THE USE OF DISPARATE IMPACT ANALYSIS IN SUBJECTIVE CRITERIA EMPLOYMENT DISCRIMINATION CASES: ALL THAT GLITTERS ISN'T GOLD?

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I. INTRODUCTION

"Employers can't use poorly conceived, basically lousy, thoughtless evaluation procedures to determine who they will hire."[1] This is how one attorney characterized the holding in the U.S. Supreme Court's recent decision of *Watson v. Fort Worth Bank and Trust.*[2] In a victory for employees, the Court held 8-0[3] that Title VII[4] discrimination claims involving subjective criteria are now subject to disparate impact analysis.

At first glance the *Watson* decision appears to be a boon for employees seeking Title VII relief for denial of jobs or promotions based on subjective criteria. However, upon closer examination of the case, that may not be so. Although a unanimous Court agreed to subject Title VII subjective criteria discrimination claims to disparate impact analysis, a plurality[5] of the Court also attempted to redefine the evidentiary standard used in disparate impact cases. That redefinition would make it more difficult for a plaintiff to meet the burden of proof in such cases. The plurality opinion regarding the evidentiary standard became the majority opinion during the next term in *Wards Cove*

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1. *Impact of Supreme Court's Watson Ruling Will Hinge on Disparate Impact Interpretation,* 133 Daily Lab. Rep. (BNA), at C-5 (July 12, 1988) [hereinafter *Watson Ruling*] (Comments of Don Bersoff, an attorney with the firm of Ennis, Friedman and Bersoff). Bersoff wrote the *amicus* brief submitted by the American Psychological Association in Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988).

2. 487 U.S. 977 (1988).

3. Justice Kennedy did not take part in the consideration or decision of the case.

4. Title VII of the Civil Rights Act of 1964, 78 Stat. 253, current version at 42 U.S.C. § 2000e. Section 2000e-2(a) provides:

> (a) It shall be an unlawful employment practice for an employer-
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (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.

5. The plurality was composed of Chief Justice Rehnquist, Justices White, O'Connor, and Scalia. Three of the remaining Justices agreed with the "fresh" interpretation of the standard to apply to the analysis and a fourth felt no such interpretation should be given without a factual context. Justice O'Connor announced the judgment of the Court and delivered an opinion of the Court with respect to Parts I, II-A, II-B, and III, in which Chief Justice Rehnquist and Justices Brennan, White, Marshall, Blackmun and Scalia joined, and an opinion with respect to Parts II-C and II-D in which Chief Justice Rehnquist, and Justices White and Scalia joined. Justice Blackmun filed an opinion concurring in part and concurring in the judgment in which Justices Brennan and Marshall joined. Justice Stevens filed a concurrence with the opinion.

Packing Co., Inc. v. Atonio[6].

The redefinition of the evidentiary standard led one member of the legal community to comment that the decision reflected an "Alice in Wonderland perversity,"[7] from both a legal and practical point of view. Undoubtedly the *Watson* and *Wards Cove* decisions will spawn more litigation for further legal interpretation and fine-tuning, thus prompting the General Counsel of the Equal Employment Opportunity Commission to term the *Watson* decision a "full employment bill for lawyers."[8] This article will discuss the subjective criteria issue of *Watson* and the change in evidentiary standard of *Wards Cove*. Background on the issues and potential difficulties in application will be discussed as well.

II. TITLE VII EMPLOYMENT DISCRIMINATION

The Supreme Court has consistently recognized two distinct employment discrimination theories under Title VII. One theory is disparate treatment, in which a plaintiff must prove defendant's discriminatory intent or motive after alleging less favorable treatment by his or her employer because of race, gender, religion, color, or national origin. Under *McDonnell Douglas Corp. v. Green*,[9] plaintiff's *prima facie* case establishes a presumption of discriminatory intent on the part of the employer by eliminating the most obvious non-racial causes for the employer's actions regarding plaintiff. A plaintiff's *prima facie* case consists of proof that the employer had a job or promotion available for which plaintiff was qualified; the plaintiff applied for the position; and the employer rejected plaintiff's application, then continued to seek applicants with qualifications similar to those of the plaintiff.[10] The employer rebuts the *prima facie* case by producing evidence that it has a legitimate, nondiscriminatory reason for its action regarding the plaintiff.[11] If the employer meets its burden, then the plaintiff, in order to prevail, must prove by a preponderance of the evidence that the legitimate reason proffered by the employer is a mere pretext for discrimination.[12] At all times, the burden of persuading the court of intentional discrimination by the defendant employer remains with the plaintiff employee.[13]

The second type of discrimination, and the one we are concerned with here, is disparate impact discrimination as established in *Griggs v. Duke Power*

6. 490 U.S. 642 (1989). While *Watson* was the case in which the U.S. Supreme Court set forth the change in the evidentiary standard regarding disparate impact claims, this part of the decision was only decided by a plurality of the Court. Since a plurality decision is not binding precedent and need not be followed by lower courts, *see* Powers v. Ala. Dept. of Educ., 854 F.2d 1285, 1293 n.13 (11th Cir. 1988), the Court's binding majority decision in *Wards Cove* will be used, for the most part, to discuss the changes in the evidentiary standard.

7. *Equal Employment Opportunity Commission Will Stand Firm on Its Uniform Guidelines on Employee Selection Procedures, Shanor Says.* 157 Daily Lab. Rep. (BNA), at A-11 (Aug. 15, 1988) [hereinafter *Employee Selection Procedures*] (Comments of Harvard Professor Elizabeth Bartholet, formerly of the NAACP Legal Defense Fund, regarding *Watson*, before the annual meeting of the American Bar Association on August 8, 1988).

8. *Id.* (Remarks of EEOC General Counsel, Charles Shanor, at the annual meeting of the American Bar Association in Toronto, Canada, August 8, 1988).

9. 411 U.S. 792 (1973).

10. *Id.* at 802.

11. *Id.*

12. *Id.* at 804.

13. *Watson*, 487 U.S. at 986.

Co.[14] In this type of case, the plaintiff need not prove the employer's intent to discriminate in order to establish a violation of Title VII. Unlike disparate treatment cases where intent is an integral part of the cause of action, here the intent of the employer is irrelevant. Rather, the thrust is that the employer's facially neutral policy or practice has a "significant adverse effect" on a group protected by Title VII.[15] To establish a *prima facie* case, the plaintiff shows, generally by statistical data, that the employer's neutral policy has a disparate impact upon one or more groups protected by Title VII.[16] The employer then either disproves plaintiff's evidence, or in the alternative, produces evidence of a business necessity justifying the challenged policy. The employer's evidence can, in turn, be rebutted by the employee persuading the court that the reason proffered by the employer is a mere pretext for discrimination.[17]

Regarding what actually constitutes a disparate impact, several federal agencies, including the Equal Employment Opportunity Commission, and the Departments of Justice and Labor, adopted a set of Uniform Guidelines to provide standards for ruling on the legality of selection procedures used by private and public employers.[18] The Uniform Guidelines on Employee Selection Procedures takes the position that there is a 20% permissible margin between the outcome of the performance of the majority and the minority under a given test or screening device.[19] Disparate impact is statistically demonstrated when the selection rate for groups protected by Title VII is less than 80% that of the highest "scoring" majority group.[20] Agencies retained discre-

14. 401 U.S. 424 (1971).

15. *Watson*, 487 U.S. at 986-87.

16. At various times the Court has devised tests to satisfy plaintiff's requirements in demonstrating a disparate impact. *See* Connecticut v. Teal, 457 U.S. 440, 446 (1982) (a plaintiff must show a "significan[t] discriminatory impact"); New York City Transit Authority v. Beazer, 440 U.S. 568, 584 (1979) (the plaintiff must have "statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities"); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (the test selects applicants for hire in a significantly discriminatory pattern); Washington v. Davis, 426 U.S. 229, 246-47 (1976) (the test disqualifies substantially disproportionate numbers of blacks); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants); Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971) (the devices "operate to disqualify Negroes at a substantially higher rate than white applicants").

Note that the standard is different in cases when the employer and/or union voluntarily adopt an affirmative action plan. To justifiably adopt such a plan, the Court requires the existence of a " 'manifest imbalance' that reflect[s] underrepresentation [of a group given Title VII protection] in 'traditionally segregated job categories.' " Johnson v. Trans. Agency, Santa Clara County, California, 480 U.S. 616, 628 (1987). *See also* United Steelworkers v. Weber, 443 U.S. 193, 209 (1979) (manifest racial imbalance in traditionally segregated job categories). However phrased, the Court requires that causation be shown by proof that the specific policy or practice keeps employees protected by Title VII out of the workplace at a disproportionate rate.

17. *Watson*, 487 U.S. at 986.

18. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1(A) (1990) [hereinafter Uniform Guidelines].

19. *Id.* at § 1607.

20. *Id.* at § 1607.4(D). The terminology is intentionally imprecise here because the "outcome" depends upon the nature of the screening device. If the device is a written examination, then the outcomes compared will be test scores. If the screening device is a no-beard policy, then the outcome may be the percentage of Black males affected by the medical condition which makes them react adversely to shaving, compared with the percentage of white males affected by the condition (and the concomitant percentage of Black males thereby adversely affected by the no-beard policy compared to the percentage of white males so affected). *See* Richardson v. Quik Trip Corp., 591 F.Supp. 1151 (S.D. Iowa 1984). For discussions of the disparate impact standard, *see* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982); Blumrosen, *Strangers in Paradise: Griggs v.*

tion to adjust the figures in individual cases as deemed appropriate.[21]

Therefore, in order for a disparate impact case to be made, plaintiff must show that an employer's policy or procedure which acts as a screening device for the employer, excludes members of a Title VII class at a disparate rate. If there is no such showing, there is no finding of disparate impact under Title VII. If the plaintiff establishes a *prima facie* case of disparate impact, the employer may either rebut the means used to establish the disparate impact or, in the alternative, produce evidence that there is a business necessity justifying the policy. If business necessity is shown, the plaintiff may rebut such evidence by persuading the court that the business necessity proffered by the employer is a mere pretext for discrimination.

III. SUBJECTIVE CRITERIA ISSUE

Since the U.S. Supreme Court's 1971 decision in *Griggs v. Duke Power Co.*,[22] there has been a loophole in the judicial law interpreting the country's single most important piece of general employment civil rights legislation. *Griggs* interpreted Title VII of the 1964 Civil Rights Act as the basis for a cause of action for employment discrimination when the employer's policy, while neutral on its face, has a disparate impact upon groups included within Title VII's protection. Interpreting Title VII to include discrimination through the use of disparate impact analysis has become the basis for challenging virtually any type of objective criteria used as a screening device.[23] The use of subjective criteria in the disparate impact context, however, went unchecked by the Supreme Court.[24]

Duke Power Co. and The Concept of Employment Discrimination, 71 MICH. L. REV. 59 (1972); Helfand & Pemberton, *The Continuing Vitality of Title VII Disparate Impact Analysis*, 36 MERCER L. REV. 939 (1985); Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV. 869 (1985); Maltz, *Title VII and Upper Level Employment—A Response to Professor Bartholet*, 77 NW.U. L. REV. 776 (1983); Rigler, *Title VII and the Applicability of Disparate Impact Analysis to Subjective Selection Criteria*, 88 W. VA. L. REV. 25 (1985); Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793 (1978); Willborn, *The Disparate Impact Model of Discrimination; Theory and Limits*, 34 AM. U. L. REV. 799 (1985); Comment, *Defining the Proper Bounds of Disparate Impact Analysis: Beyond an Objective/Subjective Employment Criteria Dichotomy*, 49 U. PITT. L. REV. 657 (1988); Note, *Application of the Adverse Impact Analysis to Subjective Criteria in Title VII Employment Discrimination Cases*, 38 BAYLOR L. REV. 363 (1986); Note, *Evaluation of Subjective Selection Systems in Title VII Employment Discrimination Cases: A Misuse of Disparate Impact Analysis*, 7 CARDOZO L. REV. 549 (1986).

21. Uniform Guidelines, *supra* note, § 1607.4(D).

22. 401 U.S. 424 (1971).

23. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440 (1982) (written examination as racial discrimination); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (rule against employing drug users as racial discrimination); Dothard v. Rawlinson, 433 U.S. 321 (height and weight requirements as gender discrimination); Washington v. Davis, 426 U.S. 229 (1976) (written verbal skills test as racial discrimination); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (written aptitude tests as race discrimination); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (rule barring employment of married women with pre-school aged children as gender discrimination); Chrisner v. Complete Auto Transit, 645 F.2d 1251 (6th Cir. 1981) (prior experience requirement as gender discrimination); Richardson v. Quik Trip Corp., 591 F. Supp. 1151 (S.D. Iowa 1984) (no-beard rule as racial discrimination); Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971) (garnishment experience as racial discrimination); Davis v. America Nat'l. Bank of Tex., 12 Fair Empl. Prac. Cas. (BNA) 1052 (N.D. Tex. 1971) (parentage of children without marriage as racial and gender discrimination); Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972) (arrest record history as racial discrimination).

24. *Watson*, 487 U.S. at 988. The Court has consistently used only the disparate treatment the-

The Supreme Court's decision in *Connecticut v. Teal*,[25] spoke of subjective criteria and disparate impact in a manner which suggested that the Court might later address the issue. In *Teal*, the employer used the objective criteria of a passing score on a written promotion examination as a screening device for promotions. If the applicant did not pass the objective portion of the promotion process, then there could be no consideration of the candidate under the subjective portion of the process, i.e., evaluations and recommendations.[26]

The written examination had a disparate impact upon Black candidates who desired further consideration for promotion. The employer then applied an undefined "affirmative action plan,"[27] which had no disparate impact upon the number of Blacks actually promoted. The employer was sued, based on a disparate impact claim, by Black candidates who had failed a written examination which served as a pass/fail barrier to further consideration for promotion.

Teal did not specifically say that an employer could avoid liability by using the objective examination score in conjunction with other subjective criteria—rather than using the exam as a pass/fail barrier—so that there would be no objective scores to exhibit a disparate impact.[28] However, one inference of the Court's use of the identifiable "pass/fail barrier"[29] language is that a significant problem with the employer's scheme lay in failing to consider the subjective criteria in the promotion determination for all candidates whether or not they passed the written examination.[30] The implication was that an objective screening device provided an obvious source of data from which to determine a disparate impact. On the other hand, subjective criteria provided no obvious source, making disparate impact, therefore, more difficult to prove.

Supporting this inference is the fact that no use of disparate impact analysis in discrimination cases involving subjective criteria existed until *Watson*. With the door left open by the Court's refusal to eschew an employer's use of subjective criteria, it could then be expected that, at some point, the Court would be called upon to decide the issue of analyzing subjective criteria using

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ory when analyzing subjective criteria. Such criteria has included discretionary promotion decisions, United States Postal Serv. Board of Governors v. Aikens, 460 U.S. 711 (1983); discretionary decisions not to fire individual who was said not to get along with co-workers, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); hiring based on personal knowledge of candidates and recommendations, Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); and the discretionary decision not to rehire someone engaged in criminal acts against the employer while laid off, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

25. 457 U.S. 440 (1982).

26. The subjective criteria here was particularly important. The promotion candidates had provisionally held the positions which they were aspiring to for almost two years before the written examination; therefore, their evaluations and recommendations from their actual performance of the job would presumably be an important factor to consider in determining whether to make their provisional appointments permanent.

27. Petitioners contested the Court of Appeals' characterization of their employee selection procedure, but the U.S. Supreme Court concluded that it was unnecessary to resolve the dispute. *See Teal*, 457 U.S. at 443.

28. The primary issue in *Teal* was whether the employer's non-disparate impact "bottom line" promotion figures could shield the employer from liability for, or act as a defense to, a discrimination case brought by those who failed a portion of the employer's promotion scheme having a disparate impact.

29. *Teal*, 457 U.S. at 452.

30. *See* Bennett-Alexander, *Protection of the Individual Employee and the 'Bottom-Line' Defense*, 34 LAB. L.J. 704, 712-13 (1983).

the disparate impact analysis. It did so six years later in *Watson v. Fort Worth Bank and Trust.*

A. *The Watson Decision*

Clara Watson, a Black female, applied for a position as a teller at Fort Worth Bank & Trust in August of 1973, but the bank hired her as a proof operator. During her tenure at the bank, Watson applied for promotion four times. Each time the promotion was denied her and given to a white employee. Approximately two and a half years after being hired by the bank, Watson was promoted to a drive-in teller. Four years later Watson applied to be the main lobby teller supervisor and was passed over for a white male. Watson then applied as a supervisor of the drive-in bank and the position was filled by a white female. Watson became a commercial teller in the main lobby and informally acted as assistant to the supervisor of tellers for approximately one year. In February of 1981, the white male supervisor of tellers was promoted and Watson applied for his job. The white female drive-in supervisor was selected, so Watson applied again for the drive-in supervisor job and a white male was selected.

In selecting supervisors, the bank did not have formal criteria for evaluation, but rather relied upon the subjective judgment of the supervisors familiar with the jobs and candidates. All supervisors involved were white. At one point, Watson was told by an undisclosed source that the teller position was a "big responsibility with a 'lot of money . . . for Blacks to have to count.' "[31]

Thus after failing to be promoted several times, Watson filed a discrimination charge with the Equal Employment Opportunity Commission against Fort Worth Bank & Trust and exhausted her administrative remedies. She then filed suit in the U.S. District Court for the Northern District of Texas alleging that the bank unlawfully discriminated against Blacks in hiring, compensation, initial placement, promotions, terminations and other terms and conditions of employment.[32]

The district court treated Watson's claim as a disparate treatment case and concluded that she had established a *prima facie* case of race discrimination which the bank rebutted by presenting evidence of legitimate nondiscriminatory reasons for each of the promotions involved. The case was dismissed when Watson failed to show on rebuttal that the bank's reasons were merely pretextual.[33]

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31. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 990 (1988).

32. Watson originally filed a class action suit and the district court certified the class. Later the court decertified the class when it concluded, in light of trial evidence, that there was not a common question of law or fact among the groups of applicants and employees as certified. After being split, the district court found that the class of Black employees did not meet the requirement for numbers and decertified the sub-class. The court further concluded that since Watson's claims did not adequately represent the applicant class, as they were not typical of the group's members, she was not an adequate representative for the class. But the court addressed the merits of the groups' claims since Watson had "proceeded zealously on behalf of the job applicants . . . ." 487 U.S. at 983. On appeal to the Court of Appeals for the Fifth Circuit, the court ruled that the district court had not abused its discretion in decertifying the class. But to avoid unfair prejudice the court vacated the part of the judgment affecting Black job applicants and remanded with instructions to dismiss without prejudice. *Id.* The Supreme Court did not address these issues upon appeal. 487 U.S. at 984.

33. *Watson*, 487 U.S. at 984.

Before the Court of Appeals for the Fifth Circuit,[34] Watson argued that the district court committed error in not applying the disparate impact analysis to her claim. The court held that Title VII challenges to discretionary promotion systems are addressed by disparate treatment rather than disparate impact analysis. The subjective policy challenged was the bank's procedure of leaving promotion decisions to the unchecked discretion of the supervisors. The Fifth Circuit affirmed the district court's holding that Watson failed to prove her disparate treatment claim. The U.S. Supreme Court granted *certiorari* to resolve the split among the lower courts on whether the appropriate theory in subjective criteria cases was disparate impact or disparate treatment.[35]

In an increasingly rare 8-0 decision, the Supreme Court for the first time held that the disparate impact test could be used to analyze employment discrimination claims under Title VII based on an employer's use of subjective criteria. The bank and the United States[36] argued that disparate treatment is adequate to address subjective criteria and it would be "impossibly difficult"[37] for employers to defend the use of subjective criteria under disparate impact analysis. As a result, they argued, employers would be forced to adopt numerical quotas to avoid liability. That is, only if a statistical disparity did not exist would a plaintiff be precluded from establishing a *prima facie* case of disparate impact.

Watson, on the other hand, argued that subjective selection methods should be addressed under disparate impact analysis because they are as likely as objective screening devices to have discriminatory effects. If the disparate impact analysis is confined to the latter, Watson argued, employers could simply substitute subjective criteria for objective tests and circumvent liability for discrimination under Title VII—the *Teal* inference.[38]

The U.S. Supreme Court preferred Watson's reasoning, concluding that disparate impact is just as applicable to subjective employment criteria as to objective standardized tests. In both, there is a facially neutral practice adopted with no intent to discriminate that has effects indistinguishable from intentionally discriminatory practices. The Court feared that if Watson's view was not adopted, employers could easily insulate themselves from liability for disparate impact.[39]

Employers could avoid liability by simply not making standardized criteria absolutely determinative. By using objective and subjective criteria together without permitting the objective criteria to act as a pass/fail barrier, the

34. 798 F.2d 791 (5th Cir. 1986).

35. Circuits applying the disparate impact test to subjective criteria included the Ninth Circuit (Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (*en banc*), *aff'd on other grounds* 490 U.S. 642 (1989)) and the Eleventh Circuit (Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985)). *Cf.* Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

36. The U.S. Department of Justice filed the brief for the United States, which EEOC signed. The U.S. Department of Labor refused to do so. *Watson Ruling*, *supra* note 1. The Department of Labor's Office of Federal Contract Compliance Programs is charged with enforcement of Executive Order 11246, as amended, requiring businesses which conduct business with the federal government on a contractual basis not to discriminate on the bases set forth in Title VII and in addition, to do certain affirmative acts related to providing equal opportunity for such groups.

37. *Watson*, 487 U.S. at 989.

38. *Id.*

39. *Id.* at 989-90.

subjective criteria could be given any weight the employer wished. Otherwise, the pass/fail barrier results alone could be attacked by dissatisfied employees in a disparate impact suit.[40] Leaving promotion decisions to the unchecked discretion of supervisory employees should not raise the inference of discriminatory conduct, but such supervisors will not always act without discriminatory intent.[41] Even if intentional discrimination could be prevented by disparate treatment, the "problem of subconscious stereotypes and prejudices would remain."[42]

The Court opined that while the remark made to Watson regarding the teller position as one of "big responsibility with a lot of money for . . . Blacks to have to count"[43] may not prove discriminatory intent, it does suggest "a lingering form of the problem that Title VII was enacted to combat."[44] Therefore, the Court could not see why Title VII would not be violated by either the employer's intentional impermissible discriminatory practices or an undisciplined system of subjective decision making. Both would adversely affect an employee because of race, gender, color, religion or national origin in violation of Title VII. Thus, the Court effectively addressed the issue left unresolved by the *Teal* decision[45] and prevented employers from doing what the *Teal* language seemed to imply, i.e., avoiding disparate impact liability by using subjective criteria to screen employees.[46]

Employees who found themselves repeatedly turned down for promotion, with little opportunities for advancement after entering the workplace, have often been met with the brick wall of a subjective decision-making process—one virtually impossible to attack. Since employees had little chance of challenging the employer's decisions, certain employees were unable to participate fully in the fruits of the workplace. Subjective criteria did not lend themselves to the quick and easy analysis afforded by objective criteria, so employees many times simply did nothing. Even though it appeared that the amorphous subjective criteria resulted in groups of people being excluded from full participation in the work place, the law provided virtually no redress.

The *Watson* decision cured this ill. For the first time in the history of Title VII, employees had a viable means of redressing the elusive, amorphous area of stereotypical, negative, preconceived notions which result in certain groups being unable to fully enjoy the Title VII pledge of equal employment opportunity. By recognizing that subjective criteria can be subjected to disparate impact analysis, employees who had fallen through the cracks in earlier employment discrimination cases could now bring such cases under the disparate impact theory of employment discrimination. Such a holding also gave, acknowledged and validated the notion that while obvious, overt discrimination may have waned after the enactment Title VII, covert and 'unintentional' discrimination remained alive and well, and in need of redress.

40. *Id.*
41. *Id.* at 990.
42. *Id.*
43. *Id.* at 977.
44. *Id.*
45. *See supra* notes 25-30 and accompanying text.
46. *Watson*, 487 U.S. at 989-91.

IV. EVIDENTIARY STANDARD ISSUE

In a move which has the potential of undermining the gains made by employees under the subjective criteria holding, the Court also addressed the issue of the evidentiary standard to be used in reviewing disparate impact cases. The *Watson* holding on this issue, while only a plurality, set the stage for the next term's majority decision in *Wards Cove Packing Co., Inc. v. Atonio*[47].

In *Watson*, the bank, the United States and the Court were concerned that in light of the Court's holding regarding subjective criteria and disparate impact, it would be impossible for an employer to defend against a case in which the plaintiff made out a *prima facie* case using statistical evidence. The concern was that there is a need for subjective criteria in certain job categories and validation of that criteria to show proof of business necessity would be expensive and impracticable. Employers would have to adopt secret quota systems as their only alternative to insure that plaintiffs could not establish a statistical *prima facie* case of disparate impact.

The four justice plurality held that the plaintiff's burden of establishing a *prima facie* case goes beyond "the need to show that there are statistical disparities in the employer's work force."[48] According to the plurality, the plaintiff must first identify the specific employment practice being challenged, then show a causal connection between the specific challenged practice and the statistics presented.[49] It is not sufficient to show only statistical evidence that an employer hires or promotes minorities or women in numbers significantly lower than their representation in either the relevant labor force or in one part of the employer's work force as against another.

The employee must show that a specific policy or practice of the employer causes statistics exhibiting a disparate impact.[50] Once the employee demonstrates the disparate impact of the policy or practice, the employer has the burden of producing evidence of a business necessity. However, the burden of persuasion for proving a business necessity never shifts to the employer; rather, the burden of persuasion remains, at all times, with the employee.[51] The Court's reasoning would have the result of increasing the evidence plaintiff must show to prevail in a disparate impact claim, thereby leaving the total burden of proof upon the plaintiff at all times.

The predicted result of this portion of the *Watson* decision was that there would inevitably be more cases needed to settle the issue. One seasoned civil rights attorney foresaw "10 years of litigation to sort out the adverse impact standard."[52] This prediction seemed prophetic when EEOC's general counsel stated that EEOC would comply with the 8-0 part of the decision applying the disparate impact test to subjective criteria, but not with the plurality part of the decision shifting the burdens of proof and production.[53] It again seemed a

47. 490 U.S. 642 (1989).
48. *Id.*
49. *Id.* at 994.
50. *Watson*, 487 U.S. at 990.
51. *Id.* at 997.
52. *Watson Ruling, supra* note 1 (Comment of Barry Goldstein, then assistant counsel, NAACP Legal Defense and Education Fund).
53. *Employee Selection Procedures, supra* note 7, at A-11.

cogent prediction when the Eleventh Circuit Court of Appeals stated in the subsequent case of *Powers v. Alabama Department of Education*:[54]

> [W]e are aware that four members of the Supreme Court recently have indicated that the burden of proof of the absence of business necessity rests with plaintiff [citing *Watson*]. A plurality opinion, however, is not binding precedent and in the meantime, we are bound by several decisions of this court (as well as the Supreme Court cases [referring to *Beazer*[55] and *Albemarle*[56]]. . .) stating flatly that the employer bears the burden of proving that a practice is job-related.[57]

Almost one year after the *Watson* decision, the Court again faced the issue of the use of the disparate impact test to analyze subjective criteria cases in *Wards Cove Packing Co., Inc. v. Atonio*.[58] The Court revisited the issue of the disparate impact evidentiary standard and relied heavily on its *Watson* decision. This time all of the justices took part in the decision and Justice Kennedy, who had taken no part in the *Watson* case,[59] sided with the *Watson* plurality and made it a majority. That majority in *Wards Cove* reasserted and clarified the standard set forth in *Watson*.[60]

A. *The Wards Cove Decision*

In *Wards Cove* two employers ran salmon canning operations during the limited summer month salmon runs in Alaska. The employers required two types of workers for the canneries. There was a need for unskilled workers to perform the "cannery jobs" which involved handling and processing the fish, and skilled workers to handle the "noncannery" jobs involving processing payroll, machinery mechanics, medical personnel, etc. The canneries only operate during the salmon runs in the summer and are vacant for the remainder of the year. It was shown that the employer hired mostly nonwhite Alaska natives and Filipinos for the lower paid, less desirable cannery jobs, and mostly whites for the higher paid, more desirable noncannery jobs. Virtually all noncannery jobs paid higher wages than the cannery jobs.

Fifteen years before the Court's decision, a group of nonwhite cannery employees brought suit against the employer for racial discrimination under Title VII. The employees alleged that several of the employers' hiring and

54. 854 F.2d 1285 (11th Cir. 1988).
55. New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979).
56. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).
57. *Powers*, 854 F.2d at 1292 n.11.
58. 490 U.S. 642 (1989).
59. *See supra* notes 3 and 5.
60. While *Wards Cove* is the case which actually changed the evidentiary standard since a majority of the Court decided the issue, it was the *Watson* case which set forth much of the basis for the *Wards Cove* ruling and it was to *Watson* that the Court in *Wards Cove* looked for much of its support. It is therefore virtually impossible to fully discuss *Wards Cove* without reference to the *Watson* rationale which the Court so heavily relied upon and adopted in *Wards Cove*. However, it should be made clear that while the two cases must be read together for a full understanding of the Court's *Wards Cove* rationale, it is *Wards Cove*, with its majority holding, which actually effected the change in the evidentiary standard. In several places the Court in *Wards Cove* did not give the detailed explanations of its rationale as it did in Watson; perhaps because it felt it provided sufficient detail when it revamped the evidentiary standard in *Watson* the term before. Whatever the reason, there are places where issues are more fully understood within the *Watson* language. *Watson* is referred to where it is necessary in order to more fully understand *Wards Cove*, and to the extent that the *Wards Cove* Court embraced and reiterated its position in *Watson*, *Watson's* rationale actually becomes a part of *Wards Cove*.

promotion practices were responsible for the racially stratified workforce and such policies denied them employment in the more desirable and lucrative noncannery jobs. The employees alleged that the high numbers of nonwhites in cannery jobs resulted from the employers' practices of nepotism, rehire preference, lack of objective hiring criteria, separate hiring channels,[61] and refusal to promote from within.[62] They also complained that the employer maintained segregated eating and living facilities for cannery and noncannery workers.[63] To establish the disparate impact of these policies, the employees compared the high percentage of nonwhite workers in the cannery jobs and the low percentage of such workers in the noncannery jobs.[64]

The district court entered judgment for the employer after rejecting the subjective criteria claims under a disparate impact theory. As to the objective criteria claims based on English language requirement, nepotism, rehire preference, and failure to post noncannery openings, the court rejected these claims for failure of proof.[65]

The Ninth Circuit affirmed,[66] but the decision was vacated when the circuit court agreed to hear the case *en banc* due to an intra-circuit conflict over use of the disparate impact test in analyzing subjective criteria.[67] Since the *en banc* ruling reversed the trial court and instead held that subjective criteria could be analyzed using the disparate impact test,[68] the case was remanded to the circuit court panel for further proceedings. On remand[69] the panel held that plaintiffs had made out a *prima facie* case of disparate impact in hiring skilled and unskilled noncannery positions. The panel remanded the case to the trial court with instructions that it was the employer's burden to prove that any disparate impact resulting from its practices was justified by a busi-

61. *Wards Cove*, 490 U.S. at 647.

62. *Id.* at 647-48. The employer sought cannery workers in Native villages and through dispatches from the International Longshoremen Workers Union Local 37 pursuant to a hiring hall agreement with the local. This resulted in the lowest paying jobs being filled predominantly by Alaska Natives and Filipinos. For noncannery jobs the companies relied upon word-of-mouth recruitment by the predominately white superintendents and foreman. Since the housing and eating facilities for (predominantly nonwhite) cannery workers and (predominately white) noncannery workers were segregated, this resulted in mostly white cannery workers finding out about noncannery job possibilities. *Id.* at 677 n.27 (Stevens, J. dissenting). The employer recruited employees for the better paying jobs from outside the cannery work force rather than from the lower-paying, overwhelmingly nonwhite cannery worker positions. *Id.* at 677 (Stevens, J., dissenting). There was evidence — neither credited nor discredited by the lower court — that some cannery workers had college training at the time they were employed at the canneries and some employees later became architects, an Air Force officer, and a graduate student in public administration. *Id.* at 675 n.22.

63. *Id.* at 647.

64. *Id.* at 650. The district court made no precise numerical findings regarding the extent of the discrepancy between the percentage of nonwhites in cannery jobs and those in noncannery jobs, but instead noted that there were significant disparities between the noncannery jobs and the total workforce at the canneries. These disparities were explained by the fact that "nearly all employed in the cannery workers' department are nonwhite." *Id.* at 650 n.5. For example, from 1971 to 1980 one of the employers hired 443 employees for several of its noncannery jobs. Of the 443, 3 were nonwhite. The other employer employed 448 white and 42 nonwhites. *Id.* at 677 n.24 (Stevens, J., dissenting). The Supreme Court determined that the degree of disparity between the two groups was not relevant to its decision. *Id.* at 650 n.5.

65. *Id.* at 648.

66. Atonio v. Wards Cove Packing Co., Inc., 768 F.2d 1120 (9th Cir. 1985).

67. Atonio v. Wards Cove Packing Co., Inc., 787 F.2d 462 (1985); Wards Cove Packing Co., Inc. v. Antonio, 490 U.S. 642 (1989).

68. 810 F.2d 1477, 1482 (9th Cir. 1987).

69. Atonio v. Wards Cove Packing Co., Inc., 827 F.2d 439, 444-449 (9th Cir. 1987).

ness necessity. The U.S. Supreme Court granted *certiorari* because some of the issues raised in the case regarding disparate impact were issues upon which the Court was evenly divided in *Watson*.[70]

The U.S. Supreme Court ruled, *inter alia*, that, consistent with the prior term's holding in *Watson*, disparate impact is the appropriate Title VII theory with which to challenge the employer's subjective hiring and promotion practices. In this case, however, the employees made an improper comparison to support a disparate impact case. While the employees had compared the high percentage of nonwhites in the cannery job and low percentage of whites in the noncannery jobs,[71] the Court held that, " 'the proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market.' "[72]

The Court also held that the employees must show how each separate practice alleged to have a discriminatory impact disparately impacts upon nonwhites.[73] Further, reiterating its *Watson* language, the Court ruled that the burden of proof in disparate impact cases always stays with the plaintiff employee. Once the employee establishes a *prima facie* case of disparate impact, the burden shifts to the employer not to prove business necessity, but only to produce evidence of business justification.[74] Since each of these holdings has its own considerations, they will be discussed in turn.[75]

1. *Identifying A Specific Employer Practice*

In *Wards Cove*, plaintiff offered one set of statistics indicating a racially imbalanced work force and alleged several criteria as causing the disparity, including the employer's rehire preference, nepotism, lack of objective hiring criteria, separate hiring channels, and a practice of not promoting from within.

As part of plaintiff's *prima facie* case, the Court in *Wards Cove* held that the plaintiff must allege a specific policy or policies which cause the disparate impact, forming the basis of the discrimination allegation.

The Court stated:

> [P]laintiff must begin by identifying the specific employment practice that is challenged . . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.[76]

On remand, the Court stated that the plaintiff would be required to "specifically [show] that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites."[77]

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70. *Wards Cove*, 490 U.S. at 649-50.

71. *Id.* at 650.

72. *Id.* (quoting Hazelwood School Dist. v. United States, 433 U.S. 299, 308)).

73. *Id.* at 657.

74. *Id.* at 659.

75. Disparate impact analysis of subjective criteria has already been discussed. *See supra* notes 22-46 and accompanying text.

76. *Wards Cove*, 490 U.S. at 656 (quoting Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994 (1988)).

77. *Wards Cove*, 490 U.S. at 657.

To facilitate understanding of the Court's reasoning, it may be helpful to note that the *Watson* Court had previously stated:

> [I]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance . . . [and] equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.[78]

There is an obvious need for employees to be aware of the specific policy from which the disparate impact arises, but provision should be made for the instances where it is not feasible or possible for such information to be discovered by plaintiff. This may be especially important in a case such as this where the employees are only with the employer for a short span of time and several policies or practices causing disparate impact are alleged. Here plaintiff would specifically be required to show that there is a disparate impact caused by the employer's policies of nepotism; segregating (non-white) cannery and (white) noncannery employees' eating and living facilities; using segregated hiring channels, and so forth. If the employee could not show a specific disparate impact from a given policy, then as dubious as the policy may be, the employer could continue to use the policy.

It is ironic that the Court would choose a case with facts such as those in *Wards Cove* to extend the disparate impact evidentiary standard. The employer's cannery employment system moved one of the dissenters to term the salmon industry as much like that of a "plantation economy."[79] In fact, the evidence before the Court included a comment by a foreman who stated, when asked about cannery employment: "We are not in a position to take many young fellows to our Bristol Bay canneries as they do not have the background for our type of employees. Our cannery labor is either Eskimo or Filipino and we do not have the facilities to mix others with these groups."[80]

Even with such questionable practices, and even where as here the employer did not maintain records which might assist the employees in their information gathering,[81] the employees, according to *Wards Cove*, would be required to show how each separate policy had a statistically disparate impact upon Title VII groups in order to establish a *prima facie* case under Title VII. Plaintiff would not be able to look at the cumulative effect of the questionable policies to gather the disparate impact needed. The dissent, in addressing this requirement imposed by the majority, stated:

> This additional proof requirement is unwarranted. It is elementary that a plaintiff cannot recover upon proof of injury alone; rather, the plaintiff must connect the injury to an act of the defendant in order to establish *prima facie* that the defendant is liable. Although the causal link must have substance, the act need not constitute the sole or primary cause of the harm. Thus in a disparate impact case, proof of numerous questionable practices ought to fortify an employee's assertion that the practices caused racial disparities. Ordinary principles of fairness require that Title VII actions be tried like 'any lawsuit.' The changes the majority makes today, tipping the scales in favor of employers, are not faithful to those principles.[82]

78. *Watson*, 487 U.S. at 992 (citation omitted).
79. *Wards Cove*, 490 U.S. at 663 n.4 (Stevens, J. dissenting).
80. *Id.*
81. *See infra* notes 92-93 and accompanying text.
82. *Wards Cove*, 490 U.S. at 672-73 (Stevens, J. dissenting) (citations omitted).

The fact that the Court permitted the disparate impact requirements to be extended in this way, in a case with facts such as these, probably gives some indication of how conservatively it will view allegations of discrimination which come before it in the future.

2. *Proving Causation*[83]

Once the plaintiff identifies the specific policy which allegedly has a disparate impact, the plaintiff is required to prove that the employer's use of the policy causes a disparate impact upon a group afforded protection under Title VII. *Wards Cove* made clear that while "statistical proof can alone make out a *prima facie* case" of discrimination,[84] generally, a plaintiff merely exhibiting a statistical disparity of some sort between different groups in the work place, alone, is insufficient as proof of discrimination via disparate impact.[85]

In *Wards Cove*, plaintiffs had compared the high number of whites in noncannery jobs with the low number of nonwhites in those same jobs to prove the disparate impact. The Court stated that the proper comparison is between the racial composition of at-issue jobs and the racial composition of the qualified population within the relevant labor market from which the employees are drawn.[86] It also recognized that when such statistics are unavailable, "certain other statistics—such as measures indicating the racial composition of 'otherwise-qualified applicants' for at-issue jobs—are equally probative for this purpose."[87]

While courts have used the Uniform Guidelines[88] to determine whether a disparate impact exists, the Supreme Court, in *Watson*, said that it believed the Uniform Guidelines to be only a rule of thumb. In the Court's view, a case-by-case approach is best, given the differences in statistical methods and uses to which statistical information may be put.[89]

The *Watson* Court admitted that it has never required mathematical precision to determine disparate impact. Instead, it has "consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation."[90] What the Court has made clear is that the plaintiff must show significant statistical evidence that the employer's practices have the effect of selecting applicants for hiring or promotion in ways adversely affecting groups protected by Title VII. Once the policy is identified,

83. The Court also decided the issue of causation in *Wards Cove* the same way in which it decided the issue in *Watson*. However, the Court did not provide the type of detailed analysis in *Wards Cove* which it had previously done in *Watson*. For that reason, where necessary to provide greater insight, *Watson* is used to facilitate understanding of the *Wards Cove* language.

84. *Id.* at 650 (citing Teamsters v. United States, 431 U.S. 324, 339 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299, 307-308 (1977)).

85. *Id.* at 657.

86. *Id.* at 650 (citing *Hazelwood*, 433 U.S. at 307-308.

87. *Wards Cove*, 490 U.S. at 651 (citing New York City Transit Authority v. Beazer, 440 U.S. 568, 585 (1979)).

88. *See, e.g.*, Bushey v. New York State Civil Serv. Comm'n., 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985); Firefighters Inst. v. St. Louis, 616 F.2d 350 (8th Cir. 1980), *cert. denied, sub nom.* St. Louis v. United States, 452 U.S. 938 (1981), Guardian Ass'n. v. Civil Serv. Comm'n., 630 F.2d 79 (2d Cir. 1980); Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 125 (D. Conn. 1979); United States v. City of Chicago, 21 FEP Cas. 200 (N.D. Ill. 1979). *See supra* notes 18-21 and accompanying text for discussion of Uniform Guidelines.

89. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 995-96 n.3 (1988).

90. *Id.* at 995.

plaintiffs must show generally, consistent with the guidelines, that a statistical disparate impact exists which adversely affects a group protected by Title VII. If this is done, the employer may rebut with evidence of business necessity.

Responding to the argument that the specific causation requirement may be unduly burdensome to plaintiff, the *Wards Cove* Court stated that:

> [L]iberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims. Also, employers falling within the scope of the Uniform Guidelines on Employee Selection Procedures, are required to 'maintain . . . records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group[s].[91]

The Court further noted that an employer's obligation to collect or retain any of these data may be limited by the Guidelines themselves, such as exempting seasonal [or temporary] jobs from certain record-keeping requirements.[92] However, the employees involved in the present case were only employed for the summer months of the salmon runs[93] and, therefore, were not able to benefit from the record-keeping requirements alluded to by the Court as a way of lessening the burdensome rule imposed. The undisputed facts in this case indicate that this record-keeping rule may not be as effective a vehicle as presented by the Court because here the employers did not preserve their records.

3. *Business Justification*[94]

In *Wards Cove*, the Court held that if the plaintiff established its *prima facie* case of disparate impact, the litigation would then shift to the district court's consideration of the employer's "defense". According to *Wards Cove*, there are two components to this phase of the case. First, the court must consider the employer's offer of a justification for the use of the practice alleged to have a disparate impact.[95] Second, the court must consider the "availability of alternate practices to achieve the same business ends with less racial impact."[96]

Regarding the first stage, *Wards Cove* concluded that the "dispositive is-

91. *Wards Cove*, 490 U.S. at 657-58 (citations omitted).

92. *Id.* at 658 n.10 (construing 29 C.F.R. § 1602.14(b)).

93. *Wards Cove*, 490 U.S. at 646.

94. In what may be a move by the Court to have its terminology match its new evidentiary standard, the Court spoke not of business necessity, as established in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), and its progeny, but rather, of a seemingly less compelling business "justification". *See also Wards Cove*, 490 U.S. at 671-72 (Stevens, J. dissenting) (The court in this case based its review on the employer's justification for his use of the challenged business practice). *See infra* notes 98-104 and accompanying text.

95. *Wards Cove*, 490 U.S. at 658. Of course, as a practical matter, the employer can also attack the plaintiff's evidence offered to prove its *prima facie* case. While the *Watson* Court rejected the idea of mathematical precision in setting forth the statistical basis for a disparate impact claim, it made clear that plaintiff may not simply bring forth statistical evidence of disparate impact and expect that the evidence will stand as proof. The Court in *Watson* specifically indicated that the employer need not take plaintiff's statistical evidence at face value. Rather, once plaintiff has established a *prima facie* case of disparate impact, the employer is free to rebut plaintiff's evidence by attacking it in any way appropriate. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 996 (1988). The employer can challenge the statistical data base as being inadequate; too small; inappropriate, as comparing the incorrect populations to arrive at the disparity as in *Wards Cove*; using inadequate statistical techniques; or showing that there is another reason for the statistics being as represented. *Id.* at 997.

96. *Wards Cove*, 490 U.S. at 658.

sue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[97] Assuming that this would be the basis for much concern on the part of both the employers, anxious to use the business necessity defense, and the employees, concerned that the defense would be misused by employers as a ruse for discriminatory policies, the Court again attempted to provide guidance by stating that:

> 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 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. . . .[98]

Justice Stevens, in his dissent, was "astonished" to read that the "touchstone" of the majority was now a "reasoned review of the employer's justification for his use of the challenged practice".[99] In his view, this was a "disturbing", "casual—almost summary—rejection of the statutory construction that developed in the wake of *Griggs*. . . ."[100] It is certainly a departure from the *Griggs* language that the "touchstone is business necessity" [101] and that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[102]

According to the *Wards Cove* decision, the plaintiff's burden of persuasion as to the ultimate fact of discrimination does not shift to the employer at this phase of the case. Even though the plaintiff has established a *prima facie* case of disparate impact and the employer must show business justification for the policy having a disparate impact, the burden of persuasion on the issue of discrimination does not shift from plaintiff to the defendant employer at this stage. Rather, the Court said, "[i]n this phase, the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff."[103] To the extent that the Ninth Circuit's decision held otherwise and suggested that the persuasion burden should shift to the employer once the employee established a *prima facie* case, the Court said that decision was erroneous.[104]

The idea that an employer is merely required to produce evidence of business justification in the face of a *prima facie* case of disparate impact is at odds with the perceptions of some as to settled notions of Title VII case law. Ac-

97. *Id.* at 659.

98. *Id.*

99. *Id.* at 671 (Stevens, J. dissenting).

100. *Id.* at 671-72.

101. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

102. *Id.* at 432. *See also Wards Cove*, 490 U.S. at 668 n.14 (Stevens, J., dissenting) ("Decisions of this Court and other federal courts repeatedly have recognized that while the employer's burden in a disparate treatment case is simply one of coming forward with evidence of legitimate business purpose, its burden in a disparate impact case is proof of an affirmative defense of business necessity").

103. *Wards Cove*, 490 U.S. at 659.

104. *Id.*

cording to the dissent,[105]

> [d]ecisions of this Court and other federal courts repeatedly have recognized that while the employer's burden in a disparate treatment case is simply one of coming forward with evidence of legitimate business purpose, its burden in a disparate impact case is proof of an affirmative defense of business necessity.[106]

The dissenting justices believed the *Wards Cove* majority neglected to distinguish between disparate treatment and disparate impact cases. Employer intent is critical in a disparate treatment case, therefore requiring that the employee bear the burden of proving such intent. On the other hand, the employer's intent is irrelevant in disparate impact cases, where the employee instead establishes a *prima facie* case by proving that the policy at issue imposes a disparate impact upon a protected group.[107] Therefore, according to the *Watson* "dissent", "an employer can escape liability [in a disparate impact case] only if it persuades the court that the selection process producing the disparity has 'a manifest relationship to the employment in question'. . . [and that the] discriminatory effect is justified."[108]

The dissent concluded:

> This allocation of burdens [in a disparate treatment case] reflects the Court's unwillingness to *require* a trial court to presume, on the basis of the facts establishing a *prima facie* case, that an employer intends to discriminate, in the face of evidence suggesting that the plaintiff's rejection might have been justified by some nondiscriminatory reason. The *prima facie* case is therefore insufficient to shift the burden of *proving* a lack of discriminatory intent to the defendant.[109]

Practically speaking, since the employee can rebut the employer's evidence of business justification and/or show that there is an alternative which has less of an adverse impact upon protected classes, the employer must take the burden seriously or run the risk of losing the case due to plaintiff carrying the evidence more persuasively. But the Court in *Wards Cove* seems to miss the important distinction, referenced above, between disparate treatment and disparate impact cases. To place upon the employer the burden of persuasion as to business justification in a disparate impact case only places it where it rightfully should be, since after plaintiff establishes the *prima facie* case, actual disparate impact is shown.

If the statistical evidence is not satisfactorily rebutted by the employer, the disparate impact stands. It is not asking too much to require an employer whose policy has a proven discriminatory disparate impact to carry the burden of persuading the court that his reasons for the policy resulting in the disparate impact are justified. In fact, as argued by the dissent in *Wards Cove*, it is not only justified, but required by precedent. The dissent stated:

> Congress directed the thrust of the [1964 Civil Rights] Act to the *consequences* of employment practices, not simply the motivation. . . . Congress

105. Justice Stevens wrote the dissent and was joined by Justices Brennan, Marshall and Blackmun. *Wards Cove*, 490 U.S. at 661. There was a second dissent by Justice Blackmun, joined by Justices Brennan and Marshall. *Id.* It is the Stevens dissent which is referred to herein.

106. *Id.* at 668 (Stevens, J., dissenting).

107. *Id.* at 668-72.

108. *Id.* at 1004 (quoting Connecticut v. Teal, 457 U.S. 440, 446 (1982) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971))).

109. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 1003-04 (1988).

> has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.[110]

To adopt the view that the defendant employer should have the burden of persuasion as to business justification does not conflict with the *Wards Cove* language. *Wards Cove* requires that the burden of proving disparate impact rests upon plaintiff at all times. However, if the plaintiff presents unrebutted evidence of disparate impact, then the plaintiff has carried that burden. If defendant then has the burden of persuasion as to the issue of business justification, it does not violate *Wards Cove*. Even if a justification is shown by the employer, carrying a burden of persuasion rather than merely one of production, plaintiff still carries the ultimate burden of persuasion on rebuttal. On rebuttal, plaintiff would be required to show by a preponderance of the evidence that defendant's justification is a mere pretext for discrimination or that there is a better alternative without the accompanying disparate impact (or less adverse impact than defendant's policy). To require plaintiff to carry the burden of persuasion at all times and on all issues puts plaintiff in the ludicrous position of having to show that defendant's proffered justification is *not* a business justification rather than having defendant, who is asserting the justification, prove that it is.

Wards Cove appears to equate proof of disparate impact with proof of business necessity when the two are, of course, quite different. Disparate impact is the discrimination itself and plaintiff should bear the burden of production and persuasion on this. However, business justification is asserted by the employer of the discrimination established. That is, as the dissent said, it is like an affirmative defense; no one is better equipped to establish this justification than the employer. It is not the same as a disparate treatment case where even after plaintiff establishes a *prima facie* case, only a presumption of intent arises, which defendant can rebut with evidence of a nondiscriminatory reason showing lack of intent to discriminate. After the *prima facie* case of disparate impact is established and is not refuted by the employer, disparate impact exists and plaintiff has therefore successfully carried the burden of persuasion on this issue. It is imperceptive for the Court not to recognize that the two positions, plaintiff carrying the ultimate burden of persuasion on the issue of disparate impact and defendant carrying the burden as to business justification, are mutually exclusive. As the *Wards Cove* dissent stated, such a burden allocation would place the burden where it rightfully belongs. Failure to recognize this is injudicious, does not accomplish the purpose of Title VII, and is not in keeping with the longstanding holding in *Griggs v. Duke Power Co.* and its considerable progeny.[111]

110. *Wards Cove*, 490 U.S. at 665-66 (Stevens, J., dissenting) (quoting *Griggs*, 401 U.S. at 432).

111. In fact, Justice Stevens said in the *Wards Cove* dissent, "Even if I were not so persuaded [that the decision was inconsistent with *Griggs*], I could not join a rejection of a consistent interpretation of a federal statute. Congress frequently revisits this statutory scheme and can readily correct our mistakes if we misread its meaning." *Wards Cove*, 490 U.S. at 672 (Stevens, J., dissenting). In fact, Congress did exactly this after *Wards Cove*. While the legislature did not see fit to "correct" the Court's interpretation of *Griggs* during its 18 year tenure, it quickly did so for *Wards Cove*. On June 7, two days after the *Wards Cove* decision, Sen. Howard M. Metzenbaum (D-Ohio) sent a letter to Senate colleagues asking for their support when he introduced legislation to "reinstate the standard for proving a Title VII 'disparate impact' case to the standards that have been followed since the 1971 *Griggs* decision". *Text of Sen. Metzenbaum's Letter to Colleagues on Wards Cove Packing Co. v. Atonio Decision*, 109 Daily Lab. Rep. (BNA), at E-2 (June 8, 1989). In February of 1990 The Civil

4. *Proof of Business Justification*

The evidence that an employer may use to carry his burden of production regarding business justification is of grave importance here, since *Wards Cove's* change in the evidentiary standard in disparate impact cases so greatly increased the employee's burden. The *Wards Cove* case itself did not go into detail on this issue, however, *Wards Cove* did cite *Watson* and insight can be gathered from the *Watson* language. It is, therefore, instructive to briefly discuss *Watson* here.

Wards Cove dictates that the employer carries only the burden of production, not persuasion, in disparate impact employment discrimination cases. The *Watson* Court was concerned about the burden that its decision placed upon employers. *Watson* wanted to insure that employers could still use, as screening devices, appropriate criteria necessary for job performance without being unduly burdened with a requirement to prove the employer's need for the job criteria.

The *Watson* Court noted that it has never required test validation for determining business necessity. The Court said that its cases make "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."[112] The *Watson* court cited *New York City Transit Authority v. Beazer*[113] to support its position that it was "obvious that 'legitimate employment goals of safety and efficiency' permitted the exclusion of methadone users from employment with the New York City Transit Authority."[114] This was held true even for non-safety-sensitive jobs. That is, *Watson* held that there are situations in which validation studies are not required of the employer because it is inherent in the nature of the employment itself that certain requirements are permissible. In *Beazer* it was inherently necessary that drug-users not be hired by the Transit Authority (even in non safety-sensitive jobs) although the neutral policy of not hiring drug users may have a disparate impact upon a certain group targeted for protection by Title VII.[115] In the view of the *Beazer* Court, there was a 'manifest relationship'[116] between the screening device (i.e., the policy of not hiring drug users) and the employer's "legitimate employment goals"[117] of safety and efficiency. Thus, the employer's use of the policy was supported by a sufficient business necessity.

While the decision provides the employer with maximum flexibility, it possesses disturbing aspects. It is disturbing that the employer was permitted to simply state the somewhat amorphous goals of "safety and efficiency",

Rights Act of 1990 was introduced simultaneously in the House and Senate with much bipartisan support. S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S991 (1990); H.R. 4000, 101st Cong., 2d Sess. 136 CONG. REC. H364 (1990). Part of the stated purpose of the legislation was to overrule *Wards Cove*, restore the *Griggs* case and its progeny and give the disparate impact legislative rather than judicial underpinnings. The legislation passed by comfortable margins in both houses of Congress but was vetoed by President Bush in October of that year. There were insufficient votes for a veto override. Proponents have vowed to introduce similar legislation again.

112. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 998 (1988).
113. 440 U.S. 568 (1979).
114. *Watson*, 487 U.S. at 998 (quoting *Beazer*, 440 U.S. at 587 n.31).
115. *Beazer*, 440 U.S. at 589-94.
116. *Id.* at 587 n.31 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).
117. *Beazer*, 440 U.S. at 587 n.31.

without a showing that the goal is promoted by the policy. The employer can then use the goal as a blanket to cover policies relating to all employees, whether or not they are in safety-sensitive positions. The employer's policy, even if it had a disparate impact upon a group protected by Title VII, would be permitted as a business necessity.[118] It is also difficult to imagine a workplace policy or practice that could not be said, in some way or another, to promote "safety and efficiency."

It is probably instructive that *Watson* cites *Washington v. Davis*[119] to further illustrate its view of business necessity. In that case, unsuccessful Black police officer candidates challenged the police academy admission examination as having a disparate impact. The employees argued that the examination did not measure skills necessary to perform on the job, but only skills necessary for success in the police academy. Therefore, they argued, the examination's disparate impact could not be shown to be job related.

The *Watson* Court explains *Davis* as holding that the "job relatedness requirement was satisfied when the employer demonstrated that a written test was related to success at a police training academy 'wholly aside from [the test's] possible relationship to actual performance as a police officer.' "[120] The Court continued by citing language in Justice Stevens' concurrence in *Davis* to the effect that "[a]s a matter of law, it is permissible for the police department to use a test for the purpose of predicting ability to master a training program even if the test does not otherwise predict ability to perform on the job."[121]

The Court has given the employer a great deal of latitude in using what the employer feels is an appropriate pre-testing mechanism as a screening device even if it is not job related. Job requirements will also be permitted as justifiable business necessities if there is a legitimate employment goal set forth. This is so even if the policy has a disparate impact and even if there is no direct job-relatedness of the policy. Of course, while this provides the employer with much flexibility in developing appropriate and necessary screening devices, the Court's willingness to permit pre-screening devices which may not be related to future job performance, but only to the predicted success in the training for the job, leaves the employer with all manner of Machiavellian possibilities.

In *Watson*, the Court indicated that within the area of subjective criteria, "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.' "[122] According to the decision, many jobs, such as management posi-

118. "Even if [respondent's statistical data] is capable of establishing a prima facie case of discrimination, it is assuredly rebutted by TA's demonstration that its narcotics rule (and the rule's application to methadone users) is 'job related.' " *Id.* at 587.

119. 426 U.S. 229 (1976).

120. *Watson*, 487 U.S. at 998 (quoting *Davis*, 426 U.S. at 250).

121. *Watson*, 487 U.S. at 998-99 (quoting *Davis*, 426 U.S. at 256 (Stevens, J., concurring)). Two years after the *Davis* decision, the Uniform Guidelines were adopted. *See supra* notes 18-19. The Guidelines provide that there should be a relationship between the test and the job requirements if the test is to be used as a screening device for the job. Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. §§ 1607.14(B)(3), (C)(7) (1990).

122. *Watson*, 487 U.S. at 999. *But cf. Id.* at 1010-11 (quoting Griggs v. Duke Power, Co., 401 U.S. 424, 431 (1971)) (Blackmun, J., concurring in part, and concurring) ("*Griggs* teaches that employment practices 'fair in form, but discriminatory in operation,' cannot be tolerated under Title VII. This lesson should not be forgotten simply because the 'fair form' is a subjective one.").

tions, will require job qualifications which are not amenable to standardized testing. The indication is that the Court will be hesitant to second-guess the employer's judgment regarding these criteria because courts are less competent than employers to do so.[123] Those employers who concluded that the Court's decision to apply disparate impact analysis to subjective criteria meant that they would no longer be free to use their discretion and managerial flexibility to determine job qualifications need not fear. While the Court is permitting such review, apparently it will do so in an extremely circumspect and cautious manner.

The *Watson* Court's position indicates that it considers the employer's burden in disparate impact cases not to be an onerous one on the issue of business justification. Further, in producing evidence of business justification, the employer need not validate the job requirement or even show a relationship between the policy resulting in a disparate impact and the employee's performance on the job. Under these circumstances, it is possible that plaintiff could be screened out by a policy or practice that meets the employer's burden of producing evidence of business justification, while the policy bears no relation to plaintiff's ability to perform on the job. When *Wards Cove* says that the employer may produce evidence of business justification without shifting the burden of persuasion to the employer, the Court seems to depart radically from prior Court decisions attempting to carry out the legislative intent of Title VII.

5. *Plaintiff's Evidence of Mere Pretext or Less Adverse Alternatives*

According to *Wards Cove*, once plaintiff has singled out a particular offending employment policy, produced evidence that the policy has a disparate impact, and the employer counters by producing evidence either discrediting the statistical proof or establishing a business justification, the burden shifts back to plaintiff. Plaintiff may prevail if he or she is then able to prove by a preponderance of the evidence that the employer's business justification is a mere pretext for discrimination or that there are alternatives which the employer can use that are less harmful to the adversely impacted group. The *Wards Cove* Court noted that if plaintiff comes forward with alternatives that "reduce the racially-disparate impact of practices currently being used, and [the employer] refuse[s] to adopt these alternatives, such a refusal would belie a claim by [employers] that their incumbent practices are being employed for non-discriminatory reasons."[124]

Since the Wards Cove language was sparse, it is instructive here to look at the *Watson* language on this issue for insight into how the Court will judge such evidence being presented by plaintiff. In this vein, the *Wards Cove* Court relied on *Watson* to conclude:

> Of course, any alternative practices which [plaintiff employees] offer up in this respect must be equally effective as [the employer's] chosen hiring procedures in achieving [the employer's] legitimate employment goals. Moreover,

123. *Watson*, 487 U.S. at 999 ("In evaluating claims that discretionary 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 reconstruct business practices, and unless mandated by Congress they should not attempt it.' " *Id.* (quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978)).

124. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660-61 (1989).

> "[f]actors 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."[125]

Before employees become too sanguine about the possibility of successfully carrying their burden on the "alternatives" issue, it should be noted that the *Wards Cove*'s view is that "[c]ourts are generally less competent than employers to restructure business practices, consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice in response to a Title VII suit."[126]

The *Watson* language clearly conveys to employers that they have a great deal of latitude in deciding job requirements. Even if through plaintiff's *prima facie* case a job requirement is shown to have a disparate impact, in evaluating the alternative, the Court may consider many factors favorable to the employer. It is therefore difficult to imagine circumstances in which the Court would find plaintiff's proposed alternative acceptable. Though the Court suggested that it still intends to preserve Title VII rights,[127] its language sends employers a contrary message and effectively negates that pledge. Taken together, this "fresh . . . examination"[128] of the disparate impact test by the Court in the context of subjective criteria leaves employers better off than they appeared to be under prior Court decisions and it is not the boon it appears to be for employees.

CONCLUSION

The U.S. Supreme Court's decision in *Watson v. Fort Worth Bank and Trust* regarding the use of the disparate impact theory in analyzing subjective employment criteria seems to be favorable to employees involved in these types of employment discrimination claims. By permitting employees to use the disparate impact theory to attack the employer's use of subjective criteria for hiring, promotion and other decisions, the employee is closer to benefitting from the congressional purpose of Title VII to provide equal employment opportunity to all.

Unfortunately, the Court's change in the evidentiary standard for disparate impact cases in *Wards Cove* may be a formidable obstacle, though hopefully not an insurmountable one, to full realization of that purpose. J. Robert Kirk, an attorney with the firm of Breed, Abbott and Morgan, who submitted the *amicus* brief of the American Society of Personnel Administrators (ASPA) for consideration in *Watson*, opined that the Court was wrong in changing the

125. *Id.* at 661 (quoting *Watson*, 497 U.S. at 998).

126. *Wards Cove*, 490 U.S. at 661 (citation omitted) (quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978)). The *Wards Cove* Court used virtually the same language as in *Watson*, 487 U.S. at 999, in addressing the area of the Court passing on plaintiff's presentation of alternatives for less adverse policies. It remains to be seen whether a congressional mandate will be necessary for the Court to provide an appropriate remedy when either the business necessity for the employer's policy has not been sufficiently shown or a better alternative is presented by plaintiff. In either case, the Court would be called upon to substitute its judgment for that of the employer, and it is clear that this the Court is hesitant to do.

127. *Wards Cove*, 490 U.S. at 652.

128. *Watson*, 487 U.S. at 994. Since the Court in *Wards Cove* embraced its *Watson* ruling and used it extensively in deciding *Wards Cove*, it is appropriate to conclude that it viewed *Wards Cove* as merely another look at an issue already decided, in its view, correctly in *Watson*.

evidentiary standard because there was no convincing reason why a new standard was needed.[129] However, he went on to say that if the Court was going to open disparate impact to subjective criteria cases, the rest of Justice O'Connor's opinion "couldn't be better" because it creates relatively high standards for plaintiffs to overcome before the burden of production shifts to the employer.[130] This assessment of the case by an employer-connected trade association gives some indication of how employers now perceive their burden as it relates to disparate impact cases and perhaps Title VII in general. The Court's *Wards Cove* language, that the employer does not have the burden of persuading the court as to the business justification of its policy resulting in a disparate impact is no doubt a setback for employees. Legislative action may well restore the disparate impact evidentiary standard to its *Griggs* interpretation.[131] If it does, the *Watson* decision may not turn out to be "fool's gold" for employees after all.

129. *Watson Ruling, supra* note 1.
130. *Id.*
131. *See supra* note 111.