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UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Case No. 95-2898

Diann Walker, etc., et al.,

Appellants,

vs.

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

Appellees.

On Appeal from the United States District Court for the Northern District of Florida

REPLY BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PARTIES

AND CORPORATE DISCLOSURE STATEMENT

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

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CERTIFICATE OF TYPE SIZE AND STYLE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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

Statutes

ARGUMENT

POINT 1

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

The Supreme Court has carefully admonished that the plaintiff's burden in establishing the prima facie case is "not onerous." *Texas Department of Community Affairs v. Burdine*, 101 S.Ct. 1089, 1094 (1981). The function of the prima facie case is to "eliminate[] the most common nondiscriminatory reasons for the plaintiff's rejection." *Id.* In noting the *McDonnell Douglas* prima facie case is "not difficult to prove," the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), explained its function and rationale are based upon the "statistical probability that, when a number of potential causes for the employment decision are eliminated, an inference arises that an illegitimate factor was, in fact, the motivation behind the decision." *Id.* The potential causes for rejection eliminated by the prima facie case are apparent from the circumstantial proof model itself — that the employer was seeking applicants for a position, that the plaintiff applied for the position, and that the plaintiff possessed the basic

qualifications or skills to perform the work.

Yet in this case, where it is undisputed the Applicants were qualified for every position for which they applied,[2] the district judge held that none of the remaining ten Plaintiffs were able to meet this light burden for any of the approximately 60 claims presented to the court. It is helpful to consider the background against which this somewhat remarkable finding was made.[3]

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[2] In the prior appeal, this Court held "the proof adequately showed that each of the applicants was qualified for the position sought." *IMPACT v. Firestone*, 893 F.2d 1189, 1191-92 (1990). The district court likewise found the Applicants qualified. (R.E. 899-4). Indeed, the Employer maintained published qualifications for every position, and the Applicants were prescreened for every position before their applications were accepted. (IMPACT 893 F.2d at 1192; Pl. Ex. Z51-B, pp. 13-23).

[3] The district court's finding that in every one of approximately 60 distinct instances the black plaintiff, who was qualified and applied for the job, did not establish a prima facie case is at least as remarkable as the "inexorable zero" discussed in *Teamster v. United States*, 97 S.Ct. 1843 n. 23 (1977).

By decision of February 6, 1990, this Court vacated the judgments against all 11 Plaintiffs and remanded, directing that the district court determine whether each had established a prima facie case. 893 F.2d 1189 (11th Cir. 1990), *cert denied*, 498 U.S. 847 (1990). This Court specifically held Defendants failed to meet their burden of articulation under *Burdine*. Despite numerous filings urging that the trial court make findings as to the prima facie cases as instructed by this Court (R21-814, R22-870, R22-875), for a period of more than four years the district court failed to enter any substantive order.

On November 9, 1994, the Plaintiffs served a Petition for a Writ of Mandamus with this Court seeking an order that the district court comply with the mandate, and asking that a 45-day grace period be provided. *In Re: Walker*, No. 94-3408 (11th Cir.). Forty-three days later the district court entered its Order of December 21 (R22-879), which denied the Plaintiffs' Request for Entry of Judgment (R22-875), and indicated the court would reevaluate the disparate

treatment cases after receiving evidence concerning employment exams.[4] The district court appeared to believe the Plaintiffs had proven prima facie cases of discrimination but did not make the ruling directed by this Court.[5] Instead, the district judge ruled the Applicants were not entitled to judgment even if they had proven prima facie cases of discrimination. Although the district court expressly recognized this Court's holding, stating "[t]he Eleventh Circuit held that the defendants did not articulate legitimate, non-discriminatory reasons for their

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[4] The Applicants had previously, and later, made it clear to the district judge that they were litigating employment tests under a disparate impact theory, not as a part of their disparate treatment cases.

[5] The district court cited the binding Circuit precedent in *McWilliams v. Escambia County School Bd.*, 658 F.2d 326 (5th Cir. 1981), for the proposition that a plaintiff need not demonstrate comparative qualifications to establish a prima facie case. The trial judge stated that a "plaintiff can establish a prima facie case with proof he is black, he applied and was qualified for an available job, and was rejected in favor of a white." (R.E.-879-3 n.1).

hiring decisions," he then expressly repudiated the appellate holding, stating:

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

(R22-879- 5, 11-12).

On January 4, 1995, the Plaintiffs served a Petition for a Writ of Prohibition in response to the December 21 order. *In Re: Walker*, No. 95-2026 (11th Cir.). That petition stressed that the law of the case would be violated if the trial court were (a) to reopen the disparate treatment cases or (b) fail to make findings as to whether any of the Applicants had proven a prima facie case. The writ was denied.

On May 22, 1995, the district court entered an order which dismissed all claims (except for Plaintiff Holton). Completely contrary to the earlier December 21, 1994 order, the district judge abandoned the theory that Applicants were not entitled to judgment even if they had proven prima facie cases, and found simply that no Applicant had proven a prima facie case. (R.E.-899).

A. THE RULE OF LAW USED BY THE DISTRICT COURT CONFLICTS WITH THE SUPREME COURT'S STATEMENT OF THE PRIMA FACIE CASE

Nowhere in its brief does the Employer suggest why the district court's analysis is not clearly incorrect under the standards spelled out by the Supreme Court in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), which establishes a much more reasonable standard than that applied by the district court. *Patterson* repeated the earlier Supreme Court admonition that the plaintiff's burden in establishing the prima facie case is "not onerous." *Id.*, at 2378, citing *Burdine*, 101 S.Ct. at 1093-1094 (1981). A plaintiff "need only prove...that she applied for an available position, that she was rejected, and that after she was rejected respondent either continued to seek applicants for the position, or,... filled the position with a white employee." *Patterson*, at 109 S.Ct. 2378.

B. THE RULE OF THIS COURT WAS APPLIED BY THE DISTRICT COURT IN A WAY NEVER CONTEMPLATED BY THIS COURT

What is apparent in studying the cases in which the fourth element refers to "other equally or less qualified employees who were not members of the protected minority" is that this Court has consistently applied it speaking only to general qualifications. *Batey v. Stone*, 24 F.3d 1330, 1333-34, n. 11 (11th Cir. 1994)(citing *Wu v. Thomas,* 847 F.2d 1480 (11th Cir. 1988)(both cited by the

Employer at p. 13-14 of its brief) is illustrative. In that case this Court stated that "it is uncontroverted that the district court correctly found that Batey made out a prima facie case." *Id.*, at 1334. This is because the district court in that case applied the standard in a much more generalized way. Plaintiff Batey alleged gender discrimination in not being selected for Acting Director of Supply. The undisputed facts were that the job-winner, Fred Fomby, (a) was a GS-13, while the plaintiff was only a GS-12, (b) was senior to the plaintiff, and (c) was one of three men who had served as Acting Deputy Director, though the plaintiff had not.

Using the *Batey* facts to illustrate the correct application of the rule of law, all the Applicants in this case made out prima facie cases. There is no doubt that had the rule of law selected by the district court in this case been applied in *Batey*, plaintiff Batey would not have been held to have proved a prima facie case. The court would have pointed to the three objective indicators as proof that the plaintiff was not "equally...qualified" with the male winner.

An examination of the undisputed facts surrounding the claims prosecuted in this case will demonstrate that the district court was applying a standard for proof of the prima facie case which was sufficiently onerous to defeat all but the most obvious cases. For example, Plaintiff Diann Walker was first employed by the Defendants in 1976, as a Clerk III. (R36-4, 5). She was promoted to Clerk

Typist III in 1977, and was placed in charge of maintaining records related to financial disclosure by public officials. Ms. Walker worked in this position as a Clerk Typist III for approximately two years, during which time she received superlative work performance evaluations from her supervisors, and was repeatedly told she was doing the best possible job. During this same period, the work responsibilities for the job and the volume of work approximately tripled due to passage of the Sunshine Act by the Florida Legislature. (R36-8-16).

In early 1978, Division of Elections Director Mary Singleton told Ms. Walker the division was requesting additional funds to upgrade her position to the level of Clerk V. The division director made it clear Ms. Walker would receive the upgraded position because of her past superior performance doing that precise job. In May 1978, Ms. Singleton resigned in order to run for Lt. Governor. When the upgraded position was filled in approximately September 1978, her successor rejected Ms. Walker and selected a white employee. (R36-16-20). The district judge held Ms. Walker did not prove a prima facie case, because the selectee had experience as a supervisor and Ms. Walker did not.[6] The trial judge reasoned Ms.

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[6] There was no evidence that "supervisory experience" played any role in the selection, or that supervisory experience was valued over experience doing the

Walker did not shoulder her burden of demonstrating her qualifications were equal to or better than the selectee. (R.E. 899-5). Clearly, the district judge has constructed a rule of law which is onerous. By requiring specific proof of comparative qualifications, the rule assumes the decision was made on the basis of qualifications, in the absence of an articulation to that effect, and in the absence of any evidence of what qualifications were considered valuable to the decision-maker. In effect, it deprives the plaintiff of the benefit of the defendant's articulation. Clearly, the district judge makes the same error here that was rejected by the prior panel of this Court; he simply makes the error at the prima facie case stage, rather than at the pretext stage.

This fundamental misconception of the functioning of the circumstantial proof model can be traced through each of the claims adjudicated. Plaintiff

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precise job by the decision-maker. Ironically, Ms. Walker testified that as the position became more responsible she was given a number of other workers to supervise in order to accomplish the work, though she did not have the formal title. The district court appears to fault her for this testimony, though the evidence is indisputable.

Charles Stewart, for example, sought a series of positions between 1977 and 1979. In each case, a white person with substantially less education than Mr. Stewart was selected for the position. In each case, the district court sifted through the record and decided for himself that the work experience of each of the white selectees was more valuable in terms of "qualifications" than Mr. Stewart's education and work experience. He did this in the absence of any evidence that the selection decisions were premised upon qualifications, or that the various kinds of work experience each applicant possessed were more valuable than the combination of Mr. Stewart's academic credentials and work experience. Thus, the district judge reasoned Mr. Stewart did not prove a prima facie case, since he was unable to show the white selectees had equal or lesser qualifications than he. (R.E. 899-10-13).

Plaintiff Dorothy Roberts applied for a position as an Accountant III. She possessed six years of supervisory experience and had two and one-half years of professional accounting experience. (R.E. 899-13). She was entitled to preference in hiring because she was a current employee. (Pl. Ex. R-2, Answer to Interrogatory 20(a) 4, served July 19, 1979, and answered May 1, 1980, and August 1, 1983). The white person selected to fill the position did not possess these qualifications, but the district judge decided — in the absence of evidence —

that the white person's experience with the State computer system was more valuable than Ms. Roberts' experience with the agency's accounts. Thus, he reasoned, she did not prove a prima facie case.[7]

Without question, the district court applied an incorrect legal standard.

POINT 2

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

A. HICKS DID NOT CHANGE THE LEGAL REQUIREMENT FOR ARTICULATION

The law of this case is clear. The Employer's articulations were inadequate as a matter of law.

On pages 24-26 the Employer criticizes at length this Court's earlier

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[7] Because of space limitations, we cannot go through each of the 60 claims. However, application of the correct legal principles would produce a different result from that reached by the trial judge in every case.

opinion. That opinion has only lost its binding power as law of the case if the standard for a legally sufficient articulation was materially changed by *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). That case discusses how the evidence of pretext — the third stage of the *Burdine* pattern of proof — may be evaluated by the finder of fact. The case makes no new law on the legal sufficiency of the defendant's burden to "articulate" a "nondiscriminatory reason" — the second stage of the *Burdine* circumstantial proof model.

There is nothing in *Hicks* to change the holding of this Court that the pretext stage is reached only when "the requirements set out in *Burdine* have been fully met." *IMPACT*, 893 F.2d at 1195 n. 5. The law of this case is that the Employer did not meet its articulation burden.

The Employer misconstrues this Court's holding in *IMPACT*. This Court did not (in the words of the Employer at page 30 of its brief) base its decision on a "rejection of the employer's proof" as lacking in credibility. This Court held the manner by which the Employer sought to "articulate" was inadequate as a matter of law. By failing to introduce any evidence that any of the employment selections were made for a sufficiently specific reasons, the Employer failed in its burden of production. *Hicks* does not change this requirement.

The *Hicks* Court did not discuss at length the parameters of what constitutes a legally sufficient articulation. The Court did suggest that the burden remains as in *Burdine*. First, the majority in *Hicks* stated its holding succinctly in the first sentence of the opinion. The holding is absolutely limited to the role of the articulation in the pretext phase of the litigation. *Id.* at 2746. Second, the majority opinion restates some of the elementary aspects of the articulation without change from previous opinions, restating the *Burdine* language, e.g., that the "defendant must clearly set forth, through the introduction of admissible evidence." *Id.* at 2747. Finally, almost three years have passed since *Hicks*, and the Employer did not cite a single case for the proposition that the *Hicks* decision changed the definition of what is a legally sufficient "articulation." That is because it did not.

B. HICKS DOES NOT ALTER THE RESULT IF THE EMPLOYER FAILS TO MAKE A LEGALLY SUFFICIENT ARTICULATION

The Employer also argues that even if the Applicants have proven prima facie cases and it failed to meet its articulation burden, that under *Hicks* the Applicants are not entitled to judgment. In fact, *Hicks* expressly holds to the contrary. Justice Scalia left no room for doubt that if the plaintiff proves a prima facie case and the defendant fails to meet its articulation burden the only possible outcome is judgment for the plaintiff.

> At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine. None does if, on the evidence presented, (1) any rational person would have to find the existence of facts constituting a prima facie case, and (2) the defendant has failed to meet its burden of production.... In that event, the court must award judgment to the plaintiff as a matter of law....

While the Employer argues it produced a great quantity of evidence concerning the employment decisions, it actually produced no evidence of the reasons any of the selections were made. The volume of evidence is immaterial unless it addresses the legal questions at issue. This Court has already held the Employer did not meet its articulation burden as a matter of law.

POINT 3

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

Prior to trial, the district court ruled that employment examinations were outside the scope of this litigation. Because of that ruling, the Applicants' challenges to the employment examinations could not be tried. It is, therefore,

disingenuous to argued that the trial court's ruling at the close of the Applicants' case in chief — that all disparate impact claims were dismissed — included claims which were not then before the court. This Court thereafter held the trial court improperly eliminated the examinations from the scope of the case. On remand, it was error for the trial court to refuse to allow the Applicants to try the claims under a disparate impact theory.

POINT 4

THE DISTRICT COURT ERRED IN FAILING TO RECERTIFY THE CLASS

Introduction

The district court erred in holding that none of the Plaintiffs made out a prima facie case. The reversal of this error will necessarily reverse the **sole** basis cited by the District court for not recertifying the class.

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

The district court held that since none of the Plaintiffs had proven a prima facie case, they "no longer have a case or controversy with the defendants" and cannot represent the class. (R22-899-28). The court cited *Griffin v. Dugger*, 823

F.2d 1476 (11th Cir. 1987), for its holding. *Griffin* does not support the holding. This Court held that Peners Griffin could not represent a class of persons alleging injury from failing the entrance examination, because he had passed the entrance examination. The fact that Griffin could not have suffered the injury he sought to represent arose from the face of the pleadings. Similarly, the Supreme Court's decision in *O'Shea v. Littleton*, 414 U.S. 488 (1974), cited by this Court in *Griffin*, stands for the same proposition. Indeed, *O'Shea* states explicitly that the "complaint failed to satisfy the threshold requirement imposed by Article III of the Constitution, that those who seek to invoke the power of the federal courts must allege an actual case or controversy." *Id.* at 493.

The *Griffin* holding is not based on Griffin being unsuccessful in *proving* his claim. Such an interpretation is precluded by clear Supreme Court authority.

In 1977 in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977), the Supreme Court held that if a class is certified in a timely manner, it cannot be decertified just because the plaintiffs lose their individual claims. In that case the two plaintiffs were city drivers who sought to be over-the-road drivers. They pleaded a class but never moved to certify a class, and the case was tried as three individual cases. At trial the plaintiffs lost their individual cases and the district court then ruled that the case would not be treated as a class action.

The Supreme Court stated the rule still in effect:

> Obviously, a different case would be presented if the district court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives. In such a case, the class claims would have already been tried, and, provided the initial certification was proper and decertification not appropriate, the claims of the class members would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims. *See, e.g., Franks v. Bowman Transportation Co.*, 424 U.S. 747, 752-757; *Moss v. Lane Co.*, 471 F.2d 853, 855-856 (CA4).

Id. at 406 n. 12. Five years later the Supreme Court made clear that footnote 12 was a major pronouncement and not mere nugatory words when it discussed and cited the footnote in the text of *General Telephone v. Falcon*, 457 U.S. 147, 156 (1982). The context of the citation was significant. The Court stated "[o]ur holding in *East Texas Motor Freight* was limited," and then quoted the language from footnote 12 that made clear that *Rodriguez* did not apply if the district court had "certified a class and only later it appeared that the named plaintiffs were not class members...." *Id.*

The Applicants in this case did not make the mistake of the plaintiffs in *Rodriguez*. They moved the trial court in a timely manner for certification. The

class was certified after a full evidentiary hearing. It was then decertified for reasons not persuasive to this Court in the first appeal. After the remand (R21-804) the Applicants moved for recertification of the class on September 11, 1990, and presented evidence when the court scheduled a hearing on class recertification on January 2, 1992, (R21-850) — both events occurring more than four and three years, respectively, before the ruling on the merits of the individual claims.

Both *Rodriguez* and *Falcon* show dispositively that the fact that a plaintiff loses his claim on the merits does not deprive him of a "case or controversy with the defendants" under Article III; the trial court was incorrect to rule otherwise. (R22-899-28).

The Eleventh Circuit applied *Rodriguez* in *Scott v. City of Anniston*, 682 F.2d 1353 (11th Cir. 1982). The district court certified a class but ruled against the claims of the representatives and the class. This Court reversed, holding that the district court had misread *Rodriguez*. In noting that the claims of the class were tried with the representatives who only after trial were deemed not to be members of the class, the court held that "[t]he representation of the class was complete for all practical purposes" after the first trial. *Id.* at 1357. *Accord, Hill v. Western Electric Co.*, 672 F.2d 381 (4th Cir. 1982); *Green v. USX Corp.*, 843 F.2d 1511, 1533-34 (3d Cir. 1988).

The next year this Court not only stressed that the representational capacity of losing plaintiffs continued unabated, but that if the plaintiffs lost their individual claims on remand, "the district court should bear in mind that defeat of the individual claims does not prevent the court from finding a pattern and practice of discrimination against the class." *Perryman v. Johnson Products Co., Inc.*, 698 F.2d 1138, 1146 (11th Cir. 1983). The Court emphasized that the drafters of Title VII envisioned the statute as a protective measure and that once the class was certified the "proceeding takes on a public character" in which remedies are devised to "vindicate the policies of the [1964 Civil Rights] Act." *Id.*, citing *Hutchings v. United States Industries, Inc.*, 428 F.2d 303, 311 (5th Cir. 1970).

It is only the trial court's steadfast failure to rule on class recertification for more than three years after the evidentiary hearing, in violation of Rule 23(c)(1), which deprived the Applicants of the protections contemplated by the Supreme Court in both *Rodriguez* and *Falcon.*

B. THE COURT VIOLATED THE PLAINTIFFS' RIGHT TO HAVE THE CLASS CERTIFICATION ISSUE DECIDED "AS SOON AS PRACTICABLE"

This Court remanded this case by decision of February 6, 1990, indicating that the question of class certification should be reexamined. The mandate issued

on April 24.

The District court ruled that it would not recertify the class more than six years later — and then only after the Plaintiffs filed two extraordinary writs with this Court in an effort to spur any action at the trial level.

The sole basis for the ruling was evidence which was of record the date the mandate issued more than six years earlier, i.e., the ruling that none of the Plaintiffs established a prima facie case on any claim. (R22-899-27-29). The issue which the District court considered dispositive of the class action recertification, the lack of prima facie cases, was ready for adjudication the date this Court's mandate issued in 1990.

Thus, though there was a class certification hearing at which the Plaintiffs adduced much more sophisticated statistical evidence, the evidentiary record developed at the hearing had **no** bearing on the trial court's basis for disposition of the issue.

The Employer's response is that Rule 23(c)(1) requiring a determination "as soon as practicable" applies only to the literal commencement of the action, in this case 1979, and not to remand from a Court of Appeals with guidance to "give further consideration." The argument that there is no basis for requiring a timely reexamination of the recertification elevates form over substance.

The cases that allow amendment of the class as the action proceeds, cited by the Employer at 47, are simply irrelevant and are not challenged by the Applicants. What was important was that class certification be dealt with in a timely manner upon remand. As the record now reflects, this inexcusable delay was outcome determinative for the ability of others to come forward with "live claims."

C. THE RULING ON CLASS RECERTIFICATION WAS STILL ERRONEOUS

The Employer misreads *Armour*. In the 1980 remand this Court instructed the district court to ascertain whether there was "a live controversy involving the proposed class, and, if so, whether or not Ms. Armour is a proper class representative." *Armour v. City of Anniston*, 622 F.2d 1226 (5th Cir. 1980). Since Ms. Armour had already lost her claims, it is clear from the opinion that a plaintiff who loses her claim may be eligible to represent a class.

On remand the findings of the district court explain why the 1981 ruling of this Court does no violence to the 1980 ruling. The district court found that Ms. Armour was discharged "on unique facts, not typical of even one other employee." Indeed, the court determined that she had abandoned her job and that she perjured herself, thus showing that she did not have the proper personal properties to be a class representative. 89 F.R.D. 331, 332 (1980). With regard to the live

controversy the court found that "[n]o class of mistreated black people has been shown." *Id.* at 332.

This Court affirmed at 654 F.2d 382 (5th Cir. 1981). In complete distinction to the instant case in which the Applicants pressed for a class certification hearing, this Court found that the lawyers for the plaintiff "did absolutely nothing when given the opportunity to have the case reconsidered." *Id.* at 384. Contrary to the intimation of the Employer's Brief, this Court did not hold in that case that a live controversy could only be presented by intervenors.

In the instant case the Applicants adduced expert testimony by Dr. David Rasmussen, a labor economist, of a pattern and practice of discrimination against blacks in hiring and promotions. Further, unlike *Armour*, his testimony affirmatively demonstrated once again commonality and numerosity. It should be noted that this was more proof of the merits that is required of class representatives at the certification hearing. This is abundant evidence of a "live controversy." Further, completely unlike the findings in *Armour,* in the instant case there was no finding that the claims of the representative parties were not typical of other applicants or that any of the Applicants lacked the proper "personal properties" to be a class representative. Indeed, the law of the case stemming from the original certification order, never changed, was that the claims

of the representative parties were typical. (R3-148).

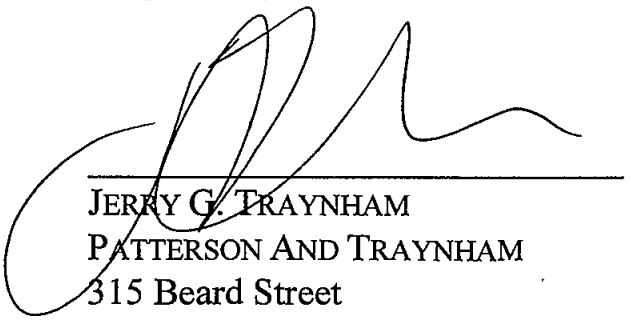
Remarkably, the Employer's brief states that the Applicants' "brief fails to inform this Court that the record before the District court demonstrated that none of the prerequisites of Rule 23 were met" (Employer's brief at pp. 45-46) — as if it were a fact. The District court made no such findings on remand. It is merely the argument of the Employer, one which they never make in adequate detail to this Court but merely reference the district court record.

The truth is that the only ruling on "the other prerequisites" was made in the Order of November 7, 1980 (R3-148) which certified the class, and there has been no contrary ruling to this day.

CONCLUSION

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

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by pre-paid United States Mail to the following counsel of record this 3d day of June, 1996.

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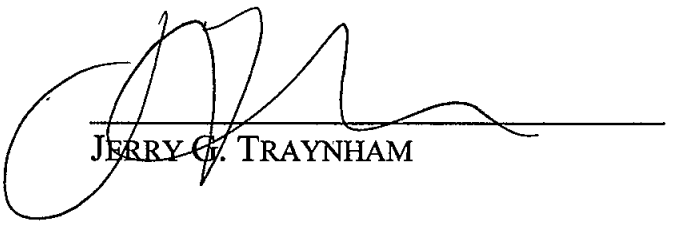

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