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Employment Discrimination

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EMPLOYMENT DISCRIMINATION

ATONIO v. WARDS COVE PACKING COMPANY: EN BANC APPROVAL OF DISPARATE IMPACT ANALYSIS FOR SUBJECTIVE EMPLOYMENT PRACTICES

I. INTRODUCTION

In *Atonio v. Wards Cove Packing Co.*[1] the Ninth Circuit, sitting *en banc*, resolved a conflict which had developed within the circuit regarding the proper analysis of certain employment discrimination claims arising under Title VII of the Civil Rights Act of 1964.[2] At issue was whether an employer's subjective hiring and promotion practices should be found unlawful based on their adverse impact upon minority employees.[3] In reversing a panel decision,[4] the full bench of the Ninth Circuit held that subjective employment practices which are demonstrably connected to a disproportionate burden on protected groups are fair game for disparate impact analysis and consequent employer liability.[5]

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1. 810 F.2d 1477 (9th Cir. 1987) (per Tang, J. *en banc* consideration; Sneed, J. filed concurring opinion in which Goodwin, J., Wallace, J., and Anderson, J. joined).

2. 42 U.S.C. § 2000e-17 (1982).

3. *Atonio*, 810 F.2d at 1478. Subjective practices are those which allow employment decisions to consider the decision maker's discretion. Objective practices are based upon fixed, measurable factors which eliminate discretion from the decision making process. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 201-05 (2d ed. 1983 & supp. 1987) [hereinafter cited as SCHLEI & GROSSMAN].

4. Atonio v. Wards Cove Packing Co., 768 F.2d 1120 (9th Cir. 1985). *See infra* notes 117-24 and accompanying text.

5. *Atonio*, 810 F.2d at 1486.

II. FACTS

This class action was brought by Filipino and Alaskan Native workers employed in the Alaskan salmon canning industry.[6] The workers alleged that the defendant employer's hiring practices were discriminatory in violation of Title VII of the Civil Rights Act of 1964[7] and of section 1981 of the Civil Rights Act of 1866.[8] The company's operations required a large number of unskilled seasonal workers and a smaller number of skilled employees, some employed on a permanent basis.[9] Most of the unskilled jobs were filled by non-white workers while the more desirable, skilled, higher paying positions were occupied by whites.[10] Specific qualifications for the higher paying jobs were not well defined and individual hiring officers had wide discretion in determining who was best for each job.[11]

The suit alleged that the disproportionate concentration of non-whites in the lowest paying jobs and the virtual absence of minorities in the skilled, higher paying positions was proof of discrimination against non-whites.[12] The complaint also alleged that the employer's use of separate hiring channels, word-of-mouth recruitment, nepotism and rehiring policies, together with the lack of objective job qualifications and the use of subjective criteria in hiring and promotions all had an unlawful disparate impact on minorities.[13]

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6. *Id.* at 1479. *See* Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir. 1984). *Domingo* began as a companion case to *Atonio*. The plaintiffs were cannery workers with claims virtually identical to those in *Atonio*. The district court found unlawful discrimination using disparate impact analysis. *Id.* at 1435. The Ninth Circuit affirmed on the basis of intentional discrimination. Defendants used racial labels in job assignments; thus their practices were not facially neutral. *Id.* at 1436.

7. 42 U.S.C. § 2000e-2(a) (1982).

8. 42 U.S.C. § 1981 (1982).

9. *Atonio*, 810 F.2d at 1479.

10. *Id.* The skilled jobs included machinists, engineers, quality-control personnel, cooks, bookkeepers, carpenters and others. The permanent employees were management and office personnel as well as a number of maintainance workers. Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1123 (9th Cir. 1985).

11. *Atonio*, 768 F.2d at 1124.

12. *Atonio*, 810 F.2d at 1479.

13. *Id.* Plaintiffs had also charged that the defendants violated Title VII by segregating the non-white workers into inferior housing and messing facilities. The district court found that these practices did not violate Title VII. *Atonio*, 768 F.2d at 1130-31. The majority *en banc* opinion did not specifically address these claims.

The district court found that although the plaintiffs had successfully made out a prima facie case of discrimination, the defendants had rebutted the inference of intentional discrimination by convincingly showing nondiscriminatory motivations.[14] The trial judge refused to apply disparate impact analysis to the subjective hiring and promotion practices citing Ninth Circuit precedent.[15] A Ninth Circuit panel, while acknowledging the existence of a conflict within the circuit, affirmed.[16] The plaintiffs' petition for a rehearing was granted so that the conflict could be resolved *en banc*.[17]

III. BACKGROUND

A. The Supreme Court and the Disparate Impact Theory

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against any employee on the basis of race, color, religion, sex or national origin.[18] The Act regulates all aspects of the employment relationship and provides for only limited exemptions.[19] The Supreme Court has stated that the objective of Title VII is the eradication of unnecessary barriers which impede the achievement of equal employment

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14. *Atonio*, 768 F.2d at 1120.

15. *Id.* at 1131. The district court applied disparate impact analysis to the allegation of nepotism but found no discrimination. *Id.*

16. *Id.* at 1132-33. *See infra* notes 106-16 and accompanying text.

17. Atonio v. Wards Cove Packing Co., 787 F.2d 462 (9th Cir. 1985).

18. 42 U.S.C. § 2000e-2(a) (1982) provides that:

> It shall be an unlawful employment practice for an employer -
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> (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
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> (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.

19. 42 U.S.C. § 2000e-2(e) (1982) permits classifications based on sex, religion or national origin (but not race or color) where sex, religion or national origin is a bona fide occupational qualification. 42 U.S.C. § 2000e-2(h) permits employers to apply different standards pursuant to bona fide seniority or merit systems and to act upon the results of professionally developed ability tests provided such system or test is not intentionally designed to discriminate.

opportunity.[20]

The Supreme Court recognizes two theories under which Title VII violations can be proved: (1) disparate treatment and (2) disparate impact.[21] Under the disparate treatment theory, an employer violates Title VII by intentionally treating people less favorably because of their race, color, religion, sex or national origin.[22] The disparate impact theory, in contrast, predicates employer liability on the significant adverse impact of an employer's facially neutral practice which cannot be justified by business necessity.[23] In practical terms, a crucial difference between the two theories is the necessity of proving an employer's discriminatory motive.[24] The Supreme Court has stated that such proof is "critical" to a disparate treatment case but is "not required under a disparate-impact theory."[25]

In a disparate treatment case, the plaintiff will always retain the burden of persuasion[26] but the burden of producing evidence will shift.[27] First, the plaintiff must establish a prima facie case

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20. Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971). *See infra* notes 35-41 and accompanying text.

21. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). In a suit brought by the government, a union and a trucking firm were found to have intentionally engaged in a pattern of discriminatory treatment of blacks and Spanish-surnamed persons. *Id.* at 342. The court held that Congress' vesting of broad equitable powers in Title VII courts enabled them to fashion the most complete relief possible to remedy violations under the Act. *Id.* at 364. Such relief can include awards of retroactive seniority to persons who could prove that they were deterred from seeking employment by their knowledge of the discriminatory practices. *Id.* at 367.

22. *Id.* at 335 n.15.

23. *Id.* at 336 n.15.

24. *Id.* at 335 n.15.

25. *Id.* The Supreme Court has stated that either theory may be applied to a particular set of facts. *Id.* at 336 n.15.

26. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). A female denied promotion to a position subsequently filled by a male successfully established a prima facie case of sex discrimination. *Id.* at 251. The court of appeals held that the employer must rebut by proving his nondiscriminatory reasons for his actions by a preponderance of the evidence. *Id.* at 256. The Supreme Court reversed holding that the burden of persuasion was always on the plaintiff. *Id.*

27. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). After being laid off, plaintiff participated in an illegal demonstration to protest the employer's racial policies. *Id.* at 794. The employer refused to rehire plaintiff ostensibly because of plaintiff's prior illegal conduct. *Id.* at 796. The district court found this reason sufficent to support dismissal of the case. *Id.* at 797. The Supreme Court held that where a plaintiff's prima facie case has been rebutted he must still be afforded an opportunity to prove that the employer's otherwise legitimate reason was actually a pretext for unlawful discrimina-

of intentionally discriminatory treatment.[28] The prima facie case creates a rebuttable presumption and shifts the burden of production to the employer.[29] The employer meets this burden by articulating a legitimate, nondiscriminatory reason for the alleged discriminatory action.[30] The burden then returns to the plaintiff to demonstrate that the defendant's articulated reason is, in fact, a pretext for unlawful discrimination.[31] In *Furnco Construction Corp. v. Waters*,[32] the Supreme Court emphasized that the primary function of this order of proof is to analyze and evaluate the evidence for its bearing on the critical question of discrimination.[33]

In contrast to disparate treatment's preoccupation with unlawful motivation, the disparate impact theory defines illegal discrimination as the use of a selection device which adversely and disproportionately affects a protected minority and cannot be justified by business necessity *regardless* of the employer's motivation.[34] The Supreme Court first adopted disparate impact analysis in the landmark case *Griggs v. Duke Power Co.*[35] At issue in *Griggs* was the employer's use of a standardized intelligence test and a high school diploma as prerequisites for em-

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tion. *Id.* at 804.

28. *Id.* at 802. The precise elements of a prima facie showing will vary with the particular facts of a case. *Id.* at 802 n.13. *See also* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977) (any production of evidence "adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act" was sufficient to make a prima facie disparate treatment case).

29. *Burdine*, 450 U.S. at 254-55. *See supra* note 26.

30. *McDonnell Douglas*, 411 U.S. at 802. *See supra* note 27. *See also Burdine*, 450 U.S. at 254-55, where the Court stated that while the defendant need not persuade the court, he must support his articulated reason by introducing sufficent evidence to justify a judgment in his favor. By carrying this burden the defendant rebuts the plaintiff's prima facie case. *Id.* at 255. Failure to rebut the plaintiff's prima facie case will result in a directed verdict for the plaintiff. *Id.* at 254.

31. *McDonnell Douglas*, 411 U.S. at 804. Pretext can be proven by showing that the defendant's proffered reason was either not the actual motivating factor or that it was simply not believable. *Id.*

32. 438 U.S. 567 (1978). *See infra* notes 50-54 and accompanying text.

33. *Id.* at 577.

34. D. BALDUS AND J. COLE, STATISTICAL PROOF OF DISCRIMINATION § 1.23 at 44-45 (1980 & Supp. 1986).

35. 401 U.S. 424 (1971). *See generally* Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59,62 (1972) (discussion of the background and implications of *Griggs*: "*Griggs* is in the tradition of the great cases of constitutional and tort law which announce and apply fundamental legal principles to the resolution of basic and difficult problems of human relationships.").

ployment.[36] The plaintiffs demonstrated that these requirements served to exclude blacks at a substantially higher rate than whites.[37] The district court and the court of appeals found that the requirements had not been implemented for a discriminatory purpose and hence there was no violation of Title VII.[38] The Supreme Court reversed, holding that practices which operate to exclude blacks from employment opportunities are prohibited unless they are necessary to the employer's business.[39] Such practices cannot be saved by the absence of intentional discrimination.[40] The consequences of employment practices may render those practices unlawful under Title VII just as readily as their motivation.[41]

To succeed under the disparate impact theory, a plaintiff's prima facie case must establish that the employer's neutral screening requirement produces a significantly discriminatory pattern of employee selection.[42] The burden then shifts to the employer to prove that the challenged requirement or practice is manifestly related to the particular job in question.[43] However,

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36. *Griggs*, 401 U.S. at 427-28.

37. *Id.* at 430 n.6.

38. *Id.* at 428.

39. *Id.* at 431. The Court referred to business necessity as the touchstone. *Id.* It found that Congress had mandated that objective, demonstrably job-related qualifications govern the employment relationship so that race, sex, religion and nationality would become irrelevant in measuring a person for a job. *Id.* at 436.

40. *Id.* at 432.

41. *Id.* Title VII had been in effect for less than six years when *Griggs* was decided. Prior to passage of Title VII, Duke Power, a South Carolina employer, had openly discriminated against blacks. *Id.* at 426-27. Discrimination in South Carolina schools had also led to blacks receiving inferior educations. *Id.* at 430. The Court recognized that under Title VII this pre-Act discrimination could not be allowed to perpetuate itself. *Id.*

42. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). A female plaintiff challenged the height, weight and gender requirements that the Alabama Board of Corrections imposed on applicants for the position of correctional officer. *Id.* at 324. The Supreme Court held that the height and weight requirements failed to meet the job-relatedness standard under *Griggs* analysis. *Id.* at 332. The gender requirement was held valid as a bona fide occupational qualification. *Id.* at 336-37.

The statistical showing necessary to establish that a disparity is significant has become a major battleground for Title VII disparate impact litigation. *See* SCHLEI AND GROSSMAN, *supra* note 3, at 98-102.

43. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). A class of black employees alleged that the employer's use of employment tests which had an adverse impact on blacks violated Title VII. *Id.* at 409. The district court found that the tests were job-related on the basis of a company validation study. *Id.* at 411. The Supreme Court held that the EEOC Uniform Guidelines on Employee Selection Procedures provided the standard for measuring the job-relatedness of employment tests and that the tests in

whereas the employer's rebuttal burden in a disparate treatment case is merely one of producing sufficent evidence to rebut the inference created by the plaintiff's prima facie case,[44] in a disparate impact case he carries a burden of persuasion at this stage.[45] The employer must persuade the fact-finder that the challenged practice is necessary to safe and efficient job performance.[46] Thus, business necessity is an affirmative defense of the use of a practice that has been shown to be discriminatory in effect.[47] The existence of this weightier rebuttal burden helps explain why employers would prefer to defend against a disparate treatment claim.

The Supreme Court has held the disparate impact theory applicable to measure the impact of each component of a selection system even if the impact of the complete system is racially proportionate.[48] Thus far the Supreme Court has directly applied the disparate impact theory only to clearly defined, nondiscretionary selection devices which were facially neutral.[49] In

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question did not meet this standard. *Id.* at 430-31.

44. *See supra* notes 26-33 and accompanying text.

45. *Griggs*, 401 U.S. at 432.

46. *Dothard*, 433 U.S. at 332 n.14. The defendant's burden has been described both in terms of business necessity, *Griggs*, 401 U.S. at 431, and job-relatedness, *Albemarle Paper*, 422 U.S. at 425. Although they are frequently used interchangeably, there is some question as to whether the two concepts are identical. *See* Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376, 388-89 (1981) (Supreme Court's failure to adequately define the business necessity defense has permitted the lowering of strict Title VII standards and has resulted in lower court confusion). *See also* Johnson, Albemarle Paper Co. v. Moody: *The Aftermath of Griggs and the Death of Employee Testing*, 27 HASTINGS L.J. 1239, 1257 (1976) (Supreme Court deference to EEOC Guidelines for validating the job-relatedness of employee tests condemned as imposing impossible burden on employers).

47. *Albemarle Paper*, 422 U.S. at 425. If the employer proves the necessity of the challenged practice, the plaintiff may still triumph by proving that the employer's legitimate interest may be equally well served by a less discriminatory device. *Id.*

48. Connecticut v. Teal, 457 U.S. 440, 455-56 (1982). An examination used to screen promotion candidates had a disproportionate impact on blacks and was not job-related. *Id.* at 445. Unsuccessful black examinees sued under the disparate impact theory. *Id.* at 444. The employer defended by proving that successful black examinees were promoted at higher rates than whites so as to correct any adverse impact on blacks. *Id.* The Supreme Court in a 5-4 decision rejected this "bottom line" defense. *Id.* at 452. The majority emphasized that Title VII protects the rights of individuals and that if the examination was not job-related its disparate impact was proof of a Title VII violation. *Id.* at 448. The dissent believed that the disparate impact theory was only relevant to measure the final results of a selection process. *Id.* at 458. (Powell, J., dissenting).

49. *See Teal*, 457 U.S. at 445 (standardized test); New York Transit Authority v. Beazer, 440 U.S. 568, 584 (1979) (blanket exclusion of methadone users held justified by business necessity despite disproportionate impact on minority applicants); *Dothard*, 433

Furnco Construction Corp. v. Waters[50] the defendant's foreman, who had complete discretion in hiring decisions, refused to accept walk-on job site applications and instead hired only persons known or recommended to him as experienced.[51] The plaintiffs, qualified black bricklayers who applied at the job site, contended that this policy had a disproportionate impact on blacks.[52] The Supreme Court decided that the proper analysis for the case was under the disparate treatment theory.[53] In a footnote the Court noted that the challenged practice did not involve employment tests or physical requirements such as had previously been analyzed under the disparate impact model.[54] This footnote has been read as evidence of a deliberate Supreme Court intention to restrict the scope of the disparate impact theory to purely objective practices.[55]

B. Subjective Criteria and the Disparate Impact Theory

Title VII gives the Equal Employment Opportunity Commission (EEOC) the authority to issue, amend or rescind procedural regulations to carry out the provisions of the Act.[56] The EEOC Uniform Guidelines on Employee Selection Procedures, first published in 1970, define discrimination as the use of a selection procedure which has an adverse impact on a protected

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U.S. at 329-31 (minimum height and weight requirements); *Albemarle Paper*, 422 U.S. at 427 (standardized intelligence test); *Griggs*, 401 U.S. at 431 (standardized tests, high school diploma requirement).

50. 438 U.S. 567 (1978).

51. *Id.* at 569-70.

52. *Id.* at 570. The district court subjected the claim to *Griggs* analysis but found there had been no showing that the practice had a disproportionate effect.

53. *Id.* at 575.

54. *Id.* at 575 n.7. Writing separately, Justice Marshall did not dispute that the disparate treatment approach could be used to analyze the workers claims. *Id.* at 582 (Marshall, J., concurring in part and dissenting in part). But he identified word-of-mouth recruitment and the limiting of hiring to those with prior experience working for a particular employer as facially neutral practices which could be analyzed under the disparate impact theory. *Id.* at 583 (Marshall, J., concurring in part and dissenting in part).

55. 3 A. Larson and L. Larson, Employment Discrimination § 76.32 (1987 & 1987 Supp.) Professor Larson contends that because the foreman had unlimited discretion in hiring decisions, the practice of refusing to hire job site applicants actually had a subjective basis. His position is that restricting *Griggs* analysis to purely objective practices is sound because of (1) the difficulty in validating subjective decisions and (2) a conceptual incompatibility between disparate impact analysis and subjective judgments. *Id.*

56. 42 U.S.C. § 2000e-12(a) (1982).

class and which cannot be validated.[57] By adopting this approach in *Griggs*, the Supreme Court definitively brought unintentional discrimination within the reach of the Act.[58] The Uniform Guidelines, which the Supreme Court has accorded great deference,[59] include subjective interviews in its definition of employee selection procedures.[60]

In 1972 Congress amended Title VII to expand its coverage[61] and to provide enforcement powers to the EEOC.[62] At the time that the amendments became law the Uniform Guidelines had been published and *Griggs* had been decided. In adopting the amendments, Congress did not intend to change existing law, as developed by the courts, except where expressly addressed.[63] Lower court decisions, pre-dating *Griggs*, had applied disparate impact analysis to subjective employment practices.[64] Neither Congress nor the *Griggs* opinion expressly restricted the use of disparate impact analysis to purely objective practices.[65]

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57. 29 C.F.R. § 1607.3 (1987).

58. *Griggs*, 401 U.S. at 432.

59. *Id.* at 433-34; *Albemarle Paper*, 422 U.S. at 431.

60. 29 C.F.R. § 1607.16 (1987) provides:

> (Q) *Selection procedure.* Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs or probationary periods and physical, educational and work experience requirements through informal or casual interviews and unscored application forms.

61. The 1972 amendments deleted the original exemptions of state and local government employees and employees of educational institutions from Title VII coverage. Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified as amended at 42 U.S.C. 2000e-1 (1982)).

62. Pub. L. No. 92-261, § 4, 86 Stat. 105 (codified as amended at 42 U.S.C. 2000e-5 (1982)).

63. Sape & Hart, *Title VII Reconsidered: The Equal Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 884-85 (1972) (objective analysis of 1972 amendments and review of their legislative history).

64. *See, e.g.*, United States v. Dillon Supply Co., 449 F.2d 800, 804 (4th Cir. 1970) Hiring and assignment system without uniform objective standards which vested wide discretionary authority in departmental supervisors produced a racially imbalanced workforce with blacks concentrated in less desirable jobs. The Fourth Circuit held that such practices, although not overtly discriminatory, classify and segregate on the basis of race.

65. Although the Supreme Court has not yet squarely considered the issue of subjective practices, in *Albemarle Paper*, 422 U.S. at 433, the Court criticized the employer's reliance on subjective supervisor ratings which were offered as validation of a pencil-and-paper test. The Court was manifestly skeptical of a practice in which subjective judgments were the basis of the employer's assertion of job-relatedness. *Id.*

During the decade following *Griggs* lower courts consistently applied the *Griggs* doctrine to subjective employment practices. The leading case is *Rowe v. General Motors*,[66] in which black hourly employees challenged the company's practice of promoting workers based on a foreman's subjective evaluation of an individual's ability.[67] The plaintiffs introduced statistical evidence of a significant disparity in employment opportunities for blacks.[68] The Fifth Circuit quoted *Griggs* in condemning General Motors' (GM) reliance on the subjective judgments of its foremen.[69] Only legitimate business necessity could excuse a practice which even inadvertently disadvantaged minority employees.[70] The GM procedure, as applied, violated Title VII because there was no proof that the affected blacks were unqualified for the higher positions.[71] Rather than being job-related, GM's subjective recommendation system provided an avenue for the individual prejudices of the foremen.[72] The Fifth Circuit was careful not to accuse either GM[73] or its foremen of intentionally discriminating but explicitly recognized the potential for subconscious discrimination.[74]

In *Griggs*, the Supreme Court had indicated that objective qualifications that were manifestly job-related should control employee selection procedures.[75] The *Rowe* doctrine postulated that subjective practices afforded a ready mechanism for discrimination which could be proved through disparate impact analysis.[76] The *Rowe* rationale was widely followed.[77] Disparate

66. 457 F.2d 348 (5th Cir. 1972).

67. *Id.* at 353.

68. *Id.* at 357.

69. *Id.* at 354.

70. *Id.*

71. *Id.* at 358-59. *Rowe* identified five factors which contributed to the unlawful system: (1) The foreman's recommendation was the most important single factor in the promotion process; (2) Foremen were not given written instructions pertaining to the qualifications necessary for promotions; (3) The foremen's own standards were vague and subjective; (4) Employees were not notified of openings nor informed of necessary qualifications; (5) There were no safeguards to prevent discrimination. *Id.*

72. *Id.* at 359.

73. *Id.* at 355. GM was praised for its affirmative recruiting of blacks, but in spite of these laudable steps the company's current policies might still be in violation of Title VII. *Id.*

74. *Id.* at 359.

75. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971). *See supra* note 39.

76. *Rowe*, 457 F.2d at 359. *See also* Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382 (4th Cir.) (subjective standards are badges of discrimination which

impact analysis was applied to subjective criteria through the entire gamut of employment determinations from recruitment to layoffs.[78] The mere use of subjective determinations was sufficient to raise a suspicion of discrimination although, without proof of a disparate impact, such practices were not *per se* unlawful.[79]

Ten years after *Griggs*, the Ninth Circuit, in *Heagney v. University of Washington*,[80] refused to use the disparate impact theory to evaluate an employer's discretionary classification system.[81] The University categorized non-academic employees as either "classified" or "exempt".[82] Classified employees had their salaries set by state law and adjusted by an administrative agency.[83] Exempt employees filled jobs with unique or unstandardized requirements and had their salaries set and adjusted at the discretion of the University.[84] The plaintiff was a research scientist whose job was categorized as "exempt".[85] She maintained that her salary was lower than comparably situated males because of the University's discrimination.[86] In her suit, she alleged both disparate treatment and disparate impact.[87] Before remanding for further consideration of the disparate

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corroborate the inference of discrimination drawn from statistical disparity in the work force), *cert. denied*, 409 U.S. 982 (1972).

77. *See* Johnson v. Uncle Ben's, Inc., 628 F.2d 419, 427 (5th Cir. 1980) (*Rowe* applicable to group decisions); James v. Stockham Valves and Fittings Co., 559 F.2d 310, 329 (5th Cir. 1977) (disparate impact analysis of subjectively decided job assignments), *cert. denied*, 434 U.S. 1034 (1978); Senter v. General Motors, 532 F.2d 511, 526-30 (6th Cir.) (cited and followed *Rowe* in applying *Griggs* to subjective promotion scheme), *cert. denied*, 429 U.S. 870 (1976); Muller v. United States Steel Corp., 509 F.2d 923, 928 (10th Cir. 1975) (vague subjective promotion decisions condemned under *Rowe-Griggs* analysis); Rogers v. International Paper Co., 510 F.2d 1340, 1345 (8th Cir.) (subjective criteria provide possibilities for abuse), *vacated on other grounds*, 423 U.S. 809 (1975); Baxter v. Savannah Sugar Refining Co., 495 F.2d 437, 442 (5th Cir. 1974) (subjective promotion system the cause of discrimination).

78. Stacy, *Subjective Criteria in Employment Decisions Under Title VII*, 10 GA. L. REV. 737, 745 (1976) (synthesis of decisions involving subjective criteria offering pragmatic guidance for practitioners).

79. Hester v. Southern Ry., 497 F.2d 1374, 1381 (5th Cir. 1974) (subjective hiring procedure need not be validated where there was no discriminatory pattern).

80. 642 F.2d 1157 (9th Cir. 1981).

81. *Id.* at 1163.

82. *Id.* at 1159.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1158-59.

87. *Id.* at 1163.

treatment claim, the court briefly discussed whether her charge could be analyzed under *Griggs*.[88]

The plaintiff contended that the University's practice of categorizing jobs as "classified" or "exempt" was a facially neutral practice which could be shown statistically to have a disproportionate impact on the salaries of female employees.[89] Without elaboration, the Ninth Circuit simply concluded that the University's practice could not be equated with objective practices and that disparate impact analysis was inappropriate.[90] Subjective employment decisions, such as the classifying of employees or the discretionary setting of salaries, must be shown to be intentionally discriminatory.[91] The court cited no authority for its refusal to require that the University prove the "job relatedness" of its practice.

In *Pouncy v. Prudential Insurance Co. of America*[92] the employer's entire promotion scheme, which included subjective components, was challenged.[93] The plaintiffs provided evidence of a racial imbalance[94] but the Fifth Circuit refused to allow a disparate impact attack on the cumulative effect of the company's policies.[95] Only the specific practice identified as responsible for the disparate impact need be validated.[96] An employer would be unfairly handicapped if forced to validate all of his practices upon the bare showing of a statistical disparity.[97] The *Pouncy* court demanded proof of a causal connection between the disparity and the challenged employment practice.[98] The Fifth Circuit panel also objected that subjective practices were not akin to the traditional bases for disparate impact analysis.[99]

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88. *Id.*

89. *Id.*

90. *Id.* The opinion does not explain why the University's system of classification could not be considered a facially neutral practice suitable for *Griggs* analysis.

91. *Id.*

92. 668 F.2d 795 (5th Cir. 1982).

93. *Id.* at 799. Job vacancies were not posted but rather white supervisors selected candidates for promotion using minimal objective criteria. Also, employee performance evaluations were rated largely on a subjective basis. *Id.*

94. *Id.* at 799.

95. *Id.* at 800.

96. *Id.* at 801.

97. *Id.*

98. *Id.*

99. *Id.* In declaring that subjective practices were not "akin" to the traditional ob-

For authority the *Pouncy* court cited a treatise,[100] whose definition of "neutral employment practices" is limited strictly to those purely objective requirements considered in *Griggs* and *Albemarle Paper v. Moody*.[101] The Fifth Circuit panel failed to discuss the *Rowe* doctrine even though *Rowe* was cited approvingly in the case[102] and was precedent for the *Pouncy* court to follow or distinguish.

In the aftermath of *Heagney* and *Pouncy* a previously settled area of the law became markedly fractured.[103] The Ninth

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jects of disparate impact analysis, the *Pouncy* court adopted a conclusional approach similar to that employed in *Heagney*. Neither court expounded on the critical differences between objective and subjective practices which warrant disparate impact analysis of the former but which deny application of the theory to the latter.

100. *Pouncy*, 668 F.2d at 801.

101. 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 73.00 (1987 & 1987 Supp.). *See supra* note 55.

102. *Pouncy*, 668 F.2d at 800 n.7. *See supra* notes 66-74 and accompanying text.

103. There is currently much disagreement on the issue throughout the circuits. The First Circuit has not had to decide the issue. *See* Latinos Unidos de Chelsea en Accion v. Secretary of Housing, 799 F.2d 774, 787 (1st Cir. 1986); Robinson v. Polaroid, 732 F.2d 1010, 1015 (1st Cir. 1984).

The Second Circuit has generally applied disparate impact analysis to subjective practices. *See* Zahorik v. Cornell University, 729 F.2d 85, 95-96 (2nd Cir. 1984) (subjective tenure process examined); Grant v. Bethlehem Steel, 635 F.2d 1007, 1016 (2nd Cir. 1980) (subjective-word-of-mouth hiring methods). *But see* Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 605 (2nd Cir. 1986) (refusal to extend disparate impact analysis to subjective criteria).

The Third Circuit has applied *Griggs* analysis to a promotion process which includes subjective components. Wilmore v. City of Wilmington, 699 F.2d 667, 672, 674 (3d Cir. 1983).

The Fourth Circuit currently refuses to apply disparate impact analysis to subjective criteria despite an earlier history of following *Rowe*. *See*, EEOC v. Federal Reserve Bank, 698 F.2d 633, 639 (4th Cir. 1983) (disparate impact analysis only applicable to objective standards), *rev'd on other grounds sub nom* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984); Pope v. City of Hickory, 679 F.2d 20,22 (4th Cir. 1982). *But see*, Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972).

The Fifth Circuit generally adheres to the position that it took in *Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795, 801 (5th Cir. 1982). *See also* Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 797 n.12 (5th Cir. 1986) (discretionary promotion procedure does not fit impact analysis), *cert. granted*, 107 S.Ct. 3227 (1987); Cunningham v. Housing Authority, 764 F.2d 1097, 1099 (5th Cir. 1985) (disparate treatment applicable to subjective hiring and promotion decisions); Lewis v. NLRB, 750 F.2d 1266, 1271 (5th Cir. 1985) (disparate impact not appropriate for discretionary promotion procedure); Walls v. Mississippi State Dept. of Public Welfare, 730 F.2d 306, 321 (5th Cir. 1984) (use of subjective criteria analyzed under disparate treatment model); Vuyanich v. Republic Nat'l Bank, 723 F.2d 1195, 1202 (5th Cir.) (disparate impact not the proper model to measure discriminatory hiring statistics), *cert. denied*, 469 U.S. 1073 (1984); Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 188 (5th Cir. 1983) (disparate impact

Circuit has noted the inherent dangers of the use of subjective

model inapplicable to subjective hiring and placement evaluations); Carpenter v. Stephan F. Austin State Univ., 706 F.2d 608, 620 (5th Cir. 1983) (*Pouncy* dictates that discretionary decisions be examined for discriminatory intent); Hill v. K-Mart Corp., 699 F.2d 776, 779 n.6, (5th Cir. 1983) (subjective decisions analyzed under disparate treatment model); Pegues v. Mississippi State Employment Serv., 699 F.2d 760, 765 (5th Cir.) (discretionary decisions not within scope of disparate impact model), *cert. denied*, 464 U.S. 991 (1983); Payne v. Travenol Laboratories, 673 F.2d 798, 817 (5th Cir.) (subjective hiring interviews not subject to impact analysis), *cert. denied*, 459 U.S. 1038 (1982). *But see*, Page v. U.S. Industries, 726 F.2d 1038, 1046 (5th Cir. 1984) (despite *Pouncy*, *Rowe* still permits impact analysis of subjective practices); Harrell v. Northern Elec. Co., 672 F.2d 444, 448 (5th Cir.) (subjective evaluations not sufficient business justification to refute disparate impact showing), *cert. denied*, 459 U.S. 1037 (1982).

The Seventh Circuit cases have been on both sides of the issue. *See* Regner v. City of Chicago, 789 F.2d 534, 538 (7th Cir. 1986) (allowing a disparate impact claim to proceed in reference to a subjective evaluation process); Clark v. Chrysler Corp., 673 F.2d 921, 927 (7th Cir.) (applying disparate impact analysis to word-of-mouth recruitment and separate hiring channels), *cert. denied*, 459 U.S. 873 (1982). *But see* Griffin v. Board of Regents, 795 F.2d 1281, 1288 n.14, (7th Cir. 1986) (disparate impact analysis inappropriate for subjective faculty hiring decisions).

The Eighth Circuit has recently indicated a willingness to apply disparate impact analysis to subjective decision-making. *See* EEOC v. Rath Packing Co., 787 F.2d 318, 327-28 (8th Cir.) (subjective hiring practices which have disparate impact on women must be justified by business necessity), *cert. denied*, 107 S.Ct. 307, (1986); Jones v. Hutto, 763 F.2d 979, 983-84 (8th Cir.) (adverse impact of excessively subjective practices was sufficent premise for liability), *vacated on other grounds*, 106 S.Ct. 242 (1985). *See also* Gilbert v. City of Little Rock, 772 F.2d 1390, 1398 (8th Cir.) (apparent willingness to apply disparate impact analysis to subjective promotion claim), *cert. denied*, 466 U.S. 972 (1984). *But see* Talley v. United States Postal Serv., 720 F.2d 505, 507 (8th Cir. 1983) (subjective decision-making system cannot form the foundation of a disparate impact case); Taylor v. Teletype Corp., 648 F.2d 1129, 1132 n.6 (8th Cir. 1981) (improper use of subjective procedures for demotions not a *Griggs*-type case).

The Sixth, Tenth, Eleventh and District of Columbia Circuits apply the disparate impact theory to all manner of subjectively-based employment practices. *See* Lojan v. Franklin County Bd. of Educ., 766 F.2d 917, 930 n.19 (6th Cir. 1985) (use of subjective criteria is a facially neutral practice subject to *Griggs* analysis); Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 93 (6th Cir. 1982) (subjective evaluations scrutinized under both theories); Hawkins v. Bounds, 752 F.2d 500, 503 (10th Cir. 1985) (impact analysis proper to evaluate use of subjective practices); Lasso v. Woodmen of the World Life Ins. Co., 741 F.2d 1241, 1244 n.1 (10th Cir.) (impact analysis appropriate for subjective promotion policy), *cert. denied*, 471 U.S. 1099 (1985); Bauer v. Bailar, 647 F.2d 1037, 1042-43 (10th Cir. 1981) (purpose of *Griggs* approach is to restrict use of subjective practices causing disparate impact); Coe v. Yellow Freight Sys., 646 F.2d 444, 450-51 (10th Cir. 1981) (impact analysis appropriate for subjective policies); Williams v. Colorado Springs School Dist. No. 11, 641 F.2d 835, 842 (10th Cir. 1981) (impact analysis appropriate for hiring system vesting nearly total discretion in school principals); Hill v. Seaboard Coast Line Ry., 767 F.2d 771, 776 (11th Cir. 1985) (disparate impact theory applicable to subjective selection process); Maddox v. Claytor, 764 F.2d 1539, 1548 (11th Cir. 1985) (subjective promotion process is facially neutral practice vulnerable to attack by disparate impact analysis); Griffin v. Carlin, 755 F.2d 1516, 1523-25 (11th Cir. 1985) (disparate impact theory is appropriate to challenge selection process containing subjective elements); Eastland v. Tennessee Valley Auth., 704 F.2d 613, 619-20, (11th Cir. 1983) (subjective selection and promotion procedures open to disparate impact attack), *cert. denied sub*

criteria in the disparate treatment context[104] but has not found them *per se* prohibited by Title VII.[105] In conflict with *Heagney* is *Hung Ping Wang v. Hoffman*,[106] decided one year after *Heagney*. The plaintiff in *Wang* challenged an entire promotion process, which contained subjective components, under both disparate impact and disparate treatment theories.[107] The district court analyzed the claim only under disparate treatment and found that there was no discrimination because the plaintiff was not the most qualified applicant.[108] The panel reversed and remanded to resolve the disparate impact claim.[109] The *Wang* court believed that it would be anomolous to require the plaintiff to prove that he was the most qualified under the promotion system when he was alleging that the system itself was discriminatory and not sufficiently job-related.[110] First, the system itself would have to be examined for its impact and, if found to have a disproportionate effect on minorities, it would have to be proven to be job-related.[111] The panel took note of the highly subjective

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nom James v. Tennessee Valley Authority, 104 U.S. 1415 (1984); Segar v. Smith, 738 F.2d 1249, 1270-72 (D.C. Cir. 1984) (no sound policy reason not to apply impact analysis to employment practices causing disparate impact), *cert denied*, 471 U.S. 1115 (1985).

104. *See* Kimbrough v. Secretary of United States Air Force, 764 F.2d 1279, 1284 (9th Cir. 1985). In *Kimbrough* a qualified black applicant was denied a promotion based on subjective evaluations. *Id.* at 1281. The court found discriminatory treatment holding that a subjective promotion process, while not discriminatory *per se*, should be scrutinized closely for evidence of abuse. *Id.* at 1284; *see also* Nanty v. Barrows Co., 660 F.2d 1327, 1334 (9th Cir. 1981). In *Nanty* a qualified Native American applicant was summarily refused an opportunity to apply for a job vacancy. *Id.* at 1329-30. His prima facie disparate treatment case went unrebutted. *Id.* at 1332. In remanding to determine whether plaintiff would have been hired in the absence of discrimination for the purpose of fashioning relief, the court cautioned that subjective criteria should be viewed with much skepticism. *Id.* at 1334; Lynn v. Regents of the University of California, 656 F.2d 1337, 1342 (9th Cir. 1981). In *Lynn* a female professor was denied tenure despite fulfilling objective requirements. *Id.* at 1340. Court found statistical data of pattern of sex discrimination helpful particularly where discriminatory treatment is alleged in highly subjective tenure process. *Id.* at 1342.

105. Ward v. Westland Plastics Inc., 651 F.2d 1266, 1270 (9th Cir. 1980). The plaintiff alleged that she was discharged because of sex discrimination evident in the employer's subjective evaluation of her job performance. *Id.* at 1269. The court affirmed the trial court's finding of no discrimination. *Id.* at 1270. Subjective evaluations, the court noted, are not discriminatory *per se* nor do they impose a burden of proving absence of intentional bias. *Id.* In a footnote the court apparently endorsed use of impact analysis for subjective criteria, the first word on the subject in the Ninth Circuit. *Id.* at 1270 n.1.

106. 694 F.2d 1146 (9th Cir. 1982).

107. *Id.* at 1147.

108. *Id.* at 1148.

109. *Id.* at 1149.

110. *Id.* at 1148.

111. *Id.*

aspects of the system and expressed concern over the possibility for bias.[112]

The *Wang* approach has been approved by a number of panels in the Ninth Circuit.[113] Others have chosen to adhere to the *Heagney* rationale and restrict subjective criteria to the disparate treatment model.[114] A Ninth Circuit panel discussed the conflict in *Moore v. Hughes Helicopters*[115] and although clearly skeptical of applying disparate impact analysis to subjective criteria, the issue was side-stepped because the plaintiff had failed to prove the requisite impact.[116]

IV. THE COURT'S ANALYSIS

A. The Panel Decision

The issue of the applicability of disparate impact analysis to subjective practices was directly before the panel in *Atonio v. Wards Cove Packing Co.*[117] The disparities existing at the canneries were striking and the companies' practices were highly discretionary.[118] The *Atonio* panel chose to follow the *Heagney v. University of Washington*[119] line of cases as the better reasoned approach.[120] The panel recognized the tension between Ti-

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112. *Id.* at 1148-49. The practices complained of included the ad hoc determination of hiring criteria for a particular job, the use of supervisor evaluations and the system used by a supervisors committee to correlate the criteria with the candidates. *Id.* at 1147. The district court found that a language skills requirement was added as a pretext to disqualify the plaintiff. *Id.* at 1147-48 n.2.

113. *See* Yartzoff v. Oregon, 745 F.2d 557, 559 (9th Cir. 1984) (disparate impact analysis applied to subjective criteria but no disparate impact shown); Peters v. Lieuallen, 693 F.2d 966, 969 n.1 (9th Cir. 1982) (case remanded to determine whether subjective tests which were not job-related had a prima facie disparate impact on blacks). *See also* Domingo v. New England Fish Co., 727 F.2d 1429, 1436 n.3 (9th Cir. 1984) (dicta recognizing that in some situations disparate impact analysis would be appropriate for use of subjective hiring criteria). *Peters* and *Wang* were decided by identical panels.

114. *See* Spaulding v. University of Washington, 740 F.2d 686, 709 (9th Cir.) (lack of well-defined criteria as facilitating wage discrimination is a claim better presented under the disparate treatment model), *cert. denied*, 469 U.S. 1036 (1984); EEOC v. Inland Marine Indus., 729 F.2d 1229, 1233 (9th Cir. 1984) (subjective wage-setting criteria properly analyzed as a disparate treatment case); O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 866 (9th Cir. 1982) (disparate treatment must be applied to allegations of vague promotion criteria).

115. 708 F.2d 475 (9th Cir. 1983).

116. *Id.* at 481-82.

117. 768 F.2d 1120 (9th Cir. 1985).

118. *Id.* at 1124.

119. 642 F.2d 1157 (9th Cir. 1981). *See supra* notes 80-91 and accompanying text.

120. *Atonio*, 768 F.2d at 1132. The panel also felt constrained by stare decisis to

tle VII ideals and the operation of the free market system.[121] By restricting disparate impact analysis to objective selection procedures, employers would be permitted the greatest freedom in defining employment qualifications yet would still be liable for intentional discrimination under the disparate treatment model.[122] This holding would be consistent with a perceived Congressional policy of minimum interference with employer prerogatives.[123] The panel feared that extending disparate impact analysis to subjective decisions, with the consequent elimination of the necessity of proving discriminatory intent, would impel employers to adopt quota hiring systems.[124]

B. THE *En Banc* MAJORITY

The full bench of the Ninth Circuit in *Atonio v. Wards Cove Packing Co.*[125] reversed the panel decision and resolved the conflict within the Ninth Circuit by extending application of the disparate impact theory to subjective employment practices.[126] Disparate impact and disparate treatment were characterized as simply "analytic tools" to be used to ascertain whether there has been impermissible discrimination by an employer.[127] The Supreme Court had sanctioned the use of either theory as applied to a particular set of facts.[128] The *Atonio* majority interpreted this as authorizing the use of whichever theory was most helpful in answering the ultimate question in a given case.[129] Prior decisions which had refused to apply impact analysis to subjective

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follow *Heagney* as the oldest unoverruled precedent. *Id.* at 1132 n.6. The *Wang* panel was chided for not discussing *Heagney*. *Id.* at 1132.

121. *Id.* at 1132.

122. *Id.* at 1132-33. *See supra* notes 26-33 and accompanying text.

123. *Id.* at 1132. The panel did not specify which Congressional enactment supported this policy but rather noted that the *Griggs* doctrine was judicially created and not explicitly provided for in Title VII. The panel was unimpressed with the argument that Congress had ratified *Griggs* in passing the 1972 amendments. *Id. See supra* notes 61-65 and accompanying text.

124. *Atonio*, 768 F.2d at 1132.

125. 810 F.2d 1477 (9th Cir. 1987).

126. *Id.* at 1478.

127. *Id.* at 1480 (*citing* Goodman v. Lukens Steel Co., 777 F.2d 113, 130 (3d Cir. 1985)); *Goodman* stated that the search for impermissible discrimination is the ultimate question in a Title VII action and cautioned against losing sight of it while enforcing the intricate evidentiary rules. *Id.*

128. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977). *See supra* note 25.

129. *Atonio*, 810 F.2d at 1480.

practices were expressly overruled.[130] Henceforth, a plaintiff in the Ninth Circuit may attack subjective practices or criteria if his prima facie case contains three elements: (1) proof of a significant disparate impact on a protected class, (2) identification of specific employment practices or selection criteria and (3) a showing of the causal relationship between the identified practices and the impact.[131]

Writing for the majority, Judge Tang[132] observed that Title VII outlaws discrimination without reference to an objective or subjective basis,[133] and that the Supreme Court has not expressly limited the disparate impact theory to purely objective criteria.[134] The full bench accepted the view that Congress endorsed *Griggs* and other decisional law when it amended Title VII in 1972.[135] Cases at that time had applied impact analysis to subjective practices.[136] The court reasoned, therefore, that applying impact analysis to subjective practices would be consistent with Congressional intent.[137]

Further support was drawn from the fact that the agencies charged with the enforcement of Title VII[138] have promulgated regulations which apply the disparate impact theory to all employee selection procedures without regard to subjective-objective distinctions.[139] These regulations have been accorded great deference by the Supreme Court and can be read as communi-

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130. *Id.* at 1486.

131. *Id.* at 1482. By requiring proof of a causal connection, *Atonio* incorporates the bare holding of Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795 (5th Cir. 1982). *See supra* notes 92-102 and accompanying text.

132. Judges Tang and Anderson were members of the *Atonio* panel.

133. *Atonio*, 810 F.2d at 1482 ("Title VII states that it is an unlawful employment practice to limit, segregate, or classify . . . employees or applicants for employment in *any way*." 42 U.S.C. § 2000e-2 (a)(2)(1982)) (emphasis in original).

134. *Atonio*, 810 F.2d at 1482.

135. *Id.* at 1482 (citing Helfand & Pemberton, *The Continuing Vitality of Title VII Disparate Impact Analysis*, 36 MERCER L. REV. 939 (1985), in which the legislative history of the 1972 amendments is extensively reviewed. Helfand and Pemberton argue that Congressional policy demands an expansive reading of the *Griggs* doctrine).

136. *See* United States v. Bethlehem Steel Corp., 446 F.2d 652, 657-58 (2nd Cir. 1971). *See also* United States v. Dillon Supply Co., 429 F.2d 800, 802, 804 (4th Cir. 1970).

137. *Atonio*, 810 F.2d at 1482-83.

138. Included are the Equal Employment Opportunity Commission, Office of Personnel Management, Department of Justice and Department of Labor.

139. *Atonio*, 810 F.2d at 1483. *See supra* note 60.

cating the will of Congress.[140] Since the purpose of Title VII is to remove unnecessary barriers to equal employment opportunities, Judge Tang believed that limiting disparate impact analysis would retard execution of that purpose.[141] A subjective practice unaccompanied by a conscious intent to discriminate may still operate as an unnecessary barrier; therefore the court felt such practices should be exposed to disparate impact scrutiny.[142]

The Ninth Circuit squarely confronted the argument that the Supreme Court had limited use of the disparate impact theory in *Furnco Construction Corp. v. Waters*.[143] *Furnco* was distinguished because the plaintiffs failed to establish a prima facie case of discrimination under the disparate impact theory.[144] They had not proven that the challenged practice actually had an adverse impact on minority applicants.[145] The *Atonio* plaintiffs had fully satisfied the three elements of a prima facie disparate impact claim.[146] Consequently, Judge Tang interpreted *Furnco* as imposing "no limitation on the use of impact analysis beyond the restrictions inherent in demonstrating a prima facie case."[147] Nothing in *Furnco* forbade analysis of subjective practices under the *Griggs* doctrine.[148]

The Ninth Circuit was not content to simply support its holding with appropriate authority but defended it forcefully on the basis of logic and policy. The defendants had contended that because subjective decisions are, by nature and definition, reflective of the decision-maker's conscious motivations, such decisions are unlawful only if an actual intent to discriminate is proven.[149] This contention was dispelled by the *en banc* court. A subjective practice may be a vehicle for intentional discrimination, but it may also be discriminatory even though the employer's conscious intent is completely neutral or even benign.[150]

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140. *Atonio*, 810 F.2d at 1483 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971)).
141. *Atonio*, 810 F.2d at 1483.
142. *Id.*
143. 438 U.S. 567 (1978). *See supra* notes 50-55 and accompanying text.
144. *Atonio*, 810 F.2d at 1484.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id. See supra* notes 34-41 and accompanying text.
149. *Atonio*, 810 F.2d at 1484.
150. *Id.*

If the subjective practice is used as a covert means to mask discrimination, its very coverture will make it difficult to prove the invidious intent.[151] If such practices are causing a disproportionate impact on a protected class, the purposes of Title VII are well served by allowing proof of the impact to be the basis of liability and thus eliminate the need for proving intent.[152] Proof of intent may be as undesirable as it is unnecessary because of the ill will that such proof may engender.[153]

The Ninth Circuit believed that allowing a distinction to be made between subjective and objective practices would actually subvert the purpose of Title VII because employers bent on discriminating would be encouraged to dispense with objective standards in an effort to avoid judicial scrutiny.[154] The full bench perceived the distinction as basically meaningless because most selection procedures encompass both objective and subjective elements.[155] Since the area is so grey, courts would continue to have difficulty discerning when disparate impact analysis would be proper.[156] Therefore, insisting on a meaningless distinction would not be helpful to future trial courts.[157]

The Ninth Circuit considered whether its decision would impose an unfair burden on employers. In rebutting a prima facie disparate impact claim, the court discerned no inherent unfairness in forcing an employer defending a subjective practice to shoulder the same burden as an employer defending objective criteria.[158] In either case the heavy burden of proving business necessity is appropriate because of the employer's unique position as the party most knowledgeable about the purposes and effects of his employment practices.[159] Such a burden is commensurate with the plaintiff's task in proving his prima facie case.[160] The court approved of challenging numerous practices either individually or collectively as long as the requisite show-

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 1485.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 1486.
160. *Id.* at 1485.

ing of a causal connection to a disparity is made.[161] If the defendant's burden is arduous it is because Title VII's purpose of extinguishing discriminatory employment practices mandates that it be so.[162] That purpose is best realized, the court held, by submitting subjective employment practices to disparate impact analysis.[163]

C. Concurrence

The concurring opinion evidences a concern that the majority's opinion may lead to disparate impact and disparate treatment being used interchangeably.[164] Because the majority provided no guidance in determining in which situations each theory should be used, Judge Sneed proposed some standards of differentiation.[165] He advanced a theory that would look to the function of the challenged practice as a means of determining whether disparate impact or disparate treatment is the correct theory to apply.[166] He agreed with the majority that the subjective-objective distinction was not a meaningful one.[167] Under his theory, disparate impact analysis would be proper whenever the plaintiff has challenged a practice that renders his true qualifications irrelevant.[168] If the employer has ignored the plaintiff's known qualifications for an allegedly discriminatory reason, the claim is properly analyzed under the disparate treatment model.[169] The nature of the wrong as pleaded and proved will determine which theory is applicable.[170] The respective burdens should be allocated accordingly.[171]

Judge Sneed acknowledged that his theory had not as yet been adopted by any court but that its application was consistent with the results reached in a number of cases in which simi-

161. *Id.* at 1486 n.6.
162. *Id.* at 1486.
163. *Id.*
164. *Id.* (Sneed, J., concurring).
165. *Id.* at 1486-87 (Sneed, J., concurring).
166. *Id.* at 1489 (Sneed, J., concurring).
167. *Id.*
168. *Id.* at 1490 (Sneed, J., concurring).
169. *Id.*
170. *Id.* at 1490-91 (Sneed, J., concurring).
171. *Id.* at 1491 (Sneed, J., concurring).

lar questions had been examined.[172] The canneries' practices were subjected to Judge Sneed's theory rendering results somewhat at odds with the majority.[173] Under his theory, the plaintiff's claims of discrimination in connection with rehiring policies, subjective criteria and segregation in housing and messing were correctly dismissed by the district court.[174] But he believed that the separate hiring channel and nepotism claims should have been remanded for analysis under the disparate impact theory.[175]

V. CRITIQUE

The full bench of the Ninth Circuit has restored a mighty weapon to the arsenal of the Title VII plaintiff by permitting subjective employment practices to be attacked through disparate impact analysis. A plaintiff who can prove that a significant statistical disparity is causally linked to an employment practice is relieved of the necessity of proving that the disparity was caused by purposeful discrimination.[176] The *Atonio* court performed exhaustive analysis which relied on the high ideals of Title VII and an expansive interpretation of Supreme Court precedents. While cognizant that employer prerogatives would be restricted by its decision, the *en banc* court appreciated that the basic premise of Title VII demands that employers not be free to utilize practices which may foster discrimination.[177]

The Ninth Circuit refused to accept a conceptually rigid distinction between the disparate impact and disparate treatment theories. Acceptance of a supposed bright line drawn between subjective and objective practices would have led to severe restrictions on the use of disparate impact analysis. Instead, the *Atonio* court adopted a pragmatic approach which described the two theories as analytic tools useful in identifying impermissible discrimination.[178] Title VII litigation in the Ninth Circuit will now focus on the ultimate question of discrimination rather

172. *Id.* at 1491 n.4 (Sneed, J., concurring).
173. *Id.* at 1492-94 (Sneed, J., concurring).
174. *Id.* at 1493-94 (Sneed, J., concurring).
175. *Id.* at 1493 (Sneed, J., concurring).
176. *Id.* at 1480.
177. *Id.* at 1485.
178. *Id.* at 1479.

than on ancillary characterization issues. Such an approach can only enhance the likelihood that the goals of Title VII will eventually be achieved.

Affirming the original panel decision would have created an incentive for employers to institute subjective procedures which would be vulnerable only to disparate treatment attack. Under the disparate treatment analysis, an employer need only articulate a legitimate, nondiscriminatory reason for his employment decisions.[179] A subjective practice having a disproportionate impact would violate Title VII only upon proof of the discriminator's unlawful state of mind. An employer would not have to prove the business necessity of his subjective practice. Since subjective practices have long been recognized as being particularly susceptible to discriminatory abuse,[180] it would be anomolous to impose a lighter burden on employers using such practices while demanding that objective practices be more rigorously scrutinized. By rejecting this anomoly the Ninth Circuit's *en banc* decision is likely to spur employers to examine their procedures to eliminate sources of subtle discrimination.[181]

Where subjective practices are immune from disparate impact analysis, characterization of a challenged practice is of critical importance.[182] Plaintiffs would have to carefully draft their disparate impact claims in terms of objective practices while defendants would emphasize the subjective aspects of those practices. By recognizing that such a distinction is not meaningful,[183] the Ninth Circuit has freed trial courts from having to decide if a particular practice is subjective or objective. The *Atonio* court realized that there is no bright line between subjective and objective employment practices.[184] By focusing on the ultimate

179. *See supra* note 30.

180. *See supra* notes 75-79 and accompanying text.

181. *See* Denis, *Subjective Decision Making: Does It Have a Place in the Employment Process?*, 11 EMPL. REL. L. J. 269 (1985) (practical advice to employers for avoiding Title VII liability).

182. Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 28 SUP. CT. REV. 17, 29-30 (1979) (arguing that current confused standards of adverse impact and job validation are detrimental to economic productivity without promoting equal employment opportunity).

183. *Atonio*, 810 F.2d at 1485. "When we view employment practices from the perspective of their impact on a protected class we are unable to see a principled and meaningful difference between subjective and objective practices." *Id.*

184. *Id.* The facts of *Atonio* are illustrative of this point as word-of-mouth recruit-

question of discrimination, the Ninth Circuit's *Atonio* opinion reflects a determination to advance the purposes of Title VII and not be preoccupied with procedural niceties. The Ninth Circuit is unconcerned that the line between disparate impact and disparate treatment may become blurred as long as the eradication of discrimination and its effects is furthered.[185]

The *Atonio* court provided welcome guidance to future trial courts and litigants by clarifying the elements necessary for a prima facie disparate impact case. The court emphasized that a plaintiff must prove a causal link between specific, identified practices and the bottom line disparity.[186] By stressing this causal link, the *en banc* court disarmed those who fear that indiscriminate use of the disparate impact theory could impose an injustice on an employer forced to defend his entire selection process.[187] The plaintiff, not the defendant, must link the disparity to specific practices and not simply rest after proving the imbalance. However, the court expressly provided that practices, once identified, could be considered individually *and* collectively.[188] As long as a plaintiff is specific, *Atonio* does not limit the range or number of practices which can be attacked and linked to the disparity. The link in *Atonio* was established inferentially through the identification of the practices and proof of the disparity.[189] This will probably be the usual method of establishing the connection, but since the burden is on the plaintiff, in a close case, direct proof may be required.

In assessing the relative evidentiary burdens in a disparate impact case, the *Atonio* court believed that the employer's heavy

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ment, rehire policies and nepotism all include both subjective and objective elements.

185. *Id.* at 1486.

186. *Id.*

187. *See* Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795, 800 (5th Cir. 1982). *Cf.* Segar v. Smith, 738 F.2d 1249, 1270-71 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). In *Segar*, an employee's challenge of the cumulative effect of a company's practices was found appropriate where the plaintiff could make out a prima facie showing of a significant disparity. *Id.* at 1266. Defendant, in rebuttal would have to identify which practice caused the disparity to meet his burden of articulating a legitimate nondiscriminatory reason for the disparity. *Id.* at 1270. With plaintiff's proof and defendant's identification of the specific practice, all elements of a disparate impact case would be before the court. *Id.* at 1271. Thus, there would be no reason why defendant should not prove the business necessity of the practice which he has identified. *Id.*

188. *Atonio*, 810 F.2d at 1486 n.6.

189. *Id.*

rebuttal burden would be commensurate with the plaintiff's difficult task in establishing a prima facie case.[190] Emphasis on the difficulty of the plaintiff's undertaking seems to be implicit recognition that justifying the necessity of a disparity-causing subjective practice may be impossible.[191] Nevertheless, such a practice must be justified or it violates Title VII. An employer must change his practices or be prepared to contest the elements of the plaintiff's prima facie case. The plaintiff's statistical evidence may be attacked as inaccurate, incomplete, non-probative or false.[192] Only after all the elements have been established and the employer has failed to discredit the prima facie case does the defendant's arduous burden of proving business necessity arise.

The broad implications of *Atonio v. Wards Cove Packing Co.* should not be underestimated. Virtually any employment practice may subject an employer to Title VII liability if it disproportionately impacts a protected group and cannot be justified.[193] The Ninth Circuit swept away artificial limitations on the use of the theory. Instead, *Atonio* suggests that the boundaries of the disparate impact theory are only those "restrictions

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190. *Id.* at 1486.

191. Where the qualifications for a job can be readily measured in terms of objective, quantifiable skills, such as the blue collar jobs at issue in *Atonio*, subjective assessments of applicants will rarely, if ever, be justifiable under Title VII standards. A more difficult problem is posed when the jobs in question, such as those in Heagney v. University of Washington, 642 F.2d 1157 (9th Cir. 1981), have unique or difficult to define qualifications. Arguably subjective standards are more defensible in the latter case. Nothing in Judge Tang's opinion suggests limiting the use of disparate impact analysis. Whether the disparate impact theory should be used to evaluate discrimination in upper level jobs is a question which has generated considerable academic discussion. *See, e.g.* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982); Maltz, *Title VII and Upper Level Employment - A Response to Professor Bartholet*, 77 NW. U.L. REV. 776 (1983); Newman, *Remedies for Discrimination in Supervisorial and Managerial Jobs*, 13 HARV. C.R.-C.L. REV. 633 (1978); Stacy, *Subjective Criteria in Employment Decisions Under Title VII*, 10 GA. L. REV. 737 (1976).

192. Although the order of proof in a disparate impact case is described as a three-part process, an intermediate step exists where the defendant may attempt to refute the plaintiff's prima facie case. Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376, 384 n.38 (1981). *See supra* note 46.

193. Since the court explicitly overruled the panel decision, subsequent cases which relied on it may now have their authority questioned. Notably AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985) where in a comparable worth challenge to the state's practice of paying salaries based on prevailing market forces, the court reversed the district court's finding of Title VII liability based on application of disparate impact analysis. Citing the *Atonio* panel, the court found the practice not to be one to which the disparate impact theory is properly applied. *Id.* at 1405-06.

inherent in demonstrating a prima facie case."[194] This test, derived from the Ninth Circuit's expansive reading of Supreme Court cases, recognizes that not every employment practice can have its impact defined and measured. Such practices would be resistant to disparate impact challenge simply because of the difficulty of proving a prima facie case. The disparate impact theory is based on proving discrimination through a statistically significant showing. It follows that the boundaries of the theory are to be found in the science of statistics and not in an arbitrary distinction between subjective and objective criteria.[195] By refusing to limit disparate impact analysis to objective criteria, the Ninth Circuit has chosen to permit expansion of the theory to its logical limits.

VI. CONCLUSION

The Ninth Circuit is now firmly among those circuits which refuse to limit application of the disparate impact theory to purely objective employment practices.[196] Minority and female employees may be expected to demand that all manner of employment practices which have tended to exclude them from employment opportunities be justified under the rigorous test of business necessity. Unless the United States Supreme Court imposes limitations on its use, the disparate impact theory is available to employees at any level to challenge any employment practice within the jurisdiction of the Ninth Circuit as long as he or she can satisfy the elements of a prima facie case.

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194. *Atonio*, 810 F.2d at 1484.

195. The Supreme Court recently granted certiorari in Watson v. Fort Worth Bank & Trust, 798 F.2d 791 (5th Cir. 1986), *cert. granted*, 107 S. Ct. 3227 (1987), to hear the single question: "Is the racially adverse impact of an employer's practice of simply committing employment decisions to the unchecked discretion of a white supervisory corps subject to the test of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)?" 43 EMPL. PRAC. GUIDE (CCH) ¶ 37,130 (JUNE 22, 1987). By answering this question the Supreme Court should settle the issue of whether the disparate impact theory is applicable to subjective employment practices.

196. *See supra* note 103.

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