11-2-1985

11-02-1985 Preliminary Memorandum

Unknown
Law clerk, US Supreme Court

No. 85-93, Bazemore v. Friday, and No. 85-428, United States v. Friday.

The SG has submitted a reply, 10/30/85, arguing that resps' contentions concerning employees hired after 1965 are irrelevant, because the SG seeks review only of the ruling that Title VII provides no remedy for post-1965 failure to remedy racial disparities in wages paid to employees hired before 1965.

For the reasons discussed in the bench memo, I agree that cert should be granted on this issue (Question 1). I also agree that cert should be denied on the county chairmen issue (Question 4). Although I think petrs are probably correct that General Building Contractors v. Pennsylvania should not be extended to Title VII actions, this case does not involve a simple delegation, as petrs suggest. Instead, the decisions below seem to turn on the special way in which the agricultural extension service was set up, vesting county officials from the outset with authority to select chairmen.

I recommend granting cert on the remaining three issues:

Statistical evidence (Question 2). The distinction drawn in the pool memo between this case and the decisions of the CADC and CA2 seems overly technical. The CADC and CA2 have pretty clearly held that a Title VII plaintiff has no burden to refute alternative explanations for disparate impact until the defendant provides some evidence that the omitted variable is potentially important. See Segar v. Smith, 738 F.2d 1249, 1277 (CADC 1984) ("Since DEA has presented no admissible evidence that black agents are more likely than white agents to lack a second year of

requisite experience, plaintiffs' failure to account for this variable does not dilure the force of their statistical analysis ...."); Guardians Assoc. v. Civil Service Comm'n, 630 F.2d 79, 88 n. 7 (CA2 1980) ("To accept such unsupported possibilities, and require the plaintiffs to refuste every circumstance that could explain the disparate impact shown by the statistics, would create an onerous burden of proof, far in excess of the Title VII standard as intepreted by the Supreme Court."). The approach taken by the DC and the CA4 in this case is difficult to reconcile with these statements. This dispute concerns more than the factual findings in this case; it concerns what sort of statistical showing may properly be demanded of Title VII plaintiffs, absent some sort of countervailing statistical evidence.

On the other hand, because of the technical distinction noted in the pool memo, the split in the circuits is not sharp, and perhaps this issue should be allowed to percolate longer.

The 4-H Clubs (Question 3). Limiting Green to schools makes no sense. The CA4's holding to the contrary clearly is of broad legal importance, and I don't think this Court should deny cert simply because the present SG does not care about de facto discrimination against Blacks.

Class action certification (Question 5). The SG is correct that denial of class certification did not matter below, where the Govt was pressing for the same relief as the private plaintiffs. But the SG now opposes cert on every issue except that of continuing salary disparity. Consequently, if the Court grants cert on the county chairmen issue or the statistical issue (both

of which involve post-1965 hires), the class action question will no longer be moot. The 4-H Club issue is different, since there the plaintiffs appear to be seeking only injunctive relief, and class status may thus be unimportant. Still, without class status petrs may not have standing to seek injunctive relief as broad as they do. (Unfortunately, the complaint is not included in the Petn App, and the briefs do not make clear exactly what relief petrs sought in DC.) On the "merits" of the class certification issue, petrs seem correct the courts below erred in ways sufficiently important to warrant cert.

No. 85-93: Grant, limited to questions 1, 2, 3 and 5.
No. 85-428: Grant and consolidate with 85-93.
DS 11/2/85