

1991 WL 67529  
United States District Court, W.D. Washington.

Frank ATONIO, et al., Plaintiffs,  
v.  
WARDS COVE PACKING COMPANY, INC., et al.,  
Defendants.

CS-74-145-JLQ.

Jan. 23, 1991.

As Amended March 20, 1991.

#### Attorneys and Law Firms

Abraham A. Arditi, Northwest Labor & Employment Law Office, Seattle, Wash., for plaintiffs.

Douglas M. Fryer, Douglas M. Duncan, Richard L. Phillips, Mikkelborg, Broz, Wells & Fryer, Seattle, Wash., for defendants.

#### Opinion

QUACKENBUSH, Chief Judge.

\*1 On January 25, 1990, the Ninth Circuit Court of Appeals entered the following Order:

The Supreme Court having reversed the judgment of this court in the above entitled matter, it is hereby ordered that this case is remanded to the district court for further proceedings in conformity with the opinion of the Supreme Court.

Upon receipt of the Ninth Circuit's Order on March 31, 1990, this court directed that briefs be submitted on the issues remanded by the Supreme Court. At the request of counsel for the plaintiffs, oral argument was heard on this matter in Spokane, Washington on July 27, 1990. The court then directed counsel to file supplemental briefs on subjects argued before the court. The final brief was filed on August 31, 1990, and the matter has been under advisement by the court since that date.

#### A. HISTORICAL REVIEW

This case was tried by the court in May of 1982. Post-trial briefs and argument were thereafter submitted. The court filed its written Opinion Following Nonjury Trial (hereafter Opinion) on November 3, 1983. In 1985, the Ninth Circuit Court of Appeals affirmed this court at 768 F.2d 1120. The Ninth Circuit panel opinion affirming this court's opinion was withdrawn and presented for en banc review at 787 F.2d 462 (9th Cir.1985). The Ninth Circuit vacated the original opinion in 1987 and the en banc panel then remanded the case to the original panel, at 810 F.2d 1477 (1987). The panel then reversed this court at 827 F.2d 439 (1987.) Thereafter, the Supreme Court granted certiorari, and in 1989, at 490 U.S. —, 109 S.Ct. 2115, reversed the Ninth Circuit and remanded the case. 490 U.S. 642, 109 S.Ct. 2115. The Ninth Circuit panel then remanded the case to this court "for further proceedings in conformity with the opinion of the Supreme Court."

#### B. ISSUES ON REMAND

It is clear that this court's disposition in its Opinion of the plaintiffs' claims of disparate treatment has not been disturbed by either the Ninth Circuit or the Supreme Court. Despite the suggestions by the plaintiffs that the court should either expressly or indirectly revisit the disparate treatment claims, the court declines that invitation. The issues remanded by the Supreme Court are limited to the disparate impact claims. 490 U.S. —, 109 S.Ct. 2120 (n. 4). As this court observed during the trial, and as stated by Justice White in footnote 4 of the Supreme Court's opinion, the questions before this court are not, nor have they been, whether this court "approves" of the defendants' hiring practices or the practices at the canneries but, rather, whether the plaintiffs have established that the defendants' practices violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 c-e.

This court determines that the appropriate issues that should now be reviewed and analyzed are:

1. Factually, what is the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs?

2. Did the plaintiffs establish a prima facie case of disparate impact on some basis other than the racial disparity between cannery and noncannery workers?

\*2 3. Did the plaintiffs establish that nonwhite applicants for the at-issue jobs were deterred from applying for the at-issue jobs by express or implicit practices of the defendants?

4. If a prima facie case of disparate impact has been established, have the plaintiffs established that a challenged practice by the defendants was linked causally with the adverse impact?

5. Have the plaintiffs established that either objective or subjective employment practices such as nepotism, separate hiring channels, rehire preference and subjective decision making in the selection of noncannery employees had a disparate impact on nonwhites?

6. If the plaintiffs have established a prima facie case of disparate impact, have the defendants produced evidence of a business justification for the employment practice?

7. If the defendants have produced evidence of business justification for a practice causing a disparate impact, have the plaintiffs carried the ultimate burden of proving that discrimination against non-whites resulted from a specific employment practice?

### C. FACT-FINDING AND ANALYSIS OF REMAND ISSUES

#### 1. Racial Composition of Labor Market and At-Issue Jobs

In this court's Opinion the court ruled against the plaintiffs' claim that the relevant labor pool for the at-issue jobs was the composition of the cannery workers work force. (Opinion, pps. 19-23, 62-63, 67). This court, as well as the Supreme Court, found that such a claim was flawed by the over-representation of nonwhite persons in the cannery force.

This court found that the testimony offered by the defendants as to the relevant labor pool for the at-issue jobs was credible. This testimony was based upon census data for the relevant period. The percentage of whites in

the relevant labor pool for the at-issue jobs is found in Table 4 of Exhibit A-278. This court adopts those figures as the findings of this court as though fully set forth herein haec verba. This court further finds that the testimony of Dr. Rees as to the available labor supply for the at-issue jobs was credible and the court accepts that testimony.

This court further finds that the percentage of whites hired by the defendants for the at-issue jobs did not exceed the percentage of whites in the available labor force, except for certain instances, which the court finds were not statistically significant. The four instances relied upon by the plaintiffs, where a statistical disparity existed, were because of nondiscriminatory reasons, such as the preference of the Alaska Native individuals who were qualified for the at-issue jobs, who preferred to fish privately during the operation of the canneries.

The court further finds that the defendants hired individuals for the at-issue jobs based upon their qualifications, and not upon their race. The plaintiffs claim that the qualifications for each at-issue job, as testified to by Mr. DeFrance, were not in existence in writing at the time of the hiring by the defendants. While that is in fact true, the court finds that the qualifications for each job, as testified to by Mr. DeFrance, were qualifications required for the at-issue jobs, and the defendants evaluated applications for each job based upon the requirements of the job(s) and the qualifications of each applicant.

\*3 The plaintiffs' strongest argument was based upon the admitted fact that the available race-identified applicant flow statistics for the period of 1978-1980 showed that nonwhite applicants totaled 26 percent of the applicants who set forth their race. This court, however, does not give substantial weight to this evidence for several reasons. First, of the 1,966 applications considered, only 539 contained race identifications, of which 138, or 7 percent of the total applications, were nonwhite. Secondly, the census-based labor market statistics and testimony offered by the defendants were more credible as to the relevant labor market available for the at-issue jobs. As previously found by this court, the evidence established that the at-issue jobs were not held by a significantly higher percentage of whites than those existing in the relevant available labor market.

This court has been troubled by the claims of the plaintiffs that the defendants destroyed applications for at-issue positions for the relevant periods prior to 1980. The evidence substantiates that, for some of the canneries, the defendants did destroy applications. The court notes that

one of the attorneys for the defendants even forwarded on July 5, 1978, a memo to the Superintendents of the canneries and to the officers of the defendants concerning the destruction of the applications. (See Memorandum of attorney Jeremiah M. Long, dated July 5, 1978, attached as Exhibit G to plaintiffs' Citations To Transcript Re: Destruction of Personnel Records). The court finds that even after this memo, some of the canneries destroyed the seasonal applications. While not free from doubt, this court finds that any destruction of records took place in the usual course of business, in accordance with the long-standing practice that such applications are destroyed annually. There is no evidence that the officers of the defendants directed the destruction of the applications in an effort to withhold damaging evidence. In fact, the record does establish that the applicant records were retained for the majority of the canneries after 1978.

Finally, the plaintiffs contend that the court should infer that the applicant racial data would be adverse to the defendants by reason of 29 C.F.R. § 1607.4A, the Uniform Guidelines on Employee Procedures. The court agrees with the defendants that these Guidelines are not mandatory with regard to the at-issue jobs in this case, particularly since the jobs are seasonal. *See* 29 C.F.R. § 1602.14(b).

Based upon the prior Opinion of this court and the additional Findings herein set forth, this court concludes that the nonwhite racial composition of the relevant available labor market did not exceed the actual nonwhite composition of the defendants' at-issue labor force.

## 2. Was A Prima Facie Case Established By The Plaintiffs On A Nonstatistical Basis?

The defendants argue that since the plaintiffs did not statistically establish that there was a disparate impact in the at-issue job hiring by the defendants, the plaintiffs have failed to show any causal connection between any employment practices and a resultant disparate impact on the plaintiffs. While the fact that there is not a statistical imbalance in the at-issue jobs carries substantial weight, an employer may not escape liability under Title VII by demonstrating that, at the "bottom line", its work force is racially balanced where particular hiring practices operate to deprive minorities of employment opportunities. *Connecticut v. Teal*, 457 U.S. at 450; and *Wards Cove*, 490 U.S. 642, 109 S.Ct. at 2124. The burden is upon the plaintiffs to show that the defendants' application of a specific employment practice created a disparate impact on nonwhites' employment opportunities. *Wards Cove*,

109 S.Ct. at 2124.

\*4 The alleged specific employment practices challenged by the plaintiffs include nepotism, separate hiring channels, rehire preferences, and subjective decision-making.

### a. Nepotism

In its original Opinion, at p. 64, this court referred to "nepotism" evidence and to a "high incidence of nepotism." This court's use of the term "nepotism" was not meant to be construed to include a finding that the defendants gave preference to relatives of other employees. This term was used only in its general sense, that being that the plaintiffs introduced evidence that a substantial number of the employees of the defendants were related. This court did not find in its original Opinion, and does not now find, that the defendants favored applicants by reason of their being related to other employees. The evidence is to the contrary. While the evidence did establish that some employees were related in some manner to other employees, the evidence did not establish that such employees were hired based upon their relationship to other officers or employees. This court concludes that the employees hired for at-issue jobs were hired based upon their qualifications and not by reason of being related to another employee.

The plaintiffs introduced Exhibits 608 through 612 to support their claim of hiring based upon relationship. These exhibits and the statistics contained therein were flawed in that they inflated the number of employees who were related. These statistics submitted by the plaintiffs, inter alia, counted related employees who were rehired each year as separate and new hires for each year, and by counting both related parties as new hires. The plaintiffs' evidence did not distinguish between employees who became related after being hired and those who were related at the time they were hired. Besides the lack of appropriate statistical methodology in the plaintiffs' evidence, the evidence established that related applicants were not hired when they did not have the necessary qualifications. This court therefore finds that the plaintiffs' evidence did not establish a disparate impact upon the plaintiffs by reason of alleged nepotistic hiring practices.

b. Separate Hiring Channels

The plaintiffs' evidence failed to establish that the defendants recruited employees for the at-issue positions through separate hiring channels. Plaintiffs' real challenge in this regard is that there was one hiring channel, Local 37, for the cannery worker positions, and another hiring channel for the at-issue positions.

The evidence in this case failed to establish that the defendants had separate hiring channels for the positions at the canneries. As previously found, since Local 37 had members who were predominately nonwhite, members of that union who filled cannery worker positions were largely nonwhite. However, as the court has previously found in its Opinion, cannery workers were not precluded from applying for at-issue jobs; and, as also previously found by this court, some individuals who had worked as cannery workers were thereafter hired in at-issue jobs.

\*5 The defendants did not have a separate hiring channel for the at-issue jobs, but hired persons from the general labor pool if the applicants had the necessary qualifications. The defendants' practices in hiring for the at-issue positions did not disparately impact nonwhites.

c. Rehire Preferences

This court has found that the plaintiffs failed to establish initial hiring practices which disparately affected nonwhite applicants. From this finding, it follows that the defendants' appropriate business practice of rehiring experienced persons in the at-issue positions could not result in a disparate impact finding in this case.

d. Subjective Decision Making

Plaintiffs contend that the defendants, having no written specifications for each at-issue job, relied solely on subjective decision-making. This court has previously found, and again finds, that the defendants hired for the at-issue jobs based upon the qualifications of the applicants and the availability of a position. The plaintiffs failed to establish that any subjective decision-making process resulted in a disparate impact upon the decision as to the hiring of nonwhite applicants. The census statistics, which this court has found applicable as to the relevant available work force, and the statistics of the at-issue work force, confirm the lack of adverse subjective decision-making.

3. Did The Plaintiffs Establish That Nonwhite Applicants For The At-Issue Jobs Were Deterred From Applying For The At-Issue Jobs By Express Or Implicit Practices Of The Defendants?

This court has previously found, and again finds, that cannery workers, along with the general population, having the necessary qualifications for at-issue positions, were free to apply for such jobs. Any feeling that an individual cannery worker or nonwhite may have had to the contrary was not the result of any express or implicit practice of the defendant.

4. If A Prima Facie Case of Disparate Impact Has Been Established, Have The Plaintiffs Established That A Challenged Practice By The Defendants Was Linked Causally With The Adverse Impact?

For the reasons stated hereinabove in this Supplemental Opinion and in this court's original Opinion, the court answers this question in the negative.

5. Have The Plaintiffs Established That Either Objective Or Subjective Employment Practices Such As Nepotism, Separate Hiring Channels, Rehire Preference and Subjective Decision Making In The Selection of Noncannery Employees Had a Disparate Impact On Nonwhites?

For the reasons stated in this court's original Opinion and for the reasons stated, supra, the court answers this question in the negative.

6. If The Plaintiffs Have Established a Prima Facie Case of Disparate Impact, Have the Defendants Produced Evidence of a Business Justification For The Employment Practice?

The plaintiffs have not established a prima facie case of disparate impact; therefore, the business justification issue is not before the court. However, the business justification of the defendants for their housing and messing practices were discussed in this court's Opinion at pps. 69-73 and

will again be discussed, *infra*.

7. If The Defendants Have Produced Evidence of Business Justification For A Practice Causing A Disparate Impact, Have The Plaintiffs Carried the Ultimate Burden of Proving That Discrimination Against Nonwhites Has Been Caused By A Specific Employment Practice?

\*6 By reason of this court's prior rulings, business justification is not a remaining issue in this case, but will be discussed in the housing and messing section.

#### D. HOUSING AND MESSING

Because of the peculiar circumstances of this case and what at first blush might appear to be a clear case of housing and messing along racial lines, this court will address the issue separately, even though it was previously discussed and decided on both a disparate treatment and disparate impact basis in this court's prior Opinion. (See pps. 47 and 48; 70-73.) This court is also mindful of the rule set forth in footnote 9 of *Wards Cove*, at 109 S.Ct. 2124, that allegations of segregation in housing and eating facilities in the work place may be challenged under Title VII without showing a disparate impact on hiring or promotion.

This court is not insensitive to the claim of segregated housing or messing. In this case, the evidence did not establish that the employees were segregated at the various canneries based upon their race but, rather, were housed and fed based upon their time of arrival, the nature of their employment, and the shift being worked. In fact, all housing and messing at the defendants' canneries was occupied and used by both whites and nonwhites. In some of the housing, such as that occupied by the cannery crews which had a majority of nonwhites, whites were in the minority. In other housing, being that occupied by the skilled workers where the majority were white, nonwhite skilled workers were in the minority. The same rule applied to the food service or messing areas which in most instances were proximately located to the housing. The cannery workers' mess usually served oriental-style food, since that was the preference of the cook selected by those workers. Cannery workers, regardless of race, were permitted to change their messing assignment to the mess

used by the skilled workers, or vice versa.

As stated in this court's original Opinion, the nature of the work and the shortness of the season at the remote Alaskan canneries played a vital role in this court's analysis and decision on the housing and messing claims. The actual canning season each summer is a short one, usually lasting only a period of a few weeks. The skilled cannery workers occupying the at-issue jobs are required to arrive in advance of the cannery workers in order to repair the damage from the preceding winter and prepare the canneries for the arrival of cannery workers and the operation of the facility during the salmon harvest. The skilled advance workers are housed together regardless of race and remain so housed throughout the salmon season. These workers, who arrive earlier in the colder season and stay later than the cannery workers, are properly housed in the more insulated buildings.

Based upon this court's prior Opinion and the additional findings made herein, the court concludes that the plaintiffs have failed to establish a prima facie case of disparate impact in the provision of housing and messing for the plaintiffs. Even if the court had found a prima facie case had been established by the plaintiffs, the defendants have produced credible evidence of proper business justification for the housing and messing practices. This court has previously made findings herein and in its prior Opinion concerning the business justification for the practices. The plaintiffs have failed to show that the defendants' stated business justification reasons are pretextual and the plaintiffs have failed to establish disparate impact in the housing and messing practices of the defendants.

#### E. CONCLUSION

\*7 This court concludes that, based upon the standards established in the Supreme Court's decision in *Wards Cove*, the plaintiffs have failed to establish disparate impact in any of the defendants' hiring practices for the at-issue jobs, and have also failed to establish that the defendants' housing and messing practices have a disparate impact on the class plaintiffs. This court has also reviewed its prior Opinion in this matter entered in 1983, and has found no reason or basis for altering any of its Findings of Fact or Conclusions of Law set forth therein. For the reasons set forth in this Supplemental Opinion, and for the reasons previously set forth in this court's prior Opinion Following Nonjury Trial signed by this

1991 WL 67529

court on October 31, 1983, the Clerk of this court shall enter judgment dismissing the complaint of the plaintiffs and the claims therein with prejudice with the defendants being awarded their costs and disbursements herein incurred.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and Judgment and furnish copies to

counsel.

**All Citations**

Not Reported in F.Supp., 1991 WL 67529

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