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Disparate Impact Analysis and Subjective Employment Practices
Watson v. Ft. Worth Bank and Trust

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On June 29, 1988, the United States Supreme Court broadened the means by which plaintiffs in race or sex discrimination cases may prove that discrimination occurred. In its decision in *Clara Watson v. Fort Worth Bank and Trust*,[1] the Court held that the disparate impact analysis method of proving discrimination, which the Court had previously applied only to *objective* employment practices, could properly be applied to *subjective* employment practices as well. This bulletin reviews the major points of the decision.

THEORIES OF DISCRIMINATION UNDER TITLE VII

Since the passage of Title VII of the Civil Rights Act of 1964,[2] which prohibits discrimination in employment on the basis of race, sex, creed, color, or national origin, the courts have recognized two theories by which discrimination may be proved: disparate treatment analysis and disparate impact analysis.

Disparate treatment analysis is a means of proving intentional discrimination. An employer will be found to have violated Title VII if it is shown that the employer treats some employees or applicants less favorably because of their race, sex, creed, color, or national origin. This different (or disparate) treatment may be shown either by direct evidence (for example, a statement to a female applicant that a certain position is "a man's job") or, as is usually the case, by indirect evidence.

The Supreme Court has recognized a means by which disparate treatment may be inferred, sufficient to require the employer to rebut the inference of discrimination. Under the model set forth in *McDonnell Douglas Corp. v. Green*,[3] an ap-

1. __U.S.__, 56 U.S.L.W. 4922 (June 29, 1988).
2. 42 U.S.C. §2000e.

3. 411 U.S. 792, 802 (1973). Elaboration on the *McDonnell Douglas* standard is found in Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-55 (1981); U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983).

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plicant can create a *prima facie* case of discrimination in hiring by showing that:

1. He belongs to a protected class;
2. He applied and was qualified for a job for which the employer was seeking applicants;
3. He was rejected, despite the fact that he met the qualifications for the job; and
4. After his rejection, the employer continued to seek applicants from persons with the same qualifications as the applicant.

The employer then has the burden of presenting evidence to the court that the applicant was rejected, not because of his race, but because of a legitimate, nondiscriminatory reason. Such reasons might include the fact that another applicant possessed superior qualifications or that the applicant did poorly in the employment interview. Finally, once the employer has advanced its legitimate reason for the applicant's rejection, the applicant has an opportunity to show that the employer's proffered reason for rejection is pretext and that the real reason is discrimination. It is always the case in disparate treatment analysis that the plaintiff has the ultimate burden of proof and that this burden remains with the plaintiff at all times.[4]

This disparate treatment model has long been used to challenge subjective employment decisions, such as selection for promotion by the use of interviews. In contrast, where objective means of screening or selecting candidates (such as scored tests or credential requirements) are used, plaintiffs alleging discrimination have relied on a second theory of discrimination: disparate impact analysis.

The seminal disparate impact analysis case is *Griggs v. Duke Power Company*.[5] In that case the employer required employees to possess a high school diploma and to obtain a passing score on a personnel test in order to be eligible for promotion from laborer positions to any other jobs in the company. A group of black employees sued the company under Title VII, claiming the requirements for promotion out of the laborer jobs were discriminatory. Duke Power's response was that the job requirements applied to all applicants alike, black or white, and that it did not intend to discriminate.

The Court held that even if an employer does not intend to discriminate, it may nonetheless be in violation of Title VII if the employer's practices have a disparate impact on a protected group. Unlike the disparate treatment theory, in a disparate impact case the plaintiff is not required to prove a discriminatory motive of the employer as part of the *prima facie* case. Rather, a plaintiff may establish a *prima facie* case by showing that an employment practice that is facially neutral (such as a requirement that all applicants pass a scored test or possess certain educational credentials or licensure) has the effect of disproportionately excluding members of a protected class. In a case challenging the use of a scored test, for example, a black plaintiff may use statistics to show that a significantly greater number of blacks than whites fail the test. Where statistically significant differences are shown (termed *substantial adverse impact*), the inference is drawn that these differences in scores between black and white applicants constitute a pattern or practice of discrimination.

The magnitude of disparity needed and the amount of statistical proof required to establish substantial adverse impact sufficient to constitute a *prima facie* case varies from case to case; there is no one method that has been universally accepted by the courts. In the *Griggs* case the plaintiffs showed that 34 percent of the white males in North Carolina had a high school diploma, while only 12 percent of the black males possessed this credential. The Court held that this statistical showing was sufficient to constitute a *prima facie* case.

Once the *prima facie* case is established, the employer may rebut the inference of discrimination by (1) submitting countervailing statistical proof,[6] (2) showing that the statistics offered by the plaintiff are not sufficiently probative,[7] or (3) demonstrating that the practice, although having substantial adverse impact, is directly related to job performance and may be fairly characterized as a "business necessity."[8] In

4. *See, e.g.*, Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978).
5. 401 U.S. 424 (1971).
6. Hazelwood School District v. United States, 433 U.S. 299 (1977).
7. Castaneda v. Partida, 430 U.S. 482 (1977).
8. *Griggs*, 401 U.S. at 431.

the *Griggs* case the company was unable to demonstrate that its high school diploma and testing requirements, which the plaintiffs' statistical evidence clearly showed had adverse impact on blacks, were job related.

After *Griggs*, the lower courts were faced with numerous challenges to employment practices used to differentiate among applicants. The question arose whether disparate impact analysis was only to be applied to specific, objective job requirements or was also appropriate for subjective employment practices. The circuit courts reached different answers.[9] To resolve the split in the circuits, the Supreme Court granted certiorari in the *Watson* case.

THE LOWER COURT DECISION IN *WATSON*

Clara Watson, a black woman, was hired as a proof operator by Fort Worth Bank and Trust in 1973. She was promoted to teller positions of increasing responsibility from 1975 until 1980. Between February of 1980 and January of 1981, Watson applied and was turned down for four separate promotion opportunities with the bank. In each instance either a white male or a white female (all of whom were also current bank employees) was selected for the position. The method used to evaluate the employees for promotion was to allow a single managerial bank official to select the employee he or she thought was the best for the position, relying on each candidate's performance evaluation and previous experience. In August 1981, following her four rejections for promotion, Watson resigned. She filed a Title VII suit in the United States District Court for the Northern District of Texas on August 21, 1981, claiming that the bank discriminated against her and other similarly situated persons on the basis of race in making promotion decisions.

The district court analyzed Watson's case under the disparate treatment theory and held that although Watson demonstrated a *prima facie* case of discrimination, she failed to demonstrate that the bank's articulated reasons for not promoting her were a pretext. On appeal, the Fifth Circuit Court of Appeals similarly held for the bank on the merits.[10] In so doing, the court rejected Watson's argument that the district court should have applied disparate impact analysis to her claims of discrimination in promotion. The Fifth Circuit instead held, "a Title VII challenge to an allegedly discretionary promotion system is properly analyzed under the disparate treatment model rather than the disparate impact model."[11] It was this failure to allow Watson to present her case under a disparate impact theory that the Supreme Court addressed.

THE SUPREME COURT OPINION IN *WATSON*

Although all eight[12] justices agreed with the proposition that disparate impact analysis may be applied to cases in which subjective criteria are used to make employment decisions, there were three opinions in the case. No opinion garnered a majority. Justice O'Connor (joined by Rehnquist, C.J., White, and Scalia, J.J.) wrote the plurality opinion in Watson. Three justices (Blackmun, J., joined by Marshall and Brennan, J.J.) disagreed with Justice O'Connor on the question of shifting burdens of proof. Justice Stevens concurred in the judgment but concluded that the case should be remanded so that further statistical evidence of discrimination could be considered.

Justice O'Connor's opinion noted that in each of the Court's opinions following *Griggs*, the Court had applied disparate *impact* analysis to situations involving standardized employment tests or criteria. In *Albemarle Paper Co. v. Moody*[13] the challenged employment practice was the use of

9. Cases limiting the application of disparate impact analysis to objective, identifiable employment criteria include Lewis v. NLRB, 750 F.2d 1266, 1271 (5th Cir. 1985) and Zahorik v. Cornell University, 729 F.2d 85, 95-96 (2d Cir. 1984). Cases allowing the application of disparate impact analysis to subjective employment decisions include Regner v. City of Chicago, 789 F.2d 534, 538-39 (7th Cir. 1986); Segar v. Smith, 738 F.2d 1249, 1270 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); Griffin v. Carlin, 755 F.2d 1516, 1522-25 (11th Cir. 1985); and Antonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987)(en banc).

10. 798 F.2d 791, 798 (5th Cir. 1986).
11. 798 F.2d at 797.
12. The case was argued before Justice Kennedy was appointed and confirmed to the Court; he took no part in the consideration or decision of the case.
13. 422 U.S. 405 (1975).

written aptitude tests; in *Washington v. Davis*,[14] a written test of verbal skills; and in *Connecticut v. Teal*,[15] a written examination. In contrast, stated Justice O'Connor, the Court had always used disparate *treatment* analysis in reviewing hiring and promotion decisions that were based on the exercise of personal judgment or the application of subjective criteria.[16]

But the fact that the Court had not previously applied disparate impact analysis to subjective means of selection did not mean that such analysis was not appropriate. Rather, stated Justice O'Connor, "disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests."[17]

Recall that under disparate impact analysis, once a statistical showing of disparate impact is made, the employer must justify the use of the offending selection device as a business necessity. Turning to the evidentiary standards that should apply to such cases, the Court acknowledged the difficulty in validating subjective methods of selection:[18]

> Standardized 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. Respondent warns, however, that "validating" subjective selection criteria in this way is impracticable. Some qualities--for example, common sense, good judgment, originality, ambition, loyalty, and tact--cannot be measured accurately through standardized testing techniques. . . . Because of these difficulties, we are told, employers will find it impossible to eliminate subjective selection criteria and impossibly expensive to defend such practices in litigation. [Their] only alternative will be to adopt surreptitious quota systems in order to ensure that no plaintiff can establish a statistical prima facie case.

While acknowledging that the threat of proof of disparate impact by statistics could indeed pressure employers into adopting quota systems, Justice O'Connor warned that such a result would "be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision."[19]

The Court then offered further explanation as to why employers should not be forced to adopt such systems to prevent a *prima facie* case from being made.

First, the Court emphasized that the plaintiff in a disparate impact case must do more than merely present statistics showing that there are different hiring rates for blacks and whites. Rather, the individual claiming that an employer's hiring practices are discriminatory has the burden of isolating and identifying the specific employment practice that is challenged. This task may be difficult where subjective selection criteria are used.

Second, even if the specific employment practice is identified, stated the Court, the plaintiff must prove causation; that is, "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."[20] The Court declined to specify what level of statistical proof will establish causation. Noting that no consensus has developed around any mathematical standard, the Court held that "at this stage in the law's development, we believe . . . a case-by-case approach" is appropriate.[21]

Third, the court stated clearly that even if an employer is required to demonstrate that the employment practice in question is job related, "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times."[22] It was this characterization of the burden of proof that prompted the opinion by Justice Blackmun, who stated that the correct formulation of the burden of proof was to shift it to the employer once a *prima facie* statistical showing had been made.

14. 426 U.S. 229 (1976).
15. 457 U.S. 440 (1982).
16. See cases listed *supra* note 3.
17. 56 U.S.L.W. at 4925.
18. 56 U.S.L.W. at 4926.
19. 56 U.S.L.W. at 4926.
20. 56 U.S.L.W. at 4927.
21. 56 U.S.L.W. at 4927 n.3. The Court thus declined to endorse EEOC's 80 percent rule, as set forth in the Uniform Guidelines on Employee Selection Procedures. That rule holds that where an employer's selection rate for one group of applicants is less than 80 percent of the selection rate of another group of applicants, the first group has statistically established a *prima facie* case of discrimination. The Court also declined to endorse the "standard deviation" analysis sometimes used in jury-selection cases. *See, e.g.*, Rivera v. Wichita Falls, 665 F.2d 531, 536 n.7 (5th Cir. 1982).
22. 56 U.S.L.W. at 4927.

Justice O'Connor's plurality opinion further stated that an employer is not required to use formal validation studies to prove that particular criteria predict actual on the job performance. Indeed, she went on to state that the employer will often find it easier to produce evidence of a clear relationship of the subjective device to the employment practice in question than is the case with standardized tests. Noted the Court, "many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing."[23]

In sum, stated Justice O'Connor, "the high standards of proof in disparate impact cases are sufficient in our view to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment."[24]

The Court remanded the case to the United States Court of Appeals for the Fifth Circuit to evaluate the statistical evidence and determine whether Watson had established a *prima facie* case of discriminatory promotion practices under disparate impact theory.

23. 56 U.S.L.W. at 4928.
24. 56 U.S.L.W. at 4928.

CONCLUSION

Notwithstanding Justice O'Connor's assurances to employers, this case is properly viewed as a victory for plaintiffs in Title VII cases. It is true, as the plurality opinion states, that proof of discrimination by statistical evidence remains a difficult undertaking by the plaintiff. It is significant that the Court plurality has clearly stated that in both disparate treatment and disparate impact cases, the burden of proof remains always with the plaintiff. Whether employers adopt informal quota systems in order to preclude a *prima facie* showing of statistical imbalance remains to be seen. But with the opening of subjective employment decisions to challenge by disparate impact analysis, employers are well advised to review their practices to ensure they are clearly job related.

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