5-18-1981

Brief in Opposition

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No. 80-1747

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

BETHLEHEM STEEL CORPORATION,
E. RICHARD DRIGGERS, JAMES DEAVER
and THOMAS R. CONNELLY,

Petitioners,

against

ROYSWORTH D. GRANT, WILLIE C. ELLIS
and LOUIS MARTINEZ, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Questions Presented

1. Whether this Court should review questions regarding the sufficiency of the proofs in this Title VII action, when the record is not yet complete, the Second Circuit having remanded the case to permit Bethlehem the opportunity to present additional evidence on "business necessity".

2. Whether this Court should review the proof relating to the "disparate impact" case when final resolution of the "disparate treatment" case in the district court will, in all likelihood conclude the matter.

3. Whether this Court should review the Second Circuit's analysis of the facts presented in support of and in defense to the charge that Bethlehem's hiring practices had a "disparate impact" on minority ironworkers, given the Second Circuit's careful articulation and strict application of the analytic approach set forth by this Court in *Griggs* v. *Duke Power Co., Albermarle Paper Co.* v. *Moody* and *Dothard* v. *Rawlinson.*

4. Whether this Court should review the Second Circuit's decision when, contrary to Bethlehem's contention, it is not at all in conflict with the decision of the Sixth Circuit in *Chrisner* v. *Complete Auto Transit Inc.*

5. Whether the Second Circuit correctly declined to eliminate from the statistical analysis all positions filled with appointees who had any prior Bethlehem foreman experience.

6. Whether this Court should review the Second Circuit's decision to consider as part of the statistical pool of qualified applicants for foremen positions, black and Puerto Rican ironworkers who had qualifications and experience equal to or greater than the minimum standards for the appointment of white ironworkers as foremen.

7. Was it error for the Circuit Court to consider, as part of the evidence of disparate treatment, that Bethlehem's superintendents failed to solicit minority employees known to them to have had the qualifications and experience to work as foremen, while they actively solicited white ironworkers with no prior Bethlehem experience to fill foreman jobs.

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Opinions Below

The unanimous opinion of the United States Court of Appeals for the Second Circuit is reported at 635 F.2d 1007 and is appended to the Petition as Exhibit A. The unreported decision of the District Court is appended to the petition as Exhibit B. The Order of the United States Court of Appeals for the Second Circuit denying petitioners application for a rehearing with a suggestion for rehearing *en banc,* appended to the Petition as Exhibit E, noted that "the suggestion for a rehearing *en banc* has been transmitted to the judges of the Court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon."

Statement of the Case

This class action was brought by two black ironworkers and one dark-skinned Puerto Rican ironworker who challenged discrimination by Bethlehem Steel Corporation (hereinafter "Bethlehem") which, *inter alia,* violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq., 42 U.S.C., §1981 and Executive Order 11246.

A. Facts

The opinion of the Second Circuit sets forth the Court's factual findings in considerable detail. Petitioner does not challenge the Court's findings of fact. The following factual summary responds to misstatements of the record which appear in the petition.

This case involved Bethlehem Steel Corporation's Fabricated Steel Construction Division, formerly a major steel erector in the New York City metropolitan area. The division was closed and Bethlehem went out of the structural steel business in 1976.

At issue was the means by which Bethlehem's project superintendents, all of whom were white, appointed ironworkers to be foremen on projects in the New York City area. The practices of these superintendents must be viewed in the context of the historic pattern of discrimination against minority workers in the structural steel industry, including at Bethlehem, and the fact that even from 1970 to 1976 Bethlehem only hired black and Puerto Rican ironworkers in significant numbers (averaging approximately 12% of its work force) where federal or other affirmative action programs mandated such hiring. Its employment of blacks and Puerto Ricans fell to 2% on the few projects where no such affirmative requirements were present.

Notwithstanding its recognition of the historic pattern of discrimination in its industry, Bethlehem did nothing to insure that appointments of foremen be made pursuant to any rational,

much less an even-handed, merit-based system. Instead, it permitted its superintendents to hire foremen on a word of mouth basis, without a procedure for posting openings or accepting applications, and utilized wholly subjective and generally unspecified criteria in making these appointments. The result was that the superintendents basically hired whomever they pleased.

Contrary to Bethlehem's strenuous assertion in its petition, there was no uniform practice of appointing or attempting to appoint foremen who had prior Bethlehem foreman experience nor even a practice of appointing foremen who had considerable ironworker experience with the company. On the contrary, as the Circuit Court found, (A-24) the superintendents frequently hired their friends and relatives to fill foremen positions even though those individuals had not been prior Bethlehem foremen and in some instances had never worked for the company at all. The two superintendents who did most of the hiring, Mr. Deaver and Mr. Driggers, testified to the appointment of family members as foremen, and Driggers' son held a forman position before he graduated from apprenticeship school. The alleged "requirement" of prior foreman experience was belied by the fact that of the 67 foremen appointed on the 10 projects upon which this case focused, 29 of them had not previously been Bethlehem foreman and there was no evidence that an attempt was made to hire Bethlehem foreman before selecting these 29 men. The company certainly made no effort to appoint respondent Martinez who had proven himself at Bethlehem and other companies as a highly qualified foreman. The record also showed, and the Circuit Court found (A-24) that of the 67 foremen whose work histories were studied in this case, 50% first became foremen after attaining only one year or less ironworker experience with Bethlehem.

Out of 126 of foremen positions filled on the 10 sample projects, only one was filled by a black ironworker and he was appointed because of intense community pressure by minority groups in the neighborhood of the construction site and not as a result of an independent or voluntary decision by the superintendent.

During the period under review approximately 10% of Bethlehem's work force was black or Puerto Rican.

Also during this period, respondents who each had 20 or more years of ironwork experience, including foreman experience, tried but were unable to obtain foreman positions with Bethlehem. Although most foremen did not apply for their positions—they were solicited by friendly superintendents—respondents did make application. On each occasion, except two, they were told they were "too late." The superintendent, informally and by word of mouth, had previously filled all his positions with white foremen. One of the two exceptions involved respondent Ellis who applied for a position which the superintendent subsequently gave to a white ironworker purportedly "to keep peace with the union" (A-20). A position for which Grant applied was filled some months later by a less-qualified white ironworker, ostensibly because the superintendent did not remember Grant's application. The Second Circuit found these to be "lame" and unacceptable excuses (A-20). It found that the evidence presented established, *prima facie* cases on both "disparate impact" and "disparate treatment" grounds.

Bethlehem attempted to show that the informal and word-of-mouth hiring process was justified by "business necessity" in that it permitted superintendents to hire the men they knew best to be qualified. It also asserted a justifiable practice of appointing men with prior foreman experience to fill foreman openings. The Second Circuit viewed these "business necessity" explanations in light of the evidence that neither "prior foreman" status nor experience with the company were the standards by which the superintendents hired. It remanded the case to give Bethlehem an additional opportunity to produce any additional evidence it might have to rebut the *prima facie* case.

Reasons Why the Writ Should Be Denied

I

The Factual Record is Incomplete.

1. The Second Circuit reversed a decision of the District Court and held that Respondents had proved, *prima facie,* both "disparate impact" and "disparate treatment" cases under Title VII of the Civil Rights Act of 1964. The Circuit Court remanded the case to the District Court to give the Petitioners an opportunity to present any additional evidence they may have to rebut the *prima facie* case of discrimination. Thus, the record before this Court is not complete. This Court should not review this case in its current posture since the record evidence may change and the District and Circuit Courts will not have had opportunity to rule on a complete record.

II

This Court should not review the adequacy of the proofs on the "disparate impact" case since final resolution of the "disparate treatment" case will conclude the matter.

The petition primarily focuses on the Second Circuit's ruling that Bethlehem's "business necessity" defense was insufficient to rebut Respondent's *prima facie* showing that the company's means of hiring foremen had a discriminatory impact on Black and Puerto Rican ironworkers. The Petition also raises questions about the Circuit Court's analysis of the statistics presented to show adverse impact on Respondents and their class. Even if there were issues worthy of review by this Court with respect to the Circuit Court's analysis of the evidence in the "disparate impact" case, ultimately Bethlehem can not prevail since "disparate treatment" has been conclusively established.

At trial, respondents established, *inter alia,* that Bethlehem's superintendents employed nepotic hiring practices and solicited

whites to be foremen ahead of Blacks with greater Bethlehem experience and with better work records and, generally, that a "Black man had a much higher threshold of acceptability than a Caucasian in Mr. Deaver's (the principal hiring agent's) mind." (A-10).

Given that the evidence of "disparate treatment" is so overwhelming (A-22) it would be totally inappropriate for this Court to grant this petition in order to review the sufficiency of the evidence—pro and/or con—on the "disparate impact" aspect of the case. Because respondents, in any event, would prevail under the "treatment" analysis, the Court would be engaged in an academic exercise in reviewing the Second Circuits analyses of "impact."

III

Contrary to petitioner's claim, this court has enunciated separate standards for evaluating "disparate treatment" and "disparate impact" cases and the second circuit, in this case, correctly applied the applicable standards.

(Responding to Petitioners' I-B. & C.)

In *Teamsters* v. *United States,* 431 U.S. 324, 335-6, n. 15 (1977) the distinction between "disparate treatment" and "disparate impact" cases was clearly articulated. Recently, in *Texas Department of Community Affairs* v. *Burdine,* ____ U.S. ____ 67 L. Ed. 2d 207 (March 4, 1981) this Court, reviewing the nature of the evidentiary burden on the defendant after a "*prima facie* case of discriminatory treatment" has been proved reiterated its understanding that the analysis differs in the "disparate impact" context:

> "We have recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." See

McDonnell Douglas, *supra,* 411 U.S. at 802, N. 14, Teamsters v. United States, 431 U.S. 324, 335-336, and N. 15 (1977).

The decisions in *Burdine, Furnco Construction Co.* v. *Waters,* 438 U.S. 567 (1978) and *Board of Trustees of Keene State College* v. *Sweeney,* 439 U.S. 24 (1978) which discussed the allocation of evidentiary burdens in "disparate treatment" cases did not alter, in any respect, the standards previously established in *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) for assessing the sufficiency of proofs in cases where facially neutral practices are alleged to adversely impact on a minority group.

The Second Circuit specifically applied the *Griggs-Dothard-Albermarle* analysis in this case (A-16-18). As this analysis makes clear, the employer's burden, once a *prima facie* "impact" case is shown, is not merely to articulate a non-discriminatory reason for a refusal to hire, as it is in the McDonnell Douglas or "disparate treatment" analysis. Rather, it must show that the criteria or practice which adversely impacts on minority employees is necessary to safe and efficient job performance. The Court below made precisely this distinction (A-15-17).

The Second Circuit did not find that Bethlehem "adduced evidence of business necessity". In fact, the Court clearly found that Bethlehem had no consistent business practice whatever by which ironworkers were appointed to be foremen. Bethlehem asserts (Petition, page 11) that the Court of Appeals did find there was a business practice of hiring experienced Bethlehem foremen in preference to other ironworkers and that proof of this practice met the employer's burden. But Bethlehem has taken the Second Circuit's words out of context. The Court found that while prior foreman experience might be a hiring "factor" properly considered as part of a business necessity defense, that purported criterion had to be looked at in light of the proof "that the superintendents selected some foremen on the basis of friendship without knowledge of or inquiry into their prior

safety history" and that "some of these foremen possessed bad safety records that would have excluded them from hiring on a strictly merit-based hiring system." (A-24) The Court also noted that Bethlehem did not uniformly impose this criterion, but chose whites to be foremen who had less tenure than respondents, each of whom was qualified to be a foreman (A-24). The Court also considered the proof that "Bethlehem's supervisors hired their sons, friends and persons whom they trusted, often despite these men's relatively slight experience as Bethlehem ironworkers even though persons with Bethlehem foreman experience (including appellant Martinez) were available for the job." (Ibid)

Bethlehem's "business necessity" defense was simply not credited in light of the proof—primarily from the mouths of Bethlehem superintendents—that there was no business practice followed at all, much less one required by legitimate business concerns. Petitioners, unhappy that the Second Circuit saw through their spurious business necessity defense, now attempt to save their case by putting forth a baseless claim that the Second Circuit misapplied the relevant evidentiary standards.

IV

There is no conflict between the second circuit's decision and the decision of the sixth circuit in Chrisner v. Complete Auto, __ F.2d __, No. 78-1337 (6th Cir. Mar. 19, 1981).

(Responding to Petitioners I-A.)

In *Chrisner,* the Sixth Circuit held that an employer, responding to a prima facie impact case, need only show that its practice has "a manifest relationship to the . . . employment" and not that its practice or policy was the "least discriminatory" alternative. It held that the burden of proving alternatives with less discriminatory impact is the plaintiffs after the business necessity defense has been established.

The Second Circuit in this case defined the respective burdens in almost the identical terms used by the *Chrisner* Court (A-17). It too placed the burden of proving less discriminating alternatives upon the plaintiff, stating:

> Should the employer adduce evidence of business necessity the plaintiff must then be given an opportunity to show "that other selection devices without a similar discriminatory effect would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975) (quoting from *McDonnell Douglas Corp.* v. *Green, supra*, 411 U.S. 792, 801); see also *Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977). (A-17)

The only difference between the cases is that the challenged practice in *Chrisner* had a manifest relationship to employment so that the burden shifted back to the plaintiff to show less discriminatory alternatives. Here that third step was not reached because Bethlehem did not show business necessity justified its practices, although it has been provided an opportunity to do so on remand.

V

The Second Circuit correctly declined to eliminate from the statistical analysis all positions filled by appointees who had at any time been Bethlehem foremen.

(Responding to Petitioner II)

There is no dispute that only one of the 126 foreman positions filled between 1970 and 1976 was filled by a black ironworker and that that one appointment was made because of community pressure and not because the hiring superintendent independently or voluntarily chose the man for the job. Based on this evidence, and the evidence regarding the numbers of black and Puerto Rican ironworkers in Bethlehem's workforce, the Court concluded that a *prima facie* statistical case of adverse impact was shown.

Bethlehem argues that the Circuit Court should have considered the 97 positions filed by men who had previously held a Bethlehem foreman job, not to have been among the open positions for which black or Puerto Rican ironworkers could compete. Thus, says Bethlehem, there was one black appointee out of 29 available appointments, not one out of 126. According to Bethlehem the Circuit Court in considering all 126 positions in its statistical analysis ignored "the legitimate incumbency expectations of regular Bethlehem foremen."

The Second Circuit declined to insulate from the statistical analysis all positions filled by men with any prior Bethlehem foreman experience. That approach, the Court reasoned, would treat as unassailable the right of any white who had foreman experience to be appointed ahead of any black without that experience, which would perpetuate past discrimination and assign blacks indefinitely to non-supervisory jobs. The Court also noted that some superintendents rehired foreman with bad prior safety records who would have been excluded on a merit-based system. Many of the appointees with prior foreman experience had less experience than respondents as ironworkers and as foremen with other companies. Moreover, the Court found that the purported practice of hiring men with prior foremen experience was not in affect when it came to reappointing respondent Martinez who had proved himself as a Bethlehem foreman and that superintendents regularly appointed their sons and friends including men with little or no Bethlehem experience at all. Bethlehem's double standard did not escape the Second Circuit's scrutiny.

> Appellees cannot in one breath maintain that these positions should not be considered as part of appellants' statistical case because the rehiring of experienced foremen is so fundamentally necessary, and in the next breath assert that they acted reasonably in hiring friends and relatives with comparatively little experience ahead of experienced foremen like Martinez, on the basis of subjective judgments of the new candidates' competence. If these positions were open to qualified whites without foreman experience, they should also have been open to qualified blacks. (A-24)

The Court concluded that under the circumstances of this case consideration of prior Bethlehem foreman experience could be a factor in a business necessity defense, but such experience could not be declared a *sine qua non* for appointment nor a basis for foreclosing scrutiny under a disparate impact analysis.

VI

The Bethlehem work force statistics presented were a valid basis against which to compare Bethlehem's supervisory hiring statistics.

(Responding to Petitioners III)

Bethelem argues that there were a higher percentage of apprentices and trainees among the black and Puerto Rican ironworkers than among the white ironworkers and therefore a lesser percentage of the minority ironworkers were qualified to be considered for supervisory positions. Thus, says Bethlehem although 10% or more of its work force may have been black or Puerto Rican the Court should not have looked for 10% of its supervisory work force to have been black or Puerto Rican.

There was no showing that the black and Puerto Rican ironworkers as a group had proportionately less members qualified to fill supervisory positions than the whites as a group. Bethlehem superintendents specifically testified that there was no particular length of experience needed to become foreman and "all parties . . . recognized that experience was only one of several factors to be considered when selecting foremen" (A-24-25). As the Circuit Court noted, Bethlehem's own statistics showed that half of its foremen worked for the company a year or less before being elevated to foreman. (A-24) Superintendent Driggers testified that he appointed his son to be a foreman before the boy graduated apprenticeship school, and it was established that apprenticeship or trainee standing, itself, proved nothing because experienced ironworkers frequently took such positions as a means to enter the union or the trade in this area.

The District and Circuit Courts found, and the parties agreed, that the only proven qualification for superintendent involved "safety consciousness, leadership qualities and productiveness". (A-8). There was absolutely no proof that those qualities were in short supply among the black and Puerto Rican ironworkers and therefore no basis to assume that among their numbers there were disproportionately fewer ironworkers qualified to be foremen.

VII

The Court did not hold that Bethlehem was required to solicit specific black or Puerto Rican ironworkers "to increase minority representation".

(Responding to Petitioners IV)

The Second Circuit in this case, quoting *Furnco,* noted that "employers had a responsibility only to offer blacks the same opportunities as whites, not to solicit blacks or otherwise devise hiring methods that would maximize black employment." (A-21) The Court held that "the failure to solicit qualified blacks as foremen constituted a form of unacceptable discrimination *in this case,* since whites were here being solicited at the same time, even though the whites made no application for the foremen jobs for which they were hired." (A-21) The latter part of the Court's statement—which petitioner left out of the quote (Petition, page 26)—is highly significant. The Court's statement must be viewed in light of the fact that there was no application procedure and that the whites who were appointed as foremen were *solicited* by the superintendents. Only the plaintiffs made appllications and their applications were to no avail because the superintendents had already filled positions with whites before the jobs were announced. In this context, Bethlehem's failure to solicit the qualified blacks with Bethlehem experience, including Martinez (a proven Bethlehem foreman), while it was overtly soliciting whites, including those with little or no Bethlehem experience, constituted discrimination. That ruling was not in error nor contrary to *Furnco.*

Conclusion

For the foregoing reasons the petition for a writ of *certiorari* should be denied.

May 18, 1981

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