

WATSON, WARDS COVE, AND THE BURDEN OF PROOF IN DISPARATE IMPACT DISCRIMINATION

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ABSTRACT

Recent Supreme Court cases have established for disparate impact discrimination claimants the same burden of proof carried by claimants under disparate treatment discrimination. In the *Watson* case, the Court extended disparate impact to cover subjective employment practices such as interviews but maintained that plaintiffs had throughout the burden of proof. In *Wards Cove*, the Court reiterated that plaintiffs carried the burden of proof in disparate impact cases. Until these decisions, some courts had maintained that the burden of proof shifts from plaintiff to employer once the prima facie case had been established. These Supreme Court decisions have provoked a vigorous and often strident debate on the meaning and application of discrimination law. This article frames the issues in this debate and analyses the implications for disparate impact discrimination.

The legality of subjectively made employment decisions has been a difficult issue under the Civil Rights Act of 1964 (CRA). Courts have questioned employment decisions based on subjective judgments because of their susceptibility to individual bias and inconsistent interpretation by those who use them. However, some courts have conceded that employment decisions regarding professional, managerial, and other white-collar workers may appropriately be based on subjective criteria. In some situations, subjective practices have been allowed for employment decisions related to blue-collar jobs [1].

The gravamen with subjective criteria or employment practices, such as personality, aggressiveness, attitude, or leadership, is that they are less susceptible to empirical measurement. Furthermore, people may evaluate the same individual differently on these criteria because they are capable of idiosyncratic interpretation. Objective employment criteria or practices such as tests, an education

requirement, or some physical characteristics such as height are relatively simple to measure accurately [2]. Determining and proving whether subjective employment decisions are discriminatory, however, has been problematic.

Two recent Supreme Court decisions, *Watson v. Fort Worth Bank and Trust Co.* [3] and *Wards Cove Packing v. Atonio* [4], have addressed subjective practices under the CRA. In *Watson*, the court recognized that subjective employment selection practices could be analyzed under disparate impact theory rather than limiting as before such practices to evaluation under disparate treatment theory. The Court also outlined in greater clarity the proper burdens of proof that apply in disparate impact cases. In *Wards Cove*, the Court applied the *Watson* decision to a case involving subjective selection practices in which statistical evidence was principally used to establish the prima facie case.

The Court's application of *Watson* and its findings on the correct use of statistical evidence engendered severe criticism from civil rights advocates [5]. The Civil Rights Act of 1990, which President George Bush vetoed, was drafted in response to *Watson*, *Wards Cove* and other recent court decisions [6] that Congressional sponsors argued had repudiated long-standing court interpretations of the CRA. The critical issue in dispute has been the allocation of proof in disparate impact cases. This analysis starts by tracing the development of disparate impact theory in *Griggs v. Duke Power Company* [7] and then relates its subsequent unfolding through the *Watson* and *Wards Cove* cases.

THEORIES OF DISCRIMINATION

Disparate Treatment Discrimination

The structure for disparate treatment analysis was set by *McDonnell Douglas v. Greene* [8] and *Texas Department of Community Affairs v. Burdine* [9]. In disparate treatment cases the analysis concentrates on the defendant's alleged discriminatory motive or intent. In such cases proof of discriminatory motive is required for the court to reach a finding of discrimination [10]. *Burdine* stated that the employer need only meet a burden of production standard of proof to rebut a prima facie case established under the *McDonnell Douglas* model and specifically asserted that the burden of persuasion remains with the plaintiff throughout the process.

To establish a *prima facie* case of disparate treatment discrimination, the plaintiff must show that: 1) he/she belongs to a protected group; 2) he/she applied and was qualified for the job which was vacant; 3) despite satisfactory qualifications, he/she was rejected; and 4) after the rejection, the position remained open and the employer continued to seek applications from persons with similar qualifications [8]. If the plaintiff is successful, the employer must "articulate a legitimate nondiscriminatory" rationale for the employee's rejection [9, 254-5].

If the employer adequately provides such, the plaintiff has the opportunity to supply evidence challenging the employer's defense. However, the plaintiff must offer evidence that meets a persuasion burden to successfully rebut the employer's stated reason for the employment decision. At this last step the plaintiff must convince the court that the employer's rationale is merely a pretext for intentional discrimination. This pretext evidence must directly establish "that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence" [9, 256].

Disparate Impact Discrimination

Disparate impact theory was adopted by the Supreme Court in *Griggs v. Duke Power* [11]. The Court unanimously held that an employer may violate the CRA when acting in good faith without any intent to discriminate. In oft-repeated language the Court stated that Congress intended in Title VII "to achieve equality of employment opportunities and remove barriers that . . . favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices" [11]. The theory of disparate impact discrimination advanced in *Griggs* is based on the discriminatory effect of facially neutral policies rather than, as in disparate treatment cases, the intent underlying the defendant's action [12].

In *Griggs* the Court held that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability" [11, 429]. The Court went on to conclude that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation" [11, 429-30]. Hence, facially neutral selection practices that have significant adverse effects on protected groups violate Title VII. As the *Griggs* court stated "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation" [11, 431].

The pre-*Watson* evidentiary framework for disparate impact requires the plaintiff to establish a *prima facie* case by proving that the employer's selection practices have a disproportionate effect, or adverse impact, on a protected group. If the plaintiff satisfies this burden through the presentation of statistical evidence of adverse effect, the employer then must present evidence that the challenged practice "bear[s] a demonstrable relationship to successful performance of the job for which it was used" [11, 431]. Doing such establishes that the selection practice measures the knowledge, skills and abilities necessary for successful job performance. If the employer meets the business-necessity or job-relatedness defense, the plaintiff may then introduce evidence to show that a less discriminatory procedure will equally advance the employer's legitimate interests [13].

Comparing the Two Theories Prior to Watson

The critical distinction between the two theories is the allocation of the burden of proof. Under disparate impact theory attention is directed to the results of the employer's selection practices. In contrast, under disparate treatment theory, the employer's discriminatory motive is the focal point [13]. In disparate impact cases, the plaintiff bears the initial burden of proof in establishing the *prima facie* case. If this is met, the burden shifts to the defendant to provide a defense based on the job relatedness or business necessity of the suspect practice. Finally, if the defendant should satisfy that burden, the plaintiff could still prevail by suggesting a less discriminatory alternative or by showing that the practice actually cloaks the employer's intention to discriminate against a protected class.

However, in disparate treatment theory the plaintiff does not, at any time, relinquish the burden of persuasion. After the establishment of *prima facie* case, the employer has a burden or production level of proof to justify the employment decision on some nondiscriminatory basis. The burden of persuasion, though, remains with the plaintiff and must be met if the plaintiff is to rebut the employer's explanation at the final pretext stage.

WATSON AND SUBJECTIVE PRACTICES

Since the touchstone *Griggs* case, disparate impact analysis had been confined to situations involving objective criteria such as a standardized test. Where employment decisions have been made on the basis of personal judgment or other innately subjective criteria, the Supreme Court applied disparate treatment theory in which evidence of intent to discriminate is required [3, 107].

The courts of appeal, however, have not strictly followed the Supreme Court's declension on the appropriate theory of discrimination for subjective practices. Roeger identified several patterns of evidentiary standards used by the appeals courts in cases involving subjective employment practices [14]. The Third, Sixth, Eleventh, and D.C. circuits consistently applied the disparate impact model to subjective employment decisions. The Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth circuit had also applied the disparate impact model to subjective decision making, but had not been consistent in their approach.

Given this conflict between the circuits, the Supreme Court agreed to review the *Watson* case, which dealt with the applicability of disparate impact theory to subjective employment decisions. *Watson*, a black female, claimed that Fort Worth Bank and Trust had discriminated against her when it refused to promote her to any of four supervisory vacancies in succession. She alleged moreover that the bank had unlawfully discriminated against blacks as a class in hiring, compensation, initial placement, promotions, terminations, and other terms and conditions of employment. The District Court rejected the class-based claims and determined

that Watson was not an adequate representative of the applicant class, thereby disallowing her charge of a discriminatory promotion policy. It also concluded that Watson had failed to establish a *prima facie* case of racial discrimination in hiring because the percentage of blacks in the bank's workforce approximated the percentage of blacks in the metropolitan area where the bank is located.

The District Court did consider her individual claims under the disparate treatment model and found that she had established a *prima facie* case. However, the bank successfully rebutted the charges by presenting legitimate, nondiscriminatory reasons for each of the challenged promotion decisions and Watson failed to show that the reasons were a pretext for racial discrimination. Therefore, the action was dismissed by the District Court. On appeal the District Court findings were supported and the case was not remanded [15].

In the petition to the Supreme Court, Watson argued that the disparate impact model should be applied to analyze hiring or promotion systems that involve the use of discretionary or subjective criteria. The Supreme Court granted certiorari "to decide . . . whether disparate impact analysis appl[ies] to subjective employment practices, and whether such analysis can be applied in this new context under workable evidentiary standards" [3, 104, 106].

According to Lee, three major issues relating to disparate impact theory were unresolved prior to the Court's *Watson* decision [2]. First, may plaintiffs challenge subjective employment practices or criteria under disparate impact theory? Second, what evidentiary burden must defendant employers meet to rebut successfully plaintiffs' assertions that such subjective practices violate Title VII? Third, can plaintiffs attack the cumulative effects of an employer's practices instead of identifying each of the specific policies or practices that disfavor a protected class? The Court's decision in *Watson* addressed each of these critical issues.

Subjective Practices Under Disparate Impact Theory

In her plurality decision, Justice O'Connor concluded that bringing subjective practices under disparate impact theory was necessary to protect the Court's *Griggs'* line of cases. The Court's concern was that limiting disparate impact to objective criteria would enable employers to combine both types of practices and thereby avoid a disparate impact analysis. As long as the employer had not made decisions solely on objective factors, "selection systems that combine both types would generally have to be considered subjective in nature" [3, 107]. The *Watson* court felt that both subjective and objective criteria are classifiable as "facially neutral practice[s], adopted without discriminatory intent, [which] may have effects that are indistinguishable from intentionally discriminatory practices" [3, 107]. An undisciplined subjective decision-making system, the Court remarked, that "has . . . the same effects as a system pervaded by impermissible intentional

discrimination” should fall under “Title VII’s proscription against discriminatory actions . . .” [3, 107].

Regarding evidentiary standards, the Court believed that difficulties inuring to validating subjective criteria raised the danger that employers would “adopt surreptitious quota systems in order to ensure that no plaintiff can establish a statistical prima facie case” [3, 108]. Simply presenting evidence of statistical disparities in the composition of an employer’s workforce does not necessarily imply that “unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance” [3, 108]. Nor did the Court maintain that employers should be expected to “eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in . . . their workforces” [3, 108]. As the Court noted, “extending disparate impact analysis to subjective employment practices has the potential . . . to lead in practice to perverse results . . . [i]f quotas and preferential treatment become the only cost-effective means of avoiding” violations of Title VII [3, 108]. Such results would, the Court pointed out, emphatically contradict the intent of Congress [3, 108].

Despite this concern, the Court argued that proper evidentiary standards would minimize the risk that employers would resort to disallowed practices. Using this opportunity, the Court embarked upon “a fresh and somewhat closer examination of the constraints that operate to keep [disparate impact] analysis within its proper bounds” [3, 108].

The direction that this analysis of evidentiary standards would take was indicated in the Court’s earlier linking together of disparate treatment and impact discrimination. The plurality noted that the need to prove intent distinguishes the facts and evidence in disparate treatment from those in disparate impact. In disparate impact the evidence “focuses on statistical disparities, rather than on specific incidents, and on competing explanations for these disparities” [3, 106]. However, these differences in “factual issues . . . do not imply that the ultimate legal issue [in disparate impact] is different than in cases [of]. . . disparate treatment. . . .” Therefore, defendants should not be held “liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination” [3, 106]. The plurality’s subsequent discourse on evidentiary standards significantly reified the meaning of these statements.

Specific Causation and Burden of Proof

The Court identified two constraints that would militate against the adoption of quotas and preferential treatment as a response to this decision. First, the Court stated that plaintiffs must identify the specific challenged employment practice and then prove causation by showing “that the practice in question has caused the exclusion of applicants . . . because of their membership in a protected group”

[3, 109]. To establish causation, plaintiffs must show “statistical disparities . . . sufficiently substantial that they raise an inference of causation” [3, 109]. Employers may present countervailing evidence where they believe the plaintiff’s statistical evidence is wrong or deficient. The Court specifically mentioned that small or incomplete samples, inadequate statistical methods, and improper comparison groups could provide the basis upon which to challenge plaintiff’s statistics.

Second, the Court found another constraint in the business-necessity or job-relatedness defense. The plurality stated that the employer’s “burden of showing that any given requirement must have a manifest relationship to the employment . . . should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant” [3, 110]. Going on, the Court said that “the ultimate burden of proving that discrimination . . . has been caused by a specific employment practice remains with the plaintiff at all times” [3, 110]. The plurality by this statement made it clear that as in disparate treatment analysis the burden of proving discrimination stays with the plaintiff. This language in fact closely parallels the Court’s discussion of burden of proof for disparate treatment in the *Burdine* case: “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff” [9, 248, 252-56].

Establishing a Manifest Relationship

Evidence sufficient to establish a manifest relationship between the challenged practice and the particular employment, the Court noted, need not require formal validation studies. As Justice O’Connor wrote, “employers are not required, even when defending standardized or objective tests, to introduce formal ‘validation studies’ showing that particular criteria predict actual on-the-job performance” [3, 110]. For subjective criteria, the Court said that “employers will often find it easier than in the case of [objectives] tests to produce evidence of a manifest relationship” [16]. The Court pointed out that “subjective selection practices would be so impossibly difficult to defend under disparate impact analysis that employers would . . . adopt numerical quotas in order to avoid liability” [3, 107].

In *Watson* the Court recognized that “except for jobs whose occupants make or sell a product, thereby inviting quantification and statistical correlation between selection criteria and performance, validation is difficult or impossible” [3, 108]. However, in many jobs successful performance involves qualities that cannot be measured directly [3, 108]. As some commentators have opined, employers have an onerous burden in defending subjective qualities such as effective leadership, cooperation, customer/client relations, or legal/policy compliance [12]. By limiting the employer’s burden of proof, the *Watson* plurality believed that it could

bring subjective practices under disparate impact theory without triggering quota systems.

WARDS COVE

The day after announcing its *Watson* decision, the Court granted *certiorari* in *Wards Cove Packing Co., Inc. v. Atonio* [4]. The Court accepted this case to clarify issues disputed in *Watson* pertaining to the proper application of liability under disparate impact theory. In *Wards Cove*, the *Watson* plurality joined by Justice Kennedy projected a restructured disparate impact proof model that augmented the requirements necessary to prove a disparate impact claim. This case gave the Court a second opportunity to “examine . . . [whether] a plaintiff could attack the cumulative effect of a multi-factor hiring/promotion system or whether specific system elements . . . had to be identified” [2]. In addition, *Wards Cove* enabled the Court to identify again what the employer must demonstrate to defend subjective practices and whether that defense differs from the defense required for objective practices.

The *Wards Cove* case involved an Alaskan salmon cannery with two general types of workers: unskilled cannery jobs and skilled noncannery jobs. The unskilled jobs were predominantly filled by nonwhites, and the skilled positions were filled with white workers. The plaintiffs alleged that the workforce’s racial stratification between cannery and noncannery jobs resulted from various employer hiring and promotion practices. The District Court rejected plaintiffs’ claims of both disparate treatment and impact discrimination. On appeal, the Ninth Circuit reversed and stated that respondents had made out a *prima facie* case of disparate impact discrimination in hiring for both skilled and unskilled noncannery jobs by statistics showing a high percentage of nonwhites in cannery jobs and a low percentage of such workers in noncannery positions. The appeals court also held that when a plaintiff shows that disparate impact has been caused by “specific, identifiable employment practices or criteria, the burden shifts to the employer to prove the challenged practice’s business necessity” [17].

Statistical Evidence Standards

The Ninth Circuit recognized a *prima facie* case based on statistics comparing the racial composition of the cannery to noncannery workforce. The Supreme Court rejected this test as inconsistent with precedent and the intent of Title VII. The proper test, the Court observed, is “between the racial composition of the [at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market” [18]. The court of appeals’ test fails because using the cannery workforce as a proxy for the qualifieds in the relevant labor market for the skilled noncannery jobs is patently wrong. As the Court surmised, comparing

the percentage of nonwhite skilled noncannery workers to the percentage of nonwhite cannery workers to ascertain disparate impact is “nonsensical.” Allowing such a test to stand would subject an employer to challenges whenever there was a racial imbalance in the employer’s workforce and would likely lead to quotas as the “only practical option . . . to . . . insur[e] that no portion of his work force deviates in racial composition from the other portions . . .” [4, 1524].

The Court also faulted the Ninth Circuit’s position with regard to the unskilled noncannery positions. First, a *prima facie* disparate impact case cannot be established on the basis of a racial imbalance in different segments of the employer’s workforce even for positions that require similar skills. Absent proscribed barriers that limit minority applicants to the noncannery jobs, “if the percentage of selected [nonwhite] applicants . . . is not significantly less than the percentage of qualified [nonwhite] . . . applicants, the employer’s selection mechanism probably does not operate with a disparate impact on minorities” [4, 1524].

Second, defining the cannery workers as the likely labor pool for unskilled noncannery positions was wrong. As the court said, this potential labor pool was too broad because most “cannery workers did not seek jobs in unskilled noncannery positions,” thereby invalidating the cannery workers “as a surrogate for the class of qualified job applicants because it contains many persons who have not (and would not) be noncannery job applicants” [4, 1524]. On the other hand, using cannery workers as a proxy for the “qualified labor population generally . . . is too narrow because there are obviously many qualified persons in the labor market for noncannery jobs who are not cannery workers” [4, 1525].

Finally, the Court noted that the statistical disparity between nonwhite cannery and nonwhite noncannery workers resulted primarily from the employer’s reliance on a labor union to fill the cannery positions. Not using the union as its hiring source would, as the District Court observed, likely reduce the racial differential to statistical insignificance. The Court could not see how the employer’s use of the union to fill the cannery jobs establishes a case of disparate impact for the noncannery positions as maintained by the Ninth Circuit.

The Need to Show Causation

The question of causation in a disparate impact case was also clarified in *Wards Cove*. The Court stated that the “law in this respect was correctly stated by Justice O’Connor’s opinion in *Watson* . . .” [4, 1525]. Following that analysis the Court reiterated that the “plaintiff does not make out a case of disparate impact simply by showing . . . [a] bottom line . . . racial imbalance in the work force” [4, 1526]. The plaintiff must, the Court stressed, identify a specific employment practice and then show that the “challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites” [4, 1525; 19].

Business Justification and Validation

If plaintiff establishes a *prima facie* case, the inquiry shifts to “whether a challenged practice serves in a significant way, the legitimate employment goals of the employer” [4, 1527]. The Court in *Wards Cove* again adopted and reinforced the allocation of proof scheme that had been discussed in *Watson*. The Court stated that “. . . the employer carries the burden of producing evidence of a business justification . . . [while] the burden of persuasion . . . remains with the disparate-impact plaintiff” [4, 1527]. The Court justified this position by noting that “this rule conforms with the usual method for allocating persuasion and production burdens in the federal courts . . . and [follows] . . . the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer’s assertion that the [challenged] practice was based solely on a legitimate . . . consideration” [4, 1527]. While the Court did acknowledge that a contrary view could be drawn from some earlier decisions, “an employer’s ‘burden of proof’ with respect to a legitimate business justification defense . . . should have been understood to mean an employer’s production—but not persuasion—burden” [4, 1527].

Justice White’s *Wards Cove* opinion also suggested that the employer is not required to validate subjective practices challenged under disparate impact theory. According to Lee, “except for jobs whose occupants make or sell a product, thereby inviting quantification and statistical correlation between selection criteria and performance, validation is difficult or impossible” [2]. Justice White backed away from the *Griggs* standard of “business necessity,” stating that “the touchstone . . . is a reasoned review of the employer’s justification” [4, 1527]. While the Court rejected an insubstantial justification, it noted that nothing requires the challenged practice to “be essential or indispensable to the employer . . .” to be considered a business necessity [4, 1527]. Requiring such a high level of justification would, the Court feared, lead employers to adopt hiring quotas as the only practical option to avoid challenges to their employment practices [4, 1527].

Alternate Practices and Pretext

Even if the plaintiff fails to rebut the employer’s business necessity defense, the plaintiff may still prevail by offering an alternate practice with less racial effect. Therefore, in *Wards Cove* the Court stated that “any alternative practices . . . must be equally effective as [the current] hiring procedures . . . and . . . factors such as the cost or other burdens of . . . alternative selection devices are relevant in determining whether they would be equally as effective . . .” [4, 1527-8]. However, the Court cautioned against substituting the courts’ view of appropriate procedures for that of businesses since courts are “generally less competent than employers to restructure business practices” [4, 1528]. These constraints clearly

indicated that the Court wanted to minimize judicial oversight of subjective management decisions that were well-grounded in practice and rationale.

CONCURRENT AND DISSENTING OPINIONS IN WATSON AND WARDS COVE

Much debate and criticism has followed the *Watson* and *Wards Cove* decisions. The legal parameters of this discussion were forcibly identified in the concurrent and dissenting opinions to the cases. Essentially, two criticisms have been raised against these decisions: first, that the distinction between disparate treatment and disparate impact discrimination has been clouded, if not ignored, and second, that the employer's burden of proof in disparate impact cases has been eased while the complainant's burden has been increased.

Distinguishing Disparate Impact from Disparate Treatment

The concurrent opinion in *Watson* framed the fundamental issue: that the plurality had incorrectly equated disparate impact and disparate treatment discrimination. Though disparate impact focuses on the effect of an employment practice and disparate treatment on the employer's intent, the plurality treated each type of discrimination as analytically the same. The significance of this holding is shown by its impact on the *prima facie* case. Prior to *Watson*, a *prima facie* case of disparate impact discrimination meant that an "employment practice [had] directly established . . . a disparity . . ." which required the employer to provide a business necessity defense of "the process producing the disparity" [3, 112]. Thus, once an improper effect has been shown by the *prima facie* case, "it is up to the employer to prove that the discriminatory effect is justified" [3, 112].

Moreover, the employer's burden in disparate impact is to provide an affirmative defense of business necessity. Thus, once the *prima facie* case is established, the employer must "justify the practice by explaining why it is necessary to the . . . business. Such a justification is a classic example of an affirmative defense" [4, 1531]. Instead, the plurality articulated a view of disparate impact closer to that of disparate treatment claims where the *prima facie* case only requires the employer to produce a legitimate, nondiscriminatory reason for the its action.

As trenchantly noted in the concurring opinion, the *prima facie* case in disparate treatment does not "require a trial court to presume . . . that an employer intended to discriminate . . . [and] is therefore insufficient to shift the burden of proving a lack of discriminatory intent to the" employer [3, 113]. By adopting the disparate treatment model, "the nature of the [employer's] burden of proof in disparate impact cases appears to have taken on the less onerous tone of disparate treatment cases" [20].

The concurrence, though, re-asserted the opinion that to rebut a *prima facie* case of disparate impact the employer must meet a burden of persuasion level of proof to escape liability. The dissenting opinion in *Wards Cove* likewise iterated that the employer's burden of proof is "an affirmative defense of business necessity . . . [whereby the employer] can escape liability only by persuading the factfinder that the . . . practice . . . is necessary to the operation of business . . ." [4, 1531]. The plurality and majority opinions had on the other hand rendered nugatory the "distinct orders of proof" between disparate treatment and impact discrimination without drawing upon statutory authority or precedent.

The Business Necessity Requirement for Subjective Practices

The plurality in *Watson* asserted that the employer's production burden of business necessity could be satisfied by "producing evidence that its employment practices are based on legitimate business reasons" [3, 110]. But, the concurrence argued that this disparate treatment level burden was inappropriate for disparate impact claims since the "employer accused of discriminating intentionally need only dispute that it had any such intent . . . [while] such a justification is simply not enough to legitimize a practice that has the effect of excluding a protected class from job opportunities . . ." [3, 113]. In their view, justification beyond that of offering any legitimate reason must be required to rebut the *prima facie* case.

The concurrence maintained that "to be justified as a business necessity an employment criterion must bear more than an indirect or minimal relationship to job performance" [3, 113]. The challenged employment practice, the concurrence asserted, "must directly relate to a prospective employee's ability to perform the job effectively" [3, 113]. While demonstrating the nexus between the employment practice and performance for subjective practices may not be possible under the EEOC's Uniform Guidelines, the concurrence believed nonetheless that "a variety of methods are available for establishing . . ." the criterion-performance link [3, 114]. The concurrence cited validation studies, expert testimony and successful past practice as methods of establishing business necessity at a persuasion level. As the concurrence strongly emphasized in its discussion of meeting the business necessity defense, a court "may not rely on its own, or an employer's, sense of what is 'normal' . . . as a substitute for a neutral assessment of the evidence presented" [3, 115].

Another difference turns on the *Watson* plurality's statement that an employer "will often find it easier . . . to justify the use of subjective practices as a business necessity" [3, 115]. The greater difficulty in determining the relation between subjective practices and job performance along with the plurality's suggestion that such practices will be easier to defend could lead to the adoption of vague subjective criteria that have disparate impact without fear of liability. The

plurality's analysis, the concurrence argued, "would encourage employers to abandon . . . selection [methods] subject to neutral application for the shelter to vague generalities" [3, 115]. While the task may be more complicated, lower requirements for subjective practices should not be accepted by the courts. And what should be explicitly avoided is a situation where courts accept subjective practices "at face value, as long as they strike the . . . court as normal and legitimate" [3, 115].

Statistical Evidence Standards

In *Wards Cove*, the majority held that statistical evidence must be drawn from comparisons of the employer's workforce and the relevant labor market, not from intra-workforce comparisons. The dissent in *Wards Cove* argued that greater credence should be given statistics derived solely from imbalances in the employer's workforce. The dissent maintained that neither fixed numerical standards nor exact parameters for the relevant labor market had been adopted by the courts. The dissent instead urged that the courts consider the particular facts of a case rather than subscribe to rigid formulas when identifying the relevant labor market for at issue jobs. Thus, when considering the merits of a complainant's evidence, there are circumstances when the "racial stratification in the work force [supplies] a significant element of . . . the *prima facie* case" [4, 1534].

THE EFFECT ON DISPARATE IMPACT

Differing opinions have been expressed about the impact *Watson* and *Wards Cove* will have on disparate impact discrimination. Shaw, Moore, and Braswell see the disparate impact model becoming an artifact, since "the Court has demonstrated an eagerness to diminish the practical value of disparate impact analysis while keeping it at least visible, a relic of past excesses" [21]. Others think that the critical impact has been changing the employer's burden at trial to demonstrating the rationale for the named practice rather than having to convince the trier of fact of its essential nature [22].

Bond and Sanders in reference to Justice O'Connor's statement about predicting on-the-job performance stated that the "[t]he defendant need only produce evidence that the challenged practice is job related" [20, 1038]. They noted that "the plurality appears to have . . . changed only the nature of the defendant's burden of proof" [20, 1038]. Therefore, the burden of proving business necessity is somewhat more difficult than merely proving a legitimate business reason. Bond and Sanders point out that "other language in the plurality's opinion suggests that while the Court has [lowered] the defendant's burden to that of

production . . . , the same can not be said for the nature of its burden [which] seems to be toward job relatedness . . . ” [20, 1038].

Cox embraced a similar view of the cases. He stated that “it is possible to interpret the defense as requiring only a plausible or reasonable relationship between the challenged practice and business needs.” This implies that “disparate impact theory is merely an extension of disparate treatment theory designed to capture pretextual use of race and gender neutral employment criteria” [23]. Cox concluded that *Watson* has established a weak form of impact theory that is to be applied to subjective criteria versus the form of impact theory for objective practices established in *Griggs*.

CONCLUSION

Subjective practices are not *per se* discriminatory. They are, however, vulnerable to abuse and may be a subterfuge for intentional discrimination. Even when the decision maker lacks any discriminatory animus, subjective criteria such as a preliminary interview may operate as a built-in headwind, just as the diploma and testing requirements did in *Griggs*. As Alessandra said, “[s]ubjective decisions also permit unconscious discrimination, which, because it is unintentional, is not covered under disparate treatment analysis by definition” [24].

Watson allowed challenges to subjective practices under disparate impact theory but also explicitly placed the ultimate burden of proof on the plaintiff. The burden shifting that had been recognized prior to *Watson* was obviated. Additionally, the Court maintained that the employer’s business-necessity, job-related defense in disparate impact would be satisfied by producing evidence of legitimate business reasons for the employment practice.

The impact of *Watson* and *Wards Cove* on disparate impact analysis has been controversial. Alessandra wrote that these decisions “may frustrate the purposes of Title VII by deterring subjective criteria suits [and] . . . may represent at least a partial collapsing of the disparate impact and disparate treatment tests into the same analysis” [24]. On the other hand, Lee pointed out that the combined effect of *Watson* and *Wards Cove* may likely expose employers to more litigation, because subjective practices may now be challenged under disparate impact theory [2, 415].

The manner in which the Court clarified the relation of subjective practices and burden of proof to disparate impact has been at the core of this disagreement. Given this debate and the remaining unanswered questions on disparate impact, more litigation and additional legislation seem likely as the parties struggle to defend or condemn the Court’s most recent venture into Title VII law.

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