



### Ground Rules for Adverse Impact

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The Supreme Court has been silent on adverse (or disparate) impact since *Wards Cove v. Atonio* (1989). Furthermore, even though adverse impact is featured in the Civil Rights Act of 1991 (CRA-91), there are still residual ambiguities, as evidenced by the controversial ruling in *Lanning v. Septa* (1999; see for example Sharf, 1999). The *Uniform Guidelines on Employee Selection Procedures* (1978) are scheduled for revision. Given our likely role as contributors, I want to propose for discussion nine ground rules for the revision based on the following definition of adverse impact:

A statistically significant difference in actual or implied selection rates between (or among) two (or more) Title VII protected classes (race, color, religion, sex & national origin) causally connected to selection tests or other selection criteria that, themselves, are subject to psychometric scrutiny in accordance with the *SIOP Principles* (as revised).

#### Ground Rule 1—Only Actual or Implied Selection Rates

*Griggs v. Duke Power* (1971), the landmark adverse-impact ruling, featured two causes of adverse impact: (a) cognitive tests (Bennett & Wonderlic) and (b) the high school diploma. So did *Albermarle v. Moody* (1975), which together with *Griggs* served as the basis for the *Uniform Guidelines*. The cognitive tests excluded 94% of *actual* Black applicants as compared to 42% of *actual* White applicants. These were people with names and addresses who tried and failed. The diploma was deemed exclusionary based on demographic data revealing a 34% high-school graduation rate for Whites and a 12% graduation rate for Blacks in North Carolina at the time. Clearly, applicants need not apply if they are knowingly deficient with respect to an exclusionary rule. Therefore, while adverse impact based on standardized tests is generally evaluated using actual applicants, adverse impact based on exclusionary rules occurs by implication.

Other examples of *implied* adverse impact include exclusionary rules based on height and weight criteria (*Dothard v. Rawlinson*, 1977), methadone use (*NYC v. Beazer*, 1979), facial hair (*Fitzpatrick v. Atlanta*, 1993; *Bradley*

v. *Pizzaco*, 1993), arrest records (e.g., *Gregory v. Litton*, 1972; *Green v. Missouri Pacific*, 1975), misdemeanors versus felonies (*Carter v. Gallagher*, 1971; *Butts v. Nichols*, 1974; and *Hyland v. Fukada*, 1978), and credit information such as wage garnishment (*Johnson v. Pike*, 1971; and *Wallace v. Debron*, 1974). There are others, but these will suffice. Ground Rule 1 says actual or implied selection rates are the *only* viable source of adverse impact.

## Ground Rule 2—Title VII Classes

Ground Rule 2 says Title VII is the *only* viable law available for applicants or employees to sue for traditional adverse impact violations. As a starter, consider a portion of Section 1607.2(D) of the *Uniform Guidelines* that states:

These Guidelines apply only to persons subject to Title VII, Executive Order 11246, or other equal employment opportunity requirements of federal law. These Guidelines do not apply to responsibilities under the Age Discrimination in Employment Act of 1967, as amended, not to discriminate on the basis of age, or under Sections 501, 503, and 504 of the Rehabilitation Act of 1973, not to discriminate on the basis of handicap.

The Supreme Court has ruled that adverse impact is not viable in constitutional claims (see *Washington v. Davis*, 1976). Furthermore, despite early adverse-impact victories in the Age Discrimination in Employment Act (ADEA; see *Geller v. Markham*, 1980; *Leftwich v. Harris-Stowe*, 1983), such claims were effectively precluded by the Supreme Court ruling in *Hazen v. Biggens* (1993). Adverse impact is also irrelevant to the Equal Pay Act because those claims are scripted (i.e., proof of unequal pay for jobs equal in skill, effort, responsibility, and working conditions).

Executive Order 112146 (EO 11246) on voluntary affirmative action is clearly an important issue in the *Uniform Guidelines*, but *not* for lawsuits by applicants or employees. EO 11246 is administered by the Office of Contract Compliance Programs (OFCCP) for nonfederal contractors and the EEOC for federal agencies. These two agencies have sole power to challenge affirmative action violations and order remedies. To both the OFCCP and EEOC, elimination of adverse impact is one of several recommended solutions for reducing underutilization of minorities and women (together with enhanced recruitment, outreach, and training).

Adverse impact is also referenced in statutory language in Section 103(a) of the Americans with Disabilities Act (ADA), but here, it is merely a prelude to the reasonable accommodation scenario. As written in the ADA:

It may be a defense to a charge of discrimination under this Act that an alleged application of standards, tests, or selection criteria that screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and

such performance cannot be accomplished by reasonable accommodation, as required under this Act.

For example, a written test with adverse impact on learning-disabled people requires proof of job relatedness, but the larger question is whether the KSAs needed to perform well on the test relate to essential functions of the job (and if so, if barriers implied by the test can be eliminated with reasonable accommodations). To illustrate, in *Stutts v. Freeman* (1983), Stutts, a dyslexic, was excluded from operating heavy equipment based on low GATB scores. The 11th Circuit ruled the KSAs required to perform well on the GATB are unrelated to successful operation of heavy equipment.

In addition, adverse impact in disability claims is generally facially apparent, meaning, statistical proofs are unnecessary. For example, in *Strathie v. Dept. of Transportation* (DOT; 1983), a DOT regulation excluding bus drivers with hearing aids had an obvious adverse impact on individuals with hearing impairments. So too would any rule excluding individuals with eye glasses, who take medication, who cannot sit or stand for long periods, and so on.

### **Ground Rule 3—Focus on Selection, Not Recruitment**

The reason for limiting the *Uniform Guidelines* to Title VII and Executive Order 11246 is transparent. It protects employers covered by EO 11246 from vulnerability under Title VII. As stated in Section 1607(C) of the *Uniform Guidelines*:

These Guidelines apply only to selection procedures which are used as a basis for making employment decisions. For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which were previously denied employment opportunities or which are currently underutilized, may be necessary to bring any employer into compliance with federal law, and is frequently an essential element of an effective affirmative action program; but recruitment practices are not considered by these Guidelines to be selection procedures.

Thus, Ground Rule 3 says recruitment is *not* a viable source of adverse-impact claims. Consequently, fears of adverse impact due to Internet-based recruitment are misplaced (see Sharf, 2000; Harris, 2003). There is vulnerability for employers who recruit exclusively on the Internet if doing so leads to significant underutilization of minorities. However, the vulnerability is with respect to EO 11246, *not* Title VII. Of course, if employers knowingly use such practices with the motive to limit minority recruits, this makes for a viable Title VII *disparate treatment* claim. But how likely is that in this day and age?

Another illustration of the connection between adverse impact and selection procedures is in comparable-worth claims. Here, jobs with 70% or more females usually pay less than jobs with 70% or more males, even when job evaluation studies show the “male” jobs *do not* have more internal worth than

the “female” jobs. Thus, the claim is that market forces (or prices) adversely impact jobs congregated by females, as made, for example, by female nurses in *Spaulding v. University of Washington* (1984). However, the ruling in *Spaulding* was that “market prices” do *not* represent a “specific employment practice,” and it negated the adverse impact claim. After *Spaulding*, comparable-worth plaintiffs were forced to prove that employers use market forces to intentionally limit female participation, a claim that has failed repeatedly (see for example *American Federation v. Nassau County*, 1996).

#### **Ground Rule 4—Cross-job and Composition Disparities are for Motive Scenarios**

Compare *Griggs* to *International Teamsters v. US* (1977) and *Hazelwood v. US* (1977) and you see three types of statistical disparities. *Griggs* featured actual or implied *applicant flow* data (i.e., selection rates). In comparison, *Teamsters* featured *cross-job* disparities (minorities congregated in a less appealing job as compared to nonminorities congregated in a more-appealing job) and *Hazelwood* featured *composition* disparities (underutilization of minorities in the workforce when compared to qualified and available minorities in the labor pool). Ground Rule 4 is a corollary to Ground Rule 1 and says cross-job and composition disparities are more suitable for disparate treatment scenarios than adverse impact scenarios.

*Griggs* was a prototypical adverse-impact case. In contrast, *Teamsters* and *Hazelwood* were prototypical class-action disparate treatment (or pattern or practice) cases. As explained by this author elsewhere,<sup>1</sup> the Supreme Court ruled that large cross-job and composition disparities are sufficient to establish a prima facie pattern or practice claim. However the implied defense is the same as in individual claims of disparate treatment as prescribed in *McDonnell Douglas v. Green* (1973). That defense, often termed a “burden or production,” requires only an articulation (or verbalization) of a legal reason for a selection decision, not factual proof. The plaintiff must then prove the articulation offered is a pretext for discrimination (i.e., baloney).

The teamsters lost because there was no plausible explanation other than facial discrimination (i.e., minorities need not apply) for an “inexorable zero” number of minorities in the more desirable of two bus-driving routes. On the other hand, the Hazelwood School District won because (a) the relevant composition disparity<sup>2</sup> was not statistically significant and (b) the defendant had a plausible legal reason explaining why the disparity existed (they could not successfully recruit from St. Louis because it was too far from the Hazelwood

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<sup>1</sup> See Gutman (2000), pages 33–38.

<sup>2</sup> In *Hazelwood*, the composition disparity for the entire county (including St. Louis) was statistically significant, but the composition disparity in the immediate area excluding St. Louis was not. The Supreme Court then ruled the appropriate comparison was to the labor pool that excluded St. Louis.

School District and the St. Louis jobs offered better pay). Neither case involved nor implied defenses amounting to job relatedness as required by *Griggs*. Ground Rule 4 says keep it that way.

Why? Basically, *Wards Cove* contains the elements of *Teamsters*, not *Griggs*. There were cross-job disparities such that Eskimos and Filipinos were congregated in a less-desirable job category (cannery work) and Caucasians were congregated in a more-desirable job category (professional work). Ironically, in a prior case with virtually identical facts as *Wards Cove* (*Domingo v. New England Fish*, 1984), the 9th Circuit viewed the cross-job disparities as evidence for a pattern or practice of discrimination and concluded an adverse ruling was unnecessary. Accordingly:

In this case, plaintiffs presented sufficient evidence of discriminatory treatment...[t]he workforce statistics were not necessary to raise an inference of discrimination. They merely demonstrated the consequences of Nefco's discriminatory hiring practices.

The 9th Circuit should have done likewise in *Wards Cove*. Strangely, the *Wards Cove* Circuit Court decided that adverse impact based on cross-job disparities is a viable claim. Ground Rule 4 says no way!

The controversy in *Wards Cove* focused squarely on a plurality opinion by Justice O'Connor (and three others) in the prior case of *Watson v. Fort Worth Bank* (1988). In *Watson*, O'Connor proposed using the defense from *McDonnell Douglass v. Green* (articulation) to replace the job-relatedness defense from *Griggs* and *Albermarle* (and the *Uniform Guidelines*). Had the Supreme Court followed its own precedents from *Teamsters* and *Hazelwood*, the logical ruling would have been (a) *Wards Cove* is a pattern or practice case, not an adverse impact case and (b) in a pattern or practice case, the burden is on the plaintiff to prove the defendant's articulated legal reason for the statistical disparity (cross-job or composition) is lunchmeat. In other words, there was no need to disturb the *Griggs-Albermarle* tradition in *Wards Cove*.

### **Ground Rule 5—Subjectivity is not Discretion**

*Black's Law Dictionary* (1990) defines *discretionary acts* as involving "no hard and fast rule as to the course of conduct that one must take or not take and, if there is a clearly defined rule, such would eliminate discretion." In other words, discretionary power implies arbitrary decision making. To us, *subjective* decision making implies judgments open to psychometric scrutiny. For example, we do not endorse discretionary performance appraisals. Yet, to the O'Connor plurality in *Watson* (including Rehnquist, Scalia, and White), the terms "discretion" and "subjectivity" were treated as synonyms, a view later endorsed by Justice Kennedy, who teamed up with the O'Connor plurality to form the majority in *Wards Cove*. Ground Rule 5 says subjective decisions and discretionary decisions are not necessarily the same.

Watson should have been *Griggs* revisited.<sup>3</sup> Clara Watson was passed over for promotion four times by White supervisors based on subjective ratings of interview performance, experience requirements, and past job performance. The 1987 *Principles for the Validation and Use of Personnel Selection Procedures* identifies the selection procedures below as suitable for validation research. The causes of the cross-job disparities cited in *Wards Cove* (word-of-mouth recruitment, walk-in hiring, nepotism, and “vague subjective selection procedures”) are conspicuously absent from this list, whereas the causes of adverse impact cited by Clara Watson are underscored.

[P]aper-and-pencil tests, performance tests, work samples, personality inventories, interest inventories, projective techniques, tests of honesty or integrity including polygraph examinations, assessment center evaluations, biographical data forms or score application blanks, **interviews**, educational requirements, **experience requirements**, reference checks, physical requirements such as height and weight, physical-ability tests, **appraisals of job performance**, computer-based tests interpretations, estimates of advanced potentials, or any other selection instrument, whenever any one or a combination of them is used or assists in making a personnel decision.

In a brief filed for the American Psychological Association (APA), Bersoff, (1988) argued that subjective tests (or “devices”) use the same psychometric procedures for validation as objective tests. Justice O’Connor believed differently, stating:

Standardized tests...like those at issue in our previous disparate impact cases, can often be justified through formal “validation studies”... respondent warns, however, that “validating” subjective criteria in this way is impracticable

O’Connor suggested it is because subjective decisions are discretionary that they are harder to validate than standardized tests. Accordingly:

In the context of subjective or discretionary employment decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a “manifest relationship to the employment in question.”

In short, the APA was unable to convince a majority of justices that in accordance with our *Principles*, there is no difference in how to validate an objective test versus (say) a structured (and scored) interview.

### Ground Rule 6—Psychometric Scrutiny

The O’Connor plurality was influenced by key lower-court rulings that subjective decision making is not a viable source of adverse impact. How-

<sup>3</sup> At least the major part of it was. There were also charges of disparate treatment based on stock statistics that the Supreme Court ignored.

ever, in those cases, the so-called “subjective” decisions were discretionary, not the types of judgments referenced by Bersoff (1988) and the *Principles* as amenable to psychometric scrutiny. Ground Rule 6 says adverse impact rules apply *only* to subjective decisions that are quantifiable and subject to psychometric scrutiny, and do *not* apply to discretionary decisions.

To illustrate, in *Harris v. Ford* (1981), the plaintiff claimed “subjective decisions in determining discharges for ‘poor workmanship’ impacts disproportionately on women.” In *Talley v. US Postal* (1983), the plaintiff claimed “subjective decision making by the primarily White supervisory force has disproportionately affected Blacks and females.” Harris was allegedly fired for poor performance and Talley (a postal worker) was allegedly fired for losing her mailbox keys a second time. Both courts reached the same conclusion. As stated by the Harris Court, “subjective decision making...is not the type of practice outlawed under *Griggs*.” Ground Rule 6 says discretionary decisions do *not* fall under *Griggs*, but quantifiable subjective judgments do.

The termination decisions in the *Harris* and *Talley* cases were at the discretion of supervisors. Discretionary decision making should fall within the purview of disparate treatment. *Harris* and *Talley* should have had the opportunity to challenge the articulation that they were fired for cause, as would occur under disparate-treatment rules. Any claim here of adverse impact is frivolous without evidence of actual or implied applicant flow-rate disparities. Of course, the *Watson* ruling was unanimous in concluding that subjective decision making is subject to adverse impact rules. What needs to be clarified is that claims as in *Harris* and *Talley* do not fit the description of “subjective decision making” because discretionary decision making is *not* subject to psychometric scrutiny.

### **Ground Rule 7—The Guidelines are not Equally Applicable to All Causes of Adverse Impact**

As stated elsewhere by this author<sup>4</sup>, adverse impact is *not* a homogeneous phenomenon. Although the *Griggs-Albermarle* rules for assessing validity are exacting, they are not equally applicable to all causes of adverse impact. They apply best to tests and other procedures that are standardized, or capable of being standardized. However, case law reveals both a lighter and a heavier standard.

Biographical factors such as methadone use (for transit authority cops; *New York City v. Beazer*, 1979) and felony armed robbery conviction (for security guards; *Hyland v. Fukada*, 1978) have been successfully defended with articulations (as in *McDonnell Douglas v. Green*, 1973) of obvious reasons for exclusion. Cases featuring educational requirements have been successfully defended by citing federal studies supporting a high-school diploma for police officers (*Davis v. Dallas*, 1985) and experts testifying that a 4-year college degree is necessary to cope with the exacting training demands

<sup>4</sup> See Gutman (2000) pages 42–50 and Gutman (2003).

for commercial airline pilots (*Spurlock v. United Airlines*, 1972). It is arguable, of course, that the defenses above were lighter relative to *Griggs-Albermarle* because each involved safety sensitive positions. However, cases such as *Lanning* (and so many others) reveal that the defense to adverse impact by standardized tests is no less exacting for police departments as for power companies and paper mills.

At the other extreme, cases such as *Dothard v. Rawlinson* (1977) reveal more exacting standards for exclusion based on physical characteristics such as height and weight. Here, the standard is proving it is reasonably necessary to exclude all or most individuals who fail to meet the standard. If this sounds similar to the BFOQ (bona fide occupational qualification) defense in gender and age cases, it is. Indeed, in *Dothard*, the Supreme Court struck down the height and weight criteria but found it was reasonably necessary to exclude all or most women from being guards in all-male maximum-security prisons. Thus, it was easier to exclude members of an entire class than it was any individual, male or female, based on height and weight.

Therefore, Ground Rule 7 says case law reveals that different types of causes of adverse impact are associated with different standards for defense, and the *Uniform Guidelines* should reflect that fact.

### **Ground Rule 8—Components Should Be Identified By the Employer**

We know from *Connecticut v. Teal* (1982) that any component of a selection procedure that causes adverse impact must be defended, even if there is no (“bottom line”) adverse impact after all components are completed. In *Watson*, the O’Connor plurality interpreted *Teal* to mean the plaintiff must identify the cause(s) of adverse impact. As noted in Bersoff’s (1988) brief, it was unclear if Fort Worth Bank actually scored their interviews and ratings, or how they were combined to make the promotion decision. In several pre-*Watson* cases with similar facts (*Gilbert v. Little Rock*, 1983; *Griffen v. Carlin*, 1985; *Green v. USX*, 1988), circuit courts demanded defense of the entire selection system if the “bottom-line” outcome was adverse impact and the cause(s) was unclear. CRA-91 requires plaintiffs to identify the cause(s) of adverse impact. However, Sec.105(B)(i) in CRA-91 specifies that the entire selection system must be defended if there is bottom-line adverse impact and the cause(s) are not clear. Accordingly:

[T]he complaining party shall demonstrate that each particular challenged employment practice causes disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent’s decision-making processes are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.

Ground Rule 8 says that as a practical matter, it makes sense to score every selection test or criterion that is scorable and understand the contribution of each such component to the selection rate.

### **Ground Rule 9—Job Relatedness is Not Synonymous With Business Necessity**

The defense to adverse impact in CRA-91 is “job relatedness and consistency with business necessity,” as it is in the ADA, which was codified in 1990 (before CRA-91). As noted by Gutman (2003), taken literally “business necessity” implies a heavier defense than job relatedness.<sup>5</sup> Furthermore, there is an element of a literal meaning of business necessity in the BFOQ defense and in the *Dothard* ruling on height and weight criteria. However, in the author’s opinion, the 3rd Circuit wrongly interpreted this phrase in *Lanning v. Septa* (1999) when it ruled a test must measure the “minimal qualifications necessary for successful job performance.” This runs counter to statutory language in CRA-91 that 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 US 424 (1971), and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 US 642 (1989).

Therefore, Ground Rule 9 says there is no reason to suppose the phrase “job relatedness and consistency with business necessity” changes any of the original meaning or any of the parallel terms in *Griggs-Albermarle* or the *Uniform Guidelines*.

### **Conclusions**

There are other issues, most notably, alternative procedures that produce less or no adverse impact (a requirement in the *Uniform Guidelines*). For example, in *Bridgeport Guardians v. Bridgeport* (1991), one witness (Jim Outtz) proposed more intensive scrutiny of applicants using videotaping procedures, but the 2nd Circuit ruled the city was not obligated to incur extra expenses to do so. Similarly, Barrett (1997) reported that in the 1970s, there was no adverse impact among applicants who passed his course on legal issues before taking a police-entry exam. However the city (Akron, Ohio) stopped offering the course based on financial reasons. Obviously, there is no reasonable accommodation requirement for equally valid alternatives, but perhaps this issue should be entertained (e.g., incentives for companies that pay extra to find equally valid alternatives). I’ll leave that for another time (and possibly, another author). For now, let me reemphasize my reason for proposing the ground rules. I hope we can start a dialogue and come to some agreements that

<sup>5</sup> It was noted that the literal meaning of business necessity implies something is necessary for the business to survive, whereas the meaning job relatedness does not.

we can then take to the EEOC so as to influence the revision of the *Uniform Guidelines*. I have no direct proof of this, but it is my sense that we have been most successful in court cases on issues SIOP members have agreed on and less successful on issues SIOP members have bickered over.

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## **SIOP Name Change Results!**

*Fritz Drasgow announces that based on recent voting results SIOP's name will **NOT** be changed.*