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Burdening the Plaintiff: Proving Employment Discrimination after *Kastanis v. Educational Employees Credit Union*

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BURDENING THE PLAINTIFF: PROVING EMPLOYMENT DISCRIMINATION AFTER *KASTANIS V. EDUCATIONAL EMPLOYEES CREDIT UNION*

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Abstract: In *Kastanis v. Educational Employees Credit Union*,[1] the Washington Supreme Court held that a plaintiff who presents direct, undisputed evidence of discrimination bears the burden of persuading the jury that the employer's actions were not justified by business necessity. By substantially increasing the plaintiff's burden, this decision will make it more difficult for plaintiffs to successfully litigate employment discrimination claims in Washington State. Not only is the court's reasoning contrary to existing state and federal law, but there are also strong policy reasons arguing against the continued application of the court's rule.

The Educational Employees Credit Union (EECU) terminated Peggy Jones's employment when she married a co-employee, Dean Kastanis. Peggy Jones began working for the EECU in 1973. Originally, Ms. Jones was a teller, but after her promotion in the early 1980s, she became an accounting manager. Dean Kastanis was appointed Chief Executive Officer of the EECU in 1973. In 1985, Mr. Kastanis and Ms. Jones began seeing each other socially. Although the EECU had previously had in place a policy precluding employment of close relatives without prior approval of the Board of Directors, it abolished this policy in 1986. On October 5, 1989, Mr. Kastanis informed the Board that he and Ms. Jones would marry within two weeks. The Board concluded that this marriage would result in a conflict of interest.[2]

Specifically, the Board expressed concerns that the marriage would result in a conflict of interest because Mr. Kastanis, the CEO, would have supervisory authority over his wife in her role as accounting manager. Additionally, the CEO and accounting manager were responsible for auditing each other's work.[3] Notwithstanding the Board's disapproval, Peggy and Dean married on October 21, 1989.

1. 122 Wash. 2d 483, 859 P.2d 26 (1993), *amended*, 865 P.2d 507 (Wash. 1994).
2. *Id.* at 486, 859 P.2d at 28.
3. *Id.* at 496–97, 859 P.2d at 33.

Four days later, the Board voted to terminate Peggy,[4] and two months after Peggy's discharge, the Board asked Dean to resign.[5]

Ms. Kastanis[6], responded by suing her employer for sex discrimination under state and federal law and for wrongful discharge, intentional infliction of emotional distress, and marital status discrimination under Washington State law.[7] On the issue of marital status discrimination, the trial judge charged the jury that the plaintiff had the burden of proving that: (1) she was married to another employee of defendant's company; (2) she was terminated from her employment with the defendant; and (3) but for her marital status, she would not have been terminated.[8] The judge further instructed that, should the jury find that Ms. Kastanis had proved these propositions, it should enter a judgment for the plaintiff. Alternatively, if the jury found that the defendant had proved the "business necessity" of its practice, it should render its verdict for the defendant.[9] The jury returned a verdict for the plaintiff on the issue of marital status discrimination.[10]

The EECU appealed the judgment, and the court of appeals certified the EECU's appeal to the Washington Supreme Court. The supreme court vacated the judgment and remanded the case, holding that the judge's instruction was erroneous because it placed the burden of persuasion[11] on the employer to prove the defense of business necessity. The court held that the employer merely has a burden of production[12]

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4. *Id.* at 486, 859 P.2d at 28.

5. *Id.* at 487, 859 P.2d at 28. The court's statement of facts gives no indication as to why Dean Kastanis was terminated from his job. This fact, however, was not relevant to the disposition of this case.

6. Ms. Jones adopted her husband's name after their marriage.

7. *Id.* The applicable Washington statute provides: "It is an unfair practice for any employer . . . [t]o discharge or bar any person from employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability . . . ." Wash. Rev. Code § 49.60.180 (1994).

8. *Kastanis*, 122 Wash. 2d at 489, 859 P.2d at 29.

9. *Id.*

10. *Id.* at 487, 859 P.2d at 28. The trial court granted summary judgment for the defendant on the Title VII, wrongful discharge, and intentional infliction of emotional distress claims. The jury ruled against Ms. Kastanis on her sex discrimination claim. *Id.*

11. The burden of persuasion has been defined as "[t]he onus on the party with the burden of proof to convince the trier of fact of all elements of his case." *Black's Law Dictionary* 196 (6th ed. 1991).

12. The burden of production has been defined as "[t]he obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue. Such burden is met when one . . . has introduced sufficient evidence to make out a prima facie case, though the cogency of the evidence may fall short of convincing the trier of fact to find for him." *Id.*

with regard to this defense and the burden of persuasion remains with the plaintiff to prove the absence of business necessity.[13] This ruling is the focus of this Note.

This Note begins with an examination of existing federal and state employment discrimination law. Part II then analyzes and criticizes the holding in *Kastanis v. Educational Employees Credit Union* on three separate grounds. First, this Note argues that when a plaintiff provides direct, undisputed evidence of discrimination the burden should be on the employer to justify its actions. Second, it contends that a bona fide occupational qualification defense, and not a business necessity defense, should have been applied. Finally, it argues that, even applying a business necessity defense, the court should have placed the burden of proving the defense on the employer.

I. FEDERAL AND STATE EMPLOYMENT DISCRIMINATION LAW

A. Relationship Between State and Federal Law

A plaintiff may bring a federal claim for unlawful employment discrimination under Title VII of the Civil Rights Act (Title VII) which prohibits discrimination based on race, color, religion, sex, or national origin.[14] In addition, many states have enacted statutes similar to Title VII prohibiting employment discrimination and providing an employee with a state, as well as a federal, cause of action for employment discrimination.[15] In Washington, Title 49 of the Revised Code of Washington (RCW) is patterned after Title VII[16] but expands Title VII's

13. *Kastanis*, 122 Wash. 2d at 493–94, 859 P.2d at 32.

14. Title VII provides:

> It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment 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.

42 U.S.C. § 2000e-2(a) (1988).

15. Title VII is not intended to be the exclusive remedy for those claiming employment discrimination but rather is intended to supplement existing fair employment practices and laws. Alexander v. Gardner-Denver Co., 415 U.S. 36, 48–49 (1974).

16. Johnson v. Goodyear Tire & Rubber Co., 790 F. Supp. 1516, 1525–26 (E.D. Wash. 1992) (stating that the "order of proof, burdens of production, and ultimate burden of persuasion are the

protection by adding additional categories of prohibited discrimination, including marital status.[17] Under Title 49, the term marital status refers not only to the condition of being married or single, but also to the identity of one's spouse.[18] Thus, an employee who is discharged or discriminated against because of the identity or occupation of the employee's spouse has a cause of action for marital status discrimination. Because Washington's employment discrimination law is patterned after federal law and the *Kastanis* court relies on federal case law in its opinion, federal authority is relevant to the applicable defenses and the placement of burdens in *Kastanis*.

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same under both Title VII and RCW § 46.90"); Oliver v. Pacific N.W. Bell Tel. Co., 106 Wash. 2d 675, 678, 724 P.2d 1003, 1005 (1986) (holding that Wash. Rev. Code § 49.60 is patterned after Title VII of the Civil Rights Act and therefore decisions interpreting Title VII are persuasive authority in interpreting Wash. Rev. Code § 49.60); Fahn v. Cowlitz County, 93 Wash. 2d 368, 376, 610 P.2d 857, 861 (1980), *amended*, 621 P.2d 1293 (Wash. 1981) (finding federal authority persuasive in construing state employment discrimination statute); Hollingsworth v. Washington Mut. Sav. Bank, 37 Wash. App. 386, 390, 681 P.2d 845, 848 (1984) (holding that state courts should look to interpretations of Title VII of the 1964 Civil Rights Act when construing Wash. Rev. Code § 49.60 because the two statutes are substantially similar).

17. *See supra* note 7. The Washington State employment discrimination statute applies to "any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit." Wash. Rev. Code § 49.60.040(3) (1994). An employee who is employed by his or her "parents, spouse, or child, or [employed in the] domestic service of any person" is not covered by this statute. *Id.*

18. Because the legislature had not defined the term "marital status" in 1993, the Human Rights Commission promulgated the following rule: "[D]iscrimination against an employee or applicant for employment because of (a) what a person's marital status is; (b) who his or her spouse is; or (c) what the spouse does, is an unfair practice because the action is based on the person's marital status." Wash. Admin. Code § 162-16-150 (1992). *See also* Washington Water Power Co. v. Washington State Human Rights Comm'n, 91 Wash. 2d 62, 68–69, 586 P.2d 1149, 1153 (1978) (holding that the Human Rights Commission did not exceed its authority by promulgating rules which stated that discriminating against an employee based on the identity or occupation of the employee's spouse constitutes marital status discrimination). In 1993, the legislature amended the RCW by adding a definition of marital status. Martial status under the RCW is now defined as "the legal status of being married, single, separated, divorced, or widowed." Wash. Rev. Code § 49.60.040 (1994). In the future, this amended provision may eliminate the cause of action for marital status discrimination based upon the identity of one's spouse. No state court, however, has addressed this issue, so it is unclear whether courts will continue to abide by previous decisions broadly interpreting the definition of marital status or will now adopt a more restrictive definition. Notwithstanding this statutory amendment, the court's ruling in *Kastanis* will affect all future employment discrimination cases because it changes the traditional placement of the burdens of proof.

B. *The Plaintiff's Prima Facie Case*

Under federal law, an employee who feels that she[19] has been discriminated against may bring suit under either a disparate treatment theory of discrimination or a disparate impact theory of discrimination.[20] As in all civil cases, the plaintiff in an employment discrimination suit bears the burden of proving a prima facie case by a preponderance of the evidence.[21] In the employment discrimination area, a plaintiff may present a prima facie case of discrimination either by providing direct evidence of discrimination, or more commonly, by providing indirect evidence of discrimination. Because plaintiffs often choose to present a prima facie case by using indirect evidence of discrimination, the courts have established a burden-shifting scheme applicable to both disparate treatment and disparate impact employment discrimination cases.

1. *Disparate Treatment*

When a plaintiff sues under a disparate treatment theory, the plaintiff is alleging that the employer has intentionally discriminated against her.[22] To prove disparate treatment, a plaintiff must show that the defendant has acted with discriminatory intent by demonstrating that the employer's action was at least partially motivated by an illegitimate purpose.[23] A plaintiff may present a prima facie case of disparate treatment by presenting direct evidence of discrimination.[24] Because the majority of plaintiffs in employment discrimination cases do not possess direct evidence of discrimination,[25] plaintiffs generally establish a prima facie case of intentional discrimination using the three-step burden-shifting test articulated in a trilogy of U.S. Supreme Court cases,

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19. Because the plaintiff in *Kastanis* is a woman, this Note uses the pronoun "she" throughout the paper for the sake of simplicity and consistency.

20. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713 n.1 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 n.5 (1981); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977); Johnson v. Goodyear Tire & Rubber Co., 790 F. Supp. 1516, 1525 (E.D. Wash. 1992) (citing Oliver v. Pacific N.W. Bell Tel. Co., 106 Wash. 2d 675, 678, 724 P.2d 1003, 1005 (1986)).

21. Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989); *Burdine*, 450 U.S. at 252–53; *International Bhd. of Teamsters*, 431 U.S. at 336; Hollingsworth v. Mutual Sav. Bank, 37 Wash. App. 386, 390, 681 P.2d 845, 848 (1984).

22. *International Bhd. of Teamsters*, 431 U.S. at 335–36 n.15.

23. *Price Waterhouse*, 490 U.S. at 241–42.

24. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

25. *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring).

beginning with *McDonnell Douglas Corp. v. Green*,[26] and adopted by Washington State.[27]

To establish a prima facie case of intentional discrimination under the *McDonnell Douglas* formula, the plaintiff must first allege that she was a member of a protected group, was discharged, was replaced with a member not within that protected group, and was qualified to do the job.[28] Once the plaintiff establishes these four elements, the factfinder may infer unlawful discrimination. The second part of the *McDonnell Douglas* formula then allows the defendant to rebut the inference of discrimination by articulating a legitimate, non-discriminatory reason for its actions.[29] The defendant's burden at this stage is one of production, not of persuasion.[30] If the defendant meets its burden of producing a legitimate, non-discriminatory reason for its actions, the third part of the test requires the plaintiff to prove by a preponderance of the evidence that she has been intentionally discriminated against.[31] Once a plaintiff has established a prima facie case, either by meeting the *McDonnell Douglas* test or by presenting direct evidence, the burden-shifting scheme drops from the case.[32] The *McDonnell Douglas* test thus aids a

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26. 411 U.S. 792 (1973). *See also* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

27. Kastanis v. Educational Employees Credit Union, 122 Wash. 2d 483, 490, 859 P.2d 26, 30 (1993), *amended*, 865 P.2d 507 (Wash. 1994) (citing Grimwood v. University of Puget Sound, Inc., 110 Wash. 2d 355, 364, 753 P.2d 517, 521 (1988)).

28. *Aikens*, 460 U.S. at 714; *Burdine*, 450 U.S. at 253 n.6; International Bhd. of Teamsters v. United States, 431 U.S. 324, 357–58 (1977); *McDonnell Douglas*, 411 U.S. at 802; *Kastanis*, 122 Wash. 2d at 490, 859 P.2d at 30.

29. *Aikens*, 460 U.S. at 714; *Burdine*, 450 U.S. at 253 n.6; *International Bhd. of Teamsters*, 431 U.S. at 357–58; *McDonnell Douglas*, 411 U.S. at 802; *Kastanis*, 122 Wash. 2d at 490, 859 P.2d at 30.

30. If the defendant does not offer any legitimate, non-discriminatory reason for its action, it has failed to meet its burden and judgment should be entered for the plaintiff. The defendant's burden, however, is not to persuade the court that it was motivated by the legitimate, non-discriminatory reason that it has articulated, but merely to raise a genuine issue of material fact as to whether the defendant did actually discriminate against the plaintiff. *Kastanis*, 122 Wash. 2d at 490, 859 P.2d at 30 (citing *Burdine*, 450 U.S. at 254, 257).

31. Until recently, a plaintiff could meet her burden by demonstrating that the legitimate, non-discriminatory reasons offered by the defendant were merely a pretext for discrimination. *See Aikens*, 460 U.S. at 714–15; *Burdine*, 450 U.S. at 253; *McDonnell Douglas*, 411 U.S. at 804; *Kastanis*, 122 Wash. 2d at 30–31, 859 P.2d at 491. A pretext is an "[o]stensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance, pretense." *Black's Law Dictionary* 1187 (6th ed. 1991). *But see* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2751 (1993) (holding that a plaintiff cannot prevail on a disparate treatment claim by merely convincing the factfinder that the reasons offered by the defendant were pretextual, but instead needs to affirmatively prove that the defendant intentionally discriminated against her).

32. *Kastanis*, 122 Wash. 2d. at 491, 859 P.2d at 31 (citing *Burdine*, 450 U.S. at 255 n.10).

plaintiff in making out a prima facie case of discrimination, although the ultimate burden of persuading the factfinder that the defendant has intentionally discriminated against the plaintiff remains at all times with the plaintiff.[33]

2. *Disparate Impact*

When a plaintiff brings a disparate impact claim, she is not alleging that the employer has intentionally discriminated against her but instead is alleging that a facially neutral policy has a disproportionate impact on a protected group.[34] To establish a prima facie case in a disparate impact case, the plaintiff must present evidence that the employer's practice selects employees in a significantly discriminatory manner.[35] The intent underlying the employer's action, therefore, is not relevant.[36] To prove disparate impact, a plaintiff usually relies on statistical evidence to show that the employer's employment practices operate to discriminate against a group,[37] and the parties' arguments consequently center on competing explanations for the statistical disparities.

C. *Defenses*

If a plaintiff relies on indirect evidence of discrimination, an employer may escape liability if it articulates a legitimate, non-discriminatory reason for its actions and the plaintiff fails to convince the trier of fact that the employer did in fact engage in discriminatory behavior. Even if a plaintiff meets her burden of persuading the factfinder that she has been discriminated against, however, an employer may sometimes escape liability through one of two separate defenses. Under federal law there

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33. *Id.* at 492, 859 P.2d at 31 (citing *Burdine*, 450 U.S. at 256).

34. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

35. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Contreras v. City of Los Angeles, 656 F.2d 1267, 1275 n.5 (9th Cir. 1981).

36. *International Bhd. of Teamsters*, 431 U.S. at 335 n.15.

37. *Id.* The Equal Employment Opportunity Commission (EEOC) guidelines have established a "four-fifths rule" which allows a plaintiff to instruct the jury that it may draw an inference of disparate impact discrimination when the class allegedly discriminated against occupies less than twenty percent of the jobs in question. 29 C.F.R. § 1607.4(D) (1993). This approach has been severely criticized and Washington courts have explicitly rejected this rule. *See* Shannon v. Pay 'N Save Corp., 104 Wash. 2d 722, 728–29, 709 P.2d 799, 804–05 (1985) (holding that rule should not be applied because (1) the jury should be free to form its own opinion based on the evidence presented without adhering to a mechanical formula; (2) the formula lacks both a substantive and a statistical basis; and (3) adopting this rule would compromise Washington's policy of avoiding jury instructions that comment on the evidence or emphasize certain portions of the case).

are two distinct defenses, the "bona fide occupational qualification" (BFOQ) defense and the business necessity defense. These two defenses arise in different contexts and cannot be interchanged. Disparate treatment may sometimes be justified by showing that the practice is based on a bona fide occupational qualification, while disparate impact may be justified by demonstrating that the practice is mandated by business necessity.

1. The Bona Fide Occupational Qualification Defense

Title VII provides the employer with a BFOQ defense which relieves an employer who intentionally discriminates against an employee from liability under limited circumstances. The BFOQ defense permits otherwise discriminatory actions when an employer can prove that those actions are necessary to the normal operation of its particular business or enterprise.[38] To prove a BFOQ defense, an employer must persuade the factfinder that all or substantially all members of the excluded class cannot safely and effectively perform essential job duties.[39] Because Congress intended the BFOQ to be a narrowly construed exception to the prohibition against discrimination,[40] courts have consistently held that a

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38. 42 U.S.C. § 2000e-2(e) (1988) provides:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

The BFOQ language indicates that the defense is applicable to hiring situations, but federal courts have interpreted this language more broadly to apply to other employment situations, including discharges. *See* Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) (Federal Aviation Administration regulation requiring flight engineers to retire at age 60); Johnson v. Mayor & City Council of Baltimore, 472 U.S. 353 (1985) (Federal Civil Service statute requiring firefighters to retire at age 55); Levin v. Delta Air Lines, Inc., 730 F.2d 994 (5th Cir. 1984) (policy requiring transfer of pregnant flight attendants).

Washington courts have similarly applied the BFOQ defense to employment situations outside of hiring, such as discharges, although the statute itself indicates that the defense is only applicable to hiring situations. Wash. Rev. Code § 49.60.180 (1994) ("It is an unfair practice for any employer: (1) *to refuse to hire* any person because of age, sex, marital status, . . . *unless based upon a bona fide occupational qualification* . . . (2) *To discharge or bar* any person from employment because of age, sex marital status . . . " (emphasis added)).

39. *See* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

40. Dothard v. Rawlinson, 433 U.S. 321, 333 (1977); *Weeks*, 408 F.2d at 232. *See also* 29 C.F.R. § 1604.2 (1993); 110 Cong. Rec. 7213 (1964) (stating that § 703(e)(1) creates a "limited exception"); H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

defendant must bear the burden of persuasion in establishing a BFOQ.[41] This interpretation comports with a traditional canon of statutory construction: when there is a humanitarian remedial statute which serves an important public purpose, the burden of proving an exception to the general policy of the statute should be upon the person claiming the exception.[42]

2. *Business Necessity Defense*

While the BFOQ is a defense to some disparate treatment discrimination claims, "business necessity" is the appropriate defense to a disparate impact discrimination claim.[43] After a plaintiff presents a prima facie case of disparate impact discrimination, the employer may escape liability by showing that the exclusionary practices are manifestly related to job duties.[44] However, even if the employer can show that there is a manifest relationship between the discriminatory practice and a significant business purpose, the defendant may still be liable if the plaintiff can demonstrate that there was an alternative method of achieving the employer's articulated purpose that would have either a lesser or no adverse effect on the protected group.[45] Like the BFOQ defense, the burden of persuading the factfinder that business necessity required the utilization of the discriminatory practice lies with the employer.[46]

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41. *Dothard*, 433 U.S. at 329; Jatczak v. Ochburg, 540 F. Supp. 698, 702 (E.D. Mich. 1982).

42. *Weeks*, 408 F.2d at 232 (citing Phillips Co. v. Walling, 324 U.S. 490, 493 (1952)).

43. Fahn v. Cowlitz County, 93 Wash. 2d 368, 379–80, 610 P.2d 857, 863 (1980), *amended*, 621 P.2d 1293 (Wash. 1981).

44. *Dothard*, 433 U.S. at 329; Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). Over the years, the federal courts have changed the requirement of what an employer must prove to prevail on a business necessity defense. For instance, the test has ranged from needing to prove that the device in use was necessary to the normal operation of the business to having to show that the device was merely job-related. *Griggs*, 401 U.S. at 432 (holding that employer must show that requirement was necessary to the normal operation of the businesses in order to prevail on a business necessity defense); Contreras v. City of Los Angeles, 656 F.2d 1267, 1279–80 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (holding that business necessity is established if requirements are significantly correlated with important elements of the job). The least stringent standard was imposed by the Supreme Court in Wards Cove v. Atonio, 490 U.S. 642 (1989), discussed *infra* notes 90–94 and accompanying text, where the Court held that the plaintiff bears the burden of proving that the practice was not manifestly job-related.

45. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (citing McDonnell Douglas Corp. v. Green, 411 U.S 792, 804 (1973)); EEOC v. Rath Packing Co., 787 F.2d 318, 328 (8th Cir. 1986); *Contreras*, 656 F.2d at 1285.

46. *Albemarle*, 422 U.S. at 425; *Griggs*, 401 U.S. at 432; *Contreras*, 656 F.2d at 1285; *Fahn*, 93 Wash. 2d at 382 n.4, 610 P.2d at 865 n.4.

3. *Differentiating Between the Two Defenses*

The burden of proving a BFOQ defense is substantially greater than the burden of proving that a requirement is justified by business necessity. In order to prevail on a BFOQ defense, an employer must demonstrate that virtually all members of the excluded class are unable to perform the job, while in order to prevail on a business necessity defense, an employer generally need only show that a job requirement bears a manifest relationship to the job.

When a policy or action is facially discriminatory, the plaintiff will have a claim of disparate treatment and a BFOQ will be the appropriate defense. For instance, in *Dothard v. Rawlinson*,[47] the U.S. Supreme Court held that the employer needed to prove a BFOQ in order to justify its policy prohibiting the employment of female prison guards. The BFOQ defense was appropriate in that instance because females are a protected class under Title VII and the policy in question explicitly discriminated against women. In order to justify its policy of not hiring persons shorter than 5 feet 2 inches for certain positions, however, the employer only needed to prove the business necessity of this requirement. This distinction was correct because persons under 5 feet 2 inches, unlike women, are not a protected class under Title VII.[48] Because the challenged policy did not facially discriminate against a protected class, the plaintiffs needed to prove that the policy had a disparate impact on a protected class because a larger percentage of persons under 5 feet 2 inches are women. Consequently, the employer needed to demonstrate the business necessity of the height requirement as a defense to the disparate impact claim.[49]

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47. 433 U.S. 321 (1977).

48. At least one Washington Supreme Court Justice has stated that persons who are discriminated against because of their height are a protected class because they have a physical handicap. *Fahn*, 93 Wash. 2d at 387, 610 P.2d at 867 (1980) (Dolliver, J., dissenting). A handicap has been defined as "a disadvantage that makes achievement unusually difficult; *esp*: a physical disability that limits the capacity to work." Chicago, Milwaukee, St. P. & Pac. R.R. v. State Human Rights Comm'n, 87 Wash. 2d 802, 805, 557 P.2d 307, 310 (1976) (emphasis in original). Thus, according to Justice Dolliver, employers should only be able to discriminate against persons based on their height if they can show that the minimum height requirement is a bona fide occupational qualification.

49. Levin v. Delta Air Lines Inc., 730 F.2d 994 (5th Cir. 1984), provides another example of this distinction. In *Levin*, a class of women brought suit challenging the airline's policy prohibiting the employment of pregnant flight attendants. Prior to the Pregnancy Act Amendment of 1978, these women would have needed to sue under a disparate impact theory because they were alleging that Delta's policy had a disparate impact on women, a protected class. After the Amendment, however, pregnant women became a protected class, and those discriminated against on the basis of their pregnant condition could sue under a disparate treatment theory. *Id.* at 996.

The United States Supreme Court again distinguished between the BFOQ and business necessity defenses in *International Union, U.A.W. v. Johnson Controls*.[50] In *Johnson Controls*, the defendant's company policy forbade women employees of childbearing age from working in areas where they would be exposed to significant amounts of lead.[51] The Court of Appeals for the Seventh Circuit held that the policy did not constitute sex-based discrimination because the employer had proved its business necessity.[52] The Supreme Court reversed, holding that the defense of business necessity was inapplicable because the policy was discriminatory on its face and could therefore only be validated if the employer could prove that not being a woman of childbearing age was a BFOQ.[53]

II. *KASTANIS V. EDUCATIONAL EMPLOYMENT CREDIT UNION*

A. The McDonnell Douglas Formula is Inapplicable in this Case

In *Kastanis*, the court confused the business necessity defense with the legitimate business justification prong of the *McDonnell Douglas* test. The fact that Ms. Kastanis presented direct, undisputed evidence of discrimination removes this case from the *McDonnell Douglas* formula. Business necessity is a defense to a claim of disparate impact, while the legitimate business justification prong of the *McDonnell Douglas* test is a formula devised to assist a plaintiff who lacks direct evidence in making out a prima facie case. An employer bears the burden of persuasion with regard to a business necessity defense, whereas the employer only bears the burden of production with regard to the legitimate business justification defense. These two defenses are distinct, serve utterly different purposes, and are, in any case, inapplicable here.

The three-step burden-shifting test devised in *McDonnell Douglas* is used when a plaintiff attempts to make out a prima facie case of discrimination but does not have direct evidence of discrimination. An employer accused of discrimination typically denies that an action taken

50. 499 U.S. 187 (1991).

51. *Id.*

52. The Court accepted Johnson Controls's argument that its policy was justified by business necessity because it was needed to protect women working in these areas from suffering an increased risk of bearing children with birth defects. Significantly, even though the appellate court applied the wrong defense, it placed the burden on the employer to prove the business necessity of its actions. *Id.*

53. *Id.* at 199–200.

was for the improper reasons stated by the plaintiff. In doing so, the employer often asserts that it had a legitimate, non-discriminatory reason for its actions. Courts adopted the *McDonnell Douglas* formula because they recognized that plaintiffs almost always lack direct evidence of discrimination[54] and therefore need to rely on circumstantial evidence from which a jury could draw an inference of discrimination. The *McDonnell Douglas* formula thus permits plaintiffs to make out a prima facie case based on that inference.[55]

Courts have repeatedly stated, however, that the burden-shifting scheme presented in *McDonnell Douglas* is inapplicable when a plaintiff presents direct evidence of discrimination.[56] Thus, when the defendant admits that it has discriminated against the plaintiff on a prohibited basis but offers an excuse for that action, the plaintiff has made out a prima facie case and the *McDonnell Douglas* formula is no longer needed.[57] When there is direct evidence of discrimination, the discriminatory policy is presumptively invalid and the defendant may escape liability only by proving an affirmative defense.

In *Kastanis*, the plaintiff presented direct, undisputed evidence of discrimination: the defendant intentionally discriminated against her due to her change in marital status when she married a co-worker. The employer did not dispute this allegation but rather justified

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54. Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring).

55. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (citing Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)).

56. *Trans World Airlines*, 469 U.S. at 121; Jackson v. Harvard Univ., 900 F.2d 464, 467 (1st Cir. 1990). *See also Johnson Controls*, 499 U.S. at 200 (citing the Equal Employment Opportunity Commission's statement that "[f]or the plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law."); Terbovitz v. Fiscal Court of Adair County, 825 F.2d 111, 115 (6th Cir. 1987) (holding that direct evidence of discrimination removes the case from the *McDonnell Douglas* formula because the plaintiff no longer needs the inference of discrimination); Grimwood v. University of Puget Sound, Inc., 110 Wash. 2d 355, 362–63, 753 P.2d 517, 520 (1988) (stating that the *McDonnell Douglas* formula aids a plaintiff in making out a case of discrimination with circumstantial evidence). In *Price Waterhouse*, Justice O'Connor reasoned as follows:

> [T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by. That the employer's burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the same manner where there is direct evidence of intentional discrimination.

Price Waterhouse, 490 U.S. at 271 (O'Connor, J., concurring).

57. Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1039 (2d Cir. 1993) ("The critical question is whether a plaintiff has proven by a preponderance of the evidence that the defendant intentionally discriminated or retaliated against the plaintiff for engaging in protected activity." (citing Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990))).

discriminating against the plaintiff on the grounds of business necessity. Thus the employer was offering a defense, and the application of the *McDonnell Douglas* formula was inappropriate given that the plaintiff offered direct proof of discrimination under a disparate treatment theory. If the plaintiff had presented evidence of discrimination that had been disputed by the employer, then the court would have been correct in applying the *McDonnell Douglas* formula and placing the burden of persuasion on the plaintiff after the employer had offered a legitimate reason for its actions. In that scenario, however, the plaintiff has not made out a prima facie case. The *McDonnell Douglas* formula would therefore be applicable because the employer has not conceded that it has acted in a discriminatory manner, but is alleging that its actions have been misinterpreted.

The *Kastanis* court's misapplication of *McDonnell Douglas* also led it to misconstrue the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*.[58] Unlike the plaintiff in *St. Mary's*, the plaintiff in *Kastanis* offered direct, undisputed evidence of discrimination. The *Kastanis* court correctly noted that in *St. Mary's* the Supreme Court held that even after the plaintiff had proven that the reasons given by the defendant employer were pretextual, the plaintiff still had to carry the burden of persuasion on the issue of whether he was discriminated against. *St. Mary's*, however, differs from the present case in one important respect: in *St. Mary's*, the defendant employer disputed the employee's allegation of discrimination. The plaintiff in *St. Mary's* alleged that his discharge was racially motivated. The defendant employer rebuffed that charge and claimed that the plaintiff was discharged for legitimate reasons and not because of his race. The Supreme Court held that once the defendant employer had provided legitimate reasons in support of its actions, the burden-shifting scheme dropped from the case and the plaintiff needed to prove the ultimate issue; that is, that he had been the subject of discriminatory action. In contrast, the employer in *Kastanis* did not claim that Ms. Kastanis was terminated for any reason other than her marriage to Mr. Kastanis. The burden to disprove the business necessity of an employer's practice should not shift to the employee even under *St. Mary's*, and the *Kastanis* court's reliance on *St. Mary's* is therefore misplaced.

58. 113 S. Ct. 2742 (1993).

B. *A BFOQ and Not a Business Necessity Defense Should Have Been Applied*

In *Kastanis*, the court should have required the employer to prove a BFOQ defense, not a business necessity defense. Because the BFOQ defense is more difficult to prove than the business necessity defense,[59] the court's determination of the applicable defense is crucial to the case. The *Kastanis* case is a disparate treatment case, for the plaintiff has made undisputed allegations that she was fired for marrying the CEO.[60] Thus, the EECU in effect claimed that not being married to the CEO was a bona fide occupational qualification for the job of accounting manager. The employer supported this claim with assertions that an accounting manager married to the CEO would be unable to fulfill the essential functions of her job, which included auditing the CEO's work and receiving supervision from the CEO. Because business necessity is only a defense to a disparate impact claim, whereas a BFOQ is a defense to a disparate treatment case, the *Kastanis* court should have held that the employer needed to prove a BFOQ.

The regulations implementing the employment discrimination provisions in Washington also support the conclusion that a BFOQ, and not a business necessity defense, should have been applied in this case. The Human Rights Commission (HRC)[61] recognizes that in some instances it may be justifiable for an employer to discriminate against an employee based upon marital status.[62] In order to relieve employers from liability in these circumstances the regulations state that

> business necessity may justify action on the basis of what the spouse does, and where this is so the action will be considered to

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59. *Johnson Controls*, 499 U.S. at 198.

60. This case would be a disparate impact case if the company policy that prohibited the employment of close relatives were still in place, resulted in the termination of married spouses, and had a disparate impact on one sex. However, because the policy was not in place at the time of Ms. Kastanis's termination, she was not suing to invalidate the policy. Rather, she was asserting disparate treatment because she was discriminated against on the basis of an unlawful categorization. The *Kastanis* court recognized this distinction when it stated, "this case involves allegations of disparate treatment, not disparate impact . . . [and therefore] we do not address the burdens of proof in disparate impact cases." Kastanis v. Educational Employees Credit Union, 122 Wash. 2d 483, 859 P.2d 26 (1993), *amended*, 865 P.2d 507, 507 (Wash. 1994).

61. The Human Rights Commission possesses general jurisdiction and power to enact provisions intended to eliminate and prevent discrimination in employment. Wash. Rev. Code § 49.60.020 (1993); Washington Water Power Co. v. State Human Rights Comm'n, 91 Wash. 2d 62, 586 P.2d 1149 (1978).

62. Wash. Admin. Code § 162-16-150 (2)(b) (1992).

> come within the bona fide occupational qualification exception to the general rule of nondiscrimination. 'Business necessity' for purposes of this section includes those circumstances where an employer's actions are based upon a compelling and essential need to avoid business-related conflicts of interest, or to avoid the reality or appearance of improper influence or favor.[63]

In drafting the pertinent regulations, the HRC likely contributed to the *Kastanis* court's confusion by using the terms "business necessity" and "bona fide occupational qualification" in the same sentence. These are terms of art in the area of employment discrimination, and the term "business necessity" thus does not take on its everyday usage. The HRC, in attempting to carve out examples of when discrimination based on marital status would not be prohibited, described these instances in terms of business necessity. Notwithstanding the ambiguity in the regulation's language, the fact that the statute and the regulation both use the term bona fide occupational qualification[64] when referring to the defense of business necessity is evidence that the legislature intended that the defendant bear the more stringent burden of proving a BFOQ defense. The term "business necessity," unlike the term "bona fide occupational qualification," is more likely to be included in a regulation without intent to attach any particularized meaning to the phrase. Because the term BFOQ is a specialized term and has been used in the federal courts to define a particularized phenomena, it is probable that the HRC intended to create an affirmative defense when using the term.

Not only have the legislature and the Human Rights Commission used the terms "business necessity" and "bona fide occupational qualification" interchangeably, but the HRC has also inconsistently defined BFOQ. For instance, portions of the regulation support the contention that the HRC did not intend to make the BFOQ defense any more stringent than the business necessity defense. First, the HRC acknowledges that the legislature did not define the term "BFOQ" and then continues to state that a BFOQ will be granted "[w]here a person's race, creed, color, national origin, age, sex, marital status or handicap will be essential to, or

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63. Wash. Admin. Code § 162-16-150(2) (1992).

64. Wash. Rev. Code § 49.60.180 provides: "It is an unfair practice for any employer . . . [t]o refuse to hire any person because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability . . . unless based upon a *bona fide occupational qualification* . . . . " (emphasis added). Wash. Admin. Code § 162-16-150(2) (1992) provides: "[B]usiness necessity may justify action on the basis of what the spouse does, and where this is so the action will be considered to come within the *bona fide occupational qualification* exception to the general rule of nondiscrimination." (emphasis added).

will contribute to, the accomplishment of the purposes for which the person is hired."[65]

This definition is not as strict as the one employed by the federal courts because it suggests that a policy may qualify for a BFOQ when discriminating will merely contribute to the effectiveness of the business's operation. This interpretation, however, is questionable when read in conjunction with another provision of the Washington Administrative Code (WAC) which reads: "The commission believes that the BFOQ should be applied narrowly to jobs for which a particular quality . . . *is essential* to the accomplishment of the purposes of the job."[66]

This latter provision is more in tune with the definition employed by the federal courts, and Washington courts have applied the more stringent definition of BFOQ.[67]

Not only have the federal courts applied a BFOQ defense to disparate treatment cases, but other states that have statutes prohibiting marital status discrimination have also characterized an employer's defense as a BFOQ. These states have placed the burden on the employer to prove that all, or substantially all, of the plaintiffs in that class would be unable to satisfactorily perform essential job functions.[68] For example, the language of the Minnesota statute prohibiting discrimination on the basis of marital status is substantially similar to Washington's statute,[69] and the

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65. Wash. Admin. Code § 162-16-020(2)(a) (1992).

66. Wash. Admin. Code § 162-16-130 (1992) (emphasis added).

67. Franklin County v. Sellers, 97 Wash. 2d 317, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983). In *Franklin*, the County challenged the administrative agency's reliance on federal case law in interpreting the BFOQ defense and alleged that the language of the WAC indicated that Washington courts should adopt a less stringent standard for a BFOQ defense. The court, however, rejected this argument and held that reliance on federal case law was proper and that a literal interpretation of the WAC regulation, which would allow an employer's actions to qualify for a BFOQ exemption whenever the practice contributed to the job's effectiveness, would frustrate the purposes of RCW § 49.60. *Id.* at 327–28, 646 P.2d at 117–18. While this argument was seemingly settled by the court in *Franklin*, the *Kastanis* court's confusion highlights the necessity of clarifying the statute and regulations in order to make the language consistent with federal employment discrimination jurisprudence.

68. *See* Ross v. Stouffer Hotel Co., 816 P.2d 302, 304 (Haw. 1991); Kraft, Inc. v. State, 284 N.W.2d 386, 388 (Minn. 1979).

69. The Minnesota Human Rights Act states:

> Except when based on a bona fide occupational qualification, it is an unfair employment practice: . . . [f]or an employer, because of . . . marital status . . . to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or . . . to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

Minnesota Supreme Court has held that an employer must advance a bona fide occupational qualification when the employer discriminates on the basis of marital status.[70] The Hawaii Supreme Court has likewise held that "[only] where an employer can show that the marital status of the employees has a relationship to the statutory exception for bona fide occupational qualifications, [can] a refusal to hire, or a termination . . . be upheld."[71] Thus, Washington courts should consider that other states which similarly interpret their marital status discrimination statutes have placed the burden of persuasion on the employer to prove a BFOQ in order to justify discriminating against a person on the basis of marital status.[72]

C. *The Employer Should Bear the Burden of Proving a Business Necessity Defense*

Not only did the *Kastanis* court apply the wrong defense, but more importantly, the court erred when it held that the employer did not bear the burden of persuasion with regard to the business necessity defense. Even though the court applied a business necessity defense in a disparate treatment case, it should have placed the burden of persuasion for proving the business necessity defense on the employer. With a brief exception,[73] federal courts have consistently held that the burden of persuasion on the issue of whether a requirement is job-related rests with the employer.[74] Furthermore, the Washington Supreme Court itself has

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Minn. Stat. § 363.03 (West 1991).

70. *Kraft*, 284 N.W.2d at 388.

71. *Ross*, 816 P.2d at 304.

72. Because the regulation's language is likely to continue to cause confusion in the courts, the legislature should direct the Human Rights Commission to redraft the pertinent WAC regulations and omit the language of "business necessity." Employers would still be able to escape liability under the regulation when they could prove that all or substantially all members of the class of persons discriminated against were unable to safely and efficiently perform essential job functions. Redrafting the regulation in this fashion would thus address the legislature's concern while clarifying the law. Additionally, the regulations should be amended to provide one consistent definition of a BFOQ. If Washington courts plan to continue to rely on federal case law in their interpretation of employment discrimination cases, it would be wise for the HRC to adopt the more stringent BFOQ definition which comports with the federal courts' definition and to delete all other potentially conflicting language.

73. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), discussed *infra* notes 90–94 and accompanying text.

74. Griggs v. Duke Power Co., 401 U.S. 424, 431–32 (1971) ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.").

stated that the burden is on the employer to show the business necessity of a particular practice.[75]

The *Kastanis* court's decision to place the burden of persuasion on the plaintiff to prove the defense of business necessity rests in large part on its refusal to characterize the appropriate defense as an affirmative defense. In making this determination the court properly looked to "(1) whether the statute reflects a legislative intent to treat absence of the exception or the existence of a justification as one of the elements of a cause of action or (2) whether the justification negates an element of the action which the plaintiff must prove."[76]

With respect to the first part of the test, the *Kastanis* court found that the legislature intended to treat the absence of business necessity as one of the elements of a cause of action for employment discrimination. In reaching this conclusion, the *Kastanis* court relied on the language in Title 49 of the RCW, which uses the terminology of a bona fide occupation qualification when creating an exception to the prohibition against employment discrimination.[77] The court then stated that the bona fide occupational qualification is not defined by the statute but that the regulations promulgated by the HRC provide some guidance by stating that "business necessity may justify action on the basis of what the spouse does, and where this is so the action will be considered to come within the bona fide occupational qualification exception."[78] Consequently, the court determined that because it found no indication that the bona fide occupational qualification of business necessity was intended to be an affirmative defense, it was error for the trial court to assign the burden of persuasion on the issue to the employer.[79]

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75. The *Fahn* court stated:

> While we have made an effort to distinguish between the BFOQ and business necessity defenses as they are discussed in the federal Title VII cases, we have also noted that the effect of each defense is the same: the burden is on the employer to show that the practice is necessary to the successful performance of the job.

Fahn v. Cowlitz County, 93 Wash. 2d 368, 382 n.4, 610 P.2d 857, 865 n.4 (1980), *amended*, 621 P.2d 1293 (Wash. 1981).

76. Kastanis v. Educational Employees Credit Union, 122 Wash. 2d 483, 493, 859 P.2d 26, 31 (1993), *amended*, 865 P.2d 507 (Wash. 1994) (citing State v. McCullum, 98 Wash. 2d 484, 490, 656 P.2d 1064, 1068–69 (1983)).

77. *Id.* at 492, 859 P.2d at 31. Wash. Rev. Code §49.60.180 (1994) states, "It is an unfair practice for any employer . . . [t]o refuse to hire any person because of age, sex, marital status, race creed, color, national origin, or the presence of any sensory, mental, or physical disability . . . unless based upon a bona fide occupational qualification."

78. *Id.* (citing Wash. Admin. Code § 162-16-150 (2) (1992)).

79. *Id.* at 493, 859 P.2d at 31.

In making this determination, the court seemingly overlooked a crucial factor. The regulation previously relied upon by the court does in fact address the question of the burdens of proof in cases brought under this statute. WAC 162-16-150(6), entitled "Burden of justification," states:

> [S]ince the bona fide occupational qualification is an exception to the general rule of nondiscrimination, the burden is on the employer, employment agency, or labor organization to show that the discrimination is justified.[80]

The *Kastanis* court never acknowledged this language. Nevertheless, the regulation's language evinces an intent to treat the defense of business necessity as a narrowly construed affirmative defense on which the defendant must bear the burden of persuasion.

Applying the second prong of its test to determine whether the employer's defense ought to be an affirmative defense, the *Kastanis* court looked to whether the justification of business necessity negates an element of the action that the plaintiff must prove. In making this determination, the court analogized this case to *State v. McCullum*,[81] a first-degree murder case. In that case, the Washington Supreme Court held that the burden of persuasion on the issue of self-defense rested with the prosecution because self-defense negated the necessary element of intent required for a conviction of first-degree murder.[82] Therefore, the *McCullum* court concluded that the state has the burden of proving the absence of self-defense in a murder case once the defendant has proposed the defense.[83]

The analogy drawn by the *Kastanis* court between placing the burden of proving the absence of self-defense on the state in the *McCullum* case and placing the burden of proving the absence of business necessity on the employee in the *Kastanis* case fails for several reasons. First, the analogy is inapposite because *McCullum* involved a criminal statute. Although the *Kastanis* court summarily rejected the argument that a case interpreting a criminal statute should not be relied on by a court

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80. Wash. Admin. Code § 162-16-150(6) (1992). The WAC also cites to Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). The *Weeks* case characterizes the BFOQ exception as an affirmative defense and states that the burden of proof is on the employer to demonstrate that the offered justification falls within the BFOQ exception. *Id.* at 232.

81. 98 Wash. 2d 484, 656 P.2d 1064 (1983).

82. *Id.* at 496, 656 P.2d at 1072.

83. *Id.*

interpreting a civil statute,[84] the court's reasoning on this point is unpersuasive. According to Washington's criminal law statutes, intent is an element of first-degree murder.[85] Intent is what distinguishes first-degree murder from other classes of homicide.[86] By contrast, the federal and state employment discrimination statutes do not contain any mention of business necessity within their definition of the act of employment discrimination. Furthermore, the *McCullum* court only attempted to analyze whether intent negated an element of first-degree murder because the criminal statute did not directly address the question of which party ought to bear the burden of persuasion on the issue of self-defense.[87] However, this is not the case in the employment discrimination context where the pertinent regulation plainly places the burden of proof on the employer.[88] Because the regulation itself answers the question of burden placement, it was unnecessary for the court to analyze this issue under *McCullum*.

Moreover, the employer's actions in *Kastanis* fell within the definition of marital status discrimination, and business necessity should therefore have been treated as a defense, and not as an element to be disproved by the plaintiff. Finally, the court's cursory statement fails to acknowledge that the justice system affords greater constitutional protections to criminal defendants.[89] Consequently, the *Kastanis* court's reliance on a case interpreting the burdens of proof applicable in a criminal case is misplaced.

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84. In response to this argument, the *Kastanis* court stated, "[w]hile McCullum involved a criminal statute, its analysis is equally applicable here." *Id.* at 493, 859 P.2d at 32.

85. "A person is guilty of murder in the first degree when: . . . [w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person . . . ." Wash. Rev. Code § 9A.32.030(1)(a) (1994).

86. *See* Wash. Rev. Code § 9A.32.030 (1994). A person acting in self-defense cannot be acting intentionally as defined by statute because acting intentionally requires that the person act with the objective or purpose of accomplishing a result which constitutes a crime. *McCullum*, 98 Wash. 2d at 495, 656 P.2d at 1071.

87. The new criminal code is "conspicuously silent on the quantum or burden of proof as to self-defense." *McCullum*, 98 Wash. 2d at 492, 656 P.2d at 1070. "Since the Legislature has not clearly imposed the burden of proving self-defense on criminal defendants, we conclude [that] the obligation to prove the absence of self-defense remains at all times with the prosecution." *Id.* at 494, 656 P.2d at 1071 (citing State v. Roberts, 88 Wash. 2d 337, 345, 562 P.2d 1259, 1263 (1977)).

88. *See supra* note 80 and accompanying text.

89. Compare the "preponderance of the evidence" standard used in civil cases with the "beyond a reasonable doubt" standard applicable in criminal cases. The burden of proof is more likely to be shifted from criminal defendants to the state because a criminal defendant's due process rights are implicated when he or she is forced to carry the burden on a particular issue, and an error in this context is reversible because it is of constitutional magnitude. *See McCullum*, 98 Wash. 2d at 488, 656 P.2d at 1067 (citing Sandstrom v. Montana, 442 U.S. 510 (1979)).

The *Kastanis* court also relied on *Wards Cove Packing Co. v. Atonio*[90] to support its determination that the employer's burden of proof with respect to a legitimate business justification is only a burden of production, not a burden of persuasion. This reliance, however, is misplaced for several reasons. First, *Wards Cove* was a disparate impact case and dealt only with the burdens of proof applicable in disparate impact cases.[91] The *Kastanis* case, on the other hand, is a disparate treatment case and thus requires a different analysis of the burdens of proof. In fact, the court itself acknowledged that the *Kastanis* case was a disparate treatment case and consequently limited its holding to disparate treatment cases.[92]

Furthermore, the *Wards Cove* case erroneously construed the employment discrimination statutes and rejected prior case law, thus prompting Congress to pass the 1991 Civil Rights Act, which overruled the Court's interpretation of Title VII enunciated in *Wards Cove*.[93] Specifically, the 1991 Amendments to the Civil Rights Act of 1964 state:

> An unlawful employment practice based on disparate impact is established under this title only if—(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to

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90. 490 U.S. 642 (1989).

91. *Id.* at 645.

92. *See supra* note 60.

93. The legislative history to the 1991 Civil Rights Act includes the following excerpts:

> The purposes of this Act are . . . to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs v. Duke Power Co., [citation omitted], and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, [citation omitted]; . . . [and] to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Civil Rights Act of 1991, Pub. L. No. 102-166 § 3(2), (4) (1991).

"The Congress finds that . . . the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, [citation omitted] has weakened the scope and effectiveness of Federal civil rights protections; and . . . legislation is necessary to provide additional protections against unlawful discrimination in employment." *Id.* § 2(2), (3).

"Mr. President, for nearly 2 years many of us have been attempting to put together a civil rights bill that would redress problems created by the Supreme Court of 1989, particularly a bill that would reinstate the *Griggs* decision and that would overrule the *Wards Cove* decision." 137 Cong. Rec. 15,277 (1991) (statement of Senator Danforth).

> demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .[94]

Additionally, Section 104 of the Civil Rights Act states that "[t]he term 'demonstrates' means meets the burdens of production and persuasion." Thus, the 1991 Civil Rights Act directs the courts to place both the burdens of production and persuasion on an employer who is asserting a business necessity defense to an allegation of employment discrimination in a disparate impact case.

In essence, *Wards Cove*, a discredited disparate impact case, is wholly inapplicable to *Kastanis*. The court, in fact, accepted this proposition by stating that its opinion only addresses the burdens of proof applicable in disparate treatment cases, and yet the court inexplicably placed heavy reliance on the *Wards Cove* decision. Although it is preferable for the court to disregard entirely disparate impact cases in this context, absent this condition the court should, at a minimum, take the changes made by the 1991 Civil Rights Act into consideration.

D. *Policy Considerations Favor Placing the Burden on the Employer to Prove Business Necessity*

Placing the burden of persuasion on the employer to prove business necessity as a defense to an intentional discrimination claim is also warranted on a number of policy grounds. First, this approach is consistent with the purposes of the anti-discrimination laws. These laws were passed in order to prevent the invidious effects of discrimination. In some instances, however, the legislature has recognized that discrimination may be justifiable.[95] In these cases, the burden should be on the party claiming that it has a valid reason to discriminate. The employer in these cases is already engaging in the type of activity that these laws are designed to prohibit. Consequently, the employer should bear the burden of justifying its actions.[96]

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94. Civil Rights Act of 1991, Pub. L. No. 102-166 § 105.

95. This exception is very narrow. An example of when discrimination may qualify as a BFOQ is taking sex into consideration for a theater role. Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(2) (1993).

96. *Kastanis* provides a compelling example of the type of discrimination that the legislature sought to prevent when it passed the prohibition on marital status discrimination. Mr. Kastanis and Ms. Jones were openly involved in a relationship for four years prior to their marriage. Kastanis v. Educational Employees Credit Union, 122 Wash. 2d 483, 486, 859 P.2d 26, 28 (1993), *amended*, 865 P.2d 507 (Wash. 1994). Thus, many of the concerns articulated by the employer as a justification for terminating Ms. Kastanis were present prior to her marriage. One may assume that if Mr. Kastanis and Ms. Jones had not married but had merely continued their intimate relationship,

Second, in employment discrimination cases, the employer, and not the employee, will more likely know why an employment decision was made.[97] An employer has greater access to information concerning the employer's employment decisions.[98] Access to that information makes it much easier for an employer to prove that an employment decision was based on business necessity than it is for an employee to prove the absence of business necessity.[99] Additionally, requiring the plaintiff in an employment discrimination case to prove the absence of the business necessity of the defendant's practice forces the plaintiff to prove a negative—an extremely difficult, and in some situations impossible, task.

Furthermore, earlier cases placing the burden of persuasion on the employee relied on policy justifications which are not applicable in the present case. For instance, in *Baldwin v. Sisters of Providence*[100] the Washington Supreme Court held that the burden of persuasion remained on the employee to prove that he was discharged without cause.[101] In that case the court expressed concern that shifting the burden of persuasion to an employer would cause employers to remove just cause clauses from their employee handbooks in order to avoid future liability.[102] This concern, however, is not present in a discrimination context, for no employer has the option to relieve itself of an obligation not to discriminate on prohibited grounds.

Finally, Washington law is more liberal than federal law in the area of employment discrimination in that Washington has included marital status discrimination in its statute while Title VII does not apply to discrimination based on marital status. The Washington legislature has

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and perhaps even if they had chosen to live together, Ms. Kastanis would not have been terminated. Thus, it was precisely the change in Ms. Kastanis's marital status that prompted her termination. This type of action is exactly what the statute is designed to guard against.

97. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 773 n.32 (1976).

98. *International Bhd. of Teamsters*, 431 U.S. at 359 n.45 ("Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof") (citing C. McCormick, *Law of Evidence* §§ 337, 343 (2d ed. 1972)). *See also* Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 Wash. L. Rev. 719, 768 (1991).

99. Some courts have taken the opposite stand because in their view liberal discovery and EEOC rules give plaintiffs adequate access to employment files. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981). However, these files are often unhelpful. Business necessity is often proven not by resort to employment files, but by resort to company policy. Moreover, it is unfair to make a plaintiff demonstrate the best way to run a business.

100. 112 Wash. 2d 127, 769 P.2d 298 (1989).

101. *Id.* at 136, 769 P.2d at 303.

102. *Id.* at 135–36, 769 P.2d at 302–03.

directed that the laws against discrimination be construed liberally.[103] Thus, it would make little sense for the legislature to pass a more encompassing law than Congress, while the Washington courts interpret this law more narrowly than the federal courts interpret Title VII.

III. CONCLUSION

The Washington Supreme Court should retreat from its position that a plaintiff who presents direct, undisputed evidence of employment discrimination bears the burden of persuading the factfinder that the employer's actions were not justified by business necessity once the employer articulates a reason for its actions. The *McDonnell Douglas* formula, upon which the court relies, should only be used to assist a plaintiff in making out a prima facie case where there is indirect evidence of discrimination. In those cases, once an employer has articulated a legitimate, non-discriminatory reason for its actions, it is entitled to a presumption that it has acted in good faith, and it is therefore the employee's burden to convince the factfinder that the employer has discriminated against her. However, when an employee has direct, unrefuted evidence of discrimination, as did the plaintiff in *Kastanis*, the employer ought to bear the burden of persuading the factfinder that its discriminatory actions were justified. This principle is supported by both federal and state case law and statutes. In order to guarantee that Washington's employment discrimination statutes are construed in accordance with federal standards, the legislature ought to direct the Human Rights Commission to redraft portions of the relevant regulatory provisions by specifically deleting misleading references to the business necessity defense in the disparate treatment context.

103. Wash. Rev. Code § 49.60.020 (1994).