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Watson and Subjective Hiring Practices: The Continuing Saga of Industrial Psychology, Title VII and Personnel Selection

Daniel L. Bell

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INTRODUCTION

The field of employment discrimination law presents an incredible array of practical problems for human resource practitioners. The cornerstone of the federal effort to curtail employment discrimination, the Civil Rights Act of 1964 (Title VII), has focused the attention of human resource professionals and academicians on certain employment selection and promotion practices. Specifically, one scientific discipline, industrial psychology, has a long history of association with Title VII.

Based on this continuing relationship, each Supreme Court decision concerning the use of employment selection devices or systems inevitably affects the study

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1 The massive body of federal (e.g., Civil Rights Act of 1964, Equal Pay Act, Age Discrimination in Employment Act, Fair Labor Standards Act, Employee Retirement Income Security Act) and state fair employment laws have created a need for diversified human resource professionals well educated in the law to avoid costly litigation.


4 Industrial psychology is the study of man and his workplace. See infra note 109.

5 The Division of Industrial/Organizational Psychology (Division 14) of the American Psychological Association ("APA") was an active participant in the development of the Uniform Federal Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1-1607.18 (1978) (hereinafter Guidelines), was the benefactor of an express statutory exemption for "professionally developed" tests in Title VII, § 703(h), and is the subject of comment in numerous Title VII opinions. E.g., Albermarle Paper Co. v. Moody, 422 U.S. 405, 429 (1975) ("Albermarle engaged an expert in industrial psychology to 'validate' the job relatedness of its testing program.") The industrial psychologist is commonly involved in pre-trial, trial, and post-trial activity in employment discrimination litigation. See B. Schlei & P. Grossman, Employment Discrimination Law 158-59 (2d ed. 1983) (hereinafter B. Schlei & P. Grossman).

Section 703(h) provides, in relevant part: "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test . . . ."

6 The term "selection device" connotes a single procedure (e.g., test) used in personnel selection; a "selection system" connotes greater than one device, in combination (e.g., a test score and an interview), used for selection purposes.
and practice of industrial psychology. *Watson v. Fort Worth Bank & Trust,* the Supreme Court's most recent Title VII decision, is an ideal example. *Watson* afforded industrial psychologists the opportunity to provide important information which will impact future human resource management. Employers, with the aid of industrial psychology, must now re-evaluate their subjective selection practices. A legally defensible subjective practice, like an objective practice, must select individuals based on job-related factors and not rely on employer intuition.

This comment will analyze *Watson* from both a legal and industrial psychological perspective. Part one of the comment discusses the legal impact of *Watson.* First, the Supreme Court's analytical framework for Title VII discrimination claims is presented. Next, *Watson* is analyzed in the context of prior case law to consider its potential impact on employment discrimination litigation.

Part two concentrates on the role of industrial psychology in the *Watson* decision. First, the comment introduces industrial psychology. The association of industrial psychology, Title VII, and personnel selection is presented next. Finally, the comment presents current industrial psychological research concerning several "subjective" selection devices.

**PART 1**

**THE LEGAL FRAMEWORK**

*The Civil Rights Act of 1964 (Title VII)*

Title VII, Section 703(a)(1), makes it 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" because of that individual's "race, color, religion, sex, or national origin." In addition, an employer may not "limit, segregate, or classify" employees or applicants "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" those same characteristics.

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8 The APA filed an amicus curiae brief, which embodied the ideology of industrial psychology. That brief provided the Supreme Court with insight into the possible use and defense of subjective selection devices in Title VII litigation. See, Brief for the American Psychological Association as Amicus Curiae in Support of Petitioner, reprinted in 143 American Psychologist 1019-28 (1988) (hereinafter APA Brief).
9 See infra note 14 - 56.
10 See infra notes 74 - 108.
11 See infra notes 109 - 110.
12 See infra notes 111-120.
13 See infra notes 121 - 161.
14 See supra note 2.
16 *Id.* Section 703(c)(2) imposes parallel obligations on labor organizations.
The Supreme Court’s interpretation of these provisions has resulted in a series of Title VII decisions which regulate employment selection practices.

**The Supreme Court’s Development of Title VII Theory**

In an effort to achieve equal employment opportunity, Title VII seeks to abolish employment barriers which operate to favor one class of persons over another.\(^\text{17}\) To accomplish that goal, the Supreme Court has articulated two theories of discrimination. Currently, Title VII violations may be proved under: (1) disparate impact theory\(^\text{18}\) and/or (2) disparate treatment theory.\(^\text{19}\)

1. The Disparate Impact Theory

Disparate impact made its debut in the seminal case, *Griggs v. Duke Power Co.*\(^\text{20}\) In *Griggs*, the employer’s selection procedure for initial hiring and promotion decisions required a satisfactory score on two standardized aptitude tests.\(^\text{21}\) The court of appeals, which focused on the absence of a discriminatory motive for the test use, dismissed the case.\(^\text{22}\)

The Supreme Court reversed.\(^\text{23}\) The Court expressly rebutted the court of appeals’ analysis.\(^\text{24}\) The *Griggs* Court held that “good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”\(^\text{25}\) The Court concluded that “Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.”\(^\text{26}\)

*Griggs* established the principle that “facially neutral” selection practices that have significant adverse effects (e.g., significantly lower scores) on protected groups are a violation of Title VII.\(^\text{27}\) Thus, a violation is established regardless of the absence of discriminatory motive.\(^\text{28}\)

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\(\text{18}\) See infra notes 20 - 32. The disparate impact theory is hereinafter referred to as the impact theory.

\(\text{19}\) See infra notes 33 - 41. The disparate treatment theory is hereinafter referred to as the treatment theory.

\(\text{20}\) 401 U.S. 424 (1971).

\(\text{21}\) See *L. Cronbach, Essentials of Psychological Testing* 27 (4th ed. 1984) (hereinafter *L. Cronbach*) ("A test is considered to be standardized when the tester’s words and acts, the apparatus, and the scoring have been fixed so that the scores collected at different times and places are fully comparable.")

\(\text{22}\) *Griggs*, 401 U.S. at 429.

\(\text{23}\) See supra note 20.

\(\text{24}\) *Griggs*, 401 U.S. at 432-34.

\(\text{25}\) Id. at 432 (emphasis added).

\(\text{26}\) Id. (emphasis in original).

\(\text{27}\) The *Griggs* Court stated: “The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” Id. at 431.

\(\text{28}\) Id.
a) the evidentiary framework

The Court’s interest in the selection device’s effects focused its analysis on a device’s operational results. Thus, a plaintiff’s prima facie case consists of proving that the employer’s selection device has a disproportionate effect (i.e., adverse impact) on a protected group.29 If the plaintiff satisfies its burden of persuasion, the “...employer can escape liability only if it persuades the court that the selection process producing the disparity has a ‘manifest relationship to the employment in question’.”30 To do so, an employer will often show that the selection device “bear[s] a demonstrable relationship to successful performance of the job for which it was used.”31 This relationship, in effect, establishes that the selection device measures the knowledge, skills and abilities (KSA’s) necessary for successful job performance. Therefore, the selection device is a legitimate, non-discriminatory basis for employment selection.

If the employer sustains its burden of persuasion on the “business necessity” (i.e., job relatedness) issue, the plaintiff may introduce evidence showing the availability of a less discriminatory procedure which equally advances the employer’s asserted interest.32

2. The Disparate Treatment Theory

McDonnell Douglas Corp. v. Green33 introduced the Supreme Court’s dispa-
rate treatment analysis. In *McDonnell Douglas*, the plaintiff, a black ex-employee, alleged that the defendant’s decision not to re-hire him was based on race.\(^{34}\) The Court dismissed the action and, in doing so, promulgated the current evidentiary scheme used in treatment cases.\(^{35}\)

\textit{a) the evidentiary framework}

In contrast to the disparate impact theory, the treatment analysis concentrates on the defendant’s alleged discriminatory motive or intent.\(^{36}\) The Court developed a series of shifting burdens which focus judicial inquiry solely on the issue of illegal motive. Under this scheme, the plaintiff carries the initial burden of production.\(^{37}\) In order to satisfy that burden, the plaintiff must show that: (1) he/she belongs to a protected group; (2) he/she applied and was qualified for the job which was vacant; (3) despite satisfactory qualifications, he/she was rejected; and (4) after the rejection, the position remained open and the employer continued to seek applications from persons with similar qualifications.\(^{38}\)

If the plaintiff establishes a prima-facie case, the burden shifts to the defendant\(^{39}\) to “articulate a legitimate non-discriminatory” rationale for its selection decision.\(^{40}\) If the defendant demonstrates such a rationale, the burden of production shifts back to the plaintiff. The plaintiff, who has carried the burden of persuasion on the issue of discriminatory motive, must now establish that the employer’s proffered rationale is merely a pretext for intentional discrimination.\(^{41}\)

3. A Comparison of the Theories (Pre-Watson)\(^ {42}\)

Analytical focus and burden allocation are two key distinctions between the impact and treatment theories.

The impact theory directs attention to the results of the employer’s selection

\(^{34}\) Id. at 794.
\(^{35}\) Id. at 802.
\(^{36}\) *Watson*, 108 S. Ct. at 2784.
\(^{37}\) *McDonnell Douglas*, 411 U.S. at 802.
\(^{38}\) Id.
\(^{39}\) Id. In contrast to an impact claim, the defendant’s burden is one of production, not persuasion. “The prima facie case is . . . insufficient to shift the burden of proving a lack of discriminatory intent to the defendant.” *Watson*, 108 S. Ct. at 2793 (Blackmun, J., concurring). This also provides insight as to why employers prefer to litigate impact claims rather than treatment claims.
\(^{41}\) Id. at 256. Pretext evidence must be used to directly establish “that a discriminatory reason more likely motivated the employer or indirectly by showing that employer’s proffered explanation is unworthy of credence.” Id. Evidence of pretext includes “direct evidence of a past or present prejudice toward the plaintiff or members of plaintiff’s class.” See *PLAYER*, supra note 32, at § 5.40, p. 338. In addition, statistics showing an unbalanced workforce and proof of inconsistent applications of the employer’s proffered rationale are probative of pretext. Id.
\(^{42}\) This section presents the state of the law prior to *Watson*. The plurality decision in *Watson* was split on the issue of burden allocation under disparate impact claims. See infra note 48.
device. In the absence of an adequate "business necessity" defense, the selection device causing adverse impact is unlawful. In sharp contrast, the employer's discriminatory motive is the exclusive focus of the treatment theory.

A more critical distinction, particularly for litigation purposes, is the allocation of burdens under each theory. Under the impact theory, the plaintiff bears the initial burden of proof (i.e., production and persuasion). If that burden is met, the burden of proof shifts to the defendant. Finally, if the defendant should satisfy that burden, the plaintiff must prove that less discriminatory alternatives are available which serve the same business purpose.

In contrast, the plaintiff does not, at any time, relinquish the burden of persuasion in treatment cases. After making out a case pursuant to the McDonnell Douglas test, the burden of production shifts to the employer to explain the selection decision in terms of non-discrimination. The burden of production then shifts back to the plaintiff, combined with the burden of persuasion, and the pretext evidence is presented. Thus, before Watson, there was no evidentiary confusion between the theories. Each theory required a different degree of evidence on different elements to establish a Title VII violation.

The Objective/Subjective Selection Device Crisis and Watson

Despite these distinctions, the analysis of certain selection devices caused confusion in lower courts. Courts continually battled over whether an employer's subjective (i.e., discretionary) selection device was properly analyzed under: (1)
treatment theory;\(^{(2)}\) impact theory;\(^{(4)}\) or (3) both.\(^{(5)}\) Before the *Watson* decision was handed down, both courts and commentators proposed solutions concerning the analysis of such devices in Title VII litigation. The *Watson* Court articulated a clear cut answer.\(^{(6)}\)

1. The Watson Decision

Petitioner, Clara Watson (Watson), a black employee at Fort Worth Bank & Trust (Bank), was hired in 1973 as a proof operator.\(^{(7)}\) In early 1976, Watson received a promotion to the drive-in facility teller position.\(^{(8)}\) After four years in that position, Watson began to seek a job change.\(^{(9)}\) In the period 1980-81, Watson applied for four supervisory positions and was denied each position.\(^{(10)}\)

The Bank’s selection procedures were based on the unreviewed discretion of bank supervisors.\(^{(11)}\) The Bank had failed to develop any formal devices (e.g., tests) to select applicant’s for the vacant supervisory positions.\(^{(12)}\) Thus, each selection (i.e., promotion) decision was made based on the subjective (i.e., personal) judgment of supervisors who had knowledge of the candidates and the jobs to be filled.\(^{(13)}\) This placed the employment opportunities of each minority applicant in the hands of a white supervisor with unbridled discretion.\(^{(14)}\)


\(^{54}\) See Lujan v. Franklin County Bd. of Educ., 766 F.2d 917, 930 n. 19 (6th Cir. 1985) (subjective devices are subject to *Griggs* analysis); Hawkins v. Bounds, 752 F.2d 500, 503 (10th Cir. 1985) (subjective devices are properly analyzed under impact theory); Hill v. Seaboard Coast Line R. Co., 767 F.2d 771, 776 (11th Cir. 1985) (a selection process containing subjective devices is subject to impact analysis).

\(^{55}\) See Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 93 (6th Cir. 1982) (subjective decision-making can be analyzed under either theory).

\(^{56}\) Although a unanimous Court affirmatively answered the main issue concerning subjective devices, the effect of that answer on the impact theory’s analytical framework was far from unanimous. See *supra* note 48. Currently, it is unclear whether the plurality’s position will become the majority view.

\(^{57}\) *Watson*, 108 S. Ct. 2782.

\(^{58}\) Id.

\(^{59}\) Id.

\(^{60}\) Id. In February 1980, Watson applied for a position as supervisor of main lobby tellers. *Id.* She was rejected in favor of a *white* male. *Id.* Subsequently, she applied for the drive-in bank supervisor position. *Id.* She was rejected in favor of a *white* female. *Id.* Between 1980-81, Watson served as a commercial teller and, informally, as assistant to the teller supervisor. *Id.* When the teller supervisor was promoted, Watson applied for the vacant position. *Id.* She was rejected, again, in favor of the *white* female drive-in bank supervisor. *Id.* Seizing the opportunity to fill that vacancy, Watson applied for the drive-in position. *Id.* Nonetheless, she was rejected in favor of a *white* male. *Id.*

\(^{61}\) Id.

\(^{62}\) Id.

\(^{63}\) Id.

\(^{64}\) *Watson*, 798 F.2d at 798 (5th Cir. 1986). All supervisors involved in promotion decisions concerning Watson were white.
Watson filed an administrative charge with the Equal Employment Opportunity Commission (EEOC). Subsequent to this administrative process, Watson filed suit in United States District Court (Northern District of Texas). She alleged that the Bank had unlawfully discriminated against blacks, as a group, in hiring, compensation and several other employment procedures. After a series of class action motions, the district court reviewed Watson's individual claims under the disparate treatment theory. The district court concluded that although a prima facie case was established, the defendant satisfied its rebuttal burden, and, in the absence of the plaintiff's showing of pretext, the action was dismissed.

The 5th Circuit Court of Appeals affirmed in part. The majority concluded that the lower court's treatment analysis was sound. In addressing Watson's argument that subjective selection procedures could be analyzed under the disparate impact model, the court stated: "[A] Title VII challenge to an allegedly discriminatory promotion system is properly analyzed under the disparate treatment model rather than the disparate impact model." This approach placed the subjective selection crisis directly before the Supreme Court.

ANALYSIS

The Supreme Court decided that subjective devices were properly subject to analysis under the impact theory. However, Justice O'Connor's attempt to re-cast impact analysis in the form of treatment analysis, caused a faction in the Watson decision. The Court's opinion hinged on two interrelated issues: (1) May subjective selection devices, which adversely affect a protected class, be analyzed under the disparate impact model? and, if so, (2) What is the proper evidentiary framework for analysis of those claims?

65 Watson, 108 S. Ct. 2782.
66 Id.
67 Id.
68 Id. Watson moved for class certification pursuant to Federal Rule of Civil Procedure 23. Id. Although the district court initially certified the class, the court later rescinded that certification. Id. The class was bifurcated into: 1) black applicants; and 2) black employees. Id. at 2783. Subsequently, the employee subclass was found wanting under the numerosity requirements of Federal Rule 23(a) and decertified. Id. Then, Watson was deemed as inadequate representative of the applicant subclass based on incongruent claims. Id. The district court did address the applicant class claims and ruled in the defendant's favor. Id.
69 Id. The court applied the McDonnell Douglas analysis. See supra notes 33-41.
70 Id.
71 Id.
72 Id.
73 Id. This is consistent with prior case law in the fifth circuit. See, e.g, Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795, 801 (5th Cir. 1982) (subjective practices not akin to traditional bases for impact analysis).
74 Id. at 2779. See infra note 78.
75 Justice O'Connor, joined by Justices Rehnquist, Scalia, and White, believed that the acceptance of subjective devices for impact analysis necessitated a reformulation of the existing impact evidentiary framework. Id. at 2788-91. Justice Blackmun, joined by Justices Brennan and Marshall, concurred in the
Is Impact Analysis of Subjective Selection Procedures Proper?

A unanimous Court resolved this issue in the affirmative. The Court’s decision, authored by Justice O’Connor, turned on a basic proposition: the disparate impact model is concerned solely with the disproportionate effects of a selection device on a protected class. From this perspective the Court could not logically distinguish subjective devices from objective devices (assuming identical adverse effects on a protected class). A decision to exempt subjective devices from impact analysis would have given employers an incentive to discard objective devices in favor of subjective methods to avoid litigation of impact claims. In addition, the Court believed that exemption of subjective devices would allow “employers so easily to insulate themselves from liability under Griggs, disparate impact analysis might effectively be abolished.”

result but specifically denounced the plurality’s attempted re-draft of impact analysis. Id. at 2791-97. Justice Stevens, in yet another concurring opinion, took issue with Justice O’Connor’s brash move and stated that any discussion of a new framework was premature pending the outcome of the district court’s analysis on remand. Id. at 2797.

This result undercuts the purpose of Title VII. The Civil Rights Act of 1964 attempted to focus employment selection decisions on applicants’ work related factors (e.g., knowledge, skills, and abilities), rather than immutable factors such as race or sex. Thus, objective devices were favored over subjective devices because the basis for employment decisions became more verifiable. If employers reverted back to subjective decision-making, it could result in a corresponding shift in focus from job related to discriminatory factors. This is an unacceptable result under Title VII. Accord, Doverspike, Barret & Alexander, The Feasibility of Traditional Validation Procedures in Demonstrating Job Relatedness, 9 Psychology & Law 35, 35 (1985) (hereinafter Doverspike). (“The litigious climate has resulted in a decline in the use of tests and an increase in more subjective methods of hiring.”)

Although these conclusions are undoubtedly true, one of the Court’s proffered rationale underlying them is deceptive. The plurality concerned itself with employer attempts to avoid impact analysis. The Court feared that if subjective devices were exempt from impact analysis, employers would couch objective devices, with adverse impact, inside “subjective” selection systems. The Court stated that a “selection system that combines both types [of devices] would generally have to be considered subjective in nature.” Id. The Court reasoned that under such a system, the employer could accord substantial deference to the discriminatory objective devices and give little significance to the “token” subjective device (e.g., interview). This would allow employers to avoid impact analysis of discriminatory objective devices because subjective systems would be subject only to treatment analysis. This proposition is misleading, particularly as it concerns the Court’s prior disparate impact decisions.

The real issue is why a selection device, within a “subjective” selection system, would not be subject to impact analysis. In the “subjective” selection system below, the tests (i.e., objective devices) are identifiable and subject to impact analysis in the same manner they would be without the interview (i.e., subjective device). It makes little practical sense to allow the mere presence of the interview to serve as an impenetrable barrier in the face of a separate device’s adverse impact. The author believes that such a position is untenable in light of prior impact theory cases and the express purpose of Title VII.

Protection for employees/applicants, in the Court’s hypothetical crisis, is embodied in the “business necessity” defense. Under traditional impact analysis, the employer, after the employee’s showing that the selection practice has adverse impact, must establish that a “manifest relationship” exists between selection device performance and job performance. Under Griggs, a selection device is to be adopted after a study concerning its “relationship to job performance ability.” In essence, an employer must, at a minimum, show that their selection device(s) measure the knowledge, skills and abilities (KSA’s) needed for successful job performance. If a certain KSA is used infrequently on the job (i.e., job performance is minimally dependent
The Court's Dissolution In The Face of A New Evidentiary Framework

After Watson, Title VII case law clearly dictates that selection devices (regardless of their objective or subjective nature), which have adverse impact, are subject to disparate impact analysis. The blurry issue, particularly important to employment lawyers and human resource professionals, is: In what evidentiary posture do the on the KSA, the employer cannot legitimately give the device measuring the KSA a disproportionate weight in the selection decision. In effect, the employer would emphasize the KSA in disproportion to its necessity for job performance. This asymmetric relation is the antithesis of job relatedness which seeks to establish the necessity of a selection device based on its relationship to job performance.

In addition, this "weighting" approach may subject an employer to plaintiff's showing of the availability of a less discriminatory alternative.

For example, Company A has seven vacant secretarial positions. A job analysis reveals that typing is 10%, dictation is 70%, and filing is 20% of the job. This can be interpreted to mean that a successful secretary uses dictation skills seven times as often as an unsuccessful secretary. Based on the job analysis, the employer adopts a selection system consisting of a typing test, dictation test, and a personal interview.

There are twenty applicants (10 blacks/10 white). The following are the scores of each applicant on both tests:

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Under the Supreme Court "worst case" scenario, the employer, who wants a white only workforce, weights (i.e., assign a numerical value which expresses the importance of the KSA in the selection decision) the tests in a manner that results in hiring only whites (the weight for typing = .7 and dictation = .1; see above).

Thus, an employer can easily manipulate test weights to accomplish a discriminatory objective. The interview results are not considered in the actual decision-making process. The results of this "subjective" selection process, including the "token" interview, suggest that seven whites, and no blacks, should be hired.

Consequently, a black plaintiff can attack the job relatedness (i.e., business necessity) of either test based on the overall adverse impact of the selection system. See Connecticut v. Teal, 457 U.S. 440 (1982). The employer must justify the use of these devices. The employer will assert that the devices are demonstrably related to job performance (i.e., they are samples of what occurs on the job and, thus, the devices are valid for this job (albeit only content valid, see infra note 125).

The plaintiff, in rebuttal, will attempt to show the availability of a less discriminatory use of the same system. The plaintiff will show that if the tests are weighted in accordance with their importance to job performance (as per the company's job analysis), the tests: (1) become increasingly job related, and (2) have less adverse impact.
plaintiff-employee and defendant-employer now find themselves? 7

1. Justice O’Connor Forges a New Impact Analysis

The Watson Court reached an impasse on the issue of which party would bear the burden of persuasion under an impact analysis. Nevertheless, Justice O’Connor, penned a decision that could result in a major shift in Title VII litigation. 80

The practical ramifications of Watson stem from the type of proof commonly used to establish impact claims. In the typical impact case, the plaintiff must show that the selection device at issue had a disparate effect on a protected group. 81 The general focus of “evidence in these ‘disparate impact’ cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities.” 82 In practice, this burden is easily met, and when satisfied shifts the burden onto the employer to defend its use of the selection device. Justice O’Connor assumed 83 that an employer will find it impractical, as well as scientifically questionable, to establish the “business necessity” (i.e., job relatedness) of subjective selection devices. Consequently, she attempted to “safeguard” employ-

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Now, the results dictate hiring seven blacks and no whites. Note that this weighting scheme is more job related than the employer’s scheme because the test weights are directly correlated to results of the job analysis. In the face of such evidence, the interview would become the focal point of judicial inquiry. The plaintiff’s evidence directly contradicts the employer’s proffered justification for the devices and satisfies the burden of proving a less discriminatory alternative. Thus, an employer’s efforts to “insulate” its discriminatory selection practices with a subjective interview could not obstruct the reach of impact analysis before or after Watson.

79 See supra note 48 and accompanying text.
80 Watson, 108 S. Ct. at 2787-91.
81 See, B. Schlei & P. Grossman, supra note 5, at 91-92. See also, Player, supra note 32, at § 5.41. This evidentiary burden is usually satisfied with statistical proof showing a device’s adverse impact on a protected group.
82 Watson, 108 S. Ct. at 2784-85.
83 Both Justice Blackmun (Id. at 2795) and industrial psychologists challenge the validity of this assumption. Id. at 2795. See generally, APA Brief, supra note 8.
ers from any unfair burdens the expanded impact theory could cause in the applied business setting.  

2. The O’Connor Shuffle

In the face of the traditional impact analysis, Justice O’Connor advocated that the plaintiff’s prima facie case consists of:\(^{85}\) (a) identification of the alleged discriminatory selection device, (b) a statistical showing of adverse impact on a protected group, and (c) proof that the identified device caused the observed disparity between groups.

The goal of the identification element is to curtail plaintiffs’ gun shot pleading approach. That approach usually resulted in challenges of entire selection systems, placing a tremendous burden on the employer to defend each selection device.  

Accordingly, Justice O’Connor’s new prima facie case simply attempts to “fairly” allocate the burdens of discrimination litigation. The approach prevents employers from shouldering the brunt of the evidentiary and economic burdens of impact cases.

Although Justice O’Connor’s criteria deviate somewhat from the traditional impact analysis, they accomplish an acceptable balance of the competing parties’ interests. If Justice O’Connor had stopped the reconstruction effort at this point, a unanimous opinion probably would have issued from the Court on the evidentiary issue. However, Justice O’Connor pressed on and significantly strayed from prior Supreme Court case law. In doing so, a “second constraint” was erected to protect employers from the potential explosion of impact claims.\(^ {87}\)

3. The Evidentiary Conflict Surfaces

Justice O’Connor attempted to couch this new approach in a discussion of the employers “business necessity” burden.\(^ {88}\) She stated that the Griggs “manifest relationship” standard could not be interpreted as a shift in the burden of persuasion.

\(^{84}\) Justice O’Connor concluded that an employer who must use subjective selection devices (e.g., for managerial positions) would encounter a “Hobson’s choice”: (1) use a job-related subjective device, which if found to have adverse impact, would be nearly impossible to defend; or (2) simply hire minorities to assure that no finding of adverse impact could occur (i.e., adopt a quota). After hypothetically posturing the employer in this precarious position, Justice O’Connor correctly decided that neither outcome was acceptable under Title VII. Watson, 108 S. Ct. at 2788.

\(^{85}\) This approach parallels the view of several courts of appeals. See, e.g., Atonio v. Wards Cove Packing, 810 F.2d 1477, 1486 (9th Cir. 1987) (en banc), 827 F.2d 439 (9th Cir. 1988), cert. denied, 108 S. Ct. 2896 (1988).

\(^{86}\) Compare, Atonio, 810 F.2d at 1486 (the plaintiff must prove causation between the practice identified and the disparate impact) with Segar v. Smith, 738 F.2d 1249, 1270-71 (D.C. Cir. 1984) (the plaintiff’s challenge of a company’s selection system accompanied by a showing of disparate impact would result in defendant’s rebuttal burden of identification of which practice caused the disparity).

\(^{87}\) Watson, 108 S. Ct. at 2790 Justice O’Connor stated: “A second constraint on the application of disparate impact theory lies in the nature of the ‘business necessity’ or ‘job-relatedness’ defense.” Id.

\(^{88}\) Id.
from the plaintiff to the defendant. According to Justice O’Connor, the plaintiff in an impact case does not relinquish the burden of persuasion but carries the “ultimate burden of proving discrimination caused by a specific employment practice... at all times.” In practice, this statement unifies the evidentiary scheme of both impact and treatment theories. This apparent unification occurs despite the practical and conceptual differences that prompted the distinctions between the theories.

a) Is Evidentiary Unification Supported by Supreme Court Precedent?

The evidentiary distinctions, which Justice O’Connor’s scheme obviates, are primarily based on the differing situations in which the theories are advanced. Under Griggs and its progeny, the plaintiff had the initial burden of proof (i.e., production and persuasion). Once that showing was made, the burden of proof, not production, shifted to the employer to establish the “business necessity” of its discriminatory device. This burden allocation is consistent with the fact that the employer, at that point in the litigation, is advancing an affirmative defense, not merely “a competing theory” for the disparity observed.

Analogous to the bona fide occupational qualification (BFOQ) defense under Title VII, the “business necessity” defense is not asserted until the plaintiff has proved that the selection practice under siege had a discriminatory impact. The BFOQ defense, although conceptually and practically distinct, is comparable to the

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89 Id.
90 Id.
91 Id. at 2792-93 (Blackmun, J., concurring) (“In attempting to mimic the allocation of burdens the Court has established in the very different context of individual disparate- treatment claims, the plurality turns a blind eye to the crucial distinctions between the two forms of claims.”). See also, Mertens, Watson v. Fort Worth Bank & Trust (108 S. Ct. 2777): Unanswered Questions, 14 EMPL. REL. L.J. 163-73 (1988) (Addressing the unification of the two discrimination theories).
92 The impact theory is advanced where a “facially neutral” selection device is alleged to be discriminatory. Logically, judicial inquiry focuses on the inanimate selection device. In contrast, the treatment theory contends that an employer’s discriminatory attitudes are the basis for plaintiff’s treatment. Consequently, the litigation concentrates on stereotypes and the employer’s corresponding behavior.
93 See also, Albermarle, 422 U.S. at 425 (the employer is required to “meet the burden of proving that its tests are ‘job related.’”); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (the employer must “[p]rove that the challenged requirements are job related.”).
94 Justice O’Connor states that impact analysis concerns a series of alternative explanatory theories regarding the cause of statistical disparities. However, there is a definite difference between a “theory” advanced to rebut the cause of a statistical disparity and one which, after accepting that disparity, seeks to justify it. This distinction is the pivotal difference between statistical rebuttal evidence and the business necessity defense. The BFOQ is a statutory exception for selection decisions which are explicitly based on a prohibited factor (e.g., no females hired as car mechanics). Courts construing this defense have established 3 basic elements that the defendant must prove. See PLAYER, supra note 32, at § 5.29.

Title VII § 703(e), states, in relevant part: “Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire...employees...on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonable and necessary to the normal operation of that particular business or enterprise.”

* See generally, PLAYER, supra note 32, at § 5.29.
business necessity defense. In a typical BFOQ case, the plaintiff proves that an employer policy prohibits hiring based on a prohibited factor (e.g., sex). This is direct and conclusive proof, in the absence of proof that the prohibited factor is a BFOQ, that Title VII has been violated. Consequently, the defendant must prove that the discriminatory factor is a BFOQ or lose the case (i.e., the defendant bears the risk of non-persuasion). Similarly, under the business necessity defense, once the employee establishes that a discriminatory selection device is in operation, the employer must prove that the observed disparate effects are permissible based on the device’s “business necessity.” If the employer fails to persuade the trier of fact on this issue, the case is lost (i.e., the employer bears the risk of non-persuasion). Thus, it is suggested that a more principled result, under Supreme Court precedent, is that the defendant assume the burden of persuasion when the plaintiff has established the operation of a discriminatory selection device.

In addition, under Justice O’Connor’s approach, the use of subjective selection devices would relegate the defendant’s rebuttal burden to de minimis level. She stated that some characteristics (e.g., loyalty, tact, good judgment) important to success in certain jobs (e.g., managerial), are not amenable to standardized (i.e., objective) testing. Based on this assumption, Justice O’Connor states:

“In the context of subjective or discretionary employment decisions, the employer will often find it easier...to produce evidence of a ‘manifest relationship to the employment in question.’”

Thus, Justice O’Connor presumably lowered the employer’s “business necessity” burden to a level similar to the employer’s burden in treatment cases.

A management selection example illustrates some potential problems under this approach. Company A has eight vacant business manager positions. The company hires based on the results of: (1) a mathematics test score, and (2) an interview, purportedly used to assess ability to engage in social discourse and leadership. The interviews are unstructured and interviewers are experienced job

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98 Notice that the employer makes no effort to dispel the fact that the policy/device does discriminate. To the contrary, at this stage the employer tries to prove that the established discriminatory effects are justified because the selection device furthers a legitimate business purpose (e.g., it selects the person best able to perform).
99 Watson, 108 S. Ct. at 2787.
100 Id. at 2791.
101 Justice O’Connor states that upon a prima facie showing of disparate impact, the defendant has the “burden of producing evidence that its employment practices are based on legitimate business reasons....” Id. at 2790. Compare that with the employer’s burden of production in treatment cases (to “articulate a legitimate, nondiscriminatory reason” for the decision). See also, id. at 2794 (Blackmun, J., concurring) “Again, the echo from disparate-treatment cases is unmistakable. In that context, it is enough for an employer to articulate some legitimate, nondiscriminatory reason’ for the allegedly discriminatory act....” Id.
102 Management selection is addressed because Justice O’Connor specifically references managerial positions as commanding the use of subjective devices. Id. at 2791.
incumbents. The company has undertaken no effort to establish what KSA’s are necessary for job performance. The company has never had a black manager and has no desire to correct that anomaly. Consequently, the interview is routinely used to conceal the company’s discriminatory hiring.

The company receives 100 applications (50 blacks/50 whites).\(^{103}\) On the basis of the math test scores, the eight positions should have been filled by the black candidates. However, the company chooses eight white candidates to fill the vacancies.

1. The *Griggs* Analysis

Under *Griggs* and its progeny, proof that the interview has an adverse impact on blacks satisfies the plaintiff’s burden of proof.\(^{104}\) Then, the burden of persuasion shifts to defendant to prove ‘‘business necessity’’ for the interview. The employer will fail to meet this burden. The employer has not established the ‘‘job-relatedness’’ of the interview (i.e., the relationship of characteristics purportedly assessed in the interview and job performance) nor is there any documentation of interview results (e.g., notes, ratings of candidates). Under these facts, it is unlikely that the defendant would establish a ‘‘reasonable doubt’’ in the mind of the trier of fact on the issue of ‘‘business necessity.’’ Consequently, the plaintiff would prevail in the action.

2. O’Connor’s Impact Analysis

Under Justice O’Connor’s approach, the plaintiffs are not so fortunate. Because of the lesser burden on the employer in the ‘‘business necessity’’ phase, it is likely that the burden will shift back onto the plaintiff.

As before, the plaintiff has identified the device and showed that it caused the

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\(^{103}\) The top 20 scores (1 (low) - 20 (high) on the mathematics test are:

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\(^{104}\) The selection rate for blacks = 0% (0/50). The selection rate for whites = 16% (8/50). Under the four-fifths rule, there is adverse impact (zero is less than 80% of 16). In addition, the plaintiff will show that the math test results dictate the hiring of 8 blacks, but none were hired.
adverse impact on black candidates. The employer now has the burden of production to show "...that its employment practices are based on legitimate business reasons..."\(^{105}\) The employer will assert that the interview was used to assess certain qualities, necessary for job success, but not amenable to testing. The company will attempt to establish that each interviewer used his/her qualified judgment (based upon job experience) to assess those attributes that are necessary to job performance. In addition, the employer may simply state that the interview was "necessary" to screen out persons objectively qualified but otherwise unsuitable for the job (i.e., they knew math but could not socially interact or lead others). Obviously, this type of showing, in addition to being a haven for discrimination, places a very minimal burden on the employer. Even more striking is the fact that the employer is allowed to avoid "validation"\(^{106}\) of selection devices where adverse impact is established. This result stands in direct opposition to the Guidelines\(^{107}\) and the Griggs job relatedness concept.

Nevertheless, it will serve to rebut the presumption of discrimination established by the plaintiff’s evidence. In the absence of strong pretext evidence, given the burden of persuasion, it is likely that the employer will prevail. This distorted result is a function of the lesser burden placed on the employer. As such, the modern scheme could become a vehicle for employers to perpetuate employment discrimination.

4. The Future of The Modern Scheme

Fortunately, in light of the possible skewed results under Watson, this proposed scheme is just that - a proposal. Because Watson was a plurality decision, its effect on the Griggs model is unclear. However, Watson, at a minimum, serves notice on future Title VII litigants that the evidentiary framework of impact claims is on shaky ground.

The Court (divided 4 - 3 in favor of adoption) will have two opportunities to clarify the issue in the 1988-1989 term. Thus, the votes of Justices Kennedy (who did not participate) and Stevens (who withheld decision on the issue) should become swing votes.\(^{108}\)

PART II

INTRODUCTION TO INDUSTRIAL PSYCHOLOGY

Industrial psychology, in general, is concerned with human behavior in the

\(^{105}\) Watson, 108 S. Ct. at 2790.

\(^{106}\) See infra notes 124-125.

\(^{107}\) See supra note 5.

work place. The practicing industrial psychologist serves a dual role in industry: (1) to ensure that employees' work environments allow effective and efficient performance, and (2) to provide cost-effective solutions to management concerning human resource issues. In their struggle to satisfy these competing interests, industrial psychologists have had to cope with "practical" factors which curtail their scope of activity. Chief among these "practical" concerns is the onslaught of federal and state laws governing the employment relationship.

**Industrial Psychology, Title VII & Personnel Selection**

A quick perusal of any industrial psychology text evidences the affiliation of Title VII and industrial psychology. Despite the fact that the science of personnel selection can be traced back to the early 1920's, it was not until the passage of Title VII of the Civil Rights Act that the two professions began to come together. Since the early 1970's, a large body of case law and psychological research has focused on the inevitable interaction of Title VII, industrial psychology, and personnel selection.

Industrial psychological research into selection devices and systems, under the guidance of the Guidelines and Principles, has resulted in a significant body of research from which legal professionals can gain insight into disputed selection practices. Recently, industrial psychological research found its way into the Supreme Court's chambers. In fact, that research was the subject of judicial

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113 See supra note 2.
114 See supra notes 20 - 42.
115 See, e.g., Leap, Holley, & Field, Equal Employment Opportunity and Its Implications for Personnel Practices, 27 Lab. L.J. 278 (1976); Dooverspike, supra note 77 (An attempt to clarify misconceptions concerning feasibility and viability of traditional selection procedures and introduction of various selection procedures).
116 A sub-field of industrial psychology, personnel psychology, is directly concerned with all aspects of individual differences in the workplace. For instance, personnel psychologists determine what KSA's are necessary for job performance (i.e., job analysis), how to evaluate employee performance (i.e., performance appraisal), and how to assess potential employees (i.e., selection system design). While this comment discusses the concepts traditionally associated with personnel psychology, the author uses the broader term for purposes of introduction to the legal profession. For a greater explanation of personnel psychology, See B. Bass & G. Barrett, supra note 109, at 229-58.
117 See supra note 5.
118 See supra note 31.
The Current State of Industrial Psychological Knowledge on "Subjective" Selection Devices

1. Background

A core concept winding through Title VII and industrial psychology is validation. Since Griggs, industrial psychologists have played a vital role in establishing the "job relatedness" of selection devices. Job-relatedness, in Title VII parlance, has become virtually synonymous with the validation of a selection device. Consequently, industrial psychologists are consistently called on to demonstrate, and substantiate, the relationship between: (1) the selection device, (2) the knowledge, skills, and abilities (KSA's) necessary to perform the job, and (3) job performance. This is, in fact, the validation process.

19 See, APA Brief, supra note 8; Doverspike, supra note 77.

20 Justice Blackmun cited directly to the APA Brief in his concurring opinion (Watson, 108 S.Ct. at 2795 n.5) to support the assertion that subjective selection devices, like objective ones, are also capable of "psychometric scrutiny" (i.e., validation).

21 This section of the comment introduces research cited in the APA Brief, supra note 8; the author’s purpose is to introduce these psychological concepts to legal professionals, particularly employment lawyers, in a manner which allows effective insight into issues affecting corporate and individual clients.

22 See supra note 31, 124-125.

23 The broader concept is "business necessity." The job-relatedness (i.e., validity) of a selection device is probative of the employer's business purpose for use of the device. The Griggs Court established that if a test had an adverse impact on a protected group and was not "job related," the test was being "used to discriminate" and fell outside the Title VII testing exemption (§ 703(h), supra note (4)). The Griggs Court stated: "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance...What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." Griggs, 401 U.S. at 436 (emphasis added).

124 Both the Guidelines, supra note 5, and the Principles, supra note 31, regulate the validation process and set out rules for establishing the reliability and validity of selection devices.

25 There are three validation strategies under both the Guidelines and the Principles: (1) content, (2) criterion, and (3) construct validity. Content validity is "an attempt to establish that test performance is a representative sample of job performance or job-required knowledge." See Principles, supra note 31, at 37. Criterion validity is "an attempt to demonstrate a statistical relationship between scores on a predictor (e.g., selection device) and scores on a criterion [e.g., job performance] measure." Id. Construct validity is "an attempt to demonstrate a relationship between underlying traits or hypothetical constructs [e.g., leadership] and job related behavior." Id. See also, Guidelines, supra note 5, at § 1607.14 (B), (C), (D). Each type of validation is dependent on defining what KSA's are essential for a given job. A job analysis is "a procedure undertaken to understand job duties and behaviors and performance standards." See Principles, supra note 31, at 38. A job analysis provides information necessary to develop or select a selection device which measures a job's KSA's.

For example, Company A, (see supra note 78), is developing a selection system for their business manager position. In order to choose a selection device which is "demonstrably related to job performance," the employer must identify what KSA's are necessary for job performance. Consequently, the employer hires an industrial psychologist to perform a job analysis of the manager position.
2. Subjective Devices

Personal interviews and employee performance ratings are among the most commonly encountered "subjective" selection devices. The Watson Court, on the surface, adopted different, albeit polarized, positions on the issue of whether these subjective selection devices could be validated similar to objective devices. Industrial psychologists, as delineated in the APA Brief, believe the answer is yes.

a) The Employment Interview

The personal interview, given its cost-effectiveness and convenience, is probably the most often used selection device. In spite of its frequent use, the interview, in an uncontrolled setting, is plagued with problems.

The most common problem, which compromises the validity of the interview, is the attitudinal bias of the interviewer. For example, the interviewer can be unduly influenced by a single factor (e.g., physical attractiveness) which impacts on the assessment of job-related factors (e.g., communication skills). Interviewer stereotypes also bias the interview results. Despite these problems, industrial psychologists believe that interviews can be accurate predictors of job performance if the job analysis identifies that the position requires a knowledge of algebra. Under a content validation strategy, an algebra test is constructed which samples the knowledge needed for the job by asking questions which are similar to those encountered on the job. A criterion validation approach would assess the relationship between the scores of the algebra test and a measure of job performance. The criterion validity study results in a figure which represents the strength of the relationship between test performance and job performance (i.e., a validity correlation coefficient).

Both the Guidelines, supra note 5, and the Principles, supra note 24, regulate the validation process and set out rules for establishing the reliability and validity of selection devices.

Compare, Watson, 108 S. Ct. at 2787 (Justice O'Connor noted "that'... 'validating' subjective criteria... [in a manner similar to objective criteria] is impracticable.") with, Watson, 108 S. Ct. at 2795 (Justice Blockman stated "a variety of methods are available in establishing the link between these [i.e., subjective] selection processes and job performance, just as they are in objective devices.").

For example (see supra note 78), if Company A’s job analysis finds that oral communication skills are necessary to management performance, a content valid interview could be developed. The interview would ask specific questions which elicit oral communication and assess the interviewee on his/her ability to communicate. This intuitive “face-valid” approach is consistent with both Justice O’Connor’s perspective that the interview is “manifestly” related to the job and Justice Blackmun’s ideas concerning an establishing link between the selection device, the requisite KSA’s and job performance.

See APA Brief, supra note 8, at 1020 - 27. The APA’s amicus brief presents industrial psychological research on interviews, performance ratings and experience requirements.

See e.g., W. Cascio, supra note 111, at 263-64.

The effect of interviewer bias is distortion of the interviewer’s final judgment. Thus, the link between the interview (i.e., information elicited concerning relevant KSA’s) and job performance is diluted. This occurs because the interviewer attends to factors which are not related to job performance. This “bias,” in effect, reduces the accuracy of the inferences based on the interview results because the final judgment is based on attributes unrelated to job performance. See Schmitt, Social and Situational Determinants of Interview Decisions: Implications for the Employment Interview, 29 Personnel Psychology, 79, 97 (1976).

For instance, the interviewer concludes that a beautiful interviewee is also intelligent and articulate.

Stereotyping occurs when the interviewee is attributed certain characteristics based on their membership in a certain group (e.g., race, sex) instead of their idiosyncratic characteristics.
they are developed according to generally accepted psychometric standards.\textsuperscript{133}

Asking questions that are directly linked to job analysis results and information from job incumbents increases the structure and job-relatedness of the interview (which reduces bias, thus increasing validity of interviewer judgments). A good example of this approach, developed by industrial psychologists, is the situational interview.\textsuperscript{134}

The situational interview calls for the transformation of information gathered on critical incidents\textsuperscript{135} into interview questions.\textsuperscript{136} The interviewer asks a hypothetical question based on the critical incidents.\textsuperscript{137} The applicant is directed to explain what he/she would do if faced with the facts presented. Each answer is rated independently on a five-point scale.\textsuperscript{138} The scores received on these interviews are then scrutinized to assess their relationship to job performance.\textsuperscript{139}

In addition, and this is commonly ignored by employers for cost reasons, the validity of the interviewer should be established. Conceptually, the interview is an information gathering device necessary to accurate decision-making. Thus, the interviewer needs "skills in data gathering and [data] interpreting."\textsuperscript{140} As no effective decision can be made with inaccurate or irrelevant information, or worse, no information, interviewers should be trained on interviewing techniques. Training should focus on improving the interviewer's ability to focus on and retain job-related information. In addition, the employer should develop a more structured interview to establish some sort of relativity between interviewers and interviewees.\textsuperscript{141} A structured interview increases the ability of interviewers to focus on job-related information, and decreases assessment of irrelevant attributes which distract inter-

\textsuperscript{133} See APA Brief, supra note 8, at 1023.
\textsuperscript{135} A critical incident is a report "by knowledgeable observers of things employees did that were especially effective or ineffective in accomplishing parts of their jobs." See W. CASCIO, supra note 111, at 88.
\textsuperscript{136} See APA Brief, supra note 8, at 1023 n.24.
\textsuperscript{137} For example, for a management position: "How would you delegate duties to senior level subordinates that are commonly perceived as low level tasks?"
\textsuperscript{138} Two separate persons rate the answers on a five point scale. This serves to increase reliability of results because of a broader sample of behavior.
\textsuperscript{139} The scores of each interviewee were correlated with a job performance criterion. This is a typical criterion validity study which seeks to establish a statistical relationship between the predictor score (e.g., interview results) and a criterion measure (e.g., job performance). Most importantly, the process was found to accurately predict future job performance of females and blacks. See Interview, supra note 134.
\textsuperscript{140} See A. ANASTASI, PSYCHOLOGICAL TESTING 610-61 (5th ed. 1982).
\textsuperscript{141} If two persons interview the same person but focus on different attributes, the interviews cannot be compared to assess the ratings on certain factors. The ability to compare ratings on the same factors is a great advantage to ensure accuracy and decrease the operation of interviewer bias in the ratings. The objective is to accumulate as much information as possible, from all qualified sources, to get a more reliable picture of the interviewee's attributes. A standardized interview also reduces the importance of each interviewer's individual judgments and corresponding biases.

http://ideaexchange.uakron.edu/akronlawreview/vol22/iss4/5
viewer attention and distort perceptions.

In sum, the use of employment interviews should be "preceded by a thorough analysis of the target job, the development of a structured set of questions based on the job analysis, and the development of behaviorally specific rating instruments by which to evaluate applicants." The assessment of employees "should be maximally dependent on their personal characteristics and minimally dependent on who made the assessment...Where non-test predictors like interviewer judgments are used, the [employer] should develop procedures that will minimize error resulting from differences between judges."\textsuperscript{142}

\textbf{b) Performance Ratings}

As opposed to the interview, a performance rating covers a longer period of behavior (bi-annual and annual ratings are common) on which to base an employment decision. Despite this fact, ratings, and performance appraisals in general, are consistently attacked for their subjectivity and bias.

\textbf{i. Introduction}

Employee performance appraisal provides feedback to employees concerning their work and provides employers with information necessary to human resource planning. Performance ratings are conducted for various reasons and by various methods.\textsuperscript{143} Among the most popular rating scales are the behaviorally anchored rating scale (BARS)\textsuperscript{144} and the graphic rating scale. BARS use dimensions derived from worker and supervisor ratings of the important dimensions of effective job performance.\textsuperscript{145} Job behavior statements "anchor" each dimension. These statements are positioned vertically on a scale. The statements form a continuum running from those which exemplify effective performance to those which illustrate poor performance.\textsuperscript{146}

The greatest virtue of BARS are the behavioral anchors. The anchors establish the scales job relatedness because the rating is based on incumbent's job behaviors. This is legally relevant because a rating used to select for promotions is subject to the same job relatedness restrictions as any other "test."\textsuperscript{147}

\begin{footnotesize}
\begin{itemize}
\item See APA Brief, \textit{supra} note 8, at 1023-24 (citations omitted).
\item See generally, W. CASCIO, \textit{supra} note 111.
\item For greater explanation of the BARS system, See W. CASCIO, \textit{supra} note 111, at 92-95.
\item \textit{Id.} at 93.
\item For example, a telephone operator position is rated on "accuracy." The dimension has statements ranging from "takes too much time to give requested information" (ineffective) to "time from receipt of request to information disbursement is consistently small" (effective).
\item A performance appraisal is considered a selection procedure under the Guidelines. See generally, Guidelines, \textit{supra} note 5, at § 2(C).
\end{itemize}
\end{footnotesize}
The graphic rating scale is the most common, albeit simplest, rating method. This type of scale vertically presents an array of employee attributes. An employee receives a rating on each attribute. Graphic rating scales traditionally have from five to nine points. The rater’s task is to select a rating which represents the employee’s “score” on a particular attribute.

Regardless of the method used, each has inherent weaknesses and are frequently attacked in employment litigation as discriminatory.

ii. Bias in Ratings

In order to create rating instruments that can withstand psychometric and legal scrutiny, industrial psychologists have accumulated a large body of performance rating research. Rating scales, like interviews, are subject to rater bias. In employment situations, a bias can arise where the rater and ratee are of different races. It is not unheard of for white raters to assign significantly lower ratings to black ratees than white ratees. Unfortunately, the magnitude of this race conscious effect is reported to be greater in real life than in laboratory studies. In addition, the probability of this type of rater distortion occurring increases as the proportion of blacks in the workforce decreases.

iii. Constructing a Valid Rating System

Although these conclusions do not aid employers in discrimination litigation, there are several steps to take in developing a defensible rating system. A job
analysis is the centerpiece of establishing the job relatedness of the rating device. In order to attain legal strength, the knowledge, skills, and abilities rated must be identified through a job analysis. In the absence of such an effort, the employer could rate attributes that have little or no relation to effective performance.\footnote{154} More importantly, if the performance rating is used for promotions to other positions, the employer must establish its job relatedness for the future position.\footnote{155} Consequently, a relationship must be established between the current and future positions to ensure that the attributes rated for the current position are also related to job performance in the new position. If the current and future positions do not require the use of similar knowledge, skills, and abilities, the ratings will become a weakness in the employer’s defense should it be scrutinized in litigation. Courts usually require a job analysis to verify the overlap of factors in the current and future position.\footnote{156} As such, the touchstone of any defensible rating system is the job analysis. Without it, an employer’s ratings are questionable on their face and subject to impeachment in court.

Like interviews, the skill of the rater is a critical factor in reliability of rating scales. The most qualified rater is that person who is familiar with the work to be performed, and has the skills to accurately perceive and rate that work behavior.\footnote{157} The finding that raters in close proximity (e.g., first level supervisors) to the ratee provide more reliable ratings\footnote{158} supports this position. More importantly, especially for training and development purposes, persons trained in rating skills showed a decrease in rating errors.\footnote{159} This decrease resulted in an increase in the reliability and validity of ratings.\footnote{160}

To summarize, a rating system can withstand legal scrutiny if:\footnote{161} (1) the attributes rated are directly correlated (i.e., job related) with the results of a reliable job analysis; (2) the attributes rated are clear, definite factors (e.g., accuracy), not abstract, global traits (e.g., honesty); (3) the ratings are behaviorally based, allowing

\footnote{154} This frequently occurs where a job’s duties change over time based on technology or organizational development. The KSA’s rated were critical to the prior job, but have little importance for the new job. In the absence of a current job analysis, an employer may rate the old position’s relevant KSA’s which are less job related for the new position.\footnote{155} The instrument’s job relatedness has not been established and, in the face of adverse impact, would be a Title VII violation.\footnote{156} See Cascio & Bernardin, Implications of Performance Appraisal Litigation for Personnel Decisions, 34 Personnel Psychology 211, 217 (1981). See also, Albermarle, 422 U.S. at 431-33. The Court condemned the employer’s validation study as “materially defective” because the rating system did not comply with the job analysis requirements in the Guidelines.\footnote{157} See Kleiman & Durham, Performance Appraisal, Promotion and the Courts: A Critical Review, 34 Personnel Psychology 103, 114 (1981).\footnote{158} See L. Cronbach, supra note 21, at 512.\footnote{159} See A. Anastasi, supra note 140, at 612. The methods and utility of rater training for reduction in rating errors and bias are explicated in, See e.g., Bernardin & Pence, Effects Of Rater Training, 65 J. Applied Psychology 60 (1980); Borman, Format and Training Effects on Rating Accuracy and Rating Errors, 64 J. Applied Psychology 410 (1979).\footnote{160} Id.\footnote{161} See, APA Brief, supra note 8, at 1025.
for comparison (i.e., verification) of ratings with evidence of ratee’s job behavior; and (4) the raters are trained to reduce sources of bias and errors.

CONCLUSION

Watson’s legal impact remains unclear pending further clarification. However, the decision’s impact on employment practices will be immediate. Employers can no longer harbor discriminatory attitudes under the guise of subjective selection practices. In Watson, the Court purged selection practices of subjectivity in an effort to curb discrimination and create equal employment opportunity for all people. Watson serves notice to employers that subjective selection practices are to be strictly scrutinized in misuse.

Industrial psychologists can assist employers in the development and defense of subjective selection practices. Under Watson, cautious employers are advised to establish the job relatedness of all selection devices. Although this can be an expensive proposition, employers have several strategies available to them which have differing costs. In the face of climbing litigation expense, the costs saved on potential litigation makes validation a cost-effective approach to human resource management. In this role, industrial psychologists will become a strong force in human resource management in the 1990’s.

Daniel L. Bell

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