

The Burger Court Opinion Writing Database

Western Air Lines, Inc. v. Criswell

472 U.S. 424 (1985)

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



2

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

CHAMBERS OF
THE CHIEF JUSTICE

May 24, 1985

Re: 83-1545 - Western Air Lines v. Criswell

Dear John:

I join your March 7 draft.

Regards,



Justice Stevens

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

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1985

RE: 83-1545 - Western Air Lines v.
Criswell

Dear John:

I join your June 10th draft.

Regards,



Justice Stevens

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 4, 1985

No. 83-1545

Western Airlines v. Criswell

Dear John,

Upon reflection, I am not comfortable with the proposal to treat the above case and Oklahoma City v. Tuttle differently. In both cases, the petitioner failed properly to object to the allegedly erroneous instruction given at trial. In both cases, the respondent failed to raise this objection in the court of appeals or in response to the petition for certiorari. And in both cases, the issues have been fully briefed and argued, so the judicial economy rationale advanced in the Tuttle opinion for addressing the merits is equally present here.

Of course the defect in both cases is nonjurisdictional and it is thus within our discretion to handle the cases differently. But the only purported basis I can discern for the differential treatment proposed here is that the issues in Tuttle are more focused than the issues in Criswell. I am far from certain that this assertion is accurate. In neither case was the presentation of issues a model of clarity; footnote 2 in the current draft of Tuttle makes clear the ambiguity of the issues presented in that case. More fundamentally, I am uncomfortable with basing our decision to exercise jurisdiction or not--once a case has been granted, briefed and argued--upon so amorphous a criterion. At most, there is some minor degree of difference in the clarity of presentation of the issues in the two cases, and this difference does not, in my judgment, justify a DIG in one case and proceeding to the merits on the other.

Thus, if we are to reach the merits in Tuttle I think we should reach the merits in Criswell as well, and my vote is still

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to affirm. I would not be averse to dismissing both Criswell and Tuttle as improvidently granted, however.

Sincerely,

Bill

Justice Stevens

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 24, 1985

No. 83-1545

Western Air Lines, Inc.
Criswell, et al.

Dear John,

I agree.

Sincerely,



Justice Stevens

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8:19 AS YAM 18

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 4, 1985

83-1545 - Western Airlines v. Criswell

Dear John,

I would reach the merits in this case
and not DIG.

Sincerely yours,



Justice Stevens

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

June 5, 1985

83-1545 - Western Air, Lines, Inc. v. Criswell

Dear John,

Please join me.

Sincerely,

Justice Stevens

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83-1545-2 5/11.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 21, 1985

Re: No. 83-1545-Western Airlines v. Criswell

Dear John:

I would reach the merits in this case and not DIG.

Sincerely,

J.M.

T.M.

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 5, 1985

Re: No. 83-1545-Western Air Lines v. Criswell

Dear John:

Please join me.

Sincerely,

J.M.
T.M.

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 14, 1985

Re: No. 83-1545, Western Air Lines v. Criswell

Dear John:

My preference is to reach the merits in this case and
not to DIG.

Sincerely,



Justice Stevens

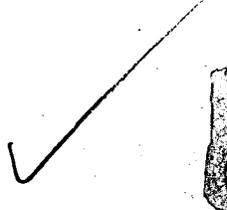
cc: The Conference

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



CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 4, 1985

Re: No. 83-1545, Western Air Lines v. Criswell

Dear John:

Please join me in your circulation of May 23.

Sincerely,

Justice Stevens

cc: The Conference

84 JUN 30 1985

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 1, 1985

83-1545 Western Air Lines v. Criswell

Dear John:

Please add at the end of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Lewis

Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 23, 1985

¹⁵⁴⁵
83-1945 Western Air Lines v. Criswell

Dear John:

Please add at the end of the next draft of you opinion that I took no part in the consideration or decision of this case.

Sincerely,

Lewis

Justice Stevens

lfp/ss

cc: The Conference

64 May 24 1985

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 1, 1985

Re: No. 83-1545 Western Air Lines v. Criswell

Dear John,

Please join me in your Per Curiam.

Sincerely,

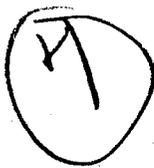


Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1985

Re: No. 83-1545 Western Air Lines v. Criswell

Dear John,

Please join me.

Sincerely,

WR

Justice Stevens

cc: The Conference

82 JUN 10 5 41 AM

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 28, 1985

MEMORANDUM TO THE CONFERENCE

Re: 83-1545 - Western Air Lines
v. Criswell

It seems to me that there are three alternative ways to dispose of this case: (1) to dismiss as improvidently granted, supported by a Per Curiam generally along the lines of the attached draft; (2) to DIG with a one line order and without explanation; or (3) to go ahead and decide the merits, which as I recall a conference discussion, would generally result in an affirmance.

There is, of course, some tension between the DIG in this case and the circulating opinion in Tuttle, but I am persuaded that the issue in Tuttle is much more sharply focused than the issue in this case and that the two dispositions are really not inconsistent with one another.

My own slight preference is for a DIG with the Per Curiam explanation, but I do not have strong feelings on the matter and would also be happy to try my hand at an opinion on the merits if that should be the consensus after reviewing the enclosure.

Respectfully,



Enclosure

February 28, 1985

83-1545 - Western Air Lines v. Criswell

Per Curiam.

Like Trans World Airlines, Inc. v. Thurston, ___ U.S. ___ (1985), decided earlier this Term, this case involves the application of the Age Discrimination in Employment Act, 29 U.S.C. §621-634, to an airline's refusal to employ otherwise qualified individuals as flight engineers because they are over age 60.¹ In this case, Western Air Lines, Inc., the petitioner, contended that the under-age-60 requirement for flight engineers was a "bona fide occupational requirement" (BFOQ) adopted for safety reasons and that the refusal to employ respondents was based on "reasonable factors other than age" (RFOA).² After

¹As we explained in Thurston, the flight engineer is one of the three cockpit positions in large commercial aircrafts. "The 'captain' is the pilot and controls the aircraft. He is responsible for all phases of its operation. The 'first officer' is the copilot and assists the captain. The 'flight engineer' usually monitors a side-facing instrument panel. He does not operate the flight controls unless the captain and the first officer become incapacitated." ___ U.S., at ___. "A regulation promulgated by the Federal Aviation Administration prohibits anyone from serving after age 60 as a pilot on a commercial carrier. 14 CFR §121.383(c). Captains and first officers are considered 'pilots' subject to this regulation; flight engineers are not." Id., at ___, n. 2.

Footnote(s) 2 will appear on following pages.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

Thurston R.N.
STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 2, 3, 4, 5

From: Justice Stevens

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1545

WESTERN AIR LINES, INC., PETITIONER *v.*
CHARLES G. CRISWELL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[March —, 1985]

PER CURIAM.

Like *Trans World Airlines, Inc. v. Thurston*, — U. S. — (1985), decided earlier this Term, this case involves the application of the Age Discrimination in Employment Act, 29 U. S. C. § 621-634, to an airline's refusal to employ otherwise qualified individuals as flight engineers because they are over age 60.¹ In this case, Western Air Lines, Inc., the petitioner, contended that the under-age-60 requirement for flight engineers was a "bona fide occupational requirement" (BFOQ) adopted for safety reasons and that the refusal to employ respondents was based on "reasonable factors other than age" (RFOA).² After trial, a jury returned a verdict

¹As we explained in *Thurston*, the flight engineer is one of the three cockpit positions in large commercial aircrafts. "The 'captain' is the pilot and controls the aircraft. He is responsible for all phases of its operation. The 'first officer' is the copilot and assists the captain. The 'flight engineer' usually monitors a side-facing instrument panel. He does not operate the flight controls unless the captain and the first officer become incapacitated." — U. S., at —. "A regulation promulgated by the Federal Aviation Administration prohibits anyone from serving after age 60 as a pilot on a commercial carrier. 14 CFR § 121.383(c). Captains and first officers are considered 'pilots' subject to this regulation; flight engineers are not." *Id.*, at —, n. 2.

²Section 4(f)(1) of the Act provides that it shall not be unlawful for an employer to take action that is otherwise prohibited by the Act "where age is a bona fide occupational qualification reasonably necessary to the normal

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Please forward me
[Signature]

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

MAY 23 1985

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1545

**WESTERN AIR LINES, INC., PETITIONER v.
CHARLES G. CRISWELL ET AL.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[May —, 1985]

JUSTICE STEVENS, delivered the opinion for the Court.

The petitioner, Western Air Lines, Inc., requires that its flight engineers retire at age 60. Although the Age Discrimination in Employment Act (ADEA), 29 U. S. C. §§ 621-634, generally prohibits mandatory retirement before age 70, the Act provides an exception "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business."¹ A jury concluded that Western's mandatory retirement rule did not qualify as a BFOQ even though it purportedly was adopted for safety reasons. The question here is whether the jury was properly instructed on the elements of the BFOQ defense.²

¹Section 4(f)(1) of the ADEA provides:

"It shall not be unlawful for an employer . . .

(1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . ." 81 Stat. 603, 29 U. S. C. § 623(f)(1).

²In *Trans World Airlines, Inc. v. Thurston*, — U. S. — (1985), decided earlier this Term, TWA allowed flight engineers to continue working past age 60, and allowed pilots to downbid to flight engineer positions provided that they were able to find an open position prior to their 60th birthdays. See *id.*, at — — —. Pilots who were displaced for any reason besides the FAA's age-60 rule, however, were permitted to "bump" less senior persons occupying flight engineer positions without waiting for vacancies to occur. We held that this transfer policy discriminated among pi-

[Handwritten signature]

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 21, 22

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: _____

Recirculated: _____ JUN 10 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1545

**WESTERN AIR LINES, INC., PETITIONER v.
CHARLES G. CRISWELL ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

[June —, 1985]

JUSTICE STEVENS delivered the opinion of the Court.

The petitioner, Western Air Lines, Inc., requires that its flight engineers retire at age 60. Although the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §§ 621-634, generally prohibits mandatory retirement before age 70, the Act provides an exception "where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business."¹ A jury concluded that Western's mandatory retirement rule did not qualify as a BFOQ even though it purportedly was adopted for safety reasons. The question here is whether the jury was properly instructed on the elements of the BFOQ defense.²

¹ Section 4(f)(1) of the ADEA provides:

"It shall not be unlawful for an employer . . .

"(1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . ." 81 Stat. 603, 29 U. S. C. § 623(f)(1).

² In *Trans World Airlines, Inc. v. Thurston*, — U. S. — (1985), decided earlier this Term, TWA allowed flight engineers to continue working past age 60, and allowed pilots to downbid to flight engineer positions provided that they were able to find an open position prior to their 60th birthdays. See *id.*, at —. Pilots who were displaced for any reason besides the FAA's age-60 rule, however, were permitted to "bump" less senior persons occupying flight engineer positions without waiting for vacancies to occur. We held that this transfer policy discriminated among pilots on

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 18, 1985

MEMORANDUM TO THE CONFERENCE

Re: 84-1271 - Johnson v. American Airlines, Inc.

This petition was held for Western Air Lines, Inc. v. Criswell, No. 83-1545. In Johnson, American Airlines' pilots reaching age 60 sought to downbid to flight officer positions in order to avoid the effect of the FAA's age-60 rule for pilots. American denied the downbids on the ground that the flight officer position was a training ground for future pilots. American contended that the filling of those positions with retired pilots would undermine its training program and also might cause confusion in the cockpit over who was in charge in an emergency situation.

American had some 450 career flight engineers who had been hired before 1964. After 1964, however, American never hired any persons for the flight officer position who were not qualified to become pilots. Moreover, unlike Western and TWA, American did not permit any pilot who became medically disqualified for the pilot position to downbid for the flight officer position -- although it apparently did allow pilots to downbid for various other reasons. As the Court of Appeals found, the "hiring policy adopted was to hire only future captains as flight officers and to require crew members to train and qualify for the next highest cockpit position, to which one would move in accordance with seniority and American's needs. Under this up-or-out policy, if a crew member is ever unable to progress to the next highest cockpit position, he or she must transfer to a noncockpit position or be terminated." App. to Pet. for Cert. 2, 745 F.2d 988, 991 (CA5 1984). Thus, except for the 450 career flight engineers hired before 1964 who had been given an exclusion from the requirement, all flight officers at American had to

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 28, 1985

Re: 83-1545 Western Air Lines v. Criswell

Dear John,

I, for one, am content with your proposed
per curiam.

Sincerely,



Justice Stevens

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 10, 1985

Re: 83-1545 Western Air Lines v. Criswell

Dear John,

Since you have withdrawn your per curiam circulation in this case, I will go along with your circulation of May 23 despite some reservations about the Tamiami test.

Sincerely,

Sandra

Justice Stevens

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.82 7/10 8.82