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Supreme Court Issues Three Employment Discrimination Rulings

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In May and June the United States Supreme Court announced three decisions interpreting Title VII of the Civil Rights Act of 1964.[1] The first case, *Ward's Cove Packing Company v. Atonio*,[2] significantly changed the requirements for a plaintiff to prevail in a Title VII disparate impact claim. The second case, *Price Waterhouse v. Hopkins*,[3] created a limited exception to disparate treatment claims under Title VII where mixed motives are attributable to the employer in making an employment decision. The third case, *Martin v. Wilks*,[4] held that employees could attack a consent decree that established a city's affirmative action plan as reverse discrimination, even where they did not intervene in the matter originally. This bulletin summarizes these three important rulings.

Two of these cases deal with two theories by which discrimination may be proved under Title VII: disparate impact analysis and disparate treatment analysis. Disparate *impact* analysis has to do with unintentional discrimination. The United States Supreme Court has 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 different (or disparate) impact on a protected group. This model has been used to challenge objective means of making employment decisions, such as scored tests or credential requirements. 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 model has long been used to challenge employment decisions such as selection for promotion by the use of interviews. *Local Government Law Bulletin* Number 32, "Disparate Impact Analysis and Subjective Employment Practices," (July, 1988), discusses these theories in detail.

Ward's Cove Packing Company v. Atonio

As discussed in *Local Government Law Bulletin* Number 32, disparate impact analysis was first applied by the Supreme Court in *Griggs v. Duke Power Company*.[5] The *Griggs* Court held that a plaintiff may establish a *prima facie* case of discrimination by showing, through statistical data, that a neutral employment practice has the effect of disproportionately excluding members of a protected class from employment. Once the *prima*

facie case is established, the employer's obligation (assuming no challenge to the statistics is made) is to demonstrate that the employment practice, although discriminatory in effect, nonetheless is justified as a business necessity. The Supreme Court and other federal courts having jurisdiction over North Carolina employers subsequently applied the *Griggs* model in numerous cases.[6] The Court most recently held in *Watson v. Ft. Worth Bank and Trust*[7] that disparate impact analysis could be applied in challenges to subjective employment practices.

The *Ward's Cove* case was brought by a group of minority, salmon-cannery workers who alleged that the Ward's Cove Packing Company violated Title VII by hiring minorities for low-paying unskilled jobs while filling skilled and supervisory jobs with white applicants. The result was racial stratification of the work force.

Specifically, the workers claimed that the employer's hiring and promotion practices of nepotism, a rehire preference, word-of-mouth referrals from white employees, a lack of objective hiring criteria, and others had a substantial disparate impact on the minority employees. Although the plaintiffs lost in the lower courts under a disparate treatment theory, the Ninth Circuit Court of Appeals held that they did establish a *prima facie* disparate impact claim and remanded the case for further proceedings to determine whether the employer's hiring practices could be justified by business necessity.[8] The Supreme Court granted *certiorari*.

In a 5-4 opinion, Justice White, writing for the majority,[9] first addressed the question of the proper basis for comparison in a statistical showing of disparate impact. The lower court had ruled that the plaintiffs had established a *prima facie* statistical showing by comparing two groups of Ward's Cove Company employees: the high percentage of nonwhite workers holding unskilled jobs versus the low percentage of nonwhite workers holding skilled jobs. Such a comparison, stated the Court, is irrelevant. Rather, the proper comparison is between the racial composition of the qualified persons in the labor market and the persons holding those jobs in the employer's work force. Justice White said, "If the absence of minorities holding [those jobs] is due to a dearth of qualified nonwhite applicants (for reasons that are not [the employer's] fault), [the employer's] selection methods or employment practices cannot be said to have had a 'disparate impact' on nonwhites."[10] If the Court were to hold otherwise, he reasoned, then an employer with any segment of its work force that was racially imbalanced when compared to any other segment of its work force would be required to engage in the expensive and time-consuming task of defending the business necessity of the methods used to select segments of its work force. The employer would be forced to adopt strict quotas to comply with the act, a result Congress rejected in drafting Title VII.[11] Justice White continued: "As long as there are no barriers or practices deterring nonwhites from applying for [the skilled] positions, if the percentage of *selected* applicants who are nonwhite is not significantly less than the percentage of *qualified* applicants who are nonwhite, the employer's selection mechanism probably does not operate with a disparate impact on minorities."[12]

The second question addressed by the Court was whether the plaintiffs could establish a disparate impact claim by merely showing that there were statistical disparities in the company's work force. The Court held that such a showing was insufficient. Rather, the plaintiffs in a disparate impact case "also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices they are attacking here, specifically showing that each challenged practice has a significant disparate impact on employment opportunities for whites and nonwhites."[13] In other words, it is the plaintiff's burden to isolate the specific employment practice that causes the different rates of hiring among applicant groups.

Anticipating the criticism that this burden on the plaintiff would be difficult (if not impossible) to achieve, the Court noted that the liberal discovery rules under Title VII litigation afford plaintiffs broad access to employers' records and that employers are required to maintain records that disclose the impact of any employment tests they use under the Uniform Guidelines on Employee Selection Procedures.[14] "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 work force,"[15] the opinion stated.

As noted above, the Court's prior disparate impact opinions required a demonstration of *business necessity* by the employer to defeat the *prima facie* case. In *Ward's Cove*, however, the Court reexamined the business necessity defense and lowered the burden on employers in justifying the use of particular employment practices by recasting *business necessity* as *business legitimacy*. The Court said:

> [T]he dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. 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. At the same time, though, there is no requirement that the challenged business practice be "essential" or "indispensable" to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above.[16]

Finally, the court addressed the question of the burden of proof in a disparate impact case. As the plurality had held in *Watson v. Ft. Worth Savings and Loan*, the majority in *Ward's Cove* held that the burden of proof remains with the disparate impact plaintiff at all times. In explaining this holding, the opinion acknowledged that the Court's earlier opinions could be read otherwise, "but to the extent that those cases speak of an employer's 'burden of proof' with respect to a legitimate business justification defense, they should have been understood to mean an employer's production—but not persuasion—burden."[17] Thus, although the employer has an obligation to present evidence on the issue of discriminatory impact, the burden of convincing the court that discrimination has occurred is always the plaintiff's. If a plaintiff is unable to rebut the employer's business necessity defense, the Court noted, there is still an opportunity for the plaintiff to persuade the court that other methods would also serve the employer's legitimate hiring interests without causing a disparate impact.

The majority opinion thus changed the elements of disparate impact analysis in three ways: first, by barring the use of internal work force statistical comparisons to establish a *prima facie* case; second, by requiring plaintiffs to identify the specific employment practice that caused the disparity to exist and, where such a showing is made, to lower the standard an employer must meet to justify that practice; and third, by placing the burden of proof in a disparate impact case on the plaintiff at all times.

Justice Stevens filed a dissent that chastised the majority for "turning a blind eye to the meaning and purpose of Title VII," adding that he could not "join this latest sojourn into judicial activism."[18] Similarly, Justice Blackmun's dissent criticized the majority for "essentially immunizing [discriminatory] practices from attack under a Title VII disparate impact analysis," adding, "One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."[19]

Price Waterhouse v. Hopkins

Disparate treatment analysis is also discussed in *Local Government Law Bulletin* Number 32. As explained in that bulletin, under the Supreme Court's rulings,[20] once a plaintiff makes a *prima facie* case of disparate treatment an inference of discrimination is created, which shifts the burden of production to the defendant employer, who must rebut the inference by articulating a legitimate nondiscriminatory reason for its action. The plaintiff may then try to demonstrate that the employer's proffered reason for its action is pretext. The burden of proof in disparate treatment claims remains at all times with the plaintiff.

However, the *Price Waterhouse* case examined the question of who has the burden of proving discrimination when mixed motives are involved. The plaintiff, Ann Hopkins, was a senior manager who was considered for partnership with Price Waterhouse (a major accounting firm). She was refused partnership and was told that despite her excellent record in generating new business for the firm, she lacked the interpersonal and social skills needed to be a partner and that she needed to walk, talk, and dress in a more feminine manner. She sued Price Waterhouse under Title VII, claiming that the firm discriminated against her on the basis of sex in denying her partnership. Thus the Court was faced with a case in which two reasons for

denial of partnership were presented, one legitimate (lack of interpersonal and social skills) and one in violation of Title VII (sexual stereotyping). In the lower court opinion, the Court of Appeals for the District of Columbia held for Hopkins, concluding that an employer may only escape Title VII liability in a mixed-motive case where it proves by clear and convincing evidence that it would have made the same employment decision in the absence of an impermissible motive and that Price Waterhouse had not made the required showing.

In a plurality opinion by Justice Brennan,[21] the Court held that if a Title VII plaintiff can prove that gender played a motivating part in an employment decision, the burden of proof shifts to the employer to show that the same decision would have been made in any event, based on other legitimate considerations. This shifting burden only occurs in cases in which the plaintiff can show that the employer relied upon an unlawful motive as a substantial factor in making its employment decision. Elaborating on the burden of the employer in a mixed-motive case, the Court said:

> [I]n most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. . . . An employer may not . . . prevail in a mixed-motive case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The very premise of mixed-motive cases is that a legitimate reason was present. . . . The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.[22]

The plurality held that the lower court erred by requiring the employer to make this showing by clear and convincing evidence instead of by a preponderance of the evidence and remanded the case for further proceedings.

The plurality opinion was joined by two opinions concurring in the judgment, one by Justice White and one by Justice O'Connor. Thus six members of the Court agreed with the proposition that the burden of proof shifts in mixed-motive cases to the employer to demonstrate, by a preponderance of the evidence, that the same employment decision would have been reached absent consideration of the plaintiff's sex. Justice White stated that the proper approach to Title VII mixed-motive cases was the approach used by the Court in analyzing free speech cases under *Mount Healthy Bd. of Educ. v. Doyle*,[23] which held that in a mixed-motive case the burden is on the plaintiff to show that the protected speech or conduct was a motivating factor in the employer's employment decision. The burden then shifts to the employer to show that it would have made the same decision even in the absence of the protected speech or conduct. Justice O'Connor explained that in her view the shifting burden of proof should only be used in cases where the employer "has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion."[24]

Justice O'Connor further explained the limited circumstances in which the burden of proof should shift to employers in Title VII litigation:

> No doubt, as a general matter, Congress assumed that the plaintiff in a Title VII action would bear the burden of proof on the elements critical to his or her case. . . . But in the area of tort liability . . . the law has long recognized that in certain "civil cases" leaving the burden of persuasion on the plaintiff to prove "but-for" causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care. . . . Where an individual disparate treatment plaintiff has shown by a preponderance of the evidence that an illegitimate criterion was a *substantial* factor in an adverse employment decision, the deterrent purpose of the statute has clearly been triggered. More importantly, as an evidentiary matter, a reasonable factfinder could conclude that absent further explanation, the employer's discriminatory motive "caused" the employment decision. The employer has not yet been shown to be a violator, but neither is it entitled to the same presumption of good faith concerning its employment decisions which is accorded employers facing only circumstantial evidence of discrimination. Both the policies behind the statute, and the evidentiary principles developed in the analogous area of causation on the law of torts, suggest that at this point the employer may be required to convince the factfinder that, despite the smoke, there is no fire.[25]

Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, filed a dissent, stating that the Court's ruling manipulated the existing rules for Title VII cases in a way certain to cause confusion.

Martin v. Wilks

This case involved the question of whether white employees could be allowed to challenge a consent decree establishing an affirmative action plan, where those employees chose not to intervene in the original litigation.

In 1974 a class action was brought against the City of Birmingham by a group of black employees and applicants under Title VII, alleging that the city engaged in racially discriminatory hiring and promotion practices in its fire department. Before the district court rendered a decision, the parties entered into two consent decrees that together established an extensive affirmative action plan. The district court gave tentative approval to the decrees and published notice of its intent to make them final. After the decrees were approved, a group of white fire fighters filed a complaint against the city arguing that enforcement of the decrees would result in discrimination against them because less qualified blacks would be promoted over them. The city admitted that it would indeed be making decisions based in part on race, but that the decision to do so was not a violation of Title VII, because it would be made under the terms of the consent decree approved by the court.

The district court dismissed the white fire fighters' suit. The Eleventh Circuit Court of Appeals reversed, holding that because the white employees were neither parties nor individuals with a privity of interest to the consent decrees, their claims of race discrimination were not precluded by the decrees.[26] In doing so, the eleventh circuit joined the view previously taken by the seventh circuit;[27] all other federal appeals courts, including the fourth circuit,[28] had ruled in similar settings that where individuals are aware that a pending Title VII suit may affect them and they choose not to intervene, they are not permitted to later relitigate the issues in a new action.

In a 5-4 opinion by Chief Justice Rehnquist (joined by White, O'Connor, Scalia, and Kennedy, JJ.), the Court affirmed the ruling of the eleventh circuit. The Court held that under the Rules of Civil Procedure, "joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree."[29] Justice Rehnquist reasoned that because the parties to a suit presumably know better than others the relief they are seeking and how obtaining that relief will affect others, they should bear the burden of bringing those others into the lawsuit as parties rather than placing the burden to intervene on those who may be affected.

The majority of courts that had considered this issue had held that to allow later challenges to Title VII consent decrees was an impermissible collateral attack, undermining the statute's purpose of eradicating discrimination in the workplace. The Supreme Court, however, held that such an interpretation simply did not comport with the requirements of rules nineteen and twenty-four, governing joinder of parties and issue preclusion, respectively. "A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly 'settle,' voluntarily or otherwise, the conflicting claims of another group of employees who do not join in the agreement."[30] The better approach, stated the Court, was to require the parties to a suit to identify those affected by the litigation and mandate their intervention:

> [P]laintiffs who seek the aid of the courts to alter existing employment policies, or the employer who might be subject to conflicting decrees, are best able to bear the burden of designating those who will be adversely affected if plaintiffs prevail; these parties will generally have a better understanding of the scope of likely relief than employees who are not named but might be affected. Petitioners' alternative [requiring those with an interest in the litigation to find out about it and to intervene] does not eliminate the need for, or difficulty of, identifying persons who, because of their interest, should be included in a lawsuit. It merely shifts that responsibility to less able shoulders.[31]

Justice Stevens filed a dissent (joined by Brennan, Marshall, and Blackmun, JJ.). His view was that a district court should not be required to retry a case "every time an interested nonparty asserts that some error that might have been raised on direct appeal was committed. Such broad allowance of collateral review would destroy the integrity

of litigated judgments."[32] The majority's ruling, he stated, will "subject large employers who seek to comply with the law by remedying past discrimination to a never-ending stream of litigation and potential liability. It is unfathomable that either Title VII or the Equal Protection Clause demands such a counter-productive result."[33]

Implications of the Court's Rulings

First, the practical effect of the ruling in *Ward's Cove Packing Co. v. Atonio* is to make it less likely that a local government employer will be successfully sued under a Title VII disparate impact claim. This is not to say, however, that any employer is now immune to such a challenge. Employers still need to evaluate the extent to which their hiring practices may disadvantage protected groups and still need to strive to achieve equal employment opportunities. Likewise, the requirement found in the uniform guidelines that all selection devices be valid remains in full force and in effect. Nonetheless, the Court clearly has made it more difficult for a disparate impact plaintiff to prevail.

Second, the ruling in *Price Waterhouse v. Hopkins*, while not surprising given the facts of the case, has great potential to complicate Title VII disparate treatment litigation. It would appear likely that a plaintiff with a weak disparate treatment claim would make every attempt to recast an attack as a mixed-motive case, so as to shift the burden of proof to the employer. The extent to which the lower courts will now be faced with mixed-motive claims and the extent to which they will analyze Title VII cases under this model remains to be seen.

Third, irrespective of the frequency of mixed-motive cases, an important teaching of the *Price Waterhouse* case is that sexual stereotyping is actionable as sex discrimination under Title VII. Local government employers should make every attempt to ensure that their personnel practices do not reflect gender bias.

Finally, the ruling in *Martin v. Wilks* certainly reduces the incentive for an employer to settle a Title VII class action because the employees who obtain an affirmative action plan as part of the consent decree cannot be assured that other employees will not challenge the employment decisions made under that plan. Neither can an employer be assured that it will not be repeatedly forced to defend its actions in court under the terms of the decree against those claiming reverse discrimination.

Notes

The author is an Institute of Government faculty member whose fields include employment law.

1. 42 U.S.C. § 2000e.
2. 57 U.S.L.W. 4583 (U.S. June 5, 1989).
3. 57 U.S.L.W. 4469 (U.S. May 1, 1989).
4. 57 U.S.L.W. 4616 (U.S. June 12, 1989).
5. 401 U.S. 424 (1971).
6. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Washington v. Davis, 426 U.S. 229 (1976); Connecticut v. Teal, 457 U.S. 440 (1982); Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561 (4th Cir. 1985); Jones v. General Tire & Rubber Co., 608 F. Supp. 1013 (W.D.N.C. 1985); Nicholson v. Western Electric Co., 555 F. Supp. 3 (M.D.N.C. 1982).
7. 487 U.S. ____, 95 L.Ed.2d 492 (1988).
8. 879 F.2d 439 (9th Cir. 1987).
9. Justice White was joined by Rehnquist, C.J., and O'Connor, Scalia, and Kennedy, JJ. Justice Stevens filed a dissent, joined by Brennan, Marshall, and Blackmun, JJ. Justice Blackmun filed a dissent, joined by Brennan and Marshall, JJ.
10. 57 U.S.L.W. at 4586.
11. *Id.*
12. *Id.* (emphasis added).
13. 57 U.S.L.W. at 4587.
14. 29 C.F.R. § 1607.1 (1988).
15. 57 U.S.L.W. at 4588.
16. *Id.*
17. *Id.*
18. 57 U.S.L.W. at 4589 (Stevens, J., dissenting).
19. 57 U.S.L.W. at 4593 (Blackmun, J., dissenting).
20. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).
21. Joined by Marshall, Blackmun, and Stevens, JJ.
22. 57 U.S.L.W. at 4476.
23. 429 U.S. 274 (1979).
24. 57 U.S.L.W. 4478.
25. *Id.* at 4479-80.
26. 833 F.2d 1492 (11th Cir. 1987).
27. Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986).
28. Goins v. Bethlehem Steel Corp., 657 F.2d 62 (4th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982).
29. 57 U.S.L.W. at 4618.
30. *Id.* at 4619.
31. *Id.*
32. 57 U.S.L.W. at 4623.
33. *Id.* at 4625.

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