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UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

DIANN WALKER, ETC., ET AL.,

Appellants,

vs.

SANDRA B. MORTHAM, AS SECRETARY OF STATE OF THE STATE OF FLORIDA, ET AL.,

Appellees.

CASE NO. 95-2898

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
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APPELLEES' ANSWER BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

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CERTIFICATE OF INTERESTED PERSONS

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

Sherril M. Colombo, Esq.

Delores Colston

Richard M. Dunn, Esq.

Rosa Henderson

Linda Issac

Louvenia Jones

Barbara King

Maurice Paul, Chief U.S. District Judge

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument may assist both the parties and the Court and is hereby requested on those issues raised in the parties' Brief.

CERTIFICATE OF TYPE SIZE AND STYLE

This Answer Brief contains 12 point Courier type pursuant to Eleventh Circuit Rule 32-4.

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TABLE OF AUTHORITIES

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Other Authorities

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STATEMENT OF JURISDICTION

This appeal is from a Final Judgment of the United States District Court for the Northern District of Florida dated May 19, 1995 entered on May 22, 1995. The Final Judgment is a final order and this Court has jurisdiction under 28 U.S.C. § 1291.

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ISSUES PRESENTED FOR REVIEW

1. Whether the District Court applied the prevailing law in this Circuit to its factual findings in concluding that Appellants failed to prove a prima facie case.

2. Whether, assuming the Eleventh Circuit prior to remand had not decided that Appellants proved a prima facie case, this Court should review defendants' production at trial and enter judgment for the Appellees.

3. Whether the District Court violated the Eleventh Circuit's mandate or law of the case on remand in determining that none of the Appellants met their burden of production to establish a prima facie case.

4. Whether the District Court abused its discretion in holding that discovery of the employment examinations is a moot issue.

5. Whether the District Court abused its discretion in refusing to recertify the class action, which was previously decertified by the District Court.

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STATEMENT OF THE CASE

I. Procedural History

This litigation was commenced in the Northern District of Florida by ten plaintiffs and a nonprofit corporation, Increased Minority Participation by Affirmative Change Today of Northwest Florida, Inc. ("IMPACT"), against George Firestone as Secretary of State and the State of Florida ("Appellees"), for alleged racial discrimination in hiring and promotions in violation of 42 U.S.C. §§ 1981, 1983. (R1-1). Appellants[1] sought injunctive and monetary relief and sought to maintain a class action on behalf of all past, present and potential black employees. (R1-1-1).

On November 7, 1980, the District Judge certified the litigation as a class action. (R3-148). The District Court then decertified the class approximately five years later, on September 17, 1984, because the record disclosed the representative did not appear financially able to continue class representation. (R14-553). On December 17, 1985, Appellants moved to recertify. (R15-593). This request was denied on January 22, 1986. (R15-603).

The District Court denied Appellants' motion, filed just prior to trial, to require discovery of examinations, tests and test scores of Appellant applicants and those of the successful employees. (R16-636).

---

[1] When the term "Appellants" is used, it refers to all plaintiffs that claimed discrimination in employment decisions, other than Gracie Holton (whose claim is no longer an issue) and the claims by IMPACT, which was dismissed by the District Court.

Trial commenced on April 1, 1986. At the close of Appellants' case, the District Court dismissed all disparate impact claims. (RE40-5). The court did not rule on Appellees' motion for involuntary dismissal for plaintiffs' failure to prove a prima facie case. (R40-7). On August 11, 1986 the District Court issued its findings of fact and conclusions of law and a final judgment in favor of Appellees. ("8/11/86 Order"; R17-664 RE Tab A).

Appellants appealed to this Court and this Court reversed the trial court order in part and remanded to the District Court for further determinations. (R21-799). As a result of the remand, Appellees unsuccessfully sought a petition for a writ of certiorari on October 1, 1990 by the Supreme Court. 498 U.S. 847 (1990). Following remand to the District Court, Appellants moved for entry of judgment in their favor. (R22-875). The District Judge denied the motion. (R22-879). Discovery took place on the class issue and a class certification hearing was held. (R56-850). The District Court entered judgment in favor of Appellants on May 19, 1995. ("5/19/95 Order"; R22-899; RE Tab D).

II. Statement of Facts

At trial, Appellants did not prove their case. While deciding not to address whether Appellants proved a prima facie case in its 1986 Order, the District Court found that Appellants had a "general lack of information concerning what job was applied for, when, and who received it." (R17-664-4).

Furthermore, now that St. Mary's Honor Center v. Hicks, 509 U.S. ___, 113 S. Ct. 2742 (1993) is the law, it is clear that based

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upon the fully developed record, Appellees' articulation was sufficient as a matter of fact and law. Following denial of Appellees' motion for involuntary dismissal Appellees:

> [P]ut on six days of testimony by supervisors of plaintiffs and by officials of the Florida Department of State. Defendants also introduced into evidence plaintiffs' personnel files, including work evaluations and job applications. Furthermore, defendants introduced into evidence the files of the successful applicants for each of the positions for which plaintiffs allegedly applied. (footnote omitted) Through direct testimony, defense witnesses explained the contents of these files and traced the qualifications of each applicant. (footnote omitted).
>
> Considering defendants' evidence, no mystery cloaked defendants' position about why plaintiffs were not promoted. Thomas Gardner, the Assistant Secretary of State in charge of administrative matters since 1981, and several other supervisors testified that the practice of the Florida Department of State was to hire and to promote the most qualified applicants. Such testimony alone might be insufficient to meet defendants' burden of producing evidence of a legitimate nondiscriminatory reason for the employment actions. <u>Defendants went substantially further, however, by producing evidence of applicant qualifications</u>.
>
> Defendants introduced evidence of the successful applicants' qualifications and produced records and other testimony which cast clouds on the qualifications of plaintiffs. Defendants presented evidence of facts that bore on the decisions to reject plaintiffs for promotion: dismissal for physically striking a supervisor; failure to take a qualifying exam at the suggestion of the supervisor; a history of conditional and unsatisfactory evaluations by both black and white supervisors; a poor attendance record; rudeness to customers; excessive errors; disruptive and loud behavior; failure to listen to criticism; lack of motivation and initiative; attendance of an unaccredited

> college; and misrepresentation of educational qualifications on an employment application.

IMPACT, 893 F.2d at 1199. (Edmondson, J. concurring and dissenting in part) (emphasis added).

In the 1986 Order by the District Court, it presumed, without deciding, that Appellants established a prima facie case. (8/11/86 Order at p. 7; R17-664-7; RE Tab A). The District Court then analyzed the Appellants' claims under the McDonnell Douglas Corp. v. Greene, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) analysis and concluded Appellees' presentation of its case - setting forth the reason why the Appellants were not chosen for the particular position - was sufficient for its burden of production. (8/11/96 Order; R17-664-6; RE Tab A). Appellees presented testimony that the actual selectees were better qualified and supplied applications and personnel cards in support of their position that the person thought to be the most highly qualified was hired. (Id.) With regard to other positions, Appellees offered testimony to show why the particular Appellant was considered less qualified. (Id.) Based upon Appellees' submissions, the District Court originally found that the Appellees had "more than sufficiently sustained its light burden of articulation with regard to each position" sought. (8/11/86 Order at p. 7; R17-664-7;RE Tab A).

The District Court, in its 1986 Order in determining whether Appellants met their burden of persuasion to show that Appellees articulated legitimate, non-discriminatory reasons are a pretext for discrimination, found that Appellants, failed to show pretext

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or anecdotal evidence that Appellees were motivated by an improper racial consideration. (R17-664-8.) The District Court analyzed each claim and concluded, in light of Appellees' legitimate, non-discriminatory reason, that Appellants failed to sustain their burden of establishing that the selectee had qualifications equal to or less than those of the Appellant or other evidence demonstrating pretext. (Id. at p. 15).

This Court remanded the case to the District Court to determine "whether a prima facie case was made out by any of the claimants on any of their claims." IMPACT v. Firestone, 893 F.2d 1189, 1194-95 (11th Cir.) ("IMPACT"), cert. denied, 498 U.S. 847 (1990). This Court concluded that the Appellees did not sufficiently meet their burden of production in that their evidence was not sufficiently specific. Id. at 1194. In essence, this Court stated that Appellees did not offer sufficient evidence explaining the decisions and that introducing personnel records that may have indicated the employer based its decision on one or more of the possible valid grounds, did not suffice. Id. However, this Court did not decide whether a prima facie case was met, nor did it determine whether Appellants established pretext for intentional discrimination. See id. at 1189.

Also, this Court upheld the District Court's decision to reject the opinion of Appellants' statistical expert, Dr. Dyson. Id. at 1195. As for the class action, this Court held that "now that the trial court has had the full opportunity to observe the handling of the case, which, in effect was still tried in many respects as if it were a class action, it will be in a position to give further consideration to its decision to deny recertification when moved for by the Appellants. This issue will remain open for consideration by the trial court on remand." Id. at 1196. This Court also held that Appellants had standing to raise the employment examination issue and the District Court erred in denying discovery on the employment examination issue for lack of standing. Id.

Following remand, a status conference was held by the District Court on August 31, 1990 (R21-803). Briefs were filed by the parties on October 23, 1990 and January 7, 1991. (R21-814; R21-823). On September 11, 1990, Appellants moved to recertify the class claiming they were financially able to support the class. (R21-804). The District Court rejected Appellants' claim that it should automatically certify the class without further inquiry and, instead, opened discovery relating to the class certification issue. (R21-829). A class certification hearing was held on January 2, 1992. (R56-850). On September 28, 1994, Appellants moved for entry of judgment on their individual disparate treatment claims claiming that either the record evidence demonstrates that each of the plaintiffs established a prima facie case or the Eleventh Circuit had already made that determination. (R22-875). On December 21, 1994, the District Court entered an order denying the motion for entry of judgment. ("12/21/94 Order"; R22-879;RE Tab B). In the 12/21/94 Order, the District Court held that the Eleventh Circuit did not make a determination that each of the plaintiffs made out a _prima facie_ case and that even if they established a _prima facie_ case, they failed to produce evidence of intentional discrimination. (RE Tab B at p. 3). In fact, the District Court realized that "[i]f the Eleventh Circuit had made that determination [that each of the plaintiffs made out a prima facie case of racial discrimination], the Eleventh Circuit certainly would not have remanded the case to this Court with instruction to make such determination." (RE Tab B at p. 8) The District Court also held that "the disparate impact claims are no longer viable and will not be considered in future proceedings" since the Eleventh Circuit did not overturn the dismissal of the disparate impact claims. (_Id_. at 13-14.) Appellants never appealed this order. The District Court ordered that discovery would be permitted on the issue of employment examinations but Appellants' attorneys did not engage in discovery. (_Id_. at p. 14.) Appellants' petitions for a Writ of Mandamus and a Writ of Prohibition were denied. (R22-884). Appellants moved for a rehearing _en banc_ which was denied by this Court on March 8, 1995. (R22-894).

The District Court entered its final decision on May 19, 1995 holding that none of the Appellants established a _prima facie_ case. ("5/19/95 Order"; R22-899; RE Tab D at p. 31). Regarding class recertification, the District Court held that since none of the Appellants established a _prima facie_ case, with respect to their claims, there was no longer a case or controversy, and, therefore Appellants had no standing to seek class certification. (5/19/95

Order; RE Tab D at p. 28). Since the disparate impact claims were dismissed during trial and not disturbed by the Eleventh Circuit, and based upon Appellants' representation that they had no use for the employment examination evidence with respect to their disparate treatment claims, except as they applied to the class action request, the District Court held the employment examinations were no longer an issue. (5/19/95 Order; RE Tab D at p. 30). Appellants filed their notice of appeal from the May 22, 1995 Order on July 10, 1995 and filed their brief on February 6, 1996. (R22-906).

III. Scope of Review

The determination whether the District Court applied an incorrect legal standard to the Appellants' claim that a prima facie case was established is a conclusion of law subject to plenary review. Waldrop v. Southern Co. Services, Inc., 24 F.3d 152, 155 (11th Cir. 1994). Whether the District Court violated the "law of the case" doctrine when it concluded that Appellants failed to establish a prima facie case, is also subject to plenary review. Id.

The District Court's factual finding regarding Appellants' failure to establish a prima facie case is reviewed for clear error. United States v. Crosby, 59 F.3d 1133, 1136 (11th Cir. 1995).

The determination of whether the District Court erred in reconsidering Appellants' motion to require discovery of the examinations and test scores is a matter of discovery and is therefore committed to the discretion of the District Court and is reviewed under an abuse of discretion standard. Patterson v. United States Postal Serv., 901 F.2d 927 (11th Cir. 1990).

The District Court's determination not to recertify the class is a matter within the wide discretion of the District Court and is reviewed under an abuse of discretion standard. Griffin v. Karlin, 755 F.2d 1516, 1531 (11th Cir. 1985); Central Weslan College v. W.R. Grace & Co., 6 F.3d 177, 185 (4th Cir. 1993).

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SUMMARY OF THE ARGUMENT

Appellants urge this Court to find that the District Judge used the wrong legal standard in deciding that none of the Appellants proved a prima facie case. They ask the Court to remand the case, but change the Judge pursuant to 28 U.S.C. § 2106. However, none of their arguments are meritorious since the trial court applied the proper standard. Using the recent Eleventh Circuit precedent and applicable U.S. Supreme Court cases, the trial court properly required Appellants to prove as a prima facie requirement that a person not a member of the protected class with "equal or lesser qualifications" got the job. Should the Court affirm the trial court order, the case is over.

Alternatively, given the refinement provided by the U.S. Supreme Court in St. Mary's Honor Center v. Hicks concerning defendant's burden of production, Appellees urge the Court to conclude that they met their burden of production and that Appellants failed to prove pretext or intentional discrimination. The St. Mary's Court established that even if Appellees articulated reasons (established over six days of testimony and documentary presentation) that were not believable, the burden to prove intentional discrimination remained with Appellants.

Other issues raised by Appellants, including the denial of a motion for class recertification and discovery on employment examinations, were properly ruled on by the Court.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE WELL-ESTABLISHED LAW IN THIS CIRCUIT ON REMAND WHEN IT CONCLUDED THAT APPELLANTS FAILED TO ESTABLISH A PRIMA FACIE CASE

The District Court applied well-established law in deciding whether any of the Appellants established a prima facie case on their discrimination claims. Appellants' argument to the contrary is a misreading of the this Circuit's case law regarding the requisite elements to establish a prima facie case.

This Court remanded this case "to the district court for it to determine whether a prima facie case was made out by any of the claimants on any of their claims." IMPACT v. Firestone, 893 F.2d 1189, 1194-95 (11th Cir.) (footnote omitted), cert. denied, 498 U.S. 847 (1990). That is exactly what the District Court did in its May 19, 1995 Order ("5/19/95 Order"; R22-899; RE Tab D). The Appellants are correct that the District Court, on remand, held that none of the Appellants submitted the necessary proof to establish a prima facie case; however, they are incorrect in surmising that the District Court used the identical reasoning that the Eleventh Circuit rejected in remanding this case.

Appellants' claim that the District Court applied an incorrect standard from that of Supreme Court precedent is a misreading, of not only the law in this Circuit, but Supreme Court precedent itself. See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363 (1989); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981); McDonnell Douglas

Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). Appellants contend that both Burdine and Patterson stand for the proposition that to establish a prima facie case they are not required to prove they have equal or better qualifications. However, Appellants misread the District Court's Order that states that to establish a prima facie case, Appellants 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. (5/19/95 Order at p. 4; RE Tab D) Specifically, Appellants must each prove the following:

> 1. that he is a member of a protected class;
>
> 2. that the adverse action was taken against him, e.g., discharge, demotion, failure to hire, or failure to promote;
>
> 3. that a person not a member of the protected class with equal or lesser qualifications received the position; and
>
> 4. that he applied for and was qualified for the position.

Id. (citing Roberts v. Houston County Board of Education, 819 F. Supp. 1019, 1025 (M.D. Ala. 1993) (citing Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989)); Hill v. Seaboard Coast Line R.R. Co., 885 F.2d 804, 809-10 (11th Cir. 1989)).

The District Court's recitation of the law in its Order is in accordance with well-established Eleventh Circuit precedent. E.g., Batey v. Stone, 24 F.3d 1330, 1333-4 (11th Cir. 1994); Hill, 885 F.2d at 804; Wu v. Thomas, 847 F.2d 1480, 1483-4 (11th Cir. 1988); Lee v. Russell County Bd. of Educ., 684 F.2d 769, 773 (11th Cir. 1982); see United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-5, 103 S. Ct. 1478 (1983). As articulated in Batey, a failure to promote claim, the following elements establish a prima facie case of discrimination in promotion:

> A plaintiff must prove: (1) she is a member of a protected minority; (2) she was qualified for and applied for the promotion; (3) she was rejected despite those qualifications; and (4) other equally or less qualified employees who were not members of the protected minority were promoted.

24 F.3d at n.11 (emphasis added) (citing Wu, 847 F.2d at 1483). In fact, a majority of Appellants' claims were for failure to promote.[2] Thus, the Appellants are fatally incorrect in their view that the District Court applied the wrong standard on remand.

For instance, this Court in Wu held the record evidence supported the district court's conclusion that appellants failed to prove a prima facie case of discrimination for promotion based upon sex. 847 F.2d at 1484. In reaching this conclusion, the Eleventh Circuit held that:

> To establish a prima facie case of discrimination in promotion, a plaintiff must prove: (1) he or she is a member of a protected minority; (2) was qualified for and applied for the promotion; (3) was rejected despite these qualifications; and (4) other equally or less qualified employees who were not members of the protected minority were promoted. Perryman v. Johnson Products Co., Inc., 698 F.2d 1138, 1142 n.7 (11th Cir. 1983).

Id. at 1483 (emphasis added). Appellants' attempt to distinguish

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[2] The only Appellants not employees were Charles Stewart and Delores Colston (a former employee), and intervenors, Linda Issac and Jacquelyn Ross.

this case by characterizing the prima facie language as dicta is wrong. While the Eleventh Circuit concluded that the lower court had correctly held that the appellant failed to show she was qualified for the position sought, this Court specifically stated that: "Appellant also failed to prove that an equally or less qualified male was promoted during the time of her promotional application." Id. at 1484. This language is not dicta.

Likewise, Appellants attempt to characterize the language in Perryman as dicta by representing that the requirements of the prima facie case were not at issue. Appellants also attempt to show the Eleventh Circuit's apparent incorrect reliance on Perryman in an earlier decision setting forth the formulation of the prima facie case for discriminatory discharge. Lee, 684 F.2d at 773. If Perryman is incorrect law, then so are numerous decisions in the Eleventh Circuit subsequent to Perryman as well as those in other circuits. E.g., Perdomo v. Browner, 67 F.3d 140, 144 (7th Cir. 1995) (recognizing that to establish a prima facie case for discrimination in promotion, the plaintiff must prove that the defendant granted the promotion to a person of a different race "but who had similar or lesser qualifications"); Sample v. Aldi, Inc., 61 F.3d 544, 548 (7th Cir. 1995) (same).

This Court in Perryman set forth the appropriate standards for a prima facie case. Perryman realized that the elements deemed by the Supreme Court necessary for a prima facie case to show hiring discrimination "have been modified and broadly applied to all types of illegal discrimination in the employment process." 698 F.2d at

1141. For example, a plaintiff may establish a prima facie case of hiring discrimination by proving:

> (1) that he or she belongs to a protected minority, (2) that he or she applied for and was qualified for a job for which the employer was seeking applicants, (3) that, despite these qualifications, he or she was rejected, and (4) that, after the rejection, the employer continued to seek applications from persons with similar qualifications.

Id. at 1141 n.6 (emphasis added) (citing McDonnell, 411 U.S. at 802, 93 S. Ct. at 1824). Noteworthy, in McDonnell, the last prong indicates that the relative qualifications by other applicants are significant.

Perryman recognized that an example of the modification and broadly applied elements for a prima facie case set out in McDonnell is contained in Lee, 684 F.2d at 773 (discriminatory termination allegations), where the plaintiff is required to show that he was replaced by a person outside the protected class or was discharged while a person outside the class with equal or lesser qualifications was retained. Perryman, 698 F.2d at 1142. A similar burden is imposed on plaintiffs seeking to establish a prima facie case of discriminatory promotion. Id. Thus,

> a plaintiff may establish a prima facie case of promotion discrimination by proving that he or she is a member of a protected minority, was qualified for and applied for the promotion, was rejected despite these qualifications, and that other employees with equal or lesser qualifications who were not members of the protected minority were promoted.

Id. at n.7 (citing Crawford v. Western Elec. Co., Inc., 614 F.2d 1300, 1315 (5th Cir. 1980); Bundy v. Jackson, 641 F.2d 934, 951

(C.A.D.C. 1981)). Certainly, Appellants' interpretation that the "equal or lesser qualifications" language was dicta is remarkable.

Appellants ignore that this Circuit has held that the McDonnell formulation for a prima facie case is not rigid. See Jones v. Gerwens, 874 F.2d 1534, 1539 (11th Cir. 1989). The McDonnell case only "set[s] forth one method of making out a prima facie in a Title VII case." Id. The Supreme Court has clarified that the prima facie case formulation in McDonnell was not meant to be exclusive, and a prima facie case of disparate treatment may be established in a number of ways. Id. (citation omitted) As recognized in McDonnell, but not by Appellants, "the facts necessarily will vary in Title VII cases, and the specification above [setting forth the elements for a prima facie case of discriminatory hiring] of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n.13, 93 S. Ct. 1817, 1824 n. 13. The relevant elements to establish a prima facie case under McDonnell are: (1) that the plaintiff belongs to a racial minority; (2) that he applied for and was qualified for a job that the employer was seeking applicants; (3) that despite these qualifications, he was rejected; and (4) after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. Id.[3] Even applying Appellants' prima facie case model in this case, they

[3] The last element in McDonnell implies similar or equal qualifications.

still cannot meet their burden of production. For instance, Appellant Stewart claimed to have applied for a Regional Representative position in 1979. (5/19/95 Order at p. 12; RE Tab D). However, Mr. Stewart did not know who received the position until his counsel testified it was Carl Wall. (Id.) Despite his counsel's statement, Mr. Stewart offered no evidence at all as to Wall's race or qualifications. (Id.) Appellant Walker did not know the name or qualifications of the selectee for Secretary IV position. (5/19/95 Order at p. 8; RE Tab D). Similarly, Intervenor Ross did not know who received the Secretary III position that she applied for in 1979, outside of her counsel's testimony. (5/19/95 Order at p. 26; RE Tab D). She also did not know the race or qualifications of the successful applicant. (Id. at 26-27; RE Tab D).

Appellants also attempt to distinguish Hill on the basis that it was dicta. Hill involved alleged racial discrimination in the promotion of railroad employees to the position of foreman. The Eleventh Circuit found that the lower court's conclusion that four of five plaintiffs were not qualified for the foreman position was not clearly erroneous. Id. at 807. In reaching this conclusion, it was specifically stated that to make out a prima facie case under the McDonnell standard:

> The plaintiff must show by a preponderance of the evidence that (1) he belongs to the protected group; (2) he applied and was qualified for a job for which the employer was seeking applicants; (3) he was rejected; and (4) after his rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's

qualifications.

Id. at 808 (emphasis added) (citing Burdine, 450 U.S. at 253, 101 S. Ct. at 1094 n.6. Similar to the present case, the Hill panel held that a rebuttable inference that the employer discriminated "is not justified where the plaintiff's qualifications are inferior to those of the nonminority employee favored by the job decision." Id. at 810. Therefore, Appellants are incorrect in stating that the language was unnecessary dicta.

Appellants are also wrong in construing Hill as considering the term "equal qualifications" as equivalent to "qualified" for the position at issue. This is not what the Eleventh Circuit decided. Moreover, the Hill panel expressly held that even though the incorrect legal standard was applied as to the qualified plaintiff, a remand for redetermination of the prima facie case would be futile because he could not overcome a legitimate business justification, i.e., "choosing the most qualified candidates." Id. at 810. Similar to Hill, Appellees' defense in this case centered on producing evidence that it hired the "most qualified" employees for the positions sought by Appellants.

Appellants label holdings as "dicta" when they are not in their favor as to what the modified McDonnell elements for discrimination in employment decisions are in this Circuit. Also, Appellants' repeated reliance on Patterson does not support their argument. In Patterson, the Supreme Court held that the plaintiff, to establish a prima facie case, did not have to prove that she was better qualified than the promoted white employee. 491 U.S. at

186, 109 S. Ct. at 2377. The Supreme Court stated that the plaintiff need only prove for a prima facie case, in part, that after she was rejected, the defendant either continued to seek applicants for the position or filled the position with a white employee. Id.; 109 S. Ct. at 2378. In reaching this conclusion, the Supreme Court cited Burdine, 450 U.S. at 253, n.6.

Burdine was a failure to promote and termination case, where the Supreme Court held that the plaintiff must prove "that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." Id. at 253; 101 S. Ct. at 1094. Burdine cited to McDonnell which described an appropriate model for a prima facie case of racial discrimination that the position remained open and the employer continued to seek applications from persons of complainant's qualifications. Id. at n. 6. Furthermore, the holding in Burdine focused on the error by the Court of Appeals in requiring the employer to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff as it "is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." 450 U.S. at 258.

Likewise, Appellants' inflexible analysis for a prima facie case is not supported by the decision in Crawford v. Western Electric Company, 614 F.2d 1300 (5th Cir. 1980), which they cite. In Crawford, the Fifth Circuit held that a plaintiff may establish a prima facie case by those elements set forth in McDonnell. Id. at 1315. However, as stated above, the McDonnell framework is not rigid. Finally, Appellants' statement that this Circuit's decision in Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989), supports their position is misplaced. In Carter, the Eleventh Circuit stated that "this Circuit has a adopted a variation of the four-pronged test set out for Title VII claims in McDonnell Douglas Corp. v. Green...." Id. at 582. Thus, Carter did not treat the McDonnell framework as a mandate for every case and there is no reason that it should be so applied in this case.

The recent Supreme Court decision in O'Connor v. Consolidated Coin Caterers Corp., 9 L. Weekly Fla. S526 (U.S. April 1, 1996), supports the proposition that in the McDonnell prima facie case elements are not mandatory criteria. In O'Connor, the Supreme Court addressed the issue whether a plaintiff alleging discharge in violation of the ADEA must show he was replaced by someone outside the age group protected by the ADEA (40 and older) to establish a prima facie case under McDonnell. The Supreme Court noted that in McDonnell "[w]e held that a plaintiff alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et. seq., could establish a prima facie case by showing '...(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the] complainant's qualifications.'" Id. (quoting McDonnell, 411 U.S. at 802) (emphasis added). The Supreme Court held that a plaintiff is not required to show in every case of age discrimination that the replacement was under the age of 40. Id. ("As the very name 'prima facie case' suggests, there must at least be a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption', Burdine, supra, at 254 n. 7.") Id. Thus, the proper prima facie elements in this case requires evidence adequate to create an inference that the Appellants' failure to obtain the requested promotion or the position was based on an illegal discriminatory criterion, such as the selectees were equally or less qualified than Appellants. See, e.g., Walker v. NationsBank of Florida N.A., 53 F.3d 1548, n. 12 (11th Cir. 1995) ("[o]ur cases have repeatedly stressed that an overly strict formulation of the elements of a prima facie case is to be avoided"); Kralman v. Illinois Department of Veteran Affairs, 23 F.3d 150, 153, n. 2 (7th Cir. 1994) (illustrating the varying methods of proof for a prima facie case, i.e., four different statements of a prima facie case requirement in cases involving discharge and two different versions of a prima facie case for hiring, regarding claims under the ADEA in the Seventh Circuit); Oxman v. WLS-TV, 846 F.2d 448, 454 (7th Cir. 1988) (McDonnell did not state that "its variation of the fourth element is a sine qua non for recovery.") Accordingly, and based upon these well-reasoned authorities set out in the Supreme Court, the Eleventh Circuit, as well as other Circuits, it was not error for the District Court to require the Appellants in this case to establish that the selectees were equally or less qualified.

II. THE ELEVENTH CIRCUIT HAD NOT PRIOR TO REMAND, DECIDED THAT APPELLANTS PROVED A *PRIMA FACIE* CASE; NOT ONLY IS JUDGMENT FOR APPELLANTS INAPPROPRIATE, BUT JUDGMENT FOR APPELLEES IS WARRANTED

This Court previously held that a remand was proper for the District Court to determine whether a *prima facie* case was made. *IMPACT*, 893 F.2d at 1194-95. Appellants argue that this Court decided Appellants established a *prima facie* case even though they are faced with an order from this Court clearly stating it is remanding the matter to the District Court to determine this precise issue. *IMPACT*, 893 F.2d at 1194-95. Specifically, they contend that they are black, applied for specific positions for which they were qualified, that white persons were selected, and that they met their *prima facie* case. This contention is incorrect as was shown in Point I above. *See*, *e.g.*, *Batey*, 24 F.3d at n. 11.

Furthermore, this Court's recitation of Appellees' burden of proof is respectfully dicta in light of the remand a determination whether a *prima facie* case was met. It is respectfully submitted that because this Court remanded for a *prima facie* case, any discussion as to the Appellees' burden of production under *McDonnell* or *Burdine* was not relevant to the proceedings on remand. In fact, the District Court realized these specific instructions and solely decided whether a *prima facie* case was met. (5/19/95 Order at p. 4; RE Tab D). In any event, if this Court were to decide that the wrong legal standard was used, it must remand for new findings in light of the controlling legal principles. *Clark*

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v. Huntsville City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983). Additionally, Appellants attempt to bypass and circumvent the intent requirement must be rejected.

Not only are Appellants not entitled to entry of judgment, but based upon the Supreme Court decision in St. Mary's Honor Center v. Hicks, 509 U.S. ____, 113 S. Ct. 2742 (1993) (applied retroactively to this case pursuant to Harper v. Virginia Department of Taxation, 509 U.S. 86, ___ 113 S. Ct. 2510, 2517 (1993)), Appellees are entitled to entry of judgment in their favor. In St. Mary's, the Supreme Court stated that the fact finder's rejection of an employer's asserted reason for its actions does not entitle the plaintiff to judgment. 509 U.S. at _____, 113 S. Ct. at 2747. The plaintiff, at all times, retains the ultimate burden of persuasion to prove intentional discrimination. Id. If the defendant carries the burden of production, the presumption raised by the prima facie case is rebutted and drops out providing the plaintiff the opportunity to demonstrate through presentation of his own case, and through cross-examination, "that the proffered reason was not the true reason for the employment decision [citations omitted] and that race was." Id. (citing Burdine, 450 U.S. at 255-56).

Appellants assert that if the employer is "silent" in the face of the presumption created by the plaintiff's prima facie case, then this Court must enter judgment for him. This claim is unfounded based on Appellees' production in this case. For each Appellant, and each claim, Appellees articulated legitimate, nondiscriminatory reasons for the challenged decision. In fact, the District Court in the 1986 Order found that the Appellees more than sufficiently sustained its light burden of articulation. (8/11/86 Order at p. 7; RE Tab A). What is more, Appellees consistently produced sufficient documentation in support of their contention that the most qualified applicant was selected. Id. Appellees presented testimony about the reasons some of the actual selectees were better qualified or the reasons that the particular Appellant was considered less qualified. (Id.) Appellees introduced applications and personnel cards revealing the qualifications of each candidate in support of their argument that the person regarded as the most highly qualified was hired. Id. As to other positions, Appellees offered testimony to show why the particular Appellant was considered less qualified. Id. Jay Kassees, Chief of Personnel Services for Appellees, testified and repeatedly compared criteria of Appellants and the selectees. (R40-25; R46-5; R47-51; R47-115; R45-23).

Appellants "presented their case as if the burden was on the Defendant to produce all of the information and all of the explanations merely upon the making of a general charge that discrimination existed." (8/11/86 Order at p. 4; RE Tab A) Likewise, Appellants now claim that Appellees have not done enough and in fact, were even "silent" even though this characterization is at odds with the record evidence. Appellants would have this Court believe that Appellees' six days of testimony and production of record evidence was, in all respects, a period of silence.

This Court did not hold that Appellees were "silent" in addressing their burden of production; instead, it held that the nondiscriminatory reasons proffered by Appellees were not specific enough as Appellees did not offer proof by any person who made the employment decision or any other person indicating that the decision was made on the basis of what he or she thought demonstrated the most qualified person. IMPACT, 893 F.2d at 1194. Even though Appellees disagree with this Court's earlier opinion regarding how, and whether, they met their burden of production, this Court's interpretation of the Appellees' evidence is a far cry from an employer remaining "silent" in light of a plaintiff's prima facie case (which was not met in this case). Unlike Turnes v. AmSouth Bank of N.A., 36 F.3d 1057 (11th Cir. 1994), where the employer "came forward with no explanation of why it rejected Turnes (the plaintiff) based on what it knew when it rejected him," id. at 1062, in this case Appellees introduced as admissible evidence testimony and documentary proof of the reasons as to why Appellants were not promoted or hired.

Moreover, Appellants' reasoning was discredited by the Supreme Court in St. Mary's where the court stated:

> By producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioner sustained their burden of production, and thus placed themselves in a 'better position than if they had remained silent.'

113 S. Ct. at 2748 (emphasis added).

Notably, if a defendant fails to sustain its burden, but reasonable minds can differ as to whether a preponderance of the evidence establishes the facts of a prima facie case, then a question of fact remains for the trier of fact. St. Mary's, 509 U.S. at ____, 113 S. Ct. at 2748. In this case, no prima facie case was established and Appellees introduced evidence of articulated nondiscriminatory reasons for their employment decisions. Appellants just could not convince the factfinder. In fact, the District Court stated in its Order denying Appellants' attempt to obtain entry of judgment on remand that "even if it turns out all the plaintiffs made a prima facie case", they are not entitled to a judgment as a matter of law since Appellants must prove that the Appellees took the adverse employment action because of their race. (12/21/94 Order at pp. 8-12; RE Tab B).

Appellants' repeated attempt to obtain judgment in their favor is also belied by this Court's recent opinion in Walker, 53 F.3d 1548, where it noted that in earlier cases, once the defendant met its burden of production and rebutted the plaintiff's prima facie case, the plaintiff could carry the ultimate burden of persuasion either with evidence demonstrating that the defendant was more likely than not motivated through the discriminatory reason or that the defendant's nondiscriminatory reason was not worthy of belief. Id. at 1557 (citations omitted). However, St. Mary's established that the fact-finder's disbelief "of the reasons the defendant offers does not compel judgment for the plaintiff." Id. (citing St. Mary's, ___ U.S. at ____, 113 S. Ct. at 2749). In fact, the District Court in its December 1994 Order held that based on St. Mary's, Appellees met their burden of production. (12/21/94 Order at pp. 11-12; R22-879-11, 12; RE Tab B). Thus, there is no basis to enter judgment in favor of Appellants, even if Appellants could establish a prima facie case.

While this Court's decision in IMPACT could be read to say that disbelief of the employer's reasons alone because they are not specific enough may be sufficient for a finding of intentional discrimination, it is respectfully suggested that after St. Mary's, the Court today should reach a different result. Since the intentional discrimination issue was never decided by this Court in IMPACT, although the District Court explicitly found Appellants failed to show intentional discrimination in its initial Order (8/11/86 Order; RE Tab A at p. 8) the procedural posture of this case suggests an incorrect rule of law: that even though Appellees introduced legitimate reasons for the employment decisions, which were rejected as non-specific, this in combination with a prima facie case is enough to show intentional discrimination as the Appellees are in no better position than if they were silent.

In this case, and as recognized by the concurrence/dissent, Appellees introduced testimony and documents for six days by supervisors and state officials. IMPACT, 893 F.2d at 1199 (Edmondson, J., concurring and dissenting, in part). Appellees also introduced evidence of Appellants' personnel files, such as work evaluations and job applications; they introduced into evidence the successful applicants' files for each position and then explained through defense witnesses the contents of the files and the qualifications for each applicant. Id. Appellees produced evidence of applicant qualifications as well as records on

Appellants' qualifications relevant to the decisions for rejection of Appellants for the particular promotion. Id. For instance, Appellant Delores Colston was discharged for disloyalty, insubordination and physically fighting with her superior and then never admitted the reasons for her earlier discharge on her subsequent applications for positions that she claims were denied because of her race. (8/11/86 Order at p. 43-44; RE Tab A). Appellees introduced evidence directly attacking Appellants' own proof in that a number of positions were not even job openings, Appellants did not meet the qualifications for some positions, for others they did not even know the race of the selectee, or the selectee was nonwhite, and for some positions Appellants never submitted job applications. IMPACT, 893 F.2d at 1199-1200. Applying the holding in St. Mary's:

> Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of (in the context of the present case) race. That the employer's proffered reasons is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review - which should be conducted on remand in this case under the 'clearly erroneous' standard of Federal Rule of Civil Procedure 52(a) [].

509 U.S. at ____, 113 S. Ct. at 2756. Thus, the Supreme Court has rejected Appellants' argument in this case.

In St. Mary's, the Supreme Court illustrated the faulty analysis leading to an incorrect judgment against an employer based on a rejection of the employer's proof: Prior to trial, a supervisor, who conducted the hiring for the employer, is fired. In this scenario, the company must come forward with some explanation for their refusal to hire (from its antagonistic former employee) and the jury must be instructed that if they find the explanation incorrect, they must assess damages against the company whether or not they believe it was guilty of racial discrimination. Id. at 2750-51. Under this analysis, evidence that the hiring officer was of the same minority group as the plaintiff would be irrelevant as the plaintiff could prove his or her case indirectly by showing that the employer's explanation was unworthy of credence. Id. However, "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." Id. at 2751.

Appellees were not silent in their burden of production - instead this Court held they were not specific enough in responding to over 60 vague claims of discrimination. However, the IMPACT decision creates a burden on employers that is not recognized by case precedent. See St. Mary's, 509 U.S. at ____, 113 S. Ct. at n.5 ("The notion that every reasonable employer keeps 'personnel records' on people who never become personnel, showing why they did not become personnel (i.e., in what respects all other people who were hired were better) seems to us highly fanciful - or for the sake of American business we hope it is."); Walker, 53 F.3d at 1556 (defendant need only produce, not prove, a nondiscriminatory reason and this burden is "exceedingly light"); Perryman, 698 F.2d at 1142 (same). In any event, as this Court recently noted, "[w]hen a trier of fact has before it all the evidence needed to decide the ultimate issue of whether the defendant intentionally discriminated against the plaintiff, the question of whether the plaintiff properly made out a prima facie case 'is no longer relevant.'" Richardson v. Leeds Police Dept., 71 F.3d 801, 806 (11th Cir. 1995) (citations omitted). Utilizing the St. Mary's analysis, this Court should conclude that Appellees' burden of production was met. If this Court has not already resolved this case by holding that the District Judge used the proper standard to determine the prima facie case issue, the Court should enter judgment for Appellees on the basis that Appellants never proved pretext or established intentional discrimination.

III. THE DISTRICT COURT PROPERLY FOLLOWED THIS COURT'S DIRECTION ON REMAND TO DETERMINE WHETHER A PRIMA FACIE CASE WAS ESTABLISHED

A. The District Court Followed This Court's Mandate

Contrary to Appellants' position, the District Court did not ignore the mandate of this Court. In fact, the District Court followed this Court's mandate and applied Eleventh Circuit precedent to hold that none of the Appellants established a prima facie case. See Hill, 885 F.2d at 809-10. The "mandate rule" (application of the law of the case doctrine to a specific set of facts) is given flexibility as there are times when even a specific mandate, i.e., an order for a new trial, may end up with a different result on remand. Litman v. Massachusetts Mut. Life Ins. Co., 825 F.2d 1506, 1511-12 (11th Cir. 1987).

Appellants' "law of the case" and mandate arguments are inapplicable and were previously rejected, on remand, by the District Court. "The 'law of the case' doctrine invokes the rule that findings of fact and conclusions of law by an appellate court are generally binding on all subsequent proceedings in the same case in the trial court or on a later appeal." Dorsey v. Continental Casualty Co., 730 F.2d 675, 678 (11th Cir. 1984) (citation omitted). In fact, in Dorsey, the Eleventh Circuit rejected the defendant's attempt to apply the law of the case doctrine to excerpts from a prior opinion as these statements did not constitute a determination by the court of appeals. Id. at 679. An exception to the "law of the case" doctrine is when "controlling authority compels a contrary decision of law applicable to the issue." Id. at 678, n. 2.

The Eleventh Circuit in IMPACT did not find that Appellants had made out a prima facie case. The Eleventh Circuit did not direct the District Court to enter judgment in favor of Appellants. Instead, Appellants take the IMPACT's statements out of context. The Eleventh Circuit expressly stated that it did not decide "whether every plaintiff or intervenor made out a prima facie case...." IMPACT, 893 F.2d at 1191.

Appellants would have the District Court, on remand, enter a judgment in their favor even though this Court unequivocally stated that: "Without attempting to determine from the testimony and records introduced during the 11 day trial whether every plaintiff or intervenor made out a prima facie case" all intervenors proved they were black employees, they had applied for the positions, and that the positions were filled in most cases by a white person. Id. at 1191 (emphasis added). However, this is not entirely correct as the District Court, on remand, found that both Issac and Ross (intervenors) did not know who received the positions and it was their counsel that "testified" as to the name and race of the selectees. (5/19/95 Order at pp. 25-26; RE Tab D).

This Court also stated that each of the applicants was qualified for the position sought and the position remained open after the plaintiff was denied the appointment. Id. at 1191. Applying Appellants' bright line test for a prima facie case, i.e., that he or she is black; applied for a specific position for which he is qualified; and that a white person was selected then it was futile to remand in light of the findings on appeal. Moreover, if the comparative qualifications component has no place in the prima facie case, then there was no reason to remand this case. Appellants' argument is nonsensical.

Appellants' arguments were also expressly rejected on remand where the District Court recognized that "[i]f the Eleventh Circuit had made that determination, the Eleventh Circuit certainly would not have remanded the case to this Court with instruction to make such determination." (12/21/94 Order at p. 8; RE Tab B).

B. The Findings of the District Court are Not Clearly Erroneous

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Appellants' urging that the District Court's determination of comparative qualifications in the absence of evidence as to which characteristics were valued for a proven job are clearly erroneous and confuses the law. The comparative qualification issue was not decided by the Eleventh Circuit and this is a separate finding from whether or not Appellants proved they were qualified as part of their prima facie case.

Even if Appellants were all qualified for the position sought, the selectees were more qualified, or at least Appellants failed to show that the selectees were equally or less qualified. Appellants have basically conceded any challenge to the factual determinations of the District Judge so long as this Court agrees with the legal standard applied. Appellants fail to point to any specific instances where the District Court's Order is clearly erroneous for any particular claim by Appellants. Instead, they assert a generic claim that the District Court's Order was "clearly erroneous" in finding comparative qualifications. However, Appellees' burden of production was not considered on remand because the District Court was instructed "to determine whether a prima facie case was made out by any of the claimants on any of their claims." IMPACT, 893 F.2d at 1194-95. Cf. Smith v. Horner, 839 F.2d 1530, 1538 (11th Cir. 1988).

In Smith, the employer, as part of its burden of production, selected an individual that it felt was "best qualified." In holding that the plaintiff failed to prove that she was better qualified and, therefore, failed to show the employer's reasons were a pretext for intentional discrimination, this Court found that the reasons set forth by the employer were legitimate. Id. Thus, an employer's evidence as to comparative qualifications does not come into play until the plaintiff has established a prima facie case.

Succinctly stated, the complete finding by this Court was that some of the personnel records introduced by Appellants or Appellees showed that as to either education, prior experience, or training, the applicant was superior to the successful applicant; however, it was also clear "from some of the personnel records that the white applicant was superior on one or more of the same 'qualifications.'" IMPACT, 893 F.2d at 1192. And, "[w]ith respect to others, the plaintiffs offered no proof as to the relative qualifications of the successful applicant." Id. (emphasis added) Therefore, the District Court was not clearly erroneous in determining Appellants' comparative qualifications as part of the prima facie case.

Finally, even though Appellants fail to offer any specific instances whatsoever where they met their burden of production in establishing a prima facie case, a review of the District Court's May 1995 meticulous findings supports the affirmance of its decision. (5/19/95 Order at pp. 5-27; RE Tab D). For instance, Appellant Diann Walker applied for the position of Clerk V in May 1978 and the successful applicant was a white female. Id. at p. 5. However, Walker's proof solely consisted of her bare assertion that she had superior qualifications than the selectee (even though she was not required to show superior qualifications). Id. Despite this assertion, Walker admitted on cross-examination that she never performed normal supervisory functions and offered no other proof of relative qualifications. Id. Likewise, Walker claimed she applied in August 1979 for three Clerk V positions. Id. at pp. 6-7. One of these positions was filled by Buck Kohr, a white male. Id. at p. 7. The record showed that the selectee did not become a Clerk V until nine months after Walker alleged he did and five months after Walker was promoted to a Clerk V position. Id. In addition, Walker did not produce any evidence of the selectee's qualifications as equal to, or less than, her own. Id.

Another example is contained in Appellant Barbara King's claims. Ms. King claimed that she applied in February 1979 for the position of Clerk-Typist III but did not know either the identity of the successful applicant or their race. (5/19/95 Order at p. 14; RE Tab D). For the position of Secretary III, for which Ms. King applied in March 1979, she contended that the position went to Patty Stewart. Id. However, Ms. King had no knowledge of Ms. Stewart's qualifications and then failed to even list Ms. Stewart as the successful applicant for any of the claimed positions in her post-trial memorandum. Id.

Similarly, Appellant Pearl Williams testified that she applied for three Administrative Secretary positions in 1984 and 1985 and that these positions went to three white females: Barbara Birks, Elinor Kalfas and Nancy Downing. (5/19/95 Order at p. 18; RE Tab D). The personnel card for Ms. Birks showed that she resigned in

November 1983. Id. In addition, the personnel cards showed that neither Ms. Kalfas, nor Ms. Downing, ever occupied a position as a Administrative Secretary in 1984 or 1985. Id. Another example of Appellants' ultimate failure to realize their burden of production for a prima facie case is in Appellant Louvenia Jones' claim. Ms. Jones asserted that she applied for a Clerk II position in January 1977 and was discriminatorily denied the position. (5/19/95 Order at p. 19; RE Tab D). However, she did not testify who received the position. Id. In fact, it was her counsel who later "testified" that the position went to Ann Surrency, a white female. Id. Again, for a claim that she was discriminatorily denied a Clerk II position in April 1977, Ms. Jones offered no testimony, other than by her counsel, as to who received the position. Rosa Henderson testified that no less than three individuals received the same position for which she was allegedly discriminatorily denied - one of them was another Appellant, Louvenia Jones (also a black female). (Id. at p. 22).

Due to Appellants' ambiguous and scarce record evidence, Appellees were left to rebut extremely vague claims. In fact, more often than not, Appellants could not even identify who received the position. (8/11/86 Order at p. 8; RE Tab A). These facts did not change in the 1995 District Court Order. Appellants' counsel even read the names and exhibit numbers into the record - an unusual practice. (Id.; e.g., 5/19/95 Order at p. 19; RE Tab D). An example of Appellants' disarray is highlighted where Appellant Rosa Henderson testified that a white male received the Microphotography

Supervisor position, while her earlier deposition testimony contended Appellant Louvenia Jones received this position. (5/19/95 Order at p. 22; RE Tab D). Then, when recalled to the stand, she contradicted all her earlier testimony and testified Gary Reeves received this position. (Id.) In sum, Appellants repeatedly could not state who was hired or their race and often did not know the qualifications for the particular job. (5/19/95 Order at p. 7; RE Tab D).

In sum, as the above illustrates, the Appellants failed to produce sufficient evidence to meet their burden of production for a prima facie case. Thus, it was not clearly erroneous for the District Court to conclude, based on its independent review of the record, that Appellants failed to prove a prima facie case.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECIDING, BASED UPON APPELLANTS' REPRESENTATIONS, THAT DISCOVERY OF EMPLOYMENT TESTS IS A MOOT ISSUE

Appellants complain that the district court erred in denying them the opportunity to obtain employment testing information for purposes of pursuing a disparate impact case. This Court, in its opinion, following their determination that the Appellants had standing to raise the employment examination issue, the Court stated:

> Can the defendants overlook completely the fact that there was evidence to the effect that one of the elements considered by the selector for any of these positions was the relative test scores received by the applicants on the examinations. IMPACT at 1196.

This Court addressed the employment examination issue in the context of a disparate treatment claim.

Upon remand, this district court ordered that plaintiff should conduct and complete discovery of defendants' employment examination record by a date certain. (December 21, 1994 Order at p. 14). Appellants have declined to take discovery on the employment test issue since the court had issued an order stating that disparate impact claims are no longer viable and will not be considered by the court (12/21/94 Order at p. 14 RE Tab B). Appellants contend that their testing issues were disparate impact issues not disparate treatment issues. Appellants, after remand, have taken the position that the primary role of the employment testing issue in this case on the plaintiffs' side is a claim which can be asserted on behalf of the class. (Motion for Clarification at p. 4-5; R22-893; RE Tab C). The District Court ruled on May 19, 1995 that plaintiffs' motion for class recertification was denied. (5/19/95 Order at p. 31; RE Tab D).

The District Court correctly held that evidence of employment examinations given to the respective candidates for the positions at issue, and the scores of the applicants, are no longer at issue due to Appellants' representation that "they have no use for the employment examination evidence with respect to their disparate treatment claims[]" and that the "use only of the employment examination evidence would be for disparate impact claims or class claims." (5/19/95 Order at p. 30; RE Tab D). Appellants do not deny this representation and re-assert this representation in their

Brief. (Brief at pp. 10-11). Similarly, in Appellants' motion for clarification dated February 27, 1995, they unequivocally state that employment testing is not an element of any part of Plaintiffs <u>disparate treatment</u> claims, and they will submit no such evidence in support of the disparate treatment claims. (R22-893; RE Tab C at p. 4). Thus, since the District Court did not abuse its discretion, as discussed <u>infra</u>, in denying class recertification, and the examination materials are otherwise only relevant to the dismissed the class action and disparate impact issues, then the District Court did not abuse its discretion in denying discovery on remand of these items.

Appellants' argument on appeal is also circuitous. They contend that since the examination claims were not before the District Court at the conclusion of their case in chief - at which point the disparate impact claims were dismissed - that the ruling dismissing the disparate impact claims does not affect their "license to litigate the examination claims under a disparate impact theory." Appellants' argument fails to acknowledge their representation set forth above on the relevancy of this information. The Eleventh Circuit did not disturb the dismissal at trial of the disparate impact claims and a careful reading of this Court's decision shows that this Court viewed the employment examinations as relevant to the disparate treatment claims. Since Appellants have abandoned their request for the employment information for disparate treatment claims, then their relevancy is no longer an issue. Judicial economy is served by binding the

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parties to the facts presented and the theories argued below.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING RECERTIFICATION

District courts have wide discretion in deciding whether or not to certify a proposed class. Their decisions may be reversed only for an abuse of discretion. Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177, 185 (4th Cir. 1993); Griffin v. Carlin, 755 F.2d 1516, 1531 (11th Cir. 1985). The party seeking class certification bears the burden of showing that all of the prerequisites of Rule 23 have been satisfied. Gilchrist v. Bolger, 733, F.2d 1551, 1555 (11th Cir. 1984); In Re Amerifirst Sec. Litig., 139 F.R.D. 423, 427 (S.D. Fla. 1991).

Appellants argue that the District Court erred in: (a) refusing certification because it determined the merits of the individuals' claims prior to certification and (b) failing to rule on certification "as soon as practicable." Those arguments are not meritorious.

The District Court originally certified this case as a class action on November 6, 1980, within one year of filing. The District Court subsequently decertified the class on September 17, 1984. The case was tried in 1986. On February 6, 1990, this Court entered its opinion in IMPACT, 893 F.2d 1189. In its opinion, this Court stated:

> Now that the trial court has had a full opportunity to observe the handling of the case, which, in effect, was still tried in many respects as if it were a class action, it will be in a position to give further consideration to its decision to deny

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> recertification when moved for by the appellants. This issue will remain open for consideration by the trial court on remand.

Id. at 1196.

Contrary to Appellants' position, it would be improper, and impossible, for a District Judge who sat through eleven days of trial not to consider such proceedings in making his determination on remand of the certification issues. This Court recognized, as noted in the above-quoted language, that the District Court's first-hand experience would aid in making a proper class certification determination. None of Appellants' cases dealt with the situation where the case had already been fully tried and was remanded for findings based on evidence already submitted, including class certification determination.

Despite Appellants' contentions, the law does not prohibit the District Judge, after he has heard a full trial on the merits, from considering the nature and merits of plaintiff's claims in determining class certification. The nature of plaintiff's claims are directly relevant to a determination of whether the matters in controversy are primarily individual in character or are susceptible to proof in a class action. Brooks v. Southern Bell Tel. & Tel. Co., 133 F.R.D. 54, 56 (S.D. Fla. 1990). Since such evidence is often intertwined with the merits, a court may look behind the pleadings to determine whether certification should be granted. General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 160 (1982); Kaser v. Swann, 141 F.R.D. 337, 339 (M.D. Fla. 1991) (citing Nelson v. United States Steel Corp., 709 F.2d 675, 679-80 (11th Cir. 1983)). Thus, the District Court's denial of recertification was not an abuse of discretion.

Appellants' argument that the District Court erred in failing to recertify the class because it determined the merits of the individual claims prior to class certification is also faulty because it assumes that a court cannot make the determination after a full trial on the merits. Such determinations will arise after a case is tried and has gone up on appeal.

Appellants base their argument on Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). In Eisen, the Supreme Court held that the class action plaintiff must bear the cost of individual notice to the members as required by Rule 23(c)(2), and found it was error for the District Court to conduct a preliminary hearing on the merits for the purpose of allocating the costs of notice. Eisen does not stand for the proposition posited by Appellants, that a court may not try the merits of the representative parties' claims prior to class certification.

As noted in Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267 (4th Cir. 1980):

> The court must be prepared under Rule 23(c)(1) to alter or amend [a pre-trial determination of class certification] if the course of trial on the merits reveals the impropriety of class action maintenance. And this of course necessarily implies that a reviewing court must be prepared to find error in a trial court's failure to alter or amend -- to 'decertify' the class action -- if on the whole record, including the evidence adduced on trial, it appears to the reviewing court that this was the proper course.

(emphasis added). The Stastny court held that the district court erred in failing to withdraw certification of the plaintiffs' Title VII class action at the conclusion of the trial on the merits. In the case at bar, the District Court properly considered all of the facts and evidence before it and did not abuse its discretion in denying recertification.

The District Court, in its May 1995 Order, correctly analyzed the issue of class recertification. The District Court determined that because none of the remaining Appellants had constitutional standing to raise a claim.

In order to bring a private Title VII class action, two prerequisites must be met. First, there must be an individual plaintiff with constitutional standing to raise the claim and who has satisfied the procedural requirements of Title VII, and second, the requirements of Rule 23 of the Federal Rules of Civil Procedure must be met. Griffin v. Dugger, 823 F.2d 1476, 1482 (11th Cir. 1987). As this Court emphasized in Griffin, "any analysis of class certification must begin with the issue of standing and the procedural requirements of Title VII." Id.

In Griffin, as in this case, class certification was before the appellate court after a full trial. In Griffin, the Eleventh Circuit held that the district court erred when it certified the class because none of the named representatives had standing (the class being black correctional officer applicants with testing claims). Accord, O'Shea v. Littleton, 414 U.S. 488, 494 (1974) ("if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class").

Appellants' argument that a plaintiff does not lose her representational capacity when she loses her own claim is incorrect under the facts in our case. Armour v. City of Anniston, 654 F.2d 382 (5th Cir. 1981). In Armour, an employee unsuccessfully attempted to certify a class with herself as representative. The employee lost her individual claim of racial discrimination after a full trial. After a series of appeals and remands, the Fifth Circuit affirmed the judgment of dismissal based on the employee's failure to establish a live case or controversy as required by United States Parole Commission v. Geraghty, 445 U.S. 388 (1980), and Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980). The court found that since no one sought to intervene or be substituted as the named representative subsequent to the judgment on the merits, a "live controversy" was not established. Armour, 654 F.2d at 384.

Similarly, the District Court found that none of the representatives had a "case or controversy." No attempt was made to intervene or substitute an appropriate representative and no representatives remain. Thus, like Armour, no "live controversy" exists. See United States Parole Comm'n v. Geraghty, 445 U.S. 388, 395-96 (1980). The District Court, therefore, correctly denied recertification.

Appellants' brief also fails to inform this Court that the record before the District Court demonstrated that none of the

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prerequisites of Rule 23 were met. When this Court remanded to the District Court for a review of the certification issues, the Appellees asserted that none of the requirements for class certification existed. Appellants therefore had the burden to demonstrate, after rigorous analysis, that all the requirements of Rule 23 had been satisfied. Appellants never satisfied their burden.

In fact, the evidence presented at the evidentiary hearing before the District Court demonstrated that certification would have been absolutely inappropriate. Simply stated, Appellants failed to prove numerosity, typicality, commonality and adequate representation. The failure to establish even one of the four requirements is "fatal" to class certification. Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718 (11th Cir. 1987), cert. denied, 483 U.S. 959 (1988).

Appellees will not burden this Court with all of the factual reasons why the prerequisites of Rule 23 were not met. Appellees incorporate the numerous memoranda in opposition to certification previously filed with the District Court in their Record Excerpt at Tabs E-G.

Thus, the District Court did not abuse its discretion denying certification.

Appellants request, in their conclusion, to reassign this case to another judge is unfounded. First, Appellants present no factual basis for such reassignment. Second, Appellants' statements that such reassignment will support "judicial economy" or is supported by "errors in the District Court's Orders" are legally insufficient. Appellants never moved to recuse the District Judge because no basis exists. Their request should be summarily denied.

In this case, the District Court certified the class within one year after suit was brought. That ruling satisfied the requirement of "as soon as practicable after commencement of an action."

Although Rule 23(c)(1) requires the court to determine "as soon as practicable after the commencement of an action" whether it should be maintained as a class action, such a determination may be altered or amended as the case progresses towards a resolution on the merits, General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 160 (1982), Cook v. Rockwell Int'l Corp., 151 F.R.D. 378 (D. Colo. 1993), and can be finalized as late as entry of a decision on the merits. Jiminez v. Weinberger, 523 F.2d 689, 699 (7th Cir. 1975); Catanzano v. Dowling, 847 F. Supp. 1070, 1078 (W.D.N.Y. 1994).

After remand, the District Court did exactly what this Court ordered. First, on August 27, 1991, the District Court entered an Order that discovery should be reopened, and after discovery, an evidentiary hearing would be held to allow arguments on the class certification issue. Depositions were taken in October 1991 and the Court held an evidentiary hearing on January 2, 1992 (R22-850). Both parties asked the court to allow full briefing to be followed by oral argument (Doc. 850). Both parties then requested

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extensions on the briefing. (R22-857). Briefing was concluded around April 1992 (R22-864; R22-865). In September 1992, the court set oral argument on the certification issues and a status conference for October 7, 1993. (R22-866). When the parties appeared before the court for further argument, the court inquired as to the settlement status of the case. The parties advised the court that they would communicate and make good faith efforts to resolve the case. After approximately a year of negotiations, the attempts at settlement proved unfruitful. During October 1993 through September 1994, the parties took little or no action in the case. On September 28, 1994, the Plaintiffs filed "Plaintiffs' Request for Judgment" (R22-875) which ultimately lead to the judgment being appealed herein.

Thus, a review of this record demonstrates that the District Court followed the requirements of Rule 23(c)(1) and did not unnecessarily delay in denying recertification after remand. Moreover, if there was any delay by the District Court it was not prejudicial, nor have Appellants represented that they were prejudiced by the District Court not acting sooner on the recertification request.

CONCLUSION

After seventeen years and two entries of judgment in their favor, Appellees submit that this case was properly decided by the District Court. The District Court applied the correct legal standard in determining Appellants failed to establish a prima facie case and that Appellants are not entitled to judgment as a matter of law. Additionally, Appellees have met their burden of production and affirmance of the District Court's May 1995 Order is warranted by this Court. Finally, the District Court did not abuse its discretion in denying discovery materials or by not recertifying the class.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail on this 15 day of ~~April~~ May, 1996, on Peter S. Fleitman, Asst. Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399; Kent Spriggs, Esq., Spriggs & Johnson, 324 West College Avenue, Tallahassee, Florida 32301; and Jerry Traynham, Esq., Patterson & Traynham, 315 Beard Street, Post Office Box 4289, Tallahassee, Florida 32315.

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