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DEPARTMENT OF JUSTICE

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ASSISTANT ATTORNEY GENERAL

Ross

Department of Justice
Washington

Sent to Leonard
10/6/69

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: United States v. Dillon Supply Company (No. 13,975, 4th Cir.)
(E.D. N.C., C.A. No. 1972)

RECOMMENDATION

I recommend appeal from the district court's order of July 1, 1969, dismissing the complaint after trial.

STATUS

The judgment of the district court dismissing the complaint was entered on July 1, 1969. A protective notice of appeal was filed on August 28, 1969, and the record on appeal was filed and the appeal docketed on October 8, 1969. Our brief is due for filing on November 17, 1969. 1/

QUESTIONS PRESENTED

1. Whether a company which has in the past assigned its employees to departments on the basis of race has a duty under Title VII of the Civil Rights Act of 1964 to permit its Negro employees to transfer without penalty to vacant positions in white departments on the basis of their seniority and qualifications, and to take other steps to disestablish the racial character of its departments and to provide employment opportunities to Negroes which are equal to those of their similarly qualified white contemporaries.

1/ Preparation of this memorandum has been delayed by the reassignment of lawyers and the reorganization of this Division.

2. Whether in a suit by the Attorney General alleging a pattern or practice of resistance to the full enjoyment of equal employment opportunity rights secured by Title VII of the Civil Rights Act of 1964, the district court erred in excluding evidence concerning the defendant's employment practices prior to the effective date of the Act, evidence concerning the defendant's employment practices prior to the date of filing of the suit, and after a certain point in the trial, evidence concerning the defendant's employment practices prior to January 1, 1969, and evidence not pertaining to specific acts of overt discrimination, on the ground that only relevant facts concerned were those pertaining to overt discrimination at the time of trial, and on the ground of our failure to comply with its pre-trial orders.

STATEMENT

1. The Basic Facts

Dillon Supply is a North Carolina company engaged in the business of selling, installing and servicing industrial equipment and supplies. Its Raleigh plant, which is the subject of this litigation, has approximately 236 employees, of whom approximately 44 are Negroes. The company employs a number of men in laboring, production and welding jobs in the Fabrication Shop, Fork Lift Department, Steel Warehouse and Traffic Departments. None of these departments has any significant requirements for entry level positions either in terms of education or of prior experience. Most of the defendant's Negro employees were assigned to the "dead end" truck driver and warehouse laborer jobs, or to cleanup duties in the Fabrication Department, while whites with no greater qualifications were afforded the opportunity to learn to become, and to become welders.

Since discovery closed in May 1968, and because the court excluded from evidence certain documentary exhibits, the evidence before the court as to the present racial composition of the departments

on which the litigation centered was almost exclusively testimonial. The testimony of various government and defense witnesses, however, placed before the court a reasonably accurate picture of the current makeup of these departments, as reflected in the following table:

	W	N
Traffic	1	9
Steel Warehouse Laborers	2	11
Fabrication Shop (Welders and Helpers)	30-40	3
Fabrication Shop Cleanup	0	6
Fork Lift	11	2

The racial assignments were not accidental. Both before and for a period after the Act, the defendant followed a practice of overt segregation on the basis of race. For example, it was stipulated that until February 1966, the company cafeteria was operated on a two-part basis, one part for whites and the other for Negroes.

The departments here in question have long been racially identifiable as white or Negro. From July 1965, the effective date of the Civil Rights Act, until January 1967, there were no Negro welders or helpers in the Fabrication Shop. In December 1964, there were nine Negro drivers and a white supervisor in the Traffic Department; the parties stipulated that the same situation existed in 1967.

The company engaged, and essentially continues to engage, 2/ in a system of decentralized hiring. Employees have always been, and are,

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2/ The only change in this procedure has been that C.A. Dillon, Jr., as a result of the Justice Department's complaint, has seen most applicants personally since sometime early in 1968. He keeps no list of vacancies, however; he testified that he has a mental picture of where vacancies exist. Nor is the applicant told of all vacancies; Mr. Dillon decides on some basis what department to send the applicant to, and the decision whether to hire is then made by the departmental supervisor.

hired by the supervisory personnel in each department. There is no procedure or policy set up whereby supervisors in one department know of vacancies in other departments. In the past applicants looking for a job did not go to a central personnel office where a single individual could determine their qualifications and fill all vacancies on a rational nonracial basis. Rather, they went to the racially identifiable department of which they had heard and with which they were familiar, and were hired there without any attempt by anyone to fit applicant to vacancy in the operation as a whole.

The company depended upon a friends and relatives recruiting system for each department. Applicants normally heard about job opportunities from relatives and friends who worked for the defendant. Thus whites heard about job opportunities in the white departments, and Negroes found out about opportunities in the Negro departments in the same way.

2. Pre-Trial Proceedings

Following referral of this matter to him by the EEOC in accordance with the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., the Attorney General filed a complaint on February 27, 1967 alleging that the defendant was engaged in a pattern or practice of discrimination against Negroes on the basis of race with respect to their employment opportunities.

The complaint alleged that the company assigned Negroes on a racial basis to menial and low-paying jobs, without regard to their qualifications, and kept Negro employees in menial and low-paying job categories on account of their race by racially discriminatory practices affecting promotion and reassignment, while providing advancement to white employees who are no more skilled or qualified than the Negroes not so promoted or reassigned. The complaint also alleged that the company, prior to the effective date of the Act, conducted substantially all of its facilities and operations on a racial basis, and has failed to take adequate steps to correct the effects of its past policy and practice of racial discrimination in employment.

Due to the illness of Chief Judge Butler during a substantial portion of the year 1968, the case was eventually assigned to Judge Kellam of the Eastern District of Virginia, sitting by designation.

Discovery had originally been closed as of May 1968. When it became apparent that trial would not be held until almost a year thereafter, the government moved to reopen discovery, so that the records could be brought up to date. By order of February 20, 1969, Judge Kellam denied the motion. On the same date, however, the court directed the government to file an up-to-date statement of the provisions of the Civil Rights Act which the defendant "is now violating," (emphasis supplied) and, at a later date, witness summaries. Plaintiff accordingly filed its "Pretrial Statement of Issues of Fact and Issues of Law," which included a six and one-half page outline of the specific ways in which it contended the defendant was violating Title VII. By order of March 24, 1969, the court held that our statement was "vague and indefinite" and did not comply with its order, and ordered the filing of a statement setting forth "each specific violation which the plaintiff asserts now exists" (emphasis supplied), i.e., where discrimination in hiring, assignment or transfer is alleged, the names, dates and qualifications of the persons denied and the persons granted preference, where segregated facilities are alleged to be "now maintained," the facts relating thereto, etc.

The government then filed its "Summaries of Expected Testimony," which comprised 67 pages and essentially disclosed its entire case. In the left-hand margin of each summary were numerical and letter references to the paragraphs and subparagraphs of the Statement of Issues of Fact previously filed, thus indicating the particular issue of fact to which each item of expected testimony related.

By order of April 10, 1969, the court held that these documents were insufficient to comply with its prior orders, and, after further correspondence and negotiation with defendant, plaintiff filed a "Statement of Present Violations" which set forth in more general form, in a page, the government's allegations against the defendant. The

defendant, while still insisting that the documents filed by the government were insufficient (a position later sustained by the court), filed responses thereto as well as summaries of expected testimony, in the same form as those filed by the plaintiff. Accordingly, there was substantially complete disclosure by both sides of all evidence in advance of trial, though the court had ruled that the government had failed to comply with its orders.

The plaintiff asked the court to issue a decree (1) enjoining future discrimination and failure to take affirmative steps to correct the effects of past discrimination; (2) requiring that new employees be assigned in such a way as to eliminate the racial identities of departments and jobs; (3) requiring the adoption of uniform, objective criteria for hiring, assignment and promotion and disapproving the practice of decentralized hiring in the context of a racially segregated plant; and (4) providing present Negro employees the opportunity to transfer to predominantly white jobs in the Fabrication Shop as vacancies occur without loss of seniority or other accumulated benefits.

3. Trial Proceedings

The court heard approximately 30 witnesses and received into evidence certain exhibits offered by the defendant; other testimonial and documentary evidence offered by the government was excluded by the court on various grounds. By its proof at the trial, the government endeavored to show that the defendant had discriminated against Negro employees by assigning a majority of them, on account of their race, to all-Negro or substantially all-Negro job categories with inferior remuneration and opportunities for advancement, and without regard to their qualifications. The government further offered evidence to show that Negro employees who had been assigned to traditionally white departments (e.g., the Fabrication Shop) had been discriminatorily treated within those departments and afforded inferior employment opportunities after departmental

assignment. Finally, the plaintiff sought to show that up to and for a period after the effective date of the Act the company openly maintained its facilities as well as its departments on a racially segregated basis.

The testimony at trial showed that some white employees learned of vacancies in the Fabrication Shop where relatives were already employed, took no tests, and were taught how to weld and became welders there. Negro applicants, by contrast, did not have relatives or friends in the all-white welding department, and consequently gravitated to the all-Negro Traffic Department and to the virtually all-Negro laborer section of the Steel Warehouse. Although, subsequent to the lawsuit, Mr. Dillon began to see most applicants personally, even under his present system he sends applicants to departmental supervisors and it is they who do the hiring.

In addition to the evidence of hiring practices which tended to perpetuate the effects of past discriminatory practices, evidence was introduced to show overt discrimination down to the period of the trial.

There were no Negroes in the welder, mechanic, and welder helper categories as late as 1967. While white welder helpers were learning welding in the Shop during this period, company supervisory officials told Charles Jones, a Negro high school graduate employed as a laborer in the Fabrication Shop in February 1966, that he should transfer to the Steel Warehouse because he had no future in the Fabrication Shop and would not secure advancement there. Meanwhile, during the three years immediately preceding the trial of this case, a series of white persons with no welding experience, or practically none, some with only elementary school education, were hired and trained as welders by the company. Though some whites have been tested, a number of whites never had to take a welding test to gain entrance to the welder training. Jerry Wayne Carter, for example, admitted that he had no mechanical experience at all and no more than an elementary education. He was not tested and was

trained in welding. Wesley Wallace, who likewise had no experience, was referred to Dillon by his uncle, a welder in the Fabrication Shop. Wallace wanted to learn a new trade, and, after he was hired, but without taking any test, his uncle taught him to weld.

Leslie Wilson, Johnny Scoggins, and James Hocutt were each referred by a friend or relative, employed at the company, and were likewise given no test. They each had a small amount of prior experience in welding, but were given no test, and learned their skills on the job. Three other whites--David Baker, Michael Smith, and Larry Shores-- were hired by John Taylor after January 1967, all with no prior welding skills, and all were permitted to pick up welding on their own.

The treatment of Negroes was different. No Negro had ever become a welder at Dillon prior to the filing of this suit and only three since suit was filed, none without taking a test. Charles Jones and several others were required to take such a test, and they were told that they had failed it. In contrast to the inexperienced whites who are never tested at all and who were taught to weld on the job, some of the Negroes who allegedly failed had completed a welding course at W. W. Holding Technical Institute.

Negroes encountered obstacles in addition to having to take this selectively applied test. Charles Jones had to complain several times both to the foreman and to the superintendent before he was taken off traditionally Negro sweeping jobs in the Fabrication Shop "cleanup crew" and allowed to weld. Both Jones and John Pope, another Negro welder, were assigned to the cleanup crew as late as December 1968 and January 1969, because there was "no work" for them at the time; white welders were not so assigned.

The evidence showed that Negroes in the identifiably black departments were treated in a traditionally discriminatory fashion. To the Negro truck drivers of the Traffic Department fell

the task of rendering personal services for company officials, such as hauling the trash, raking the lawn and even cleaning Mr. Hennessee's dog pen.

Nor were the prospects for Negroes significantly brighter in the traditionally Negro jobs at the steel warehouse. Negro laborers in that department could look forward to advancement, if at all, only to a category known as "leadman," which the defendant described as a supervisory position, but which involves exactly the same kind of work as laborers.

In the predominantly white Fork Lift Department, Malachi Jones, a Negro, was hired in June 1967 and relegated to cleaning up and painting for over a year although he had informed the company of his 440-hour auto mechanic course. At the time of trial painting and cleaning consumed 25 hours a week of his time, with the balance spent assisting mechanics on fork lift trucks. In February of 1969, the company assigned as a full-time mechanic's helper in the Fork Lift Department one Johnny Ramsey Jones, a white who had less seniority than Malachi Jones and who could not get his own car running. Malachi Jones connected the loose wires and made other repairs sufficient to make the car run.

In pursuit of a view of the law reflected in its pre-trial orders, the court excluded a substantial amount of evidence on the ground that the only relevant facts were those in existence at the time of trial or immediately prior thereto, because only such facts were pertinent to a determination of "violations which now exist." Thus, the court excluded evidence relating to the existence of segregated bathroom facilities as late as July 1967, on the ground that these conditions no longer existed. It excluded evidence that in June 1968, a company official turned away a request by a Negro who was making persistent efforts to be permitted to become a welder with the remark, "Well, you've got to be patient," on the ground that the official was no longer with the company, and that, in the court's words, "If the company has eliminated any feeling which Mr. Taylor had, it no longer exists."

Similarly, when a witness testified that over a period of six years continuing to the time of trial only one black warehouse employee had worked in an office position, the court limited the evidence to the situation at "the present time."

Finally, after plaintiff had presented 16 witnesses, the court limited all further testimony to the period since January 1, 1969, on the ground that "we've been in as far back as 1962," sixteen witnesses was enough, and the only relevant evidence concerned conditions which "still exist." By this ruling the court excluded, for example, evidence that all new drivers in the Traffic Department hired since 1969 were black. The ruling excluded 13 of the remaining 16 witnesses for the government. Written offers of proof were made with respect to six of these witnesses, five of whom had significant, non-cumulative testimony to offer.

In the trial court's view, the law limited the relevant evidence in another respect. The only kind of evidence Judge Kellam was interested in concerned acts of overt discrimination. Beyond that, "discrimination" in the court's view meant a clearly proven instance where a named Negro, whose qualifications were demonstrably equal or superior to those of a named white, was passed over for a job. This view, combined with the concept that discrimination so defined must "now exist," underlay the elaborate controversy over whether the government had complied with the court's pre-trial orders, or whether (as the court found) it had failed adequately to set out what violations of Title VII "now exist." Thus, even though paragraph 2x of the government's Pretrial Statement of Issues of Fact specified that black employees "have been and are concentrated" in "menial and low-paying" jobs (emphasis supplied); even though the government's "Summaries of Expected Testimony" contained numerous references to specific pay rates of witnesses, with the key number '2' in the margin; and even though the government's Statement of Present Violations alleged that "The defendant makes racially discriminatory job assignments which result in less favorable conditions of employment for Negroes" (emphasis supplied)--the court excluded all evidence of rates of pay or opportunity to earn overtime, on the ground that these matters

were not contained in our specifications of violations.

For the same reason, the court refused to permit the government to examine the manager of the Fabrication Shop on current machine shop pay records in order to show that blacks were paid less than whites. And the court excluded on the ground of relevancy testimony concerning a conversation between the same manager and an employee of the North Carolina State Employment Service, which was offered to show that the company was rejecting graduates of an MDTA training course in welding on spurious grounds. The court's objection to this last testimony apparently arose from the fact that it concerned alleged inadequacies in the MDTA training program under Dillon standards, rather than some specific act of overt discrimination as the court understood that term. The court's highly restrictive view of the kind of evidence relevant to proof of a pattern or practice of discrimination thus made it practically impossible for the government to prove its case.

4. The Court's Order

The trial court dismissed the action in a memorandum order dated July 1, 1969. Noting that [t]here are white and Negro office workers, welders, machinists, mechanics, truck drivers, laborers, helpers, supervisors, and so on, the court ignored the statistical evidence indicating racially identifiable departments, and further found that [t]he alleged violations asserted against the defendant are not substantiated by the believable evidence in any particular. Holding that the enactment of Title VII did not "require an employer to discharge all of its then employees and to commence a rehiring," or in terms require maintenance of a central hiring office, the court also said that the contention that all persons applying for employment should be told of any existing vacancy was answered by Mr. Dillon's testimony that "he would look rather foolish to tell a person with secretarial qualifications applying for a position as a secretary that there was a vacancy for a welder or machinist."

The court resolved all issues of fact in favor of the defendant, accepting even the most tenuous proffered inferences and explanations. It reviewed the testimony of overt discrimination against certain Negro witnesses, and found either that no discrimination had been proved or that any overt discrimination that had occurred had been corrected by adjustments made with respect to those individuals subsequent to the filing of suit. Judge Hollan also castigated the government at length for alleged failure to cooperate with the court and for the use of delaying tactics.

DISCUSSION

The trial court's view of Title VII of the Civil Rights Act of 1964 as prohibiting only overt discrimination, and its view that the only testimony relevant to injunctive relief is evidence of such violations remaining in existence at the time of trial, are clearly at odds with the governing law. Because of its fundamental misconception of what the law requires, and its unusual and unsupported evidentiary rulings, the district court did not permit us to prove our case. Appeal is warranted to correct the gross errors of the district court. In addition, it will afford the Court of Appeals for the Fourth Circuit an opportunity to lay down specific instructions as to how the case should be handled on remand; and in so doing to provide guidance to other district courts in that circuit as to the proper meaning and application of Title VII.

1. The various errors made by the district court can be traced to its fundamental misconception of what Title VII of the Civil Rights Act of 1964 requires. The district court viewed Title VII as simply proscribing acts of overt discrimination. But the prohibitions of Title VII are far broader. Where, as here, an employer has discriminated in the past, and when its present policies tend to perpetuate the present effects of that past discrimination, its present policies are unlawful under Title VII, even though they are racially neutral on their face. Local 189, United Papermakers v. United States, __ F.2d __, 60 CCH Lab. Cas. ¶9288 (5th Cir., No.

25,956, July 28, 1969), pet. for reh'g en banc denied, 61 CCH Lab. Cas. ¶9328; United States v. Hayes Int'l Corp., ___ F. 2d ___, 60 CCH Lab. Cas. ¶9303 (5th Cir., No. 26,609, Aug. 19, 1969); United States v. Sheet Metal Workers, ___ F.2d ___, 61 CCH Lab. Cas. ¶9319 (6th Cir., No. 19,316, Sept. 16, 1969).

In the case at bar, the evidence showed that defendants had followed the traditional practice in the area of assigning Negroes to comparatively menial jobs, in largely segregated departments. The company practice of hiring persons (largely recruited from friends and relatives) directly into the white departments without first accepting bids from Negroes in the traditionally Negro departments tends to perpetuate the racial nature of the departments. Similarly, the company's decentralized hiring practices, when combined with its policy of "friends and relatives" recruiting, tend to perpetuate the segregated nature of its departments. For the white relatives and friends of employees in the white departments applied for employment there; and similarly the Negro relatives and friends of existing Negro employees sought and obtained employment in the Negro departments.

A company which has in the past maintained racially segregated departments has a duty under Title VII to permit its present Negro employees to transfer without penalty to vacant positions in white departments on the basis of their seniority and qualifications. In Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), restrictive departmental transfer and seniority provisions were held to be unlawful employment practices because they were superimposed on a racially segregated departmental structure, and the court ordered that the class of Negro employees discriminated against by these provisions be permitted a fair opportunity to transfer to white departments. The Fifth Circuit adopted that position in Local 189, United Papermakers v. United States, supra. In United States v. Hayes Int'l Corp., supra, a transfer program initiated voluntarily by the company was held to be inadequate to break the discriminatory pattern embodied in its segregated lines of progression, and the court remanded the case for entry of a preliminary injunction providing more liberal transfer opportunities for the black employees. These cases are ample

precedent for the Court of Appeals in the present case to hold that transfer opportunities must be made available for Dillon Supply employees who have been assigned to racially segregated departments if a pattern or practice of discrimination is proved on remand.

Similarly, a company which has in the past maintained racially segregated departments and recruited largely on the basis of word-of-mouth referrals by friends and relatives of present employees has a duty under Title VII to hire and assign from a central office and take other affirmative steps to disestablish departmental segregation. In Local 189, United Papermakers v. United States, supra, the district court ordered the substitution of mill seniority for job seniority in order to disestablish segregated lines of progression. The court held that

> Where a seniority system has the effect of perpetuating discrimination, and concentrating or "telescoping" the effect of past years of discrimination against Negro employees into present placement of Negroes in an inferior position for promotion and other purposes, that present result is prohibited. . . . 282 F. Supp. at 44.

In the present case, the trial court erred in holding that nothing in Title VII requires that hiring be done through a central office. As the district court said in Local 189:

> . . .we do not hold that 'mill seniority' is per se required under Title VII. But we hold that, where, as here, "job seniority" operates to continue the effects of past discrimination, it must be replaced by some other nondiscriminatory, system, and that mill seniority is an appropriate system in this case. 282 F. Supp. at 45.

In the present case, decentralized hiring must be similarly replaced. In United States v. Sheet Metal Workers, supra, the court held that a union referral system in which priority was based on pre-Act experience in the industry and under the collective bargaining agreement constituted present discrimination because it carried forward the effects of the unions' former discriminatory practices. The court ordered that the referral system be discarded or appropriately modified. And in Local 53, Asbestos Workers v. Vogler, 407 F. 2d 1047 (5th Cir. 1969), the court held that the use by an all-white union of membership endorsements, family relationship, or membership election as criteria for membership or referral was illegal, and ordered the development of objective membership criteria. The union's nepotistic practices in that case had the same effect as decentralized hiring and word-of-mouth dissemination of notice of vacancies had in the present case.

2. The trial court's exclusion of evidence of past discrimination, both pre-Act and post-Act, is clearly reversible error in light of a long line of cases. United States v. Sheet Metal Workers, supra; Local 189, United Papermakers v. United States, supra; Local 53, Asbestos Workers v. Vogler, supra; United States v. Plumbers & Pipefitters, Local No. 73, F. Supp. , 61 CCH Lab. Cas. ¶9329 (S.D. Ind. 1969); Dobbins and United States v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968); Quarles v. Philip Morris, Inc., supra; United States v. Building Trades Council of St. Louis, 271 F. Supp. 454 (E.D. Mo. 1965).

In addition, the trial court's insistence that any discrimination which existed had been corrected by belated removal of racial designation of facilities and by post-suit upgrading of certain Negro employees flies in the face of a long line of cases holding that "reformation" on the eve of or in response to a lawsuit is no defense to an allegation of pervasive discrimination, and that the plaintiff is entitled to an injunction notwithstanding professions of a change of heart. E.g., Cypress v. Newport News General and Nonsectarian Hospital Association, 375 F. 2d 648 (4th Cir. 1967); Buckner v. County School Board of Greene County, Virginia, 332 F. 2d

452 (4th Cir. 1964); United States v. Hayes Int'l Corp., supra; United States v. Plumbers & Pipefitters, Local No. 73, supra. [P]rotestations of repentence and reform timed to anticipate or blunt the force of a lawsuit offer insufficient assurance" that the practice sought to be enjoined will not be repeated. Lankford v. Gelston, 364 F. 2d 197, 203 (4th Cir. 1966)(illegal searches and seizures).

The final error we should attack--the trial court's view that the only evidence relevant to proof of a pattern or practice of discrimination is evidence of specific acts of overt discrimination--is crucial but difficult to pin down. The most striking result of this view was the court's holding that the government had failed to comply with its pre-trial orders; but here the court's view of what constituted "present violations" played an equal role. The ultimate result was the exclusion of important evidence detailed in the Statement above. The account of the Pre-Trial Proceedings, supra, reviews the evidence and makes clear the opposing views as to whether the pre-trial orders were complied with. The main point to be made on appeal is that overt acts of discrimination are frequently difficult to establish, and do not constitute the only kind of evidence of a pattern or practice of discrimination. The government must be permitted to adduce evidence of a more general nature, and courts must be willing to draw the necessary inferences. "In the problem of racial discrimination, statistics often tell much, and Courts listen." State of Alabama v. United States, 304 F. 2d 583, 586 (5th Cir.), aff'd, 371 U.S. 37 (1962)(voting). Accord, United States v. Hayes Int'l Corp., supra (employment). But the trial court in the present case ignored the statistical evidence. In United States v. Sheet Metal Workers, supra, the court held that in light of the statistical and other evidence there was no need for the government to show even a single instance of post-Act refusal of membership or referral. Yet instances of denial of transfer or assignment whose racial motivation was clearly established by a comparison of qualifications were the only kind of evidence in which the trial court in the present case was interested, despite the showing that entry level qualification requirements were tenuous or nonexistent in all relevent departments. Also

symptomatic of a general misconception of 'patern or practice" was the failure of the trial court to draw inferences of discrimination from testimony relating to assignment of blacks to the cleanup crew in the machine shop, assignment of blacks to duties such as cleaning out dog pens of company officials, post-Act maintenance of segregated facilities, etc. The trial court's apparent view that a pervasive pattern of discrimination could be 'corrected" by token reassignment and upgrading was part of the same problem. We should ask the Court of Appeals to hold that the government did comply with pretrial orders to the best of its ability, that the trial court erred in excluding evidence relating to pay, overtime, and conversations with Mrs. Julia Clarke, and that our view of how a pattern or practice may be proved was the correct one.

RECOMMENDATION

For the foregoing reasons, I recommend appeal.

JERRIS LEONARD
Assistant Attorney General
Civil Rights Division