

Supreme Court's Wards Cove Packing Decision Redefines the Adverse Impact Theory Under Title VII

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Overview of the Court's Decision and Its Impact

On June 5, 1989, in a 5 to 4 decision, the U.S. Supreme Court held in *Wards Cove Packing Company v. Atonio*, 109 S.Ct. 3115 (1989), that a Title VII adverse impact case cannot be established merely by showing that the percentage of minorities in skilled jobs is not as great as in non-skilled job categories. Instead, Justice White (joined by Chief Justice Rehnquist and Justices O'Connor, Scalia and Kennedy) ruled that the proper comparison is with the percentage of minorities among persons who are qualified for and interested in the skilled work. In addition, the majority rejected across-the-board attacks on employment systems, holding that plaintiffs must show that specific practices *caused* the statistical disparity.

Most importantly, the Court in *Wards Cove Packing* eliminated many previous differences between the disparate treatment and impact theories. Disparate treatment theory requires a showing of *intentional* discrimination. To establish a *prima facie* case, a plaintiff can show that he was a member of a protected group, was qualified for a job, did not receive it, and the job went to another person not in the protected group. The employer then can rebut this showing merely by presenting evidence that it had a legitimate reason for its business decision. The employer does not have to *prove* that the decision was necessary to its business as the employer previously had to prove to rebut a disparate impact case.

In *Wards Cove Packing*, the majority apparently made it easier for employers to rebut a showing of adverse impact. Instead of *proving* the "business necessity" of its practice, the employer need only produce evidence that its practice "serves, in a significant way, the legitimate business goals of the employer." The burden of convincing the court that the practice was not justified by business reasons then rests on the plaintiff. The court said one way a plaintiff can carry this burden is by proving that there were other selection devices with less adverse impact that would be equally effective in serving the employer's legitimate interests.

The decision does not eliminate the requirement that employers produce business justification for its practices. Rather, as Justice White's

majority opinion points out, in reviewing the employer's defense, the district court must conduct a:

reasoned review of the employer's justification for his use of the challenged practice once adverse impact has been shown. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices.

Legislation has already been introduced by Senator Howard Metzenbaum (D-OH) to overturn the Court's decision. Employers should continue to recognize, however, that even under the Court's *Wards Cove* decision, Title VII remains a powerful incentive for an employer to assure that its employment practices are nondiscriminatory.

The Underlying Facts

Ward's Cove involves the employment practices of two companies that operate salmon canneries in remote and widely separated areas of Alaska. The canneries operate only during the salmon runs in the summer months. The locations of salmon runs vary from year to year, as does the number of cannery workers at various locations.

There are two types of jobs. Noncannery jobs are classified as skilled positions. They include: machinists and engineers who maintain the canning equipment; quality control personnel who conduct FDA-required inspections and record keeping; ship tender crews; cooks; carpenters; storckeeper; bookkeepers; beach gangs for dock yard labor and construction, and other jobs. Noncannery jobs are filled predominantly with white workers who are hired during the winter months from the companies' offices in Washington and Oregon.

Cannery jobs are filled predominantly by nonwhites, namely Filipinos and Alaska Natives. The Filipinos are hired through a hiring hall agreement with a Union local in Seattle. The Alaska natives primarily reside in villages near the remote cannery locations. The noncannery jobs pay more than the cannery jobs. Workers in each job group live in separate dormitories and eat in separate mess halls. All the justices, however, acknowledged that issues of segregation and nepotism that had been raised in the lower courts were not directly at issue before the Supreme Court. Thus, this was treated as a disparate impact case based "solely on [the plaintiffs'] statistics."

The Court's Statistical Ruling

The plaintiffs' statistical case was based primarily on a comparison between the large percentage of minorities holding cannery jobs and the

mostly white composition of the noncannery workforce. Had the Court accepted this method of comparison, it would have made a significant change in Title VII law by allowing a prima facie case merely because there were relatively more minority workers in one job category than in another.

But the majority rejected the plaintiffs' arguments and reaffirmed its long-standing view that the proper comparison is between the racial composition of the jobs at issue (here the noncannery jobs) and the racial composition of the persons in the relevant labor market with the qualifications and interest in performing those jobs. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977). Justice White pointed out that the vast majority of cannery workers were not qualified for, nor did they seek, skilled noncannery jobs.

Indeed, Justice White termed "nonsensical" the plaintiffs attempt to compare the number of nonwhites in the skilled and unskilled jobs. If that view had prevailed, even an employer who hired skilled minorities at the level of their workforce availability, would nevertheless violate Title VII because of the larger percentage of minorities filling the unskilled job categories. But as there was no evidence that the employer deterred minorities from applying for the skilled jobs, or otherwise erected barriers to their moving from one job group to another, the mere statistical imbalance was not sufficient to establish a prima facie disparate impact case.

The Plaintiff Must Show the Specific Practice Caused the Statistical Disparity

In *Wards Cove*, the plaintiffs launched an across-the-board attack on the canneries' employment system. They alleged that several "objective" practices (e.g., nepotism, separate hiring channels, rehire preferences, and subjective decision making) all had a disparate impact on nonwhites. They failed, however, to demonstrate which of the practices resulted in the adverse impact.

The majority opinion affirmed the Ninth Circuit on this point and held that it was insufficient merely to list the employer's practices. Instead, the Court will require plaintiffs to demonstrate that the disparity they complain about has been *caused by* one or more of the employment practices, "specifically showing that each challenged practice has a significantly disparate impact on employment opportunities." However, once that causal connection is made, courts may not be very "fussy" about the plaintiffs' statistical proof. *Allen v. Seidman*, 50 FEP Cases 610 (7th Cir. 1989).

Employer Recordkeeping Obligation

In response to arguments that this standard is too harsh on plaintiffs, the majority opinion pointed out that liberal discovery under the Federal Rules of Civil Procedure gives plaintiffs broad access to employers' records. Further, Justice White stated that:

employers falling within the scope of the Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.1, *et seq.*, (1988), are required to 'maintain . . . records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities or persons by identifiable race, sex, or other ethnic group[s].' See § 1607.4(A). This includes records concerning 'the individual components of the selection process' where there is a significant disparity in the selection rates of whites and nonwhites. See § 1607.4(C). Plaintiffs as a general matter will have the benefit of these tools to meet their burden of showing a causal link between challenged employment practices and racial imbalances in the workforce . . .

This is the first time the Supreme Court has ever stated that the Guidelines recordkeeping provisions impose any required burden on employers.

The recordkeeping requirements of the Uniform Guidelines also have been a recent focus of attention of both the OFCCP and EEOC. The revised OFCCP Compliance Manual relies extensively upon the recordkeeping requirements in the Guidelines for statistical data needed to pursue potential discrimination under Executive Order 11246. In addition, EEOC recently proposed a rule which would incorporate the recordkeeping requirements of the Guidelines into EEOC's recordkeeping procedures.

To what extent the courts after *Wards Cove* will require strict compliance with the Guidelines remains to be seen. It is clear, however, that the Court has sent a strong signal that employers should be keeping adequate records and that documentation of employment practices will be important in litigating future Title VII cases.

The Employer May Rebut with Evidence of a Legitimate Business Reason

The most important and controversial part of the majority decision is its interpretation of the employer's rebuttal burden. Previously, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in later cases, the Court stated that the employer had to show that an employment practice with adverse impact was justified by "business necessity," or that the selection process had "a manifest relationship to the employment in question." Justice Stevens' dissent in *Wards Cove* strenuously argues

that this showing was an affirmative defense that had to be *proven* by the employer.

Justice White's majority opinion, however, holds that to the extent the Court's earlier opinions speak of the employer's "burden of proof," "they should have been understood to mean an employer's production—but not persuasion burden." As in a disparate treatment case, the employer faced with a prima facie disparate impact showing now can "articulate," and need not "prove" that it had a legitimate reason for its practice. Thus, with the addition of Justice Kennedy, a majority of the Court has adopted the rebuttal view previously expressed in Justice O'Connor's plurality opinion in *Watson v. Fort Worth Bank and Trust*, 108 S. Ct. 2777, 2790–91 (1988).

A majority of the Court now holds that "*the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.*" (Emphasis added.) And while an insubstantial justification will not suffice, at the same time, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business. The majority stressed that courts are less competent than employers to restructure business practices. In future cases employers will rely heavily on the *Wards Cove* majority opinion to argue that their rebuttal burden has been eased significantly by the Court's decision.

The Type of Rebuttal Evidence Now Required of the Employer

As shown, in *Wards Cove Packing*, a majority of the Court has merged the traditional disparate treatment and adverse impact theories insofar as the burden stays with the plaintiff, and the employer may rebut a prima facie case by presenting evidence, rather than proving, a legitimate business reason for its practices. It remains to be seen how the lower courts will apply this new standard. Employers should not assume, however, that they automatically will win these cases merely by presenting testimony, an affidavit or a letter from a company official setting forth a generalized justification for its practice.

Disparate impact litigation traditionally has subjected the employer's reasons to intense scrutiny from expert witnesses, statisticians, or industrial psychologists to determine their credibility, rationality and adherence to industry practice. Employment decisions that cannot be supported with legitimate reasons still are subject to attack. It may be assumed that this detailed scrutiny will take place in many future Title VII adverse impact cases using the merged standards. Further, as previously noted, plaintiffs today often bring disparate *treatment* cases and evidence of intentional discrimination may still be used effectively against an employer. Disparate treatment law remains undisturbed by this decision.

Griggs v. Duke Power Was Not Overruled

Assertions that the Court overruled *Griggs v. Duke Power* overstate the *Wards Cove* holding. Indeed, it is likely that *Griggs* would have come out the same way even under the *Wards Cove* standards. In *Griggs*, the plaintiffs isolated specific practices (high school diploma requirement and aptitude tests) that had statistically significant adverse impact on minority job applicants. Because the employer could not show that these requirements were related to the jobs for which they were used, the Court found that the employer had not met its burden of showing business necessity. In future cases involving standardized tests, if an employer cannot show a valid business reason for a selection device, it may still be vulnerable under Title VII.

Indeed, Justice O'Connor's plurality opinion in *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988)—which was adopted by the *Wards Cove* majority—reaffirmed the principle that some facially neutral practices with adverse impact will violate Title VII even in the absence of a showing of intentional discrimination. In *Watson*, all of the justices agreed that where an employer's "undisciplined system of subjective decision-making has precisely the same effects as a system perverted by intentional discrimination, it is difficult to see why Title VII" should not apply. 108 S. Ct. at 2786-87.

Thus, while *Wards Cove Packing* has not expanded Title VII to permit unsupported across-the-board attacks on an employment system, plaintiffs still may have the ability to prove that discrete selection devices violate Title VII. In addition, the *Wards Cove* majority opinion reaffirmed the decision in *Connecticut v. Teal*, 457 U.S. 440 (1982), which held that even if an overall selection process shows no adverse impact, a plaintiff still may sue under Title VII if a particular component of a selection process has an adverse impact.

Do Employers Have to do Validation Studies of Selection Practices?

It is clear that employers may do such studies to support their business justification. As Justice O'Connor stated in the *Watson* plurality opinion, "[s]tandardized tests and criteria, like those at issue in our previous disparate impact cases, can often be justified through formal 'validation studies,' which seek to determine whether discrete selection criteria predict actual on-the-job performance." Thus, employers with studies showing the validity of a particular selection device have an excellent chance of proving the legitimacy of their employment practice.

But Justice O'Connor also stated in *Watson*, "[o]ur cases make clear that employers are not required, even when defending standardized or objective tests, to introduce formal 'validation studies' showing that par-

tical criteria predict actual on-the-job performance." It is likely that a majority of the Court will agree and not *require* formal validation studies to defend an employment practice.

An employer using a standardized test, however, should closely evaluate the reasons for using the test as compared with the possibility that a plaintiff may challenge the test with its own industrial psychologists who will argue that the test does not serve any legitimate purpose for that particular job. Plaintiff's counsel have indicated that they may use their own validation studies to rebut the employer's assertions that they have legitimate reasons for their practices.

With more subjective selection procedures where formal validation studies are not practical, both Justice O'Connor in *Watson* and the majority opinion in *Wards Cove Packing* stressed that courts generally are less competent than employers to restructure business practices and should proceed with care before ordering an employer to adopt another system.

Thus, validation studies are safe harbors. Other justifications also will be sufficient, but should be carefully reviewed for credibility and documentation.

Conclusion

The *Wards Cove Packing* decision is a significant development in Title VII law. As compared to the theories advanced by the plaintiffs and the four-member minority opinion, the majority opinion is much more favorable to employers defending employment discrimination suits.

But it is unclear how the lower courts will apply the decision, or whether and to what extent the decision will generate federal legislation. We also do not know whether the decision will be followed by state agencies and courts. We do know that plaintiffs' attorneys continue to be successful in some highly effective disparate treatment litigation, and that employers must be able to justify their practices with legitimate business reasons. Thus, Title VII remains an important statute with substantial protections for minorities, women and other protected groups.