COMMENTS

Allocation of the Burden of Persuasion in Title VII Disparate Impact Cases

The development of the law under the several theories of employment discrimination has been intertwined and inconsistent. A tangle of legal and procedural concepts has emerged, resulting in confusing Supreme Court holdings, conflict among the circuits, and a failure of notice to employers. The Fifth Circuit's struggle to apply the Supreme Court's deceptively simple division of burdens and order of proof in Title VII cases illustrates the complex nature of the problem. This Comment is an examination of the Fifth Circuit's interpretation of the defendant employer's burden in employment discrimination cases based on disparate impact.

In *McDonnell Douglas Corp. v. Green*,[1] the Supreme Court set out what appeared to be a straightforward, three part division of the burdens and order of proof in a Title VII[2] employment discrimination case.[3] The majority stated that after the plaintiff had established a prima facie case[4] of discrimination, the burden "must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[5]

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1. 411 U.S. 792 (1973).
2. 42 U.S.C. § 2000e -1 through -17 (1976 & Supp. IV 1980).
3. 411 U.S. at 802-04.
4. *McDonnell Douglas* also defined one example of a prima facie case of disparate treatment. A plaintiff may establish his case by showing (1) that he is a member of a protected group; (2) that he applied and was qualified for a position which the employer was seeking to fill; (3) that he was rejected; and (4) that the employer continued to seek others with the plaintiff's qualifications to fill the position. *Id.* at 802. These elements have been modified when needed to fit circumstances other than discriminatory hiring. *See, e.g.*, McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980) (*McDonnell Douglas* factors adapted to a reduction in force); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977) (*McDonnell Douglas* factors adapted to a discriminatory discharge case). These cases were brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1976 & Supp. III 1979) but used the standards of proof and the prima facie case analysis developed in Title VII cases.
5. 411 U.S. at 802.

After the employer met his "burden of proof" at this stage, the burde shifted to the plaintiff to prove that the employer's articulated reason w merely a pretext for a disciminatory motive.[6]

In *McDonnell Douglas,* the Court found that plaintiff presented prima facie case of racial discrimination by showing that he was black, l applied and was qualified for a job as a mechanic, he was not hired, ar defendant continued to seek mechanics with plaintiff's qualification Defendant had, however, also presented evidence of a "reasonable basi for its refusal to rehire plaintiff; plaintiff had participated in an illeg "stall-in" that disrupted traffic around defendant's plant during tl morning rush hour.[8] The Court remanded to allow plaintiff to show th defendant's articulated reason for its treatment of plaintiff was a prete for a discriminatory decision.

The burden of "articulation," which, under *McDonnell Douglas,* shif to the defendant after the plaintiff has established his prima facie cas created a substantial amount of confusion in the federal circuit court Some interpreted the burden as one of producing evidence;[9] others hel that the entire burden of persuasion shifted to the defendant.[10] Occasio ally, the courts distinguished between claims based on disparate impa and those based on disparate treatment[11] or between claims of age di crimination[12] and race or sex discrimination, but often they made no di tinctions of any kind. Indeed, the opinions often muddled terminology t the point that commentators were not sure which burden they were shif ing to the defendant.[13]

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6. *Id.* at 804.

7. *Id.* at 802.

8. *Id.* at 803-04.

9. *See, e.g.,* Long v. Ford Motor Co., 496 F.2d 500, 505-06 (6th Cir. 1974).

10. *See, e.g.,* Vaughn v. Westinghouse Elec. Corp., 620 F.2d 655 (8th Cir. 1980); Turn v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977); Holthaus v. Compton & Sons, In 514 F.2d 651 (8th Cir. 1975); Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387 (2d Ci 1973).

11. The difference in disparate impact cases and disparate treatment cases is explain in International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). The Court stat that "[p]roof of discriminatory motive is critical" in disparate treatment cases althou such a motive can be inferred from differences in treatment. In disparate impact cases, r proof of discriminatory motive is needed. 431 U.S. at 335 n.15. Since Title VII was intend to reach discriminatory consequences as well as discriminatory motives, *see* Griggs v. Du Power Co., 401 U.S. 424 (1971), employment practices that are facially neutral but affect protected group more harshly than they affect other groups are also prohibited unless th are justifiable by business necessity. An attack on a facially neutral criterion or practice is disparate impact case. *Id.*

12. *See, e.g.,* Bittar v. Air Canada, 512 F.2d 582 (5th Cir. 1975). *See also* Lindsey Southwestern Bell Tel. Co., 546 F.2d 1123, 1124 n.3 (5th Cir. 1977).

13. *McDonnell Douglas* actually started the terminology problem when it talked abo burdens of proof in connection with the defendant's burden of articulation. *See* 411 U.S. a

The Fifth Circuit, however, was clear about which burden it was shifting to the defendant in Title VII cases. In *Turner v. Texas Instruments, Inc.*,[14] the court rejected the district court's standard of proof, which required defendant to "prove by clear and convincing evidence" that plaintiff had not been discriminated against after plaintiff had established a prima facie case.[15] "We find no justification for casting upon the employer the extraordinary burden of proving his reasons by 'clear and convincing evidence,' "[16] the court stated. It then held that the employer bears the burden of proving his legitimate, nondiscriminatory reasons for acting by a preponderance of the evidence. At that point, the burden of proof shifts back to the plaintiff to prove pretext.[17] Plaintiff in *Turner* was discharged after being "punched in" on a time clock by a coworker before he actually returned to defendant's plant from his lunch break. Another coworker, a white man, had not been fired even though he too had been "punched in" by another employee. Defendant stated that the white employee had no knowledge that he was being "punched in," but that plaintiff did. The Fifth Circuit found that defendant had proved by a preponderance of the evidence that a legitimate, nondiscriminatory reason existed for plaintiff's discharge.[18]

The court's reasoning in *Turner*, a disparate treatment case, focused on the ease with which an employer could merely articulate a legitimate, nondiscriminatory reason for his action.[19] The court found the *McDonnell Douglas* articulation standard applicable to those cases in which the factual validity of the employer's reason is not in dispute, but inappropriate when plaintiff might want to challenge the employer's facts.[20] It characterized the employer's reasons as an affirmative defense through which the plaintiff's prima facie case could be rebutted and placed the "risk of nonpersuasion" squarely on the defendant who, it pointed out, was the party to benefit from the defense.[21]

802-03.

14. 555 F.2d 1251 (5th Cir. 1977), *overruled*, Burdine v. Texas Dept. of Community Affairs, 647 F.2d 513 (5th Cir. 1981).

15. *Id.* at 1254.

16. *Id.* at 1255.

17. *Id.*

18. *Id.* at 1256.

19. The court stated:

> For example, an employer could articulate as his reason for dismissal that an employee had a poor attendance record when in fact the employee had a good attendance record. The employee's attendance record would be presumed to be poor, and the employee would have to show that his poor attendance record was not the real reason for his dismissal.

Id. at 1255.

20. *Id.* at 1255 n.3.

21. *Id.* at 1256. The court noted the ambiguity in *McDonnell Douglas'* articulation stan-

Two years later, in *Burdine v. Texas Department of Community Af fairs*,[22] the Fifth Circuit reiterated its holding in *Turner* and again inter preted the defendant's burden of articulation as a requirement that de fendant "prove nondiscriminatory reasons by a preponderance of th evidence."[23] In *Burdine*, plaintiff alleged that the Texas Department c Community Affairs had refused to promote her to Project Director of th Department's Public Service Careers Division because of her sex. She als alleged that she had been discriminated against because of her sex b defendant's discharge of her (during a reduction in force) while retainin a male colleague and by defendant's requirement that she perform th same duties as Project Director without paying her as much as male di rectors. The trial court found against plaintiff on all three allegations.

The Fifth Circuit affirmed the district court's ruling on the promotion but reversed on the discharge issue[25] and remanded for further considera tion on the equal pay issue.[26] It found that defendant failed to rebu plaintiff's prima facie case of discriminatory discharge through its "bal assertion" that the male who replaced her was qualified and that her dis charge was "in the best interest of the program."[27] Defendant's burde does not include proving the absence of a discriminatory motive, th court stated, but does involve "more than merely stating ficticious rea sons; *legally sufficient* proof is needed before the trier of fact can fin plaintiff's proof rebutted."[28]

The Supreme Court disagreed. After granting certiorari[29] to resolve th conflict in the circuits over interpretation of the defendant's burden, th Court vacated the Fifth Circuit's decision and remanded the case for fur ther consideration.[30]

Initially, the Court reiterated the *McDonnell Douglas* allocation of th burdens and order of presentation of proof for a Title VII disparate treat ment case.[31] It then pointed out that the plaintiff's ultimate burden wa

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dard and pointed out that the term "burden of proof" in that case could mean either burde of production or burden of persuasion. *Id.* at 1256 n.4 (citing C. MCCORMICK, HANDBOOK O THE LAW OF EVIDENCE § 336 (2d ed. 1972)). The court hesitated, however, to rely on th ambiguities in *McDonnell Douglas* as support for its position. 555 F.2d at 1256 n.4.

22. 608 F.2d 563 (5th Cir. 1979), *vacated sub nom.* Texas Dept. of Community Affairs v Burdine, 450 U.S. 248 (1980).

23. *Id.* at 567.

24. *Id.*

25. *Id.* at 569.

26. *Id.* at 570.

27. *Id.* at 568.

28. *Id.* at 567 (citing 555 F.2d at 1255)(emphasis in original).

29. 447 U.S. 920 (1980).

30. 450 U.S. 248, 252 (1981).

31. *Id.* at 252-53. The Court was quick to point out, however, that "the factual issue and therefore the character of the evidence presented, differ when the plaintiff claims that

to persuade the factfinder that the employer intentionally discriminated against him.[32] The division of intermediate evidentiary burdens, the Court stated, brings the parties and the Court quickly and fairly to this "ultimate question."[33]

The Court then discussed the "rebuttable presumption" of discrimination that arises from plaintiff's establishment of a prima facie case. The creation of this presumption and the allocation of burdens in a Title VII case is intended "to sharpen the inquiry into the elusive factual question of intentional discrimination."[34] Once the presumption is established, the burden shifts to the defendant to rebut it "by producing evidence that the plaintiff was rejected . . . for a legitimate, nondiscriminatory reason."[35] The defendant is not required to persuade the court that this reason was his actual motivation; defendant's evidence need only raise a genuine issue of fact on the issue of discrimination. The explanation must be clear, the evidence admissible, and the reason "legally sufficient to justify a judgment for the defendant."[36] The sufficiency of defendant's evidence, the Court stated, should be judged by how well it accomplishes two objectives: (1) meeting the prima facie case by presenting an acceptable reason for the employer's decision, and (2) framing the issue with sufficient clarity to allow plaintiff a "full and fair opportunity to demonstrate pretext."[37] The evidence must allow the factfinder to conclude that "discriminatory animus" did not motivate the employer's decision.[38] If the defendant is successful at this stage, the presumption of discrimination is rebutted, and the plaintiff must seek to prove that defendant's reason is pretextual.

The Court then dismissed the Fifth Circuit's fears about the ease with which an employer could articulate a ficticious legitimate reason for his action.[39] Deciding that shifting only the burden of production to the defendant would not unduly hinder a plaintiff's case, the Court advanced three built-in safeguards against abuse of the articulation standard. First, the defendant's evidence must be "clear and reasonably specific" in order to meet the plaintiff's prima facie case and to give the plaintiff a genuine opportunity to show pretext. Second, an informal "burden of persuasion" and thus, an incentive to prove the factual basis for its reason, shifts to

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facially neutral employment policy has a discriminatory impact on protected classes." *Id.* at 252 n.5.

32. *Id.* at 252-53.
33. *Id.* at 253.
34. *Id.* at 255 n.8.
35. *Id.* at 254.
36. *Id.* at 255.
37. *Id.* at 255-56.
38. *Id.* at 257.
39. *See* note 17 *supra* and accompanying text.

the defendant out of the need to persuade the factfinder that the employ ment decision was actually legitimate. Third, liberal discovery rules ar supplemented by the plaintiff's access in a Title VII case to the Equa Employment Opportunity Commission's investigatory files on the case.[4]

On remand,[41] the Fifth Circuit considered whether defendant had me its burden of production and concluded that it had. The court overrule to the extent necessary its cases shifting the burden of persuasion instea of the burden of production to the defendant.[42] The court then affirme the district court's judgment for defendant.

The issue of defendant's burden in rebutting plaintiff's prima facie cas in a disparate treatment case is now settled. *Burdine* made clear that th burden of persuasion (which it never defined) does not shift to defendant instead, defendant bears only the burden of producing clear, specific, an admissible evidence sufficient to present a legitimate reason for his actio and to allow plaintiff a full and fair opportunity to demonstrate pretext.[4] The circuit courts are now applying this standard uniformly in disparat treatment cases.[44]

The circuit courts are not applying *Burdine* as readily or as uniformly however, in disparate impact cases or in cases of classwide discrimination Several circuits look instead to *Griggs v. Duke Power Co.*,[45] in which mi nority applicants and employees challenged defendant's requirement of high school diploma or a passing grade on certain intelligence tests fo hiring or transfer, as the seminal disparate impact case. These courts hol that in cases in which plaintiff has made out a prima facie case of dispa rate impact, the "burden of proof" shifts to defendant to justify an em ployment procedure or policy.[46] While the opinions of these courts ar

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40. 450 U.S. at 258.

41. 647 F.2d 513 (5th Cir. 1981).

42. *Id.* at 514.

43. 450 U.S. at 255.

44. *See, e.g.*, Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981); Unger v. Con solidated Foods Corp., 657 F.2d 909 (7th Cir. 1981); Knutson v. Boeing Co., 655 F.2d 99 (9th Cir. 1981); Haring v. CPC Int'l, Inc., 664 F.2d 1234 (5th Cir. 1981) (age discriminatio case that applied Title VII burdens under *Burdine*).

45. 401 U.S. 424 (1971).

46. *See, e.g.*, Contreras v. City of Los Angeles, 656 F.2d 1267, 1271 (9th Cir. 1981) (de fendant must prove that an employment screening device with a disparate impact on Span ish-surnamed applicants is job related); Chrisner v. Complete Auto Transit, Inc., 645 F.2 1251, 1263 (6th Cir. 1981) (hiring requirements for truck drivers had disparate impact o women and must be justified by "manifest relationship" to employment). *Id.* at 1259. Thes cases are interesting because of their failure to use *Burdine's* "burden of production" lan guage. *Contra*, Boyd v. Madison Co. Mut. Life Ins. Co., 653 F.2d 1173 (7th Cir. 1981) (dispa rate impact case of sex discrimination rebutted by employer's showing of a legitimate reaso for giving "attendance bonuses" to clerical workers, all of whom were female, and not t male supervisors and managers). *Id.* at 1175. *See also* Taylor v. Teletype Corp., 648 F.2

generally as deficient in their explanations of this burden of "proof" as were the circuit court opinions in disparate treatment cases, they do appear to envision a heavier burden for defendant than *Burdine's* production of evidence.

An examination of a recent Fifth Circuit decision illustrates the confusion that persists after the Supreme Court's decision in *Burdine*. A final determination of the appropriate analytical approach is clearly needed in order to eliminate the conflicting applications of federal policy within and among the circuits.

In *Johnson v. Uncle Ben's, Inc*,,[47] the Fifth Circuit reconsidered[48] a claim by black and Mexican-American plaintiffs that their employer had engaged in employment practices which had a disparate impact on protected minorities. The Supreme Court had remanded[49] the case to the Fifth Circuit for reconsideration in light of its opinion in *Burdine*. The appellate court held that its decision in a disparate impact case was not altered by *Burdine*; the *employer* has the burden of *persuading* the trier of fact that the employee was "rejected or someone else was preferred, for a legitimate, nondiscriminatory reason."[50] The court then remanded the case to the district court for further proceedings.[51]

In *Uncle Ben's*, the Fifth Circuit examined the reasoning of the Supreme Court in *Burdine*, which shifted only a burden of production to defendant,[52] before applying it to the case at bar. The majority pointed to a footnote in the *Burdine* opinion[53] (in which the Supreme Court noted that the character of the evidence differs in disparate impact and disparate treatment cases) and concluded that the Court had explicitly approved a distinction between the two types of cases.[54] Then the court re-

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1129 (8th Cir. 1981).

47. 657 F.2d 750 (5th Cir. 1981).

48. The United States District Court for the Southern District of Texas dismissed all claims relating to Mexican-Americans and all but one claim relating to blacks. Plaintiffs appealed, and the Fifth Circuit Court of Appeals modified, affirmed in part, reversed in part, and remanded. Johnson v. Uncle Ben's, Inc., 628 F.2d 419 (5th Cir. 1980). Plaintiffs appealed to the United States Supreme Court.

49. 451 U.S. 902 (1981).

50. 657 F.2d at 752 (quoting *Burdine*, 450 U.S. at 254).

51. 657 F.2d at 754.

52. See notes 35-36 *supra* and accompanying text.

53. *Id.* (citing *Burdine*, 450 U.S. at 252 n.5). In this footnote the Court stated: "We have recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes," and cited its opinions in *McDonnell Douglas*, 411 U.S. at 802 n.14, and *Teamsters*, 431 U.S. at 335-36 n.15.

54. The Fifth Circuit stated that recent opinions of the Second Circuit and the Tenth Circuit implied the shifting of the burden of persuasion to defendant in disparate impact cases was unchanged by *Burdine*. 657 F.2d at 753 n.3. Neither case on which the Fifth

lied on the Supreme Court's opinion in *Dothard v. Rawlinson*,[55] a disparate impact case in which plaintiffs successfully challenged certain height and weight requirements for Alabama prison guards. In *Dothard* the Supreme Court stated that if the employer "proves that the challenged requirements are job related,"[56] plaintiff could still defeat the rebuttal by showing less discriminatory alternatives.[57] The Fifth Circuit concluded that such language indicates that the burden of persuasion had indeed shifted to defendant.[58]

The court supported its conclusion by examining the nature of the prima facie case and the plaintiff's ultimate burden in both types of dis

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Circuit relied appears to support this contention. In *Teal v. Connecticut*, 645 F.2d 133 (2d Cir. 1981), in which black state employees challenged a practice that based promotion decisions on the results of a written examination, the Second Circuit reversed the district court's holding that plaintiffs had failed to establish a prima facie case. The appellate court remanded and refused to comment on the question of job relatedness since the lower court had not previously reached the issue. 645 F.2d at 140. In *Coe v. Yellow Freight Sys., Inc.*, 646 F.2d 444 (10th Cir. 1981), the Tenth Circuit affirmed a district court finding that a black employee, who had applied for a supervisory position and had not been promoted, failed to establish a prima facie case of disparate impact. During its discussion of the disparate impact theory, the court of appeals stated the familiar *Griggs* language: "[t]he burden then shifts to the employer to show that its practice is 'job related.' " The court did not discuss the shifting of burdens further. 646 F.2d at 451. Since it is not clear whether the burden to *show* is one of production or persuasion, the Tenth Circuit's brief comment is of little support for the Fifth Circuit's holding. *See* notes 80-83 *infra* and accompanying text.

55. 433 U.S. 321 (1977).

56. *Id.* at 329 (emphasis added).

57. *Id.*

58. 657 F.2d at 753. In passing, the Fifth Circuit cited to NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981). This decision is the only other post-*Burdine* circuit court opinion that has examined the respective burdens of the plaintiff and defendant in a disparate impact case. Plaintiffs brought suit under Title VI and other federal statutes alleging that defendant's plan to relocate a Wilmington, Delaware, medical facility from the inner city to the suburbs would have a disparate impact on blacks and other minorities. The Third Circuit held that the same standards, tests, and burdens of proof appropriate to Title VII disparate impact cases should be applied in Title VI impact claims. The court then stated that *Burdine* applied to disparate impact as well as disparate treatment cases and that the defendant bore only a burden of production in order to defeat the plaintiff's prima facie showing. The court supported its position by arguing that to shift the burden of persuasion would render the third step—when plaintiff may defeat defendant's rebuttal by showing less discriminatory alternatives—superfluous. The majority also gave two policy arguments in support of its opinion. First, the court said, it is illogical to place a greater burden on a defendant whose allegedly discriminatory practices are unintentional. Second, two different standards would produce unnecessary confusion in the lower courts. *Id.* at 1335-36.

Certainly the court's opinion in *NAACP* should have been given more attention by the Fifth Circuit. The Third Circuit's strong endorsement of *Burdine's* application to disparate impact cases should not be ignored merely because plaintiff brought suit under Title VI.

crimination cases.[59] The court observed that in a disparate *treatment* case, plaintiff must show that he was a victim of purposeful discrimination. A prima facie case raises the presumption that the acts, if otherwise unexplained, were more likely than not the result of impermissible factors.[60] As a result, the plaintiff's burden of "establishing a prima facie case of disparate treatment is not onerous."[61] By contrast, in a disparate *impact* case, plaintiff must not only prove circumstances raising a presumption of discriminatory impact, he must prove the existence of the impact itself.[62] The court then added cryptically that since knowledge of the legitimate business reason for the practice at issue is uniquely available to the employer, it is appropriate that the employer be expected to persuade the court of its existence.[63] The Fifth Circuit did not attempt to explain why a legitimate business reason is any more "uniquely available" to the employer in a disparate impact case than it is in a treatment case.

The Fifth Circuit concluded that since *Uncle Ben's* is a disparate impact case, it is not affected by the Supreme Court's decision in *Burdine*. The court stated that burdens of proof governing disparate impact claims are clearly established. The majority held, therefore, that the employer had the burden of persuading the trier of fact that the practices in question were job related in order to rebut plaintiff's prima facie showing of discrimination.[64]

One judge dissented, contending that the Supreme Court's decision in *Burdine* did apply to cases of disparate impact.[65] The dissenting opinion argued that if the majority's interpretation of the Supreme Court's distinction between impact and treatment were correct, there would have been no reason for the Supreme Court to remand the case to the Fifth Circuit for consideration in light of *Burdine*. The judge stated his belief that the basic allocation of burdens is the same in both treatment and impact cases, even though the character of the evidence differs. He added that it was unnecessary to reach the issue of allocation of burdens, however, since he believed that plaintiffs had failed to establish a prima facie case. He concluded that since the district court's finding was not clearly erroneous, it should be sustained.[66]

An examination of the Supreme Court's disparate impact decisions

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59. 657 F.2d at 753.
60. *Id.* (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).
61. *Id.* (quoting *Burdine*, 450 U.S. at 253).
62. *Id.*
63. *Id.*
64. *Id.* at 753-54.
65. *Id.* at 754 (Thomas, J., dissenting).
66. *Id.* at 754-55.

supports the Fifth Circuit's contention[67] that the Court distinguishes between disparate impact and treatment theories. The analysis[68] presented in *McDonnell Douglas* for application to disparate treatment cases was modified for application to disparate impact cases in *Albemarle Paper Co. v. Moody*.[69] In *Albemarle*, in which black employees successfully challenged the employer's use of certain tests in the job application process under Title VII, a three-step analytical approach was presented: the plaintiff's prima facie case is established by showing that the practice (the test) selects applicants for hire in a racial pattern significantly different from the applicant pool; the defendant can rebut the plaintiff's case by showing that the practice has a manifest relationship to the employment in question; and the plaintiff can defeat the defendant's rebuttal by showing that other tests or selection devices could serve the employer's legitimate interests without a similarly undesirable effect.[70] This assumes, of course, that impact and treatment claims can be clearly differentiated.[71]

Because of the imprecision in the terminology used by the Supreme Court in disparate impact cases, the Fifth Circuit's conclusion that *Burdine* did not alter recent Supreme Court precedent in impact cases is questionable. In short, it is difficult to decipher what precedent actually has been established. A study of the Court's opinions in impact cases reveals a lack of clarity not only about the respective burdens of plaintiff and defendant but about the nature of those burdens as well. The Court's decisions consistently place the burden of establishing a prima facie case of disparate impact on the plaintiff: "plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern."[72] But this clarity vanishes when the Court's decisions are examined for the nature and extent of defendant's burden. In *Griggs*, the Court announced that an effective rebuttal rested on the employer's demonstration of business necessity.[73] The Court appeared, however, to use three different definitions for business necessity: "relat[ionship] to job performance,"[74] "demonstrable relationship to successful performance of the jobs for which it was used,"[75] and "manifest relationship to employment in question."[76] Furthermore, the Court's use of the terms "job relatedness" and "business necessity" is

67. *Id.* at 752.
68. *See* note 4 *supra*.
69. 422 U.S. 405 (1975).
70. *Id.* at 425.
71. *See* note 109 *infra* and accompanying text.
72. Dothard v. Rawlinson, 433 U.S. at 329; *accord*, Albemarle v. Moody, 422 U.S. at 425.
73. 401 U.S. at 431.
74. *Id.*
75. *Id.*
76. *Id.* at 432.

confusing; job relatedness could refer to one means of demonstrating business necessity,[77] or it could suggest a low standard placed on defendant while "business necessity" could indicate a high standard.[78]

The confusion is compounded by the inconsistent terminology used to indicate the extent of the employer's burden. In *Griggs*, the Court stated that the employer has the "burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question."[79] But in subsequent disparate impact decisions the Court also referred to the defendant's burden as one of articulating,[80] demonstrating,[81] and proving.[82] The interchangeable use of these terms is bewildering, since "articulate" and "demonstrate" imply a burden of production while "prove" suggests a burden of persuasion. In *New York City Transit Authority v. Beazer*,[83] in which plaintiffs failed to establish a prima facie case supporting their allegation that the Transit Authority's refusal to hire methadone users had a disparate impact, the Court summarily stated that plaintiff has the ultimate burden of proving a violation of Title VII.[84] Unfortunately, the Court's opinion in *Beazer* did not address the question of whether defendant has an intermediate burden of persuasion.

The Fifth Circuit in *Uncle Ben's* attempted to support its position that a distinction should be made between defendant's burden in impact and treatment claims by pointing to differences in the degree of difficulty in establishing plaintiff's prima facie case.[85] The court implied that since the plaintiff's burden in establishing a prima facie case of disparate impact is more difficult, a greater burden should be placed on defendant.[86] The court's discussion of these policy considerations is superficial, however, and lends little support to the decision.

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77. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 133 (1976) (hereinafter cited as Schlei & Grossman).

78. An analogous multiple standard structure can be seen in the Court's review of equal protection cases. When a suspect class is concerned, the state must be able to show that its classification is the least restrictive alternative and is necessary to the accomplishment of a compelling end in order to withstand strict judicial scrutiny. Absent an effect on a suspect class, the state must show merely that a classification is reasonable and bears a rational relationship to a legitimate end in order to survive low level judicial scrutiny. Obviously, the high scrutiny burden of demonstrating "necessity" is more onerous than the low scrutiny burden of demonstrating "relatedness." *See generally* J. NOVAK, R. ROTUNDA, & J. NELSON, HANDBOOK ON CONSTITUTIONAL LAW 522-27 (1978).

79. 401 U.S. at 432.

80. *See, e.g.*, Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978).

81. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979).

82. *See, e.g.*, Albemarle v. Moody, 422 U.S. at 425.

83. 440 U.S. 568 (1979).

84. *Id.* at 587 n.31.

85. 657 F.2d at 753.

86. *Id.*

An analysis of the Court's reasoning in *Burdine* reveals several flaws that contributed indirectly to the result in *Uncle Ben's*. First, the Court in *Burdine* stated that the burden of persuasion "never shifts"[87] and used this statement as support for its holding that a defendant in a disparate treatment case has only a burden of production. The statement is not, however, a completely accurate reflection of the views of leading authorities on evidence. Although the Court cited Wigmore,[88] McCormick also states that the burden of persuasion "does not shift from party to party during the course of the trial"[89] but is allocated only when a decision must be made—after all of the evidence has been produced and each party has met its burden of production. Even at this point, it is relevant only if the trier of fact has not been convinced by one party or the other. Then, the judge would decide against the party to whom the risk of nonpersuasion (the burden of persuasion) has been allocated.[90]

Usually, the burden of persuasion is on the plaintiff, the party seeking a change in the status quo.[91] As McCormick points out, however, policy considerations may place it on the defendant. One of these considerations concerns disfavored contentions and explains the shift to defendant of all three burdens—pleading, production, and persuasion—on defenses such as contributory negligence, statute of limitations, and truth in defamation actions. Another doctrine advanced as support for shifting the burden is the peculiar knowledge one party may have of the facts regarding an issue. While McCormick points out that this doctrine should not be overemphasized, it is a policy consideration which has been recognized. Another consideration is the judicial recognition of probabilities. The risk of nonpersuasion may be allocated to the party contending that the more unusual event has occurred.[92]

The Court's bald statement that the burden "never shifts," therefore, is not accurate, nor is it dispositive of the question. The division of intermediate burdens in an employment discrimination case could include the burden of persuasion on each issue as well as the burden of production. Then, if the defendant's evidence did not persuade the judge that a neutral criterion with a disparate impact was job-related,[93] judgment would be entered for plaintiff on the strength of his unrebutted and unexplained prima facie case.

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87. 450 U.S. at 253 (quoting 9 J. WIGMORE, EVIDENCE § 2489 (Chadbourn rev. 1981)).
88. *Id.*
89. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 336 (2d ed. 1972).
90. *Id.*
91. *Id.* at § 337.
92. *Id.*
93. *See* Griggs v. Duke Power Co., 401 U.S. at 431-32, for the various articulations of the standard that defendant must meet to justify disparate impact.

The differences between disparate impact and disparate treatment cases, which the *Burdine* opinion does not fully explore, may also provide support for shifting the burden of persuasion to the defendant in impact but not in treatment cases. One difference is the nature of plaintiff's prima facie case. In disparate treatment cases, the plaintiff needs only to show the four *McDonnell Douglas* factors: membership in a protected group, qualification for a position, a vacancy in the position, and injury.[94] As the Supreme Court has pointed out, the burden of establishing this prima facie case is "not onerous."[95] On the contrary, proof of disparate impact can be difficult. The plaintiff must determine what statistics to use; he must gather the most probative and legally significant statistics available.[96] While general population statistics may be used, their effectiveness will vary with the nature of the position sought.[97] Decisions must be made on the source of statistics (for example, the qualified labor market or the actual applicant flow), the proper geographic scope of the statistics (for example, the city or county in which the employer is located, the recruitment area, or the metropolitan area), and the proper time frame for statistics (for example, a fixed point in time or a relevant time frame).[98] The plaintiff must also show a *substantial* disparity. The complexity of these factors and the sophistication of analysis needed to integrate them into a prima facie showing of disparate impact appear to place a heavier burden on the plaintiff than the parallel showing needed in disparate treatment cases.

Because the plaintiff's burden is greater in an impact case and because he must prove the disparate impact rather than proving circumstances that merely allow the factfinder to infer disparate treatment, the resulting prima facie case may be a stronger indication of the probability of discrimination than it is in disparate treatment cases. Considerations of fairness, then, may justify a proportionally higher burden on the employer to justify his employment practice or to explain a raw disparity. Shifting the burden of persuasion would be less fair in treatment cases, in which the defendant would have to prove his actual subjective motivation for firing or not hiring an individual, than in impact cases, in which motivation is irrelevant.[99] In an impact case, the employer would have to persuade the judge only that an employment criterion is related to job performance (which in some cases may be so manifest that no proof is

94. 411 U.S. at 802.

95. 450 U.S. at 253.

96. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 308, 310 (1977).

97. *Compare* Griggs v. Duke Power Co., 401 U.S. 424 (1971), *with* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

98. *See* Schlei & Grossman, *supra* note 77, at 1161-93 (1976 & Supp. 1979).

99. *See* International Bhd. of Teamsters v. United States, 431 U.S. at 335 n.15.

required)[100] or that gross disparities between population and work force statistics are the result of pre-Act hiring,[101] a bona fide seniority system,[102] or other factors. Since these are objective rather than subjective criteria, it would seem that their proof would be less onerous.[103]

If the court continues to apply the low standard of business necessity applied in *Beazer*, fairness again seems to require that the defendant do more than "articulate" the job-relatedness of a particular employment criterion. The Supreme Court has not directly addressed this question. Its discussion of defendant's proof in *Beazer* indicates, however, that the Transit Authority's legitimate employment goals of safety and efficiency "are significantly served by—even if they do not require—TA's rule."[104] This case seems almost to adopt a "reasonable relationship" test for defendant's practice of not hiring methadone users for any position, even those positions that had no effect on the safety of passengers; this is certainly not the same test as the "business necessity" mentioned in *Griggs*.[105]

If all that is required of defendants is the "articulation" of a reasonable relationship between the challenged practice and job performance, plaintiffs may be discouraged from litigating valid claims of discrimination. While plaintiffs would still have the opportunity after defendant's articulation to show that less discriminatory alternatives were available to the employer, *Beazer* may have virtually eliminated this stage. The Court in *Beazer* held that the "express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination."[106] In a disparate impact case such as *Beazer*, in which plaintiffs challenged a facially neutral hiring criterion, this finding would seem to be irrelevant. The Court has stated many times that a discriminatory motive need not be shown in impact cases.[107]

This confusion about motive or intent in disparate impact cases illuminates another problem in employment discrimination cases. It is often difficult to determine whether a claim is being considered under the disparate impact or the disparate treatment analysis.[108] For this reason, con-

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100. Smith v. Olin Chem. Corp., 555 F.2d 1283 (5th Cir. 1977)(presumed business necessity not to hire applicant with degenerative back condition as manual laborer).

101. Hazelwood School Dist. v. United States, 433 U.S. at 310.

102. International Bhd. of Teamsters v. United States, 431 U.S. at 348.

103. *But see* Albemarle v. Moody, 422 U.S. 405 (heavy burden on employer to demonstrate the job relatedness of preemployment tests).

104. 440 U.S. at 587 n.31.

105. 401 U.S. at 431.

106. 440 U.S. at 587.

107. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. at 335 n.15.

108. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) (disparate treatment case in which employer's facially neutral practice of not accepting applications at the gate was

sistency in the nature of the burden that shifts to the defendant may be desirable. As the Eighth Circuit has pointed out, "unnecessary confusion in the trial courts" would be caused by a procedural difference in defendant's burdens under impact and treatment cases.[109] This confusion would be even more troublesome if a case were brought under both theories or if it were difficult to tell under which theory the case was being brought. In addition, the court emphasized, it is "illogical" to impose a greater burden on an innocent employer who uses a neutral criterion than on one who is suspected of a discriminatory motive.[110] On the contrary, it would seem fairer to require more of the intentionally discriminatory defendant. Societal policy should encourage the use of standards in employment decisions, both because objectivity may be expected to facilitate the hiring of minorities on the basis of their qualifications and because of the "broad, overriding interest, shared by employer, employee, and consumer [in] efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions."[111] Penalizing the employer who chooses to use objective criteria by placing a heavier burden on him than on the one who allegedly intentionally mistreats minorities would hardly encourage the use of neutral practices and policies.

On the other hand, society should also seek to encourage an employer to consider any potential disparate impact from the employment criteria and procedures he chooses to use, whether such an impact is intentional or accidental. Realization that he will have to persuade a judge of the job relatedness of his criteria would be likely to encourage the employer to scrutinize his criteria carefully, with an eye to potential litigation. This realization might also make the employer more sensitive to raw disparities between the percentage of minorities in his work force and the percentage in the relevant labor market.

The result in *Uncle Ben's* is not as clear a departure from legal precedent as one might think at first glance. There are valid legal and policy arguments in support of the Fifth Circuit's conclusion. A more thorough Supreme Court analysis of the problem is clearly needed in order to pro-

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challenged); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (disparate treatment case in which plaintiffs relied heavily on statistics showing disparate impact to prove "pattern or practice" of discrimination); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) (pattern or practice disparate treatment case relying heavily on raw disparity between percentage of minorities in employer's work force and percentage in labor market).

109. NAACP v. Medical Center, Inc., 657 F.2d at 1335.

110. *Id.*

111. 411 U.S. at 801.

vide guidance for potential plaintiffs, potential defendants, and the lower courts.

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