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New Disparate Impact Analysis in Employment Discrimination: Emanuel v. Marsh in Light of Watson, Atonio, and the Failed Civil Rights Act of 1990, The

Robert L. Norton

The New Disparate Impact Analysis in Employment Discrimination: *Emanuel v. Marsh*[1] in Light of *Watson*,[2] *Atonio*,[3] and the Failed Civil Rights Act of 1990

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin.[4] Under Title VII, a determination of unlawful employment discrimination may be based on either disparate treatment analysis or disparate impact analysis.[5] Disparate treatment theory requires a showing that the employer intended to discriminate against an employee on a prohibited basis, such as the employee's race or sex,[6] while disparate impact theory does not require a showing of discriminatory intent.[7] Instead, disparate impact theory requires a showing that a facially neutral employment practice, without a proper business justification, operated to adversely affect a member of a protected group.[8]

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1. 828 F.2d 438 (8th Cir. 1987).
2. Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988).
3. Wards Cove Packing v. Atonio, 109 S. Ct. 2115 (1989).
4. Civil Rights Act of 1964, §§ 701-18, J, 42 U.S.C. §§ 2000(e)-(e)17 (1982).
5. Disparate impact analysis and disparate treatment analysis stem from § 703(a) of the Civil Rights Act of 1964, which provides:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment; because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

6. Texas Dept of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
7. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).
8. *Griggs*, 401 U.S. at 431.

The Supreme Court first used disparate impact analysis in employment discrimination cases in *Griggs v. Duke Power Co.*[9] and disparate treatment analysis in *McDonnell Douglas Corp. v. Green.*[10] Controversy resulted over the scope and application of the analyses, including whether the nature of the challenged employment practice should dictate which mode of analysis, disparate impact or disparate treatment, should be used to determine if illegal discrimination occurred.[11] Specifically, the question became whether courts should use disparate impact or disparate treatment analysis when dealing with subjective employment decisions.[12] In *Watson v. Fort Worth Bank and Trust*[13] and *Wards Cove Packing v. Atonio,*[14] the Supreme Court answered the question by holding that subjective employment practices should by analyzed under a modified disparate impact analysis.

This Comment will examine the application of the radically changed disparate impact analysis of *Watson* and *Atonio*, through an analysis of an Eighth Circuit case, *Emanuel v. Marsh.*[15] In *Emanuel*, a pre-*Watson* and *Atonio* opinion, the Eighth Circuit refused to apply disparate impact analysis

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9. 401 U.S. 424 (1971).

10. 411 U.S. 792 (1973).

11. In determining whether disparate impact analysis may be applied to subjective employment practices, the circuits have split. The Fourth Circuit traditionally has not applied disparate impact theory to subjective employment practices. Equal Employment Opportunity Commission v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983), *rev'd on other grounds* 467 U.S. 867 (1984).

The Fifth, Seventh and Eighth Circuits have reached internally conflicting results. *See* Emanuel v. Marsh, 828 F.2d 438 (8th Cir. 1987) (disallowed application); Griffin v. Board of Regents, 795 F.2d 1281 (7th Cir. 1986) (refused to apply disparate impact analysis); Regner v. City of Chicago, 789 F.2d 534 (7th Cir. 1986) (allowed the application); Page v. United States Indus., 726 F.2d 1038 (5th Cir. 1984) (allowed the application of disparate impact to subjective employment criteria); Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983) (allowed application of impact analysis), *cert. denied*, 466 U.S. 972 (1984); Pouncy v. Prudential Ins. Co. 668 F.2d 795 (5th Cir. 1982) (disallowing the application).

The remaining circuits allowed the application of impact analysis to subjective employment criteria. *See* Wards Cove Packing Co. v. Atonio, 810 F.2d 1477 (9th Cir. 1987); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984); Zahorik v. Cornell Univ., 729 F.2d 85 (2nd Cir. 1984); Rowe v. Cleveland Pneumatic Co., Numerical Control, 690 F.2d 88 (6th Cir. 1982).

12. *See supra* note 11. An employment practice is considered subjective if it involves an opinion, perhaps in the form of a supervisory review rating or a judgment based on an interview.

13. 490 U.S. 642 (1988).

14. 109 S. Ct. 2115 (1989).

15. 828 F.2d 438 (8th Cir. 1987).

to subjective employment practices.[16] The court found for the defendant/employer after applying disparate treatment analysis and finding no intentional discrimination.[17] The *Watson* and *Atonio* courts subsequently concluded that courts should analyze subjective employment practices with disparate impact theory, but drastically altered the burdens of proof.

In this Comment, the author argues that the circuit court in *Emanuel* would reach the same finding of "no illegal discrimination"[18] using *Watson* and *Atonio*'s new disparate impact analysis as it did using disparate treatment analysis. This exercise will illustrate the formidable barriers facing employment discrimination plaintiffs under the new disparate impact analysis. Finally, this Comment addresses the failed Civil Rights Act of 1990, focusing on the attempt to restore the burdens of proof in disparate impact analysis to their pre-*Watson* and pre-*Atonio* status.

II. FACTS OF *EMANUEL*

Plaintiffs Alston A. Emanuel and Leon Paige brought a class action against the United States Army for employment discrimination based on race.[19] The plaintiffs alleged that the U.S. Army Troop Support and Aviation Material Readiness Command (TSARCOM) either persuaded them not to apply for promotions or denied them promotions based on their race.[20]

Emanuel, a black male civilian, was employed as a packaging specialist at TSARCOM in St. Louis, Missouri.[21] He sought a promotion in 1975, but was denied the promotion in favor of Snyder, a white male with comparable training, skill, and experience.[22] Emanuel filed a complaint alleging racial discrimination with the U.S. Army Civilian Appellate Review Agency (USACARA), an independent agency that investigates potential employment discrimination by the Army.[23] USACARA concluded that Emanuel's supervisors had discriminated against him and the Army accepted USACARA's recommendation to retroactively promote Emanuel.[24] Snyder, the white male originally promoted in Emanuel's place, retained his promotion and was transferred.[25]

16. *Id.* at 442.
17. *Id.*
18. *Id.* at 443.
19. *Id.* at 439.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

Snyder and Emanuel performed well in their respective positions in the following years and both received awards recognizing their contributions.[26] In 1980, Snyder and Emanuel once again applied for a promotion where only one opening was available.[27] Emanuel had temporarily held the position to be filled, but Snyder received the promotion.[28]

The individual who promoted Snyder over Emanuel testified that he based the promotion decision in part on a rating given to individual employees, a subjective rating based on the opinion of the employee's supervisor.[29] Emanuel alleged that his supervisor, the same person who discriminated against him in 1976 according to USACARA, had given him unjustifiably low ratings based on his race.[30] An Army review panel agreed with Emanuel's contention of an incorrect rating and, as a result of the panel's findings, his rating was raised.[31] Once again, Emanuel filed a racial discrimination complaint with USACARA and the agency once again found that the Army discriminated against Emanuel based on his race.[32] USACARA noted specifically that Emanuel's qualifications had been improperly evaluated by his supervisor and that this subjective employment device, the supervisory rating, caused the promotion of Snyder over Emanuel.[33] This time, however, the Army rejected the agency's conclusion of racial discrimination and refused to act on Emanuel's behalf.[34] Emanuel filed a Title VII suit in federal district court seeking a promotion and back-pay.[35]

The district court applied disparate treatment analysis and held that a *prima facie* case of racial discrimination had been made, but also found that the Army had rebutted the presumption by articulating "convincing non-discriminatory reasons in support of its [promotion] decision."[36] The district court found for the Army, concluding that Emanuel had not met his burden of proving that the Army intentionally discriminated because he had not

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26. *Id.*
27. *Id.* at 440.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* The review panel did not inquire as to discrimination. They simply found that Emanuel deserved a higher rating than he had received. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 440-41. Emanuel originally filed the suit as a class action, but after his retirement, Paige was substituted for Emanuel as the class representative. In the present case, Paige's appeal from the district court's order denying class certification was denied. *Id.* at 441.
36. *Id.*

proven that the Army's offered reasons were a pretext for racial discrimination.[37] On appeal, Emanuel argued that the district court erred in refusing to apply disparate impact analysis to the discrimination claim.[38]

The Eighth Circuit affirmed the district court's use of disparate treatment analysis and its finding of "no illegal discrimination."[39] The court noted that the challenged employment practice, supervisory review and rating, was subjective in nature.[40] The court held that when an employer utilizes subjective employment procedures, disparate treatment analysis, not disparate impact analysis as Emanuel contended, should be applied; and that, under a treatment analysis, there was sufficient evidence for the district court to find that the Army had not discriminated against Emanuel based on race.[41]

III. LEGAL BACKGROUND

Title VII of the Civil Rights Act of 1964, as amended in 1972, prohibits employment discrimination and the use of criteria which tend to deprive an individual of opportunities in employment based on the individual's race, color, religion, sex, or national origin.[42] Two distinct causes of action carrying different *prima facie* elements and different burdens of proof sprung from this Title VII mandate.[43]

First, "disparate treatment" analysis requires that a plaintiff show intentional discrimination.[44] Plaintiff makes a *prima facie* case by showing: 1) that she is a member of a protected group; 2) that she applied and was qualified for the position in question; 3) that she was subsequently rejected; and 4) that the employer continued to seek similarly qualified applicants for the position.[45] If the plaintiff makes the *prima facie* case, the burden shifts

37. *Id.*

38. *Id.* at 439. Emanuel also argued that the Army should be estopped from litigating the qualifications issue with regard to the white civilian promoted instead of Emanuel and that the district court's findings were clearly erroneous. *Id.* The estoppel argument is based on a study conducted by the Army which rated Emanuel as more qualified than the white male who received the promotion for which Emanuel applied. *Id.*

39. *Id.* at 439.

40. *Id.* at 442.

41. *Id.* at 442-3.

42. Title VII of the Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (1982).

43. *Id.*

44. *See* McDonnell Douglas Co. v. Green, 411 U.S. 792 (1971).

45. *Id.* at 802.

to the employer/defendant to articulate a nondiscriminatory reason for the rejection.[46] If the defendant meets this burden, the plaintiff must demonstrate that the defendant's articulated reason for rejection is a mere pretext for discrimination based on race or another disfavored justification.[47] The *prima facie* case and the defendant's burden are easily satisfied and the ultimate issue generally centers on whether the plaintiff is able to show that defendant's stated rationale is a mere pretext for intentional discrimination.[48]

Due to a plaintiff's difficult requirement of meeting the ultimate burden in "disparate treatment" cases, plaintiffs have preferred "disparate impact" analysis. Traditionally, a plaintiff made a *prima facie* case for a disparate impact claim if she showed that a facially neutral employment practice, such as a standardized test, had a discriminatory impact on a protected group, such as the non-hiring of a higher percentage of women than men evidenced by a statistical imbalance in the work-force.[49] The burden then shifted to the defendant who could attempt either to rebut the showing of discriminatory impact,[50] perhaps by showing that the plaintiff had not used the proper labor pool in her proof of the statistical imbalance, or to justify the challenged practice by proving that the challenged practice is a business necessity or is at least job-related.[51]

As noted above, the Eighth Circuit applied disparate treatment analysis to subjective employment procedures in *Emanuel*, rejecting plaintiff's arguments for the application of disparate impact analysis.[52] At that time, the circuits were split as to whether subjective practices should be analyzed under treatment or impact theory.[53] Courts discussed the advantages and disadvantages of applying disparate impact analysis to subjective employment practices[54] and a current discussion of these advantages and disadvantages will benefit the upcoming analysis.

Arguing for the application of disparate impact to subjective practices, plaintiffs noted that subjective selection methods such as supervisors' opinions, which may be influenced by prejudicial stereotypes, are as likely to

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46. *Id.*

47. *Id.* at 804.

48. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1980); *McDonnell Douglas*, 411 U.S. at 802.

49. *Griggs*, 401 U.S. 424 (1971).

50. Defendant can challenge the validity of a plaintiff's statistical proof in an attempt to show that no actionable impact occurred. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 313 (1977).

51. *Griggs*, 401 U.S. at 431.

52. *Emanuel*, 828 F.2d at 442.

53. *See supra* note 11.

54. *Id.*

result in discriminatory effects as are objective methods such as standardized tests.[55] Thus, the discriminatory effects of both objective and subjective practices should be actionable under the same theory, disparate impact theory. Disparate impact theory should be utilized because a plaintiff should not face the more difficult requirement of proving intentional discrimination under disparate treatment theory simply because the employer utilizes subjective employment practices.[56]

If courts use treatment analysis simply because an employer uses subjective employment methods, employers could avoid all impact claims by inserting supervisory reviews or interview scores, which are considered subjective procedures, into their hiring or promoting practices. According to the Supreme Court in *Watson v. Fort Worth Bank & Trust*, an employer could convert its employment procedures to "subjective methods" simply by introducing a single subjective employment practice into her existing employment practices.[57] Thus, employers could adopt a single subjective practice and avoid disparate impact analysis, which in effect would isolate the employer from liability unless plaintiffs could show that the employer intentionally discriminated using disparate treatment analysis. In effect, a crafty employer could eliminate altogether the possibility of disparate impact litigation and force plaintiffs to prove intentional discrimination if courts require that subjective employment practices be analyzed with disparate impact theory.

Employers argue that courts must analyze subjective employment methods with disparate treatment theory only, because defending subjective employment practices under disparate impact theory would be nearly impossible. Employers claim that subjective employment practices, such as ratings based on supervisory opinions, would be impractical to validate under disparate impact theory's "business necessity" burden.[58] In short, employers argue that they need subjective employment practices to evaluate important subjective employee qualities such as attitude and tact, but they fear that a court would not find these traits to be business necessities.[59]

Therefore, to avoid liability under disparate impact analysis, employers claim that they in effect must adopt quotas to insure that a statistical imbalance does not occur. The Supreme Court, however, outlawed the use of quotas unless the employer can demonstrate a compelling justification.[60] The threatened use of quotas is a weak rationale for the abandonment of disparate

55. *Watson*, 487 U.S. at 989.
56. *Id.* at 990.
57. *Id.*
58. *Id.* at 989.
59. *Id.* at 992.
60. City of Richmond v. J.A. Croson Co., 488 U.S. 467, 499 (1989).

impact analysis with subjective employment practices, considering that it likely is an illegal response to potential litigation pursuant to the well-established, disparate impact analysis. In short, the threat to commit an illegal act, using quotas, should not influence the application of an established legal doctrine, disparate impact analysis, in favor of those individuals, the employers, threatening the illegal act.[61] The *Watson* Court, however, pointed to the fear of encouraging the use of quotas as a rationale, not for abandoning the analysis of subjective employment practices with disparate impact theory, but for formulating a new disparate impact theory[62]—a new theory that ironically favors those individuals threatening use of the illegal quota system, the employers.

IV. SUBJECTIVE EMPLOYMENT PRACTICES AND THE NEW DISPARATE IMPACT: *WATSON* AND *ATONIO*

A. The Watson Compromise

In *Watson v. Fort Worth Bank & Trust*,[63] a bank denied Watson, a black teller, promotions to supervisory positions in favor of similarly qualified white applicants on four occasions.[64] Watson alleged that the bank, which utilized subjective employment practices, discriminated against her on the basis of race in violation of Title VII of the Civil Rights Act of 1964.[65] Despite Watson's arguments that disparate impact analysis be used, the district court applied disparate treatment analysis and found for the defendant/bank.[66] On appeal, Watson argued that the district court should have applied disparate impact analysis to her claims, but the Fifth Circuit affirmed and noted that promotion systems which use subjective criteria are correctly examined with disparate treatment analysis.[67]

The United States Supreme Court granted Watson's petition for a writ of certiorari[68] to determine whether subjective employment practices should be analyzed under disparate impact theory or disparate treatment theory. The Court agreed with Watson and overturned the Fifth Circuit's ruling that

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61. *See* Middleton, *Challenging Discriminatory Guesswork: Does Impact Analysis Apply?* 42 OKLA. L. REV. 187, 226 n. 226 (1989).

62. *Watson*, 487 U.S. at 993.

63. *Id.* at 977.

64. *Id.* at 982.

65. *Id.* at 983.

66. *Id.*

67. *Id.* at 984.

68. Watson v. Fort Worth Bank & Trust, 483 U.S. 1004 (1987).

disparate impact theory should be used with subjective practices.[69] The Court, in accordance with a rationale discussed above, found that if impact analysis were not applicable to subjective practices, an employer could avoid defending against impact analysis claims simply by including a single subjective employment practice.[70] The insertion of the discretionary subjective procedure into the hiring or promoting practice would make the overall process subjective in nature.[71] Thus, under disparate treatment theory, the employer could lighten its burden to merely "*articulating* a legitimate non-discriminatory rationale,"[72] as opposed to "*proving* business necessity" under impact theory. The adoption of a subjective employment practice would have allowed an employer to isolate itself from liability for discrimination, unless the plaintiff could show that the discrimination was intentional.[73] As will be discussed fully below, the method for proving that the discrimination is, in fact, intentional is to show that the employer's articulated non-discriminatory rationale for the challenged employment practice served as a mere pretext for discrimination.

The *Watson* Court recognized that subjective practices often discriminate illegally due to prejudicial stereotypes and subconscious feelings that do not amount to intentional discrimination. Due to the fear that the discriminatory effects of these stereotypes would be immunized in a disparate treatment analysis, the Court held that disparate impact analysis must be applied to subjective employment practices.[74]

To this point, the *Watson* opinion reads as a victory for Civil Rights activists. However, after the Court unanimously[75] mandated that subjective employment practices be analyzed according to impact theory, a plurality of the Court compromised its decision by radically changing the evidentiary standards used in impact theory.[76]

The *Watson* court recognized the undesirable possibility of employers using quota systems, which are expressly prohibited under Title VII,[77] to insure that their subjective employment practices did not result in statistical disparity and ensuing litigation.[78] In short, the *Watson* court held that

69. *Watson*, 487 U.S. at 999.
70. *Id.* at 990.
71. *Id.* at 989.
72. *See McDonnell Douglas*, 411 U.S. at 802.
73. *See Griggs*, 401 U.S. at 431.
74. *Watson*, 487 U.S. at 990.
75. The decision was 8-0. Justice Kennedy did not participate because he became a member of the Court after the oral arguments.
76. *Watson*, 487 U.S. at 991.
77. 42 U.S.C. § 2000e-2(j) (1982).
78. *Watson*, 487 U.S. at 992.

disparate impact analysis should apply to subjective practices,[79] but found validity in defendant's "quota threatening" argument and used that finding as a preliminary rationale for changing the burdens of proof in impact theory in favor of the defendant/employer.[80] As a result, *Watson* makes it much more difficult for a plaintiff to make her *prima facie* case, drastically narrows the difference between treatment and impact analysis, and in effect creates formidable barriers that few plaintiffs will be able to cross.

Under the new impact theory of *Watson*, a plaintiff makes a *prima facie* case by identifying the specific employment practice that caused the statistical disparity[81] and by showing that the statistics are sufficient to infer that the challenged practice caused the disparity.[82] Once the *prima facie* case is met, a defendant/employer need only "produce" evidence that "its employment practices are based on legitimate business reasons."[83] Traditionally, a defendant under impact analysis had the burden of "proving" business necessity as opposed to merely "producing" a legitimate business rationale.[84]

The *Watson* plurality also stated that the ultimate burden remains on the plaintiff at all times, noting that the *Griggs* decision[85] should not be read to imply that the ultimate burden of proof could be shifted to defendant.[86] Once a defendant meets its burden of production, a plaintiff must prove that an alternative employment device would serve the employer's interests equally well with less discriminatory impact and that the employer did not adopt the alternative device.[87]

In his partial concurrence, Justice Blackmun asserted that the evidentiary standards set forth by the plurality were clearly "contradicted by our cases."[88] Blackmun noted the similarities in evidentiary standards in the plurality's new impact analysis and the traditional treatment analysis.[89] Similar to a

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79. *Id.* at 991.

80. *Id.* at 991-93.

81. *Id.* at 994. Before *Watson*, a plaintiff shifted the burden of persuasion to the defendant under impact theory by merely showing a statistical disparity in the employer's workforce. *Griggs*, 401 U.S. at 431. The burden then shifted to the employer to prove business necessity. *Id.*

82. *Watson*, 487 U.S. at 994-95.

83. *Id.* at 998.

84. *Compare Griggs*, 401 U.S. at 431, *with Watson*, 487 U.S. at 998.

85. *See supra* note 51 and accompanying text.

86. *Watson*, 487 U.S. at 997.

87. *Id.*

88. *Id.* at 1000-01 (Blackmun, J., concurring, joined by Brennan and Marshall, JJ.) Justice Stevens concurred separately, noting that it was unwise and unnecessary to formulate a new set of evidentiary standards at this time. *Id.* at 1011.

89. *Id.* at 1001.

defendant "articulating a legitimate business rationale" in disparate treatment analysis, a defendant under the new impact analysis must meet a mere burden of production after plaintiff has made her *prima facie* case.[90]

Blackmun recognized that in a traditional impact analysis, the burden of proof shifted to the defendant because plaintiff had already established in her *prima facie* case that discrimination existed.[91] The onus should therefore fall on the defendant to justify the proven discriminatory effect.[92] The *Watson* Court's compromise, which allowed subjective employment devices to be analyzed under impact theory but changed the evidentiary standards in favor of the defendant/employer, is a compromise only in appearance. In effect, *Watson* gives a clear advantage to the defendant/employer.

The changes in evidentiary standards are so drastic that the resolution of the debate regarding subjective employment practices in impact versus treatment theory becomes meaningless in a practical sense. A plaintiff capable of winning a discrimination case under the new impact analysis of *Watson* could also win a case under disparate treatment theory, due to the practical effects of *Watson's* compromising, pro-employer evidentiary shift in disparate impact analysis. The following detailed examination of the *Watson* shift will clarify further the new disparate impact theory's uncanny similarity to traditional disparate treatment theory and will illustrate the practical uselessness of *Watson*'s ruling that this new impact analysis should be applied to subjective employment practices.

Under the new disparate impact theory, after the plaintiff makes her *prima facie* case and the defendant articulates a legitimate business rationale for the challenged practice, the plaintiff must show that an alternative non-discriminatory practice will serve the same purpose for the employer as did the challenged practice. This is remarkably similar to a plaintiff's ultimate burden of showing "pretext for intentional discrimination" in treatment analysis. In fact, the only way to prove that the defendant's stated rationale is a pretext for intentional discrimination is to identify a practice, alternative to those used by the employer, that would have served the employer's interest equally as well as the challenged practice.

The Supreme Court's merging of disparate impact and treatment theories became more obvious when the Court next encountered an employment discrimination issue in *Ward's Cove Packing Co. v. Atonio.*

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90. *Id.* at 1004.

91. *Id.*

92. *Id.* There are also practical reasons for keeping the burden of proof on the defendant, such as better access to information regarding employment practices and mechanics of the employment device in question.

B. Atonio Extends and Clarifies Watson

The facts of *Wards Cove Packing Co. v. Atonio*[93] demonstrate that racial discrimination served as the norm, not the exception, in defendant's Alaskan salmon canneries. In defendant's canneries, a privileged class of primarily white workers held the vast majority of the cannery positions, which are considered skilled labor positions.[94] A group predominately consisting of Filipinos and non-white Alaskans held the non-cannery positions, which are considered unskilled labor positions.[95] Based on the distinction of skilled versus unskilled labor, the whites received higher pay and better benefits than the non-whites.[96]

At the appellate level, the Ninth Circuit held that subjective employment practices were properly analyzed under disparate impact theory. The court followed the traditional application of impact theory and held that once plaintiff makes his *prima facie* case, the burden of *proof* shifts to the defendant to *prove* the business necessity of the challenged practice.[97] Defendants appealed to the Supreme Court, which granted certiorari.[98]

The plurality of *Watson*, along with new Reagan-appointee Justice Kennedy, extended the evidentiary standards for subjective employment criteria of *Watson* to all disparate impact claims.[99] The Court emphasized that the burden of proof is to remain with the plaintiff at all times and that the employer must meet a burden of production, not of proof.[100] Thus, a defendant need only assert that it based the employment practice on a legitimate business consideration.[101]

The *Atonio* court elaborated on the "alternative employment practice" stage created by *Watson*, which a plaintiff may use to prove her case after the defendant has met her burden of producing a legitimate employment rationale for the challenged practice.[102] *Atonio* noted that the alternative practice

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93. 109 S. Ct. 2115 (1989).
94. *Id.* at 2119.
95. *Id.*
96. *Id.* at 2119-20.
97. *Id.*
98. 487 U.S. 977 (1988).
99. *Atonio*, 109 S. Ct. at 2126.
100. *Id.*
101. *Id.* The Court also attacked plaintiff's use of statistical evidence and remanded the case with instructions as to the proper determination of a disparate impact claim. *Id.* at 2121-24. The Court also noted that a plaintiff must specifically identify the challenged employment practice which gave rise to the disparate impact. *Id.* at 2124.
102. *Id.* at 2127.

must be equally effective and that factors such as potential cost to the employer must be considered in determining the legitimacy of the alternative.[103] The Court also noted that the plaintiff would prove his case if the employer refused to adopt the plaintiff's offered alternatives, because such a refusal would provide evidence that the employer adopted the challenged practice for discriminatory purposes.[104] This position clearly makes "intent" critical to impact analysis.

In his dissent, Justice Stevens called the majority opinion the "latest sojourn into judicial activism."[105] Justice Blackmun, in a separate dissent, noted that the Court has taken "major strides backwards in the battle against race discrimination."[106] Perhaps the greatest backward stride is that the plurality opinion of *Watson*, which unadvisably upset the established standard of proof in Title VII cases, is now the law.[107] Another backward stride is that a plaintiff after *Atonio* must present the specific employment practice that caused the statistical disparity, even though such proof often is impossible for a plaintiff to obtain.[108] A reasonable interpretation of this requirement is that a multiplicity of practices may only be challenged if plaintiff can demonstrate how "each" practice creates a disparate impact in the composition of the defendant's work-force.[109] It may be argued that the majority opinion intends to allow a group of practices to be considered a single practice for this purpose, especially since "practices" (plural) is used at one point in the opinion.[110] But in his dissent, Blackmun noted his belief that the majority opinion will be interpreted rigidly, such that a plaintiff must prove the causal nexus between "each" challenged practice and the statistical disparity.[111]

As noted above, the Court is merging disparate treatment and impact theories,[112] especially in the practical sense of what must be proven for a plaintiff to win. *Atonio* provided evidence of this merger by noting that a plaintiff may be able to win even if the defendant meets its burden of producing a legitimate employment rationale.[113] If a plaintiff offers a non-discriminatory, alternative practice to the employer that represents the same

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103. *Id.* at 2124-25.
104. *Id.* at 2126-27.
105. *Id.* at 2127-28.
106. *Id.* at 2136.
107. *Id.*
108. *Id.* Blackmun also felt it was a great error that the opinion barred the use of internal work-force comparisons in the making of plaintiff's *prima facie* case. *Id.*
109. *Id.* at 2136 (Blackmun, J., dissenting).
110. *Id.* at 2125.
111. *Id.* at 2136.
112. *See supra* section IV A.
113. *Atonio*, 109 S. Ct. at 2126-27.

interests to the employer as the challenged discriminatory practice and the employer refuses to adopt plaintiff's proposal, plaintiff has shown that the employer used the challenged practice as a mere pretext for intentional discrimination. At this point, the employer has chosen the discriminatory practice over the non-discriminatory alternative and obviously is discriminating intentionally. Showing this intentional discrimination is clearly the same as showing intentional discrimination in treatment theory.

V. ANALYSIS

To better understand the nearly impenetrable barriers the new adverse impact theory imposes on plaintiffs, the facts of *Emanuel v. Marsh*[114] will now be analyzed in light of *Watson* and *Atonio*. Under current law,[115] a court would handle *Emanuel's* facts differently than did the Eighth Circuit originally. However, the outcome would be the same—a finding of no illegal discrimination.[116]

A court would analyze the subjective promotion criteria in *Emanuel*, which were ratings based on supervisors' opinions, under the new impact theory[117] instead of treatment theory as did the Eighth Circuit.[118] First, one must assume that the court would accept Emanuel's statistical proof of discriminatory effect. Emanuel would be able to meet his initial burden of identifying the precise practice that gave rise to the disparate impact, because the individual who made the promotion testified that he based his decision on the challenged supervisory rating.[119] However, had Emanuel not been privy to the lower supervisory rating he had received or not known that the rating was relied on by the promoter, he would not have made the *prima facie* case. It is unclear whether Emanuel knew the promoter relied on the rating prior to his testimony;[120] but if he did not, Emanuel would not have made the *prima facie* case because he probably would not have been able to identify the specific practice that caused the discrimination.

Next, defendant's burden of producing a legitimate non-discriminatory rationale would easily be met. Defendant could assert that the supervisory reports are used because they incorporate important intangible employment

114. 828 F.2d 438 (8th Cir. 1987).

115. The most recent case dealing with adverse impact theory is *Atonio*, 109 S. Ct. 2115 (1989).

116. *Emanuel*, 828 F.2d at 443.

117. *Watson*, 487 U.S. at 979.

118. *Emanuel*, 828 F.2d at 442.

119. *Id.* at 443.

120. *Id.*

factors such as the overall attitude of the employee.[121] Since an employee seeking a supervisory position such as the one Emanuel sought[122] should have a good attitude, defendant's production burden would be met. This illustrates the transparent nature of defendant's burden because certain generic rationales, such as the need for a good attitude, are virtually foolproof in that they are applicable almost universally to employment situations and they will be considered legitimate business interests.

Finally, Emanuel could offer a practice, alternative to the challenged supervisory review, that would serve the same business purpose as the review, but with less discriminatory impact.[123] It is unlikely that an objective test could measure an employee's attitude equally as well as a supervisor who had observed the employee, especially considering that no employee applying for promotion will admit to having a bad attitude. Perhaps as an alternative, a court would allow an employer to interview an employee's co-workers to help determine the applicant's attitude. Even if a court ignored such potential problems as voting favorably only for one's friends, or group members voting favorably only for other group members, which could create even greater morale problems, the suggestion still might not meet the burden under the dicta of *Atonio*. The court in *Atonio* recognized in dicta that cost and other burdens were factors to be considered in determining the adequacy of the proposed alternative.[124] Undoubtedly, the defendant would argue that such an alternative does not equally serve its interests because interviewing co-workers is too expensive and inefficient due to the loss of working hours. Furthermore, an employer would argue that it is not a good practice to have employees overly concerned with their co-workers' attitudes. Thus, such a suggestion does not equally serve the employer's interests as did the supervisory review and rating system.

Based on the dicta from *Atonio* calling for deference to the employer's chosen practices[125] and the other barriers discussed above, it is unlikely that a plaintiff in Emanuel's position would be successful. Thus, a case such as *Emanuel*, which the appellate court recognized could have gone either way after analyzing the case under treatment theory,[126] becomes an obvious failure under the new impact theory.

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121. Indeed an employer may justify every subjective employment practice by alleging a relationship to attitude.

122. *Emanuel*, 828 F.2d at 439.

123. *Atonio*, 109 S. Ct. at 2126.

124. *Id.* at 2127.

125. *Id.*

126. *Emanuel*, 828 F.2d at 443.

VI. CONGRESS REACTS

A leading critic of the pro-employer shift in the Supreme Court's decisions noted that the opinions appear to be "chapters in an ideological crusade" aimed at inhibiting minorities and women from proving violations of civil rights laws.[127] This mode of thought gave rise to the Fair Employment Reinstatement Act, which later came to be known as the Civil Rights Act of 1990.

Bills in both houses of Congress, S. 2104 and H.R. 4000, aimed at overturning the effects of several Supreme Court decisions including *Atonio* and *Watson* received early widespread support.[128] Both bills specifically targeted the altered burdens of proof in disparate impact analysis as mandated by *Atonio* and proposed to restore the defendant's burden in disparate impact cases to that of "proving business necessity."[129] Specifically, section 703 of the Civil Rights Act of 1964 was to be amended to make an employment practice unlawful if the complaining party could show that the practice resulted in a disparate impact on a protected group and the employer failed "to demonstrate that such practice is required by business necessity."[130] This amendment would have reestablished defendant's burden as "proving business necessity," the same burden created by the *Griggs* Court almost twenty years ago.[131]

Over an eight month span, S. 2104 and H.R. 4000 served as the topic of numerous Congressional hearings.[132] After engaging in the compromise and accommodation process, the Senate and the House passed respective bills and the compromise process continued during the conference committee's deliberations.[133] The bill, as it existed following the conference committee's

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127. William L. Taylor, Senior Editor, 4 CIV. RTS. MONITOR, No. 2 (Fall-Summer 1989).

128. S. 2104, 101st Cong. 2d Sess. (1990), had 38 co-sponsors as of 2/9/90 and H.R. 4000, 101st Cong., 2d Sess. (1990), had 123 co-sponsors as of 2/7/90.

129. S. 2104, 101st Cong., 2d Sess. (1990); H.R. 4000, 101st Cong., 2d Sess. (1990). The appellate court in *Atonio* stated the law of adverse impact theory in a way which may soon come to fruition in the form of legislation. The court of appeals held that disparate impact analysis is applicable to subjective employment practices. The court retained the burdens of proof of the pre-*Watson* cases, as the defendant had to "prove" business necessity once plaintiff had made her *prima facie* case. This opinion did conform to *Watson* in that the plaintiff must challenge a specific employment practice.

130. 136 CONG. REC. S1019 (daily ed. Feb. 7, 1990) (statement of Sen. Kennedy).

131. *Griggs*, 401 U.S. at 424

132. 136 CONG. REC. S15105 (daily ed. Oct. 12, 1990) (statement of Sen. Kennedy).

133. *Id.*

alterations, included several key changes that the committee believed were necessary to avoid a presidential veto.[134]

First, the final version of the bill compromised the definition of business necessity in certain circumstances. Employers only needed to prove that the challenged practices had a "significant relationship to a manifest business objective," as opposed to having a necessary relationship to the operation of one's business, if the challenged "practices [did] not involve job performance or selection or where they concern[ed] methadone, alcohol or tobacco use."[135] Thus, this compromise relaxed the burden on employers if the challenged practice did not concern an employee's job performance, such as a practice aimed at improving safety, or if the challenged practice concerned an employee's drug or alcohol use.

Second, the final version of the bill expressly prohibited any interpretation of the legislation that would have encouraged employers to use quota systems.[136] This "no interpretation encouraging quotas" addition arose after the Bush administration announced that it would veto the legislation if the bill encouraged the use of quota systems by employers.[137] Although proponents of the legislation did not believe the overruling of *Atonio* would result in the use of quota systems, the joint committee added the "no interpretation encouraging quotas" language to assure opponents of the legislation that their quota fears would not materialize.[138]

Finally, the bill retained the *Watson* and *Atonio* mandate requiring that all disparate impact plaintiffs show the specific practices that caused the statistical disparity in the work-force, as opposed to showing only that a statistical disparity existed.[139] The plaintiff could have avoided this specific practices requirement only if the employer could not produce the records needed by the plaintiff to make such a determination.[140] The specific practices requirement is favorable to the employer because it makes plaintiff's *prima facie* burden more difficult, but the mandate to employers regarding the production of records would have had the effect of deterring employers from concealing or destroying records needed by the plaintiff.

Opposition to the Civil Rights Act of 1990 from the White House increased during the compromise period. A Department of Justice spokesperson, Deputy Attorney General Donald Ayer, noted that the Bush adminis-

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134. *Id.*
135. *Id.*
136. *Id.*
137. 136 CONG. REC. S15105 (daily ed. Oct. 12, 1990) (statement of Sen Kennedy).
138. *Id.*
139. *Id.*
140. *Id.*

tration opposed the overruling of *Atonio* and also argued against the American Bar Association's support of the legislation.[141] As evidenced by Ayer's statements to the ABA and a letter to Senator Kennedy from Attorney General Dick Thornburgh noting Thornburgh's intention to advise the President to veto the legislation, a fear of encouraging the use of quota systems remained the primary reason given by the Bush administration for its continuing opposition to the legislation.[142]

The fear of quota systems involves the belief that employers would attempt to avoid disparate impact litigation, which is based on statistical disparities, by resorting to hiring and promoting a certain percentage of minorities and women. To the common employer, a quota system would serve as the most fool-proof method of avoiding disparate impact litigation. Simply put, "[i]f you [can be] sued by the numbers, . . . hire by the numbers."[143]

However, the Supreme Court held in *City of Richmond v. J.A. Croson Co.* that the use of quota systems is not justifiable absent a compelling rationale.[144] The use of quotas to avoid litigation is not the type of compelling rationale contemplated by *Croson.* This is apparent because the Supreme Court in *Croson* struck down the use of a quota where the justification, a history of public and private racial discrimination, seemed substantial.[145] The Court deemed this insufficient to "justify the use of an unyielding racial quota."[146] If a history of prior discrimination proved insufficient to justify the use of a quota system, then the use of a quota simply to avoid litigation clearly is not a sufficiently compelling rationale.

Thus, the bill's opponents' fears that employers would use quota systems to avoid disparate impact litigation appear illogical because the use of a quota for such a purpose would be illegal. Indeed, the threat to act unlawfully, using quotas to avoid disparate impact litigation, should have the effect of encouraging more diligent enforcement of the already existing law prohibiting quotas as opposed to serving as a rationale for the veto of needed legislation.[147] However, the White House continued to state its belief that the

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141. *ABA Backs Abortion Rights, Right to Die, and Job Protection*, 58 U.S.L.W. 2477 (Feb. 20, 1990).

142. *Id.*; 136 CONG. REC. S15105, (daily ed. Oct. 12, 1990) (statement of Sen. Kennedy).

143. Biskupic, *Failure to Enact Civil Rights Bill Laid to Political Miscalculation*, 48 CONG. Q. WEEKLY REP. 3610, 3611 (Oct. 27, 1990) (quoting Sen. Alan K. Simpson).

144. 488 U.S. 469, 499 (1989).

145. *Id.*

146. *Id.*

147. Middleton, *supra* note 61.

civil rights bill was undesirable because it would encourage the use of quotas.[148] Specifically, the Bush administration stated that the new bill's litigation rules were so overly technical and different from prior standards that the legislation would provide too great an incentive to employers to use quota systems.[149]

Proponents of the bill urged against the President's plan to veto the bill, citing Congress's good faith efforts to meet all reasonable objections to the bill.[150] The aforementioned compromises, such as the "no interpretation encouraging quotas" language, served as evidence of those good faith attempts.[151] However, the efforts proved insufficient to satisfy the White House as on October 22, 1990, President Bush vetoed the Civil Rights Act of 1990.[152] On October 24, 1990, all hope for the passage of the Civil Rights Act of 1990 ended as the Senate's attempted override of the President's veto failed by a single vote.[153] Displeased by the bill's failure, civil rights activists vowed to return with similar legislation in 1991.[154]

VII. CONCLUSION

The changes in the burden of proof defined in *Watson* and *Atonio* are not merely technical adjustments to the standards used in employment discrimination cases. This Comment demonstrated that the practical effect of the changes is a significant, one-sided gain in favor of employers who discriminate. In a turn to the right, the Supreme Court may have forgotten that their decisions have practical effects. According to the NAACP Legal Defense and Educational Fund, over one hundred race discrimination claims against employers were dismissed within the first few months following the *Atonio* decision.[155] One critic commented, "[n]ight has fallen on the Court as far as civil rights are concerned."[156]

With the attempted Civil Rights Act of 1990, Congress shed light on the civil rights picture, but a President's veto and a failure to override that veto blotted out the attempted stand against discrimination. Therefore, plaintiffs

148. 136 CONG. REC. S16562 (daily ed. Oct. 24, 1990) (President's veto message on S. 2104).

149. *Id.*

150. *Id.*

151. *Id.*

152. Biskupic, *supra* note 143, at 3610.

153. *Id.*

154. *Id.*

155. 136 CONG. REC. E229 (daily ed. February 7, 1990) (statement of Rep. Hawkins).

156. 4 CIV. RTS. MONITOR No. 2, at 3 (Summer-Fall 1989).

such as Emanuel, Watson, and Atonio will continue to suffer under the overly stringent and misguided standards of proof imposed by the Supreme Court.

ROBERT L. NORTON