IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1492

WALTER E. WASHINGTON,
Individually and in his capacity as
Commissioner of the District of Columbia, et al.,

Petitioners,

v.

ALFRED E. DAVIS, et al.,
GEORGE HARLEY,
JOHN D. SELLERS,

Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Respondents have failed to demonstrate the erroneousness of the District Court's summary judgment ruling.

In petitioners' brief filed November 19, 1975, it was asserted that the District Court's summary judgment ruling was justified because the existing record conclusively establishes (1) that Test 21 has no adverse racial impact and (2) in any event, Test 21 is manifestly job related under acceptable legal standards. Since much of the police applicant respondents' submission on the latter issue and their related attempt to justify the ruling

of the Court of Appeals has been dealt with in petitioners' main brief, no further response to the police applicant respondents' job relatedness contention will be undertaken here.

On January 10, 1976, however, the Federal respondents filed a brief in which they assert that the record fails to establish the absence of an adverse racial impact in the Metropolitan Police Department's hiring practices. The Federal respondents go on to argue that, while the decision of the Court of Appeals as to the job relatedness of Test 21 is erroneous, the decision of the District Court on that issue is equally erroneous because of the supposed insufficiency of the summary judgment record. The Federal respondents accordingly urge that a remand for the compilation of a more complete record is required. It is the position of petitioners that the Federal respondents, much like the police applicant respondents, have misconceived the impact issue and that the requested remand for further exploration of the job relatedness issue is totally unnecessary. It is to a specific discussion of these matters that petitioners now turn.

1. Adverse racial impact

In claiming that there is no adverse racial impact in the Metropolitan Police Department's selection procedures, petitioners in their main brief focused on statistics spanning the period from August 1969 (when Chief Wilson took office) through December 1971 and emphasized the Department's substantial minority recruitment efforts during these years (A. 66-72). Although both the police applicant and the Federal respondents focus on a period commencing earlier in history, it is submitted that such focus is unjustified and that a more recent period in excess of two years is far more relevant and reliable as a basis for analysis. Instead of proffering any singular all-inclusive standard for assessment of the impact issue, petitioners

in their main brief advanced three factors which, considered in their totality, conclusively negate an adverse impact in the hiring practices of the Metropolitan Police Department.

First, petitioners noted that during 1970 and 1971, the two most recent years for which statistics are available (A. 34-35), blacks constituted 53% of the applicant pool and 43% of those selected. The Federal respondents do not deal in any manner with the significance of these figures (cf. brief at 18) and the police applicant respondents claim (brief at 19) that "this [10%] underrepresentation of blacks among the persons hired is itself substantial." In Swain v. Alabama, 380 U. S. 202 (1965), however, 26% of those eligible for jury selection in a particular county were Negroes while the jury panels over an extended period averaged 10% to 15% Negroes. Nonetheless, this Court refused to consider that there was a prima facie showing of discrimination on the basis of such a 10% underrepresentation. Compare Alexander v. Louisiana, 405 U. S. 625 (1972). These observations are applicable by analogy on the issue of whether petitioners have selected "applicants for hire * * * in a racial pattern significantly different from that of the pool of applicants." Albemarle Paper Co. v. Moody, 422 U. S. 405, 425 (1975); cf. Note, Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal, 89 Harv. L. Rev. 387, 393, n. 26 (1975).

Second, petitioners claimed in their main brief that a favorable comparison between the racial composition of the Department's work force and the percentage of minority group members residing in the surrounding area is sufficient to negate an adverse racial impact. Petitioners further noted that since Chief Wilson took office in 1969, 44% of all new recruits have been

black[1] and that such a percentage correlated favorably with the percentage of eligible blacks in the 20-29 age group residing within a 50-mile radius of the center of the District, the area in which the Department's recruitment efforts have primarily focused. The brief of the Federal respondents (pp. 16-20) is conspicuously silent on this aspect of the impact issue and the brief of the police applicant respondents (pp. 22-23) challenges the rationality of the "50 mile radius" as a basis for analysis. However, the police applicant respondents did not, as they might have, advance any such challenge in the District Court and readily concede in this Court (brief at 22, n. 29) that "the percentage of blacks within 50 miles of the District is below 36.5%." But there is no need to belabor this point further as the brief of the Executive Committee of Division 14 of the American Psychological Association (at 29) significantly notes that, according to the 1970 census, blacks constituted 24.7% of the generally "eligible 20-29 age group in the District of Columbia Standard Metropolitan Statistical Area (SMSA) * * * ." And the brief of the N. A. A. C. P. Legal Defense and Educational Fund, Inc. (at 5), observes, as this Court may judicially note, that the SMSA is considerably smaller in size than the Department's primary recruitment area.

Third, petitioners claimed (brief at 15-16) on the basis of language enunciated by this Court in Griggs v. Duke Power Co., 401 U. S. 424, 429-430 (1971), that a comparison between past and recent statistical data may

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[1] Recent percentages are considerably higher. Between January 1, 1974, and December 31, 1974, the Department hired 89 black officers (54.94%), 72 white officers (44.44%), and one Spanish officer (.62%). Between January 1, 1975, and June 7, 1975, the Department hired 115 black officers (49.15%) and 119 white officers (50.85%). Between January 1, 1974, and June 7, 1975, the Department hired 204 black officers (51.52%), 191 white officers (48.23%), and one Spanish officer (.25%).

fairly establish such a substantial increase in the minority component of an employer's work force as to dispel the notion that hiring practices freeze a racially tainted status quo of yesteryear and, as such, refute the notion of an adverse impact in selection practices. Here the increase in the black component of the Department's work force, extending over a recent period of several years (A. 191-192), is overwhelming. Again, however, the Federal respondents do not deal with this aspect of the impact issue and the police applicant respondents (brief at 25) accord it cursory treatment at best.

Petitioners do not request this Court to hold that any one of these three factors is ipso facto sufficient to negate an adverse racial impact in the hiring practices of the Department. But both the police applicant respondents and Federal respondents have fallen far short of demonstrating that the totality of these factors, considered in conjunction with the Department's aggressive and successful efforts at minority recruitment (A. 66-80), may fairly justify any other conclusion on the undisputed factual data now before this Court.

2. Job relatedness of Test 21

Petitioners agree with the contention of the Federal respondents that the decision of the Court of Appeals must be reversed because of its unjustified rejection of the principle that a modern day police department may test applicants with a view to ascertaining their trainability. However, petitioners emphatically disagree with the contention of the Federal respondents that the existing record provides insufficient basis for upholding the summary judgment ruling of the District Court. In this latter regard, the Federal respondents urge that this Court must defer to experts in the field of industrial psychology for guidance in its assessment of the job relatedness issue and,

for such guidance, must remand the case to the District Court for additional evidence on two aspects of the case, which this Court is supposedly incapable of dealing with on the existing record.

In a more specific context, the Federal respondents claim (brief at 14-15, 24-33) that the existing record is fatally deficient from the standpoint of establishing (a) that the Department's training program imparts to the new recruit knowledge, skills, or abilities required for performance of the post training job, and (b) that the achievement test scores (i.e., the scores attained on the recruit school examination on which D. L. Futransky relied in his 1967 study) are unreliable criterion measures because evidence relating to the recruit school examinations is not in the record to provide a basis for an inference that the examinations demonstrate mastery of the training program.

In requesting this Court to remand the case for the development of psychological evidence on the question of whether "the content of the training program" is related "to the job of a police officer" (brief at 33), the Federal respondents request a course of action which is both unwise and unnecessary. The Department's training curriculum (A. 110-171) was considered by the District Court and is now before this Court. It places emphasis on a host of matters pertinent to modern law enforcement, including report writing, the laws of arrest, search and seizure, the rules of evidence, and various statutory and regulatory provisions with which policemen are

necessarily concerned in performing their jobs (A. 112-113, 125-155).[2] Since this Court, much like the District Court, constantly reviews cases involving the manner in which policemen perform their jobs and has indeed imposed a great deal of the related job requirements in its decisions rendered throughout the years, this Court is surely capable of concluding on the existing record that there is a rational relationship between the duties a policeman is required to perform and the type of knowledge, or "job specificability," the Department's training academy is designed to impart. Cf. Albemarle Paper Co. v. Moody, supra, 422 U. S. at 433. At the root of the Federal respondents' contrary view of this case (cf. brief at 31, n. 28) lies the question concerning the extent to which courts should rely on psychological data in decision making. Of course, this Court has not hesitated to rely on such data when reliance was necessary to shed light on the injustice of a practice or condition. See Brown v. Board of Education, 347 U. S. 483, 494, n. 11 (1954). On the other hand, this Court has declined to do

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[2] The training curriculum was tendered to the District Court by the Federal respondents (A. 81) and states, inter alia (A. 112) that:

> "The recruit program is intended to present the fundamentals of modern police work and the generaly knowledge necessary to make the recruit a competent, professional performer at the level of patrolman or officer.
>
> "This program is designed to provide the new member of the Department with the knowledge and techniques necessary for effective and well disciplined police service, coupled with the development of proper professional attitude and individual responsibility."

The police applicant respondents did not claim otherwise in the District Court and do not now claim otherwise.

so when the data was undeveloped and uncertain. See Powell v. Texas, 392 U. S. 514 (1968). If that be so, this Court must certainly decline to remand a case for the development of psychological evidence as to the nature of a job when its own expertise and subject matter familiarity is entitled to more credence than a plethora of psychological studies. This is just such a case for, whatever may be said of other jobs, the assessment of a police training program and its general relationship to the occupation of police officer is obviously more a legal question than a psychological one.

It is interesting to note in that regard that in 1966 the President's Commission on Crime in the District of Columbia, consisting essentially of lawyers, made an extensive study of the Department's training program and concluded, inter alia, that "the subjects taught recruits during their basic training cover many of the matters with which they should be familiar when they assume their duties as police officers * * * ." See Report of the President's Commission on Crime in the District of Columbia, 1966, at 176, cf. id. at 174-178. In Castro v. Beecher, 459 F. 2d 725, 735 (1st Cir., 1972), the Court, in holding that a high school education was rationally related to a policeman's job, placed reliance on studies, not unlike that of the local Crime Commission. By parity of reasoning, this Court can conclude, on the basis of the local Commission's study, that there is indeed a relationship between what the Department's training academy teaches and the matters with which a policeman must be familiar in performing his job, even apart from this Court's superior independent knowledge and expertise in the area and its perusal of the recruit school curriculum. In short, a remand on that issue would serve no useful purpose.

In advancing their second proposed basis for remand (i.e., evidentiary inquiry as to whether recruit school examinations are related to training

program), the Federal respondents take an approach which is demonstrably inequitable and plainly unsupported by the recent decision of this Court on which they rely, i.e., Albemarle Paper Co. v. Moody, supra, 422 U. S. at 433 (cf. brief at 25-26).

Although the Futransky report, which shows the correlation between Test 21 scores and recruit school examination scores, was prepared in 1967 (A. 99), the examinations of which the Federal respondents would require production and/or evidentiary explication were given in 1963 to 361 police recruits of both races who were then appointed to the Department and presumably attended the training academy in that same year (A. 101-102). A recent inquiry conducted by counsel for petitioners discloses that these 1963 examination papers are now unavailable. We thus have a bona fide employer attempt to validate a test at an early stage in history rather than an attempt to do so at a time when a group of aggrieved employees, as in Albemarle, file a civil rights action under the 1964 Civil Rights Act and raise the specter of back pay. It is quite understandable that an employer like the Albemarle Paper Co. would be able to preserve data on which its recent study was based. Or in the language of this Court (422 U. S. at 433, n. 32):

> "It cannot escape notice that Albemarle's study was conducted by plant officials, without neutral, on-the-scene oversight, at a time when this litigation was about to come to trial. Studies so closely controlled by an interested party in litigation must be examined with great care."

Here, in sharp contrast, the study was plainly prepared with "neutral, on-the-scene oversight," and the 1963 recruit school examinations were administered and graded long before the action of the police applicant respondents was filed on December 10, 1970 (A. 24). These respondents did not address any discovery efforts to these examinations. Instead of attempting to ascertain the availability of their authors with a view to deposing

them, the police applicant respondents were content to focus the litigation on the issue of whether Test 21 must be stricken due to its failure to predict overall job performance on the part of a policeman (A. 50-51, 54-55). Nor did the Federal respondents, who joined with petitioners in requesting summary judgment (A. 81-98), consider the need for additional specificity as regards the recruit school examinations. Now in 1976, the examinations are unavailable and the recollections of the instructors who prepared them have understandably faded. Consequently, the effect of a remand for the purpose of probing the relevance of the 1963 examinations to the recruit school curriculum would be to inequitably penalize the Civil Service Commission for its diligence in conducting an impartial study, at an early time in the history of equal employment litigation, and to reward the police applicant respondents for their laches in failing to probe that issue after they entered the District Court litigation over 5 years ago.

The Federal respondents overlook this Court's related pronouncement in Albemarle that "the question of job relatedness must be viewed in the context of the * * * [employer's] operation and the history of the testing program." 422 U. S. at 427. Nothing in the training academy's manner of operation or the history of the Department's testing program suggests that the recruit school examinations were ineptly prepared in a manner which was not calculated to assess mastery of what was taught. Nothing suggests that they failed to reflect the competence of those who staffed the training academy's faculty. If anything, the presumption should be to the contrary. Indeed, the 1966 Report of the President's Crime Commission, supra, at 176, observed on the basis of an "IACP Survey" that "the quality of instruction provided by the police instructors [at the training academy] was generally good." Surely nothing less should be presumed as to the quality

of the examinations given by these instructors. See United States v. Chemical Foundation, 272 U. S. 1, 14-15 (1926). Cf. Chappell v. United States, 119 U. S. App. D. C. 356, 359, n. 5, 342 F. 2d 935, 938, id. (1965).

There is an additional reason why the reliance of the Federal respondents on Albemarle is misplaced. In that case, as the Federal respondents (brief at 26) are quick to admit, test scores were measured against subjective supervisorial ratings. Here, in contrast, entrance test scores were compared with objective criteria or examinations prepared by instructors of recognized competence (cf. A. 180-182). The contention of the Federal respondents, at this late date, that this Court should in effect presume that they are unrelated to the subject matter taught, in the absence of contrary evidence as to what transpired in 1963, is at odds with both legal and equitable principles and should be rejected by this Court.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the reasons advanced by the Federal respondents in support of their request for a remand are unjustified. The judgment of the Court of Appeals should accordingly be reversed and the District Court's entry of summary judgment in favor of petitioners and the Federal respondents should be upheld by this Court.

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CERTIFICATE OF SERVICE

I, David P. Sutton, one of the attorneys for Walter E. Washington, et al., petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that 3 copies of the Reply Brief for Petitioners were mailed, postage prepaid, this 16th day of January 1976, to each of the following:

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