Chapter 2: Systemic Disparate Treatment Discrimination—Voluntary Affirmative Action

• Voluntarily adopted by the employer, not court-ordered

• Title VII Sec. 703(a)’s prohibition of discrimination because of race, sex, etc.

• Title VII Sec. 703(j): nothing in the statute “shall be interpreted to require any employer . . . to grant preferential treatment to any individual or group . . .”

• Justice Brennan: 703(j) does not state “require or permit”
Chapter 2: Systemic Disparate Treatment Discrimination—Voluntary Affirmative Action

• Steelworkers v. Weber (U.S. 1979) [p. 151]

• Weber standards
  • Plan’s purpose is to break down patterns of racial segregation and hierarchy
  • The interests of white employees are not unnecessarily trammeled
  • The plan is temporary and is not intended to maintain racial balance
Chapter 2: Voluntary Affirmative Action

  • Facts; issue
  • The plaintiff’s prima facie case
  • The employer’s LNR: the affirmative action plan
  • The plaintiff’s pretext showing
  • *Weber*
Johnson (cont.)

• Manifest imbalance and the applicable comparison [p. 155]
  • Prima facie case showing not required; long-term and short-term goals

• Were Johnson’s rights unnecessarily trammeled? [p. 157]

• The plan was designed to attain and not maintain a balanced work force [p. 157]

• Justice O’Connor’s concurrence; Justice Scalia’s dissent
Chapter 2: Voluntary Affirmative Action

• Section 1981 [p. 161, note 2]
• The diversity rationale [p. 162, note 3]
• Civil Rights Act of 1991 Sec. 116 [p. 162, note 4]
• Affirmative action and the ADEA [p. 163, note 8]
• Affirmative action and the Constitution [p. 163]
Chapter 3: Systemic Disparate Impact Discrimination

• Title VII Sec. 703(a)(2): “It shall be an unlawful employment practice for an employer to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”
Chapter 3: Systemic Disparate Impact Discrimination

• *Griggs v. Duke Power Co.* (U.S. 1971)
  • Facts; issue

• The objective of Congress [p. 169]

• Facially neutral employment practices “cannot be maintained if they . . . ‘freeze’ the status quo of prior discriminatory employment practices.” [p. 169]

• Title VII prohibits overt discrimination and “practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.” [p. 169]
Griggs (cont.)

- An exclusionary practice must “be shown to be related to job performance” [p. 169]
- “Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.” [p. 170]
- The employer has the burden of showing that a requirement has “a manifest relationship to the employment in question.” [p. 170]
- Title VII Sec. 703(h) [pp. 170-71]
Chapter 3: Systemic Disparate Impact Discrimination

  - Facts; issue

- Statistics and the proper comparison [p. 173]

- Racial imbalance in one segment of the employer’s work force does not establish a prima facie case with respect to the selection of workers in other positions [p. 174]
Wards Cove (cont.)

• Causation and the plaintiff’s prima facie case: the plaintiff must prove that a particular employment practice caused the claimed disparate impact [p. 176]
  • Must specifically show that each challenged practice has a significant disparate impact

• Employer’s burden of production: offer a business justification for the challenged practice
  • The touchstone is reasoned review; prior cases speaking of employer’s “burden of proof” should have been understood to mean burden of production [p. 176]

• Plaintiff’s alternative practices showing (burden of proof)
  • Equally effective alternative practices; costs and other burdens are relevant
Chapter 3: Systemic Disparate Impact Discrimination

• The Civil Rights Act of 1991: Section 703(k) [p. 183]
• The prima facie case: 703(k)(1)(A)(i)
• The employer’s job-related and business necessity defense: Section 703(k)(1)(A)(i)
• Bundling and unbundling: Section 703(k)(1)(B)(i)
• The plaintiff’s alternative employment practice showing; Section 703(k)(1)(A)(ii)
• Judge not jury trials [p. 210, note 5]
Chapter 3: Systemic Disparate Impact Discrimination

• *Watson v. Fort Worth Bank & Trust* (U.S. 1988)
  • Disparate impact analysis applies to subjective employment criteria; see p. 186, note 5

• Word-of-mouth practices [p. 186, note 3]

• Choice of labor market as a practice [p. 186, note 4]

• Pleading a disparate impact case [p. 187, note 6]

• English-only rules [p. 188, note 8]
Chapter 3: Systemic Disparate Impact Discrimination

• *Connecticut v. Teal* (U.S. 1982) (5-4)
  • The facially neutral exam requirement

• Percentage promotion rate for black employees was 22.9%; for white employees, 13.5%

• Held: “bottom line” result of promotion process does not preclude plaintiff’s prima facie case [p. 189]

• Dissent: an employer should not be denied the opportunity to refer to group figures when rebutting an alleged violation based on group figures [p. 191]
Chapter 3: Systemic Disparate Impact Discrimination

• *Dothard v. Rawlinson* (U.S. 1977)
  - The facially neutral state-law height and weight requirements

• The plaintiffs’ prima facie case of unlawful sex discrimination [p. 196]

• The employer’s “actual applicants” defense [p. 197]

• Dissent: not convinced that a large percentage of actual women applicants or those “seriously interested” in applying for guard positions would not meet the requirements [p. 198]
Chapter 3: Systemic Disparate Impact Discrimination

• The EEOC’s and federal agencies’ 80% rule [p. 200]
• Courts do not view the rule as a safe harbor in private suits [p. 201]
Chapter 3: Systemic Disparate Impact Discrimination

- *El v. SEPTA* (3d Cir. 2007)
  - The facially neutral prior criminal conviction policy

- The business necessity defense: employers must “show that a discriminatory hiring policy accurately—but not perfectly—ascertains an applicant’s ability to perform successfully the job in question.” [p. 205]

- SEPTA seeks to exclude applicants who “pose too much of a risk of potential harm to the passengers to be trusted with the job.” [p. 205]
  - The EEOC’s guidelines; *Lanning I* and *II*
El (cont.)

- SEPTA’s evidentiary claims [p. 207] and experts [p. 208]; explanation for its policy?
- Plaintiff did not hire an expert and did not depose SEPTA’s experts [p. 208]
- Summary judgment in SEPTA’s favor was appropriate. Agree or disagree?