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Disparate Impact Claims Under the New Title VII

*Michael Carvin**

My topic today focuses on the rebuttal burden that an employer bears in responding to a disparate impact claim under Title VII of the Civil Rights Act of 1991 ("1991 Act"). What were the issues in terms of this disparate impact claim that Congress, apart from the decisions it already made in 1964, had to grapple with in 1991? The basic outline of the debate was that the Bush Administration took the position that there was an inherent tension between the notion of prohibiting disparate impact, an employer engaging in acts with a disproportionate impact, and our desire to avoid quota hiring in the workforce. The civil rights groups responded by saying that these were the fanciful wanderings of ideological-straight-white-male-republican-millionaires. Well, I guess I am all of those except the last.

As one who was creating these fantasies about what problems would occur if Congress had followed the disparate impact position taken by Senator Kennedy and the civil rights groups, I would like to examine exactly what this public policy debate entails. I will analyze how a disparate impact claim would work if the position of Senator Kennedy and the civil rights groups had prevailed. First, what is a disparate impact claim? What does it mean to prohibit a disparate impact? As I stated earlier, in its purest sense—without some kind of defense for the employer, it is a government mandate for proportional quotas. It is a command by the government requiring employers to hire all groups in proportion to their availability in the area. If an employer's hiring practices result in a disparate impact on a particular group (*i.e.*, a group is not hired in proportion to its availability) and Congress makes that illegal, Congress obviously is requiring employers to hire all groups in proportion. For example, an employment test has a disproportion-

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ate impact if the top one hundred people who pass the test are hired, thirty of the top one hundred test takers are black, and the hiring area is the District of Columbia which has a black population of sixty-five percent. Only thirty percent of the people hired are black; yet the area is sixty-five percent black. Therefore, a pure disparate impact standard, which requires that an employment practice cannot have a disparate impact, would require an employer in the District of Columbia to hire sixty-five blacks. In essence, it would require employers to engage in proportional quota hiring.

I think that everyone agrees that, therefore, we must create an escape hatch for employers. An employer must be able to offer a business justification for not hiring the sixty-five black persons. Thus, the key question became how stringent should this business justification be? If it is impossible or unbelievably costly for an employer to justify the disparate impact, the government essentially is mandating quotas. For example, if a test for ditch diggers requires an employer to predict who the chief executive officer is going to be in twenty years, which is impossible to do, the employer essentially is required to engage in quota hiring. On the other hand, as the civil rights groups pointed out, if the employer's burden is too weak, the employer perhaps then could select tests for the purpose of excluding minorities. For example, the employer could create a test that required a prospective ditch digger to conjugate irregular Latin verbs in order to get a ditch digger's job. Such a test would be very stupid, and we certainly would suspect that the employer had a bad purpose. In addition, an employer might ignore a test that better served his needs and that had a less disparate impact. We do not want to allow employers to forego better tests that have a less disparate impact. We want practices that are fair to the aspirations of minority groups.

So how did *Wards Cove Packing Co. v. Atonio* resolve this dilemma? Basically, the Court in *Wards Cove* established a two-fold test. First, does the employer's selection practice significantly serve his legitimate business purposes? If the practice does, the Court certainly will not require him to do something that harms his legitimate business purposes. In addition, from the applicant's perspective, a minority applicant would have no reason to complain. If that applicant is less qualified pursuant to a standard that significantly serves a legitimate business purpose, the applicant will not contribute as much to the employer's workforce as would the applicant's nonminority competitors. As a result, a minority plain-

tiff has not been disserved in any way in that context. The Court also gave minority plaintiffs a second opportunity to prevail. A minority plaintiff can still win if the plaintiff develops a test that is just as good in terms of fulfilling the employer's business purposes but has less of a disparate impact. If the employer actually is acting in an arbitrary, irrational, or even discriminatory way, the plaintiff will be able to produce a better test by looking to a similar employer or industry. If the plaintiff can produce a better test, the plaintiff wins.

The *Wards Cove* opinion led to some of the more unbelievable rhetoric among the civil rights community that I have ever heard. The civil rights community claimed that the *Wards Cove* opinion "was a resurrection of Jim Crow," and that "it cast plaintiffs into the darkness; plaintiffs who were just trying to bring a simple case." After reading the opinion, however, one simply cannot believe the division between the rhetoric used to describe this case and the reality of what it held.

With that context, we can now examine the alternative offered by the civil rights groups. The Bush Administration argued that this alternative would lead to quotas, which civil rights groups dismissed as "playing the race card" and the grossest sort of racial politics. They said that this was gross racial politics because there was simply no way that restoring their understanding of the *Griggs* standard could lead an employer to hire on a quota basis. Under the alternative of the civil rights groups, in order for an employer to justify nonproportional hiring, the employer had to prove by objective evidence that his selection practices were required by business necessity. In other words, an employer is excused from hiring by quotas only if the selection practice is necessary to his business. The alternative of the civil rights groups was a little more specific in defining business necessity. Under their alternative, business necessity includes employment practices that are *essential* to successful job performance. If the employer considers something that is not *essential* to successful job performance, he is guilty of employment discrimination. Without analyzing the vagaries of Title VII law, I think it is pretty obvious that this alternative would mandate, in the *real* world, hiring by quota. Put yourself in the shoes of the employer who is confronted with a claim that he has not racially balanced his workforce. The employer, in response, must justify his actions, but the employer faces many practical and conceptual problems in trying to meet this burden. First, to show that an attribute is essential to the successful job perfor-

mance, the employer must define what successful job performance is—this step is a lot harder than one might think. For example, what is a successful lawyer? Is it somebody who makes a lot of money? If so, then Thurgood Marshall would not have been a successful lawyer. Thus, just determining what attributes an employer is looking for in his employees is a tough enough problem, but the real problem is requiring that employers only test for essential attributes.

The alternative proposed by the civil rights groups would say that employers can look only at the essential attributes. First, virtually nothing is *essential* to job performance, anybody who goes to law school knows that a law degree is not essential to good performance as a lawyer. Neither Abraham Lincoln nor Clarence Darrow had a law degree. More important, when you apply for a job, no employer says, "Do you have the essential qualifications for this job?;" "Do you have the minimum qualifications?;" or "I am for hiring for Cravath, Swaine & Moore, oh, you have a Brooklyn law degree? Fine, here is your office." Employers do not ask questions about *essential* qualifications; instead, they engage in a comparison of *relative* qualifications. There are 8 million people with the essential qualifications to be a lawyer, let alone a civil service employee or a fire fighter, the essential requirement for which is being vertical. But that is not how people make decisions because it means that an employer can consider only the minimum qualifications for the job. Employers can exclude only those applicants who do not have the minimal qualifications. After excluding that group—those that can not be vertical, the employer must hire on the basis of race because he is precluded from engaging in a relative determination of the merits of the individual applicants. The civil rights community was outraged when people suggested that this standard might lead to quota hiring.

As I stated earlier, civil rights groups were outraged when others suggested that their "essential to job performance" alternative might lead to race conscious hiring in the employment arena. The opposing sides of the debate over the 1991 Act embarked on a Byzantine discussion of how one actually would articulate a standard for determining the employer's justification, keeping in mind the competing considerations discussed earlier. Mr. Schnapper said that it is impossible to articulate such a standard. I disagree. Articulating a standard was not impossible because of language limitations, but because both sides were proceeding from opposite premises. However, Congress finally did pass a bill.

Of course, the big question is, who won this debate? How was this debate ultimately resolved in terms of identifying the employer's justification? A preliminary point is, that another aspect of *Wards Cove* put only the burden of production on the employer. In other words, an employer only had to articulate a nondiscriminatory reason for his disparate practices. In the 1991 Act, Congress clearly and unequivocally said that the employer now has the burden of production and persuasion. In other words, it is his alternate burden to prove to the court that his business justification is proper. The significance of that burden should be determined on what standard the employer has to show. This standard was the object of a great debate between the Bush Administration and the Kennedy forces.

The opposing sides turned to the Americans with Disabilities Act ("ADA"), even though this Act has nothing to do with racial discrimination for the answer. Congress clipped the following phrase from the ADA, "if the employer shows that the challenged practice is job related to the position in question, and consistent with business necessity, then the practice is justified," and inserted it into the 1991 Act. In my view, notwithstanding the reports that came out in the wake of this compromise, this was a significant victory for the Bush Administration. This standard preserves the essential aspects of *Wards Cove* in terms of a substantive standard—the language Congress chose to define the employer's burdens—and in terms of the purposes clause—the manner in which Congress treated *Wards Cove*. As I stated earlier, Congress often fudges an act's language and its purposes when it cannot develop a clear standard that will not alienate anyone, and then lets the courts resolve controversial issues.

Here again, Congress punted. The problem was—to mix my sports metaphors—the ball was in Kennedy's court. Ambiguity would not work this time because the *Wards Cove* decision was out there, and it was the law of the United States. Thus, if Congress were ambiguous about what the law was, and did not use words like overrule, the *Wards Cove* opinion would still be good law, and the Bush Administration would win this debate. Thus, by first examining the language of the 1991 Act and then analyzing the Act's legislative history and purposes, I think that *Wards Cove* is still the law today on the issue of what constitutes a sufficient justification.

Again, the language of the statute is "job related for the position in question and consistent with business necessity." This lan-

guage is a conjunctive; the employer has two obligations to meet. To justify a challenged practice despite its disparate impact, the defendant must show both that it is "job related for the position in question *and* consistent with business necessity." Despite the conjunctive between the two clauses, however, it is difficult to imagine what the second requirement adds to the first.

First, and most important, the second prong mandates only that a practice be "*consistent with*" business necessity. In contrast, the 1990 version of the bill, vetoed by President Bush, ordered that the employer "demonstrate that such practice is *required by* business necessity. The 1990 version of the Act thus would have, indeed, imposed a most onerous requirement on employers: that they demonstrate that selection practices are essential to their business needs. The enacted version, however substantially liberalized this requirement. It mandates only that selection practices be compatible with business necessity—however that term is defined. The challenged procedure need not be an essential method, or the best means, of accomplishing identified needs. The practice simply has to be connected with, associated with, or related to business necessity, which is not a particularly demanding standard.

In any event, whatever the proper meaning and scope of the phrases "consistent with" and "business necessity," both terms should be essentially irrelevant to future Title VII litigation. This is because selection *practices* must in all cases be "job related for the position in question." If a practice is job related, it is, by definition, *consistent with* business necessity. I cannot conceive of a practice that is job related but is nonetheless inconsistent with an employer's business purposes—even necessary business purposes. A device that seriously measures a skill or attribute that is job related simply cannot be inconsistent with the employer's necessity of hiring on the basis of merit. Accordingly, while the general rule is that statutes should not be construed so as to render any part superfluous, it clearly seems that the only operative provision of the new Act is the requirement that practices be "job related for the position in question." Thus, as Mr. Schnapper even suggested, the second half of the standard is not really the substantive element that will get a lot of attention in case law.

The standard that will get the attention is "job related for the position in question." Taking the "fuddy duddy" approach to statutory interpretation, the question is what does this language mean if we tried to figure it out by going to a dictionary. It is certainly a standard that is no more onerous, I submit, than *Wards Cove*.

The standard, however, does require you to consider the hiring criteria in light of the particular job in question. For instance, an employer cannot look at a job an applicant might have twenty years in the future, *i.e.*, testing for a vice-president when the person is applying for a sales position. But as to that particular position, however, the statute simply requires the employer to measure something related to the job. Again, "related to" is an extraordinarily expansive term which gives the employer a lot of discretion. The language only requires that it is connected with the job or associated with the job. In terms of the things that were animating this debate, it seems to me that, unlike the standard in the 1990 version of the bill and the standard rejected by the *Wards Cove* Court, the statute does not say that what the employer tests for has to be essential or important to the job; it does not have to be the most important thing for the job. Specifically, under a plain language analysis, a selection device need not be the best measure of a job to be "connected" or "related" to the job. Nor need it measure any skill that is essential or even particularly important to the job. Skills that are relatively unimportant for a particular job are nonetheless related to that job. Equally important, a selection device need not be related to job *performance* as such. There are many characteristics of employees—their relationships with fellow employees and supervisors, drug use, or how well one trains another—that are related to a job, even if they are not directly relevant to job performance. It may be one of those things that, in the aggregate, makes somebody a little better qualified than another, but by itself is not the important part of the job.

An employer, under a plain-meaning analysis of "related" or "connected," can consider these types of factors because they are related to the job even though they are not the central part of the job. That was the real focus of the debate between the Kennedy and Bush Administration forces. The Kennedy forces only wanted to consider knowledge, skills, and abilities that were essential to the job. This had really been the course of Title VII law in the EEOC and with some lower courts during the 1970s and 1980s. Under that interpretation, employers had a very difficult burden.

The plain-meaning also does not require the employer to focus only on characteristics that relate to job performance. Again, this was the centerpiece of the debate. The Kennedy forces argued that an employer cannot look at legitimate purposes, but he can only look at job performance. Therefore, job performance was the

essential constraint that the Kennedy forces wanted to place on the employer's hiring and promotion decisions.

However, many factors relate to the job, but do not impact job performance directly. For example, if partners in a law firm were deciding to whom they would offer a partnership position, they would not make an offer to an admiralty lawyer, even if she were the best admiralty lawyer in the world, if the firm did not have any need for an admiralty lawyer. On the other hand, the firm could have an associate who could not find his way out of his office, but his best friend is general counsel at Westinghouse and sends the firm \$ 5 million a year in legal fees. Even though that associate cannot perform his job, the firm has a strong, legitimate business purpose in maximizing firm profits, for making him a partner. Obviously, one considers these factors because they are related to the job. The Bush Administration and Kennedy forces debated a whole list of these types of issues, and it seems to me that the words "related to the job" could clearly encompass them. For example, an employer could consider an employee's relationship with his supervisor; the employee's absentee rate; whether or not the employee engages in drug use, even if it is not affecting that individual's job performance. Thus, it seems that this notion of job relatedness does encompass the broader question of whether one can consider the employer's legitimate business purposes. Job relatedness, in the 1991 Act, does not encompass validation studies or the other tests developed by the administrative agencies, particularly the EEOC, which demonstrate that showing "job relatedness" is virtually impossible because these statistical studies are incredibly difficult to develop. None of that is incorporated, codified, or referenced in the 1991 Act or in the legislative history.

I have just set forth an analysis of what the words in the 1991 Act mean. A valid response, however, is that the term "job related" might well be a term of art that had some meaning in the Title VII world or that the Supreme Court had discussed, and Congress had that meaning in mind when it used this term. Thus, the term "job related" carries all the meanings incorporated in prior Supreme Court opinions that discussed the meaning of job relatedness. Indeed, Congress specifically addresses these prior Supreme Court opinions in the purposes clause of the statute and defines the term "job related" based on those Supreme Court opinions. In the statute, Congress says that the terms "job related" and "business necessity" are intended to codify the meaning given to those

terms in *Griggs v. Duke Power Co.* and the other Supreme Court decisions prior to *Wards Cove*.

Unfortunately, this definition simply avoids the question of what these terms mean. Congress just punted. The whole debate between the supporters and opponents of the 1991 Act was exactly what the Supreme Court meant by the phrase "job related" prior to the *Wards Cove* decision and whether *Wards Cove* faithfully reflected that understanding. The 1991 Act's supporters argued that the Supreme Court's prior Title VII precedent, primarily relying on *Griggs*, held that selection devices be "required by business necessity," or some similar formulation, and that *Wards Cove* constituted a dramatic relaxation of that standard. Opponents of the Act, in contrast, argued that Title VII case law, in particular *New York Transit Authority v. Beazer*, *Watson v. Fort Worth Bank & Trust*, and *Washington v. Davis*, simply required that a selection device bear a demonstrable relationship to job performance or some business purpose and that *Wards Cove* merely adopted and applied this well established principle. As noted, the purposes clause did not purport to resolve this debate. In addition, the 1991 Act, by its terms, prevents either side from putting its gloss on the meaning of Title VII case law through legislative history.

How did they resolve this question of the meaning of these two entirely different views of what job relatedness meant in the opinions prior to *Wards Cove*? Well, in the purposes section, Congress essentially said that what job related meant in the prior opinions is what job related meant in the prior opinions. Congress refers one back to these opinions, but does not resolve the debate. This reminds me of the arguments that I used to have with my mother. "It means what I said it means, and do not ask me any further questions." Thus, Congress simply did not resolve the question that had animated this two-year debate. In short, the opposing sides of the 1991 Act debate simply agreed to disagree about what substantive standard guided pre-*Wards Cove* case law and the extent to which *Wards Cove* was faithful to that standard.

I certainly recognize that this language, codifying all the opinions prior to *Wards Cove*, indicates some disfavor with *Wards Cove*. I mean, *Wards Cove* is lonely; everybody else has been codified. That one opinion is sitting out there uncoded. However, I just do not think that vague distaste for an opinion overrules it. Furthermore, the opinion in *Wards Cove* itself meant to adopt the reasoning in the prior opinions as to the meaning of job relatedness. The Court did not say that it was departing from all these stupid opin-

ions, but instead said that it was codifying them. The Court did not say it was interrupting them, but that its holding was well established. Thus, in the next case, when the Court is next asked to determine the meaning of job relatedness in the opinions prior to *Wards Cove*, the Supreme Court presumably will say what it said it was in *Wards Cove*. "Nobody told us to change the law, we were not lying in *Wards Cove*. We were telling the truth, and we will tell you the truth again. It means what we said it meant." Therefore, in my view, the statute's failure to resolve this debate necessarily means that *Wards Cove's* understanding of "job related" and "business necessity" must still be the governing law of the land. In that decision, a majority of the Supreme Court set forth its good faith understanding of the substantive requirements of Title VII concerning job relatedness. There is no hint in the opinion that its understanding of this concept marked a departure from prior case law or that *Wards Cove* otherwise overruled previous decisions. To the contrary, the opinion quoted extensively from prior Supreme Court Title VII decisions and purported to simply apply the understanding of the job relatedness and business necessity established in those cases.

Since *Wards Cove* was simply an interpretation and application of Supreme Court decisions prior to *Wards Cove*, rather than a departure from those cases, the Act's codification of the concepts embodied in those pre-*Wards Cove* cases provides no basis for the Supreme Court to depart from *Wards Cove*. Rather, a majority of the Supreme Court in future cases should, and presumably will, do precisely what a majority of the court did in *Wards Cove*—interpret pre-existing Title VII case law in the same manner as it interpreted that law in the *Wards Cove* opinion.

Certainly nothing in the 1991 Civil Rights Act requires or indicates that the Court should do otherwise. In order to amend the requirements of a statute "erroneously" interpreted by a Supreme Court decision, Congress must either set forth its own substantive standard in language which, normally understood, departs from the standard created by the Court's opinion, or at a minimum, must explicitly state that it is overruling the disfavored opinion. While the vetoed 1990 version of the Civil Rights Act plainly did both these things, the 1991 version enacted into law plainly did neither.

In the 1990 version of the Act, the one former President Bush vetoed, Congress actually used the word, overruled. Congress said the purpose of this Act is to incorporate job relatedness as

used in *Griggs*, and to overrule the meaning given to it in *Wards Cove*. That provision was unacceptable to the Bush Administration, and so the bill ultimately enacted includes the provision, quoted above, stating that one purpose of the Act is to codify the concept of business necessity enunciated by the Supreme Court in *Griggs* and in the other Supreme Court decisions prior to *Wards Cove*. Thus, the version of the Act ultimately enacted deletes the provision expressly overruling *Wards Cove* and substitutes a statement which simply incorporates pre-*Wards Cove* case law. Accordingly, interpreting the 1991 Act to overrule *Wards Cove* would render this revision meaningless. This would run afoul of the statutory construction principle that changes in language between proposed and enacted bills should be deemed to have meaning.

To be sure, disparate impact case law prior to *Wards Cove* was not entirely consistent, and both supporters and opponents of the 1990 bill could point to phrases from Supreme Court decisions supporting their understanding of the job-related requirement. The relevant point, however, is that the Supreme Court decision in *Wards Cove* interpreted the Court's prior opinions in a manner displeasing to the 1990 Act's supporters. It was therefore incumbent upon them to reverse that decision. The Act, however, neither states that *Wards Cove* is overturned nor creates new substantive language which, naturally understood, differs from the analysis contained in *Wards Cove*. Rather, the Act uses substantive language which, on its face, is certainly no more onerous on employers than the standard adopted in *Wards Cove* and states that this language should be interpreted consistent with the very Supreme Court decisions analyzed in *Wards Cove*.

If we assume that Congress did overturn *Wards Cove* and look at the broader purposes and spirits animating the statute, the Court is still presented with an insolvable dilemma. We know that Congress did not like the *Wards Cove* view of job related, but what should the Court use in future cases? Mr. Schnapper said it is impossible to come up with a standard. Even if the Court could come up with one, what exactly are they supposed to use? In future cases, the Court should not and presumably will not suggest that its interpretation of these decisions in *Wards Cove* was disingenuous or intellectually dishonest. And even were the Court inclined to do so, the Act and its legislative history provide no guidance on what understanding of the pre-*Wards Cove* case law should be adopted in its stead. They cannot look at the prior opinions because they have already looked at those. Presumably, they can-

not look at the bill Kennedy introduced, or the 1990 Act because, of course, they would be enacting a bill that was vetoed and thus would change the one that was actually enacted. The Court should not be in the business of creating statutes which cannot be enacted through the democratic law-making process. The Court cannot retreat to the version of the 1990 Act. Even if we assume that this congressional frown is somehow determinative of Congress' attitude to *Wards Cove*, Congress nonetheless has failed to provide the Court with an alternative standard or to tell them how to use the case law to determine the meaning of job relatedness.

This brings us back to where we started this discussion. The question in interpreting the 1991 Act—determining its effect on *Wards Cove*—will depend largely on whether or not courts will interpret laws to mean what the law says or whether they will write laws for Congress that Congress did not have the wit or the will to write for itself. The reader here probably can guess where I stand on the issue. I think that Congress failed in its constitutional duty. It did not say what it meant, and it did not resolve for us the fundamental public policy questions of the day. The Supreme Court exceeds its authority when it writes a law for Congress. The Court certainly exceeds its authority when it overrules a clear writing of Congress, as it did in *Steelworkers v. Weber*. The Court also exceeds its authority if it penalizes private actors for their conduct by erecting a standard of conduct that Congress was either unwilling or unable to establish. If you cannot find the law in the United States Code or in the legislative history (actually, under this Act, one is prohibited from looking at the legislative history), it would be unfair and utterly improper for the Court to erect such a standard. The Court should insist that if Congress wants to write a law, it must write that law. This requirement has the constitutional virtue of leaving the law-making power in the legislative branch. It also has the democratic virtue of giving the citizens some notion of where its elected representatives actually stand on the issues, without allowing them to obfuscate and obscure the issues. If that method of analysis is followed in terms of interpreting the *Wards Cove* standard and the 1991 Act, *Wards Cove* will remain the law.