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THE 21ST ANNUAL ROBERT F. WAGNER, SR. NATIONAL LABOR LAW MOOT COURT COMPETITION

FINAL ROUND ORAL ARGUMENTS

THE BENCH

Presiding as Chief Justice
Spencer H. Lewis

Charles I. Cohen
Sarah Fox
John Neil Raudabaugh
Daniel Silverman
John C. Truesdale

THE ADVOCATES

Petitioners
John H. Elovson
Christy Holman

Respondents
Andrew Goodstadt
Lisa Solbakken

Note

The text of the Final Round Oral Arguments has been edited to include citations to relevant case law articulated by the advocates.

BAILIFF: All rise. Oyez, oyez. All those who have business before this, the Honorable Supreme Court of the United States, are admonished to draw near and give their attention for the Court is now sitting. God save the United States and this Honorable Court.

The Supreme Court of United States is now in session. Justices Cohen, Fox, Raudabaugh, Silverman, Truesdale and Chief Justice Lewis presiding.

CHIEF JUSTICE LEWIS: You may proceed.

MR. ELOVSON: May it please the Court, your Honors, my name is John Elovson and I along with my co-counsel Christy Holman represent the Petitioner Julie McCoy in this action. Before I begin, I'd like to reserve two minutes of time for rebuttal. Your Honors, my co-counsel Christy Holman will argue why the Petitioner has stated a valid cause of action for disparate impact under the ADEA;[1] and I will be arguing why the terms of Petitioner's collective bargaining agreement requiring her to submit her ADEA claim to final and binding arbitration is unenforceable as a matter of law. Your Honors, this case is about autonomy and safeguarding individual statutory rights; and the Court of Appeals for the 13th Circuit failed to achieve this result when it found Petitioner's arbitration as her sole means of addressing her ADEA claim in this case.

JUSTICE SILVERMAN: Let me ask you, didn't your client file a grievance?

MR. ELOVSON: Yes, she did.

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[1] Age Discrimination Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. §§ 621-634 (1994).

JUSTICE SILVERMAN: She opted to use the grievance procedure to her advantage, did she not?

MR. ELOVSON: Yes, she did, your Honor.

JUSTICE SILVERMAN: Why shouldn't we accept at least the factual finding of the arbitrator that there was no discrimination? Putting aside the legal issues, why shouldn't we accept the factual finding? Is this like getting two bites at the apple?

MR. ELOVSON: Your Honor, in a sense, yes. However, the alternatives to not allowing Petitioner to have two bites at the apple are much graver than allowing that to happen. By not allowing Petitioner to have two bites at the apple essentially what this Court allows to happen is for a collective entity to waive the individual rights of an individual for the collective benefit of a majority of individuals and also takes the risk of that right being lost entirely.

JUSTICE SILVERMAN: Why is it a waiver? If she opted to file a grievance and go to arbitration and a finding was made on the facts that there was no discrimination? Why is it a waiver? She opted to do it.

MR. ELOVSON: Your Honor, she did opt to do it. Under the terms of the collective bargaining agreement, she did not agree initially to waive that right. That right was waived before Petitioner even began working for Puerta Pacific College. The Union pre-negotiated that right with the employer and thereby prospectively waived that right.

JUSTICE COHEN: Counselor, would it have made any difference if no grievance had been filed in this circumstance?

MR. ELOVSON: In what sense, your Honor?

JUSTICE COHEN: Well, we know there was a grievance filed and it went to arbitration. What is the legal significance of that? Would the situation with which the Court is confronted be any different if this individual had simply chosen not to file a grievance?

MR. ELOVSON: No, your Honor, for two reasons. First, because a union may not, to begin with, prospectively waive the right of a jury trial of the individual members of its union. And, secondly, as recognized by this Court in the *Alexander*[2] line of cases, the filing of a grievance and pursuing that under a grievance procedure alone is insufficient to preclude a later suit in Federal Court. However, your Honors, the real issue in this case is that the collective entity is waiving the individual right for the collective benefit of the majority of members and this Court has distinguished between the rights that a union may waive and the rights that it may not.

JUSTICE RAUDABAUGH: Counsel, the whole purpose of the collective bargaining agreement; and, that is, in an employment setting issues regarding work where you have a union and negotiate an agreement, it's basically, as you're characterizing it, the tyranny of the majority but at the same time, the purpose of that relationship is purposely to waive certain rights, to waive certain individual rights, for the benefit of that relationship negotiated on behalf of all? So I'm at a loss to understand what is your objection to this plaintiff appellant here losing out in favor of the negotiated process for resolving employment-related disputes, and clearly this is simply a matter of employment policy coming up against a business decision at the campus. It's sort of ordinary, isn't it?

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[2] Alexander v. Gardener-Denver, 415 U.S. 36, 49 (1974).

MR. ELOVSON: No, your Honor, it is not. It is precisely what this Court has distinguished in its cases such as in *Barrentine v. Arkansas-Best Freight System.*[3] And that is that there are certain rights that a union may waive on behalf of its employees such as certain seniority benefits or economic plans or even an individual or even rights that are conferred by statute.

JUSTICE RAUDABAUGH: But Counsel, I'm sorry to interrupt again, but in negotiating the agreement, if you're familiar with the process of bargaining, that probably was a fairly significant chip on the table that the parties adjusted overall economic tradeoffs for so that the right to give up setting up the employer for being lambasted with multiple counter-suits for other issues, they have a nice clean tray. They probably paid more in wages or in benefits or what have you. Isn't that part of the deal?

MR. ELOVSON: No, your Honor, it is not because the rights that a union may waive have been collectively conferred on the individual members in order to gain collective benefit at the negotiating table. That's the rationale behind the right to strike and certain other collective rights that this Court has recognized that unions may bargain on the behalf of their union members. However, that rationale does not underlie Congress's purposes for passing individual right statutes to begin with.

JUSTICE SILVERMAN: An individual could waive the right but a union could not on behalf of the individual?

MR. ELOVSON: Precisely, your Honor.

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[3] 450 U.S. 728, 747 (1981).

JUSTICE SILVERMAN: But doesn't that give a benefit to people who join unions? It discriminates in favor of people who join unions. They get two bites at the apple whereas those who don't join unions don't.

MR. ELOVSON: No, your Honor. There is no benefit because each person, whether they're a member of a union or not a member of a union, will be able to pursue their claim in Federal Court and that's precisely what Congress intended.

JUSTICE SILVERMAN: But an individual could waive the rights and, therefore, be required to go to arbitration.

MR. ELOVSON: They could, your Honors.

JUSTICE SILVERMAN: But if you're in a union setting, you cannot waive the right?

MR. ELOVSON: Your Honor, as the 7th Circuit just decided this Thursday in *Pryner v. Tractor Supply Company*[4] there is an arrangement that will allow an individual under the terms of a collective bargaining agreement to waive their rights to a jury trial. In that case, your Honor, Chief Justice Posner recognized that a union may not prospectively waive a union member's rights to a jury trial. However, if that individual, while they're still a union member, may agree individually with the employer to pursue arbitration, then that waiver is acceptable. And the reason for that is because in that case it is the individual himself as the individual in *Gilmer v. Interstate/Johnson Lane Corp.*[5] that has made the decision to waive that right. And the

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[4] Nos. 96-2437, 96-2892, 1997 WL 125936 (7th Cir. 1997).

[5] 500 U.S. 20 (1991).

distinction, your Honors, is because it is an individual who is waiving the individual right for an individual benefit and that is not what occurs when a union may prospectively waive these rights.

JUSTICE COHEN: Counsel, let me ask you this. Suppose the result of the arbitration had been different than it is here and that discrimination would have been filed. Supposing I don't have to honor that. I'm entitled to have my rights adjudicated in a jury trial proceeding in Federal District Court. Would your arguments be the same here?

MR. ELOVSON: For the employer, no, use the individual rights statutes that are found under Title VII[6] and the ADEA were written for employees to protect their rights in the workplace. They were not intended to protect the rights of employers in the workplace.

JUSTICE COHEN: But are you saying the employer doesn't have any rights in this matter at all?

MR. ELOVSON: Your Honor, the employer does have rights. The employer has the right, as does the individual employee, to arbitrate the claims as best they can at that proceeding. However, if that proceeding does not end perhaps the way that they would like, they may still appeal that decision. They may still appeal that decision.

JUSTICE COHEN: Do we know what rights there are on appealing of an arbitration?

MR. ELOVSON: Your Honor, appeal is very limited. It's limited to manifest disregard of the law and factual issues. The factual determinations of an arbitrator are very deferential. But again, your

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[6] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994).

Honor, the point of these statutes is to protect individual statutory rights and thereby allowing an employee a second chance to vindicate their claim in an appropriate forum is different than allowing an employer to challenge again a determination of the arbitrator.

JUSTICE RAUDABAUGH: But what is it you don't like about some of my very fine colleagues on the 4th Circuit Bench?

MR. ELOVSON: Your Honor, the 4th Circuit's decision in *Austin*[7] is incorrect for thievery reasons we just mentioned. The *Austin* Court never went through an analysis between the difference of the collective rights that a union may waive and the individual rights that it may not.[8]

JUSTICE RAUDABAUGH: Didn't the employer pay in the bargain for the contract and that the contract that they negotiated specifically included the provisions for waiving statutory claims? Hasn't the employer paid for the bargain?

MR. ELOVSON: Your Honor, the issue here is not whether the employer has paid for the bargain because even if they paid for the bargain, that does not mean that a contract is unconscionable or violates public policy.

JUSTICE RAUDABAUGH: So you're saying a union then only represents collective interests not individual interests?

MR. ELOVSON: Your Honor, by definition a union should only be able to represent the collective interests of the individual members of

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[7] Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996).
[8] *Id.*

the union and should not be able to prospectively waive the individual statutory rights that have been conferred by independent power, i.e., Congress in this case, to mandate that there is a minimum level of protection for workers in the workplace.

JUSTICE FOX: Counsel, why should we consider this kind of waiver to be unconscionable? We have held in *Gilmer* that the unrepresented employee can be compelled essentially as a condition of employment to arbitrate these kinds of claims which is a much more vulnerable position, being forced into an arbitration system than a represented employee.[9] Why should we be more concerned about the represented employee and the protection of his rights than we are about the unrepresented employee?

MR. ELOVSON: Your Honor, perhaps I misspoke. Unconscionable is not the proper term, rather against public policy is a more appropriate term to use in this case. Your Honors, that is the whole point, because there is an inherent conflict between the role of the union as the exclusive representative of an individual in an arbitration and someone trying to vindicate their individual statutory rights as opposed to the individual in *Gilmer*.[10] Your Honors, the individual in *Gilmer* was, although not represented by a Union, was free to choose his own lawyer.[11]

JUSTICE FOX: Why is there more conflict in this situation than any kind of unjust discharge claim? In either case the employee is claiming that he was discharged in violation of some kind of constraint on the employer. Why would the union's interest be any more different

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[9] *Gilmer*, 500 U.S. at 31.
[10] *Id.* at 20.
[11] *Id.* at 35.

than the employee's in representing him on the statutory claim than on any unjust discharge, unjust cause discharge claim?

MR. ELOVSON: Precisely for the reasons that this Court enunciated in its *Barrentine* decision. Your Honors, the overall goal of the union is to maximize the economic benefit of the maximum numbers of its individuals; and what happens is any individual statutory rights cases—

JUSTICE RAUDABAUGH: Well, now, Counselor, haven't we already spoken many years ago in a line of cases that puts the union in the position of even being sued if it does not properly represent the interests of each individual member?

MR. ELOVSON: Your Honor, the union's duty of fair representation is insufficient to safeguard individual statutory rights in the arbitration process. Although this Court has recognized in decisions such as *Vaca v. Sipes*[12] that a union may not act arbitrarily, discriminatorily or in bad faith towards its members. It is equally recognized that this is an extremely high threshold for a union member to have to prove. For example, your Honors, in *Air Line Pilots Association International v. O'Neill*,[13] this Court recognized explicitly that for an individual to be able to sue, to successfully sue, their union for a breach of its duty of fair representation that employee must show that the activities by the union were wholly irrational.[14] Your Honors, Congress did not pass the individual statutory rights at issue in this case in order to be protected by a threshold of irrationality on the part of the person who is supposed to be protecting their rights.

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[12] 386 U.S. 171, 190 (1967).
[13] 499 U.S. 65, 78 (1991).
[14] *Id.* at 78.

JUSTICE RAUDABAUGH: Well, let me ask you from a public policy point of view, should Congress continue over the years to continually add more and more protective rights through individual additional statutes, are we putting an impossible burden here on the employer and on the union and really bringing about a reason to not be interested in reaching negotiated agreements if you're setting yourself up for constant multiple lawsuits?

MR. ELOVSON: Your Honor, that is unfortunately the give-and-take process of the collective—

JUSTICE RAUDABAUGH: Isn't it just a take process? Where is the give?

MR. ELOVSON: Your Honor, the give is that both individuals during arbitration have the opportunity to expeditiously end the lawsuit that they may have against the employer.

JUSTICE COHEN: Counselor, is the collective bargaining relationship set up on a voluntary basis?

MR. ELOVSON: Your Honors, to a certain degree it is voluntary as in this case that Ms. McCoy chose to become a member of the union. However, the actual collective bargaining process itself which requires mandatory binding arbitration should not be considered to be voluntary in the sense as enforceable. The reason for that again, your Honors, is because the terms of the agreement that this individual is agreeing to—

CHIEF JUSTICE LEWIS: Isn't the union's duty of fair representation adequate to preserve the rights and protect the interests of the individual members?

MR. ELOVSON: No, again, your Honor, because the threshold of showing that the union has breached its duty of fair representation is an extremely high burden and that's precisely the point that this Court made in *McDonald v. City of West Branch, Michigan,*[15] that the Court was unwilling to allow arbitration of a 1983 claim in that case which precluded a later suit in Federal Court.[16] And one of the reasons for that is simply because of the misalignment of interest between the union and the individual claimant and also the difficulty that the fair duty of representation presents in showing that it has been breached.

JUSTICE TRUESDALE: Counsel, is there any indication in this record that the union did anything other than go one hundred percent to bat for Ms. McCoy in representing her adequately?

MR. ELOVSON: Your Honor, I see that my time is up. May I respond?

JUSTICE TRUESDALE: Yes, please.

MR. ELOVSON: Your Honors, the record is insufficient to indicate whether the union in this case actually sufficiently and vigorously pursued her claim. However, this Court understands that its decisions have much larger implications than just the facts before this case. The issue before this case is whether this Court is going to allow a situation where the collective entity that may have a direct conflict of interest with the individual may continue to be the sole representative of that person in arbitration.

JUSTICE FOX: Again, could you articulate what that conflict

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[15] 466 U.S. 284, 286 (1984).
[16] *Id.* at 287.

of interest is?

MR. ELOVSON: Certainly, Justice Fox. The conflict of interest is that the goal of the union is to maximize the overall benefit, economic benefit, for the majority of its members, and suits brought under Title VII and the ADEA threaten that because the individual is seeking monetary damages under those claims.

JUSTICE RAUDABAUGH: But, Counsel, if I may ask a follow-up question.

CHIEF JUSTICE LEWIS: Yes.

JUSTICE RAUDABAUGH: It seems to me your argument is saying something akin to the fact that to the extent that an individual is singled out improperly under a particular statute that's designed to protect people, minorities, people with different attributes from the majority, you're saying that somehow that that would work against the interests of the majority or that the majority would work against the interests of the minority. That's what goes on in courts and in the public sector all the time and in the battle in the courts. Isn't the union made better even if the decision goes in favor of the individual here than against the collective interests of the majority?

MR. ELOVSON: Your Honor, no, it is not; and the reason for that is because the union again seeks to maximize the economic benefits of its members. That's the rationale of having a union to begin with, is to be able to provide a united front to negotiate for better economic terms for its members. And the sacrifice of the individual statutory rights are not necessarily going to affect the union standing with a majority of its members and that's where the inherent conflict lies.

CHIEF JUSTICE LEWIS: Let me ask you this final question: Are you suggesting earlier in your comment that there's some differentiation in remedies available, either by way of the collective bargaining through arbitration or the statutory remedies?

MR. ELOVSON: No, your Honor, that was not the point I was making. I was making that the remedies which individuals seek by bringing a claim under the ADEA can threaten the economic certainty of the majority of its members because if an individual seeks monetary damages for an egregious violation of their civil rights, that award may threaten the employer's ability to provide moneys for economic plans or benefits to the majority of its workers. And that's precisely what this Court recognized in *Barrentine*[17], your Honors. Unions do sacrifice the individual claims of its members because they try to maximize the benefit for the majority. Thank you.

CHIEF JUSTICE LEWIS: Proceed.

MS. HOLMAN: May it please the Court, my name is Christy Holman, counsel for Petitioner Julie McCoy. This case is about age discrimination and about ensuring that the purpose of Congress in enacting the ADEA is fulfilled. First, this Court should find that disparate impact is actionable under the ADEA because to hold otherwise would defeat the purpose of Congress. Second, this Court should reverse the decision of the District Court because respondent has not established a business necessity. Disparate impact should be actionable under the ADEA. The same reasons that led this Court to apply disparate impact liability under Title VII in *Griggs v. Duke Power Company*[18] apply to the ADEA.

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[17] 450 U.S. at 735.

[18] 401 U.S. 424, 436 (1971).

CHIEF JUSTICE LEWIS: Is there anything in the statute of the ADEA that suggests disparate impact is available as an analysis?

MS. HOLMAN: Your Honor, Congress did not specifically address disparate analysis or disparate impact liability or place it under the statute but neither did Congress do so under Title VII. However, the language of the ADEA and the language of Title VII are very similar.

CHIEF JUSTICE LEWIS: Could the Congress have done so under the 1991 Civil Rights Act[19] and made it explicitly clear that it was available?

MS. HOLMAN: Your Honor, Congress could have done so. However looking to the 1991 Civil Rights Act[20] where Congress expressly wrote disparate impact liability enters Title VII, Congress did so in response to this Court's decision in *Wards Cove Packing v. Antonio*[21] where this Court altered the burden of proof required in a Title VII[22] disparate impact liability case.[23]

JUSTICE COHEN: Counsel, are you saying the law was so clear in 1991 that there was a right to bring a disparate impact claim that there was no need for Congress to have so stated if that were its intention?

MS. HOLMAN: With respect to the ADEA, your Honor?

JUSTICE COHEN: Yes.

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[19] Pub.L.No.102-166.
[20] *Id.*
[21] 490 U.S. 642, 659 (1989).
[22] 42 U.S.C. § 2000e-2.
[23] *Wards Cove Packing Co.*, 490 U.S. at 659.

MS. HOLMAN: Yes. And that is precisely my point and that this Court has recognized in *Lorillard v. Pons,*[24] for example, that Congress is deemed to be aware of the interpretation that courts give to statutes.[25] And in 1991 every Circuit Court to have considered the issue found that disparate impact liability was available under the ADEA and thus Congress, by not taking action during the ADEA, was deemed to be aware that courts have found disparate impact liability to be available.

JUSTICE SILVERMAN: What is the employment practice that you feel falls more harshly on the protected class in this particular case?

MS. HOLMAN: Your Honor, here Ms. McCoy challenges Part II of the profit plan which is the salary structure which links years of experience to salary.

JUSTICE SILVERMAN: She was making more money and why isn't that a valid defense? The fact that the school has to pay more money, how does that adversely impact on age?

MS. HOLMAN: Your Honor, here Ms. McCoy was terminated because she had too many years of experience and earned too high a salary and the statistics is that Ms. McCoy—

JUSTICE RAUDABAUGH: But, Counsel, you could look at it a different way, particularly the 7th Circuit Chicago School would look at it as though this school has made a conscious determination and that is if you want well reasoned, wise teaching you go to a school that employs older people and pays more. And this school has made a decision they can't afford that and so students matriculating ought to

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[24] 434 U.S. 575, 580 (1978).

[25] *Id.* at 580.

know that they'll get less wise, younger and more inexperienced teaching. Isn't that pure and simple the bottom line choice here?

MS. HOLMAN: No, your Honor, it's not.

JUSTICE RAUDABAUGH: How are you going to pay for someone if you have a financial inability to pay?

MS. HOLMAN: Your Honor, here the record reflects that Puerta Pacific does not have a business necessity and cannot justify its salary structure on the basis that it cannot afford the salaries. There is no business necessity in this case; and looking to the stipulated facts, Petitioner does note that Respondent experienced a business downturn in 1989 and layoffs in 1991. However, since then, the District Court found that the school is able to attract new faculty, is reopening degree programs.

JUSTICE RAUDABAUGH: But isn't it also possible that the school made a conscious decision and said, "Quite frankly Ms. McCoy has not been teaching all these years. It's been an experiential-based benefit that she brings to the classroom and quite frankly the faculty has elected in this course to say that just a few years in the field is adequate to basically learn, you know, 90 percent of what one would teach and we don't need an additional 30 years of experience." Isn't that possible and what's discriminatory about that decision?

MS. HOLMAN: Your Honor, the problem here with Puerta Pacific's salary structure is that by its terms it excludes over 80 percent of qualified individuals over the age of 40 in the State of Wagner and for that reason it has a discriminatory effect.

JUSTICE FOX: Counsel, just to return to that point on disparate

impact analysis, didn't this Court essentially decide that issue in *Hazen Paper*[26] when we said that as long as the employer's decision is wholly made and motivated by factors other than age, that the concerns that ADEA were designed to address are not present and that's true even if the motivating factor happens to be correlated with age?

MS. HOLMAN: Your Honor, *Hazen Paper Company v. Biggins* is distinguishable from this case for two very important reasons. First, this Court in that case expressly reserved the issue of disparate impact liability; but more importantly, *Hazen Paper* was a disparate treatment case.[27] And Respondent will make much of the fact that this Court stated in *Hazen Paper* that age and factors that correlate with age are analytically distinct and disparate impact liability should therefore not be available.[28] But all this Court held in *Hazen Paper Company* was that a disparate treatment plaintiff must establish discriminatory intent and that merely showing that defendant-employer based its decision on factors that correlate with age is insufficient to establish discriminatory intent.[29]

CHIEF JUSTICE LEWIS: Counselor, why should this Court impose a theory of liability based exclusively on the language of the statute?

MS. HOLMAN: Your Honor, the language of the statute here mirrors that of Title VII and this Court implied disparate impact liability under Title VII and it should similarly do so under the ADEA. First, there's nothing in the language to preclude disparate impact liability.

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[26] *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993).
[27] *Id.*
[28] *Id.*
[29] *Id.*

Additionally, if we look to specific provisions, again Respondent will argue that the key difference is the exception to liability under the ADEA for reasonable factors other than age, a provision not found under Title VII; but the critical point here is that that is an exception to liability. And Congress intended for a plaintiff to able to bring a disparate impact claim and for an employer to then be able to defend the claim on the ground that its decision was based on a reasonable factor other than age that rises to the level of a business necessity and this is a question for the finder of fact.

JUSTICE COHEN: Counselor, would you say that our hands are actually tied on this disparate impact analysis, that the answer is actually crystal clear already that there must a disparate impact claim?

MS. HOLMAN: Your Honor, disparate impact analysis must be allowed under the ADEA, yes, Petitioner wholeheartedly agrees with that for the additional reason—

JUSTICE COHEN: But what I'm asking is whether it's crystal clear already that your position mandates that result?

MS. HOLMAN: Your Honor, Petitioner cannot necessarily say that it's crystal clear because there is a split in the circuits.

JUSTICE COHEN: Okay. Then let me ask you this: Since the Court has had the benefit of the last 30 years of dealing with disparate impact cases, why should this Court if it has the choice to extend the situation and end up with more and more lawsuits based not on actual treatment but based on statistics?

MS. HOLMAN: Your Honor, one particularly compelling reason is an additional similarity between the ADEA and Title VII and

that is the problem of sophisticated employers who can institute policies that are apparently facially neutral but have the effect of discriminating. And this Court in *Watson v. Forth Worth Bank & Trust*[30] stated that disparate treatment alone could not eliminate current practices where discriminatory intent is virtually impossible to prove.[31]

JUSTICE SILVERMAN: Ms. Holman, do you concede that this is facially neutral? My understanding of the facts is Ms. Stubing who was hired at $27,000 a year, Ms. McCoy was never offered that job at $27,000 a year. So the discriminatory practice that was engaged in was the failure to offer her the job first. Isn't that the discriminatory practice, failure to offer Ms. McCoy the job at $27,000 before they offered to it someone younger?

MS. HOLMAN: No, your Honor. Here the discriminatory practice is the fact that the salary structure by its terms excludes almost 90 percent of qualified individuals.

JUSTICE SILVERMAN: But supposing Ms. McCoy was willing to accept the job at $27,000?

MS. HOLMAN: Absolutely, if Puerta Pacific had a salary structure in place and would enable any individual, any qualified individual, to accept the job for the first year at $28,000 or less than salary, that would not have a disparate impact. And particularly since if we look to the salary structure, it only limits salary for the first year of employment. Ms. McCoy was not given that employment.

JUSTICE TRUESDALE: Does the record show whether she

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[30] 487 U.S. 977, 988-89 (1988).

[31] *Id.* at 988.

offered to work at that lowered rate, if Francis Parker, I believe the plaintiff in that case, had offered to work at the lower rate?

MS. HOLMAN: Your Honor, the record does not reflect whether Ms. McCoy made the offer or was given the option. However, looking to whether Respondent has established a business necessity in this case, here Respondent has not; and while this Court has never articulated the standard for business necessity under the ADEA, Ms. McCoy urges this Court to adopt the formulation of the 8th Circuit to establish business necessity the practice must be job related and that there must be a compelling need to maintain the practice. And here Respondent fails to meet this standard.

JUSTICE TRUESDALE: Wouldn't that get the Court into the business of substituting its business judgment for that of the plaintiff in this case?

MS. HOLMAN: Your Honor, while Petitioner does note that there's a judicial policy against second-guessing business decisions, Circuit Courts have already accepted disparate impact liability and the majority of them recognize and do conduct the necessary analysis of whether the business is able to articulate necessity it is compelling and the practice is job related. Courts are already conducting the analysis.

JUSTICE COHEN: When you say courts, you really mean juries, do you not?

MS. HOLMAN: Yes, your Honor. Most typically it would be a jury although in this case there was a bench trial. An additional reason Puerta Pacific has not established business necessity in this case is because any business necessity that might have existed is certainly in the past as demonstrated by the record. But, your Honors, even if this Court

finds that somehow Respondent has managed to justify its discriminatory hiring practices as a business necessity, Ms. McCoy asks this Court to remand to the District Court because here the District Court—

CHIEF JUSTICE LEWIS: Isn't there a finding in the record that the employer had made its business necessity defense?

MS. HOLMAN: Yes, your Honor.

CHIEF JUSTICE LEWIS: Are you asking us to substitute our finding as a matter of law to the Court's finding which is a fact finding?

MS. HOLMAN: Your Honor, the District Court's finding is based on fact but whether business necessity was established should be reviewable by this Court as a mixed question of fact and law; and in this case Puerta Pacific has not made that showing. If we look to the findings of the District Court in particular the record reflects that while Petitioner only challenges Part II of the profit plan which is the salary structure and not Part I which is the endowment fund, the District Court's findings do not distinguish between Part I and Part II and thus offer the benefits that the District Court found as a result of this overall profit plan. For all we know, they could be solely as a result of the Part I and thus the District Court has not made particularized findings of fact that Part II of the profit plan is essential in this case and meets the business necessity. But, your Honors, if this Court does find somehow that Respondent has established business necessity, Ms. McCoy does ask that this Court remand so that she may be given an opportunity to establish that there's an alternative practice that would meet the business goals without the disparate impact. In conclusion, your Honor, disparate impact must be actionable. I see my time is up. May I conclude my statement?

CHIEF JUSTICE LEWIS: Yes, you can.

MS. HOLMAN: Disparate impact must be found actionable under the ADEA or the purpose of this statute will be defeated. Congress did not intend to create a right without a remedy. Thank you.

CHIEF JUSTICE LEWIS: Counsel.

MR. GOODSTADT: Good morning, Mr. Chief Justice and may it please the Court, my name is Andrew Goodstadt, counsel for the Respondent Puerta Pacific College. I will be addressing why the arbitration provision contained in the collective bargaining agreement between Puerta Pacific College and the American union of College Professors should be enforced. My co-counsel Lisa Solbakken will be discussing why the Age Discrimination in Employment Act does not recognize the disparate impact theory of discrimination liability. Your Honors, the arbitration provision contained in the collective bargaining agreement between Puerta Pacific College and the American Union of College Professors should be enforced and thus the arbitration decision upheld for three reasons.

JUSTICE COHEN: Counselor, I want explore with you something I did with your opposing counsel; that is, we know factually here that the grievance happened to have been filed and the case taken to arbitration. First, let me just suppose that a grievance hadn't been filed at all. What effect, if any, would that have on your argument here today?

MR. GOODSTADT: Your Honors, had the grievance not been filed based upon the union's decision to not file a grievance, then Petitioner would have a claim against the union for a breach of duty of fair representation and upon that claim the union would have to show

that they made an independent and objective investigation into the—

JUSTICE COHEN: I'm asking something a little different. As I understand the collective bargaining agreement, the individual can file a grievance and it's up to the union to decide whether or not to process that to arbitration; is that correct?

MR. GOODSTADT: Yes, your Honor.

JUSTICE COHEN: Therefore, my question is as follows: Suppose the individual said, "I'd rather have a jury trial" and this is right off the bat. "So I'm going to ignore the grievance procedure in the collective bargaining agreement and go straight to court." What effect, if any, would that have on your analysis?

MR. GOODSTADT: Your Honor, the outcome in that situation would be the exact same. In that situation we would put this case in purview of *Gilmer v. Interstate/Johnson*[32] where this Court held that where a valid arbitration agreement exists between the employer and the employee that the Court will preclude the plaintiff from bringing their claim in Federal District Court and in fact must follow the terms and conditions of the agreement and file their claim in arbitration.[33]

JUSTICE COHEN: Now, let's suppose the grievance was filed but the union says in its judgment, "We're not taking this case to arbitration." So there never was an arbitration and then we have the District Court suit that was brought here. Would that change your analysis in any way?

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[32] 500 U.S. at 35.

[33] *Id.*

MR. GOODSTADT: Yes, your Honor—no, your Honor. The outcome would be the same. As stated before, the grievant's claim in that situation would be one of a breach of duty of fair representation against the union.

JUSTICE COHEN: So you're saying in circumstances where the union doesn't breach its duty that this individual doesn't even get one bite at the apple? That the mere filing of the grievance is the sole right that this individual has rather than the two bites that are asserted here?

MR. GOODSTADT: Your Honor, Ms. McCoy when she entered her employment at the college, she made a valid, knowing and voluntary decision to join the union. By doing so, she empowered the union to negotiate the terms and conditions—

JUSTICE FOX: Counselor, there's no requirement here that this arbitration provision only applies to people that are actually members of the union. I take it that any person that is in the bargaining unit, whether a member of the union or not, is covered by this arbitration clause; is that correct?

MR. GOODSTADT: Yes, your Honor.

JUSTICE FOX: So in that sense the only knowing decision she made was to accept employment there; is that correct?

MR. GOODSTADT: Your Honor, although accepting employment was one of the known decisions in this case, by empowering the union to be her exclusive representative, she then empowered them to represent her in these proceedings. However, if she did not choose to join the union, then she would not have empowered the union to be her sole representative. She could have empowered her own

attorney to represent her at the proceedings; and, therefore, again that would put her in the exact same position that the plaintiff in *Gilmer* was in. In fact, in this situation, your Honor, the employee governed by the collective bargaining agreement, as Justice Silverman pointed out before, in fact benefits the position.

JUSTICE FOX: To be clear here, your argument is dependent on the notion that not only did she make a voluntary decision to accept employment here, but she made an additional crucial decision to designate the union as her exclusive representative. I'm not sure that's established in the record.

MR. GOODSTADT: Your Honor, the record doesn't reflect that the university is a closed shop. And under the collective bargaining agreement it's not a closed shop. The employee does have the opportunity to choose whether to empower the union.

JUSTICE TRUESDALE: Following up on Justice Fox's comment, the law is clear that the union is obligated to represent non-members as well as members. So that in filing a grievance, and I think Justice Cohen brought out, that if the union on investigation into the exercise of its best judgment decided that there was not merit to a grievance and then it would decline a particular arbitration, then where would that leave the situation?

MR. GOODSTADT: Your Honor, that situation would put the individual in this case in the same position as the plaintiff was in *Clayton v. UAW*,[34] where in that case the union decided not to bring the claim. There was a contract in that case. The union decided not to bring the contractual claim to arbitration. This Court stated in that opinion

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[34] 451 U.S. 679, 698 (1981).

that in that case the employee has the opportunity to file a case in Federal District Court against the union for a breach of fair duty of representation. Upon that breach, that is, when Ms. McCoy in this case, upon demonstrating this breach, that is where Ms. McCoy in this case will have her bite at the apple.

JUSTICE SILVERMAN: Mr. Goodstadt, if we are to conclude that disparate impact does apply in the Age Discrimination in Employment Act, would we still defer to an arbitrator who concluded it did not apply?

MR. GOODSTADT: Your Honor, when the arbitrator made his decision that disparate impact did not apply, this Court had not yet determined that issue.

JUSTICE SILVERMAN: If we were to determine it does apply, would we defer to an arbitrator who is incorrect in his interpretation of the law?

MR. GOODSTADT: Yes, your Honor, because—

JUSTICE SILVERMAN: So then the union has waived substantive rights to the Age Discrimination Act?

MR. GOODSTADT: No, your Honor. In fact this Court stated in *Gilmer v. Interstate/Johnson*[35] by agreeing to arbitrate an Age Discrimination in Employment Act[36] claim that in fact the plaintiff doesn't forego any substantive provisions.

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[35] 500 U.S. at 26.

[36] 29 U.S.C. §§ 621-34.

JUSTICE SILVERMAN: But if the arbitrator concluded that disparate impact does not apply, incorrectly in our view, why isn't the employee worse off than before the arbitration under the substantive law that applies?

MR. GOODSTADT: Because in that situation, your Honor, the employee, Ms. McCoy in this case, would be in the same position as the employees who brought their cases under the Disparate Act theory of the ADEA since 1991, where before 1991 the circuit courts did not recognize that theory of disparate impact liability. In those situations, this Court's determination is not retroactively applied in those cases. This Court stated that in *Gilmer v. Interstate/Johnson*[37] that in fact arbitration should be placed on the same footing as the Court system.

JUSTICE SILVERMAN: It's not retroactively applied to the case that's before us at bar. If we conclude that disparate impact should apply, she is in effect worse off under the law because she went to the arbitration because the union has given up substantive rights. Could the union waive her right to grieve for age discrimination completely?

MR. GOODSTADT: No, your Honor.

JUSTICE SILVERMAN: So did it waive the right of the subject to disparate impact for age discrimination?

MR. GOODSTADT: No, your Honor.

JUSTICE SILVERMAN: That's what happened here.

MR. GOODSTADT: Your Honor, what the union did was waive

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[37] 500 U.S. at 29-30.

a right to bring this claim in federal district court. There are a number of federal district courts that have not recognized this theory of liability under the Age Discrimination in Employment Act.

JUSTICE SILVERMAN: If we say they're wrong, then she has waived the substantive right?

MR. GOODSTADT: Your Honor, if this Court were to determine today that in fact they do not recognize the theory of liability, then she would have foregone the substantive provision in the Act, just as every claimant has foregone substantive provisions in the district courts.

JUSTICE SILVERMAN: Should we defer to that?

MR. GOODSTADT: Yes, your Honor, because that would place arbitration on the same footing as the federal district court because the purpose behind the Federal Arbitration Act[38] and this Court has stated on numerous occasions since 1983 that arbitration should in fact be deferred to as a federal district court be deferred to.

JUSTICE FOX: You would apply a lower standard of review to, say, a Court of Appeals review of an arbitration decision that was appealed to the Court than to the claim that had been brought in district court? Is there a different standard that would be applied if someone was challenging the arbitration finding?

MR. GOODSTADT: Your Honor, the Federal Arbitration Act, Section 10, specifically provides for procedure on appellate matters to

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[38] 9 U.S.C. § 1.

take in this situation.[39] In fact, it is very similar to the standard, clearly erroneous, where the arbitration decision must be upheld unless the arbitrator capriciously or arbitrarily applied the law.

CHIEF JUSTICE LEWIS: You're not suggesting under the FAA that Congress intended to put arbitration and the federal district court on the same footing?

MR. GOODSTADT: No, your Honor. The FAA was originally enacted in response to a growing case backlog in the federal court system. This Court has interpreted that statute and has used that statute in fact to put them on the same footing since 1983 and that's *Old Sage Home Hospital v. American Construction Corporation.* That's one of the primary reasons why *Alexander v. Gardner-Denver*[40] does not apply in this case. *Alexander v. Gardner-Denver* was decided in 1974 at a time where in fact there was a judicial facility towards the arbitrator's confidence and ability to vindicate a plaintiff's statutory rights under the ADEA, Title VII, and the ADEA.

JUSTICE COHEN: Counselor, you tell us that the union has the power to make the waiver that it made in this case; is that right?

MR. GOODSTADT: Yes, your Honor.

JUSTICE COHEN: But in response to Justice Silverman you said that they don't have the power to take away the rights under the ADEA itself; is that also correct?

MR. GOODSTADT: Your Honor, the union doesn't have the

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[39] *Id.* § 10.

[40] 415 U.S. 36 (1974).

right to take away the substantive rights of the Age Discrimination in Employment Act.

JUSTICE COHEN: Where is the right line? How are we as a court to divine that the union has the power to take away Right A but not Right B? Are we supposed to just feel what the right decision is?

MR. GOODSTADT: No, your Honor. The union has a right to negotiate the terms and conditions of employment regardless of the bargaining agreement. This is a preferred method of labor negotiations.

JUSTICE COHEN: Let's suppose a bargain is struck and the employer says to the union, "I'm willing to pay everybody here two dollars an hour extra if I don't have to be bound by the ADEA. So, union, I'm proposing to you two bucks an hour extra for everybody but I want a written waiver from everybody that the ADEA won't apply." And then that goes to a ratification and the employees say, "two bucks an hour. I'll take my chances." What's this Court to do with that situation?

MR. GOODSTADT: Your Honor, in that situation the union and the employer in that situation have violated public policy. It's a gross violation of public policy. They're taking away the statutory substantive provisions afforded to an individual under the ADEA.

JUSTICE FOX: Are you saying that when Congress enacted the ADEA that it considered certain aspects of the ADEA to be more important than things like what forum these cases can be brought in?

MR. GOODSTADT: Your Honor, although Congress may not have demonstrated their intent, this Court in *Gilmer v.*

Interstate/Johnson[41] does state that the forum in which this claim of age discrimination can be decided is not foregoing any substantive provisions of the statute. And, in fact, the plaintiff—

JUSTICE FOX: Our decision in that case was based on the fact that the individuals who asserted the claim had them themselves made a waiver. This is obviously a different situation where we're talking about the union having waived the right for the employee and you have acknowledged that certain aspects of the ADEA or rights under the ADEA that the union could not waive. What is the distinction between the rights that the union cannot waive and the right to go into Federal Court? Why is it that they can waive that right and not other aspects of the ADEA?

MR. GOODSTADT: Your Honor, the union cannot waive as articulated the substantive provisions the right to be free from discrimination in the workplace. However, this Court stated that the employee has not given up that right by bringing their claim in an arbitral forum. It simply forgoes the federal district court forum in favor of the arbitration forum.

JUSTICE FOX: Congress said to that employee that employee has the right to bring that claim in federal court.

MR. GOODSTADT: Your Honor, although Congress afforded that right, Congress never stated that is its exclusive forum for the right to be vindicated and this Court stated that in fact an arbitration forum is a preferred method of vindicating an Age Discrimination Act claim.

JUSTICE SILVERMAN: Except on employment contracts, isn't

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[41] 500 U.S. at 26.

this school interstate commerce?

MR. GOODSTADT: Your Honor I believe you're referring to Section 1 of the Federal Arbitration Act.

JUSTICE SILVERMAN: Yes.

MR. GOODSTADT: The interpretation of this act, this provision, started in 1953 in the 3rd Circuit, *Tenney Engineering, Inc. v. United Radio and Machine Workers.*[42]

JUSTICE SILVERMAN: Do we have an employment contract here?

MR. GOODSTADT: Your Honor, although a collective bargaining agreement is not technically an employment contract between an employer and employee, it does serve to govern the terms and conditions of employment.

JUSTICE SILVERMAN: Well, she's bound by it?

MR. GOODSTADT: Yes, your Honor.

JUSTICE SILVERMAN: This school is engaged in interstate commerce?

MR. GOODSTADT: Your Honor, the school is not engaged directly in interstate commerce as Section 1 would delineate.[43] Section 1 is a narrow scope of interstate commerce. Congress deliberately chose

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[42] 207 F.2d 450 (3d Cir. 1953).

[43] 9 U.S.C. § 1.

to use narrow language in Section 1 and they chose Section 2—

JUSTICE SILVERMAN: That definition would be different than under the National Labor Relations Act[44] and employment law as interpreted.

MR. GOODSTADT: I see my time is expired. May I continue?

JUSTICE SILVERMAN: Please if you wouldn't mind. Under every employment law that I know of interstate commerce is broadly defined so far as federal jurisdiction is concerned and you're asking us to adopt a narrow interpretation of the FAA. Why is that?

MR. GOODSTADT: Your Honor, the language used in Section 2 does use broad language involving commerce which every Federal Circuit Court uses to address this issue and this Court has held on a number of times that language is coterminous with the broad powers under the commerce laws that Congress has to regulate interstate commerce. However, Section 1 specifically states "engaged in interstate commerce" which is narrow language.

CHIEF JUSTICE LEWIS: Isn't it a rule of statutory construction when there are specifics and followed by general that the general is limited by the specifics?

MR. GOODSTADT: Your Honor, the rule of use in general in statutory construction could state that.

CHIEF JUSTICE LEWIS: Are you arguing contrary to Congress on that?

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[44] 29 U.S.C. § 151 (1988).

MR. GOODSTADT: No, your Honor. That is exactly my point. In fact the last clause of Section 1 is in fact limited to sea persons, railway workers and other groups that have engaged in commerce where they're actually involved in delivering goods across state line.

JUSTICE FOX: Congress used those terms in the Fair Labor Standards Act as well and courts have not interpreted them to mean employees who were literally engaged in the transportation industry. Why did Congress mean—that was my colleague's question as well—why should we interpret the FAA but not the Fair Labor Standards Act to cover only such employees?[45]

MR. GOODSTADT: Because if Congress intended for Section 1 to be coterminous with Section 2, it would use that exact same language. It deliberately chose the language and the history behind the act reflects that in fact this exclusionary clause was enacted into the statute in response to the seaman's union and railway workers and the fact that they imposed it because Congress had already delineated alternative dispute resolution for these industries.

JUSTICE FOX: What are the classes of workers other than seamen or railway workers you think Congress had in mind under your view of the phrase "any other classes of workers engaged in interstate commerce?"

MR. GOODSTADT: Your Honor, the 6th Circuit determined that the U.S. Postal Service is an example of another industry that's engaged in interstate commerce. As a history the Postal Service is charged with actually delivering goods across state lines.

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[45] 29 U.S.C. § 201 (1996).

JUSTICE FOX: I believe at the time that the FAA was enacted, the U.S. Postal Service was a government agency, and its employees were not private sector employees.

MR. GOODSTADT: Your Honor, this is just an example of a 20th Century industry that fits within the delineated language of Section 1 as another example of an industry that's engaged in interstate commerce.

JUSTICE SILVERMAN: What about Jones & Laughlin Steel Company producing steel, wouldn't that be an interstate commerce within the FAA?

MR. GOODSTADT: No, your Honor.

JUSTICE SILVERMAN: Were we wrong in *Jones & Laughlin?*[46] Was the National Labor Relations Act unconstitutional?

MR. GOODSTADT: No, your Honor; but in the 3rd Circuit case in *Tenney Engineering*[47] where the Circuit Court first interpreted the language of the statute, that contract was a collective bargaining agreement that governed employees who were engaged in manufacturing goods that were to be delivered across state lines. And this Court affirmatively relied on that decision, and that's actually a similar case that describes and interprets the language of Section 1.

JUSTICE RAUDABAUGH: Can you conceive of any statutorily protected individual right that should not be deferred to arbitration?

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[46] 301 U.S. 1 (1937).

[47] 207 F.2d 207 (1953).

MR. GOODSTADT: Yes, your Honor. In fact the Fair Labor Standards Act has been determined to be a statute that is in fact not amenable to arbitration. This Court set up a bright line test in *Mitsubishi Motors Corporation v. Soler Chrysler Plymouth*[48] in determining whether to enforce an agreement to arbitrate. First, the Court must look to whether in fact the parties agree to arbitrate the dispute in question. Whereas the instant case clearly Article 47 of the arbitration agreement. And second where the statute in question is amenable to the arbitrable process, the burden was placed on the plaintiff to show that something in the legislative history, the legislative language would be contrary to arbitration. The issue of whether the ADEA is in fact amenable to arbitration was addressed by this Court in *Gilmer v. Interstate/Johnson*[49] in 1991 and was in fact held to be a statute that is amenable to arbitration where a plaintiff can bring their claims in an arbitral forum and have their rights fully vindicated.

JUSTICE RAUDABAUGH: And as a good public policy to send to arbitration claims of discrimination and preclude a claim for not getting time-and-a-half for overtime?

MR. GOODSTADT: Your Honor, this Court has determined that's vindication. Thank you.

MS. SOLBAKKEN: Good morning, your Honors. May it please the Court, my name is Lisa Solbakken. I'm counsel for the Respondent Puerta Pacific College. The District Court of Wagner erred in determining disparate impact liability is an available form of recovery under the Age Discrimination in Employment Act, which I'll refer to as the ADEA, for three reasons. The first reason is the legislative history

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[48] 473 U.S. 614, 619 (1985).

[49] 500 U.S. at 21.

which underlies the ADEA indicates that Congress never intended that theory of recovery to be available under the act. The second reason is that the unique statutory provisions of the ADEA indicate that disparate impact liability would be in conflict to a full reading of the statutory provisions. Third, the nature of the conduct prohibited by the Age Discrimination in Employment Act indicates that disparate impact liability would be contrary to the purpose of that act. In the alternative if this Court is to determine that disparate impact liability is available under the Age Discrimination in Employment Act, Respondent contends that its profit plan falls within the business necessity exception to that statute.

Your Honors, disparate impact liability is an extraordinary protection which was judicially created by this Court in *Griggs v. Duke Power Company*.[50] In *Griggs* this Court looked to the purpose behind Title VII and decided that in order to promulgate that purpose, eradicate discrimination in employment, with regard to protective classes in Title VII, disparate impact liability is necessary.[51]

JUSTICE COHEN: Isn't the very same true with respect to age discrimination? Why should we have one standard for racial discrimination and another standard for age discrimination? Isn't that just giving lawyers something to be arguing about?

MS. SOLBAKKEN: To the contrary, your Honor. The history behind racial and sexual discrimination, two of the protected classes under Title VII, that being invidious and malevolent discrimination, is quite distinct from the discrimination—

JUSTICE FOX: You're saying that age discrimination can't be

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[50] 401 U.S. 424 (1971).

[51] *Id.*

malevolent or insidious?

MS. SOLBAKKEN: Well, your Honor, as per the Secretary's report which provides a substantive basis for the Age Discrimination in Employment Act, the purpose behind the Age Discrimination in Employment Act was to prevent erroneous stereotypes as to the abilities of the older workers. In fact the Secretary's report does explicitly distinguish the historical discrimination peculiar to the protective class of Title VII and that of the protective class of the Age Discrimination in Employment Act. In order to eradicate these neutral policies which act as a pretext to freeze the status quo of prior discriminatory practices, it was necessary to create disparate impact liability under Title VII. However, there's no need and no such need to a certain extent this form of recovery to the Age Discrimination in Employment Act.

JUSTICE SILVERMAN: Supposing you have a rule that said seniority will be a factor in determining whether people will be let go. In other words, an employer says ten years and you're out. It's a neutral policy. It applies to everybody. Ten years seniority and you're out. Obviously it affects older workers. Why wouldn't that be bad?

MS. SOLBAKKEN: Well, your Honor, there are specific provisions in the Age Discrimination in Employment Act which protect against exactly what you're speaking of, which protect against retirement plans, which tend to discriminate against the protected class. So in that instance the older workers would remain protected.

JUSTICE SILVERMAN: I'm not talking about retirement. But in a case like this where a woman has worked for a certain number of years and they let her go because she had a certain number of years. Why isn't that something we should be concerned about? There's no valid interest necessarily to the employer, is there, in having someone

younger? There's no bona fide occupational reason why they should have younger workers.

MS. SOLBAKKEN: No, your Honor.

JUSTICE SILVERMAN: If you have no valid interest, why should we rule that it be legal?

MS. SOLBAKKEN: Well, your Honor, in the instant case Puerta Pacific College has a valid reason for instituting a profit plan, that reason being that this institution was one that was teetering on the edge of financial ruin.

JUSTICE SILVERMAN: But you didn't offer the job to Ms. McCoy at this $27,000 rate?

MS. SOLBAKKEN: No, your Honor.

JUSTICE SILVERMAN: Had you done that, that would have freed you up from this discrimination charge?

MS. SOLBAKKEN: In this instance, yes, your Honor.

JUSTICE SILVERMAN: So why shouldn't we rule that the employment practice in failing to offer her the job at $27,000 is inherently discriminatory?

MS. SOLBAKKEN: Well, in the first place, your Honor, because disparate impact liability is not an available form of recovery under the Age Discrimination in Employment Act. In the second instance, even if this Court has decided that it's an available form of recovery, the profit plan is a business necessity exception which,

although a business exception would concede a disparate impact in this instance, it would preclude recovery because it is necessary in order to maintain the operational viability of Puerta Pacific College.

JUSTICE FOX: Isn't Petitioner's argument that you need disparate impact here to get the case into court, that the arguments you're making that your client has an RFOA defense or business justification defense are just that, defenses, and that without a disparate impact analysis this claim could never get that far?

MS. SOLBAKKEN: Exactly, your Honor, and Petitioner's claim should not get that far because disparate impact liability should not be recognized under the Age Discrimination in Employment Act. Am I answering your question?

JUSTICE FOX: Under the circumstances that he says, that you have some rule which is in fact for the purposes of age discrimination which is facial and neutral, that you must after ten years leave the company. Under your—if you don't have a disparate impact analysis, you would never get to the point where you could determine whether the employer had in fact a legitimate business because there's no disparate—you can't show disparate treatment and the case is out of court even in circumstances where we're hypothesizing that this is in fact for purpose of age discrimination.

MS. SOLBAKKEN: Well, your Honor, the Secretary's report in creating the Age Discrimination in Employment Act exclusively stated that this was not what age discrimination or the problem with age discrimination was in this country. In fact it was the erroneous stereotypes that were due to an older worker's ability to work and that those factors which merely tend to bear more strongly upon the protected class be dealt with in other factors.

CHIEF JUSTICE LEWIS: In order to make out a case for disparate impact don't have you to demonstrate that there's a rule seemingly neutral on its face that has a disparate impact on a particular class?

MS. SOLBAKKEN: Yes, your Honor.

CHIEF JUSTICE LEWIS: And also isn't in most instances experience correlated with age?

MS. SOLBAKKEN: Yes, your Honor.

CHIEF JUSTICE LEWIS: In other words, the more experience you have, the greater likelihood that you're going to be an older worker?

MS. SOLBAKKEN: Yes, your Honor.

CHIEF JUSTICE LEWIS: Isn't this exactly what this particular Respondent did?

MS. SOLBAKKEN: Well, yes, your Honor.

CHIEF JUSTICE LEWIS: Then why shouldn't disparate impact apply?

MS. SOLBAKKEN: Well, your Honor, this Court has held or this Court has determined that one's years of service is adequately distinct from one's age and in that regard a factor may correlate with an individual's age, yet exceed the boundaries of that which is sought to be protected under the Age Discrimination in Employment Act. In fact in

Hazen Company v. Biggins[52] this Court stated that disparate treatment was the essence of what Congress sought to prohibit under the Age Discrimination in Employment Act.

JUSTICE RAUDABAUGH: I want to go back to this because I think deferring to the Secretary's report and so forth is interesting but somehow the logic of it is passing me by. Fellow justices here made the observation that it's a mathematical fact that if you have ten years of experience over someone with one year, the odds are that you are probably older. Certainly if you had 50 years of experience over someone who had only ten years, odds are probably much more certain that you're older. You keep referring to the notion that they're only interested in disparate treatment analysis because of the stereotyping. What is not stereotypical of having a policy screening out older people? Doesn't that reflect underneath the same stereotypical view that an individual case is advancing? What's the difference?

MS. SOLBAKKEN: Well, your Honor, in the instance of a policy acting mechanically to disregard the abilities of older workers, a disparate treatment claim would remain available because it is the intention behind the employer's policy and in that regard the claimant would be—

JUSTICE RAUDABAUGH: But that's not the question I'm asking. All of these other statutes that you talked about have disparate treatment options. What I'm trying to understand is why is it that you are so intent on precluding us from going forward with the disparate impact option?

MS. SOLBAKKEN: For a number of reasons, your Honor.

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[52] *Hazen Paper*, 507 U.S. at 608.

Congress has most recently indicated its intent not to permit disparate impact liability under the Age Discrimination in Employment Act in its 1991 Civil Rights amendments.[53] In the Civil Rights Amendments in 1991 Congress explicitly provided for disparate treatment under Title VII, yet failed to make an analogous amendment under the Age Discrimination in Employment Act.

JUSTICE COHEN: But Ms. Holman told us that in 1991 the law was clear, even though the Supreme Court hadn't determined it, that there was a right to bring a disparate act claim under ADEA. Was she incorrect?

MS. SOLBAKKEN: Yes, your Honor. Moreover in 1991—

JUSTICE COHEN: Before we get to the moreover, how was she incorrect?

MS. SOLBAKKEN: Well, your Honor, there was a circuit split as to whether or not disparate impact liability was available under the Age Discrimination in Employment Act as indicated by the record in this case. Moreover, your Honor, while Petitioner suggests that disparate impact was added to Title VII merely in response to this Court's decision in *Wards Cove v. Antonio,*[54] Congress obviously had an intent about the availability of disparate impact under Title VII.

CHIEF JUSTICE LEWIS: Counselor, I'm confused. I'm trying to get clear in my mind what's to prohibit an employer from identifying a group of workers in the workplace, say, fifty-eight and older or fifty-seven and older and simply deciding, "I think I'm going to let these

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[53] Pub.L.No. 102-166.

[54] 490 U.S. 642, 659 (1989).

workers go and at some point in the future I'll replace them with younger ones"? If disparate impact analysis is not available, what is to prevent an employer from doing this, as a money saving device, as esthetic appeal? What's to prevent him from doing this?

MS. SOLBAKKEN: A disparate treatment claim, your Honor.

CHIEF JUSTICE LEWIS: You're saying that there's a lot of individual disparate treatment claims? Suppose they lay off 150 workers or 300 workers?

MS. SOLBAKKEN: Well, your Honor, in that instance as articulated there would be an intentional thing on behalf of the employer to discriminate against the older workers in that instance.

JUSTICE SILVERMAN: Let me follow up Justice Lewis's question. Suppose an employer said, "We don't want anyone with gray hair waiting the tables." What public policy or reason do we have for making that rule lawful?

MS. SOLBAKKEN: I'm sorry?

JUSTICE SILVERMAN: Why should that be lawful? What is the employer's interest in saying, "We only want people with black hair or brown hair serving tables and no gray haired individuals"? Wouldn't that have a disparate impact on older people?

MS. SOLBAKKEN: Well, your Honor, if I'm understanding your question, that would be arbitrary age discrimination and in that regard the individuals would again have a disparate treatment claim as would the secretary's report—

JUSTICE RAUDABAUGH: There's been a lot of Secretary reports in the last few years that aren't always credited. So let's get back to this question that they're pursuing. Tell me how you're going to pursue the disparate treatment claim on behalf of the fifty or 100 or whatever number of gray-haired waiters. What's the evidence of the disparate treatment claim as to me or to Mr. Truesdale or any of the rest of us up here with gray hair? How do you go after an individual case of disparate treatment discrimination in that scenario?

MS. SOLBAKKEN: Well, your Honor, statistics would be one element that a Court would look at when deciding a disparate treatment claim. However, the statistics are the only means and it's the sole evidence in a disparate impact claim. And in the instance of the Age Discrimination in Employment Act the probative value of these statistics are blighted. In that regard their age does at one point have—

JUSTICE RAUDABAUGH: So statistics can be used to make out a disparate treatment claim alone, that of the 40,000 people a certain telephone company claims to have laid off or separated, ninety percent of people fifty and older got the axe. That makes out a disparate treatment claim for anyone in that group?

MS. SOLBAKKEN: No, your Honor. I'm sorry if I misspoke earlier. Statistics are the sole evidentiary tool under disparate impact while under disparate treatment it would be one factor that a lower Court could look at.

JUSTICE RAUDABAUGH: My question is: If we're only going to limit people to a disparate treatment avenue and all they have is evidence that they, plus anyone else who is fifty or older, got the axe how much further do they have to go? Are they going to be successful at all? They have no particular evidence of anything directed to them.

MS. SOLBAKKEN: Well, your Honor, to bring it back to the facts of the instant case, Ms. McCoy would have a valid breach of contract claim in that regard that she may pursue that claim pursuant to the collective bargaining agreement. However, bringing a disparate impact claim would not be the necessary way by which to vindicate her rights.

CHIEF JUSTICE LEWIS: I'm confused. What I'm trying to figure out is that under disparate impact you're saying that the statistics is the sole evidence that the Court makes its judgment as to whether discrimination occurred.

MS. SOLBAKKEN: Yes, your Honor.

CHIEF JUSTICE LEWIS: Then how do you distinguish remedy available in disparate impact between remedy available disparate treatment when statistics are used in both instances?

MS. SOLBAKKEN: Well, your Honor, I'm not sure I understand what your Honor means. However, under Title VII both aspects of recovery are available. Your Honor, I see that my time is expired. May I answer your question?

CHIEF JUSTICE LEWIS: You may answer this question.

MS. SOLBAKKEN: Under Title VII both aspects of recovery, both theories of recovery are available. In that regard the remedies and the damages available to a claimant would remain the same. However, under disparate impact—under the Age Discrimination in Employment Act rather, excuse me, your Honor, such liability should remain unavailable as per Congressional intent.

JUSTICE TRUESDALE: Counsel, you made several references to the Secretary's report.

MS. SOLBAKKEN: Yes, your Honor.

JUSTICE TRUESDALE: I didn't hear you say about the fact that EEOC[55] which presumably has great expertise in this field, the EEOC has filed that disparate impact is available under the ADEA.[56] Why shouldn't the Court give great deference to the agency that is charged with responsibility in this area?

MS. SOLBAKKEN: Yes, your Honor. Well, EEOC guidelines are traditionally given deference by the Court except when they are contrary to the plain reading of the statute as it is in the instant case. Moreover, your Honors, this Court has invalidated the EEOC's interpretation of the Age Discrimination in Employment Act before. And public employees of *Ohio v. Beck,*[57] this Court stated that EEOC erroneously brought in broader protection under Section 4(f) of the Age Discrimination in Employment Act than actually was intended by Congress and in that regard struck the guidelines as invalid[58] which is what should be done in the instant case, your Honor. Thank you.

MS. HOLMAN: Your Honors—

JUSTICE COHEN: Ms. Holman, let me just ask you right off, it seems we have a conflict between the two sides here. In 1991 what was the state of the law with respect to disparate impact under ADEA?

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[55] Equal Employment Opportunity Commission.

[56] 29 U.S.C. §§ 621-34.

[57] 379 U.S. 89 (1964).

[58] *Id.*

Was there a conflict in the circuits or was there not?

MS. HOLMAN: Thank you, your Honor. That was to be my first point. In 1991 there was no circuit split and opposing counsel does misstate the law in this case. There was no circuit split until after 1993 and this Court's decision in *Hazen Paper Company v. Biggins.* Additionally, your Honors, Respondents erred in several additional respects. There is no business necessity. There's nothing in Respondent's profit plan to indicate that this is a temporary measure, that Respondent has any intention of not discriminating in perpetuity. Additionally, Respondent can't possibly justify this as a business necessity, this linking salary to years of experience, when they don't extend the option of allowing any qualified individual to accept the position at $28,000 per year for the first year in salary. And despite Respondent's protest to the contrary, the record at page seventeen very expressly states that Part II of the profit plan has allowed the college to enjoy the most expansion and the best fiscal health since it opened the School of Criminal Justice in 1972. There cannot possibly be a business necessity for these discriminatory hiring practices, and we urge this Court to defer to the EEOC's interpretation of the ADEA. Thank you.

[COURT IN RECESS]

CHIEF JUSTICE LEWIS: Please be seated. I would like to replace some sterner faces with some smiles and just express some of the feelings of my colleagues and how much they were impressed with the demeanor, with the argument, with the whole presentation of both teams.

Certainly for me it was a learning experience to be able to observe how well both teams handled themselves and certainly it was a very difficult decision on our part to arrive at and I would like to announce with great pleasure the winner of the 21st Annual Robert F.

Wagner National Labor Law Moot Court Competition going to Hastings College of Law. And that team is comprised of Christy Holman and John Elovson and the outstanding member of that team is Christy Holman.

But I would also like you to give a big round of applause to the team from Brooklyn Law School. They both did a magnificent job and certainly it was a difficult decision. Thank you very much.

[COURT ADJOURNED]

MR. PETER WALLIS: There are several awards we would like to present at this time. The fourth best team in the Wager Competition is John Marshall Law School. The third best team is Pepperdine University School of Law. The second best team is Brooklyn Law School. And the best overall team in the Wagner Competition is the University of California-Hastings School of Law.

MS. NICHELLE LANGONE: The best preliminary round oralist award is presented to Tamara Baines from the Georgia State University School of Law. The best petitioner's brief award is presented to Wake Forest University School of Law and the best respondent's brief award is presented to John Marshall Law School. Congratulations to everyone and thank you for attending the 21st Annual Robert F. Wagner Sr. National Labor Law Moot Court Competition.