95 2898

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Case No. 95-2898

Diann Walker, etc., et al.,

Appellants,

vs.

Sandra B. Mortham, as Secretary of State of the State of Florida, et al.,

Appellees.

Appealed from the U.S. Dist. Court
for the Northern Dist. of Florida

PRINCIPAL BRIEF OF APPELLANTS

JERRY G. TRAYNHAM
PATTERSON AND TRAYNHAM
315 Beard Street
Post Office Box 4289
Tallahassee, Florida 32315
(904) 224-9181

KENT SPRIGGS
SPRIGGS & JOHNSON
324 West College Avenue
Tallahassee, Florida 32301
(904) 224-8701

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Case No. 95-2898

Diann Walker, etc., et al.,

Appellants,

vs.

Sandra B. Mortham, as Secretary of State of the State of Florida, et al.,

Appellees.

PRINCIPAL BRIEF OF APPELLANTS

JERRY G. TRAYNHAM
PATTERSON AND TRAYNHAM
315 Beard Street
Post Office Box 4289
Tallahassee, Florida 32315
(904) 224-9181

KENT SPRIGGS
SPRIGGS & JOHNSON
324 West College Avenue
Tallahassee, Florida 32301
(904) 224-8701

Diann Walker, et al., etc. vs. Sandra B. Mortham, et al.; Case No. 95-2898

CERTIFICATE OF INTERESTED PARTIES

AND CORPORATE DISCLOSURE STATEMENT

Counsel for Appellants hereby certifies that the following is a list of all persons and entities known to him that may have an interest in the outcome of this appeal.

Delores Colston

Richard Dunn, Attorney for Appellees

Rosa Henderson

Linda Issac

Louvenia Jones

Barbara King

Scott D. Kravetz, Attorney for Appellees

Maurice Paul, Chief United States District Judge

Ben R. Patterson, Attorney for Appellants

Dorothy Roberts

Jacqueline Ross

Kent Spriggs, Attorney for Appellants

Diann Walker, et al., etc. vs. Sandra B. Mortham, et al.; Case No. 95-2898

William Stafford, United States District Judge

Charles Stewart

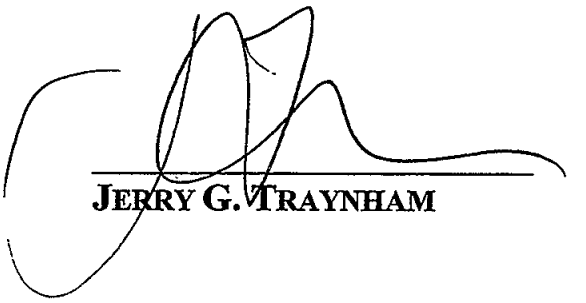
Jerry G. Traynham, Attorney for Appellants

Diann Walker

Thomas A. Warren, Attorney for Appellants

Mitchell E. Widom, Attorney for Appellees

Pearl Williams



JERRY G. TRAYNHAM

STATEMENT REGARDING ORAL ARGUMENT

Oral argument will be helpful to the Court in understanding the record, and in answering questions counsel may not anticipate in writing their briefs.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is printed in a 14 point Times New Roman typeface provided by Microsoft with its Windows 95 operating system.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT ..... C1 of 2

STATEMENT REGARDING ORAL ARGUMENT i

CERTIFICATE OF TYPE AND STYLE OF PRINT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

STATEMENT OF JURISDICTION x

STATEMENT OF THE ISSUES xi

STATEMENT OF THE CASE

Course of Proceeding and Disposition Below 1

Statement of the Facts 12

Standard of Review 15

SUMMARY OF THE ARGUMENT 17

ARGUMENT 19

POINT 1 19

THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD IN RULING THE APPLICANTS DID NOT ESTABLISH A PRIMA FACIE CASE UNDER BURDINE

POINT 2 35

THE DISTRICT COURT VIOLATED THIS COURT'S MANDATE, AND WAS CLEARLY ERRONEOUS, IN FINDING APPLICANT'S DID NOT ESTABLISH A PRIMA FACIE CASE

POINT 3 39

THE DISTRICT COURT ERRED IN REFUSING TO ALLOW PLAINTIFFS TO PURSUE THEIR CHALLENGE TO THE DISPARATE IMPACT OF EMPLOYMENT TESTS

POINT 4 40

THE DISTRICT COURT ERRED IN FAILING TO RECERTIFY THE CLASS

A. The Court Erred In Determining The Merits Of The Individual Claims Prior To Class Certification 42

B. The Court Violated The Applicants' Right Under Rule 23 To Have The Issue Of Class Certification Determined "As Soon As Practicable" 46

C. Even if the Court had not violated rule 23 as to timeliness and consideration of the merits of the underlying claims, its ruling was still erroneous 50

CONCLUSION 53

CERTIFICATE OF SERVICE 55

TABLE OF AUTHORITIES

Cases

**Armour v. City of Anniston,*

597 F.2d 46 (5th Cir. 1979) 50

Armour v. City of Anniston,

654 F.2d 382, 383-384 (5th Cir. 1981) 52

Baumer v. United States,

685 F.2d 1318, 1321 (11th Cir. 1982) 36

Bonner v. City of Pritchard,

661 F.2d 1206 (11th Cir. 1981) 29

Bundy v. Jackson,

641 F.2d 934, 951 (D.C. Cir. 1981) 32

**Carter v. Miami,*

870 F.2d 578 (11th Cir. 1989) 30

Castle v. Sangamo Weston,

837 F.2d 1550, 1558 (11th Cir. 1988) 30

**Crawford v. Western Electric Co., Inc.,*

614 F.2d 1300 (5th Cir. 1980) 29, 32, 33

Deposit Guaranty National Bank v. Roper,

445 U.S. 326 (1980) 50

Dorsey v. Continental Casualty Co.,

730 F.2d 675, 678 (11th Cir. 1984) 37

EEOC v. International Longshoreman's Association,

623 F.2d 1054, 1058 (5th Cir. 1980) 37

**Eisen v. Carlisle & Jacquelin*,

417 U.S. 156, 177-78 (1974) 42

Goldstein v. Manhattan Indus., Inc.,

758 F.2d 1435, 1442 (11th Cir.), *cert. denied* 106 S.Ct. 525 (1985) 30

Hill v. Seaboard Coast Lines R. Co.,

885 F.2d 804 (11th Cir. 1989) 32, 33

**Huff v. N.D. Cass, Inc.*,

485 F.2d 710 (5th Cir. 1973)(*en banc*) 43

Hutching v. United States Indus., Inc.,

428 F.2d 303, 310, 311 (5th Cir. 1970) 43

*IMPACT v. Firestone[1],

893 F.2d 1189 (11th Cir. 1990), *cert. denied* 498 U.S. 847 ..... passim

Kirkpatrick v. J.C. Bradford and Co.,

827 F.2d 718 (11th Cir. 1987),

cert. denied, 485 U.S. 959 (1988) 44

Lee v. Russell County Board of Education,

684 F.2d 769, 773 (11th Cir. 1983) 31

**Litman v. Massachusetts Mutual Life Insurance Co.*,

825 F.2d 1506 (11th Cir. 1987) (*en banc*) 36

**McDonnell Douglas v. Green*,

411 U.S. 792, 802 (1977) 6, 29

Nance v. Union Carbide Corp.,

540 F.2d 718, 723 n.9 (4th Cir. 1976), vacated

on other gr'ds and remanded, 431 U.S. 952 (1977) 44

---

[1] The full case style is *Increase Minority Participation by Affirmative Action Today of N.W. Florida v. Firestone.* The case will be referred to as *IMPACT.*

Nelson v. Murphy,

44 F.3d 479, 500 (7th Cir. 1995) 48

Pace v. Southern Ry. Systems,

701 F.2d 1383, 1386 (11th Cir.), *cert. denied* 104 S.Ct. 549 (1983) 31

**Patterson v. McLean Credit Union*,

109 S.Ct. 2363 (1989) 20, 25, 26, 29, 33

Paxton v. Union National Bank,

688 F.2d 552, 559 (8th Cir. 1982), *cert. denied*

460 U.S. 1083 (1983) 45

Perryman v. Johnson Products, Inc.,

698 F.2d 1138, 1142 n. 7 (11th Cir. 1983) 31, 33, 44

Quern v. Jordan,

440 U.S. 332, 348 n. 18, 99 S.Ct. 1139, 1148 n. 18 (1979) 36

Ross v. Bank South, N.A.,

837 F.2d 980 (11th Cir. 1988) 44

**Satterwhite v. City of Greenville*,

634 F.2d 231 (5th Cir. 1981) 51

Shores v. Sklar,

844 F.2d 1485 (11th Cir. 1988) 44

Stastny v. Southern Bell T & T,

628 F.2d 267, 275 (4th Cir. 1980) 45, 46, 48

**Texas Dept. of Comm. Affairs v. Burdine*,

101 S.Ct. 1089 (1981) 6, 20, 27, 28, 34

**United States Parole Commission v. Geraghty*,

445 U.S. 388 (1980) 50

United States v. Robinson,

690 F.2d 869, 872 (11th Cir. 1982) 37

United States v. Torkington,

746 F.2d 1437, 1440 n.2 (11th Cir. 1984) 53

Wheeler v. City of Pleasant Grove,

746 F.2d 1437, 1440 n. 2 (11th Cir. 1984) 36

Wu v. Thomas,

847 F.2d 1480 (11th Cir. 1988) 32

Statutes

Title VII, 42 U.S.C. § 2000e ..... passim

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Northern District of Florida. This Court has jurisdiction pursuant to 28 USC §1291.

STATEMENT OF THE ISSUES

POINT 1

THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD IN RULING THE APPLICANTS DID NOT ESTABLISH A PRIMA FACIE CASE UNDER BURDINE

POINT 2

THE DISTRICT COURT VIOLATED THIS COURT'S MANDATE, AND WAS CLEARLY ERRONEOUS, IN FINDING APPLICANT'S DID NOT ESTABLISH A PRIMA FACIE CASE

POINT 3

THE DISTRICT COURT ERRED IN REFUSING TO ALLOW PLAINTIFFS TO PURSUE THEIR CHALLENGE TO THE DISPARATE IMPACT OF EMPLOYMENT TESTS

POINT 4

THE DISTRICT COURT ERRED IN FAILING TO RECERTIFY THE CLASS

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

This Title VII action was initially filed on June 19, 1979, as a class action by twelve individual plaintiffs and a non-profit corporation, Increase Minority Participation by Affirmative Change Today of North West Florida, Inc. (I.M.P.A.C.T.), against the Florida Secretary of State and against the State of Florida.[2] Applicants sought to maintain a class action on behalf of all past, present and potential black employees of the Employer. (R1-1).

The initial Complaint alleged a pattern of intentional discrimination in hiring, promotions, discipline and assignments which was put into effect, in large

---

[2] For purposes of clarity, throughout this brief the Plaintiffs/Appellants will be referred to primarily as the Applicants, or the Plaintiffs, unless the context is otherwise clear. The Defendants/Appellees will be referred to collectively as the Employer. References to the record will be made parenthetically by the letter 'R' followed by the record volume number, the district court document number, and the page number — e.g. (R6-243-4, 5).

measure by a hierarchy of predominately white supervisors exercising subjective discretion in making employment judgments. The Complaint also charged that the Employer maintained a racially biased environment. (R1-1).

On November 7, 1980, the initial district judge certified the litigation as a class action on behalf of "all past, present and future black persons employed by the Department of State of the State of Florida, and all past, present, and future black applicants for employment with the Department of State of the State of Florida." (R3-148). The district court found as fact that the Appellants in these appeals are employees and applicants for employment with the Florida Department of State, and the Plaintiff I.M.P.A.C.T. was a Florida non-profit corporation established for the purpose of improving the working status of its members and eliminating the effects of past and present discrimination.

Early in discovery the Applicants sought information on objective employment testing by the Employer, and its disparate impact upon black applicants for employment. (See, R1-18-7-9; R1-19-2, 3). The Applicants' Third Amended Complaint, filed in April 1984, specifically alleged that objective employment tests imposed an unjustified initial barrier to employment and had a

disparate impact upon blacks. (R4-203-3, 4). On August 1, 1983, the Employer, for the first time, interposed an objection to discovery requests relating to employment examinations, and refused to provide any further information on objective tests. (R9-350; R9-352). On December 13, 1983, the Applicants moved the district court for an order compelling discovery, explaining the information was needed to pursue the examination claims, and was independently relevant to other issues important to the class. (R11-419-6). The district court entered an order compelling discovery on February 13, 1984. (R11-435). The Employer immediately made it clear it would not comply.

On February 16, 1984, Applicants filed an emergency motion to suspend the pre-trial schedule, noting that they were unable to continue to adequately represent the certified class unless the court granted substantial and immediate relief. (R12-442). Applicants noted for the Court that the Employer was withholding information critical to the economical litigation of class claims, and that without the information previously compelled by the court, litigation could cost $30,000 to $50,000, at least five times the reasonable costs that would be incurred if the Employer did not avoid discovery. Applicants noted that given the economic war

of attrition being waged against Applicants' counsel, they were unable to finance this vastly increased cost of litigation. Applicants requested the court to suspend the pretrial schedule until they could insure adequate representation for the class. On the following day, the Employer moved the trial court for an order reconsidering its order compelling discovery of employment testing materials needed by Applicants. (R12-459). On March 2, 1984, the Employer moved to stay discovery on employment examinations (R12-478), which the Applicants opposed (R12-483). On March 17, 1984, the Applicant moved for Rule 37 discovery sanctions. (R12-487). On March 23, 1984, the trial court granted the Employer's motion to stay discovery on examinations. (R13-490).

On September 17, 1984, the district court entered an order decertifying the class, for the financial inability of the Applicants to adequately represent the class claims at trial. (R.E.-77) (R14-553).

On December 17, 1985, Applicants moved to recertify the class, pointing out to the Court that adequate financial planning was in place to litigate the class claims. (R15-593). On January 22, 1986, the court denied the motion to recertify the class. (R15-603).

On March 7, 1986, Applicants filed an emergency motion to expedite disposition of motions filed two years earlier, including the motion for discovery sanctions on testing materials. (R16-620). On March 10, 1986, the Applicants filed an emergency motion for Rule 37 discovery sanctions regarding testing, pointing out the court had not yet ruled on the motions filed two years earlier. (R16-622). On March 28, 1986, the last work day before trial, the district court denied the motions for discovery sanctions, holding employment examinations were not within the scope of the litigation. (R16-636).

This case was tried between March 31 and April 15, 1986. (R17-651). Because of the district judge's pretrial rulings, the disparate impact of employment tests was not tried to the court. Following the closing of Applicants' case in chief the District Court dismissed all disparate impact claims, and dismissed the individuals claims of Gracie Holton (Dejerinette). (R.E.-139-141). On August 11, 1986, the District Court issued a memorandum opinion, which he styled "Findings of Fact and Conclusions of Law and Final Judgment." During the course of his opinion, the district court decided all issued and all claims against all of the Applicants. (R17-664). The district court interpreted the Supreme Court's

decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. at p. 258, as not requiring a defendant to produce evidence of the factual basis of its decision. While suggesting that the Employer did present some testimony "why some of the actual selectees were better qualified", the court appeared to have accepted the argument of counsel as the Employer' articulation under *Burdine*, and then to have held Applicants to the burden of demonstrating the pretext of counsels' positions on each employment selection. No other explanation for the court's rationale was apparent.

Following an appeal, on February 9, 1990, this Court reversed the trial judge and remanded for further proceedings. *IMPACT v. Firestone*, 893 F.2d 1189 (11th Cir. 1990). This Court held the Employer had failed to meet its articulation burden under *Burdine*, stating:

> [I]t is clear that the trial court erred in determining that in each of the more than 60 claims with which it dealt and to which it assumed the establishment of a prima facie case, the defendants had satisfied the requirements of *Burdine*. In not a single case, did the defendants offer proof by any person who made the employment decision, or by any other person, stating that the decision was made on the basis of what he or she thought demonstrated the best qualified person. * * *

> In this case, the defendants offered no evidence explaining any employment decisions.

Id., 893 F.2d at 1193, 1194. Because the trial judge had not determined whether the Applicants had proven a prima facie case, this Court remanded with instructions to determine whether the Applicants had established a prima facie case on any of their claims. *Id.*, at 1194, 1195. This Court also held the district judge had erroneously dismissed Gracie Holton's claims at the close of Applicant's case in chief, and remanded for further proceedings. *Id.*, at 1196, 1197. The Court held the district judge had erred in eliminating employment tests from the scope of the litigation. *Id.* at 1196. The Court found that the record showed decertification of the class for lack of adequate financing was related to the trial court's failure to properly supervise discovery, and to an estimate of costs Applicants would incur if the district judge did not require the Employer to adequately respond to discovery. This Court held the issue of class certification would remain open on remand. *Id.*, at 1195-1196.

The Supreme Court denied the Employer's petition for writ of certiorari on October 1, 1990. *Id.*, 498 U.S. 847.

On remand, the Applicants requested a status conference, which the district court conducted on August 31, 1990.[3] (R21-800; R21-803). At the status conference, the parties were directed to file briefs on the issues remaining. Briefs were filed on October 23, 1990, by Applicants, and on January 7, 1991, by the Employer. On September 11, 1990, Applicants moved to recertify the class, noting they had reserved $100,000 to finance trial of the class claims. (R21-804). The trial court reopened discovery for a short period on August 27, 1991, solely related to class certification issues (R21-829), and conducted a class certification hearing on January 2, 1992. (R56-850). The parties filed briefs. The trial court did not rule on the class certification issue or take any other significant action.

On September 28, 1994, the Applicants moved for entry of judgment on their individual disparate treatment claims, noting they had requested this action in their status conference memoranda in 1990 and 1993. (R22-875). On December 21, 1994, the district court entered an order denying the motion for entry of

---

[3] Following remand, Applicant Gracie Holton's claim was settled between the parties. (R22-905).

judgment, and holding that employment tests claims could not be tried under a disparate impact theory. (R.E.-879). The trial judge appeared to recognize that Applicants had proven a prima facie case on all of their claims, by citing the binding Circuit precedent in *McWilliams v. Escambia County School Bd.*, 658 F.2d 326 (5th Cir. 1981), for the proposition that a plaintiff need not demonstrate comparative qualifications to establish a prima facie case. The trial judge stated that a "plaintiff can establish a prima facie case with proof he is black, he applied and was qualified for an available job, and was rejected in favor of a white."[4] (R.E.-879-3 n.1).

The judge then appeared to repudiate this Court holding on appeal. He expressly recognized this Court's holding, stating "[t]he Eleventh Circuit held that the defendants did not articulate legitimate, non-discriminatory reasons for their

---

[4] The judge also stated that this Court had found the Intervenors — Applicants Ross and Issac — had proven a prima facie case, citing *IMPACT* at 893 F.2d 1196. (R.E.-879-13). The citation appears to be a scrivener's error.

hiring decisions." The district court then expressly found to the contrary of the appellate holding, stating:

> In this case, the defendants introduced evidence of nondiscriminatory reasons. . . . Taken as true, however, the defendants' evidence does permit the conclusion that there was a nondiscriminatory reason for the adverse action. Thus, the defendants have met the burden of producing evidence.

(R.E.-879-11-12). For this reason, the court denied Applicant's motion and did not rule upon the prima facie case issues. Reacting to Applicants' statements that their employment testing claims were addressed to the disparate impact of the examinations, the trial judge held Applicant could not proceed under a disparate impact theory. Even though he had not permitted discovery on employment testing and had not permitted examination issues to proceed to trial, he reasoned that he had dismissed all disparate impact claims at the close of Applicant's case in chief at trial, and that ruling had not been disturbed by this Court. (R.E.-879-13).

In an abundance of caution, Applicants moved the court for clarification, explaining that the examination issues presented questions of disparate impact, not

disparate treatment. Applicants explained that the judge had refused discovery on the exam issues, and had not permitted them to be tried. The motion asked the court to clarify whether Applicants would be permitted to try the issue of the disparate impact of the employment examinations. (R22-893).

On May 22, 1995, the district court entered an order finding that none of the Applicants had proven a prima facie case, that class certification should be denied, and that the examination claims could not be tried under a disparate impact theory and were thus eliminated from the case. (R.E.-899). In finding Applicants had not proven a prima facie case, the judge abandoned his earlier adherence to *McWilliams, supra*, and held Applicants were required to prove their comparative qualifications were equal to or better than those of the white selectees.[5] He then methodically found Applicants had not met this burden, using similar, and in some cases, identical language as that reversed by this Court's earlier decision. (R.E.-

---

[5] The district judge also apparently abandoned his earlier holding that this Court had found Applicants Ross and Isaac had proven a prima facie case. See, footnote 4.

899-3-27). The trial court reasoned class certification should be denied, because no Applicant had established a prima facie case, and thus lacked constitutional standing to assert the claims of the class. The court entered judgment against all of the Applicants except Holton. (R.E.-899). Ms. Holton's claims were dismissed following notice of settlement on July 13, 1995. (R22-907).

Statement of the Facts

Most of the factual issues were resolved during the first appeal of this case, and are the subject of this Court's opinion in *IMPACT* at 893 F.2d 1189. These factual issues are more efficiently presented in the course of the argument. In addition, the following background facts may assist the Court in understanding the scope of the case.

Each of the Applicants sought numerous promotional opportunities within the Florida Department of State. Largely, they were unsuccessful in advancing, commensurate with their training and ability. Their trial theory was that the Employer utilized an employment system which relied heavily upon decision-making of a subjective character. Since the decision-makers within the Employer' organization were predominately and disproportionately of the white race,

Applicants asserted a position that the highly subjective nature of employment decisions, in hiring, promotions, employee performance evaluations, and the like, gave wide latitude to the expression of conscious racial bias (disparate treatment), and the system itself impacted adversely upon black individuals by allowing the expression of conscious and unconscious racial bias (disparate impact).

As late as 1984, the Employer's work force showed a skewing of blacks toward the bottom-level jobs, with whites concentrated in the higher paying positions and acting as the employment decision-makers. The Employer's 1983-1984 affirmative action plan (Pl. Ex. Z-50-A) reveals the Employer's total work force consisted of 22.6 percent black employees. However, blacks comprised 31 percent of the lower level clerical employees and only 5.6 percent of the managers and administrators. Whites, which comprised 75 percent of the work force, made up 95 percent of the managers and administrators.

The process of selecting employees for new positions or for promotions was highly subjective. Each of the employment positions maintained by the Defendant have certain minimal educational and experience requirements, referred to as training and experience, or, in shorthand, "T&E." These are contained in the job

specifications. (Pl. Ex. Z51-B, p. 13). In making employment selections, generally the immediate supervisor makes the choice of which applicant will receive the position. Each applicant must meet the basic criteria specified by the T&E. The process begins in the personnel office, where applications are received. The personnel office has the initial responsibility for making certain that each applicant meets the position's minimum training and experience requirement. (Pl. Ex. Z-51B, p. 16). The personnel officer takes the application for each qualified applicant and places it in a packet for transmittal to the hiring authority. The personnel office also places a form in the application packet which identifies each applicant, their race, sex, any disability, and other items such as veteran preferences. (Pl. Ex. Z51-B, p. 20, 21, 22). Employment examinations were required for the majority of clerical positions. (Pl. Ex. Z51-B, p. 24, 25).

After the person making the selection decision receives the application packet from the personnel office, he or she is required to interview at least five applicants before making the employment selection. (Pl. Ex. Z51-B, p. 16-18). Current employees are entitled to preference in employment selections. (Pl. Ex. R-2, Answer to Interrogatory 20(a) 4, served July 19, 1979, and answered May 1,

1980, and August 1, 1983). After the personnel office screens the applications for basic T&E requirements, the decision made by the selecting authority is one made on a wholly subjective basis. (Pl. Ex. Z51-B, P. 13-18).[6]

Each of the Plaintiffs underwent this process in seeking advancement within the Employer's organization.

Standard of Review

The standard of review of each of the issues is as follows:

Point 1 — This point is reviewed *de novo* because it is a question of law whether the district court applied the correct legal standard in finding no Plaintiff established a *prima facie* case on any of the more than 60 claims tried to the court.

Point 2 — This point is reviewed *de novo* to determine whether the district court violated this Court's mandate or the law of the case. The Court must also determine whether the district judge was clearly erroneous in making factual

---

[6] These facts were in substance found by this Court. IMPACT, 893 F.2d at 1191, 1192.

findings in the absence of evidence and in conflict with this Court's appellate findings.

Point 3 — This point is reviewed *de novo* to determine whether the district court committed a legal error in refusing to allow Applicants to try their examination claims under a disparate impact theory.

Point 4 — This point is reviewed *de novo* to determine whether the district court committed legal error in failing to recertify the class.

SUMMARY OF THE ARGUMENT

On the last appeal, this Court reversed and held the Employer failed in meeting its articulation burden under *Burdine* on the more than 60 claims tried to the district court. Because the district judge had never ruled upon whether the Applicants had proven prima facie cases, this Court remanded for that determination. This Court also reversed the judge's finding that employment examination claims were not within the scope of the case. This Court found the district court's decertification of the class may have been related to the district court's failure to permit appropriate discovery, and remanded for a determination whether the class should be recertified.

In ruling the Applicants failed to prove a prima facie case on any of the approximately 60 claims tried, the district judge applied a new and incorrect legal standard. Although both this Court and the district court had found the Applicants (1) were black applicants for employment, (2) that had applied for available specific jobs for which they were qualified, and, (3) that white persons were selected for each of the positions, the district judge held Applicants were also required to prove the comparative qualifications of themselves and the white

selectees. In imposing this very specific standard, the court violated the plain meaning of the *McDonnell Douglas/Burdine* standard, the plain language of *Patterson v. McLean Credit Union*, and the binding precedent of this Circuit.

In addition, the district judge violated the mandate of this Court and the law of the case, and was clearly erroneous in assessing comparative qualifications where this Court had held there was no evidence in the record.

The district judge also erred in refusing to allow Applicants to pursue their employment exam claims under a disparate impact theory. He reasoned he had dismissed all disparate impact claims following Applicants' case in chief at the first trial, and this Court had not reversed that action. However, the employment exam claims were not permitted by him to proceed to the first trial, and could not have conceivably been encompassed within the earlier dismissal.

Finally, on remand the district judge studiously avoided deciding the class certification issue for five years, and then denied certification when he held no Applicant had proven a prima facie case. He erroneously reasoned that since the Applicants lost their claims, they lacked standing to represent the class.

ARGUMENT

POINT 1

THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD IN RULING THE APPLICANTS DID NOT ESTABLISH A PRIMA FACIE CASE UNDER BURDINE

On remand from this Court, the district judge held that not one of the Applicants below had established a *prima facie* case on any of the approximately 60 claims tried to the court. In reaching this determination, the trial judge used the identical reasoning this Court rejected in reversing his earlier determinations that the Employer had articulated legitimate reasons for employment selections which Applicants did not show were pretextual. The trial judge applied an incorrect legal standard, a standard which is radically contrary to any reasonable reading of

the plain language of the Supreme Court in *Burdine*[7] and in *Patterson v. McLean Credit Union*[8], and a standard which violates the binding precedent of this Circuit.

Following the original trial of this case, the district judge "assumed without deciding" that each of the Applicants had proven a prima facie case of discrimination[9], and then found the Employer had met its articulation burden "merely by *contending* that the person believed to be most qualified was hired." *Id.*, 893 F.2d at 1193 (emphasis in original). Even though the Employer had offered no proof that any of the employment decisions had been made on the basis of qualifications, and no proof as to what characteristics constituted "qualifications" for any of the employment positions at issue, the trial court found the Applicants had failed to show the Employer's articulation was a pretext for discrimination. The trial judge reached this determination by himself sifting

---

[7] *Texas Dept. of Comm. Affairs v. Burdine*, 101 S.Ct. 1089 (1981).

[8] 109 S.Ct. 2363 (1989).

[9] *IMPACT*, 893 F.2d at 1191.

through personnel information which had been read into the record, and deciding that on each of the more than 60 claims the Applicant was less qualified than the person selected. *Id.*, 893 F.2d at 1193-1195.

A panel of this Court reversed, finding the district court had applied an incorrect legal standard.

> In this case, the defendants offered no evidence explaining any employment decision. The Court spoke in terms of the defendants' "claim" that all employees were selected on the basis of qualifications. Such a "claim," not supported by admissible evidence, did no more than allow defendants to furnish a resumé from which the trial court then made *its* determination that the person selected was better qualified than the black applicant. Introducing personnel records which *may* have indicated that the employer based its decisions on one or more of the possible valid grounds did not suffice.

Id., 893 F.2d at 1194 (emphasis in original). This Court found the Employer had not met its articulation burden, and — because the district judge had assumed, without deciding, the Applicants had proven their prima facie cases — remanded for the trial court to determine "whether a prima facie case was made out by any of the [Applicants] on any of their claims." *Id.*, 893 at 1195. In remanding the case,

this Court assisted the district judge by making the following findings of fact which are material to the question on remand. This Court held Applicants had proven "they were black employees, they had made applications for specified positions, that the positions had been filled by another person, and that, in most if not all cases, that other person was white." The Court also held the Applicants had proven "that each of the applicants was qualified for the position sought" and that "[i]n each case, also, the position remained open after the plaintiff had been denied the appointment."[10] *Id.,* 893 F.2d at 1191-1192.

On remand, the district judge found that none of the Applicants had established a prima facie case as to any claim. (R.E.-899-3-27). The district court reached this determination by making the identical findings this Court reversed, but applying them to the prima facie case element of the circumstantial proof

---

[10] There is no genuine dispute between the parties, that I have detected, as to the facts found by this Court. On remand, the district judge found the Applicants applied for specific positions, and were, in almost every instance, qualified for the position they sought. (R.E.-899-4).

model rather than to the pretext element.[11] To accomplish this, the district court applied an incorrect legal standard.

Citing 11th Circuit decisions in *Carter v. Miami*, 870 F.2d 578 (1989), and in *Hill v. Seaboard Coast Lines R. Co.*, 885 F.2d 804 (1989), the trial judge reasoned that to establish a prima facie case, Applicants were required to prove not only that they were qualified for the positions at issue, but, in addition, that they were equally or better qualified than the person selected for each position. (R.E.-899-4).

> [T]o establish a prima facie case, the plaintiffs must prove by a preponderance of the evidence:
>
> * * * that a person not a member of the protected class with equal or lesser qualifications received the position.

---

[11] Compare the district court's dispositive order on remand (R.E.-899-3-27) with the order reversed by the previous appeal (Findings of Fact and Conclusions of Law, R17-664-9-49). The reasoning is substantially identical, and in many passages, the language tracks almost word for word.

Id. Finding the Applicants unable to meet this standard, the district court held no Applicant proved a prima facie case. In requiring proof of equal or better qualifications as part of the prima facie case, the trial judge seized upon dicta in several decisions of this Circuit and gave the language of the dicta a meaning never intended by its authors.[12] The standard applied by the trial court effectively turns the circumstantial proof model on its head, rendering meaningless the Supreme Court's purpose for requiring each element. Moreover, as utilized by the

---

[12] As will be seen, "equal or better qualifications" means no more than "qualified." Where a plaintiff and the person selected each possess the essential training and skills to perform the job, for purposes of the prima facie case they are equally qualified. In this case, the requisite training and skills are published; both the Court of Appeals and the district court have found the Applicants meet the published requirements and are thus "qualified." To the extent the persons selected also met these criteria, the Applicants, by showing they were qualified, proved they were equally qualified within the meaning of this dicta.

district court this standard violates the precedent of the Supreme Court, and the binding precedent of this Circuit.

The most recent expression of the Supreme Court in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), identified on familiar evidentiary scenario which illustrates how far the trial court deviates from a straight forward application of the model. Justice Kennedy, in analyzing the evidentiary framework established by the *McDonnell Douglas/Burdine* scheme, described the prima facie case in these terms:

> Under our well-established framework, the plaintiff has the initial burden of proving, by the preponderance of the evidence, a prima facie case of discrimination. *Burdine*, 450 U.S., at 252-253, 101 S.Ct., at 1093-1094. The burden is not onerous. *Id.*, at 253, 101 S.Ct., at 1093-1094. Here, petitioner need only prove by a preponderance of the evidence that she applied for and was qualified for an available position, that she was rejected, and that after she was rejected respondent either continued to seek applicants for the position, or, as is alleged here, filled the position with a white employee. *See, id.*, at 253, and n. 6, 101 S.Ct., at 1094, and n. 6; *McDonnell Douglas, supra*, 411 U.S., at 802, 93 S.Ct. at 1824.

Patterson, at 109 S.Ct. 2378 (underlined emphasis supplied). In addition, *Patterson* illustrates the trial court's error quite forcefully by its refusal to permit a district court to require a plaintiff to prove relative qualifications even to demonstrate pretext.

> It was . . . error for the District Court to instruct the jury that petitioner could carry her burden of persuasion only by showing that she was in fact better qualified than the white applicant. . . .

Patterson, at 109 S.Ct. 2379. Beyond an initial check to eliminate the most common reasons for non-selection, comparative qualifications are relevant only if the defendant articulates that the particular employment selection was made on the basis of qualifications. No such articulation was made in this case.

The Applicants in this case met every requirement of the prima facie case articulated by Justice Kennedy in *Patterson*. They proved they were black applicants, that they applied for specific positions for which they were qualified, and that the positions either remained open or were filled by white employees. *IMPACT*, at 893 F.2d 1191-1192. The trial judge had no quarrel with these facts, but found the Applicants failed to meet an additional test not required by *Patterson*.

This additional test by the trial court assumes the defendant will articulate that the selection was made on the basis of the best qualified applicant, and requires the plaintiff to rebut the hypothetical articulation at the prima facie case stage in the absence of any explanation of what qualifications the employer values for the position. This test poses an impossible burden for the plaintiff, and is fundamentally incorrect. For example, in this case the Employer produced no evidence as to what was valued as a qualification for any of the positions at issue. Yet the trial judge, for example, found that even though Plaintiff Walker had greater experience than the white selectee for a clerical position, Kevin St. Louis, the selectee was more qualified because he possessed a college degree. (R.E.-899-7). Four pages later in his order, the district court found that even though Plaintiff Stewart had the college degree lacked by the white selectees, the white selectees, for three separate positions, were better qualified because they possessed greater relevant experience. (R.E.-899-11-13). All of this he found in the absence of any evidence as to what were qualifications or which qualifications were preferred.

The standard used by the district judge is at war with the principles inherent in carefully crafted circumstantial proof model developed by the Supreme Court in

McDonnell Douglas, Burdine and later cases. The various elements of the model are not arbitrary or mindless constructions. Each element serves a specific function "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 254 n.8, 101 S.Ct. 1089 at 1094 n.8. The plaintiff's prima facie case serves the important function of "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine*, at 101 S.Ct. 1094. After the plaintiff establishes a prima facie case, the burden passes to the defendant to "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason." *Id.* The defendant's articulation serves the important functions

> to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Id., at 101 S.Ct. 1095. The sufficiency of the defendant's articulation is to be judged by the extent to which it fulfills the foregoing functions. *Id.* Where the defendant fails to meet its light burden of explaining the reasons for its actions, however, the

failure of the defendant to articulate denies the plaintiff an opportunity to demonstrate pretext. "[I]f the employer is silent in the face of the presumption [created by plaintiff's prima facie case], the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Id.*, at 101 S.Ct. 1094.

Where a plaintiff proves as a part of his prima facie case that he is "qualified" to hold the position sought, he has met the Supreme Court's requirement of "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine*, at 101 S.Ct. 1094. In this case, all of the Applicants met the published "qualifications" for each position sought. Even in the words of the dicta seized upon by the trial judge, the Applicants may be viewed as equally qualified with other applicants and the white selectees. The district court's requirement, at the prima facie case stage, of proof of the specific relative qualifications of the plaintiff and the selectee is completely foreign to the purposes of the circumstantial proof model.

Requiring proof of relative qualification as a part of the prima facie case also violates binding precedent of this Circuit.[13] In *Crawford v. Western Electric Co., Inc.*, 614 F.2d 1300 (5th Cir. 1980), this Court construed the Supreme Court's description of the prima facie case in the seminal opinion in *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1977), virtually identically to Justice Kennedy's much later description in *Patterson, supra.* The McDonnell Douglas Court set out four elements required to make a prima facie case: (1) that the plaintiff belongs to a racial minority; (2) that he applied for and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected; and, (4) "that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." In *Crawford*, the Court construed the qualifications aspect of the fourth element to be

---

[13] In *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981), this Court adopted as binding precedent all decisions of the former Fifth Circuit which preceded the creation of the Eleventh Circuit.

nugatory, and held the standard to be that the employer continued to seek applicants or "filled the positions with whites." *Id.*, 614 F.2d at 1315.

Ironically, one of the two 11th Circuit cases cited by the district court as supporting its formulation of the prima facie case, *Carter v. City of Miami*, *supra* actually supports the position of the Applicants. In *Carter*, the Court held an ADEA plaintiff must prove (1) membership in the protected class, (2) that the plaintiff was qualified for the job, (3) an adverse employment action, e.g. failure to hire, and (4) that the job went to a person outside the protected class. *Id.*, 870 F.2d at 582. The appellate panel makes no reference to a requirement that the plaintiff prove the persons selected were equally or less qualified than he. The Court cited as authority for its formulation *Castle v. Sangamo Weston*, 837 F.2d 1550, 1558 (11th Cir. 1988); *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1442 (11th Cir.), *cert. denied* 106 S.Ct. 525 (1985); and, *Pace v. Southern Ry. Systems*, 701 F.2d 1383, 1386 (11th Cir.), *cert. denied* 104 S.Ct. 549 (1983).

The Applicants in this case meet all of the *Carter* requirements for proof of a prima facie case.

The first time the "equal or lesser qualifications" language construed by the district judge appeared as a part of the prima facie case in this Circuit was in *Perryman v. Johnson Products, Inc.*, 698 F.2d 1138, 1142 n. 7 (11th Cir. 1983). The language was dicta, since the requirements of the prima facie case was not even at issue. The district court was reversed because this Court held that the defendant had adequately carried its burden of articulation.[14]

Perryman cited two cases for its formulation of the fourth wing of the prima facie case, one which was binding precedent on the Court. Neither stands for the proposition for which it was cited. The Former Fifth Circuit authority cited was *Crawford v. Western Electric Co., Inc.*, 614 F.2d at 1315. The standard for the final element of the prima facie case in *Crawford* was "that after their rejection Western

---

[14] The language seems to have been inappropriately borrowed from one of several formulations of the prima facie case for discriminatory discharges, *Lee v. Russell County Board of Education*, 684 F.2d 769, 773 (11th Cir. 1983), in which the plaintiff is generally being compared to other occupants of the same job title.

Electric either continued to attempt to fill the positions or in fact filled the positions with whites." *Id.*[15]

The language was repeated as dicta in *Wu v. Thomas*, 847 F.2d 1480 (11th Cir. 1988). It did not affect the disposition of the case because this Court had already affirmed that the plaintiff was not qualified under the second wing of the prima facie case test. The language appeared again in *Hill v. Seaboard Coast Line R.R.*, 885 F.2d 804 (11th Cir. 1989), the second case cited by the district judge here. Ironically, the use of the incantation in *Hill* was to lower the prima facie case requirement for plaintiff Coleman. The district court had held that he must show that less qualified white candidate was chosen for foreman. The language was

---

[15] *Perryman* also cited *Bundy v. Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981), as one of the two cases upon which such a rule was based. *Bundy* does not support the rule for which it was cited. It set a materially lighter and more appropriate plaintiff's burden — "other employees with similar qualifications" were promoted.

unnecessary dicta, however, since the *Hill* panel found the case could be disposed of on other grounds. *Id.*, 885 F.2d at 810.[16]

An accurate description of the elements of a plaintiff's prima facie case is set forth by Justice Kennedy in *Patterson*, and is likewise found in the binding precedent of this Circuit in such cases as *Crawford, supra* and *Carter, supra.* Because it is undisputed that the Applicants have established that they are black persons, that they have applied for specific positions for which they are qualified, and that white persons were selected to fill the positions sought, this Court should

---

[16] The Hill panel appeared to construe the term "equal qualifications" as equivalent to "qualified" for the position. The panel appeared to find no inconsistency between the plaintiff proving he had equal qualifications and the selectee being the best qualified. "[A]lthough Coleman might prevail in establishing a prima facie case [by proving he had equal qualifications], he could not overcome a legitimate business justification — i.e. choosing the most qualified candidates. . . ." *Id.*

reverse the district court and direct entry of judgment in favor of the Applicants on the claims before the district judge.[17]

POINT 2

THE DISTRICT COURT VIOLATED THIS COURT'S MANDATE, AND WAS CLEARLY ERRONEOUS, IN FINDING APPLICANT'S DID NOT ESTABLISH A PRIMA FACIE CASE

In holding the Applicants had not established prima facie cases on their claims, the district court ignored the holdings of this Court that at trial there was no evidence produced "as to what the [Employer] considered as a 'qualification'", and that "[i]n not a single case, did the [Employer] offer proof by any person who made

---

[17] This Court determined in the prior appeal that the Employer did not meet its articulation burden. "[I]f the employer is silent in the face of the presumption [created by plaintiff's prima facie case], the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Burdine*, at 101 S.Ct. 1094.

the employment decision . . . stating that the decision was made on the basis of what he or she thought demonstrated the best qualified person." *IMPACT*, 893 F.2d at 1192, 1194. Indeed, the only evidence of what qualifications were valued by the Employer were the published requirements for each job, which this Court held, and the district court conceded, were met by the Applicants on every claim. "Moreover, the proof adequately showed that each of the applicants was qualified for the position sought." *Id.*, 893 F.2d 1191-92. By avoiding these finding by this Court, the district judge violated the law of this case.

Further proceedings on a remand are constrained by two complimentary doctrines, the "mandate rule" and the doctrine of "law of the case." *Litman v. Massachusetts Mutual Life Insurance Co.*, 825 F.2d 1506 (11th Cir. 1987) (*en banc*). The mandate rule requires a court on remand to follow the explicit and implicit directions set forth by the appellate court in its mandate, judgment and opinion. "[A] district court is not free to deviate from the appellate court's mandate." *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 n. 2 (11th Cir. 1984); *Baumer v. United States*, 685 F.2d 1318, 1321 (11th Cir. 1982). The lower court may take up for the first time only those issues which are not ""within [the

mandate's] compass."' *Quern v. Jordan*, 440 U.S. 332, 348 n. 18, 99 S.Ct. 1139, 1148 n. 18 (1979) (quoting *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168, 59 S.Ct. 777, 781 (1939).

Where the appellate court has explicitly decided facts or issues, the trial court on remand cannot circumvent the mandate by redeciding the same issues or by approaching the same issues under new theories or factual allegations. *Baumer*, 685 F.2d at 1321 (district court could not take evidence of fair market value of option where appellate court remanded for determination of option's fair market value when exercised); *EEOC v. International Longshoreman's Association*, 623 F.2d 1054, 1058 (5th Cir. 1980) (district court could not hold hearing on the equity of merging one of four locals of a union where appellate court directed that all four locals be merged), *cert. denied*, 451 U.S. 917, 101 S.Ct. 1997 (1981).

Under the doctrine of *law of the case*, "both the district court and the court of appeals generally are bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case." *United States v. Robinson*, 690 F.2d 869, 872 (11th Cir. 1982); *Dorsey v. Continental Casualty Co.*, 730 F.2d 675, 678 (11th Cir. 1984). Because this Court had already determined that the

Applicants were qualified for the jobs at issue, and there was no other evidence of which qualifications had particular value for any given job, the district court's determination of comparative qualifications violated the law of this case.

In addition, the district judge was clearly erroneous in finding comparative qualification in the absence of evidence. This Court held "[q]ualifications for selection of an employee can depend upon seniority, length of service in the same position, personal characteristics, general education, technical training, experience in comparable work or any combination of them." *Id.*, 893 F.2d at 1194. This Court also noted that Applicants were clearly superior on some claims with respect to some of these "qualifications." *Id.*, 893 F.2d at 1192. The district court was clearly erroneous, however, in determining the value of Applicants' comparative qualifications in the absence of any evidence as to which characteristics were valued for a given job.

POINT 3

THE DISTRICT COURT ERRED IN REFUSING TO ALLOW PLAINTIFFS TO PURSUE THEIR CHALLENGE TO THE DISPARATE IMPACT OF EMPLOYMENT TESTS

The district court did not permit Applicants to engage in discovery of facts relating to employment examinations, and, in fact, held the issue was not within the scope of the litigation. He did not permit the issue to proceed to the original trial. *IMPACT*, 893 F.2d 1191, 1196. This Court held the district judge erred in eliminating the examination claims from the case, and remanded.

On remand, the district judge reasoned that since he had dismissed all disparate impact claims at the conclusion of Applicants' case in chief at the first trial and this Court did not disturb that action, that Applicants could not now litigate their examination claims under a disparate impact theory. This reasoning is legally flawed. At the conclusion of Applicants' case in chief at the original trial, the district court could only have ruled upon the claims which were before him at that time. The Applicants' examination claims were not before him, since

the judge did not allow them to proceed to trial. The judge's ruling on other disparate impact claims does not affect the Applicants' license to litigate the examination claims under a disparate impact theory. The district court erred.

POINT 4

THE DISTRICT COURT ERRED IN FAILING TO RECERTIFY THE CLASS

This case was certified as a class action on November 7, 1980. (R3-148). The class was decertified on September 17, 1984. (R14-553). On appeal this Court correctly characterized the district court's decertification as based on a conclusion that the "class lacked adequate financing to carry the action to a conclusion." *IMPACT*, 893 F.2d at 1195 (11th Cir. 1990). In reversing the decision below, this Court stated that the trial court finding was "based on an estimate of costs which the appellants stated could be obviated if the court required the defendant to furnish additional information." *Id.* at 1195. This Court noted that the case was "in effect was still tried in many respects as if it were a class action." *Id.* at 1196. This Court concluded that the trial court would "be in a position to give further consideration to its decision to deny certification when

moved for by the appellants. This issue will remain open for consideration by the trial court on remand." *Id.* at 1196.

On September 11, 1990, the Applicants again moved the trial court to certify the class. (R21-804). Because lack of adequate financing had been the basis for decertification, the Applicants filed an affidavit pledging to hold in reserve $100,000 for the prosecution of the case. (R-22-845).

An evidentiary hearing was held on the class certification motion on January 2, 1992. (R56). Dr. David Rasmussen testified in person as an expert labor economist for the Applicants. The Defendant was given permission to file an affidavit from its expert Dr. Joan Haworth within 15 days of the hearing. (R22-851). The Applicants filed an unopposed motion for leave to file a responsive affidavit, in the nature of rebuttal Dr. Rasmussen would have given at hearing had Dr. Haworth testified live. (R22-856). The motion was denied on March 24, 1992. (R22-861).

A. THE COURT ERRED IN DETERMINING THE MERITS OF THE INDIVIDUAL CLAIMS PRIOR TO CLASS CERTIFICATION

The court may not try the merits of the claims of the representative parties prior to class certification. The Supreme Court clearly prohibited "preliminary inquiry into" (much less determination of) the merits the claims of the representatives or the putative class during the class certification process in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974), stating:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. . . . This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether the action may be maintained as such "[a]s soon as practicable after the commencement of [the] action . . . ." In short we agree with Judge Wisdom's conclusion in *Miller v. Mackey International*, 452 F.2d 424 (CA5 1971), where the court rejected a preliminary inquiry into the merits of a proposed class action:
>
> > In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the

> merits, but rather whether the requirements of Rule 23 are met. *Id.* at 427.

Nothing has changed the law in the intervening years.

In *Huff v. N.D. Cass, Inc.,* 485 F.2d 710 (5th Cir. 1973)(*en banc*), before determination of maintainability of the class, the trial court conducted an evidentiary hearing on the individual claims of the plaintiff Brisco Huff, which was effectively a trial, and held that he had not suffered discrimination. Having suffered no discrimination, the court held he could not be a class representative; thus, no class was certified. The former Fifth Circuit sitting *en banc* reversed.

This Court first focused on the importance of private law suits in the overall enforcement scheme of Title VII, quoting with approval its language in *Hutching v. United States Indus., Inc.,* 428 F.2d 303, 310, 311 (5th Cir. 1970) "that the court trying a Title VII suit bears a special responsibility in the public interest to resolve the employment dispute by determining the facts regardless of the individual plaintiff's position. . . ." and that the trial judge in a Title VII case bears a special responsibility in the public interest to resolve the employment dispute, for once the judicial machinery has been set in train, the proceeding takes on a public

character in which remedies are devised to vindicate the policies of the Act, not merely to afford private relief to the employee. *Id.*, 485 F.2d at 713 (1973).[18] This Court continued that "racial discrimination, which is by definition class discrimination, is a particularly virulent form of employment discrimination because it is generally both subtle and pervasive." *Id.* at 713-714 (footnotes omitted). The Court stressed the "individual's role as private attorney general taking on the mantle of the sovereign." *Id.* at 714 (footnote omitted).

The Court then recognized that it was inappropriate for trial courts to "find out too much" about a plaintiff's claim before class certification. *Id.* at 714. The court held the "ultimate merit of [the plaintiff's] claim was prematurely tried. . . ." *Id.* at 715.

This rule has been repeatedly applied by this Court. *Shores v. Sklar*, 844 F.2d 1485, 1494 (11th Cir. 1988)(assessment of likelihood of success on the merits an improper basis for denial of class certification); *accord, Kirkpatrick v.*

---

[18]This language was again cited with approval in this Court's decision in *Perryman v. Johnson Products, Inc.*, 698 F.2d 1138, 1146 (11th Cir. 1983).

J.C. Bradford and Co., 827 F.2d 718 (11th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); *Ross v. Bank South, N.A.*, 837 F.2d 980 (11th Cir. 1988).

In *Nance v. Union Carbide Corp.*, 540 F.2d 718, 723 n.9 (4th Cir. 1976), vacated on other gr'ds and remanded, 431 U.S. 952 (1977), the court stated:

> The language of Rule 23(c) makes it quite clear that the determination of class action status is to be made "before the decision on the merits." See Peritz v. Liberty Loan Corporation (7th Cir. 1975).... [other citations omitted].

In *Stastny v. Southern Bell T & T*, 628 F.2d 267, 275 (4th Cir. 1980) the court stated that "a deliberate deferral of the [class] determination until full trial on the merits . . . is fraught with serious problems of judicial economy, and of fairness to both sides." This language was cited approvingly in *Paxton v. Union National Bank*, 688 F.2d 552, 559 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983).

In *Stastny*, 628 F.2d at 275, the court cited to the language from *Eisen* and stated: "[t]he solution of conducting a generalized preliminary inquiry — a mini-trial — into the merits of the class claims to determine the propriety of class action treatment has been expressly rejected." The leading treatise on class actions states

unequivocally in the first sentence of the section entitled "Representative Need Not Show Probability of Success on Merits of Individual Claim or Class Claim":

> It is also settled that the named plaintiff need not demonstrate a probability of success on the merits or show in advance that he or she suffered damages in order to serve as the class representative.

1 Newberg on Class Actions § 3.29 at 3-149 (3d Ed 1992).

The district court did not follow the command of the Supreme Court. It had a full record on the class certification as of March, 1992. It sat mute for more than two and a half years, and determined maintainability only after deciding the merits.

B. THE COURT VIOLATED THE PLAINTIFFS' RIGHT UNDER RULE 23 TO HAVE THE ISSUE OF CLASS CERTIFICATION DETERMINED AS SOON "AS SOON AS PRACTICABLE"

1. The Basic Rule:

Rule 23 (c)(1) requires that:

> As soon as is practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.

(emphasis added). The Seventh Circuit recently reemphasized the imperative nature of this proviso.

> "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Fed.R.Civ.P. 23(c)(1). This case was active on the district court's docket for three years and four months, but despite two motions for class certification and full briefing by the parties the court never decided whether it could be maintained as a class action. The district court did not give a reason for this inaction, and we do not perceive one. Prompt decision one way or the other is imperative not only so that the parties know whose interests are at issue but also so that representative plaintiffs with live claims may be substituted. For a properly certified class action survives the mootness of the original representative's claims while an individual action must be dismissed in identical circumstances. Compare *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), with *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975).

Nelson v. Murphy, 44 F.3d 479, 500 (7th Cir. 1995)[19]. The delay by the District Court after remand by this Court was longer than that in *Nelson.*

2. The Added Command of Title VII

To the normal command of Rule 23 is added the command of Title VII that the judge is "to assign the case for hearing at the earliest practicable date and to cause the case to in every way be expedited." 42 U.S.C. § 2000e-5(f)(5). This was honored in the breach.

3. Application of the Law to These Facts

The violation of these rules is much more compelling in the instant case than any of those cited above.

This case is 17 years old.

---

[19]In *Stastny v. Southern Bell T & T*, 628 F.2d 267, 277 (4th Cir. 1980), the court stated that in evaluating a motion for class certification the inquiry requires development of an adequate record and noted that it should be "the sooner the better."

It was certified as a class action with these Applicants as representative parties for almost four years.

It was decertified for a single reason.

That reason was deemed at least questionable by this Court.

On remand the Plaintiffs moved expeditiously. They cured the defects identified by the trial judge. They demonstrate adequate financial ability and retained a new expert, Dr. David Rasmussen, a labor economist.[20]

From the hearing on the motion, the district court then took more than 41 months to rule on the question of class certification. This would have been completely inappropriate if the matter was being heard for the first time. Considering the matter was on remand, the delay is inexplicable.

---

[20]In its first opinion in this case, the district court held that the Applicants' expert, Dr. Dyson, "testified about matters beyond his expertise." (R17-664-2). Labor economist is the same discipline as the Employer's expert in the first trial, and the discipline accepted by the trial judge. (R17-664-3).

C. EVEN IF THE DISTRICT COURT HAD NOT VIOLATED RULE 23 AS TO TIMELINESS AND CONSIDERATION OF THE MERITS OF THE UNDERLYING CLAIMS, ITS RULING ON CLASS CERTIFICATION WAS STILL ERRONEOUS

The district court's order would be erroneous even if the court had not violated Rule 23 in considering the merits of the representative parties and in delaying the decision. This error flows from the Supreme Court's tolling decisions.

In *Armour v. City of Anniston*, 597 F.2d 46 (5th Cir. 1979), the former Fifth Circuit affirmed both the rejection of the plaintiff's claim and the rejection of class status. The plaintiff had sought class certification prior to the adjudication and it had been denied. She never was a representative of a class (unlike the instant Plaintiffs who were certified as class representatives). The court held that Armour "lacks the nexus necessary to represent the class." *Id.* at 49. The plaintiff appealed and the Supreme Court vacated the Fifth Circuit's opinion, 445 U.S. 940 (1980) in light of *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980) and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). On remand, the

Court of Appeals entered a one paragraph order which remanded the case to the district court to ascertain whether there was still a live controversy between the parties and "if so, whether or not, Mrs. Armour is a proper representative." 654 F.2d 382 (5th Cir. 1980). There was an identical holding in *Satterwhite v. City of Greenville*, 634 F.2d 231 (5th Cir. 1981). If there were a categorical bar on an unsuccessful plaintiff representing a class, such language could not have been used. The former Fifth Circuit necessarily held that the rule of law in the waking of the Supreme Court tolling opinions was that a plaintiff did not necessarily lose her representational capacity merely because she had lost her claim, even where the case had never been certified.

On remand no one came forward and there was no showing by Mrs. Armour of desire to represent a class. The district court failed to certify a class and the decision was affirmed. *Id.*, 654 F.2d 382 (5th Cir. 1981). What is notable about that opinion is that the Court of Appeals explained in greater detail that the pair of Supreme Court cases which had given rise to the vacation and remand had indeed changed what appeared to be the old rule that a representative of a class never certified who lost his own claim might indeed be a proper representative.

> Our principal task is to determine whether the District Court properly interpreted and followed the Supreme Court's decision in *Geraghty*, *supra*, and *Roper*, *supra*. In *Geraghty*, the Court held that the named representative of an uncertified class could continue to appeal the issue of class certification even though the named representative's individual claim had been rendered moot, so long as the controversy continues to be "live" and the named representative has a legally cognizable interest or personal stake in the litigation. *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). In that case, the Court had no difficulty concluding that the controversy was still "live", because other members of the proposed class sought to intervene in the original action once it became clear that the named representative's claim had become moot. On the question of the class representative's "personal stake" in the outcome, the Court held that the dismissal of his individual claim did not divest him of his personal stake in seeing that the rights of the proposed class were adequately represented. This was particularly true in *Geraghty*, where the Court found that the respondent has vigorously advocated his right to have a class certified.

Armour v. City of Anniston, 654 F.2d 382, 383-384 (5th Cir. 1981). It is clear after these cases that a more flexible approach is to be taken. The district court should have certified the class.

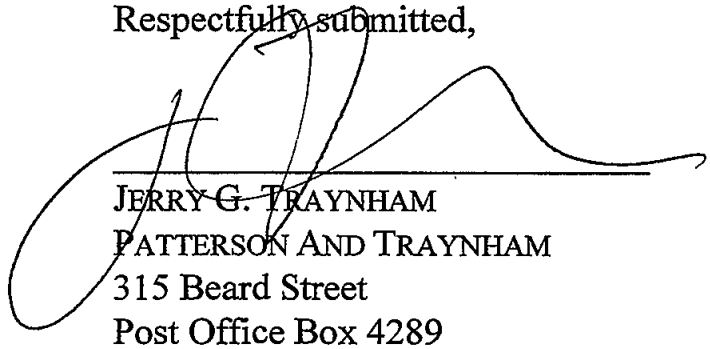
CONCLUSION

For the foregoing reasons, the Court is requested to reverse the district court's order, and remand with instructions to enter judgment on the Applicants' individual disparate treatment claims, to certify the class, and to permit the Applicants to litigate their employment examination claims under a disparate impact theory.

If this case is remanded, the Court should exercise its supervisory powers under 28 USC §2106 to reassign this case to a different district judge. *See, United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989). The Applicants admit they have no "right" to reassignment. However, this case has been pending 17 years. It has taken the Applicants 6 years from this Court's last remand to get the case back before this Court. This feat was achieved only with the added spur of petitions to this Court for extraordinary writs. The errors in the district court's orders are believed to be sufficiently apparent that they would not have been committed by any reasonable judge reasonably intent upon an impartial adjudication of this controversy. Reassignment is most considerably likely to

achieve great judicial economy both below and ultimately in this Court. Failure to reassign this case is, lamentably, a judgment to cast it into the 21st century.

Respectfully submitted,



JERRY G. TRAYNHAM
PATTERSON AND TRAYNHAM
315 Beard Street
Post Office Box 4289
Tallahassee, Florida 32315
(904) 224-9181

KENT SPRIGGS
SPRIGGS & JOHNSON
324 West College Avenue
Tallahassee, Florida 32301
(904) 224-8701

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by pre-paid United States Mail to the following counsel of record this 6th day of February, 1996.

Richard Dunn, Esquire
Mitchell E. Widom, Esquire
One Biscayne Tower, Suite 2400
Two South Biscayne Blvd.
Miami, Florida 33131

JERRY G. TRAYNHAM