IN THE SUPREME COURT OF THE UNITED STATES

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WANDA ADAMS, et al., :

Petitioners, :

v. : No. 01-584

FLORIDA POWER CORPORATION and :

FLORIDA PROGRESS CORPORATION. :

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Washington, D.C.

Wednesday, March 20, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JOHN J. CRABTREE, ESQ., Key Biscayne, Florida; on behalf of the Petitioners.

GLEN D. NAGER, ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now on number 01-584, Wanda Adams vs. Florida Power Corporation and Florida Progress Corporation. Mr. Crabtree.

ORAL ARGUMENT OF JOHN G. CRABTREE

ON BEHALF OF THE PETITIONERS

MR. CRABTREE: Mr. Chief Justice, and may it please the Court: There are three core reasons why the Court should hold that disparate impact is an available method of proof in age discrimination cases. First, the Court held in Griggs that identical prohibitory language prohibited facially neutral actions by an employer to disproportionately impacted the protected class.

QUESTION: Mr. Crabtree, we are not talking about a situation where you are claiming that the fact of disparate impact gives rise to a permissible inference of intentional discrimination. You are relying just on disparate impact alone, are you not?

MR. CRABTREE: No, Your Honor. We believe that disparate impact both serves the purpose of proving indirectly that perhaps subconscious biases exist, as well as detecting biases that could otherwise be concealed.

QUESTION: Well, now in Washington against

Davis, we held that disparate impact was not enough by itself under the statute or Constitution that you could infer from it an intent to discriminate. Now, are you, I didn't get the impression from the court of appeals opinion that you are arguing that this plan by the Respondent supports an inference of an intent to discriminate on the basis of age.

MR. CRABTREE: We believe it does support an inference of an intent, an intent that does not need to be proven, that it justifies that it can justify the necessity for the doctrine because without it, it would be easy for an employer to conceal its intent for example, an employer could choose a device like a five-year rule in which they said that we won't hire anybody with more than five years' experience or we'll have speed tests.

QUESTION: That's a very handy prophylactic rule, but with it, once you, once you acknowledge that indeed the malicious intent is necessary with it, with the rule that you propose, you are going to get a lot of employers that have no such malicious intent.

MR. CRABTREE: Justice Scalia, we are not suggesting that malicious intent is required at all for disparate impact. We are suggesting that disparate impact will detect that as well, or at least the provision --

QUESTION: You just say it is bad in itself.

It is not bad because it shows malicious intent.

MR. CRABTREE: That's certainly true. We absolutely believe that.

QUESTION: Because if the only reason it's bad is because it shows malicious intent, my goodness, it seems to me it goes much too far. There are a lot of employers who have in place policies that may affect elderly employees more harshly who, you know, have no intent to do that.

MR. CRABTREE: That's certainly true, and definitely, the doctrine goes beyond that. But what we are suggesting is it will also, it also prevents an employer from being able to hide behind --

QUESTION: Well, you want us to consider the case on the assumption that the employer has no intent to discriminate. He actually has, his intentions are absolutely pure, but in some instances, he is still going to be liable under the adverse, pardon me, disparate impact theory.

MR. CRABTREE: In many instances, that is correct, Justice Scalia.

QUESTION: And that's your position.

MR. CRABTREE: That is our position. That's correct.

QUESTION: Okay. So you are relying on

disparate impact alone?

MR. CRABTREE: That is correct, Your Honor.

QUESTION: May I ask, because it's always helpful to me to know, what's at stake in the particular case. What is the practice that you claim has a disparate impact in this case?

MR. CRABTREE: What we have alleged in this case is that the employer's reduction in force has had a disparate impact upon the older workers, the selection device of the older workers.

QUESTION: Are you saying reductions in force are always practices that if they have a disparate impact, give rise to a, an age discrimination claim?

MR. CRABTREE: No, Your Honor, because in virtually every instance where there is reduction in force it will be quite easy for an employer to satisfy the defense under the reasonable factors of the age provision of the act.

QUESTION: What is different about the reduction in force in this case?

MR. CRABTREE: Well, in this case, Your Honor, as the district court acknowledged in its opinion that we are proceeding from, we had evidence at the highest levels that the decision to undertake the downsizing was actually a decision to get rid of, intended to get rid of older

workers.

QUESTION: That's the disparate treatment claim?

MR. CRABTREE: Unfortunately, it's not, Your Honor, because as the district court judge acknowledged, we could not make a disparate treatment case under these facts because in the disparate treatment case, we would still have to prove, unless we could make a cat's paw analysis that the actual decision maker harbored an animus against the employee who is terminated. But what we are suggesting under this model and under this framework is that if we can make a prima facie case of disparate impact, then the employer can justify that impact by showing that its decision was based upon reasonable factors and that those reasonable factors --

QUESTION: But this is what I -- excuse me for interrupting, but is it the decision to downsize that it has to be reasonable or the particular discharge decisions on each individual have to be reasonable?

MR. CRABTREE: We have identified in this case the action of the employer as being the decision to downsize itself.

QUESTION: The decision to downsize itself?

MR. CRABTREE: Which for most instances will be much more difficult probably for plaintiffs than it would

be if you want on a more micro-level. However --

QUESTION: Why would it be more difficult? All you have to prove if I understand your theory is that there are more older workers in the group that were discharged than younger workers?

MR. CRABTREE: Will, it would have to be a substantially disparate impact between the two groups. It would be more difficult because it would be much easier for an employer to justify a reduction in force in almost any circumstance.

QUESTION: I thought you conceded that it was not enough for you to show disparate impact. That you had, say 70 percent of the people and my problem with your presentation is the same as Justice Stevens. In every disparate impact case that I know, a rule neutral is on its face that disparate impact like the high school diploma requirement in Griggs, there is the standard that has a differential effect. A high school diploma, a pen and paper test as in Washington V. Davis, a height, weight requirement as in Dothard vs. Rawlinson, but you don't come to us with any rule, standard, practice. You just say reduction in force.

MR. CRABTREE: Well, what we are saying is this, is that the Court indicated in Wards Cove that the plaintiff in an age -- in a discrimination case is to

identify a specific practice or action by an employer that results in disparate impact that cannot be justified. We have identified this downsizing as being such a practice because we don't believe the employer can justify it because the downsizing was motivated by desire to --

QUESTION: Why don't we leave motive out of it for purposes -- forget motive. Let's imagine in your case, that's what I thought this case was about, we imagine in your case the employer had a wonderful motive. There are other cases where the rule in question was we are going to fire some tenured teachers to save money. That was the real reason to save money. The tenured teachers tend to be older teachers. There was another case in which they said the court looked at a rule that said we will fire people in the higher-paid positions. That was their real reason to save money.

But the court said each of those rules like your case, too, has a disparate impact on older employees. And just saving money is not a justification and therefore the plaintiff wins. Now, I take it that's the proposition you are defending.

MR. CRABTREE: We are defending that proposition. That's correct.

QUESTION: Okay. Then the other parts to me are easy. Of course you can use it to prove bad motive,

et cetera, but that's the hard proposition. Now, I wish you would explain why as a matter of law that tough proposition nonetheless is the law.

MR. CRABTREE: Well, we believe it's the law because the prohibitions themselves as construed in Griggs apply to actions and then the reasonable --

QUESTION: Well, the background in Griggs was racial discrimination, and the policies there seem to me to rest on a long history of societal and historical bias against black people. Now, we don't have that background with age discrimination, do we?

MR. CRABTREE: No, Justice O'Connor, we do not.

QUESTION: So it might be quite a different proposition here.

MR. CRABTREE: Respectfully, no, Your Honor. And here's why. As the court acknowledged in Watson, the court is not limited a disparate impact to remedying past problems with discrimination. Disparate impact goes beyond that. Disparate impact exists to detect subconscious stereotypes operating in the work force, exactly what the court identified as the primary form of discrimination that exists under the ADEA.

Thirdly, in Griggs the court said that the legislative purpose of the act was "plain from the language of the statute", so the court was looking at the

statute itself.

QUESTION: That's a good idea. What is the statute that we are dealing with here? Can we look at the language of the statute?

MR. CRABTREE: Sure, Your Honor. It's on page 5.A, the appendix to the petitioner's brief. And when you look at the statute itself, what you see between (a)(1) and (a)(2) is a difference between a micro and a macro-orientation. In (a)(1), we are concerned about an employer's individual actions directed towards an individual employee, but in (a)(2), we are concerned with an employer's macro-actions directed towards its employees and how that impacts individuals.

QUESTION: In each of those cases, Mr. Crabtree, it says because of such individual's age. Now, doesn't that suggest that there is some motive requirement?

MR. CRABTREE: No, Your Honor. We don't believe it does and I'll explain why. When you look at (a)(2), the clause because of such individual's age, the word individual is critical because at the beginning of two, it reads, to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee

because of such individual's age. So the clause relates to the effect and not to the motive of the actor.

QUESTION: I would think it relates to, to the limit, segregate or classify.

MR. CRABTREE: It cannot, Your Honor, because the word his employees follows those words.

QUESTION: In any event, the wording is identical to Title VII, and Title VII on that wording has been held to have this differential impact theory for sex, as well as race.

MR. CRABTREE: That's absolutely correct, Justice Ginsburg. And of course, Congress has never acted to expressly prohibit disparate impact under Title VII. The only prohibition of disparate impact under Title VII is in its age as the court construed in Griggs and Griggs' progeny.

QUESTION: Was this language adopted in this form after it had been clearly established that the Title VII language did include disparate impact? You know, as an original matter, I wouldn't have thought it did.

MR. CRABTREE: Oh, it did not.

QUESTION: We held that. Now, was this language adopted after we held that or before it?

MR. CRABTREE: It was before, Your Honor. It certainly was. However --

QUESTION: After Title VII, but before Griggs?

MR. CRABTREE: That's correct. And to hold that this language does not prohibit disparate impact would mean that there was no disparate impact under Title VII. Even in the 1991 Civil Rights Act, all Congress did was define a defense.

QUESTION: But it seems to me that even if we accept your reading of the statute which I am not sure is the more natural reading, you still have because of such individual's age, that is to say what you would call disparate impact, what the statute says adverse impact must still be because of such individual's age and if we think because of, implies or necessarily requires a bad purpose, you still have the same problem.

MR. CRABTREE: If because of did require a bad purpose, we would, however, there is two reasons why we can, why it is not. One is that the first one is that the reasonable factors other than age defense cannot make sense if the prohibitions only apply to intentional actions.

QUESTION: Now you are going to the second. Just so I'm focusing in on this. (A)(2), it seems to me that your reading of the statute doesn't explain because of, then you have to go to this other part of the statute, which you have to do any way. So I mean this whole

argument over how to interpret 2 it seems to me doesn't get you there.

MR. CRABTREE: Again, we are relating because of back to the effect of the individual and we are relying upon the court's interpretation of that language in Griggs.

QUESTION: Well, one, one might feel that Griggs is stare decisis because it could feel that perhaps it reasoning would not readily be extended if there was some reason for distinguishing it.

MR. CRABTREE: That might make sense. I would agree, Your Honor, however we don't believe there is any basis to distinguish here given the court's subsequent cases post-Griggs.

QUESTION: But as -- may I go back to the question that we opened with, and that is I don't know of any case under Title VII where someone could just say reduction in force affected more women than men, therefore, I have an impact case or reduction in force, it affected more minorities than majorities so therefore. It's always been some specific practice that you could identify some rule, some neutral rule. In fact, it's even sometimes referred to as neutralized base discriminatory and impact.

Here I don't -- reduction of force in and of

itself is not such a neutral rule. It's -- it's too general. So I, what is the precise rule practice standard that's comparable to a high school diploma, a height and weight. What is there in this case?

MR. CRABTREE: Your Honor, two answers. First of all, that we equate reduction in force to a test. It's a selection process. We are not challenging a question on the test. We are challenging the test itself. But even if the court were to find that we have inadequately identified the action of the employer that should be subject to disparate impact analysis, we would still, it's an interlocutory proceeding. We would be happy to proceed on the theory as the court redefines or the court defines disparate impact under the ADEA. We would amend our complaint in accordance with the court's ruling.

QUESTION: I don't think that the district court finding allows you to say the standard is the reduction itself because the district judge said that the people involved held a wide variety of jobs, were managed and supervised by different people and were terminated at different times by different decision makers based on different considerations of criteria, and that seems to me just wholly to reject that there is a rule or a standard.

MR. CRABTREE: The reason why we believe it's important to be able to do the analysis with the reduction

of force being the action is because otherwise it would allow an employer to purposely choose to do a reduction in force to get rid of its older workers where there is a corporate culture pervaded by ageism and have consequences as it did here where it greatly reduced the age of its work force.

QUESTION: What is your closest precedent under Title VII dealing with race or dealing with sex where you have something so groundly general as a reduction in force with different decisions, different standards, different times?

MR. CRABTREE: There are cases dealing with reduction of force under Title VII. There is one NAACP vs. Medical Center, Inc., It was out of the third circuit. 657 F.2d 1322. There have probably been others.

QUESTION: And nothing more specific than a reduction in force?

MR. CRABTREE: Candidly, Justice Ginsburg, I don't recall. I just know --

QUESTION: Mr. Crabtree, I thought the question on which we granted certiorari was not whether this particular claim of disparate impact was too general or not specific enough. But whether the whole, I'll read it, is a disparate impact method of proving age discrimination available to plaintiffs.

MR. CRABTREE: That's correct, Justice Scalia.

QUESTION: And I would hope you would address Justice Breyer's question in which he said why should we do this to say that tenured employees are the higher salaried employees? What would be the justification in a case such as that for using your theory of liability?

MR. CRABTREE: Well, in most instances, employer is going to be able to explain why he engages in any selection process.

QUESTION: Most instances, they can't explain it very well. In most instances, I think in a business or a university, you begin to look into it, and it dissolves in front of your eyes. People say you could do it this way, you could do it that way, you could do it some other way, and it will turn out you haven't thought about it that much. Now, it may well be sensible to make an employer go to that effort we were talking about race and gender, and yet here, there is so many rules correlated with age. There are so many that how could the employer run his business where you are going to have a court second-guessing every single rule that's correlated with age. That's the problem. What's your response?

MR. CRABTREE: And that may very well be why Congress chose to use the result factors other than age language, and that is why there are, although we don't

agree with them, why there were good intellectual arguments that reasonable factors other than age is something less than business necessity. That it is easier to justify.

QUESTION: What would your test be? I mean do you think the ninth circuit in the cases I mentioned was right? I mean, if you are going to apply exactly the same tough tests as in these other places, maybe they were. What's your opinion about that?

MR. CRABTREE: We believe that the term is ambiguous. And we believe for that reason the court should defer interpretation.

QUESTION: Which is what? Say what you think the form of words is?

MR. CRABTREE: That it is that the employer must justify the action as being business necessity.

QUESTION: But reasonable factors other than age provision doesn't really solve Justice Breyer's problem, does it, because it puts the burden on the employer to establish that, doesn't it?

MR. CRABTREE: It does, Your Honor.

QUESTION: So you are still in a situation where the employer said well he could have done it a lot of different ways and you are saying I'm sorry, that's no good.

MR. CRABTREE: But if the employer must only show that its action was reasonable, it is not as demanding as showing that it was necessary.

QUESTION: You said emphasize reason.

QUESTION: It's still a burden on him.

MR. CRABTREE: It is still a burden on him. Yes, Your Honor.

QUESTION: May I go back to the --

QUESTION: Please.

QUESTION: May I go back to your argument of a minute ago that the, that the various defenses make no sense except on the disparate impact theory possibility of disparate impact theory. What is your response to the argument that they make equally good sense on the theory that they respond to mixed motive discharges? What's your answer?

MR. CRABTREE: They don't make sense on the mixed motive analysis because in the mixed motive analysis there is still an issue as to whether or not the employer's illegal motive caused an illegal action. In a, in a statute, it provides that the action is otherwise prohibitive, so you already have an action that is itself a violation of the act but-for the defense that follows. We don't have the same concerns we have in a mixed motive case where we don't know if the motive of the employer

actually caused the action. It's already been determined as a premise of the defense.

There is an additional reason why we believe that the court should hold that disparate impact applies under the ADEA. And that is Congress passed the OWBPA and provided that employees who were terminated in reductions in force should be entitled to, were entitled to receive physical information prior to deciding whether or not to take the termination package, presumably of substantial economic value, or take their chances in litigation.

Given that disparate treatment can generally not be predicated upon nothing more than statistics. And given that employees terminated in RIF's usually do not have an independent basis to suspect that they are being singled out for discrimination.

QUESTION: Mr. Crabtree, could I just come back for a moment to, to your argument which I think is an important one that some of the defenses don't make sense unless there is a discriminatory impact basis. What about the defense that says it will not be unlawful to discharge or otherwise discipline an individual, an individual, for good cause? I mean, that's obviously a redundancy. It can only imply to an intentional discrimination case, not to a, not to an impact case. But it's obviously redundant because if you are disciplining him for good cause, you

are obviously not disciplining him with a motive of punishing his age. It's just thoroughly redundant. It seems to me a lot of these defenses are redundant. They are just there to make clear that there are safe harbors, one of which is disciplining an individual for good cause. Another one is observing the terms of a seniority system and so forth.

MR. CRABTREE: Well, when you are observing the terms of a seniority system, you know, you may be looking at age directly. You may have, you can easily have a violation that exists under the act otherwise.

QUESTION: Well, no, I don't, I don't know any seniority systems that go on the basis of people's age as opposed to how long they have been working there. Do you know any seniority systems that say you have more seniority if you are 65?

MR. CRABTREE: I'm not sure, Your Honor. I don't have an answer to that. But I don't think that we can disregard the words of the reasonable factors other than age in this case. I don't think we can ignore the term reasonable factors, and when you look at, at (f)(1), and you look --

QUESTION: It's redundant. It's just redundant the way to discharge, it's lawful to discharge an individual for good cause. Of course it's redundant. You

don't have to say that once you say that there has to be either intentional discrimination, or as you would say, adverse impact. You are talking about disciplining an individual. You really don't need that. Once you say there has to be intentional discrimination, but it's there just to make everything that much clearer. And you can make the same argument about the BFOA provision.

MR. CRABTREE: You might be able to make that argument, but it is not the most logical argument. It does not respect Congress' words. It does not respect the fact that Congress required that the factors not just be neutral, but that they be reasonable because even if we ignored the otherwise prohibitive language, Justice Scalia, we still have to give effect to the term reasonable.

Congress not merely required that the factors exist or that they be legitimate or bonafide as in the EPA or as Gunther acknowledged, but that they be reasonable as well.

QUESTION: I don't want. I think you should be able to reserve your rebuttal time. But I do have one question. You seem to acceed to Justice O'Connor's suggestion that Griggs involving racial discrimination involved deeply rooted attitudes which called for special rules, and that those just don't apply with the age

factor. Would you want us to write the opinion that way, or are there some subtle biases against elderly workers that are important to support your theory?

If you train a worker, you are going to get a better return on your investment as the worker is younger, etc.

MR. CRABTREE: That's certainly true, Justice Kennedy. There are those subtle biases and that's what Secretary Ward's report acknowledged and that's what the court acknowledged in Hazen Paper when it said that subtle biases, stereotypes are largely an issue, not animus in age discrimination and that is consistent with the court's holding in Watson that disparate impact exists largely to detect subtle biases. If I may, Your Honor, I'll reserve the remainder of my time.

QUESTION: Very well, Mr. Crabtree. Mr. Nager, we'll hear from you.

ORAL ARGUMENT OF GLEN D. NAGER

ON BEHALF OF THE RESPONDENTS

MR. NAGER: Mr. Chief Justice, and may it please the Court: If I may, I'd like to address why fully consistent and giving full respect to Griggs vs. Duke Power Company, this Court can and should hold that the age discrimination and employment act does not make --

QUESTION: Even though the language is

essentially the same?

MR. NAGER: Justice O'Connor, it's not. It is common language in Section 4, but this Court doesn't construe language in a statute in isolation from the remainder of the statute, and the remainder of this statute is quite different. The remainder of the statute includes the reasonable factors other than age provision. The remainder of this statute is based upon a report of the Secretary of Labor which said that the problems of age discrimination in the workplace were quite distinct and quite different from the problems that motivated the enactment of Title VII and it's the problems that motivated the enactment of Title VII which gave rise to Griggs. That's what this Court said in Griggs. It's what your opinion for the court says in Watson. So what, if we look at the statute, statutory language not in isolation, because in fact, we can read all of the court's Title VII disparate impact cases and we won't see the language parsed. The court looked at that language in terms of the overall objectives of the statute, and rendered a decision in light of the distinct and enormous problems of race discrimination that this country has faced and dealt with. Age discrimination, the Congress itself recognized was different. That's why it didn't include age in Title VII. Instead it commissioned a report from the secretary of

labor to tell us about the problems of older workers. Recommend legislation to us.

And the bill, the report that was commissioned was submitted. This Court repeatedly in EEOC vs. Wyoming, in Hazen Paper, has repeatedly recognized that that report set the foundation for the statute.

QUESTION: I thought you were going to tell us that because of age, is one of your strongest points, and as Justice O'Connor said, that's the same language structure that we had in Griggs, and that we would have to interpret them differently.

MR. NAGER: You are right, Justice Kennedy.

QUESTION: But, but, but then you automatically throw me over I guess to part (f) and talk about reasonable factors other than age, which is exactly what the petition wanted to do.

MR. NAGER: That's my lack of clarity, Justice Kennedy. What we are suggesting to the Court is the more natural construction of the language in 4(a), the because of language, is an intent requirement. The fact of that intent requirement is confirmed and compelled by the remaining provisions in the statute. Our suggestion is just as your opinion in Public Employee Retirement System vs. Betts did.

QUESTION: May I just interrupt. I want to be

sure I have -- you think that because of such individual's age or more normally refers to the very first part of the paragraph that talks in the plural rather than the singular?

MR. NAGER: Yes, Justice Stevens, because the structure of the statute says that the employer can't limit, segregate or classify his employees in a way that has an adverse effect on an individual.

QUESTION: On any individual.

MR. NAGER: Because of such individual's age.

QUESTION: Correct. The effect that that modifies, not the classification.

MR. NAGER: No. The comma in that provision, I think eliminates any ambiguity about what the because of phrase modifies. That it modifies the verbs to limit, segregate or classify.

QUESTION: Even though the former is plural and the because of is singular?

MR. NAGER: Because the sentence has to be read as a whole. It says limit, segregate or classify the employees in a way that has an effect on an individual because of the individual's age.

QUESTION: Right.

MR. NAGER: But the --

QUESTION: You said it perfectly.

MR. NAGER: It is -- I would grant you that it is not the most elegantly written sentence in the world, but I would also urge upon you, Your Honor, that the comma in that sentence grammatically compels that the because of phrase modifies the to limit, segregate or classify.

QUESTION: Your view is well, Title VII, the court really got it wrong. They are not good grammarians, so they got it wrong, but that's stare decisis so we'll leave it alone, because it's the identical wording, the F part I think you may have more of an argument there because it's not found in Title VII. But if your grammar argument has to be saying, and tell me if I'm wrong about this, the court really got it wrong in Griggs because there is no room for an impact test under Title VII any more than under age, but because the court said it in 1971 and continued to say it, we are stuck with it, but we don't have to make the same mistake again. Is that your argument?

MR. NAGER: Justice Ginsburg, I'm not here to challenge Griggs in any respect. I am here to say that the more natural construction of that language was not the one the court adopted in Griggs, and just as this Court does that on occasion because of other materials that influence the construction of a statute.

QUESTION: I mean, we look at the whole

statute, as you said, not just the comma.

MR. NAGER: That's the point.

QUESTION: The comma could be outweighed by other factors in one statute, and not in the other.

MR. NAGER: And that is what the court has found in its Title VII cases.

QUESTION: A comma is not a very big thing, is it?

MR. NAGER: I'm sorry, could you --

QUESTION: I say a comma is not a very big thing.

MR. NAGER: Well, it is part of the statute, and we think it has to be taken into account, but our argument that the age discrimination employment act should not be allowed to recognize disparate impact claims does not rest solely on the comma. Our point about Section 4(a), Justice Kennedy and Justice Ginsburg is that the more natural construction of that language is the, an intent requirement, as Chief Justice Rehnquist recognized in his separate opinion on certiorari in Geller vs. Markham. The fact that the court found other considerations to lead to a different conclusion in the context of a limited class of Title VII cases does not compel a particular construction of the Age Discrimination Employment Act.

We have to look at those other considerations that inform the construction of the Age Discrimination Act.

QUESTION: Well, I can see you point to (f) in the reasonableness because there is no counterpart to that in Title VII, but frankly --

MR. NAGER: That's --

QUESTION: Frankly, I would find it unseemly to take the identical words and say we ignore the comma in one case. If we had paid attention to the comma, you have to reach the same result.

MR. NAGER: I don't think it's unseemly at all, Justice Ginsburg.

QUESTION: If you are wrong the first time.

MR. NAGER: Well, I'm not here to take --

QUESTION: Which stare decisis would require us to accept for Title VII but wouldn't require us to accept for this statute.

QUESTION: That's the very point I made to you, and you rejected it. I said --

MR. NAGER: Justice Ginsburg, this Court has on any number of occasions, and I'll use the Chief Justice's opinion in Fogerty vs. Fantasy as an illustration, said that identical language in two separate statutes can be given two different meanings by this Court if a single

meaning isn't compelled by the words themselves and if the statute has different purposes or different legislative history. You coined that opinion.

QUESTION: But here we know even though Griggs didn't come until sometime later, the Congress did, when it wrote the Age Discrimination Act, it did copy quite deliberately the Title VII language.

MR. NAGER: That is true. But it is also the case that it did not copy the 4(f)(1) language. It is also the case that at the time --

QUESTION: But that's a different argument, looking at the statute as a whole and saying whatever the first part means, here we have another part that's absent from Title VII so we don't have to interpret it the same way.

MR. NAGER: I have two points. Congress couldn't have known about Griggs at the time that the, that it used the language from Title VII in 4(a) because Griggs hadn't yet been decided, so that was not a well-established construction by this Court in 1967. But you are also right, it is the essence of our argument here, not to ask the Court to construe 4(a) in isolation. It's to ask the Court to do as it did in Betts and as it does in any number of cases to construe 4(a) in light of the other provisions. Justice Scalia has made the point

about the discharge for cause. We also make the point about the reasonable factors other than age. That is an intent-based provision and it shows that this statute at every turn was concerned with employer intent, whether it be good cause, whether it be decisions .

QUESTION: What you do you with the argument, which I think is an interesting one, that it is a reasonable factors other than age requirement.

MR. NAGER: It is --

QUESTION: If, if there were an intent requirement in the act, it wouldn't matter whether you are using reasonable factors or not, so long as you are not using age. You know, I don't like people with blue eyes. That ought to be good enough, so long as blue eyes has nothing to do with age.

MR. NAGER: As you have pointed out, Justice Scalia, it's perfectly appropriate for Congress to clarify and make unambiguous in any respect conceivable that it does not want any decision that's based upon a reasonable factor to be subject to liability under this statute.

Secondly --

QUESTION: Okay, but that argument is equally compatible with the position that your brother is taking on the other side, and if you take the ambiguity that is left, and you combine it with the argument that Justice

Ginsburg is making about the parallel language with Title VII, doesn't it lead you to say all right, the parallel language is answered only by an argument which in fact, boils down to an ambiguity and an ambiguity doesn't defeat the policy of construing like statutes, like drafted statutes in a like manner.

MR. NAGER: The answer to that is no. The reason that it's no is because whatever one thinks the reasonable factor other than the word reasonable and the reasonable factors other than age means, it's still a motive-based test based upon what considerations are you taking into account, and --

QUESTION: Why does it have to be a reasonable factor other than age? I'm not sure you have answered my question? So long as it's not age, the intent factor is not satisfied. You should be able to use an unreasonable factor other than age.

MR. NAGER: You absolutely can. Section 4 F simply clarifies what's lawful. It doesn't tell us what's unlawful. We only can find what's unlawful by going to 4(a) and reading it in light of the provisions in 4(a).

QUESTION: So you say it's a safe harbor provision for sure if it's a reasonable factor other than age, it's okay?

MR. NAGER: And it tells us more than that,

Justice Scalia. It tells us that intent is what counts. Interestingly enough, our opponents in both their opening brief and their reply brief concede that the phrase based upon reasonable factors other than age is a reference to an intent requirement, and the whole notion, as Justice Breyer has pointed out through his questioning at the opening of this argument, is what distinguishes a disparate treatment case from an impact case is that intent is irrelevant, so if reasonable factors other than age --

QUESTION: I don't really understand -- I must say, I don't entirely follow the argument. Supposing you have a test that you have to have an IQ above 110, something or other, in order to avoid discharge, and you find that that has a disparate impact on older workers for some reason, they lose their intelligence quota or something like that. Beyond the age.

MR. NAGER: Bad news for us.

QUESTION: Bad news for many of us. But there is statistics that show that. And you might come back and say I didn't realize that or something like that. It would be enough for you to show that, that that's totally irrelevant because you just didn't realize that fact. But why then would they need to say you have to defend that as a reasonable practice?

MR. NAGER: The legislative history and the secretary's report makes quite clear why they put the reasonable in there, because they were concerned about the mixed motive cases. This statute, when it was originally discussed, the question came up, does this mean age has to be the only factor that's considered in order for it to be lawful solely? And the answer to that was the secretary came back and said no.

We recognize that employers have been considering age for a long time. What we think the Congress should prohibit is the use of age as a screening device to filter. Now, it will still be the case because human beings are human beings that employers will still be cognizant of employees' age. They can't help but be.

But so long as a reasonable factor other than age is the basis of the decision, there should be no liability for it.

QUESTION: Yes, but why is that necessary to deal with mixed motive? Why can't you recognize mixed motive by recognizing unreasonable factors other than age? That's an equally mixed motive, if you would have an unreasonable factor.

MR. NAGER: Well, every time that the mixed motive issue has been discussed, this Court in construing Title VII, in construing the National Labor Relations Act,

in construing the Constitution, the 1983 and Mt. Healthy cases, has always put a verb -- an adjective, motivating factor, substantial factor. Congress is speaking in common sense terms in writing these clarifying provisions to make it clear that age had to be the but-for cause of an employment action, and the employer had to intend it that we give you the illustration, our brief of Judge Wright's opinion for the D.C. circuit in Cuddy vs. Carmen, which talks about how the two provisions were intended to work in tandem just as Justice Kennedy's opinion for this Court in Betts said that 4(f)(2) and 4(a) were supposed to work in tandem to define the elements of a plaintiff's case.

Could 4(a) have been written and construed without a clarifying provision? Of course. And we would be taking that position whether that additional language was there or not. But it doesn't weaken our argument in the slightest that Congress went further and clarified what the standards would be in a mixed motive case.

QUESTION: Well, what, what does seem to weaken the argument is leaving even aside the mixed motive argument, you were, you are arguing that a reasonable factor test is proof that in fact it was a, an, a malicious motive-based liability in the first place. And it seems to me that what you are saying, if that is true,

then any motive other than the proscribed one is going to defeat liability.

MR. NAGER: That's correct.

QUESTION: And the odd thing is that you are saying that by specifying a reasonable factor defense, Congress was indicating that there would be an unreasonable factor defense because reasonable or unreasonable, if it's not age, there is no liability. And that it seems to me is an odd argument to say that by putting in the word reasonable they are, they are in effect confirming that an unreasonable defense would be equally good.

MR. NAGER: I think the answer to that question is that reasonableness goes, is a permissible, the reasonableness of a nondiscriminatory factor that an employer offers is something that a judge can consider and if he finds a disputed issue of fact, a jury can consider in deciding whether or not the nondiscriminatory factor that is offered is a pretext for age discrimination.

QUESTION: But if you really held that reason. In other words, the reasonableness of the, of the employer's alleged motive goes somehow to the credibility of the employer's argument that it was his motive, is that what you are getting at?

MR. NAGER: Correct.

QUESTION: As an evidentiary point, I see it. As a logical point for defining the statute, it seems to me that it's clear.

MR. NAGER: Well, I understand your point, Justice Souder, and I will be the first to acknowledge this case would be easier if the word reasonable weren't there. But all the Court has to decide in this case is whether or not the statute embraces a disparate impact test.

QUESTION: Is there anywhere we can go, is there any way if you were finished, were you?

MR. NAGER: Well, I just wanted to make the following point. Whether it's a reasonable motive or an unreasonable motive, it's still a motive and that's incompatible with disparate impact. The question is one of intent, not one of statistical correlations with age and not one of accuracy and verifiability of business judgment which are the two core issues in a disparate impact case.

What distinguishes fundamentally a disparate treatment case from a disparate impact case is that in a treatment case while statistics are appropriate statistics that would satisfy Delbare are admissible, and can go to motive, the issue that we argue to the jury is motive. We don't argue about whether or not the correlation is so

substantial that it itself would state a prima facie violation and the jury is not allowed to question the employer's business judgment if it finds that in fact the employer was not motivated by age, and that makes a huge difference at a practical level and a legal level in the resolution of age discrimination cases, and that of course is why we would say that impact claims should not be recognized. I'm sorry.

QUESTION: Is there any way, which I'm sure you don't want to bring up necessarily, but is there any way short of saying there is never a disparate impact claim? The problem that you mention could be alleviated. If I think, for example, that unlike race or gender, we might go into an ordinary company and find dozens or hundreds or maybe virtually every rule or practice or limitation connected with promotions is correlated with age.

MR. NAGER: That's true.

QUESTION: On the other hand, you might have some rules that are really correlated with age very heavily and have no justification. All right, so is there a way of dealing with that problem short of saying there is never a disparate impact case?

MR. NAGER: Well, there is a way of dealing with it. I think Justice O'Connor's opinion for the Court in Hazen Paper sets it out for us, but it doesn't require

the recognition of a disparate impact claim. Justice O'Connor's opinion for the Court in Hazen Paper says that merely showing a correlation is not enough to create an inference of disparate treatment, but the court left open the question if the employer, the reason they used the factor, there was evidence that they thought that that factor should be used.

QUESTION: That denies my hypothetical. That's saying you are going to go over to intent. What I'm asking you is if in fact the language here does justify a disparate impact case, a real one, what I have been talking about throughout. Is there any way to deal with the problem of practicalities, which is a big one? That distinguishes this from race and gender.

MR. NAGER: Well, I can only answer the question the following two ways. I don't think Congress contemplated which may be my legal answer for you.

And I can answer it to you practically because I advise employers on these issues, and the way we deal with these issues now is not to change the practices unless we find they are really ridiculous. The way we advise our employers to deal with these practices now is to use quotas. When we advise employers if they are doing a reduction in force as to how to reduce the probability of a disparate impact claim and the circuits that have

recognized them, we take out little five-year age bans and under 40 and over 40 and we assess who is included within it and who isn't included within it, and we tell them if you don't change the numbers, you face a greater exposure to a claim.

Now, that is, I guess one way of discouraging employers from having thoughtless, even though not aged biased practice by the sword of a major lawsuit. Whether or not that's a legally common --

QUESTION: But you don't have the power to do which this case I guess does ask us to do possibly, and that is also to look at the question of the defense here and say what does it mean in context? I mean, you could say, for example, reasonably necessary means necessary. Or you could say that reasonably necessary means a reasonable practice giving weight to the employer's reasonable judgment in this. There are a lot of things you could say. So I want your opinion on that.

MR. NAGER: Well, my opinion is that the statute doesn't say reasonably necessary. That's what the BFOQ provision says.

QUESTION: BFOQ. Based on reasonable factors. It's hard to get around that. Based on --

MR. NAGER: Yes. It's, the entire phrase has to be read. It says based on it. What are the factors?

And that's a reference to motive. We know that from the ordinary English language, we know it from this Court's own cases talking about factors, and we know it from the legislative history because the secretary of labor in studying and reporting to Congress at Congress' legislative direction distinguished between purposeful uses of age as stereotypes of the abilities of older workers, and other forces that adversely impact older workers and what the secretary of labor recommended to deal with your problem that you pointed out, Justice Breyer, is not a coercive sanction that used, made neutral practices with disparate effects illegal. What the secretary of labor recommended to Congress and Congress adopted his recommendation in enacting the statute was the promotion of education, training and manpower programs both to get employers to better understand the talents and capabilities of older workers and where older workers were --

QUESTION: Isn't the answer to Justice Breyer's concern about the employer who has an unreasonable criteria that in fact has a bad impact upon older workers? Isn't the answer that there is a sanction, and that is a jury is unlikely to believe it.

MR. NAGER: Yes. That's the answer I gave, but he told me I --

QUESTION: Any lawyer advising such, such a, such an employer would say boy, if you are dragged into court, and nobody is going to believe that you didn't adopt this for the reason of getting rid of older employees. That seems to me --

MR. NAGER: It's a much better answer than I gave. I thought --

QUESTION: It's a very good answer. I wanted to know whether there was also any other answer.

QUESTION: You gave that answer. May I just ask you this just to think through the problem a little bit. Assume I agree with you 100 percent that the reasonable factors other than age defense is a motive-based defense, why couldn't you have a good motive defense to a prima facie case that's based on objective factors?

MR. NAGER: Well, I don't think it's a defense. I should state that. I think that the provision is not in there as an affirmative defense. I think the provision is in there to clarify what the scope of the prohibition is.

QUESTION: Well, even as read in a defense, it's an exclusion category case, the motive. But whether it's a defense or an exclusion, the fact that it is motive-based doesn't seem to me necessarily to mean that the prima facie case must also be motive-based.

MR. NAGER: If we are talking about a disparate treatment case, I agree with you, Justice Stevens, that in an appropriate case with an appropriate statistical presentation, a judge would be justified in saying that the plaintiff has presented enough evidence to require the employer to respond to a disparate treatment allegation. Now, you know, it's hard to speak universally about statistical presentations. Most of them in my experience may satisfy Delbare, but don't tell us very much about the real merits of the case, but if we adopt as the premise that you have got a particularly powerful statistical presentation, I don't think there is any case law and certainly not from this Court because Teamsters and cases like that say that statistics are admissible to prove intent, that a plaintiff couldn't have statistics alone as their prima facie case, but it would be about intent, and the employer would be responding about its own intent. It wouldn't be responding about as the employer does in Title VII cases, about -- now, we not only had a good motive. Here's the proof that we were right about what we were trying to predict, because that is what the rebuttal burden in a Title VII dispute.

QUESTION: May I ask you --

QUESTION: I understand that. But it seems to me that it would be perfectly reasonable if you treat

disparate treatment as prima facie -- I mean a disparate impact as prima facie evidence of a wrongful intent. But I'm not sure that it would not also be an appropriate response even if disparate treatment was sufficient regardless of the actual intent. It makes good sense for Congress to put this defense in any way. I'm not sure you have --

MR. NAGER: I'm not sure I understood the question.

QUESTION: Assume your opponent is right. That disparate impact, which is totally innocent in terms of any malicious intent creates a prima facie case. Would it not nevertheless be sensible for Congress to say yes, all that is true, but if you have the right kind of good motive described in this paragraph, that shall nevertheless be a defense?

MR. NAGER: Well, I think that would make good sense, but I think that Congress was advised by the secretary of labor that we are going to see correlations between age and neutral selection criteria all the time, and I don't think that Congress had in mind that foreseeable adverse impacts, not done because of but in spite of, should be a common basis for a prima facie case, whether it be called disparate treatment or disparate impact.

QUESTION: May I understand better than I have from your argument why you say it's the reasonable factor is not a defense? You are saying it's like the Equal Pay Act, which says any factor, any other factor other than sex. And that's always been regarded as a defense to an equal pay charge. You are charged with a violation of equal pay and you say no, it was based on any other factor other than sex.

Why isn't it, since you are using the Equal Pay Act to say there is no impact theory under the Equal Pay Act, why isn't this equally a defense, rather than as you say, part of the definition?

MR. NAGER: Well, perhaps our argument was not clear. We were not referring to the Equal Pay Act in the way that your question suggests. The only mention we made of the Equal Pay Act was where we made the point that the court in construing Title VII disparate impact doctrine has suggested in county of Washington vs. Gunther and in Justice Stevens' opinion for the Court in Manhart, the disparate impact claims would not be cognizable in the areas of pay disparities correlated with gender because the Bennett amendment incorporated the effect of the Equal Pay Act defenses into Title VII. It's our opponents who have made arguments based upon Gunther that there is something different about this.

QUESTION: I thought you were both making arguments? I thought, maybe I'm wrong about this, that your opponent was saying that this F provision is just like business necessity under Title VII and you said I thought, no, it's as in the Equal Pay Act when, where there is no impact test under the Equal Pay Act. I thought that was your argument. Maybe I misread you. But I think --

MR. NAGER: No. That was not our argument, Justice Ginsburg. Our argument was that the reason, one of the reasons why this Court can and should rule that the Age Discrimination Act doesn't recognize disparate impact claims and be completely consistent and respectful of Griggs is that the court in Title VII cases has recognized that other provisions of the statute may cause Griggs to yield to other congressional manifestations of intent requirements in specific areas.

QUESTION: Well then, let's just take the two statutes. One says reasonable factor, and the other says any factor, any other factor other than sex. Same kind of provision. Why in one case is it a defense and the other case, part of the definition of the --

MR. NAGER: Well, I think the answer to that is that the court construed the four so-called affirmative defenses as affirmative defenses under the Equal Pay Act.

This Court in Betts recognized that when Congress wrote 4(f), they didn't intend for all of the provisions in 4(f) to be affirmative defenses. Some of them were affirmative defenses. This Court in Criswell held that the BFOQ was an affirmative defense. 4(f)(2) was held not to be an affirmative defense but was held to be an exemption that redefined the elements of a prima facie case and our suggestion to the Court is since the reasonable factor other than age provision is not a provision in which the employer is trying to justify the use of age, employer is saying our decision should be held lawful because it's based upon factors other than age that it's not appropriate to characterize that as an affirmative defense, but rather --

QUESTION: I don't follow why it isn't, you couldn't make the very same argument about the Equal Pay Act.

MR. NAGER: Well, I suppose if I had been before the court in 1974 arguing that case, I might have made that argument.

QUESTION: Well, that's another one we are stuck with it because it's stare decisis, isn't it?

MR. NAGER: Well, no. We just recognize that we have a different statute and we also have a different court. I mean, the fact that --

QUESTION: Thank you, Mr. Nager. Mr. Crabtree, you have three minutes remaining.

REBUTTAL ARGUMENT OF JOHN G. CRABTREE

ON BEHALF OF THE PETITIONERS

MR. CRABTREE: Thank you, Your Honor. Justice Scalia, you asked earlier why we should not construe the good cause provision as just something similar to the reasonable factors provision.

The difference is the absence of the words otherwise prohibited. The same words that did not exist in (f)2 when Betts was decided. Without the words "otherwise prohibited" there would be a good argument that the reasonable factors defense was not a defense. But because of those two critical words, it is inescapable that there has already been a violation of the act.

Second, Fogerty was a copyright case, not another discrimination case in trying to import the attorneys fee provision, prevailing party fee provision in that case did not make sense as it does here because the ADEA in Title VII share a common purpose and the common legislative history and the common language.

In Gunther, the court did not hold that there was not disparate impact for a wage disparities under Title VII. What the court held was that the defense was any other factor and that that applied or suggested that

it might apply in a facially neutral practice. But the court also said in Gunther that the, that the Defendant, in proving its defense, must establish that factors were legitimate and bonafide. Here, of course, we have the additional word reasonable so mere legitimacy, or merely being bonafide cannot be enough.

While the, as counsel conceded in mixed motive cases, the court's analysis is whether or not but-for, the but-for analysis must be connected and whether or not the employer's motives caused the employer's action is at issue. And again, going back to the words otherwise prohibited, we don't have that under the reasonable factors defense for the ADEA. I have no more to offer.

QUESTION: Thank you, Mr. Crabtree.

MR. CRABTREE: Thank you very much.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)