7 pointed out, laying firebrick on this type of job is considered lucrative, and the earlier a bricklayer was hired, the longer he had an opportunity to work.)

Resps' suit contended that petr's hiring practices, and especially its policy of refusing to hire at the gate, were racially discriminatory. Six of the resps had attempted to secure employment with petr by "appearing at the jobsite gate"; while none was hired in that manner, three of them were eventually hired for the job. One other resp, who had not applied at the gate, was also hired.

3. DECISIONS BELOW: The DC granted petr's motion to dismiss, finding not only that resps had failed to prove their case but also that petr had proven what it was not required to, i.e., that it had not engaged in racial discrimination in its employment practices in regard to bricklayers on the Interlake job.

The DC found that petr's hiring policies of not hiring at the gate, not accepting written applications, and only hiring as bricklayers those whom the superindendent knew to be highly competent were racially neutral on their face and were applied equally to both blacks and whites. Not only was there no showing of a disproportionate impact, but on the contrary the DC concluded that the hiring policies resulted in a percentage of black bricklayers on the job far in excess of the percentage of black bricklayers in the relevant labor market (5.7 per cent). The DC also concluded that resps had failed to prove a case of discrimination under McDonnell Douglas, for even if they were qualified, petr's failure to hire them was pursuant to its legitimate and nondiscriminatory hiring policies which were justified as a business necessity.

The CA 7 sustained the DC's judgment as to five of the resps. As for the other three, the court concluded that they had established racial discrimination. Applying the test set forth in McDonnell Douglas, supra, the CA stated that they belonged to a racial minority, they did all they could to apply, they were qualified for the jobs which were about to be open, they were refused consideration (although not permanently in one case), and thereafter the petr sought out and employed persons of similar qualifications. The court disagreed with the DC's acceptance of petr's argument that a valid business reason justified its failure to hire at the gate. It said that there was a reasonable alternative to petr's "haphazard, arbitary, and subjective" hiring

methods -- written application could be accepted at the gate, with inquiry as to qualifications and experience; the applicant's claims could then be checked out and compared with the qualifications and experience of those on the list. In response to petr's argument that its hiring methods were not racially discriminatory, the court stated: "The historical inequality of treatment of black workers seems to us to establish that it is prima facie racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers." Finally, the CA rejected petr's argument that the hiring statistics relied on by the DC rebutted any inference of racial discrimination:

> "Where the percentage of minority members in a workforce is lower than the group considered, that fact may well indicate the operation of racial discrimination. Absence of such discrimination is not proved by the percentage in the workforce being higher than the percentage in the group considered."

4. CONTENTIONS: (1) Petr contends that the CA 7's rejection of the statistical showing as proof that petr's policies were not discriminatory is contary to the approach taken by the Court last Term in Hazelwood School District v. United States, supra. In that case, petr contends, the Court concluded that a statistical comparison between the minority representation in the skilled labor force capable of performing the work in question and the minority representation in the employer's work force is clearly probative of whether the employer has engaged in hiring discrimination.

(2) Petr argues that the CA 7's decision is also in conflict with another decision of last Term, International Brotherhood of Teamsters v. United States, supra. There the Court noted that in an employment discrimination suit alleging disparate treatment, as opposed to disparate impact, "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." Petr points out that the CA 7's opinion is devoid of any finding of discriminatory intent or motive.

(3) Finally, petr argues that the CA 7 usurped the functions of the DC by substituting its own judgment for that of the DC as to the legitimacy, job relatedness, and business necessity of petr's hiring practices.

5. DISCUSSION: Petr raises some serious questions about the decision below. In the Teamsters decision, supra, the Court discussed the two types of employment discrimination suits: (1) "disparate treatment" in which the employer is alleged to have treated some people less favorably than others because of their race, color, religion, sex, or national origin; and (2) "disparate impact" in which it is alleged that employment practices which are facially neutral in their treatment of different groups in fact fall more harshly on one group than another and cannot be justified by business necessity. In the former case, "[p]roof of discriminatory motive is critical," whereas in the latter, such proof is not required. 45 U.S.L.W., at 4509 n. 15.

The basis for this suit seems to me to fit more closely into the disparate impact category, for the CA 7 noted that the "seeming equality of treatment [of black and white applicants by petr] is deceptive." However, as the CA apparently recognized, there are problems with basing the suit on this theory, the main problem being that no disparate impact was proven. If anything, it was shown that petr's hiring practices resulted in a greater number of black bricklayers than otherwise would have been expected.

The CA 7 instead found that the three resps had proven racial discrimination under the McDonnell Douglas test, which I interpret as falling within the disparate treatment category. This basis also seems questionable, for it is not at all clear that petr treated black and white applicants differently. No one was hired at the gate; all were hired on the basis of subjective recommendations and referrals. While petr's methods of hiring may have been arbitrary, I question whether they were shown to be racially discriminatory.

What the CA 7 really seems to have done is to have concluded that the subjective hiring methods employed by petr are per se racially discriminatory. If that is the real basis for the decision, then it is in conflict with the CA 5's decision in Hester v. Southern Railway Co., 497 F.2d 1374 (CA 5 1974). There the court held that "nonvalidated tests and subjective hiring procedures are not violative of Title VII per se. Title VII comes into play only when such practices result in discrimination. At that point, the burden of producing evidence shifts to the employer, who must offer

satisfactory justification for his procedures." In that case the CA 5 concluded that the plaintiff had failed to prove the resulting discrimination, and thus the DC had erred in finding a Title VII violation.

Because this case looks like a possible grant, I would call for a response.

There is no response.

10/17/77 Gibson Opinion in Petn.

ME

I agree that there are problems in this case. Two features of petr's hiring practices seemed to disturb CA7. First, those blacks who were hired tended to be hired later than the whites who were hired; hence, they did not work as many days as the whites. Petr's response to this is that the total number of man-days worked by blacks was greater than the proportion of the work-force that was black; hence, blacks got their fair share of the pie. This may or may not be right. One could argue that discriminatory impact is present because the blacks' man-days were divided among a greater number of blacks, so that on average each black who was hired worked fewer days than each white. Although CA7 was not very explicit, I think this is part of what bothered it. I do not think any of the Court's cases answer the question whether this kind of disparate impact is actionable under Title VII.

Second, CA7 was disturbed by the fact that only those blacks who came to Dacies' attention through his own contacts were hired. I do not see this as a problem, since only those whites who came to Dacies' attention through his own experience were hired, too. What CA7 may have been getting at was that petr placed a ceiling on the number of blacks it would recruit, but its opinion is awfully obscure on this point. See Pet.App.A at A8-A9.

Yes

It seems to me that CA7 may have been right to be bothered by the first point, but it did not explain it very well. Although I have my doubts as to whether this particular problem arises often - I just don't know - the case probably merits a CFR, discuss, and join 3.

Ja.

(Assembly, Jan 3)

SUPPLEMENTAL MEMORANDUM

To: Mr. Justice Powell November 10, 1977

From: Jim Alt

Re: No. 77-369, Furnco Construction Co. v. Waters (November 11, 1977 Conference List - discuss)

3

The response for which you called is in. Resp contends:

(1) The decision below does not conflict with Hazelwood, because "nowhere does the Seventh Circuit suggest that the use of statistics in an employment discrimination lawsuit is a one-way street." Response at 5. This is difficult to square with CA7's statement that "Absence of ... discrimination is not proved by the percentage [of blacks] in the workforce being higher than the percentage [of blacks] in the group considered

[for employment]." Pet.App. A at A8. Resp goes on to argue that the foreman's hiring list, which contained only the names of whites, was compiled in an "obviously discriminatory manner;" and that "maintenance of that list becomes no less of an exclusionary device because, long after plaintiffs applies for work, some blacks are transferred in." Ibid. The first point has not been accepted by either the DC or the CA; neither hinted that the foreman intentionally excluded blacks from his hiring list. The second point is the one that I think got to CA7: the fact that even though blacks ended up working 13.3% of the total hours on the job, they were hired later than whites so that each black worked fewer hours.

(2) Resp also contends the decision below does not conflict with Teamsters v. U.S., for two reasons. First, petr contends that its practice is neutral on its face because neither blacks nor whites are hired at the gate; hence, it claims, no intent to discriminate is apparent. But the "disparate treatment" of which resp complains is not the refusal to hire at the gate, but rather the hiring of most of the workers from an all-white list.

Second, to the extent that discriminatory motive must be shown, Teamsters said that such motive can "be inferred from the mere fact of differences in treatment." Such difference in treatment is shown here because the foreman never put the name of any black on his hiring list.

I am not quite sure what point resp is trying to make here. I think it comes back to the claim that the foreman

acted in a discriminatory manner when he compiled his hiring list. But as I have said, neither court below accepted or went off on that claim.

(3) Resp contends the CA properly rejected the DC's finding that use of the hiring list was justified by legitimate business reasons. This is so because, as the CA said, an alternative to using the hiring list would be to accept applications from all comers and then to check out their qualifications.

DISCUSSION: My view of this case has not changed. CA7 was disturbed by the fact that each black worked fewer hours than his white counterpart, and by the fact that the employer apparently set some kind of quota on the number of blacks it would hire when it set out to recruit blacks. But the fact remains that the DC found that use of the hiring list was justified by legitimate business reasons, and that it also found that the employer's hiring practices were not discriminatory in either intent or effect. The case still is problematical; but whether it presents a problem of widespread importance is a matter of doubt to me. I would favor a deny or join 3.

JA

NOV 11 1977

Court ..CA - 7.......... Voted on.................., 19...
Argued ...., 19... Assigned ...., 19... No. 77-369
Submitted ...., 19... Announced ...., 19...

FURNCO CONSTRUCTION CORPORATION, Petitioner

vs.

WILLIAM WATERS, ET AL.

9/3/77 - Cert.

Byron thinks CA7 ignored principles of our cases

D

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	AFF	MOTION G	D	ABSENT	NOT VOTING
Burger, Ch. J.						Join 3							
Brennan, J.			✓										
Stewart, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.						Join 3							
Powell, J.			✓										
Rehnquist, J.		✓	V. & R. on Hazelwood & Teamsters or Grant										
Stevens, J.			✓										

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 11, 1977

RE: 77-369 - Furnco Construction Corp. v. Waters, p. 2 (Nov. 11 Conference)

MEMORANDUM TO THE CONFERENCE

I have requested that the Clerk relist this case for the next Conference.

Regards,

WEB

NOV 23 1977

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 77-369

FURNCO CONSTRUCTION CORP.

vs.

WATERS

Relisted for the Chief Justice.

9 voted to Deny - but case is close & 9 called reminder.

Relist for Harry

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Powell, J.			✓	(3)									
Rehnquist, J.		✓											
Stevens, J.			✓										

DEC 2 1977

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 77-369

Submitted ....., 19... *Announced* ....., 19...

FURNCO CONSTRUCTION CORP.

vs.

WATERS

Relisted for Mr. Justice Blackmun.

Relist
for
Harry

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Rehnquist, J.													
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DEC 9 1977

Court ..... *Voted on*....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 77-369

Submitted ....., 19... *Announced* ....., 19...

FURNCO CONSTRUCTION CORP.

vs.

WATERS

Relisted for Mr. Justice Blackmun.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Burger, Ch. J.		✓		✓									
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White, J.		✓											
Marshall, J.			✓										
Blackmun, J.					join 3								
Powell, J.			✓										
Rehnquist, J.		✓											
Stevens, J.			✓										

DEC 9 1977

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 77-369

FURNCO CONSTRUCTION CORP.

vs.

WATERS

Relisted for Mr. Justice Blackmun.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Powell, J.			✓										
Rehnquist, J.		✓											
Stevens, J.			✓										
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77-369 - Furnco Construction Corp. v. Waters.
I shall stay with my "Join 3" vote. 4-3

HAB 12/6

I'm inclined to agree this is a candidate for a DIG. The DC did not make the necessary finding of fact & CA7 misapplied McDonnell-Douglas.

BOB-TAIL BENCH MEMO

TO: Mr. Justice Powell

FROM: Nancy Bregstein April 16, 1978

RE: No. 77-369, Furnco Constr. Corp. v. Waters

This case should not have been granted. Both courts below failed to do their jobs, and neither the dist ct's decision nor the CA's decision reversing the dist ct applies correct legal theory. The dist ct's failure to understand the proof requirements in a Title VII action resulted in an inadequate record, which caused the CA to go off on its own theory of the case (without adequately explaining its factual predicate) and which makes it very hard, if not impossible, for this Court to review the decisions below.

The CA decided this case on the theory of disparate treatment under McDonnell Douglas Co. v. Green, 411 U.S. 792 (1973), but did not fully explain its theory on this rationale. Petr now argues to this Court that this is not a McDonnell Douglas case but a Griggs case (Griggs v. Duke Power Co., 401 U.S. 424 (1971). Resps argue that the result below can be sustained under either McDonnell Douglas or Griggs, but urge this Court to remand if it finds no violation under McDonnell Douglas because the CA did not consider a Griggs theory and therefore there is nothing on that score for this Court to review. Alternatively, resps argue on three grounds that this case should be DIG'd.

Finally, to make things even more complicated the SG argues that the judgment below should be affirmed as to two of the resps (Smith and Samuels) but reversed as to the third (Nemhard). This is because intentional discrimination under McDonnell Douglas was established as to Smith and Samuels but not as to Nemhard, and no Griggs violation was established at all.

In a very brief memo--because of time constraints and the fact that the long-range significance of this case is almost nil--I will give you my basic impressions. I have not spent much time trying to unravel the facts of this case, and to determine what was and was not argued and proved below, because of inadequate time.

I. McDonnell Douglas

Under McDonnell Douglas, all three resps made out a prima facie case of racial discrimination. Each of them showed

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[1]

At that point it was up to Furnco to rebut the prima facie case by articulating "some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S., at 802. Here Furnco says it rebutted the prima facie case by showing that thre were two legitimate, nondiscriminatory reasons why resps were not hired: (1) Furnco (through Dacies, the supervisor) did not take applications at the gate; and (2) Furnco only hired people its supervisor (here, Dacies) knew to be qualified bricklayers and with whom he had worked previously.

The next step in the McDonnell Douglas case is for the plaintiffs to show that the reasons given by the employer were mere pretexts hiding a racially

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1. Technically, Furnco was not "seeking applicants" because its hiring methodd did not use applications but relied on the knowledge of the superintendent of qualified bricklayers with whom he had worked previously. If the particular word "applicants" is dispositive, then resps did not even make out a prima facie case. For purposes of this memo, I will assume that "applicants" also could mean "new employees" who would be hired according to whatever method the employer used.

discriminatory reason. The SG argues, and resps seem to agree, that resps did prove pretext as to Smith and Samuels. They say that plaintiffs introduced evidence that Davies had worked with Smith and Samuels on previous jobs; they therefore qualified as bricklayers with whom Dacies had worked and whom he knew to be qualified. (Indeed, Smith eventually was hired.) Once Smith and Samuels showed up at the gate, therefore, Dacies' refusal to hire them constituted racial discrimination. I am not exactly sure whether resps are saying that the discrimination occurred when Dacies refused to hire them when they showed up at the gate or when he failed to include their names in his "list" of qualified bricklayers with whom he had worked.

If we are talking about disparate treatment, i.e., racially motivated refusal to hire a qualified individual because of his race, then it would seem to me that even if the failure to place Smith and Samuels on Dacies' list in the first place was not discriminatory, the failure to hire them when they showed up at the gate probably was. This would not apply to Nemhard, however, because it is conceded that he never worked with Dacies before.

The problem with this whole theory is that the underlying facts are disputed. Furnco contends that there is no evidence that Dacies worked with Samuels in the past, and it contends that although he worked on some of the same jobs with Smith, it is unclear whether they knew each other. (Resps say that Smith once acted as supervisor on a

job where Dacies worked under him, but Furnco contests this.) As for the intentional discrimination worked by the failure to put Samuels' and Smith's names on Dacies' list, Furnco seems to be saying that there could have been any number of reasons why Davies did not have Smith on his list of qualified bricklayers. The problem is that it is conceded that there were no names of black bricklayers on Dacies' list. Again, however, we have no evidence of how many black bricklayers worked with Dacies before, what his motivation was in making up this list, whether qualified white bricklayers with whom he had worked in the past were omitted from the list, etc. The all-white list looks very suspicious, but we really do not know much about how it came about. If it was resps' burden to show that the refusal to hire at the gate was a pretext, it seems to me it was their burden to introduce some of this missing evidence. On the other hand, it could be that proof of Dacies' failure to place any black names on his list satisfied resps' burden.

Resps make one other argument to show that the refusal to hire at the gate was a pretext and indeed that Furnco's representation that it never hires at the gate is false. They say that black bricklayers obtained work on previous Furnco jobs by applying at the gate. As a matter of fact, it is said that another Furnco supervisor (Urbanski) told one of the resps about the Interlake job (at issue here) and suggested to him that he might obtain

work on it by applying at the gate. Again, these facts are disputed; Furnco says it was its own practice and industry practice not to accept applications at the gate.

In short, the McDonnell Douglas case is troublesome because the facts are so unclear. And in concluding that plaintiffs had made out a winning case of disparate treatment, the CA neither distinguished between Smith and Samuels on the one hand and Nemhard on the other nor reached the third step in the McDonnell Douglas analysis (whether the supposedly non-discriminatory reason for the refusal to hire in fact was a pretext). Instead, it shifted gears and concluded that there was no business necessity, under Griggs, for Furnco's hiring procedures. Thus we do not have the benefit of the CA's view on whether the refusal to hire Smith or Samuels was a pretext. I do not feel comfortable having this Court resolve that question. The CA's conclusion that there was no need for Furnco's hiring method might be read as a conclusion that it was a pretext, but it did not say so and this was not its analytical framework, once it had shifted to considerations under Griggs.

Can't apply because of absence of factual findings

II. Griggs

Assuming that there was no disparate treatment, the analysis shifts to whether a facially neutral hiring policy had a disproportionate impact on blacks under Griggs. Here I would tend to agree with resps that the CA

should consider this question in the first instance. Here the question would be whether the refusal to take applications at the gate and the method of having the supervisor hire people he knew to be capable had a disproportionate impact on blacks.

Again, analysis of this question is complicated by the fact that we do not really know what went on. In addition, petr and resps go at the question in totally different ways. Petr says we should look at the fact that there was no disproportionate impact of its over-all hiring procedure, which included not only Dacies' use of his list but also the instructions from Furnco to Dacies to try to hire 16% blacks on the job. Resps, on the other hand, says that Dacies' list was the main way of hiring, and the directive to hire blacks was just an after-thought when Furnco realized it might be in trouble for not having an integrated work force. Resps also dispute the relevant percentage of blacks in the relevant labor force (they say it's about 13§ whereas petr, citing a federal study, say it is 5.7%), and the percentage of blacks hired for the Interlake job. Resps say that petr's 16% figure is distorted because some of the black bricklayers were transferred from another Furnco job.

It is very silly and a waste of time for the Court to have to resolve these disputes because the courts below failed to do it correctly. Assuming that the percentage of black workers on the Interlake was higher than the

percentage in the relevant labor force, as the dist ct found, it is hard to accept resps' theory without making a finding that the hiring of blacks for the Interlake job was a sham. In fact, the minority workers worked 13.3% of the man-days on the job; and whites worked an average of 34.05 days while blacks worked an average of 32.5 days. This would not prove a case of disproportionate impact under Griggs. Yet resps are right that it would be inconsistent with Title VII principles to say that an employer complies with the law by using an exclusively white hiring list as his basic method of hiring but then supplements his work force, later, by hiring a number of blacks. In short, the parties do not seem to disagree on the legal principles but interpret the facts differently.

III. The grounds for a DIG

I think this case should be dismissed as improvidently granted. As is apparent from the above discussion, there is no law here for the Court to figure out, and the decision will not result in the articulation of any new principles. The case is extremely fact-specific and we do not have a good view of the facts. In addition to the fact that the case requires much sorting of unique facts and no potential for legal development, resps point out that none of the questions supposedly presented really is presented.

(1) The first question presented deals with whether a CA can find statistics showing no disproportionate impace irrelevant. The answer to this question is obvious: of course it can't. But here the CA must have bought resps' view of the case: that the basic hiring took place off of Dacies' list and the addition of black workers later was a sham. This assessment of the facts may or may not be correct, but their is no novel principle involved. In addition, the Court already has said that statistics are not conclusive, and that a showing of a racially balanced work force will not be an absolute defense to a conclusion of disparate treatment (e.g., racially motivated discrimination against an individual). That is what the CA purported to find in this case.

(2) The second question is whether a court can find disparate treatment without finding discriminatory motive. I agree with resps that this is a semantic ploy. A conclusion of disparate treatment necessarily contains a finding of discriminatory motive because of the proof required. If the plaintiff proves that the supposedly non-discriminatory reason for the refusal to hire was a pretext, by implication he has proved that the real reason was racially discriminatory.

(3) The third question is a rehash of the first: whether a violation of Title VII under Griggs can be shown without a showing of disproportionate impact. Again, the answer is clear: Of course it can't. But here the parties

simply disagree on the facts of which statistics should have been used, which black workers should have been counted, and whether Dacies' list or the overall hiring was the relevant hiring method to focus on; they do not disagree about the controlling principle. This last question might be certworthy if this kind of thing happened frequently and if the facts were clear, but neither is true here.

Accordingly, I would DIG. This is not because the decision below is right but because the case will not result in the announcement of any new principles and it is a mess. If the case is not DIG'd, I will have to take a closer look at the facts to come up with the correct result. My sense is that there was no Griggs violation (because the figures showed no disproportionate impact and resps' theory about the hiring of some blacks as an afterthought does not seem to have been adopted by the CA); but there may have been disparate treatment of Samuels or Smith.

N.B.

77-369 FURNCO v. WATERS Argued 4/17/78

Title VII case from CA 7
Furnco had a ctt. install five brick
in a steel plant

Kaplan (Pet+)

Standards of employment:

1. Only hired bricklayers with track record of ability

2. No hiring at gate

3.

Smith ~~in~~ who had worked before - was hired in a non-disc. sequence with some whites were hired before & after. Blacks were hired throughout entire process of job - as were whites.

Blacks worked 2½ times the number in available work force.

The alleged "all white list" in a red herring. Only slips of paper - but conceded there was no black on these slips.

But Pet+. instructed Supt. to hire 16% blacks.

"list" was not exclusive basis of hiring - as proved by fact that 13½% were black.

Kaplan (cont.

CA 7 agreed DC's findings & the statistics.

Minier (Resp).

Blacks were all qualified

Not a "class action".

Does not argue that an employer must invite applications.

Argues that "process" was discriminatory & therefore doesn't matter whether result was good or bad.

Probably a PC reversal

77-369 FURNCO v. WATERS Conf. 4/19/78

The Chief Justice Remand or Reverse

CA7 misapplied our cases. It made its own findings w/o finding DC's findings to be erroneous

---

Mr. Justice Brennan DIG

Confused mess.

CA7 did fail to address findings of DC

If it were clear that hiring was limited to an all "white list", case would be ~~clear~~ easy - but this is not at all clear.

Mr. Justice Stewart Reverse or DIG

This is a dog. CA7 simply disregarded findings of DC. It also confused Griggs-Albemarle test with McDonnell-Douglas test. The former were "pattern & practice" class suits. This was individual suit. No pattern or practice issue. Statutes are not a defense if individual discrimination is shown.

Would reverse in P.C or ground that CA7 ignored DC's findings or could DIG

Mr. Justice White Reverse or Remand

McDonnell doesn't apply. CA7 implied a discrimination from the methods of hiring.

CA7 never found any intentional discrimination vs these Pls except on an erroneous application of McDonnell

CA7 fouled this up.

Mr. Justice Marshall DIG

This is a "[redacted] "pee-wee".

Can't find in this record any basis for finding discrimination vs any one of the three Pls - but case is wholly [redacted] unimportant.

X X X

Might join very narrow reversal.

Mr. Justice Blackmun Affirm in part; Reverse in Part

A DIG would be unfair to the Co.

All three made an initial prima facie case. But Newhart's claim was clearly rebutted. Co should not be stuck with his claim.

As to other two, would affirm - though issue is close.

Will not DIG

Could join Reversal on WH R's ground.

Mr. Justice Powell Remand for determination of facts - or Reverse on basis of DC's findings.

Mr. Justice Rehnquist Reverse or Remand.
This case would not be here if CA7 had done its duties. It ignored the DC findings.
Will not DIG

Mr. Justice Stevens

~~Grant~~
Could join Harry in affirm as to Smith & Samuels & Reverse as to
Will not DIG

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 5, 1978

RE: No. 77-369 Furnco Construction v. Waters

Dear Bill:

I will await the dissent. I find the discussion of the business necessity doctrine very troublesome.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 5, 1978

No. 77-369 - Furnco v. Waters

Dear Bill,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 8, 1978

Re: No. 77-369 - Furnco Construction Corp. v. Waters

Dear Bill:

Please join me.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference

TO: Mr. Justice Powell

FROM: Nancy June 12, 1978

RE: Furnco Constr. Corp. v. Waters--WHR's opinion

I think the opinion is okay on the McDonnell Douglas issues. It ~~remands to the CA~~ disagrees with the CA on the question whether the employer offered a legitimate reason explaining the failure to hire resps; but it remands to the CA for consideration of the question whether the reason was a pretext. This is good, because it lets resps argue that Dacies' use of the all-white list shows that his hiring method was a pretext for the exclusion of blacks.

I am uncomfortable, however, with WHR's treatment of Griggs. The CA did not discuss the Griggs argument, while the dist ct concluded that Furnco's hiring practices are justified by "business necessity". Resps' brief states that the Griggs argument was briefed and argued before the CA. Yet WHR's opinion seems to exclude Griggs analysis completely from this case. He does this in two ways. In his footnote 8, in which he mentions alternative theories of the case that were not considered by the CA but are to be considered on remand, he discusses only McDonnell Douglas points. More importantly, the opening sentence of Part II-A (on p. 7) says that this is a McDonnell Douglas case. And it also seems to say that plaintiffs cannot base their case on Griggs if they do not allege use of employment tests, particularized requirements such as height or

CA ? thought Griggs inapplicable

weight, or a "pattern or practice" of discrimination. The inclusion of this sentence makes it seem like WHR is intentionally excluding Griggs analysis from this case.

I think this is wrong. Plaintiffs ~~xx~~ seem to have based their case alternatively on McDonnell Douglas and Griggs. And the infamous "all-white list" could be used as evidence under either theory. Under McDonnell Douglas, it would be used to show that the supposedly legitimate hiring practice of not hiring at the gate was pretextual. Under Griggs, plaintiffs would attempt to show that use of Dacies' hiring practice ~~xxxxxxxxxx~~ had a disproportionate impact on minorities. Whether they would prevail is questionable--resolution of the question would depend in part on the CA's decision as to the proper focus. Plaintiffs argue that use of the all-white list resulted in the ~~xxx~~ hiring of no blacks; Furnco, on the other hand, says the proper focus is on the total hiring policy, which was broader that Dacies' all-white list. In other words, the list was not the exclusive method of hiring; and under the total ~~xx~~ hiring policy, there was not a disproportionate impact on ~~xxxxx~~ blacks. (See p. 8 of my bench memo.) I ~~xxxx~~ tend to think ~~Xxx~~ Furnco would prevail on the Griggs question; and the SG agreed that plaintiffs would not prevail on Griggs. But the issue should not be foreclosed by this Court; the CA should be instructed to consider plaintiffs' Griggs argument on remand. This is not just a matter of disposing of this case correctly; the first sentence in Part II-A will have a broader impact on future Title VII litigation.

I tried to get in touch with WHR's clerk (Mike Young) about this, but he was out of town. ~~I would~~ (He'll be back tomorrow.) I would like to find out whether the exclusion of Griggs was intentional, and, if so, ~~whether~~ why WHR thinks Griggs analysis can't be used in this case. If they insist on keeping the opinion this way, I would recommend that you dissent on this point. I've spoken to WJB's and TM's clerks about this, and this is the ground on which they intend to dissent. (They are not dissenting on the "business necessity" point, as indicated in WJB's letter to WHR. Upon further reflection, they realized correctly that business necessity is irrelevant under McDonnell Douglas.) BRW's clerk also believes that the exclusion of Griggs is wrong.

I will let you know what Mike Young says tomorrow.

Nancy

P.S. Beth Israel has been circulated.

June 17, 1978

No. 77-369 Furnco v. Waters

Dear Bill:

It would help me if you would consider favorably the following.

Commence Part II-A (p. 7) of your opinion with the words "We agree . . ." in the 8th line of the first paragraph.

Then drop into a footnote the references to Griggs, Albemarle and Dothard, simply omitting the word "Since" (in two places) so that our agreement that McDonnell Douglas controls does not appear to be predicated on the fact that none of the situations involved in Griggs, Albermarle or Dothard is present here.

As I have said before, I do not think Griggs has any applicability to this case in view of the findings by the District Court that were not questioned by CA7. But there is no real reason to say anything about Griggs.

If these negligible changes are agreeable to you, I will join forthwith.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 19, 1978

Re: No. 77-369 Furnco v. Waters

Dear Lewis:

The proposed changes contained in your letter of June 17th are agreeable to me, and I have likewise cleared them with Potter and Harry, who joined the earlier draft. I will accordingly send the necessary revisions to the Printer, and hope to have a new draft incorporating your changes in circulation as soon as possible.

Sincerely,

Mr. Justice Powell

June 19, 1978

No. 77-369 Furnco v. Waters

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 19, 1978

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Sincerely,

Mr. Justice Powell

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: JUN 2 0 1978

P. 7
Footnotes Renumbered
Bill has made the changes I requested on p. 7 LFP

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-369

Furnco Construction Corporation, Petitioner, *v.* William Waters et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents are three black bricklayers who sought employment with petitioner Furnco Construction Corporation. Two of the three were never offered employment. The third was employed only long after he initially applied. Upon adverse findings entered after a bench trial, the District Court for the Northern District of Illinois held that respondents had not proved a claim under either the "disparate treatment" theory of *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), or the "disparate impact" theory of *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). The Court of Appeals for the Seventh Circuit, concluding that under *McDonnell Douglas* respondents had made out a prima facie case which had not been effectively rebutted, reversed the judgment of the District Court. We granted certiorari to consider important questions raised by this case regarding the exact scope of the prima facie case under *McDonnell Douglas* and the nature of the evidence necessary to rebut such a case. — U. S. — (1977). Having concluded that the Court of Appeals erred in its treatment of the latter question, we reverse and remand to that court for further proceedings consistent with this opinion.

I

A few facts in this case are not in serious dispute. Petitioner Furnco, an employer within the meaning of §§ 701 (b) and (h) of Title VII of the 1964 Civil Rights Act, specializes in refractory installation in steel mills and, more particularly, the rehabilitation or relining of blast furnaces with what is called in the trade "firebrick." Furnco does not, however, maintain a permanent force of bricklayers. Rather, it hires a superintendent for a specific job and then delegates to him the task of securing a competent work force. In August 1971, Furnco contracted with Interlake, Inc., to reline one of its blast furnaces. Joseph Dacies, who had been a job superintendent for Furnco since 1965, was placed in charge of the job and given the attendent hiring responsibilities. He did not accept applications at the jobsite, but instead hired only persons whom he knew to be experienced and competent in this type of work or persons who had been recommended to him as similarly skilled. He hired his first four bricklayers, all of whom were white, on two successive days in August, the 26th and 27th, and two in September, the 7th and 8th. On September 9 he hired the first black bricklayer. By September 13, he had hired eight more bricklayers, one of whom was black; by September 17, seven more had been employed, another of whom was black; and by September 23, 17 more were on the payroll, again with one black included in that number.[1] Between October 12 to 18, he hired six bricklayers, all of whom were black, including respondent Smith, who had worked for Dacies previously and had applied at the jobsite somewhat earlier. Respondents Samuels and Nemhard were not hired, though they were fully qualified and had also at-

[1] Respondents contend that two of these four blacks were not actually "hired," but merely "transferred" from another Furnco job. Brief for Respondents 7–8. Both the District Court and the Court of Appeals spoke only of "hiring" bricklayers, however, and those parts of the record to which respondents point do not persuade us that this is a mischaracterization.

tempted to secure employment by appearing at the jobsite gate. Out of the total of 1819 man-days worked on the Interlake job, 242, or 13.3%, were worked by black bricklayers.

Many of the remaining facts found by the District Court and the inferences to be drawn therefrom are in some dispute between the parties, but none was expressly found by the Court of Appeals to be clearly erroneous. The District Court elaborated at some length as to the "critical" necessity of insuring that only experienced and highly qualified firebricklayers were employed. Untimely work would result in substantial losses both to Interlake, which was forced to shut down its furnace and lay off employees during the relining job, and to Furnco, which was paid for this work at a fixed price and for a fixed time period. In addition, not only might shoddy work slow this work process down, but it also might necessitate costly future maintenance work with its attendant loss of production and employee layoffs; diminish Furnco's reputation and ability to secure similar work in the future; and perhaps even create serious safety hazards, leading to explosions and the like. Pet. for Cert. A13–A15. These considerations justified Furnco's refusal to engage in on-the-job training or to hire at the gate, a hiring process which would not provide an adequate method of matching qualified applications to job requirements and assuring that the applicants are sufficiently skilled and capable. *Id.*, at A18–A19. Furthermore, there was no evidence that these policies and practics were a pretext to exclude black bricklayers or were otherwise illegitimate or had a disproportionate impact or effect on black bricklayers. Pet. for Cert. A17–A18. From late 1969 through late 1973, 5.7% of the bricklayers in the relevant labor force were minority group members, see 41 CFR § 60–11 *et seq.*,[2] while, as mentioned before, 13.3% of

[2] Respondents attempted to introduce a study conducted in late 1973 by the local union which matched members' names and race in an effort to show what percentage of the union membership was black. The study

the man-days on Furnco's Interlake job were worked by black bricklayers.

Because of the above considerations and following the established practice in the industry, most of the fire-bricklayers hired by Dacies were persons known by him to be experienced and competent in this type of work. The others were hired after being recommended as skilled in this type of work by his general foreman, an employee (a black), another Furnco superintendant in the area, and Furnco's General Manager John Wright. Wright had not only instructed Dacies to employ, as far as possible, at least 16% black bricklayers, a policy due to Furnco's self-imposed affirmative action plan to insure that black bricklayers were employed by Furnco in Cook County in numbers substantially in excess of their percentage in the local union,[3] but he had also recommended, in an effort to show good faith, that Dacies hire several specific bricklayers, who had previously filed a discrimination suit

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concluded that approximately 500 of the 3,800 union members were black. The District Court excluded this evidence because the study had been conducted two years after Furnco completed its job. Pet. for Cert. A16 n. 1. The Court of Appeals thought rejection of this evidence was an abuse of discretion, but in dealing with the merits did not rely on the racial proportions in the labor force, so did not remand the case to permit introduction of that testimony. The Court of Appeals also noted that in any event respondents suffered no prejudice by the court's refusal to admit the study because it would not have demonstrated discrimination. The study showed that 13.7% of the membership of the union was black, while the evidence demonstrated that 13.3% of the man-days were worked by black bricklayers, Furnco had set a goal of 16% black bricklayers, and 20% of the individuals hired were black. 551 F. 2d, at 1090.

[3] According to the District Court, this affirmative action program was initiated by Furnco following a job performed in 1969–1970 from which charges of racial discrimination in hiring were filed by several black bricklayers. These claims are apparently still pending on appeal in the Illinois courts and the merits of a parallel federal action remain to be adjudicated. See Pet. for Cert. A15; *Batiste* v. *Furnco*, 503 F. 2d 447 (CA7 1974).

against Furnco, negotiations for the settlement of which had only recently broken down, see n. 3, *supra.*

From these factual findings, the District Court concluded that respondents had failed to make out a Title VII claim under the doctrine of *Griggs* v. *Duke Power Co., supra.* Furnco's policy of not hiring at the gate was racially neutral on its face and there was no showing that it had a disproportionate impact or effect. Pet. for Cert. A20–A21. It also held that respondents had failed to prove a case of discrimination under *McDonnell Douglas, supra.* Pet. for Cert. A21. It is not entirely clear whether the court thought respondents had failed to make out a prima facie case of discrimination under *McDonnell Douglas, supra,* see Pet. for Cert. A20–A21, but the court left no doubt that it thought Furnco's hiring practices and policies were justified as a "business necessity" in that they were required for the safe and efficient operation of Funrco's business, and were "not used as a pretext to exclude Negroes." Thus, even if a prima facie case had been made out, it had been effectively rebutted. *Id.,* at A21.

> "Not only have Plaintiffs entirely failed to establish that Furnco's employment practices on the Interlake job discriminated against them on the basis of race or constituted retaliatory conduct but Defendant has proven what it was not required to. By its cross-examination and direct evidence, Furnco has proven beyond all reasonable doubt that it did not engage in either racial discrimination or retaliatory conduct in its employment practices in regard to bricklayers on the Interlake job."[4] Pet. for Cert. A22.

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[4] The District Court also found that certain other plaintiffs never attempted to apply for work at Interlake or were fired or not hired for valid reasons, such as insubordination or poor workmanship. Pet. for Cert. A17–A19. The Court of Appeals, concluding that the District Court's findings were not clearly erroneous, affirmed the judgment against these particular plaintiffs. 551 F. 2d, at 1087–1088. These rulings are not challenged here.

The Court of Appeals reversed, holding that respondents had made out a prima facie case under *McDonnell Douglas, supra,* at 802, which Furnco had not effectively rebutted. Because of the "historical inequality of treatment of black workers" [5] and the fact that the record failed to reveal that any white persons had applied at the gate, the Court of Appeals rejected Furnco's argument that discrimination had not been shown because a white appearing at the jobsite would have fared no better than respondents. That court also disagreed with Furnco's contention, which the District Court had adopted, "that the importance of selecting people whose capability had been demonstrated to defendant's brick superintendent is a 'legitimate, nondiscriminatory reason' for defendant's refusal to consider plaintiffs." *Id.,* at 1088. Instead, the appellate court proceeded to devise what it thought would be an appropriate hiring procedure for Furnco, saying "[i]t seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seeking out employees from among those known to the superintendent." *Ibid.* This middle course, according to the Court of Appeals, was to take written applications, with inquiry as to qualifications and experience, and then check, evaluate and compare those claims against the qualifications and experience of other bricklayers with whom the superintendent was already acquainted. We granted certiorari to consider whether the Court of Appeals had gone too far in substituting its own judgment as to proper hiring practices in the case of an

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[5] The court stated:

"The historical inequality of treatment of black workers seems to us to establish that it is *prima facie* racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers. How else will qualified black applicants be able to overcome the racial imbalance in a particular craft, itself the result of past discrimination." 551 F. 2d, at 1089.

employer which claimed the practices it had chosen did not violate Title VII.[6] —— U. S. —— (1977).

II

A

We agree with the Court of Appeals that the proper approach was the analysis contained in *McDonnell Douglas, supra.*[7] We also think the Court of Appeals was justified in concluding that as a matter of law respondents made out a prima facie case of discrimination under *McDonnell Douglas.* In that case we held that a plaintiff could make out a prima facie claim by showing:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the em-

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[6] The petition for certiorari set out three questions:

"1. Whether the Seventh Circuit, in reversing the judgment of the District Court, erred in finding as irrelevant to the issue of racial discrimination in hiring, statistics demonstrating that in hiring highly skilled bricklayers, the employer hired Negroes in a percentage far in excess of their statistical presence in the relevant labor force.

"2. Whether a court may find an employer guilty of racial discrimination in employment due to alleged disparate treatment in hiring without a finding of discriminatory intent or motive.

"3. Whether a hiring practice not shown to result in disparate impact or treatment of prospective minority employees and found by the District Court to be justified by business necessity and legitimate business reasons may be found to be racially discriminatory by the Court of Appeals merely because it is subjective and because the Court of Appeals substitutes its judgment for that of the District Court as to what constitutes legitimate business reasons." Pet. for Cert. 2.

[7] This case did not involve employment tests, which we dealt with in *Griggs* v. *Duke Power Co., supra,* and in *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 412–413 (1975), nor particularized requirements such as the height and weight specifications considered in *Dothard* v. *Rawlinson,* 433 U. S. 321, 329 (1977), and it was not a "pattern or practice" case like *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 344, 358 (1977).

> ployer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualification." 411 U. S., at 802 (footnote omitted).

This, of course, was not intended to be an inflexible rule, as the Court went on to note that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situation." *Id.*, at 802 n. 13. See *International Brotherhood of Teamsters* v. *United States, supra,* at 358. But *McDonnell Douglas* did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act." *International Brotherhood of Teamsters* v. *United States, supra,* at 358. See also *id.*, at 335 n. 15. And here respondents carried that initial burden by proving they were members of a racial minority; they did everything within their power to apply for employment; Furnco has conceded that they were qualified in every respect for the jobs which were about to be open;[8] they were not offered employment, although Smith later was, and; the employer continued to seek persons of similar qualifications.

B

We think the Court of Appeals went awry, however, in

[8] We note that this case does not raise any questions regarding exactly what sort of requirements an employer can impose upon any particular job. Furnco has conceded that for all its purposes respondents were qualified in every sense. Thus, with respect to the *McDonnell Douglas* prima facie case, the only question it places in issue is whether its refusal to consider respondents' applications at the gate was based upon legitimate, nondiscriminatory reasons and therefore permissible.

apparently equating a prima facie showing under *McDonnell Douglas* with an ultimate finding of fact as to discriminatory refusal to hire under Title VII; the two are quite different and that difference has a direct bearing on the proper resolution of this case. The Court of Appeals, as we read its opinion, thought Furnico's hiring procedures not only must be reasonably related to the achievement of some legitimate purpose, but also must be the method which allows the employer to consider the qualifications of the largest number of minority applicants. We think the imposition of that second requirement simply finds no support either in the nature of the prima facie case or the purpose of Title VII.

The central focus of the inquiry in a case such as this is always whether the employer is treating "some people less favorably than others because of their race, color, religion, sex, or national origin." *International Brotherhood of Teamsters* v. *United States, supra,* at 335 n. 15. The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. See *International Brotherhood of Teamsters* v. *United States, supra,* at 358 n. 44. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

When the prima facie case is understood in the light of the opinion in *McDonnell Douglas,* it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. To prove that, he need not prove that he pursued the course which would both enable him to achieve his own business goal *and* allow him to consider the *most* employment applications. Title VII forbids him from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees. To dispel the adverse inference from a prima facie showing under *McDonnell Douglas,* the employer need only "articulate some legitimate nondiscriminatory reason for the employee's rejection." *McDonnell Douglas, supra,* at 802.

The dangers of embarking on a course such as that charted by the Court of Appeals here, where the court requires businesses to adopt what it perceives to be the "best" hiring procedures, are nowhere more evident than in the record of this very case. Not only does the record not reveal that the court's suggested hiring procedure would work satisfactorily, but there is nothing in the record to indicate that it would be any less "haphazard, arbitrary, and subjective" than Furnco's method, which the Court of Appeals criticized as deficient for exactly those reasons. Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.

This is not to say of course that proof of a justification which is reasonably related to the achievement of some legitimate goal necessarily ends the inquiry. The plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination. And as we noted in *McDonnell Douglas, supra,* at 804–805, this evidence might take a variety of forms. But the Court of Appeals, although stating its disagreement with the District

Court's conclusion that the employer's hiring practices were a "legitimate, nondiscriminatory reason" for refusing to hire respondents, premised its disagreement on a view which we have discussed and rejected above. It did not conclude that the practices were a pretext for discrimination, but only that different practices would have enabled the employer to at least consider, and perhaps to hire, more minority employees. But courts may not impose such a remedy on an employer at least until a violation of Title VII has been proven, and here none had been under the reasoning of either the District Court or the Court of Appeals.

C

The Court of Appeals was also critical of petitioner's effort to employ statistics in this type of case. While the matter is not free from doubt, it appears the court thought once a *McDonnell Douglas* prima facie showing had been made out, statistics of a racially balanced work force were totally irrelevant to the question of motive. See 551 F. 2d, at 1089. That would undoubtably be a correct view of the matter if the *McDonnell Douglas* prima facie showing were the equivalent of an ultimate finding by the trier of fact that the original rejection of the applicant was racially motivated: a racially balanced work force cannot immunize an employer from liability for specific acts of discrimination. As we said in *International Brotherhood of Teamsters* v. *United States*, *supra*, at 341–343:

> "the District Court and the Court of Appeals found upon substantial evidence that the company had engaged in a course of discrimination that continued well after the effective date of Title VII. The company's later changes in its hiring and promotion policies could be of little comfort to the victims of the earlier post-Act discrimination, and could not erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it."

See also *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 412–413 (1975.) It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force. See *Griggs* v. *Duke Power Co., supra,* at 430; *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U. S. 273, 279 (1976).

A *McDonnell Douglas* prima facie showing is not the equivalent of a factual finding of discrimination, however. Rather, it is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not those actions were bottomed on impermissible considerations. When the prima facie showing is understood in this manner, the employer must be allowed some latitude to introduce evidence which bears on his motive. Proof that his work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided. We cannot say that such proof would have absolutely no probative value in determining whether the otherwise unexplained rejection of the minority applicants was discriminatorily motivated. Thus, although we agree with the Court of Appeals that in this case such proof neither was nor could have been sufficient to *conclusively* demonstrate that Furnco's actions were not discriminatorily motivated, the District Court was entitled to *consider* the racial mix of the work force when trying to make the determination as to motivation. The Court of Appeals should likewise give similar consideration to the proffered statistical proof in any further proceedings in this case.

III

The parties also press upon the Court a large number of

alternative theories of liability and defense,[9] none of which were directly addressed by the Court of Appeals as we read its opinion. Given the present posture of this case, however,

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[9] Respondents, for example, argue that regardless of the propriety of Furnco's general refusal to hire at the gate or of a general policy of hiring only bricklayers known to the superintendent or referred to him by an insider, a foreman or another bricklayer, Dacies' particular method of hiring was discriminatory. Thus, the general hiring practice, though perhaps legitimate in the abstract, was discriminatorily applied in this case, and cannot be used to rebut the prima facie case. Brief for Respondents 19–26. In particular, respondents argue that the evidence proved that Dacies hired from a "list" he had prepared, which allegedly included competent fire-bricklayers with whom he had worked, but in fact included only white fire-bricklayers with whom he had worked. Exclusion from this list of competent blacks with whom he had worked, such as respondents Smith and Samuels, was itself discriminatory and thus cannot be used to rebut respondents' prima facie case.

Furnco, on the other hand, vigorously disputes that Dacies hired only from this list and that the hiring process can be as neatly broken down into various components as respondents would like. It argues that even if most of the people with whom Dacies was familiar were white, Dacies made a concerted effort to speak with people who were familiar with competent black bricklayers and then hired a large number of black bricklayers. In fact, argues Furnco, the statistics indicate that he hired a disproportionately large number of blacks, thus clearly indicating that his so-called "list" certainly could not have been the exclusive source of potential employees even if it had been all white. It further disputes the notion that Furnco or Dacies had in any way put some sort of ceiling on the maximum number of blacks they were willing to hire. It asserts there is absolutely nothing in the record to support such a conclusion.

The District Court made no findings which would support respondents' view of the evidence. The Court of Appeals mentioned the existence of such a list, 551 F. 2d, at 1086, but we do not read its opinion as expressly relying on this point either. Rather, as we read its opinion, the court found only that respondents had made out a prima facie case under *McDonnell Douglas* and that, for the reasons outlined in the text, Furnco had failed to rebut that prima facie case. On remand, respondents are of course free to pursue any such contentions which have been properly preserved.

we think those matters which are still preserved for review are best decided by the Court of Appeals in the first instance. Accordingly, we declined to address them as an original matter here. The judgment of the Court of Appeals is reversed and remanded for further proceedings consistent with this opinion.

It is so ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 20, 1978

Re: 77-369 - Furnco Construction Company v. Waters

Dear Bill,

Please join me in your opinion in this case with its most recent changes.

Sincerely yours,

Byron

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 23, 1978

RE: No. 77-369 Furnco Construction v. Waters

Dear Thurgood:

Please join me.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1978

Dear Bill:

Re: 77-369 Furnco v. Waters

The recent changes satisfy me, and I join.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A B.	L. F. P.	W. H. R.	J. P. S.
							5/3/78	
Join WHR 6/20/78	await dissent 6/15/78	Join WHR 6/5/78	Join WHR 6/20/78	typed dropt con in part + diss. in part 6/23/78	Join WHR 6/8/78	Join WHR 6/19/78	1st dropt 6/2/78	Join WHR 6/23/78
	Join TH 6/23/78						2nd dropt 6/5/78	
				1st dropt 6/27/78			3rd draft 6/20/78	

77-369 Furnco Construction v. Waters