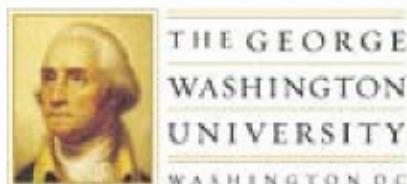


# The Burger Court Opinion Writing Database

*Furnco Construction Corp. v. Waters*  
438 U.S. 567 (1978)

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

June 20, 1978

Dear Bill:

Re: 77-369 Furnco v. Waters

The recent changes satisfy me, and I join.

Regards,

WSB

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

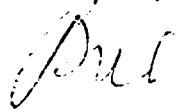
June 5, 1978

RE: No. 77-369 Furnco Construction v. Waters

Dear Bill:

I will await the dissent. I find the discussion  
of the business necessity doctrine very troublesome.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF  
JUSTICE W. J. BRENNAN, JR.

June 23, 1978

RE: No. 77-369 Furnco Construction v. Waters

Dear Thurgood:

Please join me.

Sincerely,



Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

June 5, 1978

No. 77-369 - Furnco v. Waters

Dear Bill,

I am glad to join your opinion  
for the Court.

Sincerely yours,

P. S.  
P.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

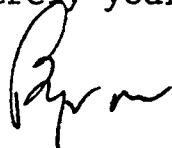
June 20, 1978

Re: 77-369 - Furnco Construction  
Company v. Waters

Dear Bill,

Please join me in your opinion in  
this case with its most recent changes.

Sincerely yours,



Mr. Justice Rehnquist

Copies to the Conference

23 JUN 1978

No. 77-369, Furnco Construction Corp. v. Waters

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

It is well established under Title VII that claims of employment discrimination because of race may arise in two different ways. International Brotherhood of Teamsters v. United States, 431 U.S 324, 335-336 n. 15. An individual may allege that he has been subjected to "disparate treatment" because of his race, or that he has been the victim of a facially neutral practice having a "disparate impact" on his racial group. The Court today concludes that the Court of Appeals was correct in treating this as a disparate treatment case controlled by McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973).

87 JUN 1978

Printed  
1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 77-369

Furnco Construction Corporation, Petitioner,  
v.  
William Waters et al. On Writ of Certiorari to  
the United States Court  
of Appeals for the Sev-  
enth Circuit.

[June —, 1978]

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

It is well established under Title VII that claims of employment discrimination because of race may arise in two different ways. *International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 335-336, n. 15. An individual may allege that he has been subjected to "disparate treatment" because of his race, or that he has been the victim of a facially neutral practice having a "disparate impact" on his racial group. The Court today concludes that the Court of Appeals was correct in treating this as a disparate treatment case controlled by *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973).

Under *McDonnell Douglas*, a plaintiff establishes a prima facie case of employment discrimination through disparate treatment by showing:

"(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U. S., at 802 (footnote omitted).

Once a plaintiff has made out this prima facie case, the burden shifts to the employer who must prove that he had a

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 8, 1978

Re: No. 77-369 - Furnco Construction Corp. v. Waters

Dear Bill:

Please join me.

Sincerely,

*HAB.*

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 17, 1978

No. 77-369 Furnco v. Waters

Dear Bill:

It would help me if you would consider favorably the following.

Commence Part II-A (p. 7) of your opinion with the words "We agree . . ." in the 8th line of the first paragraph.

Then drop into a footnote the references to Griggs, Albemarle and Dothard, simply omitting the word "Since" (in two places) so that our agreement that McDonnell Douglas controls does not appear to be predicated on the fact that none of the situations involved in Griggs, Albermarle or Dothard is present here.

As I have said before, I do not think Griggs has any applicability to this case in view of the findings by the District Court that were not questioned by CA7. But there is no real reason to say anything about Griggs.

If these negligible changes are agreeable to you, I will join forthwith.

Sincerely,



Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 19, 1978

No. 77-369 Furnco v. Waters

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 2, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 77-369 - Furnco Construction v. Waters

As soon as the Printer can get it back to me, I anticipate circulating a second draft of this opinion which will contain several changes. Most are matters of style; one is a change in emphasis which might be called substantive. Because of the traditional preference for circulation of Court opinions as early in June as possible, I circulate the enclosed first draft as is.

Sincerely,



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

Circulated: JUN 2 1978

Recirculated: \_\_\_\_\_

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-369

Furnco Construction Corporation, Petitioner,  
v.  
William Waters et al. } On Writ of Certiorari to  
} the United States Court  
} of Appeals for the Sev-  
} enth Circuit.

[June —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents are three black bricklayers who sought employment with petitioner Furnco Construction Corporation. Two of the three were never offered employment. The third was employed only long after he initially applied. Upon adverse findings entered after a bench trial, the District Court for the Northern District of Illinois held that respondents had not proved a claim under either the "disparate treatment" theory of *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), or the "disparate impact" theory of *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971). The Court of Appeals for the Seventh Circuit, concluding that under *McDonnell Douglas* respondents had made out a prima facie case which had not been effectively rebutted, reversed the judgment of the District Court. We granted certiorari to consider important questions raised by this case regarding the exact scope of the prima facie case under *McDonnell Douglas* and the nature of the evidence necessary to rebut such a case. — U. S. — (1977). Having concluded that the Court of Appeals erred in its treatment of the latter question, we reverse and remand to that court for further proceedings consistent with this opinion.

Changes pp. 5, 10, 12

Stylistic changes throughout

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

Circulated:

2nd DRAFT

JUN 5 1978

Recirculated:

## SUPREME COURT OF THE UNITED STATES

No. 77-369

Furnco Construction Corporation, Petitioner,  
v.  
William Waters et al. On Writ of Certiorari to  
the United States Court  
of Appeals for the Sev-  
enth Circuit.

[June —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents are three black bricklayers who sought employment with petitioner Furnco Construction Corporation. Two of the three were never offered employment. The third was employed only long after he initially applied. Upon adverse findings entered after a bench trial, the District Court for the Northern District of Illinois held that respondents had not proved a claim under either the "disparate treatment" theory of *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), or the "disparate impact" theory of *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971). The Court of Appeals for the Seventh Circuit, concluding that under *McDonnell Douglas* respondents had made out a *prima facie* case which had not been effectively rebutted, reversed the judgment of the District Court. We granted certiorari to consider important questions raised by this case regarding the exact scope of the *prima facie* case under *McDonnell Douglas* and the nature of the evidence necessary to rebut such a case. — U. S. — (1977). Having concluded that the Court of Appeals erred in its treatment of the latter question, we reverse and remand to that court for further proceedings consistent with this opinion.

*Wait  
changes*

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 19, 1978

Re: No. 77-369 Furnco v. Waters

Dear Lewis:

The proposed changes contained in your letter of June 17th are agreeable to me, and I have likewise cleared them with Potter and Harry, who joined the earlier draft. I will accordingly send the necessary revisions to the Printer, and hope to have a new draft incorporating your changes in circulation as soon as possible.

Sincerely,

Mr. Justice Powell

✓

P. 7

*Footnotes Renumbered*

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

Circulated:

Recirculated: JUN 20 1978

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 77-369

Furnco Construction Corporation, Petitioner,  
*v.*  
William Waters et al. } On Writ of Certiorari to  
the United States Court  
of Appeals for the Sev-  
enth Circuit.

[June —, 1978]

*Wait for  
Answer*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 23, 1978

Re: 77-369 - Furnco v. Waters

Dear Bill:

If I read your opinion as foreclosing on remand further litigation on the Griggs issue, I think I would be inclined to join Thurgood. Maybe I am just getting tired at this time of year, but I do not so understand your opinion and therefore I join you.

Respectfully,



Mr. Justice Rehnquist  
Copies to the Conference