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Civil Rights - Employment Discrimination - Title VII - Prima Facie Violation

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Recent Decisions

CIVIL RIGHTS — EMPLOYMENT DISCRIMINATION — TITLE VII — PRIMA FACIE VIOLATION — The Supreme Court of the United States has held that a non-discriminatory "bottom line" is no defense to a prima facie claim of employment discrimination under Title VII of the Civil Rights Act of 1964.

Connecticut v. Teal, 102 S. Ct. 2525 (1982).

The respondents, Winnie Teal, Rose Walker, Edith Latney and Grace Clark, were black employees of the Department of Income Maintenance of the State of Connecticut.[1] All four were provisionally promoted to Welfare Eligibility Supervisory positions and served in such capacities for almost two years.[2] In order to be considered for permanent supervisory positions, the respondents were required to pass a written examination. On December 2, 1978, the written test was given to 329 candidates.[3] Based on a passing score of 65%,[4] only 54.17% of the identified black candidates passed the exam, or approximately 68% of the corresponding passing rate for white candidates.[5] Respondents failed the examination and were therefore excluded from further consideration for permanent supervisory status. In April of 1979, respondents[6] filed suit in the

1. Connecticut v. Teal, 102 S. Ct. 2525, 2529 (1982).

2. *Id.*

3. *Id.* There were 48 black candidates and 259 white candidates.

4. *Id.* Although the actual mean score was 70.4%, the mean scores of the black candidates were 6.7% lower than the scores of the white candidates; in an apparent attempt to soften the disparate impact of the test, the passing rate was set at 65%. *Id.* n.3. *See* Teal v. Connecticut, 645 F.2d 133, 135 & n.4 (2d Cir. 1981).

5. 102 S. Ct. at 2529. *See id.* n.4 for a detailed table illustrating the passing rates of the various candidate groups who took the exam. The State of Connecticut did not contest the district court's implicit finding that the exam on its face may have resulted in disparate impact under the "eighty percent rule" of the Uniform Guidelines on Employment Selection Procedures adopted by the Equal Employment Opportunity Commission. *See* App. to Pet. for Cert. 18a, 23a & n.2. The guidelines provide in relevant part that "[a] selection rate for any race . . . which is less than four-fifths (4/5) (or 80%) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact." 29 C.F.R. § 1607.4D (1981).

6. 102 S. Ct. at 2529. These black respondents were joined on a pendent claim by four white employees who alleged that the written test violated Connecticut law which required

United States District Court for the District of Connecticut against the State of Connecticut, two state agencies and two state officials, alleging, inter alia, that the petitioners violated Title VII[7] by requiring as an absolute condition for promotion consideration that applicants pass a written, non-job-related, examination which disproportionately excluded blacks.[8]

Approximately one month before trial, the petitioners made promotions from the eligibility list generated by the written exam.[9] Eleven blacks and thirty five whites were promoted to permanent supervisory positions.[10] The selection process resulted in the promotion of 22.9% of the participating black candidates, while 13.5% of the white candidates were promoted.[11] Petitioners urged that this "bottom line" result, which was more favorable to blacks than to whites, constituted a complete defense to the respondents' law suit.[12]

The United States District Court for the District of Connecticut treated respondents' claim as one of disparate impact[13] and entered judgment for the petitioners.[14] Although Judge Daly recognized that the comparative passing rates for the examination indicated a prima facie case of adverse impact upon minorities, he stated that the entire hiring process did not reflect such an adverse impact. Accordingly, the district court held that the "bottom line" percentages precluded the finding of a Title VII violation; therefore, the employer was not required to prove the examination's job-relatedness.[15]

On appeal, the United States Court of Appeals for the Second

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that promotional exams be job-related. This claim was not addressed by the Court. *See* 645 F.2d 133, 135 n.3.

7. Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. V 1982).

8. 102 S. Ct. at 2529.

9. *Id.* Petitioners primarily considered past work performance, recommendations and seniority, and then applied what the Second Circuit characterized as an affirmative action program to ensure a significant number of minority supervisors. Although the petitioners contested this characterization, the Supreme Court did not address the issue. *Id.* at 2530 n.5.

10. *Id.* at 2530.

11. *Id.* In actuality, the black candidates experienced a promotion rate 170% of the promotion rate of the white candidates. *Id.* n.6.

12. *Id.* at 2530.

13. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (*see infra* notes 33, 36 and accompanying text); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (*see infra* notes 34, 36 and accompanying text); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

14. 102 S. Ct. at 2530. *See* App. to Pet. for Cert. 18a.

15. 102 S. Ct. at 2530. *See* App. to Pet. for Cert. 22a-24a, 26a.

Circuit reversed[16] and held that the district court erroneously determined that the results of the written examination alone were insufficient to support a prima facie case of disparate impact under Title VII.[17] Judge Meskill stated that any pass-fail barrier that denied employment opportunities to a disproportionately large number of minorities and prevented them from advancing in the selection process must be shown to be job-related.[18] The United States Supreme Court granted certiorari[19] and subsequently affirmed the judgment of the Second Circuit, by holding that a nondiscriminatory "bottom line" did not constitute a defense to the respondents' prima facie claim of employment discrimination under Title VII.[20]

Justice Brennan, author of the majority opinion,[21] first addressed the issue of whether an examination that barred a disparate number of black employees from promotion consideration and was not shown to be job-related presented a claim under section 703(a)(2) of Title VII.[22] The respondents based their claim upon the Court's prior construction of section 703(a)(2) in *Griggs v. Duke Power Co.*[23] Justice Brennan noted that, although the employment requirements in *Griggs* applied equally to all employees and applicants, a disproportionate number of blacks were barred from employment opportunities.[24] The *Griggs* Court held that even though there was no showing of racial purpose or invidious intent by the employer in imposing these requirements, they were never-

16. Teal v. Connecticut, 645 F.2d 133 (2d Cir. 1981).

17. *Id.* at 137.

18. *Id.* at 138.

19. 102 S. Ct. 89 (1981).

20. Connecticut v. Teal, 102 S. Ct. 2525, 2529 (1982).

21. Justice Brennan's majority opinion was joined by Justices White, Marshall, Blackmun, and Stevens. *Id.* at 2526. Justice Powell filed a dissenting opinion, in which Chief Justice Burger, Justice Rehnquist and Justice O'Connor joined. *Id.* at 2536 (Powell, J., dissenting).

22. *Id.* at 2530. Section 703(a)(2) of Title VII provides in pertinent part:

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

42 U.S.C. § 2002e-2(a)(2) (1976 & Supp. V 1982).

23. 401 U.S. 424 (1971). In *Griggs*, prior to the enactment of Title VII, black employees of the company were restricted to the labor department. After the passage of Title VII, employees who desired a transfer out of the labor department were required to have either a high school diploma or to achieve a passing grade on two professionally-prepared aptitude tests. *Id.* at 426-27. New employees were required to possess both the diploma and the passing grades to obtain employment outside the labor department. *Id.* at 427-28.

24. *Id.* at 426.

theless invalid because of their disparate impact and lack of job-relatedness.[25]

Justice Brennan identified a three-prong analysis of disparate impact claims as established through *Griggs* and its progeny.[26] The plaintiff must first show that the facially neutral employment practice had a significant discriminatory impact. If this is accomplished, the employer must then show that the requirement is job-related in order to negate a finding of discrimination. However, the plaintiff may still prevail if it is shown that the requirement was used as mere pretext for discrimination.[27] Justice Brennan explained that *Griggs* identified the congressional intent underlying the enactment of Title VII, which was to remove "artificial, arbitrary and unnecessary barriers to employment" which had historically been encountered by women and blacks.[28]

Justice Brennan stated that the examination given by the petitioners clearly fell within the language of section 703(A)(2) as interpreted by *Griggs*.[29] The language of section 703(a)(2) deals not with jobs or promotions but rather with classifications and limitations that would deprive an individual of employment opportunities.[30] In enacting section 703(a)(2) Congress' basic objective was to achieve equal employment opportunities and remove barriers which had favored white employees in the past.[31] The use of a non-job-related barrier by an employer to deny any minority or woman applicant employment or promotion, which had an adverse effect on the applicant's employment opportunities, clearly violates sec-

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25. *Id.* at 431. The Court stated that: "[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. *The 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." *Id.* (emphasis added).

26. 102 S. Ct. at 2531.

27. *Id. See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). *See also infra* notes 90-102 and accompanying text.

28. 102 S. Ct. at 2531. *See Griggs*, 401 U.S. at 431. *See also* Dothard v. Rawlinson, 433 U.S. 321 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Additionally, both the House and the Senate reports cited *Griggs* with approval in the 1972 amendments to Title VII which extended the protection of the act to state and municipal employees. *See* S. REP. No. 92-415, 92d Cong., 2d Sess. 5 (1971) ("Employment as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs"). *See also* H.R. REP. No. 92-238, 92d Cong., 2d Sess. 8 (1971), and 1972 U.S. CODE CONG. & AD. NEWS 2137.

29. 102 S. Ct. at 2531.

30. *Id. See supra* note 23.

31. 102 S. Ct. at 2531-32. *See Griggs*, 401 U.S. at 429-30.

tion 703(a)(2).[32]

Justice Brennan noted that *Griggs*, which relied on section 703(a)(2), specifically focused on employment practices, procedures or tests which acted as "built-in headwinds" for minority groups.[33] He found that in the instant case, the examination given to the respondents clearly constituted a practice which created a barrier to employment opportunities and equality.[34] He added that the Court's conclusion that respondents' claims were encompassed by section 703(a)(2) was further reinforced through the 1972 congressional extension of the protection of Title VII to state and municipal employees.[35]

Justice Brennan recognized that post-*Griggs* decisions, which have considered disparate impact claims under section 703(a)(2), have consistently focused on employment and promotional requirements which created a discriminatory bar to employment opportunities. Further, he noted that the Court has never interpreted section 703(a)(2) to focus on the overall numbers of applicants actually hired or promoted.[36]

Justice Brennan disagreed with the district court's dismissal of respondents' claim for failure to establish a prima facie case of em-

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32. 102 S. Ct. at 2532. Section 703(a)(2) prohibits "artificial, arbitrary, and unnecessary barriers to employment" which would "limit . . . or classify . . . applicants for employment . . . in any way which would deprive or tend to deprive any individual of employment *opportunities*." *Griggs*, 401 U.S. at 431 (emphasis added).

33. 102 S. Ct. at 2532. *See Griggs*, 401 U.S. at 430-32.

34. 102 S. Ct. at 2532. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (Congress' purpose was to achieve equality of employment opportunities and remove barriers to equality).

35. 102 S. Ct. at 2532. Although Congress did not explicitly consider the viability of the defense offered by the State of Connecticut, the 1972 amendments to Title VII reflected a congressional intent to extend to state and municipal employees the same equality of opportunity and elimination of discriminatory barriers that the *Griggs* interpretation of Title VII had afforded to employees in the private sector. *Id. See supra* note 25.

36. 102 S. Ct. at 2532. In Dothard v. Rawlinson, 433 U.S. 321 (1977), the Court found that the minimum statutory height and weight requirements for correction counselors constituted an arbitrary barrier to equal employment opportunities for women forbidden by Title VII. *Id.* at 331-32. Although *Dothard* noted the bottom line impact of the requirement, it focused on the disparate effect that the height and weight requirements had on the female applicants. *Id.* at 329-30. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the case was remanded to permit the employer to prove that the tests given were job related. The Court did not suggest that an employer could avoid meeting this burden of proof by promoting a sufficient number of black employees who passed the examination. *Id.* at 436. Additionally, in New York Transit Auth. v. Beazer, 440 U.S. 568 (1979), the Court determined that statistical evidence which indicated that employment practice denies members of one race equal employment opportunities did in fact establish a prima facie violation of Title VII. *Id.* at 584.

ployment discrimination under section 703(a)(2).[37] He found that the measurement of disparate impact solely at the bottom line ignored the Title VII individual guarantee of an opportunity to compete equally with white workers on the basis of job-related criteria.[38] Therefore, respondents' rights under section 703(a)(2) were violated unless the petitioners could demonstrate that the examination was related to the effective performance of a Welfare Eligibility Supervisor.[39]

The United States, in its amicus curiae brief,[40] observed that respondents' claim was within the affirmative commands of Title VII, but supported the district court's judgment which relied upon an employer's defense as provided in section 703(h).[41] The United States contended that the petitioners' examination was not used to discriminate because the employer did not actually deny promotion to a disproportionate number of blacks.[42] Justice Brennan noted that under *Griggs*, the United States' reliance on section 703(h) was misplaced.[43] He reiterated that the legislative history of section 703(h) indicated that Congress added this provision to clarify the permissability of job-related tests despite their disparate impact.[44] But the use of non-job-related tests, which had a disparate impact and were used to classify or limit employees, discriminated against employees under Title VII; it was irrelevant whether the tests were designed or intended to have such an effect or whether the employer attempted to compensate for a discrimina-

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37. 102 S. Ct. at 2533.

38. *Id.*

39. *Id.*

40. *Id.* The Government's brief was submitted by the Justice Department which shares responsibility for federal enforcement of Title VII with the Equal Employment Opportunity Commission (EEOC). The EEOC declined to join in the brief. *Id.* at 2533 n.11.

41. Section 703(h) provides in relevant part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administrations or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(h) (1976 & Supp. V 1982).

42. 102 S. Ct. at 2533.

43. *Id.*

44. *Id.* at 2533-34. *See Griggs*, 401 U.S. at 433-36. Justice Brennan, in support of this interpretation, revealed that when section 703(h) was introduced to the Senate as an amendment to Title VII, it " 'did not alter the meaning of Title VII, but "merely clarifie[d] its present intent and effect."' " 102 S. Ct. at 2534 (quoting American Tobacco v. Patterson, 102 S. Ct. 1534, 1539 (1982) (quoting 110 CONG. REC. 12723 (remarks of Sen. Humphrey))).

tory effect.[45] Therefore, Justice Brennan held that respondents' claim of disparate impact from the examination's pass-fail barrier stated a prima facie case under section 703(a)(2) to which no "bottom line" defense could be asserted under section 703(h).[46]

Justice Brennan next considered the position of petitioners and amici curiae that an exception should be developed, either in the nature of an additional burden upon employees in establishing a prima facie case, or an affirmative defense, where employers compensate for a discriminatory barrier by hiring or promoting a sufficient number of blacks to thereby reach a non-discriminatory "bottom line."[47] Justice Brennan rejected this suggestion because it required a redefinition of the protections guaranteed by Title VII.[48]

Justice Brennan again relied upon the legislative history of the entire statute and its principal focus on the protection of the individual employee, not the minority group as a whole.[49] He observed that the petitioners and amici curiae apparently confused unlawful discrimination and discriminatory intent in their assertion of a "bottom line" defense to a discrimination claim by an individual employee.[50] Justice Brennan conceded that a non-discriminatory bottom line coupled with a good faith effort to achieve a non-discriminatory workforce could assist an employer in rebutting the inference of intentional discrimination.[51] However, he noted that the question of intent was not at issue. The question was, rather, whether petitioners could justify discrimination against respondents in light of favorable treatment of other members of respondents' racial group.[52] Under Title VII, a racially balanced workforce does not constitute a defense to individual acts of discrimination.[53] Justice Brennan emphasized that Congress clearly

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45. *See Griggs*, 401 U.S. at 433.

46. 102 S. Ct. at 2534.

47. *Id.*

48. *Id.*

49. *Id. See* 110 CONG. REC. 7213 (1964) (memorandum of Sens. Clark and Case). *See also* 110 CONG. REC. 8921 (1964) (remarks of Sen. Williams).

50. 102 S. Ct. at 2535.

51. *Id.* "Proof that [a] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided." Furnco Const. Corp. v. Waters, 438 U.S. 567, 580 (1978). *See also* Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977) (statistical evidence is not irrefutable and depends on surrounding facts and circumstances).

52. 102 S. Ct. at 2535.

53. *Id. See* Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), in which the Court stated: "It is clear beyond cavil that the obligation imposed by Title VII is to provide an

did not intend to permit employer discrimination against individual employees merely because of favorable treatment of others in the employee's group.[54]

Petitioners next contended that the Court should distinguish facially discriminatory policies from policies, such as in the instant case, that are facially neutral with a discriminatory impact.[55] Justice Brennan refused to recognize such a distinction and stated that it is the effect on the individual victim and not the facial nature of the discriminatory policy which results in a Title VII violation.[56]

The Court concluded that a nondiscriminatory "bottom line" was no defense to the respondents' prima facie claim of employment discrimination; thus, the judgment of the United States Court of Appeals for the Second Circuit was affirmed and the case was remanded.[57]

In his dissenting opinion, Justice Powell[58] asserted that although the Court's past decisions had been sensitive to the critical distinction between cases proving Title VII violations through a showing of disparate treatment or discriminatory intent and those cases showing disparate impact, the majority blurred this distinction in the case at bar.[59] Justice Powell conceded that although the language of section 703(a)(2) suggested that discrimination occurs only on an individual basis,[60] the Court in *Griggs v. Duke Power Co.*[61] and subsequent disparate impact cases had considered the violation of section 703(a)(2) in terms of the adverse impact on the

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equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Id.* at 579 (emphasis in original) (citations omitted).

54. 102 S. Ct. at 2535 (citing Los Angeles Dept. of Water &Power v. Manhart, 435 U.S. 702 (1978)). The *Manhart* Court could not justify the unfairness to individual female employees that was allowed by employers asserting favorable treatment to the class of woman employees as as whole, because the statute's focus on the individual was unambiguous. *Id.* at 708 (citing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam)). In *Phillips,* the Court found that a rule which barred the employment of married women with preschool age children violated Title VII even though women constituted 75 to 80 percent of the positions which the plaintiff sought. 400 U.S. at 551.

55. 102 S. Ct. at 2535.

56. *Id. See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 342 (1977) (affirmation of good faith held insufficient to dispel prima facie case of discrimination).

57. 102 S. Ct. at 2536.

58. *See supra* note 22.

59. 102 S. Ct. at 2536 (Powell, J., dissenting).

60. *See supra* note 21.

61. 401 U.S. 424 (1971).

individually protected group.[62] Justice Powell explained the Court's distinction that disparate treatment cases focus on the treatment of the individual, while disparate impact cases deal with the protected group.[63] Additionally, disparate impact cases subsequent to *Griggs* have consistently considered the result of the employer's total selection process in reference to any adverse impact on the protected group.[64] Justice Powell concluded that if the case at bar were correctly decided on the basis of precedent, a disparate impact would clearly not have been found. He further stated that the majority ignored reality in its finding that the selection process had an unfavorable disparate impact on blacks.[65]

Justice Powell noted that the majority, disregarding the distinction developed by precedent, continuously asserted that Title VII focused on individual, not group, rights.[66] He stated that in so doing, the aims of Title VII were confused with the legal theories through which those aims were to be vindicated.[67] Although individuals, not groups, are intended to be protected by Title VII, its jurisprudence has recognized two distinct methods of proof: those cases involving direct proof of discriminatory intent,[68] in contrast with disparate impact cases in which plaintiffs prove discrimination by inference.[69] Justice Powell asserted that there can be no

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62. In *Griggs*, the Court held that the disparate impact of an employer's practices on a racial group may be violative of § 703(a)(2). *See Griggs*, 401 U.S. at 432.

63. 102 S. Ct. at 2536 (Powell, J., dissenting). *See* Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978) in which Justice Marshall stated:

> It is well established under Title VII that claims of employment discrimination because of race may arise in two different ways . . . An individual may allege that he has been subjected to "disparate treatment" because of his race, or that he has been the victim of a facially neutral practice having a "disparate" impact on his racial group.

Id. at 581-82 (citation omitted).

64. 102 S. Ct. at 2536 (Powell, J., dissenting). *See* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (height and weight requirements found to disproportionately bar women's opportunity for employment as correction counselors); Albemarle Paper Co. v. Moody, 422 U.S. 405, 409-11 (1975) (seniority system and test requirement kept disproportionate amount of blacks in lower paying jobs); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (requirement of high school diploma and passing grade on achievement test found to exclude disproportionate number of blacks).

65. 102 S. Ct. at 2537 (Powell, J., dissenting). Justice Powell concluded that the 22.9% promotion rate for blacks when compared with the 13.5% rate for whites would clearly indicate no disparate impact. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* In these cases, the main focus is on the individual plaintiff who, at the forefront throughout the presentation of evidence, tries to establish direct, intentional discrimination. *Id.*

69. *Id.* The plaintiff attempts to show that the selection process results in dispropor-

Title VII violation based on the disparate impact theory absent disparate impact on a group.[70]

Justice Powell suggested that, in the instant case, respondents conflated both theories by undertaking to prove discrimination by reference to group figures while attempting to preclude a showing of non-discrimination through viewing the impact on the group and the process as a whole.[71] According to Justice Powell, the majority's acceptance of the respondents' position confused the individualistic aim of Title VII with the methods of proof through which Title VII rights are vindicated.[72] Justice Powell admitted that respondents as individuals were entitled to Title VII protection but stressed that after pleading a disparate impact claim, they could not deny the petitioners the opportunity to introduce evidence that no disparate impact existed.[73] He stated that under a facially neutral employment process, without adverse impact on the group, Title VII was not violated.[74]

Justice Powell next addressed the distinction between the facially discriminatory policy cases[75] and those facially neutral policy situations such as in the instant case,[76] and concluded that this distinction must not be blurred. Disparate impact claims such as those found in *Teal* are based upon how well groups fare in relation to other groups under a particular practice or test.[77] In fact, where one individual minority member has taken a test, Justice Powell noted that there can be no disparate impact claim regardless of what weight is given the test in the selection process.[78]

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tionate rejection of members of a protected group to which he belongs; thus, an inference may be drawn that the plaintiff was himself a victim of this discriminatory process. *Id.*

70. *Id.* The EEOC has adopted bottom line principles in deciding whether to bring an action against an employer. *Id.* at 2537 n.4.

71. *Id.*

72. *Id.*

73. *Id.* at 2538 (Powell, J., dissenting). *See* EEOC v. Greyhound Lines, 635 F.2d 188 (3d Cir. 1980), in which the Third Circuit observed: "[n]o violation of Title VII can be grounded on the disparate impact theory without proof that the questioned policy or practice has had a disproportionate impact on the employer's workforce . . . there can be no disparate impact unless there is disparate impact." *Id.* at 192.

74. 102 S. Ct. at 2538 (Powell, J., dissenting).

75. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam).

76. 102 S. Ct. 2525 (1982).

77. *Id.* at 2539 (Powell, J., dissenting).

78. *Id.* at 2539 n.7. Justice Powell noted that in disparate impact cases, the probative value of statistical evidence varies with the sample size; a sample of only one for example, would be too small to establish a prima facie case of disparate impact. *See, e.g.*, Interna-

Justice Powell concluded that the majority's decision was a step in the direction of confusion; that Title VII does not require implementation of merit hiring or measures directed at placing the greatest number of minority applicants for consideration for positions or promotion;[79] nor does it require that employers develop tests which accurately reflect the skills of each individual candidate. He commented that the majority appeared to be unaware of the practical reality and probable consequences of its decision.[80] Justice Powell expressed his concern that the majority could force employers to eliminate tests or rely upon expensive job-related test procedures which might not sustain challenge.[81] As a result of the majority's decision, state and local governmental units with limited funds could resort to quota hiring, an arbitrary and unfair employment method, which could result in the employment of fewer minority members.[82]

Disparate impact and disparate treatment cases[83] have been recognized by the Supreme Court as prima facie violations of Title

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tional Bhd. of Teamsters v. United States, 431 U.S. 324, 329 n.20 (1977) (small sample size detracts from value of statistical evidence); Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620-21 (1974) (sample size of thirteen presents concern); Rogillio v. Diamond Shamrock Chem., 446 F. Supp. 423, 427-28 (S.D. Tex. 1978); Dendy v. Washington Hosp. Center, 431 F. Supp. 873, 876 (D.D.C. 1977) (sample must mirror the employment situation).

79. *See, e.g.*, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258-59 (1981) (employer not required to give preferential treatment to minorities or women, nor restructure the employment practice so as to maximize their number hired); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978) (employer not required to modify his employment practices so as to enable the maximum number of minorities and women to be given employment opportunities).

80. 102 S. Ct. at 2539 (Powell, J., dissenting).

81. *Id.*

82. *Id.* at 2539-40 (Powell, J., dissenting). Justice Powell quoted from Brown v. New Haven Civil Serv. Comm'n, 474 F. Supp. 1256 (D.Conn. 1979), in which the Connecticut District Court warned:

> [A]s private parties are permitted under Title VII itself to adopt voluntary affirmative action plans . . . Title VII should not be construed to prohibit a municipality's using a hiring process that results in a percentage of minority policemen approximating their percentage of the local population, instead of relying on the expectations that a validated job-related testing procedure will produce an equivalent result, yet with the risk that it might lead to substantially less minority hiring.

Id. at 1263 (citations omitted).

83. Under disparate impact cases, facially neutral practices (no overt discriminatory motive evident) that have discriminatory consequences are considered; while under disparate treatment cases the plaintiff must show discriminatory motive or intent by the employer to establish a violation. *See,* Furnish, *A Path through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine,* 23 B.C.L.Rev. 419 (1982).

VII of the Civil Rights Act of 1964.[84] The disparate impact theory finds its origin in *Griggs v. Duke Power Co.*,[85] a 1971 decision in which the Supreme Court held that Title VII attempts to eliminate employment practices which create barriers and discriminate on the basis of race, color, religion, sex or national origin.[86] The import of the *Griggs* decision was the Court's finding that a showing of intent to discriminate was not necessary to constitute a violation of Title VII;[87] rather, the *Griggs* Court concluded that even a facially neutral policy or practice which disproportionately excluded members of a protected class would be found to be unlawful, unless the employer could show a business necessity for the policy or practice.[88]

Decided five years after *Griggs*,[89] *Albemarle Paper Co. v. Moody*[90] provided the Supreme Court with an opportunity to clarify the *Griggs* burden in disparate impact cases.[91] As in *Griggs*, the *Albemarle* plaintiff established a prima facie case by showing disparate impact. The burden then shifted to the employer who was required to show a business necessity for the particular policy or

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84. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1982).

85. 401 U.S. 424 (1971). *See supra* note 23. In *Griggs*, after the passage of Title VII, the company required existing employees to have either a high school diploma or achieve a passing grade on an intelligence test in order to be promoted out of the labor department. New applicants were further burdened by having to meet both requirements. While these requirements were applied to all individuals equally, they had a disproportionate effect on black candidates. 401 U.S. at 427-30.

86. *Id.* at 431.

87. The *Griggs* approach contrasted the traditional action under the equal protection clause where intent is critical. *See, e.g*, Washington v. Davis, 426 U.S. 229 (1976). *Davis* dealt with recruiting procedures for police officers which included passing a written personnel test that had a disproportionate effect on black candidates. The plaintiffs in *Davis* proceeded under the equal protection clause, asserting that their fifth amendment due process rights were violated. (It should be noted that when this suit was filed, Title VII did not extend to governmental employees). *See* Teal v. Connecticut, 102 S. Ct. 2525, 2531 n.8 (1982). *See also* Brown v. General Serv. Admin., 425 U.S. 820, 825 (1976). The *Davis* Court found that the test, neutral on its face, did not constitute a violation, and that proof of intent to discriminate is essential. 426 U.S. at 246-48. *See generally*, Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1 (1979).

88. 401 U.S. at 431.

89. In this interim period, the Court decided McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) which recognized the disparate treatment theory where the plaintiff asserts intentional, but covert, discrimination. *Id.* at 801. In disparate treatment cases the question of intent is crucial, *see infra* note 91, while in disparate impact cases such as *Griggs*, intent is irrelevant. *See* Furnish, *supra* note 83, at 419.

90. 422 U.S. 405 (1975). In *Albemarle*, plaintiffs sought injunctive relief from the company's use of a seniority system and pre-employment tests which were shown to have an adverse impact on blacks. *Id.* at 409.

91. *Id.* at 436.

practice in question.[92] *Albemarle* further determined that even if a particular practice was validated through a showing of business necessity, the plaintiff could rebut the employer's defense and prove that it was a mere pretext for discrimination by exposing less discriminatory alternatives.[93] *Albemarle* not only explained the meaning of the *Griggs* business necessity defense,[94] but expanded its burden of proof by creating the rebuttal by the plaintiff. In so doing, the Court paralleled the orders of proof in disparate impact cases with those of disparate treatment cases.[95]

In *Dothard v. Rawlinson*,[96] a non-test disparate impact case, the class action plaintiffs alleged that an Alabama statute was sexually discriminatory.[97] Although the Supreme Court upheld the plaintiffs' use of statistical evidence[98] to show that the requirements of the statute excluded a disproportionate number of females from employment as prison guards,[99] and recognized the district court's appropriate application of Title VII,[100] the Court, without addressing the question of intent, nonetheless found Alabama's job-related business necessity defense to be a bonafide occupational qualification and therefore not a violation of Title VII.[101] In effect,

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92. The *Albemarle* Court's explanation of business necessity required the employer to prove that the tests were job-related, *id.* at 425, as defined under EEOC guidelines, 29 C.F.R. § 1607.1-.18 (1981). 422 U.S. at 430-31.

93. 422 U.S. at 436. It is interesting to note that the Court cited McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a disparate treatment case, in identifying this additional burden in the form of a rebuttal by the plaintiff. *Id.* at 425.

94. *Id. See infra* note 101.

95. *See* Furnish, *supra* note 83, at 423.

96. 433 U.S. 321 (1977).

97. The statute required all law enforcement officials to be not less than five feet two inches tall nor more than six feet ten inches in height, and weigh not less than 120 pounds nor more than 300 pounds. ALA. CODE § 36-21-46 (1975 & Supp. 1982).

98. The Court allowed the plaintiffs to use general United States population figures to show the statute's disparate impact on females. The Court rejected the defendant's assertion that population figures for the State of Alabama should be used, because such data from the smaller sample would not differ. 433 U.S. at 330-31.

99. *Id.* at 323 n.2. The district court in *Dothard* found that the statute's height requirement would exclude 33.29% of the women in the United States between the ages of 18 and 79, while only excluding 1.28% of the men. Similarly, the weight restriction would exclude 22.29% of the women and only 2.35% of the men. Combined, the height and weight standards of the statute excluded 41.13% of the female population while comparatively excluding less than one percent of the male population. 433 U.S. at 329-30; *see* Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376 (1981).

100. 433 U.S. at 332.

101. *Id.* at 336-37. The job related defense centered around the "contact" oriented nature of the correction counselor position, in which the inclusion of females would jeopardize prison security. *Id.*

Dothard, as an extension of *Albemarle,* eased the employer's burden of proof promulgated as the *Griggs* business necessity test. After the *Dothard* decision, a discriminatory employment practice need only be shown to be necessary to *safe* and *efficient* job performance to survive a Title VII challenge.[102]

The next term in *Furnco Construction Corp. v. Waters,*[103] a disparate treatment case, the employer's defense to a Title VII claim was further broadened.[104] Justice Rehnquist, writing for the majority,[105] held that the employer need only show that his hiring procedures were reasonably related to the achievement of some legitimate purpose.[106] Justice Rehnquist stated that Title VII does not impose on employers a duty to adopt hiring procedures that maximize the hiring of minority employees.[107] *Furnco* also considered the use of statistical evidence in establishing the prima facie case of employment discrimination and found that evidence of a balanced workforce does not negate finding an employer liable for specific acts of discrimination.[108] *Furnco* therefore continued the Supreme Court's trend of easing the employer's burden of proof in disparate impact cases, a stand consistent with the Court's position in *Griggs, Albemarle* and *Dothard* in that the question of intent to discriminate was not recognized as an element of the prima facie disparate impact violation of Title VII.[109]

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102. *Id.* at 331 n.14 (emphasis added).

103. 438 U.S. 567 (1978).

104. *Id.* In *Furnco,* three black bricklayers brought an action against the company, charging that their policy of allowing the job superintendent to hire only those applicants known by him to be experienced or competent was a violation of Title VII. *Id.* at 569-70. The Seventh Circuit in Waters v. Furnco Constr. Corp., 551 F.2d 1085 (7th Cir. 1977) reversed the district court, recognizing the claim as one of disparate treatment under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *See supra* note 93. The Seventh Circuit negated Furnco's business necessity defense by formulating less discriminatory alternative practices. 551 F.2d at 1088-89.

105. 438 U.S. at 575. The Court used the disparate impact test of *McDonnell Douglas,* under which to assert a prima facie claim the plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802.

106. 438 U.S. at 576-77.

107. *Id.* at 577-78.

108. *Id.* at 579. The use of statistical evidence was discussed in International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977) ("[S]tatistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue").

109. Although *Furnco* was a disparate treatment case, it warrants attention because it

In 1979, the Supreme Court in an apparent contradiction to its prior development of disparate impact cases decided *New York City Transit Authority v. Beazer.*[110] At issue in *Beazer* was the validity of the New York City Transit Authority's (T.A.) anti-narcotics rule,[111] which excluded methadone[112] users from employment in *any* position with the T.A.[113] The plaintiffs[114] alleged that the blanket exclusion of all methadone users from any employment with the T.A. violated Title VII of the Civil Rights Act of 1964.[115] The district court, without considering the Title VII claim, found that the T.A.'s criteria had no *rational relation* to the jobs to be performed and constituted a violation of both the due process and equal protection clauses of the fourteenth amendment.[116] In a subsequent opinion, the district court additionally found the rule to violate Title VII.[117] Judge Griesa noted that although the T.A.'s policy was facially neutral, the impact would disproportionally affect more blacks and Hispanics than whites.[118] The United States Court of Appeals for the Second Circuit affirmed the decision of the district court on the constitutional issue without considering the Title VII claim.[119] The Supreme Court granted certiorari[120] and

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exemplifies the narrowing burdens of proof in disparate treatment cases and their effect on disparate impact cases. *See generally* Furnish, *supra* note 83, at 435-36.

110. 440 U.S. 568 (1979).

111. *Id.* at 571-72. The anti-narcotics rule is based on Rule 11(b) of T.A.'s Rules and Regulations: "Employees must not use, or have in their possession, narcotics, tranquilizers, drugs of the Amphetamine group or barbituate derivitives or paraphernalia used to administer narcotics or barbituate derivatives, except with the written permission of the Medical Director-Chief Surgeon of the System."

112. 440 U.S. at 572-73. Methadone is regarded as a narcotic within Rule 11(b). No written permission has ever been given by the medical director to employ persons under its use.

113. 440 U.S. at 571-72.

114. The plaintiffs included four former employee's of the T.A. who additionally represented the class of all persons who have been or will be subject to dismissal or disqualification from employment consideration by the T.A. because of past or present participation in a methadone program. Beazer v. New York Transit Auth., 399 F. Supp. 1032, 1033-35 (S.D.N.Y. 1975).

115. 42 U.S.C. § 2000e-2000e-17 (1976 & Supp. V 1982). In addition, it was alleged that the anti-narcotic rule, in conjunction with the T.A. blanket policy, violated the Civil Rights Act of 1866, Rev. Stat. § 1977, 42 U.S.C. §§ 1981, 1983 (1976). *See* 440 U.S. at 576-77.

116. Beazer v. N.Y. City Transit Auth., 399 F. Supp. 1032, 1057 (S.D.N.Y. 1975).

117. Beazer v. N.Y. City Transit Auth., 414 F. Supp. 277 (S.D.N.Y. 1976). It was admitted that the plaintiffs renewed their claim under Title VII solely to obtain the award of reasonable attorney's fees for the prevailing party as awarded under 42 U.S.C. § 2000e-5(k) (1976). 414 F. Supp. at 278.

118. 414 F. Supp. at 279.

119. Beazer v. N.Y. City Transit Auth., 558 F.2d 97 (2d Cir. 1977). Judge Oakes of the Second Circuit recognized the award of attorney's fees by the district court in the subse-

reversed,[121] holding that even if the respondents' weak statistical evidence established a prima facie case of discrimination, it was rebutted by the T.A.'s showing that its anti-narcotics rule was job related.[122] Justice Stevens recognized the district court's express finding that the anti-narcotics rule, unmotivated by racial animus, eliminated respondent's rebuttal that the policy was merely a pretext for intentional discrimination.[123] Through this position, the *Beazer* Court established discriminatory intent as an element of the plaintiffs' rebuttal burden of proof in disparate impact cases; which in the past had been the major difference between disparate impact and disparate treatment cases.[124]

In effect, *Beazer* is inconsistent with the principles developed by the Court in *Griggs* and its progeny. By requiring a showing of intent to discriminate, the *Beazer* decision virtually eliminated the plaintiffs' rebuttal to the job related defense of the employer[125] as it was formulated by the Court in *Albemarle* and *Dothard*. The *Beazer* interpretation reduces the business necessity—job-relatedness defense to such an extent that it allows employers to exclude all persons with a particular characteristic, from *all* jobs because most persons with the characteristic cannot perform some jobs.[126] In contrast, *Griggs* mandates that Title VII does not preclude the use of testing or statistical procedures, but would not give them controlling force.[127] Since *Beazer*, the Court has not explained the divergence it apparently took when the decision was handed down. The future of the Court's decisions in this area may shed some light on whether *Beazer* will or will not be the trend.

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quent proceeding, but implied that the reasonable attorney's fees could now be granted the prevailing party in a § 1983 action under the newly enacted Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976).

120. 440 U.S. 568 (1979). In addition to the magnitude of the questions involved, the Court granted certiorari because of the concern over the departure by the lower courts from the normal procedure of considering, in the same opinion, the statutory claim before the constitutional claim. *Id.* at 570-71.

121. Beazer v. N.Y. City Transit Auth., 440 U.S. 568, 570-71 (1979).

122. *Id.* at 586-87.

123. *Id.* at 587.

124. *See* Furnish, *supra* note 83, at 424. *See also* Note, *supra* note 99, at 418.

125. 440 U.S. at 587. *See also* Furnish, *supra* note 83, at 424.

126. *See* Furnish, *supra* note 83, at 431. The district court found that not all were safety sensitive, that some were non-critical on the overall operation of the transportation system. 399 F. Supp. 1032, 1052 (S.D.N.Y. 1975). Yet the Court equated the 25% safety sensitive jobs as justification for refusing employment to all methadone users for all other positions with the T.A. within the *safe* and *efficient* business necessity—job-related defense. 440 U.S. at 587 n.31.

127. Griggs v. Duke Power Co., 401 U.S. 424, 435 (1971).

It can be seen from the foregoing, that although the theoretical distinctions between the disparate impact and disparate treatment theories appears clear from a definitional standpoint, their case by case application by the courts has resulted in a blurring and cross application of the two theories. It has been suggested that this pattern is representative of the Court's evolution toward a merger of the two theories.[128] This observation appears sound when one views the overall purpose of Title VII as, to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[129] It does not seem necessary under a Title VII claim to look to the absence or presence of an intent to discriminate. Rather, the hiring or promotional criteria employed should simply be examined on the basis of its impact on the individual group, its job-relatedness, and its relation to either the business necessity of employing that particular criterion or the hardship or unreliability of utilizing any other method.

When examined in this light, the majority in *Teal* reached the proper conclusion. The "bottom line" result should not be a valid defense to a Title VII claim if this "bottom line" was reached pursuant to a process which employed a step that had a discriminatory impact on a minority group. To conclude that a bottom line result favorable to a minority group justifies a discriminatory practice during the derivation of this favorable end result is untenable under a Title VII analysis.

The facts of the *Teal* case itself indicate the patently unreliable and dangerous nature of the "bottom line" result. For, in *Teal,* the promotion list was released one year after the action was instituted, approximately one month before trial.[130] Although the Court failed to raise this point in more than a factual context,[131] and did not question the integrity of the Connecticut Department of Income Maintenance in the making of this final promotion determination, surely *Teal* illustrates the highly suspect nature and potential for abuse in allowing the "bottom line" as a defense. To hold otherwise would be virtually to grant employers the right to discriminate against individual minority employees at an early stage of the employment process, while supplying them with a defense via a test which would only look to the end result in determining

128. *See* Furnish, *supra* note 83, at 419-20.
129. Griggs, 401 U.S. at 429-30.
130. Connecticut v. Teal, 102 S. Ct. at 2529.
131. *Id.*

whether a violation had occurred.

The majority in *Teal* properly reviewed the promotion examination in light of its impact and job-relatedness. Finding it to have both a discriminatory impact and a non-job-related status, they correctly applied the principles of section 703(a)(2) of Title VII and found that, in fact, a prima facie employment discrimination violation had occurred, to which the "bottom line" result was no defense.

Nicholas Galli