NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 7
Issue 3 *Volume VII, Symposium 1990 Part Three: 1989 Supreme Court Decisions - Employment Discrimination and Affirmative Action: Have Civil Rights Been Eroded?*

Article 6

1990

The Immediate Fallout of Wards Cove

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THE IMMEDIATE FALLOUT OF *WARDS COVE*

by Judith Reed*

> "One wonders whether the majority still believes that race discrimination . . . is a problem in our society, or even remembers that it ever was."[1]

I. INTRODUCTION

Justice Blackmun's lament, set forth in his dissenting opinion in *Wards Cove Packing Co. v. Atonio*,[2] communicates what is wrong with each of the decisions discussed today. The Court has clearly turned its back on racial minorities. Nowhere is that more evident than in the *Wards Cove* decision; indeed, the opinion makes clear that the Court's majority has not only turned its back, but also has turned the tables on minority-plaintiffs. In *Wards Cove*, a decision that stands in stark contrast to the more than eighteen years of precedent that it threatens to overturn, the Court, in a five to four opinion, performed surgery on the allocation of burdens of proof in a disparate impact case. This article discusses the holding and how it has been applied by the lower courts, prefaced by a brief summary of the prior case law.

The Supreme Court first addressed the legality, under title VII of the Civil Rights Act,[3] of practices neutral on their face but discriminatory in application in *Griggs v. Duke Power Co.*[4] There the Court considered whether title VII prohibited an employer from requiring a high school education or successful completion of a standardized test, where those requirements disproportionately disqualified black applicants.[5] In an unanimous opinion authored by Chief Justice Burger, the Court held that such practices could indeed violate title VII, without regard to whether the

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1. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2136 (1989) (Blackmun, J., dissenting) (citation omitted).

2. *Id.*

3. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

4. 401 U.S. 424 (1971).

5. *Id.* at 426.

employer had any intention to discriminate.[6]

Griggs concluded first that title VII forbids the use of non-job related tests, job requirements, and other selection criteria, if they have a significant adverse impact on minorities or women.[7] Where such disparate impact exists, it is irrelevant whether an employer acted with a discriminatory motive.[8] The Court held that "[t]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[9]

In *Griggs*, the burden was on the employer to show that "any given requirement [bore] a *manifest relationship* to the employment in question."[10] The Court made clear that it was incumbent on the employer to justify the use of a practice with a discriminatory effect.[11] In *Albemarle Paper Co. v. Moody*,[12] the Court emphasized that upon a showing of a prima facie case of discrimination an employer must meet the burden of proving that its tests are job related.[13] In *Dothard v. Rawlinson*,[14] which dealt with minimum height and weight requirements for prison guards, the Court insisted that an employer prove that the challenged requirements are job related.[15] Five years later, the Court reiterated that an "employer must . . . *demonstrate* that any 'given requirement has a manifest relationship to the employment in question' . . . ."[16] Thus, *Griggs* and its progeny established a specific order and method of proof in a disparate impact case, specifically allocating the burden of proof on specific issues between the two adversary parties to the litigation. First, the plaintiff must

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6. *See id.* at 436 (Brennan, J., not participating) ("[A]ny tests used must measure the person for the job and not the person in the abstract.").

7. *Id.* at 431 ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed [in title VII].").

8. *Id.* at 432 ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.").

9. *Id.* at 431.

10. *Id.* at 432 (emphasis added). "What Congress has forbidden is giving these devices and mechanisms controlling force unless they are *demonstrably a reasonable measure of job performance.*" *Id.* at 436 (emphasis added).

11. *Id.* at 432.

12. 422 U.S. 405 (1975).

13. *Id.* at 425.

14. 433 U.S. 321 (1977).

15. *Id.* at 329.

16. Connecticut v. Teal, 457 U.S. 440, 446 (1982) (emphasis added) (quoting *Griggs*, 401 U.S. at 432).

establish a prima facie case by demonstrating that the disputed requirement or requirements had a significant adverse impact on minorities or women.[17] Second, where a prima facie case has been so established, the burden of proof shifts to the employer to prove that the requirement is job related.[18] Third, if the employer succeeds in doing so, the plaintiff can still prevail if he or she can show that some alternative requirement would be equally efficacious from the employer's perspective without entailing the objectionable adverse impact.[19]

II. THE DECISION IN *WARDS COVE*

In *Wards Cove*, plaintiffs sued an Alaskan salmon cannery alleging that a number of practices, including nepotism, word-of-mouth hiring, a rehire preference, separate hiring channels and a lack of objective hiring criteria, had resulted in a racially stratified workforce.[20] The unskilled cannery jobs were filled predominantly by Filipinos and Alaskan Natives.[21] The noncannery jobs, filled predominantly by white employees, ranged from semi-skilled, such as cooks and construction workers, to skilled, such as machinists, quality control inspectors and boat crews.[22] The Ninth Circuit Court of Appeals[23] held that this showing of "racial stratification by job category . . . was sufficient" to support an inference of discrimination in hiring practices.[24] Thus, since plaintiffs had made out a prima facie case of disparate impact in hiring,[25] the circuit court remanded for the district court to determine whether the employer had satisfied its burden of proving that any disparate impact caused by its hiring and employment practices was justified by business necessity.[26] Before the district court could act on remand, the Supreme Court granted

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17. *Id.*

18. *Albemarle Paper Co.*, 422 U.S. at 425.

19. *Id.*

20. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2120 (1989). Not only was the workforce racially stratified, but nonwhite employees lived and ate in segregated quarters, which were inferior to those assigned to whites. This anachronistic situation led Justice Stevens to comment that the industry's characteristics "bear an unsettling resemblance to aspects of a plantation economy." *Id.* at 2128 n.4 (Stevens, J., dissenting) (citation omitted).

21. *Id.* at 2119.

22. *Id.* at 2119 n.3.

23. Atonio v. Wards Cove Packing Co., 827 F.2d 439 (9th Cir. 1987).

24. *Id.*

25. *Id.* at 444.

26. *Id.* at 445.

certiorari and subsequently reversed and remanded the case.[27] In so doing, the Court redefined the tripartite *Griggs* test,[28] making it considerably more difficult for plaintiffs to prevail, by shifting much of the employer's burden to plaintiffs.[29]

Under *Wards Cove*, the prima facie case consists of two subparts. First, the plaintiff must show a disparity by making the proper statistical comparison, that is, the comparison must be between those occupying the at-issue jobs and those who are qualified for the positions.[30] *Wards Cove* makes clear, as have the lower courts for many years, that proof of a prima facie case requires that the plaintiff must ordinarily show what impact the employment requirement(s) actually had on qualified actual or potential applicants for the position at issue.[31] Plaintiffs may look to some other broader pool only if the needed skills may be readily found within the general population,[32] the application process itself is tainted by discrimination,[33] or there is no application process at all.[34]

Had the Court refrained from going further than holding that plaintiffs had to do more than show mere racial stratification in the workplace to establish a prima facie case,[35] its holding would have generated little, if any, controversy.[36] This is because there was arguably support for this first prong of the prima facie case.[37] Unfortunately, the Court did not stop after this holding but went on to add further elements

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27. *Wards Cove*, 109 S. Ct. at 2127.

28. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

29. *Wards Cove,* 109 S. Ct. at 2125-26.

30. *Id.* at 2121.

31. *Id.*

32. *Id.* at 2121 n.6. (where the jobs are unskilled, general labor market or census data may be acceptable).

33. *See id.* at 2122 n.7.

34. *See generally* SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 570-84 (2d ed. 1983).

35. *See Wards Cove*, 109 S. Ct. at 2122.

36. As Justice Stevens points out in his dissenting opinion, it would have been appropriate for the majority to have ended its opinion at this point and allow the district court to consider whether plaintiffs' evidence could meet this prima facie case requirement, according to the circuit court's direction. *Id.* at 2127 n.3 (Stevens, J., dissenting). *See also id.* at 2135-36 ("I agree with the Court of Appeals that when the District Court makes the additional findings prescribed today, it should treat the evidence of racial stratification in the work force as a significant element of respondents' prima facie case.") (citation omitted).

37. *See, e.g.*, Teamsters v. United States, 431 U.S. 324 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) (statistical evidence showing a disparity in hiring minority teachers was enough to establish a prima facie case of racial discrimination).

to the prima facie case.

After *Wards Cove*, even if the plaintiff makes the proper statistical showing, it is no longer sufficient to allege that a number of practices may be responsible for the disparity. To satisfy the second part of the prima facie case, the plaintiff must show "causation" by both identifying the specific practice(s) at issue and showing that the identified practice in fact caused the observed disparity.[38] "[T]he plaintiff is . . . responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed disparities."[39] Plaintiffs must then "specifically show[] that *each* challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites."[40]

Once the plaintiff has made out a prima facie case, the employer has an opportunity to offer a justification for the challenged practice(s).[41] Under *Griggs*, a prima facie showing of impact shifted the burden to the employer to show the policy was based on business necessity.[42] For this Court, three things have changed.

First, the burden that shifts to the employer is no longer one of proof, but one of production.[43] Second, the "touchstone" is no longer business necessity,[44] but instead is a "reasoned review of the employer's justification for his use of the challenged practice."[45] The employer need

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38. *Wards Cove*, 109 S. Ct. at 2125.

39. *Id.* at 2124 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)).

40. *Id.* at 2125 (emphasis added). In answer to any argument that the "specific causation requirement is unduly burdensome," Justice White points to the liberal discovery provisions of the federal rules and the record keeping requirements of EEOC regulations. *See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1-.18 (1988). Yet, in the same breath, the Court notes that in the case under consideration, the Wards Cove Packing Co. would not have to maintain records on its employees, because of an exemption for seasonal employment. *See id.* at 2125 n.10 (relying on 29 C.F.R. § 1602.14(b)).

41. *Id.* at 2125.

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

43. *See Wards Cove*, 109 S. Ct. at 2126. While acknowledging that some of its earlier decisions could be read as suggesting otherwise, the Court went on to say, disingenuously, that those cases "should have been understood to mean an employer's production -- but not persuasion -- burden." *Id.* (citation omitted).

44. As Justice Stevens points out in his dissenting opinion, in *Griggs* the "touchstone" was "business necessity," which was viewed as a "weighty" burden, requiring the employer to show that the practice was essential to effective job performance. *Id.* at 2132 (Stevens, J., dissenting).

45. *Id.* at 2126.

only produce evidence that in some significant way, the challenged practice serves legitimate employment goals.[46] The effect of this is to place the burden on the plaintiff -- the party with less access to the evidence -- to prove a negative, that is, to show that the practice does *not* serve the employer's legitimate goals.

Third, if the employer is successful in producing evidence of justification, as in pre-*Wards Cove* law, the plaintiff may still prevail by either "disproving an employer's assertion" or showing that an alternative selection without adverse impact could achieve the same goal.[47] However difficult this showing might have been before *Wards Cove*, it will be virtually an impossible task after the decision. This is because the Court encumbers this showing with a requirement that the alternative device must be "equally effective" as, and be of no greater cost or burden to the employer, when compared with the practice at issue.[48] Finally, the Court holds that even where the plaintiff is able to make the necessary causal connection, the burden of proof remains on the plaintiff.[49]

III. THE *WATSON* DECISION

A major source of this distortion of the law on disparate impact was the majority's deliberate blurring of the distinction that had existed for years between disparate treatment and disparate impact.[50] The first inkling that the Rehnquist wing of the Court was moving in this direction surfaced in *Watson v. Fort Worth Bank & Trust.*[51] There, the Court held for the first time that disparate impact theory could apply to challenges to subjective practices, as well as objective practices such as written tests.[52] The Court did so, based on its opinion that "our decisions in *Griggs* and succeeding cases could largely be nullified if disparate impact analysis were applied only to standardized selection practices."[53] Having decided the

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46. *Id.* at 2125-26. While a "mere insubstantial justification" is not adequate, the challenged practice need not be "essential" or "indispensable" to the employer's business. *Id.* at 2126.

47. *Id.* For example, in the case of a test, the plaintiff might show flaws in an employer's validation study. Failing that, the plaintiff could attempt to show that another type of test with less adverse impact would select competent workers.

48. *See id.* at 2127.

49. *Id.* at 2126.

50. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986-87 (1988).

51. *Id.*

52. *Id.* at 989-91.

53. *Id.* at 989.

only issue on which the Court granted *certiorari*,[54] the Court reached out to discuss allocation of the burdens of proof, which preceded a parallel discussion in *Wards Cove*.[55] The Court viewed its holding as an extension of disparate impact analysis that had to be accompanied by safeguards against the possible result that employers, finding it too difficult to defend subjective practices, would resort to quotas to avoid litigation.[56] Those safeguards, according to the plurality, should include requiring that the plaintiff isolate specific practices and prove a causal connection between the disparity and those practices.[57]

The concurring opinions in *Watson*[58] and dissenting opinions in *Wards Cove*[59] explain why the allocation of burdens of proof are different in the two types of cases. In a disparate treatment case,[60] the focus is on the motive of the employer.[61] Thus, to make out a prima facie case of disparate treatment in, for example, hiring or promotion, a plaintiff need only show that: (1) he belongs to a racial minority; (2) he applied and was qualified for an available position; (3) he was rejected; and (4) the employer continued to seek applicants with similar qualifications.[62] The purpose of the prima facie case is to "create a presumption of unlawful discrimination by 'eliminat[ing] the most common nondiscriminatory

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54. The Court phrased the issue as follows: "[W]e must determine whether the reasons that support the use of disparate impact analysis apply to subjective employment practices, and whether such analysis can be applied in this new context under workable evidentiary standards." *Id.*

55. Justice O'Connor's opinion, setting forth the burdens of proof which became law after *Wards Cove* did not garner sufficient support in *Watson*, presumably because Justice Kennedy, a member of the *Wards Cove* majority, did not sit on the Court when *Watson* was decided. Justices Blackmun, Brennan, and Marshall dissented from this aspect of the *Wards Cove* decision, while Justice Stevens, concurring in the judgment, cautioned that it was "unwise to announce a 'fresh' interpretation of our prior cases applying disparate-impact analysis to objective criteria," in the absence of findings by the district court on the employer's explanation for its use of supervisor discretion in that case. *Id.* at 1011 (Stevens, J., concurring) (citation omitted).

56. *Id.* at 993 (O'Connor, J., plurality opinion).

57. *Id.* at 994-95.

58. *See id.* at 1000 (Blackmun, J., concurring).

59. *Wards Cove*, 109 S. Ct. at 2127 (Stevens, J., dissenting).

60. Such a case presents "the most easily understood type of discrimination" where "[t]he employer simply treats some people less favorably than others because of their race . . . ." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

61. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) (shifts burden of proof to employer).

62. *Id.* at 802.

reasons for the plaintiff's rejection.'"[63] Because "[t]he burden of establishing a prima facie case of disparate treatment is not onerous,"[64] the burden that shifts to the employer in such cases is merely to "articulate a legitimate, nondiscriminatory reason"[65] for the negative action. The plaintiff may then show such reason to be pretextual.[66] The ultimate burden of persuasion properly remains with the plaintiff:

> In a disparate treatment case there is no "discrimination" within the meaning of Title VII unless the employer intentionally treated the employee unfairly because of race. Therefore, the employee retains the burden of proving the existence of intent at all times. . . . [T]he employer may undermine the employee's evidence but has no independent burden of persuasion.[67]

In contrast to "a claim of intentional discrimination, which the [prima facie case] factors establish only by inference, the disparate impact caused by an employment practice is *directly* established by the numerical disparity."[68] Thus, "[t]he plaintiff in such a case already has proved that the employment practice has an improper effect; it is up to the employer to prove that the discriminatory effect is justified."[69] The *Wards Cove* majority ignores this crucial distinction.

We have now seen how the Court arrived at this juncture. In order to weigh the likely impact of this extraordinary revision of prior case law, we need to look at how the lower courts have interpreted *Wards Cove*. Five courts of appeals and a number of district courts have had occasion to apply *Wards Cove*. The decisions indicate problems ahead for plaintiffs

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63. *Wards Cove*, 109 S. Ct. at 2130 (Stevens, J., dissenting) (footnote omitted) (quoting in part Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)).

64. *Burdine*, 450 U.S. at 253.

65. *Id.* at 254.

66. *Id.* at 255-56.

67. *Wards Cove*, 109 S. Ct. at 2131 (Stevens, J., dissenting). The Ninth Circuit similarly noted "[t]he crucial difference between a treatment and an impact allegation is the intermediate burden on the employer." Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1485 (9th Cir. 1987).

68. *Watson*, 487 U.S. at 1004 (Blackmun, J., concurring) (emphasis in original).

69. *Id. See also Wards Cove*, 109 S. Ct. at 2127-33 (Stevens, J., dissenting). "[W]hen an employer is faced with sufficient proof of disparate impact, its only recourse is to justify the practice by explaining why it is necessary to the operation of a business. Such a justification is a classic example of an affirmative defense." *Id.* at 2131. *See also id.* at 2131 & nn.15-17 (discussion of how the various treatises on evidence, from 1872 to the present day, support the *Griggs* allocation of burdens of proof).

in each aspect of the Court's holding, with the possible exception of the first prong of the prima facie case, requiring the proper statistical comparison.[70] The cases are inconclusive for purposes of predicting the long-term impact, primarily because the cases were tried before *Wards Cove*. However, several courts of appeal view *Wards Cove* as substantially changing the law, and district courts will undoubtedly adapt their readings of the decision accordingly.

IV. THE PLAINTIFF'S BURDEN TO SHOW CAUSATION

This second prong of the prima facie case essentially opens the door for courts to more easily dismiss the plaintiff's case where there is a multicomponent selection procedure. Cases which applied the *Griggs* allocation of burden of proof are currently being remanded to be analyzed under the *Wards Cove* allocation.

In *Allen v. Seidman*,[71] the defendant argued that "the plaintiffs had failed to pinpoint particular aspects of [a three-day oral and written selection procedure] that were unfavorable to blacks."[72] The Court responded that "nothing in the structure of a disparate-impact case requires such pinpointing; whether the reason for the test's disparate impact can be identified is merely another issue bearing on the correct interpretation of the plaintiffs' statistics."[73] Plaintiffs satisfied the causation element of the

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70. Because the need for a proper statistical comparison arguably had to be satisfied before *Wards Cove*, those cases where the plaintiffs lost on that basis would have likely lost even if *Wards Cove* had not been decided. *See, e.g.*, Hill v. Seaboard Coastline R.R. Co., 885 F.2d 804 (11th Cir. 1989) (plaintiffs made a bare bones showing by simply comparing 12% black carmen with only 1 black foreman out of 25); Mallory v. Booth Refrigeration Supply Co., 882 F.2d 908 (4th Cir. 1989) (plaintiffs had failed to make the proper comparison, *i.e.*, between those on the clerical pool who were qualified to be supervisors and those who had been appointed). *But see* Allen v. Seidman, 881 F.2d 375, 379-80 (7th Cir. 1989) (plaintiffs not required to take into account all possible differences in the candidate pool).

71. 881 F.2d 375 (7th Cir. 1989).

72. *Id.* at 381.

73. *Id. See also* Lu v. Woods, 717 F. Supp. 886 (D.D.C. 1989). "Neither [plaintiff] himself nor his proof at trial has specified precisely what it is about AID's method of evaluating and promoting its employees that has produced the alleged disparity." *Id.* at 891. There the district court pointed out that plaintiff had not introduced evidence of other Asian-Americans or what caused them to be excluded from higher positions at AID. *Id. See also* Harris v. Lyng, 717 F. Supp. 870 (D.D.C. 1989). The court held that "despite the potential for racial discrimination by the all-white [selection committee] plaintiff has failed to show the necessary causal connection between the [committee's] actions and any claimed discrimination," because the committee did not select but merely recommended individuals for promotion. *Id.* at 875 (citation omitted).

prima facie case here because it was not difficult to imagine how a selection procedure in which objective standards were absent may have harmed black applicants.[74]

This same sort of logic was followed by the district court in *Sledge v. J.P. Stevens & Co.*,[75] which refused to vacate its 1975 liability determination in light of *Wards Cove*.[76] The court held that the identification by plaintiffs of the uncontrolled, subjective discretion of defendant's employment officials as the source of the discrimination shown by plaintiffs' statistics sufficed to satisfy the causation requirements of *Wards Cove*.[77]

The Second Circuit also appears to have taken *Wards Cove* to heart.[78] In a pre-*Wards Cove* opinion, *Equal Employment Opportunity Commission v. Joint Apprenticeship Committee of the Joint Board of the Electrical Industry*,[79] the district court had granted the Equal Employment Opportunity Commission's (EEOC) motion for partial summary judgment on disparate impact claims that the JAC's[80] high school diploma requirement discriminated against blacks and that its age limitations discriminated against women, noting that it was "not necessary for plaintiffs to explain the disparity on which their prima facie case rests; they must only show that its existence is more probable than not."[81] Because of this language the Second Circuit concluded that the district court's decision "appears not to conform to the applicable legal standard" under *Wards Cove*.[82] The Second Circuit vacated and remanded for further proceedings in light of *Wards Cove*, which clarified that the EEOC bore the initial burden of demonstrating not only race and gender disparities but

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74. *See Allen*, 881 F.2d at 381.

75. 52 Empl. Prac. Dec. (CCH) ¶ 39,537, at 60,496 (D.C.N.C. 1990).

76. *Id.* at 60,499.

77. *Id.* at 60,498. The record here showed that the tests used by the defendant were normally not given until after a decision to offer employment to an applicant had already been made, and that blacks did as well on the tests as whites. Defendant's personnel officers were unable to explain the statistical disparities with defendant's personnel officers offering only that they tried to hire the "best qualified people." *Id.*

78. *See* EEOC v. Joint Apprenticeship Comm. of the Joint Indus. Bd. of the Elec. Indus., 895 F.2d 86 (2d Cir. 1990).

79. *Id.*

80. JAC is the joint labor-management board that administers training programs for apprentice electricians in the New York City metropolitan area. *Id.* at 87.

81. *Id.* at 91 (quoting the United States District Court for the Southern District of New York). Relying on applicant data and census data, the EEOC showed that there was a substantial disparity between the applicants pool and the acceptance rate of blacks and women into the program. *Id.* at 87-88.

82. *Id.*

also a causal nexus between those disparities and JAC's diploma and maximum age requirements."[83]

In *Lowe v. Commack Union Free School District*,[84] plaintiffs challenged, in an age discrimination suit, the New York Board of Education hiring procedure, which consisted of an interview and writing sample test.[85] Finalists were interviewed by principals whose recommendations were accepted.[86] The court of appeals held that plaintiffs failed to show disparate impact, while also questioning whether the plaintiffs adequately identified a specific employment practice.[87] "Under *Wards Cove* and *Watson*, [plaintiffs] cannot satisfy the requirements of a prima facie case simply by broadly attacking as discriminatory the hiring process as a whole."[88] The court went on to note, however, that even if plaintiffs' attack were to be viewed as a challenge to the practices that narrowed the pool of candidates, it still failed based on the statistics presented.[89]

V. THE EMPLOYER'S BURDEN OF JUSTIFICATION

Probably the most troubling aspect of the Court's decision is its redefinition of the employer's burden of justifying the practice producing the racial disparity.[90] In framing this aspect of the evidentiary analysis along the lines of *Burdine*, rather than *Griggs*, the Court has sent a message to the lower courts.[91]

That message has not been lost on those lower courts that have had occasion to apply this aspect of the *Wards Cove* test. In *Hill v. Seaboard Coast Line Railroad Co.*,[92] the Eleventh Circuit read *Wards Cove* as having overruled the existing law in the circuit on this issue, since "the

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83. *Id.*

84. 886 F.2d 1364 (2d Cir. 1989).

85. *Id.* at 1367. Defendants acknowledge that interviewers had considerable discretion in conducting the interviews. *Id.*

86. *Id.* at 1367-68.

87. *Id.* at 1370.

88. *Id.* at 1371.

89. *Id.* at 1371-72. The facts showed that applicants over the age of forty were actually overrepresented in the candidates selected. Moreover, while the court found that internal applicants under forty fared better in the interview process, the overall results did not show a disparity that was significant, in part because of small sample size problems. *Id.* at 1372.

90. *Wards Cove*, 109 S. Ct. at 2125-26.

91. *Id.* at 2126-27.

92. 885 F.2d 804 (11th Cir. 1989).

employer merely has the burden of production [after plaintiff has made out a prima facie case] . . . ."[93]

In *Allen v. Seidman*,[94] Judge Posner observed that *Wards Cove* "modified the ground rules that most lower courts had followed in disparate-impact cases" in part by "return[ing] the burden of persuasion to the plaintiff, while leaving the burden of production on the employer, and also dilut[ing] the 'necessity' in the 'business necessity' defense . . . ."[95] Indeed, under *Wards Cove* the term "business necessity" defense is "now a misnomer, since the 'defense' does not require a showing of necessity and is no longer an affirmative defense[]."[96] The court suggests that the doctrine be renamed the "issue of legitimate employer purpose."[97] Because of the change in the nature of the employer's burden announced in *Wards Cove*, "after that decision the prima facie case means less than it did before, so there is less reason to be fussy about it. Under the regime of *Wards Cove* it just makes the defendant produce some evidence in justification of its test, after which the plaintiff must prove the test unreasonable."[98]

The Seventh Circuit held that the plaintiffs had established a prima facie case under the standards adopted in *Wards Cove* and had also "mounted a powerful attack" on defendant's justificatory evidence.[99] The court appeared to agree with plaintiffs that the challenged test was poorly designed and administered, and noted that the test had been abandoned shortly after the suit was filed.[100]

Despite all this evidence undercutting the employer's asserted business justification, the Seventh Circuit remanded the case because the district court appeared to have placed the burden of persuasion on the defendant.[101] However, there is a suggestion that the plaintiffs' evidence, although compiled pre-*Wards Cove*, might be sufficient to meet plaintiffs'

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93. *Id.* at 812 n.12.

94. 881 F.2d 375 (7th Cir. 1989).

95. *Id.* at 377.

96. *Id.*

97. *See id.* at 381.

98. *Id.* at 379.

99. *See id.* at 380.

100. *Id.* ("The evidence supports the district court's findings that there were no set questions, no set right or wrong answers, no fixed passing grade, no instructions for weighting performance on the various parts of the exam, no fixed time limits for the individual sessions, and no evaluation of the panel members."). Further, the test arbitrarily emphasized some aspects of the job over others and failed to test many of the tasks that would be performed. *Id.* at 380-81.

101. *Id.* at 381.

burden after *Wards Cove*.[102] The appellate court held that the only issue open on remand is whether the employer had a legitimate purpose in using the challenged test."[103]

In a companion case, *Evans v. City of Evanston*,[104] the issue on appeal was whether defendants' physical agility test for the job of firefighter "serves a legitimate interest of the employer" under the changed "ground rules for disparate impact litigation [announced in *Wards Cove*]."[105] Affirming the prior finding that the test itself was fine under the relaxed standard of *Wards Cove*, the court turned to the question of the defendants' methods of scoring the test.[106]

Under *Wards Cove*, the employer has the burden of producing evidence that the test itself, and the method of scoring used, serves a legitimate employer purpose.[107] To this end, the employer must produce evidence that the method of determining who passed the test in question was related to the city's need for a physically capable firefighting force.[108] The Seventh Circuit characterized the city's evidence on this question as "feeble."[109] However, the failure of the city to justify the method of scoring, when viewed in light of their production of justificatory evidence relating to the test itself, is not enough to warrant failing to place the burden of persuasion on the plaintiff.[110] The case was then remanded to permit the district court to determine "whether, with all the evidence in, the plaintiff proved . . . that the test, because of its method of scoring, did not serve the legitimate ends of the employer but instead unreasonably excluded women."[111]

In *Bernard v. Gulf Oil Corp.*,[112] the Fifth Circuit Court of Appeals held that the district court was not clearly erroneous in finding that the challenged practices were justified by legitimate business purposes under *Wards Cove* and *Watson*.[113] An industrial relations expert and a retired

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102. *Id.* at 377-81.

103. *Id.* at 381.

104. 881 F.2d 382 (7th Cir. 1989).

105. *Id.* at 383.

106. *Id.* at 383, 384.

107. *Id.* at 384.

108. *Id.*

109. *Id.* at 384-85.

110. *Id.* at 385.

111. *Id.*

112. 890 F.2d 735 (5th Cir. 1989).

113. *Id.* at 740. The plaintiffs attacked Gulf Oil's seniority system, including the manipulation of certain lines of progression, and the use of promotional and hiring tests having an adverse impact on black employees. *Id.* at 737-38.

personnel official testified that the lines of progression were restructured to increase efficiency and that the changes conformed with industry practices at the time.[114] This evidence apparently was sufficient to satisfy the employer's burden "to produce evidence, but not to prove, that the 'challenged practice serves, in a significant way, the legitimate employment goals of the employer.'"[115]

With regard to the tests, in probably the most striking departure from pre-*Wards Cove* law, the Bernard court appears to adopt a rule that "employers are not required, even when defending standardized or objective tests, to introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance."[116]

Similarly, the Fourth Circuit considers the justification burden to have been transferred to the plaintiff in *Mallory v. Booth Refrigeration Supply Co.*[117] In *Mallory*, the court of appeals held that after a prima facie showing, plaintiffs would then be required to "prove that the proffered justification for the practice does not serve any legitimate employment goals of the employer."[118]

But in *Green v. USX Corp.*,[119] the Third Circuit Court of Appeals, while allowing that "*Wards Cove* may have relaxed the employer's burden to rebut the prima facie case,"[120] did "not read the decision as requiring [it] to accept at face value an employer's explanations of the adverse impact of its hiring practices on blacks."[121]

Finally, in *Sledge v. J.P. Stevens & Co.*,[122] the court stated that, "[a]s a result of *Wards Cove* we now know . . . that in the face of a prima facie case the employer's burden, even in a disparate impact case, is simply one of production and not of proof."[123] However, "[t]he nearest the defendant came to producing evidence that its hiring practices were dictated by business necessity was the testimony of one of its witnesses that

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114. *Id.* at 741.

115. *Id.* at 740 (quoting *Wards Cove*, 109 S. Ct. at 2126).

116. *Id.* at 742 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988)).

117. 882 F.2d 908 (4th Cir. 1989).

118. *Id.* at 912.

119. 896 F.2d 801 (3d Cir. 1990).

120. *Id.* at 805.

121. *Id.* The employer defendant had argued that its hiring system enabled it to select the best qualified employees and that blacks had just "dropped out" of the process more often than whites. *See* Green v. United States Steel Corp., 570 F. Supp. 254, 275-77 (E.D. Pa. 1983).

122. 52 Empl. Prac. Dec. (CCH) ¶ 39,537, at 60,496 (D.C.N.C. 1990).

123. *Id.* at 60,497-98.

defendant simply endeavored to hire the best qualified people to fill vacancies in its work force."[124] This was not sufficient to shift the burden back to the plaintiffs.[125]

VI. PLAINTIFFS' SHOWING OF AN ALTERNATIVE SELECTION PROCEDURE

Most cases are resolved at the second stage of the tripartite evidentiary analysis.[126] This is likely to be as true before *Wards Cove* as after. But after *Wards Cove*, given the Supreme Court's addition of the requirement that the proposed alternatives be "equally effective" as the challenged practices in meeting the employer's legitimate objectives, it may be expected that no plaintiffs will meet this burden.[127]

In *Bernard v. Gulf Oil Corp.*,[128] the Fifth Circuit rejected a proposed alternative to restructuring lines of progression, as well as a proposed alternative to promotional tests.[129] The court stated that "[t]he Supreme Court has made it clear that by 'equally effective' it meant an alternative practice that would serve the employer's business purpose fully as well in terms of utility, cost, 'or other burdens' of the proposed

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124. *Id.* at 60,498.

125. *Id.* at 8. *See also* EEOC v. O & G Spring and Wire Forms Specialty Co., 732 F. Supp. 72 (N.D. Ill. 1990). The district court found that the employer had provided legitimate business reasons for relying on word-of-mouth recruitment by showing it got a source of workers that were willing to work at low pay, *i.e.*, Polish immigrants with technical training. In so doing, the court overturned its previous rejection of that justification and an earlier liability finding, after *Wards Cove*, because the burden had been placed on the employer. *Id. But see* EEOC v. Andrew Corp., 51 Empl. Prac. Dec. (CCH) ¶ 39,364, at 59,537 (1989). The district court upheld a challenge to word-of-mouth recruitment from a primarily white workforce. The court found that the practice did not serve legitimate goals, expressed by the employer as inevitable and least costly. The court rejected that defense as "weak evidence," based in part on the company's willingness to advertise in suburban papers. *Id.* at 59,441-42.

126. *See, e.g., Wards Cove*, 109 S. Ct. at 2128-33 (Stevens, J., dissenting) (the tripartite evidentiary analysis in disparate impact cases consists of: (1) a showing by plaintiff that the employer-defendant's employment practice has a disparate impact on minorities; (2) a rebuttal by the defendant showing that the practice is one of "business necessity"; and (3) if the practice is one of "necessity" a showing by the plaintiff that another system would serve their ends without having as harmful an impact on minorities). Disparate impact cases rarely, if ever, progressed to the employee rebuttal stage since a clear burden was put on the defendant to show that the practice be "manifestly" related to the employment in question. *See, e.g.,* Connecticut v. Teal, 457 U.S. 440, 446-47 (1982).

127. *Wards Cove*, 109 S. Ct. at 2127.

128. 890 F.2d 735 (5th Cir. 1989).

129. *Id.* at 744.

alternative device."[130]

In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*,[131] the Seventh Circuit Court of Appeals held that the burden was to show any alternative selection practice which was as "economically and technically feasible" and equally effective. Here, the plaintiffs did not produce evidence of any alternative and the Court upheld the company's "fetal protection policy" that excluded all fertile women from certain hazardous jobs.[132]

In *Equal Employment Opportunity Commission v. Carolina Freight Carriers Corp.*,[133] a case involving the alleged disparate impact on Hispanic applicants for truck driver positions of a "no-conviction" policy, the district court rejected the EEOC's attempt to show that a policy which barred applicants who had convictions within five to ten years of applying would serve the employer's purpose of minimizing its employee theft losses.[134] The district court concluded that since the employer showed that its employee theft losses were lower than others in the industry, the EEOC had failed to meet its burden of proving that its alternative was "equally effective or [would] have a less restrictive effect."[135]

VII. CONCLUSION

While a review of these opinions is inconclusive, they highlight the disturbing aspects of *Wards Cove*. First, in this delineation of the allocation of the burdens of proof, the Court moves closer to an intent standard which is directly contrary to its earlier readings of title VII and,

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130. *Id.* (citing *Wards Cove*, 109 S. Ct. at 2127).

131. 886 F.2d 871 (7th Cir. 1989), *cert. granted*, 110 S. Ct. 1522 (1990).

132. This case is mentioned here only as an example of an interpretation of this *Wards Cove* requirement. However, if the Supreme Court holds, as it should in my opinion, that a policy that applies to women only is not facially neutral, this case would not be susceptible to a disparate impact analysis.

133. 723 F. Supp. 734 (S.D. Fla. 1989).

134. *Id.* at 752, 754. The employer's policy prohibited the hiring of applicants who had ever been convicted of a felony. *Id.* at 742. The district court also found fault with aspects of the prima facie case, although plaintiff showed that all six positions at issue were filled by non-Hispanic applicants and that Hispanics were more likely to be convicted than non-Hispanics. For example, there were few openings, a lack of evidence on the number disqualified and no proof of number convicted but qualified otherwise for employment. Given these statistical gaps, it is likely that this case would have been lost even prior to *Wards Cove*. *Id.* at 745-46.

135. *Id.* at 753.

indeed, contrary to congressional intent.[136] Second, lower courts could easily conclude that little remains of the employer's burden, because "reasoned review" comes very close to a "rational basis" test. Is it sufficient for an employer to simply state that the challenged selection criterion is the least expensive and simplest method of obtaining the "best qualified" workers?[137]

Finally, where the employer uses a multicomponent selection process, how precise must plaintiff's proof be? It is not uncommon for employers to use several different criteria in making a selection decision; a combination of tests, for example, or separate height and weight requirements. In some cases the requirement that the plaintiffs identify a specific practice and show causation will not be difficult to meet. Where the employer has records from which all parties can determine how much an adverse impact, if any, each job requirement may have had, both parties will have access to the information, and either or both will put it in evidence.

Under a different scenario, however, after *Wards Cove*, plaintiffs will have a much less likelihood of success. Consider the following example: (1) the employer uses a combination of requirements to make a hiring or promotion decision; (2) that combination, taken together, has a net adverse impact on minorities or women; and (3) the employer does not have records from which it is possible to ascertain which requirement or requirements are responsible for that adverse impact. Under *Wards Cove*, where these three factors are present, the disparate impact claim may well be dismissed. It is not sufficient that a plaintiff can show that the employer is making employment decisions in a manner which causes a substantial adverse impact; the plaintiff under *Wards Cove* is required, on pain of dismissal, to demonstrate which of the various specific job

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136. In *Teal*, the Supreme Court notes that "[t]he legislative history of the 1972 amendments to Title VII . . . extended the protection of the Act . . . by deleting exemptions for state and municipal employers. That history demonstrates that Congress recognized and endorsed the disparate impact analysis employed by the Court in *Griggs*." *Teal*, 457 U.S. at 447 n.8 (citations omitted). The notion that the only discrimination that should be sanctioned is intentional discrimination is becoming a hallmark of the Rehnquist Court. *See, e.g.*, McClesky v. Kemp, 481 U.S. 279 (1987) (rejecting challenge to Georgia's capital punishment statute, despite overwhelming proof of statistical disparities in administration of the death penalty depending on the race of the victim); City of Mobile v. Bolden, 446 U.S. 55 (1980) (no violation of the Voting Rights Act, and the pre-1982 amendments to that act, by at-large elections in absence of proof of discriminatory intent).

137. Such a defense was categorically rejected by the Supreme Court in Furnco Constr. Corp. v. Waters, 438 U.S. 657 (1978) (employer asserted that allowing a white superintendent to hire employees, which he knew to be competent, was justified as a business necessity).

requirements caused the adverse impact, and to what degree.

The Court justified this "latest sojourn into judicial activism,"[138] and the changing of long-established ground rules, because a contrary holding would result in "a host of evils" including the wholesale adoption of quotas by employers who found the burden of validating subjective criteria impossible to meet.[139]

Those who argue that quotas will be the inevitable result of placing the burden of proof on the employer to justify criteria having a disparate impact have been unable to substantiate this proposition. If this result were actually likely, one might expect that eighteen years of experience under *Griggs*, as well as experience in those circuits that prior to *Watson* had held subjective practices subject to a disparate impact analysis, would have yielded some empirical evidence to support this proposition.[140] Yet, neither the Supreme Court nor the Bush Administration has been able to present such support, preferring apparently to rely on some abstract common sense notions. What has been a result of the burden of proof allocation under *Griggs* was that employers who relied on tests to hire or promote, reformed those tests, where they were seen to have a disparate impact on minorities and women. Employers who wished to avoid litigation sought expert assistance in constructing fairer tests and in the end obtained a more diverse workforce.[141] This kind of progress will halt at a time when elements such as changing demographics of the workforce, economic need and a growing atmosphere of racial bias make it most needed. We can only hope that Congress acts quickly to restore the *Griggs* standard.

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138. *Wards Cove*, 109 S. Ct. at 2128 (Stevens, J., dissenting).

139. *Id.* at 2122 ("The Court of Appeals' theory would 'leave the employer little choice . . . but to engage in a subjective quota system of employment selection.'") (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring)). *See also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 993 (1988).

140. *See Watson*, 487 U.S. at 984-85.

141. For example, in 1970, only 6.4 % or 23,796 of the 375,494 police officers and detectives in the country were black, while in 1982, 9.3 % or approximately 47,000 of the 505,000 police officers in the country were black. *See* U.S. BUREAU OF THE CENSUS, CENSUS OF THE POPULATION: 1970, VOL. 1, CHARACTERISTICS OF THE POPULATION, PART 1, UNITED STATES SUMMARY § 1, at Table 223 (1973).