NAACP v. Town of Harrison: Applying Title VII Disparate Impact Analysis to Municipal Residency Requirements

James C. King

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NAACP v. TOWN OF HARRISON: APPLYING TITLE VII DISPARATE IMPACT ANALYSIS TO MUNICIPAL RESIDENCY REQUIREMENTS

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discriminatory employment practices based on race, color, religion, sex or national origin. Title VII prohibits intentionally discriminatory employment practices as well as practices that are facially neutral but discriminatory in operation. Courts have developed two theories of employer liability under Title VII: “disparate treatment” and “disparate impact.” Courts apply disparate treatment analysis to claims of intentional employment discrimination, and disparate impact analysis to facially neutral but discriminatory employment practices. A plaintiff

2. Id. Title VII provides in pertinent part:
   (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
   (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.
4. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (addressing claim made by black civil rights activist that employment discharge was racially motivated and violated Title VII), vacating 463 F.2d 337 (8th Cir. 1972); Griggs, 401 U.S. 424 (analyzing black employee’s Title VII challenge to employer’s requirement of high school education or passing of intelligence tests as prerequisite for employment or transfer to other positions).

(409)
may premise an employment discrimination claim under either or both theories of liability, and a court may use either theory in arriving at its decision.6

In *NAACP v. Town of Harrison*,7 the United States Court of Appeals for the Third Circuit reviewed a New Jersey district court finding of employment discrimination under the disparate impact theory of liability.8 The plaintiffs, the Newark, New Jersey branch of the National Assoc-

see Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 252-55 (1981) (addressing female employee’s Title VII claim of employment termination based on gender discrimination); *see also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (contending in Title VII suit that employer conducted pattern of discrimination against blacks and Spanish-surnamed persons); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 303-13 (1977) (alleging that Hazelwood, Missouri school district violated Title VII by engaging in “pattern or practice” of teacher employment discrimination); *McDonnell Douglas*, 411 U.S. at 805 n.18. In *Teamsters*, the Court stated: “‘Disparate treatment’... is the most easily understood type of discrimination. ... Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.” For a discussion of the disparate treatment theory of liability, see *infra* notes 30-37 and accompanying text.

Employment practices that do not have a discriminatory motive but are functionally equivalent to intentional discrimination are analyzed under the “disparate impact” theory of liability. For the development of this theory, see *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 646-61 (1989) (addressing disparate impact claim of nonwhite cannery workers that salmon packing company’s facially neutral hiring practices produced racial stratification in workplace and denied noncannery positions based on race); *see also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986-1000 (1988) (applying disparate impact analysis to subjective promotion system in suit by black employee denied promotion in favor of white applicants); Connecticut v. Teal, 457 U.S. 440, 446-56 (1982) (considering black state employees’ claim of disparate impact resulting from requirement that employees pass neutral written examination before promotion); Dothard v. Rawlinson, 433 U.S. 321, 328-37 (1977) (addressing claim of disparate impact by female denied position as prison guard for failing to meet height and weight requirements); *Teamsters*, 431 U.S. at 328-37 (discussing application of disparate impact theory to practices that perpetuate effects of prior discrimination); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 136-37 (1976) (alleging disparate impact in class action based on employer’s neutral disability plan that did not include pregnancy as insurable disability); Washington v. Davis, 426 U.S. 229, 246-47 (1976) (considering disparate impact claim made by two blacks rejected for positions as police officers because of allegedly discriminatory hiring procedures); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (treating disparate impact claim of black employees that company’s neutral employment practices, seniority system and backpay issue violated Title VII); *Greggs*, 401 U.S. at 431. For a discussion of the disparate impact theory of liability, see *infra* notes 38-52 & 53-71 and accompanying text.

6. *See Teamsters*, 431 U.S. at 335 n.15. After a thorough discussion of both theories of liability, the *Teamsters* Court stated, “Either theory may, of course, be applied to a particular set of facts.” Id.


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tion for the Advancement of Colored People (NAACP),\textsuperscript{9} charged that the Town of Harrison, New Jersey engaged in discriminatory employment practices against NAACP members.\textsuperscript{10} Specifically, the NAACP challenged Harrison's enactment of a residency requirement for uniformed and nonuniformed municipal employment.\textsuperscript{11} The United States District Court for the District of New Jersey concluded that the residency ordinance effected a disparate impact on minority groups in adjacent communities who sought employment in Harrison.\textsuperscript{12}

In Harrison, the Third Circuit examined the NAACP's claim of disparate impact in light of the United States Supreme Court's holding in Wards Cove Packing Co. v. Atonio.\textsuperscript{13} The Third Circuit utilized the Supreme Court's definition of the "relevant labor market" in Wards Cove to affirm the district court's holding that the NAACP had established a prima facie case of disparate impact.\textsuperscript{14} The Third Circuit also affirmed the district court's business justification analysis, concluding that the reasons offered by the Town to justify its use of a residency requirement failed to meet the Town's burden of production under Wards Cove.\textsuperscript{15}

The Third Circuit's affirmance of the district court's holding is significant for two reasons. First, residency ordinances afford a municipality a popular means of providing social and economic benefits to its

\textsuperscript{9} Harrison, 940 F.2d at 796. The NAACP is a national membership organization that seeks to secure the civil and equal employment rights of minorities. \textit{Id.} The Newark and Jersey City, New Jersey branches of the NAACP were joined on appeal by the New Jersey State Conference of the NAACP and by the NAACP national organization. \textit{Id.} at 792. In the district court, the Newark and Jersey City branches were joined by branches from Paterson and Passaic, New Jersey. \textit{Harrison}, 749 F. Supp. at 1327.

Individual NAACP branches act through committees that promote education, political action, legal redress and labor and industry. \textit{Id.} at 1332. Through these committees, the NAACP seeks to eliminate all forms of discrimination and to promote the interests of blacks. \textit{Id.} The efforts of the NAACP branches are on behalf of all blacks, regardless of formal membership in a branch or the national organization. \textit{Id.} Given the historical discrimination in employment opportunities experienced by blacks, a principal goal of the NAACP is "to overcome employment discrimination and to enable blacks to participate in the job market on an equal basis." \textit{Id.}

\textsuperscript{10} \textit{Id.} at 1328. For a discussion of the procedural history of the NAACP's Title VII litigation, see \textit{infra} note 89.

\textsuperscript{11} \textit{Harrison}, 749 F. Supp. at 1328-29. For a discussion of the plaintiffs' specific claims, see \textit{infra} notes 89-90 and accompanying text.

\textsuperscript{12} \textit{Harrison}, 749 F. Supp. at 1342-43. For a discussion of the district court's holding, see \textit{infra} note 91.


\textsuperscript{14} \textit{Harrison}, 940 F.2d at 801. For a discussion of the Third Circuit's analysis of the NAACP's prima facie case, see \textit{supra} notes 95-101 and accompanying text.

\textsuperscript{15} \textit{Harrison}, 940 F.2d at 805. For a discussion of the Third Circuit's approach to the Town's burden of production and business justifications, see \textit{infra} notes 102-115 and accompanying text.
residents.\textsuperscript{16} After \textit{Harrison}, the validity of these residency ordinances may be jeopardized if they create a disparate impact on minority groups. Second, the Third Circuit misconstrued the nature of the employer’s burden at the business justification stage of a disparate impact claim. In interpreting \textit{Wards Cove}, the Third Circuit stated that the employer’s evidentiary burden at the business justification stage was not clearly enunciated in the case law.\textsuperscript{17} Unfortunately, \textit{Harrison} does not contribute to a better understanding of the scope of this burden. In sum, the Third Circuit’s holding in \textit{Harrison} does not provide sufficient guidance to future courts faced with a disparate impact claim after \textit{Wards Cove}.

This Note explores the approach adopted by the Third Circuit in \textit{Harrison}, focusing specifically on the court’s interpretation of \textit{Wards Cove} and its application to municipal residency requirements.\textsuperscript{18} Part II provides a legal framework to help understand the issues facing the Third Circuit on appeal.\textsuperscript{19} This framework outlines the theories of liability that have evolved under Title VII and examines the Supreme Court’s analysis in \textit{Wards Cove}.\textsuperscript{20} Part III discusses the Third Circuit’s analysis in \textit{Harrison}.\textsuperscript{21} Part IV critiques this analysis and submits that the Third Circuit correctly affirmed the district court’s holding that the NAACP had presented a prima facie case of disparate impact.\textsuperscript{22} The Third Circuit, however, misapplied the teaching of \textit{Wards Cove} in rejecting the business justifications offered by the Town for its residency requirement.\textsuperscript{23} Part V considers the current state of disparate impact analysis after \textit{Wards Cove} and the recent enactment by Congress of the Civil Rights Act of 1991.\textsuperscript{24}

\section*{II. Background}

Title VII proscribes discriminatory employment practices based on

\begin{footnotesize}
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\item See \textit{Harrison}, 940 F.2d at 804-05. For a discussion of the Town’s description of these benefits, see infra notes 113-14 and accompanying text.
\item \textit{Harrison}, 940 F.2d at 803.
\item For a discussion and critique of the Third Circuit’s analysis in \textit{Harrison}, see infra notes 75-141 and accompanying text.
\item For a discussion of this legal framework, see infra notes 25-74 and accompanying text.
\item For a discussion of Title VII theories of liability, see infra notes 30-54 and accompanying text. For a discussion of the Supreme Court’s analysis in \textit{Wards Cove}, see infra notes 55-74 and accompanying text.
\item For a discussion of the Third Circuit’s analysis in \textit{Harrison}, see infra notes 75-115 and accompanying text.
\item For a critique of the Third Circuit’s analysis in \textit{Harrison}, see infra notes 116-41 and accompanying text. For an analysis of the Third Circuit’s affirmance of the NAACP’s prima facie case, see infra notes 116-23 and accompanying text.
\item For a discussion of the Third Circuit’s misapplication of \textit{Wards Cove}, see infra notes 124-41 and accompanying text.
\item For a discussion of the impact of \textit{Wards Cove} and the Civil Rights Act of 1991, see infra notes 142-58 and accompanying text.
\end{enumerate}
\end{footnotesize}
an employee's race, color, religion, sex or national origin. The United States Congress enacted Title VII in an attempt to guarantee equal employment opportunities to all persons and to eradicate discriminatory employment practices that have disadvantaged minority groups in the workplace. As originally enacted, Title VII only applied to private employers. The Equal Employment Opportunity Act of 1972, however, expanded the scope of Title VII to include state and local governmental employers.


The legislative history of Title VII illustrates that Congress, in enacting the Civil Rights Act of 1964, intended to insure that "men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States." 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey).

26. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). In McDonnell Douglas, the Supreme Court noted that Congress enacted Title VII "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." Id. The Court also noted that "[t]he broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." Id. at 801.


29. See 42 U.S.C. § 2000e(a) (Supp. II 1972) (current version at 42 U.S.C. § 2000e(a) (1988)); H.R. Rep. No. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2152. The 1972 amendment, which broadened the definition of "person" to include state and local government units, represented a significant expansion of the scope of Title VII. See id. When the 1972 amendment was passed, approximately 10.1 million people were employed by state and local governments, an increase of over two million employees since Title VII was enacted in 1964. Id. Furthermore, the legislative history of the 1972 amendment to Title VII demonstrates that Congress recognized and subscribed to the disparate impact theory of liability. See Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982). Deleting the exemption for state and municipal employers confirmed Congress' intention to provide state and municipal employees with the same equality of opportunity as private employees and to eliminate the discriminatory barriers that the private market had erected since the enactment of Title VII. Id.

A. Title VII Theories of Liability

Title VII permits plaintiffs to demonstrate employment discrimination under two theories of liability: disparate treatment and disparate impact.\(^{30}\) Plaintiffs alleging disparate treatment under Title VII focus on the employer's discriminatory intent.\(^{31}\) In addressing claims of disparate treatment, courts have developed a series of shifting evidentiary burdens designed to clarify the factual questions surrounding an employee's claim of alleged intentional discrimination.\(^{32}\)

In *McDonnell Douglas Corp. v. Green,*\(^ {33}\) the Supreme Court, in considering an employee's claim of intentional discrimination, established the criteria for proving the first of these evidentiary burdens, the plaintiff's prima facie case.\(^ {34}\) The Court declared that the plaintiff bears the burden of proving four elements:

- He belongs to a racial minority.
- He applied and was qualified for a job for which the employer was seeking applicants.
- He was rejected.
- After his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

In *Burdine,* the Court declared that a plaintiff's demonstration of a prima
den of establishing a prima facie case of intentional discrimination. Once the plaintiff has established a prima facie case, the burden then shifts to the employer to enunciate a legitimate, nondiscriminatory reason for the challenged practice. The Court stated that if the employer meets this burden, the burden shifts back to the plaintiff to prove that the employer’s justification is, in fact, a pretext for discrimination.

Plaintiffs alleging disparate impact need not focus on the employer’s discriminatory intent. In \textit{Griggs v. Duke Power Co.}, the Supreme Court established the disparate impact theory of liability in employment discrimination. The Court stated that Title VII prohibits

facie case created a presumption that the employer unlawfully discriminated against the employee. \textit{Burdine}, 450 U.S. at 254. The Court stated that "[i]f the trier of fact believes the plaintiff’s evidence, and if the employer is silent in the face of the presumption, the court must enter the judgment for the plaintiff because no issue of fact remains in the case." \textit{Id.}; see also \textit{Furnco Constr. Corp. v. Waters}, 438 U.S. 567, 577 (1978) (instructing that prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors"); \textit{Teamsters}, 431 U.S. at 358-59 & n.44 (noting that plaintiffs established prima facie case of disparate treatment by demonstrating existence of discriminatory hiring "pattern and practice").


36. \textit{Id.} The \textit{McDonnell Douglas} Court concluded that in asserting that Green participated in unlawful conduct, McDonnell Douglas adequately discharged its burden of proof in rebutting Green’s prima facie case. \textit{Id.} at 803; see also \textit{Burdine}, 450 U.S. at 252-55 (stating that employer, in rebutting plaintiff’s prima facie case, bore burden of production in offering nondiscriminatory basis for challenged practice).

37. \textit{McDonnell Douglas}, 411 U.S. at 804. The \textit{McDonnell Douglas} Court remanded the case for a determination of the pretext issue. \textit{Id.} at 807; see also \textit{Burdine}, 450 U.S. at 256 (stating that plaintiff may establish pretextual employment practice directly by persuading court that employer was motivated by discriminatory intent or indirectly by demonstrating that employer’s proposed explanation lacked credence); \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405, 425 (1975) (declaring that pretextual discrimination existed if plaintiff demonstrated that other practices served employer’s goals without undesirable discriminatory effect).


40. \textit{Id.} at 431. In \textit{Griggs}, black employees at the Duke Power Company’s generating plant brought suit to challenge the requirement of a high school diploma or the passing of standardized intelligence tests as a condition of employment or transfer within the plant. \textit{Id.} at 425-26. The Court stated that neither requirement was significantly related to successful job performance. \textit{Id.} at 426. The requirements, however, disqualified black applicants more often than white applicants. \textit{Id.} The Court further stated that in the past, only white persons had held the jobs at issue, evidencing an established practice of giving preference to white persons. \textit{Id.}
not only intentional discrimination, but also facially neutral employment practices that perpetuate discrimination. Subsequently, the Supreme Court has held that disparate impact analysis hinges on the premise that even if employment practices do not discriminate purposefully, these practices, when implemented, may be functionally identical to intentional discrimination. The Court, however, has not demanded proof of intentional discrimination, for disparate impact analysis focuses on the consequences of an employer’s practice, not on an employer’s motive.

Disparate impact analysis generally implements the same shifting evidentiary burdens applied in a disparate treatment claim. A plaintiff alleging disparate impact bears the initial burden of establishing a prima facie case. To prove a prima facie case of disparate impact, a plaintiff must show that an employer’s facially neutral employment practice produced a discriminatory hiring pattern. A plaintiff often utilizes statistical comparisons to gauge the effect of a specific employment practice on a particular group. A plaintiff’s choice of a particular statistical com-

41. Id. at 431. The Griggs Court held that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” Id.


43. Griggs, 401 U.S. at 432. The Griggs Court declared that “good 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.” Id.


45. See Watson, 487 U.S. at 994 (noting that plaintiff must “isolat[e] and identify] the specific employment practices that are allegedly responsible for any observed statistical disparities); Dothard, 433 U.S. at 329-31 (stating that plaintiff must demonstrate that facially neutral employment practices result in significantly discriminatory hiring pattern); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (concluding that Griggs burden of business necessity arises only after plaintiff has established prima facie case of discrimination by showing that employment practice selects applicants in pattern significantly different from pool of applicants).

46. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 & n.20 (1977) (stating that statistical proof may be used by Court to demonstrate employment discrimination). See generally Andrea R. Waintroob, The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level, 21 WM. & MARY L. REV. 45, 69-86; Alessandra, Comment, supra note 5, at 1760. Alessandra and Waintroob outline the three types of statistical comparisons ac-
parison often is crucial to determine whether the plaintiff has presented a significant statistical disparity to establish a prima facie case of disparate impact.\textsuperscript{47} The Supreme Court has stated that the appropriate statistical inquiry in a disparate impact case compares the percentage of individuals in an employer's work force belonging to the affected group with the percentage of that affected group in the relevant labor market.\textsuperscript{48}

Once a plaintiff has established a prima facie case of disparate impact, knowledge by the Supreme Court for gauging the impact of an employer's practice on a particular group. "General population statistics" compare the percentage of protected group members adversely affected by an employment practice with the percentage of nonprotected individuals similarly affected. See \textit{Waintroob}, supra, at 69-70; Alessandra, Comment, supra note 5, at 1760. For examples of the Court's use of general population statistics in a disparate impact claim, see \textit{Dothard}, 433 U.S. at 330 (relying on generalized national statistics in addressing claim of discriminatory minimum height and weight requirements); \textit{Teamsters}, 431 U.S. at 337 n.17 (relying on statistical disparity between racial composition of Teamsters line drivers and racial composition of city and metropolitan area surrounding Teamsters terminals); \textit{Griggs}, 401 U.S. at 430 n.6 (relying on 1960 U.S. census that indicated statistical disparity between black and white males receiving high school diplomas). Comparisons to the general population are often used when many persons possess the job skill at issue or when the skill can readily be acquired. See \textit{Hazelwood}, 433 U.S. at 308 n.13 (comparing job skill of truck driving in \textit{Teamsters} with teaching in \textit{Hazelwood}). When specific qualifications are required, comparisons to the general population may have minimal value.

"Applicant flow data," the second type of statistical comparison acknowledged by the Court, compares the minority composition of a pool of applicants with the composition of those actually employed. See \textit{Waintroob}, supra, at 81-82; Alessandra, Comment, supra note 5, at 1760. \textit{Albemarle Paper} is an example of the use of such data in addressing a claim of disparate impact. See \textit{Albemarle Paper}, 422 U.S. at 425 (comparing racial composition of applicants for hire or promotion with racial composition of pool of applicants). The third type of statistical comparison, "available workforce statistics," compares the percentage of a protected group in the relevant labor market with the percentage of that group employed by a particular employer. See \textit{Waintroob}, supra, at 76-77; Alessandra, Comment, supra note 5, at 1760. Alessandra defines the relevant labor market as "those individuals having the requisite skills for the job." \textit{Id.} at 1760. For an example of the use of available workforce statistics in a disparate impact claim, see \textit{infra} note 48 and accompanying text.

\textsuperscript{47} Alessandra, Comment, supra note 5, at 1760.

\textsuperscript{48} \textit{Hazelwood}, 433 U.S. at 308. The \textit{Hazelwood} Court adopted available workforce statistics as its statistical comparison. \textit{Id.} at 308 n.13. These statistics compared the racial composition of the school district's teaching staff with the racial composition of the qualified teacher population in the relevant labor market. \textit{Id.} at 308. This comparison is especially effective when the job skill at issue requires special qualifications. \textit{Id.} at 308 n.13.

In \textit{Hazelwood}, the government alleged that the Hazelwood School District, located in suburban St. Louis County, Missouri, engaged in teacher employment discrimination. The Court noted that statistical disparities alone, in the proper circumstances, may constitute a prima facie case. \textit{Id.} at 307-08 (citing \textit{Teamsters}, 431 U.S. at 339); see also \textit{Watson}, 487 U.S. at 987 ("The evidence in these 'disparate impact' cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities.").
pact, the burden shifts to the employer to justify the continued use of the challenged practice. In \textit{Griggs}, the “touchstone” for determining if the employer had met its burden of proof was “business necessity.” Subsequently, the Court has held that an employer attempting to justify an allegedly discriminatory employment practice must explain each component of the challenged practice and may not rely on its overall nondiscriminatory effect. Thus, an employer may not adopt a “bottom line” defense to a charge of disparate impact.

If an employer successfully rebuts a plaintiff’s prima facie case by justifying the challenged employment practice, a plaintiff nevertheless may prevail by demonstrating that the challenged practice serves as a

\textit{Griggs v. Duke Power Co.}, 401 U.S. 424, 431 (1971). In \textit{Griggs}, the Court stated that “[i]f an employment practice which operates to exclude [blacks] cannot be shown to be related to job performance, the practice is prohibited.” \textit{Id.} Therefore, the Court invalidated Duke Power’s requirement of a high school diploma as well as the passing of a standardized general intelligence test. \textit{Id.} at 432. The Court held that Congress, in enacting Title VII, required “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.” \textit{Id.} at 431; \textit{see also Albemarle Paper}, 422 U.S. at 431 (holding that discriminatory tests must have relevance to elements of work behavior applicable to employment at issue); \textit{Schlei \& Grossman, supra} note 5, at 103-07.

The business necessity standard differentiates liability under a theory of disparate treatment from one of disparate impact. In a disparate treatment claim, the employer’s burden is one of production. \textit{See Texas Dep’t of Community Affairs v. Burdine}, 450 U.S. 248, 254 (1981) (holding that employer need only \textit{produce} legitimate, nondiscriminatory reason for challenged practice). In establishing the business necessity standard as the employer’s burden in a disparate impact claim, the \textit{Griggs} Court required the employer to bear the burden of proof, including the burdens of production and persuasion. \textit{Griggs}, 401 U.S. at 431. This burden could be satisfied by proving that the challenged practice was justified by business necessity. \textit{Id.}

The plaintiffs challenged a written test requirement for promotion to welfare supervisor in Connecticut. \textit{Id.} at 444. Statistics demonstrated that while more whites than blacks passed the test, blacks received promotion more often than whites. \textit{Id.} The Court stated that “[t]he suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the \textit{opportunity} to compete equally with white workers on the basis of job-related criteria.” \textit{Id.} at 451.

\textit{Id.} at 456; \textit{see also Alessandra, Comment, supra} note 5, at 1761 (stating that after \textit{Teal}, disparate impact analysis measures effect of \textit{each component} of employer’s practice and, therefore, a “racially balanced ‘bottom line’ will not suffice”).
pretext for discrimination, or that an alternative practice would accomplish the employer’s goals without the same discriminatory effect.\textsuperscript{54}

B. Wards Cove Packing Co. v. Atonio: A Disparate Impact Claim

In \textit{Wards Cove Packing Co. v. Atonio},\textsuperscript{55} the Supreme Court faced a claim of employment discrimination based on the disparate impact theory of liability. The plaintiffs, a class of nonwhite cannery workers in the Alaska salmon industry, alleged that Wards Cove, a salmon packing company, discriminated in its hiring and promotion procedures.\textsuperscript{56} The plaintiffs claimed that these practices produced a disparate impact on cannery workers by denying them noncannery positions on the basis of race in violation of Title VII.\textsuperscript{57} After an en banc panel of the Ninth Circuit concluded that the cannery workers had established a prima facie case of disparate impact, the Supreme Court granted certiorari\textsuperscript{58} to ad-

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  \item \textsuperscript{54} See Watson, 487 U.S. at 998 (quoting \textit{Albemarle Paper} for plaintiff’s burden to show alternative and less discriminatory employment practice). In \textit{Albemarle Paper}, the Court stated:
  \begin{quote}
  If an employer does . . . meet the burden of proving that its tests are “job related,” it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest in “efficient and trustworthy workmanship.”
  \end{quote}
  \textit{Albemarle Paper}, 422 U.S. at 425 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). In \textit{Griggs}, the pretext issue did not arise because the Court concluded that neither of the employer’s challenged employment practices bore a demonstrable relationship to successful job performance. \textit{Griggs}, 401 U.S. at 431.
  \item \textsuperscript{55} 490 U.S. 642 (1989).
  \item \textsuperscript{56} \textit{Id.} at 647-48. The salmon industry in Alaska operates during the summer months only, beginning in May or June of each year. \textit{Id.} at 646. Two types of occupations existed at the canneries: “cannery jobs,” which were unskilled positions on the cannery line, and “noncannery jobs,” which were skilled positions such as machinists, engineers, quality control personnel and support staff. \textit{Id.} at 647 & n.3. Most cannery jobs were filled by Filipinos and native Alaskans. \textit{Id.} at 647. The majority of noncannery positions were filled by whites hired during the off-season. \textit{Id.} Noncannery workers generally received greater compensation than their cannery line counterparts. \textit{Id.}
  \item \textsuperscript{57} \textit{Id.} at 647-48. The cannery workers alleged a variety of discriminatory practices, “including nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels [and] a practice of not promoting from within.” \textit{Id.} at 647. The cannery workers also protested Wards Cove’s racially segregated housing and dining facilities. \textit{Id.} at 648. Due to the location and intensity of the salmon canning season, all employees lived and ate at the canneries. \textit{Id.} at 646-47.

The cannery workers alleged both disparate treatment and disparate impact in stating their Title VII claim. \textit{Id.} at 648. The Court dismissed the disparate treatment suit, citing the unanimous opinion of the lower courts that the cannery workers did not prove intentional racial discrimination. \textit{Id.} at 649 n.4. \textit{Contra id.} at 663-64 n.4 (Stevens, J., dissenting) (declaring that “[s]ome characteristics of the Alaska salmon industry . . . bear an unsettling resemblance to aspects of a plantation economy”).
  \item \textsuperscript{58} Atonio v. Wards Cove Packing Co., 487 U.S. 1232 (1988). After an un-
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dress several disputed issues concerning the proper analysis of a Title VII disparate impact claim.59

The *Wards Cove* Court began its analysis by scrutinizing the prima facie case presented by the cannery workers.60 In concluding that the cannery workers had failed to establish a prima facie case, the Court specified the appropriate statistical comparison to be utilized in disparate impact cases.61 The Court stated that the correct statistical analysis compares the racial composition of those qualified persons in the labor market with those persons currently employed in the job at issue.62 Be-

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59. *Wards Cove*, 490 U.S. at 649-50. The Court stated that certiorari was granted “because some of the issues raised by the decision below were matters on which this Court was evenly divided in *Watson v. Fort Worth Bank & Trust*.” *Id.*

60. *Wards Cove*, 490 U.S. at 650-55.

61. *Id.* at 650-52.

62. *Id.* This comparison corresponds to the available work force statistic described in Alessandra, Comment, supra note 5, at 1760. For a definition and discussion of this statistical comparison, see supra note 46. The *Wards Cove* Court recognized the use of other statistical comparisons in the event labor market statistics are difficult to obtain, such as those indicating the race of “otherwise-qualified applicants” for the jobs. *Wards Cove*, 490 U.S. at 651.

The *Wards Cove* Court rejected the Ninth Circuit's statistical comparison of the racial composition of the cannery work force to the racial composition of the noncannery work force. *Wards Cove*, 490 U.S. at 651. The Court stated that such a comparison, even if it illustrated great disparity, failed to measure the relevant labor market, or in the words of the *Wards Cove* Court, the “qualified population in the labor force.” *Id.* at 651. The Court reasoned that if it had adopted the Ninth Circuit's comparison, any employer confronted with a racially imbalanced work force, for whatever reason, could be haled into court under a claim of disparate impact. *Id.* at 653. The Court further stated that employers would thus be forced to adopt quotas in order to maintain racial balance among the segments of its work force. *Id.* The Court concluded that such quotas would contravene Congress' express intent in drafting Title VII. *Id.; see also 42 U.S.C. § 2000e-2(j) (1988).*
cause the Ninth Circuit had used an incorrect statistical comparison, the Court held that the cannery workers did not establish a prima facie case of disparate impact.\(^{63}\) Having remanded the case for further proceedings, however, the Court proceeded to consider the additional challenges to the Ninth Circuit’s holding.\(^{64}\)

The *Wards Cove* Court first examined the issue of causation in a claim of disparate impact.\(^{65}\) The Court declared that a plaintiff alleging disparate impact must identify the specific employment practice that produced the alleged discrimination.\(^{66}\) Having identified the specific practice at issue, the Court stated that the plaintiff may then offer statistical evidence to prove causation.\(^{67}\)

The Court discussed the nature of the burden that shifts to an employer after a plaintiff has established a prima facie case.\(^{68}\) At this justification stage of a disparate impact claim, the Court stated that “the dispositive issue is whether a challenged practice serves, in a significant

\begin{itemize}
\item \textit{Wards Cove}, 490 U.S. at 655. Having found no prima facie case, the Court stated that any further analysis of causation or business justification was premature. \textit{Id.} The Court remanded the proceeding to determine if a prima facie case could be established on another statistical basis. \textit{Id.}
\item \textit{Id.} The Court stated: “Because we remand for further proceedings, however, on whether a prima facie case of disparate impact has been made in this case, we address [additional] challenges petitioners have made to the decision of the [Ninth Circuit].” \textit{Id.}
\item \textit{Id.} at 656.
\item \textit{Id.} at 656-57 (citing \textit{Watson v. Fort Worth Bank & Trust}, 487 U.S. 977, 994 (1988)). In \textit{Watson}, the Court addressed whether disparate impact analysis applied to a bank’s hiring or promotion practices that utilized “discretionary” or “subjective” employment criteria. \textit{Watson}, 487 U.S. at 989. In analyzing the causation issue, the Court enunciated the plaintiff’s burden to establish a prima facie case of disparate impact:
\begin{quote}
The plaintiff must begin by identifying the specific employment practice that is challenged. . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is . . . responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.
\end{quote}\textit{Id.} (citing \textit{Connecticut v. Teal}, 457 U.S. 440 (1982)).
\item \textit{Id.} at 656. The \textit{Wards Cove} Court stated: Just as an employer cannot escape liability under Title VII by demonstrating that, “at the bottom line,” his work force is racially balanced . . . a Title VII plaintiff does not make out a case of disparate impact simply by showing that, “at the bottom line,” there is racial imbalance in the work force. \textit{Id.} at 656-57. The Court thus confirmed its earlier rejection of the “bottom line” defense to claims of disparate impact. \textit{See} \textit{Connecticut v. Teal}, 457 U.S. 440, 450 (1982) (asserting that Title VII disparate impact analysis focuses on impact of particular hiring practices on minority employment opportunities and not simply on bottom line employment numbers).
\item \textit{Id.} at 658. The Court described this burden as comprised of two elements: the justifications offered by the employer for using the challenged practice, and the availability of alternative, nondiscriminatory practices to accomplish the same goals. \textit{Id.}
\end{itemize}
way, the legitimate employment goals of the employer." The "touchstone" of this analysis entails a reasoned review of the employer's justification for using the challenged practice. This standard differs from the prior "touchstone" of business necessity defined by the Court in Griggs.

The Wards Cove Court distinguished between the evidentiary burdens of production and persuasion in a disparate impact claim. Although the employer bears the burden of producing evidence of a business justification for the challenged practice, the Court declared that the burden of persuasion remains with the plaintiff at all times. Finally, the Court stated that the plaintiff still could prevail if he or she persuades the Court that the employer's business justification serves as a pretext for discrimination.


70. Wards Cove, 490 U.S. at 659. The Court found that this review required more than articulating an insubstantial justification, but did not require that the challenged practice be "essential" or "indispensable" to the employer's business. Id. Contra Griggs, 401 U.S. at 431 (holding that at business justification stage of disparate impact case, employer bears burden of production and persuasion in demonstrating "touchstone" of business necessity). See generally Linda M. Mealey, Note, English Only Rules and "Innocent" Employers: Clarifying National Origin Discrimination and Disparate Impact Theory under Title VII, 74 MINN. L. REV. 387, 417 (1989) (stating that Wards Cove burden requiring reasoned review was considerably more lenient than burden of business necessity).

71. See Griggs, 401 U.S. at 423. For a discussion of the Griggs standard, see supra notes 50-51 and accompanying text.

72. Wards Cove, 490 U.S. at 659.

73. Id. The Wards Cove Court stated that "[t]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times," Id. (quoting Watson, 487 U.S. at 997). The Wards Cove Court recognized "that some of our earlier decisions can be read as suggesting otherwise." Id. at 660 (citing Watson, 487 U.S. at 1006-08 (Blackmun, J., concurring)). The Court stated that its analytical framework conformed with the usual method of allocating the burden of persuasion and production in federal courts, and also conformed with the approach adopted in disparate treatment cases. Id. at 659-60 (citing FED. R. EVII. 301); see also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256-58 (1981). The Wards Cove Court stated that the plaintiff retained the burden of persuasion in a disparate impact case because he or she must prove that employment was denied because of race, color, religion or national origin. Id.; see also 42 U.S.C. § 2000e-2(a) (1988).

74. Wards Cove, 490 U.S. at 660; see also Watson, 487 U.S. at 998; Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). The Wards Cove Court held that an employer's refusal to adopt less discriminatory alternatives would disprove a claim that the employment practices did not discriminate. Wards Cove, 490 U.S. at 661. The Court recognized that the cost effectiveness of the alternative practice was important in determining whether it would accomplish the employer's goals. Id.
III. NAACP v. TOWN OF HARRISON

In NAACP v. Town of Harrison, the Third Circuit considered whether the Town of Harrison, New Jersey violated Title VII in enacting and enforcing a municipal residency ordinance as a prerequisite for municipal employment. The NAACP alleged that the Town’s employment practices created a disparate impact on NAACP members who wished to obtain municipal employment in Harrison. In evaluating the NAACP’s claim, the Third Circuit applied the Supreme Court’s holding in Wards Cove Packing Co. v. Atonio to determine the validity of Harrison’s municipal residency requirement.

For many years, the Town of Harrison had adhered to a general policy that permitted only Town residents to apply for municipal employment. In 1978, the New Jersey legislature codified this general policy by enacting the New Jersey Act Concerning Residence Requirements for Municipal and County Employees (the Residence Act).

The Town of Harrison is a small, industrial community situated in Hudson County, New Jersey. The district court declared that Harrison was geographically “closely aligned with immediately adjacent Essex County to the west and could very well be considered an extension of the City of Newark which it abuts.”

The NAACP's appeal from the district court was upheld, and the court affirmed the validity of the residency requirement. The court ruled that the residency ordinance was a valid way to ensure that the Town of Harrison had a work force that was representative of the population of the area. The court also noted that the ordinance was not a violation of Title VII because it was a valid way to ensure that the Town of Harrison had a work force that was representative of the population of the area.
Residence Act permitted municipalities to impose a residency require-
ment upon all officers and employees of the municipality. \(^8\)

Pursuant to the Residence Act, Harrison adopted a local ordinance
mandating that certain officers and employees reside in the Town of
Harrison. \(^8\) After enacting this residency ordinance, the Town hired
employees for its municipal work force in compliance with the ordi-
nations, establishing and administering lists of eligible applicants, and certi-
fying the highest-ranking applicants on the lists to appropriate municipal
officers. N.J. STAT. ANN. §§ 11A:3-1, 4-1, 4-2, 4-4, 4-8.

81. Id. § 40A:9-1.3. Specifically, the Residence Act permits a municipality
to "require [that] . . . all officers and employees employed by the [municipality]
. . . be bona fide residents therein." Id. The Residence Act also authorizes a
municipality "to limit the eligibility of applicants for positions and employments
in the classified service of such [municipality] to residents of that [municipal-
ity]." Id. § 40A:9-1.4 (emphasis added). If residency is not a prerequisite to an
application, the Residence Act states that the municipality "shall require . . . that
all nonresidents subsequently appointed . . . shall become bona fide residents of
the [municipality] within [one] year of their appointment," except as otherwise
provided in the statute. Id. § 40A:9-1.5. If a sufficient number of qualified resi-
dents do not exist for a particular position, the municipality may look to the
county in which the municipality is located, to adjacent counties, to the state as a
whole, or to any other area. Id. § 40A:9-1.6.

The scope of the Residence Act, however, is specifically limited by any judi-
cial or agency order issued to eliminate discriminatory employment practices.
Id. § 40A:9-1.10 ("Any requirements . . . shall be subject to any order issued by
any court, or by any State or Federal agency pursuant to law . . . to eliminate
discrimination in employment . . . ").

Police and fire department employees in New Jersey are expressly exempted
from the Residence Act. Harrison, 940 F.2d at 795 n.1 (citing N.J. STAT. ANN.
§ 40A:122.1 (police officers); § 40A:14-9.1 (fire fighters)); see also Booth v.
A.2d 179 (N.J. 1984), cert. denied, 469 U.S. 1107 (1985). While a municipality
may not require police and fire department personnel to live within its borders,
a municipality may give preference to its residents in the initial appointment
process. Harrison, 749 F. Supp. at 1330 (citing N.J. STAT. ANN. § 40A:14-123.1a
(police officers) and § 40A:14-10.1a (fire fighters)). The two statutes establish a
classification system according to residency for police force and fire depart-
ment positions. Id. These statutes permit municipalities to determine whether resi-
dency is required on the closing date for the Civil Service examination or on the
actual date of appointment. See also In re Leary, 450 A.2d 504 (N.J. 1982). Thus,
a municipality is able to limit applicants for police and fire department personnel
to residents of the municipality. Harrison, 749 F. Supp. at 1330.

The New Jersey Supreme Court has upheld ordinances that permit munici-
palities to impose residency requirements. See Abrahams v. Civil Service Com-
mission, 319 A.2d 483 (N.J. 1974) (affirming lower court's rejection of challenge
to constitutionality of local residency requirements by finding substantial ra-
tional justifications for ordinances that outweigh adverse impact); Kennedy v.
City of Newark, 148 A.2d 473 (N.J. 1959) (holding that state constitutional op-
tosition to residency requirement must yield to rational basis for requirement
that furthers public welfare).

82. Harrison, 749 F. Supp. at 1330. Harrison adopted this residency ordi-
nance on October 6, 1981. The ordinance provided in pertinent part:

[All officers and employees of the Town shall, as a condition of
employment, be bona fide residents of the Town . . .

No person shall be an eligible applicant for any position of employ-
nance, the Residence Act and other state statutes applicable to police and fire personnel. The Town staffed uniformed positions through eligibility lists compiled from the results of a state civil service examination. Nonuniformed positions typically were filled through word-of-mouth or through informal application.

The Town of Harrison had never considered a nonresident for uniformed or nonuniformed employment. Furthermore, no black had ever held a uniformed or nonuniformed municipal position in the Town. In contrast, blacks represented 22.1% of Harrison's private work force in 1988. The NAACP, through its Newark, New Jersey...
branch, filed suit against the Town of Harrison in July 1989, alleging that the Town had rejected individual NAACP members for municipal employment because they had not satisfied the Town's residency requirement. The NAACP asserted that the enactment of a residency ordinance, and the Town's adherence to the hiring practices set forth in the ordinance, effected a disparate impact on blacks in violation of Title VII. Following a bench trial, the district court enjoined Harrison from enforcing its residency ordinance and required the Town to take affirmative steps to attract qualified black applicants in numbers comparable to

Black employees comprised 16.1% of the office and clerical employees of these establishments, 7.6% of the officers and managers, 21.4% of the craft workers, 34.1% of the operatives, 29.4% of the laborers and 31.8% of the service workers. Given Harrison's nonexistent black population, virtually all of these employees must have commuted to Harrison from other municipalities. The district court opinion included 1980 Census and 1987 Equal Employment Opportunity Commission figures for the seven-county region of Northern New Jersey.

On appeal, the Third Circuit upheld the district court's dismissal of the complaint for lack of standing, but vacated the orders denying the NAACP's motions for reconsideration and leave to amend. The Third Circuit concluded that "without showing... a distinct and palpable injury to one of its members, the NAACP, as an association, cannot achieve standing despite its long-standing and sincere interest in rectifying such perceived discrimination." The Third Circuit remanded the case to the district court to reconsider the NAACP's motion for reconsideration and for leave to file an amended complaint. While its appeal was pending, the NAACP filed a second suit asserting the same claims and requesting the same remedies contained in its original suit. After the two complaints were consolidated, the NAACP filed an amended complaint. The NAACP's amended complaint detailed the experiences of individual NAACP members who had sought police, fire and clerical positions in the Town. These individual claims satisfied the standing issue on which the NAACP's earlier complaint had been dismissed. The challenge here is not to residency requirements per se or to the State statutes which give a municipality the power to decide whether applicants be residents of the municipality. The challenge is to Harrison's election to use its powers in a manner which excludes black persons from employment.

Id. at 1336-37 (citing 42 U.S.C. § 2000e-2 (1988)). The district court stated:

Id. at 1537.
91. *Harrison*, 940 F.2d at 797. The district court concluded that the NAACP had established a prima facie case of disparate impact under Title VII. *Harrison*, 749 F. Supp. at 1341. The district court found a "marked disparity between the pool of qualified black applicants for municipal jobs in Harrison and the actual black representation among Harrison's employees." *Id.* at 1337. The district court concluded that "this disparity [was] caused, at least in substantial part, by Harrison's residency requirement." *Id.*

The NAACP presented statistical evidence from which the district court determined that the Town's relevant labor market contained substantial numbers of qualified black applicants for municipal employment in Harrison. *Id.* at 1341. In the absence of a residency requirement, the district court stated that qualified blacks would seek municipal employment in Harrison. *Id.* From this evidence, the court concluded that Harrison's facially neutral residency requirement effected a disparate impact on blacks. *Id.*

The NAACP alleged that Harrison's failure to employ blacks in municipal positions also supported an inference of purposeful discrimination under the disparate treatment theory of liability. *Id.* at 1337 n.5. The district court rejected this claim, finding that Harrison's residency requirement had evolved over many years and did not evince a purposeful intent to discriminate that was necessary to sustain a claim of disparate treatment. *Id.*

Returning to its disparate impact analysis, the district court concluded that the Town did not demonstrate a sufficient business justification to overcome the effect of the disparate impact caused by its residency requirement. *Id.* The Town presented several business justifications to the district court to support its imposition of a residency requirement. *Id.* at 1341-42. The Town argued that protective service personnel, such as police and fire department employees, should live in the municipality in order to respond promptly to emergencies. *Id.* at 1341. The Town also noted that residency in the municipality promoted knowledge of and loyalty to the community. *Id.* The Town stressed the financial costs involved in opening the eligibility lists to nonresidents. *Id.* Finally, the Town argued that a residency requirement for nonuniformed positions promoted greater loyalty among employees and decreased tardiness and absenteeism. *Id.*

The district court concluded that these justifications were either overbroad or insubstantial. *Id.* at 1342. In rejecting the Town's purported justification that uniformed employees must live in Harrison in order to respond to an emergency, the district court emphasized that state statutes prevented Harrison from requiring police and fire personnel to reside in the Town. *Id.* (citing N.J. STAT. ANN. § 40A:14-122.1 and § 40A:14-9.1 (West 1980 & Supp. 1992)). The district court stated that Harrison's residency ordinance and these state statutes enabled the Town to require applicants for municipal employment to reside within the Town, but prevented the Town from imposing residency as a condition of employment. *Id.* This paradox effectively prevented blacks from gaining municipal employment, while failing to accomplish the Town's objective that police and fire personnel reside in the Town. *Id.*

The district court found that other means could ensure the availability of off-duty uniformed personnel in times of emergency, including residency based on a reasonable response time or residency within certain distances from Harrison. *Id.* Such a policy would enable Harrison to attract black applicants from adjacent areas. *Id.*

Similarly, the district court held that the Town's claim of increased costs was insubstantial. *Id.* The court noted that the greater choice resulting from more highly-qualified applicants would offset any additional cost to administer the larger eligibility lists. *Id.* The district court also dismissed the Town's claims that its residency requirement promoted increased community involvement. *Id.* The court concluded that this claim was not sufficiently substantial to justify the
A. The State Statutory Scheme

The Third Circuit commenced its analysis by focusing on the New Jersey state statutory scheme. The Residence Act enabled New Jersey municipalities to require residency as a prerequisite to municipal employment. Although the Residence Act was permissive, not mandatory, Harrison argued that because a majority of New Jersey municipalities had chosen to impose a residency requirement, this collective action signalled, in effect, a constitutionally sound statewide policy.

The discriminatory effect of the residency requirement. Finally, the district court dismissed Harrison's residency requirement for nonuniformed employees as "too nebulous and insubstantial" to justify a discriminatory employment practice.

In addition to providing injunctive relief and an affirmative remedy, the district court's decree further enjoined Harrison from using eligibility lists to fill vacancies for uniformed positions that were compiled while the residency ordinance was in effect. Harrison, 940 F.2d at 797. The decree directed Harrison to readvertise, retest and compile new eligibility lists from which to select future applicants for uniformed positions. Id.

The Third Circuit noted that both of the Town's issues on appeal centered around the district court's alleged inability to accord proper weight to the state statutory scheme. Id.

92. Id. at 798. The Third Circuit noted that both of the Town's issues on appeal centered around the district court's alleged inability to accord proper weight to the state statutory scheme. Id.


94. Harrison, 940 F.2d at 799 & n.4 (citing Abrahams v. Civil Serv. Comm'n, 319 A.2d 483 (N.J. 1974)). In Abrahams, the New Jersey Supreme Court addressed the state legislature's permissive approach to local residency requirements. Abrahams, 319 A.2d at 489. The court stated that sufficient rational justifications existed for the policy underlying municipal residency requirements. Id. These justifications outweighed the adverse impact on aspiring municipal employees. Id. The court concluded:

In short, there are one or more substantial rational justifications for the policy of such an ordinance sufficient to outweigh such adverse impact as it may have either upon aspirants to municipal employment or those already in the municipal employ. . . .

[The] statutory local option in the case of employees . . . vests the policy choice in the municipal legislature, not the courts. Some municipalities . . . have deemed it consonant with local policy to exercise the option. We hold they may validly do so free of any constitutional interdiction.

Id.

The Abrahams court noted that advocates of the validity of municipal residency requirements argue that such requirements promote ethnic balance. Id. Advocates maintain that residency requirements also enhance employee performance by increasing awareness of city conditions and by promoting greater personal interest in the city's welfare. Id. These advocates further argue that absenteeism and tardiness are also reduced, thus ensuring that sufficient, trained
B. The NAACP's Prima Facie Case

Having analyzed the pertinent statutory language, the Third Circuit addressed the Town of Harrison's challenge that the NAACP had failed to establish a prima facie case of disparate impact.95 Harrison contended that the district court had defined the relevant labor market too narrowly.96 Harrison alleged that this restrictive definition distorted the validity of the NAACP's statistical data.97 Harrison urged the Third Circuit to adopt a “state-wide multi-employer” relevant labor market.98

The Third Circuit rejected this “bottom line” approach, stating that
the district court's determination of a four-county relevant labor market was reasonable and not inconsistent with Supreme Court precedent. 99 The residency requirements of other municipalities, even if statutorily permitted, were simply irrelevant. 100 Therefore, the Third Circuit concluded that the NAACP successfully had established a prima facie case of disparate impact. 101

C. The Town of Harrison's Business Justifications

The Town of Harrison asserted that the district court erred in rejecting the business justifications offered to support the Town's residency ordinance. 102 The Town argued that it offered a sufficient business justification by demonstrating that a rational purpose supported the adoption of its residency ordinance. 103 This rational purpose, the Town alleged, was embodied in both the passing of the New Jersey Residence Act and in its enforcement through Harrison's local ordinance and state statutes pertaining to police and fire personnel. 104 Harrison claimed that this statutory scheme amounted to a statewide policy that had withstood constitutional attack. 105

99. Id. at 801. The Third Circuit relied on Wards Cove to confirm its rejection of the "bottom line" approach to Title VII disparate impact analysis. Id. (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)). The court based its analysis of the plaintiffs' initial burden on the specific employment practices of the employer, rather than on the overall effect of the employer's practices. Id.; see also Wards Cove, 490 U.S. at 656-57.

100. Harrison, 940 F.2d at 801. The Third Circuit rejected Harrison's argument that its hiring practices should only be judged against other municipal employers throughout the state. Id. In finding the practices of other employers irrelevant, the Third Circuit concluded that Harrison had cited no legal precedent, statutory or common law, in support of its theory of a statewide multi-employer labor market. Id. Therefore, the Third Circuit affirmed that the district court's definition of a four-county labor market was "reasonable, well-supported and in no way inconsistent with the holding of Wards Cove." Id.; see also Connecticut v. Teal, 457 U.S. 440, 442 (1982) (rejecting "bottom line" approach to disparate impact analysis and stating that disparate impact theory of liability focuses on each component of employer's practice). For a discussion of the "bottom line" approach to Title VII disparate impact analysis, see supra notes 52-53 and accompanying text.

101. Harrison, 940 F.2d at 801. In affirming the district court's definition of the relevant labor market, the Third Circuit implicitly recognized that the NAACP had established a prima facie case of disparate impact. See also Harrison, 749 F. Supp. at 1337 (defining two prongs of plaintiff's prima facie case). The definition of the relevant labor market was essential to both prongs of the NAACP's prima facie case. The first prong of the plaintiff's burden, identifying a statistical disparity, was affirmed by the Third Circuit on appeal. Harrison, 940 F.2d at 801. The second prong, connecting the statistical disparity to Harrison's residency requirement, was not at issue on appeal. Id. at 798.

102. Id. at 801.

103. Id. (citing reasoned review standard established by Court in Wards Cove, 490 U.S. at 659). For a discussion of this standard, see supra notes 68-71.

104. Harrison, 940 F.2d at 801.

105. Id. at 801-02; see also Abrahams v. Civil Serv. Comm'n, 319 A.2d 483
Under the principles established in *Wards Cove*, Harrison asserted that it had discharged its burden of production in this business justification stage simply by pointing to the New Jersey statutory scheme and the statewide policy underlying it. The Town contended that the district court had erred in declaring Harrison's proffered business justification insubstantial without compelling the NAACP to prove that this justification was pretextual. By failing to shift the burden back to the NAACP, Harrison charged that the district court violated the teaching of *Wards Cove*. This violation effectively required the Town to prove that its residency ordinance was compelled by business necessity.

The Third Circuit determined that *Wards Cove* did not reduce an employer's burden of production at the business justification stage to a showing of mere rationality. To the contrary, the Town's burden of production clearly involved more than a mere articulation of possible rational bases for its residency requirement. The Third Circuit concluded that the Town was required to demonstrate that the challenged employment practice significantly served its legitimate employment goals.

Having defined the employer's burden of production in a disparate

(N.J. 1974) (holding that residency requirements are based on one or more substantial rational justifications). For a discussion of *Abrahams*, see supra note 94. 106. *Harrison*, 940 F.2d at 802; see also *Wards Cove*, 490 U.S. at 659 (rejecting "business necessity" burden of proof at business justification stage in favor of whether practice serves "legitimate employment goals" of employer).

107. *Harrison*, 940 F.2d at 802.

108. *Id.*


110. *Harrison*, 940 F.2d at 803. The Third Circuit emphasized that while an employer need not demonstrate the absolute necessity of a challenged employment practice, it must demonstrate that the practice furthers legitimate business goals "in a significant way." *Id.* (citing *Wards Cove*, 490 U.S. at 659); see also *Mealey*, Note, supra note 70, at 419 (urging that courts not defer to employer's business justifications but subject them to "reasoned review"). For a discussion of the effect of *Wards Cove* on the "business necessity defense" and on the allocation of burdens in disparate impact cases, see *id.* at 414-17; see also Mack A. Player, *Is Griggs Dead? Reflecting (Fearfully) on Wards Cove Packing Co. v. Atonio*, 17 FLA. ST. U. L. REV. 1 (1989).

111. *Harrison*, 940 F.2d at 804. The Third Circuit initially stated that the case law was unclear as to the "quantum and quality" of evidence required after *Wards Cove*. *Id.* The Third Circuit, however, determined that Harrison retained the burden to produce "significant evidence that establishes a strong factual showing of manifest relationship between the challenged practice and the defendant's employment goals." *Id.*; see also *Player*, supra note 110, at 32 (contending that employer's burden met by production of "objective evidence . . . factually showing a nexus between the selection device and a particular employment goal"). For a discussion of case law after *Wards Cove* that addresses Title VII disparate impact claims, see *infra* note 141 and accompanying text.

112. *Harrison*, 940 F.2d at 804 (citing *Wards Cove*, 490 U.S. at 659). The Third Circuit stated that "Harrison was required to present objective evidence
impact claim, the Third Circuit explored the specific business justifications offered by the Town to support its residency requirement. After examining the justifications offered for both uniformed and nonuniformed employees, the Third Circuit concluded that Harrison had not presented a sufficient nexus between its residency requirement and any particular employment goal. Therefore, the Third Circuit affirmed the district court's finding that Harrison had not met its burden of production with respect to business justification.

demonstrating a nexus between its residency ordinance and a particular employment goal." \(^{113}\) The rational bases advanced by Harrison in support of its residency requirement for uniformed personnel included the need for quick response to emergency situations, the fostering of loyalty through local officers who know the community and the increased cost in time and money of opening the eligibility lists to nonresidents. \(^{114}\) With regard to nonuniformed employees, Harrison argued that its residency requirement promoted loyalty and reduced tardiness and absenteeism. \(^{115}\)

\(^{113}\) Id.

\(^{114}\) Id. The district court had rejected Harrison's proximity argument, claiming that there were alternative means, short of a residency requirement, to ensure sufficient uniformed personnel in the event of an emergency. \(^{115}\)

\(^{115}\) Id. The district court dismissed the Town's business justifications for imposing a residency requirement upon nonuniformed personnel, calling these reasons "too nebulous and insubstantial to justify practices which have had a significant discriminatory effect, which have prevented the Town from ever employing a black person." \(^{115}\) Having determined that the district court correctly analyzed the NAACP's disparate impact claim, the Third Circuit addressed the Town's claim of error in the remedy fashioned by the district court. \(^{116}\) The Third Circuit also considered an alleged due process violation contained in an \textit{amicus curiae} brief. \(^{117}\) A thorough discussion of these issues is beyond the scope of this Note. What follows is a brief summary of the most salient points made by the Third Circuit in disposing of these matters on appeal. For the Third Circuit's analysis of these issues, see id. at 805-12.

The decree formulated by the district court required the Town of Harrison to cease enforcing its residency ordinance and to stop requiring municipal residency as a prerequisite to municipal employment. \(^{118}\) The decree also required Harrison to take affirmative measures to recruit and employ qualified black applicants in proportion to their availability in the relevant labor market. \(^{119}\) Harrison challenged the decree, contending that the requirement of affirmative recruitment activities violated Title VII and the Town's equal protection guarantees. \(^{120}\) The Town argued that simply repealing its residency ordinance was the proper remedy. \(^{121}\) The Town relied entirely on language in \textit{Wards Cove} that required a plaintiff attempting to establish a prima facie case to
IV. ANALYSIS

In *Harrison*, the Third Circuit commenced its analysis by examining the state statutory scheme that authorized municipalities to adopt residency requirements.\(^{116}\) This statutory scheme was an appropriate starting point because both issues raised by the Town on appeal originated from the New Jersey Residence Act, the Town's local residency ordinance and the alleged statewide policy underlying this legislation.\(^{117}\) Harrison urged that the nearly uniform adoption of municipal residency requirements throughout the state created a statewide multi-employer labor market that, when viewed in the aggregate, did not discriminate based on race.\(^{118}\)

The Third Circuit correctly concluded that Harrison had cited no legal precedent for its theory of a statewide multi-employer labor market as the basis for the disparate impact.\(^{119}\) From this language, the Town concluded that any remedy devised by the district court had to be narrowly tailored to eliminate only the residency ordinance that the district court had determined was discriminatory. Id.\(^{citing Wards Cove, 490 U.S. at 656.}\)

The Third Circuit disagreed with this argument, concluding that "the district court [did not] err[] in formulating a decree designed to eliminate . . . disparity through affirmative recruitment efforts. The remedy fashioned flows logically from the Title VII violation and in no way transgresses the remedial authority conferred upon the courts under Title VII." Id. Therefore, the remedy entered by the district court did not violate Title VII or the Town's equal protection guarantees. Id.\(^{at 807.}\)

Finally, the Third Circuit addressed the due process and equal protection arguments contained in an *amicus curiae* brief filed by seven residents of the Town of Harrison. Id.\(^{at 808.}\) The *amici* were applicants for fire department positions in Harrison whose names were recorded on the eligibility lists Harrison maintained for this position. Id.\(^{at 809.}\) The *amici* claim that the district court's invalidation of this eligibility list without affording those on the list an opportunity to be heard denied them of a property interest in violation of due process of law. Id.

The Third Circuit dismissed the *amici's* claim, stating that the eligibility list did not represent a constitutionally protected property interest. Id.\(^{at 810.}\) The Third Circuit declared that a new eligibility list, which presumably would include the *amici*, was necessary to include those persons omitted from the original list as a result of the discriminatory residency ordinance. Id. Finally, the Third Circuit dismissed the *amici's* equal protection claim as merely a variant of their unsuccessful due process claim. Id.\(^{at 812.}\)

\(^{116.}\) Id.\(^{at 798.}\) For a discussion of the Third Circuit's treatment of the state statutory scheme, see *supra* notes 92-94 and accompanying text.

\(^{117.}\) *Harrison*, 940 F.2d \(^{at 798.}\) For a discussion of the pertinent language of the New Jersey Residence Act, see *supra* note 81.

\(^{118.}\) *Harrison*, 940 F.2d \(^{at 799.}\) The Third Circuit declared that a statewide multi-employer labor market did not discriminate racially, because by definition it cut evenly across racial lines. Id.\(^{at 800.}\) The district court had determined, however, that the appropriate labor market for the Town of Harrison consisted of the four counties of Hudson, Essex, Bergen and Union. Id.\(^{at 799.}\) This determination essentially enabled the NAACP to establish a prima facie case of disparate impact in the district court. Id.; see also Alessandra, *Comment, supra* note 5, at 1760 (defining "relevant labor market" as those individuals having requisite skills for job).
Title VII explicitly makes each employer responsible for its own employment practices.\textsuperscript{120} In addition, case law did not support the Town's position, for the Supreme Court has consistently rejected a "bottom line" approach to disparate impact analysis.\textsuperscript{121} The dispositive issue facing the Third Circuit was whether the Town of Harrison's residency requirement effected a disparate impact on minority applicants for municipal employment.\textsuperscript{122} Absent any statutory authority or case law supporting the Town's position, the Third Circuit properly determined that the Town's theory of a statewide multi-employer labor market lacked merit.\textsuperscript{123}

In addressing the business justification defense presented by the Town, the Third Circuit stated that the Town misperceived the nature of the employer's burden after \textit{Wards Cove}.\textsuperscript{124} Harrison contended that it had satisfied its burden of production with respect to business justification by identifying the state statutory scheme and the statewide policy supporting this scheme.\textsuperscript{125} The district court's characterization of the Town's justifications as insubstantial, however, effectively compelled the Town to persuade the Third Circuit that its residency requirement was justified by business necessity.\textsuperscript{126} Harrison asserted that to impose a burden of proof of business necessity, consisting of the dual burdens of production and persuasion, violated the teaching of \textit{Wards Cove}.\textsuperscript{127}

The Third Circuit found that while \textit{Wards Cove} did not require the Town to prove that its residency requirement was justified by business necessity, the Town had to offer more than a mere rational basis for this requirement.\textsuperscript{128} After examining each of Harrison's business justifica-
tions, the Third Circuit concluded that Harrison had not presented sufficient objective evidence to establish a nexus between the challenged employment practice and a particular employment goal. Therefore, Harrison failed to satisfy the Third Circuit’s interpretation of the employer’s burden of production with respect to business justification. On remand, the Town apparently would have to demonstrate that its business justification was not insubstantial. This more onerous burden arguably approaches the standard of business necessity that the Supreme Court in Wards Cove expressly rejected.

The author submits that the Third Circuit, not the Town of Harrison, misperceived the scope of the employer’s burden under Wards Cove. The Third Circuit correctly concluded that Harrison could not merely assert that its statutory scheme had a rational basis. Harrison, however, did more than merely assert that a rational basis supported its residency requirement; the Town offered specific economic and social justifications for its practice. These justifications clearly fulfilled the more relaxed standard established by the Court in Wards Cove.

Although Wards Cove arguably diluted the business necessity burden imposed upon the defendant under prior case law . . . it did not reduce the defendant’s burden to a showing of mere rationality. While it is now clear that the employer need not show that a challenged practice is absolutely necessary, it must demonstrate that the practice furthers legitimate business goals “in a significant way.”

Id. at 803 (quoting Wards Cove, 490 U.S. at 659) (citation omitted).

129. Id. at 804; see also Player, supra note 110, at 32 (asserting that even after Wards Cove, employer must “present[] objective evidence . . . factually showing a nexus between the selection device and a particular employment goal”).

130. Harrison, 940 F.2d at 803-04. Having attempted to prove that its residency ordinance significantly served its legitimate employment goals, Harrison argued that Wards Cove required the NAACP to prove that its justifications were a pretext for discrimination. Id. at 802 (citing Wards Cove, 490 U.S. at 659). The Third Circuit, however, intervened and declared that the Town’s justifications were insubstantial. Id. This intervention in the process of shifting evidentiary burdens violated the teachings of Wards Cove. See Wards Cove, 490 U.S. at 660-61 (stating that on remand burden is on respondent Atonio to demonstrate pretextual discrimination).

131. See id. at 659 (concluding that employer need not prove that challenged practice is essential but may not offer insubstantial justification).

132. Harrison, 940 F.2d at 802; see also Wards Cove, 490 U.S. at 659 (holding that “touchstone” is not business necessity standard of Griggs but reasoned review of employer’s justification for challenged practice).

133. Harrison, 940 F.2d at 802.

134. Id. at 804-05. These justifications included faster response time in emergencies, increased community involvement, greater loyalty, reduced tardiness and absenteeism and decreased costs. For a discussion of these justifications, see supra notes 113-15 and accompanying text.

135. See Wards Cove, 490 U.S. at 659 (declaring “touchstone” of employer’s burden to be reasoned review of challenged practice).
Therefore, the Third Circuit should have accepted the Town's business justifications because the Town had met its burden of production according to *Wards Cove*.

The Supreme Court's decision in *Wards Cove* has engendered much debate over the proper allocation of burdens in a claim of disparate impact.136 The *Wards Cove* Court overruled well-established precedent concerning the shifting of evidentiary burdens at the business justification stage of a disparate impact case.137 At one extreme is the *Griggs* standard, requiring that an employer bear the burden of proving that the challenged practice is compelled by business necessity.138 At the other extreme is the Town of Harrison's interpretation that *Wards Cove* required the Town to produce merely a rational basis for the challenged practice.139

The Third Circuit in *Harrison* interpreted *Wards Cove* to permit a court to intervene in this controversy to reject an employer's proffered business justifications as insubstantial.140 In *Harrison*, the Third Circuit adopted a results-oriented approach to the question of disparate impact. Apparently, the court determined that disparate impact had occurred, yet was faced with unfavorable Supreme Court precedent. The Third Circuit avoided this predicament by distinguishing *Harrison* on its facts, declaring the Town's business justifications insubstantial without requir-

136. See Player, supra note 110, at 1 (asking if precedent established in *Griggs* had died and reflecting (fearfully) on the Court's decision in *Wards Cove*); Mealey, Note, supra note 70, at 419 (declaring that after *Wards Cove*, "how courts should interpret the phrases 'legitimate,' 'in a significant way,' and 'reasoned review' is unclear"). For a discussion of the Court's decision in *Wards Cove*, see supra notes 55-74 and accompanying text.

137. *Wards Cove*, 490 U.S. at 656-59. Specifically, *Wards Cove* increased the plaintiff's burden to identify the specific employment practice that allegedly caused the disparate impact, rather than rely solely on statistical comparisons. *Id.* at 656. The decision also eased the burden of the employer in rebutting a plaintiff's prima facie case. *Id.* at 659. Instead of the *Griggs* "touchstone" of business necessity, the *Wards Cove* Court held that a challenged practice must significantly serve the legitimate employment goals of the employer. *Id.* This more relaxed standard reduced the employer's burden to one of production and placed the burden of persuasion upon the plaintiff. *Id.*


139. *Harrison*, 940 F.2d at 802 (citing *Wards Cove* for proposition that New Jersey Residence Act and statewide policy to enforce it satisfied employer's burden of production). For a discussion of the Town's business justifications, see supra notes 102-15 and accompanying text.

140. *Harrison*, 940 F.2d at 804-05. Under disparate impact analysis as outlined in *Wards Cove*, if an employer produced a business justification for the challenged practice, the burden shifted to the plaintiff, not to the court, to prove pretextual discrimination. For a discussion of the pretext issue, see supra notes 37 & 54 and accompanying text. For a discussion of the Third Circuit's intervention in the shifting evidentiary burdens of a disparate impact case, see supra notes 124-32 and accompanying text.
ing the Town to prove pretext. Although this tactic permitted the Third Circuit to achieve its desired result, such an approach violates the teaching of *Wards Cove* and provides insufficient guidance to future courts addressing the issue of the proper allocation of burdens at the business justification stage of a disparate impact case. Other federal courts of appeals that have addressed this issue apparently have experienced this same confusion and lack of direction. ¹⁴¹

V. THE CIVIL RIGHTS ACT OF 1991

After extensive negotiations in Congress and between Congress

¹⁴¹ Interestingly, the majority of federal courts of appeals cases researched by the author cite *Wards Cove* to support the plaintiff's burden to identify a specific employment practice when making out a prima facie case, rather than to support the employer's burden of production at the business justification stage. This reluctance to cite *Wards Cove* to support the employer's business justification burden may reflect a certain discomfort with the soundness of the Court's holding. See Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1146-47 (2d Cir. 1991) (finding disparate impact employment discrimination in promoting examination and ruling that appropriate remedy was injunction prohibiting use of rank-order list to fill vacancies); Busby v. City of Orlando, 931 F.2d 764, 777 n.12 (11th Cir. 1991) (upholding plaintiff's prima facie case but noting that employer's burden of proof in disparate impact claim after *Wards Cove* is one of production, not persuasion); Wooden v. Board of Educ., 931 F.2d 376, 379 (6th Cir. 1991) (dismissing disparate impact claim for failure to identify specific employment practice and lack of causal connection between practice and alleged discrimination); Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157, 159 (2d Cir. 1991) (dismissing disparate impact claim because plaintiff did not establish prima facie case by focusing on "bottom line" racial imbalance in work force); McNairn v. Sullivan, 929 F.2d 974, 979 (4th Cir. 1991) (dismissing disparate impact claim for failure to establish under-representation of protected group and failure to show specific employment practice caused disparate impact); EEOC v. J.M. Huber Corp., 927 F.2d 1322, 1328-29 n.24 (5th Cir. 1991) (declaring disparate impact theory requires showing policy is significantly related to legitimate business purpose such as successful job performance); Bradley v. Pizzaco of Neb., Inc., 926 F.2d 714, 716 (8th Cir. 1991) (affirming plaintiff's prima facie case based on identification of specific employment practice but remanding suit for business justification proceeding under disparate impact theory); MacPherson v. University of Montevallo, 922 F.2d 766, 771 (11th Cir. 1991) (relying extensively on *Wards Cove* in analyzing claim of disparate impact and granting directed verdict due to insufficient prima facie case); Gilty v. Village of Oak Park, 919 F.2d 1247, 1254-55 (7th Cir. 1990) (dismissing disparate impact claim for failure to identify specific employment practice at issue and lack of any causal connection between practice and alleged discrimination); Nash v. Consolidated City of Jacksonville, 905 F.2d 355, 358 (11th Cir. 1990) (holding that defendant's burden of production not satisfied by showing that examination was justified on basis that it promoted most qualified employees), cert. denied, 111 S. Ct. 967 (1991); Green v. U.S.X., 896 F.2d 801, 805 (3d Cir. 1990) (stating that employer's explanation of adverse impact of its hiring practices on blacks need not be taken at face value by court); Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1533 (7th Cir. 1990) (stating that *Wards Cove* curtailed scope of disparate impact liability under Title VII by requiring employee to identify specific employment practice before challenging statistical disparity in workforce).
and the White House, President George Bush signed into law on November 21, 1991 the Civil Rights Act of 1991 (the Civil Rights Act of 1991 or the Act).142

The Civil Rights Act of 1991 on its face expressly overturns Wards Cove.143 Congress specifically stated in one of its findings that “the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio... has weakened the scope and effectiveness of Federal civil rights protections.”144 According to Congress, the Act is intended to “respond to recent decisions of the Supreme Court by expanding the scope of rele-

142. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Congress and the White House had disagreed over the proper response to the Supreme Court’s decision in Wards Cove. See Thomas J. Piskorski & Michael A. Warner, The Civil Rights Act of 1991: Overview and Analysis, 8 THE LABOR LAWYER 9, 11 (1992). In fact, this disagreement had resulted in the nonpassage of the Civil Rights Act of 1990. Id. Congressional Democrats maintained that Wards Cove improperly altered the burdens of proof in disparate impact cases established by the Court in Griggs. Piskorski & Warner, supra, at 12. This alteration enabled employers to use employment practices and policies that created an adverse effect on minorities. Id. The White House, on the other hand, argued that the proposed redefinition of the employer’s burden would be so onerous that employers would be forced to adopt quotas in order to avoid liability. Id.; see also Gary A. Moore & Michael K. Braswell, “Quotas” and the Codification of the Disparate Impact Theory: What Did Griggs Really Say and Not Say?, 55 ALBANY L. REV. 459 (1991) (outlining debate and citing Justice White’s majority opinion in Wards Cove as exemplifying respective positions of parties).


144. Civil Rights Act of 1991 § 2, 105 Stat. at 1071. Congress found that (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace; (2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protection; and (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Id.
vant civil rights statutes in order to provide adequate protection to victims of discrimination."145 Congress stated its purpose was "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs v. Duke Power Co. . . . and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio."146

Under the Act, after proving a prima facie case of disparate impact, a plaintiff may prevail if the employer is unable to demonstrate that the challenged practice is "job related for the position in question and consistent with business necessity."147 A plaintiff also may prevail if the employer continues the alleged discriminatory practice and refuses to adopt an alternative employment practice suggested by the plaintiff.148

The Act also addresses a plaintiff's burden in a disparate impact case.149 The Act requires a plaintiff to demonstrate that each particular

145. Id. § 3, 105 Stat. at 1071. Congress enumerated the following purposes of the Act:
   (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;
   (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);
   (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-2000e-17); and
   (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

146. Id.

147. Id. § 105(a), 105 Stat. at 1074. The Act provides that if an employer demonstrates that the particular employment practice at issue does not cause the alleged disparate impact, the employer need not demonstrate that the challenged practice is consistent with business necessity. Id.

Under Wards Cove, an employer bears the burden of producing a business justification for the challenged employment practice. See Wards Cove, 490 U.S. at 659. This justification may not be insignificant, but it need not be essential or indispensable to the employer's business. Id. For a discussion of Wards Cove, see supra notes 55-74 and accompanying text. For a discussion of the Wards Cove Court's analysis of the nature of the employer's burden in a disparate impact case, see supra notes 68-71 and accompanying text.

Under Griggs, an employer bears the burden of proof (production and persuasion) at the business justification stage of a disparate impact claim. See Griggs, 401 U.S. at 481. This burden requires that the employer's practice be compelled by the "touchstone" of business necessity. Id. For a discussion of Griggs, see supra notes 39-41 & 50-51 and accompanying text. For a discussion of the Wards Cove Court's distinction between the burdens of production and persuasion in a disparate impact claim, see supra notes 72-73 and accompanying text.

148. Civil Rights Act of 1991 § 105(a), 105 Stat. at 1074. For a discussion of the Wards Cove Court's handling of the pretext issue, see supra note 74 and accompanying text.

challenged employment practice causes a disparate impact. If a plaintiff demonstrates that an employer's decisionmaking process is not capable of separation for analysis, this process may be analyzed as one employment practice.

These provisions of the Civil Rights Act of 1991 are designed to reverse the holding in Wards Cove that an employer need only produce a business justification for a challenged employment practice, and that the burden of persuasion remains with the plaintiff at all times. The Act also overturns the holding in Wards Cove that the "dispositive issue" in a disparate impact claim is whether the challenged practice "serves, in a significant way, the legitimate employment goals of the employer," and requires that the challenged practice be "consistent with business necessity."

Critics of the Act state that although the Act does indeed alter employment discrimination law, in many respects the Wards Cove decision remains "largely untouched." For example, although the Act uses the terms "job related" and "business necessity," neither term is specifically defined. Protracted bargaining sessions between Congress and

150. Id.

151. Id. In Wards Cove, the Supreme Court cited Watson v. Fort Worth Bank & Trust to reaffirm that a plaintiff must identify the specific employment practices that are responsible for any alleged statistical disparities. Wards Cove, 490 U.S. at 656 (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)). For a discussion of the plaintiff's burden in Wards Cove and Watson, see supra notes 65-67 and accompanying text.

152. See Piskorski and Warner, supra note 142, at 12. For a discussion of the Court's allocation of the burdens in Wards Cove, see supra notes 72-73 and accompanying text.

153. See Piskorski & Warner, supra note 142, at 12. For a discussion of this holding by the Wards Cove Court, see supra notes 68-71 and accompanying text.

154. See Gullett, supra note 143, at 462. Professor Gullett states that "Wards Cove [Packing Co.] v. Atkinson appears to be alive and well despite the sound and fury regarding its demise." Id.

155. See Gullett, supra note 143, at 464; see also Civil Rights Act of 1991 § 104, 105 Stat. at 1074 (amending "Definitions" section of Civil Rights Act of 1964 but not providing definitions of "job related" or "business necessity"). The legislative history of the Act does not offer any insight into the meaning of these terms. The Act states that this history is confined to an interpretive memorandum introduced by Senator Danforth that appears in the Congressional Record. Civil Rights Act of 1991 § 105(b), 105 Stat. at 1075. The Act provides that "[n]o statements other than the interpretative memorandum appearing [in the Congressional Record] shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove." Id. The interpretive memorandum states:

The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in other Supreme Court decisions prior to Wards Cove Packing Co. v. Atkinson, 490 U.S. 642 (1989).

the Bush Administration over the meaning of "business necessity" resulted in final legislation for which both sides could and did claim victory.\footnote{56} In the words of one commentator: "Guidance concerning the level of proof required of an employer to successfully defend itself against a prima facie charge of disparate impact remains hazy and will ultimately be decided again by the Supreme Court."\footnote{57} Furthermore, the Act's clarification that the burden of persuasion shifts to the employer once the plaintiff has demonstrated a prima facie case may not provide the plaintiff with a significant advantage.\footnote{58}

Despite the enactment of the Civil Rights Act of 1991, courts still face the task of defining the meaning of the term "business necessity." Given the Supreme Court's current interpretation of "business necessity" in \textit{Wards Cove}, the Act ultimately may have little or no effect on the Court's consideration of disparate impact claims. This potential outcome may cause more courts to follow the lead of the Third Circuit in \textit{Harrison} in rejecting what is perceived as unfavorable Supreme Court precedent by distinguishing undefined terms or manipulating the allocation of burdens in a disparate impact case. The resultant confusion and inconsistency in the courts will not benefit plaintiffs or employers seeking resolution of disparate impact claims.

\textit{James C. King}

one of the stated purposes of the Act." Moore & Braswell, \textit{supra} note 142, at 478.


\footnote{57} Gullett, \textit{supra} note 143, at 464.

\footnote{58} See Gullett, \textit{supra} note 143, at 464 (contending that "[o]nly when the evidence that both parties present is 'in equipose' does this burden result in a finding for plaintiff that would otherwise not be reached").