St. Mary's Law Journal

Volume 21 | Number 4 Article 17

1-1-1990

Employer's Burden of Rebutting Prima Facie Case under Disparate Impact Theory Is One of Production While Ultimate Burden of Persuasion Remains with Complainant.

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CIVIL RIGHTS—Title VII Disparate Impaet Theory—Employer's Burden of Rebutting Prima Facie Case Under Disparate Impact Theory Is One of Production While Ultimate Burden of Persuasion Remains With Complainant.

Wards Cove Packing Co. v. Atonio,
__ U.S. __, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989).

Wards Cove Packing Co. (Wards Cove) operates a salmon packing cannery in a remote region of Alaska.[1] Cannery jobs at Wards Cove, requiring little skill, are staffed predominantly by non-whites, while whites occupy skilled noncannery jobs.[2] In 1974, a class of minority cannery workers brought suit in federal district court alleging that employment practices used by Wards Cove had an adverse impact on their employment opportunities in violation of title VII of the Civil Rights Act of 1964.[3] The district court rejected the cannery workers' claims and entered judgment for Wards Cove.[4] The United States Court of Appeals for the Ninth Circuit, in a panel deci-

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1. Wards Cove Packing Co. v. Atonio, __ U.S. __, __, 109 S. Ct. 2115, 2119, 104 L. Ed. 2d 733, 744 (1989). The petitioners included Wards Cove and Castle & Cooke, Inc., who operate several salmon packing canneries in remote regions of Alaska. Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1122 (9th Cir.), *vacated*, 787 F.2d 462 (9th Cir. 1985)(en banc), *remanded*, 810 F.2d 1477 (9th Cir.)(en banc), *returned to panel*, 827 F.2d 439 (9th Cir. 1987), *vacated and remanded*, __ U.S. __, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989).

2. *Wards Cove*, __ U.S. at __, 109 S. Ct. at 2119, 104 L. Ed. 2d at 745. The nonwhite cannery workers were a group composed of Filipinos dispatched by Local 37 of the International Longshoreman Workers Union and Native Alaskans who resided in nearby villages. *Id.* The skilled noncannery jobs included machinists, engineers and quality control personnel. *Id.* at n.3. Some of the noncannery workers consisted of nonskilled support personnel necessary to support the entire cannery community. *Id.* These workers held positions such as cooks, beach gangs for dock yard labor, and store keepers. *Id.*; *see also id.* at __, 109 S. Ct. at 2134 n.21, 733 L. Ed. 2d at 763 n.21 (Stevens, J., dissenting)(listing fifteen unskilled titles as noncannery positions).

3. *Id.* at __, 109 S. Ct. at 2120, 104 L. Ed. 2d at 745. The respondents complained of objective practices including alleged nepotism, an English language requirement, failure to post noncannery job openings, and the employer's preference for rehiring. *Id.* The cannery workers also complained of the segregated living and eating facilities at the canneries. *Id.* The trial court found these conditions to be the result of nondiscriminatory motivations on the part of the canneries and purposeful conduct of the union. *See Atonio*, 768 F.2d at 1130-31.

4. *Wards Cove*, __ U.S. at __, 109 S. Ct. at 2120, 104 L. Ed. 2d at 745-46. The employees brought claims under both disparate impact and disparate treatment title VII liability theories. *Id.* The district court ruled that disparate impact theory was not applicable to subjective hiring practices. The objective practices, however, were subject to disparate impact theory, but

sion, affirmed.[5] Sitting en banc, the Ninth Circuit vacated the panel affirmance and reversed the district court's ruling that disparate impact theory did not apply to subjective hiring practices.[6] The court remanded the case to the Ninth Circuit panel, concluding that upon a prima facie showing of discrimination the burden shifts to the employer to prove the business necessity of the challenged practice.[7] On remand, the panel court held that the cannery workers had established a prima facie case under disparate impact theory.[8] The United States Supreme Court granted certiorari to determine the appropriate application of disparate impact theory under title VII.[9] Held—*Reversed*. An employer's burden of rebutting a prima facie case under disparate impact theory is one of production while the ultimate burden of persuasion remains with the complainant.[10]

The Civil Rights Act of 1964 (the "Act")[11] was enacted by Congress for the purpose of eliminating discrimination on the basis of race, color, religion, sex, and national origin.[12] The statute primarily was a response to the continuing racial stratification of African Americans in society.[13] The Act provides for equal access to public accommodations,[14] prohibits discrimination

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the district court nevertheless rejected them for lack of proof. The court rejected all of the disparate treatment challenges. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at __, 109 S. Ct. at 2120, 104 L. Ed. 2d at 746.

9. *Id.*

10. *Id.* __, 109 S. Ct. at 2126, 104 L. Ed. 2d at 753.

11. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964)(codified at 42 U.S.C. §§ 2000a to 2000e-17 (1982)).

12. H.R. REP. NO. 914, 88th Cong., 1st Sess. 26, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 2391, 2401 (1964)(observing need for legislation); *see also* Franks v. Bowman Transp. Co., 424 U.S. 747, 763-64 (1976); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01 (1976); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 245-46 (1964). *See generally* Eisenberg, *Civil Rights Act of 1964*, in CIVIL RIGHTS AND EQUALITY 235-38 (1989)(discussing provisions of Act and subsequent amendments).

13. *See* H.R. REP. NO. 914, 88th Cong., 1st Sess. 3, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2393 (recognizing significant discrimination against African Americans). Individual congressmen expressed separate views which recognized that African Americans were deprived of many advantages enjoyed by whites in society. *See* H.R. REP. NO. 914, 88th Cong., 1st Sess. 3 *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2428-29 (views of Rep. King)(segregation depriving African Americans of exercise of rights and enjoyment of privileges); *see also* Eisenberg, *Civil Rights Act of 1964*, in CIVIL RIGHTS AND EQUALITY 235 (1989)(noting reactions to civil rights demonstrations and southern regionalism as basis for proposal of legislation). *But see* Blumrosen, *Rethinking the Civil Rights Agenda: Impressions of the Rutgers Law School Conference*, 37 RUTGERS L. REV. 1117, 1120-21 (1985)(observing relative calm of civil rights activity in early 1960's and attributing passage of Civil Rights Act of 1964 to broad based acceptance of civil rights concept).

14. *See* 42 U.S.C. § 2000a(a) (1982) (guarantee of equal and complete access to services and goods in all places of public accommodation). Title II is a constitutional exercise of con-

in federally assisted programs,[15] and requires equal opportunity in employment.[16]

title VII of the Civil Rights Acts of 1964[17] broadly proscribes employment discrimination on the basis of race, color, religion, sex, and national origin.[18] Congress specifically exempted from coverage discrimination which occurs due to the requirements of an employer's bona fide occupational qualifications.[19] Additionally, Congress provided a detailed administrative process

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gressional power under the commerce clause of the United States Constitution. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964); *see also* Katzenbach v. McClung, 379 U.S. 294, 301-05 (1964)(discussing congressional power to prohibit discrimination in places of public accommodation and other uses of commerce clause by Congress); Note, *The Civil Rights Act of 1964—Source and Scope of Congressional Power*, 60 NW. U.L. REV. 574, 576-84 (1965)(analyzing *Heart of Atlanta* and *Katzenbach* and concluding congressional power broad under commerce clause). For a discussion of the provisions of Title II as enacted, see generally Recent Statute, *The Civil Rights Act of 1964*, 78 HARV. L. REV. 684, 687-88 (1965).

15. *See* 42 U.S.C. § 2000d (providing equal participation in all aspects of programs receiving financial assistance from Federal Government).

16. *See id.* § 2000e-2(a)(1)-(2) (prohibiting discrimination in employment on basis of race, color, religion, sex, and national origin).

17. *Id.* §§ 2000e to 2000e-17.

18. *See id.* § 2000e-2(a). The statute provides:

> It shall be an unlawful employment practice for an employer-
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. In 1972, Congress extended the reach of title VII to include employees of local, state, and federal government and their agencies. *See generally* Donohue, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1411-31 (1986)(discussing major theoretical positions regarding title VII).

19. 42 U.S.C. § 2000e-2(e) (1982). The bona fide occupational qualification (the "bfoq") defense is not available in cases involving allegations of racial discrimination. *Id.* The defense is narrowly construed to provide few exceptions to the general requirements of employment opportunity in title VII. Dothard v. Rawlinson, 433 U.S. 321, 333 (1977). Courts have consistently rejected stereotypical characterizations based on gender when asserted as bases for bfoq's. *Id.* at 333. Where a state employer is the defendant, the defense must meet the minimum requirements of the equal protection clause of the fourteenth amendment. *Id.* at 334 n.20. The requirement of male applicants only has been upheld as a bfoq for the position of guard at a state penitentiary. *Id.* at 334-35. The defense is intended to be applied in cases involving allegations of sex discrimination. *See id.* at 334 (bfoq intended as narrow exception to gender discrimination). *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 340-69 (2d ed. 1983)(discussing bfoq defense as it applies to sex discrimination); A. RUZICHO, L. JACOBS & L. THRASHER, EMPLOYMENT DISCRIMINATION LITIGATION § 1.30 (1989)(providing overview of bona fide occupational qualification defense).

for the resolution of claims under title VII.[20] Despite these instances of guidance from Congress, the United States Supreme Court has faced the task of developing the framework through which injured persons may litigate alleged title VII violations.[21] In the wake of Supreme Court precedent, two distinct theories of employment discrimination under title VII have evolved, disparate treatment theory and disparate impact theory.[22] The usefulness of

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20. 42 U.S.C. §§ 2000e-4 to -5. Title VII's administrative agency is the Equal Employment Opportunity Commission (the "EEOC"). *Id.* § 2000e-4(a). If an individual has a complaint of discrimination against an employer, he or she has 180 days to file a grievance with the EEOC. *Id.* § 2000e-5(e). If the time limit has passed, an extension may be granted at the discretion of the court. *Id.* The EEOC has broad powers to effectuate conciliation agreements and may intervene in civil actions against non-governmental agencies. *Id.* § 2000e-4(g)(4), (6). In addition to its administrative abilities, the EEOC has authority to bring a civil suit against an employer in federal district court in the event that nonjudicial remedies fail. *Id.* § 2000e-5(f). District courts have wide discretion to administer equitable relief for proven wrongs, including the ability to order an employer to rehire an aggrieved party and to award backpay. *Id.* § 2000e-5(g). For a discussion of employment discrimination and the EEOC under title VII, see generally Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 66-75, 94-100 (1972)(discussing nature of discrimination and powers of EEOC); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 933-82 (2d ed. 1983)(providing overview of administrative procedures of EEOC).

21. *See* Watson v. Forth Worth Bank & Trust, __ U.S. __, __, 108 S. Ct. 2777, 2787, 101 L. Ed. 2d 827, 842-43 (1988)(extending disparate impact theory to subjective hiring and promotion practices); United States Postal Serv. Bd. of Governors v. Aiken, 460 U.S. 711, 713-17 (1983)(describing method of allocating proof in disparate impact theory); Connecticut v. Teal, 457 U.S. 440, 446-51 (1982)(refusing to allow "bottom line" racial balance defense denying liability on basis of acceptable hiring of protected class in overall analysis of employment); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981)(describing burden of persuasion as remaining with plaintiff at all times in disparate treatment theory); New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979)(refining concept of job relatedness defense in rebutting prima facie case); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)(explaining that prima facie case in disparate treatment intended to raise inference of discriminatory motive); Dothard v. Rawlinson, 433 U.S. 321, 331 (1977)(reasoning that defendant must produce persuasive evidence of correlation between effective job performance and challenged employment practice); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)(establishing framework for shifting burdens of proof in disparate impact cases); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)(establishing four part structure for prima facie case in disparate treatment theory); Griggs v. Duke Power Co., 401 U.S. 424, 430-36 (1971)(articulating disparate impact theory to challenge facially neutral employment practices having adverse effects). *See generally* L. MODJESKA, HANDLING EMPLOYMENT DISCRIMINATION CASES §§ 1.7-.9 (1980)(discussing disparate treatment and disparate impact theories of employment discrimination); Middleton, *Challenging Discriminatory Guesswork: Does Impact Analysis Apply?*, 42 OKLA. L. REV. 187, 191-206 (1989)(discussing theories of proof under title VII); Note, Watson v. Fort Worth Bank & Trust: *Reallocating the Burdens of Proof in Employment Discrimination Litigation*, 38 AM. U.L. REV. 919, 924-37 (1989)(tracing judicial development of disparate treatment and disparate impact theories and discussing relationship).

22. *See Watson*, __ U.S. at __, 108 S. Ct. at 2784-85, 101 L. Ed. 2d at 839-41 (discussing

the two theories lies in their respective allocations of the burdens of proof[23] characterized by tripartite procedures guiding the presentation of evidence.[24]

The courts apply disparate treatment theory when an individual member of a protected group alleges that he or she is subjected to intentional discrimination through the practices of an employer.[25] This type of discrimination

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evidentiary distinctions between disparate treatment and disparate impact theories); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)(distinguishing disparate treatment and disparate impact models of discrimination); *McDonnell Douglas*, 411 U.S. at 802 (endorsing disparate treatment theory in title VII cases); *Griggs*, 401 U.S. at 431-35 (establishing disparate impact theory in title VII Cases). *See generally* P. BRANDIN & D. COPUS, IN DEFENSE OF THE PUBLIC EMPLOYER 2-7 (1988)(outlining different theories of discrimination evolving from title VII); C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION §§ 1.3 -.5 (1980)(describing employment discrimination theories under title VII).

23. *See Watson*, __ U.S. at __, 108 S. Ct. at 2788-91, 101 L. Ed. 2d at 844-48 (providing normative analysis of evidentiary standards in disparate impact cases); *Aikens*, 460 U.S. at 714-17 (reasserting framework for allocation of proof in disparate treatment cases); Green v. USX Corp., 843 F.2d 1511, 1522-23 (3d Cir. 1988)(stating disparate impact best understood as burden shifting device to allocate burdens of proof), *vacated and remanded*, __ U.S. __, 109 S. Ct. 3151, 104 L. Ed. 2d 1015 (1989). *Green* involved a class of African Americans alleging that subjective employment practices implemented by a steel manufacturer had resulted in unsuccessful attempts to gain employment. 843 F.2d at 1515-16. In holding that disparate impact analysis applied to subjective employment practices, the Third Circuit described the usefulness of disparate impact analysis as a tool guiding the presentation of evidence. *Id.* at 1522. The court observed that the analysis was based on notions of fairness and reasonableness. *Id.* at 1522-23. Additionally, the court noted that disparate impact theory operates to provide a means to an end, namely, the goal of eliminating employment discrimination. *Id.* at 1522. *See generally* A. RUZICHO, L. JACOBS & L. THRASHER, EMPLOYMENT DISCRIMINATION LITIGATION § 8.09 (1989)(discussing allocations of proof in disparate impact and disparate treatment theories); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1286-1326 (2d ed. 1983)(providing overview of allocations of proof in disparate treatment and disparate impact analysis).

24. *See Watson*, __ U.S. at __, 108 S. Ct. at 2788-91, 101 L. Ed. 2d at 844-48 (detailing three part framework of presentation of evidence in disparate impact cases); *Albemarle Paper*, 422 U.S. at 425 (establishing three part framework for allocation of proof in disparate impact cases); *McDonnell Douglas*, 411 U.S. at 800-05 (creating three part structure for allocation of proof in disparate treatment cases). *See generally* A. RUZICHO, L. JACOBS & L. THRASHER, EMPLOYMENT DISCRIMINATION LITIGATION § 8.09 (1989)(discussing three part allocation of proof in disparate treatment and disparate impact theories); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1286-1326 (2d ed. 1983)(providing overview of three part allocation of proof in disparate treatment and disparate analysis).

25. *See Watson*, __ U.S. at __, 108 S. Ct. at 2784, 101 L. Ed. 2d at 839 (plaintiff required to prove discriminatory intent of employer in disparate treatment cases); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)(plaintiff has ultimate burden of persuading court of intentional discrimination); *Teamsters*, 431 U.S. at 335 n.15 (showing discriminatory intent critical and may be inferred from fact of different treatment); *McDonnell Douglas*, 411 U.S. at 804 (discriminatory motive may be shown by employee in rebutting employer's business justification as pretext for intentional discrimination). In *Burdine*, a female employee of the State of Texas brought suit alleging intentional discrimination based on gen-

is considered the most easily understood discrimination.[26] Under disparate treatment theory, a plaintiff initially must establish a prima facie case of intentional discrimination.[27] Once established, the burden of production

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der. 450 U.S. at 250-51. After a vacancy appeared in a supervisory position, the plaintiff applied for the job. *Id.* at 250. Despite her qualifications and the absence of other applicants, the position remained open for six months and was eventually filled by a male from another division. *Id.* at 250-51. The plaintiff was fired from her lower level position and subsequently rehired into another division. *Id.* at 251. In vacating the lower court's opinion, the Supreme Court observed that a plaintiff's burden in establishing a prima facie case of intentional discrimination is proof by a preponderance of the evidence. *Id.* at 252-53. *See generally* Middleton, *Challenging Discriminatory Guesswork: Does Impact Analysis Apply?*, 42 OKLA. L. REV. 187, 191-200 (1989)(discussing methods of showing discriminatory intent in prima facie case under disparate treatment theory); Note, Watson v. Forth Worth Bank & Trust: *Reallocating The Burdens of Proof In Employment Discrimination Litigation*, 38 AM. U.L. REV. 919, 924-35 (1989)(outlining development of disparate treatment and disparate impact cases). Although less common than suits by individuals, disparate treatment may also be alleged by a class of individuals in what is referred to as pattern-or-practice suits. *See* Bazemore v. Friday, 478 U.S. 385, 391 (1986)(class of African American employees alleged pattern of practice of disparate treatment in pay by North Carolina Agricultural Extension Service); *see also Teamsters*, 431 U.S. at 337-39 (class of African American truck drivers alleged disparate treatment by union). For a discussion of disparate treatment class actions, see generally 2 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 50.21 (9)(1989 and Nov. 1989 Supp.); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1322-24 (2d ed. 1983).

26. *See* Watson v. Ft. Worth Bank & Trust, __ U.S. __, __, 108 S. Ct. 2777, 2784, 101 L. Ed. 2d 827, 839 (1988) (quoting *Teamsters*, 431 U.S. at 335 n.15)(disparate treatment discrimination easily understood); *see also* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 13-15 (2d ed. 1983)(quoting *Teamsters* and discussing requirements of proof in disparate treatment cases).

27. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). In *McDonnell Douglas*, the Court defined a four part model for a plaintiff to establish a prima facie case in disparate treatment theory. *Id.* Under the model, a plaintiff must prove: (1) membership in a protected group; (2) that he or she applied and was qualified for the position for which the employer was seeking applicants; (3) that he or she was rejected despite being qualified; and (4) that the position remained open after his or her rejection and the employer continued to seek applicants with qualifications equal to those of the plaintiff. *Id.* To prevent a narrow application of the model, the Court made clear that the standard was flexible and that it would be applied despite variations in factual settings. *Id.* at 802 n.13; *see also Burdine*, 450 U.S. at 252 n.5 (explaining framework provided by *McDonnell Douglas*); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 567-76 (1978)(discussing *McDonnell Douglas* and finding plaintiffs' prima facie case established despite absence of white applicants for job). In disparate treatment cases alleging intentional discrimination against a class of individuals, the plaintiffs may establish a prima facie case by a showing of statistical disparities between the makeup of the employer's workforce and the general population. *See* Bazemore v. Friday, 478 U.S. 385, 400-01 (1986)(statistical evidence may by supported by evidence of specific discrimination); Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977)(showing of gross statistical disparities alone may be sufficient for prima facie case of pattern-or-practice discrimination); International Bhd. of Teamsters v. United States, 431 U.S. 324, 337-39 (1977)(gross disparities between percentage of African Americans in workplace and percentage in general population, combined with showing of instances of individual discrimination, sufficient for prima facie

shifts to the defendant to deny the plaintiff's allegations by offering a legitimate, nondiscriminatory business justification for the particular employment decision.[28] Finally, the plaintiff still may prevail by demonstrating that the employer's justification constitutes mere pretext for discriminatory motives.[29] The ultimate burden of persuasion, however, remains with the plaintiff at all times.[30]

In contrast to disparate treatment theory, disparate impact theory does not consider intent and the courts apply disparate impact analysis when a class of individuals suffers the discriminatory effects of an employer's facially neutral hiring or promoting practices, whether those practices are objective

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case). *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1298-1324 (2d ed. 1983)(discussing prima facie case in disparate treatment and relevant case law).

28. *See Burdine*, 450 U.S. at 254-56 (discussing defendant's burden of proof and noting that defendant need not prove absence of discriminatory intent); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2 (1978)(employer's burden met by explaining actions or producing evidence of legitimate, nondiscriminatory reason for treatment); *Furnco Constr.*, 438 U.S. at 578 (employer need only articulate legitimate, nondiscriminatory reasons for plaintiff's rejection). A variety of legitimate nondiscriminatory reasons are recognized by the courts and may include: (1) an explanation that the person actually hired was more qualified than the plaintiff; (2) a poor attendance record on the part of the plaintiff; (3) an employer's professional judgment regarding the qualities of an employee exercised in good faith; and (4) the plaintiff's inability to work together with coworkers. *See* Middleton, *Challenging Discriminatory Guesswork: Does Impact Analysis Apply?*, 42 OKLA. L. REV. 187, 191 n.25 (1989)(observing that employer's nondiscriminatory reason include any reason sufficient to raise material issue of fact as to existence of discrimination). In disparate treatment cases involving the use of statistics, a prima facie case may be rebutted before it is established. *See Teamsters*, 431 U.S. at 339-40 (employer may defeat prima facie statistical evidence by showing it to be flawed, statistically insignificant, or that more appropriate comparisons do not indicate statistical significance); *see also* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1323 (2d ed. 1983)(defendant's use of statistics implicates plaintiff's statistical sources, geographic scope, time frame, and designation of weights).

29. *See Burdine*, 450 U.S. at 256 (discussing plaintiff's burden of showing pretext by direct or indirect means); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283-84 (1976)(plaintiff may show pretext by showing differential treatment of identically situated African American employee in reverse discrimination disparate treatment cases); *McDonnell Douglas*, 411 U.S. at 804-05 (plaintiff may show illegitimate motive predominated over proffered reason or undermine credibility of proffered reason). *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1313-22 (2d ed. 1983)(discussing plaintiff's proof of pretext); Middleton, *Challenging Discriminatory Guesswork: Does Impact Analysis Apply?*, 42 OKLA. L. REV. 187, 191 (1989)(plaintiff must be given opportunity to show defendant's reason mere pretext).

30. Watson v. Fort Worth Bank & Trust, __ U.S. __, __, 108 S. Ct. 2777, 2784, 101 L. Ed. 2d 827, 840 (1988)(quoting *Burdine*, 450 U.S. at 253); *see also* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983)(observing burden of persuasion remains with plaintiff in disparate treatment cases). For an overview of the burdens in disparate treatment cases, see generally A. RUZICHO, L. JACOBS & L. THRASHER, EMPLOYMENT DISCRIMINATION LITIGATION 319-28 (1989).

or subjective.[31] Under this theory of discrimination, a plaintiff must develop a prima facie case by use of statistical data to demonstrate disparities between the percentage of qualified protected persons in the jobs at issue and the percentage of qualified protected persons applying for those jobs.[32] The plaintiff must additionally prove that the disparities indicated in the prima facie case resulted from the employer's specific practices.[33] The burden of

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31. *See Watson*, __ U.S. at __, 108 S. Ct. at 2785-87, 101 L. Ed. 2d at 840-43 (describing disparate impact theory and extending application to subjective employment practices); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)(providing framework of analysis in disparate impact cases); Griggs v. Duke Power Co., 401 U.S. 424, 431-35 (1971)(articulating basis for application of disparate impact theory); *see also* Blumrosen, *Strangers In Paradise:* Griggs v. Duke Power Co. *And The Concept Of Employment Discrimination*, 71 MICH. L. REV. 59, 62 (1972)(discussing underlying assumption of disparate impact theory); Comment, *Applying Disparate Impact Theory To Subjective Employee Selection Procedures*, 20 LOY. L.A.L. REV. 375, 377 (1987)(no requirement of improper intent in challenging facially neutral employment practices under disparate impact theory); Comment, *When Doctrines Collide: Disparate Treatment, Disparate Impact, And* Watson v. Fort Worth Bank & Trust, 137 U. PA. L. REV. 1755, 1759 (1989)(disparate impact results of facially neutral practices that have adverse effect on members of protected class).

32. *See Watson*, __ U.S. at __, 108 S. Ct. at 2788, 101 L. Ed. 2d at 845 (aspect of plaintiff's prima facie case requires statistical disparities in employer's work force); New York City Transit Auth. v. Beazer, 440 U.S. 568, 585 (1979)(criticizing statistical data not including analysis of otherwise qualified job applicants); Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977)(plaintiff must establish defendant's practices resulted in substantially disproportionate exclusionary impact). *See generally* M. PLAYER, EMPLOYMENT DISCRIMINATION LAW 357-67 (student ed. 1988)(discussing plaintiff's prima facie case in disparate impact theory). Three types of statistical proof are available to plaintiffs in establishing a prima facie case of disparate impact: "general population" statistics, "applicant flow" data, and "available workforce" statistics. *See* Comment, *When Doctrines Collide: Disparate Treatment, Disparate Impact, and* Watson v. Fort Worth Bank & Trust, 137 U. PA. L. REV. 1755, 1760 (1989)(describing three types of statistical proof available to plaintiff in prima facie case). General population and available workforce statistics are similar in that they respectively compare the percentage of protected persons in the at-issue jobs to the availability of those persons in the population at large or the labor market in the relevant geographic region. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1333 (2d ed. 1983). Applicant flow data is based on the actual or potential flow of applicants for a particular position. *See id.* at 1348-52 (discussing actual and potential applicant flow data). If fallacies in a plaintiff's statistical data are discerned, they may be attacked by a defendant through the introduction of countervailing statistical evidence. *Beazer*, 440 U.S. at 584 n.25.

33. *See Watson*, __ U.S. at __, 108 S. Ct. at 2788, 101 L. Ed. 2d at 845 (plaintiff must identify employment practices and show causation); *Beazer*, 440 U.S. at 584 (employment practice shown by statistics to have effect of denial of opportunity); *Albemarle Paper*, 422 U.S. at 425 (plaintiffs must show questioned practices select applicants in disparate manner); *see also* A. LARSON, 3 EMPLOYMENT DISCRIMINATION § 76.33, at 15-97 (1989)(plaintiff must show causation after *Watson*); R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 109 (1990)(noting that plaintiff must prove that specific employment practices caused statistical disparities demonstrated). *But see* Wards Cove Packing Co. v. Antonio, __ U.S. __, __, 109 S. Ct. 2115, 2132, 104 L. Ed. 2d 733, 761 (1989)(Stevens, J., dissenting)(additional proof of causation unwarranted in disparate impact cases).

production then shifts to the defendant, who, admitting the plaintiff's prima facie case[34] must rebut it by demonstrating that the practices which have a discriminatory impact are justified as a business necessity.[35] The plaintiff, however, may still prevail upon showing that the defendant could use alternative employment practices that would result in a less disparate impact.[36] Thus, while disparate treatment and disparate impact theories are superficially similar in structure, the differing types of discrimination underlying the two theories[37] have led the courts to develop distinct allocations of the

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34. *See Watson*, __ U.S. at __, 108 S. Ct. at 2792, 101 L. Ed. 2d at 849 (Blackmun, J., dissenting)(defendant may only *prove* prima facie showing result of business necessity); *Dothard*, 433 U.S. at 329 (defendant must *prove* demonstrated discrimination result of job-related practices); *Albemarle Paper*, 422 U.S. at 425 (defendant, once prima facie case of discrimination established, must *prove* employment practices justified as job-related); *see also* Smith, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following* Texas Dep't of Community Affairs v. Burdine, 55 TEMP. L.Q. 372, 394 (1982)(defendant admits showing of discrimination *arguendo*); Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *And the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 85 (1972)(defendant may admit discrimination and argue good reasons for it).

35. *See* Watson v. Fort Worth Bank & Trust, __ U.S. __, 108 S. Ct. 2777, 2790-91, 101 L. Ed. 2d 827 847 (1988) (discussing development of standards for defining defendant's business justification defense); Connecticut v. Teal, 457 U.S. 440, 446 (1982)(quoting *Griggs*, 401 U.S. at 432 (1971))(defendant must show practices manifestly related to employment); *Griggs*, 401 U.S. at 431 (touchstone of employer defense is business necessity). *See generally* Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911, 927-34 (1979)(discussing theory of business necessity, legislative intent, and scope of defense); Comment, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 99-118 (1974)(discussing business necessity defense and proposing four part model for evaluation); Note, *Fair Employment Practices: The Concept of Business Necessity*, 3 MEM. ST. U.L. REV. 76, 82-91 (1972)(analyzing lower court treatment of business necessity as defined in *Griggs* and proposing alternative standard of "safety and efficiency").

36. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *see also Watson*, __ U.S. at __, 108 S. Ct. at 2790, 101 L. Ed. 2d at 847 (citing *Albemarle Paper*, 422 U.S. at 425)(asserting plaintiff must show alternatives). The alternatives, if successfully presented, function to reveal the defendant's justification as a pretext for discrimination. *Albemarle Paper*, 422 U.S. at 425. In presenting the alternatives, a plaintiff must consider the costs associated with an employer's implementation of the alternatives. *Watson*, __ U.S. at __, 108 S. Ct. at 2790, 101 L. Ed. 2d at 847. Additionally, the alternative employment practices must be as effective as those complained of in achieving the legitimate needs of the employer. *Id.* For a discussion of the plaintiff's showing of alternatives, see generally B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1330-31 (2d ed. 1983).

37. *See Watson*, __ U.S. at __, 108 S. Ct. at 2784-85, 101 L. Ed. 2d at 839-41 (noting differences between bases of disparate impact and disparate treatment theories of discrimination); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 581-82 (1978)(Marshall, J., concurring in part, dissenting in part)(discussing differing types of discrimination underlying disparate impact and disparate treatment theories); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)(disparate treatment theory based on intentional discrimination

burdens of proof.[38]

In developing disparate impact theory, the Supreme Court has not settled on the precise nature of the defendant's burden in rebutting a plaintiff's prima facie case of discrimination.[39] The Court first recognized disparate impact theory in the landmark decision of *Griggs v. Duke Power Co.*[40] While

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while disparate impact based on discrimination resulting from use of facially neutral employment practices); *see also* Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U.L. REV. 799, 800-01 (1985)(noting while basis of intentional discrimination under disparate impact theory "clear and intuitive," no clear theoretical framework explaining disparate impact); Comment, *When Doctrines Collide: Disparate Treatment, Disparate Impact, And* Watson v. Fort Worth Bank & Trust, 137 U. PA. L. REV. 1755, 1756 (1989)(substantial differences in theoretical underpinnings of disparate treatment and disparate impact).

38. *See Teamsters*, 431 U.S. at 335-36 n.15 (distinguishing disparate treatment and disparate impact theories of discrimination). *Compare Albemarle Paper*, 422 U.S. at 425 (describing allocation of proof in disparate impact theory and observing defendant has burden of *proving* practices are job related) *with* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973)(describing allocation of proof in disparate treatment theory and indicating defendant's burden in rebutting prima facie case one of production). *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1286-1331 (2d ed. 1983)(providing overview of judicial development of proof in disparate treatment and disparate impact cases); Note, Watson v. Fort Worth Bank & Trust: *Reallocating the Burdens of Proof in Employment Discrimination Litigation*, 38 AM. U.L. REV. 919, 925-35 (1989)(discussing Supreme Court decisions in development of disparate treatment and disparate impact theories of liability).

39. *Compare Watson*, __ U.S. at __, 108 S. Ct. at 2787, 101 L. Ed. 2d at 842-43 (1988)(plurality opinion)(defendant has burden of production in rebutting prima facie case in disparate impact cases) *and* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979)(mere showing of job relatedness sufficient to rebut prima facie case) *with* Dothard v. Rawlinson, 433 U.S. 321, 331 (1977)(defendant must prove challenged practices complained of related to employment) *and Albemarle Paper*, 422 U.S. at 425 (defendant employer has burden of proving that requirements be job related). A defendant rebuts a prima facie case by use of the business necessity defense, requiring a burden of persuasion. *See* M. PLAYER, EMPLOYMENT DISCRIMINATION LAW 356 (student ed. 1988)(defendant has burden of persuasion in business necessity defense). *But see* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1328 (2d ed. 1983)(question of appropriate burden for defendant in rebutting prima facie case unclear).

40. 401 U.S. 424 (1971). In *Griggs*, African American employees alleged that the company requirements of a high school diploma and successful completion of two standardized intelligence tests resulted in a disparate impact on their employment opportunities. *Id.* at 426-28. The Court found that Congress intended to remove all arbitrary, artificial, and unnecessary barriers to employment when it enacted title VII. *Id.* at 430. In finding the requirements unrelated to job performance, the Court emphasized both the concept of business necessity and congressional intent in enacting title VII. *Id.* at 431-32. Commentators have disagreed over the appropriateness of the Court's holding in *Griggs*. *Compare* Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 466-564, 457-63 (1985)(arguing at length that *Griggs* without basis in Congressional intent of title VII and poses threat of quotas) *with* Blumrosen, Griggs *Was Correctly Decided - A Response to Gold*, 8 INDUS. REL. L.J. 443, 443-44 (1986)(observing that courts apply statutory construction principles beyond explicit intent of Congress and fear of quotas unfounded in reality).

invoking congressional intent, the language of the *Griggs* majority did not clearly state the nature of the defendant's burden.[41] In the first major review of disparate impact theory following *Griggs*, the Court in *Albemarle Paper Co. v. Moody*[42] stated that the defendant's burden required proof of a legitimate business necessity for alleged discriminatory employment practices.[43] This language was substantially repeated in *Dothard v. Rawlinson*,[44] but in the absence of reliance on *Albemarle*, the Court did little to clarify the precise extent of the defendant's burden in rebutting the plaintiff's prima facie case.[45] More than ten years after *Dothard*, the Court attempted to clarify the issue when it extended disparate impact theory to include subjective as well as objective employment practices in *Watson v. Fort Worth Bank & Trust*.[46] In *Watson*, four Justices in a plurality opinion interpreted *Griggs* as implying that the defendant's burden is one of production only.[47] The plu-

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41. *See Griggs*, 401 U.S. at 432 (1971). The Court stated that Congress had placed a burden on the employer of "showing" a manifest relationship between the challenged practices and the employment in question. *Id.* The Court spoke also, however, of practices which were a "reasonable measure" of job performance. *Id.* at 436. Finally, the Court discussed with favor the guidelines of the EEOC in requiring the employer's practices to be "job related." *Id.*

42. 422 U.S. 405 (1975).

43. *Id.* at 425. The *Albemarle* Court reasoned that a prima facie case could be rebutted if an employer could prove the job-relatedness of a given practice. *Id.*; *see also* Note, Watson v. Fort Worth Bank & Trust: *Reallocating the Burdens of Proof In Employment Discrimination Litigation*, 38 AM. U.L. REV. 919, 932-34 (1989)(discussing *Albemarle* and implying limited insight provided by Court).

44. 433 U.S. 321 (1977).

45. *See id.* at 329. In *Dothard*, a female applicant to the Alabama Board of Corrections challenged the Board's height and weight requirements. *Id.* at 324. The Court quoted *Griggs*' language that an employer's requirement be manifestly related to the employee's job performance. *Id.* at 329. In finding that the defendant had failed to meet its burden of establishing a manifest relationship, the Court stated that the employer must *prove* that the challenged practices are job related. *Id.* at 329-31. Uncertainty over the appropriate burden continues to characterize the court's decisions. *See* Watson v. Fort Worth Bank & Trust, __ U.S. __, __, 108 S. Ct. 2777, 2790, 101 L. Ed. 2d 827, 847 (1988)(interpreting prima facie showing as shifting to defendant burden of production only). *But see id.* at __, 108 S. Ct. at 2792, 101 L. Ed. 2d at 849 (Blackmun, J., concurring)(previous cases establish burden of persuasion shifts to employer). *See generally* Note, Watson v. Fort Worth Bank & Trust: *Reallocating the Burdens of Proof In Employment Discrimination Litigation*, 38 AM. U.L. REV. 919, 934 (1989)(Court in *Dothard* provided little insight into issue of burden). *But see* Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C.L. REV. 419, 428 (1982)(*Dothard* established rigorous standard and mere assertion of relationship between requirement and performance insufficient).

46. __ U.S. __, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988).

47. *Id.* at __, 108 S. Ct. at 2790-91, 101 L. Ed. 2d at 847-48. The *Watson* plurality asserted that in the context of subjective criteria, the employer would find it easier to produce evidence of a manifest relationship between challenged practices and job performance. *Id.* at __, 108 S. Ct. at 2791, 101 L. Ed. 2d at 848. The plurality appeared to contradict itself,

rality's use of specific language defining the burden that shifts to the defendant in interpreting *Griggs* provided some guidance, yet in the absence of a majority voice, the issue remained unsettled.[48]

In *Wards Cove Packing Co. v. Atonio*,[49] a majority of the Supreme Court held that the appropriate burden for the defendant to rebut a plaintiff's prima facie case of discrimination under disparate impact theory is one of production; while the ultimate burden of persuasion remains with the plaintiff.[50] Apparently fearing an employer's use of racial quotas and the poten-

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however, when it referred to the "high standards of proof" required in disparate impact cases. These standards, the plurality reasoned, would satisfy employers and render needless the use of quota systems to avoid litigation. *Id.* For an analysis of *Watson* and its departures from disparate impact theory, see generally A. LARSON, 3 EMPLOYMENT DISCRIMINATION § 76.33, at 15-93 to -98 (1989)(identifying in *Watson* three major deviations from traditional disparate impact theory). For thorough discussions of *Watson* and its implications for disparate impact cases, see generally Comment, *When Doctrines Collide: Disparate Treatment, Disparate Impact, And* Watson v. Fort Worth Bank & Trust, 137 U. PA. L. REV. 1755, 1765-90 (1989)(concluding plurality failed to articulate differences between disparate treatment and disparate impact and thus improperly reallocated burdens of proof); Note, Watson v. Fort Worth Bank & Trust: *Reallocating the Burdens of Proof In Employment Discrimination Litigation*, 38 AM. U.L. REV. 919, 937-51 (1989)(concluding *Watson* plurality places impossible burden on plaintiffs in disparate impact cases).

48. *See Watson*, __ U.S. at __, 108 S. Ct. at 2790, 101 L. Ed. 2d at 847 (1988)(plurality opinion referring specifically to burden of *production* shifting to defendant in rebutting prima face case). The plurality in *Watson* was composed of Justice O'Connor, Chief Justice Rehnquist, Justice White, and Justice Scalia. *Id.* at __, 108 S. Ct. at 2787, 101 L. Ed. 2d at 837. Justice Kennedy did not participate in the decision. *Id.* at __, 108 S. Ct. at 2791, 101 L. Ed. 2d at 848.

49. __ U.S. __, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989).

50. *Id.* at __, 109 S. Ct. at 2126, 104 L. Ed. 2d at 753. The Court also held that the Court of Appeals for the Ninth Circuit had erred in finding that the plaintiffs had used the appropriate statistical measures. *Id.* at __, 109 S. Ct. at 2122, 104 L. Ed. 2d at 750. The Court observed that statistics showing disproportionate percentages of nonwhite workers in noncannery positions compared to those in cannery positions were alone insufficient to establish the respondent's prima facie case under disparate impact theory. The Court reasoned that the cannery job statistics were not indicative of the pool of qualified job applicants nor the qualified population in the labor force. Were it to hold otherwise, the Court explained, employers would be led to implement racial quotas in order to avoid litigation. *Id.* Furthermore, the Court declared such data irrelevant to any inquiry where there is no significance to statistical disparities between other appropriate measures. *Id.* at __, 109 S. Ct. at 2123, 104 L. Ed. 2d at 749. *See generally* W. CONNOLLY, D. PETERSON & M. CONNOLLY, USE OF STATISTICS IN EQUAL EMPLOYMENT OPPORTUNITY LITIGATION § 2.01 (1989)(comprehensive overview of use of statistics in prima facie case under disparate impact theory); P. BRANDIN & D. COPUS, IN DEFENSE OF THE PUBLIC EMPLOYER 147-50 (1988)(discussing statistics used in plaintiff's prima facie case). Additionally, the Court adopted the *Watson* plurality's expansion of the requirements of a prima facie case to include a showing of an element of causation. *Wards Cove*, __ U.S. at __, 109 S. Ct. at 2124, 104 L. Ed. 2d at 751 (1989). The Court held that, on remand, the respondents must prove the statistical disparities to have been caused by each of the challenged practices. *Id.* at __, 109 S. Ct. at 2125, 104 L. Ed. 2d at 752. The Court

tial difficulties in justifying subjective employment practices, the Court liberalized the requirements of the employer's business justification defense by rejecting the standard that the challenged practice be essential to the employee's job performance.[51]

The majority relied on the *Watson* plurality's statement that the ultimate burden of persuasion in a disparate impact case remains with the plaintiff at all times.[52] The Court reasoned that placing a burden of production on the defendant conformed with existing allocations of burdens in federal courts generally and specifically with similar allocations in disparate treatment cases.[53] The Court acknowledged that its previous decisions *could* be read as indicating that a defendant's burden was one of both production and persuasion.[54] Nevertheless, the majority stated that such reasoning was incorrect and that the earlier decisions *should* have been read to provide for a

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reasoned that such a requirement would not be unduly burdensome on the respondents due to the liberal discovery rules in federal court. The majority observed that employers are required to keep records disclosing the impact of employment practices under the provisions of the Uniform Guidelines on Employee Selection Procedures. *Id.* (citing 29 C.F.R. § 1607.4(A) (1988). *But see id.* at __, 109 S. Ct. at 2133 n.20, 104 L. Ed. 2d at 762 n.20 (Stevens, J., dissenting)(liberal discovery rules asserted as significant by majority have no bearing on respondents because undisputed that petitioners maintained no records pursuant to Guidelines); *see also id.* at __, 109 S. Ct. at 2125 n.10, 104 L. Ed. 2d at 752 n.10 (observing that 29 C.F.R. § 1602.14(b) specifically exempts from record-keeping requirements seasonal employers such as petitioners).

51. *See id.*, at __, 109 S. Ct. at 2125-26, 104 L. Ed. 2d at 752-53 (asserting business justification defense requires more than mere insubstantial justification but need not be essential or indispensable to business). The dissent criticized the majority's analysis of the business justification defense. *See id.* at __, 109 S. Ct. at 2132, 104 L. Ed. 2d at 760-61 (Stevens, J., dissenting)(quoting *Dothard v. Rawlingson*, 433 U.S. 321, 331 (1977))(prior cases place heavy burden on defendant and business justification must be essential to job performance). *But see* Note, *Fair Employment Practices: The Concept of Business Necessity*, 3 MEM. ST. U.L. REV. 76, 91 (1972)(concluding standard of necessity impossible for defendants to meet).

52. *Wards Cove*, __ U.S. at __, 109 S. Ct. at 2126, 104 L. Ed. 2d at 753.

53. *Id.* The Court cited Federal Rule of Evidence 301 in support of its proposition regarding allocations of proof in federal courts. Rule 301 states:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

FED. R. EVID 301. *But see Wards Cove*, __ U.S. at __, 109 S. Ct. at 2132 n.18, 104 L. Ed. 2d at 760-61 n.18 (Stevens J., dissenting)(federal rule 301 not substantive rule on burden of proof).

54. Wards Cove Packing Co. v. Atonio, __ U.S. __, __, 109 S. Ct. 2115, 2126, 104 L. Ed. 2d 733, 753 (1989). The court cited the plurality decision in *Watson* as its authority for this proposition. *Id.* As Justice Stevens observed in dissent, however, the *Watson* plurality relied on no authority at all for its proposition. *Id.* at __, 109 S. Ct. at 2132 n.18, 104 L. Ed. 2d at 760 n.18 (Stevens, J., dissenting).

shifting of the burden of production only.[55] Finally, the Court considered the language of title VII itself and drew from it the conclusion that the burden of persuasion must always remain with the plaintiff.[56]

The dissent, led by Justice Stevens, criticized the majority as judicial activists departing from the meaning and purpose of title VII.[57] Noting congressional intent as expressed in *Griggs*, Justice Stevens characterized the business necessity defense as affirmative in nature, thus requiring the burdens of both production and persuasion.[58] Justice Stevens reasoned that af-

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55. *Id.* at __, 109 S. Ct. at 2126, 104 L. Ed. 2d at 763.

56. *Id.* at __, 109 S. Ct. at 2124-26, 104 L. Ed. 2d at 752-53. The Court reasoned that the language of title VII, which forbids discrimination "because" of a person's race or other protected characteristic, placed upon a plaintiff the burden of proving throughout the trial that this status was the basis for the discrimination. *Id.*

57. *Id.* at __, 109 S. Ct. at 2127-28, 104 L. Ed. 2d at 755-56 (Stevens, J., dissenting). The dissent was also critical of the majority's requirement of specific causation in a plaintiff's prima facie case. *Id.* at __, 109 S. Ct. at 2132-33, 104 L. Ed. 2d at 761-62 (Stevens, J., dissenting). Justice Stevens reasoned that while a degree of causation is essential to a plaintiff's prima facie case in disparate impact theory, requiring the specific employment practice to be the sole reason for the demonstrated disparities violated ordinary principles of fairness. *Id.* The implications of this requirement for a plaintiff's prima facie showing can be seen in a discussion of *Green v. USX Corp.* 843 F.2d 1511 (3d Cir. 1988), *vacated and remanded*, __ U.S. __, 109 S. Ct. 3151, 104 L. Ed. 2d 1015 (1989). In *Green*, a class of adversely affected African Americans brought suit alleging that a steel producer's subjective hiring practices resulted in denials of employment for African American applicants. *Id.* at 1515-16. The defendant had applied twenty subjective criteria as an "amalgam" in making employment decisions. *Id.* at 1523. At trial, the plaintiffs identified the applicant interview, a single component of the employment process, as causing the disparate hiring results. The plaintiffs argued, however, that the defendant's entire process had caused the results. The Third Circuit nevertheless affirmed the district court's validation of the plaintiff's prima facie case. *Id.* Because the *Wards Cove* decision requires that all the practices complained of must each be specifically shown to have caused the disparate results, on remand, the plaintiffs in *Green* will now have to isolate all twenty subjective practices utilized by the defendants. *See Wards Cove*, __ U.S. at __, 109 S. Ct. at 2124-25, 104 L. Ed. 2d at 750-52 (1989)(establishing specific causation of all elements of employment process as necessary to prima facie case). The dissent also took issue with the majority's assertion that the statistical evidence put forth by the Respondents was of limited value. *See id.* at __, 109 S. Ct. at 2127-28, 104 L. Ed. 2d at 755-56 (probative value of racial stratification in work force underestimated by majority). The dissent analyzed at length the particular facts of the case and concluded that, although the Respondents' data was insufficient by itself to establish a prima facie case, evidence of a racially stratified work place should be treated as a significant element of such a case. *Id.* at __, 109 S. Ct. at 2133-36, 104 L. Ed. 2d at 762-65.

58. *See id.* at __, 109 S. Ct. at 2131, 104 L. Ed. 2d at 760 (Stevens, J., dissenting)(business justification "classic" example of affirmative defense). Justice Stevens found support for this position in the allocation of burdens utilized in price discrimination suits. *Id.* at __, 109 S. Ct. at 2131 n.17, 104 L. Ed. 2d at 760 n.17. In such suits, Justice Stevens observed, a defendant must rebut a prima facie case of price discrimination as either a cost justification or an effort, in good faith, to match the equally low prices of a competitor. *Id.* (citing United States v. Borden Co. 370 U.S. 460, 476 (1962) and Standard Oil Co. v. FTC, 340 U.S. 231, 250 (1951)).

ter a plaintiff establishes a prima facie showing of discriminatory effect similar to a showing of injury in an ordinary civil trial, a defendant can escape liability only by persuading the trier of fact that the act was justifiable or excusable.[59] Justice Stevens distinguished the allocation of burdens in disparate treatment cases by emphasizing the intentional nature of the discrimination involved.[60] Observing the methods available to a plaintiff to establish a prima facie case of intentional discrimination, Justice Stevens reasoned that a burden of production was appropriate in affording the defendant an opportunity to rebut the plaintiff's evidence.[61] Justice Stevens observed, however, that in disparate impact cases the only recourse available to a defendant, once the plaintiff establishes a prima facie case of discrimination, is to justify the demonstrated disparities by explaining that the business practices are necessary to successful performance.[62] The dissent, thereby, criticized the majority for neglecting to explore the interplay between the differing allocations of proof in disparate treatment and disparate impact theories.[63] Additionally, Justice Stevens criticized the majority's characterization of the business justification defense as existing somewhere along a continuum between essential to the business and a "mere insubstantial justification."[64] Justice Stevens stated that the majority had rejected a consistent statutory construction of congressional intent.[65] Finally, Justice Stevens observed that Congress had ample opportunity to amend title VII in the event that the Court's previous rulings had misconstrued congressional intent.[66]

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59. *Id.* at __, 109 S. Ct. at 2131, 104 L. Ed. 2d at 760 (Stevens, J., dissenting).

60. *Id.*

61. *Id.* at __, 109 S. Ct. at 2132, 104 L. Ed. 2d at 760-61 (Stevens, J., dissenting).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* Justice Stevens relied on *Griggs*' use of the term necessity and the holding in *Dothard* that job requirements be essential to effective performance. *Id.*

66. *Id.* Justice Stevens acknowledged the doctrine of precedent in remarking that, had he believed the Court's prior decisions misconstrued congressional intent, he would nevertheless dissent from the majority insofar as the statutory construction found in prior holdings had been consistent with one another. *Id.* Additional support for Justice Stevens' observations regarding congressional intent is to be found in legislation introduced in the United State Senate which directly addresses the majority decision in *Wards Cove*. *See* S. 2104, 101st Cong., 2d. Sess. §§ 3-5 (1990)(restoring pre-*Wards Cove* disparate impact analysis). The legislation, entitled the Civil Rights Act of 1990, amends title VII by defining the term "demonstrates" as meaning the burden of production and persuasion. *Id.* §§ 1, 3(1)(m). Additionally, the business necessity defense is defined as requiring a showing that a practice be "essential to effective job performance." *Id.* § 3(o). Under the proposed Act, a plaintiff need not demonstrate that its protected status was the sole motivating factor for the alleged discrimination. *Id.* § 5(a)(1). The legislation enjoys widespread support in both the House of Representatives and the Senate. *See* H.R. 4000, 101st Cong., 2d Sess. (1990)(listing 123 U.S. Representatives as co-sponsors); S. 2104, 101st Cong., 2d Sess. (1990)(listing 34 U.S. Senators as co-sponsors).

Justice Blackmun, in a separate dissent, stated that the plurality opinion in *Watson* providing for a burden of production for the defendant, had now become law and that as such the majority had rejected a longstanding allocation of burdens of proof in disparate impact cases.[67] Justice Blackmun concluded by questioning the majority's continuing belief in the existence of racial discrimination against nonwhites in American society.[68]

The Supreme Court's decision in *Wards Cove* has allocated the burden of proof in a way which allows defendants to easily defeat demonstrated instances of discrimination brought under title VII disparate impact theory.[69]

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67. Wards Cove Packing Co. v. Atonio, __ U.S. __, __, 109 S. Ct. 2115, 2136, 104 L. Ed. 2d 733, 754 (1989) (Blackmun, J., dissenting).

68. *Id.* Justice Blackmun cited the Court's recent decision in *City of Richmond v. J. A. Croson Co.* for the proposition that the Court neglected to recognize the existence of racial discrimination against nonwhites. *See* City of Richmond v. J. A. Croson Co., __ U.S. __, __ 109 S. Ct. 706, 717, 102 L. Ed. 2d 854, 877 (1989)(holding benign racial classifications require narrow tailoring to achieve compelling governmental interest). The *Croson* case involved a plan, known as a "set-aside," adopted by the city of Richmond which required all prime contractors awarded city construction contracts to subcontract at least 30 percent of the total workload to minority owned businesses. *Id.* at __, 109 S. Ct. at 712-13, 102 L. Ed. 2d at 871. In applying strict scrutiny to find the plan in violation of the fourteenth amendment, the Court rejected the use of evidence of societal discrimination as a sole basis for justifying the enactment of a minority set-aside plan. *Id.* at __, 109 S. Ct. at 723, 102 L. Ed. 2d at 885. For a discussion of the Court's holding in *Croson*, see Note, *Constitutional Law - Equal Protection - Benign Classifications Based on Race Must be Narrowly Tailored to Achieve a Compelling Governmental Interest*, 21 ST. MARY'S L.J. 493, 503-10 (1989)(concluding Court reached correct decision in applying strict scrutiny).

69. *See Wards Cove*, __ U.S. at __, 109 S. Ct. at 2132-33, 104 L. Ed. 2d at 761-62, (Stevens J., dissenting)(majority's holding allows defendants to easily defeat disparate impact cases); *id.* at __, 109 S. Ct. at 2136, 104 L. Ed. 2d at 755, (Blackmun, J., dissenting)(discriminatory practices "immunized" by majority's holding and defendants will easily prevail); A. LARSON, 3 EMPLOYMENT DISCRIMINATION § 76.33, at 15-100.1 (1989)(Court's opinion will render plaintiff's case difficult if not impossible). Professor Larson recognized that the majority's decision in *Wards Cove* was an affirmation of the plurality decision in *Watson v. Fort Worth Bank & Trust*. 3 A. LARSON, EMPLOYMENT DISCRIMINATION § 76.33 at 15-98 (1989); *see also* Watson v. Fort Worth Bank & Trust, __ U.S. __, __, 108 S. Ct. 2777, 2788-90, 101 L. Ed. 2d 827, 845-47 (1988)(plurality opinion)(in prima facie case plaintiff must identify specific practices complained of and show causal connection between such practices, while defendant may rebut by meeting burden of production only). 3 A. LARSON, EMPLOYMENT DISCRIMINATION § 76.33, at 15-98 (1989). In his analysis of the *Watson* plurality decision, Professor Larson concludes that the new approach adopted by the *Wards Cove* Court damages a plaintiff's prospects in three respects: (1) the additional requirement of causation in the prima facie case requires a plaintiff to show more than discriminatory impact, namely, that such impact was the specific result of identified practices; (2) the defendant's burden in rebutting the plaintiff's case has been reduced to a burden of production; and (3) the concept of a business justification is defined as requiring only a valid purpose serving the business. *Id.* at 15-97 to -98. Professor Larson observes that the Court's holding in *Wards Cove* is based on a pragmatic response to the extension in *Watson* of disparate impact theory to subjective employment practices. *Id.* at 15-100.1. While Larson agrees with the Court's result as it applies

In justifying this outcome,[70] the Court declined to emphasize, for example, the inherent difficulties plaintiffs face as a result of their lack of economic resources and access to relevant data.[71] Meanwhile, justification of subjective employment practices does not pose great difficulties for defendants[72]

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to disparate impact cases involving subjective employment practices, he reasons that the decision is overreaching insofar as it applies to cases involving objective employment practices. *Id.* at 15-100.1. *But see* R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 108-09 (1990)(implicitly approving of reallocation of burdens as applied to both objective and subjective employment practices); Blumrosen, *The 1989 Supreme Court Rulings Concerning Employment Discrimination and Affirmative Action: A Minefield for Employers and a Gold Mine for Their Lawyers*, 15 EMPLOYEE REL. L.J. 175, 176 (1989)(*Wards Cove* decision contrary to interests of the employers). Professor Blumrosen observes that several "hidden traps" for employers are to be found in *Wards Cove*. *Id.* He notes that the Court made reference to an employer's duty to keep records. *Id.* at 177. In the event that these records are not kept, Professor Blumrosen suggests that courts may appropriately draw adverse inferences therefrom. Additionally, Professor Blumrosen emphasizes the Court's refusal to reject the EEOC's Uniform Guidelines for selection processes. *Id.* Thus, Professor Blumrosen notes, validation of challenged practices under the Guidelines will still be required of employers. *Id.* at 178. Furthermore, Professor Blumrosen continues, plaintiffs will tend to have little difficulty in offering alternatives to employers' business justifications. These alternatives, including employers warning their supervisors not to discriminate, periodic analysis of records to identify developing problems, and upper-level review of supervisory decisions, would effectively decrease the discriminatory impact of existing practices and result in few additional costs. Finally, implementation of such practices, Professor Blumrosen argues, would not entail any restructuring of basic aspects of the employment decision-making process. *Id.*

70. *See Wards Cove*, __ U.S. at __, 109 S. Ct. at 2122-25, 104 L. Ed. 2d at 748-52 (citing as justifications for diminished burden on employer fear of use of quotas, expensive and time-consuming litigation, and liberal discovery rules available to plaintiffs).

71. *See* S. REP. NO. 415, 92d Cong., 1st Sess. 4 (1972)(observing that plaintiffs' disadvantaged economic position major reason for title VII and that costs of litigation often preclude plaintiffs from instituting action); *see also* Segar v. Smith, 738 F.2d 1249, 1271 (D.C. Cir. 1984)(noting superior position of employers to relevant data), *cert. denied sub nom.* Meese v. Segar, 471 U.S. 1115 (1985); Rose, *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 SAN DIEGO L. REV. 63, 91-92 (1988)(discussing difficulties encountered by plaintiffs when relevant data not available). *But see Wards Cove*, __ U.S. at __, 109 S. Ct. at 2125, 104 L. Ed. 2d at 752 (requirements for maintaining records coupled with discovery rules sufficient to afford plaintiffs ability to carry burden).

72. *See* Wards Cove Packing Co. v. Atonio, __ U.S. __, __, 109 S. Ct. 2115, 2126, 104 L. Ed. 2d 733 753 (1989) (diminishing requirements for business justification defense under disparate impact theory); *Watson*, __ U.S. at __, 108 S. Ct. at 2791, 101 L. Ed. 2d at 848 (employer's ability to establish a manifest relationship of subjective criteria to job easier in subjective practices cases than objective cases). The plurality in *Watson* observed the "self-evident" nature of many employment positions requiring personal qualities not subject to quantitative evaluation. *Id.* The plurality also stated the idea that courts are generally in a less favorable position than employers in restructuring employment practices. *Id.* (quoting Furnco Constr. Corp. v. Waters, 348 U.S. 567, 578 (1978)). One commentator has observed that this deferential standard relied upon by the *Watson* plurality, in discussing the ease of justifying subjective practices, is a function of the elitist nature of the judiciary. *See* Bartholet, *Application of Title VII to Jobs in*

because employers have insight into relevant job-related information and are more economically advantaged than plaintiffs.[73] Additionally, because of the liberalization of the business justification defense, employers will not have to use racial quotas to avoid disparate impact litigation.[74] Conscien-

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Higher Places, 95 HARV. L. REV. 947, 978-80 (1982)(observing tendency of judges to defer to employers in prestigious jobs). Professor Bartholet observes that judges identify with upper level employers and defer to their decisions. *Id.* at 979. This deference stems from benefits judges have enjoyed from selection systems similar to those which characterize upper level jobs. Thus, judges are faced with passing decision on "their own world." This operates to the benefit of upper level employers, yet, observes Professor Bartholet, a similar benefit does not accrue to lower level employers. *Id.* In analyzing lower level employment subjective employment systems, Bartholet states, judges cannot exercise an expertise they do not possess. *Id.* at 979-80. Additionally, Bartholet reasons that the distance between judges and lower level jobs, or "blue collar jobs," permits judges to weigh the social cost of discrimination against the demands for traditional employment systems. Bartholet notes, however, that while judges easily envision alternatives to discrimination in lower level jobs, because they are hindered by their identification with upper level employees, judges do not readily see alternatives. *Id.* at 980. Professor Bartholet concludes by recommending that judges distance themselves and reject "common sense" justifications by requiring strict evidentiary justification. *Id.*; *see also* Comment, *Applying Disparate Impact Theory to Subjective Employee Selection Procedures*, 20 LOY. L.A.L. REV. 375, 405 (1987)(observing that employer may easily explain subjective employment practices in disparate treatment cases); Note, Watson v. Fort Worth Bank & Trust: *Reallocating the Burdens of Proof in Employment Discrimination Litigation*, 38 AM. U.L. REV. 919, 947 (1989)(noting that employer will be able to articulate a business justification defense under mere burden of production in disparate impact cases). *But see* 3 A. LARSON EMPLOYMENT DISCRIMINATION § 76.34 (1977)(discussing difficulties facing employer in validating subjective criteria); Comment, *Evaluation of Subjective Selection Systems in title VII Employment Discrimination Cases: A Misuse of Disparate Impact Analysis*, 7 CARDOZO L. REV. 549, 579 (1986)(extremely difficult for employers to justify subjective criteria).

73. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 359-60 n.45 (1977)(asserting employer in superior position to explain denial of employment); Segar v. Smith, 738 F.2d 1249, 1271 (D.C. Cir. 1984), *cert. denied sub nom.* Meese v. Segar, 471 U.S. 1115 (1985)(recognizing advantages to employer in attaining information); *see also* Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1486 (9th Cir.)(en banc), *returned to panel*, 827 F.2d 429 (9th Cir. 1987), *vacated and remanded*, __ U.S. __, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989)(proof of business necessity not onerous for subjective practices in relation to objective practices); Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. PITT. L. REV. 555, 605 n.147 (1985)(noting title VII cases like "David and Goliath").

74. *See Wards Cove*, __ U.S. at __, 109 S. Ct. at 2126, 104 L. Ed. 2d at 753 (business justification not "essential" but more than insubstantial); Comment, *Disparate Impact and Subjective Employment Criteria under Title VII*, 54 U. CHI. L. REV. 957, 977 (1987)(arguing that even under strict liability view of disparate impact, employer not faced with option of quotas). *But see Wards Cove*, __ U.S. at __, 109 S. Ct. at 2132, 104 L. Ed. 2d at 760-61 (Stevens, J., dissenting)(prior decisions indicate "weighty" burden in business justification defense); Watson v. Fort Worth Bank & Trust, __ U.S. __, __, 108 S. Ct. 2777, 2793-94, 101 L. Ed. 2d 827, 851-52 (1988)(Blackmun, J., concurring)(observing requirement for business necessity is manifest relationship and job-relatedness standard). *See generally* Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV.

tious employers who expend considerable resources to develop complex hiring and promotional practices can implement structural safeguards to ensure such practices do not result in a disparate impact on any protected group in society.[75] Furthermore, the additional element of causation in a plaintiff's prima facie case combined with limitations placed on the types of statistical evidence used by disparate impact plaintiffs, contributes to the justifications for placing burdens of both production and persuasion on the defendant.[76] Thus, proving a business necessity defense does not present an undue burden to a defendant.[77]

911, 911-934 (1979)(analysis of business justification defense concluding that less stringent standard than that espoused by prior decisions should apply).

75. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 201-05 (2d ed. 1983)(discussing successful methods recognized by major study as effective job appraisal methods for subjective criteria). Professors Schlei and Grossman indicate a number of options an employer may implement to ensure that subjective practices do not have a discriminatory effect on current or prospective employees. Among these options are: (1) the use of objective guidelines for individual evaluators of employees; (2) the assignment of weights to factors considered in evaluation; (3) the experience of the evaluator in the field applied for; (4) written instructions for evaluators to follow; and (5) allowing personal interviews with applicants to review evaluations. *Id. See generally* 3 A. LARSON, EMPLOYMENT DISCRIMINATION § 76.35, at 15-104.8 (1989)(suggesting four methods employers may use to minimize discrimination from subjective procedures); Blumrosen, *The 1989 Supreme Court Rulings Concerning Employment Discrimination and Affirmative Action: A Minefield for Employers and a Gold Mine for Their Lawyers*, 15 EMPLOYEE REL. L.J. 175, 178 (1989)(suggesting methods to diminish disparate impact of challenged practices).

76. *See Wards Cove*, __ U.S. at __, 109 S. Ct. at 2124-25, 104 L. Ed. 2d at 751-52 (holding additional requirement of showing of specific causation for plaintiff's prima facie case); *see also* 3 A. LARSON, EMPLOYMENT DISCRIMINATION § 76.33, at 15-97 (1977)(concluding plaintiff faces more difficult task in part due to increased requirements of prima facie case). *But see Wards Cove*, __ U.S. at __, 109 S. Ct. at 2132-33, 733 L. Ed. 2d at 761-62 (Stevens, J., dissenting)(additional requirements for prima facie case "unwarranted" and unfair). Justice Stevens compared the plaintiff's prima facie case in a disparate impact claim to a prima facie case in an ordinary civil trial and observed that the plaintiff must demonstrate that the element of causation has some relationship to the injury. *Id.* at __, 109 S. Ct. at 2132, 104 L. Ed. 2d at 761. However, the element of causation, Justice Stevens stated, need not be the sole cause of the injury. *Id.* Justice Stevens found support for his position in the *amicus curiae* brief filed on behalf of the defendants by the Solicitor General's office. *Id.* at __, 109 S. Ct. 2132 n.19, 104 L. Ed. 2d at 761 n.19. This brief observed that the impossibility of challenging a multiple factor selection process resulting in a single employment decision would make a challenge to the entire process appropriate. *Id.*

77. *See Watson*, __ U.S. at __, 108 S. Ct. at 2791, 101 L. Ed. 2d at 848 (1988)(employer faces no undue burden in business justification defense); *Atonio*, 810 F.2d at 1486. *But see* Note, *Fair Employment Practices: The Concept of Business Necessity*, 3 MEM. ST. U.L. REV. 76, 91 (1972)(business necessity defense poses almost impossible task). The author argues that the business necessity defense, requiring a showing of job relatedness, poses an unfair and unworkable rule when employers are faced with validating practices not closely related to individual job performance. *Id.* at 88. The author proposes an alternative test of business necessity based upon a standard of safety and efficiency. This standard, the author reasons,

Furthermore, the majority has rejected longstanding precedent by analyzing the Court's prior cases as providing for a burden of production for the defendant.[78] Conceptually, the use of business justification is similar to an affirmative defense, involving confession and avoidance.[79] Once established, a plaintiff's prima facie case under disparate impact theory provides a clear indication of discrimination which a defendant may only avoid, not deny.[80] The dissent correctly pointed out that such a characterization comports with common law pleading principles.[81] Additionally, the language employed by

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allows greater flexibility in balancing the practical needs of an employer against the social interests of equality in employment opportunity. *Id.* The author suggests that employment practices such as seniority systems, apprenticeship programs, and use of applicants' arrest records may be validated under this standard despite the lack of sufficient relationship to individual performance under the job-relatedness test. *Id.* at 89. Additionally, the author reasons that a common sense understanding of business necessity, focusing on an employer's profit-making goals, supports a safety and efficiency standard. *Id.* In 1979, the Supreme Court appeared to adopt a hybrid test in upholding a New York City hiring practice excluding methadone treatment patients. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979)(requirement job-related because significantly served goals of safety and efficiency).

78. Wards Cove Packing Co. v. Atonio, __ U.S. __, __, 109 S. Ct. 2115, 2127, 104 L. Ed. 2d 733, 755-56 (1989)(Stevens, J., dissenting); *see also* Watson v. Fort Worth Bank & Trust, __ U.S. __, __, 108 S. Ct. 2777, 2795-97, 101 L. Ed. 2d 827, 853-56 (1988)(Blackmun, J., concurring)(placing burden of production on defendant contrary to precedent); *see also* Note, Watson v. Fort Worth Bank & Trust: *Reallocating the Burdens of Proof in Employment Discrimination Litigation*, 38 AM. U.L. REV. 919, 945-46 (1989)(reallocation of burden of production to employer inconsistent with case law).

79. *Wards Cove*, __ U.S. at __, 109 S. Ct. at 2131, 104 L. Ed. 2d at 760 (Stevens, J., dissenting). *See* Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 85 (1972)(rebuttal of prima facie case in disparate impact by confession and avoidance); Smith, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following* Texas Department of Community Affairs v. Burdine, 55 TEMP. L.Q. 372, 394, (1982)(defendant may confess and avoid prima facie case in disparate impact); *see also* Note, Watson v. Fort Worth Bank & Trust: *Reallocating the Burdens of Proof in Employment Discrimination Litigation*, 38 AM. U.L. REV. 919, 945-46 (1989)(defendant admits discrimination and attempts to justify it in disparate impact theory).

80. *See Wards Cove*, __ U.S. at __, 109 S. Ct. at 2131, 104 L. Ed. 2d at 760 (Stevens, J., dissenting)(defendant escapes liability in disparate impact by justifying, not denying, prima facie case); *see also* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977)(defendant may only justify discrimination shown in prima facie case); Albemarle Paper Co. v. Moody, 422 U.S. 405, 430-32 (1975)(defendant may justify discrimination by proving practices job-related); Note, Watson v. Fort Worth Bank & Trust: *Reallocating the Burdens of Proof in Employment Discrimination Litigation*, 38 AM. U.L. REV. 919, 945-46 (1989)(defendant does not deny but rather justifies discrimination).

81. *Wards Cove*, __ U.S. at __, 109 S. Ct. at 2130-31, 104 L. Ed. 2d at 759 (Stevens, J., dissenting). Justice Stevens compared the disparate impact situation to that of an ordinary civil trial. *Id.* at __, 109 S. Ct. at 2131, 104 L. Ed. 2d at 759 (Stevens, J., dissenting). He concluded by reasoning that the prima facie case, like a showing of a harmful act in tort, cannot be denied by a defendant but rather can only be explained or justified. *Id.* Generally,

the majority and in the Court's previous decisions indicated that a defendant's mere articulation of a justification will not suffice to rebut a prima facie case.[82] Thus, that an employer must do more than merely articulate a justification for its practices, combined with the observation that in so justifying the practices it is admitting the discrimination and not denying it, the defendant's burden in rebutting a prima facie case of disparate impact is one of both production and persuasion.[83]

By defining the burden that shifts to a defendant under disparate impact theory as one of production, the Supreme Court has established a structure which will tend to perpetuate employment practices neutral on their face but discriminatory in their application. Employers will encounter little difficulty in meeting their burden of production to rebut a plaintiff's prima facie case. Furthermore, the ease with which an employer may now prevail creates a disincentive for persons unjustly discriminated against to seek recourse for the effects of those practices under title VII. Perhaps more significantly, the Court's apparent willingness to readily reject longstanding precedent in the

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the party who pleads a fact has the burden of proving it. J. WEINSTEIN, J. MANSFIELD, N. ABRAMS & M. BERGER, EVIDENCE, CASES AND MATERIALS 1070 (1983); C. MCCORMICK, MCCORMICK ON EVIDENCE 337 (3d ed. 1984). Dean McCormick observes that policy reasons often lead courts to disfavor certain claims by placing the burden of proving a defense on the party asserting it. C. MCCORMICK, MCCORMICK ON EVIDENCE § 337 (3d ed. 1984). *See generally* B. JONES, JONES ON EVIDENCE, CIVIL CASES §§ 1781-80 (1912)(discussing form of pleadings and burdens in civil cases). Jones observes that although pleadings generally control the allocations of burdens in the civil trial, an exception exists in certain situations where a defendant will assume the burden of proof once a plaintiff establishes a prima facie case. *Id.* § 179. Additionally, a burden of proof may rest on a party who has particularized knowledge in an area which is the basis of an assertion. 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2486 (1981). *See generally id.* §§ 2485-2489 (discussing allocation of evidentiary burdens between parties in civil suits).

82. *See Wards Cove*, __ U.S. at __, 109 S. Ct. at 2125-26, 104 L. Ed. 2d at 752-53 (business justification must show practice serves employment goal in "significant" manner and requires "reasoned review" of justification); *Dothard*, 433 U.S. at 329 (defendant must prove job relatedness); *Albemarle*, 422 U.S. at 431-32 (defendant must prove challenged practices job-related); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)(defendant must show manifest relationship to employment needs).

83. *See Wards Cove*, __ U.S. at __, 109 S. Ct. at 2132, 104 L. Ed. 2d at 761 (Stevens, J., dissenting)(defendant has burden of proof, not production alone); Watson v. Fort Worth Bank & Trust, __ U.S. __, __, 108 S. Ct. 2777, 2794-97, 101 L. Ed. 2d 827, 853-56 (1988)(Blackmun, J., concurring)(defendant must prove business necessity and as such burden of production insufficient); *see also* Smith, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following* Texas Department of Community Affairs v. Burdine, 55 TEMP. L.Q. 372, 394 (1982)(defendant in disparate impact has burden of persuasion). *But see* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1325 (2d ed. 1983)(issue of appropriate burden in business justification defense unsettled).

absence of significant justification implicates the continuing vitality of *Griggs* and the principles of social equality it represents.

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