U.S. Supreme Courts 1989 Civil Rights and Employment Cases: A Defense Perspective

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Recent rulings of the United States Supreme Court in the areas of civil rights and employment litigation in the 1989 session have caused a flurry of media attention and consternation among civil rights groups. Efforts have been made in Congress to remedy the effects of these decisions, which many groups say mark the beginning of the end of progress towards equal opportunities for minorities and women which has occurred since the passage of the 1964 Civil Rights Act.

It is indisputable that the 1989 term decisions of the Supreme Court will have an impact on plaintiffs in class action suits. From the perspective of defending these types of suits, however, the impact of the decisions is far less pronounced. When asked the question, "What will change in the way you handle discrimination suits in the aftermath of the 1989 decisions?", the short answer is: not much.

That is not to say, of course, that those defending civil rights suits and Title VII actions will not find comfort in the Supreme Court's decisions. Nevertheless, as a practical matter, the defense will be handling these suits in the future in very much the same way it handled them before. Indeed, despite all the rhetoric, I would venture to guess that the way employers behave with respect to their employees will be unchanged in the aftermath of these decisions with the possible exception that employers may be more careful in making subjective evaluations of their employees in light of the Supreme Court's decision in *Price Waterhouse v. Hopkins*.[1]

The Supreme Court's decisions in the 1989 term and *Watson*

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1. 109 S. Ct. 1775 (1989).

v. Fort Worth State Bank and Trust,[2] which was decided in 1988, mark a change in the Supreme Court's view of civil rights and employment discrimination cases. It can be argued, however, that the limitations placed upon discrimination actions by the Supreme Court simply lessen the number of remedies available to civil rights plaintiffs and do not lower the *quality* of the remedies. Even under the Court's most recent decisions, plaintiffs will still win the 'good' cases. The bad and weak cases, however, may be thrown out of court before trial, which in the end is a service to us all.

Perhaps the recent employment discrimination decision of the Supreme Court that has received the most criticism is *Wards Cove Packing Company, Inc. v. Atonio*.[3] The *Wards Cove* decision is an excellent example of how, although the law may have changed, the handling of the defense by defense lawyers will not be substantially effected by the decision.

Wards Cove involved a class of non-white cannery workers alleging that they were denied employment as higher paid, non-cannery workers due to the employer's discriminatory hiring and promotion practices.[4] As proof of the disparate impact of the employer's hiring practices, plaintiffs offered statistics which showed that a much higher percentage of minority job applicants were hired for unskilled cannery jobs, than for skilled positions.[5] The plaintiffs proceeded on the "disparate impact" theory, which does not require evidence of the employer's subjective intent to discriminate.[6] In disparate impact cases, the plaintiff must show that a facially neutral policy has a disparate impact on a protected class. The employer is then permitted to come forward with evidence supporting its practice.[7]

The Supreme Court changed the law in *Wards Cove*. The Court held that when using statistics to create a *prima facie* case of disparate impact, a plaintiff must focus on comparing selected applicants with the qualified labor population.[8] The plaintiffs in *Wards Cove* simply compared the number of minorities in unskilled cannery jobs with the number of minorities in skilled positions.[9]

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2. 487 U.S. 977 (1988).
3. 109 S. Ct. 2115 (1989).
4. *Id.* at 2120.
5. *Id.* at 2121.
6. *Id.* at 2120.
7. *Id.*
8. *Id.* at 2121.
9. *Id.* at 2121-122.

Courts in the past held that plaintiffs who relied on statistics showing a relatively small percentage of protected workers in skilled positions versus a large number of protected workers in unskilled positions satisfied a *prima facie* case of disparate impact. In contrast, however, defense lawyers frequently argued that the relevant comparison was, as the Court in *Wards Cove* held, a comparison with the relevant labor market. Defense lawyers argued that an employer can only discriminate against a protected class if members of the protected class are available for positions and are denied those positions. For example, it is impossible for an employer to discriminate against a class of protected persons if no protected persons are available to hold those positions. As the Supreme Court stated, "If the absence of minorities holding such skilled positions is due to a dearth of qualified non-white applicants (for reasons that are not petitioner's fault), petitioner's selection methods or employment practices cannot be said to have a 'disparate impact' on non-whites."[10]

In addition to tightly defining proper statistical analyses, the Court restricted what constitutes "causation" in a disparate impact case.[11] Even if a proper statistical analysis is used to show that there is a racial imbalance in the workforce, plaintiffs now have the further burden of showing that the imbalances are caused by an isolated, particular hiring practice.[12] This showing is now part of a plaintiff's *prima facie* case. In so stating the Court relied on its decision a year earlier in *Watson v. Fort Worth Bank and Trust*.[13]

In *Wards Cove*, the respondents alleged that several "objective" employment practices (e.g., nepotism, separate hiring channels, rehire preferences, as well as the use of subjective decision-making) used to select non-cannery workers had a disparate impact on non-whites.[14] The Court held that in order to succeed in proving a *prima facie* case of disparate impact, plaintiffs must show that

> the disparity they complain of is the result of one or more of the employment practices they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and non-whites. To hold otherwise would result in employers being potentially liable for the myriad of innocent causes that may lead to statistical imbalances in the composition of their work

10. *Id.* at 2122.
11. *Id.* at 2124.
12. *Id.*
13. 487 U.S. 977 (1988).
14. 109 S. Ct. at 2125.

forces.[15]

These changes will not significantly change the way defendants defend employment discrimination cases. Employers have always argued that a plaintiff must show which of its particular practices has caused the discrimination, even in a disparate impact case, and cannot simply dump statistics of racial or gender imbalance in the workforce on the defendant and claim that "something" must have caused it, and that "something" must be inherently discriminatory.

The Court in *Wards Cove* also altered the burden that the defendant must meet once the plaintiff has made out a *prima facie* case of disparate impact. Under the old proof burden outlined in *Griggs v. Dukes Power Co.*,[16] if plaintiffs established a *prima facie* case of disparate impact, the focus shifted to the employer to show a business justification for the use of the attacked employment practices.[17] In the past, federal courts found that if a *prima facie* case was established, the employer had the *burden* of proving that the employment practice was required by business as a necessity. In *Wards Cove*, however, the Supreme Court explained that the employer does not have the burden of proving business necessity, but only carries the burden of producing evidence of a business justification for the employment practice. The burden of persuasion, the Court held, remains with the disparate impact plaintiff.[18]

The *Wards Cove* Court held that were the challenged practice required to be "essential" or "indispensable" to the employer's business for it to pass muster, the degree of scrutiny would be almost impossible for most employers to withstand.[19] Again citing *Watson*, the *Wards Cove* Court states that "the 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."[20] The Court acknowledged that "some of our earlier decisions can be read as suggesting otherwise,"[21] but it claims those rulings were limited to a burden of production, not persuasion.[22] In addition, if the plaintiff cannot overcome the business necessity defense, it may still be able to prevail by showing

15. *Id.*
16. 401 U.S. 424 (1971).
17. *Id.* at 132.
18. 109 S. Ct. at 2120.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest."[23] The Court noted that those alternative practices put fort by the plaintiff must be "equally effective" as petitioner's chosen hiring procedure in achieving petitioner's legitimate employment goals.[24]

The area of business justification may be the only facet of the *Wards Cove* decision that changes how the defendant may approach the case. Obviously, if the defendant does not carry the burden of proof at all in the disparate impact case, the defendant may be more conservative in the proof that it offers to rebut the plaintiff's case. As a practical matter, however, in most of the lawsuits that are tried the defendant will do everything it can to prove that the employment practices that it uses are necessary and legitimate. Nothing in *Wards Cove* will change that way of defending claims.

Two other recent decisions are also illustrative of the fact that these changes will have very little practical effect on how lawyers and defense counsel handle employment discrimination cases. In *Lorence v. AT&T Technologies, Inc.*,[25] the Court resolved a split among the courts of appeals by holding that the *date* of the signing of a collective bargaining agreement triggers the statute of limitations for discrimination complaints rather than the time when the employer felt the "concrete effects" of the system contained in the collective bargaining agreement.[26] The Court, contrary to the position of the Justice Department and the EEOC, ruled that a civil rights challenge to a seniority plan must be filed within 300 days of the plan's adoption. In this case, the lawsuit was filed by three female employees within 300 days after the employees were demoted, pursuant to the seniority plan, but three years after the seniority plan was adopted.[27]

Commentators have suggested that the *Lorence* decision reverses the trend in the "continuing violation" line of cases, under which a plaintiff could wait years before challenging employment practices and then claim that the violation was continuing until the present. Now, at least in the field of *bona fide* seniority systems, employers that institute seniority systems or change systems that are already in place can expect that any challenges will be made within a reasonable time frame after the

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23. *Id.*
24. *Id.* at 2127.
25. 109 S. Ct. 2061 (1989).
26. *Id.* at 2261.
27. *Id.* at 2264.

changes are introduced. As a practical matter, employers will still make changes in their seniority systems the way they always have. The defense of the case will rest with whether the plaintiff has proven an actual intent to discriminate on statutorily prescribed grounds on the part of those who negotiated or maintained that seniority system. The only change will be that plaintiffs cannot bring cases many years after the change in the seniority system has taken place.

Similarly, the change in law set forth in *Martin v. Wilks*,[28] is significant not so much for the defense of civil rights cases and employment cases, but for its procedural effects. In *Martin*, white Birmingham, Alabama firefighters sued the city, alleging that because of their race they were being denied promotions in favor of less qualified blacks. The firefighters argued that the defendant's decisions were made on the basis of race and on reliance of a consent decree entered in a proceeding in which plaintiffs were not parties. The Supreme Court decided that the white firefighters were not precluded from challenging the employment decisions made pursuant to a consent decree, as the white firefighters were not parties to the lawsuit in which the decree had been entered.[29]

While *Martin* certainly signals the conservative stance the Court takes in the affirmative action cases, it does not eliminate the importance of affirmative action programs. The real impact of this decision is to make proceedings to obtain consent decrees more complex for both plaintiffs and employers. To ensure that consent decrees are not collaterally attacked, parties must join all possibly effected employees to the initial lawsuit, making the litigation more time consuming and expensive for all concerned. Old cases resolved by consent decrees may be reopened as well. The net result of *Martin* does not change an employer's underlying affirmative action responsibilities, but gives all employees a day in court when affirmative action obligations come under attack.

In the past when settling discrimination lawsuits on behalf of employers, we rejected the use of consent decrees for much the same reasons that underly the Court's opinion in *Martin v. Wilkes*. It has long been the belief of defense attorneys that those consent decrees were not only a "can of worms" for an employer, but could be collaterally attacked by those not a party to the consent decree. Thus, even if an employer were extremely willing to accommodate a protected class by the use of goals, those goals were often difficult and expensive to implement and the class

28. 109 S. Ct. 2180 (1989).
29. *Id.* at 2180.

might be better served by other relief. That has been my advice to clients with respect to consent decrees. In addition, defense counsel have always suspected that consent decrees may be subject to a collateral attack by non-class members, either those in other protected classes or by whites. Thus, neither the class settling with the employer nor the employer can gain any comfort from the imposition of a consent decree when, again, the class may be better served by other relief.

Another Supreme Court decision decided last June which received considerable attention was *Patterson v. McClean Credit Union*,[30] a lawsuit by a black teller against her employer. In *Patterson*, the Supreme Court addressed the validity of claims under 42 U.S.C. § 1981 in employment discrimination lawsuits.[31] Section 1981 is a civil rights statute passed in the reconstruction era which prohibits racial discrimination in the making and enforcement of contracts. The Supreme Court reaffirmed that Section 1981 prohibits racial discrimination in the making and enforcement of private contracts.[32] Thus, the *Patterson* decision applies to private employers as well as the United States government. However, the Court narrowly defined Section 1981 lawsuits. The Court ruled that Section 1981 could only be used for hiring and failure to promote claims, and then only where the promotion would result in a "new and distinct relationship between employee and employer."[33] Section 1981 lawsuits could not be brought because of racial harassment or other working conditions.[34] Thus, the black plaintiff in *Patterson* who allegedly was the target of racial slurs by a supervisor, could not sue for these remarks under Section 1981. [35]

The Court based its interpretation upon a distinction between the language of Section 1981, which refers to the ability to "make and enforce contracts," and "post-formation conduct" which deals with the performance of an already-established contractual obligation. It found that conditions of continuing employment were post-formation conduct which did not implicate the protections of Section 1981.[36] The Court also relied upon the expansive reach of Title VII in its decision to narrowly construe matters actionable under Section 1981, noting that this opinion served to "preserve the integrity of Title VII procedures without sacrificing any signifi-

30. 109 S. Ct. 2363 (1989).
31. *Id.* at 2363.
32. *Id.*
33. *Id.* at 2365.
34. *Id.*
35. *Id.* at 2367.
36. *Id.* at 2372-73.

cant coverage of the civil rights laws."[37]

Because of the extensive coverage of Title VII and state human rights acts, this decision has little impact on employers. The racial harassment claims the Court dismissed as not actionable under Section 1981 would certainly have been actionable under the terms of Title VII. Indeed, the practical impact of the decision is to force plaintiffs to follow the procedural requirements of Title VII in disputes over conditions of employment and work environment. In addition, the decision limits the types of damages that are available to a plaintiff in these cases, since Section 1981 is a tort statute which provides for tort remedies and Title VII damages are limited to wage loss.

Since Section 1981 is a civil rights statute, it is limited in scope to racial minorities. It does not apply to women. Thus, the decision in *Patterson* can be construed as an attempt by the Supreme Court to bring the laws regarding racial and sexual discrimination into conformity via Title VII. Prior to the *Patterson* decision and other like decisions which limit the scope of 1981 actions, multiple remedies to plaintiffs. Plaintiffs routinely brought claims under Section 1981, Title VII, state human rights acts, and the Age Discrimination in Employment Act. When coupled these causes of action were with state tort causes of action which have become so popular in recent years, the number of counts contained in most employment law cases, even individual cases, is in the double digits.

Title VII was designed to remedy discrimination in the employment context. Thus, an argument can be made that it should be the sole federal remedy for the alleviation of discrimination in the workplace. The fact that Section 1981, unlike Title VII, allows for tort damages should not serve to maintain a system in which a plaintiff has multiple theories of recovery. Congress apparently did not intend discrimination in the workplace to be considered a tort. One or two laws at most that apply to discrimination would let employers know where they stand and give employees a relatively simple vehicle for obtaining redress for their grievances. The Supreme Court's decision in *Patterson* serves these purposes by limiting the number of theories available to a plaintiff and yet cannot be construed as the taking away of any substantive right a plaintiff may have.

The import of the recent Supreme Court decisions, as a practical matter, will be that bad cases will be less likely to go to trial. Summary judgment may be granted more quickly under *Wards*

37. *Id.* at 2375.

Cove and *Lorence v. AT&T Technologies*. Good cases, however, will survive no matter what. I think that is borne out by the decision in *Price Waterhouse v. Hopkins*.[38] In *Price Waterhouse*, the plaintiff was a senior manager in the Price Waterhouse accounting firm, one of the "big eight" accounting firms. She was proposed for partnership at Price Waterhouse in 1982 along with 87 men. 37 of the candidates were admitted to the partnership, 21 were rejected, and 20, including Hopkins, were held for reconsideration the following year.[39] Many positive comments were made about Hopkins during the partnership selection process, including comments that she was "an outstanding professional" who had "a strong character, independence and integrity."[40] She was popular with clients, and good at attracting them. One client testified at trial that she was "extremely confident, intelligent, strong and forthright, very productive, energetic and creative."[41]

Nevertheless, Hopkins apparently lacked certain "interpersonal skills"[42] in the office and had a difficult time dealing with staff members. The partners' negative comments about Hopkins—even those of partners supporting her—focused on her "interpersonal skills."[43] In making these comments, however, there were "clear signs" that some of the partners reacted negatively to Hopkins' strong and independent personality because she was a woman.[44] One partner described her as "macho."[45] Her file was replete with comments regarding the fact that she was "a lady" who had "masculine" characteristics. A male partner who explained to Ms. Hopkins the reasons for the decision to place her candidacy on hold put the whole matter in perspective. He advised Hopkins that to improve her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."[46]

At trial, a social psychologist testified that, based on these and other reported remarks, the partnership selection process was likely influenced by sex stereotyping. According to the Supreme Court, "[i]n the specific context of sex stereotyping, an employer who acts on the basis of the belief that a woman cannot be aggres-

38. 109 S. Ct. 1778.
39. *Id.* at 1781.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

sive, or that she must not be, has acted on the basis of gender."[47]

Price Waterhouse is what is known as a "mixed motive" case. In mixed motive cases, an employment decision is a result from "a mixture of legitimate and illegitimate motives." It is unlikely that Ann Hopkins could have met the standard required in a disparate treatment case. Under a disparate treatment case theory, plaintiff must show that she was treated differently from others based upon her status in a protected class.

The trial judge held Price Waterhouse legitimately emphasized interpersonal skills in its partnership decisions, and he also found that the firm had not fabricated its complaint about Hopkins interpersonal skills as a pretext for discrimination.[48] Price Waterhouse also did not give decisive weight to such traits because Hopkins was a woman. However, male candidates who lacked these interpersonal skills were admitted to partnership, but these males, the company claimed, possessed better positive traits that Hopkins lacked.[49] In addition, it is important to note that many of the sex stereotypical comments made by evaluators were made by Hopkins' supporters, not her detractors. Thus, those males making sex stereotypical remarks were not acting with an intent to discriminate, since they were advocating her admission to the partnership. Thus, the court had to find that, unlike in a simple disparate treatment case, this case involved a mixture of motives and that at least one motive resulted in Hopkins not being granted partnership.

The importance of the *Price Waterhouse* case is that a mixed motive case is the only type of discrimination in which the burden of proof shifts to the defendant. Perhaps this is demanded because these are the most difficult types of cases for plaintiffs to prove.[50] What the Court has done is develop a hybrid type of case—which

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47. *Id.* at 1790-91.

48. *Id.* at 1783.

49. *Id.*

50. Under the disparate treatment theory, the burden of persuasion always remains with the plaintiff. Under *McDonald Douglas Corp. v. Green* 411 U.S. 792, 802, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) and *Texas Department of Community Affairs v. Bodine*, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981), the plaintiff must show that they were a member of a protected class and were denied employment or promotion. The defendant must then come forward with a legitimate non-discriminatory reason for the decision, which the platintiff may then attack as a pretext. Although the defendant bears the burden of production of a legitimate non-discriminatory reason, it does not ever bear the burden of proof in a disparate treatment case. As discussed earlier with respect to the *Wards Cove* decision, the burden of proof in a disparate impact case always remains with the plaintiff as well. Again, the defendant in those cases is required to come up with a legitimate business justification to explain the apparent disparate impact, but at no point does the actual burden of proof shift to the defendant.

involves the actual shifting of the burden of proof to the defendant. The plaintiff must show that a discriminatory reason was one motive for the adverse personnel decision. The defendant is then required to show that even if it had not taken gender or race into account, it would have made the same decision. As the court noted, it is important to shift the burden of proof to the defendant in these cases because

> if an employer allows gender to affect its decision-making process, then it must carry the burden of justifying its ultimate decision. We have not in the past required women whose gender has proved relevant to an employment decision to establish the negative proposition that they would not have been subject to that decision had they been men, and we do not do so today.[51]

All of this brings me to my last and most important point. In my view, the 1989 decision that will have the greatest impact on the way employers deal with employees in the workforce is the *Price Waterhouse* decision and its view of subjective decision-making practices. I have heard some commentators argue that *Price Waterhouse* is an anomaly because people simply do not "talk" like that anymore when evaluating employees. Let me tell you that those people are wrong. Subjective decision-making takes place in the highest levels of an organization. In unskilled and low level skilled work, objective decision making is much more common. You can count the number of items that someone makes or the number of telephone calls an individual takes during a given day and determine whether or not she is being productive. When you get to a decision like partnership in an accounting firm, as in *Price Waterhouse*, or a law firm, however, the decision-making process is much more subjective and relies heavily on opinions about employees' personalities.

In addition, at this level the decision-makers are managers and supervisors who, although they may be extremely competent in their own jobs, sometimes have very little time for listening to "personnel" types who want to teach them how to do an evaluation. It is sometimes easier, in my experience, to control the actions of first line supervisors by training and education, than it is to control the behavior of executives who ought to know better. Thus, the idea that *Price Waterhouse* is a decision of little significance in actual terms, because "no one does those sorts of things anymore" is a dangerous and naive point of view. Instead, *Price Waterhouse* is likely one of the most significant decisions coming out of the Supreme Court last term; it will have the greatest im-

51. *Id.* at 1789.

pact on the way employers do business. Henceforth employers will have to be very careful to couch their evaluations in sex neutral terms, otherwise the plaintiff's bar will have a field day.

The other decisions will have an impact on the success rate of discrimination actions, by making the plaintiff's job at trial harder, and will limit plaintiffs' available remedies. But by and large, with the exception of *Price Waterhouse*, these decisions will have little effect on the way the defense is handled and, more importantly, how employers treat their employees.