United States Court of Appeals

For the Eleventh Circuit

No. 98-6600

District Court Docket No. 94-00356-CV

IN RE: EMPLOYMENT DISCRIMINATION LITIGATION
AGAINST THE STATE OF ALABAMA, et al.,

EUGENE CRUM, JR., individually and on behalf of a class of similarly situated individuals, ROBERT L. SMITH, et al.,

Plaintiffs-Appellees,

versus

STATE OF ALABAMA, HALYCON VANCE BALLARD, individually and in her official capacity as Director, Alabama Department of Personnel, et al.,

Defendants-Appellants,

UNITED STATES OF AMERICA,

Intervenor.

Appeal from the United States District Court
for the Middle District of Alabama

Before ANDERSON, Chief Judge, TJOFLAT, Circuit Judge, and FAY, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 29, 1999
For the Court: Thomas K. Kahn, Clerk
By: Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: APR 07 2000

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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D. C. Docket No. 94-00356-CV-T-N

IN RE: EMPLOYMENT DISCRIMINATION LITIGATION
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(December 29, 1999)

both their individual and official capacities.[3] Some of the cases were class actions in which plaintiffs sued on behalf of themselves and all other black persons who are employed, have been employed, or who may in the future be employed by the defendants.[4] Plaintiffs claimed, inter alia, discrimination against African-Americans

> in layoffs, recalls from layoffs, terminations, discipline, hiring, rehiring, evaluations, compensation, transfers, job duty assignments, recruitment, screening, selection procedures, denial of promotions, demotions, rollbacks, sick leave, subjective decision-making practices, and other terms and conditions of employment which have resulted in disparate impact and treatment of the plaintiff-intervenors and the plaintiff class.

They sought declaratory, injunctive, and compensatory relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000(e), et seq., and 42 U.S.C. §§ 1981 and 1983 (1994).

Retirement System of Alabama, Voters Registration, the Department of Human Resources, the Department of Mental Health, the Medicaid Agency, the Board of Public Accounting, the Commission on Physical Fitness, the Labor Board, the State Docks Department, and the Department of Transportation.

[3] In this case, we are concerned only with the disparate impact provisions of Title VII. We are aware that Title VII "provides relief only against 'employers' as defined under the statute." Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1243 (11th Cir. 1998), cert. denied, 120 S. Ct. 327 (1999). We note the individual defendants only as background.

[4] The issue of class certification is currently pending before the district court.

which are predicated on a disparate impact theory of liability. Defendants timely appealed.[7]

II.

A district court's order denying or granting a motion to dismiss a complaint against a state based on the Eleventh Amendment's grant of sovereign immunity is reviewed by this court de novo. See Seminole Tribe v. Florida, 11 F.3d 1016, 1021 (11th Cir. 1994), aff'd on other grounds, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

III.

In resolving the issues presented on this appeal, it is helpful to look first at the anatomy of a Title VII discrimination case that employs disparate impact

[7] Although states can waive their sovereign immunity, the Eleventh Amendment has been interpreted as a jurisdictional barrier to the power of the federal courts. See Hans v. Louisiana, 134 U.S. 1, 15, 10 S. Ct. 504, 507, 33 L. Ed. 842 (1890) ("The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States."). As such, the Supreme Court has held that a district court order denying a claim by a state or a state entity to Eleventh Amendment immunity from suit in federal court may be appealed under the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993).

Id. at 425-26, 91 S. Ct. at 851.[9] Prior to the date of Title VII's enactment, the defendant company in Griggs had openly discriminated on the basis of race in the hiring and assignment of its employees. When the company abandoned its policy of de jure discrimination, it made the completion of high school a prerequisite for employees who wanted to transfer from the company's labor department (the only department previously employing African-Americans) to any other department in the company (all of which formerly hired only whites). The Court found that the high school requirement, as well as other standardized tests used by the defendant, had a disparate impact on African-Americans because "[i]n North Carolina . . ., while 34% of white males had completed high school, only 12 % of Negro males had done so." Id. at 430 n.6, 91 S. Ct. at 853 n.6. Similarly, "with respect to

[9] The particular provisions of Title VII interpreted by the Supreme Court in Griggs were 42 U.S.C. § 2000e-2(a)(2) and (h):

> (a) It shall be an unlawful employment practice for an employer–
>
> . . . .
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> . . . .
>
> (h) 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 provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin . . . .

See Griggs, 401 U.S. at 426 n.1, 91 S Ct. at 851 n.1.

Since Griggs, Congress has codified the appropriate burdens of proof in a disparate impact case in 42 U.S.C. § 2000e-2(k) (1994), and a settled jurisprudence has arisen to implement the methodology. In the first stage of a disparate impact case, the "complaining party [must] demonstrate[] that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(k)(1)(A)(i).[10] To "demonstrate" means to "meet[] the burdens of production and persuasion." 42 U.S.C. § 2000e(m) (1994). In other words, in order to surmount the first hurdle in a disparate impact race discrimination case, the plaintiff must make out a prima facie case "that [a] facially neutral employment practice ha[s] a significantly discriminatory impact." Connecticut v. Teal, 457 U.S. 440, 446, 102 S. Ct. 2525, 2530, 73 L. Ed. 2d 130 (1982). Demonstrating disparate impact in the first instance can be tricky business; it often involves ominous-sounding methods of statistical inquiry like "multiple regression analysis," see Eastland v. TVA, 704 F.2d 613, 621 (11th Cir. 1983), "standard deviation," see Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 n.3, 108 S. Ct. 2777, 2789 n.3, 101 L. Ed. 2d 827

[10] The statute also provides that "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(i).

(plurality). The Supreme Court has described as "nonsensical" comparisons to a baseline pool that is not adequately tailored to reflect only those potential applicants who are actually qualified for the job or job benefit at issue. Wards Cove, 490 U.S. at 651, 109 S. Ct. at 2122; see also New York Transit Auth. v. Beazer, 440 U.S. 568, 585-86, 99 S. Ct. 1355, 1365-66, 59 L. Ed. 2d 587 (1979) (where plaintiffs challenged city's policy of not employing persons using methadone as having a disparate impact on blacks and Hispanics, statistics indicating the racial composition of methadone users throughout the whole city "tells us nothing about the class of otherwise-qualified applicants and employees[,]" in part because "a substantial portion of the persons included in [the city-wide figures] are either unqualified for other reasons – such as the illicit use of drugs and alcohol – or have received successful assistance in finding jobs with employers other than [the defendant]"); Maddox v. Claytor, 764 F.2d 1539, 1549-50 (11th Cir. 1985) (holding that plaintiff's statistics did not "shed any light on the legally relevant issue" because they did not indicate "the group of applicants who were interviewed, or even the group of applicants found qualified or the group of all applicants"). "To adequately assess statistical data, there must be evidence identifying the basic qualifications [for the job or job benefit at issue] and a determination, based upon these qualifications, of the relevant statistical pool with

context of a pattern or practice case); see also Teamsters, 431 U.S. at 339-40 n.20, 97 S. Ct. at 1856-57 n.20 ("[E]vidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would . . . be relevant."); Peightal, 26 F.3d at 1554 ("[F]or positions requiring minimal training or for certain entry level positions, statistical comparison to the racial composition of the relevant population suffices, whereas positions requiring special skills necessitate a determination of the number of minorities qualified to undertake the particular task."). Courts have thus sometimes found helpful a showing of the racial composition of the pool of those who actually applied for a particular job or job benefit, see Teal, 457 U.S. at 443, 102 S. Ct. at 2528-29 (analyzing racial composition of the pool of persons who actually took written examination administered by employer); Nash v. Jacksonville, 905 F.2d 355, 358 (11th Cir. 1990) (same), or those who were found to be actually qualified in a given geographic area, see Hazelwood, 433 U.S. at 308, 97 S. Ct. at 2742. But even actual applicant statistics may "not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." Dothard, 433 U.S. at 330, 97 S. Ct. at 2727;

qualified but for their failure to meet the challenged employment requirement) for the job or job benefit at issue. If the court fails to define the qualified applicant pool in an appropriately specific manner, then the challenged employment practice has not actually been shown to be "causing" any "disparate impact." Something else, unrelated to the employer's practices and procedures, may be holding back a particular racial group. An example might help clarify our rationale. Consider a community composed of equal numbers of African-Americans and whites. There are, let us say, 1,000 blacks and 1,000 whites. Now, imagine that within this community, an employer announces that it is going to hire eighty new employees, all for identical labor positions, and that it will only consider applicants who have a high school diploma. The correlation between educational attainment and race in the community breaks down as follows: 30% of the African-American segment has a high school diploma (70% does not), whereas 50% of the white segment has a high school diploma (50% does not). Now assume that 100 blacks and 100 whites apply for the eighty jobs. Their educational attainment corresponds in all respects to that of the community at large; that is, thirty of the African-Americans have a high school education, as do fifty of the whites. Citing its high school degree requirement, the employer hires the thirty blacks and the fifty whites with high school degrees.

this hypothetical is that because the community as a whole is composed of equal numbers of blacks and whites, the eighty employment positions should also be filled with equal numbers of blacks and whites; but this is not the case. If the employer's population evidence is credible, then the qualified applicant pool includes only 60% of the blacks (because 40% are underage), but all of the whites. What we would expect, given these facts, is that the employment outcome absent the high school requirement would mimic that produced when a high school diploma is required – over 1.65 times as many whites as blacks will be hired because over 1.65 times as many are of working age. Under these facts, it is clear that the plaintiffs have not demonstrated that the high school diploma requirement has a disparate impact in the first instance.

Once the plaintiffs have met their burden of demonstrating that a challenged employment practice causes a disparate impact, the burden shifts to the defendant employer "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).[12] Alternatively, the complaining party can demonstrate "that

[12] The 1991 amendments to Title VII, inter alia, reversed the Supreme Court's interpretation in Wards Cove, 490 U.S. at 659, 109 S. Ct. at 2126, where the Court held that defendants only need to meet the burden of production, but not persuasion, during the second stage of a disparate impact case. Section 2000e-2(k)(1)(A)(i) requires an employer to "demonstrate" that the challenged practice is a job related business necessity, and as noted, supra,

successful in demonstrating that a high school education is a job related business necessity for the job at issue, then what the employer has done, in effect, is to demonstrate that the requirement does not actually cause a disparate impact. A finding of business necessity is equivalent to a finding that the qualified applicant pool only includes those persons who have attained a high school degree. Likewise, if the employer failed to demonstrate business necessity, then the plaintiffs would have succeeded in proving disparate impact in the ultimate sense; this is because the qualified applicant pool would include those persons of working age who did not posses the required education.

If the court ultimately finds that the employer has violated the disparate impact provisions of Title VII, and is therefore engaged in an unlawful employment practice, the court may order a wide range of equitable relief under 42 U.S.C. § 2000e-5(g)(1) (1994).[13] Principally, the court should enjoin the

[13] 42 U.S.C. § 2000e-5(g)(1) provides:
If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate

Citizens or Subjects of any Foreign State." The Amendment has been interpreted as a jurisdictional bar on the federal courts from hearing suits brought against states by their own citizens, or by citizens of other states. See Hans v. Louisiana, 134 U.S. 1, 15, 10 S. Ct. 504, 507, 33 L. Ed. 842 (1890). Under Seminole Tribe v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d (1996), Congress may abrogate a state's sovereign immunity, but it can only do so if: (a) Congress "unequivocally expressed its intent to abrogate the immunity," through "a clear legislative statement;" and (b) Congress has acted "pursuant to a valid exercise of power." Id. at 55, 116 S. Ct. at 1123 (quoting Green v. Mansour, 474 U.S. 64, 68, 106 S. Ct. 423, 426, 88 L. Ed. 2d 371 (1985)). Defendants claim that neither prong is satisfied with regard to the disparate impact provisions of Title VII. We now address their arguments in turn.

A.

Defendants first argue that in enacting the disparate impact provisions of Title VII, Congress failed to express a clear legislative statement of its intent to abrogate the states' sovereign immunity. We need address this contention only briefly. When Title VII was first enacted in 1964, its coverage was not extended to state and local governments. In 1972, the statute was amended to include

> Section 5. The Congress shall have the power to enforce, by ~~appropriate legislation, the provisions of this article.~~

In Fitzpatrick v. Bitzer, the Supreme Court concluded that,

> [i]n the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress, acting under § 5 of the Fourteenth Amendment, authorized federal courts to award money damages in favor of a private individual against a state government found to have subjected that person to employment discrimination on the basis of 'race, color, religion, sex, or national origin.'

427 U.S. at 447-48, 96 S. Ct. at 2667. The Court also stated that "[t]here is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment." Id. at 453 n.9, 96 S. Ct. at 2670 n.9. Given this clear precedential guidance, we have no hesitation in concluding that Congress unequivocally expressed its intent to abrogate the states' Eleventh Amendment immunity when it amended Title VII to cover state and local governments.

Defendants argue that subsequent Supreme Court decisions dealing with the clarity with which Congress must express its intent to abrogate, such as Dellmuth v. Muth, 491 U.S. 223, 228, 109 S. Ct. 2397, 2400, 105 L. Ed. 2d 181 (1989), and Atascadero State Hospital v. Scanlon, 473 U.S. 234, 239-40, 105 S. Ct. 3142, 3146, 87 L. Ed. 2d 171 (1985), compel a reconsideration of Fitzpatrick. We are unable to reconsider Fitzpatrick since the Supreme Court has clearly held that "if a

L. No. 102-166, § 105, 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k)),

it could not have meant to subject states to disparate impact suits (as opposed to disparate treatment, or pattern or practice suits) when it amended Title VII to cover state and local governments in 1972. This argument misunderstands the evolution of the disparate impact theory. Disparate impact analysis did not spring forth anew in 1991; as discussed, supra, in 1971 the Supreme Court interpreted the original Civil Rights Act of 1964, particularly sections 2000e-2(a)(2) and (h), see, supra, n.9, to prohibit "practices that are fair in form, but discriminatory in operation." Griggs, 401 U.S. at 431, 91 S. Ct. at 853. The Supreme Court has explicitly found that "Congress recognized and endorsed the disparate-impact analysis employed by the Court in Griggs," Teal, 457 U.S. at 447 n.8, 102 S. Ct. at 2531 n.8, and that "Congress indicated [in the 1972 amendments] the intent that the same Title VII principles be applied to governmental and private employers alike." Dothard, 433 U.S. at 331 n.14, 97 S. Ct. at 2728 n.14. There is no indication that, by enacting the 1991 amendments, Congress sought to do anything more than reaffirm and strengthen the disparate impact analysis, see supra, n.12 and part II. Therefore, defendants' argument, while interesting, is meritless because it is clear that Congress has, indeed, sought to subject states to disparate impact lability under Title VII.

employees of the Public Works Department of the City of Anniston, Alabama, sued their employer claiming that certain of the city's employment practices had a disparate impact on African-Americans. The City argued, and the district court ruled, that government entities could not be made subject to disparate impact claims under Title VII because "the legislature could not by statute create a right of action subject to less stringent requirements than those imposed by that amendment alone." Scott, 597 F.2d at 899. Because Supreme Court decisions like Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976), require plaintiffs to show that a government entity acted with discriminatory intent in order to demonstrate a Fourteenth Amendment violation, the district court in Scott reasoned that subjecting government agencies to disparate impact claims (which do not require a showing of discriminatory intent) was not within the congressional prerogative. The former Fifth Circuit reversed, finding that Title VII disparate impact analysis rested squarely within Congress' Section 5, Fourteenth Amendment power. See Scott, 597 F.2d at 900.

Defendants argue, first, that Scott is inapposite because the plaintiffs in Scott sued a municipality, a government entity not entitled to Eleventh Amendment sovereign immunity. This argument is wholly unconvincing. The question in Scott was essentially the same as the question of whether Congress has

The question presented by defendants is whether the disparate impact scheme, as we have described it in part III, supra, goes so far beyond the constitutional command – that no state deny to any person the equal protection of the law – that it cannot fit within Congress' Section 5 enforcement power. In order to make out a claim of status-based discrimination in violation of the constitutional guarantee of equal protection, a plaintiff must prove that a government agent acted with "discriminatory purpose," Davis, 426 U.S. at 239, 96 S. Ct. at 2047;[17] the requirement of discriminatory motive "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Adm'r v. Feeney, 442 U.S. 256, 279, 99 S. Ct. 2282, 2296, 60

[17] Davis was the first case in which the Supreme Court expressly stated, "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." Davis, 426 U.S. at 239, 96 S. Ct. at 2047. The plaintiffs in Davis, black applicants for employment as police officers by the District of Columbia, brought suit under the equal protection component of the Due Process Clause of the Fifth Amendment; they claimed that a written personnel test administered by the District of Columbia police department had a racially disparate impact on African-Americans. Had the Supreme Court held that plaintiffs using constitutional equal protection analysis to attack allegedly discriminatory state action need not demonstrate a discriminatory purpose, but only a disparate impact, then every state action having a disparate impact on a particular racial group would have become subject to the Court's strict scrutiny, "the most demanding test known to constitutional law." City of Boerne, 521 U.S. at 534, 117 S. Ct. at 2171.

Human Resources v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). In Smith, the Court concluded that consistent with the Free Exercise Clause, a state may apply neutral, generally applicable laws to religious practices even when those laws are not supported by a compelling government interest. With RFRA, Congress sought to supplant the Court's interpretation with one more favorable to religious interests. The Act attempted to "overrule" Smith by mandating that neutral laws that substantially burden religious exercise must be justified under the compelling government interest test. See City of Boerne, 521 U.S. at 512-15, 117 S. Ct. at 2160-62.

The Court concluded that Congress had acted beyond the scope of its Fourteenth Amendment enforcement power:

> Congress' power under § 5 . . . extends only to enforcing the provisions of the Fourteenth Amendment. The Court has described this power as 'remedial.' The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of the Fourteenth Amendment.'

have any meaning." Id. at 532, 117 S. Ct. at 2170. As to what a plaintiff class of religious observers would have to prove in a case brought under the Act, "RFRA's substantial burden test . . . [was] not even a discriminatory effects or disparate impact test." Id. at 535, 117 S. Ct. at 2171. Plaintiffs might be able to bring suit "[w]hen the exercise of religion ha[d] been burdened in an incidental way by a law of general application." Id. Once substantial burden was shown, "the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. . . . Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." Id. at 534, 117 S. Ct. at 2171.

Defendants contend that, like RFRA, the disparate impact provisions of Title VII are so out of line with the constitutional harm to be remedied that they cannot be sustained under Congress' Fourteenth Amendment enforcement power. They point out that demonstrating disparate impact does not require a plaintiff to show that the employer was motivated by a discriminatory purpose. In order to prove an equal protection violation, however, a plaintiff must demonstrate discriminatory intent, "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its

In a Title VII race discrimination disparate impact case, the plaintiff carries the prima facie burden of demonstrating to a court that a particular employment practice disproportionately burdens one racial group over another. As we described in our analysis in part III, supra, making out the prima facie case is not always such an easy thing to do. The plaintiff is forced to tailor her qualified applicant pool to represent only those applicants or potential applicants who are otherwise-qualified (but for the challenged employer practice) for the job or job benefit at issue. We emphasize the importance of this tailoring function because if the qualified applicant pool is adequately narrowed by the interaction between the plaintiff and defendant during the first stage of the analysis, then a prima facie finding of disparate impact by the court means that the plaintiff has demonstrated that the challenged practice (and not something else) actually causes the discriminatory impact at issue. Though the plaintiff is never explicitly required to demonstrate discriminatory motive, a genuine finding of disparate impact can be highly probative of the employer's motive since a racial "imbalance is often a telltale sign of purposeful discrimination." Teamsters, 431 U.S. at 339-40 n.20, 97 S. Ct. at 1856-57 n.20; see also Davis, 426 U.S. at 253, 96 S. Ct. at 2054 (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the

discrimination." Albemarle Paper, 422 U.S. at 425, 95 S. Ct. at 2375; see also Teal, 457 U.S. at 447, 102 S. Ct. at 2530 (even where employer demonstrates that a challenged practice is a job related business necessity, "the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination").

All of this is not to say that the plaintiff is ever required to prove discriminatory intent in a disparate impact case; it is clear that what plaintiffs must demonstrate is a discriminatory result, coupled with a finding that the employer has no explanation as to why the challenged practice should be sustained as a job related business necessity. What our analysis does show, however, is that the disparate impact provisions of Title VII can reasonably be characterized as "preventive rules" that evidence a "congruence between the means used and the ends to be achieved." Id. at 530, 117 S. Ct. at 2169. Congress has not sought to alter the "substance of the Fourteenth Amendment's restrictions on the States" with the disparate impact provisions of Title VII. City of Boerne, 521 U.S. at 519, 117 S. Ct. at 2164. Our analysis of the mechanics of a disparate impact claim has led us unavoidably to the conclusion that although the form of the disparate impact inquiry differs from that used in a case challenging state action directly

government actors to have adequately demonstrated a compelling interest, and a rarer one still that courts find no less restrictive alternatives to be available.

Finally, we need not dredge up this nation's sad history of racial domination and subordination to take notice of the fact that the "injury" targeted by Title VII, intentional discrimination against racial minorities, has since our inception constituted one of the most tormenting and vexing issues facing this country. There can be little doubt that the core motivation animating the Fourteenth Amendment's Equal Protection Clause was a concern for protecting the rights of racial minorities subject to historical discrimination, see Alexander Bickel, "The Original Understanding and the Segregation Decision," 69 Harv. L. Rev. 1 (1955), and that Congress is acting most comfortably under the Amendment when it is acting to cure racial prejudice. See Strauder v. West Virginia, 100 U.S. (10 Otto) 303, 306-07, 25 L. Ed. 664 (1880). The House Report accompanying the 1972 amendments to Title VII, extending coverage to state and local governments, documented the troubling persistence of race discrimination in public employment:

> In a report released in 1969, the U.S. Commission on Civil Rights examined equal employment opportunity in public employment in seven urban areas located throughout the country – North as well as South. The report's findings indicate that widespread discrimination against minorities exists in State and local government employment,

incongruent with the purpose of preventing intentional discrimination in public employment, nor disproportionate to the injury to be avoided.

V.

For the foregoing reasons, we conclude that in enacting the disparate impact provisions of Title VII, Congress has unequivocally expressed its intent to abrogate the states' Eleventh Amendment sovereign immunity, and that Congress has acted pursuant to a valid exercise of its Fourteenth Amendment enforcement power. We, therefore, AFFIRM the district court's denial of defendants' Rule 12(b)(1) motion to dismiss all disparate impact claims against the State of Alabama, based on the state's claim to sovereign immunity under the Eleventh Amendment.

AFFIRMED.

A True Copy - Attested:
Clerk, U.S. Court of Appeals
Eleventh Circuit
By: Lisa A. Festa
Deputy Clerk
Atlanta, Georgia