WARDS COVE PACKING CO. v. ATONIO: A STEP TOWARD ELIMINATING QUOTAS IN THE AMERICAN WORKPLACE

CHARLES J. COOPER*

Congress is currently debating the subject of the "disparate impact test" or "effects test" of liability under Title VII of the Civil Rights Act of 1964,[1] as a result of a recent Supreme Court decision. In *Wards Cove Packing Co. v. Atonio*,[2] the Court placed a greater burden on plaintiffs to prove racial discrimination in the workplace. Before *Wards Cove*, a court could use the "disparate impact test" to invalidate facially neutral business practices, even though the court found no evidence of an employer's subjective intent to discriminate.[3] The focus of a court facing a disparate impact claim was on whether the business practice had a significant and adverse effect on a certain class of employees. Once a plaintiff established a "disparate impact," the employer had to demonstrate that the selection devices used—for example, an aptitude test or a height and weight requirement—were necessary to the employer's business.[4] If the employer could not satisfy the test of business necessity, the employer had to discard those selection devices.

With *Wards Cove*, however, the Court has redefined the plaintiff's burden of proof and has abandoned the business necessity test. Rather than just needing to show a disparate racial impact, a plaintiff must now show which employment practice created the disparate impact. Once the plaintiff has established a prima facie case, an employer need demonstrate only that its policy significantly furthers or serves a legitimate business purpose. Gone is the "requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business."[5]

Wards Cove turns the clock back on the use of racial quotas in employment. Those who favor racial quotas contend that turning the clock back on the quota system is tantamount to turning

* Partner, Shaw, Pittman, Potts & Trowbridge, Washington, D.C.; former Assistant Attorney General of the United States.

1. 42 U.S.C. §§ 2000e to 2000e-17 (1988).
2. 109 S. Ct. 2115 (1989).
3. *See Wards Cove*, 109 S. Ct. at 2119.
4. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
5. *Wards Cove*, 109 S. Ct. at 2126.

the clock back on advances made in civil rights, and have moved quickly in Congress to rescue quotas from the threat of *Wards Cove*.

This ongoing congressional debate is not the first time Congress has considered the "disparate impact test." Congress debated the same matter in 1964 before it passed Title VII of the Civil Rights Act. Title VII was designed, in part, to preclude intentional discrimination, discrimination that the employer sought to achieve by using a test that would produce discriminatory results or by using other, more explicit methods. Title VII was aimed at employers and unions with twenty-five or more employees, which comprised approximately seventy-five percent of the American labor force.[6]

The thrust of the 1964 debate focused on the lack of a definition of discrimination in Title VII. Opponents of Title VII were worried that the executive branch, the administrative agencies, and the courts would enforce the title by inserting whatever definition of the term appealed to them. In particular, the opponents feared that racial discrimination would be equated with a lack of racial balance. They were concerned that the government would find discrimination whenever an employer's selection criteria produced a racial imbalance in its work force.

A minority report of the House Judiciary Committee illustrates the opponents' concern.[7] Because Title VII did not define discrimination, the report warned that the Johnson administration intended to use a construction of the term that would include racial imbalance.[8] To demonstrate how Title VII would operate in practice, the report posited several hypothetical employment situations. In each situation, the committee concluded that if the workplace was not racially balanced, federal agencies or bureaucrats would require the employer to hire whatever person was needed to satisfy the prescribed ratio.[9]

The supporters of Title VII responded to these concerns.

6. *See* Rodgers, *Fair Employment Laws for Minorities: An Evaluation of Federal Implementation*, in IMPLEMENTATION OF CIVIL RIGHTS POLICY 93, 96 (C. Bullock & C. Lamb eds. 1984). In 1972, Congress extended Title VII to govern employers with 15 or more employees. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(2), 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e(b) (1988)).

7. *See* H.R. REP. No. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2431-2519.

8. *See* 1964 U.S. CODE CONG. & ADMIN. NEWS at 2436.

9. *See id.* at 2437-43.

For example, Senator Humphrey, the moving force behind the 1964 Civil Rights Act, addressed the opponents' concerns in a speech on the Senate floor. Senator Humphrey emphasized that Title VII prohibited only deliberate discrimination against individuals: "[E]mployers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, religion, sex, or national origin."[10] Moreover, Humphrey pointed out that "[t]he only standard which the bill establishes for unions and management alike is that race will not be used as a basis for discriminatory treatment."[11]

The chief experts in the Senate on Title VII were Senators Case and Clark, the bipartisan captains of the legislation. Case and Clark understood their opponents' concern regarding the possible construction of the term "discrimination," especially in light of *Myart v. Motorola, Inc.*,[12] a case decided earlier that year. *Motorola* was a little-known ruling rendered by a state hearing officer under the Illinois Fair Employment Practices Act.[13] Although the decision was obscure, the officer's holding was significant. He invalidated an employment test that was neutral and free of any intentional discrimination but had a disproportionate impact on minorities. He called the test "obsolete" and forbade the employer from using it until the employer could show that the test no longer caused a racial imbalance within its work force.[14] In other words, the hearing officer did exactly what the Supreme Court would later do in *Griggs*: He invalidated a facially neutral test because it resulted in a disproportionate impact on minorities.

Senator Case assured the Senate that a case like *Motorola* could not arise under Title VII. He said that neither the Equal Employment Opportunity Commission nor a federal court could "order an employer to lower or change job qualifications simply because proportionately fewer Negroes than white[s]

10. 110 CONG. REC. 6549 (1964) (statement of Sen. Humphrey).

11. *Id.* (statement of Sen. Humphrey).

12. No. 63C-127 (Illinois Fair Employment Practices Comm'n, Feb. 26, 1964), *aff'd sub nom.* Motorola, Inc. v. Illinois Fair Employment Practices Comm'n, No. 64-L-27747 (Ill. Cir. Ct. Apr. 30, 1965), *rev'd*, 34 Ill. 2d 266, 215 N.E.2d 286 (1966). *Myart v. Motorola, Inc.*, is reprinted at 110 CONG. REC. 5662 (1964); subsequent citations are to the reprinted version of the case.

13. The Illinois Fair Employment Practices Act, which was codified at ILL. REV. STAT. ch. 48, ¶¶ 851-867, was repealed in 1980.

14. *See Motorola*, 110 CONG. REC. at 5664.

are able to meet them. Title VII says only that covered employers cannot refuse to hire someone simply because of his color."[15] Senator Case stated further that "whatever its merit as a socially desirable objective, title VII would not require, and no court could read title VII as requiring, an employer to lower or change the occupational qualifications he sets for his employees simply because proportionately fewer Negroes than whites are able to meet them."[16] In the Senator's opinion, Title VII expressly protected the employer's right to insist that prospective applicants, either black or white, meet the relevant job qualifications; "[i]ndeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color."[17]

Senator Clark, the other bipartisan captain of Title VII, took the same view of the *Motorola* case. He contended that "the Civil Rights Bill would not make unlawful the use of tests such as those used in the *Motorola* case unless it could be demonstrated that such tests were used for the purpose of discriminating against an individual because of his race."[18] Explaining the difference between discriminatory intent and disproportionate impact, Senator Clark said: "It is not enough that the effect of using a particular test is to favor one group above another to produce a violation of the Act. An act of discrimination must be taken with regard to an individual because of such individual's race."[19]

To emphasize his point, Senator Clark expressed his preference for an earlier, stronger version of the bill that was before the Senate. The bill was competing with Title VII, and Clark preferred it because it defined discrimination as follows: "[Discrimination] shall include any act or practice which because of an individual's race results or tends to result in material disadvantage or impediment to any individual in obtaining employment or the incidence of employment."[20] The definition included those situations where race-neutral, nondiscriminatory tests had the unintended result of excluding a disproportionate number of minorities. Notwithstanding his preference

15. 110 CONG. REC. at 7246 (statement of Sen. Case).
16. *Id.* at 7246-47 (memorandum of Sen. Case).
17. *Id.* at 7247 (memorandum of Sen. Case).
18. *Id.* at 9107 (statement of Sen. Clark).
19. *Id.* (statement of Sen. Clark).
20. *Id.* (statement of Sen. Clark).

for this competing bill, Clark assured Congress that "the fact remains that the issues raised by the *Motorola* case have nothing to do with title VII of the pending Civil Rights Bill and are plainly beyond its scope."[21]

The congressional debates are filled with similar passages making it clear that no one, opponent or supporter, intended Title VII to reach unintentional discriminatory effects; even its supporters wanted it to reach only intentional discrimination. One additional passage is illustrative. It is drawn from a colloquy between Senator Robertson, an opponent of Title VII, and Senator Humphrey. Senator Robertson claimed that Title VII, by not defining discrimination, would yield results like those in the *Motorola* case.[22] In response, Senator Humphrey made Senator Robertson an offer: "If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there."[23]

The supporters of Title VII finally relented and agreed to amend its language to ensure that it could not be misconstrued. Section 706(g) as enacted prohibits only intentional discrimination: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate . . . ."[24] Senator Humphrey explained the change: "Section 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief. This is a clarifying change. Since the title bars only discrimination because of race, color, religion, sex, or natural [sic] origin it would seem already to require intent . . . ."[25] He went on to say that "[t]he express requirement of intent is designed to make it wholly clear that inadvertent or accidental discriminations will not violate the title or result in entry of court orders."[26] Stated simply,

21. *Id.* (statement of Sen. Clark).

22. *See id.* at 7419 (statement of Sen. Robertson).

23. *Id.* at 7420 (statement of Sen. Humphrey).

24. Civil Rights Act of 1964, § 706(g), 42 U.S.C. § 2000e-5(g) (1988).

25. 110 CONG. REC. 12,723 (1964) (statement of Sen. Humphrey).

26. *Id.* at 12,723-24 (statement of Sen. Humphrey).

an employer could violate Title VII only by intentional discrimination.[27]

In spite of the language and the legislative history of Title VII, the Supreme Court jettisoned discriminatory intent as an element of a Title VII violation when it adopted the "disparate-impact test" or "effects test" in *Griggs v. Duke Power Co.*[28] In so doing, the Court stuffed the pages of Title VII into Senator Humphrey's mouth, and the predictions of the opponents of Title VII were realized.

In *Griggs*, the Duke Power Company had adopted written aptitude tests and a high school diploma requirement to improve the general quality of its work force. The selection devices produced a racially disproportionate result in the work force, despite their apparent neutrality.[29] Although the true intent of Duke Power in using the tests is debatable, the lower courts found no discriminatory purpose on the company's part, and hence no violation of Title VII.[30] The Supreme Court also found no intentional discrimination by the company, but the Court invalidated the application of the facially neutral selection criteria, because they disproportionately excluded minority applicants and were not shown to be essential to job performance. The Court stressed that, in determining the propriety of racially disproportionate selection practices, "[t]he touchstone is business necessity."[31]

In the twenty years since *Griggs*, employers have been unable to meet the burden of showing a business necessity to justify certain employee selection methods that, although neutral on their face and free of invidious intent, cause a racial imbalance in the employer's labor force. Faced with such an impossible dilemma, employers have adopted means of employee selection that do not produce a disproportionate racial impact: racial preferences and quotas.

In addition to the voluntary use of quotas, courts have effectively imposed quotas on those employers who fail to prove

27. For an exhaustive examination of Title VII's legislative history on this point, see Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985).

28. 401 U.S. 424 (1971).

29. *See Griggs*, 401 U.S. at 427-28.

30. *See id.* at 428-29. The company had added the aptitude test requirement on July 2, 1965, the effective date of Title VII. *See id.* at 427-28.

31. *Id.* at 431.

that a certain test or device is both job-related and necessary to their businesses.[32] The imposition of quotas by the courts is a common practice. I am aware of no case in which a court has upheld a selection device having a disproportionate impact based on a business necessity rationale. Absent *Griggs* and its progeny, it is unlikely that we would have reached the current situation, in which race is a constant concern to most employers.

In *Wards Cove*, however, the Supreme Court abandoned the "business necessity" test as it has been applied since *Griggs* and redefined the employee's burden in proving disparate impact. To establish a prima facie case, an employee must now show more than "a racial *imbalance* in the work force."[33] He must " 'isolat[e] and identify[] the specific employment practices that are allegedly responsible for any observed statistical disparities.' "[34] After a plaintiff has set forth his prima facie case, a court will consider two components of business necessity claimed by the employer: "first . . . the justifications an employer offers for his use of these practices; and second, the availability of alternate practices to achieve the same business ends, with less racial impact."[35] In considering the business justifications for using the devices,

> [t]he touchstone of [the] inquiry is a reasoned review of the employer's justification for his use of the challenged practice. . . . [T]here is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster . . . .
>
> In 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.[36]

Thus, " 'the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times*.' "[37]

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32. *See, e.g.*, United States v. Paradise, 480 U.S. 149 (1987).

33. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2124 (1989) (emphasis in original).

34. *Id.* (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (plurality opinion)).

35. *Id.* at 2125.

36. *Id.* at 2126.

37. *Id.* (emphasis added by the Court in *Wards Cove*) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 997 (1988) (plurality opinion)).

Even if a plaintiff fails to persuade the court that the employer's selection devices lack a business justification, the plaintiff can still prevail. To do so, a plaintiff must "persuade the factfinder that 'other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s];' by so demonstrating, [the plaintiff] would prove that '[the employer was] using [its] tests merely as a "pretext" for discrimination.' "[38] The alternative devices must be as effective as the employer's current selection methods, and the substitution of the new devices must not overly burden the employer.[39]

The new standard in *Wards Cove* will be easier for employers to meet, and consequently plaintiffs will find it more difficult to prove that certain business practices unjustifiably discriminate against them. Because the supporters of job quotas believe that the new standard will relieve much of the pressure on employers to hire and promote by race, they are working in Congress to reinstate the "business necessity" test of *Griggs*.

As in 1964, today's advocates of the "business necessity" test maintain that their bill has nothing to do with quotas.[40] A recent editorial in the *Washington Post* describing *Griggs* and the "effects test" states that

> the courts have themselves been alert to this danger [that the use of statistics and the effects test will yield quotas] and have provided the necessary stopping places. In judging whether discrimination exists, they have generally been careful to use numbers only as loose guides. Even then, suspect numbers alone do not convict; there remains the defense of business necessity . . . .[41]

The editorial also states that "[t]he risk that numbers can turn into quotas is real, but that is not what has happened under *Griggs*."[42] The *Post*'s contention notwithstanding, *Griggs* and the "business necessity" test did indeed lead to racial preferences in the American workplace, despite the firm assurances of Title VII's supporters in 1964.

Through its decision in *Wards Cove*, the Supreme Court has

38. *Id.* (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).
39. *See id.* at 2127.
40. *See, e.g.*, 136 CONG. REC. S10,287 (daily ed. July 23, 1990) (statement of Sen. Metzenbaum).
41. *The Quotas Question*, Wash. Post, Mar. 16, 1990, at A22, col. 1.
42. *Id.*

given this country its last clear chance to retreat from quotas in the workplace—from a legal regime in which skin color, far from being irrelevant, is an ever-present and critical employment criterion. For at least the past decade, quotas have pervaded the workplace. Despite the extent of the quota system and the arbitrary manner in which it rewards individuals—not on the basis of merit, but on the basis of gender or skin color—certain members of Congress are attempting to preserve it. If these politicians succeed and racial preferences survive this last clear chance, the quota system will remain a part of the American ethos and will likely be with us forever.