1-1-1989

# Title VII : Application of Impact Analysis to Subjective Employment Criteria, 24 Harv. C.R.-C.L. L. Rev. 264 (1989)

Karen H. Cross
*John Marshall Law School Chicago*, khcross@uic.edu

## TITLE VII: APPLICATION OF IMPACT ANALYSIS TO SUBJECTIVE EMPLOYMENT CRITERIA—*Watson v. Fort Worth Bank and Trust* 108 S. Ct. 2777 (1988)

At first glance one might view *Watson v. Fort Worth Bank and Trust*[1] as a victory for Title VII plaintiffs. *Watson* holds in principle that, disparate impact analysis applies equally to both subjective and objective employment criteria.[2] Unfortunately, the decision also imposes new, more formidable evidentiary requirements on those challenging subjective decisionmaking in the workplace. Although the Supreme Court stopped short of explicitly overruling the disparate impact precedent set in *Griggs v. Duke Power Co.*,[3] both the spirit of the opinion and its potential effect do in fact represent a retreat from *Griggs*.

The *Watson* case involves a black woman who filed a Title VII class action against her employer, Fort Worth Bank and Trust, challenging the bank's discretionary hiring and promotion practices.[4] The District Court decertified the plaintiff class of employees and applicants,[5] and went on to dismiss Watson's

---

[1] 108 S. Ct. 277 (1988).

[2] In the first case to apply disparate impact analysis, Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court struck down high school diploma and intelligence examination requirements where such tests were not shown to be necessary to job performance. *Griggs* and subsequent Supreme Court cases have all applied disparate impact analysis to "objective" employment criteria. *See, e.g.*, Connecticut v. Teal 457 U.S. 440 (1982) (written examination); Dothard v. Rawlinson, 433 U.S. 321 (1977) (minimum height and weight requirement); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (written and verbal personnel examinations). *Watson* is the first Supreme Court case to hold that disparate impact theory applies equally to "subjective" employment criteria, which include those factors considered in making discretionary hiring or promotion decisions.

[3] *Griggs*, 401 U.S. 424.

[4] The bank relied on the discretion of its white supervisors to hire and promote. To establish a prima facie case of discrimination, Watson demonstrated, *inter alia*, that in hiring, 16.7% of the white applicants and only 4.2% of the black applicants received offers of employment. The probability that this disparity was due to chance was one in ten thousand. Watson v. Fort Worth Bank and Trust, 798 F.2d 791, 811 (5th Cir. 1986) (Goldberg, J., dissenting) (vacated 108 S. Ct. 2777 (1988)).

[5] The District Court initially certified the plaintiff class of job applicants and employees, but later decertified the class, holding that it did not satisfy the requirements of Fed. R. Civ. P. 23(a) as interpreted in General Telephone Company of the Southwest v. Falcon, 457 U.S. 147 (1982). *See Watson*, 798 F.2d at 795–96.

The class certification issue is vitally important to plaintiffs in impact analysis cases because a broad pool of affected individuals is necessary to form a basis for statistical data demonstrating the effect of discriminatory practices. The Supreme Court did not reach this issue in *Watson*, but rather limited its discussion to the applicability of impact analysis to subjective criteria.

individual claim under disparate treatment theory.[6] The Fifth Circuit affirmed the class decertification as well as the dismissal of Watson's individual claim.[7] The Supreme Court granted certiorari on the limited question of whether disparate impact analysis applies to subjective employment criteria.[8]

Writing for a unanimous Court, Justice O'Connor in *Watson* holds that in principle, impact analysis applies as much to subjective, discretionary criteria as it does to objective criteria such as the standardized tests and diploma requirements involved in *Griggs*. Justice O'Connor recognizes that upholding the applicability of impact analysis to subjective employment criteria was a necessary consequence of *Griggs*; a holding to the contrary would have fatally weakened *Griggs* by permitting employers to evade its requirements simply by incorporating subjective criteria into their decisionmaking.[9] Had Justice O'Connor limited *Watson* to the issue on which the Court granted certiorari, the future viability of *Griggs* would be assured.

Justice O'Connor, however, proceeds to articulate a number of evidentiary "guidelines" for lower courts to follow: (1) in order to make a prima facie case of discrimination, a Title VII plaintiff must identify the specific practice being challenged; (2) the burden of proof remains with the plaintiff at all times; and (3) to rebut a plaintiff's prima facie showing, an employer

---

[6] The District Court analyzed Watson's claim under the disparate treatment test outlined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In order to establish a prima facie case under the analysis adopted in *Burdine* and *McDonnell*, a plaintiff need only demonstrate that "she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253. At this point the burden of production shifts to the defendant, who must articulate a legitimate, nondiscriminatory reason for rejecting the plaintiff. *Burdine*, 450 U.S. at 247. Once the defendant has met this burden of production, the burden shifts back to the plaintiff, who must prove that the defendant's reason was merely a pretext for discrimination. *McDonnell*, 411 U.S. at 804.

Under impact analysis the shifting burdens of proof are different because the purpose of impact analysis is to relieve a plaintiff of her burden of proving purposeful discrimination. *See Burdine*, 450 U.S. at 252 n.5; *McDonnell*, 411 U.S. at 802 n.14 (recognizing the difference of evidentiary requirements in impact cases). Thus once the plaintiff demonstrates that a particular employment practice results in a pattern of discrimination, the burden shifts to the defendant, who must prove that its employment criteria are "job-related." *See, e.g., Albemarle*, 422 U.S. at 425.

[7] *Watson*, 798 F.2d at 791.

[8] 107 S. Ct. 3227 (1987).

[9] *Watson*, 108 S. Ct. at 2786.

need not demonstrate that the challenged criteria are necessary to job performance as long as the criteria are "normal and legitimate."[10]

Justices Stevens and Blackmun, concurring in the judgment, each wrote separate opinions. Justice Stevens would postpone specifying evidentiary standards until the District Court has articulated further findings.[11] Justice Blackmun, joined by Justices Brennan and Marshall, argues that the evidentiary standards offered by the plurality conflict with the Court's prior holdings on impact doctrine.[12] Both Justice Stevens and Justice Blackmun acknowledge that the plurality's articulation of evidentiary standards in *Watson* was not required to decide the issue on which the Court had granted certiorari.[13]

While the plurality opinion purports to apply traditional impact doctrine, its analysis of the evidentiary standards contrasts sharply with *Griggs* and other impact cases.[14] Indeed, Justice O'Connor acknowledges that *Watson* departs from prior impact doctrine: "[W]e do not believe that each verbal formulation used in prior opinions to describe the evidentary [sic] standards in disparate impact cases is automatically applicable in light of today's decision."[15]

As Justice Blackmun's concurrence points out, the *Watson* analysis departs significantly from prior impact doctrine. The plurality's assertion that the burden of proof remains with the plaintiff at all times conforms with disparate *treatment* analysis and not with impact analysis. Under disparate treatment theory, the defendant bears only the burden of production.[16] Likewise, under *Watson*, after a plaintiff has demonstrated that an employer's job-selection process results in class-wide discrimination, the defendant need only *produce* evidence that the job

---

[10] *Id.* at 2787–91.
[11] *Id.* at 2797.
[12] *Id.* at 2792 (Justice Kennedy took no part).
[13] *Id.* at 2792 n.1, 2797.
[14] *See supra* note 2.
[15] *Watson*, 108 S. Ct. at 2788 n.2.
[16] *Id.* at 2792 (Blackmun, J., concurring); *see also supra* note 6. Justice O'Connor cited *Albemarle* (an impact case) for the proposition that the defendant need only produce rebutting evidence before the burden shifts back to the plaintiff. *Watson*, 108 S. Ct. at 2787. In fact, *Albemarle* refers not to the defendant's burden of production but to the defendant's burden of persuasion. *Albemarle*, 405 U.S. at 425.

criteria are "normal and legitimate" to reverse the presumption of discrimination. *Watson* thus represents a significant departure from *Griggs*, which required the defendant to *prove* that the employment criteria used were job-related.[17]

In addition to changing the burden requirements, *Watson* also changes the requisite elements for rebuttal. Instead of demonstrating "job necessity" (the *Griggs* standard), a defendant need only show that the employment criteria are based on normal and legitimate business practices. Again, this latter standard is reminiscent of disparate treatment analysis and not traditional impact doctrine.[18] In adopting the "normal and legitimate" standard over the formal "job necessity" standard, however, the Court ignores the fact that common but discriminatory hiring practices are exactly what Title VII was meant to eliminate:

> [A] reviewing court may not rely on its own, or an employer's, sense of what is "normal" . . . as a substitute for a neutral assessment of the evidence presented. Indeed, to the extent an employer's "normal" practices serve to perpetuate a racially disparate status quo, they clearly violate Title VII unless they can be shown to be necessary, in addition to being "normal."[19]

Even though the *Watson* court holds that *Griggs* is equally applicable to subjective and objective employment criteria, it appears to rewrite the *Griggs* evidentiary standard.

Justice O'Connor justifies these new evidentiary guidelines by relying on language in the Title VII provision regarding preferential treatment. She interprets this provision as an implicit rejection of hiring quotas. "This congressional mandate," she explains, "requires in our view that a decision to extend the reach of disparate impact theory be accompanied by safeguards

---

[17] *Griggs*, 401 U.S. at 431–32.

[18] When applying impact theory, the Supreme Court has consistently required that an employer demonstrate job necessity. *See Teal*, 457 U.S. at 451 (employer must "demonstrate that the examination given . . . measured skills related to effective performance"); *Dothard*, 433 U.S. at 332 n.14 ("a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge").

[19] *Watson*, 108 S. Ct. at 2796 (Blackmun, J., concurring).

against [a] result that Congress clearly said it did not intend."[20] The Court accepts the employer's argument that the subtle nature of discretionary decisionmaking makes evaluating the job-relatedness of the criteria used extremely difficult.[21] The evidentiary burden necessary to reverse a presumption of discrimination under the *Griggs* standard would be too heavy for employers to bear. As a result, to avoid a *Griggs*-based challenge to their hiring and promotion practices, employers will presumably adopt quota systems of minority hiring as a cheaper alternative to validating their employment practices for job-relatedness.[22] Thus, Justice O'Connor lowers the evidentiary burden so employers can avoid the possibility of having a "mandatory" quota-based system of hiring.

Justice O'Connor points to a "congressional mandate" against employers' use of quotas. Yet the *Watson* court's assumption that application of the *Griggs* standard to subjective criteria would inevitably lead to quota-based hiring is problematic. Indeed, the *Griggs* court rejected the same argument relied upon in *Watson*—that the Court's insistence on proving job-relatedness would result in quota-based hiring.[23]

Assuming that a "congressional mandate" against quotas exists, it is not inconsistent with the standard established by *Griggs*. Professor Elizabeth Bartholet argues that the objective

---

[20] *Watson*, 108 S. Ct. at 2787. The text of the Title VII provision reads as follows:

> Nothing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group . . . .

42 U.S.C. § 2000e-2(j).

[21] *Watson*, 108 S. Ct. at 2787; *see also* Rose, *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 San Diego L. Rev. 63, 88 (1988).

[22] The term "validating" refers to the formal testing processes employers use to demonstrate "by professionally accepted methods" that their hiring and promotion procedures are "significantly correlated with important elements of work behavior which . . . are relevant to the . . . jobs for which candidates are being evaluated." *Albemarle*, 422 U.S. at 431, *citing* 29 C.F.R. § 1607.4(c).

Courts often look to the Equal Employment Opportunity Commission (EEOC) Guidelines, 29 C.F.R. § 1607, to determine whether a particular employer's validation method in fact conforms with professional standards. Thus, one way an employer can meet the *Griggs* "job necessity" requirement is by validating its employment procedures under EEOC standards.

[23] *Griggs*, 401 U.S. at 434, 436.

behind *Griggs* and subsequent cases was not to promote the use of preferential quota systems but rather to further merit-based hiring and promotion through the development of criteria which more accurately reflect job performance. Application of the *Griggs* standard forces employers to eliminate discriminatory systems, not through quotas, but through restructured employment practices that meet employers' stated goals. As a result of *Griggs*, reviewing courts have struck down criteria which are not only discriminatory but also inefficient.[24]

Justice O'Connor's unprecedented evidentiary guidelines for disparate impact analysis, previously limited to disparate treatment analysis, are not consistent with the purpose of Title VII. As its legislative history demonstrates, Title VII was intended to eradicate discriminatory impact as well as purpose. The wording of Title VII itself refers not to employment decisions but to employment *practices*.[25] As one commentator notes, the choice of the word "practices" reflects a deliberate effort on the part of Congress to reach all institutionalized practices, whether intentionally or inadvertently discriminatory.[26]

The legislative endorsement of the *Griggs* decision in the 1972 amendments to Title VII removed any possible doubt as to whether Congress intended the eradication of discriminatory impact in hiring.[27] The Senate Report to the 1972 amendments recognized the importance of addressing the structural causes of discrimination: "'Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in

---

[24] Bartholet writes that in many instances employment criteria such as standardized examinations are not only discriminatory, but also "demand[ ] knowledge that a promising candidate ha[s] no reason to possess." Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945, 991 (1982). She gives an example from Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972), in which a 1965 examination for junior high school principals posed the following question: "Which one of the following violin makers is NOT of the great triumvirate of Cremona?" Bartholet, *supra*, at 991 n.151, citing *Chance*, 330 F. Supp. at 220 n.23. As the court in *Chance* noted, such an examination cannot measure the qualities expected of a junior high school principal. 330 F. Supp. at 220. Reviewing courts have thus struck down ineffective and discriminatory selection criteria used by employers. *See infra* note 42.

[25] 42 U.S.C. § 2000e-2(a).

[26] *See* Rose, *supra* note 21, at 81.

[27] *See* S. Rep. No. 415, 92d Cong., 1st Sess. 5 n.1 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 8 (1971). *See also Teal*, 457 U.S. at 447 n.8.

terms of "systems" and "effects" rather than simply intentional wrongs.'"[28]

Justice O'Connor offers the impracticability of validating subjective systems as another rationale for the *Watson* standard. She asserts that such qualities as "common sense, good judgment, originality, ambition, loyalty, and tact . . . cannot be measured accurately through standardized test[s]."[29] Forcing employers to validate such criteria for job-relatedness, she concludes, would place an impossible burden on them.

Assuming that subjective systems are inherently difficult to validate, this difficulty would not justify lessening an employer's burden of proof under traditional impact theory. Difficulties in scrutinizing *objective* systems also existed in the 1970's when the Court decided *Griggs*.[30] However, the *Griggs* court emphasized that Title VII expressly protects an employer's right to insist that job applicants meet certain qualifications, so long as those qualifications measure performance: "What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."[31]

As to the difficulty of validation, Justice O'Connor focuses on the difficulty of measuring subjective criteria. In so doing, she ignores the primary purpose behind the *Griggs* "job necessity" requirement: to determine whether there is a positive correlation between articulated employment criteria and job performance goals. In fact, testing experts contend that there is nothing inherent in subjective as opposed to objective criteria which would prevent an evaluator from validating this correlation.[32] The American Psychological Association submitted an amicus brief in *Watson*, arguing that subjective systems are amenable to the same sort of scrutiny as that traditionally given to objective screening devices.[33] Moreover, there are other means of demonstrating job-relatedness. As Justice Blackmun points out, validation of subjective criteria may require a different type of inquiry: employers could use nationwide studies,

---

[28] *Teal*, 457 U.S. at 447 n.8, *quoting* S. Rep. No. 415, 92d Cong., 1st Sess. 5 (1971).
[29] *Watson*, 108 S. Ct. at 2787.
[30] *See supra* note 23 and accompanying text.
[31] *Griggs*, 401 U.S. at 436.
[32] *See* Bartholet, *supra* note 24, at 986.
[33] *Watson*, 108 S. Ct. at 2795 n.5 (Blackmun, J., concurring).

present expert testimony, or submit evidence of prior successes to demonstrate that particular criteria bear a relationship to effective performance.[34]

Heightened scrutiny of subjective criteria would at the very least force employers to assess their systems to determine whether effective, non-discriminatory alternatives exist. It would also force employers to record regularly the observations on which employment decisions are made, thus providing a reviewing court with a stronger basis on which to evaluate job-relatedness.[35] Finally, it would force employers to revise conventional criteria which are either unnecessarily vague or are of questionable usefulness in predicting ability to perform on the job.[36]

The *Watson* decision does not deny that impact analysis furthers Title VII goals.[37] The opinion does, however, imply that the *Griggs* standard should not apply with the same weight to professional hiring and promotion decisions as it does to lower-level employment decisions.

In the plurality opinion, Justice O'Connor relies on institutional competence concerns to suggest that only lower-level job-selection criteria should be subject to strict judicial scrutiny:

> It is self-evident that many jobs, for example those involving managerial responsibility, require personal qualities that have never been considered amenable to

---

[34] *Id.* at 2795 (Blackmun, J., concurring). Note that the defendant in *Watson* failed to demonstrate job-relatedness, through formal job validation techniques or otherwise:

> [D]efendant presented the skimpiest of rebuttal evidence. As witnesses, the bank called four white officers and three black employees, none of whom had any special statistical expertise . . . . At best, these witnesses rebut any anecdotal evidence. Where the plaintiff is relying on statistical evidence, however, these witnesses are about as useful as a football in a game of basketball.

*Watson*, 798 F.2d at 810 n.19 (Goldberg, J., dissenting).

[35] Rose, *supra* note 21, at 90. In fact, the EEOC's recording requirements, 29 C.F.R. §§ 1607.4, 1607.15 (1988), are binding on employers under Section 709(c) of Title VII, even though the EEOC has no substantive rulemaking authority. Rose, *supra* note 21, at 91 n.125.

[36] Rose, *supra* note 21, at 91. One job criterion Rose discusses is "appearance." An employer could improve on this criterion by replacing it with something more specific, such as "neatness" or "appropriateness of attire." *Id.*

[37] *Watson*, 108 S. Ct. at 2786.

> standardized testing. In evaluating claims . . . it must be borne in mind that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." [38]

By implying that employers will find it easier to demonstrate job-relatedness for subjective criteria than for objective criteria,[39] despite the declaration that impact analysis applies equally to both,[40] the Court suggests a different standard for reviewing upper- versus lower-level employment discrimination claims.[41]

In the past, courts have viewed subjective job selection criteria affecting lower-level positions with suspicion. In most cases, such subjective systems have been struck down as discriminatory, even when employment decisions were based on such seemingly reasonable criteria as leadership ability and ability to take orders.[42] In other words, courts evaluating lower-level job selection have not hesitated to substitute their judgment for that of experienced supervisors. In view of the goals of Title VII, this result makes sense since subjective systems,

---

[38] *Id.* at 2791, *citing* Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978).

[39] *Watson*, 108 S. Ct. at 2796.

[40] *Id.* at 2785.

[41] In general, lower-level employment decisions are based on objective criteria such as the high school diploma requirement struck down in *Griggs*. In upper-level employment decisions, such as business promotions, law firm partnerships and academic tenure decisions, employers tend to rely on less quantifiable criteria. To the extent that this generalization holds true, the distinction between objective and subjective criteria takes on special significance to minorities who are denied access to upper-level job positions.

Lower-level job qualifications may be somewhat more amenable to measurement through objective tests. Note, however, that part of the reason the use of subjective criteria is more common to upper-level employment is because courts have struck down subjective critera at the lower level as discriminatory. *See infra* note 42 and accompanying text.

For a detailed analysis of the differential standard courts apply when reviewing upper- and lower-level employment decisions, see Bartholet, *supra* note 24.

[42] *See* Bartholet, *supra* note 24, at 974–76. For cases which illustrate how courts have struck down subjective systems at the lower level, *see id.* at 974–75, nn.91–100; *see also* Miles v. M.N.C. Corp., 750 F.2d 867, 871 (11th Cir. 1985) ("subjective evaluations involving white supervisors provide a ready mechanism for racial discrimination"); Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1133 (11th Cir. 1984) ("subjective procedures can lead to racial discrimination . . . because such procedures place no check on individual biases"); Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 827 (5th Cir. 1982).

with their lack of formally defined criteria, are particularly susceptible to racial biases.[43]

Courts have, however, routinely applied a different standard to upper-level employment decisions. Justice O'Connor's opinion in *Watson* reflects this tendency to shy away from the *Griggs* analysis when the employment criteria affect prestigious, influential positions.[44] Courts refuse to strike down employment decisions which deny access to opportunities involving influence and prestige. Professor Bartholet attributes this discrepancy to personal bias:

> Judges defer to the employers with whom they identify, and they uphold the kinds of selection systems from which they have benefited. They know these decisionmakers; they sympathize and identify with their concerns and their use of traditional selection methods . . . . In dealing with lower level jobs, the courts have had enough distance to weigh the social cost of racial exclusion against the need for traditional systems.[45]

The *Watson* court fails to weigh the social costs of denying minorities access to prestigious jobs against the costs of reforming subjective employment criteria. Instead, the Court defers to managerial judgment. Indeed, Justice O'Connor writes that courts should not interfere with legitimate business practices, absent a Congressional mandate to do so.[46]

Evidently, the Court interprets the Congressional mandate behind Title VII as extending only so far as lower-level employ-

---

[43] *See* Bartholet, *supra* note 24, at 974.

[44] *See id.* at 976–80. For illustrative cases, see *id.* at 976–77, nn.103–08; *see also* Sengupta v. Morrison-Knudsen Co., Inc., 804 F.2d 1072, 1075 (9th Cir. 1986) (holding in the case of a black engineer who was laid off that "the use of subjective employment criteria is not unlawful per se"); Hickman v. Flood & Peterson Ins., Inc., 766 F.2d 422, 425 (10th Cir. 1985) (insurance agency which maintains separate classes of agents and brokers, who are all male, and clerical workers, who are all female, has "wide discretion in setting job standards . . . and in deciding whether applicants meet those standards"); and Verniero v. Air Force Academy Sch. Dist. No. 20, 705 F.2d 388, 392 (10th Cir. 1983) (upholding a school board's refusal to promote a woman to positions such as school principal and director of special education because of "[s]ubjective evaluations [of her] ability to get along with others [which] is a legitimate business reason for the non-selection").

[45] Bartholet, *supra* note 24, at 979–80.

[46] *See supra* note 38 and accompanying text.

ment. But the history of both the 1964 act and the 1972 amendments indicates that Congress did not intend to restrict the application of Title VII to lower-level employment.

Comments made in Congressional discussion of civil rights legislation reveal that Congress actually contemplated and endorsed the idea that Title VII should apply to all social strata. The House committee responsible for drafting what became the Civil Rights Act of 1964 made specific reference to discrimination in upper-level employment as an evil to be eradicated by the new legislation. The committee noted that "[a]rbitrary denial of equal employment opportunity is heavily concentrated in certain rapidly growing industries . . . such as banks and financial institutions, advertising agencies [and] insurance companies."[47] Even more explicit is the statement Senator Javits made opposing a proposal (eventually rejected) to the 1972 amendments which would have exempted physicians and surgeons from Title VII protection:

> One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water . . . . Yet this amendment would go back beyond decades of struggle and of injustice . . . and thus lock in and fortify the idea that being a doctor or a surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them.[48]

Carried to its logical extreme, the rationale of *Watson* would overrule *Griggs* entirely. In *Watson*, Justice O'Connor first holds that there is no theoretical distinction between objective and subjective criteria. Second, she outlines stricter evidentiary standards for plaintiffs in impact cases. In as much as these new evidentiary standards apply equally to both objective and subjective systems, the guidelines set forth in *Watson* move employment discrimination law a significant step backwards from

---

[47] Rose, *supra* note 21, at 76–77, *quoting* H.R. Rep. No. 570, 88th Cong., 1st Sess. 3 (1963).

[48] Bartholet, *supra* note 24, at 981, *quoting* 118 Cong. Rec. 3802 (1972).

*Griggs*.[49] Even if the *Watson* standard applied only to subjective criteria, however, an employer could often avoid a *Griggs*-based challenge by incorporating subjective criteria into a formerly objective system.

A narrower reading of *Watson* would limit its strict evidentiary standards to upper-level employment decisions where the Court seems inclined to defer to managerial discretion. Such a distinction is invidious from a policy perspective. To the extent that *Watson* distinguishes between upper- and lower-level employment criteria, the decision reinforces the view that equal opportunity in employment is a privilege which exists only at the bottom half. When job promotion decisions require discretionary judgment—in particular, when decisions about professional positions involving influence and power are at stake—the Court apparently will not intervene to uphold meritocratic principles.[50]

*Watson*'s implicit distinction between upper- and lower-level employment criteria also disserves Congress' purpose in enacting Title VII. Through Title VII, Congress did not intend to lock minorities into the least influential and powerless positions in society; it sought to eradicate discrimination at all levels. Indeed, minority group participation is needed most in the upper rungs of society in order to achieve Title VII's goals.

—Karen Halverson

---

[49] *See supra* note 6.
[50] *See supra* note 44 and accompanying text.