10-1974

Albemarle Paper Co. v. Moody

Lewis F. Powell Jr.

11/27/74

DISCUSS

Out

Hunton, Williams represents Albemarle Paper

DB

Preliminary Memo

OUT

Conf. of Dec. 6, 1974
List 3, Sheet 3

No. 74-428 + No 74-389

HALIFAX LOCAL NO. 25	Cert. to CA 4 (Craven, Bryan, Boreman dissenting in part)	Timely
V.		
MOODY	Federal/Civil	

Summary: See the pool memo in Albemarle Paper Co. v. Moody, No. 74-389 consolidated with this case.

There is a consolidated response to both petitions.

11/25/74	O'Neill	Ops in Pet.

Out
H+W representation
D13

Preliminary Memo

Conf. Dec. 6, 1974
List 3, Sheet 3

No. 74-389

ALBEMARLE PAPER CO.	Cert. to CA 4 (Craven, Bryan, Boreman dissenting in part)	Timely
V.		
MOODY	Federal/Civil	
No. 74-428		
HALIFAX LOCAL NO. 25	(same as above)	Timely
V.		
MOODY		

Summary: The case was here last term on a procedural issue. Moody v. Albemarle Paper Co., ____ U.S. ____ (June 17, 1974). This time on the merits the case presents the questions as to: (a) whether an award of back pay under Title VII of the Civil Rights Act of 1964 was a matter of equitable discretion for the USDC or couldn't be

denied except in special circumstances; (b) whether a class action for back pay including class members who filed no prior complaint with the EEOC is appropriate under Title VII; and (c) whether certain allegedly job validated employment testing was proper under Griggs v. Duke Power Co., 401 U.S. 424.

The action was brought in 1966 for alleged violations of Title VII, prohibiting discrimination in employment. In 1973, the USDC (Dupree) found violation of Title VII in Albemarle's seniority system which it enjoined but it also held that certain pre-employment testing was properly validated under Griggs v. Duke Power, supra, and denied a back pay award under § 706g. A panel of the 4th Circuit reversed on both grounds with Judge Craven being joined by Judge Boreman on the testing issue and by Judge Bryan on the back pay issue. The CA, with Senior Circuit Judges Boreman and Bryan voting, voted to hear the case en banc and oral argument was had. A tentative vote of the CA was to modify the judgment with regard to the back pay order. On certified question to this Court, it was held that Senior Circuit Judges couldn't vote on whether the case should be reheard en banc. The necessary votes not existing among active judges to rehear the case, the CA vacated its order to rehear the case and petrs, the employer and bargaining representative, sought cert here.

Facts: Albemarle Paper Co., a North Carolina paper and pulp mill, practiced overt racial segregation until the mid-1960's with certain types of lower paying jobs being exclusively for blacks while

others were for whites. Because of the highly technical nature of the paper mill business, from the early 1950's, its jobs have been highly specialized with the mill being organized into departments and each department containing various "lines of progression" of related job groups. The seniority system being used in the mill required that all advancements be through the lines of progression and generally used as a criteria seniority in the line of progression rather than plant-wide seniority. The effect of this system was to perpetuate the effect of prior discriminatory hiring practices after their abandonment in 1964 by making it difficult for blacks locked into lower paying lines of progression to transfer to higher paying lines of progression. The seniority system was incorporated into the collective bargaining agreement between Albemarle and Halifax Local No. 25 of the AFL-CIO United Papermakers and Paperworkers, the collective bargaining representative and petr in No. 74-428. The USDC and all three judges of the CA panel were in agreement that this seniority system violated § 703(a) of Title VII, 42 U.S.C. § 2000e-2(a), and with the consent of both petrs an order shifting the company to a time in plant seniority system has been entered.

Because of the increasingly technological nature of the paper mill business, the company in 1956 adopted pre-employment testing in order to insure that employees had the requisite intelligence to cope with the increasing automation of the plant. Until 1963, the

Beta exam (designed to measure intelligence of illiterates through non-verbal testing) and the Bennett test (verbal) were used. In 1963 the company continued using the Beta test but shifted to the Wonderlic test (verbal) and abandoned the Bennett test because of inadequate data as to its effectiveness. Employment applicants are required to score a certain minimum on each test in order to enter 8 of the Company's 11 departments and 14 of its 17 lines of progression. 96% of all whites and 64% of all blacks achieve the Company's minimum requirement on the Wonderlic test here in issue. In 1964, the Company prior to the passage of the Title VII began an extensive affirmative action program attempting to hire blacks who could pass the tests for its higher paying lines of progression and also combined certain predominately black lines of progression with certain predominately white lines. After this Court's narrow reading of § 703(a)(2), (h) [42 U.S.C. § 2000e-2(h)] in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), the Company hired an expert to test the validity of its tests.

The validation procedure, conducted with the assistance of Purdue University, consisted of having employees in 10 job groups in 8 out of the 14 lines of progression for which such tests were required take the tests. Their results were then compared to job evaluations of them by their supervisors, done without knowledge of the test scores. The tests together proved valid for 9 of the 10 jobs but both were individually valid for only 1 of

the 10 jobs. The expert based on all findings declared the tests conclusively validated within the EEOC guidelines [29 CFR § 1607. 5(b) (1970)] referred to with approval in Griggs, supra, at 433-34. The USDC likewise found the tests valid. The CA panel reversed (2-1) over the dissent of Judge Bryan and ordered the USDC to enjoin use of the tests.

Resps' action was brought in 1966 as a class action under 42 U.S.C. § 2000e in 1966. In response to petrs' attempt to prevent certification of the class in that year and motion for summary judgment, resps in a filed pleading stated that they were not seeking back pay for class members. Five years later in 1971, resps amended their complaint to seek back pay for class members. The USDC denied back pay under the authority of § 706(g) of Title VII [42 U.S.C. § 2000e-5(k)] making the granting of such relief discretionary because (a) petr had in good faith attempted to comply with the changing judicial interpretations in the area and had never intentionally violated the Act; and (b) it would be inequitable to allow resps to recover this staggering amount given their prior representation that they would not seek back pay and the detrimental reliance by Albemarle and the Union on this representation, both in not speeding trial of the suit and in not gathering evidence about individual class members. The CA panel reversed over the dissent of Judge Boreman equating § 706(g) with the attorney fees section of Title II [42 U.S.C. § 2000a-3b] and

hence holding back pay must be awarded in the absence of very limited special circumstances.

Contentions: (1) Both petrs argue that the award of back pay by the CA reversing the USDC was error and in conflict with other CA decisions. A copy of 42 U.S.C. § 2000e-5g, [§ 706(g)], is attached.

Section 706(g) expressly provides that the USDC upon finding a violation "may order such affirmative relief as may be appropriate which may include . . . reinstatement . . . with or without back pay." This Court recognized in dicta in Curtis v. Loether, ____ U.S. ____ (1974) "that the decision whether to award back pay is committed to the discretion of the trial judge [in Title VII actions]." All other courts to directly pass on the question of back pay orders under Title VII have applied the traditional equitable discretion standard on review of the trial judge's denial of back pay. See e.g. Manning v. International Union, 466 F.2d 812, 816 (6th Cir. 1972) cert. denied 410 U.S. 946 (1973); Schaeffer v. Yellow Cabs, 462 F.2d 1002, 1006 (9th Cir. 1972); U.S. v. N.L. Industries, 479 F.2d 354 (8th Cir. 1973). Kober v. Westinghouse Elec. Corp., 480 F.2d 240, 246-47 (3rd Cir. 1973) expressly rejects the rationale of this opinion and adopts the reasoning of Judge Boreman's dissent. There is simply no support from policy, legislative history, or judicial decisions for extending the special circumstances rule of Title II attorney fees (Newman v. Piggie Park Enterprises, 390

U.S. 400) to Title VII back pay awards. If neither the good faith of the defendants nor the inequitable conduct of the plaintiffs are factors to be taken into account when denying back pay awards, as the CA states, there is no trial court discretion and the CA panel has unilaterally amended the statute to reverse Senate Amendment No. 656 to Title VII [110th Cong. Rec. 12381-85 (June 5, 1964)] which changed the provisions of the original bill providing for a manditory back pay award into a discretionary remedy. Further, petr Albemarle argues that a FRCP Rule 23 class action cannot be maintained for back pay where some members of the class have not filed complaints with the EEOC since this is inherently in conflict with the purpose of the Act requiring exhaustion of EEOC remedies.

The Union renews these arguments in addition to concluding from a study of the history of Title VII that it was intended to work through mediation and administrative action and not windfall judicial awards. It points out that the ruinous monetary award which will be imposed on unions as a result of the judicial co-conspirator theory under Title VII together with a per se rule on back pay awards may well destroy unions such as itself and argues that the traditional discretion rule of back pay awards under the NLRA ought to be applied. It concludes that the schism within the 4th Circuit ought to be resolved by this Court.

The CA decision, relying on cases upholding trial court back pay awards, states that while discretion is present in making such

awards, it necessarily must be exercised in light of the purposes of Title VII, Since the purpose of this portion of Title VII is to restore what has been taken by discrimination, back pay should be awarded unless special circumstances are present. Newman v. Piggie Park Enterprises, supra. Neither a tardy request for such relief nor good faith on the part of the defendant is such a circumstance. The dissenter's arguments reflect those of petrs.

Resp argues that there is no conflict with cases such as Kober, notwithstanding the rejection of this holding therein, since such cases are female discrimination cases where the discrimination was caused by obligatory women protection statutes. This would clearly be a special circumstance under the rule in this case. Further, substantial authority exists in favor of the special circumstances rule and it has been expressly adopted in the 5th, 6th, and 7th Circuits. [Citations collected in Resp. at 9, n.12]. The legislative history of § 706(g) shows that the discretion referred to therein is to design the most complete compensatory remedy possible. All the CA majority did was require the USDC to exercise his discretion in light of this statutory purpose. The good faith of the employer is not controlling in a Title VII case (Griggs, supra, at 432) and petr was not prejudiced by tardy assertion of the back pay claim since defences to back pay are the same as those to injunctive relief and over one-half of the plaintiff class filed individual back pay claims

prior to trial. Finally the notes to Rule 23 indicate that its use in civil rights actions was contemplated and many cases have upheld such back pay class actions and stated that exhaustion of EEOC remedy need only be as to the subject matter of the suit. [Citations collected in Resp. at 14].

(2) The Company (but not the Union) argues that the portion of the CA opinion invalidating the Beta and Wonderlic tests is error. Griggs placed the burden on petr to prove the validity of his tests. He did validate the tests through use of an expert and showed a strong positive correlation between the tests and job performance and the USDC concluded that he had shown that the tests were necessary for safe operation of the plant and hence within the 42 U.S.C. § 2000e-2(h) exception to Title VII. Although he didn't use specific criteria for supervisor ratings and instead merely secured a general supervisor rating, mechanistic adherence to EEOC guidelines is not required. It is impossible mathematically to have a perfect validation or a perfectly correlated test. If Griggs is other than a blanket prohibition of testing, the reasonable correlation shown here ought to suffice. Further, the CA decision was clearly error in as much as it directs an injunction against petr rather than allowing him to correct any deficiencies in the validation. The dissenter, Judge Bryan, and the USDC make the same points.

The CA majority focus on the following alleged deficiencies in the testing: no objective criteria for supervisor ratings; limited correlation of tests with performance; limited testing (since 6 of the 14 departments where tests were required were not validated) combined with failure to show work between departments related; no proof that statistical error not present since lower scorers may disproportionately improve skills after getting the job. Resp repeats these arguments in addition to noting that after proper validation is conducted, petr may seek to get the injunction against testing LIFTED.

Discussion: The first issue appears to be whether back pay awards are to be a matter of equitable discretion or whether they should be granted except in very limited special circumstances such as discrimination compelled by state law. A number of cases, of which Kober is typical, articulate an equitable discretion standard while a number of CA decisions articulate the special circumstances rule. The "equitable discretion" cases virtually all deal with sex discrimination colorably compelled by state female protection statutes. Most of the "special circumstance" decisions are merely in the context of upholding a USDC award. The language in the cases is in direct conflict but the facts are somewhat distinguishable.

On the merits, I think it does take a "special circumstance" rule to reverse the USDC's denial of back pay so that the issue

is squarely presented. The legislative history is ambiguous and policy factors weigh in either direction on the question of whether a special circumstances test is the appropriate one. The issue may well be a certworthy one unless the Court desires to await a more direct conflict.

There is some logic to petrs' class action argument but no case law support that I could locate and several directly contrary CA decisions.

The testing argument appears to be a factual one. However, it does raise the interesting question of what degree of validation must exist and what procedures for validation must be used for valid testing. Decisions in the area are ad hoc and the issue presents no reason to grant cert although it might profitably be considered together with the back pay issue if that is deemed certworthy.

There is a consolidated response to both petitions.

11/25/74 O'Neill Ops in Pet.

APPENDIX C

42 U.S.C. §§ 2000e-2(a), 2000e-2(h) AND 2000e-5(g)

42 U.S.C. § 2000e-2(a)

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

42 U.S.C. § 2000e-2(h)

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be unlawful employment practice for an employer to give and to act upon the

results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or use to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

42 U.S.C. § 2000e-5(g)

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admis-

sion, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

* * *

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 74-389

Submitted ....., 19... *Announced* ....., 19...

ALBEMARLE PAPER COMPANY, ET AL., Petitioners

vs.

JOSEPH P. MOODY, ET AL.

DISCUSS

OUT

10/7/74 Cert. filed.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
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Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Conference 12-6-74

Court CA - 4 ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. 74-428

Submitted ....., 19... Announced ....., 19... (Vide 74-389)

HALIFAX LOCAL NO. 25, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, Petitioner

vs.

JOSEPH P. MOODY, ET AL.

OUT

10/15/74 Cert. filed.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
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Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 74-389

Submitted ....., *19*... *Announced* ....., *19*...

ALBEMARLE PAPER CO.

VS.

MOODY RELIST OUT

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
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Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Court ..... *Voted on*....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 74-428

Submitted ....., 19... *Announced* ....., 19...

HALIFAX LOCAL NO. 25

vs.

MOODY RELIST OUT

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
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Rehnquist, J.	.....	...	...	...	...	...	...	...	...	...	...	...	...	.....
Powell, J.	.....	...	...	...	...	...	...	...	...	...	...	...	...	.....
Blackmun, J.	.....	...	...	...	...	...	...	...	...	...	...	...	...	.....
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Burger, Ch. J.	.....	...	...	...	...	...	...	...	...	...	...	...	...	.....

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 22, 1975

RE: Nos. 74-389 & 74-428 Albemarle Paper Co. v. Halifax Local No. 425, etc. v. Moody, et al.

Dear Potter:

I agree.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 16, 1975

Re: Nos. 74-389 & 74-428 - Albemarle Paper Co. v. Moody

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

Copies to Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
			4/28/75					
Concur in part + Dissent in part 6-19-75	Join PS 6-20-75	Join PS 5-22-75	2nd draft 5-22-75 3rd draft 6-17-75	Join PS 6-16-75	Concur 6-4-75	Concur 6-19-75	Out	May write concurring opinion 6/6/75 Concurring opinion
								typed draft 6/13/75 1st draft 6-17-75
					74-389 Albemarle v. Moody 74-428 Halifax v. Moody			