1988 WL 1026079 (U.S.) (Appellate Brief)
Supreme Court of the United States.

WARDS COVE PACKING COMPANY, INC., Castle & Cooke, Inc., Petitioners,
v.
Frank ATONIO, et al., Respondents.

No. 87-1387.
October Term, 1988.
November 4, 1988.

Brief of Amicus Curiae National Association for the Advancement of Colored People

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*1 INTEREST OF AMICUS CURIAE

Amicus curiae National Association for the Advancement of Colored People (NAACP) is an organization dedicated to the furtherance of racial equality and social and economic justice in this country. To promote these ends, the NAACP and its members engage in activity protected by the United States Constitution, including petitioning the government for the redress of grievances. The NAACP and its members throughout the United States for more than twenty years have assisted workers in utilizing Title VII of the Civil Rights Act of 1964 to challenge employment discrimination against minorities and women. The NAACP has urged the Congress to strengthen Title VII and other provisions of the Civil Rights Act of 1964.

***2** Open and notorious segregation of Black workers into inferior jobs was one of the hallmarks of the system of segregation and discrimination in the South before the Civil Rights Act was adopted. Because of the litigation under Title VII, many of the overt forms of discrimination, such as hiring from dual segregated labor markets, discrimination in job assignments, and discriminatory refusals to allow Blacks into better paying jobs, have been abandoned. However, there still remain circumstances in which minorities are restricted today, in precisely the same manner as in earlier years.

For the reasons explained below, the opinions of the District Court and Court of Appeals, for differing reasons, may permit the continued existence of blatant job segregation. The NAACP urges this Court to correct the errors of both the District Court and the Court of Appeals, and to reaffirm that the evil of job segregation remains unlawful under Title VII.

This amicus curiae brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Certiorari was granted to consider three questions relating to the concept of discrimination under Title VII of the Civil Rights Act of 1964 that deals with neutral practices which have a "disparate impact" on minorities or women.[1] This case does not ***3** involve such practices. It involves racial segregation in hiring, job assignments, and promotions against Filipino and Alaskan Native workers in favor of whites.[2] The employers hired minority workers through separate procedures and channels from those used to hire whites. They assigned minority workers to lower paying jobs and refused to consider them for promotion or transfer to white jobs. Whites were hired through separate procedures and channels from those used to hire minorities into higher paying jobs and were separately housed and fed from minorities. These facts, established by the District Court, constitute racial segregation in violation of the statute.

The courts below did not recognize the job segregation of minorities as a violation of Title VII. The District Court discounted evidence of segregation of minorities in low paying jobs as "over-representation" of minorities. It then analyzed several employment practices separately but never examined the interaction between segregated hiring, job assignment, and the refusal to consider minorities for promotion or transfer. The Court of Appeals analyzed employment procedures under the

disparate impact principle and reversed the District Court. In applying the impact principle, it recognized a "business necessity" defense to the maintenance of job segregation. This is not the law Job segregation is illegal.

This court granted Certiorari to consider questions relating to the application of impact theory. However, the facts--segregation in hiring, job assignments, and refusal to transfer or promote minorities--make this case an inappropriate vehicle to resolve questions concerning disparate impact theory. The District Court analysis was clearly erroneous, and the Court of Appeals committed error in allowing a "business necessity" defense to segregation.

Since the Court of Appeals found for the employees, albeit on an erroneous theory, its judgment should be affirmed. This ***4** Court should remand, making clear that the segregation which has been established in this case is illegal and cannot be defended on grounds of business necessity.

THE ARGUMENT

I. TITLE VII UNQUALIFIEDLY PROHIBITS SEGREGATION OF EMPLOYEES OR APPLICANTS WHICH DEPRIVE OR TEND TO DEPRIVE ANY INDIVIDUAL OF EMPLOYMENT OPPORTUNITIES OR OTHERWISE ADVERSELY AFFECT HIS STATUS BECAUSE OF RACE

The language of Sec. 703(a)(2), makes it an unlawful employment practice for an employer to:

> "... limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race ..."

Overt and current job segregation on the basis of race has never been defended before this Court. In the earliest cases under Title VII, employers admitted pre-act segregation against blacks, but stated that segregation had ended, and the post-act situation was justified by seniority or testing practices.[3] None of the cases previously before this Court involved an employer who hired minorities through recruiting practices separate from those used to hire whites, assigned them to lower paying jobs and then, as a matter of general policy, refused to consider them for promotion or transfer to the better "white" jobs. The refusal to consider minorities for promotion out of segregated jobs is illegal *per se* as maintaining segregation.

*5 II. THE FACTS FOUND BY THE DISTRICT COURT ESTABLISH SEGREGATION OF WORKERS BY RACE BY THE EMPLOYER

The facts found by the District Court establish that the defendants did segregate employees and applicants in ways which deprived them of employment opportunities because of their race.[4] The District Court found:

(1) Employees were segregated by race, with whites holding better, higher paying jobs and Alaskan Natives and Filipinos holding lower paying laborer and cannery jobs.[5]

(2) Filipinos and Alaskan Natives have been recruited from Alaskan Native communities and a local union in Seattle composed mainly of workers of Filipino extraction.[6]

(3) They have been assigned to do low paid labor and cannery work.[7]

(4) The jobs done by these workers are characterized as "Filipino jobs," or "Eskimo jobs," or "native" jobs.[8]

***6** (5) The employer does not consider members of the plaintiff class for employment, promotion, or transfer to the higher paying jobs held by whites, regardless of their possible qualifications.[9]

(6) Whites have been recruited primarily from the lower 48 states for the higher paying jobs.[10]

(7) The whites had superior residential and eating facilities.[11]

(8) The pay of white workers, both unskilled and skilled, was higher than that of Alaskan Native and Filipino workers.[12]

(9) When Filipino and Alaskan Native workers sought to apply for the white jobs, they were brushed off with a variety of excuses relating to the timeliness of their applications.[13]

III. THE COMBINATION OF SEGREGATED RECRUITING AND HIRING CHANNELS, SEGREGATED JOB ASSIGNMENTS, AND REFUSAL TO CONSIDER MINORITIES FOR PROMOTION OR TRANSFER TO WHITE JOBS ESTABLISH A VIOLATION OF TITLE VII

The employers devised segregated labor markets. For the higher paying jobs, they recruited whites from the lower 48. For the low paying jobs, they recruited minorities from the local villages or the Filipino union. They assigned minorities to the ***7** lower paying cannery and labor jobs, and whites to the higher paying jobs. They did not permit minority employees promotion or transfer to better jobs.[14] Thus the employers segregated the plaintiff class through its hiring practices, and maintained that segregation through job assignment practices and through refusal to consider minorities for promotion and transfer. These facts were all found by the District Court. This blanket refusal to consider minorities for better jobs locked them into the lower paying jobs for which they had been hired.[15]

This obvious violation of Title VII was obscured because of the efforts of the courts below to fit this case of brutal segregation into the framework of disparate impact or disparate treatment.[16] The concept of disparate impact was intended to address facially neutral practices.[17] The concept of disparate treatment was intended to order the proofs in an individual case of discrimination.[18] But these categories were never intended to be exclusive.[19] They were not developed in, nor have they been applied to, cases of current work force segregation.

The emphasis on the proof process can obscure the ultimate issues of discrimination. In ***8** *United States Postal Service v. Aikens,*[20] this Court criticized the district court for addressing the existence of a prima facie case when all the evidence was in, rather than dealing with the question of discrimination *vel non.* In *Texas Department of Community Affairs v. Burdine,*[21] this Court noted how the lower court's procedural rulings harbored a substantive error. The same errors were committed here.

IV. THE SO-CALLED "OVER-REPRESENTATION" OF MINORITIES IN LOWER PAYING JOBS, PLUS THEIR EXCLUSION FROM HIGHER PAYING WHITE JOBS, DOES CONSTITUTE ILLEGAL SEGREGATION UNDER TITLE VII

The District Court addressed skills requirements for the "white jobs" as matters of disparate treatment requiring proof of intent.[22] On that issue, it examined the statistics showing the disparity between the large number of minorities in the lower paying jobs and their absence in the "white" jobs. It discounted this evidence, calling it "over-representation" because minorities were only a tiny fraction of the total population of Alaska, Washington and Oregon.[23] The District Court then viewed individual instances of rebuffed applicants, word of mouth recruiting among whites, racial labels, segregated housing and eating facilities as either justified or insignificant. It noted that "this is not a promotion from within case,"[24] but did not find that all minorities were unqualified for the "white jobs."[25]

***9** The Court of Appeals in reviewing the District Court stated:

> Thus, when considering the skilled positions, the [district] court found that statistics which merely highlight the segregation of whites and nonwhites between the at-issue and cannery worker jobs, without more, could not serve to raise an inference that the segregation is attributable to intentional discrimination against any particular race.[26]

To summarize, the District Court identified the "over-representation" of minorities in the lower paying jobs. This "over-representation" was then relied upon to deemphasize the comparison of the number of minorities in lower paying jobs with whites in higher paying jobs. This "over-representation" is a euphemism for segregation. Treating segregation as "over-representation" obscured segregation as a violation.[27]

The argument that because plaintiffs are segregated they are entitled to no relief because they are over-represented is disingenuous. In early Title VII cases, employers did not argue they were entitled to keep Blacks in lower paying jobs because they had so many of them.[28] Where the employer uses segregated recruiting processes to hire minorities or women into lower paying jobs and then refuses as a matter of policy to consider them for promotion or transfer, nothing more is needed to establish a violation of Title VII.[29] This case is not analogous to ***10** *Watson v. Fort Worth Bank and Trust,*[30] where four justices were concerned with the risk of finding discrimination when it did not exist. Rather it is its opposite--a failure to see discrimination when it is blatant.

The Court of Appeals compounded the error of the District Court in the statement quoted above. It assumed that proof of segregation in hiring and assignment along with the refusal to allow promotion and transfer was not enough to show a violation of the statute, but that, in addition, intentional discrimination had to be shown.[31] This double burden, a requirement of showing *both* segregation *and* discrimination, is not warranted. The statute makes segregation itself illegal.

The statute is intended to assist those who have been segregated to break out of their situations, not to permit the fact of segregation to justify restrictions against them. The segregation into low paying jobs does not constitute favored treatment as the term "over-representation" suggests; rather, it constitutes the continued exploitation of minority workers trapped into low paying jobs. This Court has repeatedly said that the objective of the statute is to open opportunities to those who have traditionally been denied them.[32] In this case, the group interest of minorities in freedom from job segregation is identical to the interest of each individual minority group member.

***11** This Court has frequently noted that the statute proscribes discrimination against individuals.[33] In *Connecticut v. Teal,*[34] the court stated that the employer could not "cancel out" discrimination against some minorities by promoting others. Similarly in *Furnco*[35] and *Teamsters,*[36] this Court held that the hiring or promotion of some minorities does not permit an employer to discriminate against others. In this case, each individual minority worker is a victim of the unlawful segregation of minorities. This deprivation of individual rights cannot be justified by a claim that the concentration of minorities in segregated jobs constitutes "over-representation."

V. THERE CAN BE NO "BUSINESS NECESSITY" JUSTIFICATION FOR MAINTAINING JOB SEGREGATION

The Court of Appeals reviewed the District Court's analysis of the facts from the perspective of the disparate impact principle, with its corollary defense of business necessity. The Court of Appeals said:

> ... While the district court discounted the comparative statistics in evaluating the claims of intentional discrimination in skilled jobs we find them sufficiently probative of adverse impact. The statistics show only racial stratification by job category. This is sufficient to raise an inference ***12** that some practice or combination of practices has caused the distribution of employees by race and *to place the burden on the employer to justify the business necessity of the practices identified by the plaintiffs.* [[emphasis added][37]

This analysis contained an error of law in assuming, without discussion, that the defense of business necessity was available in a case where the employer knowingly creates and maintains job segregation and does not consider minority workers for advancement into white jobs. The statute does not permit the defense of "business necessity" in this type of case.

The "business necessity" defense was developed by this Court as a component of the concept that practices with disparate impact on minorities are illegal.[38] But it has no relevance to cases of overt discrimination. Any economic advantage which the employer may derive from such segregation is simply illegal.[39] The "legitimate business reason" test was developed in *McDonnell Douglas* as a method of ordering proof where the issue of the employer's motive is clearly drawn between two possibilities, one legal and one illegal. Neither test is required to be applied to practices which segregate minorities in hiring, assignment, promotion, and transfer.[40] Here, it is clear that the employer regularly and normally treated minorities less

favorably than whites.

The recruitment and hiring practices of the employer produced a segregated work force. The no-promotion policy maintained that segregation. There is no justification for this refusal to consider incumbent minority employees for promotion or ***13** transfer to "white" jobs for which they may be qualified.[41] The statute does not provide a Bona Fide Occupational Qualification (BFOQ) defense for racial discrimination.[42] The business necessity claim in a race case must be construed in a most limited way, so as not to defeat the purpose of the statute.[43] Even where the statute does provide for a BFOQ defense, this Court has been careful to limit the scope of that defense to preserve the thrust of the prohibition on discrimination.[44] While an employer may demonstrate that it could not recruit an integrated labor force for a specific job because of availability, it cannot simultaneously refuse to consider the people it hires into a segregated job for other opportunities without violating Title VII.[45]

These facts as a matter of law constitute the maintenance of a segregated work force which denied minorities opportunities for advancement. Intentional segregation is established by ***14** proof of the fact of segregation by race in the hiring process and job assignments, along with its knowing maintenance by refusing to permit promotions and transfers.[46] All of the opinions below assumed that the facts in this case had to be fitted into the mold of either disparate treatment or disparate impact. As a consequence they treated separately these facts concerning segregation in hiring, assignment, and refusal to permit promotion or transfer, which, taken together, establish segregation in violation of Title VII.[47]

As it did in *Aikens,* this Court should make clear that the lower courts must decide ultimate issues of segregation or discrimination *vel non* when all the evidence is before them. When faced with blatant segregation, the lower courts need not fit the case into categories of disparate impact or disparate treatment. There can be no valid reason for the conscious maintenance of a racially segregated work force which flowed from the refusal to allow transfer and promotion to white jobs.

*15 VI. THE COURT SHOULD AFFIRM THE HOLDING OF THE COURT OF APPEALS ON THE GROUND THAT ILLEGAL SEGREGATION HAS BEEN ESTABLISHED RATHER THAN DISMISS THE WRIT AS IMPROVIDENTLY GRANTED

This court granted Certiorari to consider questions which relate to disparate impact theory. But the application of that theory to the facts of this case would permit a business necessity defense to a case of overt segregation.[48] This is the substantive error embedded in the application of the disparate impact analysis to a case of job segregation. Thus, the Court of Appeals reasoning is in error.

While this Court could dismiss the writ as improvidently granted, to do so would leave uncorrected the error of the Court of Appeals in permitting a business necessity defense to job segregation. The error of the Court of Appeals should be corrected lest it generate other efforts to evade Title VII. At the same time, the Court of Appeals correctly overturned the District Court's analysis that "over-representation" of minorities detracted from the proof of discrimination. In this, the holding of the Court of Appeals should be affirmed. Therefore, the NAACP urges the Court to correct both the plain error of the District Court in its failure to appreciate the significance of the facts concerning job segregation, and the error of law of the Court of Appeals in recognizing a business necessity defense to maintenance of job segregation. This can be accomplished by affirming the Court of Appeals' holding and remanding with instructions that the evidence of segregated hiring, job assignments, and refusals to consider minorities for promotion and transfer constitute a violation of the statutory prohibition on segregation.

*16 CONCLUSION

A generation after Title VII of the Civil Rights Act was adopted, changed circumstances, some resulting from its implementation, have created new problems of interpretation. The improvement in minority and female employment under the statute, as interpreted by this Court, has moved the issues from those crude forms of discrimination of the 1960's to more subtle limitations on minority and female employment.[49] But this case is not the proper vehicle to examine these subtle questions. It is a case of crude, currently maintained, segregation. To treat this case otherwise will permit an overt

discriminator to rely on defenses tailored to more refined cases, and, thus, permit continued racial segregation. Pockets of continued segregation remain, as this case illustrates. Congress directly prohibited segregated employment practices such as those found to exist in this case by the District Court. The plaintiffs are entitled to the full protection of the Civil Rights Act of 1964.

Footnotes

* Counsel of Record

1 The questions presented are:
1. Does statistical evidence that shows only a concentration of minorities in jobs not at issue fail as a matter of law to establish disparate impact of hiring practices where the employer hires for at-issue jobs from outside his own work force, does not promote-from-within or provide training for such jobs, and where minorities are not underrepresented in the at-issue jobs?
2. In applying the disparate impact analysis, did the Ninth Circuit improperly shift the burden of proof to petitioners?
3. Did the Ninth Circuit commit error in allowing plaintiffs to challenge the cumulative effect of a wide range of non-racially motivated employment practices under the disparate impact model?

2 Both Alaskan Natives and persons of Filipino descent are considered as being in separate racial groups from whites for the purposes of the Federal reporting policies. See 43 Fed. Reg. 19,260, 19,269 (May 4, 1978).

3 *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1974); *Teamsters v. United States,* 431 U.S. 333 (1977); Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope,* 23 Rutgers L. Rev. 268 (1969).

4 References throughout are to the opinions appearing in appendices to the Joint Appendix. For convenience, the reference to Joint Appendix is omitted when referring to the opinions of the Courts below. Appendix I contains the opinion of the District Court, which also appears in 34 EPD ¶ 34,437. Appendix III contains the Court of Appeals' first opinion of Aug. 16, 1985, also appearing in 768 F.2d 1120 (9th Cir. 1985). Appendix V contains the *en banc* opinion of the Court of Appeals of Feb. 23, 1987, appearing in 810 F.2d 1477 (9th Cir. 1987). Appendix VI contains the decision of the panel of the Court of Appeals on remand from the Court *en banc,* of Sept. 2, 1987, appearing in 827 F.2d 439 (9th Cir. 1987) as to which certiorari has been granted.

5 District Court findings #105 (I-36), #109 (I-38). See also *Atonio* (VI-18) 827 F.2d 439 at 444, ("The statistics show only racial stratification by job category.") *See also, Atonio* (III-9) 768 F.2d 1120, 1124.

6 The District Court findings #90 (I-32), #105 (I-36), #109 (I-38); *Atonio* (V-6-7) 810 F.2d at 1479.

7 *Id.*

8 District Court finding #135-141 (I-76-80); *Atonio* (VI-33) 827 F.2d at 447.

9 District Court finding #86 (I-30), #89 (I-31), #110 (I-39). White jobs are filled from Seattle and Astoria. District Court findings #86 (I-30), #112 (I-39). The employers do not promote from within. District Court Finding #112 (I-39). "Defendant's cannery workers and laborers do not form a labor pool for other jobs at defendant's facilities." District Court finding #110 (I-39). *See also* Question Presented #1 on which certiorari was granted, note 1, *supra.*

10 District Court finding #86 (I-30).

11 District Court findings #148, 149 (I-81-84).

12 *Atonio* (III-91) 768 F.2d at 1124.

13 District Court findings #150-172 (I-84-94).

14 The concentration of minorities in the lower paying jobs and the denial of any consideration for promotion or transfer establishes a violation of Title VII, even though some whites were also in the lower paying jobs. *Teamsters v. United States,* 431 U.S. 333 at 337-338 (1977). *See also, Griggs v. Duke Power Co.,* 420 F.2d 1225 at 1247 (4th Cir. 1970), *reversed in part,* 401 U.S. 424 (1971), Sobeloff, J., *dissenting.*

15 *Teamsters v. United States,* 431 U.S. 345, 349-350 (1977) deals with a case of pre-act segregation perpetuated by post-act operation of a seniority system. In this case, post-act segregation is perpetuated by a refusal to consider those segregated for promotion or transfer to white jobs.

16 District Court (I-96-107). Court of Appeals: *Atonio* (III-15, 43-47) 768 F.2d 1125, 1131; (V-9-12) 810 F.2d 1480; (VI-4-9) 827 F.2d at 442.

17 *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).

18 *McDonnell Douglas v. Green,* 411 U.S. 732 (1973).

19 *Teamsters v. United States,* 431 U.S. 338 at 358 (1977).

20 460 U.S. 711, 715-717 (1983).

21 450 U.S. 248, 258-259 (1981).

22 The District Court treated skills requirements as subjective and therefore not subject to the disparate impact rule. District Court (I-102).

23 District Court findings #103 (I-35), #105 (I-36), #107 (I-37), #109 (I-38-39), #121 (I-42).

24 District Court (I-114).

25 Any such finding would have been inconsistent with the District Court's conclusion that some of the "at issue" jobs were unskilled. District Court finding #134 (I-75).

26 *Atonio* (VI-16) 827 F.2d at 444.

27 District Court finding #121 (I-42) treated "over-representation" as a reason not to credit statistics comparing proportions of minorities in lower paying jobs with whites in higher paying jobs.

28 *Local 189, United Papermakers v. United States,* 416 F.2d 980 (5th Cir. 1969); *United States v. Bethlehem Steel Corp.,* 446 F.2d 652 (2d Cir. 1971). In the early years under Title VII, the EEOC frequently obtained promises of "promotion from within" to end job segregation. Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope,* 23 Rutgers L. Rev. 268, 273-274, 303 (1969).

29 "And it is unthinkable that a citizen of this great country should be relegated to unremitting toil with never a glimmer of light in the midnight of it all." Gwin, J. in *Miller v. International Paper Co.,* 408 F.2d 283 (5th Cir. 1969). The sentiment is applicable to Alaska.

30 487 U.S. 977, 108 S. Ct. 2777 (1988).

31 "... statistics which merely highlight the segregation of whites and nonwhites between the at-issue and cannery worker jobs, without more, could not serve to raise an inference that *the segregation is attributable to intentional discrimination against any particular race.*" [emphasis added] *Atonio* (VI-16) 827 F.2d at 444.

32 *Griggs v. Duke Power Co.,* 401 U.S. 424, 426, 429-432 (1971); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417-418 (1975); *United Steelworkers v. Weber,* 443 U.S. 193, 202-203 (1979); *Ford Motor Co. v. EEOC,* 458 U.S. 219, 228 (1982); *Johnson v. Santa Clara County Transportation Agency,* 107 S. Ct. 1442 (1987).
The Uniform Guidelines on Employee Selection Procedure, while supporting the "bottom line" concept with respect to employers who employ at the availability level, expressly states that this concept is inapplicable to those employees who have been subject of prior restrictions on promotional opportunity. Uniform Guidelines on Employee Selection Procedures-1978, 29 C.F.R. Sec. 1607.4(C)(1) provides that the "bottom line" is not a justification "where the selection procedure is a significant factor in the continuation of patterns of assignment of incumbent employees caused by prior discriminatory employment practices."

33 *Connecticut v. Teal,* 457 U.S. 440 (1982); *Los Angeles Water and Power Co. v. Manhart,* 435 U.S. 702 (1978). *Phillips v. Martin-Marietta Corp.,* 400 U.S. 542, 543-544 (1971) held that an employer could not justify exclusion of women with young

children on the grounds that it hired many other women.

34 457 U.S. at 452-456 (1982).

35 *Furnco Constr. Corp. v. Waters,* 438 U.S. 567 at 579 (1978).

36 *Teamsters v. United States,* 431 U.S. 324, 341-342 (1977).

37 *Atonio* (VI-18) 827 F.2d at 444.

38 *See* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co., and the Concept of Employment Discrimination,* 71 Mich L. Rev. 59, 81-84 (1972).

39 *Compare Corning Glass Works v. Brennan,* 417 U.S. 189, 205 (1974).

40 The closest this Court has come to addressing a situation such as this is *Teamsters v. United States,* 431 U.S. 349 (1977).

41 These practices were not found to constitute a bona fide seniority system. *Compare* District Court finding #101 (I-35).

42 *See* Sec. 703(e)(1). The District Court appeared to apply a lose form of a BFOQ defense by its suggestions that many members of the class do not speak English, and prefer to fish rather than work in the summer time. District Court Finding #100 (I-34). The "business necessity" defense of *Griggs* has not been applied to cases of overt discrimination by this Court. In fact, *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975) suggests that claims of business necessity would not justify overt discrimination.

43 *United States v. Bethlehem Steel Corp.,* 446 F.2d 652, 662 (2d Cir. 1971).

44 *Dothard v. Rawlinson,* 433 U.S. 321, 333 (1977).

45 In *Furnco Constr. Co. v. Waters,* 438 U.S. 567 (1978), the employer justified its policy of not hiring at the gate on the grounds that it needed some information about the applicants' capabilities before hiring them. This argument cannot justify a blanket refusal to consider incumbent employees for promotion where these employees are well known to the employer. *Furnco*'s caution against courts restructuring an employer's recruitment and hiring practices has no application to a case where segregation exists. In *Furnco,* the employer's statistics suggested a lack of discriminatory intent. Here, the promotion and transfer policies themselves constitute illegal maintenance of segregation.

46 The decision to conduct all hiring in the lower 48 for white jobs, and not to consider applications from incumbent minority employees during the time they are employed, obviously makes it easier for whites than minorities to make applications.

47 The District Court did not properly apply that aspect of *McDonnell Douglas v. Green* which deals with statistics. *McDonnell Douglas* states that "[o]ther evidence which may be relevant to any showing of pretext includes facts as to ... petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy may be helpful to a determination of whether petitioners's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. (411 U.S. at 804-805). In the accompanying footnote, the Court stated that, "[t]he District court may, for example, determine after reasonable discovery that, 'the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices."' *Id.* at 805 (citation omitted). Contrary to these suggestions, the District Court found that such evidence established "over-representation," not discrimination. This was an error of law.

48 The statement of Question Presented #1, note 1, *supra,* assumes the legitimacy of the "no promotion" rule which is illegal under the facts of this case.

49 Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments,* 63 Chi. Kent L. Rev. 1 (1986).