

Slip-Up in the Civil-Rights Bill

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When the Supreme Court issued its decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the majority was much criticized for the cavalier manner in which it discarded 18 years of precedent regarding the “business necessity” defense for employment practices that have a disparate impact on minorities and women.

The Court also deserved serious criticism for including in its analysis one of the more curious, indeed nonsensical, passages to appear in an employment discrimination decision. And now the anomalies and problems created by this passage have been compounded by Congress. In the new compromise civil-rights legislation- intended to, as the bill’s preamble puts it, “respond” to *Wards Cove* and other high court civil-rights rulings- the legislators have proceeded to codify the nonsense.

In *Wards Cove*, the Court both relaxed the business-necessity standard for justifying an employment practice with disparate impact, and placed on the plaintiff the burden of proof as to whether that standard is met. Consistent with prior analysis, the Court further explained that once the practice has been justified, the plaintiff still has the

opportunity to show that there is an alternative practice that would equally serve the employer’s interest with a lesser discriminatory impact.

The strange twist is this: The Court then indicated that liability under the less discriminatory alternative approach follows only if the defendant refuses to adopt the alternative procedure. Thus was created an extraordinary standard under which liability turns on events occurring after trial.

History of Confusion

To understand how the Court and Congress came to this pass, one needs to look back 14 years prior to *Wards Cove*, to the Supreme Court’s decision in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). In *Albemarle*, besides strongly reaffirming the basic disparate-impact principle of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court held that after the defendant has met its burden of proving the job-relatedness of the challenged practice, it remains open to the plaintiff to show that “other tests or selection devices without a similarly undesirable racial effect, would also serve the employer’s interest in ‘efficient and trustworthy workmanship.’”

Although this was the first time the Supreme Court itself had held that a plaintiff could prevail through establishing the existence of a less discriminatory alternative, the holding was probably more significant in overruling appellate court precedent that had placed a burden of showing the absence of an alternative on the defendant.

At any rate, of greater concern here is the Justice Potter Stewart's observation for the majority opinion that showing of the existence of a less discriminatory alternative "would be evidence that the employer was using its tests merely as a 'pretext' for discrimination." This suggestion that the ultimate issue in a disparate-impact case might be one of intent was utterly out of keeping with the Court's more explicit statements that the intent behind the use of an unjustified selection practice with a disparate impact simply does not matter. As the courts of appeals had reasoned, if there existed a satisfactory alternative, the challenged practice was not necessary and was therefore unlawful- regardless of the employer's motivation.

Nor did the remark make very much sense. Discriminatory motivation would, of course, render unlawful even a practice that had a strong business justification. But rarely would the existence of a less discriminatory alternative be very probative that the decision to use the procedures at issue was discriminatorily motivated. More likely, it would simply indicate that the employer was either thoughtless or mistaken in its view that the practice was necessary.

As it happened, the remark was largely ignored in subsequent treatment of the disparate-impact claims, and, it would seem properly so. For it was

sufficiently at odds with established precedent to create one of those situations where the Court ought not to be understood to mean what it said.

The O'Connor-White Twist

Twelve years after *Albemarle*, however, Justice Sandra Day O'Connor would allude to this remark in her plurality opinion in *Watson V. Fort Worth Bank, and Trust*, 427 U.S. 977 (1987), an opinion that contained several intimations of a perceived identity between disparate impact and intentional discrimination.

If Justice O'Connors *Watson* plurality hinted that part of the Court was inclined to redefine disparate impact into a means merely of proving intentional discrimination, Justice Byron White's *Wards Cove* opinion went a good deal further. In several ways, the opinion appeared to be setting the stage for an eventual transformation of disparate-impact analysis into a tortuous search for discriminatory intent.

The insinuating process of redefining disparate impact was probably most evident in the discussion of the less discriminatory alternative. Relying directly on *Albemarle*, Justice White reasoned not that a plaintiff's demonstration of a less discriminatory alternative would undermine a defendant's claims that a practice was necessary, but simply that such demonstration "would prove that 'the employer was using its tests merely as a 'pretext' for discrimination.'"

Possibly to justify treating as *proof* of discriminatory motivation what Justice Stewart's *Albemarle* opinion had regarded merely as *evidence*, Justice White went on to deflect the objection that the existence of a less discriminatory alternative actually

proves very little about the employer's intent. He reasoned: "If [plaintiffs,] having established a prima facie case, come forward with alternatives to [defendants'] hiring practices that would reduce the racially disparate impact of practices currently being used, and [defendants] refuse to adopt these alternatives, such a refusal would belie a claim by [defendants] that their incumbent practices are being employed for non-discriminatory purposes."

That an employer refuses to adopt what has been proven to be a less discriminatory alternative is obviously probative of discriminatory intent in a way that the mere existence of such an alternative is not. So, seen as part of the evolutionary transformation of disparate-impact analysis, the discussion of the employer's refusal to adopt the alternative makes some sense.

But in the context of litigation- where the plaintiff persuades the trier of fact that there exists a less discriminatory alternative that equally serves the employer's business needs- one must ask what on earth the Court's discussion of the employer's refusal to adopt the alternative could possibly mean.

One's first thought is that the Court may not actually be talking about the litigation context, but is envisioning circumstances where, sometime in the past, the employer refused to adopt a suitable alternative that was made known. But it is hard to imagine circumstances outside of litigation where the plaintiff would have demonstrated the suitability of the alternative to the employer. In any case, Justice White's words unequivocally pertain to a situation where the refusal follows a showing made in court.

Absurd Scenarios

Yet given that unavoidable interpretation, one is left to conjure up a variety of equally absurd scenarios. Does the Court, for example, envision that after the trial judge finds for the plaintiff with respect to the existence of a satisfactory less discriminatory alternative, the judge would ask the employer if it will implement the new procedure? And would a refusal be interpreted to reflect that the prior use of the policy was discriminatorily motivated, and hence that there is liability for intentional discrimination through the past use of the practice? Or is it only the future- post refusal- use of the challenged practice that the Court is talking about?

And let us not overlook that, although refusal to use what a court has found to be a less discriminatory alternative is more probative of discriminatory motivation than the mere existence of the alternative, it still is not all that probative. Few litigants are persuaded that a court's findings adverse to the litigant's position in fact reflect a truth to which the litigant previously had been blind. In actual practice, moreover, when asked by the judge what it plans to do about implementing the alternative, the employer would usually say that what it plans to do is to appeal.

So, while it may be impossible to say what the Court could have meant, it seems clear enough that it could not have meant anything that makes any sense. This is one reason why we could expect the lower courts to ignore this cryptic passage just as the ignored the language in *Albemarle*.

Enter the new civil-rights bill. One thing that the bill clearly intends is to arrest the transformation of disparate impact into a means solely of proving intentional discrimination. And

whatever the practical import of the actual amendments- which return to the defendant the burden of proof on the business necessity standard is whatever it was prior to *Wards Cove*- Congress will have precluded the Court from wholly redefining the disparate-impact principle.

Yet one of the few things from *Wards Cove* that has been deemed worthy of codifying is that employer liability resulting from the existence of a less discriminatory alternative turns on the employer's refusal to adopt the less discriminatory alternative after the plaintiff proves that such an alternative exists.

Aspects of Congress' treatment of the "alternative" issue, to be sure, are a bit on the vague side. The countless revisions to the disparate-impact provision resulted in two cross-referenced subsections on the issue, each suggesting that the substance was to be found in the other. According to subparagraph (A)(ii) of Title VII's new Section 703(k)(1), the plaintiff can prevail on a disparate impact claim by "mak[ing] the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice." Subparagraph (C) merely states that "[t]he demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed [prior to *Wards Cove*] with respect to the concept of 'alternative employment practice.'"

If the latter provision was meant to prevent the Court from requiring that the alternative practice serve the employer's interest just as well as the challenged practice, or to do anything else for that matter, the language chosen surely is not

explicit enough. The former provision, however, is at least as explicit as the *Wards Cove* decision itself in indicating that the refusal that renders the employer liable comes after the plaintiff demonstrates the alternative procedure at trial. Indeed, the word "demonstrates" is defined by the amendments as "meet[ing] the burden of proof and persuasion."

A brief passage in an interpretative statement by Sen. Edward Kennedy (D-Mass.) attempts to deal with the implications of the refusal language by noting that the "employer cannot escape liability...by adopting the [alternative] at a later time, such as during the trial of the disparate-impact claim." Whatever "later time" is supposed to mean, such glossing cannot avoid the fact that the statutory language explicitly contemplates that the issue of the refusal does not even arise until after trial. (In any case, another section of the bill specifically precludes the courts from treating Kennedy's statement as legislative history in interpreting the disparate-impact provisions.)

Figuring out what Congress could have meant in the language about the employer's refusal to adopt the alternative and how that meaning will be implemented in trial is unlikely to be any easier than figuring out what the Court could have meant in *Wards Cove*. The only difference is that courts have less leeway in ignoring things that make no sense in statutes than they have in ignoring things that make no sense in Supreme Court opinions.