IN THE SUPREME COURT OF THE UNITED STATES

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CLIFFORD B. MEACHAM, :

ET AL., :

Petitioners :

v. : No. 06-1505

KNOLLS ATOMIC POWER :

LABORATORY, AKA KAPL, :

INC., ET AL. :

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Washington, D.C.

Wednesday, April 23, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:15 a.m.

APPEARANCES:

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SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 06-1505, Meacham versus Knolls Atomic Power Laboratory.

Mr. Russell.

ORAL ARGUMENT OF KEVIN K. RUSSELL

ON BEHALF OF THE PETITIONERS

MR. RUSSELL: Mr. Chief Justice, and may it please the Court:

This case presents a single important but narrow question. Everyone agrees that under the reasonable factor other than age provision of the Age Discrimination in Employment Act, a business practice that is reasonable is not unlawful even if it has a disparate impact on older workers. The question here is simply what happens in cases in which the proof on reasonableness is in equipoise, which party bears the risk of nonpersuasion. And on that question the statute is not silent such as to leave to the courts to decide for themselves what answer makes the most sense.

JUSTICE KENNEDY: Is there a hypothetical universe where a scheme that discriminates on the basis of age is reasonable, but there is another alternative that doesn't discriminate on the basis of age? Is the

first alternative still reasonable, or does the existence of a nondiscriminating alternative make it unreasonable?

MR. RUSSELL: This Court made quite clear in City of Jackson that the existence of alternatives, while sufficient perhaps to satisfy Wards Cove and to show a violation under Section 4(a)(2), is not sufficient to show that the action is unreasonable. And that's what the Court found to be the case in Smith. So the standards are, in fact, quite different.

The reasonable factor other than age provision looks at the reasonableness of the actual, existing practice, and that's where the "because of age" refers to the business practice there. It doesn't --

JUSTICE KENNEDY: If that's true, then is it necessary either on the burden of production or burden of persuasion aspect of the case to consider other alternatives?

MR. RUSSELL: It is in our view necessary in order to decide whether there is a --

JUSTICE KENNEDY: Why is it necessary in light of the answer you gave me at the outset?

MR. RUSSELL: It is necessary in order to establish whether you even get to the RFOA provision. By its terms --

JUSTICE KENNEDY: Whether you even get to --

MR. RUSSELL: Even get to it, because by its terms the RFOA provision only applies to conduct that is otherwise prohibited by Section 4(a)(2), and the test for whether something is otherwise prohibited under Section 4(a)(2) is Wards Cove.

This Court in Smith said that language, which was identical to the language Congress used to describe the unlawful- employment practice in Title VII, has the same meaning in both statutes. And in order to establish a violation of Wards Cove, you do have to often look at questions of alternatives.

JUSTICE GINSBURG: Mr. Russell, this is the problem that I have with your double inquiry. First, you decide business necessity. Then you decide reasonable factor other than age. Once you determine that there is no business necessity, there is a readily available alternative, so what you're left with is a pretext for age discrimination, what -- what function is there for anything else to perform?

I mean, I understand the business necessity, whether you have it pre-1991 or post, but I don't understand putting this other test on top of it. It sounds like you're making it harder for the -- for the plaintiff.

MR. RUSSELL: Well, we think that the layering of the tests arises out of the structure of the statute as Congress wrote it. If this Court disagrees with us, however, and thinks that there is room in the statutory language to treat the language of 4(a)(2) differently in some sense or to apply a different Wards Cove test, then you're still left with the question of who bears the burden of reasonableness.

And on that grounds we agree entirely with the EEOC that that question is still determined by the language of the statute, which makes quite clear that Congress thought that this was an exception to liability upon which the employer bears the burden of proof. And it made that -- made that clear both by setting the RFOA up as an exception to liability, which this Court has long told Congress will be construed as establishing an affirmative defense absent strong indications of contrary legislative intent, and by sandwiching that defense in the same sentence as two other affirmative defenses, which would be a very strange thing to do if Congress in fact intended the courts to figure out, you know, one of the three is not like the others, That it's intended, instead, as a modification of the definition.

And, third, Congress I think it -- it does, and it is telling that, in defining the unlawful

employment practice, that is in defining the plaintiff's case in chief, Congress used the same language that it did in Title VII, and this Court has never construed that language to require proof of unreasonableness.

CHIEF JUSTICE ROBERTS: Well, your friend, of course, makes the point that the age discrimination prohibition is narrower in scope than Title VII, that there are more likely to be instances in which a reasonable factor other than age came into play than there would be a basis for discrimination on the basis of race.

MR. RUSSELL: We acknowledge that. This Court pointed out in Smith that Congress itself recognized that there was a difference between age and other kinds of discrimination; but it took that difference into account not by defining the unlawful employment practice differently, but by providing age discrimination defendants a capacious defense that's not available to any other defendant in a Federal employment discrimination statute, and by in 1991 not extending the modifications to Wards Cove to ADEA plaintiffs.

Congress already specifically addressed this question of whether Wards Cove should be adjusted in order to make age discrimination claims harder to prove than Title VII claims, and it agreed that it should; but

it didn't do it in the way that Respondents suggest. Instead they lowered the bar for Title VII plaintiffs and left in place the Wards Cove test for age discrimination.

JUSTICE ALITO: Isn't it a strain to say that an employment practice was because of an individual's age, but at the same time was based on reasonable factors other than age?

MR. RUSSELL: Well --

JUSTICE ALITO: Doesn't the latter negate the former or come very close to negating the former? And if that's the case doesn't that suggest that it's not really an affirmative defense but what's necessary to show liability?

MR. RUSSELL: I don't think it does. We use the example in our brief of a weight-lifting requirement. It's quite possible for that requirement, and quite likely, that it will have a disparate impact on older workers because of their age. The effect will be felt by workers because of their age. At the same time, it is quite possible that that practice itself will be entirely reasonable. And the difference is between what the "because of age" refers to in the two different provisions.

So if you look on page 3 of the blue brief,

you have the language of the RFOA provision, and the reasonable -- the "factors other than age" refers to in that case the differentiation, that is the business practice itself. But if you turn to the prior page on page 1A and look at the language of (a)(2), the business practice, that is, the limiting, segregating, or classifying, doesn't have to be because of age. There wouldn't be a disparate treatment claim. Instead what "because of age" refers to there is the effect of that facially neutral practice. That is, the employee has to show that the neutral practice deprives or tends to deprive people of opportunities because of their age.

And the way that you do that is through the first step of the Wards Cove analysis, by showing that the practice falls more heavily on older workers as a group, so that you can reach the conclusion that the plaintiff is feeling the effect because of her age as opposed to because of her sex or some other reason specific to her. So it's not the fact that a showing of RFOA negates the showing that a disparate impact is felt because of age by the plaintiff.

As we were -- as I was mentioning before, the language of the statute we think strongly points in favor of an ordinary reading of this as an affirmative defense. The Respondent's principal objection is that

this doesn't give adequate weight to the differences between age and other forms of discrimination. But as I mentioned, we -- we do think that Congress took that into account in a different way, and there is, we think, quite an important value here in providing Congress clear rules of interpretation so that it knows when it enacts statutes using a particular formulation the courts will construe it in an ordinary way, absent some compelling indication to the contrary.

We recognize, of course, in Betts that this Court found such a compelling counter-indication in the legislative history of that statute, and in the -- the law's traditional treatment of benefits -- retirement benefits and seniority rights. But Respondents can't point to any kind of similar showing in this case that Congress would have intended this catch-all provision to mean something other than what it seems to say.

JUSTICE GINSBURG: The expression comes from the Equal Pay Act, with a substitution. In the Equal Pay Act it's "any other factor other than sex" and here it's "a reasonable factor other than age." And my impression is that that formulation in this Equal Pay Act has been rather problematic. First, you have to find there is a differential between the pay of men and the pay of women, so -- and then you go to any other

factor other than sex.

Are you suggesting any different analysis for the age category than for the sex category.

MR. RUSSELL: Well, certainly what you have to show before you get to the defense is different in the two statutes. They are similar in the sense that neither requires proof of intentional discrimination. For example, in Corning Glass Works all the plaintiffs showed there was that a facially neutral practice, that is paying the night shift folks more than the day shift folks, resulted in women getting paid less than men for the same work, and that was sufficient to shift the burden over to the employer to show that it was based on any other factor other than age.

And in here we think that it's similar, that the plaintiff has to show that a neutral employment practice has a disparate impact on the basis of age. We think in our view, in addition, the plaintiff has to make the full Wards Cove showing that would be sufficient in Title VII to establish liability conclusively. And at that point, then the burden does shift to the employer but it's a modest burden.

JUSTICE KENNEDY: The burden of production, of course.

MR. RUSSELL: Yes.

JUSTICE KENNEDY: And what about the burden of persuasion?

MR. RUSSELL: The burden of persuasion as well. We think that this is --

JUSTICE KENNEDY: Why is it that if the employer has the burden of production, and I assume that is satisfied by his saying, here's the plan that we used, here are the factors we used, here is the reason we used them. What is so difficult for the -- what is the difficulty in saying that the employee then has to show that that is unreasonable?

MR. RUSSELL: Well, we think there are some difficulties, but it's ultimately I think beside the point. The question is not what rule would make sense, but what does the statute -- what rule does the statute contemplate? And we think by phrasing the RFOA provision as a traditional affirmative defense --

JUSTICE KENNEDY: You think the statute doesn't make sense, so we don't --

MR. RUSSELL: I think the statute makes perfect sense the way it's written, but if you disagree --

JUSTICE GINSBURG: Your point that it's sandwiched between two things that are clearly affirmative defenses, BFOQ, the employer has the buried

of production and persuasion. And I forgot what the third one --

MR. RUSSELL: The foreign law exception.

JUSTICE GINSBURG: Is also an affirmative defense. So I take it your point is why should this middle one be any different?

MR. RUSSELL: Yes, we think it would be entirely odd for Congress --

JUSTICE KENNEDY: Well, I'm well aware of the statutory format here. But what I want to ask is why is it beyond the employee's means and capacity to show that this is unreasonable? It seems to me that that's the gravamen of this case.

MR. RUSSELL: I don't think it's beyond the employee's means. I don't think it's an impossible burden. Certainly Congress could have written the statute in a way that imposed that burden on the employees. We do think that it makes sense because -- that the factors that weigh in on the reasonableness tend to be in the employer's possession and they have better access to it; it makes sense for them to bear the burden.

But ultimately our argument isn't grounded on the claim that it would be impossible for Congress to have imposed that burden. It's grounded on the claim

that the text of the statute indicates that Congress made a different decision, that is it accommodated the employers' interests in dealing with the special facts of age discrimination differently.

JUSTICE KENNEDY: Well, if I find the text of the statute neutral or at least not clear, then it is proper for me to ask as a matter of efficiency where the burden should be placed, is it not?

MR. RUSSELL: It is. It is. And my answer is that we do think that most of the facts going to reasonableness are in the employer's possession.

CHIEF JUSTICE ROBERTS: Well, but the facts -- I mean, given discovery, that doesn't seem a very compelling case. Once you require the employer to come up -- in other words, the burden of production -- and say, well, the reason we did it was this, then it's just a matter of discovery. The plaintiff can say, oh, well, then let me depose that person who is the head of, you know, whatever the department. If it's for safety reasons, for some reason, or training issues, well, then we depose the person who is in charge of training or safety and ask them those questions. And it doesn't seem to me that the fact that the employer possesses the information, given very liberal discovery we have, is much of a factor.

MR. RUSSELL: Well, that's true in every case in which informational disadvantages are cited as a reason for putting the burden of proof on one party or the other. Discovery can always mitigate that disadvantage.

But we ultimately think, you know, if you find the statute so ambiguous as to think that it's a really critical consideration of what makes the most sense, then you ought to defer to the judgment of the EEOC on this question.

I would like to address if I could one specific --

JUSTICE GINSBURG: But the argument was that EEOC never spoke to disparate impact?

MR. RUSSELL: Well, it's certainly clear that the EEOC -- what their position is, and that they read their regulation as addressing disparate impact; and we think that, although it's an inartfully drafted regulation, by using the terms "individual claim of discriminatory treatment" rather than the term of art "disparate treatment," the language is broad enough to bear their reading, particularly when you see that it was enacted in the aftermath of a Department of Labor regulation that nobody disputes addresses disparate-impact cases, and it has no indication that

they were disavowing that position.

But if I could address the one other objective --

JUSTICE ALITO: In this area of the law, "treatment" and "impact" are words that have tremendously different meaning. Isn't it strange to argue that they used the term "treatment" when they really meant "impact"?

MR. RUSSELL: Well, I -- I think that the terms of art are "adverse impact" and "disparate treatment." And so that their failure to use either one of those, I think, supports the idea that they weren't talking about either one specifically. I agree, it's -- it's a hard to read regulation.

But if I could turn, for a moment, to the Adams Fruit objection, which is Respondent's insistence that this is not the kind of question that the Court should defer to an agency on. My point is simply that this is a substantive question of law. It's a question of whether reasonableness is an element of the unlawful employment practice in section 4(a)(2), the same kind of question this Court asked in Smith when it decided whether discriminatory intent was an element of the 4(a)(2) cause of action.

And the -- Congress has delegated authority

to the EEOC to address those kinds of questions. In fact, it went so far as to delegate to the authority -- delegate to the EEOC the authority not only to construe the exceptions that are in the Act, but to create additional exceptions. So I think Congress would be very surprised, indeed, to find out that this is not the sort of question to which it had delegated authority to the EEOC to answer.

If I could reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Joseffer.

ORAL ARGUMENT OF DARYL JOSEFFER
ON BEHALF OF THE UNITED STATES,
AS AMICUS CURIAE,
SUPPORTING THE PETITIONERS

MR. JOSEFFER: Mr. Chief Justice, and may it please the Court:

Congress enacted the ADEA against a settled background rule that defendants bear the burden of persuasion on affirmative defenses and other exceptions to liability. And Congress made very clear in the statute that the "reasonable factors other than age" provision is precisely such an affirmative defense. It did so first by saying that the provision applies to activities that are "otherwise prohibited by subsection

A."

That has to mean that liability for disparate impacts exists under subsection A without regard to whether the employment practice is based on reasonable factors other than age. The latter inquiry is then a defense to the liability that would "otherwise exist" under subsection A.

The second is a point that Justice Ginsburg made, which is that this subsection (f)(1) lists three different defenses right in a row. It appears to be common ground that the other two are clearly affirmative defenses as to which the employer bears the burden of persuasion. And considering that all three are introduced by the same "otherwise prohibited" language and they are set forth in a single sentence separated only by commas, there is no basis for distinguishing among them.

Now, the defendant's main argument seems --

JUSTICE KENNEDY: I'm not sure that if the statute contains three different conditions, three different commands, that it follows that the procedural implementations for all of these has to be the same.

Do you have any authority for that proposition?

MR. JOSEFFER: No. I mean, it's just a

matter of how to interpret the particular statute. And since our point here is that this is a subsection on its face --

JUSTICE KENNEDY: If you want to say that Congress was well aware of burden of persuasion, burden of production problems with affirmative action, then they wouldn't have drafted it this way, that's one thing. I'm not sure that that's true.

JUSTICE SCALIA: I suppose you could appeal to the maxim noscitur ex sociis, couldn't you --

MR. JOSEFFER: Right.

JUSTICE SCALIA: -- and say if it's in with two other chickens, it's probably a chicken?

MR. JOSEFFER: Exactly. I mean, words are generally known by the company they keep. And with these three in a row, it would presumptively assume that they are all --

CHIEF JUSTICE ROBERTS: These are not words. They are operative provisions of law.

MR. JOSEFFER: Right. They are three separate clauses that are set forth, introduced by the same, in our view, dispositive language, which is the "otherwise prohibited" phrase.

It's also the only way to make sense of the statute as a whole, because the defendant's view seems

to be that "because of age" under subsection (a)(2) and "reasonable factors other than age" under subsection (f)(1), should essentially be conflated such that the second, more specific provision is essentially surplusage.

JUSTICE ALITO: Do you think that "based on reasonable factors other than age" in the ADEA means something different from because of such -- I'm sorry, that the -- because of an individual's age in the ADEA means something different from because of such individual's race, color, religion, sex or national origin?

MR. JOSEFFER: It modifies -- it modifies something different. "Based on reasonable factors other than age" modifies the underlying employment practice, the differentiation. Over an (a)(2) -- and this was the basis of the Court's decision in Smith in part -- "because of" does not modify the underlying employment practice. It modifies the adverse effect of the unemployment practice. In other words, the statute refers to -- and this is on page 1a of the blue brief appendix -- it refers to an employment practice such as a classification that adversely affects an individual because of that individual's age.

So "because of" logically modifies what

comes before it, which is "adverse effect." And that's confirmed by the fact that the first sentence that talks about the employment practices is written in the plural, whereas "adverse effect" and "because of" are written in the singular with respect to individual, which is another point the Court made in footnote 6 in Smith.

And that also has to be the case because disparate impact liability is not based on intent. It doesn't matter why the employer draft -- has the employment practice. What matters is the effect. So in any disparate impact case there are two basic inquiries: the first is, is there an adverse effect on the protected class; and the second is, has the business practice nonetheless justifiable.

And here Congress broke those two out. Subsection (a)(2) addresses is there an adverse effect on the -- on the protected class. And then in (f)(1), Congress specifically addressed the justification standard. That's one reason that we disagree with Petitioners about their four-part test. Here Congress clearly -- here the first part of Wards Cove tells us whether there is an adverse effect under subsection (a)(2). But then when it comes to the justification step, Congress clearly said that the justification is a reasonable factor other than age. So there is no need

to read in a different justification standard from the second and third prongs of Wards Cove.

JUSTICE GINSBURG: The problem is that you would be making this provision more generous to the plaintiff than -- for example, in Title VII the defense is business necessity; the employer has the burden of production; the employee has the burden of persuasion. Here you'd read -- you're saying you come into the covered category, you were shown because of age through impact, and then the burden -- the total burden is on the employer.

Am -- am I making myself clear here?

MR. JOSEFFER: I think -- I think I understand the question. This statute is far more employer-friendly in the standard than Title VII because it relies on the reasonable factors -- the reasonableness defense, which is a much lower standard than the business necessity test under Title VII. That reflects the fact that there are more innocent explanations for age disparity.

The separate question here, though, on burden of persuasion, I think the key point there is that in Wards Cove this Court only had the equivalent of (a)(2) to work with. So it had not much textual basis to go on with respect to the second and third factors of

Wards Cove and burden-shifting. The Court had to do a lot of gap-filling once it recognized the disparate impact claim.

Since then, however, in every one of these related civil rights statutes that Congress has enacted, it has spoken more clearly on the justification stage; and has always in every one of these statutes put that burden on the defendant. It did it in Equal Pay Act, according to this Court's decision in Corning Glass. It did it in the revised Title VII. It did it here. And even in the Americans with Disabilities Act, Congress specified that business necessity is a "defense."

CHIEF JUSTICE ROBERTS: Counsel, I was surprised not to see Chevron cited in your brief. What -- what sort of deference do you think we should give the EEOC regulations here?

MR. JOSEFFER: Auer -- in our view the regulation itself as far as it goes is entitled to Chevron deference, because it's a notice and comment rulemaking pursuant to delegated legislative authority. We recognize, however, that the regulation on its face is at best inartfully written; and therefore, the question is how to interpret the regulation.

We think EEOC's interpretation of its regulation in context is reasonable for a combination of

a few factors. First, the Department of Labor contemporaneously enacted a regulation putting the burden on the employer in all cases.

Second, when the EEOC took over rulemaking authority, it didn't insert this unusual discriminatory treatment language in there, but the EEOC's position at that time and ever since has been that it did not intend a substantive change.

And third, discriminatory treatment, while it undoubtedly throws a real wrench in -- or wrinkle into things -- excuse me -- and takes us out of Chevron and into Auer, is not a term of art. Disparate treatment is a term of art. The regulations otherwise use the phrase "different treatment," but discriminatory treatment is at best confusing, especially considering --

CHIEF JUSTICE ROBERTS: I'm sorry. I thought Auer deference tells you how to interpret the regulation. And having once interpreted the regulation, you need to know what to do with it.

MR. JOSEFFER: My understanding of Auer deference is that the agency gets deference as the reasonable interpretation of its regulation. And the agency has consistent --

CHIEF JUSTICE ROBERTS: We know what the

regulation -- we give it deference; we know what the regulation means. Now, does that regulation, as understood in light of Auer deference, get Chevron deference or something else?

MR. JOSEFFER: It would get Chevron deference. I mean, I think the two-step process is the regulation here, in our view, is clearly entitled to Chevron deference as far as it goes. And if you defer under Auer to the agency's view of its regulation, then that makes the Chevron case. But it's through the lens of Auer.

And finally, as a policy matter, Justice Kennedy, one can reasonably place this burden of persuasion either way. I mean this Court put it one place in Wards Cove. Congress immediately abrogated Wards Cove and put it in the other place. The sky is not going to fall either way. But even if the text wasn't so clear, one would logically put it on the employer for a few reasons: First, all else being equal, the employer is at least in a better decision to explain the reasonableness of its very own business practice.

And, second, the parties are not ordinarily expected to prove a negative, which is what the plaintiff would have to do here. And that's why in

every statute enacted after 1964, which is the first --

CHIEF JUSTICE ROBERTS: Why is it proving a negative? They would just have to prove that it was or was not a reasonable factor other than age.

MR. JOSEFFER: Right, and --

JUSTICE KENNEDY: Yes, and just adding on to the Chief Justice, it seems the employer is the one that would prove the negative. He has to say there were no -- here is a whole universe of other frameworks, and none of these work.

MR. JOSEFFER: No, it's a very simple two-part test. Once the plaintiff has established an adverse effect, an adverse impact -- I mean, even the defendant agrees that presumptively establishes liability, because the defendant agrees to bear at least the burden of production at that point.

And the question for the employer is just to show that its business practices -- own business practice is reasonable, is supported by some reasonable factor other than age. And it ought not be hard for an employer, especially considering that the reasonableness standard is not very daunting, to explain why its own business practice is reasonable. And if an employer can't even persuade someone that its own business practice is reasonable, then the odds are that there is

a problem.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE RESPONDENTS

MR. WAXMAN: Mr. Chief Justice, and may it please the Court:

I want to make an argument both from elegance and from function and from structure. Under the employment discrimination -- a wide range of employment discrimination, beginning with this Court's decision in McDonnell Douglas, this Court has applied a three-step balance-shifting paradigm in order to help juries resolve the question of whether discrimination occurred. In the disparate treatment cases there is a burden -- the first step, the plaintiff has to establish a prima facie case that he was the subject of disparate treatment because of his race or sex.

The burden of production then shifts to the defendant in order to explain, under disparate treatment cases, a legitimate nondiscriminatory reason, which eliminates the presumption consistent with Evidence Rule 301, and the burden of proof then resumes on the plaintiff to prove discrimination because of the

prohibited characteristic.

Now, in Wards Cove, this Court looked both to Rule 301 and to the paradigm in other discrimination cases to apply a three-part test, in which there is a burden of proof to establish a presumption, a burden of production to neutralize it, and then a burden of proof to show because of race.

The Second Circuit has done exactly that in this case, and we think they are right not just because that harmonizes this Court's prior discrimination cases, and not just because three seems to be more elegant than the four steps that the Petitioners want or the two steps that the Government wants, but because it makes sense.

And this goes directly to the question, I think it was, that Justice Alito asked: Whether or not the "reasonable factors other than age" inquiry is simply what's necessary to show liability, that is, that it was because of.

The ADEA doesn't prohibit disparate treatment. It doesn't prohibit disparate impact. It prohibits -- doesn't prohibit employment practices simply because they correlate negatively with age. A plaintiff has to prove that he has suffered adverse employment action because of his age. And the question

whether an employer based its action on reasonable factors other than age is part and parcel of that inquiry. It's not a free-standing --

JUSTICE GINSBURG: Mr. Waxman, the first part --

MR. WAXMAN: -- confession and avoidance defense.

JUSTICE GINSBURG: The way you phrased the first part, it sounded to me like you were going back to the interpretation that this Court rejected, that is, under the Age Discrimination Act there is only differential treatment, not neutral factor with a differential impact.

MR. WAXMAN: No, not at all. Not at all. If I said that, I certainly don't want to be mistaken. We are not up here arguing that there is no disparate impact theory of liability under the ADEA as there is under Title VII. This Court resolved that question in Smith, and it resolved it in large part by reference to the "reasonable factors other than age" provision, which Justice Stevens' opinion for a plurality of the Court explained that, when you have a disparate treatment case, if the plaintiff proves that his -- his or her treatment -- if the defendant proves that it was because of something other than age, it isn't disparate

treatment.

The fact that there is an RFOA provision, we think, does reflect the fact that there is the potential for liability under disparate impact, but as this Court explained, it's narrower. And it's narrower because -- not only because the 1991 amendments didn't apply to age cases; it's narrower, because as this Court has recognized in almost every age case it has decided, age -- unlike race and sex and religion and national origin -- often does -- sad to say by somebody who is in his second decade of protection under the ADEA -- often does correlate with reasonable employment factors.

And the fact that all -- what it means is that at step one of the burden-shifting analysis, the Wards Cove analysis, which in a race or sex case establishes a strong presumption that the employment action was because of race or sex because there are so few employment characteristics that do correlate negatively with one's race or one's gender, it's a strong presumption which nonetheless need be met only by a burden of production.

This Court has recognized that in the age context, the presumption actually is quite weak. And it would be more than perverse to adopt the Government's proposal, which is that notwithstanding the much weaker

inference, the burden of persuasion is now on the employer, not the employee. And, in fact, the principal problem, I would say, with the Government the EEOC proposal --

JUSTICE STEVENS: Mr. Waxman, what do you do about the language "otherwise prohibited"?

MR. WAXMAN: Excuse me?

JUSTICE STEVENS: What do you do about that language in the statute?

MR. WAXMAN: May I just finish my sentence --

JUSTICE STEVENS: Sure.

MR. WAXMAN: -- Justice Stevens, and go right to "otherwise prohibited"?

The government's proposal under which, once the employer establishes the statistical disparity, the burden of proof shifts to the employer, equates what this Court has said over and over again is a prima facie case or a presumption into liability. It would dictate precisely the opposite result that this Court found in St. Mary's Honor Center. It would allow the jury, upon silence by the defendant, not to say, well, you may consider this presumption to be enough if you don't hear any other evidence. It would tell the jury the proof of statistical disparity is proof of discrimination. And

that's just wrong.

Now, "otherwise prohibited" --

JUSTICE STEVENS: Even that, there's a question about not merely statistical disparity, but a causal connection between an identified practice --

MR. WAXMAN: Right.

JUSTICE STEVENS: -- in the disparity.

MR. WAXMAN: That's exactly right.

Now, with respect to the structure of the statute and "otherwise prohibited," the -- my friends on the other side of this case turn almost everything on the fact that the "reasonable factors other than age" provision applies in -- in subsection (f) and is -- as Justice Ginsburg said -- is sandwiched in between two other provisions that, for argument's sake, let's just acknowledge are affirmative defenses on which the employer would bear the burden of proof. And why doesn't that prove anything?

I'll go first to "otherwise prohibited" and then explain why the sandwich effect is no more persuasive here than it was to the Court in Betts.

"Otherwise prohibited" means that it is prohibited subject to the following conditions. It doesn't say who bears the burden of those conditions.

What it reflects, Justice Stevens, is this

fact. You could have taken everything that is in F and just put it into A, but you would then have had to put it into B and C and E. And so what Congress said was -- it didn't say not -- things that are prohibited in Section A won't be unlawful if X, Y and Z. It says "otherwise prohibited" in those sections.

In other words, it doesn't -- it means nothing other than it's prohibited subject to the following conditions. Now, I will acknowledge for argument's purposes -- and it actually suits my argument -- to show that the BFOQ defense and the foreign-employer defense are affirmative defenses. Because as we -- as we know from Black's Law Dictionary and this Court's decisions, Dixon, for example, an affirmative defense is a defense that says: I admit the allegations of the complaint, but I have a justification for it that the law recognizes.

Now, that's --

JUSTICE SOUTER: Isn't it -- isn't the -- isn't the weak point in your argument the following: Your argument assumes that when the employer implicitly says I admit the allegations the complainant made, that the employer is admitting, in effect, to disparate treatment. That he is saying: I did it because it was my purpose to discriminate against the old.

But if we read the "because" language as also admitting the meaning, "I did it or it had an impact by reason of the age, regardless of my intent," then this incongruity that you are arguing about disappears.

MR. WAXMAN: No. It is quite to the contrary, unless -- and it may be the case that I'm completely misunderstanding you.

The point is that at step one the plaintiff has to prove a statistical disparity, a substantial, negative, statistical correlation. And that raises a presumption that what was otherwise a neutral -- appears to be a neutral factor was, in fact, because of age. That these --

JUSTICE SOUTER: In other words, for the purpose of discriminating against the old.

MR. WAXMAN: Whether it's --

JUSTICE SOUTER: And that's -- that's disparate treatment.

MR. WAXMAN: Well, no. What this -- what this Court said in Griggs is there are proof problems. There are plenty of instances in which there is undiscovered, unreconciled, unacknowledged inferences about people. And old people is the perfect example where there is no history of invidious discrimination.

There is no prior hurdle that, unlike black people and women had to overcome -- which was another factor in Griggs. It's that we all get old, and people have preconceptions sometimes about the enormity of limitations of age which may not be justified.

So the way that these defenses, the sandwich, if you will, works is the plaintiff under Wards Cove shows his statistical case. It's a prima facie -- it shows that there is a disparate impact, period. But the statute --

JUSTICE STEVENS: Mr. Waxman, you have to keep in mind they are not just showing a disparate impact. Because of a particular practice there is a disparate impact. That's what you leave out. So the quality of the practice is what is at issue, and the defendant doesn't come in and say I admit that it was unlawful. He first tries to prove it was necessary, and he fails on that. And if he fails on that, he has the lesser burden of proving reasonableness.

MR. WAXMAN: No, well let -- let me see if I can't address Justice Souter's point first. I do think I understand your point, which is what's wrong with the Petitioner's case. But, Justice Souter, the point is that once a prima facie case is established in an age case -- let's just take the three provisions that are at

issue in (f)(1).

Under BFOQ, the employer gets up and says: Well, ladies and gentlemen, the judge is going to tell you that they have established a prima facie case that the way that these otherwise neutral -- that this was because of the plaintiff's age. And you know what? I admit it. I, in fact, admit that it was by accident because of age.

JUSTICE SOUTER: In an impact -- no. In an impact case, he is saying: I admit that the impact falls more heavily on the old.

MR. WAXMAN: Correct.

JUSTICE SOUTER: And -- and it seems to me that's all he has to admit in an impact case. And he does so, and then he --

MR. WAXMAN: What he basically says is: I agree that age was the factor, but I have an excuse for it. And, similarly, in the third exception, the foreign-employers exception, he comes in and says: You have heard all of the statistics. And you know what? I did do this to disadvantage old people, because my plant is in a country that discriminates -- that makes it illegal for people over 65 to work. But --

CHIEF JUSTICE ROBERTS: But then he is not -- he didn't do it to discriminate against old

people. He did it because the foreign country requires him --

MR. WAXMAN: That's correct. And that's why I admit -- I admit that I did this in a way that had a disparate impact on old people. I did it, if you will, in order to -- I have a justification for it. Whereas, in the reasonable factors other than age, the assertion is everybody understands that the plaintiff has the ultimate burden to prove that he or she suffered an adverse employment action because of age, not because of some factor that for entirely good reasons correlates with age. And the showing that there is a statistical --

JUSTICE SOUTER: Well, then you're -- then you're just saying that there -- that there is no such thing as a disparate-impact case.

MR. WAXMAN: No.

JUSTICE SOUTER: You're saying -- you're saying that there's got to be a disparate-treatment case.

MR. WAXMAN: No, no; not at all.

JUSTICE SOUTER: Well, then I'm not following you.

MR. WAXMAN: Let's take their -- let's take their 50-pound hypothetical. The employer says: Okay,

from now on all of our employees have to be able to lift 50 pounds over their head, you know, 10 times in 30 seconds. And older people or women -- let's say older people, you know, say: Well, statistically, that has wiped us out. That has had a substantial -- a substantial adverse effect on us because we are old, and we have less upper body strength.

The employer then gives -- comes forward with a legitimate, nondiscriminatory reason or a reasonable factor other than age, and says, for example, well, you know, this is -- we need our employees to be able to lift strong things. If the plaintiff comes back and says, I am an accountant, that's not reasonable, it's a very different case than if this is a requirement imposed on stocking clerks in an auto parts -- auto parts shop where you do have to lift very heavy things over your head.

In other words, the paradigm that this Court set out in Wards Cove applies exactly the same way. It applies a three-part test except that at step three the standard of justification is different.

And this, I think -- I hope, Justice Stephens, goes to your question. In Wards Cove this Court said you show a prima facie case of a disparate impact. The burden then -- the burden of production

then shifts to the employer to explain that it was -- there is a business -- to articulate a business justification for the facially neutral requirement.

And what the plaintiff then has to do is bear the burden of proving that that wasn't a business necessity; that there is one other way, one other way in which it could have been done; and, therefore --

JUSTICE KENNEDY: But you there agree that there is a distinction between "business necessity" and "business reasonableness"?

MR. WAXMAN: Yes. And, in fact, I think it's sort of embedded in the very opening of the blue brief in this case, where the Petitioner says: Well, the Court has sometimes used the word "business justification," and the Court has sometimes used the word "business necessity," and we don't really think that means anything, so we use the words interchangeably.

But this case shows that it means everything because at step three of Wards Cove the petitioner -- the plaintiff's burden is proving that it is -- that there is one other way -- that all you have to show is that it wasn't a necessity to do it that way in order to achieve your objective and the employee wins.

But because of the differential in

correlation between age and employment factors, in this case it is a business justification; that is, the employee has to come in and say it just wasn't reasonable to use that.

And this case is a perfect example. Here we have a research lab that has one client. It's the nuclear reactor division of the United States submarine unit. And they come, and they say -- and there is no dispute about the facts here -- they say the Cold War is over. We aren't going to have as much work for you. And since you're cost-plus, you're going to have to reduce your work force; and because we are in a different kind of war, we have new missions. You are going to have to design and engineer and implement things that you hadn't done it before. And so you need to figure out a way to go ahead and do this.

And what the company did was to go through all of its units and then subunits and sections, and say: Given the new mission that the Navy has told us we are going to have to occupy, do you have people -- do you have more people than you're going to get paid for to do what you have to do?

If the answer is yes -- if the answer is no, you're fine. If the answer is yes, please consider the following: What are the skills within the people within

your section, subsection, or unit that are excess, that in light of the reduced and changed mission we don't need? Identify those skills. Then go through each one of your employees; and if it is an employee with that skill, rank them on a scale of 1 to 10 according to four different characteristics: Seniority, which gives a benefit to older workers; recent job-performance ratings; the criticality of the other skills they have, do they have some other skill that is going to be required; and their flexibility -- how willing have they been, or are they, to learn new skills?

And the company has a training manual. It goes through and trains the managers to do this. It is approved by the Department of Energy and the Department of the Navy. But after the managers engage in this analysis and prepare this matrix, they then have to justify it before a central review board, which the plaintiff's own expert acknowledged was set up in order to make the managers defend each decision and make sure that those judgments corresponded with overall management's responsibilities.

JUSTICE GINSBURG: Still, the numbers, the way it came out, are rather startling. That there were 31 people who were RIF'd; and of those, 30 turn out to be over 40.

MR. WAXMAN: That's correct. And as the district court found and the court of appeals found, those were strikingly stark numbers. They were so stark that they came to the immediate attention of the company's management and general counsel, Mr. Correa, who was -- who looked at this and said: We are going to get sued for age discrimination. What should we do about this?

And what he did about this, what the proof showed, is he went back and said: Is each one of these decisions justifiable? Did they really apply these factors? He testified that he considered just saying: We'll go back and redo it so that the age distribution comes out right. But he was concerned that the New York human rights law, which defines -- this is sort of astounding -- defines "older worker" as somebody over 18, does have a reverse-discrimination provision.

But the point here is -- and, therefore, he decided: We did this right; we used a matrix that unrebutted testimony said was the paradigm in industry.

JUSTICE GINSBURG: But the terms "flexibility," "criticality" -- I mean the way you described it, it sounds very mechanical, mathematical. But those terms are -- they call for some human judgment.

MR. WAXMAN: They definitely do. And the second question that was presented in this case, which the Court didn't accept, was an assertion by the Petitioner that the Second Circuit had assertedly held that where a reasonable factor other than age derives from a subjective judgment, the Second Circuit had held that it was immune from review under disparate-impact theory, which, as the Government pointed out in its invitation brief, is not at all what the Second Circuit held.

The point is that this Court in Smith and earlier in Hazen Paper and earlier age cases was highly cognizant of the fact that unless there is a test that implies that -- that applies certainty for employers, there is going to be -- age -- if this standard isn't reasonable and if it isn't up to the other side to prove that it's unreasonable, employers are essentially going to take age into account. They are going to do what Mr. Correa testified he wouldn't do, which is rejigger the results to come up with a -- a percentage that more approximated the balance in the work force. And that, this Court has said repeatedly --

JUSTICE GINSBURG: Well, maybe because he thought that, given the subjectivity of some of these factors, that there was at least unconscious age bias in

the decisions that were made.

MR. WAXMAN: Well, Justice Ginsburg, that is why -- and it was testimony both from the employees in the case and from our uncross-examined expert and even their expert -- the review board -- the company set up a central review board which was trained and which examined every single manager about every single decision, whether you call it subjective or objective.

Now, the district court -- the trial court who heard the testimony said that he -- he deemed flexibility and criticality objective. He said they were objective factors because of all the instructions that were given, which we have reprinted in the joint appendix in this case. But even assuming -- and I certainly take your point, Justice Ginsburg, that if you ask a manager to evaluate an employee on the degree of criticality of that employee's skills or the flexibility of that employee, you can give her all the training in the world. You can give her a 16-point checklist. Ultimately, you're relying on a judgment by a human being of another human being.

But why would we not want employers to do that? Why would we want them to -- to retreat to the safe harbor of some safe quota. You know, gee, we have a 60/40 split in our work force; and, wow, these

numbers, we did it according to Hoyle. We've done -- this is the paradigm RIF process, but go back and do it in a way that comes out with a specific set of numbers.

CHIEF JUSTICE ROBERTS: Counsel, is your recent discussion about what happened here go simply to, I guess, your alternative argument, that we should affirm because you're right, regardless of who bears the burden; or does it really go to the legal question before us?

MR. WAXMAN: Well, I think it goes to both. I mean it goes to -- it simply -- it certainly goes to the question over whether, whoever has the burden on reasonableness, you ought to do what you did in Smith and what the Eleventh Circuit did in Montalvo, which is the case you cited in Smith. And in --

JUSTICE STEVENS: Here we have a jury verdict that was affirmed by the court of appeals.

MR. WAXMAN: Well, we have a jury verdict. We have a jury verdict under Wards Cove. The court of appeals, as we pointed out in -- to the court of appeals the first time and in our petition for certiorari here the last time and to the court of appeals the second time and to this Court on pages 4, 5, and 7 of our brief in opposition this time -- the court of appeals was simply wrong in both step one and step three of Wards

Cove. This is even assuming Wards Cove were the test. There is -- under step three of Wards Cove, which is how this case was tried, it was concededly the plaintiff's burden to prove that there was some other way, one other way, to do what the company wanted that established that this wasn't a business necessity. And I will represent to the Court that in five and a half weeks of testimony there is not one sentence of evidence to that effect.

JUSTICE GINSBURG: But that was taken out of it by Judge Jacobs when he redid it. He said, we were on the wrong track with business necessity. Business necessity is out. It's only reasonable factor of age.

MR. WAXMAN: What Judge Jacobs said is the case was tried under business necessity, under which the plaintiffs at least had to prove that there was some other way that the company could equally have achieved its objectives.

JUSTICE STEVENS: Well, wasn't the issue of reasonable factor under age tried in the trial court when the case was tried?

MR. WAXMAN: No, because the EEOC regulation at the time, regulation (d), which deals with disparate-impact cases, said that reasonable -- the reasonable factors other than age provision is proven by, and only by, the business-necessity defense, a

defense as to which the plaintiffs bear the burden.

And, in fact, in Wards Cove, the Government in Wards Cove was on the employer's side. The Government urged the court to do exactly what it did. And under the Government's own regulation 1625.7(d), the burden of proving reasonable factors other than age was correctly on the plaintiff, but incorrectly equated with the substantive showing of business.

JUSTICE GINSBURG: Is that --

JUSTICE STEVENS: Am I correct to understand that your trial counsel then took the position you must prove business necessity? I mean an absence of business necessity, rather than reasonableness. They didn't advance their strongest defense.

MR. WAXMAN: Well, no, we took the position that reasonable factors other than age was a separate test and was a separate defense.

JUSTICE STEVENS: Right.

MR. WAXMAN: The judge instructed the jury to the contrary and said under Wards Cove --

JUSTICE GINSBURG: Was Judge Pooler wrong, then? She said, in effect: You forfeited reasonable factor other than sex, because you didn't bring it up. You were going on business necessity.

MR. WAXMAN: Well, what happened was -- I

mean, Judge Pooler is wrong in certain respects, but not that respect. We -- our answer pleaded reasonable factors other than age, but we didn't -- neither we nor our opponents asked for a separate instruction on reasonable factors other than age. The jury was instructed on the Wards Cove analysis because --

JUSTICE GINSBURG: The jury didn't hear a word about reasonable factors other than age. They heard about business necessity.

MR. WAXMAN: That's correct. I mean that -- and that's because -- you could say that it was a mutual mistake by everyone involved. But the EEOC had directed under subsection (d) of its regulations that reasonable factor other than age could be established only by proving business necessity. And both parties --

JUSTICE STEVENS: As everybody now knows, that was wrong.

MR. WAXMAN: That's correct. And the -- my point is we are -- we are entitled to judgment in our favor. We are entitled to an affirmance because, number one, the Second Circuit was correct that the burden of proving reasonableness was on them, and the -- the Petitioners have acknowledged expressly on page 53 of their blue brief that if in fact it is true that the Second -- if the Second Circuit is in fact correct, then

the judgment is affirmed, that is, they say when a -- "While a defendant has no obligation to press an issue upon which the plaintiff bears the burden of proof -- and therefore the Second Circuit may have been justified in reviewing the evidence of reasonableness in light of its holding that Petitioners bore the burden of proof" --

JUSTICE STEVENS: But did you plead this as an affirmative defense? Did you plead it as an affirmative defense?

MR. WAXMAN: We pleaded it as a -- I can't bring the complaint to mind, but we pleaded it as a separately specified defense, yes. We said, in our answer to the complaint, we said this is a reasonable factor other than age.

And so we are -- everyone acknowledges that if the Second Circuit is correct as to where the burden applies, the judgment should be affirmed. Our submission is that the judgment has to be affirmed whether or not the burden applies as the Second Circuit held.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Russell, you have four minutes remaining.

REBUTTAL ARGUMENT OF KEVIN K. RUSSELL
ON BEHALF OF THE PETITIONERS

MR. RUSSELL: I'd like to begin by addressing the general legal question that the Court granted cert on, and particularly going back to this idea, this assertion that the proof of the RFOA is somehow a negation of the obligation that the plaintiff has to prove that they have suffered a disparate impact because of age. It is simply incorrect. It's based -- as, Justice Souter, I think you were suggesting in some of your questions -- on a confusion about what the "because of age" requirement is in a disparate-impact case under Section 4(a)(2). The requirement under Section 4(a)(2) is simply to show that the effect of the practice is felt because of age, while the defense in the RFOA provision is to show that the practice itself is reasonable even though it has this effect.

JUSTICE ALITO: Well, the practice -- if a practice correlates with a number of -- statistically correlates with a number of different factors, is it because of all of those factors?

MR. RUSSELL: I think, under Wards Cove, this Court has said that it does, and so under Wards Cove you establish that the discrimination is felt by older workers because of age by showing that all the

workers as a group suffer disproportionately from it.

JUSTICE SOUTER: Wards Cove, in other words, says "because" may mean "correlation" and it mean "purpose," either one.

MR. RUSSELL: Yes. I mean --

JUSTICE SOUTER: Yes.

MR. RUSSELL: But I think all you have to show under 4(a)(2) is that the practice tends to disadvantage older workers because of their age. And so again in our weight -- weight example, the employer admits in our weight example that the effect of the neutral practice is to fall more heavily, is to restrict the employment opportunities of older workers because of age, but says, even if that's true -- even if there is a disparate impact because of age-- we are still entitled to the defense because the practice itself is reasonable.

It's also -- I would like to address the suggestion that Griggs is directed -- or disparate impact is directed at ferreting out intentional discrimination. Certainly it serves that function in many cases, but that's not the sole purpose of it. And it's simply not the purpose of the prima facie case in Wards Cove to give rise to an inference of intentional discrimination, and the fact that it doesn't as strongly

in the age case I think isn't a reason to think that Congress intended the courts to develop a different test for showing what's otherwise prohibited under 4(a)(2).

And, finally, if I could address some of the questions regarding what happened in this case. This case, Justice Stevens, was not tried with reasonableness in mind, both because Respondents abandoned their "reasonable factor other than age" defense, which they had raised as an affirmative defense in their answer. I believe Mr. Waxman is incorrect when he suggests that they in fact asked for instructions.

JUSTICE STEVENS: Well, if he put in all the evidence he's described, that would not have proven business necessity. It seems to me that evidence had to go to the issue of reasonableness.

MR. RUSSELL: It may have been relevant to reasonableness, but that's not why it was put in. Before the trial began --

JUSTICE STEVENS: Was he arguing that it was necessary to follow this one downsizing practice?

MR. RUSSELL: They certainly, I think -- they used that argument to show that they had a business justification and to try to rebut our showing of alternative, equally effective practices. But it was clear by the time of trial that -- you know, they had

proposed jury instructions that didn't ask for reasonableness to be part of the case. We proceeded with the case on the assumption that we would be entitled to prevail under these instructions so long that we showed that the current practice, reasonable or not, had a disparate impact and was subject to an equally effective alternative.

JUSTICE STEVENS: And just one other detail, Did -- the district judge not instruct the jury on this defense?

MR. RUSSELL: It did not.

JUSTICE STEVENS: It did not?

MR. RUSSELL: The only instruction was that we'd be entitled to prevail if we showed Wards Cove, and its --

JUSTICE STEVENS: You have an unusual case where the decisive issue, at least when you get to this Court, is something the jury never passed on.

MR. RUSSELL: Well, I think that's right. And ordinarily I think you would say that the defendants, by not raising the issue to the jury, if it's an affirmative defense, have waived it. They ask for an excuse, given the change in law. We don't think that the change in law excuses their failure to waive it. The regulation that they point to they themselves

have argued here isn't entitled to much of any deference. And, in fact, at the same time they were simultaneously arguing that there wasn't even any disparate-impact liability in the first place under the ADEA. So I don't think they can actually claim that they were relying on that.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:15 p.m. the case in the above-entitled matter was submitted.)

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