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THE INFLUENCE OF JUSTICE THURGOOD MARSHALL ON THE DEVELOPMENT OF TITLE VII JURISPRUDENCE

WENDY B. SCOTT[†]
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INTRODUCTION

The Civil Rights Act of 1964 had the noble goal of eliminating discrimination. Specifically, the Act “addressed and prohibited discrimination in public accommodations, public school education, federally-funded programs, and private sector employment” based on race, sex, religion, and other protected classifications.¹ Title VII of the Act was implemented to eliminate discrimination in the workforce and “created an Equal Employment Opportunity Commission (EEOC) to administer and enforce the statute.”² Congress, however, only gave the EEOC “the authority to seek enforcement by ‘informal methods of conference, conciliation, and persuasion’ but not the authority to compel compliance.”³ As written, Title VII was broad and left enforcement ambiguous and violations undefined.⁴ Thus, Congress left the task of determining what constituted a

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¹ Ronald Turner, *Thirty Years of Title VII’s Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 379 (1995).

² *Id.* at 379–80.

³ Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 433 (2005) (footnote omitted) (quoting 42 U.S.C. § 2000e-5(b) (2012)).

⁴ Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305, 305–06 (1983).

violation of the Act, the standards of pleading, and the proof required for successful enforcement of Title VII to the Supreme Court of the United States.

Justice Thurgood Marshall sat on the Supreme Court during the first twenty years of decisions rendered by the Court interpreting Title VII. These seminal decisions transformed Title VII from a "poor enfeebled thing"⁵ into a vehicle for social reform that equalized access to the courts by allowing employees to take action against private employers' discriminatory practices. This Article highlights Justice Marshall's influence on the development of Title VII jurisprudence. Part I presents a brief overview of Justice Marshall's personal and professional life before becoming a Justice to show how his experience influenced the development of his judicial philosophy. Part II summarizes the Court's approach to some of the issues left unresolved by Congress in the initial passage of Title VII. Specifically, it explores how the Court determined what would constitute a violation of Title VII and standards of pleading and proof. Part III examines the changes in the Court's jurisprudence before Justice Marshall retired from the bench. As the majority of Justices became less sympathetic to the protection of African Americans in the workplace, Justice Marshall's voice of dissent emerged. Part IV concludes with a discussion of the Civil Rights Act of 1991, which vindicated Justice Marshall's choice to dissent by adopting many of the positions taken in his departure from the majority view.

I. THE MAKING OF A "SOCIAL ENGINEER"

In a tribute to Justice Marshall, Justice William Brennan addressed what he believed made Justice Marshall a unique voice on the Court.⁶ He attributed the unique views of Justice Marshall to "the special voice that he added to the Court's deliberations and decisions."⁷ He described Justice Marshall's voice as a first person voice of authority and reason with the "unwavering message" that "the Constitution's protections must not be denied to anyone and that the Court must give its constitutional doctrine the scope and the sensitivity needed to

⁵ Belton, *supra* note 3, at 433 (internal quotation marks omitted).

⁶ William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 23 (1991).

⁷ *Id.*

assure that result.”⁸ Justice Brennan believed that what shaped Justice Marshall’s judicial voice were his personal experience of racial segregation and the years he spent as an advocate “using the tools of legal argument to close the gap between constitutional ideal and reality.”⁹ Justice Marshall gained his voice while attending college and law school. He attended Lincoln University where faculty and fellow students nurtured his belief in racial equality.¹⁰ Upon graduating from Lincoln, he enrolled in Howard Law School after being refused admission to his home state law school at the University of Maryland because of his race.¹¹ At Howard, Marshall came under the mentorship of Charles Hamilton Houston and was exposed to the “social engineering” theory.¹²

Houston taught that lawyers should regard themselves as engineers of the social order and, as such, must decide how to use the law to construct a fair and just society.¹³ Houston stressed that lawyers should understand more than just the legal rules; they should also appreciate “the social setting in which the law operated.”¹⁴ An effective lawyer needs to explain to the courts how their decisions impact the lives of everyday people and “how rules actually operate[] in society.”¹⁵ Houston brought his social engineering theory to life through his work with the National Association for the Advancement of Colored People (“NAACP”) along with his mentee, Marshall, who assisted in the execution of this theory in the courts.¹⁶

Shortly after joining the cadre of lawyers assembled by Houston, Marshall became the General Counsel of the NAACP in 1938.¹⁷ Marshall’s time working with the NAACP “solidified his

⁸ *Id.*

⁹ *Id.*

¹⁰ Lynn Adelman, *The Glorious Jurisprudence of Thurgood Marshall*, 7 HARV. L. & POL’Y REV. 113, 115 (2013).

¹¹ U.W. Clemon & Bryan K. Fair, *Making Bricks Without Straw: The NAACP Legal Defense Fund and the Development of Civil Rights Law in Alabama 1940–1980*, 52 ALA. L. REV. 1121, 1130 & n.49 (2001).

¹² MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, at 6 (1994) (internal quotation marks omitted).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ RANDALL WALTON BLAND, *JUSTICE THURGOOD MARSHALL: CRUSADER FOR LIBERALISM* 31 (2001).

¹⁷ Clemon & Fair, *supra* note 11, at 1131.

conviction that a committed and skillful lawyer could accomplish a considerable amount in the struggle to create a more just and equal society."¹⁸ Influenced by the NAACP's belief that equality was achieved through the courts, Marshall spearheaded a campaign to bring cases "throughout the nation and challeng[e] segregation by all means necessary."¹⁹

Marshall used the litigation of these cases to achieve social reform and, in doing so, "altered the nation's legal system and created public interest advocacy which in turn legitimized American democracy by securing access to the promise of equal justice under law for the disadvantaged and powerless in our society."²⁰ As a social engineer, he knew that access to the courts, especially the federal courts, was the "primary vehicle to pursue equal rights" and the only way to change society.²¹

Thus, as Justice Brennan observed, Marshall's experience as an African-American lawyer laid the foundation for his unwavering jurisprudential commitment, during his tenure on the Court, to secure equality and fairness through the judicial process.²² Marshall "was deeply sympathetic to the efforts of subordinated groups,"²³ and, through his judicial opinions, he gave voice to those directly impacted by the Court's decisions.²⁴ The opinions he authored in Title VII cases exemplify his belief in the social engineering theory and demonstrate his endorsement of the idea that Title VII could be "a powerful engine for social change by equalizing employment opportunities" for all.²⁵ In a nation struggling to move past Jim Crow Era segregation, Marshall would interpret Title VII as another means to hasten the eradication of discrimination in the workplace and employment practices.

¹⁸ Adelman, *supra* note 10, at 117.

¹⁹ Clemon & Fair, *supra* note 11, at 1131.

²⁰ Julius L. Chambers, *Thurgood Marshall's Legacy*, 44 STAN. L. REV. 1249, 1250 (1992).

²¹ Taunya Lovell Banks, *Thurgood Marshall, the Race Man, and Gender Equality in the Courts*, 18 VA. J. SOC. POL'Y & L. 15, 16 (2010).

²² Chambers, *supra* note 20.

²³ Adelman, *supra* note 10, at 121.

²⁴ MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991, at 5 (1997) (citing Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217-18 (1992); Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992)).

²⁵ Belton, *supra* note 3.

II. JUSTICE MARSHALL AND THE EARLY YEARS OF TITLE VII

The Supreme Court first issued its Title VII opinions during Justice Marshall's tenure. In those opinions, the Court determined what constituted a violation of Title VII and how a litigant could successfully meet the pleading and proof requirements.

A. *Defining Violation*

The Supreme Court issued its first opinion in a Title VII case in *Phillips v. Martin Marietta Corp.*²⁶ *Phillips* raised the issue of whether an employer's practice of hiring men, but not women, with school-aged children constituted a violation of Title VII.²⁷ *Phillips* commenced an action under Title VII alleging that she had been denied employment because of her sex since the employer was not accepting job applications from women with preschool-aged children.²⁸ In a per curiam opinion, the Court held "that persons of like qualifications [should] be given employment opportunities irrespective of their sex."²⁹ However, the Court held that "the existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction" in hiring practices.³⁰ The Court reasoned that an employer could demonstrate that the hiring condition "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."³¹

Seeing the potential for the entrenchment of a gender-based stereotype in Title VII case law, Justice Marshall wrote a special concurring opinion.³² He cautioned the Court not to "[fall] into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination."³³ He

²⁶ 400 U.S. 542 (1971) (per curiam).

²⁷ *Id.* at 543.

²⁸ *Id.*

²⁹ *Id.* at 544.

³⁰ *Id.*

³¹ *Id.* (internal quotation marks omitted).

³² *Id.* at 544–47 (Marshall, J., concurring).

³³ *Id.* at 545.

urged instead that employment opportunities should be limited "only by employment criteria that are neutral as to the sex of the applicant."³⁴

In *Griggs v. Duke Power Co.*,³⁵ the Supreme Court broadened the scope of what constitutes discriminatory conduct that violates Title VII. Justice Marshall joined a unanimous Court, which held that an employer violated Title VII when it utilized a facially neutral practice or procedure that was not justified out of business necessity and, in application, negatively impacted a particular group.³⁶ The Court went further, holding that, based on the legislative history of the Act and guidelines issued by the Equal Employment Opportunity Commission ("EEOC"), Congress did not require proof of discriminatory intent for a violation to occur under Title VII.³⁷ The EEOC guidelines were an "administrative interpretation of the Act," and "the enforcing agency is entitled to great deference."³⁸ The Court reasoned that the legislative history of the Act supported the guidelines issued by the EEOC, and, therefore, the guidelines should be treated as expressing the intent of Congress.³⁹ Using the EEOC guidelines, the Court held that Congress intended Title VII to allow for "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."⁴⁰ Acknowledging the "built-in headwinds" facing minorities entering the workforce, in broadening Title VII to allow for facially neutral discrimination, the Court allowed for greater access to the remedial measures available under Title VII.⁴¹

The holding in *Griggs* aligned with Justice Marshall's prior work toward equalizing employment opportunities as a social engineer. More importantly, *Griggs* allowed for an expansion of access to the courts under Title VII. Justice Marshall joined in laying a foundation to construct a more equal workplace with "scores of cases involving many thousands of workers who ha[d]

³⁴ *Id.* at 547.

³⁵ 401 U.S. 424 (1971).

³⁶ *Id.* at 435

³⁷ *Id.* at 430, 434.

³⁸ *Id.* at 433-34.

³⁹ *Id.* at 434.

⁴⁰ *Id.* at 431.

⁴¹ *Id.* at 432 (internal quotation marks omitted).

been denied jobs or promotions because of non-job-related tests which ha[d] come into widespread use since passage of Title VII in 1964.”⁴²

The Court continued to issue opinions that allowed for a “broad construction of Title VII . . . consistent with the Act’s remedial purposes.”⁴³ In *Alexander v. Gardner-Denver Co.*,⁴⁴ the Court demonstrated its commitment to expanding the right of employees to bring private suits against employers for discriminatory practices.⁴⁵ Justice Marshall again joined a unanimous Court to hold that Title VII allowed an aggrieved party to seek redress through private action despite first pursuing arbitration under a nondiscrimination clause of a collective-bargaining agreement.⁴⁶ The Court acknowledged that Title VII gave private litigants the power to “not only redress[] [their] own injur[ies] but also vindicate[] the important congressional policy against discriminatory employment practices.”⁴⁷ The Court found that “the private right of action remains an essential means of obtaining judicial enforcement of Title VII” because an employee’s individual right to be free from discriminatory practices cannot be waived.⁴⁸ If the collective-bargaining process barred an employee’s right to bring a private suit under Title VII, it “would defeat the paramount congressional purpose behind Title VII.”⁴⁹

In *McDonald v. Santa Fe Trail Transportation Co.*⁵⁰ and *Meritor Savings Bank v. Vinson*,⁵¹ Justice Marshall authored opinions advocating for the broad interpretation of Title VII to achieve its remedial purpose. In *McDonald*, two white employees were fired because of a theft for which they were held jointly and

⁴² David J. Garrow, *Toward a Definitive History of Griggs v. Duke Power Co.*, 67 VAND. L. REV. 197, 229–31 (2014) (quoting *Supreme Court Bars Employment Tests That Result in Anti-Negro Discrimination*, WALL ST. J., Mar. 9, 1971, at 4) (internal quotation mark omitted).

⁴³ Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1304–05 (1990).

⁴⁴ 415 U.S. 36 (1974).

⁴⁵ *Id.* at 45.

⁴⁶ *Id.* at 49.

⁴⁷ *Id.* at 45.

⁴⁸ *Id.*

⁴⁹ *Id.* at 51.

⁵⁰ 427 U.S. 273 (1976).

⁵¹ 477 U.S. 57 (1986).

severally liable with a black employee.⁵² Despite the shared liability, the white employees were fired and the black employee was not.⁵³ The white employees brought an action for relief under Title VII's prohibition against racial discrimination in the workplace.⁵⁴ The Court was faced with the question of exactly which races Title VII was meant to protect from discrimination.⁵⁵

Writing for the majority, Justice Marshall placed "racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites."⁵⁶ Even when "theft of property . . . [is a] . . . compelling basis for discharge[,] . . . this does not diminish the illogic in retaining guilty employees of one color while discharging those of another color."⁵⁷ By opening Title VII to include claims of racial discrimination to a majority group, Justice Marshall broadened the scope of Title VII to unprecedented breadth for individuals. Nearly any person can allege racial discrimination without first making a prima facie showing that he is a member of a racial minority, even in the wake of committing fireable offenses.⁵⁸ Consistent with Justice Marshall's vision of equality, *McDonald* expanded the meaning of racial discrimination past the point of minority discrimination and allowed for completely equal access to the courts and relief under the Act.

Meritor Savings Bank established that a claim of a hostile work environment due to sexual harassment is considered sexual discrimination and, thus, a violation of Title VII.⁵⁹ The Court expanded the relief available to victims of hostile environment sexual harassment discrimination by holding that the discrimination did not have to have an economic effect on an employee to be actionable.⁶⁰ The Court reinforced the power of the EEOC in holding that the 1980 guidelines issued by the agency "specifying that 'sexual harassment,' as there defined, is a form of sex discrimination prohibited by Title VII," and since its

⁵² *McDonald*, 427 U.S. at 276.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 279.

⁵⁷ *Id.* at 284.

⁵⁸ Michael J. Fellows, Note, *Civil Rights—Shades of Race: An Historically Informed Reading of Title VII*, 26 W. NEW ENG. L. REV. 387, 415 (2004).

⁵⁹ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66–67 (1986).

⁶⁰ *Id.* at 67–68.

issuance, “courts have uniformly held . . . that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”⁶¹ The Court again refused to limit an employee’s ability to bring private suit under Title VII by finding that the “mere existence of a grievance procedure and a policy against discrimination,” regardless of whether the employee invoked the procedure, does not insulate an employer from liability.⁶² However, the Court set limitations on the ability of an employee to initiate a sexual harassment claim. The Court held that “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”⁶³ The Court further held that it would not issue a definitive ruling as to when an employer is liable for the actions of supervisors.⁶⁴

Justice Marshall concurred with the Court’s holding that hostile environment discrimination constituted sex discrimination as defined by Title VII.⁶⁵ He reiterated his philosophy that every employee should have a workplace environment that is free from discriminatory practices by supporting the Court’s expansion of the definition of sex discrimination. Justice Marshall, however, disagreed with the Court’s refusal to rule on employer liability absent actual knowledge of the harassment.⁶⁶ Justice Marshall voiced his belief that, in analyzing employer liability under Title VII for the acts of employees, Title VII law clearly established that the act of a supervisory employee or agent is imputed to the employer.⁶⁷ His rejection of the Court’s agency theory in his concurrence demonstrates his staunch stance on further broadening the scope of Title VII and his ability to perceive the far-reaching ramifications of such a decision.

⁶¹ *Id.* at 65–66.

⁶² *Id.* at 72.

⁶³ *Id.* at 67 (second alteration in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

⁶⁴ *Id.* at 72.

⁶⁵ *Id.* at 74.

⁶⁶ *Id.*

⁶⁷ *Id.* at 74–75.

B. *Pleading and Proof*

The Court also determined the pleading and proof requirements under Title VII during Justice Marshall's tenure. The burden-of-pleading requirement functions to give parties to an action notice of what must be alleged in a complaint or answer to substantiate or rebuff the allegations.⁶⁸ Burden-of-proof standards allow courts to determine which party in an action must present evidence and what evidence is necessary to support or rebut a claim of discrimination.⁶⁹ Because Title VII did not address the requirements of proof and pleadings, the courts were left to determine the procedural framework intended by the statute.⁷⁰ The constant battle to determine how one could procedurally bring forth and prove a Title VII claim marked Justice Marshall's time on the Court.⁷¹ Justice Marshall advocated for lower pleading and proof requirements in keeping with his position that each citizen should have equal access to the courts, especially the federal court system, based on his view of the courts as the primary engine for social reform.⁷²

The most significant case to deal with pleading and proof standards during the Marshall Era was *McDonnell Douglas Corp. v. Green*.⁷³ The Court granted certiorari "[i]n order to clarify the standards governing the disposition of an action challenging employment discrimination."⁷⁴ The Court reaffirmed an employee's right to bring private suit under Title VII, holding that "a prior Commission determination of reasonable cause [is] not a jurisdictional prerequisite to raising a claim" under Title VII nor does the Act "restrict a complainant's right to sue . . . and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination."⁷⁵

⁶⁸ Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1216 (1981) [hereinafter Belton, *Burdens of Pleading*].

⁶⁹ *Id.*

⁷⁰ *Id.* at 1226.

⁷¹ *Id.* at 1207-09.

⁷² Banks, *supra* note 21.

⁷³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁷⁴ *Id.* at 798.

⁷⁵ *Id.* at 797-99.

The Court then established a three-prong proof and pleading test to determine the sufficiency of employment discrimination pleadings and the proof offered to substantiate claims and defenses.⁷⁶

First, the Court held that in a private Title VII suit, the employee has the initial burden of establishing a prima facie case of discrimination against the employer.⁷⁷ Under the second prong of the test, “[t]he burden . . . shift[s] to the employer to articulate some legitimate, nondiscriminatory reason”⁷⁸ to justify its actions, effectively allowing the employer to rebut an employee’s claim of discrimination.⁷⁹ The Court was careful to articulate that the inquiry did not end there.⁸⁰ In other words, Title VII did not permit an employer to disguise discrimination by attempting to cover the discrimination with pretext.⁸¹ Therefore, the Court identified a third prong that allowed an employee “a fair opportunity to show that [the employer’s] stated reason for” its actions was, in fact, a pretext for discrimination and that a legitimate nondiscriminatory reason for the employer’s action did not exist.⁸²

Justice Marshall joined the unanimous opinion in *McDonnell Douglas* that ultimately afforded plaintiff-employees both the opportunity to offer the initial proof and the power to rebut an employer’s pretextual justification. The decision also gave courts the ultimate conclusive power to hear and determine the employer’s reasoning and the validity of the employer’s decision making.⁸³ But while *McDonnell Douglas* set forth the general pleading requirements for Title VII cases, the Court began to carve out exceptions that did not garner Justice Marshall’s vote.

⁷⁶ *Id.* at 801–05.

⁷⁷ *Id.* at 802 (“This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.”).

⁷⁸ *Id.*

⁷⁹ *Id.* at 802–03.

⁸⁰ *Id.* at 804.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Henry L. Chambers, Jr., *Recapturing Summary Adjudication Principles in Disparate Treatment Cases*, 58 SMU L. REV. 103, 122 (2005).

The Supreme Court decided its first religious discrimination case under Title VII in *Trans World Airlines, Inc. v. Hardison*.⁸⁴ *Hardison* defined religious discrimination under Title VII and set the standard of proof for claims involving collective-bargaining agreements.⁸⁵ The Court held that "religion" encompasses religious observance and practice and that an employer must make reasonable accommodations for an employee, unless an employer demonstrates that it could not reasonably accommodate an employee without causing undue hardship on the employer's business.⁸⁶ Despite the efforts of Trans World Airlines ("TWA"), however, it could not reasonably accommodate Hardison's religious requirements without violating the collective-bargaining agreements between TWA and its employees.⁸⁷ The Court found that TWA had adopted a neutral seniority system in order to comply with various collective-bargaining agreements.⁸⁸ The Court found that there was "no suggestion of discriminatory intent"⁸⁹ in adopting the seniority system and concluded that TWA's inability to reasonably accommodate Hardison's religious practices could not be attributed to an intent to discriminate.⁹⁰ Rather, the collective-bargaining agreements, not the employer, determined when an employee was scheduled to work based on seniority, and TWA would be in violation of the agreement if it interfered to accommodate Hardison.⁹¹ The established "seniority system was not designed with the intention to discriminate against religion,"⁹² and thus, "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."⁹³ The Court held that under Title VII, TWA was not required to "carve out a special exception to its seniority system in order to help Hardison to meet his religious obligations."⁹⁴

⁸⁴ 432 U.S. 63, 66 (1977).

⁸⁵ *Id.* at 79, 81.

⁸⁶ *Id.* at 73-74.

⁸⁷ *Id.* at 82.

⁸⁸ *Id.* at 80-81.

⁸⁹ *Id.* at 82.

⁹⁰ *Id.* at 80-81.

⁹¹ *Id.*

⁹² *Id.* at 82 (quoting *Hardison v. Trans World Airlines*, 375 F. Supp. 887, 883 (W.D. Mo. 1947)).

⁹³ *Id.*

⁹⁴ *Id.* at 83.

Justice Marshall vehemently dissented from the Court's decision, arguing that the holding made "a mockery of the statute."⁹⁵ Justice Marshall's dissent notes that "an employer cannot . . . sign[] a contract that precludes all reasonable accommodations"⁹⁶ because doing so would have an impact on all of those "who do not observe the holy days on which most businesses are closed."⁹⁷ Justice Marshall felt that the Court's interpretation of the statute effectively nullified Title VII by not allowing employees who belonged to unions with collective-bargaining agreements to bring suit for discrimination without proof of discriminatory intent.⁹⁸

*Pullman-Standard v. Swint*⁹⁹ also addressed proof requirements and marks one of Justice Marshall's most significant dissenting opinions on Title VII. *Pullman-Standard* brought to fruition Justice Marshall's fear that the Court was systematically narrowing the scope of Title VII and constricting access to the courts by imposing more stringent proof standards. The Court reinforced its ruling in *Hardison* by holding, "[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."¹⁰⁰ Thus, whenever there is a challenge to a seniority system under Title VII, it will require a trial on the issue of discriminatory intent to determine whether the employer adopted the system "because of its racially discriminatory impact."¹⁰¹

Justice Marshall disagreed with the Court's continued efforts to enforce stricter pleading and proof requirements on employees.¹⁰² He expressed his concern stating:

[P]lacing such a burden on plaintiffs who challenge seniority systems with admitted discriminatory impact, a burden never before imposed in civil suits brought under Title VII, frustrates

⁹⁵ *Id.* at 88 (Marshall, J., dissenting).

⁹⁶ *Id.* at 96.

⁹⁷ *Id.* at 85 (majority opinion).

⁹⁸ *Id.* at 89 (Marshall, J., dissenting).

⁹⁹ 456 U.S. 273 (1982).

¹⁰⁰ *Id.* at 277 (quoting *Hardison*, 432 U.S. at 82) (internal quotation marks omitted).

¹⁰¹ *Id.*

¹⁰² *Id.* at 294–95 (Marshall, J., dissenting).

the clearly expressed will of Congress and effectively "freeze[s] an entire generation of . . . employees into discriminatory patterns that existed before the Act."¹⁰³

The majority's position directly conflicted with Justice Marshall's jurisprudential philosophy that relaxed pleading and proof requirements ensured access to courts to effect social change. Instead, by increasing the burden of proof, the Court left potential victims of discrimination with less avenues to effect change and improve their position in the workplace.

In *International Brotherhood of Teamsters v. United States*,¹⁰⁴ the Court had to determine exactly what evidence could support allegations of discrimination. The Court held that, as plaintiff, "the Government bore the initial burden of making out a prima facie case of discrimination."¹⁰⁵ The government then had the burden of establishing, by a preponderance of the evidence, that the company's regularly conducted and standard operating procedure was discriminatory.¹⁰⁶ The Court approved the use of statistical proof to establish a prima facie case of systematic discrimination.¹⁰⁷ The Court limited systematic discrimination to employer actions that occurred after the passage of Title VII, holding that "the routine application of a bona fide seniority system would not be unlawful under Title VII" because Congress did not intend to destroy any "vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act."¹⁰⁸

Although Justice Marshall concurred with the Court's finding of discrimination based on the statistical evidence presented by the plaintiff, he once again warned the Court of the danger of failing to grant broad deference to the EEOC's issued guidelines and to prior decisions that rejected upholding seniority systems that allow discriminatory practices.¹⁰⁹ While this case appears to broaden the burden-of-proof evidentiary standards by allowing statistical evidence, Justice Marshall was quick to note that in *Hardison*, which was decided during the same term, the majority had simultaneously enfeebled the

¹⁰³ *Id.* at 295.

¹⁰⁴ 431 U.S. 324 (1977).

¹⁰⁵ *Id.* at 336.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 339.

¹⁰⁸ *Id.* at 352-53.

¹⁰⁹ *Id.* at 381 (Marshall, J., concurring in part and dissenting in part).

employee's ability to make a prima facie case by disallowing the use of seniority rights systems as definitive proof of employment discrimination.¹¹⁰ Justice Marshall argued that the Court failed to consider the legislative history of the Act, which did not "support the conclusion that Congress intended to legalize seniority systems that perpetuate discrimination."¹¹¹ Justice Marshall further contended that the Court had not objectively examined the Act's legislative history, and if it had, "it would have been compelled to reach the opposite conclusion."¹¹² The Court's finding that seniority rights systems were not per se actionable under Title VII minimized the scope of Title VII and foreshadowed the narrowing interpretation of Title VII's access and remedies.¹¹³

III. THE CHANGING TIDES

In its attempts to clarify Title VII, the Court created confusion over the procedural framework in discrimination cases.¹¹⁴ Cases such as *Hardison*, *Pullman-Standard*, and *International Brotherhood of Teamsters* led to inconsistencies in how lower courts determined what pleading burdens would be placed on employees and employers and what evidence could be offered to prove or rebut a claim of discrimination. But as the Court gradually became more conservative, the pleading and proof standards became consistently more rigid. For instance, the proof requirement established in *McDonnell Douglas* shifted from an employee having to rebut as pretextual an employer's nondiscriminatory justification for its actions to requiring an employee to make a showing of definitive discriminatory intent.¹¹⁵ With the requirement of showing discriminatory intent, employment discrimination became nearly impossible to prove, and the power of Title VII effectively disappeared.¹¹⁶ But while the Court's approach to pleadings and proof may have

¹¹⁰ *Pullman-Standard v. Swint*, 456 U.S. 273, 294 (1982) (Marshall, J., dissenting).

¹¹¹ *Int'l Bhd. of Teamsters*, 431 U.S. at 383.

¹¹² *Id.* at 384.

¹¹³ *Id.*

¹¹⁴ Belton, *Burdens of Pleading*, *supra* note 68, at 1208–09.

¹¹⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹¹⁶ Belton, *Burdens of Pleading*, *supra* note 68, at 1224–25.

changed, Justice Marshall continued to advocate for the *McDonnell Douglas* pleading standards and rejected the Court-compelled heightened burden of proof.

In *Watson v. Fort Worth Bank & Trust*,¹¹⁷ the Court dealt with evidentiary standards as they applied to a claim of disparate impact under Title VII.¹¹⁸ A black female employee of Fort Worth Bank was denied a promotion to a supervisory position on four separate occasions in favor of white applicants.¹¹⁹ The bank "had not developed precise and formal criteria for evaluating candidates for" promotions, but instead relied "on the subjective judgment of [white] supervisors who were acquainted with the candidates and with the nature of the jobs to be filled."¹²⁰ The employee brought a claim under Title VII, alleging that the bank's promotion policies were racially discriminatory.¹²¹ The Court had to determine how to analyze a disparate impact claim in which the employer used subjective criteria in determining promotions,¹²² stating that "[o]ur decisions have not addressed the question whether disparate impact analysis may be applied to cases in which subjective criteria are used to make employment decisions."¹²³ The Court held that "disparate impact analysis may in principle be applied to subjective as well as to objective practices."¹²⁴

After the Court determined the proper analysis for subjective promotional practices, the Court then had to establish the appropriate evidentiary standard.¹²⁵ The Court reaffirmed its decision in *Teamsters* by holding that "the plaintiff is required to prove that the defendant had a discriminatory intent or motive."¹²⁶ The Court reiterated the *McDonnell Douglas* three-prong proof and pleading test to analyze Title VII claims and extended its application to disparate impact cases.¹²⁷ However, the Court held that "[t]he ultimate burden of

¹¹⁷ 487 U.S. 977 (1988).

¹¹⁸ *Id.* at 982.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 983.

¹²² *Id.* at 990-91.

¹²³ *Id.* at 989.

¹²⁴ *Id.* at 991.

¹²⁵ *Id.*

¹²⁶ *Id.* at 986.

¹²⁷ *Id.* at 985-86.

persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”¹²⁸ The Court acknowledged that by allowing the employer to use subjective tests for employment practices, employees faced a much higher burden to establish that the employment practices were intentionally discriminatory, as opposed to just preferential.¹²⁹ This proof requirement allowed employers to have a lower burden in meeting the business necessity criteria.¹³⁰ The Court justified requiring a higher burden for employees, holding that the shifting burden evidentiary standards sufficiently safeguarded Congress’s intent to ensure the strength of Title VII.¹³¹

Justice Marshall joined in a concurring opinion, agreeing with the plurality’s judgment, but not with the allocation of burdens of proof. The concurring Justices warned that “to lessen the employer’s burden of justifying an employment practice that produces a disparate impact simply because the practice relies upon subjective assessments” was inconsistent with the principles of Title VII.¹³² By “[a]llowing an employer to escape liability simply by articulating vague, inoffensive-sounding subjective criteria would disserve Title VII’s goal of eradicating discrimination in employment.”¹³³ The Court’s ruling to allocate the ultimate burden of proof to the employee was contradicted by earlier rulings, and Justice Marshall reiterated that an employee “who successfully establishes [a] prima facie case shifts the burden of *proof*” to the employer to show that the employment practice is justified by business necessity and is not intentionally discriminatory.¹³⁴

In *Wards Cove Packing Co. v. Atonio*,¹³⁵ the Court “completely dismantled the disparate impact theory.”¹³⁶ The Court’s holding “made it more difficult for plaintiffs to establish a prima facie case of disparate impact discrimination by adopting a more rigorous standard for the use of statistical evidence and

¹²⁸ *Id.* at 986 (internal quotation marks omitted).

¹²⁹ *Id.* at 994.

¹³⁰ *Id.* at 997–98.

¹³¹ *Id.* at 993.

¹³² *Id.* at 1009 (Blackmun, J., concurring)

¹³³ *Id.*

¹³⁴ *Id.* at 1001.

¹³⁵ 490 U.S. 642 (1989).

¹³⁶ Belton, *supra* note 3, at 464.

substantially easing the burden of defendants to prove they meet the business necessity test.”¹³⁷ The Court ruled that in a disparate impact claim brought pursuant to Title VII, an employee would have to show more than just a racial imbalance in the workforce.¹³⁸ The Court held that the “plaintiff’s burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer’s work force.”¹³⁹ Instead, the Court required an employee to show that the “application of a specific or particular employment practice . . . created the disparate impact under attack.”¹⁴⁰ Moreover, the Court made the plaintiff responsible “for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.”¹⁴¹ As if raising the plaintiff’s burden of proof was not enough, the Court lowered the employer’s proof requirements, holding that the business-necessity defense had “no requirement that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business.”¹⁴² The Court found that a greater degree of scrutiny “would be almost impossible for most employers to meet, and would result in a host of evils.”¹⁴³ By drastically shifting the burden of proof to the plaintiff, the majority opinion in *Wards Cove* all but made a claim under Title VII impossible for an employee to prove.

Justice Marshall joined in a dissent, which ardently opposed the majority’s requirement that an employee prove an employer’s discriminatory intent. According to the dissent, the issue was whether an employment practice has a significant, adverse effect on an identifiable class of workers, “regardless of the cause or motive for the practice.”¹⁴⁴ The dissent contended that the majority’s decision rejected “the statutory construction that developed in the wake of *Griggs*” and found this disturbing because the decision in *Griggs* “correctly reflected the intent of the Congress that enacted Title VII.”¹⁴⁵ The *Wards Cove* decision

¹³⁷ *Id.* at 466.

¹³⁸ *Wards Cove*, 490 U.S. at 656–57.

¹³⁹ *Id.* at 656.

¹⁴⁰ *Id.* at 657.

¹⁴¹ *Id.* at 656 (internal quotation mark omitted).

¹⁴² *Id.* at 659.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 670 (Stevens, J., dissenting).

¹⁴⁵ *Id.* at 672.

effectively amounted to “a rejection of a consistent interpretation of a federal statute.”¹⁴⁶ The dissent concluded that the majority “[t]urn[ed] a blind eye to the meaning and purpose of Title VII, [and] the majority’s opinion perfunctorily reject[ed] a longstanding rule of law [which] underestimate[d] the probative value of evidence of a racially stratified work force.”¹⁴⁷ Thus, where a plaintiff might have been granted deference in a factual analysis, the defendant now had the upper hand.¹⁴⁸ As such, the Court’s analysis could arguably be as follows: “Defendant’s validation data standing alone could be accepted. Plaintiff’s challenge raises some serious doubts as to the probative value of defendant’s data. But since I don’t know whose statistics are more accurate, and since plaintiff carries the burden of persuading me, and he didn’t, defendant wins.”¹⁴⁹

Finally, Justice Marshall joined the plurality in *Price Waterhouse v. Hopkins*.¹⁵⁰ There, the plaintiff proved that she had been discriminated against on the basis of sex.¹⁵¹ The trial court found that remarks pertaining to the plaintiff, which were relied on to deny her a position as partner in the accounting firm, “stemmed from an impermissibly cabined view of the proper behavior of women.”¹⁵² The Court affirmed the lower court’s finding of discrimination but disagreed with the standard of proof the lower courts applied to the employer.¹⁵³ Writing for the plurality, Justice Brennan explained:

The courts below held that an employer . . . must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination. We are persuaded that the better rule is that the employer must make this showing by a preponderance of the evidence.¹⁵⁴

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 663.

¹⁴⁸ Mack A. Player, *Is Griggs Dead? Reflecting (Fearfully) on Wards Cove Packing Co. v. Atonio*, 17 FLA. ST. U. L. REV. 1, 36. (1989).

¹⁴⁹ *Id.* (internal quotation marks omitted).

¹⁵⁰ 490 U.S. 228 (1989).

¹⁵¹ *Id.* at 251.

¹⁵² *Id.* at 236–37.

¹⁵³ *Id.* at 252–53.

¹⁵⁴ *Id.*

Just as Justice Marshall took the position that the burden of proof for the plaintiff in making a prima facie case should be reasonable, he took the same position on employers, rejecting the higher clear and convincing standard of proof.¹⁵⁵

IV. THE CIVIL RIGHTS ACT OF 1991 AND JUSTICE MARSHALL'S VINDICATION

To counter the Court's decision in *Wards Cove Packing Co. v. Atonio*,¹⁵⁶ portions of *Price Waterhouse v. Hopkins*,¹⁵⁷ and other employment discrimination cases in which Justice Marshall took issue with the majority view,¹⁵⁸ Congress enacted the Civil Rights Act of 1991, completely invalidating the precedent set by these cases.¹⁵⁹ Congress explicitly stated its intentions for the Act:

The purposes of this Act are—

- (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;
- (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989);
- (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

¹⁵⁵ *Id.* at 253.

¹⁵⁶ 490 U.S. 642 (1989).

¹⁵⁷ While Congress upheld the preponderance of evidence burden of proof, it rejected that portion of the decision that created the "same decision" defense. This defense allowed an employer to prove that it would have reached the same decision regarding the employee's status absent any discriminatory considerations. But this defense not only allowed an employer to limit the remedy, it also operated as a complete defense to liability. See Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL'Y 205, 211-14 (2007).

¹⁵⁸ Congress also reversed *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989) (holding that an employee could not sue for damages under section 1981 of the Civil Rights Act of 1866 in relation to conditions of employment caused by racial harassment), and *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989) (permitting white firefighters to challenge a consent decree in a case to which they had not been parties).

¹⁵⁹ Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(2), 105 Stat. 1071, 1071 (codified as amended in scattered sections of 42 U.S.C.).

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.¹⁶⁰

Congress drew from *Griggs* in restoring a plaintiff's power in disparate impact cases by allowing the plaintiff to allege discriminatory impact as a basis for a Title VII claim without a requisite showing of intent.¹⁶¹ The Act expanded civil rights statutes and allowed for greater access to the courts, which Justice Marshall strongly advocated for under Title VII cases. Justice Marshall's view on the burden allocated to the employer was also incorporated into the Act. The Act "imposes on the employer the burden of persuasion for business necessity and job relatedness"¹⁶² and holds an employer liable for a claim under Title VII if that employer "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."¹⁶³ By doing so, Congress affirmed Justice Marshall's interpretation of Title VII regarding burdens of proof and pleading for both parties.

CONCLUSION

As written, Title VII set forth the lofty goal of combating various forms of discrimination in the workplace but gave little guidance to the courts on the requirements for effective enforcement of the Act.¹⁶⁴ This left the Supreme Court to define what constituted discrimination that violated Title VII and determine the scope of the statute.¹⁶⁵ Of most significance, Title VII did not give statutory guidance on how to plead and prove a violation; nor did it address specifically when an employer would be liable under Title VII.¹⁶⁶ The initial decisions issued by the Court broadened the scope of Title VII and attempted to eliminate the ambiguity in the statute, making it easier for an employee to seek redress under Title VII.

¹⁶⁰ *Id.* § 3.

¹⁶¹ *Id.* § 105.

¹⁶² Charles B. Hernicz, *The Civil Rights Act of 1991: From Conciliation to Litigation—How Congress Delegates Lawmaking to the Courts*, 141 MIL. L. REV. 1, 31 (1993).

¹⁶³ *Id.* (internal quotation marks omitted).

¹⁶⁴ Turner, *supra* note 1, at 427–28.

¹⁶⁵ Elizabeth Chambliss, *Title VII as a Displacement of Conflict*, 6 TEMP. POL. & CIV. RTS. L. REV. 1, 11–12 (1996).

¹⁶⁶ *Id.* at 4–5.

The early opinions of the Court also aligned with Justice Marshall's jurisprudence and supported the theory of social engineering by broadening equal access to the courts. As the Court became increasingly more conservative, it issued a number of opinions making Title VII violations more difficult to prove. As access to courts became more restricted, Justice Marshall found his position on the Court shifting towards concurrence and dissent. Justice Marshall wrote to ensure that Title VII was enforced as Congress intended.

Congress vindicated Justice Marshall and the early Court decisions by passing the Civil Rights Act of 1991 to combat pervasive and entrenched racial discrimination in employment "by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."¹⁶⁷ It is fitting that Justice Marshall joined the majority or concurred in those cases that established reasonable proof and pleading standards that made seeking judicial relief less formidable. In doing so, Justice Marshall and his colleagues expanded Title VII so that modern social engineers have the necessary tools to bring discrimination cases and the ability to use established precedent to construct a more equal workplace.¹⁶⁸

¹⁶⁷ Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071, 1071.

¹⁶⁸ Garrow, *supra* note 42, at 230-31.