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Supplemental Brief of Appellees-Cross Appellants

Cravath, Swaine, & Moore

79-7225

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ROYSWORTH D. GRANT, et al.,

Plaintiffs-Appellants-
Cross Appellees,

-against-

BETHLEHEM STEEL CORPORATION, et al.,

Defendants-Appellees-
Cross Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF OF
APPELLEES-CROSS APPELLANTS
BETHLEHEM STEEL CORPORATION,
E. RICHARD DRIGGERS, JAMES DEAVER,
AND THOMAS R. CONNELLY

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Pursuant to leave granted by the Court at oral argument on April 2, 1980, appellees-cross appellants Bethlehem Steel Corporation, E. Richard Driggers, James Deaver and Thomas R. Connelly (collectively "Bethlehem"), submit this supplemental memorandum in response to (i) the Appellants' Brief in

in Reply and in Answer to Cross Appeal and (ii) the Amicus Brief of the United States of America and the Equal Employment Opportunity Commission in Reply to the Appellees' Position.

Appellants argued in the district court and in their principal brief on appeal that Bethlehem's method of preferring prior Bethlehem foremen in making supervisory appointments resulted in a disparate impact on black and Puerto Rican ironworkers who were in competition for supervisory positions. Bethlehem responded that (i) the extremely hazardous and complex nature of the ironworker trade justified such a preference on grounds of business necessity and (ii) that the position taken by the amicus curiae that Bethlehem's articulated preference for its prior foremen violated Title VII because it was not the method calculated to result in the maximum number of black and Puerto Rican ironworkers being selected as foremen was misplaced. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1977) explicitly held that an employer could rebut a prima facie case under Title VII simply by articulating a legitimate business reason for the complained of practice:

> "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, 411 U.S. at 802, 93 S.Ct. at 1824." 438 U.S. at 578.

The argument of the amicus curiae in its main brief that Bethlehem violated Title VII by its failure to adopt a hiring practice which would have resulted in greater minority recruitment is directly contrary to the holding in Furnco that "courts may not impose such a remedy [a system which maximized black recruitment] on an employer at least until a violation of Title VII has been proven". 438 U.S. at 578.*

In their respective reply briefs, appellants and the Equal Employment Opportunity Commission ("EEOC"), have argued that the district court and Bethlehem's reliance upon Furnco is misplaced in this action since Furnco was a "disparate treatment" case under McDonnell Douglas v. Green, 411 U.S. 792 (1975), and not a "disparate impact" case such as Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) and Dothard v. Rawlinson, 433 U.S. 321 (1977). (See, Reply Brief of Amicus Curiae at 3-4). Their position in reply is that the standard of proof necessary to rebut a prima facie showing of "disparate impact" is greater than the Furnco requirement that an employer "need only articulate some legitimate non-discriminatory reason" for the results observed. They maintain that in order to rebut a prima facie showing of disparate impact, Bethlehem must establish that there was no other selec-

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* The amicus curiae erroneously relies on certain "relief" cases which do hold that in imposing injunctive relief the courts may require that the remedy which imposes the least restriction on black employees consistent with business necessity, may be required. Imposing relief is obviously very different from assessing whether an employer's practices violate Title VII.

tion method which would have accomplished its legitimate business goals and also resulted in greater black recruitment. They reconcile this position with Furnco by positing that Furnco is limited to disparate treatment cases.

Bethlehem submits this memorandum in response to this position which was raised for the first time in reply by appellants and the EEOC.

A. THE FURNCO STANDARD IS APPLICABLE TO DISPARATE IMPACT CASES.

Appellants and the EEOC rely upon no authority for the proposition that a different standard of business necessity relates to disparate impact cases under Griggs, Albemarle and Dothard. Indeed, the quotation set forth by the EEOC as the basis of its argument reveals that Dothard and Albemarle rely upon McDonnell Douglas as authority for their allocation of the burden of proof. (Reply Brief of Amicus at 3).

The contention that the defendant bears the burden of rebutting a prima facie showing of disparate impact by establishing that the method of hiring that it adopted was not only directed toward legitimate business goals, but was also the one most likely to result in greater black and Puerto Rican recruitment is simply not supported by any of the authorities relied upon by appellants and the EEOC. Griggs was a testing case in which the defendant was held to be required to rebut a prima facie showing of statistical disparity by demonstrating the tests utilized were "related to job performance". There is no reference to proof of alternative available methods in Griggs.

Albemarle does articulate the flow of the burden of proof in a Title VII action. Following a statistical showing of disparate impact, the defendant must demonstrate the job relatedness of the tests involved. Albemarle imposes no burden on defendant with respect to the method selected being the least restrictive possible method. It does interject that concept as part of the plaintiffs' burden of rebutting the defendants showing that the tests were, in fact, job related. Albemarle posits that proof that a less restrictive test might have accomplished the same business goals might be considered as evidence of the fact that the use of the challenged tests was a pretext for discrimination. 422 U.S. at 425. In Albemarle, however, the defendant failed to establish the job relatedness of the tests involved and the court did not reach plaintiff's proof of methods. Significantly, in articulating the respective burdens imposed on the employee and the employer, Albemarle (a disparate impact case) relied upon McDonnell Douglas (a disparate impact case), as the basis for its articulation of burdens. Id.

Similarly, Dothard relied upon both Albemarle and McDonnell-Douglas for the proposition that the burden of proof which shifts to the defendant in a disparate impact case is simply that of establishing the "manifest relationship to the employment in question" of the criteria for selection. 97 S.Ct. at 2726. Dothard also notes that evidence adduced by plaintiff (not defendant) that some less restrictive criteria

might accomplish the same goals could provide the basis for a finding that the imposition of such criteria was simply a pretext for discrimination (quoting Albemarle and McDonnell-Douglas), but once again did not reach the issue. Id.

It is particularly important to note the concurrence by Justice Rehnquist in Dothard where he noted that "once the burden has been placed on the defendant, it is then up to the defendant to articulate the asserted job related reasons underlying the use of the minima." (Citing McDonnell-Douglas, Griggs and Albemarle). 97 S.Ct. at 2732. In view of the consistent articulation of the respective burdens of proof in McDonnell-Douglas (a disparate treatment case), and Albemarle and Dothard (disparate impact cases), the contention by appellants and the EEOC that a different burden is imposed on the employer in disparate impact cases is peculiarly misplaced. Justice Rehnquist in writing the opinion for the court in Furnco used precisely the same description of the burden of proof placed upon a defendant upon the satisfactory proof of a prima facie case by plaintiff as he had writing in concurrence in Dothard. In Furnco writing for the majority he required only that the defendant "articulate" a legitimate business reason for the practice in question. The Court has suggested no distinction between disparate treatment and disparate impact cases.

Nor is there any rationale for a different burden in

a disparate treatment from that in a disparate impact case. Indeed, the Supreme Court's description in Furnco of the significance of a prima facie showing under Title VII logically requires the same burden. In Furnco, the court described a prima facie showing as being proof which, when all other reasons for the observed result were eliminated, left only the conclusion that race must have been a factor. Similarly, in a disparate impact case, statistical proof posits that race must have been a factor because, absent explanation, a persistent disparity suggests that some non-random factor such as race must be operating. Furnco holds that the defendant must only articulate a legitimate explanation for the result observed.* The same is necessarily so in a statistical case.

Bethlehem submits that the argument by appellants and the EEOC that Bethlehem should have been required to establish both (i) a legitimate business reason for its preference for former Bethlehem foremen and (ii) that those goals could not have been accomplished by another method which would have maximized recruitment of black ironworker foremen is contrary to the authority they rely upon in support of their contention.

B. APPELLANTS FAILED TO ESTABLISH DISPARATE IMPACT.

The argument advanced by appellants that the con-

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* In Board of Trustees of Keene State College v. Sweeney, 439 U.S. 14, 99 S.Ct. 295 (1978), Justice Stevens, writing in dissent, expressed the rule of Furnco as requiring that the defendant adduce "evidence which explains what he has done." 97 S.Ct. at 297. The majority agreed. Id. at 296, n. 2.

sideration of evidence of a less restrictive method would have altered the statistical analysis in this case is simply misplaced. There are two distinct elements to the statistical case which plaintiffs attempted to present in the district court. The first relates to the assumption provided to plaintiffs' expert that the qualifications of black or Puerto Rican ironworkers were distributed equally across the Bethlehem workforce. Thus, plaintiffs required Mr. Faust to assume that since 10% of Bethlehem's ironworker employees were black or Puerto Rican, 10% of its foreman should have been black or Puerto Rican, in a purely random system.

The second distinct assumption in that statistical analysis was that all of Bethlehem's 126 foremen positions should have been available for random selection. Appellants now argue that Judge Knapp's application of the Furnco standard to Bethlehem's articulated legitimate business reason for preferring its prior foremen was error. The effect of Judge Knapp's application of Furnco was that he reduced the number of positions which were available to be filled by random selection from 126 to 97. Appellants now argue that that reduction was in error because the court erroreously applied the Furnco standard instead of what they maintain is a distinct standard expressed in Dothard and Albemarle.

Whatever the merit of plaintiff's argument with respect to the misapplication of the Furnco standard, however, it has relationship to the district court's analysis regarding the assumption that 10% of any foremen who were randomly selected (whatever that number was) should have

been black or Puerto Rican. The court noted that because of the relatively short period of time that blacks had been full participants in the industry, the assumption that their qualifications to be supervisors was evenly spread over the workforce was fatally defective. (Opinion at A-77). In particular the inclusion of apprentices, trainees and members of the minority coalition at the Greenpoint hospital in the statistical sample was inappropriate. (Id.) Judge Knapp also noted that because of the relatively short period of time that most black or Puerto Rican ironworkers had been in the industry he could not assume that Bethlehem would have had equal exposure to them as compared to their white counterparts. (Id.) Since he had concluded that such exposure and the ability to make subjective judgments about candidates' character and leadership capabilities was essential, he concluded that the assumptions given to plaintiffs' expert were unrealistic and standing by themselves, discredited the statistical analysis. The unreliability of these assumptions has nothing to do with Bethlehem's preference for prior Bethlehem foremen. It relates to the percentage of those randomly selected which should have been black or Puerto Rican. The fact is undisputed that a disproportionate percentage of black and Puerto Rican ironworkers in the sample were apprentices, trainees and minority coalition members who could not and would not have been considered for supervisory employment. This defect in the

statistical analysis rendered the showing of disparate impact by plaintiffs defective, requiring no consideration (by any standard) of the nature or strength of Bethlehem's proof of business necessity with respect to the number of foremen who were reasonably available for random selection.

C. THE DISTRICT COURT REFUSED TO CREDIT PLAINTIFFS' SUGGESTION THAT BETHLEHEM'S ARTICULATED PREFERENCE FOR EXPERIENCE BETHLEHEM FOREMEN WAS A PRETEXT FOR DISCRIMINATION.

Even with respect to appellants' argument that the court should have considered the supposedly less restrictive method proposed by plaintiffs, they failed to carry their burden of proof. McDonnell Douglas, Albemarle and Dothard all stand for the proposition that once a defendant has established that its method of selection is job related, the plaintiff may nonetheless seek to rebut that showing by establishing that it was utilized as a pretext for discrimination rather than as a good faith business practice. One method of proving such a pretext is to establish that the employer might have accomplished the same goals with a less restrictive selection method.

Appellants presented virtually no proof with respect to their pretext argument other than marking in evidence Bethlehem's own Guide to Equal Employment Opportunity (A-703 et seq.) which provides, in part, that Bethlehem maintain supervisory evaluation sheets for all hourly employees with five years of continuous company service. As noted previously, that procedure would not have

applied to any black ironworker ever employed by Bethlehem since no such ironworker had anything approaching five years of cumulative service, let alone continuous service. Marking that document did not constitute the demonstration of the availability of a less restrictive method. More significantly, however, the plaintiff clearly bears the ultimate burden of persuasion in a Title VII case. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 99 S.Ct. 295, 298 (1978). Appellants' presentation of Bethlehem's Guide to Equal Employment Opportunity as a less restrictive method was directed toward convincing Judge Knapp that Bethlehem's articulated preference for prior Bethlehem foremen was merely a pretext for discrimination. Judge Knapp received that evidence, considered it, and concluded on the entire record that Bethlehem's preference was not such a pretext, but was rather a matter of legitimate necessity directed toward maximizing productivity and minimizing the hazard in one of the most dangerous industries in the world. Thus, even crediting appellants' position that the court should have considered evidence about a less restrictive method, the fact is Judge Knapp did consider such evidence in its proper context and concluded that no showing of a pretext had been made out.

Conclusion

For the reasons stated above, the decision below should be affirmed.

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Respectfully submitted,

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