Slippery Slope of "Alternatives" Altering the Topography of Employment Testing?

James C. Sharf[1]

Recent federal district court decisions (a) rejected use of a valid employment test on anecdotal grounds that less adverse "alternatives" were available, and (b) treated "a pass rate below the 'four fifths rule' as sufficient to make out a prima facie case of discrimination, and therefore sufficient to justify voluntary race-conscious remedies." This is not the federal court's "first impression"—DOJ having long advocated "alternatives" to cognitive ability tests.[2] What is particularly noteworthy is the anecdotal level of evidence these judges[3] have accepted for "less adverse alternatives"—contrary to the burden on plaintiffs spelled out in the Civil Rights Act of 1991.

The Legal Context for "Alternatives"

Under Title VII, the plaintiff is burdened with demonstrating that one or more of the employer's selection or promotion procedures caused a disparate impact on the basis of race, color, religion, sex, or national origin. If the plaintiff does so, the burden shifts to the employer to prove that the challenged practice is "job related for the position in question and consistent with business necessity."[4] If the employer meets this burden, then the plaintiff can prevail only if it proves at trial that an "alternative employment procedure" exists that would also serve the business purpose articulated by the employer, would be of equal validity as the challenged practice but with less adverse impact, and the employer nevertheless "refuses" to adopt the less adverse procedure.

The "alternatives" section of the Civil Rights Act of 1991 (CRA 91) was enacted in response to the Supreme Court's 1989 decision in *Wards Cove Packing Co. v. Atonio.*[5] CRA 91 overruled the *Wards Cove* decision in some respects but codified it in others, now requiring courts to apply the law as it existed *before Wards Cove* in determining whether the plaintiff has sustained its burden at trial of proving an "alternative employment procedure." CRA 91 also stipulated that the employer would not be liable on that basis unless, after the plaintiff meets its burden at trial, the employer "refuses to adopt" the equally valid, less adverse alternative.

---

[1] jim@jimsharf.com

[2] *United States v. City of Garland, Texas,* Case No. 3:98-CV-0307-L; *United States v. Delaware State Police*, No.Civ.A. 01-020-KAJ.

[3] According to defense counsels, each judge had been identified in press coverage as a liberal female.

[4] Civil Rights Act of 1991, Sec. 105. Burden of Proof in Disparate Impact Cases; 42 U.S.C. § 2000e-2(k)(1)(A)(i).

[5] 490 U.S. 642 (1989).

Supreme Court "Introduces" Alternatives

As was also the case with the disparate impact definition of employment discrimination, the concept of "alternative employment practices" was found nowhere in the legislative history of the Civil Rights Act of 1964. It was "introduced" (i.e., created by judicial fiat) in the Supreme Court in 1975 in *Albemarle Paper Co. v. Moody,*[6] building upon its earlier 1971 decision in *Griggs v. Duke Power Co.*[7] The unanimous *Griggs* decision held that if an employment practice was shown to cause a disparate impact, the burden shifts to the employer to show that the practice has "a manifest relationship to the employment in question."[8] In *Albemarle*, the Court held that even if the employer met its burden of proof under *Griggs*, the plaintiff could still prevail by demonstrating that an alternative employment practice "would also serve the employer's legitimate interest" but "without a similar undesirable racial effect."[9] The Court stated that such a showing "would be evidence that the employer was using its tests merely as a pretext for discrimination."[10]

Subsequently in 1978 in *Furnco Construction Corp. v. Waters,*[11] the Supreme Court noted that "Courts are generally less competent than employers to restructure business practices," that a court has no power to require employers "to adopt what it perceives to be the 'best' hiring procedures," and that "Title VII…does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."[12] The 1988 Supreme Court plurality in *Watson v. Fort Worth Bank & Trust Co*.[13] noted: "(F)actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals."

Also in 1988 in *Wards Cove*,[14] the Supreme Court ruled that if an employment practice was shown to cause a disparate impact, the employer would only be required to articulate a legitimate business justification for that practice. The plaintiff would then bear the burden of proving that the practice *did not serve* the employer's proffered justification. The Supreme Court in *Wards Cove* did not depart from its ruling in *Albemarle* that the plaintiff could also prevail by showing that there was an alternative employment practice that would serve the employer's proffered justification equally well, with less adverse impact than the challenged practice, but that the employer nonetheless

[6] 422 U.S. 405 (1975).
[7] 401 U.S. 424 (1971).
[8] *Id*. at 432.
[9] *Albemarle*, 422 U.S. at 425.
[10] *see also Lanning v. Southeastern Pennsylvania Transportation Authority*, 181 F.3d 478, 485 (3d Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000) (a demonstrated alternative employment practice must "also serve the employer's legitimate business interest").
[11] 438 U.S. 567 (1978).
[12] *Id*. at 577-78.
[13] 487 U.S. 977 (1988).
[14] 490 U.S. at 659-60.

refuses to adopt it.[15] As in *Albemarle*, the Court noted that "such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons."[16] The Court also repeated its admonitions from *Watson* and *Furnco* that the alternative must be equally as effective as the challenged practice in achieving the employer's stated goals, that factors such as costs or other burdens are relevant to this inquiry, and that "the judiciary should proceed with care before mandating that an employer must adopt a plaintiffs alternate selection or hiring practice in response to a Title VII suit."[17]

The Civil Rights Act of 1991 overruled *Wards Cove* in part by placing the burden on the employer to justify an employment practice that was shown to have caused an adverse impact.[18] CRA 91 also provided that, even if the employer meets its burden, the plaintiff may still prevail if it: "makes the demonstration described in subparagraph (C) with respect to an alternative employment practice, and the respondent refuses to adopt such alternative employment practice."[19] CRA 91 defined the term "demonstrates" to mean "meets the burdens of production and persuasion," an event that occurs at trial.[20] Subparagraph (C) of the disparate impact section provides that "the demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989 with respect to the concept of 'alternative employment practice.'"[21] June 4, 1989 is the day before the Supreme Court's decision in *Wards Cove*.

The Civil Rights Act of 1991 Act thus requires two separate showings with respect to "alternatives." First, the plaintiff must meet the burdens of production and persuasion that existed under pre-*Wards Cove* law with respect to an "alternative employment practice." Second, liability may be imposed only if, after the plaintiff meets those burdens at trial, the employer nonetheless "refuses to adopt" that alternative employment practice. (Note: The Civil Rights Division of the Department of Justice has argued that the "alternatives" need not measure the same construct.[22])

---

[15] *Id.* at 660.
[16] *Id.* at 660-61.
[17] *Id.* at 661.
[18] 42 U.S.C. § 2000e-2(k)(1)(A)(i).
[19] 42 U.S.C. § 2000e-2(k)(1)(A)(ii).
[20] 42 U.S.C. § 2000e(m).
[21] 42 U.S.C. § 2000e-2(k)(1)(C).
[22] *United States v. The Delaware State Police* Civil Action No. 01-020-RRM; (Discovery Notice at 12 (U.S. Response to RFA 53). See also *United States v. City of Garland, Texas*, USDC Case N. 3:98-CV-0307-L. Civil Rights Act of 1991, Sec. 105. Burden of Proof in Disparate Impact Cases; 42 U.S.C. § 2000e-2(k)(1)(A)(i). 490 U.S. 642 (1989). 422 U.S. 405 (1975). 401 U.S. 424 (1971). *Id.* at 432. *Albemarle,* 422 U.S. at 425. *see also Lanning v. Southeastern Pennsylvania Transportation Authrity*, 181 F.3d 478, 485 (3d Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000) (a demonstrated alternative employment practice must "also serve the employer's legitimate business interest"). 438 U.S. 567 (1978). *Id.* at 577-78. 487 U.S. 977 (1988). 490 U.S. at 659-60. *Id.* at 660. *Id.* at 660-61. *Id.* at 661. 42 U.S.C. § 2000e-2(k)(1)(A)(i). 42 U.S.C. § 2000e-2(k)(1)(A)(ii). 42 U.S.C. § 2000e(m). 42 U.S.C. § 2000e-2(k)(1)(C). *United States v. The Delaware State Police* Civil Action No. 01-020-RRM; (Discovery Notice at 12 (U.S. Response to RFA 53). See also *United States v. City of Garland, Texas*, USDC Case N. 3:98-CV-0307-L.

City of New Haven Fire Department[23] (December 2006)

In March 2004 the New Haven Civil Service Board (CSB) refused to certify the results of promotional exams for the positions of lieutenant and captain in the New Haven Fire Department. Plaintiffs were White and Hispanic candidates who took the promotional exams but received no promotion because without the CSB's certification of the test results, the promotional process could not proceed. Given the number of vacancies and following the "rule of three" for hiring those with the highest scores, had the captain exam results been implemented, promotions would have gone to 7 Whites, 2 Hispanics and no Blacks; all 10 lieutenants would have been White.

An I-O from a competing firm testified before the CSB that …his company finds "significantly and dramatically less adverse impact in most of the test procedures that we design;" that "we know that a written test is not as valid as other procedures that exist;" that as an alternative to traditional written and oral testing processes, "an assessment center process…(and) situational judgment tests …demonstrate dramatically less adverse impact…"

The judge noted:

> This case presents the opposite scenario of the usual challenge to an employment or promotional examination, as plaintiffs attack not the use of allegedly racially discriminatory exam results, but defendants' reason for their *refusal* to use the results. Plaintiffs argue that the CSB did not have extensive evidence of the existence of other, less discriminatory, and equally effective selection measures. Dr. (I-O) telephonically testified that other tests, particularly ones he had developed, generally yield less adverse impact, and mentioned that an "assessment center approach" might benefit New Haven, without specifically explaining what that approach entailed. As plaintiffs argue, there was no testimony that an "assessment center" approach has a demonstrably less adverse impact, and there is some evidence in the record in this case, including from Dr. (I-O)'s website, that such an approach may still have some adverse impact. Dr. (I-O) acknowledged that he had not had time to review the exams carefully, and his comments illustrated lack of familiarity with the methods (the defendant's I-O consultant) utilized to develop the tests.
>
> Plaintiffs' argument boils down to the assertion that if defendants cannot prove that the disparities on the Lieutenant and Captain exams were due to a particular flaw inherent in those exams, then they should have certified the results because there was no other alternative in place. Notwithstanding the shortcomings in the evidence on existing, effective alternatives, it is not the case that defendants *must* certify a test where they cannot pinpoint

[23] *Ricci v. Destefano*, Civil No. 3:04cv1109 (JBA).

its deficiency explaining its disparate impact under the four-fifths rule simply because they have not yet formulated a better selection method.

In this case, the parties agree that the adverse impact ratios for African-American and Hispanic test-takers on both the Lieutenant and Captain exams were too low to pass muster under the EEOC's "four-fifths rule." As *Kirkland*[24] and *Bushey*[25] held, **a statistical showing of discrimination, and particularly a pass rate below the "four fifths rule" is sufficient to make out a prima facie case of discrimination, and therefore sufficient to justify voluntary race-conscious remedies** (emphasis added).

While plaintiffs are correct that Title VII now prohibits race-norming, none is alleged to have happened here and the 1991 amendments do not affect the reasoning and holding…, namely that **a showing of "sufficiently serious claim of discrimination" is adequate to justify race conscious, remedial measures** (emphasis added).

Here, defendants' remedy is "race conscious" at most because their actions reflected their intent not to implement a promotional process based on testing results that had an adverse impact on African-Americans and Hispanics. The remedy chosen here was decidedly less "race conscious" than the remedies in *Kirkland* and *Bushey*, because New Haven did not race-norm the scores, they simply decided to start over, to develop some new assessment mechanism with less disparate impact. Thus, while the evidence shows that race was taken into account in the decision not to certify the test results, the result was race-neutral: all the test results were discarded, no one was promoted, and firefighters of every race will have to participate in another selection process to be considered for promotion. Indeed, there is a total absence of any evidence of discriminatory animus towards plaintiffs—under the reasoning of *Hayden*, "nothing in our jurisprudence precludes the use of race-neutral means to improve racial and gender representation"… (T)he intent to remedy the disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants.

Memphis Police Department[26] (September 2006)

Plaintiffs claim there were several equally valid alternative selection procedures that would have resulted in less adverse impact than the actual 2002 process. The first was to use a practical exercise of the type used in

---

[24] *Kirkland v. New York State Department of Correctional Services*, 771 F.2d 1117 (2nd Cir. 1983).

[25] *Bushey v. New York State Civil Service Commission*..

[26] *Johnson v. City of Memphis* 00-2608 DP & 04-2017 DP; *Billingsley v. City of Memphis* 04-2013 DA.

the 1996 process. That practical exercise, Plaintiffs assert, had substantial content validity and had less adverse impact than any test used in the 2002 process. Plaintiffs further maintain that the 1996 "high fidelity" simulation of actual on-the-job behaviors "was more consistent with the standards of content validity" than the low fidelity simulation that resulted in greater mean score differences between whites and blacks. Plaintiffs argue that such a "practical type test" would have fully met the City's obligation to conduct competitive, job-related, non-discriminatory tests of a "practical nature" that measure the relative competency of the candidate to discharge the duties of a sergeant. Plaintiffs further assert that the 1996 practical test was substantially less expensive than the 2002 tests. Defendant counters that the 1996 case simulation was the weakest component of the process, was exorbitantly expensive and labor intensive and created serious security concerns.

Second, Plaintiffs suggest that assessments of integrity and conscientiousness are substantially equally valid with less adverse impact than any of the tests used in the 2002 process. Defendant counters that integrity and conscientiousness were not assessed because these qualities were not identified by the MPD's subject matter experts as important to the sergeant job during the job analysis. Plaintiffs respond that in the context of a promotion process development project in another city, Dr. (I-O) had portrayed the assessment of those particular qualities as having high validity and low adverse impact. Plaintiffs argue that Dr. (I-O) should have relied on this knowledge to include those assessments, regardless of the failure of the SMEs to identify them.

Finally, Plaintiffs assert that a merit promotion process used in Chicago, in which Dr. (I-O) was involved, represented an equally valid selection process with little adverse impact. Plaintiffs maintain that evidence regarding the Chicago process, which differed markedly from the 2002 process, demonstrates the lack of credibility of Dr. (I-O's) statement that he knew of no other process that would have less adverse impact and that he provided the City with "all the options I could think of." Defendant maintains that Dr. (I-O) considered the use of a merit-based process or panel interviews and rejected such approaches based on the amount of subjectivity involved and the potential for bias.

The Court finds merit in all three of Plaintiffs' broad suggestions as to alternative testing modalities. It is of considerable significance that the City had achieved a successful promotional program in 1996 and yet failed to build upon that success. While the 1996 process was not perfect it appears to have satisfied all of the legal requirements of promotional processes. The 2000 process departed substantially from the 1996 model in its abandonment of the practical exercise and re-weighting of the

remaining elements. The 2002 process, while arguably more sophisticated than its predecessors, suffered from a grossly disproportionate impact on minority candidates.

It is unnecessary for the Court to scrutinize the advisability of incorporating assessments of qualities such as integrity and conscientiousness or the relative merits of the Chicago process. It is sufficient to acknowledge that the existence of such alternative measures and methods belies, as Plaintiffs suggest, Defendants' position that they had no choice but to go forward with the 2002 promotion process despite its adverse impact because no alternative methods with less adverse impact were available (emphasis added).

Defendant argues that Plaintiffs have failed to meet their burden because none of the alternatives now suggested were proposed at the time the 2002 process was implemented. This argument misconstrues the appropriate standard. Plaintiffs must prove that there was "another *available* method of evaluation which was equally valid and less discriminatory" (emphasis in opinion). *Bryant v. City of Chicago*, 200 F.3d 1092, 1094 (7th Cir. 2000). **Plaintiffs are not required to have proposed the alternative. The requirement is only that the alternative was available. The Court reads "availability" in this context to mean that Defendant either knew or should have known that such an alternative existed** (emphasis added). Plaintiffs have amply demonstrated that Defendant knew of all three alternatives they have set forth.

For the foregoing reasons, the Court finds that Plaintiffs have met their burden of showing "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."[27] Accordingly, the Court finds for minority Plaintiffs on their Title VII disparate impact claim as to the 2002 process.

[27] *Albemarle*, 422 U.S. at 432.