Justice O’Connor’s Legacy in EEO Case Law

I was supposed to write my second installment on sexual harassment (“Here, There, and Everywhere”) with special focus on the European Union. I will put it off for just one more issue. There was nothing left on the 2004–2005 Supreme Court calendar, so I thought it was perfect timing for the second installment. However, Justice O’Connor unexpectedly retired, and I think this is very big news. Since joining the Court in 1980, O’Connor’s footprint is on virtually every important EEO issue. The discussion below samples from several topical areas, illustrating that influence.

Adverse Impact

By 1988, there were well-established rules for adverse impact from prior Supreme Court cases.1 Each case had identifiable and objective causes of adverse impact (cognitive tests, diplomas, height/weight criteria, methadone use). The Supreme Court then addressed two new issues in Watson v. Fort Worth Bank (1988): (a) subjective causes of adverse impact and (b) proving adverse impact when its cause is not easily identified. Only eight justices heard this case (Justice Kennedy was not yet seated), and each agreed on allowing subjective causes of adverse impact. However, speaking for a plurality of herself and Rehnquist, Scalia, and White, O’Connor proposed rules changes. She opined that plaintiffs should identify the cause of adverse impact and prove its effect statistically, except that the employer should defend an entire selection process when multiple selection procedures are used and their individual effects cannot be disaggregated. More importantly, she proposed changing the defense to adverse impact from proving job-relatedness to articulating a legitimate reason for the challenged practice(s). In other words, she proposed abandoning the heavier defense burden of persuasion traditionally used in adverse impact cases for a lighter defense burden of production traditionally used in disparate treatment cases such as McDonnell-Douglas v. Green (1973; see discussion of disparate treatment below).

It was the next case that altered the rules (Wards Cove v. Atonio, 1989). Although Justice White spoke for a 5–4 majority, it was the addition of Justice Kennedy and his agreement with O’Connor’s plurality opinion in Watson that

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dictated the ruling. The facts in *Wards Cove* were different than the facts in *Watson*. Nevertheless, White paraphrased O’Connor’s plurality opinion in *Watson*, and a political war ensured. It began with the aborted Civil Rights Restoration Act of 1990 (CRRA-90), vetoed by President Bush (and nearly overridden by Congress). Basically, Republicans wanted to keep the burden of production and Democrats wanted the other extreme (proof that challenged practices are *essential* for job performance). The politicians subsequently compromised on *Wards Cove* (and other issues) in the Civil Rights Act of 1991 (CRA-91). Congress kept O’Connor’s identification and causation provisions (including the caveat on disaggregation) and rewrote the defense burden to require proof of job-relatedness and consistency with business necessity.

I won’t belabor these issues any further. I’ve done so elsewhere. The bottom line, I think, is that CRA-91 got it right. *Wards Cove* was not an adverse impact case in the traditional sense, but rather, a pattern or practice case in the image of *International Teamsters v. United States* (1977). I believe the identification/causation provisions prevent pattern or practice cases that use *stock* statistics from being confused with legitimate adverse impact claims that use *flow* statistics. I also believe the burden of production is appropriate for the stock statistics featured in *Wards Cove* but not for the more traditional adverse impact claims featuring applicant flow data.

In the aftermath of *Wards Cove* and CRA-91, the Supreme Court has not weighed in on a *Title VII* adverse impact claim. The Court recently “tackled” adverse impact in the Age Discrimination in Employment Act (ADEA) in *Smith v. City of Jackson* (2005), but the rules for ADEA are clearly different than those for *Title VII*. What the Supreme Court really needs to do is tackle the issues in *Lanning v. SEPTA* (1999), in which the 3rd Circuit enforced a much heavier defense than *Griggs* and *Albemarle* requiring, in effect, proof that test performance is essential for successful job performance (as proposed by the Democrats for CRRA-90). The heavier defense is fine for physical characteristics such as height or weight (see *Dothard v. Rawlinson*, 1977). However, no adverse impact claim prior to CRA-91, Supreme Court or otherwise, ever held a defendant to a *Dothard*-like defense for a standardized test. So there is unfinished business here.

**Disparate Treatment**

The defense burden of *production* was established in *McDonnell Douglas v. Green* (1973) and *Texas v. Burdine* (1981; hence the name *McDonnell-Burdine* scenario). As established by Justice Powell in *McDonnell Douglas v. Green*, the sequential burdens in the prima facie, defense, and pretext phases

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2 See the *On the Legal Front* columns in the January 2003 & January 2004 issues of *TIP*.
3 An excellent discussion of the relationship between stock and flow statistics and adverse impact and pattern or practice is provided in Ledvinka and Scarpello (1991), Chapter 6.
4 The *Smith* case is discussed in *On the Legal Front* in the October 2005 issue of *TIP*.
of the trial are (a) presumptive evidence of discrimination by the plaintiff, (b) explanation of the selection decision by the defendant, and (c) proof with a preponderance of direct or indirect evidence by the plaintiff that the explanation in the defense phase is a pretext for discrimination. Everything looked fine until *St. Mary’s v. Hicks* (1993). Melvin Hicks had seemingly indisputable indirect (or circumstantial) evidence of pretext and the district court judge still ruled against him (believing he was terminated for personal reasons, not race). The Supreme Court agreed in a 5–4 decision. O’Connor was in the majority (in an opinion delivered by Scalia). Speaking for three other dissenters, Souter opined that the majority ruling turned the McDonnell-Burdine traditions into a “useless ritual.”

It turned out that Souter was wrong and what the *Hicks* majority meant is that it’s up to the trier of fact (judge or jury) to weigh the evidence. In other words, the *Hicks* majority would have supported the district court judge had he ruled in favor of Melvin Hicks. Then in *Reeves v. Sanderson Plumbing* (2000), Reeves claimed age discrimination in promotion and a jury believed him. Reeves received a nice monetary award ($70,000), but the 5th Circuit reversed based on its reading (or misreading) of *Hicks*. The Supreme Court then reversed the 5th Circuit in a unanimous opinion in which O’Connor explained the meaning of *Hicks* in plain language. The aftermath here is more promising than in the *Watson-Wards Cove* saga. Although some circuit courts understood the original meaning of *Hicks*, others did not. Reeves settled those differences.

**Mixed Motive**

Interestingly, the issue of indirect evidence emerged again in mixed motive cases, and O’Connor played a central role here as well. Mixed motive is a form of disparate treatment in which plaintiffs generally present strong *direct evidence* of an illegal discriminatory motive in the prima facie phase. Instead of rebutting the evidence, employers concede their guilt on the alleged motive but argue that the selection decision challenged (e.g., promotion) is made for other (legal) reasons. The key mixed motive rulings are *Price Waterhouse v. Hopkins* (1989) and *Desert Palace v. Costa* (2003).

*Hopkins* was a controversial ruling later addressed in CRRA-90 and CRA-91. Ann Hopkins had strong *direct evidence* of a gender-based *illegal motive* (stereotypical sex-based derogatory references) and claimed sex discrimination in promotion. The company argued it had other (legal) reasons for not promoting her. The two lower courts ruled that Hopkins deserved her promotion because *Price Waterhouse* did not present *clear and convincing* evidence that the illegal motive played *no role* in the promotion decision. In the Supreme

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5 The *Reeves* case is discussed in On the Legal Front in the April 2005 issue of *TIP*.

6 The *Costa* case is discussed in On the Legal Front in the July 2003 issue of *TIP*.

7 An excellent discussion of the *Hopkins* case and the broader issue of sex stereotypes is provided in Gutek and Stockdale (2005).
Court ruling, three justices voted to try such cases using standard McDonnell-
Burdine rules. However, a majority of six disagreed with both the lower courts
and the dissenters, ruling that the defense must prove its legal motive but with
a lesser standard than clear and convincing evidence (i.e., preponderance of
evidence). There were some differences among the majority of six. However,
the most important concurrence was O’Connor’s. She opined that because Ann
Hopkins lead with direct evidence of an illegal motive, it was appropriate for
the defense to answer in kind. Interestingly, O’Connor was the only member of
the majority who expressed this opinion. In addition, O’Connor’s belief was
bolstered by a prior ruling in TWA v. Thurston (1985) in which the Supreme
Court unanimously ruled that the “McDonnell-Douglas test is inapplicable
where the plaintiff presents direct evidence of discrimination.”

The immediate aftermath of Hopkins was an edict in the aborted CRRA-
90 to hold employers responsible for all remedies when plaintiffs prove an
illegal motive plays any role in a selection decision. However, CRA-91 com-
promised on remedies and permits declaratory or injunctive relief for plain-
tiffs prevailing on an illegal motive but also permits employers who prove the
legal motive to escape remedies specifically associated with a selection deci-
dion (e.g., back pay, reinstatement, and other monetary relief).

The longer-term aftermath of Hopkins was that lower courts read O’Con-
nor’s concurrence as an edict requiring plaintiffs to lead with direct evidence
to trigger a mixed motive defense. Then in Costa, the plaintiff (Catharina
Costa) presented strong indirect evidence of sex discrimination (termination
for violations for which males were treated less harshly). The district court
judge gave the jury a mixed motive instruction consistent with CRA-91, and
the Supreme Court agreed with the judge in a unanimous opinion delivered by
Justice Thomas. O’Connor wrote a concurrence to explain that her prior opin-
ion in Hopkins was superceded by a “new evidentiary rule” in CRA-91. Thus,
taken together, the ultimate aftermath of Reeves and Costa is that indirect evi-
dence may be as persuasive as direct evidence regardless of whether present-
ed in the prima facie phase (as in Costa) or the pretext phase (as in Reeves).

A final point to note is that O’Connor was in the 5-4 majority ruling in Pat-
terson v. McLean (1989) that limited the scope of Section 1983 of the 13th Amend-
ment in disparate treatment claims. This ruling was overturned in CRA-91, mean-
ing the McDonnell-Burdine rules (and by inference, mixed motive rules) apply in
the same way regardless of whether tried under Title VII or constitutionally.

Sexual Harassment

The Supreme Court issued six rulings on sexual harassment between 1986
and 2004.8 O’Connor’s influence here is less noticeable than elsewhere for the

These rulings are discussed in On the Legal Front in the July 2004 and October 2004 issues of TIP.
simple reason that none of these rulings were close. She did, however, write the unanimous opinion in *Harris v. Forklift* (1993), which filled a 12-year vacuum between the 1986 ruling in *Meritor* and three 1998 rulings. *Forklift* was important because *Meritor* left several questions unanswered in relation to hostile environment harassment. Some of these questions were not answered until the 1998 *Ellerth* and *Faragher* rulings, most notably on employer liability. Nevertheless, *Forklift* affirmed the definition of hostile harassment established in *Meritor*, and supported the reasonable person (as opposed to reasonable victim) standard for juries to decide whether hostile harassment has occurred, an issue that arose in the circuit courts between *Meritor* and *Forklift*.

The harasser in *Forklift* was Charles Hardy, the company owner and the victim was Theresa Harris, his administrative assistant. Hardy routinely showered Harris (and others) with epithets and proposals for sexual liaisons and frequently asked that change be removed from his pocket. Although Theresa Harris was undoubtedly a victim of hostile harassment, the lower courts favored Hardy on grounds the victim’s “psychological well being” was not seriously affected (i.e., no concrete psychological harm). O’Connor ruled that “Title VII comes into play before harassing conduct leads to a nervous breakdown” and that Hardy’s actions “would seriously affect a reasonable person’s psychological well being.” She then reaffirmed the definition of hostile harassment from *Meritor* (unwelcomed severe and pervasive sex-based behavior that interferes with the ability to perform one’s job duties). O’Connor’s definition of hostile harassment and the reasonable person standard were subsequently reiterated in the four Supreme Court rulings that followed.

**Americans With Disabilities Act (ADA)**

There were eight Supreme Court ADA rulings between 1999 and 2002. Only one was close (*Barnett v. US Air*, 2002). O’Connor played a key role in *Barnett*, but arguably, an even bigger role in three other cases with stronger majorities (*Sutton v. UAL*, 1999, *Murphy v. UPS*, 1999, and *Toyota v. Williams* (2002). *Sutton* featured legally blind twin sisters and *Murphy* featured a hypertensive truck mechanic who was required to road test the trucks he fixed. The common issue in these cases was an EEOC regulation requiring that assessment of significant restriction of major life activities be made in the nonmitigated state (i.e., without corrective lenses or medication). O’Connor struck down the regulation in both cases, sending an apparent deathblow to ADA plaintiffs. However, both rulings came with a blueprint for stronger claims of being disabled within the meaning of the ADA. Sut-
ton also featured an EEOC regulation on \textit{working} as a major life activity, which O’Connor addressed both here and in \textit{Toyota v. Williams}.

There are three ways (or prongs) to be disabled within the ADA. Prong 1 requires a \textit{current} physical or mental impairment that significantly restricts a major life activity, and the individual is capable of performing all essential job functions with or without reasonable accommodation. Prong 2 requires \textit{history} of such a disability, and Prong 3 requires being \textit{regarded} as having a disability. In \textit{Sutton}, the twins had 20-200 vision without correction and 20-20 with correction. They were already flying smaller commuter planes and wanted to fly the bigger commercial jets. They were in compliance with a Federal Aviation Authority (FAA) regulation (correctable vision to 20-20 per eye) but not with a stiffer UAL rule (minimum \textit{uncorrected} vision of 20-100 per eye). In \textit{Murphy}, the truck mechanic was in violation of a Department of Transportation (DOT) regulation excluding individuals with high blood pressure from driving large trucks. The plaintiffs in both cases made the Prong 1 argument that they were significantly restricted in the nonmitigated state but could perform all essential functions in the mitigated state.

With the EEOC regulation disposed of, the Prong 1 claims were neutralized by the very fact that all essential job functions could be performed with mitigation (meaning there were no significant restrictions in the mitigated state). However, at the same time, O’Connor cited two ways plaintiffs may be significantly restricted \textit{despite} mitigation. She noted, for example, that medication for diabetes might only \textit{partially alleviate} the illness, meaning the individual is still significantly restricted. She also noted that medication might have significantly restrictive \textit{side effects}. O’Connor’s words were then used in several circuit court cases where plaintiffs taking medication were able to prove their Prong 1 claims.\footnote{See for example \textit{EEOC v. Routh} (2001) and \textit{Lawson v. CSX} (2001).}

Unlike the twins, Vaughan Murphy did not have a viable Prong 3 claim because his exclusion was by a federal regulation, \textit{not} a company policy. On the other hand, the twins had a potentially strong Prong 3 claim because the UAL policy \textit{exceeded} a federal regulation. Nevertheless, the twins made an obvious mistake by claiming they were regarded as being disabled with respect to working, \textit{not} seeing, an oversight noted by O’Connor in her ruling. Because the EEOC regulation on working requires exclusion for a wide variety of jobs, the twins lost on their Prong 3 claim because they were already flying smaller planes (meaning they were not broadly excluded from jobs in their profession). O’Connor also challenged the validity of working as a major life activity, warning it is circular reasoning to make such a claim in an employment case. However, she refrained from ruling on the regulation and addressed it again in \textit{Toyota v. Williams} (2002).

\textit{Toyota v. Williams} featured carpal tunnel syndrome. In prior carpal tunnel cases, plaintiffs routinely claimed significant restriction for the major life activity of \textit{working} and routinely failed (e.g., \textit{McKay v. Toyota}, 1997). Using a different route, Ella Williams, who could not perform two of four essential job
functions, claimed her symptoms significantly restricted her ability to perform *manual tasks* associated with the tasks she could not perform. The 6th Circuit ruled for Williams, but the Supreme Court overturned in a unanimous opinion written by O’Connor. O’Connor ruled that Ella Williams was, in effect, “circumventing Sutton” by focusing on “manual tasks associated with only her job.” She ruled further that manual tasks are a major life function, but they must be “central to most people’s lives” (e.g., bathing, brushing teeth, household chores, etc.). Williams lost because she could perform the basic central tasks. O’Connor also issued a stern warning against future carpal tunnel claims.

In *Barnett v. US Air* (2002), Robert Barnett, an injured cargo worker, could no longer perform heavy lifting and transferred to a mailroom job. He later lost that job when *US Air* put it up for open bidding under its *unilaterally imposed* seniority plan. Requests for accommodation that oppose collectively bargained seniority agreements (CBAs) have routinely been deemed as *unreasonable* as a matter in the lower courts. The question in this case was whether to accord the same status to a company-imposed seniority plan. Two justices (Scalia and Thomas) argued that unilateral plans are as legitimate as CBAs and two others (Souter and Ginsburg) argued that Barnett’s requests for accommodation were reasonable. This left four justices who believed that unilateral plans are generally as valid as CBAs, unless they are frequently altered or contain questionable disclaimers. O’Connor opined that the key issue was whether a plan is “legally enforceable.” Nevertheless, she agreed to joined Breyer, Rehnquist, Stevens, and Kennedy to form a majority because she believed their solution “will often lead to the correct outcome” and “it was important that a majority of the Court agree on a rule when interpreting statutes.”

The *Barnett* ruling is just another example of O’Connor serving on the winning side of a close 5–4 ruling. The other three rulings are far more important. In those rulings, O’Connor defined what plaintiffs must do to prove they are disabled within the meaning of the law. She also signaled to the lower courts that working is a questionable major life activity and that carpal tunnel syndrome is a questionable impairment.

**Reverse Discrimination Rulings**

Between 1978 and 2003, the Supreme Court issued 15 so-called “reverse discrimination” rulings. O’Connor was present for 12 of them (all but *Regents v. Bakke*, 1978, *United Steelworkers v. Weber*, 1979, and *Fullilove v. Klutznick*, 1980). She influenced all 12 of these rulings, as well as subsequent interpretations of the three cases she did not serve on. Her sphere of influence in this domain covered three major topics: (a) strict scrutiny on government set aside programs for minority (MBEs) and disadvantaged (DBEs) business enterprises, (b) voluntary affirmative action based on reme-

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11 Reverse discrimination is discussed in On the Legal Front in April 2003, July 2003, October 2003, and April 2004 issues of TIP.
dial needs, and (c) voluntary affirmative action based on diversity as a compelling government interest in the strict scrutiny test.

The strict scrutiny test requires a compelling government interest served by a narrowly tailored solution. In comparison, the moderate scrutiny test requires an important government objective served in a substantially related way. In *Fullilove v. Klutznik* (1980; before O’Connor), six justices supported a federal MBE set aside program, with three basing their opinion in the heavier, strict scrutiny test and the other three basing their opinion on the lighter, moderate scrutiny test. In *Metro v. FCC* (1990), O’Connor was on the losing end of a 5–4 ruling granting the federal government moderate scrutiny for its set aside programs. This, however, was a temporary precedent. In the prior year, O’Connor delivered the 5–4 majority ruling in *City of Richmond v. Croson* (1989) holding states and municipalities to strict scrutiny for their set asides. Then in *Adarand v. Pena* (1995), she delivered the 5–4 majority ruling that overturned the 1990 *Metro* ruling and held a federal (DOT) DBE program to the same strict scrutiny standard as states and municipalities were held to in *Croson*.

The *Adarand* ruling was controversial and had some observers talking about the death of affirmative action. More sober minds realized that O’Connor did not strike down the DBE program but rather remanded for evaluation under strict scrutiny what the lower courts previously evaluated under moderate scrutiny. O’Connor wrote that strict scrutiny is “strict in theory,” but not “fatal in fact.” She outlined six criteria for set aside programs in *Croson*, and reiterated those criteria in *Adarand*. The *Adarand* case took several more years to resolve, giving the DOT more than enough time to alter the DBE program to meet O’Connor’s criteria. Ultimately, the 10th Circuit ruled that the modified program passed strict scrutiny and the Supreme Court declared it a “spoiled” case and declined to review it any further.

The use of affirmative action plans (AAPs) for remedial needs was first addressed in *United Steelworkers v. Weber* (before O’Connor). *Weber* was a 5-2 ruling establishing a Title VII parallel to strict scrutiny (*manifest* workforce imbalance served by a temporary, *nontrammeling* solution). It was the first time the Supreme Court supported a quota solution (in preferential assignment to training based on an egregious violation by a union that refused to train Blacks). The rulings in two follow-up cases were more contentious. In *Wygant v. Jackson* (1986), a 5–4 majority struck down a school board amendment to a seniority agreement, and then two nontenured Black teachers were retained and two tenured White teachers were laid off. It was the first time a majority of five justices endorsed strict scrutiny in a reverse discrimination case. The ruling (by Powell) also used strict scrutiny language and Title VII terminology (directly from *Weber*) interchangeably. In *Johnson v. Transportation* (1987), a 6–3 majority used *Weber* to support promotion of a female over a male based, at least in part, on an AAP. As in *Weber*,
there was a manifest imbalance. However, unlike Weber, there was no evidence of any specific egregious violation.

O’Connor was in the 5–4 majority in Wygant and spoke separately to explain why “role modeling theory” (i.e., the need for Black teachers to teach Black students) is not a compelling interest, whereas “racial diversity” might be “sufficiently compelling.” In effect, she signaled her later opinion in Grutter v. Bollinger (2003; see below). Johnson was noteworthy because Justice White, a member of the majority in Weber, defected because it was an egregious violation clearly caused the manifest imbalance in Weber, but there was no evidence presented of such a violation in Johnson. O’Connor wrote separately to oppose White’s view, supporting the Santa Clara Transportation Agency’s AAP because the “statistical disparity” was “sufficient for a prima facie Title VII case,” and the AAP, as implemented, satisfied “the requirements of Weber and Wygant.”

The Grutter case (along with Gratz v. Bollinger, 2003) was a throwback to the Supreme Court’s first reverse discrimination ruling in Bakke (1978). In Bakke, Justice Powell ruled that diversity is a compelling government interest in a strict scrutiny analysis and that it is possible to narrowly tailor a medical school admissions program to that interest by treating minority status (and other factors such as social and economic disadvantage) as plus factors. However, he was only one of nine justices who expressed this view. The issue laid dormant for 25 years. In the interim, some lower courts treated Bakke as bad law (see for example Taxman v. Piscataway, 1996 and Hopwood v. Texas, 1996). However, O’Connor, considered by many a disciple of Powell’s, wrote the opinion for a 5–4 majority in Grutter signaling that Bakke was good law.

The Grutter and Gratz cases were connected, involving the same university (Michigan) and two admissions programs (law school and undergraduate admissions). The Grutter ruling supported the law school plan and the Gratz ruling struck down the undergraduate plan. Considering both cases together, only one justice (Thomas) questioned whether diversity is a compelling interest. The law school was supported because five justices believed (in O’Connor’s words) that it “bears the hallmarks of a narrowly tailored plan.” The Gratz ruling was, effectively, 6–2 with one abstention (Thomas) that the undergraduate plan was not narrowly tailored. O’Connor went to great pains to explain in the Grutter ruling why the law school plan was narrowly tailored and the undergraduate plan was not.

O’Connor contributed to other reverse discrimination rulings. She was in the 6–3 majority in Firefighters v. Stotts (1984) supporting a bona fide seniority system (BFSS) over a consent decree in a case involving racial preference in termination. She was also in the 5–4 majority in Martin v. Wilks (1989), a controversial ruling supporting an after-the-fact collateral attack to a consent decree by a union representing White firefighters (a ruling was later overturned in CRA-91). Perhaps most importantly, she was ardently opposed
to quota remedies, the exception being those rare cases where there is an egregious violation, identifiable victims of that violation, and little possibility of less intrusive solutions. Accordingly, she was the deciding vote in favor of a court-ordered remedy for a pattern or practice violation in Sheet Metal Workers v. EEOC (1986), dissenting “only insofar as it affirms the use of… mandatory quotas,” and was on the losing end of a 5–4 ruling in United States v. Paradise (1987) because she believed a quota solution was applied when less intrusive solutions were available. Finally, although she joined the 6–3 majority in Firefighters v. Cleveland (1986), she issued a strong warning against “quotas” and “goals” in that case as well.

Conclusions

The cases cited above illustrate, but do not exhaust Justice O’Connor’s influence on EEO case law. However, I’ve used too many words already. In addition, I will keep my conclusions brief. In the EEO arena, I think Justice O’Connor will be remembered for being in the majority in more 5–4 cases than anyone else and for connecting her thoughts across cases better than anyone else. On substantive issues, I think she will be remembered most for her role in the reverse discrimination cases, her ADA rulings, and her role in the Watson-Wards saga. Whether I agreed or disagreed with them, I enjoyed reading her rulings immensely and will miss them.

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