The Burger Court Opinion Writing Database

Dothard v. Rawlinson

433 U.S. 321 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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

CHAMBERS OF
THE CHIEF JUSTICE

November 12, 1976

RE: 76-422 - Dothard v. Mieth, p. 1 (Conf. list - Nov. 12)

MEMORANDUM TO THE CONFERENCE:

After the orders reading, it came to my attention that there might be a jurisdictional problem with this case. In order to be absolutely sure, I have asked the Clerk's Office to relist this case for me at the next conference.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

April 13, 1977

OK
I agree

MEMORANDUM TO THE CONFERENCE:

Re: 76-422, Dothard v. Mieth

I believe we should authorize Mr. Rodak to call counsel in this case and advise that the Court wishes them to be prepared to treat the jurisdictional question.

At the close of oral argument we can decide whether to call for supplemental briefing.

Absent five dissents by noon on Thursday, I will tell Mr. Rodak to proceed.

Regards,

WEB

cc: Mr. Rodak

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

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1977

Re: 76-422 - Dothard v. Mieth

Dear Potter:

I agree with Sections I and III of your opinion in this case, and will probably join in due course. However, I am concerned that Section II of your opinion will have an adverse effect upon a multitude of law enforcement agencies which apply reasonable height and weight standards for screening applicants. I do not agree that use of such reasonable height and weight requirements (and surely 120 lbs. and 5'2" cannot be deemed unreasonable for "combat troops") violates Title VII, and I will be unable to join that portion of your opinion.

My disagreement is this:

(1) In determining whether the height and weight requirements are discriminatory against women, I do not think it is proper to use as a standard generalized population statistics. Rather, the relevant statistic is that of the probable "pool" of applicants for the position. The generality of humankind do not want to be prison guards.

In my view, it is part of a plaintiff's prima facie case to show discrimination by reference to relevant statistics; this was not done in this case.

(2) I also cannot agree that even if a discriminatory impact were shown, the height and weight requirements are not job related. Given the vulnerable position of a prison guard who must patrol in the midst of hundreds of inmates, without a weapon, the appearance of strength would seem to be as important a characteristic as possession of actual strength. In a situation where control depends upon the respect a guard can command from the inmates around him, a requirement that prison guards have certain minimum size characteristics seems quite rational. I cannot see how it can be disputed that a prison guard -- whether male or female -- who fails to meet the State's minimal qualifications is very likely to encounter serious disciplinary problems.

I agree your position is arguable, but the very fact that both views are rational persuades me it is a legislative choice. [In "liberal" Sweden and Denmark (without our jurisprudence of course), "correctional attendants" are generally six feet plus, karate trained, and psychologically screened.]

(3) Even assuming that strength were, indeed, the only relevant characteristic, I do not believe it is impermissible to use height and weight as one reasonable measure of strength. It is substantially easier to measure height and weight with a purely objective standard than to measure the type of strength which is required to be a prison guard. Second, height and weight provide leverage for effective use of whatever strength one has. Third, it is far from clear that use of a strict strength test, as your opinion suggests, would be any less discriminatory against women than the test here applied by the State. In fact, I would venture a guess that, if anything, a strength test is likely to be more discriminatory against women than is the height/weight test. If that is the case, and the State is in fact entitled to apply a test which is more discriminatory on the basis of sex, then I should think it is a fortiori entitled to use the height and weight test which is less discriminatory.

Given my view on this subject, I will await the dissent before voting as to this portion of your opinion unless you find some of this acceptable.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1977

Re: 76-422 Dothard v. Mieth

MEMORANDUM TO THE CONFERENCE:

Bill Rehnquist confirms that in due course he will be circulating a dissent in this case.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

June 17, 1977

Re: 76-422 - Dothard v. Mieth

Dear Potter:

I think my problems in this case are best met by joining Bill's concurrence, i.e., I join Parts I and III and the judgment.

Regards,

WEB

Mr. Justice Stewart
Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1977

Re: 76-422 - Dothard v. Meith

Dear Byron:

Please show me as joining you in that part of your "joint writing" (with Hazelwood, 76-255).

Regards,

WEB

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 21, 1977

Re: 76-422 Dothard v. Mieth

Dear Byron:

I intended by my June 20 memorandum to express agreement with what you stated in the "joint writing," but I did not intend to be joining incompatible writings!

In short, I'll return to my "plain join" in the Rehnquist Rendition.

I still hope you will put your Dothard and Hazelwood expressions in separate papers to avoid confusion.

Regards,

WEB

Mr. Justice White

cc: The Conference

Cy B/L

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

April 13, 1977

MEMORANDUM FOR THE CONFERENCE

Subject: No. 76-422, Dothard v. Mieth
(This case is scheduled for oral argument during the week of April 18.)

Mr. Justice Brennan has requested that this memorandum be circulated.

Introduction: Appellants filed this direct appeal under 28 U.S.C. §1253 from a judgment of a 3-J USDC granting injunctive relief against the operation of a state statute and administrative regulation. In response, appellees filed a Motion to Dismiss or Affirm in which they acquiesced in appellants' assertion of §1253 jurisdiction. The Court noted probable jurisdiction to hear this case. The parties, in their respective briefs on the merits, do not challenge the Court's jurisdiction. However, in an amicus curiae brief filed by the Women's Legal Defense Fund and the AFL-CIO, amici take the position that this appeal is not properly before the Court and that appellants should have sought review in the first instance in CA 5. Amici's argument rests principally on their perception that this appeal essentially involves nothing more than adjudication of a Title VII sex discrimination claim and on amici's own analysis of pertinent Court precedents, specifically Philbrook v. Glodgett, 421 U.S. 707, 712-713 n. 8 (1975), relying on Hagans v. Lavine, 415 U.S. 528 (1974), and MTM, Inc. v. Baxley, 420 U.S. 799 (1975).

In light of the interposition--for the first time by amici curiae after briefing on the merits by the parties--of a question going to the Court's jurisdiction to hear this case, Mr. Justice Brennan has requested that this memorandum considering the views expressed by amici be prepared and circulated to the Conference.

Facts: This lawsuit was commenced by the filing of a single complaint on behalf of two plaintiffs (and their respective classes), each seeking a different law enforcement position with the State of Alabama. Both plaintiffs challenged minimum height and weight requirements for employment. "Because a statute and administrative orders of the State of Alabama (were) challenged

on constitutional grounds and injunctive relief (was) sought against state officials, a three-judge court (was) convened pursuant to 28 U.S.C. §2281" (JS, Appx. At at 17).

Plaintiff Meith, seeking employment as a state trooper, brought suit under §1983 alleging violation of equal protection of the laws under the Fourteenth Amendment. Applying an equal protection analysis following Washington v. Davis, 426 U.S. 229 (1976), the 3-J court found a constitutional violation and awarded injunctive relief accordingly. No appeal has been taken from so much of the judgment below as pertains to plaintiff Mieth's claims.

Plaintiff Rawlinson, seeking a prison guard position, presented a claim for relief under Title VII. Employing a Title VII analysis, including consideration of the bona fide occupational qualification defense, the court below found a statutory violation. In addition, the court declared a challenged administrative regulation violative of both Title VII and the Equal Protection Clause.

Contentions of Amici: Amici concede that convening a 3-J court under 28 U.S.C. §2281 was proper as to plaintiff Mieth's exclusively constitutional claims. However, the single judge with whom the initial complaint was filed should have proceeded in the first instance to decide the Title VII question presented. If the Title VII claims warranted enjoining application of state law, then the injunction resulted from application of the Supremacy Clause; such injunction suits did not require a 3-J court under §2281, Swift & Co. v. Wickham, 382 U.S. 111 (1965). More importantly, it is the preferred practice for the single judge, when presented with both statutory and constitutional grounds for decision, to resolve the statutory claim before convening a 3-J court. See, Philbrook v. Glodgett, 421 U.S. 707, 712-713 n. 8 (1975), relying on Hagans v. Lavine, 415 U.S. 528 (1974); also, MTM, Inc. v. Baxley, 420 U.S. 799, 807 (White, J., concurring in result) (1975).

Amici find it of special significance that the instant case was decided after this Court's ruling in Washington v. Davis. Considering the necessity for proof of purposeful discrimination to demonstrate a constitutional violation, the fact that gender-based discrimination has not been declared by this Court to be inherently suspect and that no compelling state interest need therefore be shown in order to sustain a challenged state practice, amici conclude that the Title VII standard--Title VII sex discrimination, except for the bona fide occupational qualification defense, is treated like racial discrimination--is no more stringent than that imposed in sex discrimination cases decided under the equal protection standard. Amici

urge that since her constitutional claim cannot succeed if her Title VII contention fails, the fact that plaintiff Rawlinson alleges both statutory and constitutional grounds for relief should not so influence the whole course of this litigation as to permit a 3-J court adjudication of what is actually nothing more than a lawsuit arising under Title VII.

Having made their procedural claim that the Title VII questions to which this Court has agreed to give plenary consideration arise from matters appropriately considered by a single judge and not required under §2281 to be determined by a 3-J court and their substantive argument that as a result of doctrines enunciated by this Court, "an sex discrimination in employment claim against a state agency based upon the equal protection clause is necessarily superfluous where a claim under Title VII is also available," amici turn to the heart of their argument for a new jurisdictional rule in this case.

Amici note the Court's holding in MTM that a direct appeal under §1253 from the order of a 3-J court denying injunctive relief is available only where such order rests upon resolution of the merits of the constitutional claim. Amici suggest that the rationale for avoiding direct review in MTM 1/ (availability of discretionary review after consideration of the issues in the court of appeals; congressional policy of minimizing the Court's mandatory docket) is fully applicable in this case.

Amici acknowledge the Court's holding in Engineers v. Chicago, R. I. & P. R. Co., 382 U.S. 423 (1966), that, if a 3-J court is convened and decides a case on statutory grounds, an appeal from that judgment lies under §1253. They also note that the Court, in Philbrook v. Glodgett, supra, declined to reconsider its decision in Engineers. However, amici also point out that, in Philbrook, no statutory claim was presented in the complaint filed in the DC; rather, the statutory contentions were advanced, for the first time, at oral argument before the 3-J court. Here, amici contend, there existed no impediment to proceeding in the preferred manner--before a single judge.

Amici ask the Court to consider the case as it now stands in this Court, i.e., plaintiff Mieth's constitutional

1/Amici note that MTM does not require a determination that the 3-J court was without jurisdiction in the first place. They assert that it is sufficient to decide the jurisdictional question here that a single judge could have decided the Title VII claims presented by plaintiff Rawlinson.

case is no longer relevant and plaintiff Rawlinson's case will be conclusively determined on the merits of the Title VII questions. Thus, no reason obtains for excepting this case from the ordinary appellate route provided for in Title VII cases. Indeed, the 1972 congressional decision to treat employment discrimination claims against public employers in the same way as such claims against private employers commends the appropriateness of CA review. In addition, amici read congressional repeal of §2281 as approval of the policy favoring CA review espoused in MTM and Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 99 (1974).

Finally, amici ask, not that the Court disturb its ruling in Engineers, but that it announce "that a direct appeal is available only if the constitutional issue will remain in the case once the statutory issue is decided."

Discussion: It is apparent that no decision of this Court mandates the result urged by amici nor does any decision deal squarely with the situation presented here. However, amici's policy arguments in favor of CA review in this case appear sound. Interestingly, amici have put forward a narrow, somewhat fact-specific standard for arriving at the conclusion that no §1253 jurisdiction lies here, i.e., where a 3-J court orders injunctive relief upon resolution of non-constitutional claims 2/ and where resolution of any remaining constitutional issue cannot affect the outcome of the litigation, review will be in the CA in the first instance.

Amici's literal prescription--"a direct appeal is available only if the constitutional issue will remain in the case once the statutory issue is decided"--may not succeed in achieving the result requested in this case. Amici's position appears to depend on a practical perception of the impact of the relevant substantive law. Even assuming the correctness of amici's proposition that if plaintiff Rawlinson cannot prevail on her Title VII claim, she stands no chance of success on her equal protection claim, this proposition is not identical to the proposition that no constitutional question remains in the case, i.e., no jurisdiction exists in the 3-J court to reach the constitutional issue or the constitutional claim has been abandoned or withdrawn. 3/

2/Cf., No. 76-694, Buckley v. McCrae (held for decision in No. 75-1440, Maher v. Roe), a direct appeal from an order of a single judge granting preliminary injunctive relief against enforcement of a federal statute on equitable and other non-constitutional grounds.

3/There is no express indication that appellee-plaintiff below Rawlinson has abandoned her equal protection grounds for relief.

Another possible impediment to application to this case of amici's proposed rule is the disposition of the court below with regard to Regulation 204. The 3-J court held "that Regulation 204, insofar as it denies women jobs as prison guards in all-male prisons, is violative of Title VII and the Equal Protection Clause" (JS, Appx. A at 45). 4/ Amici seek to minimize the effect of this constitutional determination on the jurisdictional question. They assert that the court below employed a Title VII analysis of the regulation; the court had no reason to reach the constitutional ground and in the interest of judicial restraint should not have done so; and for substantive law reasons, as noted, the constitutional decision could not stand if the statutory determination were overturned.

Conclusion: Alternative means of achieving the result urged by amici are suggested by their argument, e.g., disapprove the Engineers rule saving §1253 jurisdiction whenever a 3-J court decides the case on statutory grounds presented to it; extend the rule of MTM to bar direct review in this Court of any 3-J court judgment except where the judgment sought to be reviewed is based on an adjudication of constitutional claims.

In any event, amici's suggestion that this case presents another appropriate occasion to reconsider §1253 jurisdiction appears to warrant comment from the parties.

Susan Ackerman Goltz

4/Appellees recite in their Motion to Dismiss or Affirm (pp. 8-9), as follows: ". . .the statutory provision and administrative regulation at issue here were not held to be unconstitutional. They were invalidated pursuant to Title VII's prohibition against sex discrimination." Appellees are in error as to the bases for the ruling on the administrative regulation.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 14, 1977

RE: No. 76-422 Dothard v. Mieth

Dear Potter:

At conference I was with you on the statute but in dissent on the regulations. I think, however, that the way you've handled the regulations is narrow enough and fact specific enough to permit me to join. I therefore do join the opinion.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 20, 1977

RE: No. 76-422 Dothard v. Mieth

Dear Thurgood:

Please join me in your opinion in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 13, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-422, Dothard v. Mieth

In the light of the memorandum of Susan Goltz, I think it would be wise to ask counsel to address the question of jurisdiction. Since, however, this case is scheduled for argument next Tuesday, it would obviously be unreasonable to ask Counsel to submit briefs on the question before argument. The most we could do would be to invite them to deal with the issue at oral argument, and perhaps ask for post-argument supplemental briefs. Even this much, it seems to me, should be done very promptly in view of the imminence of the oral argument. Perhaps a telephone call from Mike Rodak would serve the purpose.

P.S.

P. S.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

1st DRAFT

From: Mr. Justice Stewart

SUPREME COURT OF THE UNITED STATES

Circulated: JUN 9 1977

No. 76-422

Recirculated: _____

E. C. Dothard et al., Appellants, v. Brenda M. Mieth et al. | On Appeal from the United States District Court for the Middle District of Alabama.

[June —, 1977]

MR. JUSTICE STEWART delivered the opinion of the Court.

The appellee, Dianne Rawlinson, sought employment with the Alabama Board of Corrections as a prison guard, called in Alabama a "correctional counselor." After her application was rejected, she brought this class suit under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. V), and under 42 U. S. C. § 1983, alleging that she had been denied employment because of her sex in violation of federal law. A three-judge Federal District Court for the Middle District of Alabama decided in her favor. *Mieth* v. *Dothard,* 418 F. Supp. 1169. We noted probable jurisdiction of this appeal from the District Court's judgment. — U. S. —.[1]

I

At the time she applied for a position as correctional counselor trainee, Rawlinson was a 22-year-old college graduate

[1] The appellants sought to raise for the first time in their brief on the merits the claim that Congress acted unconstitutionally in extending Title VII's coverage to state governments. See the Equal Employment Opportunity Act of 1972, 86 Stat. 103, effective date, March 24, 1972, 42 U. S. C. § 2000e (a), (b), (f), (h) (Supp. V). Not having been raised in the District Court, that issue is not before us. See *Adickes* v. *Kress & Co.,* 398 U. S. 144, 147 n. 2; *Irvine* v. *California,* 347 U. S. 128, 129.

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 13, 1977

Re: No. 76-422, Dothard v. Mieth

Dear Chief,

Thank you for your letter of June 9, which confirms my understanding of the views you tentatively expressed during our Conference discussion. My recollection of that discussion, implemented by the notes I took, indicates that there were differing majorities with respect to the height and weight statute on the one hand and Regulation 204 on the other. It was primarily for that reason that I assigned the opinion to myself, as one who was in the tentative majority on both issues. I trust that we shall be made aware shortly of who will be writing in dissent, assuming that my proposed opinion on each issue is found unpersuasive by some.

As to the merits of the statutory issue, I can do no more than reiterate my considered views:

(1) National male-female statistics seem to me extremely relevant. There is no suggestion that Alabama men and women are somehow different, and applicant statistics could be severely skewed by the self-selection required by the very statute under attack.

(2) The appearance of strength, i.e., the psychological impact of tall and heavy prison guards, was not asserted as a job related qualification. In the words of the District Court, the "sole contention concerning the job relatedness of these physical requirements was that they were related to strength."

(3) If Alabama established that a particular quantum of strength were indeed a job related qualification, and if it proceeded objectively to measure all of applicants' strength by a fairly administered test, then the result would not violate the law even if an even higher percentage of women were thereby rejected than under the present height and weight criteria. That, at least, is my understanding of the "job relatedness" defense under Title VII.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conferenc

— Stylistic changes 4, 8

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

2nd DRAFT Recirculated: JUN 17 1977

SUPREME COURT OF THE UNITED STATES

No. 76–422

E. C. Dothard et al., Appellants, *v.* Brenda M. Mieth et al. | On Appeal from the United States District Court for the Middle District of Alabama.

[June —, 1977]

MR. JUSTICE STEWART delivered the opinion of the Court.

The appellee, Dianne Rawlinson, sought employment with the Alabama Board of Corrections as a prison guard, called in Alabama a "correctional counselor." After her application was rejected, she brought this class suit under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. V), and under 42 U. S. C. § 1983, alleging that she had been denied employment because of her sex in violation of federal law. A three-judge Federal District Court for the Middle District of Alabama decided in her favor. *Mieth* v. *Dothard*, 418 F. Supp. 1169. We noted probable jurisdiction of this appeal from the District Court's judgment. — U. S. —.[1]

I

At the time she applied for a position as correctional counselor trainee, Rawlinson was a 22-year-old college graduate

[1] The appellants sought to raise for the first time in their brief on the merits the claim that Congress acted unconstitutionally in extending Title VII's coverage to state governments. See the Equal Employment Opportunity Act of 1972, 86 Stat. 103, effective date, March 24, 1972, 42 U. S. C. § 2000e (a), (b), (f), (h) (Supp. V). Not having been raised in the District Court, that issue is not before us. See *Adickes* v. *Kress & Co.*, 398 U. S. 144, 147 n. 2; *Irvine* v. *California*, 347 U. S. 128, 129.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

2nd DRAFT

From: Mr. Justice Stewart

Circulated:

Recirculated: JUN 2 2 1977

SUPREME COURT OF THE UNITED STATES

No. 76-422

note name change.

E. C. Dothard et al., Appellants, *v.* Dianne Rawlinson et al. | On Appeal from the United States District Court for the Middle District of Alabama.

[June —, 1977]

MR. JUSTICE STEWART delivered the opinion of the Court.

The appellee, Dianne Rawlinson, sought employment with the Alabama Board of Corrections as a prison guard, called in Alabama a "correctional counselor." After her application was rejected, she brought this class suit under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. V), and under 42 U. S. C. § 1983, alleging that she had been denied employment because of her sex in violation of federal law. A three-judge Federal District Court for the Middle District of Alabama decided in her favor. *Mieth* v. *Dothard,* 418 F. Supp. 1169. We noted probable jurisdiction of this appeal from the District Court's judgment, *sub nom Dothard* v. *Mieth,* — U. S. —.[1]

I

At the time she applied for a position as correctional counselor trainee, Rawlinson was a 22-year-old college graduate

[1] The appellants sought to raise for the first time in their brief on the merits the claim that Congress acted unconstitutionally in extending Title VII's coverage to state governments. See the Equal Employment Opportunity Act of 1972, 86 Stat. 103, effective date, March 24, 1972, 42 U. S. C. § 2000e (a), (b), (f), (h) (Supp. V). Not having been raised in the District Court, that issue is not before us. See *Adickes* v. *Kress & Co.,* 398 U. S. 144, 147 n. 2; *Irvine* v. *California,* 347 U. S. 128, 129.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

1st DRAFT

Recirculated: 6-24-77

SUPREME COURT OF THE UNITED STATES

Nos. 76–422 AND 76–255

E. C. Dothard et al., Appellants, 76–422 *v.* Dianne Rawlinson et al.	On Appeal from the United States District Court for the Middle District of Alabama.
Hazelwood School District et al., Petitioners, 76–255 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June —, 1977]

MR. JUSTICE WHITE, concurring in No. 76–255 and dissenting in 76–422.

I join the Court's opinion in *Hazelwood*, No. 76–255, but with reservations with respect to the relative neglect of applicant pool data in finding a prima facie case of employment discrimination and heavy reliance on the disparity between the areawide percentage of black public school teachers and the percentage of blacks on Hazelwood's teaching staff. Since the issue is whether Hazelwood discriminated against blacks in hiring after Title VII became applicable to it in 1972, perhaps the Government should have looked initially to Hazelwood's hiring practices in the 1972–1973 and 1973–1974 academic years with respect to the available applicant pool, rather than to history and to comparative work force statistics from other school districts. Indeed, there is evidence in the record suggesting that Hazelwood, with a black enrollment of only 2%, hired a higher percentage of black applicants than of white applicants for these two years. The Court's opinion of course permits Hazelwood to introduce applicant pool data on remand in order to rebut the prima facie case of a discriminatory pattern or practice. This may be the only fair

JUN 20 1977

No. 76-422 Dothard v. Mieth

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I agree entirely with the Court's analysis of Alabama's height and weight requirements for prison guards, and with its finding that these restrictions discriminate on the basis of sex in violation of Title VII. Accordingly, I join parts I and II of the Court's opinion. I also agree with much of the Court's general discussion in part III of the bona fide occupational qualification exception contained in § 703(e) of Title VII.[1/] The Court is unquestionably correct when it holds "that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." Ante at 12. See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971)(Marshall, J., concurring). I must, however, respectfully disagree with the Court's application of the bfoq exception in this case.

1, 2, 6, 7

JUN 24 1977

~~1st~~ printed DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–422

E. C. Dothard et al., Appellants,
v.
Dianne Rawlinson et al.

On Appeal from the United States District Court for the Middle District of Alabama.

[June —, 1977]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in part and dissenting in part.

I agree entirely with the Court's analysis of Alabama's height and weight requirements for prison guards, and with its finding that these restrictions discriminate on the basis of sex in violation of Title VII. Accordingly, I join Parts I and II of the Court's opinion. I also agree with much of the Court's general discussion in Part III of the bona fide occupational qualification exception contained in § 703 (e) of Title VII.[1] The Court is unquestionably correct when it holds "that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Ante*, at 12. See *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 544 (1971) (MARSHALL, J., concurring). I must, however, respectfully disagree with the Court's application of the bfoq exception in this case.

The Court properly rejects two proffered justifications for denying women jobs as prison guards. It is simply irrelevant here that a guard's occupation is dangerous and that some women might be unable to protect themselves adequately.

[1] Section 703 (e), 42 U. S. C. § 2000e–2 (e), provides in pertinent part: ". . . (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupation reasonably necessary to the normal operation of that particular business or enterprise . . . ."

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 20, 1977

Re: No. 76-422 - Dothard v. Mieth

Dear Bill:

Would you please join me in your concurring opinion.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference

April 13, 1977

No. 76-422 Dothard v. Mieth

MEMORANDUM TO THE CONFERENCE:

I agree with Potter's suggestions.

L.F.P., Jr.

ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 9, 1977

No. 76-422 Dothard v. Mieth

Dear Potter:

Please join me in your opinion for the Court.

I have read James v. Wallace, 406 F. Supp. 318, cited by you, and must say that conditions (as of 1975) in Alabama maximum security prisons were indeed a "jungle". But I do doubt the desirability of note 23 (p. 14) that seems likely to encourage some other pioneer women like Ms. Rawlinson to institute similar suits on the theory that most maximum security prisons are operated on a normal, relatively stable basis. While Alabama prisons could well be the worst, it is common knowledge that every maximum security prison in the country is inhabited by the most violence-prone prisoners. Even relatively model prisoners, serving long terms in isolation from women, could be moved to misconduct by the presence on a "contact" basis with the opposite sex.

In short, I would not be inclined to suggest that the dfoq exception may not apply in other prisons.

But I am with you anyway.

Sincerely,

Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

6/17/77

No. 76-422 Dothard v. Mieth

MR. JUSTICE REHNQUIST, concurring.

I agree with, and join, Parts I and III of the Court's opinion in this case and with its judgment. While I also agree with the Court's conclusion in Part II of its opinion, holding that the District Court was "not in error" in holding the statutory height and weight requirements in this case to be invalidated by Title VII, ante, at 10, the issues with which that part deals are bound to arise so frequently that I feel obliged to separately state the reasons for my agreement with its result. I view affirmance of the District Court in this respect as essentially dictated by the peculiarly limited factual and legal justifications offered below by appellants on behalf of the statutory requirements. For that reason, I do not believe -- and do not read the Court's opinion as holding -- that all or even many of the height and weight requirements imposed by States on applicants for a multitude of law enforcement agency jobs are pretermitted by today's decision.

I agree that the statistics relied upon in this case

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

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SUPREME COURT OF THE UNITED STATES

No. 76-422

E. C. Dothard et al., Appellants, *v.* Dianne Rawlinson et al. | On Appeal from the United States District Court for the Middle District of Alabama.

[June —, 1977]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring.

I agree with, and join, Parts I and III of the Court's opinion in this case and with its judgment. While I also agree with the Court's conclusion in Part II of its opinion, holding that the District Court was "not in error" in holding the statutory height and weight requirements in this case to be invalidated by Title VII, *ante,* at 10, the issues with which that part deals are bound to arise so frequently that I feel obliged to separately state the reasons for my agreement with its result. I view affirmance of the District Court in this respect as essentially dictated by the peculiarly limited factual and legal justifications offered below by appellants on behalf of the statutory requirements. For that reason, I do not believe—and do not read the Court's opinion as holding—that all or even many of the height and weight requirements imposed by States on applicants for a multitude of law enforcement agency jobs are pretermitted by today's decision.

I agree that the statistics relied upon in this case are sufficient, absent rebuttal, to sustain a finding of a prima facie violation of § 703 (a)(2), in that they reveal a significant discrepancy between the numbers of men, as opposed to women, who are automatically disqualified by reason of the height and weight requirements. The fact that these

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 10, 1977

Re: 76-422 - Dothard v. Mieth

Dear Potter:

Please join me.

Respectfully,

Mr. Justice Stewart

Copies to the Conference