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Title VII Litigation under the Civil Rights Act of 1991

Cami Rae Baker

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TITLE VII LITIGATION UNDER THE CIVIL RIGHTS ACT OF 1991

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I. INTRODUCTION

During the 1989 term, the United States Supreme Court significantly reduced the effectiveness of Title VII of the Civil Rights Act of 1964 and other civil rights legislation. 1 Congress responded with the

1. See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding that racial harassment during employment was not actionable under § 1981 since the reconstruction era statute only covered conduct at the initial formation of the contract and conduct which interfered with the right to enforce contractual obligations in the courts); Lorance v. AT & T Tech., Inc., 490 U.S. 900 (1989) (holding that the filing time for a Title VII claim of discrimination based on a facially neutral seniority system began running at the time of the adoption of the seniority system, rather than a later date of application of the seniority system to employees); Martin v. Wilks, 490 U.S. 755 (1989) (holding that a group of white firefighters, who failed to intervene in earlier employment discrimination proceedings which approved consent decrees, could subsequently challenge employment decisions made by government officials in accordance with the consent decrees). See generally Douglas Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. CHI. LEGAL. F. 103 (1987); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (holding that statistical evidence demonstrating a high percentage of nonwhite workers in Wards Cove's cannery jobs and a low percentage of such workers in the noncannery positions did not establish a prima facie case of disparate impact under Title VII); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that a defendant could avoid liability for an employment decision based in part on an employee's sex if the defendant showed by a preponderance of the evidence that the same employment decision would have been made even if plaintiff's gender had not been taken into account). Mark S. Brodin,

II. CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 (1964 CRA) embraces only a portion of the vast civil rights law contained in the Act. Titles I through VI govern discrimination in restricting the right to vote, access to public facilities and accommodations, educational settings, and programs assisted by the federal government. Title VII controls discrimination in the workplace. Specifically, employers are liable under Title VII if they discriminate on the basis of race, color, national origin, sex, or religion.

Two types of employment discrimination claims are provided for

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6. Id. § 2000e.
9. Id. §§ 12101-12213.
10. Id. § 2000e.
11. MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.01 (1988).
12. Id.
13. Employers subject to Title VII include those "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year . . . ." 42 U.S.C. § 2000e(b) (1988).
under Title VII: intentional discrimination and disparate impact.\textsuperscript{15} Refusal to hire, discharge or discriminate with regard to compensation, terms, conditions, or privileges of employment of an individual triggers intentional discrimination suits.\textsuperscript{16} Facial neutrality policies that have the effect of limiting, segregating, or classifying employees or applicants based on their race, color, religion, sex, or national origin provoke disparate impact suits.\textsuperscript{17} Sections III and IV of this comment examine how the 1991 CRA alters each type of claim.

III. INTENTIONAL DISCRIMINATION SUITS

The 1991 CRA drastically increased the penalty employers pay for intentionally discriminating against a member of a protected class. Damages recovered for intentional discrimination can extend beyond equitable relief and backpay.\textsuperscript{18} Furthermore, a panel of jurors, rather than a judge, determines the extent of damages to be awarded to a victim of intentional discrimination.\textsuperscript{19}

A. Increased Damages

The 1964 CRA limited all Title VII plaintiffs to a recovery of backpay and equitable relief.\textsuperscript{20} Prior to the 1991 CRA, compensatory and punitive damages could only be collected by employment discrimination victims if their claim could be asserted under 42 U.S.C. § 1981.\textsuperscript{21}
Section 1981 provides protection from race, ethnic, or ancestry discrimination. In contrast, under the 1991 CRA, employees intentionally discriminated against on the basis of race, sex, color, religion, or national origin may recover both compensatory and punitive damages in addition to equitable relief. Employees suffering discrimination in the form of disparate impact, as opposed to intentional discrimination, remain limited to backpay and equitable relief.

The 1991 CRA prevents intentional discrimination plaintiffs from receiving double recovery under 42 U.S.C. § 1981 and Title VII. Inability to recover under 42 U.S.C. § 1981 is required in order to bring a Title VII claim under the 1991 CRA. However, the plaintiff is not required to actually prove that a cause of action does not exist under 42 U.S.C. § 1981.

The double recovery prohibition does not prevent a plaintiff from asserting both a section 1981 claim and a Title VII claim if the discrimination produced "demonstrably different" harm. In an interpretive memorandum of the 1991 CRA, Senator Danforth gave the example of a woman who suffers both racial discrimination and sexual harassment in employment, but suffers a different type of harm from each. She would be able to bring a section 1981 claim for racial discrimination and a Title VII claim for sexual harassment and recover for each.

The 1991 CRA limits the dollar amount a plaintiff alleging intentional discrimination can collect for punitive and compensatory damages. The cap depends on the number of persons employed by an employer during the current or preceding year. The larger the number of

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22. Id. § 1981.
24. Id.
25. Id.
26. Id.
28. Id.
29. Id.
30. 1991 CRA § 102(b)(3), 105 Stat. at 1073. Section 102(b)(3) of the 1991 CRA reads as follows:

Limitations.—The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000; and

(B) in the case of respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees
employees, the higher the cap. The 1991 CRA exposes employers with more than 500 employees to the most liability, $300,000.

The structure of the damage caps provides some employers with an opportunity to limit their exposure to liability. For example, a corporation with 505 employees can limit its exposure to $100,000 with the elimination of only five employees. Employers close to the cutting line for any of the caps could achieve similar results. The 1991 CRA categorizes employers based on the current or preceding calendar year. Therefore, reductions in exposure would not occur for two calendar years.

Exposure to liability could also be limited through fragmentation. Larger corporations could reduce exposure by forming smaller, separate companies employing fewer than 101 employees. The 1991 CRA exposes employers with fewer than 101 employees to the least amount of liability, $50,000. In order for a reorganization maneuver to be successful, the smaller companies must actually operate as separate companies.

in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

The caps on damages found in § 102(b)(3) may be removed from the 1991 CRA in the future. First, Sen. Kennedy and Sen. Hatch introduced bills which would remove these limitations. David A. Cathcart & Mark Snyderman, The Civil Rights Act of 1991, THE CIVIL RIGHTS ACT OF 1991 13 (A.L.I.-A.B.A. Video Law Review Study Materials 1992). Second, some experts argue the operation of the caps will prove unconstitutional. Id. Section 102(c) requires that jury members not be informed of the damages limitations. 1991 CRA § 102(c), 105 Stat. at 1073. Therefore, a jury may return an award exceeding one of the limits, but the court would be forced to apply the cap. In such a case, the successful plaintiff suing a smaller employer will argue the cap violates the equal protection and due process rights of the Constitution. Plaintiffs suing smaller employers would be penalized due to the size of their employer. A victim of intentional discrimination by an employer with more than 500 employees is not likely to have suffered any greater harm than a victim of intentional discrimination by an employer with less than 500 employees. Cathcart & Snyderman, supra, note 30. However, under the 1991 CRA, the plaintiff suing the smaller employer would receive anywhere from $100,000 to $250,000 less than the plaintiff suing the larger employer. 1991 CRA § 102(b)(3), 105 Stat. at 1073. Defendants will also likely challenge the caps found in the 1991 CRA as unconstitutional. For example, large employers will argue the mere size of their company should not expose them to greater liability. Cathcart & Snyderman, supra, at 30. Prior

32. Id. § 102(b)(3)(D), 105 Stat. at 1073.
33. Id. §§ 102(b)(3)(C) - (D), 105 Stat. at 1073.
34. Id. § 102(b)(3), 105 Stat. at 1073.
35. Id.
36. Id. § 102(b)(3)(A), 105 Stat. at 1073.
37. In Radio Union v. Broadcast, 380 U.S. 255 (1965) (per curiam), the Supreme Court approved a four-part test for determining when distinct legal entities may be considered an integrated enterprise or "single employer":
(1) Interrelationship of operations;
(2) Common management, "directors and boards";
(3) Centralized control of labor relations; and
to the 1991 CRA, attorneys for victims of Title VII discrimination commonly attempted to link smaller companies to larger corporations in order to reach the deeper pocket. Under the 1991 CRA, plaintiff attorneys will perform similar examinations of segmented companies with fewer than 501 employees in an effort to maximize the amount of damages available.

Awards made under the 1991 CRA for backpay, interest on backpay, and equitable relief are not included when calculating the caps for compensatory and punitive damages. The caps imposed by the 1991 CRA do not affect section 1981 causes of action. The availability of unlimited compensatory and punitive damages still operates with regard to section 1981 actions.

B. Right to Trial by Jury

Plaintiffs pursuing any lawsuit desire a trial by jury for two reasons: (1) juries are generally perceived as more sympathetic, and (2) juries return larger awards than judges. According to some studies, an award by a jury will, on average, double what a judge would award. The equitable remedies limitation found in Title VII of the Civil Rights Act of

(4) Common ownership "or financial control".

See Baker v. Stuart Broadcasting Co., 560 F.2d 389, 392 (8th Cir. 1977); Metropolitan Detroit Bricklayers v. J.E. Hoetger & Co., 672 F.2d 580, 584 (6th Cir. 1982). In some cases, "single employer" status can be shown without meeting all four prongs of the test. Armbruster v. Quinn, 711 F.2d 1332, 1338 (6th Cir. 1983); Local No. 627, Operating Engineers v. NLRB, 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), aff'd in relevant part sub nom. South Prairie Construction Co. v. Local 627, Operating Engineers, 425 U.S. 800 (1976). See generally Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055, 1075-76 (1st Cir. 1981).

38. Id.
39. Id. § 102(b)(2), 105 Stat. at 1073 ("Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.").
40. Id. § 102(b)(4), 105 Stat. at 1073 ("Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes [42 U.S.C. 1981]. "). An interpretive memorandum by the sponsors of the 1991 CRA stressed the nonapplication of limits found in the 1991 CRA to § 1981 claims:

The new damages provision thus does not limit either the amount of damages available in section 1981 actions, or the circumstances under which a person may bring suit under this section. For example, the bill does not affect the holding of the Supreme Court in Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987), that section 1981 action was intended to protect from discrimination "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." Indeed, that discrimination is national origin discrimination prohibited by Title VII as well.

42. Id.
43. Id.
1964 prevented jury trials. 44

The 1991 CRA allows Title VII plaintiffs alleging intentional discrimination the advantage of trying their case to a jury. 45 Right to a jury trial is not provided for in disparate impact suits. 46 Technically, the 1991 CRA allows either the defendant or plaintiff to elect a jury trial, 47 but in practice only plaintiffs will elect to exercise this right because juries generally return verdicts which are unfavorable to defendants. 48

The availability of jury trials provides employee-plaintiffs with a significant advantage over employers. Plaintiffs' settlement offers will now be weighed by employers against how much a jury, rather than a judge, might award. Employers will view juries as a wild card due to the difficulty of predicting jury verdicts. 49 Thus, some settlement offers not given a second glance under the original CRA will now appear more attractive to employers.

IV. DISPARATE IMPACT SUITS

A. Evidentiary Burdens Prior to the 1991 CRA


In Griggs v. Duke Power Co., 50 the Supreme Court provided its first interpretation of Title VII's "disparate impact section." 51 A group of black employees launched the Title VII class action suit against Duke

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45. 1991 CRA § 102(c), 105 Stat. at 1073.
46. Id. §§ 102(b)(1) - (e), 105 Stat. at 1073.
47. Id.
48. See generally Gunther, supra note 39, at 169-96.
49. Id.
   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.
   Id.
   Section 2000e-2(a)(1) of Title VII prohibits intentional discrimination:
   It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
   Id. § 2000e-2(a)(1).
Power Company. The plaintiffs contended that certain company requirements had a discriminatory impact on black employees.

The Supreme Court began its analysis by reviewing Duke Power's practices prior to the passage of the 1964 CRA. The evidence showed a pattern of intentional discrimination against blacks. Duke Power's plant was divided into five departments: (1) labor, (2) coal handling, (3) operations, (4) maintenance, and (5) laboratory. Of the five departments, employees assigned to the labor department received the lowest wages. In fact, the highest paid employees in the labor department made less than the lowest paid employees in the other departments. The evidence clearly showed that Duke Power preferred whites when filling positions in the higher paying departments, while restricting blacks to the labor department.

Prior to 1965, Duke Power adhered to the following personnel policy, adopted in 1955, when hiring or transferring employees: (1) requirement of a high school education for initial employment in any department, except labor, and (2) requirement of a high school education in order to transfer from the coal handling department to the higher paying departments (operations, maintenance, or laboratory). The 1955 policy did not require a high school education for transfer from labor to coal handling. The Civil Rights Act of 1964 prohibited Duke Power's open preference for whites and its practice of promoting only whites out of the labor department.

In reaction to the 1964 Act, Duke Power changed the 1955 policy. First, Duke Power established a high school education requirement for transfer out of the labor department. In 1965, most blacks lacked a high school education. Therefore, the post-Act requirement of a high school education to transfer out of the labor department produced the same result as the pre-Act open preference for whites. Second, Duke

52. Griggs, 401 U.S. at 426.
53. Id. at 427-28 (requiring "satisfactory scores on two professionally prepared aptitude tests, as well as . . . a high school education").
54. Id. at 427-28.
55. Id. at 426-27.
56. Id. at 427.
57. Id. at 427.
58. Id. at 427.
59. Id.
60. Id. (emphasis added).
61. Id.
62. Id.
63. Id. at 431 n.6 (1960 census statistics showing only 12% of black males possessed a high school education).
Power required satisfactory scores on two professional aptitude tests for initial employment in any department, except labor. Since satisfactory scores approximated the national median for high school graduates, the requirement reinforced the educational advantage enjoyed by non-blacks.

The Supreme Court found that the practices adopted by Duke Power after passage of the 1964 CRA operated to exclude minorities and were not demonstrably related to job performance. According to the Court, such practices directly conflicted with congressional purposes underlying Title VII. Congress' objective "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

Duke Power argued that the aptitude tests used were specifically authorized by section 703(h) of Title VII. Section 703(h) allows the use of "any professionally developed ability test provided that such test, its administration or action upon results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin." The Court gave substantial deference to guidelines issued by the Equal Employment Opportunity Commission (EEOC) on employment testing procedures. Under the EEOC guidelines, only "job-related" tests would be tolerated. Thus, in Title VII disparate impact suits, the fact that the employer had no intention to discriminate when adopting a practice is irrelevant. Therefore, Griggs held that an employer's only defense to a showing of disparate impact is the "business necessity" of the practice. "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

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64. Id. at 427-28.
65. Id. at 428.
66. Id. at 431 n.6.
67. Id. at 433.
68. Id. at 429.
69. Id. at 429-30.
70. Id. at 433.
71. 42 U.S.C. § 2000e-2(h). Section 2000e-2(h) only pertains to the administration of tests. High school diploma requirements are not addressed. Id.
72. Griggs, 401 U.S. at 433-34.
74. Griggs, 401 U.S. at 431.
75. Id.
76. Id.
Subsequent Supreme Court decisions fleshed out the details of Title VII disparate impact suits. In *Albemarle Paper Co. v. Moody*, the Court expanded the *Griggs* analysis holding that a plaintiff could rebut evidence of business necessity by showing that there were less discriminatory alternatives which satisfied the employer's legitimate employment interests. In *Watson v. Fort Worth Bank & Trust Co.* the Court decided that successful disparate impact suits do not require a prior history of intentional discrimination. *Watson* further expanded the coverage of disparate impact suits by allowing attacks upon the use of subjective criteria in hiring and promotion decisions if the subjectivity affected women or minorities disproportionately. Prior to *Watson*, the Court allowed only standardized or objective criteria to show disparate impact.

The most significant aspect of *Watson* is the discourse in both the plurality and minority opinions concerning the evidentiary burdens to be borne by the parties. The question was this: once an employee proves that certain business practices have a disparate discriminatory impact, is the employer simply required to bear the burden of producing evidence substantiating its assertion that the practice in question is a business necessity or, must the employer bear the heavier burden of proving that the business practice is, in fact, a business necessity? Led by Justice O'Connor, the plurality concluded that the employer must satisfy only a burden of production. Thus, if the employer proffered evidence tending to show that the practice was a business necessity, the employee is then responsible for proving either that the practices were not a necessity or that less discriminatory alternative practices could be implemented instead. In contrast, the minority, comprised of Justices Marshall, Brennan, and Blackmun, would have imposed the heavier burden of proof on the employer. Thus, the employer would have had to prove that its

77. 422 U.S. 405 (1975).
78. Id. at 436.
80. Id. at 988.
81. Id. at 990-91.
82. Id. at 988-89.
83. Id. at 991.
84. Id. at 998.
85. Id.
86. Id. at 1001.
practices were, in fact, necessary. Since there was no majority, the precedential value of Watson on this issue was questionable at best. However, Watson drew an important line separating the Justices. In 1989, just one year later, the burden shifting issue was confronted by the Supreme Court for a second time. The battlefield was Wards Cove Packing Co. v. Atonio.

2. Wards Cove Packing Co. v. Atonio

Wards Cove Packing Co. v. Atonio, which governed disparate impact suits until the enactment of the Civil Rights Act of 1991, adopted the Watson plurality's evidentiary conclusions. Justice Kennedy, who did not participate in Watson, provided the swing vote. In summary, Wards Cove held: (1) a plaintiff carries the burden of isolating and identifying the specific employment practices responsible for statistical disparities; (2) the burden of proof remains with a plaintiff and only a burden of production shifts to an employer; and (3) an employer can meet its production burden by relating challenged practices to legitimate business goals.

Civil rights advocates strongly objected to each holding in Wards Cove. First, civil rights advocates felt disparate impact plaintiffs should not be required to identify each specific employment practice and its disparate impact. Rather, they argued, plaintiffs should be allowed to rely on aggregate statistical imbalances between minority and non-minority employees or applicants. Second, civil rights advocates wanted the burden of proof, rather than production, shifted to employers once a plaintiff established a prima facie case of disparate impact. Unless the purported justifications are merely pretexts for discrimination, an employer should be able to prove the business necessity of the practice. Therefore, the civil rights advocates contended, an employer should be required to

87. Id.
88. Justice Stevens felt an analysis of shifts in burden was not necessary to decide the case. Id. at 1011.
89. 490 U.S. 642 (1989).
90. Id.
91. Watson, 487 U.S. at 977.
92. Id.
93. Wards Cove, 490 U.S. at 656.
94. Id. at 659-60.
95. Id. at 660.
96. Cathcart & Snyderman, supra note 30, at 37.
97. Id.
98. Id.
do more than simply articulate legitimate business reasons. Third, civil rights advocates objected to an employer simply showing how a challenged practice served "legitimate business goals," rather than being required to meet the Griggs "business necessity" standard.\textsuperscript{99} They argued that if an employment practice produced a disparate impact, the practice should be \textit{essential}, not merely \textit{related}, to legitimate business interests.\textsuperscript{100}

\section*{B. Evidentiary Burdens Under the 1991 CRA}

\subsection*{1. Plaintiff's Initial Burden}

The plaintiff's prima facie case must include evidence of a specific, facially neutral employment practice which causes a discriminatory impact with regard to race, color, religion, sex, or national origin.\textsuperscript{101} If an employee challenges multiple employment practices, the specific disparate impact of each particular practice must be shown.\textsuperscript{102} However, the 1991 CRA allows a plaintiff, who shows that multiple employment practices form an inseparable decision making process, to present the various practices as one employment practice. Therefore, only one showing of disparate impact would be required in such a case.\textsuperscript{103} Employers can work within the law and, at the same time, diminish their exposure to liability by keeping various employment practices distinct and separate.

\subsection*{2. Employer's Subsequent Burden}

Once a Title VII disparate impact plaintiff has presented the required prima facie case, an employer has two possible arguments. First, an employer can reduce the effectiveness of the plaintiff's disparate impact evidence by arguing that the plaintiff's statistics are incorrect or the disparate impact is slight.\textsuperscript{104} If the first argument fails, an employer then must "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."\textsuperscript{105} The 1991 CRA defines "demonstrate" as meeting the "burdens of production and persuasion."\textsuperscript{106} On this point, civil rights advocates scored a clear win. The 1991 CRA revived \textit{Griggs} with regard to the burdens to be borne

\begin{thebibliography}{99}
\bibitem{99} Id. at 37-38.
\bibitem{100} Id.
\bibitem{101} 1991 CRA § 105(a), 105 Stat. at 1074.
\bibitem{102} Id.
\bibitem{103} Id.
\bibitem{104} Id.
\bibitem{105} Id.
\bibitem{106} Id. § 104(m), 105 Stat. at 1074.
\bibitem{107} 401 U.S. 424 (1971).
\end{thebibliography}
by the parties.

The 1991 CRA also restored the *Griggs* and pre-*Wards Cove* definitions of "job related" and "business necessity." Therefore, employers must now ensure that their employment practices are *necessary* and not simply *related* to legitimate business goals. Civil rights advocates scored a significant win on this point as well. Employers should begin an immediate review of all employment practices with an eye toward what is essential, rather than arguably permissible. Employers who err on the side of being overly critical of practices will substantially reduce exposure to litigation.

V. RESPONSE OF BUSINESS OWNERS TO THE 1991 CRA

While civil rights advocates cheer many of the changes brought about by the 1991 CRA, business owners cringe and then retreat in an effort to absorb what they consider potentially devastating revisions. In the eyes of employers, the 1991 CRA contains numerous red flags worthy of alarm. First, the opportunity to tell the intentional discrimination story to a jury provides disgruntled employees or applicants with an incentive to sue. Second, the filing of an intentional discrimination suit places company profits in the hands of unpredictable and emotional jurors, rather than objective judges. Third, in a survival-of-the-fittest

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108. 1991 CRA § 3(2), 105 Stat. at 1071 ("The purposes of this Act are- (2) to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs* v. Duke Power Co., 401 U.S. 424 (1971) and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).").

109. Stacy Adler Gordon, *Civil Rights Law Bares Employers to More Litigation*, BUS. INS., Dec. 9, 1991, at 1. Based on interviews conducted with leading employer defense attorneys, Ms. Gordon's article offers helpful suggestions to employers in their efforts to comply with the 1991 CRA. First, employers should compare existing employment practices and training procedures with the requirements of the 1991 CRA. *Id.* Second, employers should conduct employee training sessions geared towards the prevention and reporting of sexual harassment. *Id.* Third, employers should utilize alternative resolution techniques. *Id.* For example, employers should consider settling disputes with employees through arbitration or mediation. *Id.* Significant costs can be saved by avoiding litigation. Fourth, employers should keep records which prove the nondiscriminatory nature of employment decisions. *Id.* The records should disclose the legitimate business reasons for each employment decision. *Id.* Finally, an employer presented with an employment discrimination problem should take remedial action immediately. *Id.*

110. *Id.*

111. *Id.* Generally, employers are not able to protect themselves from employment discrimination suits through insurance coverage. *Id.* However, with the increased exposure to liability created by the Civil Rights Act of 1991, employers will present new arguments in favor of employment discrimination coverage. *Id.* An appeal has been made to Congress to pass legislation which would allow insurers to offer separate policies protecting against employment discrimination suits. *Id.*


113. Peter Romeo, *Operators Tense in Wake of New Civil Rights Law*, NATION'S RESTAURANT
economy, jurors now possess the power in intentional discrimination cases to financially punish and potentially destroy companies by awarding punitive damages.\textsuperscript{114} Fourth, the 1991 CRA lessens the burden on plaintiffs bringing lawsuits against respectable companies who do not intentionally discriminate, but who accidentally fail to achieve a perfect, equally-balanced work force.\textsuperscript{115} Fifth, the 1991 CRA provides an additional incentive for frustrated employees to sue by requiring employers to reimburse successful plaintiffs for their expert witness fees.\textsuperscript{116} Finally, business owners see the pro-plaintiff changes as luring more attorneys into the employment discrimination arena.\textsuperscript{117}

Prior to the 1991 CRA, the ability to retain expensive, prestigious legal counsel provided employers with a significant advantage over employees.\textsuperscript{118} Intentional discrimination plaintiffs will now attract a higher caliber of attorney willing and able to absorb the initial expenses of litigation and hoping to collect substantial contingency fees. Thus, employers view the 1991 CRA as stripping management of its shields, while handing employees additional swords.

For some business owners, the worst side effect of the 1991 CRA is the creation of quotas.\textsuperscript{119} Quota-conscious employers believe the exposure to disparate impact liability under the 1991 CRA forces companies into hiring quotas.\textsuperscript{120} The quota-imposing argument envisions a company dedicated to equal employment opportunities. The labor pool utilized by the hypothetical company is well-integrated. However, the

\textsuperscript{114} Heldman, supra note 111, at 1.

\textsuperscript{115} Id.

\textsuperscript{116} Id. Section 113 of the 1991 CRA amends the Civil Rights Attorney's Fees Awards Act of 1976 and Title VII in order to allow the award of expert fees to parties who prevail in litigation under Title VII, 42 U.S.C. §§ 1981, 1981A, 1982, 1983, or 1985. Heldman, supra note 111, at 1. Section 113 overrules Supreme Court cases refusing to allow the award of expert witness fees. Id. See West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138 (1991); Crawford Fittings Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). While Section 113 allows the court discretion with regard to an award of expert fees, such an award is not limited to testimonial fees but can include all expert fees incurred throughout the pendency of the litigation. See Cathcart & Snyderman, supra note 95 and Dole and Edwards Memoranda, 137 Cong. Rec. S 15,477, H 9,530.

\textsuperscript{117} Heldman, supra note 111, at 1.

\textsuperscript{118} Id.

\textsuperscript{119} Id. Section 113 of the 1991 CRA amends the Civil Rights Attorney's Fees Awards Act of 1976 and Title VII in order to allow the award of expert fees to parties who prevail in litigation under Title VII, 42 U.S.C. §§ 1981, 1981A, 1982, 1983, or 1985. Heldman, supra note 111, at 1. Section 113 overrules Supreme Court cases refusing to allow the award of expert witness fees. Id. See West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138 (1991); Crawford Fittings Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). While Section 113 allows the court discretion with regard to an award of expert fees, such an award is not limited to testimonial fees but can include all expert fees incurred throughout the pendency of the litigation. See Cathcart & Snyderman, supra note 95 and Dole and Edwards Memoranda, 137 Cong. Rec. S 15,477, H 9,530.

\textsuperscript{117} Heldman, supra note 111, at 1.

\textsuperscript{118} Id.


\textsuperscript{120} Heldman, supra note 111, at 1.
company's work force remains substantially homogeneous. The hypothetical disparate impact is not the result of either intentional or unintentional discrimination, but merely a statistical accident.

Under the 1991 CRA, an employee or applicant may sue such a well-intending employer simply by showing the statistical disparity and selecting an employment practice as the cause of the disparity. The employer would then bear the burden of proving the job relatedness and business necessity of a challenged practice. Employers preferred the approach of the Supreme Court in *Wards Cove* which merely placed a burden of production on employers, rather than the heavier burden of persuasion.

Employers view the attachment of such a heavy burden as inherently unfair, particularly in light of the difficulty of surviving in an economic recession. An alleged victim of disparate impact discrimination may place a noose around an employer's neck by coming forward with very little evidence. The escape of even an innocent employer would be quite costly. For example, the best case scenario for a faultless employer would be the granting of summary judgment early in the case. Even so, the conscientious employer would have suffered the cost and stress of litigation. Furthermore, the possibility exists that an unmeritorious claim could proceed all the way to the expensive trial stage.

From the employer's perspective, the only alternative is to fill job openings with employees who will close any statistical disparities. In other words, the 1991 CRA forces employers to use quota-conscious hiring methods to avoid disparate impact claims.

Employers resent the focus quotas place on an applicant or employee's race, color, religion, sex, or national origin, as opposed to focusing on qualifications. Employers want to concentrate only on the qualifications of a particular employee or applicant for a particular job.

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123. 490 U.S. at 659-60 (1989).
125. Litigation is expensive regardless of the outcome. For example, even an ultimately nonliable employer could incur significant attorneys fees, court costs, discovery costs, and a likely insurance premium increase. *Id.*
126. *Id.*
127. *Id.*
Employers consider the freedom to select only the most qualified applicants essential to survival in a recessive and highly competitive economy. Unfortunately, the immediate result of pushing employers into a quota-corner is increased animosity between business owners and protected individuals.

In the eyes of civil rights advocates, the 1991 CRA bears no resemblance to the malevolent creature employers depict. First, according to the advocates, a sufficient number of qualified workers capable of comprising an integrated work force exists in the labor market. Companies simply refuse to search for or attract workers of protected classes. Second, companies without a history of discrimination have easily achieved integrated and statistically balanced work forces and have experienced less exposure to liability. Employers who have historically participated in employment discrimination and therefore lack even partially integrated work forces should not complain about burden shifting because they wove their own web. Finally, a federal court’s authority to impose sanctions for filing frivolous lawsuits will prevent the catastrophe envisioned by employers.

VI. CONCLUSION

The obvious biases of both employers and civil rights advocates cloud their perception of the 1991 CRA. An attempt to respond to the 1991 CRA in a truly objective and practical manner presents difficulties, but a few certainties emerge. First, employers must recognize that the 1991 CRA raises the stakes in intentional discrimination suits, and, with regard to disparate impact suits, the rules of the game have been altered. Second, employers can no longer afford to employ that one manager or supervisor who personally disagrees with the purposes and spirit of Title

128. Id.
129. Id.
130. The executive director of the National Association for the Advancement of Colored People (NAACP), Benjamin Hooks, has publicly expressed his approval of the 1991 Civil Rights Act. In an interview conducted shortly after the enactment of the 1991 CRA, Mr. Hooks stated:

The Supreme Court, peopled by Reagan-Bush appointees in the majority, devastated gains we thought we had made. I am glad we had the 1991 Civil Rights Bill passed and signed, but I can’t help wondering if we would not have needed it but for the backward movement of the Supreme Court. If the Court had not absolutely moved backward, we would not have had to restore the status quo.

131. Heldman, supra note 111, at 1.
132. Id.
133. Id.
VII. Employers who are willing to risk that these managers will not express their personal beliefs in their interaction with subordinates are gambling with a potential liability of hundreds of thousands of dollars, which rests in the hands of jurors. Finally, an employer who refuses to utilize only employment practices which either lack a disparate impact or are essential to business, opens the door to lawsuits which plaintiffs' attorneys will be delighted to pursue. The 1991 CRA became effective November 21, 1991. The liability clock ticks for employers who fail to take precautions.

*Cami Rae Baker*