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WARDS COVE PACKING CO. v. ATONIO: THE SUPREME COURT'S DISPARATE TREATMENT OF THE DISPARATE IMPACT DOCTRINE

Niall A. Paul*

I. INTRODUCTION

In 1971 with its decision in Griggs v. Duke Power Co., the Supreme Court held that Title VII of the Civil Rights Act of 1964 forbids any seemingly neutral employment practice from denying employment opportunity to minorities and women unless such practice was instituted because of a business necessity.

In 1988, with its decision in Watson v. Fort Worth Bank and Trust, the Court extended the disparate impact analysis to subjective criteria as well as objective employment standards. To some, this decision represented an expansion of civil rights protection, but it also advocated a shifting of burdens in all disparate impact cases. Watson suggested that the plaintiffs in disparate impact cases be required to prove that the challenged employment practice was not justified by a business need. Thus, the Court would have forced the plaintiff to prove the negative, instead of requiring the defendant to prove business necessity.

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4. 487 U.S. 977 (1988) (plurality opinion). Before Watson, the circuits were split on this issue. Id. at 982. The majority held that when an employer used subjective criteria in hiring, the disparate impact theory did not apply. Id. at 986.
5. Watson, 487 U.S. at 986. With the addition of Justice Kennedy to the Supreme Court, the Watson plurality's position soon became law. See infra note 8 and accompanying text.
7. Because the courts felt that the employer was in a better position to demonstrate why
In 1989, a Supreme Court majority made the *Watson* plurality decision the law, and rejected eighteen years of *Griggs* and its progeny, with its decision in *Wards Cove Packing Co. v. Atonio*. The *Wards Cove* Court shifted the burden of persuasion of the business necessity issue to the plaintiffs and also severely limited the long standing use of statistical evidence in demonstrating discrimination. The Court dealt a final blow to the disparate impact plaintiff by changing the employer’s explanation of the disparity from one of business necessity to one of a simple, rational, business justification.

Reaction to *Wards Cove* has been fast and furious. Many Title VII plaintiffs have been turned away by the new standards. The lower courts have implemented the new standard acknowledging a new era for the Title VII plaintiff. Members of Congress have also responded to *Wards Cove*.

This Article discusses the disparate impact standard of *Griggs* and its progeny and compares it to the new standard of *Wards Cove*. It analyzes the federal circuit court decisions applying the *Wards Cove* standard and discusses congressional reaction.

It had set its own policies, the standard prior to *Watson* was that once an employee established a prima facie case, the employer then had to carry the burden of persuasion and demonstrate that there was a business necessity requiring him to adopt the challenged employment criterion. The Court later lowered the standard from business necessity to business justification. See infra notes 102-08 and accompanying text.

9. *Id.* The Court limited statistical evidence in two dramatic ways. *Id.* First, the Court rejected the use of “infra work force comparison” (the percentage of minorities in management as compared to the percent of minorities in the manual labor force). *Id.* Wards Cove Packing Company had no minority managers, yet its labor force was almost all minorities. *Id.* The Court also demanded that the plaintiff not only show a statistical disparity but also pinpoint the specific causation of the disparity. *Id.*
10. 109 S. Ct. at 2115.
12. *See infra* note 234 and accompanying text.
15. *See infra* notes 61-152 and accompanying text.
This Article will conclude that *Wards Cove* has drastically changed, and perhaps eliminated, the viable disparate impact standard established by *Griggs*. Finally, this Article will argue that *Wards Cove* should be dismantled.


The disparate impact theory of recovery of Title VII was announced by the Supreme Court in *Griggs*. The *Griggs* Court articulated for the first time the prima facie requirements of, and defenses to, a disparate impact claim of discrimination. Under this theory of liability, the plaintiff has to demonstrate that a facially neutral employment practice was operating in a discriminatory manner. This can be shown by establishing a statistical disparity in how the practice affected the members of a protected class and how the same practice affected whites.

The disparate impact theory differs significantly from the disparate treatment theory of Title VII liability, which focuses on the intent of the employer. The disparate impact theory focuses on the impact and consequences of the employer's actions and policies, not on the employer's intent.

In *Griggs*, the employer had a history of work force segrega-
The company had five categories of jobs, one being labor intensive and the others being “operational.” The employer had relegated blacks to the labor department and allowed only whites to advance through the “operational” ranks. Despite the employer’s abandonment of outright discrimination, of the 95 persons employed at the time of the suit, 15 were black and they were all in the labor department.

The employer had put certain requirements in place for the operational fields. One was a high school diploma and the other two were satisfactory scores on two professionally prepared aptitude tests. “Neither [test] was . . . intended to measure the ability to learn to perform a particular job or category of jobs. The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates.” The employer asserted that in his judgment, the tests would be helpful in securing quality personnel, and that any resulting racial disparity was an indication of the quality of the applicant.

Griggs was the first case in which the Court extended Title VII protection against the disparate impact of employment practices. The Court rejected the employer’s argument that the plaintiffs had to prove that the employer had intended to discriminate.

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. . . . Neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.

26. 401 U.S. at 427.
27. Id.
28. Id.
29. Id. at 426.
30. Id. at 424.
31. Id. at 424-25.
32. Id. at 428.
33. Id. at 431. Since Duke Power Co. had a policy of helping its employees to pay for courses taken toward a high school degree, the Court stated that the company probably lacked any intent to discriminate with its requirements. Id. The effect of Duke Power Co.’s requirements were clear, however, and the Court held that the disparity caused by the requirements was nonetheless discriminatory and therefore illegal. Id.
34. Id. at 428.
35. Id. at 432.
36. Id. at 431 (emphasis added).
The Court rejected the employer's "judgment" that the test would improve quality. The employer argued that no intent was shown because the tests were administered for sound business reasons. The Court held that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than 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."  

The Court thus found that the simple articulation of a business reason would not be enough. Griggs required the employer to shoulder the burden of proving that any given requirement has a manifest relationship to the employment in question. Since the employer's tests were not shown to be indicative of potential for job performance, the Court held for the plaintiffs.

This business necessity defense for the employers was further defined in Albemarle Paper Co. v. Moody, in which the Court established what many have labeled a tripartite framework for disparate impact cases. The three steps are: 1) the plaintiff must establish a prima facie case by showing that an employment practice systematically screened out substantially more-protected individuals than non-protected individuals; 2) the burden then shifts to the defendant to prove that the practice is job-related; and 3) the plaintiff must then be given an opportunity to offer other practices which could accomplish the employer's stated goal in a less discriminatory manner. This third step was offered by the Court because the Act and the intent of Congress focuses on the consequences of employment decisions, not only on the motive behind those decisions.

Albemarle added another burden for the employer to bear, holding that the employer must scientifically or professionally validate the accuracy or effectiveness of the test used to make the em-

37. Id. at 431-32.
38. Id. at 431.
39. Id. at 432 (emphasis added).
40. Id.
41. Id. at 436.
42. 422 U.S. 405 (1975).
44. Albemarle, 422 U.S. at 425. See infra notes 61-94 and accompanying text (noting that the use of statistics has been severely limited by Wards Cove).
45. Albemarle, 422 U.S. at 425.
46. Id.
47. Id.
ployment determination. What *Albemarle* tried to clarify was the shifting of burdens between the parties. Even after *Albemarle*, it was not clear whether the shifted burden was a burden of production of evidence, a burden of persuasion, or a simple articulation of a rationale. In *Dothard v. Rawlinson*, the Court had an opportunity to rectify this uncertainty. The majority in *Dothard* held that the employer must introduce evidence of enough strength to demonstrate that the practice being defended was essential to job performance. Despite this ruling, some courts relied on Justice Rehnquist's concurrence in *Dothard* to hold that the employer's burden is only one of articulating a legitimate business purpose.

In disparate *treatment* cases, all an employer must do to rebut a prima facie case is articulate a non-discriminatory business reason. In disparate *impact* cases, however, the Court seemingly asks more of the employer. While *Griggs* uses the word "articulate" to describe the employer's burden, *Albemarle* and *Dothard* follow up with a requirement that the employer introduce enough evidence to establish a business necessity. It is evident from these opinions that the Court was demanding that the employer offer more than a pretextual reason. The Court insisted that the employer at least offer the requisite evidence to convince the trier of fact that the challenged practice was required by a business necessity. This discussion, however, may be moot, as *Wards Cove* has stated that a simple articulation of a business justification is enough to force the plaintiff

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48. *Id.* at 430. The problem with validation and *Wards Cove* will be addressed later. See *infra* notes 108-20 and accompanying text.

49. *See generally* Note, *supra* note 43 and accompanying text (discussing lower courts' views of the burdens in disparate impact cases).

50. *Id.*


52. *Id.* at 331. This was an important decision because the Court indicated that the employer must persuade the Court that the challenged practice was essential to the job. *Id.* When the Court indicated that an employer must introduce evidence of "requisite strength", it implied a burden of persuasion. *Id.*

53. *See Note, supra* note 43, at 935 n.106 (citing Crocker v. Boeing Co., 662 F.2d 975, 991 (3d Cir. 1981) (defining defendants' burdens as the burden to come forward with, or offer evidence of a manifest relationship)); NAACP v. Medical Center, Inc., 657 F.2d 1322, 1333 (3d Cir. 1981) (deciding that the ultimate burden of persuasion always remains with plaintiffs in both disparate impact and disparate treatment cases).

54. *See supra* notes 24-25 and accompanying text.

55. *Id.*

56. *See supra* notes 36-40 and accompanying text.

57. *See supra* notes 42-52 and accompanying text.

58. *See Dothard*, 433 U.S. at 331 (noting that the business necessity requirement is much more of a burden than that of a reasonable non-discriminatory reason).
to continue.  

III. WARDS COVE—THE NEW DIMENSION OF THE DISPARATE IMPACT DOCTRINE

The Court used *Wards Cove* to dismantle much of what had been known or understood about Title VII and disparate impact. *Wards Cove* involved a salmon cannery in Alaska which recruited its workers for unskilled cannery line jobs from nearby villages and union halls. In his dissent, Justice Stevens discusses the facts of *Wards Cove*, stating,

> To fill their employment requirements, petitioners must recruit and transport many cannery workers and noncannery workers from states in the Pacific Northwest. . . . Employees in the noncannery positions—the positions that are “at issue”—learn of openings by word of mouth; the jobs seldom are posted or advertised, and there is no promotion to noncannery jobs from within the cannery workers’ ranks.

On-line cannery positions were predominantly filled by non-white employees, and non-cannery positions were completely filled by white employees. The non-white cannery workers and the white non-cannery employees were housed in separate dormitory buildings. The plaintiffs alleged that this contributed to the failure of the cannery workers to find out about openings in non-cannery positions.

The overwhelming statistical disparity between the non-white cannery employees and white non-cannery employees was rejected by the trial court. The trial court stated that the proper comparison should be between the number of non-whites in the general population of Alaska, the Pacific Northwest and California, and the number of non-whites in the “at issue” jobs.

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61. 109 S. Ct. at 2133. The majority and the dissent must be read together to get a clear picture of the facts.

62. 109 S. Ct. at 2119.

63. 109 S. Ct. at 2135.

64. 109 S. Ct. at 2120.

65. *Id.*

66. 109 S. Ct. at 2134. The general rule on statistical evidence was set out in *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977). *Hazelwood* held that statistical evidence of discrimination should compare the racial composition of employees in the jobs at issue to that “of the qualified . . . population in the relevant labor market.” *Id.* (emphasis added).
Justice Stevens noted that the case of *Hazelwood School District v. United States* and several of its progeny indicate that the relevant labor market should not be the general population. According to Justice Stevens, *Hazelwood* "left open the definition of the qualified population and the relevant labor market. Our previous opinions . . . demonstrate that in reviewing statistical evidence, a court should not strive for numerical exactitude at the expense of the needs of the particular case."

Justice Stevens stated that the relevant, qualified labor pool must consider the available labor supply. Since the cannery jobs are seasonal, Justice Stevens argued that "[a]n undisputed requirement for employment either as a cannery or non-cannery worker is availability for seasonal employment in the far reaches of Alaska. . . . Yet the record does not identify the portion of the general population in Alaska, California and the Pacific Northwest that would accept this type of employment." Justice Stevens argued, contrary to the majority, that comparisons between cannery workers and non-cannery workers may be the best actual comparison available, since the current work force has demonstrated their availability and qualifications.

The majority in *Wards Cove* held that "the comparison between the racial composition of the cannery work force and that of the non-cannery work force, as probative of a prima facie case of disparate impact in the selection of the latter group of workers was flawed for several reasons." The Court stated that, "if the percentage of selected applicants who are non-white is not significantly less than the percentage of qualified applicants who are non-white, the employer's selection mechanism probably does not operate with a disparate impact on minorities."

The plaintiff in this case alleged that a wide disparity was caused at Wards Cove by a variety of hiring and promotion practices, among which were nepotism, a rehire preference, a lack of ob-
ective hiring criteria, separate hiring channels for labor and management, and a practice of not promoting from within the company. The plaintiffs also complained of racially-segregated housing and dining facilities. Wards Cove used primarily subjective criteria when hiring, but the plaintiffs alleged that subjective criteria used to choose amongst the candidates, and the methods used to identify candidates, created the disparate impact. The Court ultimately rejected this argument.

The Court rejected the statistical proof offered by the plaintiffs and ordered a remand, and in remanding this case the Court used the opportunity to adopt the plurality's view in Watson. Finally, the Court made into law the new standards concerning the element of causation in a disparate impact case and the shifting of burdens in the business justification stage. Wards Cove extensively quotes the Watson opinion and notes that "[t]he law in this respect was correctly stated by Justice O'Connor's opinion last [t]erm in Watson v. Fort Worth Bank & Trust. . . ." The Wards Cove court states:

We note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment act 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.

The Wards Cove Court held that the plaintiffs failed to meet their burden of causally linking the practices with the impact because they offered "only [one] set of cumulative comparative statistics as evidence of the disparate impact of each and all of [petitioners' hiring] practices." The Court issued a warning to future Title
VII plaintiffs, stating that,

[E]ven if on remand [the] respondents can show that non-whites are under represented in the at-issue jobs in a manner that is acceptable under the [new statistical standards] this alone will not suffice to make out a prima facie case of disparate impact. Respondents will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices [being attacked], specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.85

The Court acknowledged that it might receive criticism for this new requirement of specific causation, but said that the additional burden would be lessened by the existence of liberal discovery rules that allow plaintiffs access to the employer's records.86

Justice Stevens responded in his dissent to this new prima facie case requirement with the criticism the Court had anticipated.87 Justice Stevens conceded that the elementary rule of law that there must be a causal relationship between the plaintiff's injury and the defendant's action must apply to Title VII actions.88 He noted however, that while "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 employment practices ought to fortify an employee's assertion that the practices caused racial disparities."89 Justice Stevens further rejected the majority's reliance on liberal discovery rules, stating that while plaintiffs may ordinarily gain access through discovery rules to the defendants' statistical personnel records, "it is undisputed that the petitioners [in this case] did not preserve such records."90

85. 109 S. Ct. at 2125. See infra notes 235-54 and accompanying text for Congressional response. Prior to this decision, it was widely believed that the employer had to eliminate each challenged practice from the group by establishing either that each individual practice did not cause the disparity or that each individual practice was created by business necessity. 109 S. Ct. at 2125. The proposed statutes would definitely give this burden to the employer. Id.

86. 109 S. Ct. at 2125 (acknowledging once again that Wards Cove might not be widely accepted as a "good" decision).
87. 109 S. Ct. at 2127-36 (Stevens, J., dissenting).
88. 109 S. Ct. at 2132.
89. 109 S. Ct. at 2132-33 (citations omitted).
90. 109 S. Ct. at 2133 n.20. The majority concedes this point in a footnote which states, "[o]f course, petitioners' obligation to collect or retain any of this data may be limited by the Guidelines themselves. See 29 CFR § 1602.14(b) (1988) (exempting 'seasonal' jobs from certain record-keeping requirements)." 109 S. Ct. at 2125 n.10. From a footnote such as this, it is evident that the court was writing with more in mind than the adjudication of Wards Cove. The Court has given away its intention to revamp the rules on these facts without mentioning
With its ruling, the Court rejected a plaintiff's reliance on statistical proof of imbalance and the highlighting of questionable employment practices as meeting the prima facie requirements. For a disparate impact plaintiff to make out a prima facie case, the Court insisted that the questioned practice be proven to cause the statistical disparity. Justice Stevens insisted that Griggs' prima facie case was much less of a burden, requiring only that the plaintiff demonstrate that some employment practice of the employer resulted in a disparate impact upon a protected class. According to the Court, plaintiffs who prove that a process, as a whole, excludes minorities, but who fail to identify the specific steps of that process which cause the disparity, fail also to prove discrimination.

If, somehow, a plaintiff can meet the new prima facie burden, the employer must then articulate a business justification. Wards Cove changed the burden of the employer from one of persuasion, or close to persuasion, to one of production. The Court admitted that several of its cases could be read to indicate a burden of persuasion on the employer. "But to the extent that those cases speak of an employer's 'burden of proof' with respect to a legitimate business justification defense . . . they should have been understood to mean an employer's production—but not persuasion—burden." According to the Court, the burden of persuasion must always remain with the plaintiff. Thus, the plaintiff must prove that the questioned practices are not justified by business needs.

In addition to shifting the burden to the plaintiff, the Court also takes the opportunity to decrease the level to which the employer's

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91. 109 S. Ct. at 2125.
92. Id.
93. 109 S. Ct. at 2129.
94. Id.
95. 109 S. Ct. at 2125.
96. Id.
97. 109 S. Ct. at 2126. Some may say that this was not a change at all but a clarification of the original intent of Griggs. As discussed supra, this author rejects that analysis and relies on Dothard to demonstrate a burden greater than that of production. See supra notes 51-58 and accompanying text. The Wards Cove decision simply says that Dothard and its progeny, when they said or implied "burden of proof," "should have been understood to mean an employer's production — but not persuasion — burden." 109 S. Ct. at 2126.
98. Id.
99. Id. (citation omitted) Justice White fails to explain why the Court's earlier language was wrong or misunderstood. Id. He simply rejects it and proposes a different version.
100. Id.
101. Id.
"defense" must rise.\textsuperscript{102} The employer no longer needs argue that the questioned practice is justified by business necessity.\textsuperscript{103} "[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer’s business for it to pass muster."\textsuperscript{104} With this, the Court rejected the business necessity test of \textit{Griggs} and \textit{Albemarle}\textsuperscript{105} and established the much lower standard of producing evidence of a simple business reason or justification for the practice.\textsuperscript{106} The reduction of the employer's burdens and "defenses" creates other problems for disparate impact plaintiffs.

In reducing the business necessity defense to a business justification articulation, \textit{Wards Cove} also seemingly rejects \textit{Albemarle}’s insistence for formal validation of any test or standards used for hiring.\textsuperscript{107} \textit{Albemarle} concluded that employment practices that impact on a protected group are unlawful unless they are shown by competent methods to be significantly correlated with important business needs related to the jobs in question.\textsuperscript{108}

The Court in \textit{Albemarle} rejected the company’s "validation" because it was vague and ambiguous.\textsuperscript{109} The Court held that:

\[\text{[W]hile the Company contends that the [challenged] [t]ests were "locally validated" when they were introduced, no record of this validation was made. Plant officials could recall only the barest outlines of the alleged validation. Job relatedness cannot be proved through vague and unsubstantiated hearsay.}\]

The Court’s final conclusion was a mandate to the employer:

\[\text{The message of these guidelines is the same as that of the \textit{Griggs} case, that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."}\]

\textsuperscript{102} 109 S. Ct. at 2126. The Court went to great pains to reason that the employer's burden was not in the form of an affirmative defense. \textit{Id.}
\textsuperscript{103} \textit{Id.}
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Griggs} held that, because of discrimination’s insidious character, if a business is going to be allowed to discriminate against a protected class, then the justification must be the narrow one of necessity. 401 U.S. at 432.
\textsuperscript{106} \textit{Wards Cove}, 109 S. Ct. at 2126.
\textsuperscript{107} \textit{See supra} note 48 and accompanying text.
\textsuperscript{108} \textit{Albermarle}, 422 U.S. at 431; \textit{see Note, supra} note 43, at 933 (discussing \textit{Albermarle}).
\textsuperscript{109} 422 U.S. at 430.
\textsuperscript{110} \textit{Id.} at 428 n.23.
\textsuperscript{111} \textit{Id.} at 431 (quoting 29 C.F.R. § 1607.4) (emphasis added).
It is important to note that the Court insisted that the validity of the tests "should be determined on subjects who are at the age or in the same educational or vocational situation as the persons for whom the test is recommended in practice."\textsuperscript{112}

\textit{Watson} and \textit{Wards Cove}, when read together, disregard \textit{Albemarle} and its insistence on validation for hiring practices.\textsuperscript{113} They provide that employers need not validate subjective or objective criteria in order to demonstrate their accuracy and ability to predict on-the-job performance.\textsuperscript{114} \textit{Wards Cove} states there is "no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster. . . ."\textsuperscript{115}

For authority, the Court cited the plurality opinion in \textit{Watson}.\textsuperscript{116} \textit{Watson} makes the rejection of the validation requirement very clear.\textsuperscript{117} The \textit{Watson} Court reasons that because the objective test was never required to be formally validated the subjective test should not be either.\textsuperscript{118} The Court in \textit{Watson} further states that an employer can easily validate subjective criteria by indicating why personal preferences are related to job performances.\textsuperscript{119}

\begin{thebibliography}{99}
\bibitem{footnote112} \textit{Id.} at 435 (quoting \textit{American Psychological Association, Standards for Educational and Psychological Tests and Manuals, § C5.4 (1966)}). Although validation does not play a significant role in the \textit{Wards Cove} decision, the Court does show the signs of a total retreat from any stringent requirement on the employer to justify its actions. 109 S. Ct. at 2115.
\bibitem{footnote113} \textit{See infra} notes 115-20 and accompanying text.
\bibitem{footnote114} \textit{Id.}
\bibitem{footnote115} 109 S. Ct. at 2126. The idea that validation has been rejected by the Court has to be tempered with the Court's reliance on "liberal civil discovery rules." The Court stated: "Some will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs. But liberal 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, 29 CFR § 1607.1 et seq. (1988) are required to "maintain . . . records or other information which will disclose the impact which its test and other selection procedures have upon employment opportunities of persons by identifiable race, sex or ethnic group[s]."
\bibitem{footnote116} \textit{Id.} at 2125. This reliance by the Court upon the Uniform Guidelines to justify its opinion may be a ticking time bomb for employers. While the court's overall "attitude" has shifted to "favor" the employer, this focus on the Guidelines may indicate an increased importance for the Guidelines' role in employment, discrimination cases. In fact, regulation 1607.5 General Standards for Validity of Studies insists upon a very thorough and extensive validation study on each selection process. It is important to note that if the lower courts give these Guidelines credence, and employers will have a tough time validating their selection criterion. Additionally, employers will be required to keep on hand, for easy access, all the information the Guidelines require.
\bibitem{footnote117} 487 U.S. at 981.
\bibitem{footnote118} \textit{Id.} at 985.
\bibitem{footnote119} \textit{Id.}
\bibitem{footnote119} \textit{Id.} at 986.
\end{thebibliography}
[E]mployers 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 . . . . In the context of subjective or discretionary employment decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a manifest relationship to the employment in question.120

Disparate impact has all but been dismantled by Wards Cove. The court did, however, leave relatively undisturbed the opportunity for a plaintiff to prevail by countering a business justification with a less discriminatory alternative.121 In order to prevail, the plaintiff must demonstrate that the alternative is equally effective in evaluating employees, and has a less discriminatory impact of the employer's current procedures.122

Albemarle indicated that this was an important opportunity for the disparate impact plaintiff.123 This "better alternative" test gave minorities another way to gain Title VII protection.124 The complaining party must show that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship'. . . . Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination."125

The Court in Wards Cove did not resist its opportunity to limit the less discriminatory alternative option of a plaintiff, emphasizing the economic and management concerns of the employer.126

Any alternative proposed by the plaintiff must be equally effective as [the defendants'] chosen hiring procedures in achieving [the defendants'] legitimate employment goals. . . . [T]he judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice in response

120. Id. at 997-98 (emphasis added).
121. 109 S. Ct. at 2126-27.
122. Id.
123. 422 U.S. at 425.
124. Id.
125. 422 U.S. at 425 (citing McDonnell Douglas, 411 U.S. at 804-05). The Seventh Circuit addressed this change in Allen v. Seidman, 881 F.2d 375 (7th Cir. 1989). In that case, the court noted that under Wards Cove, a plaintiff could defeat the business justification test by showing a less exclusionary practice. Id. at 377. The Allen court, however, did not accept such an alternative, possibly because it took note of the Supreme Court's stern warning to proceed with care before mandating that an employer must adopt what could be considered a less restrictive alternative. Id.
126. 109 S. Ct. at 2127.
to a Title VII suit.\textsuperscript{127}

The \textit{Wards Cove} majority relied on the \textit{Watson} plurality decision in formulating this restrictive rule.\textsuperscript{128} The Court further warned that the judiciary must consider the cost of the alternatives when assessing their usefulness and cautioned the lower courts against forgetting the profit motive that drives the economy.\textsuperscript{129} The Court quoted \textit{Watson}, saying that "factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals."\textsuperscript{130} "Courts are generally less competent than employers to restructure business practices [citation omitted] . . . consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative selection or hiring practice in response to a Title VII suit."\textsuperscript{131}

\textit{Watson} also stated that these factors "would also be relevant in determining whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment."\textsuperscript{132} In other words, a plaintiff would also have to show that the business justification articulated by an employer did not carry a large economic gain that would be lost by any changes. \textit{Wards Cove} and \textit{Watson} placed an extensive burden on Title VII plaintiffs attempting to rebut the employer's justification with a less discriminatory alternative, because under the new economic view, if the alternative is less discriminatory, just as efficient, and a little more costly, then the plaintiff still fails.\textsuperscript{133}

\textsuperscript{127} Id. (emphasis added).

\textsuperscript{128} See supra notes 4-10 and accompanying text.

\textsuperscript{129} \textit{Wards Cove}, 109 S. Ct. at 2127.

\textsuperscript{130} Id.

\textsuperscript{131} Id. (emphasis added).

\textsuperscript{132} 487 U.S. at 985. It is important to note the Court's language when referring to an employer's potentially dishonest defense as a "pretext." Id. at 985. Pretext is the language of \textit{disparate treatment}. Id. at 980. Under that theory, once an employee establishes a prima facie case, a rebuttable presumption of unlawful discrimination arises. Id. at 983. If an employer then rebuts the presumption with a legitimate, nondiscriminatory reason, the employee is given the opportunity to show that the reason given is really a "pretext." Id. The \textit{disparate impact} model previously required more than a legitimate nondiscriminatory reason: it required a business necessity in order to rebut the prima facie case. Id. The Court's use of the word "pretext" in a disparate impact model demonstrates the Court's blurring of the line between the two theories. This is so because in past disparate impact cases, if an employer articulated a business necessity defense, then the employee did not have an opportunity to show "pretext." Id. at 985. Instead, an employee could defeat this proven "necessity" only by showing a less discriminatory alternative. Id.

\textsuperscript{133} See, e.g., \textit{Wards Cove}, 109 S. Ct. at 2127. Even before this "new economic view,"
As initially conceived in *Albemarle*, a plaintiff's showing of a less discriminatory alternative meant success for a plaintiff even though an employer had shown the challenged practice to be job related and necessary. From this it is clear that the burden was on the employee to demonstrate an alternative only if the defendant proved that his methods were required and justified by business necessity. However, under *Wards Cove*, it is clear that an employer does not have to prove anything. An employer may simply explain the disparities by articulating some reasonable business justification.

The impact of *Wards Cove* is even greater than most realize. After viewing the new disparate impact model, it may be assumed that the plaintiff will always be forced to show a less discriminatory alternative in an effort to win the suit. This is so because any reasonable employer will always be able to articulate at least one business purpose for the challenged practice. If a plaintiff can ever establish a prima facie case under the new statistical restrictions, then the next procedural step will be a formality. The employee will inevitably be forced to demonstrate an alternative. In light of the Court's

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134. 422 U.S. at 436.

135. *See* Alessandra, *When Doctrines Collide: Disparate Treatment, Disparate Impact and Watson v. Fort Worth Bank and Trust*, 137 U. PA. L. REV. 1755, 1761 (1989). "Although the precise contours of this [dispute impact] burden have been the subject of much debate, the courts clearly place upon the employer the burden of proving, not merely explaining, that a particular practice is warranted on the basis of business need." *Id.* This author does not disagree with Alessandra, but both this author and Alessandra have been "overturned" in this interpretation by *Wards Cove*.


137. *See supra* notes 121-36 and accompanying text.

138. Understood in light of the difficulty a plaintiff will have in establishing a significant disparity, this ability of the employer to simply side-step his burden will push each plaintiff to new limits. Of paramount concern to each plaintiff is the proof of a less discriminatory alternative, which may now be viewed as part of the plaintiff's prima facie case. *See supra* notes 121-36 and accompanying text.
admonition of supplanting judges' business sense for that of the employer, this is no minor hurdle. Indeed, with the plaintiff's case now always relying on a low cost, highly efficient and less discriminatory alternative, it is even more devastating when one realizes that "[a]lthough the Albemarle Court articulated the 'less discriminatory alternative' defense [sic] over thirteen years ago, a review of voluminous case law reveals that no plaintiff has ever successfully demonstrated a less discriminatory alternative to a challenged practice." 139

Disparate impact cases under Wards Cove are very different from those under Griggs and Albemarle. First, in an attempt to establish a prima facie case, the plaintiff cannot rely on statistical evidence demonstrating a polarization and stratification of the employer's work force. 140 The statistical comparison must be between the number of minorities in the at-issue jobs and the number of qualified minority applicants or the number of minorities within the qualified labor force in the relevant geographical area. 141

Second, the plaintiff must prove the new prima facie case by specifically identifying and isolating an individual employment practice and proving that such practice specifically caused the statistical disparity in the work force. 142

Finally, if this new burden is met, the plaintiff must prove that each questioned procedure is not justified by some business need or related reason. 143 Of course, the employer first must offer a business justification for each challenged practice, but the employee always retains the burden of proving that these justifications are not truly related to business needs. 144 Alternatively, the plaintiff can propose alternatives which could meet the same business needs without the disparate impact, but the Supreme Court has cautioned the lower courts against ordering businesses to adopt these alternatives. 145

While the disparate impact model may still exist after Wards Cove, a plaintiff virtually must prove intent in order to win. 146 If an

139. Note, Watson v. Forth Worth Bank and Trust: A Plurality's Proposal to Alter the Evidentiary Burdens in Title VII Disparate Impact Cases, 67 N.C.L. REV. 725, 739 (1989) (authored by W. Gregory Rhodes) (noting that this is true at least in reported cases, and citing the only possible contrary example as Officers for Justice v. Civil Serv. Comm'n, 395 F. Supp. 378 (N.D. Cal. 1975) (finding it inappropriate to use [the challenged] test since no evidence of its validity had been presented)).
140. Wards Cove, 109 S. Ct. at 2120.
141. 109 S. Ct. at 2121.
142. 109 S. Ct. at 2124-25.
143. See supra note 101 and accompanying text.
144. See supra notes 96-101 and accompanying text.
145. See supra notes 121-33 and accompanying text.
146. See supra notes 24-25 and accompanying text.
employer only has to give a business reason for a statistical disparity, the plaintiff is left with the unbearable burden of showing alternatives. The plaintiff has a better chance, however, of demonstrating through independent evidence, that the employer’s justification was not the true reason, which would belie discriminatory intent. Wards Cove’s analysis and language imply that an employer’s justification in a disparate impact case may be found to be a pretext. A plaintiff may have more success convincing a court that an employer’s proffered explanation is “unworthy of credence” than convincing the court to accept a less discriminatory alternative.

Regardless of the Court’s intent, the effects of the Wards Cove opinion are already being felt in the circuit and district courts of the federal judiciary. Even state courts are following the Wards Cove precedent.

IV. EARLY REACTION FROM THE FEDERAL CIRCUIT COURTS

Several circuit courts have already used Wards Cove to turn back Title VII plaintiffs, many of whom failed to establish a prima facie case under the new standard.

In Mallory v. Booth Refrigeration Supply Co., the Fourth Circuit rejected a disparate impact claim brought by African-American employees of Booth Refrigeration’s Richmond office. The employees alleged that Booth refused to promote African-American employees in the Richmond office to supervisory positions. The employer noted that any disparity in the work force in Richmond...
should be negated by the fact that of a total of seven supervisory positions, three were filled by African-Americans. The employer further offered the employment records and history of the plaintiffs as a justification for non-promotion. The Mallory court used this case to establish Wards Cove's effect on the law of the Fourth Circuit.

The Mallory court noted that the plaintiffs proved that all five clerical supervisory positions in the Richmond office were filled by white employees, and that no African-American employee was ever promoted to a supervisory position at the headquarters. In an attempt to meet their prima facie burden, the plaintiffs offered statistics showing that the qualified labor pool for the job consisted of eighteen clerical workers already employed, six of whom were black.

The court noted that even if it did recognize the eighteen clerical workers as the relevant labor pool, the plaintiff failed to prove how many were qualified. The court further rejected the plaintiff's prima facie case, saying that plaintiffs were required to "identify the specific employment practice that is allegedly responsible for the disparity and prove that the practice has caused exclusion of the group of which the plaintiffs are members." The court stated that the plaintiff's identification of Booth's subjective criteria and "refusal to consider length of service" was not enough to meet the Wards Cove individual identification requirement.

In Lowe v. Commack Union Free School District, the Second Circuit fully discussed the new standard for disparate impact cases, first noting that any disparity between classes of employees must be "sufficiently substantial" in order to raise a question of discrimination. The court gleaned from Wards Cove the negative view with which the Supreme Court viewed statistics, and articulated the

157. Id. at 911.
158. Id. at 910.
159. Id. at 912.
160. Id.
161. Id.
162. Id. This case is factually similar to Wards Cove in that the challenged hiring practices included subjective review of applications, and there were no written policies on promotions and the company did not post announcements about available positions. Id. at 909.
163. Id. at 912. See infra notes 229-31 and accompanying text discussing Mallory and the burden of proof in the business justification context.
164. 886 F.2d 1364 (2 Cir. 1989).
165. Id. at 1370.
166. Id.
new prima facie case for disparate impact. Assuming that a sufficient disparity is shown, the plaintiff must then identify the specific employment practice that has caused the disparity. The Court stated that “under Wards Cove and Watson, [the plaintiffs] cannot satisfy the requirements of a prima facie case simply by broadly attacking as discriminatory the hiring process as a whole. . . . Thus, the overall results of the process, without more, do not show disparate impact.” With this, the court rejected the plaintiffs’ claim that they were excluded from employment because of their age.

It is clear from the Second Circuit’s opinion in EEOC v. Joint Apprenticeship Committee that the law in the circuit was radically changed by Wards Cove. In Joint Apprenticeship, the court vacated a lower court’s injunction against the hiring practice of the committee. The court noted the apparent discrepancy between the case law of the Second Circuit and the law under Wards Cove. The court pointed out that, although the Supreme Court insisted that it was not “announcing new law but was merely clarifying the existing standards,” the Wards Cove decision added a new element to the prima facie requirement for disparate impact cases. The court cited the language of Wards Cove, which stated that a plaintiff

167. Id.
168. Id.
169. Id. at 1371.
170. Id. Although the Wards Cove standard was applied in this case, it is not clear whether the disparate impact theory should be applied to age discrimination cases. Stacy, A Case Against Extending the Adverse Impact Doctrine to ADEA, 10 EMPL. REL. L.J. 431 (1984-85).
171. 895 F.2d 86 (2d Cir. 1990).
172. Id. The court described the Committee's hiring practice as follows: “JAC is a joint labor-management board that administers training programs for apprentice electricians in the New York City metropolitan area. Successful completion of such a program leads to eligibility for membership in an electrician's union, Local 3 of the International Brotherhood of Electrical Workers.” Id. at 87.
In administering the programs, JAC issued recruitment announcements in 1980, 1981, and 1983. Id. “Each announcement stated that applicants would not be accepted in the program unless they, inter alia, (1) possessed a New York State-approved high school or general equivalency diploma, and (2) were no more than 22 years of age if they had not served in the armed forces, or no more than 26 if they were veterans.” Id.
“Further, in the counties from which JAC received applications, 89.2 percent of whites between the ages of 19 and 22 had high school degrees, whereas only 68.3 percent of blacks in the same age group had such degrees.” Id. “A higher percentage of black applicants (ranging from 3.42 to 6.23 percent) than of white applicants (ranging from 1.79 to 2.13 percent) lacked the mandated high school credentials. EEOC concluded that ‘the use of the criterion of a high school degree will have an adverse impact on blacks. . . .’” Id. at 88.
173. Id. at 91.
174. Id. at 90 (citing Wards Cove, 109 S. Ct. at 2124).
175. Id.
"does not make out a case of disparate impact simply by showing that . . . there is racial imbalance in the work force."^{176}

The Second Circuit noted that the Supreme Court had placed new emphasis on causation, stating that,

[In the present case, as clarified by *Wards Cove*, EEOC bore the initial burden of demonstrating not only race and gender disparities but also a causal nexus between those disparities and JAC's diploma and maximum age requirements. It is not at all clear, however, that the district court made its summary judgment decision within this framework, for it appears that the court thought it unnecessary to determine whether the statistical disparities were caused by the challenged criteria.]}^{177}

The Eleventh Circuit is more forthright about the effects of *Wards Cove*. In *Hill v. Seaboard Coastline Railroad Co.*,^{178} the Eleventh Circuit held that *Wards Cove* "overruled the existing law in this circuit on this issue."^{179} In *Hill*, the court rejected the claims of five African-American employees who claimed to have suffered from employment policies which caused a disparate impact on them because of their race.^{180} The plaintiffs offered statistical proof that 12% of the carmen, as opposed to only 4% of the foremen, were black.^{181} The plaintiffs alleged that the employer failed to promote black carmen to foremen.^{182} The court outlined the new prima facie case as follows:

The plaintiff has the burden of demonstrating that the defendant employed a facially neutral employment practice that had a significant discriminatory effect on blacks and that it is the application of that specific employment practice that has caused the disparity. The defendant may rebut the charge by "articulating a nondiscriminatory business justification" for the employment practice, in response to which the plaintiff may demonstrate that the proffered employment justification was insubstantial or pretextual or may demonstrate pretext by showing another device that would

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176. *Id.* (quoting *Wards Cove*, 109 S. Ct. at 2124).

177. *Id.* at 91. The court quoted the district court decision as stating that "[i]t is not necessary for plaintiffs to explain the disparity on which their prima facie rests; they must only show that its existence is more probable than not." *Id*.

178. 885 F.2d 804 (11th Cir. 1989).

179. *Id.* at 812 n.12 (referring to the transfer, from the defendant to the plaintiff, of the burden of proof on the business justification issue).

180. *Id.* at 805-06.

181. *Id.* at 812.

182. *Id.* at 805-06. The plaintiffs also offered evidence that white carmen were being promoted to foremen. *Id.* at 806.

183. *Id.* at 811-12 (emphasis added).
serve the employer's interest without the disparate impact.\textsuperscript{184}

The court further cited a reversal of the burdens assigned to the parties:

After the plaintiff has made out a prima facie case, the employer may rebut the inference of discrimination by articulating a nondiscriminatory business justification. \ldots At this stage, the employer has the burden of producing evidence of the business justification. The ultimate burden of persuasion remains on the plaintiff. \ldots \textsuperscript{185}

The Supreme Court's decision in \textit{Wards Cove} made it clear that the employer merely has the burden of production at this stage, and overruled the existing law in the circuit on this issue.\textsuperscript{186} At the time of the trial in this case, March 1983, \textit{the law in this circuit required the defendant, not the plaintiff, to identify the various practices resulting in the promotion decisions}.\textsuperscript{187}

Despite the differences in burdens, the court did not remand for further finding because the court rejected the plaintiff's intra-workforce comparisons.\textsuperscript{188}

In two recent cases, the Seventh Circuit addressed all aspects of \textit{Wards Cove}. In \textit{Allen v. Seidman},\textsuperscript{189} a black bank examiner brought a class action suit against the FDIC, alleging a disparate impact on hiring and promotions based on a "program evaluation" test used in determining promotion choices.\textsuperscript{190} The plaintiff demonstrated that 39% of black candidates passed the test, white 84% of white candidates passed the test.\textsuperscript{191} The Seventh Circuit ruled that this met the plaintiff's burden of establishing a prima facie case showing of disparate impact, but vacated and remanded the lower court's decision because the district court applied the business necessity defense.\textsuperscript{192}

The Seventh Circuit focused first on the proper pool for a statistical study.\textsuperscript{193} The court allowed the plaintiffs to utilize a comparison of the currently employed work force, distinguishing this comparison

\begin{footnotesize}
184. \textit{Id.} The last step openly equates the disparate impact doctrine of "pretext" with that of disparate treatment. \textit{Id.} at 812.
185. \textit{Id.}
186. \textit{Id.} at 812 n.12.
187. \textit{Id.} at 813 n.16 (emphasis added).
188. \textit{Id.} at 812. The court applied \textit{Wards Cove} and rejected a comparison between carmen and foremen indicating disparity. \textit{Id.} This was the same comparison rejected by \textit{Wards Cove}. See 109 S. Ct. at 2121-22.
189. 881 F.2d 375 (7th Cir. 1989).
190. \textit{Id.} at 381.
191. \textit{Id.}
192. \textit{Id.} at 381.
193. \textit{Id.} at 378.
\end{footnotesize}
from the one rejected in Wards Cove.194

[T]he problem of comparability is much less acute here than in Wards Cove. . . . [T]here is reason to believe that the pool taking the test will be reasonably homogenous despite possible differences (not, by the way, proved in this case) in original entry qualifications, and this makes the very large disparity between blacks and whites in performance on the test suggestive of racial bias.195

Additionally, the defendants in Allen attacked the plaintiff's statistics on grounds other than the relevant pool.196 The FDIC alleged that the plaintiff's analysis of the results of the test focused only on blacks and whites.197 The FDIC argued that Title VII plaintiffs must proffer a "multiple regression analysis" which may find other causes of the disparity besides race, such as education or experience.198 The defendants insisted that a simple black and white analysis could not meet the statistical prima facie showing demanded by Wards Cove.199 The Court's response to and application of Wards Cove may prove unsettling to supporters of Wards Cove.200

Paradoxically, our conclusion is strengthened by Wards Cove, because after that decision the prima facie case means less than it did before, so there is less reason to be fussy about it. Under the regime of Wards Cove it just makes the defendant produce some evidence in justification of its test, after which the plaintiff must prove the test unreasonable. In addition, the defendant can always present evidence to show that there is no disparate impact — that is merely an artifact of the plaintiff's statistical study.201

The FDIC also alleged that since the plaintiffs did not specifi-
cally pinpoint what was wrong with the testing, the case should have been dismissed. The defendants insisted that Wards Cove required the plaintiffs to pinpoint particular aspects of the testing that were unfavorable to blacks. The court did not agree.

[N]othing in the structure of a disparate-impact case requires such a pinpointing; whether the reason for the test's disparate impact can be identified is merely another issue bearing on the correct interpretation of the plaintiffs' statistics. . . . In a test notably devoid of objective standards . . . the danger is acute that racial bias of which the testers may well be unconscious will influence the grade.

The Seventh Circuit therefore held that the identification of the one test was particular enough to establish a prima facie case. In the Seventh Circuit, a plaintiff does not have to identify which individual aspects of the test cause the disparity. This is a reasonable interpretation of Wards Cove. In Wards Cove, the plaintiff brought before the court several different techniques, standards and selection devices which, it alleged, as a whole, caused a disparate impact. The Court's demand for specificity was focused on which selection devices caused a disparity. It did not call for a dissection of every device to determine the fatal flaw of each. While this may be of comfort to some critics, it must be remembered that it is often difficult to determine which device actually determines the disparity. In addition, this is the law of only one circuit. The Seventh Circuit may insist, when faced with multiple selection devices, that the plaintiff

202. Id. at 381. The Wards Cove decision and the decisions of the circuit courts that have examined Wards Cove seem to insist on specificity in the employees' allegation. See supra notes 200-34 and accompanying text (discussing the specificity of the allegation). The Seventh Circuit attempted half-heartedly to pinpoint one specific allegation by the plaintiff. Allen, 881 F.2d at 381. The Allen court suggested that the plaintiffs alleged that the lack of objective testers and the vast use of subjective tests was a specific allegation. Id. However, this was the same argument that was rejected by Wards Cove. 109 S. Ct. at 2125. The Allen court did note that the plaintiff in this case was attacking one test and not a series of test or devices. Allen, 881 F.2d at 381. The plaintiff was simply pointing out several problems with the one test. Id. The Seventh Circuit held that a plaintiff could not be held to show causation for each critical aspect of a single test. Id.

203. Id.

204. Id. Unfortunately, this interpretation may be a case of a court seeing a worthy plaintiff and applying the rules favorably to that plaintiff.

205. Id. at 378-79.

206. Id. at 381.

207. 109 S. Ct. at 2115.

208. Id. at 2114.

209. Id.
pinpoint which device caused the impact. Finally, in light of Wards Cove, the Allen court renamed the “business necessity defense” the “issue of legitimate employer purpose.”

In the companion case of Evans v. City of Evanston, the court once again addressed the state of statistics in the Seventh Circuit. Evans was a class action brought on behalf of women applicants who failed the physical agility test for city fire fighting positions. The circuit court rejected the lower court’s finding that the city did not justify its test. The court held that the district court placed the “burden of persuasion on the wrong party, thus requiring a remand.” The court focused on the lower court’s use of the term “justify” when deciding that the test “was not justified by Evanston.”

The Seventh Circuit agreed with the lower court judge that the city fell far short of justifying the use of the test. However, under Wards Cove the city did not have to justify the test, but had only to give a business-related reason for it. The city did this by demonstrating that fire fighters need to be fit, quick and strong. The city did not even attempt to justify its cut-off point for a passing grade. In fact, “[s]o feeble was the city’s effort to justify the cut-off point for the physical agility test that it can be argued that the city did not even carry its burden of production.” The circuit court did not feel this was sufficient. It focused instead on the language used by the lower court in asking the city to justify the test. The circuit court

\[\text{\footnotesize 210. The court in Allen presented a reasonable interpretation of Wards Cove. See supra notes 189-211 and accompanying text. However, the Supreme Court may not view Allen as reasonable. While Allen articulated the rules of Wards Cove, it specifically excluded from the burdens of Wards Cove any plaintiffs who attack a single test but who cannot explain what specifically is wrong with it. See supra notes 202-09 and accompanying text. This may be contrary to the Court’s new stringent causation requirement. Id.}\]

\[\text{\footnotesize 211. 881 F.2d at 380.}\]
\[\text{\footnotesize 212. 881 F.2d 382 (7th Cir. 1989).}\]
\[\text{\footnotesize 213. Id.}\]
\[\text{\footnotesize 214. Id. at 383.}\]
\[\text{\footnotesize 215. Id. at 385.}\]
\[\text{\footnotesize 216. Id. at 382.}\]
\[\text{\footnotesize 217. Id. at 385.}\]
\[\text{\footnotesize 218. Id.}\]
\[\text{\footnotesize 219. Id.}\]
\[\text{\footnotesize 220. Id. at 384. This explanation would probably not have satisfied the business necessity and validation requirements that existed before Wards Cove.}\]
\[\text{\footnotesize 221. Id. at 385.}\]
\[\text{\footnotesize 222. Id.}\]
\[\text{\footnotesize 223. Id.}\]
\[\text{\footnotesize 224. Id.}\]
thereafter remanded for further hearings.225

Even with the lower burden of production required by *Wards Cove*, the term “justify”, as used by the lower court, can be viewed to mean burden of production in connection with the business justification defense.226 If viewed as a burden of production, the city should still fail for the reason indicated above.227 However, the court called the defendant’s burden not a defense but an “issue of legitimate employer purpose.”228

It is important to mention that *Mallory* also addresses the shifting of burdens.229 The Fourth Circuit noted that, even if the plaintiffs had established a prima facie case under the new standard, they could not have prevailed.230 The Fourth Circuit very clearly delineated the burdens for the parties, stating that under *Wards Cove*, if a prima facie case was established then the plaintiffs must “prove that the proffered justification for the practice does not serve any legitimate employment goals of the employer.”231 Implicit in the court’s language is the assumption that an employer will always manage to proffer some business reason. The court simply went from the prima facie burden of the plaintiff to the additional burden of disproving every business reason offered by the employer. In the Fourth Circuit, this step has essentially become part of the prima facie case for any plaintiff intending to proceed under a disparate impact claim.

In an opinion which touches on *Wards Cove*, the Third Circuit acknowledges the shifting of burdens. In *Williams v. Giant Eagle Markets*,232 the court stated that the burden of persuasion remains with the plaintiff at all times.233 There are too many district court cases and state court cases which have already applied the *Wards Cove* standard to list here, but it is fair to say that the new prima facie requirements adopted by the Fourth Circuit have been widely

225. *Id.* at 386.
226. *Id.* at 385.
227. See supra note 222 and accompanying text.
229. 882 F.2d at 911-12.
230. *Id.*
231. *Id.* (emphasis added). The court is very specific about the burden of proof, and has also reduced the *Griggs* business necessity to a “legitimate employment goal.” *Id.* The Fourth Circuit interprets *Wards Cove* to require that the plaintiffs prove the negative, namely, that no legitimate employment goal was the basis for the discrimination. The court’s language is also important because it did not even consider the possibility that a company would not proffer some business reason. *Id.* The court realized that most rational employers will always be able to offer some employment goal. *Id.*
232. 883 F.2d 1184 (3d Cir. 1989).
233. *Id.* at 1190.
followed by the lower courts.234

V. CONGRESSIONAL RESPONSE

A. Fair Employment Reinstatement Act

The effects of Wards Cove on Title VII litigation were felt immediately, and were followed by Congressional criticism.235 A few senators were in favor of the opinion, but the vast majority of those who spoke criticized it as rejecting the intent and spirit of Title VII.236 Three bills were specifically drafted and introduced to reverse the effects of Wards Cove 237


236. 135 CONG. REC. S10, 219 (1989). Senator Orrin Hatch rose in favor of the decision. Id. In his speech, Senator Hatch addressed both the failed appointment of William Lucas to a civil rights post as well as several of the Court's civil rights decisions. Id. In addressing Wards Cove, Sen. Hatch relied on an article by former Judge Robert Bork, stating that "this case retains the controversial disparate impact theory but makes some effort to ensure that it is as reasonably applied as possible. It also attempts to avoid imposing racial or gender propositionality on American employers through the misuse of statistics and the misallocation of the burden of proof." Id. at S10, 220.

237. The first two bills, the Fair Employment Reinstatement Act (see infra notes 238-63 and accompanying text) and the Civil Rights Act of 1990 (see infra notes 264-73 and accompanying text) are discussed in detail. The third bill, the Civil Rights Restoration Act of 1989 (H.R. Res. 2598, 101st Cong., 1st Sess., 135 CONG. REC. E2924 (1989), was reintroduced by Congressman Tom Campbell specifically to "reverse portions of the Supreme Court's decision in Wards Cove versus Atonio." Id. Rep. Campbell said he believes that "new [Wards Cove] regime unfairly burdens the victims of discrimination. . . [and that the bill] would restore disparate impact cases to their previous conditions." Id.

A compromise combination of these bills was introduced (S. 2104/44000) and passed by Congress. This measure awaits the signature of the President. The bills' detractors claim that it would cause quotas, however the same was said about the Civil Rights Act of 1964 and Griggs. It should be noted that both the Civil Rights Act of 1964 and Griggs require, first and foremost, that selection of employers be done, according to ability, not because of a protected classification. This rule continues today and any fear of "quotas" is unfounded, particularly in light of the Supreme Court's decision in City of Richmond v. Croson Co., 488 U.S. 469 (1989) and Martin v. Wills, 109 S. Ct. 2080 (1989).

The addition of punitive damages and jury trials into the Civil Rights arsenal is an issue which cannot be dealt within this article. They both, however, do raise concerns that the remedial nature of the Acts is in jeopardy. Punitive damages should be awarded only in the most
The first bill introduced in response to *Wards Cove* was the Fair Employment Reinstatement Act ("FERA"). In introducing this bipartisan measure, Senator Metzenbaum noted that the FERA was in direct response to *Wards Cove*. The Senate record introduces the bill as "[a] bill to amend the Civil Rights Act of 1964 to clarify the burden of proof for unlawful employment practices in disparate impact cases. . . ."

The Senator pointed to *Wards Cove* as a "stunning example of the Court's retreat from equal opportunity." He stated that *Wards Cove* undermined Title VII, primarily by impairing a plaintiff's ability to prevail in disparate impact cases. Senator Metzenbaum focused primarily on the alteration of burdens.

By shifting this burden to the plaintiff, the Court has made it far more difficult for plaintiffs to secure relief in cases where employment practices have widespread discriminatory consequences. How can we expect a plaintiff—an individual employee or job applicant—to be able to prove there is no business justification for a particular practice? It is the employer, not the individual worker, who knows why the practice was adopted. *In addition, anyone who has ever been in a courtroom knows that it is virtually impossible for a party to prove the negative.*

The Senator further scolded the Court for its insistence that an employee be forced to prove that each individual practice caused the disparate impact, stating that this added burden was too much for a plaintiff to bear. "[A]s a practical matter, an employee selection process often invokes multiple practices—such as tests, interviews and education requirements—that are interrelated." According to the Senator, "[p]laintiffs who prove that the process as a whole [has a disparate impact] should not also have to isolate factor and assess its contribution, particularly because employers have far readier access to the pertinent information."

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239. Id.
240. Id.
241. Id. at S7513.
242. Id.
243. Id. (emphasis added).
244. Id.
245. Id.
246. Id.
The Fair Employment Reinstatement Act overturns the *Wards Cove* decision. . . In particular, the bill reestablishes that: first, when a plaintiff demonstrates disparate impact . . . it is the employer's burden to prove the affirmative defense of business necessity; and second, a plaintiff may challenge a group of employment practices without having to demonstrate that each specific practice within the group resulted in disparate impact. 247

FERA also makes it clear that business necessity is only satisfied by proving that the practice is essential to effective job performance. 248 Congressman Flake, while introducing the same bill into the House

247. *Id.*
248. *Id.* (emphasis added). The text of the bill is as follows:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the Fair Employment Reinstatement Act.

**SEC. 2. PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.**

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end thereof the following new subsection:

(1) IN GENERAL.—In an action or proceeding under this title, an unlawful employment practice is established when—

(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—

(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity, or

(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practices are required by business necessity: Provided, That—

(i) if the complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group resulted in such disparate impact; and

(ii) if the respondent demonstrates that a specific employment practice within the group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(2) DEFINITIONS. — For purposes of this subsection—

(A) the term 'complaining party' means a person who may bring an action or proceeding under this title;

(B) the term 'respondent' means an employer, employment agency, labor organization, or joint labor-management committee;

(C) the term 'demonstrates' means meets the burden of production and persuasion;

(D) the term 'required by business necessity' means essential to effective job performance; and

(E) the term 'group of employment practices: [sic] means a combination of employment practices or an overall employment process.

*Id.* See also *id.* at 7514 (summarizing the FERA). For a summary of the FERA see 135 Cong. Rec. S 7512-13.
of Representatives, stated that the bill was in direct response to the *Wards Cove* decision and noted that it would “restore the *Griggs* rule to the civil rights arsenal.”

In an address entitled *Wards Cove Packing Co. versus Antonio—Statistics Speak, But the Court No Longer Listens*, Congressman William Clay assailed the Court for its *Wards Cove* decision. Specifically referring to the Court’s rejection of statistical proof of the stratification of a work force, Congressman Clay cited the Court’s acceptance of a broad geographic area as the relevant population as excessive and improper. The relevant population was not limited to those persons in the union who had sojourned to Alaska year after year on cannery line jobs, and/or to those in the native village who habitually worked on cannery line jobs. The trial court . . . included the general population of all those living in Alaska, the Pacific Northwest and California . . . and the Supreme Court did not disagree.

Congressman Clay expressed a fear that, since the Court did not reject this comparison, “job stratification on race, color, sex, religion or national origin might well go unchecked.” In the case of *Dowdy v. Municipality of Monroeville*, Congressman Clay’s fears were realized. In *Dowdy*, the district court granted summary judgment to the employer because the plaintiff’s statistical data only considered the disparate impact and disparity within the work force. The municipality of Monroeville had an ordinance which mandated that nonresident employees be furloughed before any Monroeville residents. Although there was a mix of white and black resident employees, all the nonresident employees were black, thus all those fur-

251. *Id.*
252. *Id.* at H2379.
253. *Id.*
254. *Id.* The Supreme Court in *Wards Cove* instructed the trial court to determine the relevant labor market and only allow a comparison between that and the at-issue jobs with respect to the plaintiff’s prima facie case. *Wards Cove*, 109 S. Ct. at 2121-22.
256. *Id.* at 557-58. The court properly applied *Wards Cove* and rejected the infra work force comparison. *Id.* at 558. At the same time, the court denied what a casual glance revealed: that a facially neutral statute would eliminate seven blacks out of fourteen before one white would even be considered for a furlough. *Id.* at 557.
257. *Id.*
The court declared the ordinance facially neutral and rejected the plaintiff's statistical proof of discrimination.259

The court cited Wards Cove to support its conclusion that a reduction of blacks in the work force from 71.4% to 63.6% was not enough, especially when blacks made up only 4% of the municipality's residents.260 The Dowdy court applied the Wards Cove view of the relevant labor market as follows:

The parties do not stipulate to the composition of the work force in Monroeville's labor market area, but we can take judicial notice that the Pittsburgh Metropolitan area is racially and ethnically diverse. When one considers that the relevant comparison in Title VII disparate impact matters is between the composition of the general labor market and the composition of the work force in the jobs at issue . . . one can see that no prima facie Title VII claim could be made by plaintiffs unless the general labor market in the Monroeville area is well in excess of 63.6% black. This plaintiffs do not allege and cannot prove.261

The opinion in Dowdy refers to the ethnic and racial diversity of metropolitan Pittsburgh and states that the comparison should be made between the work force composition and the general labor market in the Monroeville (which the court defined as the Pittsburgh metropolitan area).262 Prior to Wards Cove, the Hazelwood Court rejected a similar comparison between suburban St. Louis and the St. Louis metropolitan area.263 In Dowdy, if the court rejected the Pittsburgh metropolitan area as the relevant labor pool and relied instead upon those members of the labor pool who have shown interest (such as current employees), then it would appear that the statistics would have been found to be discriminatory.

B. The Civil Rights Act of 1990

In introducing the Civil Rights Act of 1990,264 Senator Ken-
nedy openly declared that it is intended to overturn "a series of [Supreme Court] rulings that mark an abrupt and unfortunate departure from its historic vigilance in protecting civil rights." Senator Kennedy went on to say that the bill would restore and strengthen the basis laws that prohibit racism and other types of bias in our society. This particular piece of legislation seeks to overturn many of the Courts' recent decisions regarding civil rights in actions brought under 42 U.S.C. 1981 and Title VII, among others.

Senator Kennedy explained that the bill's attack on *Wards Cove* was focused on its elimination of the employer's burden of proving business necessity. The Civil Rights Act of 1990 "restores the *Griggs* rule by providing that, once a person proves that an employment practice has a disparate impact, the employer must justify the practice by showing that it is based on business necessity."

The supporters of this bill moved to quell the concern of those who insisted that this bill and the others would require strict racial quotas as the only way to avoid a suit. None of the bills proposed in response to *Wards Cove* requires proportional population representation. The *Griggs* opinion itself directly states that quotas will not carry the day and that only employment practices based on qualifications are legitimate. In fact, the proposed bills do not outlaw even the largest disparities in the work force if the disparity is caused by a practice which is essential to the business. In other words, the proposals simply seek to re-establish the last 20 years of disparate impact rules and procedures. Senator Kennedy maintained:

We have already heard it stated on the floor of the Senate that [the

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1990].

265. *Id.* at S1018 (referring to the *Wards Cove* decision, among others.)

266. *Id.*

267. *Id.* at S1021.

268. *Id.*

269. *Id.*

For eighteen years following Chief Justice Warren Burger's unanimous opinion for the Supreme Court in the landmark case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), Title VII had placed on employers the burden of showing that employment practices with a disparate impact . . . are required by business necessity. Last year in *Wards Cove* . . . the court effectively overruled this *Griggs* rule and held that, no matter how strong the proof of discriminatory effect, the employer need no longer prove that its practices are required by business necessity. Instead, victims of discrimination must bear the heavy burden of proving that the employer has no legal justification for its exclusionary practices.

*Id.*

270. *Id.* at S1022 (statement of Sen. Jeffords).

271. *See supra* note 237 and accompanying text.

272. 401 U.S. at 436.
legitimization of quotas] will be the inevitable result of that section which deals with the Court's decision in *Wards Cove*. . . . However, this assessment is incorrect, for the act specifically makes clear that it does not affect or change the law governing affirmative action and does not mandate quotas in any fashion. All that is intended by the framers of this provision and we believe, all that is accomplished therein is the restoration of the *Griggs* . . . rule that once a plaintiff has proven an employment practice produces a disparate impact on the basis of sex, race or other protected category, the burden shifts to the employer to justify the practice on the basis of business necessity.273

VI. WARDS COVE ESSENTIALLY OVERRULES GRIGGS

As certain members of Congress have pointed out, there are several inconsistencies between the Court's denial that it was establishing new law and the practical effects of *Wards Cove*. The unanimous *Griggs* Court has in effect been overridden by the five member majority joining in the *Wards Cove* opinion.274 The idea behind *Griggs* was that:

the objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of em-

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273. 136 CONG. REC. at S1022 (statement of Sen. Jeffords) pertaining to disparate impact as follows:

(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICE IN DISPARATE IMPACT CASES.

(1) An unlawful employment practice is established under his subsection when

(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or

(b) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practices are required by business necessity, except that —

(i) if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact; and

(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.

*Id.* at S1019.

274. 109 S. Ct. at 2118 (joining in the opinion of Justice White were Chief Justice Rehnquist and Justices O'Connor, Scalia and Kennedy).
ployment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.²⁷⁵

The Griggs Court relied on the Equal Employment Opportunities Act, (Civil Rights Act of 1964) which states in pertinent part that "it shall be an unlawful employment practice for an employer . . . 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."²⁷⁶

The Court in Griggs referred to legislative history when it insisted that Congress was concerned with the consequences of employment decisions, not necessarily the motivation of those decisions.²⁷⁷ They held that good intentions did not redeem practices which hinder a protected class in pursuit of employment opportunity.²⁷⁸ Wards Cove rejects this rationale, as it places on the plaintiff the unbearable burden of disproving all reasonably offered justifications for the employer's discriminatory practice.²⁷⁹ Griggs clearly called for the employer to demonstrate that the challenged practices measured "the person for the job and not the person in the abstract."²⁸⁰

In fact, Griggs makes it clear that testing procedures and practices which measure qualifications are what Title VII demands.²⁸¹ Therefore, even if a procedure has a disparate impact, if it is shown

²⁷⁷. Griggs, 401 U.S. at 432.
²⁷⁸. Id.
²⁸⁰. Griggs, 401 U.S. at 436. The Court further stated that "[n]othing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance." Id. "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant." Id. (emphasis added). Griggs makes it clear that quotas are not the answer. Id. In fact, under Griggs, a quota system may be a violation of Title VII. Id. The Griggs rule demands that job qualifications are what is being measured and not protected classifications. Id.
²⁸¹. Id.
to be an accurate measurement of quality which is necessary to job performance, then that procedure is valid.\textsuperscript{282} \textit{Wards Cove}, however, rejects \textit{Griggs} and its interpretation of Title VII, by allowing the employer to offer a legitimate goal to which the practice is tied as an excuse for any resulting disparities.\textsuperscript{283}

\textit{Wards Cove} does not state that an employer has to demonstrate that the challenged practices actually measure a person's ability to do the job. All \textit{Wards Cove} asks is that an employer articulate a business reason for the implementation of the practice.\textsuperscript{284} This charge is clearly at odds with \textit{Griggs} and all of it progeny.

Before \textit{Wards Cove}, the Supreme Court, the federal courts and federal agencies have all consistently enforced \textit{Griggs}, requiring an employer to defend its practice by demonstrating business necessity as well as a reliable connection between the practice and the ability to perform the job.\textsuperscript{285} The majority in \textit{Wards Cove} casually denies this heritage by stating that the burdens described in earlier cases, even the words "burden of proof," should be understood to mean a burden of production, not persuasion.\textsuperscript{286} At the same time, the \textit{Wards Cove} majority says that there is no requirement that the challenged practice be essential.\textsuperscript{287} In his dissent, Justice Stevens criticized the court for its handling of these issues, stating that he was "astonished to read that... 'there is no requirement that the challenged practice be... essential'."\textsuperscript{288}

Justice Stevens stated that, even if he didn't feel that the \textit{Griggs} standard reflected the intent of Congress, he could not join the majority because its view rejected a consistent interpretation of a federal statute which could have been corrected by Congress had the prior interpretation been found to be mistaken.\textsuperscript{289} While Congress

\begin{itemize}
  \item\textsuperscript{282} \textit{Id.}
  \item\textsuperscript{283} \textit{Wards Cove}, 109 S. Ct. at 2125-26.
  \item\textsuperscript{284} \textit{Id.}
  \item\textsuperscript{285} \textit{Id.}
  \item\textsuperscript{286} \textit{Id.}
  \item\textsuperscript{287} \textit{Id.}
  \item\textsuperscript{288} \textit{Id.}
  \item\textsuperscript{289} \textit{Id.}
\end{itemize}
had not reacted to the consistent interpretation of *Griggs* during its twenty year tenure, within a week of the *Wards Cove* decision several pieces of legislation were introduced with the intent of restoring *Griggs*.290

It is important to note the practical significance of *Wards Cove*. First, the decision severely limits statistical comparisons, and rejects intra work force comparisons, even if a company has 100% white managers and 100% non-white laborers.291 This rejection "underestimates the probative value of a racially stratified work force."292 *Wards Cove* says that this type of comparison would force an employer to engage in the "expensive and time consuming task of defending the 'business necessity' of the methods used to select the other members of his work force."293 As Congressman Clay put it, "that's what the law is all about. Chief Justice Burger said so in the *Duke Power Co.* decision back in 1987, and hundreds of courts have repeated this refrain ever since."294 Justice Stevens also argued that by allowing a comparison between the stratified work force, the Court would gain a more accurate picture of those persons qualified and available.295

An undisputed requirement for employment . . . [in this case] is availability for seasonal employment in the far reaches of Alaska. [There is no way of knowing what] portion of the general population in Alaska, California, and the Pacific Northwest . . . would accept this type of employment. . . . [C]omparing racial compositions within the work force identifies a pool of workers willing to work during the relevant times and familiar with the workings of the industry. . . . Surely this is more probative than the untailored general population statistics on which petitioners focus.296

The second disadvantage to the plaintiffs due to *Wards Cove* is the apparent need to read the mind of the employer and anticipate every reasoned goal to which the challenged practice can be tied.297 Besides the fact that this is a rejection of long standing precedent,298 it places a heavy burden upon the plaintiffs. The court recognized

290. *See supra* notes 237-73 and accompanying text.
291. *See supra* notes 235-73 and accompanying text.
292. *Wards Cove*, 109 S. Ct. at 2127. This view rejects the "common sense" value of such a showing.
293. *Id.* at 2122.
297. *See supra* notes 143-44 and accompanying text.
298. *See supra* note 290 and accompanying text.
this but insisted that liberal discovery rules and federal regulation requiring statistics be kept on minority employment would lessen the load.\footnote{299} Practically speaking, this is not so. The plaintiff must somehow prove that the challenged practice is not tied to \textit{any} business goal and then prove exactly how it causes the disparity.\footnote{300} If there is more than one component in the process, \textit{Wards Cove} requires that the plaintiff fully demonstrate how much of the disparity was caused by each component.\footnote{301} No doubt this will have a chilling effect on all disparate impact plaintiffs, especially those challenging subjective criteria. The plaintiff in a “subjective” case has the impossible task of demonstrating what it is about the employer that causes him to hire more whites than non-whites.\footnote{302} Even if a plaintiff could make a prima facie showing of disparate impact, the employer need only articulate some reasonable business explanation.\footnote{303} This is perhaps the greatest effect of \textit{Wards Cove}, as it forces all disparate impact plaintiffs to show a less discriminatory alternative.\footnote{304} As noted earlier, this has never been done.\footnote{305}

The practical effects of \textit{Wards Cove} are best illustrated by \textit{EEOC v. Joint Apprenticeship Committee},\footnote{306} a recent circuit court case in which the plaintiff challenged the employer’s requirement that applicants have a high school diploma for admission into a training program.\footnote{307} The plaintiffs demonstrated that this test for admission had a disparate impact on blacks because 89.2\% of the eligible white applicants had high school degrees whereas only 68.3\% of eligible blacks had high school degrees.\footnote{308}

Furthermore, the plaintiffs demonstrated that only 16\% of the black applicants were accepted, as opposed to the white applicant acceptance ratio of 44\%.\footnote{309} Invoking \textit{Wards Cove}, the circuit court stated that the statistics did not necessarily show a causal link be-
tween the diploma requirement and the disparity.\footnote{310}{Id. at 91.}

The \textit{Joint Apprenticeship} case is strikingly similar to \textit{Griggs}.\footnote{311}{401 U.S. at 424.} In \textit{Griggs}, one of the challenged practices was a high school diploma requirement.\footnote{312}{Id. at 427.} In \textit{Griggs}, the plaintiffs alleged that while 39\% of white males had a high school diploma, only 12\% of black males did.\footnote{313}{Id. at 430 n.6 (citing the 1960 census statistics for North Carolina).} The plaintiff then showed that of 95 employees, only 14 were black.\footnote{314}{Id. at 426.} The Court in \textit{Griggs} did not ask the plaintiffs to prove the direct and actual causal relationship between the diploma requirement and the disparity, but looked at the record for evidence that the diploma requirement had a "demonstrable relationship to successful performance of the jobs for which it was used."\footnote{315}{Id. at 431.} The \textit{Griggs} court rejected the employer's argument that the requirement had a manifest relationship to the employer's desire to improve quality.\footnote{316}{Id. at 436.} Although the Court noted that the employer's efforts to help finance its undereducated employees' attempts to earn diplomas indicated a lack of discriminatory intent, it nevertheless found that Title VII was directed at the consequences of the practices, not the motivation behind them.\footnote{317}{Id. at 432.} The Court decided for the plaintiffs under the new theory of disparate impact.\footnote{318}{Id. at 436.}

From the court's discussion in \textit{Joint Apprenticeship Committee}, it seems likely that the \textit{Griggs} plaintiffs would fail under \textit{Wards Cove} for the lack of a specific causal connection between the diploma requirement and the disparity. \textit{Wards Cove} may also signal the acceptance of Duke Power's argument that a diploma requirement had a manifest relationship to its interest in quality and efficiency. This, of course, would then force the \textit{Griggs} plaintiffs to show a less discriminatory alternative which still maintained that manifest relationship in quality and efficiency. Since no plaintiff has ever succeeded at that, it appears that the \textit{Griggs} plaintiffs would fail as well.

\section*{VII. Conclusion}

Because the basic facts of \textit{Griggs} and \textit{Joint Apprenticeship} are so eerily close and the outcomes so drastically different, it is obvious
that Griggs has been dramatically altered. What is less obvious but just as true is that Griggs and the entire disparate impact theory has, for all practical purposes, been reversed and rejected by Wards Cove. Wards Cove rejects the Congressional intent of "prohibiting an employer from discriminating in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex or national origin."319 Title VII and Congressional intent also demonstrate a desire that qualifications be the controlling factor in employment decisions. This is evidenced by the very narrow exception to a discriminatory practice, the exception being one of business necessity.320 For the foregoing reasons, this author recommends the adoption of the Fair Employment Reinstatement Act and the Civil Rights Act of 1990 in an effort to restore the disparate impact doctrine to the Griggs standard.321

320. Like any other exception to a broad prohibition, the business necessity exception should be narrowly tailored.
321. As noted in Footnote 237 supra, this author does have some concerns about the inclusion of punitive damages and jury trials in a Civil Rights Act. Historically, these Acts have been remedial in nature and conciliatory in tone. The addition of punitive damages may only increase the animosity between employer and employee. With the addition of punitive damages will come the rejection of reinstatement, and this defeats the purpose of the statute. However, the addition of increased incidental damages (for emotional distress, humiliation, etc.) may be an appropriate compromise.

As noted earlier, this author feels that jury trials will only succeed in giving a voice to the hostile group of citizens who are currently lashing out at some mythical form of oppression known as "reverse discrimination."