

Employer's Burden of Proof May Be Reduced in Testing Cases

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Resolving an issue that had split the federal circuit courts of appeals, U.S. Supreme Court ruled 8-0 this summer in *Watson v. Fort Worth Bank* that Title VII plaintiffs do not have to prove intentional discrimination in order to challenge subjective employment practices. As a result, the adverse impact theory first adopted in *Griggs v. Duke Power*, 401 U.S. 711 (1971), has been expanded beyond "objective" selection methods such as written tests and height/weight requirements. Justice Kennedy did not participate in the decision.

At the same time, however, a majority of the Court seems to have made it more difficult for plaintiffs to establish a prima facie case of adverse impact. Seven justices agreed that a statistical disparity is not always sufficient to make out a prima facie case. In addition, a majority of the justices would require a plaintiff to identify the *specific* practice being challenged and then prove that this practice *caused* the exclusion of applicants for jobs or promotions because of their membership in a "protected group."

Further, a plurality of four of the seven justices reaching the issue would significantly lessen the employer's burden of showing business necessity. This plurality stated that "validation" has never been required even for standardized or objective tests. The plurality also appears to allow the employer to rebut a prima facie adverse impact case by introducing evidence—but not necessarily having to prove—that it had legitimate business reasons for its subjective judgment. This portion of Justice O'Connor's plurality opinion opens a whole range of issues that will have to be resolved by the courts, including the legal effect of the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines).

The Employer's Rebuttal Burden

The winner in an adverse impact case is likely to be determined by the burden a court places on employers to show the "business necessity" of a challenged employment practice. Prior to *Watson*, many had assumed that the rebuttal burden was more difficult in adverse impact cases in that employers would have to prove business necessity, rather than merely being required to produce evidence supporting their business reasons.

But Justice O'Connor's plurality opinion (joined by Justices Rehnquist, White and Scalia) announced in *Watson* that:

the distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used. . . . Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination.

In discussing the employer's business necessity defense, Justice O'Connor stressed that the ultimate burden of proof cannot be shifted to the defendant, but remains with the plaintiff. And once the employer has "met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must show" that there are other selection methods that would also serve the employer's legitimate interests.

Justice Blackmun (joined by Justices Brennan and Marshall) dissented from this part of the O'Connor plurality opinion. He interpreted the plurality opinion as merging the *Burdine* disparate treatment standard with the *Griggs* adverse impact theory. Thus, Justice Blackmun reads the O'Connor opinion as allowing the employer merely to "articulate" a legitimate reason for its decision, and not having to "prove" business necessity as Justice Blackmun would require.

While there may be some argument over whether Justice O'Connor has gone this far, defense counsel can be expected to argue that the employer's rebuttal obligation is merely to articulate, not to prove, that its selection procedure is supported by legitimate business reasons.

The O'Connor Plurality Allows Business Necessity to be Shown by Evidence of Legitimate Business Reasons

One of the most heavily briefed issues in *Watson* was the role that the Uniform Guidelines should play in evaluating the validity of subjective employment practices. The controversy centered around a brief filed by the American Psychological Association (APA) claiming that the APA Standards and the Uniform Guidelines could be used to validate subjective practices, thus providing a means of determining whether subjective practices were discriminatory.

None of the *Watson* opinions endorsed the APA's assertions, and Justice Blackmun—noting that the APA had argued that subjective and objective devices are amenable to the *same* "psychometric scrutiny"—observed that "formal validation techniques endorsed by the EEOC in its Uniform Guidelines may sometimes *not* be effective in measuring the job-relatedness of subjective-selection processes." Justice Blackmun, however, did indicate that employment practices could be validated by less formal means than argued by the APA, and that

establishing business necessity “will vary with the type and size of the business in question, as well as the particular job for which the selection process is employed.”

Perhaps the most provocative section of the O'Connor plurality opinion is its discussion of whether selection techniques have to be validated to prove that they are job-related. (Justices Blackmun, Marshall and Brennan dissented from this discussion.)

Under the plurality opinion, the Uniform Guidelines did not fare particularly well. For example, the plurality noted that the “four-fifths’ rule for inferring adverse impact has been criticized on technical grounds,” and “it has not provided more than a rule of thumb for the courts.” Moreover, Justice O'Connor stated that:

Our cases make it clear 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.

Indeed, Justice O'Connor stated that:

In the context of subjective or discretionary employment decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a “manifest relationship” to the employment in question. It is self-evident that many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing. In evaluating claims that discriminatory employment practices are insufficiently related to *legitimate business purposes*, it must be borne in mind that “[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress, they should not attempt it.” *Furnco Construction Corp. v. Waters*, 438 U.S., 578.

(Emphasis added.)

Thus, far from requiring the employer to prove that its business reasons are necessary to the survival of the enterprise, Justice O'Connor's opinion allows the employer to rely upon a wide variety of legitimate business reasons. The plaintiff then would have to prove that there are other selection devices that would not have adverse effect, while at the same time serving the employer's interest in “efficient and trustworthy workmanship.” “Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals.”

It is clear from this discussion that at least four justices would not require an employer to prove that its selection procedures have been validated under the Uniform Guidelines in order to present a “business necessity” defense to a prima facie case of adverse impact. Proof that certain skills are relevant for particular jobs in a certain industry, or proof that the employer followed well-established industry practice, may provide sufficient evidence that the practice is job-related.

Atonio v. Wards Cove Packing

The day after it decided *Watson*, the Court agreed to review the *Wards Cove Packing* case, which will give all nine justices the chance to address many of the burden of proof questions opened by the *Watson* decision.

Wards Cove operates a salmon fishing and cannery operation. It has five fishing canneries in Alaska. Skilled workers are brought in prior to each fishing season to assemble canning equipment, repair winter damage, and ready the operation for the start of the salmon run. Time is of the essence, and these workers must have the required skills when they arrive at the cannery.

The plaintiffs brought a class action against the Petitioner companies alleging disparate treatment and disparate impact under Title VII of the 1964 Civil Rights Act, *as amended*, 42 U.S.C. § § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Specifically, they claimed that as unskilled cannery workers, they were discriminated against in hiring and promotion to skilled jobs, as well as with respect to the companies' housing and messing practices. In a wide-ranging attack, the plaintiffs identified 16 practices which they asserted caused a concentration of nonwhites in the cannery positions, including English language skill requirements and nepotism. In addition to anecdotal evidence, they attempted to support their claims of disparate treatment and impact with two kinds of general statistical evidence: (1) comparisons between the racial composition of the defendants' skilled jobs and the racial composition of the available external labor supply, and (2) comparisons between the racial composition of defendants' skilled jobs and the racial composition of the defendants' unskilled jobs.

With respect to the allegations of disparate treatment, the trial court concluded that the plaintiffs had not proved the individual instances of discrimination and accorded the plaintiffs' statistics little probative value because they did not reflect the pool of employees who had the requisite skills or who were available for preseason work. The district court applied a disparate impact analysis to English language requirements and nepotism claims, and found for the defendants. It declined to apply the disparate impact theory to subjective criteria and practices, as did the first panel of Ninth Circuit judges to hear the case. But a later decision by the Ninth Circuit adopted the plaintiff's adverse impact theory.

Conclusion

Justice Stevens did not participate in the burden of proof discussion in *Watson*. He argued that because the issue had not been discussed by the court of appeals, it was not properly before the court. As mentioned, Justice Kennedy did not participate because he was not a member of the Court when *Watson* was decided. In *Wards Cove*, if either Justice

Stevens or Kennedy agrees with the O'Connor plurality, plaintiffs will find it much more difficult to prevail in adverse impact cases involving both objective and subjective practices.



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