Proving Indirect Discrimination in U.S. Employment Discrimination Law.

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Prepared for Academy of European Law (ERA)
Program on the EC Anti-Discrimination Directives
September 29-30, 2008
Trier, Germany

I. Under the primary U.S. statute prohibiting employment discrimination, policies or practices that are neutral on their face, and were adopted without a discriminatory intent, are nonetheless prohibited (subject to certain affirmative defenses) if they have a discriminatory effect.

A. Establishing Case Law.
Griggs v. Duke Power Co., 401 US 424 (1971):
"The objective of Congress in the enactment of Title VII [of the 1964 Civil Rights Act] is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices. * * * The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. * * * [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

B. Shifts in the Case Law.
Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989):
Wards Cove altered the *Griggs* standard in three ways. It made it more difficult for a plaintiff to prove a prima facie case of unintentional discrimination; it altered the burden of proof so that it remained with the plaintiff, and it permitted the employer to justify its practices, regardless of

the discriminatory impact, if there was a reasonable business purpose for the practice.

C. Congress Repudiates the Court.

Civil Rights Restoration Act of 1991; 42 United States Code section 2000e-2(k):

Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if–

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; . . . .

D. Examples of Employment Practices Disallowed Under the Civil Rights Act.

1. *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (employer's use of height and weight restrictions for employment of prison guards disproportionately affected female applicants, in violation of Civil Rights Act.

2. *Connecticut v. Teal*, 457 U.S. 440 (1982) (employer's use of written employment test eliminated disproportionate share of black employees, in violation of Civil Rights Act).

3. *DeClue v. Central Illinois Light Co.*, 223 F.3d 434 (7th Cir. 2000) (employer's policy of not having bathrooms disproportionately affected female employees, in violation of Civil Rights Act).

4. *United States v. City of Warren, Michigan*, 138 F.3d 1083 (6th Cir. 1998) (suburban city with predominantly white population restricted employment to city residents in violation of Civil Rights Act).

II. Limited Availability of *Griggs* "Adverse Impact" Doctrine in Proving Discrimination: Although the *Griggs* doctrine permits proof of discrimination without proof of intent, in practice it has been limited to cases involving large numbers of employees where statistical proof of discrimination is available. In cases involving a single hiring decision (or even a small group of decisions), U.S. courts have been reluctant to apply the Griggs doctrine. Given judicial skepticism and the high cost of litigation based on statistical proof, disparate impact cases have been very difficult for plaintiffs to win. See, Michael Selmi, *Was the Disparate Impact Theory A Mistake?* 53 UCLA Law Rev. 71 (2006). And, in individual "disparate treatment" cases, proof of discriminatory intent is required (although it can be established by circumstantial evidence).

III. Limitation to Statutory Actions: the *Griggs* "adverse impact" method of proving discrimination is limited to violations of the Civil Rights Act, and does not apply to violations of the equality provision of the United States Constitution. See:

1. *Washington v. Davis*, 426 U.S. 229 (1976) (an employment test administered by the city of Washington D.C. that resulted in an adverse impact on black applicants for police officer jobs did not violate the Constitutional right to equal protection of the laws);

2. Personnel Administrator v. Feeney, 442 U.S. 256 (1979) (Massachusetts employment preference for veterans had an adverse impact on women applying for state jobs, and the Legislature may have been aware of the likely impact in adopting the preference, but knowledge is not intent, and unless the Legislature intended to disadvantage women there is no violation of the Constitutional right to equal protection of the laws).

IV. Commentary.

Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 William & Mary Law Rev. 911 (2005); Julie Chi-Hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. Illinois Law Rev. 405 (2006); Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved With Good Intentions? – Stuck on State of Mind in Antidiscrimination Law*, 42 Wake Forest Law Rev. 1141 (2007).

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