No. 29992 - Harold Moore, Clifford Cutlip, Michael Jackson, Fred Morgan, Richard Keener, Pat Vavrock, Steve Slavensky and Edward Cummings v. Consolidated Coal Company and Consolidation Coal Company Morgantown Operations

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Davis, C.J., concurring:

In this case the plaintiffs sought a new trial in their age discrimination suit brought against their former employer. The plaintiffs alleged that the trial court committed reversible error in excluding evidence of alternative layoff methods previously used by the defendant. The majority agreed with the plaintiffs and awarded a new trial. I concur in the disposition of this case by the majority. I have chosen to write separately because I believe "the majority's opinion confuse[s] the standards for disparate treatment and disparate impact discrimination cases[.]" *Conaway v. Eastern Associated Coal Corp*., 178 W. Va. 164, 172, 358 S.E.2d 423, 431 (1986) (McGraw, C.J., dissenting)

The majority opinion contends that "[t]his case is predicated solely upon a claim of disparate treatment." I disagree. This case presents a classic example of a disparate impact theory of discrimination.

Our cases allow recovery for unlawful discrimination premised upon theories of disparate treatment and disparate impact. In syllabus point 3 of *Conaway,* this Court set out

the elements of a prima facie claim of disparate *treatment*:

> In order to make a prima facie case of [disparate treatment] employment discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-1 *et seq*. (1979), the plaintiff must offer proof of the following:
>
> (1) That the plaintiff is a member of a protected class.
>
> (2) That the employer made an adverse decision concerning the plaintiff.
>
> (3) But for the plaintiff's protected status, the adverse decision would not have been made.

178 W. Va. 164, 358 S.E.2d 423 (1986). In syllabus point 3 of *West Virginia Univ. v. Decker*, 191 W. Va. 567, 447 S.E.2d 259 (1994), on the other hand, we set out the framework for litigating a disparate *impact* theory of liability:

> In proving a prima facie case of disparate impact under the Human Rights Act, *W. Va. Code* 5-11-1 [1967] *et seq.*, the plaintiff bears the burden of (1) demonstrating that the employer uses a particular employment practice or policy and (2) establishing that such particular employment practice or policy causes a disparate impact on a class protected by the Human Rights Act. The employer then must prove that the practice is "job related" and "consistent with business necessity." If the employer proves business necessity, the plaintiff may rebut the employer's defense by showing that a less burdensome alternative practice exists which the employer refuses to adopt. Such a showing would be evidence that employer's policy is a "pretext" for discrimination.

The foregoing authority demonstrates that we have developed two tests for showing unlawful discrimination. Each test focuses on a different issue. "Unlike disparate

treatment analysis, which turns on illegal motive, disparate impact turns on discriminatory effect." *Decker*, 191 W. Va. at 572, 447 S.E.2d at 264. The "[d]isparate treatment [model] is applicable to claims of intentional discrimination, as opposed to claims that a facially neutral practice is having disparate impact upon a protected class." *Decker*, 191 W. Va. at 570-571, 447 S.E.2d at 262-263. *See also Skaggs v. Elk Run Coal Co., Inc.*, 198 W. Va. 51, 74-75, 479 S.E.2d 561, 584-585 (1996) ("The crux of disparate treatment is, of course, discriminatory motive; the doctrine aims squarely at intentional acts."). Conversely, "[t]he disparate impact model bars an employer from relying on employment criteria that disproportionately affect a protected class[.]" *Skaggs*, 198 W. Va. at 63, 479 S.E.2d at 573 (citation omitted). *See also Morris Mems. Convalescent Nursing Home, Inc. v. West Virginia Human Rights Com'n*, 189 W. Va. 314, 317, 431 S.E.2d 353, 356 (1993) ("More specifically, '[t]he disparate impact theory is invoked to attack facially neutral policies which, although applied evenly, impact more heavily on a protected group.'" (quoting *Racine United Sch. Dist. v. Labor and Indus. Review Comm'n*, 476 N.W.2d 707, 718 (Wis. 1991))). Consequently, "'a complainant asserting a *disparate treatment* theory *must prove discriminatory intent* to prevail, while a complainant asserting a *disparate impact* theory *need not offer any such proof*.'" *Morris Mem'l*, 189 W. Va. at 317, 431 S.E.2d at 356 (quoting *Racine*, 476 N.W.2d at 718) (emphasis added).

In the instant proceeding, the plaintiffs alleged that the use of a facially neutral layoff policy by the defendant had an adverse impact on age protected employees. The

plaintiffs also contended that the defendant had previously used a layoff policy that did not adversely affect age protected employees. The plaintiffs are relying upon statistical data to show the impact of the complained of layoff policy, as well as the layoff policies that were used in the past. These facts strongly support a disparate impact theory. We have recognized that "[d]isparate impact in an employment discrimination case is ordinarily proved by statistics[.]" Syl. pt. 7, *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995).

Although I believe the plaintiffs' case strongly supports the disparate impact theory, on remand the plaintiffs are not precluded from having the jury instructed on both the disparate impact model and the disparate treatment model. *See Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995) (holding that plaintiff's evidence showed disparate treatment, but not disparate impact).

In view of the foregoing, I concur. I am authorized to state that Justice Maynard joins me in this concurring opinion.