Wards Cove Packing Co. v. Atonio, **490 U.S. 642 (1989)**

By

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In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the U.S. Supreme Court gave guidance on what type of statistical analysis is relevant to prove discrimination. This guidance has been relied upon to establish whether an affirmative action plan is justified to remedy the effects of discrimination. The opinion also made other significant holdings concerning the burden of proof in discrimination cases. The Civil Rights Act of 1991 was passed in part to overrule the part of the *Wards Cove* opinion concerning burden of proof. The case involved a situation where white employees occupied almost all of the skilled noncannery jobs at a seven canneries in Alaska. The non-skilled jobs were filled largely by minority workers (Filipinos, Alaskan Natives, and others). The non-skilled workers claimed that the racial imbalance in the workforce constituted discrimination in violation of title VII.

Ward's Cove is significant in the development of employment discrimination law in at least three respects. The first involves the interpretation of statistical evidence. The case involved a situation where minorities comprised more than half of the employer's unskilled positions, but less than 20 percent of its skilled positions. Justice Byron White's majority opinion squarely rejected the plaintiffs' effort to establish a prima facie case of disparate impact based on such comparison,[[1]] finding that plaintiffs could establish a claim of exclusion from the skilled jobs only by comparing the racial composition of employees in those jobs with the racial composition of the qualified labor market for those jobs.[[2]] This principle is still followed in establishing a basis for affirmative action measures to remedy the effects of past discrimination.

The second and best known development in *Wards Cove* involves the Court's interpretation of the burden of proof with respect to the business justification for a practice

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[1] Both before and after *Wards Cove*, I have treated the problematic analysis of discrimination claims that solely examine persons experiencing certain outcome rather than the entire universe of persons seeking a desired outcome. See *Illusions of Job Segregation*, *Public Interest* (Fall 1988); *Are Bias Statistics Nonsense?*, Legal Times (Apr. 17, 1989); *Indiscriminate Reading of Statistics Can 'Prove' Bias Where None Exists*, Manhattan Lawyer (Apr. 24, 1989); Unlucky Stores: Are They All Guilty of Discrimination?, San Francisco Daily Journal (Jan. 29, 1993); Multimillion-Dollar Settlements May Cause Employers to Avoid Hiring Women and Minorities for Less Desirable Jobs to Improve the Statistical Picture," National Law Journal (Mar. 27, 1995); *Women Employees' Case against Publix, Built on Wrong Data, Doesn't Compute*, Miami Daily Business Review (Aug. 2, 1996); *Statistical Proof of Discrimination*," Affirmative Action, An Encyclopedia (James A. Beckman ed.) Greenwood Press (2004); *Fair Lending Studies Paint Incomplete Picture*, American Banker (April 24, 2013); "The Mismeasure of Discrimination," Faculty Workshop at University of Kansas School of Law (Sept. 21, 2013).

[2] Reasons why the analysis of discrimination claims based on comparison of the proportion a protected group comprises of the qualified pool for a job and the proportion it comprises of persons securing the job are problematic are discussed in Section C of "Mismeasure of Discrimination," cited in note 1 supra.

causing a disparate impact and the strength of the justification in terms of importance to the employer's business needs. For approximately two decades preceding the *Wards Cove* decision, both in the Supreme Court and lower courts, the burden of establishing the justification had been placed on the defendant. For approximately the same length of time, the justification had been phrased in terms of "business necessity," with the courts of appeals' universally describing that standard as a quite stringent one, though with dicta in the Court's own opinions being somewhat interpretable.

In *Ward's Cove*, the Court placed the burden of proof as to whether there was sufficient justification squarely on the plaintiffs. This seemed a clear reversal of precedent. The Court also cast the justification standard as relatively modest. In noted that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." It went on to observe that "a mere insubstantial justification in this regard will not suffice, because such a low standard would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices," but concluded that "there is no requirement that the challenged practice be 'essential' or 'indispensable." This ruling was arguably contrary to the Court's own earlier rulings and was certainly contrary to consistent authority among the courts of appeals. Indeed, aspects of the opinion suggested that the Court was on its way to redefining the disparate impact theory into a mere means of proving intentional discrimination.

In any event, these aspects of the decision evoked much criticism and that criticism provided a significant part of the impetus for the Civil Rights Act of 1991. Among other things, that act placed the burden of justifying a practice causing a disparate impact again on the employer. The act also cast the justification standard in terms of a demonstration that "the challenged practice is job-related and consistent with business necessity." Legislative history was created to indicate that these terms were to be interpreted in light of pre-*Wards Cove* decisions. Since the Court in *Wards Cove* was maintaining that it was merely interpreting existing law, the implications of the reference to pre-*Wards Cove* decisions remains unclear.

The third significant aspect of the *Wards Cove* decision involves a curious evolution of some casual language in an early Supreme Court opinion and an unusually incongruous result arising from that evolution. Early in the development of the disparate impact theory, the courts of appeals reasoned that if there existed a less discriminatory alternative to a challenged practice, the practice could not be essential to an employer's business and hence could not satisfy the business necessity standard. Those courts had generally placed the burden of demonstrating the absence of such an alternative on the employer. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), however, the Supreme Court placed the burden of showing the existence of a less discriminatory alternative on the plaintiff. Having done so, the Court went on to observe that the existence of the alternative "would be evidence that the employer was using its [practices] as a 'pretext' for discrimination." Critics of the observation argue that while the existence of the alternative might well show that a practice was not justified under a stringent standard, it would do little to suggest that the practice was being employed for the purpose of discrimination. More likely, the employer did not know about the alternative, did not agree that it equally served is purposes, or simply preferred the selection procedure it had employed.

In *Wards Cove*, Justice White, relying on *Albemarle,* found that "if plaintiffs come forward with alternatives to the petitioner's hiring practices and that reduce the racially-disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons." The addition of the element whereby the employer refused to adopt the alternative after its utility was shown in court might have provided a better basis for inferring that the existing practice was a pretext for discrimination than would the simple demonstration that such a practice existed, but the formula set out by the Justice White's opinion created the anomalous, and perhaps unprecedented, situation in which the employer's liability would turn on events occurring after trial. Nevertheless, in its effort to address the *Wards Cove* decision in the Civil Rights Act of 1991, Congress, apparently without discussing the issue, carried over the failure of the employer to adopt the remedy alternative as an element of establishing liability on the basis the existence of a less discriminatory alternative employment practice and confirmed that it is the plaintiff's burden to demonstrate the existence of an alternative employment practice. The post-*Wards Cove* burden of proof rule is now codified at 42 U.S.C. § 2000e-2(j).[[3]]

See also [in this Encyclopedia] *Albemarle Paper Co. v. Moody;* Civil Rights Act of 1991; Discrimination; Disparate Treatment are and Disparate Impact; *Griggs v. Duke Power Co.*; Statistical Proof of Discrimination; Supreme Court and Affirmative Action; Title VII of the Civil Rights Act of 1964; White, Byron Raymond; *Yick Wo v. Hopkins*.

FURTHER READING: Davidson, Michael, 1992, "The Civil Rights Act of 1991," *Army Law* 1992 (March):3-11; Player, Mark, 1989, "Is *Griggs* Dead? Reflecting (Fearfully) on *Wards Cove Packing Co. v. Atonio*," *Florida State Law Review* 17 (winter):11-47)

[3] I treat this anomaly at length in "Slip-Up on Civil Rights Bill," *Legal Times*, Dec. 11, 1991. See also the Less Discriminatory Alternative - Procedural subpage of the Disparate Impact page of jpscanlan.com.