The Trial Judge After *Wards Cove*: Shifting Burdens, Shifting Rules

Judge David Doty*

I am here on a very dangerous mission. It is dangerous because what I want to do is share with you the way a judge makes a decision within the constructs of what we know and what is described as the law. I say this mission is dangerous because I run the risk of demythologization. Certainly, a judge occupies a mythological role in our society today; some people compare judges to priests of long ago. I was struck by the fact that Joseph Campbell, in his book *The Power of Myth*,[1] said, "When a judge walks into the room everybody stands up. You're not standing up to that guy, you're standing up to the robe he is wearing, and the role that he is going to play." What makes him worthy of that respect is the integrity of the principles of that role, and not some group of prejudices of his own. What you are standing before is a mythological character.

I do not want to mythologize what the judge does or what the law is, but hopefully point it out to you. I will avoid the obvious dangers—in light of many of the more popular demythologizations that we have gone through here, for example, the championship status of the Golden Gophers, or the Twins, or the Vikings, or the purity of baseball. (I wish Bob Stein[2] were here because he and I have great arguments about the purity of baseball, the righteousness of TV evangelists, and even democratic politicians.) I suppose we have all been innoculated at this point, so I am not really in great danger. After that whistling in the dark prologue, I am going to get to the point. My goal this afternoon is to illustrate three points in the trial judge's decision-making process affected by the decisions of the recent Supreme Court term. I understand that you have all heard about these cases from Professor Sherry, that you know what the holdings are, what they say, and what the im-

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* David S. Doty, District Judge, United States District Court for the District of Minnesota, 1987-present. Formerly of Popham, Haik, Schnobrich & Kaufman, Ltd. B.A. 1952, University of Minnesota; J.D. 1961, University of Minnesota Law School.

1. Joseph Campbell, *The Power of Myth* (1989).
2. Robert A. Stein, Dean, University of Minnesota Law School.

portant parts of the decision are. (Sometimes the two are not the same.) I am going to focus on one of those cases, *Wards Cove Packing v. Atonio*,[3] to illustrate the point. But what I want to do first is to show how the rules laid down by the Supreme Court in *Wards Cove* affect the decision-making process in general. Second, I will discuss how the relationship between the common law rules and the rules of civil procedure control the decision-making process of a judge. And third, I will assess the practical effect of this case on what lawyers and judges do. If time permits, I intend to share with you a few thoughts on what I believe the trend is in the Supreme Court, especially in the area of employment law, and answer any questions you might have. Now let's look at *Wards Cove* and examine how it clarifies, or changes, if you agree with the dissent, the rules in a disparate impact Title VII[4] case. I am sure that you know now that there are two general classifications of Title VII cases. Disparate treatment means the individual must show that she was treated differently from other individuals in like circumstances and must prove the intent of the discriminator in order to prevail. With disparate impact, the type of case in *Wards Cove*, both the majority and dissenting Justices agree that "racially neutral employment practices may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate."[5] That has historically been the difference between the two types of cases, and it is still the difference between the two kinds of cases.

So why all the fuss about this particular case? First, it held that the circuit court mistakenly relied upon improper statistics in finding that the employees had made out a prima facie case. The real holding of *Wards Cove* hangs on the Court's fear that the methods used by the circuit court and the district court might lead to the approval of quotas. The majority stated that as long as there are no barriers or practices deterring qualified non-whites from applying for non-cannery positions, if the percentage of selected applicants who are non-white is not significantly less than the percentage of qualified applicants who are non-white, the employer's selection mechanism probably does not have a disparate impact on minorities. That is the narrow holding of *Wards Cove*. The dissent does not address that particular part of the opinion. Although Justice Stevens does take on some other things, is no real disagreement with that portion of the opinion.

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3. 109 S. Ct. 2115 (1989).
4. The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).
5. *Wards Cove*, 109 S. Ct. at 2119.

The majority addressed two other challenges the employees made to the court of appeals decision. The first challenge relates to that of causation, wherein the Court makes it clearer that employees must identify the specific employment practice leading to the disparate impact in order to establish a prima facie case—even in a case using the subjective criteria. Now, I say clearer because the Court cites *Watson v. Fort Worth Bank & Trust*[6] which was the basis for the statement that an employee must now point out a specific causative element. Most people who have studied these cases in practice never expected that reading of disparate impact standards—until *Wards Cove*—but they certainly were given a big clue of what was going on in *Watson*. The *Wards Cove* Court, in an opinion by Justice White, quoted Justice O'Connor in the *Watson* case, saying:

> We note that the plaintiffs' burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. 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 in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.[7]

Now the rule is that if the employee proves a prima facie case of disparate impact, then the employer must produce evidence for a legitimate justification for the practices used to prove the cause of disparate impact in order to escape liability. In its opinion, the majority cites Rule 301 of the Federal Rules of Evidence. This seemed a little odd to some of us because that rule relates to the burden shifting going on when a presumption exists in a case—for example, when there is a presumption of death. The majority uses an analogy from the disparate treatment cases to support its argument, so if you had not gotten a clue earlier that there was going to be some sort of unification going on between these kinds of cases, you got it there. The Court is now combining disparate treatment with disparate impact cases in the particular area of the burden of proof.

What the Court did, obviously, was to emphasize that in these cases, the employee now has to prove that there was a specific factor that caused a disparate impact. The analogy would be that disparate treatment also emphasizes the fact that the employee's ultimate burden of persuasion is to show that the employer's busi-

6. 487 U.S. 977 (1988).
7. *Id.* at 2788.

ness justification, although brought forth by the employer on its burden of production, protects the employer from liability.

It is this maintenance of the burden of persuasion with the plaintiff that the dissent, and some students of the law believe changes the procedural rules of a disparate impact case. If you read the dissent, you will see that that is where it really takes off. This burden shifting can be very important in deciding the outcome of a case such as this. The employer, under the *Wards Cove* rules, may now show that the business practices are justified because they advance in a significant way the legitimate employment goals of the employer. To disprove this, of course, is going to be very difficult.

If an employee cannot persuade the trier of fact that the business necessity advanced by the employer is pretextual, according to the majority, she still may prevail if she can show that "other tests or selection devices without a similarly undesirable racial effect would also serve the employer's legitimate hiring interests." This too is a very difficult burden of proof. The majority goes on to warn that "the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice in response to a Title VII suit."[8] In other words, the Court simply *told* those of us who are in the judging business how we should go about analyzing the business advancement defense to the charge that the employer's decision was based on discriminatory factors and that any assertion to the contrary was pretexual.

Let me summarize what the rules are. First, plaintiffs must establish a prima facie case showing that they are discriminated against by the application of a facially neutral employment practice of the employer. They must both specifically identify the practice and prove its disparate impact. Second, the employer must come forth with a business justification for the allegedly discriminatory practice which passes a reasoned review of a "substantial justification." Again, these are instructions to the judge on how to analyze those particular facts. Third, the plaintiff must prove that the business necessity defense is pretextual and bears the burden of persuasion in that effort. It is here that the dissent really attacked the majority with an analysis of past cases and tort law relating to the burden of persuasion in an affirmative defense situation. Obviously, the dissent believes that the business justification is an affirmative defense and tried to argue that. In this

8. *Wards Cove*, 109 S. Ct. at 2127.

case, the majority just skipped over that notion and obviously is not treating it as an affirmative defense.

In addition to the rules set forth in cases such as *Wards Cove*, the rules of civil procedure and the Federal Rules of Evidence have had a great effect on what the courts' decision making is all about. As a quick review, Rule 56[9] relates to summary judgment, and Rule 56(c) says, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[10] Rule 56(e) states in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."[11]

Now, back when I was practicing law, that didn't mean a lot, and, frankly, we never read those sentences as meaning much of anything, but since the trilogy—the summary judgment trilogy of *Celotex*,[12] *Anderson*,[13] and *Matsushida*[14]—those words mean a great deal. It is clear from what the Supreme Court has told us that we are going to apply the rules as they are read. The words will apply, and we must dispose of cases in that manner.

Where does all this lead? Well, the judicial process, after a complaint has been filed, follows a general pattern. A pre-trial conference is held in accordance with Rule 16,[15] during which the issues are discussed. The parties occasionally will meet and confer for the first time concerning the case together with the judge; they talk about the case and, frankly, find out where the case is going to go, with the judge guiding them as to future activity. At that meeting, they arrange a schedule for discovery, also setting forth the schedule for motions, and so forth, and so on. With some imagination, you can determine that an employment case may have very different contours if certain weaknesses or strengths are ex-

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9. Fed. R. Civ. P. 56.
10. Fed. R. Civ. P. 56(c).
11. Fed. R. Civ. P. 56(e).
12. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).
13. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).
14. Matsushida Elec. Indus. Co. v. Zenith Radio Corp. (1986).
15. Fed. R. Civ. P. 16.

posed at this conference, giving a chance for either of the parties to work on each other or for the judge to express an informal opinion about the matter, or to set up a schedule which might push or pull the fact-gathering process in a particular way. Obviously, judges have to be very careful to act without causing any unfairness to a party.

The second general thing that happens in the decision-making process is that discovery goes on as controlled by the judge—or the magistrate in our court. That, of course, can have a substantial effect on an employment case. In *Wards Cove*, the majority relies on the fact that the discovery rules are going to allow a plaintiff to discover all the facts she is going to need to show, for example, that the employer's decision is not pretextual. But you can imagine that with good advocates working, it is not all that easy, and you have to be very aggressive.

The third, and probably the most important, part of the process is when a dispositive motion, either a Rule 12[16] motion on the pleadings or a Rule 56[17] motion, is made by one of the parties. It is at that juncture that the rules or analysis set forth by the Supreme Court in *Wards Cove* really comes into play. Generally, if a complaint is well-pleaded, a Title VII case is not disposed of by a motion on the pleadings. It has got to be a fairly bad pleading—and sometimes we do get them with pro se plaintiffs—but that rarely happens. But, when a Rule 12 motion is converted to a Rule 56 motion or a Rule 56 motion is brought directly, a different situation exists. If an employer challenges a Title VII plaintiff, the analytical rules of both *Wards Cove* and Rule 56 provide a severe burden for a plaintiff to overcome. If the defendant directly attacks either the plaintiff's claim of discrimination or provides evidence of business necessity, the plaintiff is required to come forth with designated facts to establish a prima facie case of discrimination and show that the employer's business necessity defense is a pretext at that stage of the pleadings because the ultimate burden of persuasion has been shifted. The plaintiff must now show a prima facie case of discrimination and *disprove* the business necessity defense. The plaintiff must produce facts from which the judge may conclude that no reasonable fact-finder, when looking at the evidence in the light most favorable to the non-moving party, would conclude that the moving party would not ultimately prevail. Of course, in a pure Title VII case, the judge deciding the

16. Fed. R. Civ. P. 12.
17. Fed. R. Civ. P. 56.

summary judgment motion is the judge who will ultimately decide the facts in the action if it is tried, since there is no jury.

You all know that a defendant is not entitled to a summary judgment unless the court concludes that there is not a genuine issue as to any material fact. Under that standard, however, the burden of proof remains on that party bearing the burden of proof at trial—that comes out of the *Anderson Liberty*[18] case. Thus, the importance of the burden-shifting holding of *Wards Cove*: the movant is not even initially required to support its motion with affidavits and other similar evidentiary materials. In a disparate impact case where the non-moving plaintiff will bear the burden of proof, the submission of any competent evidence compels the non-moving party to go beyond the pleadings and submit its own evidentiary materials demonstrating the existence of a genuine factual issue for trial. The test for the existence of a genuine factual issue is not whether there is literally no evidence, but whether there is any evidence upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the honest of proof is imposed. That is the standard which the judge has to use in deciding whether the summary judgment motion should be granted or not. The test reflects the view that summary judgment is not to be regarded as a disfavored procedural shortcut anymore but, rather, as an integral part of the federal rules as a whole, which are designed to insure the just, speedy, and inexpensive determination of every action. You can see then why many disparate impact cases can now be decided at the summary judgment stage when previously few were decided at that point.

The practical effect of the interplay between the rules of procedure in a disparate impact case as set down in *Wards Cove* and Rule 56 is to put a great burden on both the lawyers involved in these cases and on the judge. The lawyers must develop their facts early and succinctly, especially those lawyers representing plaintiffs. Plaintiffs' lawyers will be much more aggressive in discovery, especially in an attempt to make clear the causative factors leading to disparate impact in any potential business necessity justification. Plaintiffs will necessarily need to be aggressive in determining facts to prove that the business necessity is nothing but a pretext and will necessarily be very imaginative coming up with alternatives to the business necessity to show that it is not justifiable. Defendants' counsel, on the other hand, will obviously be very aggressive in bringing Rule 12 or Rule 56 motions. That leads to the most horrendous conclusion that judges will be faced with

18. *Anderson*, 477 U.S. at 249.

substantially more motions in these cases looking toward ultimate disposition. Now as you can probably imagine, the work of a judge and of law clerks is multiplied by a large factor when complicated factual scenarios are presented to the judge for decision at an early stage of the proceedings. Of course, as you probably already know, although the Rule 56 analysis that I have gone over is very heavily into factual analysis, we must look at the facts, digging them out of whatever materials are given to us by the attorneys.

Jury trials are the usual salvation of an overworked bench. But unless the law changes further to allow Title VII plaintiffs to have a jury under federal law, such as ADA plaintiffs now have, the holding in *Wards Cove* looks like really bad news for a federal judge. In lieu of this dire prediction of more work for the judge, it appears that some silver lining might be found in these otherwise gloomy clouds. For reasons announced by the Chief Justice in various speeches in some of his opinions, it appears that the Rehnquist Court is attempting to rationalize the decisions of the Court and, in most cases, to make the law more easily understood and applied. For example, in *Wards Cove*, the law related to disparate impact cases and disparate treatment cases aligned so that the rules are easier for the parties and the courts that are trying to apply them to understand. It is very difficult sometimes to try to wind your way through those things. Other examples of this rationalization effort can be adduced. For example, in the securities arbitration area, the old doctrine of *Wilko v. Swan*[19] was overturned and supplanted by the rule of *Rodriguez de Quijas*[20] which holds that such cases must now be arbitrated. It also is obvious that the Rehnquist Court, at least in my view, will probably view the political and legislative processes with more importance and really eschew judicial intervention. *Wards Cove* can illustrate that the Rehnquist Court will arguably be more careful and literal in its reading of Congressional enactments than its predecessor. It also appears that precedent will be revered by this Court, and that no revolutionary doctrine is likely to be asserted, notwithstanding the debate that *Webster*[21] and some of the other cases have generated. If you read *Webster*, *Patterson*,[22] and *Wilkes*,[23] it is clear that precedent in the true sense is going to be adhered to. Regard-

19. 346 U.S. 427 (1953).

20. Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917 (1989).

21. Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1988).

22. Patterson v. McClean Credit Union, 109 S. Ct. 2363 (1989).

23. Wilkes v. United States District Court for the Middle District of Florida, 109 S. Ct. 493 (1989).

ing *Wards Cove*, a natural reading would have been that the Court was going to overrule the *Duke Power*[24] but it took great pains to *not* overrule *Duke Power*; it is still good law.

So, what is the meaning of all of this? As one Chief Justice was quoted as telling his law clerk, "Well, I don't know really." Personally, what I think it means is that the life of a lawyer and a judge will remain extremely interesting, extremely challenging, and, in other words, probably nothing new is happening.

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24. Griggs v. Duke Power Co., 401 U.S. 424 (1971).